

# PAUL HASTINGS



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**SUBMITTED VIA E-MAIL TO: COMMENTLETTERS@WATERBOARDS.CA.GOV**

Ms. Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
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**Re: City of Rialto and Rialto Utility Authority's Comments Regarding State Water Resources Control Board July 17, 2012 Informational Meeting; In the Matter of Perchlorate Contamination at the 160-acre Site in the Rialto Area (SWRCB/OCC File A-1824)**

Dear State Water Board Members:

In response to the State Water Resources Control Board ("SWRCB" or the "Board") May 31, 2012 notice of an informational meeting in the above-referenced matter, the City of Rialto and Rialto Utility Authority (collectively, "Rialto") submit the following information and update to the Board on developments occurring since the Board stayed the proceedings in this matter.

Safe and clean drinking water is the life blood of Rialto and all other municipalities. With limited clean water due to contamination, economic growth is stifled. Rialto is an environmental justice community, which has been subjected to decades of contaminated groundwater caused by activities of the United States Department of Defense ("DoD") and its contractors and, later, manufacturers of fireworks and other pyrotechnics.

As the Board knows well, Rialto has fought for many years for safe and clean water with every effort it can muster. Those efforts have been critical to the potential final resolution of these issues that is now on the horizon. Rialto agrees that now is the time for the Board to watch vigilantly to determine whether the United States, local governments, and private parties can finalize settlement agreements and remedial plans that could finally result in the cleanup of the Rialto-Colton Basin ("Basin") and go at least part way toward reimbursing the citizens of Rialto for the heavy burden they have borne. However, we urge the Board to monitor this progress closely, and to be ready to take action if current settlement and remedial efforts falter.

To summarize, Rialto submits that the primary questions before the Board are:

- Do the planned remedies (including the selected interim remedies and yet to be determined final remedies) meet the requirements and spirit of Porter-Cologne?<sup>1</sup>
- Will the remedies be implemented in timely fashion?, and
- Will those remedies be adequately funded by responsible parties?

Rialto believes that the answers to those questions are *likely* yes, but that all of us must carefully monitor as important future events play out in order to confirm that these answers are in the affirmative.

## **I. Background**

Rialto has steadfastly pursued cleanup of the perchlorate and trichloroethylene (“TCE”) contamination in the Basin through federal litigation against the potentially responsible parties (the “PRPs”). Rialto’s primary goal through the litigation and this Board proceeding has been to ensure the long-term supply of safe drinking water to its community.

Given the complexity of the technical, legal, and jurisdictional issues involved with fully restoring the groundwater in the Basin to its beneficial use, oversight by the federal, state, and regional agencies, including the U.S. Environmental Protection Agency (“EPA”), the Board, and the Santa Ana Regional Water Quality Control Board (“Santa Ana Regional Board”), has been necessary. However, in order to begin implementation of the Interim Record of Decision (“2010 ROD Remedy”)<sup>2</sup>, Rialto believes that it is appropriate for the SWRCB to release certain defendants that are settling with EPA and the local government agencies, which include Rialto, the City of Colton, and the County of San Bernardino (the “County”). While final settlement has not been reached in the Consolidated Federal Actions (as defined below), it is expected that Emhart Industries, Inc. (“Emhart”) will agree to become the “work party” to implement the 2010 ROD Remedy.

As described below, the 2010 ROD Remedy is an important “first step” toward remediating the perchlorate and TCE groundwater contamination in the Basin. However, U.S. EPA has not proposed a final remedy to restore groundwater in the Basin to its beneficial use. Therefore, to ensure that State water quality standards are protected as part of any final remedy, it is incumbent that the Board remains involved in this matter to assure achievement of State water quality standards in accordance with Porter-Cologne. The SWRCB may also consider in the future whether to issue cleanup and abatement orders to any parties that have not settled in the Consolidated Federal Actions.

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<sup>1</sup> Porter-Cologne Water Quality Control Act (“Porter-Cologne”), Water Code §§ 13000 *et seq.*

<sup>2</sup> USEPA Superfund Interim Action Record of Decision, Source Area Operable Unit, B.F. Goodrich Superfund Site, San Bernardino County, CA (September 30, 2010).

