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PYRO SPECTACULARS, INC.

BEFORE THE STATE WATER RESOURCES CONTROL BOARD
OF THE STATE OF CALIFORNIA

IN THE MATTER OF PERCHLORATE CONTAMINATION AT A 160-ACRE SITE IN THE RIALTO AREA	SWRCB/OCC FILE A-1824 **PYRO SPECTACULARS, INC.'S ("PSI") REBUTTAL BRIEF** Date: July 9-12, 2007 July 18-19, 2007 Location: San Bernardino County Auditorium 850 East Foothill Blvd. Rialto, CA

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I. SUMMARY OF PSI'S REBUTTAL BRIEF

Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence. – John Adams, Second President of the United States (1735 - 1826)

No matter how much Rialto, the Advocacy Team, the community groups or water purveyors wish it were true, no matter how much passion is aroused to sway the Hearing Officer, neither Rialto nor the Advocacy Team have the facts – the necessary evidence – to prove PSI liable under Water Code Section 13304 for discharging or threatening to discharge to the waters of the State.

A. There May Be Perchlorate in the Groundwater, but There Is No Evidence That PSI Put it There

There is no scientifically reasonable way to prove that any perchlorate in groundwater beneath the 160-Acre Property came from PSI's operations. The Advocacy Team admits it has no way to prove perchlorate in groundwater came from PSI's operations. (Deposition of Robert Holub ("Holub Depo."), March 8, 2007, Vol. 1, 183:20-184:1; Deposition of Ann Sturdivant ("Sturdivant Depo."), Vol. 3, March 29, 2007, 717:15-23; Deposition of Kamron Saremi ("Saremi Depo."), Vol. 2, March 23, 2007, 447:15-448:2.) Similarly, Daniel B. Stephens, the expert hired by Rialto to prove sources that are currently contributing or threaten to contribute to the groundwater contamination in Rialto,[1] admits he does not have proof that any perchlorate from PSI is in the groundwater. (Deposition of Daniel. B. Stephens ("Stephens Depo."), Vol. 3, May 16, 2007, 808:9 - 809:13.)

Rialto's Opening Brief alleges releases of perchlorate by PSI and amounts of those releases to the ground (but not below ground or in groundwater) that are built on only speculation and misstatements of fact. Despite its numerous misstatements of fact, Rialto only puts alleged amounts of alleged releases of perchlorate from PSI on the surface of the 160-

[1] See Deposition of William Hunt taken on May 17, 2007 ("Hunt Depo."), 381:21 - 382:5.

Acre Property, with than 400 feet of soil between it and the groundwater. Rialto's and the Advocacy Team's arguments leave their case on the surface, but Water Code Section 13304 requires facts that prove a discharge of perchlorate is actually in the groundwater or at a depth that is a threat to groundwater. The facts do prove PSI liable under Water Code Section 13304.

Even Dr. Stephens does not set forth in his April 12, 2007 declaration that perchlorate from PSI is in the groundwater or is a threat to groundwater. Groundwater is more than 400 feet below ground surface at the 160-Acre Property. (Advocacy Team Submission of March 27, 2007 ("Advocacy Team Submission"), p. 5;[2] Declaration of Daniel B. Stephens submitted by Rialto on April 12, 2007 ("Stephens Decl."), p. 13.) As part of a "Final Calculation" that he used in his "Declaration" submitted on April 12, 2007, Dr. Stephens estimated that perchlorate on the surface at the 160-Acre Property would be expected to move toward groundwater at an average rate of 1.25 feet per year (15 inches per year), absent a source of water other than rainfall to mobilize the perchlorate. (Stephens Decl., pp. 14 and 16; Exhibit P 164.) Applying Dr. Stephens' "Final Calculation," it would take 320 years for perchlorate to reach groundwater from ground surface at the 160-Acre Property **(400 feet ÷ 1.25 feet/year = 320 years)**. (Stephens Depo., Vol. 3., May 16, 2007, 766:20-767:4.)[3] Any minimal amount of perchlorate remaining on the ground at the 160-Acre Property (or elsewhere in the Rialto-Colton Basin) does not meet the definition of "threaten" in Water Code Section 13304(e) because that section requires a "condition creating a substantial probability of harm, when the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to persons, property, or natural resources." No evidence exists that perchlorate from PSI's operations is within a hundred feet of groundwater. (Holub Depo.,

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[2]According to the Advocacy Team Submission: "In dry weather years, the unsaturated zone in the vicinity of the Property extends to a depth of over 450 feet below the ground surface (bgs)." (Advocacy Team Submission, p. 5.) According to the Stephens Declaration: "The approximate historical thickness of the vadose zone was estimated to have ranged . . . to as much as about 465 feet bgs during the drought years (e.g., 1999 through 2004) . . ." (Stephens Decl., p. 13.)

[3]USGS studies of the Rialto-Colton Basin result in a vadose zone transport speed of .15 inches per year, far slower than Dr. Stephens' calculation.

Vol. 4, April 9, 2007, 956:2-16.) If material was burned and there is so little of it left that it is never going to get to groundwater 400 feet below, then in terms of protection of waters of the State, it may not be considered a problem. (Holub Depo., Vol. 3, April 6, 2007, 687:9-14.) That is precisely what the facts demonstrate.

It is not possible for the Advocacy Team or Rialto to prove by a preponderance of the evidence, or by any other burden of proof, that perchlorate from PSI's operations actually reached groundwater or "threatens" groundwater. The speculation and conjecture of the Advocacy Team and Rialto are not sufficient proof, even of matters that need only be proven by a preponderance of the evidence. See generally, Roddenberry v. Roddenberry (1996) 44 Cal.App.4th 634, 651; Regents of University of California v. Public Employment Relations Bd. (1990) 220 Cal.App.3d 346, 359; Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 35, p. 184.) There must be facts that prove by a preponderance of the evidence that perchlorate from PSI's operations at the 160-Acre Property either actually reached the groundwater or "threatens" the groundwater to prove PSI's liability under Water Code Section 13304.

In contrast, Rialto and the Advocacy Team admit that Apollo Manufacturing[4] placed massive amounts of water together with massive amounts of fireworks composition, as Apollo was using 25,000-plus pounds of perchlorate a month, in the McLaughlin Pit. (Holub Depo., Vol. 3, April 6, 2007, 604:7-12; Stephens Decl., pp. 4-5.) The McLaughlin Pit is the only confirmed source of perchlorate contamination in groundwater from the 160-Acre Property. (Saremi Depo., Vol. 1, March 22, 2007, 263:19-264:2.)

Advocacy Team member Robert Holub testified in his deposition:

Q. Okay. Do you think that perchlorate underneath that swimming pool, that 209,000 micrograms per kilogram – I think it was the highest soil sample you've ever seen in your entire career in your region; right?

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[4]Apollo Manufacturing Company was the manufacturing division of Pyrotronics Corporation which manufactured fireworks at the 160-Acre Property from 1966 to 1985. To avoid confusion with PSI, we refer to Pyrotronics and all its divisions as "Apollo."

A. Yes.

Q. Do you think that came from Apollo's operations?

A. I think some of it may have.

Q. How much?

A. I don't know.

Q. All of it?

(Objection omitted.)

A. I don't know.

(Holub Depo., Vol. 3, April 6, 2007, 606:5-18.)

The facts at the 160-Acre Property are that:

- **PSI did not use TCE.**
- **PSI did not manufacture fireworks, but Apollo did.**
- **PSI did not purchase 25,000-plus pounds of perchlorate per month, but Apollo did.**
- **PSI did not build the McLaughlin Pit for the purpose of disposing fireworks manufacturing waste in water, but Apollo did.**
- **PSI did not put massive amounts of fireworks manufacturing waste into the McLaughlin Pit, but Apollo did.**
- **PSI did not put 3,000 gallons of water per day into the McLaughlin Pit, but Apollo did.**
- **PSI did not use thousands of gallons of water every day during its operations to wash out mixing and press buildings where Apollo's consumer fireworks were made, but Apollo did.**
- **PSI did not violate repeatedly a waste discharge requirement issued by the Regional Board to Apollo for the McLaughlin Pit, but Apollo did.**

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- **PSI did not sell the portion of the 160-Acre Property where the Apollo disposed of its fireworks manufacturing waste into the McLaughlin Pit to Ken Thompson, Inc., a viable company that agreed to properly close and clean up the McLaughlin Pit, but Apollo did.**
- **PSI did not fail to follow a requirement from the Regional Board that the McLaughlin Pit be closed pursuant to Subchapter 15, but Apollo and Ken Thompson, Inc. did.**

The Advocacy Team attempts to excuse its failure to pursue clearly liable parties Apollo and Ken Thompson, Inc. as follows: "From 1964 to 1987, several other tenants involved in pyrotechnics (fireworks) manufacturing occupied portions of the Property. However, those tenants no longer exist or are no longer viable companies, and there are no known successors that have any responsibility for those former operations. If new evidence comes to light that indicates that either successors to these companies exist, or these companies have insurance coverage that would form a basis to name them to this Order, they could be added to this Order at a later date." (Advocacy Team Submission, pp. 3-4.) (Emphasis added.) However, Rialto has the evidence that Apollo had insurance coverage. (Exhibit P 1 41.) Ken Thompson, Inc. ("KTI") which bought the property from Apollo and agreed to properly close and clean up the McLaughlin Pit is a viable company. (Deposition of Ken Thompson, April 6, 2007 ("Thompson Depo."), 51:13-17, 178:23-24, 179:3-5.)

The two companies where the facts and evidence exist that actually establish liability for perchlorate in the groundwater from the 160-Acre Property have not been pursued by Rialto or the Advocacy Team. Advocacy Team members were involved in the failure to make Apollo or KTI properly close and clean up the McLaughlin Pit for the past twenty years. Under the California Environmental Quality Act, Rialto has had the power for twenty years, and continues to have the power to require KTI to comply with the mitigated negative declaration issued by Rialto in connection with KTI's conditional use permit. With no evidence that perchlorate from PSI is in groundwater or even threatens groundwater, the Advocacy Team and Rialto chose to pursue PSI, a small business with limited financial resources, for investigation, clean-up of

the entire Rialto-Colton Basin and to provide replacement water for Rialto's entire water supply system which includes four other basins where PSI never was located.[5]

B. Rialto's Claim For Replacement Water Due To Perchlorate Contamination From The 160-Acre Property is Bogus

Rialto claims that the Hearing Officer should order PSI to submit a water replacement plan to make it "whole." (Rialto Opening Brief, 122:23 - 123:2.) Getting past Rialto's unsupported rhetoric, and focusing on the "stubborn" facts, it is clear that no water supply problems were caused by the alleged perchlorate contamination from the 160-Acre Property or by PSI. Rialto is meeting the water supply demands of its customers and projects it will do so through 2030. (Hunt Depo., 168:10-169:10; Exhibit P 157 at pp. 64-70.) Quite simply, regardless of the alleged perchlorate contamination from the 160-Acre Property, Rialto is pumping all the water to which it is legally entitled from the Rialto-Colton Basin. Rialto's claims to the contrary are contradicted by Rialto's Urban Water Management Plan and the testimony under oath of Rialto's own experts.

As a first threshold requirement for a water replacement order, there must be facts to support a finding that PSI is liable under Water Code Section 13304. This threshold requirement is ignored by Rialto. Because there is no basis for the issuance of a cleanup and abatement order against PSI under Water Code Section 13304, there can be no replacement water order.

As a second threshold requirement for a water replacement order, Rialto must prove that a discharge of perchlorate by PSI has "affected" each water supply well for which replacement water is sought. (Water Code Section 13304(a); July 13, 2004 e-mail from the Regional Board Executive Officer Gerard Thibeault to the Regional Board (Exhibit P 128).) This second threshold requirement also is disregarded by Rialto. Neither the Advocacy Team nor Rialto have made the required showing. Indeed, the Advocacy Team has admitted it cannot make

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[5]Admissible evidence of PSI's limited financial resources is set forth in the Declaration of Cheryl A. Samperio (PSI 2001802-04) submitted by PSI on April 17, 2007.

this showing. (Holub Depo., Vol. 4, April 9, 2007, 933:19 - 934:20, 934:21 - 935:15.) Rialto offers no evidence to the contrary.

The facts that establish that Rialto's water replacement claim against PSI are bogus:[6]

- **Perchlorate Contamination in the Rialto-Colton Basin Is Not Preventing Rialto from Pumping Water.** Peter Fox is Rialto's Water Superintendent. (Deposition of Peter Fox, May 2, 2007 ("Fox Depo."), 14:14-15:11.) Mr. Fox was tendered by Rialto for deposition to testify as its most knowledgeable witness on the issue of Rialto's alleged replacement water costs and damages. As its person most knowledgeable, Mr. Fox was testifying as if he were the City of Rialto. According to Mr. Fox, Rialto has an adequate supply of water to meet the needs of its citizens. (Fox Depo., 190:8-14; 191:9-192:4.) Rialto has the capacity to meet all California Department of Health Services water supply requirements. (Fox Depo., 192:6-193:2, 255:6-13.) Rialto has never failed to meet the water supply needs of its customers. (Hunt Depo., 182:3-18, 371:21-25.)
- **Rialto's Urban Water Management Plan Dated February 2006 States That Rialto Will Be Able to Meet Its Projected Water Supply Going Forward 25 Years to 2030.** (Hunt Depo., 168:10-169:10; Exhibit P 157 at pp. 64-70.) Indeed, in its Urban Water Management Plan, Rialto states it will have a water supply surplus of 11,066 acre-feet per year in 2010, and a surplus of 13,566 acre-feet per year by 2030. (Hunt Depo., 169:22-170:5.)
- **Sources of Perchlorate Unrelated to the 160-Acre Property Exist and Rialto Does Not Account for Them.** Rialto's claim for replacement water is largely

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[6]The Draft CAO purports to include water replacement claims for the City of Colton and the West Valley Water District. Neither the Advocacy Team, Colton nor the West Valley Water District have submitted any evidence regarding replacement water for the Colton or West Valley Wells. Accordingly, these claims have been abandoned and there is nothing for PSI to rebut on this issue. In PSI's Opening Brief, PSI demonstrated that the Advocacy Team had no evidence to establish that any perchlorate from PSI's operations at the 160-Acre Property impacted any well. (See PSI's Opening Brief, pp. 35-36 at PSI 10000038-39.)

based on the Declaration of William Hunt submitted by Rialto on April 12, 2007. At his deposition, Mr. Hunt admitted that the opinions in his declaration are based on a "global, systemwide view" of the Rialto water supply system. (Hunt Depo., 380:4-6.) Mr. Hunt's opinions are not limited to addressing water supply problems allegedly caused by perchlorate discharges at the 160-Acre Property. (Hunt Depo., 379:16-380:3.) Rialto is attempting to have the Hearing Officer make PSI liable for Rialto's entire water supply system, even though Rialto has presented no facts to establish any perchlorate from PSI's operations at the 160-Acre Property is in the groundwater anywhere, or is in a well anywhere. Furthermore, the facts are that PSI operated on the surface of only the Rialto-Colton Basin which is over 400 feet above the groundwater.

- **There Is Perchlorate in Four of the Five Basins from Which Rialto Pumps Groundwater. PSI Operated on the Surface of Only One of Those Four Basins, with over 400 Feet of Vadose Zone Between the Surface and Groundwater.** Rialto pumps from five basins, only one of which is the Rialto-Colton Basin. (Hunt Depo., 47:15-48:8.) Four of the five basins are contaminated with perchlorate, TCE or both. (Rialto's Urban Water Management Plan, Exhibit P 157 at p. 62.) Just in the Rialto-Colton Basin alone, there is perchlorate, TCE and PCE contamination from the County of San Bernardino Mid-Valley Landfill and perchlorate contamination from Chilean nitrate fertilizer, including City of Colton and West Valley Water District water wells in the lower Rialto-Colton Basin. (Hunt Depo., 171:15-172:6; Fox Depo., 99:9-101:11; Holub Depo., Vol. 1, March 8, 2007, 130:11-17, 130:24 - 131:12.) In light of these undisputed facts, PSI cannot possibly be liable to Rialto on its phoney "replacement water" claim.
- **Rialto's Water Supply Is Constrained Much More by Factors Other Than Contamination in the Rialto-Colton Basin.** These other factors include water rights restrictions, political, economic and engineering restraints and two wells

in the Lytle Creek Basin that are not operational. (Hunt Depo., 147:14-148:2, 347:13-350:18.) Mr. Hunt's opinions do not separate the alleged impacts on Rialto's water supply from perchlorate contamination from the surface of the160-Acre Property from these numerous other factors. (Hunt Depo., 379:16-380:3.)

- **Rialto's Alleged Water Supply "Crisis" Was Caused by Existing Water Rights Limitations and Sales of Water Rights by Rialto.** Through the adjudication of its water rights in the Rialto-Colton Basin and various water rights leases by which Rialto received over $12 million, Rialto limited itself to the amount of water it can extract from the Rialto-Colton Basin. Rialto's pumping of groundwater from the Rialto-Colton Basin is restricted by the 1961 Decree. Rialto Well Nos. 1 through 6 are in the Rialto-Colton Basin and are subject to the water rights restrictions of the 1961 Decree. (Hunt Depo., 90:2-91:8.) Water restrictions under the 1961 Decree have been in effect since 2003 and remain in effect. (Fox Depo., 101:13-102:1, 102:20-103:4.) Under the 1961 Decree, the amount Rialto currently can pump from the Rialto-Colton Basin is limited to 4,366 acre-feet per year. (Hunt Depo., 100:2-18.) In 2000, Rialto leased 1,600 acre-feet per year of its water from the Rialto-Colton Basin to the County of San Bernardino for 20 years ("the 2000 Rialto-County Water Rights Lease"), which then leased it to Fontana Water Company. (Fox Depo., 95:17-96:8.) Under the 2000 Rialto-County Water Rights Lease, Rialto received a nearly immediate multi-million dollar cash infusion of $12.875 million, plus a stream of payments of at least $1.28 million ($64,000 per year for 20 years) and up to $4.8 million ($240,000 per year for 20 years). (Exhibit P 176, p. 5 at PSI 4001153.) The County of San Bernardino wanted he 2000 Rialto-County Water Rights Lease for operation of the County of San Bernardino's pump and treat system for a TCE/PCE contamination plume migrating from the County's Mid-Valley Landfill. The 1,600 acre-feet per year of water under this lease counts against the amount

of water Rialto is entitled to extract from the Rialto-Colton Basin under the 1961 Decree. (Fox Depo., 99:9-101:11; Hunt Depo., 170:23-171:9, 171:15-172:6.)

