



November 28, 2012

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

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 "I" Street, 24th Floor [95814]
P.O. Box 100
Sacramento, CA 95812-0100

Re: City of Rialto and Rialto Utility Authority's Comments Regarding State Water Resources Control Board December 4, 2012 Workshop; 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's ("SWRCB" or the "Board") November 13, 2012 notice of proposed Resolution No. 2012- ("Resolution") authorizing entry into settlement agreements in the above-referenced matter, the City of Rialto and the Rialto Utility Authority (collectively, "Rialto") respectfully submit the following comments.

I. Introduction

Following discovery in 1997 of wide-spread perchlorate groundwater contamination in the Rialto-Colton Groundwater Basin (the "Basin"), Rialto was forced to shut down many of its drinking water supply wells. The shutdown of these wells created a water shortage emergency requiring Rialto to install expensive wellhead treatment systems in order to provide safe drinking water to its community. Given the extensive costs associated with the operation and maintenance of these treatment systems, Rialto was forced to increase the water usage fees to its customers. In addition, as part of its response to the perchlorate and trichloroethylene ("TCE") contamination, Rialto incurred substantial costs, among other things, to determine the likely sources of groundwater contamination, to identify the potentially responsible parties ("PRPs") and to respond to public concerns. These costs have imposed a substantial financial burden on the ratepayers and taxpayers in an environmental justice community, and economic growth in the area has been negatively impacted by the limited availability of safe drinking water.

Rialto has steadfastly pursued remediation of its drinking water source and recovery of its response costs through federal litigation¹ against the parties responsible for perchlorate and TCE contamination in the Basin. These parties include the United States Department of Defense (“DoD”) and its contractors, and manufacturers of fireworks and other pyrotechnics. Rialto’s efforts have resulted in settlements with certain parties, including a substantial settlement with the County to implement cleanup of the Western Plume² and to pay Rialto and Colton for a portion of their response costs.

By and large, the federal court litigation regarding cost recovery and cleanup of the Eastern Plume has been protracted and costly. However, since the Board’s July 17, 2012 informational meeting in this proceeding, there have been significant developments in the settlement of this litigation. First, on October 10, 2012, a small group of PRPs entered into a federal consent decree with EPA, Rialto, Colton, and the County to resolve claims related to perchlorate and TCE groundwater contamination at the 160-acre site. Second, a separate federal consent decree is expected to be lodged with the court on or about December 4, 2012, in which Emhart Industries, Inc. (“Emhart”) will be the “work party” responsible for implementing EPA’s Interim Action Record of Decision (“2010 ROD Remedy”).³ Third, EPA and the Goodrich Corporation (“Goodrich”) have entered into a tentative settlement agreement, which, if finalized in a third consent decree, is expected to resolve their respective claims in the Consolidated Federal Action.

Rialto is pleased with this progress. As described below, however, these consent decrees could be disapproved by the Court or challenged on appeal, and the terms of the tentative settlement with Goodrich have not been made public. As a result, some uncertainty remains (i) whether Rialto will be reimbursed for a portion of its response costs, (ii) whether the 2010 ROD Remedy will be implemented, and (iii) whether funding for any final remedy will be adequate. In addition, because EPA has yet to propose a final remedy, there is uncertainty whether any final remedy will be fully protective of State water quality standards. Further, several PRPs still have not settled with EPA. While Rialto is supportive of the proposed

¹ Rialto originally filed its Complaint against the PRPs for the groundwater contamination on January 21, 2004. In February 2010, the United States, on behalf of the U.S. Environmental Protection Agency (“EPA”), commenced litigation in federal district court to compel cost recovery and cleanup of the 160-acre B.F. Goodrich Superfund Site located in Rialto, California (the “160-acre site”). On January 20, 2010, the Court entered an order consolidating Rialto’s lawsuit with six other federal lawsuits filed by EPA, the City of Colton (“Colton”), the County of San Bernardino (the “County”), and several private parties (the “Consolidated Federal Action”).

² It is generally understood that there are two plumes of contamination in the Basin: the “Western Plume” created by contamination released at the Mid-Valley Sanitary Landfill, the Former Bunker Area, and the Stonehurst Site; and the “Eastern Plume” created by contamination released from the 160-acre site.

³ USEPA Superfund Interim Action Record of Decision, Source Area Operable Unit, B.F. Goodrich Superfund Site, San Bernardino County, CA (September 30, 2010).

Resolution, we believe the Board should continue its oversight of this matter in light of these significant, unresolved issues.

II. Developments In The Consolidated Federal Action Settlements Since July 2012

EPA's involvement in settlement of the Consolidated Federal Action has been an important part of pursuing the parties responsible for groundwater contamination in the Basin. Most of the major PRPs have moved toward settlement. The first consent decree, involving Pyro Spectaculars, Inc., Astro Pyrotechnics, Inc., the Peters Parties, Stonehurst Site, LLC, and Trojan Fireworks Company, was lodged with the Court on October 10, 2012. This first consent decree is a "cash out" settlement in which these PRPs have agreed to pay EPA (\$4,330,000), Rialto (\$500,000), Colton (\$500,000) and the County (\$333,000) for a portion of the response costs that they have incurred to address perchlorate and TCE groundwater contamination in the Basin. A second consent decree, in which Emhart will be the work party responsible for implementing the 2010 ROD Remedy, is expected to be lodged in federal court on or about December 4, 2012. As part of this second consent decree, several other PRPs, including DoD, will pay settlement money that will go toward funding the 2010 ROD Remedy and to reimburse EPA, Rialto and Colton for a portion of their respective response costs.

