

1 Philip C. Hunsucker (SBN: 135860)
Brian L. Zagon (SBN: 142403)
2 Allison E. McAdam (SBN: 226836)
RESOLUTION LAW GROUP, P.C.
3 3717 Mt. Diablo Blvd., Suite 200
Lafayette, CA 94549
4 Telephone No.: (925) 284-0840
Facsimile No.: (925) 284-0870
5 phunsucker@reslawgrp.com
bzagon@reslawgrp.com
6 amcadam@reslawgrp.com

7 Erik S. Mroz (SBN: 229241)
RESOLUTION LAW GROUP, P.C.
8 21800 Oxnard St., Suite 780
Woodland Hills, CA 91367
9 Telephone No.: (818) 598-8340
Facsimile No.: (818) 598-8350
10 emroz@reslawgrp.com

11 Attorneys for Designated Party
12 PYRO SPECTACULARS, INC.

13
14 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**
15 **OF THE STATE OF CALIFORNIA**

16 IN THE MATTER OF PERCHLORATE)
17 CONTAMINATION AT A 160-ACRE)
18 SITE IN THE RIALTO AREA)

SWRCB/OCC FILE A-1824

**MOTION NO. 6: PRE-HEARING
OBJECTION AND MOTION TO DISMISS
FOR FAILURE TO INCLUDE ALL
SUSPECTED DISCHARGERS AND
POTENTIALLY RESPONSIBLE PARTIES**

Date: March 28-30, 2007
April 4-5, 2007

Location: San Bernardino County
Auditorium
850 East Foothill Blvd.
Rialto, CA

Motion Cutoff: March 5, 2007

26
27 The Advocacy Team's failure to identify and include all known alleged dischargers
28 does not comply with the fairness requirements mandated by published rules of the State

1 Water Resources Control Board. The Advocacy Team possesses evidence of at least 42
2 alleged dischargers that are not parties to this proceeding. Despite this evidence,
3 essentially 3 parties are being singled out for investigation, cleanup, reimbursement of
4 alleged costs and the provision of replacement water for the entire Rialto-Colton Basin.
5 This obvious selective prosecution is not consistent with the obligations imposed on the
6 Santa Ana Regional Water Quality Control Board ("RWQCB") by Cal. Admin. Code, tit. 23 §
7 2907 ("Section 2907") and for the reasons set forth in other pre-hearing motions. Section
8 2907 provides in relevant part: "The Regional Board shall:

- 9 • Use any relevant evidence to identify dischargers;
- 10 • Make reasonable efforts to identify dischargers;
- 11 • Require identified dischargers to investigate;
- 12 • Coordinate with other agencies. . . . and,
- 13 • Name other dischargers as permitted by law. . . ."

14 (Emphasis added.)