Because settlements in the Consolidated Federal Actions have not been finalized, Rialto believes it would be premature for the SWRCB to release such settling defendants at this time. Thus, Rialto recommends that the Board consider this matter at its October 2012 meeting to afford the Joint Reporting Parties<sup>3</sup> an opportunity to update the Board on the status of settlement and offer suggestions on how to proceed in this matter based on the outcome of such settlement negotiations.

A. City of Rialto and the Rialto-Colton Basin

The City of Rialto has a population of about 100,000. Rialto's water department provides water service to tens of thousands of people as well as schools, hospitals, parks, open space and businesses. Groundwater is the principal source of water for residents of southwestern San Bernardino County, California. Rialto has a duty to assure that the source of the groundwater contamination is fully remediated and that perchlorate and TCE levels in the Basin meet all applicable federal, state and local standards. Due to Rialto's demographics and the impact of the perchlorate discharge on the community, in 2003 the Board found Rialto to be an environmental justice community.<sup>4</sup> One of the goals of the Board's environmental justice program is to integrate environmental justice considerations into the development, adoption, implementation and enforcement of SWRCB decisions.

In response to a 1997 alert from the California Department of Health Services, Rialto began sampling for perchlorate in its drinking water supply wells located in the Basin. In October 1997, perchlorate was detected in Rialto Well No. 2, and in response, Rialto took this well out of service. Subsequent sampling events revealed the presence of perchlorate in multiple drinking water supply wells, and, as a result, Rialto shut down the following wells in response to such contamination: Chino Well No. 1 (September 2001); Rialto Well No. 6 (October 2001); Rialto Well No. 4 (November 2002); Chino Well No. 2 (November 2002); Rialto Well No. 3 (December 2004); and Rialto Well No. 1 (September 2005).

The emergency shutdown of these wells created a water shortage emergency in the community, and Rialto took urgent steps to evaluate the water sources available to supplement its drinking water supply.<sup>5</sup> Rialto commissioned a study of the drinking water system to evaluate

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<sup>3</sup> See Joint Report and Update of Developments Related to SWRCB/OCC File No. A-1824, Santa Ana Regional Board, County of San Bernardino, City of Rialto, City of Colton, and Certain Private Parties (July 11, 2012) (the "Joint Report").

<sup>4</sup> SWRCB Resolution No. 2003-0026 (April 30, 2003). Environmental justice means "the fair treatment of people of all races, cultures and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations and policies." Gov't Code § 65040.12(e).

<sup>5</sup> See City of Rialto Resolution No. 5004 (December 2, 2003) (declaring a water shortage emergency). Rialto requires all wells impacted with perchlorate to be shut down unless and until groundwater is treated to "non-detect" levels. See City of Rialto Resolution No. 5248 (June 21, 2005).

the possibility of alternative water supplies and treatment options for the contaminated water supply wells. This study concluded that the most cost effective alternative was to shut down groundwater wells with low production volume and provide wellhead treatment for key, high water producing wells. To that end, wellhead treatment systems were installed at Chino Well Nos. 1 and 2 and Rialto Well No. 3. It was determined that these wells would provide a reliable and consistent supply of water to the community until more extensive remedial activities were undertaken by the PRPs for the perchlorate and TCE contamination.<sup>6</sup>

Given the extensive costs associated with operation and maintenance of the wellhead treatment systems, Rialto has been forced to increase the water usage fees to its customers, which continues today. The presence of perchlorate and TCE in the Basin has had and continues to have significant direct and indirect impacts on Rialto's immediate and long-term water supply. Additionally, these increased costs have imposed a substantial financial burden on the ratepayers and taxpayers in an environmental justice community.<sup>7</sup>

#### B. Eastern and Western Groundwater Plumes

While characterization of the perchlorate and TCE plumes is not complete, it is generally understood that there are two plumes of contamination in the Basin: the "Western Plume", which was created by contamination released at the Mid-Valley Sanitary Landfill ("MVSL"), the Former Bunker Area, and the Stonehurst Site; and the "Eastern Plume", which was created by contamination released from the "160-acre site."<sup>8</sup> Contaminants identified in connection with the Western Plume have appeared in Rialto Well No. 3, leading the Santa Ana Regional Board to

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<sup>6</sup> As part of its response to the emergency water supply shortage, Rialto undertook extensive assessments and research to identify potential sources and the PRPs of the perchlorate and TCE groundwater contamination. Rialto reviewed numerous historical documents and records to identify the prior and current uses and ownership of properties in Rialto and the surrounding areas. In addition, Rialto conducted initial site assessments and investigations in an effort to identify the likely sources of the groundwater contamination and to delineate the extent of the perchlorate and TCE groundwater plume.

