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

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PROSECUTION TEAM'S RESPONSE TO ATLANTIC RICHFIELD COMPANY'S PREHEARING MOTION NO. 7

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I. Introduction

Atlantic Richfield Company's (ARCO's) Prehearing Motion No. 7 seeks a ruling that liability under Water Code section 13304 is several only, and if it joint and several liability can be assigned, then a reasonable theory for apportionment exists (Atlantic Richfield's Prehearing Motion No. 7, pp. 4-5).

ARCO's arguments are without merit, given the deference that must be paid to the Water Board's long-standing interpretation of Section 13304, public policy reasons, and because ARCO (like all dischargers) may seek redress in another forum. Moreover, ARCO has failed to demonstrate any basis for allocation.

II. Liability under Water Code Section 13304 has consistently been joint and several

The State Water Resources Control Board (State Water Board) has consistently found that liability under the Water Code is joint and several:

> The State Water Board has a long-standing policy of assessing joint and several liability against all responsible parties in cleanup cases...[I]t remains the Board's intent to name all responsible parties jointly and severally liable in cleanup actions.

(In re: Petition of James Salvatore, Order WQ 2013-0109, at p. 19; see also *Union Oil company of California*, WQ Order No. 90-2 ["we consider all dischargers jointly and severally liable for discharges of waste"]; and *Ultramar, Inc*., WQ Order No. 2009-0001-UST, at p. 7, fn 12 [""All of the responsible parties are jointly and severally liable for the unauthorized releases."].)

The State Water Board has consistently applied joint and several liability in cleanup and abatement orders because, in part, doing so conserves time and maximizes limited resources of the agency that must prioritize its actions and act on behalf of all members of the public to address serious water quality issues, while still allowing the private parties the opportunity to seek redress through a contribution action if one is needed.

In *Union Oil Company of California*, WQ Order No. 90-2, the State Water Board stated that the Regional Board is authorized:

> To issue either one order, or several orders with coordinated tasks and time schedules, to all persons it finds are legally responsible, requiring any further investigating and cleanup which is necessary.

(WQ Order No. 90-2, at p. 3) The State Water Board went on to say that, "while we consider all dischargers jointly and severally liable for discharges of waste, it is

obviously not necessary for there to be duplication of effort in investigation and remediation." (*Id*. at p. 4 (emphasis added).)

Other provisions of the Water Code support imposition of joint and several liability. For example, Water Code section 13267 requires only that reporting requirements bear a "reasonable relationship" to the need for the report and the benefits to be obtained from the reports," and not any nexus with an individual discharger's purportedly divisible share of liability.

Nothing in the plain language of Water Code section 13304 supports ARCO's assertion that liability should be other than joint and several. The Water Code is focused on providing a cleanup plan and not on apportioning share of liability. Applicable regulations likewise do not require several only liability. (*See* 23 Cal. Code Regs., section 2907-2910.) In addition, the California Environmental Protection Agency's State Auditor Report for 2004 found that the "nine regional water boards apportion liability for cleanup using a strict application of joint and several liability" so that orphan shares do not exist. (2004 Auditor Report, available at http://www.bsa.ca.gov/pdfs/sr2004/2002-121.pdf, at p.2 ["even though some share of the cleanup costs is not attributable to a responsible party, each must assume full responsibility for those costs.].)

The State Water Board has an interpretive advantage over the courts regarding provisions of the Water Code, including expertise and technical knowledge regarding groundwater contamination, sources and cleanup thereof and policy and discretion issues regarding naming of dischargers in Cleanup and Abatement Orders. Thus, State Water Board Orders and Resolutions are entitled to heightened deference:

> An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts … the binding power of an agency's *interpretation* of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation … An "administrative interpretation … will be accorded great respect by the courts and will be followed if not clearly erroneous…."

(*Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, 7 (emphasis in original).) Accordingly, although courts independently review the text of a statute, they must "tak[e] into account and respect[t] the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation." (*Id*.)

