

**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. 6**

TABLE OF CONTENTS

I.	The Board’s findings on the proposed Mine and Tailings CAOs must be supported by “substantial evidence in the record”	1
II.	“Substantial evidence” means “credible and reasonable evidence”	1
III.	“Preponderance” means the convincing force of the evidence, not the quantity of the evidence	2
IV.	In adopting findings in an Order, the Board makes express or implied determinations that the evidence in support of such findings is of more convincing force than the evidence in opposition	3
V.	Conclusion	3

I. The Board's findings on the proposed Mine and Tailings CAOs must be supported by "substantial evidence in the record"

Discharger Atlantic Richfield's (ARCO's) Prehearing Motion No. 6 seeks a ruling that the Prosecution Team must prove each element of the proposed Mine and Tailings CAOs by a "preponderance of the evidence" rather than "substantial evidence." (ARCO's Prehearing Motion No. 6, at p. 1.) ARCO clearly does not like the substantial evidence standard, but that standard governs these proceedings.

The applicable State Water Resources Control Board (State Water Board) precedents hold that, in order to issue orders under Water Code section 13304, the Central Valley Water Board's findings must be supported by "substantial evidence in the record" and not a "preponderance of evidence."

The State Water Board has addressed the applicable legal standard on several occasions, each time holding that the "substantial evidence" standard governs regional board proceedings. For example, in *Exxon Company, USA* (Order No. WQ 85-7), the State Water Board upheld an order by the Central Valley Water Board, noting:

[A]ny findings made by an administrative agency in support of an action must be based on substantial evidence in the record. (See, e.g., *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 113 Cal.Rptr. 836.) Thus, while we can independently review the Regional Board record, in order to uphold a Regional Board action, we must be able to find that finding of ownership was founded upon substantial evidence.

(*Id.* at p. 6 [emphasis added].) Later, in a matter involving a cleanup order issued by the San Francisco Bay Regional Water Board, the State Water Board affirmed its application of the "substantial evidence" test, rejecting arguments that the "preponderance of evidence" test should apply. (*Stinnes-Western Chemical Corporation*, Order No. 86-16.) In subsequent cases, the State Water Board has held to the principle that the "substantial evidence" standard applies to Regional Board and State Water Board proceedings. (*Aluminum Company of America*, Order No. WQ 93-9; *In re: Sanmina Corporation*, Order No. WQ 93-14.)

II. "Substantial evidence" means "credible and reasonable evidence"

The State Water Board has defined substantial evidence to mean "credible and reasonable evidence." (*In re: Sanmina Corp*, Order No. WQ 93-14.) "Substantial evidence does not mean proof beyond a doubt or even a preponderance of evidence. Substantial evidence is evidence upon which a reasoned decision may be based." (*In re: Robert S. Taylor, et al. and John F. Bosta, et al.*, Order No. WQ 92-14, at p. 5.)

The California Supreme Court has similarly observed that substantial evidence is evidence of "ponderable legal significance," which is "reasonable in nature, credible and of solid value." (*Ofsevit v. Trustees of California State Universities and Colleges* (1978) 21 Cal.3d 763, 773, n. 9.) "Substantial evidence" means facts, reasonable assumptions based on facts and expert opinions supported by facts. *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1019.

Importantly, an agency may also rely on the opinion of its staff in reaching decisions, and "the opinion of staff has been recognized as constituting substantial evidence." (*Browning-Ferris Industries v. City Council* (1986) 181 Cal.App.3d 852, 866 *citing Coastal Southwest Dev. Corp. v. California Coastal Zone Conservation Com.* (1976) 55 Cal.App.3d 525, 535-536.)

State Water Board Resolution 92-49 (Resolution 92-49) further animates the types of evidence that may be considered substantial when naming dischargers in a cleanup and abatement order, including direct or circumstantial evidence. (Resolution 92-49, § I.A.) Such direct or circumstantial evidence applicable in these proceedings includes "documentation of historical or current activities ... as documented by public records ... or other sources of information" (*Id.*, at § I.A.1.)

III. "Preponderance" means the convincing force of the evidence, not the quantity of the evidence

ARCO does not clearly define what "preponderance of the evidence" means. "Preponderance of evidence usually means that one body of evidence has more convincing force than the evidence opposed to it." (Cal. Admin. Hearing Practice, 2d Ed., § 7.51 [internal citations omitted]; see also BAJI No. 2.60; *People v. Miller* (1916) 171 Cal. 649, 652-653 ["preponderance of evidence' [means] such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability is in favor of the party upon whom the burden rests."].)

"The sole focus of the legal definition of 'preponderance' in the phrase 'preponderance of the evidence' is on the *quality* of the evidence. The *quantity* of evidence presented by each side is irrelevant." (*Glage v Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324-325 [italics in original]; see also, *id.*, at fn 8 [citing Black's Law Dictionary and noting that "'preponderance of the evidence' is *exclusively* concerned with persuasive value of the evidence and not simply sheer quantity." (italics in original)].)

ARCO implies that the common meaning of term "preponderance" applies. (ARCO's Prehearing Motion No. 2, at p. 3 [arguing that "preponderance" means "far greater evidence"].) However, to the extent that the common definition of "preponderance" implies greater quantity of evidence, that definition simply does not apply to legal standards. (*Glage v. Hawes Firearms Co.*, 226 Cal.App.3d at 325-326.)

IV. In adopting findings in an Order, the Board makes express or implied determinations that the evidence in support of such findings is of more convincing force than the evidence in opposition

ARCO's claim that a higher legal standard applies to the Prosecution Team is a fallacy because the Board makes express or implied determinations regarding the quality and convincing force of evidence each time it adopts findings in an Order. The parties in any contested proceeding usually submit contrary evidence. The Board hears the evidence, determines what evidence is credible and reasonable, and adopts findings accordingly. The Board may choose to make an express determination that the evidence in support of any finding is of more convincing force than the evidence in opposition, but such a determination is always at least implied.

In other words, the Board determines with each finding which party has proved its claim by a preponderance of the evidence. The Board's determination regarding the persuasiveness of any evidence is not subject to appeal. The Prosecution Team is not held to any artificially high standard.

V. Conclusion

For the reasons stated above, the Central Valley Water Board should deny Atlantic Richfield's Prehearing Motion No. 6.

For the Prosecution Team:



ANDREW TAURIAINEN
Senior Staff Counsel
MAYUMI OKAMOTO
Staff Counsel
Office of Enforcement