



Linda S. Adams  
Secretary for  
Environmental Protection

# State Water Resources Control Board

## Executive Office

**Tam M. Doduc, Board Chair**  
1001 I Street • Sacramento, California 95814 • (916) 341-5615  
Mailing Address: P.O. Box 100 • Sacramento, California • 95812-0100  
Fax (916) 341-5621 • <http://www.waterboards.ca.gov>



Arnold Schwarzenegger  
Governor

August 11, 2007

### VIA EMAIL (AUGUST 11) & U.S. MAIL (AUGUST 13)

Peter R. Duchesneau, Esq.  
Manatt, Phelps & Phillips LLC  
11355 West Olympic Boulevard  
Los Angeles, CA 90064-1614  
[pduchesneau@manatt.com](mailto:pduchesneau@manatt.com)

Philip C. Hunsucker, Esq.  
Resolution Law Group, P.C.  
3717 Mt. Diablo Blvd., Suite 200  
Lafayette, CA 94549  
[phunsucker@reslawgrp.com](mailto:phunsucker@reslawgrp.com)

Robert D. Wyatt, Esq.  
Allen Matkins Leck Gamble Mallory  
& Natsis LLC  
3 Embarcadero Center, 12<sup>th</sup> Floor  
San Francisco, CA 94111-4074  
[rw Wyatt@allenmatkins.com](mailto:rw Wyatt@allenmatkins.com)

Jorge A. León, Esq.  
Office of Enforcement  
State Water Resources Control Board  
1001 I Street, 16<sup>th</sup> Floor  
P.O. Box 100  
Sacramento, CA 95812-0100  
[jleon@waterboards.ca.gov](mailto:jleon@waterboards.ca.gov)

Scott A. Sommer, Esq.  
Pillsbury Winthrop Shaw Pittman LLP  
50 Fremont Street  
San Francisco, CA 94105-2228  
[scott.sommer@pillsburylaw.com](mailto:scott.sommer@pillsburylaw.com)

Dear Messrs. Duchesneau, Hunsucker, León, Sommer, and Wyatt:

### RULINGS ON ALL OUTSTANDING MOTIONS AND PROCEDURES FOR THE UPCOMING HEARING ON PERCHLORATE CONTAMINATION AT THE 160-ACRE SITE IN THE RIALTO AREA **SWRCB/OCC FILE A-1824**

The State Water Resources Control Board's (State Water Board) evidentiary hearing on *Perchlorate Contamination at the 160-acre Site in the Rialto Area*, SWRCB/OCC File A-1824, will be conducted on August 21, 22, and 27 through 30, 2007. This is an administrative proceeding for the purpose of receiving evidence to determine whether to reissue Cleanup and Abatement Order No. R8-2005-0053 (CAO) and whether to adopt the Draft Amended CAO issued October 27, 2006, as written or amended for the investigation and remediation of perchlorate in the Rialto area, or take such other action as the State Water Board deems appropriate.<sup>1</sup> Relevant testimony and evidence, legal argument and policy statements will be received on the legal responsibility for site investigation and remediation, the technical evidence

<sup>1</sup> Fourth Revised Notice of Public Hearing In the Matter of Perchlorate Contamination at a 160-Acre Site in the Rialto Area (SWRCB/OCC File A-1824), State Water Resources Control Board, July 5, 2007, page 2.

justifying site investigation and cleanup, the feasibility and propriety of cleanup and other remediation requirements, and the appropriate cleanup standards for the protection of public health and beneficial uses of waters of the state.<sup>2</sup>

All parties and interested persons should be mindful that this is an administrative proceeding, not a judicial proceeding. As Hearing Officer, I will conduct the hearing in accordance with the State Water Board's regulations governing adjudicative proceedings<sup>3</sup> and Chapter 4.5 of the Administrative Procedure Act (APA).<sup>4</sup> The hearing will not be conducted as a hearing under Chapter 5 of the APA.<sup>5</sup>

After receiving numerous objections, motions, and motions in limine, I conducted a Pre-Hearing Conference and hearing on August 8, 2007. The Pre-Hearing Conference was pursuant to a stipulated agreement of the Santa Ana Water Board Advocacy Team, the City of Rialto, and all the responding parties. The purpose of the conference was to discuss details for the upcoming evidentiary hearing and to receive brief oral argument on all the outstanding objections, motions, and motions in limine. I had issued tentative rulings the morning of August 7, 2007.

Notwithstanding the parties' stipulation for scheduling the Pre-Hearing Conference date and briefing deadlines, Goodrich alone objected to the Pre-Hearing Conference.<sup>6</sup> The objections claimed the conference was improperly noticed, allowed insufficient time, and provided insufficient seating since only 4-5 attorneys and representatives were permitted per party. Goodrich's claim of inadequate notice relied on an inapplicable State Water Board regulation that pertains to open meetings of the State Water Board where a quorum of board members will be present. This was a pre-hearing conference of a single member. Further, there is no requirement for preliminary rulings, but I provided preliminary rulings to focus the discussion. These were provided more than 24 hours in advance as a courtesy to all parties.

I appreciate that all counsel adhered to the time constraints and conducted themselves in a professional and orderly manner. After reviewing the written submittals of the parties as they pertain to the objections and motions and considering counsels' oral argument on August 8, 2007, I issue the following final rulings.

## **MOTIONS TO EXCLUDE PARTIES**

### CENTER FOR COMMUNITY ACTION AND ENVIRONMENTAL JUSTICE (CCA EJ)

A motion to exclude CCA EJ as a Party to the proceeding was filed by Goodrich and joined by Pyro Spectaculars. By a letter dated July 24, 2007, CCA EJ informed the State Water Board

---

<sup>2</sup> *Ibid.*

<sup>3</sup> Cal. Code Regs., tit. 23, § 648, et seq.

<sup>4</sup> Gov. Code, § 11400, et seq.

<sup>5</sup> Gov. Code, § 11500, et seq.

<sup>6</sup> Letter from Peter R Duchesneau to Tam M. Doduc, "Objections to Constraints Regarding Pre-Hearing Conference Scheduled for August 8, 2007," August 7, 2007.

that it would no longer be able to participate as a designated party in this proceeding.<sup>7</sup> CCAEJ's withdrawal renders the motion to exclude CCAEJ moot. In addition, all motions filed by CCAEJ and any responses filed regarding said motions are excluded from consideration in this matter.

### STATE WATER BOARD

A renewed request that the State Water Board recuse itself from adjudicating the allegation in CAO R8-2005-0053 was submitted May 29, 2007 by Emhart, Goodrich and Pyro Spectaculars. The same request was previously denied in rulings issued April 6, 2007.<sup>8</sup>

Various motions proffer new arguments that the State Water Board must recuse itself because it previously reviewed the matter during the grant award process and has an institutional pecuniary interest in the outcome of the proceeding.