- **Using Rialto Well 3 (Which Has a Treatment System Paid for by the County of San Bernardino for Perchlorate Contamination Migrating off the Mid-Valley Sanitary Landfill) and Rialto Well 5 (Which Is Not Impacted by Perchlorate), Rialto Can Pump All of the Water it Is Currently Entitled to from the Rialto-Colton Basin under the 1961 Decree.** (Fox Depo., 210:1-20.) The California Department of Health Services told Rialto that Rialto Wells 1, 2, 4 and 6 can be used as well to pump the basin. (Fox Depo., 135:12-136:21; Exhibit P 155.) New well head treatment systems or artificial recharge in the Rialto-Colton Basin will not increase the amounts Rialto can legally extract from that basin.
- **The Rialto-Colton Basin Is in an Overdraft Situation Wholly Unrelated to Contamination.** (Hunt Depo., 357:2-10.) Water levels have remained low in the Rialto-Colton Basin since 2003, even though there was a very wet year. (Hunt Depo., 101:15-102:15.) The initial drop in water levels in 2003 was due to a drought. (Fox Depo., 103:16-22.) No operations at the 160-Acre Property caused the water levels to drop within the Rialto-Colton Basin. That was caused by over pumping. (Rialto Urban Water Management Plan, Exhibit P 157 at p. 21.) According to Susan Trager, Rialto's counsel: "It is FWC's [Fontana Water Company] pumping that seems to us to place the Rialto Basin in a permanent drought condition, so that the lease can be triggered, and FWC gets more of that cheap, clean water. For some years, it's a lack of precipitation, but we didn't see the rebound that should have occurred following the huge rains a couple of years ago." (E-mail from Susan Trager, counsel for Rialto, dated February 23, 2007, Exhibit P 152.) Rialto projects that the pumping limitations in the 1961 Decree will remain in effect through 2030. (Rialto Urban Water Management Plan, Exhibit P 157 at pp. 64-70.)

The facts are that the requirements for the issuance of a replacement water order to PSI are not met.

C. Rialto Has No Recoverable Costs

The Advocacy Team seeks recovery of its own costs and those incurred by Rialto, Colton, and West Valley Water District to clean up the alleged contamination. (Draft CAO, ¶ 73.)[7] There cannot be a recovery of costs in this proceeding because the Advocacy Team cannot prove the threshold requirement that PSI is liable under Water Code Section 13304. In addition, cost recovery claims must be brought in court. Water Code Section 13304(c). Rialto concedes that cost recovery claims must be brought in court. (Rialto's Opening Brief, 133:1-4.) Despite its concession, Rialto then proceeds to request that it be awarded water replacement costs in this proceeding.

In addition to the lack of a statutory basis for cost recovery in this proceeding, Rialto's alleged water replacement costs are totally unsupported by the evidence for the following reasons:

- **Rialto Has No Idea Whether the Costs Claimed by it Were Incurred as a Result of Any Perchlorate That May Have Come from the 160-Acre Property.** Rialto's Water Superintendent, Peter Fox, was tendered by Rialto for deposition to testify as its most knowledgeable witness on the issue of Rialto's alleged replacement water costs and damages. As its person most knowledgeable, Mr. Fox was testifying as if he were the City of Rialto. However, Mr. Fox has no idea whether the costs claimed by Rialto were incurred as a result of perchlorate from the 160-Acre Property. (Fox Depo., 186:1-187:5.) In addition, in his Declaration submitted on April 12, 2007 and in his deposition testimony, Mr. Fox did not determine which of Rialto's alleged costs or damages are attributable to perchlorate from PSI. (Fox Depo., 235:4-236:10, 252:17-23.) Once again, Rialto attempts to make PSI liable for Rialto's treatment of its entire water supply, even

[7]Neither the Advocacy Team, Colton nor the West Valley Water District has submitted any evidence regarding alleged recoverable costs. Accordingly, these claims have been abandoned in this proceeding and there is nothing for PSI to rebut on this issue.

though Rialto has no facts to show that any perchlorate from PSI's operations, with over 400 feet of vadose zone between PSI and groundwater in the Rialto-Colton Basin, caused any perchlorate impacts to any groundwater or any of Rialto's wells.

- **Rialto Has No Water Replacement Costs at All.** Since at least 2003, the California Department of Health Services never told Rialto to take a well out of service so long as it has perchlorate detections below ten times the action level. In this regard, the California Department of Health Services told Rialto that Rialto Well Nos. 1, 2, 4 and 6 can be used. (Fox Depo., 135:12-136:21; Exhibit P 155.) Because Rialto can legally continue to operate its other wells in the Rialto-Colton Basin, and simply elected not to under its own "zero tolerance" policy, it has no water replacement costs.
- **Chino Well No. 1 and Chino Well No. 2 are <u>not</u> in the Rialto-Colton Basin.** (Hunt Depo., 48:4-16; 51:19-21.) Nevertheless, Rialto claims over $2 million in water replacement costs for the installation and operation of treatment systems on Chino Well No. 1 and Chino Well No. 2. (Rialto Opening Brief, 133:1-134:11.) Both Chino Well No. 1 and Chino Well No. 2 are impacted by perchlorate, and in the case of Chino Well No. 1 by nitrates, none of which come from the 160-Acre Property. According to both of Rialto's hydrogeological experts, the perchlorate in Chino Well No. 1 and Chino Well No. 2 is not from releases at the 160-Acre Property. (Stephens Depo., Vol. 3, May 16, 2007, 794:17 - 797:4; Hunt Depo., 56:16-21.) Rialto solicited a bid to install a well head treatment system for perchlorate on Rialto No. 2 at the same time it solicited bids for Chino Well No. 1 and Chino Well No. 2. (Fox Depo., 73:25-74:14.) Rialto Well No. 2 is in the Rialto-Colton Basin which is subject to the pumping imposed by the 1961 Decree restrictions. (Fox Depo., 89:21-90:7.) Rialto decided to install the well-head treatment systems on Chino Well Nos. 1 and 2 <u>because, unlike Rialto Well No. 2, they were not subject to pumping restrictions</u>. (Fox Depo., 76:18-77:5,

81:7-82:10, 89:21-90:7, 118:6-25.) Rialto has already been reimbursed for costs of installing the treatment systems on Chino Well No. 1 and Chino Well No. 2. (Fox Depo., 158:9-159:6, 183:9-184:3.)

- **Under the 1961 Decree, Rialto Already Is Pumping All the Water it Can Legally Extract from the Rialto-Colton Basin.** There are no water rights restrictions on the amount of water that Rialto can pump from Chino Wells 1 and 2. (Hunt Depo., May 17, 2007, 360:24-362:10.) This is why Chino Well No. 1 and Chino Well No. 2 were fitted with treatment systems. (Fox Depo., 76:18 - 77:5, 81:7-10, 89:21 - 90:7, 118:6-25.)
- **By the Time it Entered into its Short-term Lease with Colton, Rialto Had Already Pumped All the Water from the Rialto-Colton Basin to Which it Was Legally Entitled under the 1961 Decree.** Regardless, Rialto seeks water replacement costs of $166,500 for water it purchased from Colton. (Rialto's Opening Brief, 134:8-9.) In July 2003, Rialto entered into a short term lease agreement with Colton to pump 1,500 acre-feet of additional water from the Rialto-Colton Basin. By this time, Rialto had already pumped all the water from the Rialto-Colton Basin to which it was legally entitled under the 1961 Decree. Rialto entered the lease with Colton so it could obtain additional water it needed to get through the summer. (Hunt Depo., 180:21-181:14; Fox Depo., 111:5-23, 115:23–117:21.) Perchlorate contamination had nothing to with Rialto needing more water after it exhausted its entitlement under the 1961 Decree. In fact, despite Rialto's claims about perchlorate preventing it from pumping the Rialto-Colton Basin, in 2003 Rialto apparently was able to pump its full 4,366 acre-feet under the 1961 Decree and the additional 1,500 acre-feet of additional water it purchased from Colton.
- **Rialto Has Not Calculated Costs Rialto Would Otherwise Have to Pay Without Perchlorate Contamination.** PSI or others should not have to pay any of the costs to purvey water that Rialto would otherwise have to pay without

perchlorate contamination. Rialto's expert, Mr. Hunt, referred to these amounts over what Rialto would otherwise have to pay without perchlorate contamination as "extraordinary costs." Mr. Hunt does not know the amount of extraordinary costs incurred by Rialto due to the perchlorate contamination. (Hunt Depo., 311:9-23.) Not surprisingly, Rialto only has submitted evidence of its claimed replacement water costs, but has not submitted any evidence of what its costs for water would be without perchlorate. Without this offset, the net result is PSI would have to provide Rialto free water, which is certainly not required by Water Code Section 13304.

- **Rialto Already Has Received Many Times the Amounts it Is Claiming in These Proceedings to Address the Perchlorate Problems.** For example, according to Mr. Hunt, Rialto has received approximately $3.4 million to address the perchlorate problems. (Hunt Depo., 385:232-386:1.) Rialto has not spent at least $1 million of the money it received. (Fox Depo., 187:6-17.) As demonstrated below, Rialto actually has received much more than $3.4 million and still has not spent at least $2.3 million.

There is no statutory basis for cost recovery in this proceeding. In addition, there is no evidence to justify a cost recovery award against PSI.

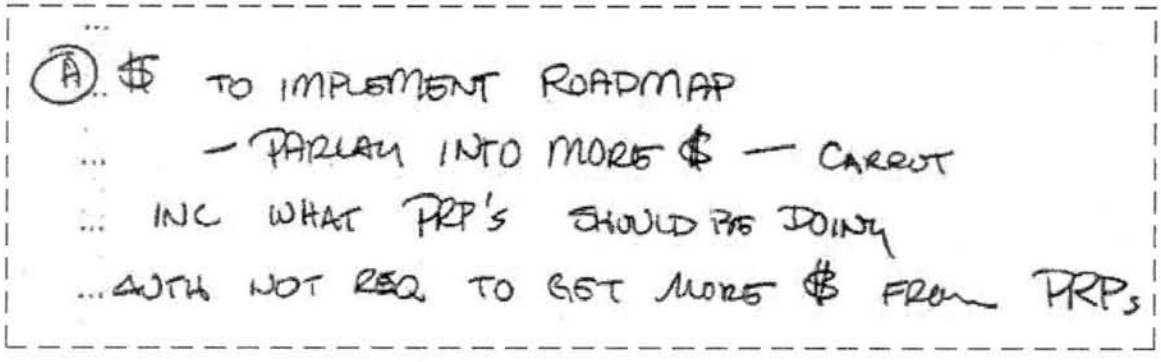
D. Rialto's Claims For More Investigation Are Without Merit And For An Improper Purpose

PSI performed all investigation requested of it by the RWQCB for the 160-Acre Property. Between soil sampling, well installation and quarterly sampling of its wells, PSI has expended approximately $1.5 million in responding to perchlorate and TCE conditions at the 160-Acre Property. (Declaration of Brian L. Zagon submitted on April 17, 2007 ("Zagon Decl."), ¶ 2.) No additional investigation has been requested by the RWQCB.

Rialto, in its "Roadmap to Remedy" document (the "Roadmap"), seeks tens of millions of dollars in additional investigation for the 160-Acre Property. In part, Rialto claims 16 additional Westbay multi-port wells and 12 additional multi-depth wells are needed to complete

the investigation. (Roadmap, ES-9 to ES-16.) Due to the depth and difficult drilling conditions, the cost of a single Westbay well easily could exceed $1 million. (Stephens Depo., Vol.3, May 16, 2007, 803:1-804:14.)

Rialto's plan is made clear in the notes of Jenny Sterling, the project manager for Daniel B. Stephens & Associates, Rialto's expert hired to prove sources that are currently or threaten to contribute to the perchlorate contamination in Rialto. In a conversation Ms. Sterling participated in with Rialto's counsel on January 30, 2007, Ms. Sterling recorded that the "$ to implement Roadmap – Parlay into more $ – Carrot" and it was to "...get more $ from PRPs." (Exhibit P 149.) An excerpt of these notes is reproduced below:



There is no doubt this explains why the Roadmap seeks investigation for areas at the RABSP other than the 160-Acre Property. Investigation for areas outside of the 160-Acre Property are beyond the scope of this proceeding. (Draft CAO, ¶1; Notice of Public Hearing dated February 23, 2007, pp. 1-2; Second Revised Notice of Public Hearing dated April 3, 2007, pp. 1-2; Third Revised Notice of Public Hearing dated April 24, 2007, pp. 1-2.)

In furtherance of its improper purpose, Rialto suggested that its expert, Dan Stephens, and his staff, avoid dischargers at the 160-Acre Property that are "judgment proof," and instead to keep focused on Goodrich, WCLC and PSI. (Exhibit P 153.) On February 24, 2007, Jenny Sterling sent an e-mail to Rialto's counsel advising that the Broco disposal pit in the Southeast corner of the 160-Acre Property had "a significant release of perchlorate" and "presents a threat to groundwater." (Id.) Sampling results for soil at the Broco disposal pit were as high as 212,000 ug/Kg. (Id.) 212,000 ug/KG is the highest soil sample for perchlorate on the entire

160-Acre Property. Ms. Sterling also stated that neither the lateral nor vertical extent of the perchlorate contamination at the Broco disposal pit had been determined. (Id.)

One of Rialto's attorneys responded the next day. He told Ms. Sterling, Dan Stephens and others that: (1) Broco was judgment proof; (2) under what factual scenarios he believed Goodrich, WCLC or the fireworks occupants could be liable for contamination detected in the Broco disposal pit; and, (3) ". . . we should also be thinking of who the responsible party is/should be, and what might happen if the costs of remediating this pit are 'orphaned' because there is no solvent responsible party." (Id.) An excerpt of Exhibit P 153 is reproduced below:

From: Cris Carrigan [CCarrigan@mmblaw.com]
Sent: Sunday, February 25, 2007 11:50 AM
To: Sterling, Jenny; scott.sommer@pillsburylaw.com; Robert A. Owen; smt@tragerlaw.com; Francis D. Logan; Elliott, Mark; Julie Macedo; Bill Hunt
Cc: Sweetland, Nicole; Casadevall, Bill; Stephens, Daniel B.; Eric Benisek
Subject: RE: New information - Goodrich/Black & Decker Site

An excellent report. One thing to keep in mind about Broco, Broco Environmental and Denova is that, as far as we know, they are all judgment proof. Another is that, as far as we know (and we have looked closely) DTSC has tapped all available insurance assets. If this pit was used by Broco/Denova in the time frames it operated at 2824 Locust, then Goodrich, WCLC and the fireworks occupants are all out of the picture on liability(because they all left the site before then), leaving the current owner as the only potentially viable financial entity for liability for this pit. I am curious as to what other types of explosive/hazardous constituents are being found at this pit. A broad array of constituents would tend to indicate it was used by Broco/Denova as the OB or OD unit since Broco/Denova burned and detonated virtually every kind of explosive hazardous material. A perchlorate-only profile might indicate this was a disposal pit created and/or used by one of Broco/Denova's predecessors since it was a more dominant chemical constituent in their manufacturing processes and waste streams. Most of the historic documents we have reviewed indicate that the 2824 location was used primarily as Broco's "lab," but Broco was a very dirty company and much of its business operation was clandestine. One rationale for DTSC not following up on the 2824 Locust location when it was closing the then-operable Alder Street OB/OD Unit was that the Locust location was supposed to have been "just the lab." No one really looked more closely until the 2003 incident mentioned below. There is deposition testimony about pits of this size and depth being used by WCLC, Pyrotronics and Goodrich, although the Goodrich witnesses have consistently located its disposal pits on aerial photographs and site diagrams further west. Obviously, we need to account for this perchlorate and its remediation in the Roadmap, but we should also be thinking of who the responsible party is/should be, and what might happen if the costs of remediating this pit are "orphaned" because there is no solvent responsible party. Thanks! Cris

Rialto's plan to scare people into paying more money to settle, by deliberately asking its expert to inflate the costs of investigation must be rejected. PSI has completed substantial soil and groundwater investigation at great expense. The facts establish that no evidence exists that PSI has discharged perchlorate to groundwater or in a manner that threatens groundwater. Accordingly, there should be no further investigation orders against PSI in connection with the 160-Acre Property.

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II. ANY CLAIMS THAT ANY CONTAMINATION FROM THE 160-ACRE PROPERTY IS AFFECTING RIALTO'S ABILITY TO SUPPLY WATER ARE BOGUS

A. Rialto And The Advocacy Team Cannot Meet The Threshold Requirements For A Water Replacement Order

As a first threshold requirement for a water replacement order, there must be facts to support a finding a of liability under Water Code Section 13304. This threshold requirement is ignored by Rialto. Because there is no basis for the issuance of a cleanup and abatement order against PSI under Water Code Section 13304, there can be no replacement water order.

As a second threshold requirement for a water replacement order, Rialto must prove that a discharge of perchlorate by PSI has "affected" each water supply well for which replacement water is sought. (Water Code Section 13304(a); July 13, 2004 e-mail from the Regional Board Executive Officer Gerard Thibeault to the Regional Board (Exhibit P 128).) This second threshold requirement similarly is disregarded by Rialto. Neither the Advocacy Team nor Rialto have made the required showing. Indeed, the Advocacy Team has admitted it cannot make this showing. (Holub Depo., Vol. 4, April 9, 2007, 933:19 - 934:20, 934:21 - 935:15.) Rialto offers no evidence to the contrary.

B. Deposition Testimony From Rialto's Water Superintendent And Expert Makes Clear Rialto Has An Adequate Water Supply To Meet Its Needs

According to testimony from Rialto's Water Superintendent, Peter Fox, Rialto has an adequate supply of water to meet the needs of its citizens. (Fox Depo., 190:8-14; 191:9-192:4.) Mr. Fox also testified Rialto has the capacity to meet all California Department of Health Services water supply requirements. (Fox Depo., 192:6-193:2, 255:6-13.) Rialto has never failed to meet the water supply needs of its customers. (Hunt Depo., 182:3-18; 371:21-25.)

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Rialto's Urban Water Management Plan, adopted by the Rialto City Council in May 2006 proves that Rialto has more water than it needs to supply its customers now and through at least 2030. (Exhibit P 157, p. 64.) Table 7-1 of the Urban Water Management Plan is reproduced below:

Table 7-1
Projected Normal Water Year Supply and Demand Comparison
Period 2010-2030 (AF/Yr)

	2010	2015	2020	2025	2030
Lytle Creek Basin	5,600	5,600	5,600	5,600	5,600
North Riverside Basin	4,500	4,500	4,000 [1]	4,000	4,000
Rialto Basin	2,766	2,766	4,366 [2]	4,366	4,366
Bunker Hill Basin	6,000	6,000	6,000	6,000	6,000
Chino Basin	1,700	1,700	1,700	1,700	1,700
Lytle Creek Surface Water	1,300	1,300	1,300	1,300	1,300
SBVMWD / Baseline Feeder	2,500	2,500	2,500	2,500	2,500
SUPPLY	**24,366**	**24,366**	**27,466**	**27,466**	**27,466**
DEMAND	**13,300**	**13,900**	**13,900**	**13,900**	**13,900**
SURPLUS	**11,066**	**10,466**	**13,566**	**13,566**	**13,566**

[1] The City's production in the North Riverside basin is projected to be 4,000 AF/yr once the City of Riverside utilizes their extraction rights.
[2] The agreement to lease 1,600 AF/yr of the City's Rialto Basin water rights during drought conditions with the County of San Bernardino will terminate in the year 2020, allowing the City to utilize their full 4,366 AF/Yr water right in the basin.

