CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

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CLEANUP AND ABATEMENT ORDER NO. R5-2014-XXXX

ATLANTIC RICHFIELD COMPANY
UNITED STATES DEPARTMENT OF AGRICULTURE,
UNITED STATES FOREST SERVICE

WALKER MINE TAILINGS
PLUMAS COUNTY

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CLEANUP AND ABATEMENT ORDER NO. R5-2014-YYYY

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PROSECUTION TEAM'S RESPONSE TO ATLANTIC RICHFIELD COMPANY'S PREHEARING MOTION NO. 1

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I. Introduction

Discharger Atlantic Richfield's (ARCO's) Prehearing Motion No. 1 seeks withdrawal and dismissal of proposed Cleanup and Abatement Orders R5-2014-XXXX (Tailings CAO) and R5-2014-YYYY (Mine CAO) on the basis that the CAOs are an impermissible "challenge" to the Forest Service's ongoing CERCLA action at the Walker Tailings site.

This motion largely treads the path of the Forest Service's arguments regarding the Tailings CAO (Forest Service Response, pp. 7-15), and must fail for the reasons set forth in the Prosecution Team's Opening Brief (pages 5-9) and Rebuttal Brief (pages 4-5). For ease of reference, those reasons are restated below.

ARCO also argues that the Mine CAO is a challenge to the Forest Service's CERCLA action at the Tailings site because cleaning the Mine will somehow impair the remediation at the Tailings. Though creative, this argument must fail. The Forest Service's CERCLA action by definition applies only to the Tailings site, and the privately owned Mine site has never been subject to a CERCLA action. Moreover, the Mine site contributes copper and other waste to Dolly Creek, which flows to the Tailings. Cleaning the Mine can only help the Tailings.

II. Background

The Forest Service issued the CERCLA Record of Decision (ROD) for the Tailings in 1994, and amended the ROD in 2001. By its terms, the Tailings ROD applies only to approximately 100-acre tailings site located on Plumas National Forest land. (See ARCO Exhibit 145, Figures 2-3.) In 2005, ARCO and the Forest Service entered into a Consent Decree regarding the Tailings site. (PT Exhibit 12.) The Consent Decree defined "the Walker Mine Tailings Site" as "encompassing approximately 100 acres, located in Plumas National Forest in Plumas County." (*Id*. at p. 8.)

The Walker Mine site is separate from the Tailings site, about a mile away, located on nearly 800 acres of private property within the Plumas National Forest. (See Mine CAO, Findings at 1, Attachment B.) Although the Mine is located upstream from the Tailings along Dolly Creek, the CERCLA ROD does not address the Mine site at all. The Mine site has never been subject to any CERCLA action.

The Forest Service has been subject to Central Valley Water Board waste discharge requirement (WDR) orders for the Tailings since well before the initial ROD. The current WDRs are set forth in Order No. R5-00-028, which was adopted prior to the 2001 amended ROD, and after consultation with the Forest Service (see PT Exhibit 10 [Forest Service comments on proposed Order No. R5-00-028].)

Order R5-00-028 requires the Forest Service to comply with specific Receiving Water Limitations by 1 October 2008. (PT Exhibit 9, at p. 8.) To date, the Forest Service has implemented all or essentially all of the remedial actions described in the amended

ROD, but the remedial action remains open. The Tailings continue to discharge mine waste, notably copper, in violation of the Receiving Water Limitations set forth in WDR Order R5-00-028. The purpose of the Tailings CAO is to require the Forest Service and ARCO (as successor to the Mine operator) to act to stop the unlawful discharges from the Tailings site.

III. The Cleanup and Abatement Orders are brought pursuant to Water Code authority

The Mine and Tailings CAOs are brought under Water Code section 13304, which authorizes the Board to compel the Forest Service and ARCO to clean up and abate the effects of waste at the Mine and Tailings sites to prevent ongoing and threatened unlawful discharges of waste from the Mine and Tailings sites into Dolly Creek and Little Grizzly Creek, both waters of the state and of the United States. The CAOs are also brought under Water Code section 13267, which authorizes the Board to require technical reports from dischargers.

The Board's authority arises in part from federally-delegated Clean Water Act authority, to which the Forest Service is subject. (33 USC § 1323, subd. (a).) If the Forest Service fails to comply with the Tailings CAO, the Attorney General for the State of California may seek injunctive relief from the superior court. (Water Code § 13304, subd. (a).) If ARCO fails to comply with either CAO, the Board may seek administrative or judicial civil liabilities under Water Code section 13350 or 13385, and the Attorney General may seek injunctive relief.

IV. CERCLA does not preempt the Board's Water Code authority

CERCLA generally reserves authority of all federal and State laws regarding discharges of pollutants:

> Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants....

