

**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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PLUMAS COUNTY**

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**PROSECUTION TEAM'S RESPONSE TO ATLANTIC RICHFIELD COMPANY'S  
PREHEARING MOTION NO. 4**

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## I. Introduction

Discharger Atlantic Richfield's (ARCO's) Prehearing Motion No. 4 seeks a ruling that the Hearing Procedures adopted by the Board are constitutionally inadequate as they do not satisfy due process requirements, and that the Board should recuse itself as potentially biased.

ARCO's motion largely retreads its 6 December 2013 objections to the Hearing Procedures, which were addressed in the Board Chair's ruling of 27 January 2014, and on that basis should be denied. ARCO's motion should be denied also because ARCO is getting a hearing on the CAOs, and the hearing procedures provide adequate notice and opportunity to be heard. Furthermore, the Board is the appropriate entity to consider evidence and conduct the hearing and it should not recuse itself.

## II. The proposed hearing does not violate ARCO's due process rights

ARCO has known that the Board would consider the Mine and Tailings CAOs as early as April, 2013, when the Prosecution Team invited ARCO to provide comments on the draft orders. (PT Exhibits 5 and 6.<sup>1</sup>) ARCO submitted comments in June 2013. (PT Exhibit 8.) ARCO's comments took the same general posture as ARCO's comments on proposed WDRs in 1999, and made clear that ARCO had no intention of discussing the proposed CAOs in any meaningful way.<sup>2</sup> Although the Executive Officer could have issued the CAOs without hearing, the Prosecution Team decided to calendar the matter for hearing.

Due process requires only a reasonable notice and a meaningful opportunity to be heard. (*Mohilef v. Janovici* (1996) 51 Cal.App.4<sup>th</sup> 267, 286; *Mathews v. Eldridge* (1976) 424 U.S. 319, 333.) Due process is a flexible concept, and "there is no precise manner of hearing which must be afforded; rather the particular interests at issue must be considered in determining what kind of hearing is appropriate." (*Mohilef v. Janovici* (1996) 51 Cal.App.4<sup>th</sup> at 286.)

*Machado v. State Water Resources Control Board* involved similar procedural due process arguments as ARCO presents here, when a dairy owner argued he was deprived of due process when the Board issued a cleanup and abatement order without first holding a hearing before the order. ((2001) 90 Cal.App.4<sup>th</sup> 720.) The court examined the three factors enumerated in *Mathews v. Eldridge*: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and 3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or

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<sup>1</sup> The April 2013 review drafts also included all of the historical archive evidence regarding Anaconda's operation of the Mine then within the Central Valley Water Board's records.

<sup>2</sup> ARCO's June 2013 comments raise almost the same legal and fact arguments that ARCO raises in its Case-in-Chief here.

substitute procedural requirement would entail. (*Id.* at 726-727 citing *Mathews v. Eldridge* (1976) 424 U.S. 319, 334-335.) The *Machado* Court found that, "the cleanup and abatement order does not impose criminal or civil penalties, nor does it shut down the Dairy or otherwise prevent its operation. Its effect is much more limited." (*Machado v. State Water Resources Control Board* (2001) 90 Cal. App.4<sup>th</sup> at 726.)

Despite ARCO's assertions that the Mine and Tailings CAOs require multi-phased, multi-day hearings, the Mine and Tailings CAOs are really not particularly complicated in comparison to matters regularly heard by the Board. In fact, the CAOs are similarly limited in scope to that in *Machado*. The CAOs are not punitive in nature and do not impose criminal or civil penalties upon ARCO. The CAOs are injunctive in nature and would impose cleanup and abatement obligations upon Discharger ARCO as the legally responsible party to cease ongoing discharges and abate conditions of pollution and nuisance as the successor corporation. While it is true that the costs are unknown at this stage, and such costs may be substantial, the remediation work and costs associated with that work will be determined by ARCO in the investigation stage and work plan development stage. The Board is statutorily prohibited from dictating manner and method of compliance. (Wat. Code § 13360.)

Just as in *Machado*, the CAOs create obligations for ARCO, but they do not affect the fundamental nature of its business. Any risk of erroneous deprivation of ARCO's private interest has been minimized not only by the hearing procedures provided in Porter-Cologne, but the specific Hearing Procedures governing this hearing. In *Machado*, the Court concluded that, even without first holding a hearing prior to issuing the cleanup and abatement order, inherent safeguards existed Porter-Cologne's hearing procedures to minimize the risk of erroneously depriving the Dairy's interest. (*Machado v. State Water Resources Control Board* (2001) 90 Cal. App.4<sup>th</sup> at 726.)