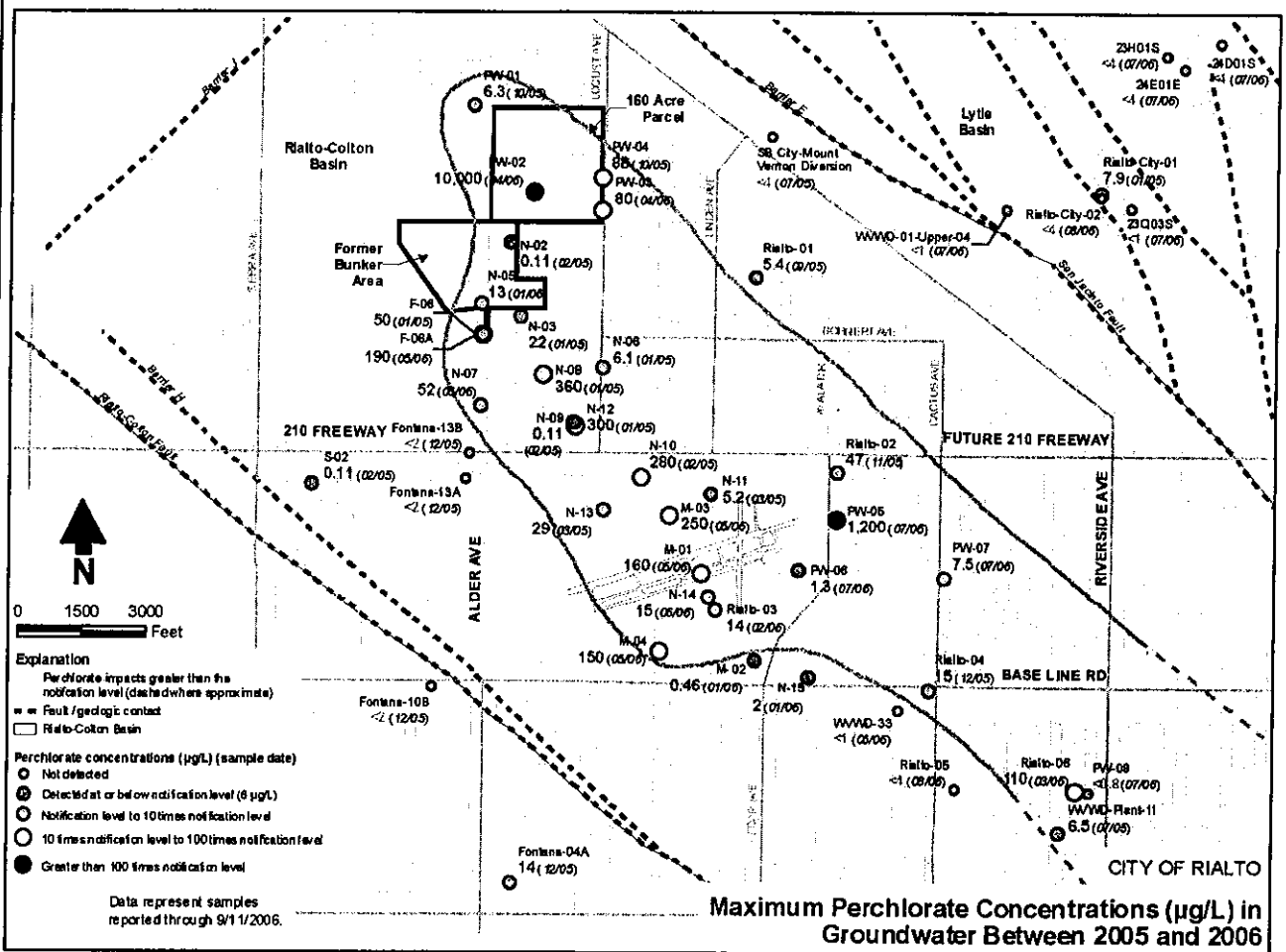
15 As discussed more fully below, similar evidence exists of 42 alleged dischargers not
16 named by the Advocacy Team. An alleged basin-wide problem deserves a basin-wide
17 solution. Regulations of SWRCB demand it. Indeed, it is the SWRCB's goal to conduct
18 these proceedings in a manner that is "fair, expeditious and cost effective." SWRCB Notice
19 of Hearing, at p. 1. If the piecemeal approach advanced by the Advocacy Team is allowed
20 to stand, this proceeding will undoubtedly result in incomplete resolution, requiring future
21 expenditures of substantial public and private resources to get to the bottom of a very
22 complex situation. Accordingly, this proceeding should be dismissed.

23 **I. INTRODUCTION**

24 These proceedings arise from perchlorate and TCE contamination at and emanating
25 from the former 2800-acre Rialto Backup Storage Point ("RABSP"), located within the
26 Rialto-Colton Groundwater Basin. Since the 1940s, the former RABSP has been owned or
27 occupied by a variety of entities, including, but not limited to, the U.S. military, various
28 defense contractors, fireworks manufacturing companies, fireworks display companies, an

1 aggregate mining operation, a municipal landfill, a junkyard and at least two licensed
 2 hazardous waste disposal facilities. Many of these entities used, handled and/or disposed
 3 of perchlorate, perchlorate containing products and/or TCE.

