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

ATLANTIC RICHFIELD COMPANY

WALKER MINE
PLUMAS COUNTY

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PROSECUTION TEAM'S RESPONSE TO ATLANTIC RICHFIELD COMPANY'S PREHEARING MOTION NO. 5

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I. Introduction

Discharger Atlantic Richfield's (ARCO's) Prehearing Motion No. 5 requests dismissal of the Mine and Tailings CAOs on the basis that the Central Valley Water Board allegedly lacks jurisdiction to consider the CAOs because the Board is liable for the discharges, which in turn makes the CAOs contribution actions for which the Board lacks authority per Water Code section 13350(i). ARCO also claims that the CAOs are barred by the terms of the 2005 Consent Decree between ARCO and the Forest Service.

ARCO's motion should be denied because the Board is not liable for any discharges at either the Mine or Tailings sites, and thus the CAOs are not contribution actions in any sense. Moreover, Water Code section 13350(i) does not apply because the CAOs are brought under Water Code section 13304, not section 13350, and no party has incurred liability under section 13350 to date. Finally, the Consent Decree does not alter or affect the Board's Water Code authority at all, and in any event the Consent Decree only applies to the Tailings site.

II. The Board is not liable for the abating the conditions of pollution or nuisance at either site

ARCO claims that the Central Valley Water Board lacks authority to consider either of the proposed CAOs because the Board "is liable for abating the alleged nuisance conditions at the Sites." (ARCO's Prehearing Motion No. 5, at p. 1.) ARCO's claim is without merit and has been rebutted in the Prosecution Team's Response to Prehearing Motion No. 2, which is incorporated by reference here. Simply, the Board is not liable for pollution or nuisance conditions at the Tailings because the Board does not own the site, has never operated the site, and has never entered into any agreements regarding the site. The Board is not liable for pollution or nuisance conditions at the Mine because the Board does not own the site, has never conducted any pollution-causing activities at the site, and has never assumed any general liability for the site. The Board has acted only in a limited capacity under authority of Water Codes section 13305 to install the seal in the Mine's 700 level portal, which stopped discharges, and to take other minor actions which have not caused discharge. These actions do not trigger general liability.

ARCO's citations to two deliberative process memoranda prepared by Central Valley Water Board staff are red herrings that should be ignored.[1] In the 2011 memorandum, staff discusses the need to identify responsible parties for the Mine site. At that time, staff had only recently begun the archive record search that ultimately led to the evidence at issue here, and sought management approval to continue the search. In the 2013 memorandum, staff discusses the evidence obtained demonstrating ARCO's liability, and requests management approval to send the draft CAOs to ARCO for

[1] These memoranda were inadvertently disclosed to ARCO in January, 2013, in response to two Public Records Act requests submitted by ARCO in November, 2013. ARCO's requests sought the entire Board files on the Walker Mine, which goes back at least four decades and includes several thousand documents.

comment and potential settlement discussion. Board staff ultimately sent the drafts to ARCO in April, 2013, but was met with ARCO's continuing determined resistance.

ARCO misconstrues the 2011 and 2013 memoranda. In each, staff's references to potential Board liability refer only to the potential ongoing costs for monitoring the seal in the Mine's 700 level portal and maintaining the portal access tunnel. As described in the Response to Prehearing Motion No. 2, it is appropriate and proper to transfer that responsibility to ARCO through the Mine CAO. In any event, ARCO cannot cite authority for the proposition that internal, deliberative staff memoranda can bind the Board in any way, because no such authority exists. The Board has never assumed general liability for the conditions of pollution and nuisance at the Mine site.

III. The Mine and Tailings CAOs are not contribution actions

ARCO argues that the Mine and Tailings CAOs should be construed as contribution actions. (ARCO's Prehearing Motion No. 5, at pp. 1-2.) The proposed CAOs are not contribution actions because the Central Valley Water Board is not liable for the conditions of pollution and nuisance at either site, especially because the Board itself has never been sued or held liable as a discharger. (*Cooper Industries v. Aviall Services* (2004) 543 U.S. 157, 165-166.) In addition, the proposed CAOs no longer seek recovery of the Board's past costs involved in installing and monitoring the mine seal (see PT Response to ARCO's Prehearing Motion No. 8), and so cannot be considered contribution actions even by ARCO's strained analogy.

ARCO also argues that the CAOs are contribution actions under Water Code section 13350(i). (ARCO's Prehearing Motion No. 5, at p. 3.) The Mine and Tailings CAOs are not contribution actions under Water Code section 13350(i), because they arise under Water Code sections 13304 and 13267. By its terms, Water Code section 13350(i) provides only for contribution actions against other responsible parties where a discharger has been subject to civil liability or administrative civil liability under Water Code section 13350. The Central Valley Water Board is not a discharger at either site, and does not seek administrative civil liabilities under section 13350 in this proceeding. Moreover, no party has ever been subject to section 13350 liabilities for the sites.

IV. The Consent Decree does not shield ARCO from Water Code liability

a. By its terms, the Consent Decree does not bind the Board

ARCO argues that the 2005 Consent Decree (PT Exhibit 12) between it and the Forest Service must shield it from liability for the Tailings sites. (ARCO's Prehearing Motion No. 5, at p. 3.) ARCO properly concedes that the Consent Decree applies only to the Tailings site.[2] (ARCO's Prehearing Motion No. 5, at p. 3 [referencing only "the

[2] The Forest Service's Tailings Record of Decision and the 2005 Consent Decree apply only to the approximately 100-acre Tailings site on Plumas National Forest land. (ARCO Exhibit 145 [ROD], at Figures 2-3; PT Exhibit 12 [Consent Decree], at p. 8.) The Walker Mine site is separate from the Tailings site, about a mile away, located on

Prosecution Team's claims against Atlantic Richfield for the Tailings Site…"].) The Consent Decree has no bearing on the Mine site or the Mine CAO.