The State Water Board is both a regulatory and adjudicatory agency.<sup>9</sup> One of its duties includes the expenditure of state funds for local projects that benefit water quality. When the State Water Board reviews an application for funding, its determinations are only related to the application. The State Water Board reviews the application to determine whether the proposed project comports with the bond law, the parameters of the particular program and whether the project is competitive on a state-wide basis with other proposed projects. The State Water Board does not make any type of determination about the circumstances that surround the need for the project unless they would affect a proposed project's functionality or are required by statute.<sup>10</sup>

As Goodrich notes, the test for determining whether an agency has an institutional pecuniary interest is "whether the official motive is 'strong' so that it reasonably warrant[s] fear of partisan influence on [the] judgment."<sup>11</sup> When developing this test, the court in *Alpha Epsilon* looked at two U.S. Supreme Court cases which found due process violations occurred (i.e., the official motive was strong) when "fines...constituted between one-third and one-half of the total budget"<sup>12</sup> and did not occur when "penalties the agency received were less than one percent of the total budget."<sup>13</sup> The court in *Alpha Epsilon* and the two U.S. Supreme Court cases it looked

---

<sup>7</sup> Letter from Penny J. Newman to Tam M. Doduc, "Perchlorate Contamination at a 160-Acre Site in the Rialto Area (SWRCB/OCC File A-1824), July 24, 2007.

<sup>8</sup> Emhart originally requested that the State Water Board hold this hearing in a related petition (SWRCB/OCC File A-1732(a)).

<sup>9</sup> Wat. Code, § 175.

<sup>10</sup> Whether a community is "disadvantaged" within the meaning of Proposition 50 is statutorily defined. (Wat. Code, § 79505.5, subd. (a).) An applicant must choose to claim disadvantaged status in their application, the State Water Board does not make that determination absent a request to do so.

<sup>11</sup> Goodrich Reply, page 7 (quoting *Alpha Epsilon Phi Tau Chapter Housing Assn. v. City of Berkeley* (9th Cir. 1997) 114 F.3d 840, 845-46).

<sup>12</sup> *Id.* at page 846 (quoting *Ward v. Village of Monroeville* (1972) 409 U.S. 57, 58) (emphasis added).

<sup>13</sup> *Ibid.* (quoting *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 250-52) (emphasis added).

to examined the amount to be recovered in relation to the agency's total budget.<sup>14</sup> For Fiscal Year 07-08, the proposed budget for the State Water Board is approximately \$722 million.<sup>15</sup> The budget for Fiscal Year 06-07 was slightly over \$1 billion. Using either figure, the amount that may be recovered (\$6 million) in the draft CAO would constitute less than one percent. According to the test relied upon by Goodrich in *Alpha Epsilon*, the State Water Board does not have an institutional pecuniary interest and there is no violation of due process. Moreover, any monies collected through a CAO must be deposited into the State Water Pollution Cleanup and Abatement Account and are not used for the State Water Board's operating budget.<sup>16</sup>

The renewed motions also assert that the State Water Board should recuse itself from this matter on the grounds that there is bias and/or prejudice of the State Water Board resulting from *ex parte* communications between the State Water Board, the Advocacy Team, and other third parties. In an effort to provide a fair administrative hearing in this matter, the State Water Board conducted an *ex parte* communication inquiry into potential *ex parte* contacts by current members of the State Water Board who may participate in any action on this matter and by the staff that advises them.<sup>17</sup> The inquiry was conducted and distributed well in advance of the scheduled hearing. In addition, the Hearing Officer has reminded the parties and interested persons of the continuing prohibition of *ex parte* communications, and additional *ex parte* contacts have been disclosed as the contacts have occurred.<sup>18</sup> The parties have not been prejudiced nor subject to bias. There has also been no showing of any appearance of bias from any *ex parte* communications.

The motions' reply cites two recent cases that were published after the initial motion to support the request for recusal. The first case, *Rondon v. Alcoholic Beverage Control Appeals Board*<sup>19</sup> is cited for the premise that a strict liability standard governs *ex parte* communications. It is argued that the case holds due process compels reversal of any decision made by a state agency where the agency has had *ex parte* communications with the prosecutor – regardless of whether there is proof of prejudice or bias.

The alleged dischargers' interpretation that *Rondon* holds a strict liability standard governing *ex parte* communications is incorrect. In *Rondon*, the court only stated that a showing of prejudice was not required to warrant reversal of the Department's [Alcoholic Beverage Control]

---

<sup>14</sup> Goodrich seeks to inflate the percentage of the amount sought by comparing the amount to be recovered to the total amount budgeted in the Cleanup and Abatement Account only. This analysis does not follow the analysis used by the U.S. Supreme Court or the Ninth Circuit.

<sup>15</sup> Current as of August 1, 2007.

<sup>16</sup> Wat. Code, § 13304.

<sup>17</sup> Letter from Elizabeth Jennings to Penny Newman, "Petitions of Kwikset Locks, Inc. Kwikset Corporation, Emhart Industries, Inc., Black & Decker, Inc., and Black & Decker (U.S.), Inc. (Amended Cleanup and Abatement Order No. R8-2005-0053 for Kwikset Locks, et al.) Santa Ana Regional Water Quality Control Board: Ex Parte Inquiry SWRCB/OCC FILE A-1824", May 11, 2007.

<sup>18</sup> Letter from Elizabeth Jennings to Robert Wyatt, "Ex parte Communications Search, SWRCB/OCC FILE A-1824", May 23, 2007.

<sup>19</sup> *Rondon v. Alcoholic Beverage Control Appeals Bd.*, (2007) 151 Cal. App. 4th 1274.

decision.<sup>20</sup> The court in *Rondon* simply held that when there is an accusation of *ex parte* communications, the burden is on the agency relying on an ethical wall to demonstrate its existence and effectiveness.<sup>21</sup> The State Water Board has had a strict ethical wall in place since the very beginning of these proceedings. Shortly after the State Water Board agreed to review this matter on its own motion<sup>22</sup> the Chief Counsel issued a memorandum detailing the separation of functions within the Office of Chief Counsel in order to ensure a fair and impartial hearing and decision making process.<sup>23</sup> In addition, all staff advising the State Water Board on this matter has maintained a separation of functions from any Advocacy Team members.

Further, if the alleged dischargers' interpretation of *Rondon* were correct, then it would render a nullity the Administrative Procedure Act's process for detailing *ex parte* communications.<sup>24</sup> There would be no purpose for disclosing and allowing comment on an *ex parte* communication. Instead, the Administrative Procedure Act would simply require the presiding officer to step down. The Administrative Procedure Act does not require that, nor does due process.

The second case, *Morongo Band of Mission Indians v. State Water Resources Control Board*<sup>25</sup> is cited for the premise that the appearance of unfairness is sufficient to invalidate the hearing. The reply asserts that whether or not "actual bias" has yet been shown, a strong appearance of impropriety clouds the proceedings and a fair hearing cannot be conducted in light of the *ex parte* communications between the State Water Board and the Advocacy Team.

Again the alleged dischargers' interpretation is incorrect. In *Morongo*, the court held that an attorney from an agency cannot act as both prosecutor and advisor to the decision maker in overlapping proceedings.<sup>26</sup> In this case, neither I nor any member of my Advisory Team is acting or has acted as a prosecutor in any related or unrelated matter during the course of these proceedings. Also, no prosecutor in this case has advised the State Water Board members on any related or unrelated matter during the pendency of this case. There is no showing of appearance of bias from any *ex parte* contacts, and no showing of an impropriety by any member of the Advisory Team. The State Water Board has maintained fairness throughout the proceedings and **all** motions to recuse the State Water Board are denied.

