

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION**

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**

CLEANUP AND ABATEMENT ORDER NO. R5-2014-YYYY

ATLANTIC RICHFIELD COMPANY

**WALKER MINE
PLUMAS COUNTY**

**PROSECUTION TEAM'S RESPONSE TO ATLANTIC RICHFIELD COMPANY'S
PREHEARING MOTION NO. 2**

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I. Introduction

Discharger Atlantic Richfield's (ARCO's) Prehearing Motion No. 2 seeks a ruling that the Central Valley Water Board itself is a discharger at both the Walker Mine and Tailings sites, as well as withdrawal or revision of proposed Cleanup and Abatement Orders R5-2014-XXXX (Tailings CAO) and R5-2014-YYYY (Mine CAO) to name the Central Valley Water Board as a discharger, on the basis that the Board installed the Mine seal and conducted other work under authority of Water Code section 13305 and because the Board has subsequently entered settlement agreements with prior owners of the Mine.

ARCO's motion should be denied as to the Tailings CAO because the Board does not own the Tailings and has never conducted any remedial work nor entered into any agreements regarding that site. The Board is not a discharger at the Tailings.

ARCO's motion should be denied as to the Mine CAO because the Board is also not a discharger at the Mine. The Board's activities at the Mine have been limited to: 1) installation of the seal, which halted discharge of acid mine drainage (AMD) and other waste from the 700 level portal (portal) to Dolly Creek; 2) rehabilitation of the portal access tunnel to maintain access to the seal; and 3) installation of surface water diversion channels near ground collapses and mine openings high above the portal, which reduces the inflow of surface runoff into the mine workings, and therefore reduces the volume of water behind the seal. The Board conducted these limited activities pursuant to a resolution adopted under Water Code section 13305, and therefore they do not result in Board liability for the entire Mine site.

Following the installation of the Mine Seal, and as authorized under Water Code section 13305, the Board brought two lawsuits against the owners of the Mine site to recover costs related to the seal and subsequent work. The Board settled those lawsuits in 1991 and 2004, respectively. As is standard, the Board released most of the various owners from liability for matters addressed in the lawsuits, but the Board did not assume liability for the Mine site in doing so.

II. The Central Valley Water Board is not a discharger at the Tailings

ARCO requests a ruling that the Board should be a responsible party for the Tailings site, but it offers no evidence or argument in support. That is because there is no such evidence and no basis for Board liability at the Tailings. The Tailings site is owned by the Forest Service, which operates the site subject to Board WDR Order No. R5-00-028. The Forest Service has conducted some remedial work at the Tailings, but the Board's involvement has been limited to twice-yearly inspections and water quality sampling. The Board has not entered into any agreements regarding the Tailings site, regarding remedial action or otherwise. There is simply no basis by which the Central Valley Water Board can be deemed a responsible party under Water Code section 13304 at the Tailings.

III. The Central Valley Water Board is not a discharger at the Mine

a. The Board acted in a limited capacity under Water Code section 13305 to stop harmful discharges from the Walker Mine portal

ARCO's predecessors abandoned the Mine in the early 1940s, and the Mine likely began discharging acid mine drainage (AMD) and metals, notably copper, shortly thereafter as groundwater filled the lower mine workings and reached the 700 level portal opening. (Walker Mine Kaiser Report dated 10 December 1942 [submitted with the Prosecution Team's Case-in-Chief Submittal CD under the electronic folder "Walker Electronic Records Submitted by Reference"; see also PT Exhibits 18 [Resolution 58-180] and 20 [Trumbull Report describing discharges and impacts].) Discharges from the portal and from the rest of the site eliminated most aquatic life and beneficial uses in Dolly Creek and Little Grizzly Creek for a distance of about 10 miles, to the confluence with Indian Creek. (*Id.*) This was a serious and significant environmental problem, although likely not well publicized due to the remoteness of the area. The Board worked for decades with landowners to try and address the problems.