"The long term drought water supply for the City from the Rialto Basin is expected to be approximately 2700 AF/Yr (4300 AF/Yr minus 1600 AF/Yr for SGVWC) when the index wells for the Rialto Basin remain between 1002.3' and 969.7' msl. When the index wells drop below 969.7' msl, the City's pumping rights could be restricted to as little as 583 AF/Yr (4366 x 50% minus 1600.)" (Rialto Urban Water Management Plan, p. 21, Exhibit P 157 at PSI 400063.) (Emphasis added.) According to Mr. Hunt, "In its Urban Water Management Plan, Rialto predicts that the 4,366 acre-feet limitation in effect under the 1961 Decree will remain in effect going forward 25 years to 2030." (Hunt Depo., 176:2-7.) Thus, Table 7-1 assumes essentially

a permanent limitation of a total of 4,366 acre-feet per year due to over pumping the basin. This can be further verified by reviewing Tables 7-2, 7-3, 7-4, 7-5, 7-6 and 7-7 of the Urban Water Management Plan which address projected water supply in dry years and multiple dry years. (Rialto Urban Water Management Plan, pp. 65-70, Exhibit P 157 at PSI 4000107 to PSI 4000112.) Never is there a projected year where Rialto is expected to pump more than 4,366 acre-feet per year from the Rialto-Colton Basin.

As the Urban Water Management Plan makes clear, the 4,366 limitation cannot be reached now because of the lease of 1,600 acre-feet per year to the County of San Bernardino, not as a result of any contamination of the Rialto-Colton Basin. Table 7-1 shows this because for 2010 and 2015 it projects only a supply of 2,766 acre-feet per year from the Rialto-Colton Basin which is exactly 1,600 acre-feet per year less than the maximum of 4,366 acre-feet per year (4,366 - 1,600 = 2,766). Note footnote (2) to table 7-1 which says: "The agreement to lease 1,600 AF/yr of the City's Rialto Basin water rights during drought conditions with the County of San Bernardino will terminate in the year 2020, allowing the City to utilize its full 4,366 AF/Yr water right in the basin." (Emphasis added.)

C. Rialto's Request For A Replacement Water Order Is Not For The Rialto-Colton Basin, It Is For Rialto's Entire Water Supply System

Rialto's claim for replacement water is largely based on the Declaration of William Hunt submitted by Rialto on April 12, 2007. At his deposition, Mr. Hunt admitted that the opinions in his declaration are based on a "global, systemwide view" of the Rialto water supply system. (Hunt Depo., May 17, 2007, 380:4-6.) Mr. Hunt's opinions are not limited to addressing water supply problems allegedly caused by perchlorate discharges at the 160-Acre Property. (Hunt Depo., May 17, 2007, 379:16-380:3.)

There is perchlorate in four of the five basins from which Rialto pumps groundwater. PSI operated on the surface of only one of those four basins, with over 400 feet of vadose zone between the surface and groundwater. Rialto pumps from five basins, one of which is the Rialto-Colton Basin. (Hunt Depo., May 17, 2007, 47:15-48:8.) Four of the five basins are contaminated with perchlorate, TCE or both. (Rialto Urban Water Management Plan, Exhibit

P 157 at p. 62.) PSI is located on the surface approximately 400 feet above only the Rialto-Colton Basin. Just in the Rialto-Colton Basin, there is perchlorate, TCE and PCE contamination from the County of San Bernardino Mid-Valley Landfill and perchlorate contamination from Chilean nitrate fertilizer. (Hunt Depo., May 17, 2007, 171:15-172:6; Fox Depo., May 2, 2007, 99:9-101:11; Holub Depo., Vol. 1, March 8, 2007, 130:11-17, 130:24 - 131:12.) In light of these undisputed facts, Rialto seeks to make PSI liable to provide replacement water for not only the entire Rialto-Colton Basin, but Rialto's entire water supply system.

D. Rialto Could Have Put Well Head Treatment On Wells In The Rialto-Colton Basin, But It Would Not Have Done Rialto Any Good, Since Pumping Those Wells Would Have Been Prohibited By Water Rights Restrictions And Recent Sales Of Water Rights By Rialto

The next stubborn fact is that contamination in the Rialto-Colton Basin is not preventing Rialto from using its maximum water rights there. Since at least 2003, water restrictions wholly unrelated to contamination have limited Rialto from pumping in the Rialto-Colton Basin. (Fox Depo., 115:23 - 116:12.) Mr. Fox testified under oath that Rialto has been able to pump its full water rights amount from the Rialto-Colton Basin going back to July 2003. (Fox Depo., 115:23 - 116:12.)

These water rights restrictions are triggered by limitations in the 1961 Decree to which Rialto is a party and as a result of two factors that have nothing to do with perchlorate contamination: (1) The 2000 Rialto-County Water Rights Lease; and, (2) Over pumping by Fontana Union Water Company.

According to the Urban Water Management Plan lease to the County:

"The City has entered into an agreement with the County of San Bernardino, to lease 1,600 AF/yr of its Rialto Basin water rights during drought conditions in order to allow the San Gabriel Valley Water Company (SGVWC) to continue to extract and remove VOCs from the Mid-Valley Landfill contamination plume. A

separate agreement provides Rialto with funding to drill a well to make up for the lost supply. This agreement will terminate in the year 2020."

(Rialto Urban Water Management Plan, p. 21, Exhibit P 157 at PSI 4000063.) (Emphasis added.) As the agreement for sale of water rights from Rialto to the County of San Bernardino itself makes clear, the County bought the 1,600 acre-feet per year from Rialto to implement its remedial plan for "Clean-up and Abatement Order No. 98-96 for San Bernardino County Waste System Division Mid-Valley Sanitary Landfill San Bernardino County." (Exhibit P 176, pp. 1, 4.) Peter Fox, Rialto's Water Superintendent testified:

Q. Going back now to the 1600-acre-feet lease with the county, what is the purpose, to your understanding, for that lease?

A. Well, it was one that was brokered by the director at that time, and I was not involved with it. It was John Girardi. And it's one to accommodate a TCE plume that was omitting off of the landfill, and they needed to be able to provide water rights to Fontana to be able to have them pump and extract and treat the water that's coming down from that area. That's as I understand it.

(Fox Depo., 99:9-19.) Similarly, Mr. Hunt testified:

"This 20-year lease was required for operation of the County of San Bernardino's pump and treat system for the PCE contamination plume migrating off the County's Mid-Valley Landfill. Neither the lease nor the County's treatment system has anything to do with the perchlorate plume. (Hunt Depo., 170:23-171:9.) The 1,600 acre-feet per year of water under the County lease counts against any restrictions that are in place under the 1961 Decree." (Hunt Depo., 171:15-172:6.)

In other words, the reduction in Rialto's water rights by the 2000 Rialto-County Water Rights Lease has nothing to do with any alleged contamination from the 160-Acre Property.

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The 2000 Rialto-County Water Rights Lease had multi-million dollar financial benefits for Rialto. Specifically, the 2000 Rialto-County Water Rights Lease resulted in:

- "[T]he County satisfying the only outstanding conditions related to the payment of $12.5 million by the County to Rialto under the terms of the Development Agreement related to the Landfill expansion entered into between the County and Rialto on June 16, 1998." (Exhibit P 176, p. 5 at PSI 4001153.) (Emphasis added.) This is the same landfill expansion approved by the Regional Board, including members of the Advocacy Team, that resulted in perchlorate contamination near the Mid-Valley Landfill. (See PSI's Opening Brief, pp. 47-51 at PSI 1000050-54.)
- "The County's obligation to pay $1.375 million to Rialto toward the cost of the water production well as proposed" in the Bunker Hill Basin. (Exhibit P 176, p. 5 at PSI 4001153.)
- Rialto's receipt of "an annual payment of $40 per acre foot (or $64,000; $40 times 1,600 acre-feet for making the standby water rights available." (Exhibit P 176, pp. 5-6 at PSI 4001153 - PSI 4001154.) In other words, Rialto receives $64,000 per year under the 2000 Rialto-County Water Rights Lease, whether or not the County needs the water rights.
- Rialto's receipt of "an additional payment of $100 per acre feet for each acre foot of water which is actually produced . . . or up to an additional $160,000; $100 times 1,600 acre-feet). (Exhibit P 176, p. 6 at PSI 4001154.) When the 1,600 acre-feet are being pumped, as now, Rialto receives $160,000 additional per year from the Rialto-County water rights sale for a total of $240,000 per year.

Since Rialto expects the Rialto-Colton Basin to be in overdraft during the remaining term of the 2000 Rialto-County Water Rights Lease,[8] Rialto will receive a total of $3,120,000 ($240,000

[8]Rialto Urban Water Management Plan, Exhibit P 157, pp. 64-70 at PSI 4000106 - PSI 4000112.)

times 13 years) from 2007 to 2020 when the deal expires, assuming no party exercises its rights to extend the deal.

Counsel for Rialto, Susan Trager, explained the reason for the lease to the County from the perspective of Rialto:

> "Our belief is that Fontana Water Company has behaved in an opportunistic manner to pump enough out of its unadjudicated and adjudicated Rialto Basin wells to trigger the free water it gets under its 1600 AFA lease agreement with Rialto which Rialto made with it at the request of the County when the County was attempting to move forward with the Mid-Valley Sanitary Landfill expansion and FWC, CCVWD, San Gabriel Valley Water Company, and Fontana Resources threatened a CEQA suit. At the time, Rialto acceded to the County's request because it received money it desperately needed to avoid bankruptcy."

(E-mail from Susan Trager, Counsel for Rialto, dated February 23, 2007, Exhibit P 152 at PSI 4000010.) (Emphasis added.) Under the 2000 Rialto-County Water Rights Lease, Rialto received a nearly immediate multi-million dollar cash infusion of $12.875 million, plus a stream of payments of at least $1.28 million ($64,000 per year for 20 years) and up to $4.8 million ($240,000 per year for 20 years). Thus, it is clear that Rialto sold significant water rights in the 2000 Rialto-County Water Rights Lease because it needed the many millions of dollars it got, not because of any contamination related to the 160-Acre Property.

Rialto also admits its water rights also are impaired by over pumping of Rialto-Colton Basin. (Rialto Urban Water Management Plan, p. 22, Exhibit P 157 at PSI 4000064.) In addition, according to the Urban Water Management Plan:

> "The extraction rights listed in the 1961 Decree totaled 15,290 AF/Yr. Fontana Union Water Company's (FUWC) Well#22 (renamed Well 10-A when it was acquired by San Gabriel Valley Water Company) is located within the Rialto geologic groundwater basin, but was left out of the adjudicated Rialto groundwater basin in the 1961 Decree. Well 10-A has produced an average of

950 to 1050 AF/Yr. for the last 50 years. Within the last few years this well, plus a second well (Well 10-B) have produced over 3,000 AF/Yr."

(Rialto Urban Water Management Plan, p. 21, Exhibit P 157 at PSI 4000063.) (Emphasis added.) According to Susan Trager, Rialto's counsel:

"It is FWC's pumping that seems to us to place the Rialto Basin in a permanent drought condition, so that the lease can be triggered, and FWC gets more of that cheap, clean water. For some years, it's a lack of precipitation, but we didn't see the rebound that should have occurred following the huge rains a couple of years ago."

(E-mail from Susan Trager, counsel for Rialto, dated February 23, 2007, Exhibit P 152 at PSI 4000010.) (Emphasis added.)

The February 23, 2007 e-mail from Rialto's counsel describes an overdraft situation. Rialto's expert, William Hunt, testified in his deposition that: The Rialto-Colton Basin is in "overdraft" because groundwater elevations are falling. (Hunt Depo., 357:2-10.) According to Mr. Hunt, water levels have remained low in the Rialto-Colton Basin since 2003 even though there has been a very wet year. (Hunt Depo., 101:15-102:15.) Overdraft is the condition of a groundwater basin in which the amount of water withdrawn by pumping over the long term exceeds the amount of water that recharges the basin. Overdraft is characterized by groundwater levels that decline over a period of years and never fully recover, even in wet years.[9] The overdraft situation was not caused by perchlorate in the basin at all,[10] much less the operations at the 160-Acre Property or PSI in particular.

The lease referred to in Ms. Trager's February 23, 2007 e-mail is discussed in Rialto's Opening Brief which states:

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[9]Andrew, J.T., (2005) Water Quality California 2004 (California Department of Water Resources), http://www.waterplan.water.ca.gov/docs/cwpu2005/vol4/vol4-waterquality-waterqualitycalifornia2004.pdf.

[10]Rialto Urban Water Management Plan (Exhibit P 157, p. 21 at PSI 4000063.)

> When dry-year conditions exist in the adjudicated portion of the Rialto-Colton Basin, resulting in a cap on Rialto's pumping rights, Rialto is obligated to lease 1,600 acre-feet of its rights to Fontana Union Water Company ("FUWC") in that water year, pursuant to the Standby Water Lease dated May 2000 between Rialto and FUWC. Under the Replacement Water Order Agreement and Lease with the County, Rialto has leased 2,400 acre-feet annually of its adjudicated Rialto Basin rights. Rialto's total pumping rights in the adjudicated Rialto basin, in dry years, is at most 4,366 acre-feet. Leasing 4,000 acre-feet to third parties leaves Rialto with only 366 acre-feet annually at most. If water levels drop far enough that Rialto is facing percentage cutbacks in its 4,366 acre-foot entitlement, Rialto could face a situation where its water rights are exhausted.[35]

(Rialto's Opening Brief, 11:6-16.)

Because of the overdraft situation referred to by Rialto's representatives, Ms. Trager and Mr. Hunt, the full 1,600 acre-feet sold by Rialto as a result of the 2000 Rialto-County Water Rights Lease will remain in effect for the entire term of the deal, until at least the year 2020. Since Rialto's water rights in the Rialto-Colton Basin are limited to a maximum of 4,366 acre-feet per year, the sale of the water to the County in the 2000 Rialto-County Water Rights Lease further reduces the potential need for replacement water from the Rialto-Colton Basin to 2,766 acre-feet per year, assuming all of Rialto's wells in the Rialto-Colton Basin could not be operated due to the presence of perchlorate (which is not the case).

In addition, Rialto has agreed with the County of San Bernardino to give up an additional 2,400 acre-feet per year for the County's interim remediation system for perchlorate. This is not a loss of water for Rialto, because Rialto gets all of the clean water from the County's interim remediation system for perchlorate. (Rialto's Opening Brief, 7:15-19.) As Rialto admits, this leaves a maximum potential need for replacement water from the Rialto-Colton Basin to 366 acre-feet per year.

Table 2 from the Declaration of William Hunt, filed as a part of Rialto's Opening Submission proves that the production by just one well, Rialto Well No. 5, will by far exceed the

366 acre-feet per year Rialto can pump legally from the Rialto-Colton Basin. Table 2, is reproduced below:

Table 2
Water Production Capacity

Zone	Well	Rated Unrestricted Capacity GPM	Water Rights Restricted? Y/N	Restricted By Perchlorate Y/N	Actual Available Capacity 2006 GPM	Comment
1A	Rialto #1	2,167	Y	Y	0	Perchlorate at 5.7 ppb
1A	Rialto #2	2,045	Y	Y	0	Perchlorate 46 ppb
1A	Rialto #3	1,835	Y	N	1,027**	Ion exchange - in service at this time
2	Rialto #4	2,402	Y	Y	0	Perchlorate 13 ppb
2	Rialto #5	3,061	Y	N	2,918	
2	Rialto #6	2,934	Y	Y	0	Perchlorate 130 ppb
2	City Well #1	658	Y	N	970	
2	City Well #2	2,277	Y	N	2,360	
2	City Well 3	1,000	Y	N	997	
3A	City Well #4	3,760	Y	N	2,963	
1B	City Well #5	645	Y	N	0	Water quality poor with Fe & Mg
1B	City Well #6	816	Y	N	0	Inoperable due to vandalism
2	Chino Well #1	1,600	N	N	1,530**	Ion exchange - in service at this time
2	Chino Well #2	1,100	N	N	1,299**	Ion exchange in service at this time
1A	Lytle Creek Surface Water	1,032	Y	N	1,527	Summer month estimate based on past history
3A	Baseline Feeder Purchased Water	N/A	N	N	1,271	Summer month estimate based on past history.
Maximum Available Supply					16,862	

Production capacity based on 2006 Southern California Edison hydraulic test results
Occasional emergency supplies from WVWD, FWD, and Riverside Highlands not included in these totals
Total dos not include a discount for required deliveries to Marygold
** Wells returned to service following wellhead treatment for perchlorate

Mr. Hunt's Table 2 shows for Rialto Well No. 5 alone, which has <u>never</u> been affected by perchlorate, can pump 2,918 gallons per minute. This translates to 4703.816 acre-feet per year.[11] Rialto could not run Rialto Well No. 5 at even 10 percent of capacity without violating the restrictions from the 1961 Decree, after considering the transfer of 4,000 acre-feet per year

[11]One (1) gallon per minute generates 1.612 acre-feet per year, so 2,918 gallons per minute generates 4,703.816 acre-feet per year (2,918 x. 1.612 = 4,703.816.)

of Rialto's rights to the County of San Bernardino. Of course, Rialto can also pump water using other wells in the Rialto-Colton Basin as well. (Fox Depo., 135:12-136:21; Exhibit P 155.)

When all of the recent agreements Rialto entered into which transfer water rights are considered, it becomes clear why Rialto is not very interested in well head treatment of its wells located in the Rialto-Colton Basin showing perchlorate – such wells can never be pumped without exceeding the legal and contractual limits on how much water Rialto can pump from the Rialto-Colton Basin, even if there were no perchlorate. Indeed, this is precisely why Rialto chose not to put well head treatment on other Rialto-Colton wells, favoring instead well head treatment on Chino Well No. 1 and Chino Well No. 2, which have no such restrictions. (Fox Depo., 76:18-77:5, 81:7-82:10, 89:21-90:7, 118:6-25.)

PSI has not caused the overdrafting of the Rialto-Colton Basin. PSI has not kept Rialto from pumping its maximum water rights amount from the Rialto-Colton Basin. Rialto's "water replacement" claims against PSI are bogus.

E. The Lack Of Artificial Recharge Activities In The Rialto-Colton Basin Was Not Caused By The Discovery Of Or The Presence Of Contamination

Rialto claims contamination from the 160-Acre Property prevents it from buying water and storing it in the Rialto-Colton Basin. However, contamination was not the reason artificial recharge activities were stopped – a previously unmapped fault was discovered by the USGS and San Bernardino Valley Municipal Water District, which prevented recharge to the Rialto-Colton Basin. According to the USGS in 1998, "A ground-water investigation, in cooperation with the San Bernardino Valley Municipal Water District in the Rialto Colton Basin of San Bernardino County, California, has showed that artificial recharge ponds operated by the Municipal Water District are isolated from the main ground-water system by a previously unmapped fault. As a result of these findings, the Municipal Water District has ceased the recharge operations at these facilities." (Exhibit P 158 at PSI 4000368.)