4 Groundwater analytical data obtained through environmental investigations at the
 5 former RABSP indicate the presence of a single, commingled, plume emanating from the
 6 RABSP. Among other evidence, a plume map created by consultants for the City of Rialto
 7 ("Rialto") demonstrates there is a single commingled plume. (See
 8 <http://www.ci.rialto.ca.us/plume-map.pdf>.) Rialto's plume map is reproduced below:



26 Since 2002, RWQCB has identified no less than 26 alleged dischargers at the former
 27 RABSP. By the fall of 2004, all of these 26 alleged dischargers were issued letters by
 28 RWQCB. (Exhibit 1). The vast majority of the dischargers identified by RWQCB were

1 issued directives to submit work plans and conduct investigations.

2 RWQCB and Rialto have been sharing information about the alleged dischargers. In
3 addition, RWQCB has been following closely the lawsuit filed Rialto in federal court entitled
4 City of Rialto, et al. v. U.S. Department of Defense et al., Case No. EDCV 04-00079 -PSG
5 (SSx), in the the United States District Court, Central District of California ("Rialto's Federal
6 Lawsuit"). In Rialto's Federal Lawsuit, Rialto has sued 42 persons it alleges are potentially
7 responsible parties. (Exhibit 2, Rialto's Fourth Amended Complaint). The 42 persons
8 named by Rialto include 23 of the 26 persons identified by RWQCB as alleged dischargers.

9 Of the 42 parties identified by RWQCB and Rialto as alleged dischargers or
10 potentially responsible parties at the RABSP, the Advocacy Team has only named 3 parties
11 in the draft Amended Cleanup and Abatement Order No. R8-2005-0053 ("the draft CAO").
12 As the lead agency responsible for state-wide water quality, the State Water Board must
13 reject RWQCB's selective enforcement and piecemeal approach. Accordingly, the State
14 Water Board should issue an order dismissing all proceedings related to the CAO.

15 **II. RWQCB'S SELECTIVE ENFORCEMENT AND PROSECUTION SHOULD NOT BE**
16 **PERMITTED**

17 RWQCB has been involved with contamination-related issues at the former RABSP
18 for nearly ten years. On November 25, 1997, the County of San Bernardino ("County")
19 informed RWQCB that perchlorate had been detected in one of its groundwater monitoring
20 wells near the County's Mid-Valley Sanitary Landfill ("Landfill"). (Exhibit 3). Less than one
21 year later, on or about October 9, 1998, RWQCB issued Cleanup and Abatement Order
22 No. 98-96 to the County based on findings that the County had discharged volatile organic
23 compounds ("VOCs") into groundwater near its landfill. (Exhibit 4). On September 26,
24 2002, RWQCB issued a directive to the County stating that the County is a suspected
25 discharger of perchlorate into groundwater and directing the County to submit a work plan
26 and conduct an additional perchlorate investigation at and near the County's landfill.
27 (Exhibit 1).

28 Through the fall of 2004, RWQCB identified the following 26 alleged dischargers at

1 the former RABSP:

- 2 1. Aerojet, a subsidiary of GenCorp
- 3 2. American Promotional Events, Inc. - West
- 4 3. American West Explosives, Inc.
- 5 4. Black & Decker, Inc.
- 6 5. Broco Environmental
- 7 6. Contractors Cargo Company
- 8 7. County
- 9 8. Denova Environmental
- 10 9. Emhart Industries, Inc.
- 11 10. The Ensign-Bickford Company
- 12 11. ETI Explosives Technologies International, Inc.
- 13 12. Ferranti International, Inc.
- 14 13. General Dynamics Company
- 15 14. Golden State Explosives, Inc.
- 16 15. Goodrich
- 17 16. Ken Thompson, Inc.
- 18 17. Lockheed Martin Corporation
- 19 18. The Marquardt Company
- 20 19. Pyro Spectaculars, Inc.
- 21 20. Raytheon Company
- 22 21. Thomas O. Peters and the Peters Trust
- 23 22. Tung Chun Company
- 24 23. United States Department of Defense
- 25 24. W.A. Murphy, Inc.
- 26 25. Whittaker Corporation
- 26 26. Zambelli Fireworks Manufacturing Company County