By the mid-1980s, the Board decided to address the portal discharge itself pursuant to Water Code section 13305, which provides that a regional board, upon determining that a condition of pollution or nuisance exists which results from a nonoperating industrial or business location, may, after notice and hearing, require abatement of a pollution or nuisance condition by the city, county, other public agency, or regional board at the property owner's expense. (Wat. Code § 13305 subd. (a).) If a city, county, or other public agency does not respond to a regional board's request to abate the condition of pollution or nuisance, the regional board shall cause the condition to be abated. (Wat. Code § 13305 subd. (e)(1) and (e)(2).)

After studying the portal discharge and commissioning technical reports to investigate potential solutions, the Board adopted Resolution R5-86-057 on 28 February 1986. (PT Exh 13.) Resolution R5-86-087 authorized the Board to take steps to install the seal in the portal, as described in the SRK Report. (PT Exh 14.) The Board certainly could have purchased the site (cf. Leviathan Mine where the State of California purchased the property from Alpine Mining Enterprises and performed remediation activities) or chosen another technical option, but it determined that the seal was the most appropriate and cost-effective way to stop the discharges from the portal. The Board installed the seal in 1987, and continues to conduct twice-yearly inspections of the portal and seal.

The seal has been very effective in halting discharges of AMD and metals from the underground mine workings. Today, mining waste from the Mine site reaches Dolly Creek and Little Grizzly Creek only through surface runoff and erosion from surface mining waste not subject to Resolution 86-057. Although discharges to Dolly Creek and Little Grizzly Creek still violate water quality standards, aquatic life has largely returned to Little Grizzly Creek. (See USFS Tailings Monitoring Reports submitted with the

Prosecution Team's Case-in-Chief as "Walker Electronic Records Submitted by Reference.")

A few years after installing the seal, the Board conducted a tunnel rehabilitation project to maintain access to the seal through the portal. The Board also constructed a number of small, concrete-lined channels on the mountain above the portal, in order to reduce the amount of surface runoff entering the underground mine workings through collapse openings and old Mine adits. These activities have been very effective, they have not disturbed surface mine waste, and they do not cause discharge.

b. The Board is not a discharger under Section 13304

Water Code section 13304 applies to any person who has 1) discharged or discharges waste into waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board; 2) caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is or probably will be discharged into waters of the state and creates; or 3) threatens to create, a condition of pollution or nuisance. Should the activities of any person result in a discharge or waste or a threat of pollution or nuisance, that person shall upon order of the regional board, clean up the waste or abate the effects of the waste or take other necessary remedial action in the case of threatened pollution or nuisance. (Wat. Code § 13304 subd. (a).) The Board is a "person" under Water Code section 13050, subdivision (c), so if its activities fall within one of the three above-mentioned categories, then it will be considered a "discharger" responsible for cleaning up and/or abating the effects of the waste and/or taking other remedial actions to abate the threat of pollution or nuisance.

Ownership, operation, possession, and control are all factors to consider when determining whether a person has caused or permitted a discharge, but they are not dispositive. When the Board acts pursuant to Water Code section 13305 or 13304 subdivision (b) to perform abatement or remedial activities, it does not automatically become a discharger under those provisions unless its activities also create, cause, or permit a discharge or condition or pollution or nuisance. In *City of Modesto Redevelopment Agency v. Superior Court*, 119 Cal.App.4th 28, 37 (2004) the Court noted "The Porter-Cologne Act appears to be harmonious with the common law of nuisance," under which "liability ... does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance." Rather, liability attaches if a defendant "created or assisted in the creation of the nuisance." (*Id.* at 38.)

ARCO analogizes the Board's activities at Walker Mine to the Board's activities at Penn Mine, as discussed in *Committee to Save Mokelumne River v. East Bay Municipal Utility District*. (13 F. 3d 305.) There, the Court found the Board liable under the Clean Water Act for discharges from the Penn Mine Facility, a series of dams and surface impoundments which the Board constructed together with East Bay MUD in an attempt

to reduce the threat of continued toxic runoff from the site. (*Id.* at 306.) The Board was liable under the Clean Water Act because the facility it constructed and operated discharged waste to waters of the United States. (*Id.* at 307.)