Relevant factors for deference include "the particular agency offering the interpretation …[factors] 'indicating that the agency has a comparative interpretive advantage over the courts' [e.g., factors that "assume the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion"] and [factors] 'indicating that the interpretation in question is probably correct' [e.g., "careful consideration by

senior agency officials … evidence that the agency 'has consistently maintained the interpretation in question, especially if [it] is long-standing'"…]. (*Id*. at 7-13.)

Similarly, under the primary jurisdiction doctrine, where issues are placed within the "special competence of an administrative body, limited review is more rationally exercised by "preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." (*Palmer v. University of California*, 107 Cal.App.4th 899, 906-07 (2003).)

ARCO has not demonstrated any basis for going against well-established State Water Board precedent applying joint and several liability to cleanup orders, and thus ARCO's motion should be denied.

III. Joint and several liability remains appropriate even if the harm is capable of apportionment

As evidenced by *Union Oil*, the regional boards *have an almost twenty-five year history* of imposing joint and several liability on dischargers named to a cleanup order. Notwithstanding this, ARCO argues that joint and several liability is inappropriate when the harm is reasonably capable of apportionment. (Prehearing Motion No. 7, at pp. 2-5.) ARCO's reliance on CERCLA for this conclusion is misplaced, since the Mine and Tailings CAOs are issued pursuant to California law, not CERCLA.

California's environmental laws are allowed to be more protective, and therefore broader, than federal laws like CERCLA. Section 9652(d) of CERCLA makes clear that "CERLCA is not intended to alter in any way the liabilities of any person under state law with respect to the release of hazardous substances." (*City of Merced v. Fields*, 997 F.Supp. 1326, 1335-36 (E.D. Cal. 1998) [recognizing that CERCLA does not preempt state law causes of action.].) Furthermore, defenses to CERCLA are to be construed narrowly to further CERCLA's broad remedial purposes. (*United States v. Honeywell Intern*., *Inc*. (E.D. Cal. 2008) 542 F.Supp.2d 1188, 1199; *Kelley v. Thomas Solvent Co.* (W.D. Mich. 1989) 727 F.Supp. 1532, 1540.)

Just as with the application of joint and several liability, the boards' policy of declining to apportion liability arises out of the desire to address serious water quality issues and place the responsibility for the cleanup on those creating the concern, rather than the public at large. In many instances, there will be so-called "orphan shares" when a company has changed corporate structure or has no assets to respond to the regional board's order. In these cases, the boards have made the public policy decision to institute joint and several liability to spread the liability across the responsible parties rather than have some portion be borne by the public at large.

This method also conserves significant staff and board resources in making determinations regarding apportionment, corporate history, and the remaining

dischargers' available funds to respond to cleanup and abatement orders, which would necessarily be presented in every cleanup and abatement order hearing should ARCO's position prevail. Such arguments are better saved, as they are in the case of the Mine and Tailings CAOs, for a separate action by and among the dischargers for contribution.

Cleanup and abatement orders are intended to be nimble instruments, and are often accompanied by a Water Code 13267 investigative order seeking information about the site to determine the appropriate method of cleanup. As discussed above, liability under section 13267 orders is likewise joint and several, even if only issued to a single party and not all suspected responsible parties.

Finally, the obligations of a cleanup and abatement order must be fulfilled even if petitioned to the State Board. Adoption of ARCO's position here would transition a complicated legal analysis regarding corporate succession and financial standing from a courtroom after the CAO has been ordered, environmental work is underway, and the proper parties have been determined, into an administrative process with more relaxed evidentiary standards and at a time when the parties are still debating who should be named to the CAO. (*See for example*, *U.S. Cellulose and Louis J. and Shirley D. Smith*, WQ Order No. 92-04.) This would add a significant burden to Water Board staff, delay remediation, and likely result in many sites having orphan shares, and therefore the need for state participation. These public policy reasons serve to continue with the long-standing practice against apportioning liability.