---

<sup>20</sup> *Id.* at page 1290.

<sup>21</sup> *Id.* at page 1287 (quoting *Howitt v. Sup. Ct.* (1992) 3 Cal.App.4th 1575). The court clearly limited its ruling to the facts "[i]n this case." *Id.* at page 1290.

<sup>22</sup> Letter from Tom Howard to Walter Pettit, "Rialto-Area Perchlorate Contamination: Own Motion Review SWRCB/OCC File A-1824", February 5, 2007.

<sup>23</sup> Memorandum from Michael A.M. Lauffer to Tam M. Doduc, "Rialto-Area Perchlorate Contamination: Hearing Team Advisors and Separation of Functions within the Office of Chief Counsel SWRCB/OCC FILE A-1824" February 13, 2007

<sup>24</sup> See Gov. Code, § 11430.50 (outlining procedures for disclosing *ex parte* communications).

<sup>25</sup> *Morongo Band of Mission Indians v. State Water Resources Control Bd.*, (2007) 62 Cal.Rptr.3d 492.

<sup>26</sup> *Id.* at page 500.

### CITY OF RIALTO AND RIALTO UTILITY AUTHORITY (RIALTO)

Various motions to exclude Rialto as a Party to the proceeding were filed by Goodrich Corporation and joined by Pyro Spectaculars after my March 8, 2007 denial of a similar motion filed by Pyro Spectaculars, which was joined by Emhart and Goodrich. The new motions assert the new arguments that Rialto: lacks statutory authority to prosecute this proceeding, has an impermissible financial interest for a joint prosecutor in the outcome of the proceeding, and has “unclean hands” that should bar its participation as a joint prosecutor and being designated as a party is inconsistent with the Notice of Public Hearing for the proceedings.

The purpose of this adjudicatory hearing is to consider adopting or amending the 2006 Draft CAO for the investigation and remediation of perchlorate in the Rialto area, or take such other action as the State Water Board deems appropriate.<sup>27</sup> The prosecutor in this matter is the Advocacy Team. Pursuant to the State Water Board regulations, parties to an adjudicative proceeding before the State Water Board shall include the person to whom the agency is directed or any other person the State Water Board determines should be a designated party.<sup>28</sup> In my discretion as Hearing Officer, I designated Rialto as a party--not as a joint prosecutor--in these proceedings. The arguments that Rialto should be disqualified as a party, alleging its role as a joint prosecutor, have no merit.

The argument that Rialto's designation as a party violates the February 23, 2007 Notice of Public Hearing because it did not submit an explanation of the basis for party status misrepresents the language in the Notice of Hearing. The Notice specifically designates six participants as parties in the hearing including Rialto. The next paragraph clearly states that “Any other person who wishes to participate in the hearing as a party must request such status...A submission shall explain the basis for party status...”<sup>29</sup> None of the six designated parties, including Rialto, were required to request party status as it was already granted to those parties. None of the arguments asserted in the various motions have merit and **all** renewed motions to exclude Rialto as a Party are denied.

### SANTA ANA WATER BOARD ADVOCACY TEAM (ADVOCACY TEAM)

On March 20, 2007, a ruling was issued that denied a motion to disqualify the Advocacy Team from prosecuting the amended CAO R8-2005-0053 issued October 27, 2006.<sup>30</sup> On April 6, 2007, again a ruling was issued that denied a [renewed] motion to disqualify the Advocacy Team.<sup>31</sup> Following this second ruling, yet additional motions to disqualify the Advocacy Team

---

<sup>27</sup> Fourth Revised Notice of Public Hearing In the Matter of Perchlorate Contamination at a 160-Acre Site in the Rialto Area (SWRCB/OCC File A-1824), State Water Resources Control Board, July 5, 2007, page 2.

<sup>28</sup> Cal. Code Regs., tit. 23, § 648.1, subd. (a).

<sup>29</sup> Notice of Public Hearing In the Matter of Perchlorate Contamination at a 160-Acre Site in the Rialto Area (SWRCB/OCC File A-1824), State Water Resources Control Board, February 2, 2007, page 3.

<sup>30</sup> Letter from Tam M. Doduc to Peter R Duchesneau, “Rulings Issued in Response to Pre-hearing Motions filed in the Matter of Perchlorate Contamination at 160-Site in the Rialto Area”, March 20, 2007, page 2.

<sup>31</sup> Letter from Tam M. Doduc to Davin Diaz, “Further Rulings Issued in the Matter of Perchlorate Contamination at 160-Site in the Rialto Area”, April 6, 2007, pages 1-2.

were filed by Emhart, Goodrich and Pyro Spectaculars. The latest motions argue that the Advocacy Team should be disqualified as a prosecutor because the Advocacy Team has a personal stake in avoiding disclosure of facts that establish responsibility, negligence, and breach of duties with regard to perchlorate releases. None of the arguments proffered justify excluding the Advocacy Team as a party. **All** motions to disqualify the Advocacy Team from prosecuting the amended CAO are denied.

### **MOTIONS TO EXCLUDE ADVOCACY TEAM WITNESS STATEMENTS**

An objection to the Advocacy Team's Witness Statements Submitted April 6, 2007 was filed by Pyro Spectaculars on the basis that the Advocacy Team failed to provide a detailed description of all proposed witness testimony and that the submittal conflicted with prior witness testimony submittals by the Advocacy team. The objection included a request that the hearing be terminated or strike all witness testimony that does not meet the hearing requirements. In the rulings issued on April 11, 2007, this objection was noted and taken under advisement.

In addition, motions including, but not limited to Emhart Motion in Limine No. 3 and Goodrich Motion in Limine No.3, were filed to strike all testimony by the Advocacy Team members on subjects that were added in the April 6, 2007 Witness List on the basis that: the Advocacy Team violated the hearing notices, failed to provide a detailed description of all proposed witness testimony and that the submittal conflicted with prior witness testimony submittals by the Advocacy Team.

The motions assert that the Advocacy Team violated the hearing notices because it proposed to provide a presentation during the case-in-chief consisting mostly of a discussion of percipient witness depositions and historical documents. The motions assert that such a presentation is precluded as the hearing notice establishes four distinct phases during the hearing: (1) opening statements, (2) direct examination of all fact and expert witnesses, (3) cross-examination of all witness, and (4) rebuttal and closing arguments. This assertion that only "fact and expert witness" testimony is allowed misstates the hearing notice. The Hearing Notices state in the *Hearing Participation* section that parties to the hearing may present legal and policy arguments, testimony by witnesses, and evidence.<sup>32</sup> The *Time Limitations for Parties and Order of Appearance* section of the Hearing Notices states that each party will be allotted a total of five hours to make opening statement, present evidence, testimony, legal and policy arguments and conduct cross-examination.<sup>33</sup> The Advocacy Teams' proposed presentation of a discussion of testimony and documents, and not simply direct examination of fact and expert witnesses, does not violate the hearing notices. Any statements made by Advocacy Team members and witnesses during the presentation of their case-in-chief will be subject to cross examination.