ARCO misstates the important factual differences between the Board's activities in the Penn Mine matter and its activities at Walker Mine. At Penn Mine, the Board owned and operated the series of dams, pumps, and pipes at the facility which contributed to an actual discharge of waste to surface waters. At Walker Mine, the mine seal stopped a discharge that for decades had eliminated most or all beneficial uses in Little Grizzly Creek for ten miles downstream. The Board's tunnel rehabilitation work helped keep access to the seal. The diversion channels on the mountain above the portal reduce the amount of surface runoff flowing into the underground mine workings, thereby reducing the amount of pressure behind the seal. The Board does not meet any of the Section 13304 elements.¹

c. It is appropriate for ARCO to assume responsibility for the entire Mine site, including the mine seal

ARCO contends that the Board alone must bear liability for maintaining or fixing the remedies it installed, namely the seal at the 700 level mine portal, and that ARCO cannot be compelled to assume responsibility for the operation and maintenance of the seal. (ARCO Prehearing Motion No. 2, at p. 3-4.) ARCO is incorrect; the Board can and should require ARCO to assume liability for the site, including the mine seal.

The Board should not be responsible for the seal in perpetuity simply because it exercised its Water Code section 13305 authority to cease an ongoing discharge. Water Code section 13305 is a tool allowing regional boards to step in on an interim basis to abate a condition of pollution or nuisance that the regional board did not cause when there are no viable responsible parties, landowners who are unable to perform cleanup, and an absence of other public agencies conducting abatement activities within a reasonable time. The remedy supplied by Water Code section 13305 was intended as a supplemental remedy available at the discretion of the regional board where other remedies may be ineffective given the nonoperational nature of the business. (*In the Matter of New Penn Mines, Inc.* Order No. WQ-73-13, p. 5.) It is completely appropriate for the Central Valley Water Board to assign liability for the mine seal to ARCO here.

It is bad policy and counter to the purpose of Water Code section 13305 to argue that the Board must bear responsibility for maintaining the mine seal in perpetuity when the Board is not a discharger under Section 13304. To hold regional boards liable for remedial actions that stop discharges, without the ability to compel subsequently identified responsible parties to carry-on and takeover abatement activities, would

¹ ARCO, however, does meet the Section 13304 elements, because its predecessors directed pollution-causing activities at the facility, including, but not limited to, specific exploration, development and operations.

surely serve as a disincentive for boards to quickly act to abate a pollution or nuisance condition at nonoperational facilities, likely resulting in continued water quality harm.

Rather, when the Board acts under Section 13305 to abate a pollution or nuisance condition that it did not cause or permit in the first place, its role should be viewed akin to that of a trustee acting in the interim to stop imminent discharges while continuing to make reasonable efforts to identify potential dischargers associated with the discharge as required by State Board Resolution 92-49.² The elements of Water Code section 13304 are not subsumed in section 13305, and the Board's efforts to locate additional responsible parties under Water Code section 13304 and Resolution 92-49 continued even though Board acted under section 13305.

It is reasonable to assume that the Board recognized that its liability would be greater as a landowner than if it simply acted to stop the portal discharges pursuant to Water Code section 13305, which is likely why it did not choose to purchase the site in 1986.³

Health and Safety Code section 25400 recognizes the need to encourage public entities to abate discharges of hazardous substances by allowing for qualified immunity from liability to apply to those public entities and their employees who respond. (Hlth. & Saf. Code § 25400 subd. (a).) When acting within the scope of employment to abate or attempt to abate hazards reasonably believed to be an imminent peril to public health and safety caused by a discharge of hazardous substances, those persons shall not be liable for any injury or property damage caused by an act or omission unless it was performed in bad faith or in a grossly negligent manner. (Hlth. & Saf. Code § 25400 subd. (b).) CERCLA provides similar protection for state and local governments taking emergency response actions on facilities owned by third parties, except in cases of gross negligence or intentional misconduct by the agency. (CERCLA section 107(d)(2), 42 U.S.C. § 9607, subd. (d)(2).)

