

**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. 3**

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I. The equitable doctrine of laches is inapplicable as a matter of law to cleanup and abatement orders regarding a continuing condition of public nuisance

Discharger Atlantic Richfield's (ARCO's) Prehearing Motion No. 3 seeks a ruling that the Prosecution Team failed to timely identify ARCO as a discharger and prosecute this matter (i.e. issue a cleanup order naming ARCO as a discharger and responsible party) and therefore, the doctrine of laches bars the Board from issuing the CAOs.

Laches is a court-made, equitable doctrine based on the "principle that those who neglect their rights may be barred from obtaining relief in equity." (State Water Board Order WQ 2013-0053, p. 4 citing *Feduniak v. California Coastal Com'n* (2007) 148 Cal.App.4th 1346, 1381.) It is a defense by which a court denies relief to a claimant who has unreasonably delayed or been negligent in asserting a claim, when that delay or negligence has prejudiced the party against whom relief is sought. (*Id.*)

The Mine and Tailings CAOs involve issues relating to continuing conditions of pollution and nuisance at the sites. Water pollution, and direct the responsible parties (ARCO and the Forest Service) to cleanup and abate the effects of mining waste on the sites. Pollution of water constitutes a public nuisance. (*Newhall Land & Farming Co. v. Superior Ct.* (1993) 19 Cal.App.4th 334, 341.) In fact, water pollution occurring as a result of treatment or discharge of wastes in violation of Water Code section 13300 et seq. is a public nuisance per se. (*Id.*) Moreover, as discussed in the Prosecution Team's Response to ARCO's Prehearing Motion No. 2, the Porter-Cologne Act is harmonious with the common law of nuisance. (*City of Modesto Redevelopment Agency* at 37.)

ARCO's motion must fail because no lapse of time can legalize a public nuisance. (Civil Code § 3490; *Strong v. Sullivan* (1919) 180 Cal. 331; *Cloverdale v. Smith* (1900) 128 Cal. 230.) Courts have held that laches and the bar of the statute of limitations are inapplicable in an abatement action to cease a continuing public nuisance. (see *Wade v. Campbell* (1962) 200 Cal.App.2d 54, 60; *City of Turlock v. Bristow* (1930) 103 Cal.App. 750, 756.) The Walker Mine and Tailings sites contain persistent conditions of per se public nuisance, which will persist until the Mine and Tailings sites are remediated. ARCO is responsible for these conditions as successor to the Mine operator.

II. The equitable doctrine of laches specifically should not apply to the Mine and Tailings CAOs here

Even if the equitable doctrine of laches somehow could apply to cleanup and abatement orders, it should not bar the Mine and Tailings CAOs because the circumstances do not meet the necessary elements.

The defense of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay.

(State Water Board Order WQ 2013-0053, p. 4, citing *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 68.)

As described in the Mine and Tailings CAOs, the Board only recently acquired evidence recently made available online sufficient to demonstrate ARCO's liability as successor to Anaconda and International. That it took the Board staff time to research far-flung archives, particularly given the Board's limited resources available for such searches, is neither unreasonable delay, nor is it acquiescence in the pollution-causing actions.¹

"[L]aches is not available where it would nullify an important policy adopted for the benefit of the public." (State Water Board Order WQ 2013-0053, p. 4 (quoting *Wells Fargo Bank v. Goldzband* (1997) 53 Cal.App.4th 596, 628); see also *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493-494.) Here, the Board is tasked under State Water Board Resolution 92-49 to "make a reasonable effort to identify the dischargers associated with the discharge. It is not necessary to identify all dischargers for the Regional Water Board to proceed with requirements for a discharger to investigate and clean up." (Resolution 92-49, § I.B.) In determining whether a person shall be required to clean up waste and abate the effects of a discharge or threat of discharge under Water Code section 13304, the Board shall "use any relevant evidence, whether direct or circumstantial, including, but not limited to ... documentation of historical or current activities ... by public records ... or other sources of information." (*Id.* at § I.A.1.)

Furthermore, ARCO has not demonstrated how it would be prejudiced by hearing the Mine and Tailings CAOs now. ARCO claims that up to three witnesses could have appeared before the Board had a hearing been held in 1999 or 2000, but ARCO does not describe how those witnesses could shed any more light on Anaconda and International's involvement in the mine facility from 1918 through 1941 than does the historical record now before the Board. As shown in ARCO's Exhibit 135, Marcile Neilsen was apparently a history buff who visited the site in 1943, but who had nothing at all to do with mine operations. Gil Luman worked at the mine for two years, 1928 and 1929, but it appears he was a logger, lumber mill hand, and "recreation aide." As interesting as it would have been to question Mr. Luman about what, exactly, a recreation aide did at the facility, it is unlikely that he would ever have been able to shed light on Anaconda or International's involvement with the mine facility. Finally, Louis Richards apparently lived at the mine as a child, from 1921 to 1927, and moved away when he was ten years old.

The fact is, this is a legacy mine site with significant water pollution problems, one of many in California. The best evidence available for most such sites is the historical record. Much of the evidence submitted here was only recently available to Board staff. Laches should not apply.

¹ The Central Valley Water Board only authorized State Water Pollution Cleanup and Abatement Account funds for responsible party searches in 2010. (Resolution No. R5-2010-0036.)

Finally, significant public policy concerns arise if laches could apply to bar the Board from issuing cleanup and abatement orders here. At a minimum, such application would significantly impair the Board's ability to identify parties responsible and to hold them accountable for cleaning up waste or abating the effects of waste that they have caused or permitted. Such a result would thwart the intent of Water Code section 13304 and State Water Board Resolution 92-49, both of which were enacted for the benefit of the public to ensure that conditions of pollution and nuisance could be properly abated.

III. Conclusion

For the reasons stated above, the Central Valley Water Board should deny Atlantic Richfield's Prehearing Motion No. 3.

For the Prosecution Team:

A handwritten signature in blue ink, appearing to read "Andrew Tauriainen".

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