The motions assert that the changes to the revised Witness List submitted April 6, 2007 greatly prejudiced the alleged dischargers' abilities to prepare for the Advocacy Team members' proposed testimony, and alleged dischargers were forced to take additional depositions of

---

<sup>32</sup> Second Revised Notice of Public Hearing In the Matter of Perchlorate Contamination at a 160-Acre Site in the Rialto Area (SWRCB/OCC File A-1824), State Water Resources Control Board, April 3, 2007, page 2.

<sup>33</sup> *Id.* at page 5.

Advocacy Team members. The motions argue that the revised list did not comply with the revised Hearing Notice that required a detailed description of each witness' testimony and that the submission be limited to the witnesses identified on the witness list submitted on Tuesday, March 27, 2007.<sup>34</sup> The April 6, 2007 submittal complied with the Hearing Notice requirements. The submittal provided detailed descriptions of the witnesses' testimony and was limited to the witnesses previously submitted. The motions assert that by changing the topics that would be presented by the Advocacy Team members the alleged dischargers were harmed by being forced to take additional depositions. The opposition to the motion asserts that the witnesses would have been deposed regardless of the April 6, 2007 witness statement. In fact, the witnesses were deposed for additional days, providing ample opportunity for questions on proposed testimony, and the hearing was postponed to dates proposed as acceptable to all of the parties. In addition, the witnesses will be available at the hearing, providing further opportunity for examination. No prejudice has occurred as a result of the revised witness statement and the motions are denied.

#### **MOTIONS ASSERTING LACK OF SUFFICIENT TIME FOR SUBMITTALS BY THE ALLEGED DISCHARGERS**

An objection to the rulings issued April 17, 2007 was filed by Goodrich and joined by Pyro Spectaculars on the basis that the Hearing Officer refused to allow the alleged dischargers sufficient time to respond to Rialto and the Advocacy Team's submission. Since the date the objection was filed the hearing and rebuttal submittal dates were extended rendering the objection moot.

#### **MOTIONS REQUESTING A PRE-HEARING CONFERENCE**

Requests for a Pre-Hearing Conference were received from Emhart, Goodrich, Pyro Spectaculars, the Advocacy Team, and Rialto. Following the June 20, 2007 submittal of the joint statement proposing potential hearing dates. The Pre-Hearing Conference occurred on August 8, 2007. The motions are moot.

#### **MOTIONS TO EXCLUDE TESTIMONY OF DR. DANIEL B. STEPHENS**

A request from Pyro Spectaculars and Goodrich and motions from Emhart to strike Dr. Daniel B. Stephens, an expert witness, from Rialto's Witness Statement and preclude or limit the witness's testimony in this matter because Dr. Stephens refused to verify its accuracy during a deposition and because he intended to present additional opinions that differed from his declaration were denied in the ruling issued June 6, 2007.<sup>35</sup>

Motions including, but not limited to, Emhart Motions in Limine Nos.1 and 2 and the Goodrich Motion in Limine No. 1, were filed to exclude the testimony of Dr. Stephens for the reasons proffered in the previously denied motions. The arguments for exclusion again include failure to

---

<sup>34</sup> *Id.* at page 3.

<sup>35</sup> Letter from Tam M. Doduc to Penny Newman, "Ruling on Motions to Preclude or Limit Witness Testimony", June 6, 2007, page 1.

sign the Stephens' declaration under penalty of perjury and for offering new and/or changed testimony and documents. The motions seek exclusion of the April 12, 2007 "Declaration of Daniel B. Stephens, PhD: Perchlorate Contamination at the 160-Acre Site in the Rialto Area (SWRCB/OCC File A-1824)" and all attached exhibits, Dr. Stephens' rebuttal declaration and supporting exhibits, and Dr. Stephens' oral testimony at the hearing.

The motions move to exclude Dr. Stephens' written and oral testimony because he refused to verify his "Declaration" under oath or penalty of perjury during a deposition. The motions cite California Code of Regulations, title 23, sections 648.4, subdivision (d), and 648.5.1 and Government Code section 11513 for the premise that no testimony, expert or otherwise, is allowed in this proceeding unless it is under oath or affirmation, and that oral evidence shall be taken only on oath and affirmation. As stated in the ruling of June 6, 2007, the witness will be required to take the oath prior to testifying in this proceeding and may be questioned on the Declaration.<sup>36</sup>

In addition, the motions incorrectly argue that the written testimony must be executed under penalty of perjury pursuant to Code of Civil Procedure section 2015.5. This section is inapplicable to this matter. The section only states that, in those instances where a declaration or written statement is required or permitted to be made under oath, the declaration or written statement must bear a certification of penalty of perjury.<sup>37</sup> In this case, written testimony need not be introduced with a penalty of perjury certification, the State Water Board regulations require "[a]ny witness providing written testimony shall appear at the hearing and affirm that the written testimony is true and correct."<sup>38</sup> If Dr. Stephens appears as a witness at the hearing, he will be required to take the oath and can affirm that the written testimony is true and correct. The motion to exclude the written evidence will be taken under advisement. If Dr. Stephens does not affirm that the written material is true and correct during his testimony, I may admit, limit, or refuse the written evidence as permitted in State Water Board regulations governing this matter.<sup>39</sup>

The motions assert that the witness intends to present opinions that differ from the Declaration and were developed after Rialto's submittal of April 12, 2007. The motions assert that the witness' change in opinion developed after April 12, 2007 is not a rebuttal opinion, should have been included in Rialto's direct case, and should be precluded from the proceeding. Rialto, in its opposition to the motions dated July 13, 2007, asserts that the opinions offered by Dr. Stephens in rebuttal respond to the alleged dischargers' experts' testimony and evidence. The Second Revised Public Hearing Notice requires that if declarations are submitted, the declarant must be available for cross-examination at the hearing.<sup>40</sup> As Dr. Stephens will be required to testify at the hearing to affirm his written testimony, he will be available for cross-examination on

---

<sup>36</sup> *Id.* at page 2.

<sup>37</sup> Code Civ. Proc., § 2015.5.

<sup>38</sup> Cal. Code Regs., tit. 23, § 648.4, subd. (d).

<sup>39</sup> Cal. Code Regs., tit. 23, § 648.4, subd. (e).

<sup>40</sup> Second Revised Notice of Public Hearing In the Matter of Perchlorate Contamination at a 160-Acre Site in the Rialto Area (SWRCB/OCC File A-1824), State Water Resources Control Board, April 3, 2007, page 4.

opinions submitted before and after April 12, 2007. To the extent that the motions claim his testimony is not credible, those claims go to the weight of the evidence, not to whether it must be stricken.

Any rebuttal testimony, evidence or argument that does not respond to another party's previously submitted testimony or evidence and is not in conformance with the Hearing Notice may be stricken.<sup>41</sup> Rialto's rebuttal submittal of Dr. Stephens' further testimony appears to be largely responsive to opinions, testimony, and argument submitted by the responding parties. In some cases, the rebuttal submittal does not have a direct correlation to a document or expert testimony of the responding parties. That does not mean, however, that Dr. Stephens' rebuttal testimony must be stricken. Given the complexities of all the parties' arguments and technical details associated with site, it is appropriate to hear directly from Dr. Stephens on this issue at the hearing. The motions to exclude Dr. Stephens' oral testimony at the hearing are denied and the motion to exclude Dr. Stephens' written testimony is taken under advisement.