IV. ARCO's position on apportionment is not reasonable or supported by public policy

ARCO argues that apportionment can be made based on the time that Anaconda and International operated the Walker Mine facility (temporal basis) and on the fact that other parties (namely Walker Mining Company before 1918) conducted limited activities on the site (nature of activities). As an initial matter, allocation based on the amount of time that ARCO's predecessors operated the site can be unfair both in general and in this specific matter. (*Summers v. Tice* (1948) 33 Cal.2d 80; Restatement of Torts Section 433B(3).)

Moreover, ARCO's reliance on *Burlington Northern* is misplaced, because that case involved account many more factors than simply the number of years a company had owned the property or the nature of the discharger's activities. In *Burlington*,

> The District Court calculated the Railroads' liability based on three figures. First, the court noted that the Railroad parcel constituted only 19% of the surface area of the Arvin site. Second, the court observed that the Railroads had leased their parcel to B&B for 13 years, which was only 45% of the time B&B operated the Arvin facility. Finally, the court found that the volume of hazardous-substance-releasing activities on the B&B property was at least 10 times greater than the releases that occurred on

> the Railroad parcel, and it concluded that only spills of two chemicals, Nemogon and dinoseb (not D-D), substantially contributed to the contamination that had originated on the Railroad parcel and that those two chemicals had contributed to two-thirds of the overall site contamination requiring remediation. The court then multiplied .19 by .45 by up .66 (two-thirds) and rounded up to determine that the Railroads were responsible for approximately 6% of the remediation costs. Allowing for calculation errors up to 50%, the court concluded that the Railroads could be held responsible for 9% of the total CERCLA response costs for the Arvin site.

(*Burlington Northern and Santa Fe Railway Company v. United States*, (2009) 556 U.S. 599, 616-17 (internal quotations omitted).)

Burlington Northern does not support ARCO in this case. The record here demonstrates that Anaconda and International operated the Walker Mine facility concurrently with the Walker Mining Company from 1918 through 1941, when the vast majority (essentially all) of the pollution-causing activities took place on the Mine and Tailings sites. ARCO's apportionment argument is too simplistic under the *Burlington Northern* approach, and fails to consider the strong public policy reasons against apportionment here.

Moreover, the type of scientific and factual evidence necessary to entertain ARCO's arguments would result in the CAO process grinding to a halt. Indeed, the apportionment in *Burlington Northern* had to be conducted by the District Court, because "the Railroads [took] a scorched earth, all-or-nothing approach to liability, failing to acknowledge any responsibility for the release of hazardous substances that occurred on their parcel throughout the 13-year period of B&B's lease." (*Id*. at 615.) This is not what the Water Code intends. Instead, cleanup and abatement orders are designed to protect, remediate, and even offer prospective relief (Section 13304 applies where a party "threatens to cause or permit" and "threatens to create a condition of pollution or nuisance" … "shall upon order of the regional board …").

Simply put, liability under the Water Code is broader than liability under CERCLA and purposely designed to pass the costs of remediation onto those who discharge into waters of the state, or who act in a way that causes waste to discharge. This public policy underlies the application of joint and several liability, and the general refusal to apportion liability at the regional board level. Nothing by way of this practice prevents a discharger from recovering more than its fair share of costs or expenditures from other responsible and solvent parties from a later contribution action; it simply prevents the state from bearing the burden and costs of such orphan shares.

Finally, ARCO has made no attempt to distinguish this case from those described in the Prosecution Team's Opening Brief, at page 20 and footnote 12, which demonstrate that even if allocation were somehow appropriate in this context, ARCO itself should be

allocated primary responsibility for the Mine and Tailings sites given its predecessors' operation of the Walker Mine facility.

V. Conclusion

For the reasons stated above, the Central Valley Water Board should deny Atlantic Richfield's Prehearing Motion No. 7.

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