Rialto has communicated with the San Bernardino Valley Municipal Water District about the possibility of artificial recharge to the Rialto-Colton Basin. (Fox Depo., 201:16-202:10.) One of Rialto's main concerns about artificial recharge is that other pumpers of the Rialto-

Colton Basin would extract more than their entitlement. Rialto has requested pumping records from other agencies to determine if they have extracted more water than they are legally allowed. (Fox Depo., 202:22-203:14, 203:21-25.)

William Hunt, one of Rialto's expert witnesses, testified in his deposition that there had been no significant artificial recharge since 1993. (Hunt Depo., 66:8-67:14; 69:20-70:18.) The facility used to artificially recharge the Rialto-Colton Basin is no longer available because it was redeveloped by West Valley Water District into a waste treatment plant. (Hunt Depo., 65:8-16.)

There is no study of whether it is a good idea to use artificial recharge for the Rialto-Colton Basin or where such recharge could take place. Mr. Hunt is not aware of any study of these issues being performed. (Hunt Depo., 183:25-185:7, 187:4-6.) Until such a study is completed, Mr. Hunt does not know whether an artificial recharge program would be feasible or not. (Hunt Depo., 301:12-17.)

III. NO COST RECOVERY IS ALLOWED AND, IN ANY EVENT, RIALTO HAS NO WATER REPLACEMENT COSTS

A. Water Code Section 13304(c) Only Allows Cost Recovery Claims That Are Brought In Court

The Advocacy Team seeks recovery of its own costs and those incurred by Rialto, Colton, and West Valley Water District to clean up the alleged contamination. (Draft CAO, ¶ 73.) There cannot be a recovery of costs in this proceeding because the Advocacy Team cannot prove the threshold requirement that PSI violated Water Code Section 13304(a).

In addition, the Advocacy Team's reliance on Water Code Section 13304(c) for its cost recovery claims is legally misplaced. Water Code Section 13304(c) is clear on its face that any cost recovery claims must be brought in a "civil action." A civil action takes place in a court. (Code of Civil Procedure Sections 22, 24 and 30.) This proceeding is not a "civil action" as required by Water Code Section 13304(c) for cost recovery claims. Rialto admits: "It is not within the scope of this proceeding to engage in the damages incurred by Rialto, which are properly the subject of a civil action. Water Code Section 13304(c)(1)." (Rialto's Opening

Brief, 133:2-4.) (Emphasis added.) Accordingly, no award of clean up costs against PSI is permitted.

B. Rialto Has No Idea Whether The Costs Claimed By It Were Incurred As A Result Of Any Perchlorate That May Have Come From The 160-Acre Property

Rialto's Water Superintendent, Peter Fox, was tendered by Rialto for deposition to testify as its most knowledgeable witness on the issue of Rialto's alleged replacement water costs and damages. As its person most knowledgeable, Mr. Fox was testifying as if he were the City of Rialto. However, Mr. Fox has no idea whether the costs claimed by Rialto were incurred as a result of perchlorate from the 160-Acre Property. (Fox Depo., May 2, 2007, 186:1-187:5.) In addition, in his Declaration submitted on April 12, 2007 and in his deposition testimony, Mr. Fox did not determine which of Rialto's alleged costs or damages are attributable to perchlorate from PSI. (Fox Depo., May 2, 2007, 235:4-236:10, 252:17-23.)

C. Rialto's Claimed "Replacement Water" Costs Are Both Fake And Not Related To Any Releases On The 160-Acre Property

Rialto produced Mr. Fox as its designee to testify about the costs Rialto is seeking in this proceeding. Mr. Fox Testified:

- **Rialto is not seeking recovery of costs in this proceeding for alleged loss of the Rialto-Colton Basin.** (Fox Depo., 61:23-63:6.) This is a startling admission since PSI operated on the surface 400 feet above the groundwater in only in the Rialto-Colton Basin.
- **Rialto is not seeking recovery of costs in this proceeding to install well-head treatment systems on Rialto Wells Nos. 1, 2, 4 and 6.** (Fox Depo., 59:11-61:17.) Unlike Chino Well No. 1 and Chino Well No. 2, all these wells actually are located in the Rialto-Colton Basin. Rialto has not put well head treatment on these wells and will not put well head treatment on these wells as long as water rights restrictions and Rialto's sales of water rights prevents Rialto from pumping these wells.

- **Mr. Fox has no idea whether the costs claimed by Rialto were incurred as a result of perchlorate from the 160-Acre Property.** (Fox Depo., 186:1-187:5.) These costs are for treatment in general, and Mr. Fox has made no effort to determine which costs claimed by Rialto are caused by perchlorate from the 160-Acre Property in general or by PSI in particular. (Fox Depo., 185:1 - 187:5; 235:4-20.) In other words, Rialto has no evidence PSI caused it to pay for well head treatment or replacement water.

The vast majority of funds Rialto claims it has spent to address perchlorate contamination are for Chino Well No. 1 and Chino Well No. 2. (Rialto's Opening Brief, 133:16-134:11.) Rialto claims that its costs for capital, operation and maintenance and related expenses on Chino No. 1 and Chino No. 2 total $1,945,021.54. If these were truly water replacement costs (which they are not), then Rialto should have accounted for the amounts it saved by not operating wells in the Rialto-Colton Basin due to contamination. Rialto has received payments, grants and settlements of more than $5.4 million.[12] In fact, Rialto admits it was reimbursed for the costs of installing the treatment system on Chino Well No. 2. (Fox Depo., 183:9-184:3.) Rialto also was reimbursed for the costs of installing the treatment system on Chino Well No. 1. (Fox Depo., 158:9-159:6.) (See also Rialto's Opening Brief, 7:4-6.) Below is a chart showing Rialto's funding for perchlorate issues:

Source of Funding to Rialto	Amount of Funding to Rialto	Date
County Payment for Bunker Hill Well	$1,375,000	2000
State Board for Planning Studies	$36,813	2002
State Water Resources Control Board's Cleanup and Abatement Account	$750,000	2003
State Propositions 13 and 50	$1,061,693	2003
Regional Board liability assessment contributions	$33,750.00	2003
Goodrich Corporation	$1,000,000	2003

[12]Rialto also has received federal grants which are not listed above. (Hunt Depo., 251:24 - 253:25; Exhibit P 179.)

Source of Funding to Rialto	Amount of Funding to Rialto	Date
County Payment for Bunker Hill Well	$1,375,000	2000
State Board for Construction	$1,024,880	2003
Federal Grant	$119,000	
TOTAL	**$5,401,136**	

(Exhibit P 176; Fox Depo., 150:5-16; 150:18-151:9;151:11-15; 155:10-156:10; and, 156:20-157:17.) Rialto admits it "has adjudicated rights in the Bunker Hill Basin." (Rialto's Opening Brief, 11:17.) However, Rialto has not installed the replacement well in the Bunker Hill Basin that the County of San Bernardino agreed to pay for and for which $1.375 million already has been paid. (Exhibit P 176, pp. 7-8 at PSI 4001155 - PSI 4001156.) According to Peter Fox, Rialto's Superintendent of Water, Rialto has never spent the $1 million it received from Goodrich and the money is sitting in an account somewhere. (Fox Depo., 187:6-17.) Rialto's "water replacement" cost claims against PSI have no basis in reality. Rialto does not have the facts necessary to prove a water replacement claim under Water Code Section 13304.

D. Rialto Could Pump Other Wells In The Rialto-Colton Basin

Since at least 2003, the California Department of Health Services never told Rialto to take a well offline so long as it has perchlorate detections below ten times the action level. In this regard, the California Department of Health Services told Rialto that Rialto Well Nos. 1, 2, 4 and 6 (all actually located in the Rialto-Colton Basin) can be used. (Fox Depo., 135:12-136:21; Exhibit 4134.) Rialto Well 1 (located in the Rialto-Colton Basin) never had detections of perchlorate in excess of the public health goal of 6 ppb. Samples from Rialto Well 1 for the last three to four months are non-detect for perchlorate. (Fox Depo., 229:12-22, 230:3-10.) Rialto Well 3 (located in the Rialto-Colton Basin) has a treatment system that was installed by the County of San Bernardino. The County paid for installation of the treatment system on Rialto Well 3 and is paying for all operation costs. (Fox Depo., 140:6-21.) The United States

Department of Defense ("DOD") is in the process of installing an ion exchange treatment system to remove perchlorate on Rialto Well 4 (located in the Rialto-Colton Basin). DOD is paying for all installation and operation costs of the treatment system for Rialto Well 4. (Fox Depo., 138:15-139:11.)

E. The Claim In Rialto's Opening Brief And Submissions That The Cost Of Its "Replacement Water" From Chino Well No. 1 And Chino Well No. 2 Are Caused By PSI Is Phoney

Rialto's Opening Brief claims that "Rialto's water treatment and water replacement activities to date have involved Chino Well No. 1 and Chino Well No. 2, which are necessarily pumped because the wells downgradient from the Goodrich/Black & Decker site are unavailable due to Perchlorate contamination and recharge into the contaminated aquifer is inhibited." (Rialto's Opening Brief, 133:11-15.)

Chino Well No. 1 and Chino Well No. 2 are not located in the Rialto-Colton Basin. (Exhibit P 157, p. 11 at PSI 4000053.) Chino Well No. 1 is located in the Chino Basin (Exhibit P 157, p. 19 at PSI 4000061; Fox Depo., 247:11-248:19). Chino Well No. 2 is located in the North Riverside Basin (Exhibit P 157, p. 11 at PSI 4000053; Fox Depo., 83:15-19, 248:21-249:2). Despite the presence of perchlorate from a source other than the 160-Acre Property, Rialto decided to put treatment systems on Chino Well Nos. 1 and 2, instead of Rialto Well 2, because they were not subject to any pumping restrictions. (Fox Depo., 76:18-77:5, 81:7-82:10, 89:21-90:7, 118:6-25.)

The two Rialto hydrogeologist expert witnesses both admit that neither Chino Well No. 1 nor Chino Well No. 2 is located in the Rialto-Colton Basin. (Hunt Depo., 48:4-13 and Stephens Depo., Vol. 3, May 16, 2007, 794:17 - 797:4.) Even Rialto's Opening Brief grudgingly admits that Chino Well No. 1 and Chino Well No. 2 do not draw from the Rialto-Colton Basin. (Rialto's Opening Brief, pp. 4-5.) Dr. Stephens further admitted that both of these wells are not affected by any contamination originating at the 160-Acre Property. (Stephens Depo., Vol. 3, May 16, 2007, 794:17 - 797:4.) Based on this stubborn fact alone, Rialto's claim that PSI is somehow responsible for "water replacement" costs is phoney.

F. By The Time It Entered Into Its Short-Term Lease With Colton, Rialto Had Already Pumped All The Water From The Rialto-Colton Basin To Which It Was Legally Entitled Under The 1961 Decree

Rialto seeks payment of $166,500 for water it purchased from Colton. (Rialto's Opening Brief, 134:8-9.) In July, 2003, Rialto entered into a short term lease agreement with Colton to pump 1,500 acre-feet of additional water from the Rialto-Colton Basin. By this time, Rialto had already pumped all the water from the Rialto-Colton Basin to which it was legally entitled under the 1961 Decree. Rialto entered the lease with Colton so it could obtain the additional water it needed to get through the summer. (Hunt Depo., May 17, 2007, 180:21-181:14; Fox Depo., May 2, 2007, 111:5-23; 115:23–117:21.) Perchlorate contamination had nothing to with Rialto needing more water after it exhausted its entitlement under the 1961 Decree.

IV. RIALTO FAILS TO APPLY THE STANDARD THAT GOVERNS THE ISSUANCE OF CLEANUP AND ABATEMENT ORDERS PURSUANT TO CALIFORNIA LAW

Along with the Advocacy Team, Rialto has the burden of proving, by a preponderance of the evidence, that PSI is liable under Cal. Water Code Section 13304.[13] Rialto filed its Opening Brief "in support of the Cleanup and Abatement Order issued by the [Regional Board], Executive Officer, on February 8, 2005 ('2005 CAO') and the Draft Amended Cleanup and Abatement Order No. R8-2005-0053 ('2006 Draft CAO') issued to... [the] 'Named Dischargers' for water replacement, investigation and remediation of perchlorate and trichloroethylene ('TCE') in the Rialto area." (Rialto's Opening Brief, 1:7-17.) However, in its entire 135 page Opening Brief, Rialto never once mentions the legal standard for issuing a cleanup and abatement order under California law.

Rialto ignores that Cal. Water Code Section 13304 requires the following elements be satisfied before the issuance of a cleanup and abatement order:

> Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition

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[13]Supporting authority for the preponderance of the evidence burden of proof is set forth in PSI's Opening Brief at p. 17 at PSI 100020.

issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste, or, in the case of threatened pollution or nuisance, take other necessary remedial action, including, but not limited to, overseeing cleanup and abatement efforts.

(Emphasis added.)

Section 13304(e) defines "threaten" to mean:

[A] condition creating a substantial probability of harm, when the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to persons, property, or natural resources.

(Emphasis added.)

Water Code Section 13050(l) defines "Pollution" to mean:

(1) [A]n alteration of the quality of the waters of the state by waste to a degree which unreasonably affects either of the following:

(A) The waters for beneficial uses.

(B) Facilities which serve these beneficial uses.

(2) "Pollution" may include "contamination."

Section 13050 (k) defines "Contamination" to mean:

[A]n impairment of the quality of the waters of the state by waste to a degree which creates a hazard to the public health through poisoning or through the spread of disease. "Contamination" includes any equivalent effect resulting from the disposal of waste, whether or not waters of the state are affected.

Section 13050(m) defines "Nuisance" to mean:

[A]nything which meets all of the following requirements:

(1) Is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.

(2) Affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

(3) Occurs during, or as a result of, the treatment or disposal of wastes.

(Emphasis added.)

With the requirements of Water Code Section13304 and California law in mind, it is clear that the facts do not support the issuance of the Draft Cleanup and Abatement Order against PSI:

- Rialto provides no evidence that PSI caused perchlorate to be discharged where it is, or probably will be, discharged into the waters of the State;
- Rialto provides no evidence that PSI permitted perchlorate to be discharged where it is, or probably will be, discharged into the waters of the State;
- Rialto provides no evidence that PSI threatens to cause perchlorate to be discharged where it is, or probably will be, discharged into the waters of the State;
- Rialto provides no evidence that PSI threatens to permit or cause perchlorate to be discharged where it is, or probably will be, discharged into the waters of the State; and,
- Rialto provides no evidence that any perchlorate from PSI caused a condition of nuisance, pollution or contamination of groundwater.

In the absence of any evidence to prove the requirements of Water Code Section 13304, there cannot be a cleanup and abatement order issued to PSI.

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V. RIALTO'S CASE AGAINST PSI IS BASED ON ARGUMENT AND SPECULATION AND NOT ADMISSIBLE EVIDENCE

Rialto's case against PSI is subject to the same burden of proof required of the Advocacy Team, namely preponderance of the evidence. Both the Advocacy Team and Rialto have failed to meet that burden because they cannot present facts that any perchlorate from PSI's operations at the 160-Acre Property actually impacts or "threatens" to impact groundwater.

In a section entitled "Summary Of Perchlorate Discharges by Pyro Spectaculars, Inc.," Rialto's Opening Brief argues, without the support of any admissible evidence, that PSI discharged a total of 1470 alleged pounds of perchlorate at the 160-Acre Property. (Rialto's Opening Brief, 60:11-61:26.) However, Rialto does not and cannot provide any evidence that any of Rialto's 1470 alleged pounds actually reached groundwater or "threatens" groundwater as required by Water Code Section 13304. Discussed in detail below is why Rialto's argument is not based on admissible evidence, but on unreasonable assumptions and inflated calculations.

As the California Supreme Court has held, "It is axiomatic that argument is not evidence." People v. Breaux (1991) 1 Cal.4th 281, 313. (Emphasis added.) See also Eller Media Co. v. Community Redevelopment Agency (2003) 108 Cal.App.4th 25, 38 ("argument is not evidence."); Fuller v. Tucker (2000) 84 Cal.App.4th 1163, 1173 ("Argument of counsel is not evidence."); Davenport v. Blue Cross of California (1997) 52 Cal.App.4th 435, 454 ("These unsworn averments in a memorandum of law prepared by counsel do not constitute evidence."); Estate of Nicholas v. Nicholas (1986) 177 Cal.App.3d 1071, 1090 ("[I]t is settled that, except for stipulations or admissions contained therein, the unsworn pleadings or counsel do not constitute evidence."). Instead, "'Evidence'" means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact." Cal. Evid. Code Section 140.

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A. Rialto Has No Evidence That PSI Discharged Perchlorate Or Threatens To Discharge Perchlorate Into Groundwater Beneath The McLaughlin Pit

Rialto's Opening Brief presents no evidence that the perchlorate conditions in groundwater beneath the McLaughlin Pit are attributable to PSI. Indeed, Rialto provides no evidence that PSI's very limited use of the McLaughlin Pit to soak a few aerial shells has impacted groundwater. Rialto also provides no evidence that any perchlorate was released from the McLaughlin Pit by PSI. Rialto provides no evidence, nor does it even argue, that any perchlorate from PSI traveled through the approximately 400 foot vadose zone and reached groundwater. In sum, Rialto provides no evidence that PSI discharged perchlorate or threatens to discharge perchlorate into the groundwater.

Testimony of Regional Board staff underscores this point. Advocacy Team member Robert Holub, the Regional Board's supervising water resource control engineer, one of the two primary persons at the Regional Board involved in the investigation and a drafter of the CAO, testified that:

Q. . . . You don't have any analytical data to indicate to you that any perchlorate from Pyro Spectaculars, Inc. is a threat or that there's a substantial probability that it will get to groundwater either; correct?

(Objection omitted.)

A. There are a number of parties that operate at the site, including Pyro Spectaculars, that our evidence shows they used perchlorate salts, and those salts collectively -- collectively from those parties did impact the groundwater, based on the groundwater data we have at the site. We have not made an attempt and it's probably not technically possible to differentiate which perchlorate from which party -- how much perchlorate from each party got to groundwater. So I -- I'm not going to be able to answer those questions in that respect.

Q. And true to what you just said, you can't tell if any perchlorate from Pyro Spectaculars from a release in the McLaughlin Pit got to groundwater; correct? It could all be from Pyrotronics; correct?

A. Yes, but it could all be from one of the parties that put waste there, including Pyro. So that's my -- that's my position.

(Holub Depo., Vol. 1, March 8, 2007, 184:2- 185:3.) (Emphasis added.)

* * *

Q. . . . And as you sit here today, you personally have no evidence, right, of any perchlorate put in the McLaughlin Pit by Pyro Spectaculars that came in direct contact with water; correct?