27 By the fall of 2004, all of the 26 parties were issued letters by RWQCB indicating
28 their status as suspected dischargers. (Exhibit 1). The vast majority of these alleged

1 dischargers were issued directives to submit work plans and conduct investigations at and
2 near the RABSP. However, of the 26 alleged dischargers identified by RWQCB and the
3 additional PRPs identified by Rialto, only PSI, Goodrich and the Emhart Entities are subject
4 to the draft CAO.

5 Due to the absence of nearly 40 known alleged dischargers, the draft CAO, indeed
6 this entire proceeding, does not meet the requirements of Section 2907 and will never
7 achieve complete resolution. The SWRCB's driving goal of a "fair, expeditious and cost
8 effective" hearing will never be met. The Advocacy Team tries to overcome this fact
9 through the use of ambiguous language. This is evident simply by reading the title of the
10 draft CAO, which refers only to the "160-Acre Property Located in the City of Rialto,
11 California," and comparing it to the relief it purports to seek, i.e., remediation of the entire
12 Rialto-Colton Groundwater Basin.

13 The "160-Acre Property" is a small part (less than 6%) of the 2800-acre former
14 RABSP. It is the RABSP, not the "160-Acre Property," that is what is commonly referred to
15 as "the Site." As is clearly shown in Rialto's plume map above, there is a single,
16 commingled, plume at an emanating from the RABSP. As such, it is both technically and
17 legally impossible to respond to conditions at the "160-Acre Property," not to mention the
18 alleged conditions in the entire Rialto-Colton Groundwater Basin, without simultaneously
19 responding to the overall contamination emanating from the RABSP. Thus, it is clear that
20 SWRCB will not be able to achieve its stated goal of complete resolution of the basin-wide
21 problem through a proceeding designed by the Advocacy Team.

22 Assuming, *arguendo*, that RWQCB's faulty premise, that the "160-Acre Property" is
23 distinguishable from the contamination at and emanating from the larger RABSP, is correct,
24 these proceedings will still not result in complete resolution and will not comply with Section
25 2907. RWQCB is aware of a total of 10 alleged dischargers who have owned, occupied or
26 operated on the "160-Acre Parcel" itself. The additional parties known by RWQCB but not
27 subject to the draft CAO include:
28

1 **American Promotional Events, Inc. - West** ("APE"). APE currently
2 occupies a large tract of land in the northern half of the "160-Acre
3 Property." Testimony and documents obtained during the federal
4 litigation indicates that APE manufactured, handled, imported, stored,
5 tested and disposed of Class C consumer fireworks at the "160-Acre
6 Property." Some of these fireworks contained potassium and/or
7 ammonium perchlorate;

8 **The Ensign Bickford Company** ("EbCo"). Documents obtained
9 during the federal litigation indicate that EbCo operated a munitions
10 manufacturing operation at the "160-Acre Property" during the 1960s.
11 EbCo's products included detonators, squibs and military hardware
12 under contract by NASA and McDonnell Douglas. Many of EbCo's
13 products are believed to have contained perchlorate;

14 **Ken Thompson, Inc.** ("KTI"). KTI currently owns a large tract of land
15 within the southern half of the "160-Acre Property." KTI's property is
16 the location of historic disposal areas, test stands, burn pits and the
17 McLaughlin Pit. KTI was aware of the potential for contamination at
18 the time it purchased the property from Pyrotronics, and it negotiated a
19 lower sale price for the property due to environmental considerations.
20 In addition, KTI was responsible for closing the McLaughlin Pit in 1987.