Similar logic and policy considerations apply here. Regional boards will be discouraged from acting under Water Code section 13305 if in doing so they 1) become liable as a discharger even when they have not caused or permitted a discharge and 2) are somehow prohibited from compelling subsequently identified potential dischargers responsible for the discharge to takeover abatement of a site.

Furthermore, the Board's liability should be limited so long as its activities do not cause or permit a discharge within the meaning of Water Code section 13304.⁴ This concept of

² *Policies and Procedures for Investigation and Cleanup and Abatement of Discharges under Water Code section 13304*, Resolution No. 92-49, as amended on April 21, 1994 and October 2, 1996.

³ ARCO's citations to two deliberative process memoranda prepared by Board staff are red herrings that should be ignored, as described on pages 1-2 of the Prosecution Team's Response to Atlantic Richfield's Prehearing Motion No. 5. Those memoranda do not constitute decisions of the Board, nor even public representations of Board positions by staff, and cannot bind the Board. The references to potential Board liability refer only to the ongoing costs for monitoring the seal and maintaining the access tunnel.

limited liability or immunity from liability is discussed in *United States v. Iron Mountain Mines* (1995) 881 F. Supp. 1432. In that case, the State of California was alleged to have "actively participated in the operation of the Shasta and Keswick Dams," which allegedly released hazardous substances triggering operator liability under CERCLA. (*Id.* at 1437.) In response to the State's assertion of immunity from CERCLA based on its regulatory or remedial capacity, the Court noted that there is no general "unexpressed, residual immunity for the states or the federal government when they act in a regulatory or remedial capacity." (*Id.* at 1443.) However, specific immunity provisions are enumerated in CERCLA, notably a provision that expressly addresses liability of those who act in a remedial capacity, and *who are otherwise not liable as owners or operators*, and provides them with protection from strict liability in CERCLA. This provision provides a special standard of liability for state and local governments acting "in response to an emergency created by the release or threatened release of a hazardous substance generated by or from a facility owned by another person" (*Id.* at 1444.) State and local governments are liable only for costs or damages resulting from their "gross negligence or intentional misconduct." (*Id.*) The State of California was not able to avail itself of this specific immunity provision as the court found its activities of participating in the operation of the dams sufficient to constitute operator liability.

The Board's actions at the Walker Mine are distinguishable from the State's actions in *Iron Mountain* because the Board does not own or operate the Mine site and it does not own or operate the seal, and in any event the seal is not causing or permitting a discharge or a condition of pollution or nuisance. Contrary to ARCO's assertions, the Board would not be liable under CERCLA for its remedial activities. Even CERCLA limits the liability of those who act in a remedial capacity where they are *not* the owner or operator. ARCO's predecessors operated the Mine, and ARCO should be liable for the entire site.

IV. The Central Valley Water Board did not assume liability for the Mine through settlement agreements with prior property owners

Atlantic Richfield contends that the Board assumed liability for the entire Mine site through its settlements with former Mine owners. (ARCO Prehearing Motion No. 2, at pp. 2-3.) ARCO misstates the terms of the settlement agreements between the Board and the settling parties. The Board did not assume liability for the Mine through the settlement agreements.

ARCO's misunderstanding of the terms of the settlement agreements is somewhat understandable, because Paragraphs 28 and 29 of the proposed Mine CAO inadvertently contain language suggesting that the Board agreed to hold the prior property owner corporations and the other defendants harmless for pollution at the site. The Prosecution Team concedes that those recitations in the Draft CAO should be

⁴ The Prosecution Team's Opening Brief, at page 20 and footnote 12, describes why ARCO should be deemed primarily liable if the Board chooses to allocate liability.

clarified and acknowledges that "hold harmless" agreements carry a specific legal definition, as noted in *California School Boards Association v. State Board of Education*, 191 Cal.App.4th 530, 568 (defining "hold harmless" as "a contractual agreement whereby one party assumes the liability inherent in a situation, thereby relieving the other party of responsibility."). In fact, the Board did not agree to hold the settling defendants harmless. The Prosecution Team has submitted a revised proposed Mine CAO herewith.