A. No analytical data to make that cause-and-effect relationship.

(Holub Depo., Vol. 1, March 8, 2007, 185:5 - 10.) (Emphasis added.)

* * *

Q. Did any perchlorate from PSI get to the groundwater?

A. It's my opinion that -- I don't have analytical data that shows perchlorate from PSI got to groundwater.

Q. And that's not just for the McLaughlin Pit, that's for the entire 160-acre parcel; correct?

A. Yes.

(Holub Depo., Vol. 1, March 8, 2007, 184:5 - 185:1.) (Emphasis added.)

Advocacy Team member Ann Sturdivant, the Regional Board's senior engineering geologist, one of the persons at the Regional Board involved in the investigation and a primary drafter of the CAO, testified that:

Q. So there's no way to distinguish between perchlorate that may have made its way into the McLaughlin Pit from Pyro Spectaculars versus perchlorate that may have made its way into the McLaughlin Pit from Pyrotronics, is there?

A. I – I don't think so.

(Sturdivant Depo., Vol. 1, March 20, 2007, 150:8-13.)

Advocacy Team member Kamron Saremi, the Regional Board's water resources control engineer, is the person on the Advocacy Team most involved in the investigation. Kamron Saremi was a contributor of information for the Draft CAO. Other than cardboard dud shells, Kamron Saremi cannot tell any other type of pyrotechnic material that was put into the

McLaughlin Pit by PSI. (Saremi Depo., Vol. 2, March 23, 2007, 376:1-12.) Other than aerial dud shells, Mr. Saremi is not aware of any other waste generated by PSI. (Saremi Depo., Vol. 3, March 27, 2007, 712:6-10.) According to Kamron Saremi:

- **There is no way to tell now whether, at any given point in time, there were aerial shells from PSI in the McLaughlin Pit.** (Saremi Depo., Vol. 3, March 27, 2007, 719:4-10.)
- **There is no way to tell whether there were aerial shells in the McLaughlin Pit from PSI on the day the McLaughlin Pit was closed.** (Saremi Depo., Vol. 3, March 27, 2007, 720:8-15.)
- **There is no way to know whether an aerial shell that was put into the McLaughlin Pit by Apollo versus an aerial shell that was put in the McLaughlin Pit by PSI is a source of groundwater contamination in the Rialto-Colton-Fontana area.** (Saremi Depo., Vol. 3, March 27, 2007, 714:17-23.)

Kamron Saremi testified under oath that he does not know how much perchlorate waste Apollo put into the McLaughlin Pit. (Saremi Depo., Vol. 3, March 27, 2007, 673:7-15.)

Like the Advocacy Team, Rialto fails to meet the burden of proving by a preponderance of the evidence that perchlorate from PSI's operations affects or threatens the waters of the State, namely the groundwater in the Rialto-Colton Basin. Rialto's Opening Brief presents no proof that the perchlorate conditions in groundwater beneath the McLaughlin Pit are attributable to PSI. Rialto merely argues that PSI discharged perchlorate into the McLaughlin Pit which then reached the ground surrounding the McLaughlin Pit. (Rialto's Opening Brief, 60:11-23.)

As explained below, Rialto uses faulty assumptions, baseless accusations and misrepresentations of the facts to make up a bogus total number of aerial shells it argues PSI discharged into the McLaughlin Pit. Even assuming Rialto's bogus number of aerial shells were true (which it is not), Rialto provides no evidence that any perchlorate got past the thick cardboard container and got into the McLaughlin Pit. Rialto provides no evidence that any perchlorate was released from the cement-enclosed McLaughlin Pit by PSI. Rialto provides

no evidence, nor does it even argue, that the alleged perchlorate traveled over 400 feet through vadose zone and reached groundwater. In sum, Rialto provides no evidence or facts that PSI discharged perchlorate or threatens to discharge perchlorate into the groundwater.

B. Rialto's McLaughlin Pit Estimate For PSI Is Not Based On Admissible Evidence Or Reasonable Inferences From Admissible Evidence

Strikingly absent from Rialto's evidence is a vadose zone model or a groundwater transport model putting any perchlorate from PSI in the groundwater or in Rialto's wells. Neither the Advocacy Team nor Rialto have a groundwater model or a vadose zone model.[14] In fact, though asked since at least 2005 by Dr. Stephens to prepare a groundwater model and a vadose zone model (Exhibit P 147), Rialto chose not to prepare either a groundwater model or a vadose zone model. (Stephens Depo., Vol. 2, May 15, 2007, 315:1-7 and 317:8 - 318:12.) The Advocacy Team provided no evidence of the amount of perchlorate, if any, PSI put in the McLaughlin Pit, only that PSI put some amount of "pyrotechnic waste" into the McLaughlin Pit. As PSI demonstrated in PSI's Opening Brief, "pyrotechnic waste" included:

a. Paper (Sturdivant Depo., Vol. 1, March 20, 2007, 175:8-9.);

b. Cardboard (Sturdivant Depo., Vol. 1, March 20, 2007, 175:10-11.);

c. Fuse (Sturdivant Depo., Vol. 1, March 20, 2007, 175:12-13.);

d. Black powder[15] (Sturdivant Depo., Vol. 1, March 20, 2007, 175:14-15.); and,

e. "Any other waste that isn't specified here. That was the intent." (Sturdivant Depo., Vol. 1, March 20, 2007, 175:16-18;Vol. 2, March 28, 2007, 13:10-14:2.)

That is because there exists no evidence, namely, testimony, writings, material objects, or other things presented to the senses, from which any reasonable estimate can be made. The only thing submitted by Rialto is the pure conjecture and argument of counsel based on no

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[14] See Sturdivant Deposition, 35:9-14; 1284:13-1285:8; and 1444:6-10 and Stephens Deposition, 315:1-7 and 317:8 - 318:12.

[15] Black powder is sometimes referred to as "loose powder" in the documents relied upon by the Advocacy Team and Rialto. In those documents, there is nothing to prove that "loose powder" ever contained perchlorate. Any attempt by Rialto or the Advocacy Team to say otherwise would be pure speculation and argument, neither of which are evidence.

admissible evidence whatsoever. The allegations refer only to hearsay, that is, an unauthenticated letter that no one remembers writing or receiving that refers to a different situation than argued, that is now being offered for the truth of the matters contained in the letter, which itself is subject to different interpretations.

Rialto attended every Advocacy Team deposition before it prepared its April 12, 2007 submission and has been coordinating the prosecution of PSI with the Advocacy Team. (Saremi Depo., Vol. 3, March 27, 2007, 738:20-744:24.) All of the testimony from the Advocacy Team witnesses quoted by PSI was given before April 12, 2007 when Rialto's Opening Submission was filed.

Undaunted by the Advocacy Team's admissions, Rialto argues that PSI "discharged upwards of 800 pounds of potassium perchlorate into the McLaughlin Pit from 1979 through 1987." (Rialto's Opening Brief, 69:5-19.) (Emphasis added.) Argument of counsel is not evidence. People v. Breaux, 1 Cal.4th at 313; Eller Media Co. v. Community Redevelopment Agency, 108 Cal.App.4th at 38; Fuller v. Tucker, 84 Cal.App.4th at 1173; Davenport v. Blue Cross of California, 52 Cal.App.4th at 454; Estate of Nicholas v. Nicholas, 177 Cal.App.3d at 1090. Accordingly, Rialto must have a reasonable method of arriving at this 800 alleged pounds number. However, Rialto's 800 alleged pounds number is actually based on at least seven faulty assumptions discussed below. These seven assumptions are faulty because they misrepresent the facts and rely on pure guessing – speculation. Possibility, speculation and conjecture are not sufficient proof, even of matters that need only be proven by a preponderance of the evidence (See generally, Roddenberry v. Roddenberry, 44 Cal.App.4th at 651; Regents of University of California v. Public Employment Relations Bd., 220 Cal.App.3d at 359; Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 35, p. 184.) The facts demonstrating that each of these seven assumptions is faulty is discussed below.

- **False Assumption 1:** *PSI used the McLaughlin Pit for 10 years.* **Why this assumption is not supported by the facts:** The facts are that the PSI could not have used the McLaughlin Pit for more than three fireworks seasons from 1980 to 1982.

It appears that Rialto uses a total alleged use time of 10 years in its Opening Brief, based upon the calculation contained at page, 69:16, "(0.88 lbs x 10 x 12 months)" which uses a 10 as a multiplier. However, Rialto also argues an 8 year use time (Rialto's Opening Brief, 60:11-14) and a 16 year use time (Rialto's Opening Brief, 66:3-7). As discussed further below, all three of Rialto's alleged use times argued in Rialto's Opening Brief are misrepresentations of the facts. The internal inconsistencies in Rialto's Opening Brief's on the total alleged use time also are inconsistent with the alleged use times in the Roadmap which admits: "McLaughlin Pit: A concrete-lined, water filled, waste holding pond was constructed by [Apollo] west of Building 67. From 1973 to 1983, explosive wastes were stored underwater in the pond until final disposal." (Roadmap, p. 52.) (Emphasis added.) Since PSI was incorporated on March 28, 1979 and began business later in the fall of 1979 (Declaration of James R. Souza submitted on April 17, 2007 ("Souza Decl."), ¶ 4), the maximum use time would be no more than three fireworks seasons from 1980 until 1982. No evidence exists that PSI began using the McLaughlin Pit the same year it began business. Furthermore, Rialto has not produced any evidence that PSI received "dud" aerial shells in 1979. Indeed, it is very unlikely that PSI used the McLaughlin Pit in 1979 because PSI began business after July 4th. "Dud" aerial shell returns are most likely immediately following July 4th. (Declaration of William Lehman, submitted April 17, 2007 ("Lehman Decl."), ¶ 12; Deposition of William Lehman ("Lehman Depo."), April 27, 2007, Vol. 1, 121:9-20.)

Rialto's assumption that PSI used the McLaughlin Pit until 1987 is not supported by evidence. The facts are that PSI could not have used the McLaughlin Pit up to the point when Rialto, the Regional Board and KTI illegally, and ineffectively, attempted to close it in December of 1987. At most, PSI used the McLaughlin Pit until approximately June of 1983. This fact comes from evidence of a January 24, 1985 Regional Board inspection report for Apollo. Bruce Paine of the Regional Board Staff memorialized a conversation with Pedro Mergil of Apollo. Mr. Paine recorded that Mr. Mergil said at that time that Apollo had not used the pond for 18 months or approximately until June 1983. (Exhibit P 27 at PSI 3000371 and Exhibit P 64 at PSI 3000511.) As of September 1984, Apollo had drained the liquid from the McLaughlin

Pit. (Exhibit P 61 - P 63.) Indeed, contemporaneous documents obtained from Rialto indicate that the McLaughlin Pit caught on fire in June 1985, clear evidence that the McLaughlin Pit was drained and the materials were dry well before 1987. (Exhibit P 70.) After it was drained, PSI did not have any reason to use the McLaughlin Pit. The facts are that PSI was not using the McLaughlin Pit up until 1987. Rather, at worst, PSI used the McLaughlin Pit until approximately June of 1983, at the latest. Accordingly, the estimated time-frame most reasonable in establishing PSI's limited use of the McLaughlin Pit would be no more than three fireworks seasons from 1980 until 1982, not the ten years assumed by Rialto.

- **False Assumption 2:** *Every month for 10 years, PSI put 10 aerial shells in the McLaughlin Pit.* **Why this assumption is not supported by the facts:** The facts are that PSI had zero to at most 15-20 per month during the 4th of July season, not throughout the year as the assumption in Rialto's Opening Brief makes.

Rialto argues that: "Assuming PSI deposited on average ten shells per month, PSI would have discharged up to 100 pounds of potassium perchlorate per year (0.88 lbs. x. 10 x. 12 months.)" (Rialto's Opening Brief, 69:15-19.) (Emphasis added.) Consider the words used by Rialto. Use of the words "Assuming" and "would have" means that Rialto does not have any direct evidence to support its argument. The only testimony or document referenced by Rialto is "Ex. 195"[16] the letter dated January 17, 1984, which actually says: "The amounts would vary from zero per month up to about 15 or 20 per month at peak season (July-August.)." Thus, Rialto clearly misrepresents the facts to blow up to its 800 alleged pounds number. Assuming the January 17, 1984 letter is authentic (which is doubtful), the letter does not say that PSI placed aerial shells in the McLaughlin Pit every month for ten years. Furthermore, according to Mr. Lehman who allegedly wrote "Ex. 195," even the "zero per month up to about 15 or 20 per month at peak season" number "seems little high, a little bit, but maybe not." (Lehman Depo., April 27, 2007, Vol. 1, 141:24 - 142:8.) "PSI's peak season was July 4th and did not

[16]Discussed below are the serious problems with whether this document is authentic.

extend to August." (Lehman Decl., ¶ 12 at PSI 2001797.) The facts are that there were "a small number of aerial shells, approximately 15 to 20 per year [that] could not be reworked and were burned in a burn pit by PSI." (Lehman Decl., ¶ 5 at PSI 2001796.) (Emphasis added.) This 10 to 15 per year number also corresponds to Mr. Hescox's recollection that a small number of aerial shells shot by Apollo prior to 1979, perhaps ten per year, were returned as defective. (Deposition of Harry Hescox, February 15, 2005 ("Hescox Depo."), 150:6-153:24.)

- **False Assumption 3:** *Every aerial shell had fireworks composition inside the thick cardboard container of 800 grams or 1.76 pounds.* **Why this assumption is not supported by the facts:** The facts are that no evidence exists to show what the fireworks composition was of aerial shells actually placed into the McLaughlin Pit.

Rialto argues that: "The average pyrotechnic content of each aerial shell was about 800 grams. (Ex.195; Rialto 33601 [p-9].)" (Rialto's Opening Brief, 64:14-14.) (Emphasis added.) Since argument is not evidence, Rialto must have admissible evidence to support its argument. However, the facts do not support Rialto's argument. 800 grams is not the size of an "average shell." (Souza Dec. ¶ 25.) Most of the small number of dud aerial shells returned to PSI were 5 inches in size, or less, and contain nowhere near 800 grams of pyrotechnic content. (Id.) As admitted by the Advocacy Team, it does not know how much perchlorate is in any individual aerial shell. (Sturdivant Depo., Vol. 1, March 20, 2007, 146:20-22; Saremi Depo., Vol. 3, March 27, 2007, 712:22 - 713:1.) Neither does Rialto. While Ex.195 states, "The chemicals generally found in these shells are listed below, with an average shell, pyrotechnic content 800 grams . . .", there is a serious problem with the authenticity of this document. Mr. Lehman, the alleged author denies he wrote the document. (Lehman Decl., ¶ 12 at PSI 2001797.) According to Mr. Lehman, "I know that I did not write the letter because I have never had any personal knowledge relating to the chemical composition of aerial shells." (Id.) (Emphasis added.) Mr. Lehman is a former employee of PSI who left after a dispute with management over twenty years ago. Mr. Lehman testified about his departure from PSI as follows:

Q. . . . And then I gather from your declaration, which I'll get out in a little bit, you had a falling out with Mr. Souza?

A. Yes.

Q. And can you tell me what it was about.

A. Just in general, I just kind of thought the guy was a son of a bitch, you know, and interfered with my business, and we had a falling out, and I left.

(Lehman Depo., April 27, 2007, Vol. 1, 24:22-25:4.) (Emphasis added.)

Since Mr. Lehman left under unhappy circumstances and has no reason for bias in favor of PSI, his testimony is credible. Mr. Lehman's testimony is unrefuted. In short, the facts are not in Rialto's Opening Submissions and they do not exist. Accordingly, Rialto's assumption is not reasonable and is based only on the unsupported argument of counsel. Argument of counsel is not evidence.[17]

- **False Assumption 4:** *The composition inside the thick cardboard container of each and every aerial shell got out of the container and into the McLaughlin Pit.*

  Why this assumption is not supported by the facts: Neither the Advocacy Team nor Rialto provides any evidence that composition inside the thick cardboard container of any aerial shell put in the McLaughlin Pit got outside of the container.

As admitted by the Advocacy Team, it does not know how much, if any, perchlorate got out of aerial shells from PSI and into the McLaughlin Pit. (Sturdivant Depo., Vol. 1, March 20, 2007, 149:6-9; Saremi Depo., Vol. 2, March 23, 2007, 377:13-23; Vol. 3, March 27, 2007, 712:16-21.) Neither does Rialto. The facts are not in Rialto's Opening Submissions and they

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[17] People v. Breaux, 1 Cal.4th at 313; Eller Media Co. v. Community Redevelopment Agency, 108 Cal.App.4th at 38; Fuller v. Tucker, 84 Cal.App.4th at 1173; Davenport v. Blue Cross of California, 52 Cal.App.4th at 454; Estate of Nicholas v. Nicholas, 177 Cal.App.3d at 1090.

do not exist. Rialto's assumption is not reasonable and is based only on the unsupported argument of counsel. Rialto's counsel's argument is not evidence.[18]

- **False Assumption 5:** *No aerial shell was ever removed from the McLaughlin Pit.* **Why this assumption is not supported by the facts:** The facts are that aerial shells were removed.

From late 1979 until about June 1983, a very small number of aerial shell "duds" were temporarily placed in the McLaughlin Pit by PSI to soak, were then removed and disposed of elsewhere, via burning pursuant to duly authorized permits issued by Rialto Fire Department. (Souza Decl., ¶ 24.) The Advocacy Team admits that it has evidence that aerial shells were removed.[19] (Exhibit P 15 at PSI 3000121.) Even Mr. Hescox whose testimony Rialto misrepresents, testified he witnessed the cracking open and burning of aerial shells. "[T]hey just break apart, and all the chemicals can be dumped out on the ground." Class B aerial shells were a hazardous item, so it was better to "cut open the shell and dump the stuff out and burn it on the ground." (Hescox Depo., Vol. 2, Feb. 15, 2005, 365:5 - 366:22). Because Rialto's faulty calculation does not consider the fact that aerial shells were removed from the McLaughlin Pit, the estimate that results from the faulty calculation is not reasonable and is based only on argument of counsel which is not evidence.[20]

- **False Assumption 6:** *The McLaughlin Pit was never cleaned out.* **Why this assumption is not supported by the facts:** The facts are that the McLaughlin Pit was cleaned out periodically.

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[18] People v. Breaux, 1 Cal.4th at 313; Eller Media Co. v. Community Redevelopment Agency, 108 Cal.App.4th at 38; Fuller v. Tucker, 84 Cal.App.4th at 1173; Davenport v. Blue Cross of California, 52 Cal.App.4th at 454; Estate of Nicholas v. Nicholas, 177 Cal.App.3d at 1090.

[19] (Sturdivant Depo., Vol. 2, March 28, 2007, 232:5-234:18.)

[20] People v. Breaux, 1 Cal.4th at 313; Eller Media Co. v. Community Redevelopment Agency, 108 Cal.App.4th at 38; Fuller v. Tucker, 84 Cal.App.4th at 1173; Davenport v. Blue Cross of California, 52 Cal.App.4th at 454; Estate of Nicholas v. Nicholas, 177 Cal.App.3d at 1090.