21 **The Pyrotronics Corporation** ("Pyrotronics"). Pyrotronics was a
22 large-scale manufacturer of consumer fireworks, which operated
23 throughout the "160-Acre Property" between 1968 and 1987.
24 Testimony and documents obtained during the federal litigation
25 indicate that Pyrotronics handled, used and disposed of raw
26 perchlorate salts at its plant. Pyrotronics operated at least five burn
27 pits in the southern half of the "160-Acre Property" and built and
28 operated the McLaughlin Pit. Records from the Rialto Fire Department

1 indicate a long history of fires and explosions at buildings used by
2 Pyrotechnics, including a 1968 blast that destroyed a 150-gallon
3 fireworks composition mixer;

4 **Rialto.** Testimony and documents obtained during the federal litigation
5 indicates that Rialto transported and arranged for the disposal of
6 confiscated fireworks at the Pyrotechnics' facility and the Broco/Denova
7 facility located on the RABSP. Discovery indicates that Pyrotechnics
8 and Broco/Denova disposed of wastes in unlined burn pits. It is
9 reasonable to assume that wastes transported and delivered by Rialto
10 to these facilities was disposed of in an identical manner. On April 15,
11 2004, Federal District Court Judge Virginia E. Philips entered an order
12 indicating that Rialto is potentially responsible for the contamination
13 and can only proceed in Rialto's Federal Lawsuit to the extent Rialto
14 can prove that it has a valid defense under CERCLA § 107(b).

15 RWQCB was previously provided all of this information. While Rialto is
16 designated as a "party" to these proceedings, it is not included as an
17 alleged discharger. Because Rialto has potential liability for the
18 perchlorate and/or TCE contamination at and emanating from the
19 RABSP, Rialto should be included as an alleged discharger. Given
20 that Rialto is an alleged discharger and PRP, Rialto should not be
21 included as a "party" as part of the prosecution.

22 **Trojan Fireworks Company.** Testimony and documents obtained
23 during the federal litigation proves that Trojan disposed of waste in a
24 burn pit owned and operated by Pyrotechnics. This burn pit is located
25 very near PW-2, which has spiked the highest samples for perchlorate
26 in groundwater;

27 **Tung Chun Company.** Tung Chun was identified by RWQCB as the
28 owner of the northern half of the 160-Acre Property where

1 manufacturing, handling, importation, storage and testing of products
2 containing perchlorate has been conducted.

3 Given the fact that these alleged dischargers are known, have been identified, and
4 their operational histories are a matter of public record, the Advocacy Team has no basis to
5 omit them from the draft CAO. Yet, even if the draft CAO included all 10 of the identified
6 alleged dischargers connected to the 160-Acre Property, and all 10 of those parties were
7 before SWRCB, this proceeding will still not provide complete resolution because 94% of
8 the RABSP is essentially being left out.

9 Section 2097 was designed to prevent this. An alleged basin-wide problem
10 deserves a basin-wide solution. By failing to consider the entire RABSP, which is the
11 source of the plume, and all of the 42 alleged dischargers, these proceedings will forever
12 be incomplete. Incomplete resolution leads to additional proceedings, court challenges and
13 appeals, not to mention innumerable future cleanup and abatement orders. To provide
14 SWRCB with a more complete understanding of the parties that have been left out, below
15 are some of the other alleged dischargers that operated on the RABSP. They include:

16 **Broco Environmental.** Broco Environmental was a licensed
17 hazardous waste treatment, storage, disposal facility located at the
18 former RABSP. Testimony and documents obtained during the federal
19 litigation indicate that Broco operated at least two burn pits at the
20 RABSP. One in the former U.S. Military bunker complex and another
21 that measured 100' long, 20' wide and 20' deep;

22 **County.** (discussed above);

23 **Denova Environmental.** Denova Environmental Operated was a
24 licensed hazardous waste treatment, storage, disposal facility located
25 at the former RABSP. Testimony and documents obtained during the
26 federal litigation indicate that Denova Environmental operated at least
27 one burn pit at the RABSP that measured 100' long, 20' wide and 20'
28 deep;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Rialto. (discussed above);

Tom Peters and The Peters Trust. Tom Peters, a former officer of Trojan Fireworks Company, and the Peters Trust is the owner of a five acre parcel in the RABSP where fireworks manufacturing and testing occurred.