### **MOTIONS TO EXCLUDE PORTIONS OF RIALTO'S REBUTTAL SUBMISSION**

Various motions requesting the exclusion of portions of Rialto's rebuttal submission including, but not limited to, Pyro Spectaculars' letter dated June 11, 2007, and Goodrich's Motions in Liminie Nos. 9 and 17. Some of the motions to exclude claim that Rialto failed to adhere to procedure by not explaining why their need was not foreseen. Rialto explained the basis for their rebuttal submissions in its rebuttal brief.<sup>42</sup> This explanation is satisfactory. Nothing required a document-by-document explanation of the rebuttal submittal. Some parties provided such a detailed explanation, but both the Emhart Parties and Rialto took a more liberal approach. Their justifications are sufficient for purposes of rebuttal submittals. These motions are denied.

Rialto has made ten requests for judicial notice of various documents previously submitted for inclusion into the record. I will grant official notice as to the existence of the documents pursuant to State Water Board regulations.<sup>43</sup> As Rialto states, it is not requesting that I take official notice of each statement contained within the various documents. It has been suggested that these requests are overly broad and seek admission of all records of the State Water Board, the County of San Bernardino, etc. My granting of Rialto's request is limited to those documents that they have included in its various submissions.<sup>44</sup>

---

<sup>41</sup> *Ibid.* Accord Cal. Code Regs., tit. 23, 648.4, subd. (a) (policy to "discourage the introduction of surprise testimony and exhibits").

<sup>42</sup> Rialto Rebuttal Brief, pages 5-7.

<sup>43</sup> Cal. Code Regs., tit. 23, § 648.2.

<sup>44</sup> For example, Rialto's request for State Water Board and Santa Ana Regional Water Quality Control Board documents states that these documents can be found in Rialto's evidence binders, series E. (Rialto Request for Official Notice for City of Rialto and Rialto Utility Auth., page 4).

## MOTIONS REGARDING DEPOSITIONS FROM AVAILABLE WITNESSES

Various motions have been made on the use of deposition transcripts from available witnesses including, but not limited to, Emhart Motions in Limine Nos. 4 and 5 and Goodrich Motion in Limine No. 5. On May 10, 2007, I informed the parties regarding my preference for live witness testimony at the evidentiary hearing. However, I also informed the parties that in the deponent's absence, transcripts would be accepted to the extent consistent with the California Evidence Code, but that in no way is to be interpreted as a relinquishment of my discretion to admit any relevant evidence pursuant to Government Code section 11513.<sup>45</sup> A deponent's appearance at the hearing does **not** exclude their deposition transcript from the record. There is no requirement for me to rule on each and every objection before a deposition transcript is admitted into evidence. These motions are denied.

## MOTIONS REGARDING FOUNDATION AND HEARSAY

Numerous motions have been made to exclude evidence on the basis of lack of foundation and/or that the evidence constitutes inadmissible hearsay. Each hearing notice has stated that the evidentiary hearing will be conducted in accordance with State Water Board regulations governing adjudicatory proceedings and Chapter 4.5 of the APA. On March 5, 2007, Goodrich made a motion that the hearing be conducted under the formal hearing procedures of Chapter 5 of the APA. That motion was denied on March 8, 2007. All of the parties have been on notice from February 23, 2007, that these proceedings would be governed by State Water Board regulations and Chapter 4.5 of the APA.

According to State Water Board regulations, adjudicative proceedings will be conducted in accordance with the provisions and rules of evidence set forth in Government Code section 11513.<sup>46</sup> That section provides that this hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.<sup>47</sup> As Hearing Officer, I have flexibility to admit evidence and make the determination as to its credibility. Similarly, I will also make all determinations as to its relevancy to the issues in the proceedings. There is no requirement under State Water Board regulations or Chapter 4.5 of the APA that a proper trial-like foundation be made for exhibits and evidence.

Government Code section 11513 also states that "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."<sup>48</sup> Many documents that are being offered are hearsay. However, in order for hearsay

<sup>45</sup> Use of Deposition Transcripts During the Evidentiary Hearing (SWRCB/OCC File A-1824), State Water Resources Control Board, May 10, 2007, page 2 (emphasis added).

<sup>46</sup> Cal. Code Regs., tit. 23, § 648.5.1.

<sup>47</sup> Gov. Code, § 11513, subd. (c).

<sup>48</sup> Gov. Code, § 11513, subd. (d).

evidence to be admitted, there is no requirement that there be an applicable exception unless the evidence stands alone to support a finding.

Many motions were made containing various issued regarding authentication, relevancy, and hearsay. These motions include, but are not limited to: Emhart Motion in Limine Nos. 3, 4, 6, and 7; Goodrich Motion in Limine Nos. 2, 4, 6, 7, 10, 13, 14, 15, and 16; and, Pyro Spectaculars' Motion in Limine Nos. 18, 19, 20, and 21. These motions are denied.

### **DECLARATIONS OF WITNESS NOT PRESENT AT THE HEARING OR UNAVAILABLE**

Two motions have been made by Goodrich to exclude the declarations of Eric Benisek, Peter Fox, Ronald Polzien, and John Kase.<sup>49</sup> Regarding Eric Benisek and Ronald Polzien, these witnesses are on Rialto's lists. The fact that Mr. Polzien resides outside of California is irrelevant; he is still listed as a witness and may be at the hearing to testify. Mr. Kase was not on Rialto's witness list because he is deceased. There is no basis to exclude Mr. Kase's declaration. Depending on the purpose for which Rialto intends to use the declaration, the rules regarding hearsay, discussed above, may apply. The motions in regards to Messrs. Benisek, Polzien, and Kase are denied.

The motion to exclude the declaration of Peter Fox is granted. Mr. Fox, while subject to cross examination during his depositions, is not on the witness lists for Rialto. He, therefore, will not be called as a witness and will not be present at the hearing. However, while his declaration is excluded, his deposition transcript may be admitted consistent with my letter issued May 10, 2007.<sup>50</sup>

### **MOTIONS TO EXCLUDE UNCREDIBLE EVIDENCE AND ELIMINATE PREJUDICIAL TERMS**

Several motions have been made to exclude evidence on the basis that it is not credible including, but not limited to, motions made by Rialto in its rebuttal brief and Goodrich Motion in Limine No. 8. Rialto states that the opinions of Drs. Oxley, Kresic, and Kavanaugh lack reliability or similarity to the actual conditions at the 160-acre site. Goodrich states that evidence, testimony, and statements that it contaminated the groundwater must be excluded because no credible evidence has been put forth. As stated above, whether or not evidence is credible is a determination for the Hearing Officer – not the parties. These motions are denied.

Goodrich also seeks to strike all references to the 160-acre site as the "Goodrich/Black & Decker site" because this term is misleading and prejudicial.<sup>51</sup> As stated above, this is an administrative hearing. There is no jury and the Evidence Code section 352 balancing test is inapplicable. This proceeding is governed by Government Code section 11513. In pertinent part, I may exclude evidence if its probative value is substantially outweighed by the probability

---

<sup>49</sup> Goodrich Motion in Limine No. 6 seeks to exclude the declarations of Messrs. Benisek and Fox. Goodrich Motion in Limine No.7 seeks to exclude the declarations of Messrs. Polzien and Kase.