The Consent Decree does not affect the Central Valley Water Board's Water Code authority in any way. The Board was not a party to the underlying litigation, and it is not a signatory to the Consent Decree. It is a fundamental principle of American law that a party cannot be bound by a judgment in litigation where it was not a party. (*Hansberry v. Lee* (1940) 311 U.S. 32, 40.) In any event, the Consent Decree itself provides that it does not limit the rights of non-parties:

> Nothing in this Consent Decree shall be construed to create any rights in or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this decree may have under applicable law.

(Consent Decree, at § 18.) ARCO does not attempt to explain how the Central Valley Water Board's Water Code authority to issue the Mine and Tailings CAOs could be limited in light of this language.

The only possible qualification on the Central Valley Water Board's rights by the Consent Decree is the ability to seek contribution from ARCO under Section 113(f)(1). Section 113(f)(2) may limit the rights of potentially responsible, non-signatory parties to the narrow extent that they are precluded from seeking contribution from parties who have resolved their liability in an approved consent decree. However, this limitation is inapplicable here because the Board is not a responsible party at the Tailings and is not seeking any contribution.

b. The Consent Decree only resolves ARCO's liability as against the United States

The Consent Decree does not resolve ARCO's liability under the Water Code. California law enters into the Consent Decree only to the extent that ARCO has agreed to forgo any claims against the United States based on the California Constitution. (Consent Decree, at § 15.) But even if California's water quality laws were somehow within the Consent Decree, the effect on Central Valley Water Board's authority under them would be limited and narrowly defined.

When the United States and a settling defendant enter into a settlement agreement, the settling defendant is only relieved of their liability *to the United States*:

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nearly 800 acres of private property. The Forest Service has never assumed any responsibility for the privately-owned mine, and there is no basis for finding that the Mine site falls within the "matters addressed" by the Consent Decree. (See *Akzo Coatings, Inc. v. Aigner Corp*. (7th Cir. 1994) 30 F.3d 761, 766.)

> Whenever the [EPA] has entered into an agreement under this section, the liability to the *United States* under this chapter of each party to the agreement…shall be limited as provided in the agreement pursuant to the covenant not to sue…

(CERCLA section 122(c)(1); 42 USC § 9622, subd. (c)(1) [emphasis added].)

CERCLA does not grant the Forest Service the power to relieve ARCO's California Water Code liability. Moreover, CERCLA favors and expressly provides for the simultaneous operation of state and federal law, except in those particular instances where compliance with state law is either impossible or contrary to the goals of CERCLA. (CERCLA sections 114(a); 42 USC § 9614, subd. (a); 302(d); 42 USC § 9652, subd. (d); 121(e)(4); 42 USC § 9621, subd (e)(4); see also *City of Merced v. Fields* (E.D.Cal. 1998) 997 F.Supp. 1326, 1335-36 [recognizing that CERCLA does not preempt state law causes of action].) There is no basis for any assertion that compliance with the Tailings CAO would run afoul of CERCLA in any way.

While it is true that Section 113(f)(2) contemplates that a settling defendant may also resolve liability to a state in a judicially approved settlement, this presupposes that the state is a party to the settlement. That is not the case here. Thus, the Board's authority has not been displaced or subordinated by the Consent Decree.

c. Paragraph 19 of the Consent Decree does not preclude the proposed Tailings CAO

ARCO claims that the Tailings CAO is barred because Paragraph 19 of the Consent Decree allegedly shields ARCO "from costs, damages, actions, or other claims (whether seeking contribution, indemnification, or however denominated) for matters addressed in this Consent Decree…" (ARCO Prehearing Motion No. 5, at p. 3.) But the scope of protection under this paragraph is limited to claims which are "provided by §113(f)(2), and any applicable law." The phrase "any applicable law" cannot resolve ARCO's Water Code liability, which was not at issue in the litigation underlying the Consent Decree. ARCO's immunity under CERCLA from the Consent Decree therefore stems solely from Section 113(f)(2), which only applies to Section 113(f)(1) contribution actions.[3]

[3] Section 113(f)(2) does not even shield ARCO from all potential *CERCLA* claims. (*United States v. Atlantic Research Corp*. (2007) 551 U.S. 128, 138-139 [holding that §113(f)(2) is not a shield potentially responsible parties from cost recovery actions under §107(a) because these are "clearly distinct remedies."]; see also *Waste Management of Pennsylvania Inc. v. City of New York* (M.D. PA 1995) 910 F. Supp. 1035, 1036.) ("[b]ut such a settling party is not entitled to protection against claims by non-settling parties who…have independently incurred costs in cleaning up a Superfund site"); and *U.S. v. Union Gas* (E.D. 1990) 743 F.Supp 1144, 1155-56 [third party plaintiff's counterclaim was not pre-empted by CERCLA's contribution protections, too broad of a reading of CERCLA's contribution protection clause would ultimately frustrate other claims raised under federal or state law, "a result clearly not intended by CERCLA."].)

V. Conclusion

For the reasons stated above, the Central Valley Water Board should deny Atlantic Richfield's Prehearing Motion No. 5.

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