<sup>7</sup> Since it first discovered perchlorate contamination in its drinking water supply wells, Rialto has coordinated and provided an open public participation and awareness process to educate and respond to local community concerns. These efforts have included, but are not limited to, holding numerous public and Town Hall Meetings to provide residents with information on perchlorate-related activities, assisting the Santa Ana Regional Board to identify PRPs, participating in the inception of Inland Empire Perchlorate Regulatory Task Force, participation in State Senate hearings on perchlorate contamination, and establishing the Mayor's Advisory Committee on Water Contamination.

<sup>8</sup> U.S. EPA has stated that there appear to be two separate sources of the Eastern and Western plumes. See EPA Support Document for the Revised National Priorities List Final Rule – B.F. Goodrich (EPA, September 2009) at 3, 17-18, and 48.

issue an order in 2003,<sup>9</sup> and amended order in 2004,<sup>10</sup> directing the County to undertake remediation and water replacement efforts in connection with Rialto Well No. 3. On September 27, 2005, Rialto and the County entered into a settlement agreement pursuant to which the County agreed to provide Rialto with replacement water and to construct and operate an initial remedy to contain and remove perchlorate and TCE emanating from source areas in and near Unit 5 of the MVSL. In 2006, the County commenced operation of this remedy, which the County estimates will ultimately cost \$60 million.

In 2008, Rialto and the City of Colton entered into a settlement agreement with the County<sup>11</sup> in the Consolidated Federal Actions pursuant to which the County agreed to continue to implement cleanup the Western Plume, and pay \$5 million to Rialto and the City of Colton. In December 2011, the federal district court approved this settlement agreement as having been made in good faith and entered an order dismissing all claims against the County in the Consolidated Federal Actions.

As discussed below, although settlement negotiations continue, no final settlement has been reached that resolves the liability for remediating the Eastern Plume, and DoD and other PRPs are challenging Rialto's good faith settlement with the County, thereby blocking critical funds from flowing back to Rialto and its ratepayers.

## **II. Developments In The Consolidated Federal Actions Since Board Proceeding Was Stayed In 2007**

### **A. EPA Investigation of 160-acre Site**

Following the stay of the proceeding in 2007, EPA increased its efforts to investigate the 160-acre site.<sup>12</sup> These efforts included sampling groundwater and water supply wells, analysis of soil and soil gas samples from deep borings, and installation and sampling of multi-level groundwater monitoring wells. In 2009, EPA oversaw additional remedial investigation work

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<sup>9</sup> Santa Ana Regional Board Order No. R8-2003-0013 (January 17, 2003). In 2002, the Santa Ana Regional Board issued an order to the County to investigate the extent of perchlorate in soil and groundwater in and around the MSVL expansion properties.

<sup>10</sup> Santa Ana Regional Board Order No. R8-2004-0072 (September 17, 2004).

<sup>11</sup> The settling defendants include the County, Robertson's Ready Mix, Inc., the Schulz Trust Parties, and other related entities.

<sup>12</sup> Dating back to 2002, EPA began assisting the Santa Ana Regional Board by providing it with technical support. On July 14, 2003, EPA made a finding that there may be an imminent and substantial endangerment because of the groundwater contamination, and issued a unilateral order to Goodrich Corporation and Emhart to perform an investigation. In 2004, EPA also oversaw a soil investigation performed by Emhart.

completed by Emhart pursuant to an Administrative Settlement Agreement and Order on Consent. And in 2010, EPA installed groundwater monitoring wells for the 160-acre site and conducted soil and groundwater sampling activities.