Following separate public comment periods for these consent decrees, we hope that the Court will approve the respective consent decrees. However, assuming approval of the consent decrees, either or both of the consent decrees could be challenged on appeal by a non-settling party or some other interested party. In the event that such an appeal is successful, all or part of either decree could become void. Thus, until any challenges to the consent decree are resolved or the relevant appeal periods have run, there is a modicum of uncertainty whether the first or second consent decrees will ultimately be implemented to resolve the claims of the respective parties. As a result, we continue to believe that the Board should remain engaged in this proceeding until these consent decrees have been entered and any challenges are resolved or the appeal periods have concluded. Notwithstanding this uncertainty, given the unique nature of this litigation, Rialto supports the proposed Resolution, including the Board's covenant not to sue the "settling parties" in proposed Administrative Settlement Agreement.

III. Board Oversight Is Important To Ensure That A Final Remedy Is Implemented To Restore Groundwater In The Basin To Its Beneficial Use

While the 2010 ROD Remedy is an important "first step" toward remediating the perchlorate and TCE groundwater contamination, EPA has not proposed a final remedy to restore groundwater in the Basin to its beneficial use. As described in Rialto's July 11, 2012 letter to the Board, the 2010 ROD Remedy is intended only to limit the movement of contaminated groundwater from the 160-acre site by targeting an area where EPA believes that most of the contaminants emanating from the 160-acre site entered the groundwater (i.e., the

Source Area OU). Thus, the 2010 ROD Remedy permits contaminants to remain in the groundwater and to migrate beyond the capture or containment zone.⁴

According to EPA, “the selected remedy represents the maximum extent to which permanent solutions and treatment technologies are practicable at the [Source Area] OU, **until EPA obtains sufficient data to select a final remedy.**”⁵ Specifically, EPA’s understanding of the Eastern and Western Plumes is not yet complete, as the testing and evaluation needed to develop a cleanup plan for the downgradient portions of the Eastern Plume (to the south or southeast) have not yet been completed. In particular, the groundwater flow directions in downgradient areas “are not well-understood,”⁶ and additional data are needed to determine what additional remedial actions are appropriate in the downgradient area.⁷ Thus, until EPA proposes a final remedy, there is uncertainty whether such remedy will be fully protective of State water quality standards, as required by the Porter-Cologne Water Quality Control Act⁸ and associated Board policies.⁹

As noted above, EPA and Goodrich have entered into a tentative settlement agreement that could potentially provide for funding of any final remedy proposed by EPA. However, until this settlement agreement is finalized and the details are available, it is not known whether and to what extent a final remedy will be funded and implemented. Rialto has been informed that settlements with additional parties are potentially close, but does not know the status or likelihood of the parties reaching a settlement.¹⁰ While Rialto supports the proposed Resolution, we continue to believe that Board should remain involved in this matter to ensure that a final remedy is fully funded and implemented. In addition, so long as there are PRPs that have not settled with EPA in the Consolidated Federal Action, we believe it is appropriate for the Board to consider whether to issue cleanup and abatement orders to any such non-settling parties.

⁴ See Remedial Investigation/Feasibility Study Report, B.F. Goodrich Superfund Site, Rialto, California (CH2MHILL, January 25, 2010) (“RI/FS”), 2-1, 2-2.

⁵ 2010 ROD Remedy, 2-63 (emphasis added).

⁶ RI/FS, 1-12.

⁷ *Id.*

⁸ Water Code §§ 13000 *et seq.*

⁹ 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). 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. Water Quality Control Plan for the Santa Ana River Basin (Feb. 2008 update), 3-40.

¹⁰ At least one major PRP, the Estate of Harry Hescoc, has not settled with EPA.

IV. Conclusion

The successful negotiation of two federal consent decrees with the majority of the PRPs in the Consolidated Federal Action is significant. If the court enters these consent decrees (and they survive potential legal challenge), such settlements will (i) alleviate the need for Rialto to incur additional response costs, (ii) permit Rialto to reimburse its ratepayers for some of the costs they have incurred, and (iii) allow the process of long-term groundwater remediation of the Eastern Plume to commence. While this progress is undoubtedly important, EPA has not yet proposed its final remedy for restoring groundwater in the Basin. In addition, although EPA has announced that it has entered into a tentative settlement with Goodrich, it is not known whether any final remedy will be fully funded and implemented as part of that potential settlement.

Given the unique circumstances of this proceeding and the related issues with the Consolidated Federal Action, Rialto supports the proposed Resolution. Based on the foregoing, however, Rialto respectfully requests that the Board continue its oversight of this matter until these uncertainties are resolved and to ensure that any final remedy proposed by EPA will restore the Basin to its beneficial use as a municipal drinking water supply. In addition, we request that the Board consider enforcement actions against those parties that have not settled with EPA in the Consolidated Federal Action.

Respectfully submitted,

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Authority