<sup>50</sup> Use of Deposition Transcripts During the Evidentiary Hearing (SWRCB/OCC File A-1824), State Water Resources Control Board, May 10, 2007.

<sup>51</sup> Goodrich Motion in Limine Number 12.

that its admission will necessitate undue consumption of time.<sup>52</sup> The fact that the reference is prejudicial is not a relevant factor. The motion is denied.

While the term's possible prejudicial effect is irrelevant and the documents containing the term are being admitted, I would caution the parties that I will not condone this type of creative vocabulary. The site has consistently been referred to as the "160-acre" site. Presentations at the hearing, oral and computer-generated, should refer to the site by this name.

### **MOTION TO EXCLUDE EXHIBITS NOT PRODUCED TO GOODRICH**

Goodrich's Motion in Limine No. 11 seeks to exclude various exhibits by the Advocacy Team and Rialto not produced to Goodrich. With respect to the two Advocacy Team documents, while an initial oversight, they have been produced to Goodrich. Goodrich cannot claim that it has been prejudiced when it then submits one of the same documents as its own exhibit. With respect to the six treatises referenced by Dr. Stephens, I know of no requirement that the parties must produce, in full, all textbooks, treatises, and references relied upon. Rialto has provided sufficient information to locate these treatises and Goodrich has not claimed that it was unable to obtain the treatises. The motion is denied.

### **MOTION TO EXCLUDE TESTIMONY BY McPHERSON**

Pyro Spectaculars' Motion in Limine No. 22 seeks to exclude the testimony of Michael McPherson because he is testifying beyond his role as an expert and because his declaration was not signed in accordance with California law. The parties will have ample opportunity to cross-examine Mr. McPherson and object at the hearing should he opine as to ultimate issues in the hearing. There is no requirement that the parties submit signed declarations. Under Government Code section 11513, only oral evidence must be taken only on oath or affirmation.<sup>53</sup> This motion is denied.<sup>54</sup>

### **MOTION TO EXCLUDE SUBMISSION OF PYRO SPECTACULARS' INSURANCE POLICIES**

Pyro Spectaculars has made a motion to exclude Rialto's submission of its liability insurance policies. It argues that this is precluded, in part, because of Evidence Code section 1155. That section precludes the submission of insurance policies to prove negligence or wrongdoing. While this hearing is not bound by that particular section of the Evidence Code, Rialto has stated that the insurance policies are not being submitted for this purpose. The other objections raised by Pyro Spectaculars have already been discussed above. The motion is denied.

---

<sup>52</sup> Gov. Code, § 11513, subd. (f).

<sup>53</sup> Gov. Code, § 11513, subd. (a) (emphasis added).

<sup>54</sup> The issue of declarations being signed insufficiently to comport with California law was also raised in Pyro Spectaculars' Motion in Limine No. 20. As to that issue, that motion is also denied.

## MOTIONS MADE DURING THE LATEST CONTINUANCE

Several motions have been made after I granted a continuance in the proceedings at the request of the parties.<sup>55</sup> I have previously rejected motions submitted during the continuance.<sup>56</sup> A motion has been made by Pyro Spectaculars to reconsider this ruling. I have reconsidered it and affirm my previous ruling. Additionally, a motion has been made by the Advocacy Team to strike all alleged dischargers' motions in limine. This and any other motions filed after June 21, 2007 are rejected and denied as untimely.

## REQUEST TO STAY THE PROCEEDINGS

During the Pre-Hearing Conference, Goodrich made a motion to stay the proceedings. This followed a letter that Emhart sent on behalf of itself, Goodrich, and Pyro Spectaculars, to the Deputy Attorney General representing the State Water Board on August 7, 2007, stating their intent to seek a stay in the proceedings and a writ of mandate directing the State Water Board's recusal and the Advocacy Team's disqualification in these proceedings. These proceedings have already been delayed for five months, twice upon the request of Emhart. These parties have made numerous requests for the State Water Board's recusal and the Advocacy Team's disqualification – to which I have repeatedly responded. Emhart itself originally requested the State Water Board to hold these hearings, in its petition on the draft CAO.<sup>57</sup> Despite their numerous objections to the Advocacy Team and Rialto's performance under the hearing procedures, Emhart, Goodrich, and Pyro Spectaculars have made various requests and mistakes of their own, including failing to serve all parties, submitting documents late, and submitting errata following the deadline for documents. I have granted some of their requests, including the current schedule which was agreed upon by all parties. For these reasons, the request to stay the proceedings is denied.

## TIME EXTENSIONS

Emhart has requested and received two separate time extensions in these proceedings. The initial investigation by the Santa Ana Regional Water Quality Control Board began in 2002. Five years later, at the initiation of the State Water Board proceedings,<sup>58</sup> I set a hearing schedule that was meant to efficiently resolve this matter. In their pre-hearing motion, Emhart claimed that the unilaterally imposed schedule was arbitrary, unreasonable, prejudicial, and unfair.<sup>59</sup> As a result,

---

<sup>55</sup> Continuation of Evidentiary Hearing (SWRCB/OCC File A-1824), State Water Resources Control Board, June 21, 2007.

<sup>56</sup> Briefing Schedule for Motions and Rejection of New and Revised Motions (SWRCB/OCC File A-1824), State Water Resources Control Board, July 10, 2007.

<sup>57</sup> See SWRCB/OCC File No. A-1732(a).

<sup>58</sup> Emhart had filed administrative petitions challenging some of the preliminary actions of the Santa Ana Water Board, but, as they pertain to cleanup and abatement orders or draft cleanup and abatement orders, the petitions had often been placed in abeyance at the request of Emhart. In other words, Emhart had asked that the State Water Board not to process the administrative petition. During these abeyance periods, there was no proceeding pending before the State Water Board concerning the 160-acre site.

<sup>59</sup> Emhart Motion and Objection No.2: Vacate Pre-Hearing Schedule, and Time Limitations Established for the Hearing for violation of Gov. Code § 11425.10(a)(1) and 11513(b) and 23 CCR § 648(b), page.6.

within three days the hearing schedule was revised, granting the parties a four-week extension and an additional 30 minutes for each party to present its case.<sup>60</sup>

More recently, a stay was requested and Goodrich threatened to file a petition for writ of mandate because of a family crisis for one of its counsel.<sup>61</sup> After receiving this letter and requests from other parties for a scheduling conference, I requested that the parties meet and confer to present a mutually agreed upon schedule.<sup>62</sup> After the parties met and conferred, Emhart submitted a joint statement on behalf of all parties.<sup>63</sup> The parties requested that: the hearing take place the last two weeks of August; the parties would submit a briefing schedule for outstanding motions and objections; a pre-hearing conference would take place the first week of August; and, the deadline for PowerPoint submissions would be August 10.<sup>64</sup> All of these requests were granted. In all, these proceedings have been delayed for five months. The latest delay resulted in my adoption of a schedule mutually agreed upon by all parties, including Emhart, Goodrich, and Pyro Spectaculars.<sup>65</sup>

The five months worth of delays are the result of three different postponements of the evidentiary hearing.<sup>66</sup> Each postponement has burdened not only State Water Board staff, but has taxed the resources of the County of San Bernardino (County). The County is providing the facility *gratis* to the State Water Board. This facility is the only facility within the City of Rialto that can accommodate the size of the evidentiary hearing and still permit public participation. County staff have made arrangements and accommodated each postponement caused by the parties at no charge to the State. When the evidentiary hearing was postponed from March to May at the request of Emhart,<sup>67</sup> the County had to cancel the Department of Education's

---

<sup>60</sup> Initial Rulings Issued in Response to Pre-Hearing Motions Filed in the Matter of Perchlorate Contamination at a 160-Acre Site in the Rialto Area, March 8, 2007.