(CERCLA Section 302(d), 42 USC § 9652, subd. (d).)

CERCLA specifically reserves State authority regarding discharges of hazardous substances:[1]

> Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.

[1] Including copper: 50 CFR § 302.4; 22 U.S.C. § 1317(a); 40 CFR § 401.15; Cal. Health & Safety Code § 25316(d).

(CERCLA Section 114(a), 42 USC § 9614, subd. (a).)

Moreover, CERCLA specifically allows states to enforce state cleanup laws against federal agencies at federal sites:

> State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States….

(CERCLA Section 120(a)(4), 42 USC § 9620, subd. (a)(4).)

Where State standards have been incorporated into a CERCLA cleanup action, the State may – but is not required to – enforce those standards in federal court:

> A State *may* enforce any Federal or State standard, requirement, criteria, or limitation to which the remedial action is required to conform under this chapter in the United States district court for the district in which the facility is located….

(CERCLA Section 121(e)(4), 42 USC § 9621, subd. (e)(4) [emphasis added].)

CERCLA Section 113(h) limits certain challenges to ongoing CERCLA actions, but does not limit the Board's authority over federally-managed CERCLA sites:

> No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action except [CERCLA-based actions]….

(CERCLA Section 113(h), 42 USC § 9613, subd. (h).)

V. The Tailings CAO is not a challenge to the CERCLA action at the Tailings

As an initial matter, the Prosecution Team does not concede that the ROD qualifies as a "removal or remedial action selected under section 9604" or as an "order issued under section 9606(a)" as those terms are used in Section 113(h), because the ROD appears to be a remedial action pursuant to Section 120, 42 USC § 9620. (See *Fort Ord Toxics Project, Inc. v. California EPA* (9th Cir. 1999) 189 F.3d 838, 833-34 [Section 120 remedial actions fall outside Section 104 and thus are not subject to Section 113(h)].)

However, even assuming for argument that the ROD does so qualify, the Tailings CAO is not a "challenge" to it, and the Board is free to utilize the administrative and judicial enforcement processes authorized under the Water Code.

a. ARCO ignores the plain meaning of the CERCLA reservations of authority

ARCO offers only a conclusory assertion that the specific reservations of authority in CERCLA Sections 114(a), 302(d), 120(a)(4) and 121(e)(4) cannot overcome the federal court jurisdictional limit in Section 113(h). In support, ARCO cites *Anacostia Riverkeeper v. Wash. Gas Light Co*. (D.D.C. 2012) 892 F.Supp.2d 161, 171, a district court case in which citizen groups brought suit in federal court under RCRA regarding a CERCLA site. The plaintiffs relied only on Section 302(d), the most general reservation of authority, which the court held could not overcome Section 113(h) in that case. The court made no findings regarding Sections 114(a), 120(a)(4) and 121(e)(4), because the plaintiffs were not a state agency seeking to enforce state laws. The specific reservations in those sections, particularly the specific reservation of State enforcement authority in Section 120(a)(4), are not subservient to Section 113(h).

b. ARCO ignores the holdings in *United States v. Colorado*

ARCO's attempt to distinguish the leading case, *United States v. Colorado* (10th Cir. 1993) 990 F.2d 1565,[2] is equally conclusory. In that Tenth Circuit case, the Army challenged Colorado's action to enforce provisions of RCRA which had been delegated to Colorado by the EPA. The Army argued that because its facility was the subject of an ongoing CERCLA remediation action, Section 113(h) barred Colorado from issuing an administrative compliance order regarding the facility under state law. Citing CERCLA sections 114(a) and 302(d), the court rejected the Army and held that "an action by Colorado to enforce the … compliance order, issued pursuant to its EPA-delegated RCRA authority, is not a 'challenge' to the Army's CERCLA response action." (990 F.2d at 1575.) Moreover, the court held that Section 113(h) is not a bar because "Colorado can seek enforcement of the … compliance order in state court" rather than in federal court. (*Id*. at 1579.)

The *United States v. Colorado* court took pains to assess whether the State's compliance order sought to halt or impair the federal agency's CERCLA action. The court found that the compliance order sought to ensure the federal agency's compliance with State law during the course of the CERCLA action, "[t]hus, Colorado is not seeking to delay the cleanup, but merely seeking to ensure that the cleanup is in accordance with state laws which the EPA has authorized Colorado to enforce…. In light of [CERCLA Sections 302(d) and 114(a)], which expressly preserve a state's authority to take such action, we cannot say that Colorado's efforts to enforce its EPA-delegated RCRA authority is a challenge to the Army's undergoing CERCLA response action." (*Id*.

[2] Prosecution Team Exhibit 11 is a courtesy copy of the *United States v. Colorado* decision.

at 1576.) "While we do not doubt that Colorado's enforcement of the final amended compliance order will 'impact the implementation' of the Army's CERCLA response action, we do not believe that this alone is enough to constitute a challenge to the action as contemplated under [Section 113(h)]." (*Id*. at 1577.)