Advocacy Team member Ann Sturdivant testified that it was her understanding that from time to time waste was removed from the McLaughlin Pit. (Sturdivant Depo., Vol. 2, March 28, 2007, 224:5-7). Exhibit 3927 to Ms. Sturdivant's deposition contains documents that show waste was removed from the McLaughlin Pit by Apollo and taken to a Class I Hazardous Waste landfill. (Sturdivant Depo., Vol. 2, March 28, 2007, 225:12-24.) Rialto ignores the evidence submitted by PSI that Apollo had the McLaughlin Pit cleaned out from time to time. (Exhibits P 52 - P 53, P 60 - P 62.) Because Rialto's faulty calculation does not consider the fact that the McLaughlin Pit was cleaned out on multiple occasions, the estimate that results from Rialto's faulty calculation is not reasonable and is based only on argument of counsel and is not evidence.[21]

- **False Assumption 7:** *Rialto assumes the content of each and every aerial shell used by PSI was 55 % perchlorate.* **Why this assumption is not supported by the facts:** The facts do not support this assumption because the only "evidence" Rialto offers to support it is information from "Astro" prior to 1988 when "Astro" was a part of Trojan Fireworks, not PSI.

Rialto argues that: "Aerial shells are a collection of stars wrapped in paper, and sometime include a whistling device. (Souza DT 53:18-55:18:2, 55:25-56:16 [P-30].) The stars made by Astro contained approximately 55 percent potassium perchlorate. (Veline 57:10-60:12, 240:13-241:1, 300:23:302:2; 332:22-333:20; Ex. 1972 [P-31]. 'Whistles' used to create sound effects in aerial display fireworks also contain perchlorate. (Carlton DT 171:10-18, 464:2-465:5 [P-32].) Accordingly, given that stars are the primary component of aerial shells and the stars contain 55 percent of potassium perchlorate, PSI's aerial shells likely contain up to 400 grams of potassium perchlorate, or 0.88 pounds each." (Rialto's Opening Brief, 69:5-13.) (Emphasis added.) Rialto does not submit any evidence of the actual amount of perchlorate, if any, in PSI's aerial shells or in the limited amount of duds soaked in the

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[21] People v. Breaux, 1 Cal.4th at 313; Eller Media Co. v. Community Redevelopment Agency, 108 Cal.App.4th at 38; Fuller v. Tucker, 84 Cal.App.4th at 1173; Davenport v. Blue Cross of California, 52 Cal.App.4th at 454; Estate of Nicholas v. Nicholas, 177 Cal.App.3d at 1090.

McLaughlin Pit. Discussed, in turn is the deposition testimony of the persons whom Rialto claims for its "evidence." As discussed below, Rialto misrepresents the testimony of each person.

First, it is difficult to find the evidence relied on by Rialto that it is a "given that stars are the primary component of aerial shells," Earlier in Rialto's Opening Brief, Rialto says: "Aerial shells are a collection of stars wrapped in paper, and sometime include a whistling device. (Souza DT 53:18-55:18:2, 55:25-56:16 [P-30].)" However, a review of the actual testimony of Mr. Souza shows he was describing what little he remembers from six or less visits to Celebrity Fireworks, Co., Inc. over twenty years ago. Start reading Mr. Souza's deposition transcript at page 52, line 15, and it is clear Mr. Souza is describing what little he can remember of the assembly process he saw at Celebrity over twenty years ago – he is not describing all the contents of all aerial shells, as Rialto's Opening Brief falsely represents. Even from the referenced part of Mr. Souza's deposition, this should be very clear:

Q. And if you know, would you describe what that process involves. What did you see?

A. As I recall back in this time, the only – only two things I could recall is them placing the stars inside the aerial canister that we talked about and – and a process called pasting, where they take the kraft paper, paste it up in water and – or glue and paste up the shells. That's all I recall.

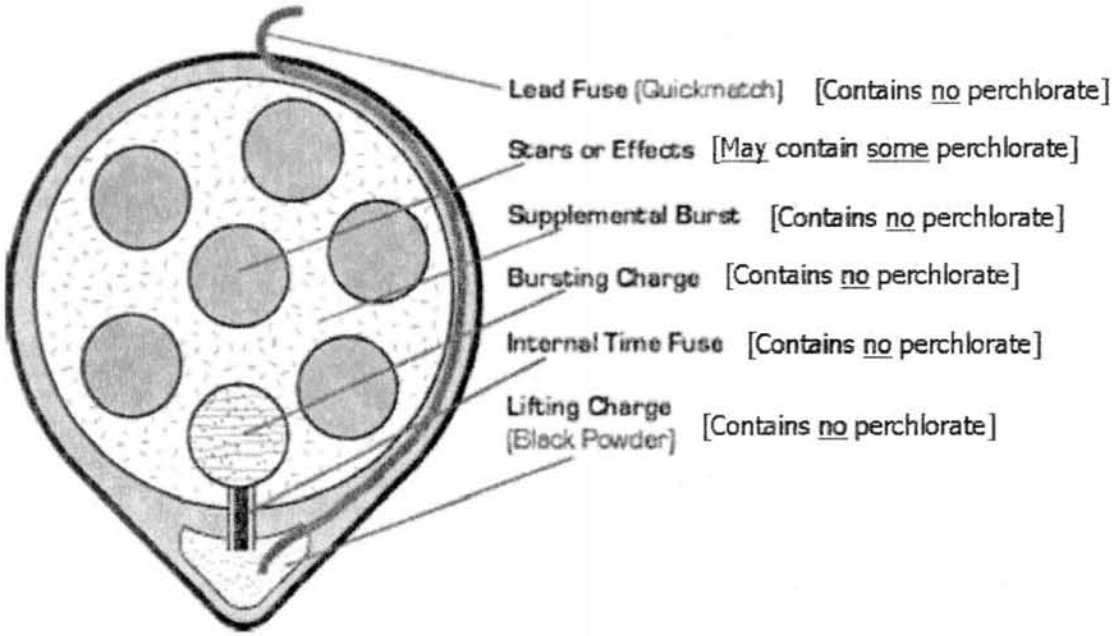
(Souza Deposition, Vol. 1, December 5, 2006, 53:23-54:5.) (Emphasis added.)

A simple internet search for "aerial shell" using Google would have provided a better general description of what is inside of aerial shells. The second "hit" on Google is the American Pyrotechics Association web site for "Contents of An Aerial Shell".[22] The third "hit" is for the definition of an aerial shell from the American Pyrotechnics Association. "**Aerial Shell**

[22]The first "hit" is for how to make a homemade aerial shell, not applicable here, but it clearly shows that most of the contents of those aerial shells are not stars.

A cartridge containing pyrotechnic composition, a burst charge, and an internal time fuse or module, that is propelled into the air from a mortar."[23]

A conceptual diagram of the inside of an aerial shell is at the second "hit" on Google:[24]



(Exhibit P 178.)

Note that not all aerial shells contain stars and this conceptual model contains "stars or effects." The majority of the contents of an aerial shell are the bursting charge, the supplemental burst and the lifting charge, not stars.

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[23]See http://www.americanpyro.com/Safety%20Info/glossary.html. Notations in brackets to the left of the diagram have been added to show which parts do not contain perchlorate.

[24]See http://www.americanpyro.com/General%20Info/shell.html.

To bolster its argument, Rialto falsely characterizes the deposition testimony of Stuart Carlton and Robert Veline.[25] However, in every citation and exhibit offered by Rialto to "prove" the perchlorate content of PSI's aerial shells, Mr. Veline and Mr. Carlton were discussing the content of Class C, safe and sane, fireworks manufactured by Trojan Fireworks before 1988, not professional grade aerial shells used by PSI. (Rialto's Opening Brief, 69:2-9.) For example, Rialto cites 171:10-18 of the deposition of Mr. Carlton to "prove" its statement that "whistles" used in aerial shells contain perchlorate." That testimony is as follows:

MR. COLE: That's fine. Now we talked about the Nite Howlers. When you were manufacturing Whistle Petes, and from your testimony you indicated that stopped in 1980, what were the ingredients of the Whistle Petes?

MR. CARLTON: Same thing as the Nite Howler.

Q: So was potassium perchlorate used as an oxidizer in those?

A: And sodium salicylate.

(Carlton Depo., Vol. 1, December 12, 2005, 171:10-18.) Nite Howlers and Whistle Petes were Class C, safe and sane, consumer fireworks that Trojan Fireworks manufactured for sale to the general public:

MR. MROZ: Now, you've testified to essentially two products that were consumer fireworks made at the plant that contained potassium perchlorate, and that was the Whistle Petes and the Nite Howler; is that correct?

MR. CARLTON: Yes.

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[25] Both Mr. Carlton and Mr. Veline are former employees of Trojan Fireworks' Astro display division and PSI's special effects division, Astro Pyrotechnics. As discussed further below, Astro Pyrotechnics was not "PSI's aerial display manufacturing division" as stated by Rialto. (Rialto's Opening Brief 69:2-3.) The Astro division made small pyrotechnic special effects and close proximity items for use in stage shows, film, concerts, etc. The Astro Pyrotechnics division of PSI began operations in March of 1988, but did not conduct any operations at the 160-Acre Property.

(Carlton Depo., Vol. 3, May 24, 2006, 576:1-20.) (Emphasis added.) This testimony has nothing to do with professional aerial shells and cannot be used to determine the perchlorate content of aerial shells.

Similarly, Rialto cites to 300:23-302:2 of the deposition of Mr. Veline to support the statement that "stars made by Astro contained approximately 55 percent potassium perchlorate." That testimony is as follows:

> MR. JOHNSON: Now, often we refer – during your first day of deposition and today's deposition you've referred to Trojan plant, and you just referred to Astro. Are they one and the same?
>
> MR. VAN VLEAR: Objection, calls for speculation, legal conclusion.
>
> MR. MROZ: Join.
>
> MR. VELINE: I believe – my understanding of the hierarchy was that Trojan was the parent company. What we called Astro Pyrotechnics was a display division, which did shows. We called the plant ourselves Astro. That's what we called ourselves.

(Veline Depo., Vol. 2, September 21, 2006, 300:23-302:2.) (Emphasis added.) Clearly, this testimony has nothing to do with PSI's operations, nothing to do with aerial shells and nothing to do with aerial shell composition or perchlorate.

Rialto offers no evidence that PSI even purchased aerial shells from Trojan Fireworks. Rialto cannot. Trojan Fireworks did not even manufacture aerial shells:

> MR. CARRIGAN: In about 1977, when you became the plant manager, was [Trojan] assembling aerial shells?
>
> MR. GARI: Objection, vague.
>
> MR. MROZ: I'll join.
>
> MR. CARLTON: We never assembled shells...

(Carlton Depo., Vol. 2, December 13, 2005, 388:5-9.) (Emphasis added.)

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Neither Mr. Veline's nor Mr. Carlton's testimony provides any evidence of the amount of perchlorate contained in any of the aerial shells used by PSI. Nor does the deposition testimony of Mr. Veline and Mr. Carlton provide any evidence of the amount of perchlorate contained in any aerial shells in the McLaughlin Pit.

In addition to falsely characterizing the testimony of Mr. Souza, Mr. Carlton and Mr. Veline, Rialto falsely argues that documents from William Bybee support its argument that, "Many aerial display fireworks contain greater than 55% perchlorate by weight." (Rialto's Opening Brief, 64:15-16; 69:11). Mr. Bybee is a former employee of Atlas Fireworks, a company related to Apollo, that operated in Rialto during the 1960s, at least a decade before PSI was even incorporated. (Deposition of William Bybee ("Bybee Depo."), October 24, 2005, Vol. 1, 23:3-5, 72:15-20). The documents were produced by Mr. Bybee at his deposition and include fireworks compositions that were used by Atlas Fireworks. (Bybee Depo., October 25, 2005, Vol. 2, 205:23-206:2, 206:4-12; 249:14-20, 250:11-14.) These documents have nothing to do with PSI's aerial shells and cannot be used to estimate the amount of perchlorate contained within them.

When all the faulty assumptions are removed, it becomes clear that not one element of Rialto's phoney "0.88 lbs. x. 10 x. 12 months" = "800 pounds" formula is supported by the facts. The facts are inconsistent with Rialto's made-up formula, as demonstrated above. Because Rialto's faulty calculation is based on misrepresentations of the facts and speculation and conjecture, the estimate that results from the faulty calculation is not reasonable. As such, it amounts to only argument of counsel. Again, argument of counsel is not evidence[26] and speculation and conjecture are not evidence.[27]

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[26] People v. Breaux, 1 Cal.4th at 313; Eller Media Co. v. Community Redevelopment Agency, 108 Cal.App.4th at 38; Fuller v. Tucker, 84 Cal.App.4th at 1173; Davenport v. Blue Cross of California, 52 Cal.App.4th at 454; Estate of Nicholas v. Nicholas, 177 Cal.App.3d at 1090.

[27] See generally, Roddenberry v. Roddenberry, 44 Cal.App.4th at 651; Regents of University of California v. Public Employment Relations Bd., 220 Cal.App.3d at 359; Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 35, p. 184.

C. Rialto Cannot Authenticate The Linchpin Of Rialto's McLaughlin Pit "Summary", "Ex. 195" The Document Allegedly Written By Bill Lehman

The linchpin of Rialto's argument is a document dated January 17, 1984 allegedly from Bill Lehman, then an employee of PSI. This document did not come from PSI's files. Rialto does not have the evidence to prove it is a business record of PSI. The alleged author of the document, Bill Lehman, consistently has denied he wrote the document. (Lehman Decl. ¶ 12.) Rialto cannot prove the January 17, 1984 letter is authentic.

Ralph Apel, the alleged recipient of the document, testified that he does not recall receiving it. (Apel Depo., Vol. 1, August 29, 2005, 161:2-3). Harry Hescox, Mr. Apel's boss at Apollo, testified that he did not recognize the document at all. (Hescox Depo., Vol. 1, February 14, 2005, 201:10-21.)

Mr. Lehman does not recall the McLaughlin Pit (Lehman Decl., ¶ 11.) Nor did Mr. Lehman witness PSI personnel putting any waste or aerial shells into the McLaughlin Pit. (Lehman Decl., ¶ 11.) Based upon his knowledge of PSI's operations, Mr. Lehman has consistently stated under oath that he believes the disposal reference in the January 17, 1984 letter is to a burn pit. (Id. at ¶ 12; Lehman Depo., April 27, 2007, Vol. 1, 150:6-153:24.)

D. Rialto Has No Proof That PSI Discharged Perchlorate, Or Threatens To Discharge Perchlorate Into Groundwater Through The Limited Burning Of "Pyrotechnic Waste"

Like the Advocacy Team, Rialto's Opening Submission provides no evidence that PSI discharged perchlorate, or threatens to discharge perchlorate, in the Rialto-Colton Basin through the burning of its waste. In an attempt to characterize PSI's waste in a manner inconsistent with the facts, Rialto, like the Advocacy Team when it wrote the Draft CAO, attempts to suggest that all of PSI's "pyrotechnic waste" is perchlorate. In the Draft CAO, term "pyrotechnic waste" used throughout the Draft CAO means "unusable, defective and excess fireworks, chemicals and other waste." (Sturdivant Depo., Vol. 1, March 20, 2007, 186:23 - 187:7.) However, in her deposition, Ms. Sturdivant admitted that "pyrotechnic waste," as used throughout the Draft CAO, could include other waste that is neither flammable nor hazardous.

(Sturdivant Depo., Vol. 1, March 20, 2007, 175:19-21.) According to Ms. Sturdivant's testimony, the term "pyrotechnic waste" in the Draft CAO includes:

a. Paper (Sturdivant Depo., Vol. 1, March 20, 2007, 175:8-9.);

b. Cardboard (Sturdivant Depo., Vol. 1, March 20, 2007, 175:10-11.);

c. Fuse (Sturdivant Depo., Vol. 1, March 20, 2007, 175:12-13.);

d. Black powder (Sturdivant Depo., Vol. 1, March 20, 2007, 175:14-15.); and,

e. "Any other waste that isn't specified here. That was the intent." (Sturdivant Depo., Vol. 1, March 20, 2007, 175:16-18;Vol. 2, March 28, 2007, 13:10-14:2.)

Rialto's Opening Brief suffers from the same infirmity as the Draft CAO. Rialto's Opening Brief argues: "PSI was constantly burning pyrotechnic waste at the Locust Street site from 1988 through 1996. At least 5.5 tons of that waste were documented to the Rialto Fire Department. Even assuming only 5% of the burned pyrotechnic waste was leftover perchlorate, PSI discharged 550 pounds of perchlorate into its earthen burn pit." (Rialto's Opening Brief, 75:4-8.) (Emphasis added.)

The facts are that most of PSI's waste was fuse (including Quickmatch) which does not contain perchlorate. (Exhibit P 7; Souza Decl. ¶ 21; Lehman Depo., April 27, 2007, Vol. 2, 70:15-21; Lehman Decl., ¶ 7 at PSI 2001796.) A letter from PSI to the San Bernardino County Environmental Health Services Agency dated September 12, 1988 states:

- "We are not a manufacturer of fireworks and therefor deal in finished inventory only."
- "Hazardous Materials - Unless we are repairing defective aerial shells or assembling ground effect set pieces we do not normally generate any hazardous waste."
- "What waste we do accumulate is primarily cuttings of quick-match or fuse which is burned on a regular basis under the jurisdiction of the Rialto Fire Department and the Air Quality Management District. The maximum we would accumulate in any given month would be approximately 50 pounds."

(Exhibit P 7.)

The Advocacy Team admits fuse does not contain perchlorate. (Sturdivant Depo., Vol. 1, March 20, 2007, 153:2-6.) Quickmatch is a type of fuse. (Souza Decl., ¶ 13.)

The Rialto Fire Department documents relied upon by Rialto for its "well over 5.5" alleged tons of waste number do not prove there was "well over 5.5 tons" of perchlorate at all. Rialto provides no evidence of how much perchlorate was involved in PSI's burning of waste materials.

Perchlorate readily combusts when exposed to fire. However, Rialto provides no evidence of how much perchlorate, if any, was left over after a burn of "pyrotechnic waste" by PSI. Again, Rialto resorts to unreasonable assumptions and mere argument of counsel for the unfounded conclusion that PSI discharged 550 alleged pounds of perchlorate at the surface of the 160-Acre Property after burning. In order for Rialto's 550 alleged pounds number to be correct, Rialto makes three additional faulty assumptions, in addition to the seven previous assumptions, none of which are supported by the facts. Each of these additional faulty assumptions are wrong, as discussed below.

- **False Assumption 8:** *All of the 5.5 alleged tons of "pyrotechnic waste" were from PSI.* **Why this assumption is not supported by the facts:** The facts are that much of the "pyrotechnic waste" Rialto is counting is not PSI's waste at all.