Trojan Fireworks Company. Trojan operated a fireworks manufacturing facility in the RABSP, which included the handling, storage and use of raw perchlorate. Testimony and documents obtained during the federal litigation indicate that Trojan had a history of fires and explosions. It is also understood that Trojan tested and burned fireworks and fireworks composition at the RABSP;

Whittaker. Documents obtained throughout the litigation indicate that Whittaker, or its predecessors, manufactured military ordnance and fireworks at the RABSP beginning in the 1960s through the early 1970s. Documents obtained from the Rialto Fire Department indicate at least two explosions at buildings located at the Whittaker facility. At least one of those explosions involved perchlorate containing products. Whittaker is believed to have used an unlined earthen pool to test underwater pyrotechnic devices. In addition, testimony indicates that Whittaker operated an unlined burn pit and test stand at the former RABSP;

Zambelli Fireworks Manufacturing Co. Documents obtained during the federal litigation indicate that Zambelli handled and stored aerial fireworks at the RABSP. Other documents obtained from the State Fire Marshall's office indicate that Zambelli tested fireworks at the RABSP.

Again, this list represents a small sample of the nearly 40 known alleged dischargers who are not involved in this proceeding. It is unfair for the Advocacy Team to single out 3

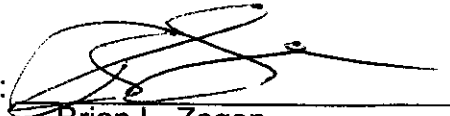
1 parties, out of 42 known alleged dischargers, name them in a proceeding concerned with
2 less than 6% of a contaminated Site and order those 3 parties to cleanup an entire
3 groundwater basin. More importantly, this approach does not follow the requirements of
4 Section 2907. SWRCB will not achieve the goal of complete resolution and this will
5 undoubtedly lead to further delay. Accordingly, the ongoing selective prosecution in these
6 proceedings should be terminated.

7 **III. CONCLUSION**

8 The failure to include all alleged dischargers in this proceeding requires dismissal.
9 Despite the presence of numerous other alleged dischargers, 3 parties are being singled
10 out for investigation, cleanup, reimbursement of alleged costs and the provision of
11 replacement water for the entire Rialto-Colton Basin. This selective prosecution is not
12 consistent with the obligations imposed on RWQCB by Section 2907 and the stated goals
13 of SWRCB. If the piecemeal approach advanced by the Advocacy Team is allowed to
14 stand, this proceeding will undoubtedly result in incomplete resolution, requiring future
15 expenditures of substantial public and private resources to get to solve a very complex
16 situation. For reasons set forth herein and in the other pre-hearing motions, this
17 proceeding should be dismissed.

18
19 DATED: March 5, 2007

RESOLUTION LAW GROUP, P.C.

20
21 By: 
22 Brian L. Zagon
23 Attorneys for Designated Party
24 Pyro Spectaculars, Inc.
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**PROOF OF SERVICE
(SWRCB/OCC File A-1824)**

I am a citizen of the United States. My business address is 3717 Mt. Diablo Blvd., Suite 200, Lafayette, California 94549. I am employed in the county of Contra Costa where this service occurred. I am over the age of 18 years, and not a party to this action. I am readily familiar with this firm's practice for collection and processing correspondence for mailing, facsimile, email, overnight delivery and personal delivery.

On **March 5, 2007**, following ordinary business practice, I served the foregoing documents described as:

MOTION NO. 6: PRE-HEARING OBJECTION AND MOTION TO DISMISS FOR FAILURE TO INCLUDE ALL SUSPECTED DISCHARGERS AND POTENTIALLY RESPONSIBLE PARTIES,

On the following Person(s):

(BY PERSONAL SERVICE) I caused such envelope to be delivered by hand this date to the offices of the addressee(s).