It is hard to imagine a set of facts more squarely on point than those in *United States v. Colorado*. Like the Colorado compliance order, the Tailings CAO here does not seek to delay the cleanup at the Tailings. Instead, the Tailings CAO seeks to ensure that the Forest Service complies with the Water Code, including EPA-delegated Clean Water Act authority. While the Forest Service's compliance with the Tailings CAO will undoubtedly impact the CERCLA response action to some extent, it is difficult to see how requiring the Forest Service to comply with the California Water Code will impair the CERCLA action in any way. The Tailings CAO is designed merely to bring the discharges into compliance with the Receiving Water Limitations set forth in WDR Order 5-00-028, something which the Forest Service incorporated into the CERCLA ROD. In this way, the Tailings CAO is wholly consistent with the CERCLA action at the site.

The Board's position here is the same as Colorado's in *U.S. v. Colorado* – a state agency acting pursuant to state law to enforce a federal statute, under authority delegated to it by the EPA, against a federal agency operating a CERCLA site. Such actions are not "challenges" to ongoing CERCLA actions. Like Colorado, the Board is acting pursuant to state administrative procedures reviewable in state court without any need to seek redress in federal court. Section 113(h) does not bar the Tailings CAO.

c. ARCO's remaining cases are distinguishable because they involve citizen suits brought in federal court, and do not involve state agencies seeking to enforce federally-delegated state laws

The other cases cited by ARCO are distinguishable in that they involve lawsuits by private citizens or local agencies brought in federal court specifically challenging CERCLA actions. *McClellan Ecological Seepage Situation (MESS) v. Perry* (9th Cir. 1995) 47 F.3d 325, holds only that a citizens group could not bring Clean Water Act and other state claims in federal court for sites covered under a Department of Defense CERCLA action, as such claims amounted to a challenge barred under Section 113(h). *MESS* does not address the question presented here, namely, whether a state agency can issue an enforcement order under federally-delegated law to a federal agency operating a CERCLA site on federal land. (See also *Pakootas v. Teck Cominco Metals, Ltd*. (9th Cir. 2011) 646 F.3d 1214 [citizen suit brought in federal district court]; *Fort Ord Toxics Project, Inc. v. California EPA* (9th Cir. 1999) 189 F.3d 828 [same].) None of the cases address CERCLA's reservations of authority, and none involve federal challenge to state administrative action under federally-delegated state authority. Moreover, there was no way to assess whether any state-proposed action would challenge or impair the CERCLA action.

ARCO conveniently ignores unfavorable court decisions. In *Shea Homes Limited Partnership v. United States* (N.D. Cal. 2005) 397 F.Supp.2d 1194, the Northern District Court rejected a citizen group's attempt to rely in *United States v. Colorado*, noting that "*Colorado* is clearly distinguishable in that the Court premised its ruling on the fact that the party asserting the RCRA claim was a state, rather than a private party." (397 F.Supp at 1204.) Indeed, the federally-managed CERCLA site at issue in *Shea Homes* had already been the subject of San Francisco Bay Regional Water Board waste discharge requirements and a cleanup and abatement order, apparently without challenge by the federal agency. (397 F.Supp. at 1197.) (See Prosecution Team Exhibit 47 [San Francisco Regional Water Board Orders R2-1996-0113 and R2-2001-0113].)

VI. The Mine CAO is not a challenge to the CERCLA action at the Tailings

ARCO argues that the Mine CAO is a challenge to the Forest Service's CERCLA action at the Tailings, even though the Mine site is privately owned and not covered by Forest Service's CERCLA action. ARCO suggests that taking remedial action to restore water quality at the upstream Mine site will impair the CERCLA cleanup at the downstream Tailings, so nothing should be done at the Mine until after the Forest Service completes the CERCLA action in some distant future. (ARCO's Prehearing Motion No. 1, at p. 3.)

It defies all logic to suggest that making the inflow to the Tailings from the Mine *cleaner* would somehow impair the Tailings CERCLA action. Like the Tailings site, the Mine site is a significant source of copper and other waste to Dolly Creek, which flows from the Mine to the Tailings. Logic dictates that doing nothing at the Mine is the greater impairment to the Forest Service's actions at the Tailings, and the greater harm to the beneficial uses of Dolly Creek and downstream.

The Prosecution Team tends to agree with ARCO that the remedial actions at the Mine and Tailings should be coordinated to have greatest effect. That is why both CAOs are being brought together, and why ARCO is named to both.

VII. Conclusion

For the reasons stated above, the Central Valley Water Board should deny Atlantic Richfield's Prehearing Motion No. 1.

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