Rialto argues, "Rialto Fire Department Records show that Astro Pyrotechnics PSI's manufacturing division, burned or had permits to burn waste pyrotechnics at the North Locust Site from January through September 1988 (RFDW0043334, RFDW004345, RFDW004342-004343; RFDW004319-004320, RFDW004321, RFDW004307 and RFDW004308 [P-63] . . ." (Rialto's Opening Brief, 74:8-13.) However, the facts are that PSI's purchase of the assets of Astro Pyrotechnics from Trojan Fireworks was not effective until April 4, 1988. (Exhibit P 144 at PSI 3001185.) Thus, Rialto's assumption is nothing more than argument of counsel which is not evidence.[28]

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[28] People v. Breaux, 1 Cal.4th at 313; Eller Media Co. v. Community Redevelopment Agency, 108 Cal.App.4th at 38; Fuller v. Tucker, 84 Cal.App.4th at 1173; Davenport v. Blue Cross of California, 52 Cal.App.4th at 454; Estate of Nicholas v. Nicholas, 177 Cal.App.3d at 1090.

In order to make its phoney numbers look more plausible, Rialto insinuates that PSI is responsible for two "'truckload[s]' full of 'off spec' fireworks and waste pyrotechnic powder" delivered to an earthen burn pit at the 160-Acre Property. (Rialto's Opening Brief, 73:20-24.) In making this false accusation, Rialto relies on the testimony of Leo Autote, a former employee of first of Trojan Fireworks Company, and later of PSI. However, the facts are that testimony cited by Rialto is very clearly referring to Trojan, not PSI:

> MR. SOLINGER: ...When we say – since we know that the business was purchased mid or spring of '88, when you're saying 'before 1988,' you're talking about the Trojan years...
>
> MR. DENNIS: That's correct.

(Autote Depo., Vol. 2, January 17, 2007, 280:17-24.)

* * *

> MR. DENNIS: I stand corrected. You're right. But as you best recall it, those two trips that you made up to 3196 North Locust prior to 1988 for these burns included things like those sweepings in their cardboard buckets; right?
>
> MR. AUTOTE: Yes.

(Autote Depo., Volume 2, January 17, 2007, 293:5-10.) (Emphasis added.) Rialto does not satisfy its burden of proof by misrepresentations of the facts and pure argument of counsel – that does not cut the mustard.[29]

- **False Assumption 9:** *All of PSI's "pyrotechnic waste" contained perchlorate.*
  Why this assumption is not supported by the facts: The facts are most of PSI's "pyrotechnic waste" was fuse (Quickmatch) and black powder which do not contain perchlorate.

[29] People v. Breaux, 1 Cal.4th at 313; Eller Media Co. v. Community Redevelopment Agency, 108 Cal.App.4th at 38; Fuller v. Tucker, 84 Cal.App.4th at 1173; Davenport v. Blue Cross of California, 52 Cal.App.4th at 454; Estate of Nicholas v. Nicholas, 177 Cal.App.3d at 1090.

Historically, the pyrotechnic materials burned by PSI largely consisted of fuse (Quickmatch) and black powder, neither of which contain perchlorate. (Exhibit P 7; Souza Decl., ¶ 26; Lehman Depo., April 27, 2007, Vol. 1, 70:15-21; Lehman Decl., ¶ 7 at PSI 2001796.) Extremely small quantities of fireworks composition as a part of the limited number of defective fireworks and duds were destroyed by PSI during these burns. (Exhibit P 7; Souza Decl., ¶ 26; Lehman Depo., April 27, 2007, Vol. 1, 70:24-25; Lehman Decl., ¶ 5 at PSI 2001796.) All the burning of these materials by PSI was done pursuant to permits issued by the City of Rialto Fire Department and in accordance with industry standards. (Exhibit 7; Souza Decl., ¶ 26.) Eye-witnesses to these burns describe them as extremely fast, hot and efficient. (Lehman Decl., ¶ 9; Lehman Depo., April 27, 2007, Vol. 1, 73:2-25.) Rialto's claim is not based on the testimony of one witness or document - it is nothing more than speculation and argument of counsel. Neither speculation[30] nor argument of counsel are evidence.[31]

- **False Assumption 10:** *5% of the burned "pyrotechnic waste was leftover perchlorate.* **Why this assumption is not supported by the facts:** The facts are no testimony, no document and no expert opinion support the claimed 5% number.

Rialto does not reveal the method it relies upon to arrive at its number. Rialto provides no evidence to prove that the method it used to arrive at its alleged 5% number is supported by the facts or is scientifically reasonable. The only thing about which one can be sure is that it is an assumption, because Rialto's Opening Brief says "even if . . ." or "even assuming . . ." (Rialto's Opening Brief, 61:12; 75:6-7.) (Emphasis added.) Rialto offers no expert opinions as part of its Opening Submissions on the effective burn rate of the "pyrotechnic material" or how much perchlorate, if any, could be expected to have remained after a burn. Indeed, Rialto

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[30] See generally, Roddenberry v. Roddenberry, 44 Cal.App.4th at 651; Regents of University of California v. Public Employment Relations Bd., 220 Cal.App.3d at 359; Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 35, p. 184.

[31] People v. Breaux, 1 Cal.4th at 313; Eller Media Co. v. Community Redevelopment Agency, 108 Cal.App.4th at 38; Fuller v. Tucker, 84 Cal.App.4th at 1173; Davenport v. Blue Cross of California, 52 Cal.App.4th at 454; Estate of Nicholas v. Nicholas, 177 Cal.App.3d at 1090.

provides no evidence or proof of how much perchlorate, if any, was left after PSI burned its "pyrotechnic waste." Clearly, the 5% number is nothing more than a guess – it is blatant speculation. Speculation is not evidence.[32]

E. The TRC Report Does Not Support Rialto's Claims Against PSI

Rialto's discussion of the "TRC 7/14/2004 Report to Christian M. Carrigan [P-70]" (Rialto's Opening Brief, 75:9-16) does not help Rialto sustain its alleged 5% number for at least three reasons. First, while the report may state that ash tested after the fire tested as high as 131,000 parts per billion of residual perchlorate, the report also states that at least one of the samples were non-detect for perchlorate. (TRC 7/14/2004 Report to Christian M. Carrigan [P-70 at Table 1].) Table 1 from the TRC Report is reproduced below:

Table 1
Perchlorate Concentrations

Sample Number	Sample Type	Result (µg/kg)
AP-1	Surficial Soil/Ash	56.1
AP-2	Surficial Soil/Ash	113
AP-3	Surficial Soil/Ash	355
AP-4	Surficial Soil/Ash	919
AP-5	Surficial Soil/Ash	5600
AP-6	Surficial Soil/Ash	44200
AP/D-1	Debris in Drum	6340
AP/D-2	Debris in Drum	1980
AP/D-3	Debris in Drum	ND*
AP/D-4	Debris in Drum	131000
AP/D-5	Debris in Drum	322
AP/D-7	Debris in Drum	229
AP/D-8	Debris in Drum	213
AP/D-9	Debris in Drum	1110
AP/D-10	Debris in Drum	17

*ND = Parameter not detected at the indicated reporting limit

Whether the 5.5 alleged tons of "pyrotechnic waste" was more like the waste that resulted in non-detect result than the 131000 parts per billion result Rialto does not and cannot say one

[32] See generally, Roddenberry v. Roddenberry, 44 Cal.App.4th at 651; Regents of University of California v. Public Employment Relations Bd., 220 Cal.App.3d at 359; Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 35, p. 184.

way or the other. Thus, the TRC 7/14/2004 Report to Christian M. Carrigan has no value as evidence in these proceedings because it takes guessing – speculation – to draw any conclusion from the report that applies to the burning of PSI's "pyrotechnic waste." Speculation is not evidence.[33]

Second, TRC took surficial samples of soil and ash following a fire in an Astro Pyrotechnics' building on Stonehurst Avenue, not on the 160-Acre Property. The building was a research and development building and contained raw perchlorate. (TRC 7/14/2004 Report to Christian M. Carrigan at p. 3.) The Advocacy Team admits this was "a laboratory, and lab means they have pure stuff sitting on a bench, on the shelf."[34] (Saremi Depo., Vol. 4, May 9, 2007, 992:10-17.) Raw perchlorate was not used by PSI on the 160-Acre Property. (Advocacy Team's Supplementary Evidence, Exhibit 1 at 50.) Accordingly, the TRC data cannot be used to reach any conclusions about what could possibly be left after a fire on the 160-Acre Property. The TRC report is silent on how the perchlorate detected in surficial soil and ash could travel through the sub-surface materials to groundwater approximately 400 feet below.

Third, assume the worst case for PSI, namely that all of Rialto's 5.5 alleged tons of "pyrotechnic waste" actually were perchlorate (which cannot be true) and assume that all the ash left after the fire resulted in a 131,000 parts per billion of residual perchlorate as in the TRC Report. How much perchlorate would be left? This is a simple math problem with three steps, as follows:

- **5.5 tons of alleged "pyrotechnic waste" = 11,000 pounds of alleged "pyrotechnic waste" (5.5 x. 2000 = 11,000)**
- **131,000 parts per billion = .000131**
- **11,000 pounds of pyrotechnic waste x. 000131 = 1.441 pounds**

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[33]See generally, Roddenberry v. Roddenberry, 44 Cal.App.4th at 651; Regents of University of California v. Public Employment Relations Bd., 220 Cal.App.3d at 359; Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 35, p. 184.

[34]There are many other problems with the TRC Report such as: (1) There is no evidence of an offer for split sampling, so bias in sample selection is a factor, especially since at the time it took the tests, Rialto had already sued PSI and (2) The ash residue sampled is more concentrated than ash itself, leading to possibly biased results.

Using the highest result from the TRC report as a basis, 5.5 tons of "pyrotechnic waste" would generate 1.441 pounds of perchlorate after burning. In other words:

Using TRC, 5.5 tons results in less than two (2) pounds of perchlorate!

F. Rialto Has No Proof That PSI Discharged Perchlorate, Or Threatens To Discharge Perchlorate Into Groundwater Through The Limited Testing Of Aerial Shells

PSI acknowledges it tested aerial shells at the 160-Acre Property. However, neither the Advocacy Team nor Rialto produce any evidence that perchlorate from testing of aerial shells by PSI at the 160-Acre Property affects or threatens groundwater. Aerial display shells, and their contents, are specifically designed to burn hot and fast. They almost always perform as planned. (Souza Decl., ¶ 23; Lehman Decl., ¶ 3 at PSI 2001795.) Rialto provides no facts to prove that perchlorate fell to the ground during PSI's testing, let alone 5% of the total content of each shell fired. Instead, Rialto argues:

> Aerial displays of fireworks result in a discharge of residual perchlorate to the ground. (See 8/205 Massachusetts Department of Environmental Protection Draft Report Evaluation of Perchlorate Contamination at a Fireworks Display, p. i or iii and following [maximum concentration of 560 parts per billion in soil beneath aerial display fireworks launch area in hours following launch event [P-90].) PSI test fired a documented 2,779 aerial display shelf (sic) at its Locust Street Site, but most of its test firing was pursuant to a general permit. Even if only 5% of the approximately 400 grams of perchlorate in each shell fell to the ground, PSI discharged at least 122 pounds of perchlorate onto the bare ground through its testing operations. More likely, given the test quantities of aerial shells were only sporadically documented, PSI discharge (sic) of perchlorate from test operations was must (sic) higher.

(Rialto's Opening Brief, 77:11-22.) (Emphasis added.)

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Rialto provides no evidence to prove that any perchlorate fell to the ground during each test done by PSI. Rialto provides no evidence to prove that Rialto's alleged 5% is a correct assumption. Rialto cites to no testimony or expert opinion concerning the effective burn rate of aerial shells. Nor does Rialto provide a realistic estimate of the amount of perchlorate, if any, could be expected to have not burned during the explosion of the shell. Rialto's alleged 5% number came only from its lawyers and is not based on evidence.

In order for Rialto's 122 alleged pounds number to be correct, Rialto makes two additional assumptions, in addition to the ten previous assumptions, none of which are supported by the facts. Each of these additional false assumptions are wrong, as discussed below.

- **False Assumption 11:** *Each aerial shell tested by PSI contained 400 grams of perchlorate.*[35] **Why this assumption is not supported by the facts:** The facts are there are no records of the amount of perchlorate in any aerial shell tested by PSI.

As admitted by the Advocacy Team, it does not know how much perchlorate is in any individual aerial shell. (Sturdivant Depo., Vol. 1, March 20, 2007, 146:20-22; Saremi Depo., Vol. 3, March 27, 2007, 712:22 - 713:1.) Neither does Rialto. The facts are not in Rialto's Opening Submission and they do not exist. Accordingly, Rialto's assumption is not reasonable and is based only on the unsupported argument of counsel. Argument of counsel is not evidence.[36]

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[35]It is not clear from the discussion in this section of Rialto's Opening Brief (pages 75 to 77) where the 400 grams of perchlorate per aerial shell comes from. We can only guess it is similar to two of Rialto's previous assumptions, Assumption 3 and Assumption 7, discussed in Section III.B., above, since 400 grams is approximately 55% of 800 grams. If our guess is correct, then False Assumption 11 is not reasonable for the reasons previously discussed in connection with false assumptions 3 and 7 in Section III.B., above. Since it is unclear, we perform a separate analysis here showing Rialto's argument about testing aerial shells is bogus too.

[36]People v. Breaux, 1 Cal.4th at 313; Eller Media Co. v. Community Redevelopment Agency, 108 Cal.App.4th at 38; Fuller v. Tucker, 84 Cal.App.4th at 1173; Davenport v. Blue Cross of California, 52 Cal.App.4th at 454; Estate of Nicholas v. Nicholas, 177 Cal.App.3d at 1090.

- **False Assumption 12:** *5% of the perchlorate in each aerial shell fell to the ground.* **Why this assumption is not supported by the facts:** The facts are no testimony, no document or expert opinion support Rialto's alleged 5% number.

Rialto does not reveal the method it relies upon to arrive at its number. Rialto provides no evidence to prove that the method it used to arrive at Rialto's alleged 5% number is supported by the facts or is scientifically reasonable. The only thing about which one can be sure is that it is an assumption, because Rialto's Opening Brief says "even if . . ." (Rialto's Opening Brief, 77:17.) (Emphasis added.) Rialto provides no expert opinions in its Opening Submissions on the percentage of perchlorate, if any, could be expected to have fallen to the ground after each test of an aerial shell. Clearly, Rialto's alleged 5% number is nothing more than a guess – it is blatant speculation and that is not evidence.[37]

G. The Massachusetts DEP Draft Report Is Not Evidence To Prove That Perchlorate From PSI's Testing Of Aerial Shells Affects Or Threatens Groundwater

First, it is clear from Rialto's Opening Brief that Rialto's 122 alleged pounds number is only an allegation as to discharges to "bare ground" and not to groundwater. (Rialto Opening Brief, 77:17-20.) According to Dr. Stephens' Declaration, any perchlorate released to the soil at the 160-Acre Property will take 320 years **(400 feet ÷ 1.25 feet/year = 320 years)** to reach groundwater, absent a source of water other than rainfall, to mobilize the perchlorate. (Stephens Decl., p. 14.) Rialto does not provide any evidence to prove facts that there was a source of water other than rainfall to mobilize any perchlorate left after testing aerial shells. Rialto provides no evidence of a transport mechanism by which this alleged perchlorate could have traveled through the approximately 400 foot thick vadose zone to reach groundwater. According to Advocacy Team member Robert Holub, if material was burned and there is so

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[37] See generally, Roddenberry v. Roddenberry, 44 Cal.App.4th at 651; Regents of University of California v. Public Employment Relations Bd., 220 Cal.App.3d at 359; Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 35, p. 184.

little of it left that it is never going to get to groundwater 400 feet below, then in terms of the Regional Board's regulation to protect waters of the State, it may not be considered a problem. (Holub Depo., Vol. 3, April 6, 2007, 687:9-14.)

Second, like the Advocacy Team, Rialto fails to mention that the groundwater at the site in the Massachusetts study started at slightly over 1 foot below ground surface in some wells and averaged about 4 feet below ground surface. (8/205 Massachusetts Department of Environmental Protection Draft Report Evaluation of Perchlorate Contamination at a Fireworks Display, Table 2, p. 7.) Thus, the vadose zone at the Massachusetts site is very thin. Where the top the water table is shallow, as at the Massachusetts site, perchlorate has less distance to travel to reach ground water. However, where the depth to groundwater is 400 feet as at the 160-Acre Property, perchlorate has a long way to travel to reach groundwater from the surface. The most stubborn fact for the prosecutors seeking to hold PSI liable is that groundwater is more than 400 feet from the surface at the 160-Acre Property. At the 160-Acre Property, depth to groundwater is over 100 times deeper than the Massachusetts site.

In addition, slug tests were performed at the Massachusetts site that indicate that the recharge rate there is much, much higher than in the Rialto-Colton Basin. (8/205 Massachusetts Department of Environmental Protection Draft Report Evaluation of Perchlorate Contamination at a Fireworks Display, p. 8 and Table 3, p. 10.) Furthermore, the climate in Rialto is semi-arid with annual rainfall of approximately 15 inches per year according to Rialto's expert, Dr. Stephens. (Stephens Decl., p. 14.) In Dartmouth, Massachusetts, the annual rainfall is over 40 inches per year. (Exhibit P 181.) A figure showing the vast difference in weather between Rialto, California and Dartmouth, Massachusetts is in Exhibit P 178. Thus, there is no comparable geological settings between Rialto, California and Dartmouth, Massachusetts. As a result, any attempt to apply the Massachusetts study to Rialto is not reasonable.

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Rialto's argument that PSI discharged at least 122 alleged pounds of perchlorate to the surface of the 160-Acre Property through the testing of aerial shells is not evidence because it is based on mere speculation. Speculation is not evidence.[38]

H. Rialto Has No Evidence That "PSI Facility Accidents" Resulted In The Discharge Of Perchlorate To The Soil, Or Is Anywhere Near Groundwater

In its Opening Brief, Rialto makes the unsupported allegation that "PSI Facility Accidents Caused Perchlorate To Be Discharged Into The Soil." (Rialto's Opening Brief, 77:23-24.) Once again, Rialto provides no evidence of how much perchlorate, if any, was released to the ground, much less into or anywhere near the groundwater, as the result of any "Facility Accident."

Rialto points to two tragic events to support its baseless accusation. The first is a 1987 explosion at the Celebrity Fireworks plant, involving the detonation of the A-4 storage bunker. (Rialto's Opening Brief, 77:25 - 78:2.) This explosion was caused by a suicidal employee of Celebrity Fireworks. While this event was tragic, it is not relevant to these proceedings. Celebrity Fireworks and the A-4 bunker were not located at the 160-Acre Property. Indeed, earlier drafts of Rialto's Opening Brief indicate that Rialto was keenly aware that the A-4 Bunker was not located at the 160-Acre Property. (Exhibit P 154, p. 6.) Rialto cites to no evidence or proof, nor can it, that the explosion at Celebrity Fireworks resulted in the discharge, or threatened discharge, of perchlorate to the soil or groundwater at the A-4 Bunker, much less the 160-Acre Property.