Karen O'Haire
Senior Staff Counsel
Water Resources Control Board
1001 I Street, 22nd Floor
Sacramento, CA 95814

On the following Person(s):

(BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Lafayette, California.

(BY EMAIL) by transmitting via facsimile the document listed above to the fax number(s) set forth above, or as stated on the attached service list, on this date.

State Water Board
Karen O'Haire
Senior Staff Counsel
Water Resources Control Board
1001 I Street, 22nd Floor
Sacramento, CA 95814
kohaire@waterboards.ca.gov

Goodrich:
Peter R. Duchesneau, Esq.
Manatt, Phelps & Phillips LLC
11355 West Olympic Blvd.
Los Angeles, CA 90064-1614
pduchesneau@manatt.com

Advocacy Team:
Jorge A. Leon, Esq.
Office of Enforcement
State Water Resources Control Board
1001 I Street, 16th Floor
Sacramento, CA 95812-0100
jleon@waterboards.ca.gov

Emhart:
Robert D. Wyatt, Esq.
James L. Meeder, Esq.
Allen Matkins Leck Gamble Mallory
& Natsis LLC
3 Embarcadero Center, 12th Floor
San Francisco, CA 94111-4074
rw Wyatt@allenmatkins.com
jmeeder@allenmatkins.com

1 Rialto:
2 Scott A. Sommer, Esq.
3 Pillsbury Winthrop Shaw Pittman LLP
4 50 Fremont Street
5 San Francisco, CA 94105-2228
6 scott.sommer@pillsburylaw.com

Gerard J. Tibeault
Executive Director
Santa Ana Regional Water Quality
Control Board
3737 Main Street, Ste. 500
Riverside, CA 92501
gthibeau@rb8.swrcb.ca.gov

7 CCA EJ:
8 Davin Diaz
9 Center for Community Action and
10 Environmental Justice
11 255 North "D" St., Ste. 402
12 San Bernardino, CA 92401
13 davin.d@ccaiej.org

Steven J. Elie
Barry C. Groveman
Musick, Peeler & Garrett LLP
One Wilshire Blvd.
Los Angeles, CA 90017
s.elie@mpglaw.com

14 Ann Sturdivant
15 Senior Engineering Geologist
16 Santa Ana Regional Water Quality
17 Control Board
18 3737 Main St., Ste. 500
19 Riverside, CA 92501-3339
20 asturdiv@rb8.swrcb.ca.gov

Bruce Amig
Goodrich Corporation
Four Colliseum Center
2730 W. Tyvola Road
Charlotte, NC 28217-4578
bruce.amig@goodrich.com

21 Kurt V. Berchtold
22 Assistant Executive Officer
23 Santa Ana Regional Water Quality
24 Control Board
25 3737 Main St., Ste. 500
26 Riverside, CA 92501-3339
27 kberchtold@waterboards.ca.gov

Robert Holub
Supervising Water Resource Control
Engineer
Santa Ana Regional Water Quality
Control Board
3737 Main St., Ste. 500
Riverside, CA 92501-3339
rholub@rb8.swrcb.ca.gov

28 Martin N. Refkin
Gallagher & Gallagher, P.C.
1925 Century Park East, Ste. 950
Los Angeles, CA 90067
refkin@thegallaghergroup.com

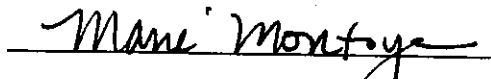
Erik Spiess
Office of Chief Counsel
State Water Resources Control Board
1001 I Street, 22nd Floor
Sacramento, CA 95812-0100
espiess@waterboards.ca.gov

Lyris List

Perchlorate E-Mail List

I declare that I am employed in the office of a member of the bar of the State of California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **March 5, 2007** at Lafayette, California.


Marie Montoya