The results from these and other EPA investigations confirmed that groundwater contamination from perchlorate and TCE is located throughout a large portion of the Basin downgradient of the 160-acre site. Based on these results, EPA listed the 160-acre site (naming it the “B.F. Goodrich Superfund Site”) on the National Priorities List (“NPL”) in September 2009.<sup>13</sup> Since the 160-acre site was listed on the NPL, EPA completed a Remedial Investigation/Feasibility Study<sup>14</sup> in January 2010 and published the 2010 ROD Remedy in September 2010. In addition, EPA intervened in the Consolidated Federal Actions against the PRPs in February 2010.

#### B. Settlement Negotiations with Eastern Plume PRPs

Rialto originally filed its Complaint against the PRPs for the groundwater contamination on January 21, 2004.<sup>15</sup> In February 2010, the United States, on behalf of the EPA, commenced litigation in federal district court to compel cost recovery and cleanup of the 160-acre site. On January 20, 2010, the federal district court entered an order consolidating Rialto’s lawsuit with six other federal lawsuits filed by EPA, Colton, the County, and several private parties (the “Consolidated Federal Actions”).

EPA’s involvement in the Consolidated Federal Actions has been an important part of pursuing the PRPs for remediating the groundwater contamination in the Basin, and has moved several of the major PRPs toward potential settlement. While confidential settlement discussions continue, a tentative settlement has been reached by a small group of PRPs, which include Pyro Spectaculars, Inc., Astro Pyrotechnics, the Peters Parties, Stonehurst Site LLC, and Trojan Fireworks Company.<sup>16</sup>

Further, if a second tentative settlement is finalized, Emhart would be the “work party” responsible for performing the remedy set forth in the 2010 ROD Remedy. Funding would be

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<sup>13</sup> 74 Fed. Reg. 48,412 (September 23, 2009); see Support Document for the Revised National Priorities List Final Rule—B.F. Goodrich (EPA, September 2009). The NPL is a list of national priorities among the known or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States. See 40 C.F.R. Part 300.

<sup>14</sup> Remedial Investigation/Feasibility Study Report (“RI/FS”), B.F. Goodrich Superfund Site, Rialto, California (CH2MHILL, January 25, 2010).

<sup>15</sup> See *City of Rialto et al. v. United States Department of Defense et al.*, Civil Action No. 5:04-cv-00079-PSG-SS.

<sup>16</sup> The settling plaintiffs include EPA, Rialto, the City of Colton, and the County.

provided by Emhart, DoD, the County, and possibly additional defendants who chose in the future to resolve claims against them as part of this settlement. This development is significant. If final settlement is reached, the process of long-term groundwater remediation of the Eastern Plume can at long last commence. The success of both tentative settlements is necessary for Emhart to be the work party for implementation of the 2010 ROD Remedy in order to begin remediation of the Eastern Plume.<sup>17</sup> Of course, there is the potential that a judicial challenge to either of the tentative settlements could delay implementation of the 2010 ROD Remedy.

C. Release of Eastern Plume Settling Defendants

The Consolidated Federal Actions have been protracted and expensive. Rialto alone has incurred millions of dollars in costs for environmental and technical consultants, water testing, water purchases and capital improvements, and attorneys' fees. The settlements contemplated today would alleviate the need for further City costs because contaminated groundwater in the Basin would be addressed. In addition, a key component of the tentative settlements is the reimbursement of Rialto (and thence its ratepayers) for some of the costs they have incurred. Although Rialto and the United States have reached partial agreement on this issue, the United States (i.e., EPA) has reserved certain contingencies regarding those payments, rendering them as yet uncertain of realization. The release of Emhart and other settling defendants named in the Joint Report is a material condition of these settlements.

**III. 2010 ROD Remedy Is An Important First Step Towards Remediating Groundwater In The Basin**

EPA's selected remedy under the 2010 ROD Remedy is intended to limit the movement of contaminated groundwater from the 160-acre site. The 160-acre site Source Area Operable Unit ("Source Area OU" or "SA OU" as it is referred to in the 2010 ROD Remedy), is a targeted area where EPA believes that most of the contaminants emanating from the 160-acre site entered the groundwater. The Source Area OU, therefore, comprises only a portion of the Eastern Plume, and does not include any part of the Western Plume (which, as noted above, is being cleaned up by the County under Santa Ana Regional Board oversight).