Nothing in the prior agreements or stipulation for entry of judgments purports to have the Board 1) assume responsibility for cleanup of the entire Mine Site or 2) assume liability for cleanup costs associated with the Board's efforts to install the plug at the 700 level mine portal, pursuant to its authority under Water Code section 13305, and cease a discharge that it was not responsible for causing. No such "hold harmless" provision exists within the four corners of the 1999 Settlement Agreement or the 2004 Stipulation for Entry of Judgment between the Central Valley Water Board and Cedar Point Properties. (See PT Exhibit 54 [Settlement Agreement]⁵ and PT Exhibit 17, previously submitted.) In fact, Section IV of the Settlement Agreement makes clear that "[n]othing in this Agreement shall be construed to prevent the Central Valley Water Board from undertaking any activity authorized by law at the Walker Mine Property, or from seeking cost recovery for such activity from the Corporation [Cedar Point Properties, Inc.], or *any other potentially responsible party*, for any such activity. (PT Exhibit 54, p. 7-8, emphasis added.) The 1999 Settlement Agreement belies ARCO's contention that the Board is the sole bearer of costs associated with activities it conducted.

With respect to the 1991 Judgment Pursuant to Stipulation (Judgment) memorializing a previous Settlement Agreement between the Board and Calicopia Corporation, Paragraph 9 of the Judgment grants the Board the right to enter the Mine Site to investigate environmental conditions, monitor discharges and water quality, and to conduct such remedial activities as it deems necessary to protect water quality. (PT Exhibit 16, p. 6, lines 17-22.) This Judgment reaffirms the Board's ability to have continuing access to the Mine Site in order to carry out necessary steps to abate ongoing discharges of mining waste as described in the 1986 Resolution adopted pursuant to Water Code section 13305. (PT Exhibit 13 [Resolution R5-86-057].)

Paragraph 9 of the Judgment also contains a limited hold harmless or indemnification clause that reads as follows: "The Board shall indemnify, save, and hold harmless defendants and each of them from any loss, liability, or damages occasioned by or arising out of any act or omission of the Board upon the Property pursuant to any right granted to it hereunder." (PT Exhibit 16, p. 7, lines 3-7.) This simply means that should loss, liability, or damages occur that are related to the right granted to Board, i.e. the right to enter, investigate, monitor, and conduct necessary remedial activities, Calicopia Corporation, the co-trustees of the Robert R. Barry trust, and other individuals in their

⁵ The Settlement Agreement was disclosed to ARCO through PRA requests prior to the Prosecution Team's case-in-chief.

personal capacity, will be relieved of responsibility to answer for those losses, liability, or damages, only. This limited provision cannot be reasonably construed to effectively place the Board into the shoes of Calicopia Corporation or Cedar Point Properties for cleanup or costs. More importantly, the agreement cannot be construed to require the Board to step into ARCO's shoes for those purposes.

V. The Central Valley Water Board need not bring all Mine site potentially responsible parties to the same hearing

ARCO argues that there may be additional potentially responsible parties at the Mine site, and that the Board has assumed the liability of those parties through the prior settlements. As described above, the Board has not assumed any such liability through prior settlements. Moreover, the Board's investigations to date have not revealed any additional potentially responsible parties; it appears that ARCO is the sole remaining potentially responsible party. Should additional information become available regarding other potentially responsible parties, the Board will investigate and bring appropriate action. That does not mean that ARCO cannot be named as a discharger now. All liability under Water Code section 13304 is joint and several, and the Board need not address liability of other dischargers at the same hearing. (*In the Matter of the Petition of Union Oil Company of California*, State Water Resources Control Board Order No. WQ 90-2, at 8.)

VI. Conclusion

For the reasons stated above, the Central Valley Water Board should deny Atlantic Richfield's Prehearing Motion No. 2.

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