<sup>61</sup> Letter from Jeffrey D. Dintzer to Tam M. Doduc, "Immediate Request for Continuance of Hearing – SWRCB/OCC File A-1824", June 19, 2007.

<sup>62</sup> Order for Information to Evaluate the Possibility of Conducting a Scheduling Conference or Continuing the Evidentiary Hearing, June 19, 2007.

<sup>63</sup> Letter from James L. Meeder to Tam M. Doduc, "A-1824: Joint Statement of All Parties in Response the Hearing Officer's Request of June 19, 2007", June 20, 2007.

<sup>64</sup> *Id.* at page 2. The briefing schedule submitted by the parties on July 9, 2007 was also granted. The sole exception was a request that the Pre-Hearing Conference occur on August 7, however I had a previous commitment. The Pre-Hearing Conference occurred one day later.

<sup>65</sup> After granting the parties' request for the Pre-Hearing Conference and I confirmed the date over one month in advance, Goodrich claims that the State Water Board failed to provide "a properly issued agenda" citing to the Bagley-Keene Open Meeting Act (Gov. Code, § 11120 et seq.). Goodrich makes the false claim that regulations for State Water Board meetings are applicable to a pre-hearing conference presided over by a hearing officer.

<sup>66</sup> See Notice of Public Hearing, February 23, 2007 [hearing dates beginning March 28, 2007]; Revised Notice of Public Hearing, March 8, 2007 [hearing dates beginning May 8, 2007]; Second Revised Notice of Public Hearing, April 3, 2007 [adjustments to the May 8th hearing schedule]; Third Revised Notice of Public Hearing, April 24, 2007 [hearing dates beginning July 9, 2007]; Fourth Revised Notice of Public Hearing, July 5, 2007 [hearing dates beginning August 21, 2007].

<sup>67</sup> Emhart Motion and Objection No.2: Vacate Pre-Hearing Schedule, and Time Limitations Established for the Hearing for violation of Gov. Code § 11425.10(a)(1) and 11513(b) and 23 CCR § 648(b), page.6.

reservation in order to accommodate the evidentiary hearing. Further delays would only further tax the County's resources and create an additional burden for County staff.

### PROCEDURAL DEFICIENCIES

The Advocacy Team's case-in-chief submission failed to adhere to the hearing notice by failing to deliver to each party the same documents in the same format as was delivered to the State Water Board. Nineteen boxes of documents did not have the tabs separating the various exhibits that were present in the copy provided to the State Water Board. This resulted in a motion filed by Goodrich and joined by Emhart to exclude these nineteen boxes.<sup>68</sup> I granted this motion and excluded nineteen of the twenty boxes submitted by the Advocacy Team in its case-in-chief.<sup>69</sup>

Despite Emhart's objections to its opposition's failure to adhere to my procedures, it has made its own mistakes. On March 20, I directed the parties that "in addition to their respective hard copy party submissions, the parties are to submit an additional hard copy of all submissions to the Santa Ana Regional Water Quality Control Board."<sup>70</sup> This extra copy was for the sole purpose of permitting the affected public access to the proceedings.<sup>71</sup> Emhart failed to send this additional copy of its case-in-chief submission claiming that their reading of the Addendum did not specify that a duplicate set of documents be sent to Riverside.<sup>72</sup> I took no action against Emhart's delay in its failure to adhere to the requirements of the proceeding.

Regarding the same case-in-chief submission, Emhart was one day late in delivering its documents to CCAEJ, which was then a party. Despite CCAEJ's request that these documents, Emhart's case-in-chief, be stricken from the record, I did not strike the documents but permitted a one day grace period for CCAEJ to submit its rebuttal. Again, Emhart was not penalized for its failure to adhere to the procedural requirements of this proceeding. Throughout these proceedings, I have repeatedly sought to maintain a fair and orderly hearing. While the Advocacy Team has had nineteen boxes of exhibits excluded from consideration for its procedural transgressions, Emhart has not been penalized at all for its own failures to adhere to the procedural requirements of this proceeding.

### **OUTSTANDING PROCEDURAL ISSUES FOR THE UPCOMING HEARING**

Per the request of Emhart, Goodrich, and Pyro Spectaculars at the Pre-Hearing Conference, I extended the deadline for electronic submissions until August 13, 2007 at 5:00 p.m.<sup>73</sup> As

---

<sup>68</sup> Letter from Peter Duchesneau to Jorge A. Leon, "Objections to Advocacy Team Submission", March 29, 2007; letter from James L. Meeder to Karen A. O'Haire, "Advocacy Team Submission", March 29, 2007.

<sup>69</sup> Ruling on Objections to Advocacy Team Submission, April 2, 2007.

<sup>70</sup> Addendum to Hearing Notice and Creation of Public Repository for Party Submissions in the Matter of Perchlorate Contamination at a 160-Acre Site in the Rialto Area, March 20, 2007, page 1.

<sup>71</sup> *Ibid.*

<sup>72</sup> E-mail from Robert Wyatt to Jorge Leon, "Complete submittal of documents", May 8, 2007.

<sup>73</sup> See also Letter from James L. Meeder to Tam M. Doduc, "Re: SWRCB/OCC File A-1824 – Proposed Agenda", August 6, 2007, page 2.

requested by the parties, I will accept objections to these electronic submissions. These objections are **due August 14, 2007 by 5:00 p.m.** Objections are limited to fifteen (15) pages total per party, single-sided, double-spaced in 12-point font. Any exhibits, declarations, affidavits, etc. accompanying these objections are included in the page limit. There will be no acceptance of late objections. I will rule on these objections by August 17, 2007 at 5:00 p.m.

Several parties requested permission to bring electronic equipment to be used to display documents. As I stated at the Pre-Hearing Conference, I will allow such equipment only if all parties have agreed to the specific equipment and my technical advisors concur. Absent such an agreement, no technical equipment other than that provided in the room will be permitted. Should the parties agree to a proposal for additional electronic equipment, they must jointly make that proposal no later than **August 14, 2007 by 5:00 p.m.** and their technical staff must be prepared to meet with State Water Board technical staff on **August 16, 2007.**

Per the request of Emhart, the parties will be permitted access to the auditorium prior to the hearing to prepare their electronic devices. Access to the auditorium will be permitted on Monday, August 20, 2007 from 1:00 p.m. to 5:00 p.m. and Sunday, August 26, 2007 from 1:00 p.m. to 5:00 p.m. There is another function already booked between the two weeks of the evidentiary hearing. As a result, the parties may need to be prepared to remove all materials at the close of the session on Wednesday, August 22, 2007. At the request of Goodrich, a rough sketch of the layout is enclosed. No objections regarding the layout will be accepted.