As its name suggests, the 2010 ROD Remedy is an *interim* remedy that is not intended to fully restore the groundwater in the Basin. EPA indicates that the selected remedy in the 2010 ROD Remedy is "the first of at least two" planned remedies to address contaminated

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<sup>17</sup> The 2010 ROD Remedy estimates that the selected remedy will cost approximately \$13 million for design and construction, and \$1.3 million for annual operation and maintenance ("O&M"). 2010 ROD Remedy, 2-26. According to the 2010 ROD Remedy, the net present value (NPV) of 30 years of O&M is \$29.3 million, which, in addition to \$13 million for design and construction, equals \$42.4 million. See *id.* As noted in the Joint Report, Emhart currently estimates will cost \$36 million (net present value) over the next 30 years.

groundwater contamination in the Basin.<sup>18</sup> Specifically, the Remedial Action Objectives (“RAOs”) of the 2010 ROD Remedy are to: (1) protect water supply wells and groundwater resources by limiting the spread of contaminated groundwater from the 160-acre site; and (2) remove the contaminants from the groundwater from the area with the highest level of contamination. In addition, the 2010 ROD Remedy remedy is designed to intercept and provide hydraulic control (also known as hydraulic containment or hydraulic capture) of contaminated groundwater to prevent further migration of perchlorate and TCE into “clean” and less contaminated portions of the Basin.

The selected remedy requires installation of a groundwater pump and treat system. This system involves the following key components: the construction and operation of groundwater extraction wells pumping approximately 1,500 to 3,200 gallons per minute (gpm) of contaminated water; liquid-phase granular activated carbon or other water treatment systems to remove TCE and other volatile organic compounds from the extracted groundwater; ion exchange or other water treatment systems to remove perchlorate from the extracted groundwater; pipelines and pumps to convey the treated water from the treatment plant to one or more local water utilities for distribution to the utility’s customers as drinking water supply; and a groundwater monitoring program.

As described by EPA, “the selected remedy represents the maximum extent to which permanent solutions and treatment technologies are practicable at the SA OU, **until EPA obtains sufficient data to select a final remedy.**”<sup>19</sup> The testing and evaluation needed to develop a cleanup plan for the downgradient portions of the Eastern Plume are underway but have not yet been completed. However, rather than wait until all testing at the 160-acre site has been completed, EPA chose to divide the Eastern Plume into two parts, and begin cleanup of the part where enough testing and analysis has been completed to carry out the cleanup (i.e., the Source Area OU). EPA expects to develop a second cleanup plan for the remaining portion of the Eastern Plume after sufficient testing and analysis have been completed.<sup>20</sup>

While not a final remedy, the 2010 ROD Remedy is an important initial step to restoring groundwater in the Basin. Significantly, the remedial system will make treated groundwater available as a source of drinking water to Rialto and the City of Colton.<sup>21</sup> As part of the proposed settlements described above, Rialto has worked extensively with EPA, the City of Colton, the County, and the settling defendants to determine how the parties will coordinate the addition of the large volume of treated groundwater to the municipal water supply system. Though the 2010 ROD Remedy is an interim remedy, it may take several years to accomplish

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<sup>18</sup> 2010 ROD Remedy, 1-1.

<sup>19</sup> *Id.*, at 2-63 (emphasis added).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*, at 2-38.



these limited RAOs. EPA expects the remedy “to take from one to two years to construct, and to operate for a period of several years to decades.”<sup>22</sup>

#### **IV. Continued SWRCB Oversight Is Necessary To Ensure That Porter-Cologne Requirements Are Satisfied**

In considering the questions posed in the introduction to this submission, the Board’s technical staff may wish to consider whether the 2010 ROD Remedy (and yet to be determined final remedies) are consistent with the template set forth in Porter-Cologne and associated Board policies. As described above, the 2010 ROD Remedy is an important part of remediating the groundwater in the Basin, but uncertainties remain as to whether the 2010 ROD Remedy and any final remedy will be fully protective of State water quality standards.