Here, *an additional* procedural safeguard has been afforded to ARCO that did not exist in *Machado*, because ARCO is getting a hearing prior to issuance of the CAOs. Water Code section 13304 does not procedurally require the regional boards to hold a hearing prior to issuing a cleanup and abatement order.

Moreover, ARCO has the right to appeal the CAOs. If a party is aggrieved by the issuance of the order, it may petition the State Water Resources Control Board for review pursuant to Water Code section 13320. Water Code section 13320 provides a process for prompt post-deprivation review for the correction of potential administrative error below. (see *Mackey v. Montrym* (1979) 443 U.S. 1, 13.)

Finally, the administrative burdens and costs to the Board in providing additional or substitute process must be considered in any due process evaluation. The costs of additional procedures, such as those proposed by ARCO, would be unduly burdensome to Board, in staff and Board member costs and in a reduction of resources available for matters. Moreover, the Board deliberately provided ARCO with more procedural process than is required under the hearing procedures in Porter-Cologne in an attempt

to avoid a situation where ARCO raised procedural due process arguments in the first place. The Board issued hearing procedures pursuant to Title 23 section 648 et seq. of the California Code of Regulations, sections 801-805 of the Evidence Code, and sections 11400 et seq. and 11513 of the Government Code. Pursuant to these statutory and regulatory procedures, the hearing procedures include the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses, and to rebut evidence. (Gov. Code § 11513 subd. (b).) Inclusion of these rights are important safeguards in the hearing process.

### **III. The Central Valley Water Board need not recuse itself**

ARCO asserts that a chance of bias exists in the Board's decision-making process here, and therefore argues that the Board is constitutionally required to recuse itself. ARCO is incorrect. When an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal. (*Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4<sup>th</sup> 731, 737 citing *Withrow v. Larkin* (1975) 421 U.S. 35, 46.) Evidence of actual bias or by "showing a situation in which experience teaches that the probability of actual bias on the party of the judge or decisionmaker is too high to be constitutionally tolerable" will serve to establish a deprivation of procedural due process. (*Id.*) In considering a similar allegation of tribunal bias in the *Morongo* matter, the California Supreme Court concluded its opinion reversing a decision finding a deprivation of procedural due process by stating:

In construing the constitutional due process right to an impartial tribunal, we take a more practical and less pessimistic view of human nature in general and of state administrative agency adjudicators in particular. In the absence of financial or other personal interest, and when rules mandating an agency's internal separation of functions and prohibiting ex parte communications are observed, the presumption of impartiality can be overcome only by specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias. Unless such evidence is produced, we remain confident that state administrative agency adjudicators will evaluate factual and legal arguments on their merits, applying the law to the evidence in the record to reach fair and reasonable decisions.

(*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4<sup>th</sup> at 741-742.)

ARCO has no evidence that the Board, or any of its members, would act in an impartial manner resulting in prejudice against it. On the contrary, ARCO admits that the Board "will not likely consciously act on its bias" but asserts the likelihood that it will unconsciously impact the decision is too great to be constitutionally tolerated. (ARCO Prehearing Motion No. 4, at p. 4.) ARCO's fear of speculative probabilities does not

warrant the Board's recusal from this matter. Furthermore, it's unreasonable and entirely pessimistic to insinuate that the Board will shirk its responsibility regarding the mine seal should ARCO succeed in proving its case.

The Board is the appropriate adjudicative entity to conduct a hearing on this matter. Ongoing discharges and threatened discharges taking place at Walker Mine are occurring in the Board's jurisdiction and the Board possesses the authority and expertise in the first instance to issue a cleanup and abatement order pursuant to Water Code section 13304. There are adequate constitutional safeguards in the statutory hearing process of the Water Code for ARCO to avail itself of if it is ultimately aggrieved by the Board's decision. Because the probability of actual bias is no more than speculative at best and because adequate safeguards are in place in the Board's hearing process, there is no basis for the Board to recuse itself on a procedural due process grounds.

#### **IV. Conclusion**

For the reasons stated above, the Central Valley Water Board should deny Atlantic Richfield's Prehearing Motion No. 4.

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