For the purpose of generating an estimated schedule, it was agreed that the parties would submit the anticipated length of their opening statements. This must be done no later than **August 14, 2007 at 5:00 p.m.** The anticipated length should be each parties' good faith estimate of its opening statement, but the proposed time will not be binding on the parties. With this submission, parties will provide the names of the attorneys who will be seated at the front table. As discussed at the Pre-Hearing Conference, only three people at a time will be able to sit at the front table. Please provide the names of all the attorneys or representatives who may circulate to the front table. We will be providing nametags in order to assist the court reporter and time keeper.

At the Pre-Hearing Conference, I expressed my desire to have all objections to a witness' examination held until the end of both direct and cross-examination of that witness. Upon the request of the parties, objections will be allowed at the conclusion of each witness' direct examination. Any objections to a witness' cross-examination will occur at the conclusion of each party's cross-examination of the witness. For each phase of a witness' examination, only one attorney per party will be permitted to examine the witness. If there a witness is shared by two or more parties, prior to direct examination, the parties must inform me and my Advisory Team how much time of a witness' direct testimony is to be allotted to each party.

For any exhibit or document that is provided to a witness at the hearing, a copy must be provided to each party, to me and the members of my Advisory Team.<sup>74</sup> This can be distributed in an exhibit binder or done individually at the time needed during a witness' examination.

---

<sup>74</sup> For the parties' reference, a total of seven copies will be needed for the Advisory Team and myself during the hearing.

The parties may bring their own court reporter and other support staff. However, I remind the parties that this is a public hearing and space must be available for members of the public to attend the hearing. Space for the attorneys and their staff is limited. The official transcript of the proceeding will be provided by the State Water Board's court reporter. I will not accept transcripts from other court reporters. Also, I will not accept interruptions from other court reporters asking for names or for persons to speak louder. Only the State Water Board's court reporter will be permitted to interrupt testimony for identifications or clarifications. If a party employs an overnight transcribing service, it may use those transcripts for the purpose of impeachment.

### **SECURITY AT THE EVIDENTIARY HEARING**

As I announced at the Pre-Hearing Conference, the California Highway Patrol (CHP) will be providing security during the evidentiary hearing. The CHP is tasked with providing security to state employees. As the experts in their field, all security matters are at the discretion of the local CHP office. Where they place themselves and whether they will patrol the parking area or wish to screen persons or packages entering the facility is at their discretion. If they perceive a safety threat, I will depend on their expertise to respond appropriately. The CHP requires strict adherence to the maximum occupancy of the room. Prior to the start of each hearing day, each party will need to provide a designated member of my Advisory Team with a head count of the number of persons representing their client. This includes any witnesses you may have in the room and anyone accompanying them. This information will permit us to comport with CHP requirements.

If you have any questions on the above matter please direct them to Karen O'Haire, Senior Staff Counsel, in the Office of the Chief Counsel at [kohaire@waterboards.ca.gov](mailto:kohaire@waterboards.ca.gov).

Sincerely,



Tam M. Doduc  
Board Chair

Enclosure

cc: See next page

cc: James L. Meeder, Esq. **[via U.S. mail & email]**  
Allen Matkins Leck Gamble Mallory  
& Natsis LLC  
3 Embarcadero Center, 12<sup>th</sup> Floor  
San Francisco, CA 94111-4074  
[jmeeder@allenmatkins.com](mailto:jmeeder@allenmatkins.com)

Steven J. Elie, Esq. **[via U.S. mail & email]**  
Barry C. Groveman, Esq.  
**[via U.S. mail and email]**  
Musick, Peeler & Garrett LLP  
One Wilshire Boulevard  
Los Angeles, CA 90017  
[s.elie@mpglaw.com](mailto:s.elie@mpglaw.com)  
[bgroveman@earthlink.net](mailto:bgroveman@earthlink.net)

Mr. Bruce Amig **[via U.S. mail & email]**  
Goodrich Corporation  
Four Coliseum Center  
2730 W. Tyvola Road  
Charlotte, NC 28217-4578  
[bruce.amig@goodrich.com](mailto:bruce.amig@goodrich.com)

Erik S. Mroz, Esq. **[via U.S. mail & email]**  
Resolution Law Group  
21800 Oxnard Street, Suite 780  
Woodland Hills, CA 91367  
[emroz@resolutionlawgroup.com](mailto:emroz@resolutionlawgroup.com)

Martin N. Refkin, Esq. **[via U.S. mail & email]**  
Gallagher & Gallagher, PC  
1925 Century Park East, Suite 950  
Los Angeles, California 90067  
[refkin@thegallaghergroup.com](mailto:refkin@thegallaghergroup.com)

Perchlorate Email Distribution List

Mr. Gerard Thibeault **[via U.S. & email only]**  
Executive Officer  
Santa Ana Regional Water Quality  
Control Board  
3737 Main street, Suite 500  
Riverside, CA 92501-3339

Mr. Kurt V. Berchtold **[via email only]**  
Assistant Executive Officer  
Santa Ana Regional Water Quality  
Control Board  
3737 Main street, Suite 500  
Riverside, CA 92501-3339

Ms. Ann Sturdivant **[via email only]**  
Senior Engineering Geologist  
Santa Ana Regional Water Quality  
Control Board  
3737 Main street, Suite 500  
Riverside, CA 92501-3339

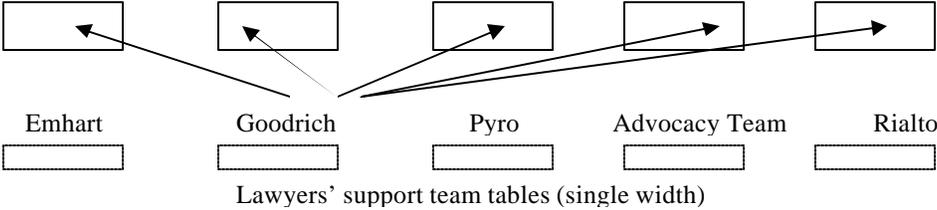
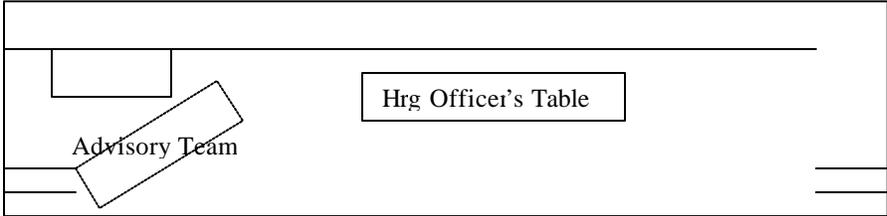
Mr. Robert Holub **[via email only]**  
Supervising Water Resource Control  
Engineer Santa Ana Regional Water Quality  
Control Board  
3737 Main street, Suite 500  
Riverside, CA 92501-3339

Erik Spiess, Esq. **[via email only]**  
Office of Chief Counsel  
State Water Resources Control Board  
1001 I Street, 22<sup>nd</sup> Floor  
P.O. Box 100  
Sacramento, CA 95812-0100

Lyris List (August 13, 2007)

State Water Board Perchlorate Hearings August 2007

Wide tables indicated are double width.



Lawyers' support team tables (single width)