As described in Board Resolution 92-49, cleanup and abatement orders must conform to Board Resolution 68-16 and water quality control plans (i.e., basin plans).<sup>23</sup> The Santa Ana Regional Board Basin Plan calls for groundwater to be cleaned up to support beneficial use for municipal purposes, which, in turn, requires the remedy to meet state and federal drinking water standards.<sup>24</sup> Because the 2010 ROD Remedy does not address or define numeric cleanup goals for limiting levels of perchlorate or TCE in the groundwater and is focused on a limited target area (i.e., the Source Area OU), it permits contaminants to remain in the groundwater and migrate beyond the capture or containment zone.<sup>25</sup> Thus, until EPA selects a final remedy,<sup>26</sup> there is some uncertainty whether it will be fully protective of State water quality standards.

As discussed above, Emhart has agreed to be the work party for the 2010 ROD Remedy. While a final EPA remedy is contemplated, the funding for any final remedy will need to be considered in the future. In the event that settlement monies are insufficient to pay for performance of the final remedy (or if another work party does not step forward to perform the work, with or without the benefit of any settlement monies), the Board oversight would likely be necessary to ensure that a final remedy is funded and implemented.

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<sup>22</sup> *Id.*, at 2-26. The 2010 ROD Remedy provides cost estimates assuming up to 30 years of operation and maintenance. *See id.*

<sup>23</sup> Basin plans establish (1) beneficial uses to be protected, (2) water quality objectives, and (3) a program for achieving such water quality objectives.

<sup>24</sup> Water Quality Control Plan for the Santa Ana River Basin (Feb. 2008 update), 3-40; see Cal. Const., Art. X, § 2 (Every cleanup standard must comply with the Constitutional direction that “the water resources of the State be put to beneficial use to the fullest extent of which they are capable.”)

<sup>25</sup> See RI/FS, 2-1, 2-2.

<sup>26</sup> The 2010 ROD Remedy does not contain a requirement to remediate impacted soil and leaves in place “a significant amount” of contaminant mass in the vadose zone. 2010 ROD Remedy, 2-5, 2-6.

Finally, EPA's understanding of the Eastern and Western Plumes is not yet complete. In particular, EPA has not delineated the downgradient (to the south or southeast) extent of the groundwater contamination and notes that groundwater flow directions in downgradient areas "are not well-understood."<sup>27</sup> Thus, there is the possibility that additional data are needed to determine what additional remedial actions are appropriate in the downgradient area.<sup>28</sup> Because the technical knowledge of the Eastern and Western Plumes is not fully developed, the Board's oversight of this matter would be beneficial to ensuring these issues are addressed in a timely manner. In addition, to the extent these issues are not addressed as part of a final remedy, the Board may wish to consider whether to issue cleanup and abatement orders against non-settling PRPs to effectuate cleanup of the Basin.

## V. Conclusion

EPA's involvement in this matter has brought about several significant steps important to remediating the perchlorate and TCE groundwater contamination in the Basin, including listing the 160-acre site on the NPL, adopting the 2010 ROD Remedy, and negotiating the tentative settlement agreements with several PRPs in the Consolidated Federal Actions. While this progress is significant, EPA has not yet proposed its final remedy for restoring groundwater in the Basin. In addition, settlements with the Eastern Plume PRPs have not been finalized nor entered by the federal district court, and DoD and other PRPs are challenging the settlement reached regarding cleanup of the Western Plume. In light of these significant, unresolved issues, the Board's oversight is critical to ensuring that groundwater in the Basin is restored to its beneficial use as a municipal drinking water supply.

Based on the foregoing, Rialto requests that the SWRCB consider this matter at its October 2012 meeting to afford the parties an opportunity to update the Board on the status of settlement in the Consolidated Federal Actions and to provide the Board with any additional recommendations regarding this proceeding.

Respectfully submitted,

PAUL HASTINGS LLP

By           /s/ Peter H. Weiner            
Peter H. Weiner

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Authority

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<sup>27</sup> 2010 ROD Remedy, 2-14. The 2010 ROD Remedy refers to this contaminated groundwater to be that which is "downgradient of Rialto-06 (to the south or southeast)." *Id.*

<sup>28</sup> *Id.*