The second "Facility Accident" mentioned by Rialto is the accidental explosion and resultant fire on September 9, 1996 that started in a 45 foot trailer parked at the PSI loading dock and warehouse. (Rialto's Opening Brief, 78:3-9.) Rialto presents no evidence of how much perchlorate was involved. Rialto presents no evidence of how much perchlorate remained after the fire, if any. Rialto has no soil samples to support its position that perchlorate

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[38] See generally, Roddenberry v. Roddenberry, 44 Cal.App.4th at 651; Regents of University of California v. Public Employment Relations Bd., 220 Cal.App.3d at 359; Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 35, p. 184.

was released as a result of this explosion. Furthermore, contemporaneous documentary evidence provides contrary facts. The Hazardous Materials Response Report dated September 9, 1996 clearly states that "all elements of the explosion were consumed in the fire" and "the fire was contained to two sections of a four section building." (Advocacy Team Exhibit 27 at 10079.)

All soil samples from PSI's operational areas on its leasehold on the 160-Acre Property have been non-detect for perchlorate. (Exhibit P 10.) Based on the data, Gerard Thibeault sent PSI a letter on March 5, 2005 stating that no additional soil samples were required at PSI's facility. (Exhibit P 12.)

Rialto cites to no evidence or proof, nor can it, that the explosion at the PSI loading dock resulted in the discharge, or threatened discharge, of perchlorate to the soil or to groundwater. Since there are no facts to back up this argument in Rialto's Opening Brief, it is nothing but the argument of lawyers, which is not evidence.[39]

I. Based On Local Data, Natural Recharge At The 160-Acre Property Would Take 320 Years Or More

It would take at least hundreds of years for perchlorate released at the surface at the 160-Acre Property to reach groundwater, absent a source of water other than rainfall to mobilize the perchlorate. As the Advocacy Team admits: "Perchlorate has very little affinity for soil particles and, therefore, is considered to move at the same rate as water through soils." (Advocacy Team Submission, p. 10.) "Groundwater underlying and immediately downgradient of the Property is within the Rialto Groundwater Management Zone. Numerous hydrogeologic studies have been performed in the Rialto Groundwater Management Zone by the United States Geologic Survey (USGS) and others (Attachment 2, USGS 1997 & 2001, GLA 2007, GeoSyntec 2006)." (Advocacy Team Submission, pp. 5-6.) Recharge in the San Bernardino area, including the Rialto-Colton Basin, has been the subject of much study by scientists with

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[39] People v. Breaux, 1 Cal.4th at 313; Eller Media Co. v. Community Redevelopment Agency, 108 Cal.App.4th at 38; Fuller v. Tucker, 84 Cal.App.4th at 1173; Davenport v. Blue Cross of California, 52 Cal.App.4th at 454; Estate of Nicholas v. Nicholas, 177 Cal.App.3d at 1090.

no connection to these proceedings.[40] Much of the work has been done by the USGS, which Rialto's experts admit is highly respected for its good work and neutrality. (Hunt Depo., 355:9 - 356:3; Stephens Depo., Vol. 3, May 16, 2007, 780:7 - 781:9.) The Advocacy Team has relied on the USGS work. (Advocacy Team Submission, pp. 5-6.) The USGS has determined that essentially no natural recharge from rainwater occurs within the Rialto-Colton Basin. In 2005, after years of study, the USGS estimated the net recharge rate of 0.15 inches per year. Danskin, W.R., McPherson, K.R. and Woolfenden, L.R. (2006), Hydrology, Description of Computer Models, and Evaluation of Selected Water-Management Alternatives in the San Bernardino, Area, California (USGS Water-Resources Investigations Report No. 05-1278, Exhibit P 161.)

As part of a "Final Calculation" that he used in his "Declaration" submitted on April 12, 2007, Dr. Stephens estimated the net recharge rate at the 160-Acre Property would be 0.75 inches per year or five times the recharge rate of 0.15 inches per year estimated by the USGS in 2005 for the San Bernardino area. According to Dr. Stephens' "Final Calculation," perchlorate on the surface at the 160-Acre Property would be expected to move toward groundwater at an average rate of 1.25 feet per year (15 inches per year), absent a source of water other than rainfall to mobilize the perchlorate. (Stephens Decl., p. 14 and 16; Exhibit 164.) Even if PSI concedes Dr. Stephens' five times higher net recharge rate than the USGS's net recharge rate, it would take 320 years for perchlorate to reach groundwater from ground surface at the 160-Acre Property **(400 feet ÷ 1.25 feet/year = 320 years)**. (Stephens Depo., Vol. 3. May 16, 2007, 766:20-767:4.) Any minimal amount of perchlorate remaining on the

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[40]These USGS studies include: Schaefer, D.H., and Warner, J.W. (1975). Artificial Recharge in the Upper Santa Ana River Area, San Bernardino County, California (USGS Water-Resources Investigations Report 75-15); Woolfenden, L. R., & Kadhim, D. (1997). Geohydrology and Water Chemistry in the Rialto-Colton Basin, San Bernardino County, California (USGS Water-Resources Investigations Report No. 97-4012); Woolfenden, L. R., Koczot, K. M., San Bernardino Valley Municipal Water District, & U.S. Geological Survey. (2001). Numerical Simulation of Ground-water Flow and Assessment of the Effects of Artificial Recharge in the Rialto-Colton Basin, San Bernardino County, California (USGS Water-Resources Investigations Report No. 00-4243); Danskin, W.R., McPherson, K.R. and Woolfenden, L.R. (2006), Hydrology, Description of Computer Models, and Evaluation of Selected Water-Management Alternatives in the San Bernardino, Area, California (USGS Water-Resources Investigations Report No. 05-1278). (Exhibits P 159 - P 163.)

ground at the 160-Acre Property (or elsewhere in the Rialto-Colton Basin) does not meet the definition of "threaten" in Water Code Section 13304(e) because that section requires a "condition creating a substantial probability of harm, when the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to persons, property, or natural resources."

VI. NO EVIDENCE EXISTS THAT PSI HAS CREATED OR THREATENS TO CREATE A CONDITION OF POLLUTION, NUISANCE OR CONTAMINATION

The Advocacy Team and Rialto must prove by a preponderance of evidence perchlorate from PSI was discharged or will be discharged to groundwater in an amount sufficient to create a condition of pollution, nuisance or contamination to make it liable under Water Code Section 13304. Rialto provides no evidence that perchlorate from PSI reached or is a threat to reach groundwater. All soil samples from PSI's operational areas on its leasehold on the 160-Acre Property have been non-detect for perchlorate. (Exhibit P 10.) Similarly, groundwater quality data obtained from well CMW-03, located downgradient from PSI's leasehold, has consistently been non-detect for perchlorate.

The testimony of Regional Board staff members actually involved in the investigation admit that they do not know whether PSI discharged perchlorate to groundwater or to soil in a manner that threatens groundwater. For example, Regional Board staff member Robert Holub testified that:

Q. Did any perchlorate from PSI get to the groundwater?

A. It's my opinion that -- I don't have analytical data that shows perchlorate from PSI got to groundwater.

Q. And that's not just for the McLaughlin Pit, that's for the entire 160-acre parcel; correct?

A. Yes.

(Holub Depo., March 8, 2007, Vol.1, 183:20-184:1.)

Ann Sturdivant, the Regional Board's senior engineering geologist, one of the persons at the Regional Board involved in the investigation and a primary drafter of the Draft CAO, testified that:

Q. So on any given day, at any sample that's taken from this basin, when you actually take the sample and you look at the data, and if you see perchlorate or you see trichloroethylene, you can't say under oath that that TCE or perchlorate came from any particular operation versus another one, can you?

A. In the water?

Q. Yes.

A. Probably not.

(Sturdivant Depo., Vol. 3, March 29, 2007, 717:15-23.)

Kamron Saremi, the Regional Board's water resources control engineer, one of the persons at the Regional Board involved in the investigation and a contributor of information for the Draft CAO, testified that:

Q. . . . And based upon the number of years that these properties have been used by all of these different users and based upon the record that you have in your own file --

A. Yes.

Q. -- you can't say whose perchlorate or trichloroethylene is in any particular well at any particular time, can you, sir?

A. I don't think we can link -- Yeah, that – that's correct.

Q. You can't do that; right?

A. Yeah, because perchlorate and TCE, they were basically common salt and common solvent.

(Saremi Depo., Vol. 2, March 23, 2007, 447:15-448:2.)

Furthermore, Advocacy Team member Robert Holub testified under oath that with respect to all three of the alleged dischargers, he does not know whether or not perchlorate from any of their operations is within a hundred feet of groundwater. (Holub Depo., Vol. 4, April 9, 2007, 956:2-6.) There is no evidence that perchlorate from any alleged discharges by Goodrich, West Coast Loading or PSI is within a hundred feet of groundwater. (Holub Depo., Vol. 4, April 9, 2007, 956:7-16.)

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According to Advocacy Team member Robert Holub, if material was burned and there is so little of it left that it is never going to get to groundwater 400 feet below, then in terms of the Regional Board's regulation to protect waters of the State, it may not be considered a problem. (Holub Depo., Vol. 3, April 6, 2007, 687:9-14.) If the McLaughlin Pit burned and there are only small concentrations of waste material left which, because of the depth of groundwater, will not make it to groundwater for a very long, long time - under those circumstances, from the Regional Board's perspective, that likely would not represent a nuisance to the waters of the State. (Holub Depo., Vol. 3, April 6, 2007, 687:22 - 688:15.) It also would not be a pollutant with respect to groundwater under the same circumstances. (Holub Depo., Vol. 3, April 6, 2007, 688:17-21.) The same must be true for any perchlorate allegedly remaining on the ground after a burn or test of an aerial shell. Mr. Holub's testimony is consistent with the opinion of Rialto's expert, Dr. Stephens, that perchlorate released to the soil at the 160-Acre Property will take 320 years **(400 feet ÷ 1.25 feet/year = 320 years)** to reach groundwater, absent a source of water other than rainfall, to mobilize the perchlorate. (Stephens Decl., pp. 14 and 16.)

VII. RIALTO'S OPENING BRIEF IS FULL OF UNSUBSTANTIATED ACCUSATIONS AND MISREPRESENTATIONS OF FACT

Throughout its Opening Brief, Rialto makes numerous false accusations and misrepresentations of fact. PSI takes this opportunity to refute the most egregious misstatements by Rialto.

A. PSI Is Not The Corporate Successor To Apollo

It is well established that PSI is not the corporate successor to Apollo. (Souza Decl., ¶¶ 2-5; Exhibit P 142.) However, Rialto insinuates that PSI is somehow the successor to Apollo. (Rialto Opening Brief, 62:1-22, 75:20-22.) In doing so, however, Rialto provides no evidence or argument to show that such a relationship exists. Nor could it. Instead, Rialto tries to meld the two separate corporations entities so that it appears as if they are one and the same. The facts are that PSI is not the corporate successor to Apollo and PSI is not responsible for

building, permitting, maintaining, failing to close or putting massive amounts of water and fireworks manufacturing waste in the McLaughlin Pit.

1. California law makes it clear that PSI is not the corporate successor to Apollo

In 1979, PSI purchased the assets of the California Fireworks Display division of Apollo, after PSI was incorporated. (Souza Decl., ¶ 4.) It is well settled law in California that a purchasing corporation generally does not take on the liabilities of the seller corporation. Pierce, et al. v. Riverside Mortgage Securities Co., (1938) 25 Cal.App.2d 248, 254. There are four well recognized exceptions to this general rule. Id. None of the exceptions apply in this case, nor has Rialto provided any evidence or proof as to how those exceptions apply with regards to PSI. In other words, Rialto provides no facts or argument why the California law should be ignored during these proceedings. PSI is not the successor to Apollo.

2. The asset purchase agreement makes it clear that PSI is not responsible for Apollo's liabilities

The asset purchase contract between PSI and Apollo makes it clear that there was no assumption of any of Apollo's liability by PSI:

> 1.04. Liabilities. It is expressly understood and agreed that Buyer [PSI] is not assuming and shall not be liable for any of the obligations or liabilities of Seller [Apollo] of any kind and nature.

(Exhibit P 142, emphasis added.) Moreover, PSI was never an affiliated or subsidiary corporation of Apollo. PSI and Apollo each had separate operations on the 160-Acre Property from the time of PSI's formation in 1979 until Apollo ceased operations in the mid-1980's. (Souza Decl., ¶¶ 2, 4, 8.) PSI cannot be held liable for Apollo's operations that used massive amounts of raw perchlorate with water - unlike PSI - at the 160-Acre Property.

3. PSI purchased the assets of California Fireworks Display after PSI was incorporated

In its Opening Brief, Rialto suggests that PSI was incorporated as a "distinct legal entity" after the asset sale. (Rialto's Opening Brief, 62:8-14.) The timing of these events has no

relevance to whether PSI took on Apollo's liabilities. The contract makes it clear that no liabilities were transferred between the two entities and California law provides that PSI is not responsible for Apollo's liabilities.

The facts is PSI was incorporated on March 28, 1979. Rialto concedes this point in its Opening Brief. (Rialto's Opening Brief, 62:13-14.) The asset purchase occurred on October 15, 1979, some six months after PSI was incorporated. (Exhibit P 142.) Indeed, it is clear that the asset purchase agreement was between PSI, "a California corporation," and Apollo, "a California corporation." (Id.)

B. PSI Did Not Conduct Manufacturing Operations At The 160-Acre Property

As stated in PSI's opening brief, PSI did not manufacture fireworks or any other perchlorate-containing products at the 160-Acre Property. (Exhibit P 7; Souza Decl., ¶¶ 9, 10; Saremi Depo., Vol. 2, March 23, 2007, 372:1-10, 595:12 - 596:3, 676:10-13; Holub Depo., Vol. 1, March 8, 2007, 178:7-13.) Despite the evidence already presented, including the deposition testimony of PSI employees and the Advocacy Team, Rialto erroneously implies in its Opening Brief that PSI manufactured aerial shells at the 160-Acre Property. (Rialto's Opening Brief, 62:14-16, 63:10-15.) The evidence is clear that PSI did not conduct manufacturing operations at the 160-Acre Property.

Individuals that witnessed fireworks company operations in Rialto have testified that PSI did not manufacture fireworks at the 160-Acre Property. Many former employees of PSI, Apollo and Trojan Fireworks have had their depositions taken in the federal litigation. Each of these witnesses has testified that PSI did not conduct manufacturing operations at the 160-Acre Property. For example, Jim Souza, President of PSI, stated under oath that PSI did not conduct any manufacturing at the 160-Acre Property. (Souza Decl., ¶¶ 6-10) Bill Lehman, a former PSI employee, testified that PSI did not manufacture items at the 160-Acre Property. (Lehman Depo., April 27, 2007, Vol. 1, 108:21-109:4.) Harry Hescox, a former employee of Apollo, who had visited PSI's business in Rialto, testified that PSI did not manufacture shells that would have used perchlorate. (Hescox Depo., Vol. 2, Feb. 15, 2005, 294:1 - 295:17.) Margot Cartagena, a former employee of Apollo and current employee of American

Promotional Events, Inc.-West, testified that PSI's business was limited to having displays, conducting different shows and putting displays together. (Cartegena Depo., Vol. 1, Sept. 20, 2005, 70:21 - 71:1.) Similarly, Ralph Apel, also a former Apollo employee, does not believe that PSI ever manufactured display fireworks at the 160-Acre Property. (Apel Depo., Vol. 1, Aug. 29, 2005, 49:18-23.) Mr. Apel testified that he went on the property that PSI leased from Apollo and never saw PSI assembling or manufacturing aerial shells at the 160-Acre Property. (Apel Depo., Vol. 1, Aug. 29, 2005, 69:69:7-14, 70:4-6.)

In addition to former PSI and Apollo employees, Stuart Carlton, a former employee of Trojan Fireworks and PSI, testified that he witnessed PSI's operations at the 160-Acre Property and PSI did not conduct any manufacturing. (Carlton Depo., Vol. 3, May 24, 2006, 582:24 - 583:1, 583:2-15.) Even Advocacy Team members have consistently testified that PSI did not conduct manufacturing operations at the 160-Acre Property. (Saremi Depo., Vol. 2, March 23, 2007, 372:1-10, 676:10-13; Holub Depo., Vol. 4, April 9, 2007, 107:19-22.) Despite Rialto's suggestions to the contrary, the overwhelming evidence is clear that PSI did not conduct manufacturing operations at the 160-Acre Property.

In what can only be called a gross misrepresentation of facts, Rialto states "PSI's aerial display manufacturing division, Astro Pyrotechnics, manufactured aerial shells (or mines) containing perchlorate as early as 1977." (Rialto's Opening Brief, 69:2-4.) First, the Astro Pyrotechnics division of PSI was not in the business of manufacturing aerial shells. It made close-proximity special effects items for use in concerts, films, etc. Mines are not aerial shells. A mine is a pyrotechnic device that contains a single star. (Carlton Depo., December 12, 2005, Vol. 2, 301:25-302:13; Veline Depo., May 23, 2006, Vol. 1, 165:9-10.) Second, PSI did not purchase the assets from Trojan Fireworks of its Astro Pyrotechnic division until eleven years later, on April 4, 1988. (Exhibits P 143 and P144.) Rialto's statement that the Astro Pyrotechnics division of PSI was operating in 1977 is absolutely false. Finally, and most importantly, the Astro Pyrotechnics division **of PSI** never made fireworks at the 160-Acre Property.

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Despite Rialto's unfounded assertions and misrepresentations to the contrary, it is clear that PSI did not manufacture fireworks at the 160-Acre Property.

C. Rialto's Misrepresentations About The Size Of PSI's Operations

Rialto makes several misrepresentations in an attempt to grossly overestimate the size of PSI's operations at the 160-Acre Property. First, like the Advocacy Team, Rialto misrepresents that PSI's leases 47 acres of the 160-Acre Property when PSI leases only 25 acres. Second, Rialto misrepresents that the storage bunkers used by PSI were located at the 160-Acre Property, when in reality those bunkers were located off-site. Through these misrepresentations, Rialto tries to portray PSI's operations at the 160-Acre Property much larger than they really are.

1. Rialto misrepresents the size of PSI's leasehold

Like the Advocacy Team, Rialto misrepresents that PSI leased or leases 47 acres of land in the 160-Acre Property. (Rialto's Opening Brief, 62:22.) Rialto knows PSI only operated in the 160-Acre Property on only 25 acres. Rialto's's Fourth Amended Complaint, filed in federal court, clearly states that PSI operated on 25 acres at 3196 North Locust Avenue.

2. Rialto misrepresents the location of the storage bunkers

In its Opening Brief, Rialto states, "The 160-Acre site included a number of concrete, earth-covered bunkers. These bunkers were in the form of Quonset huts of cast concrete. They measured 26 feet wide by 81 feet long." (Rialto's Opening Brief, 64:17-19.) However, Rialto's Road Map to Remedy places these bunkers within the former U.S. Department of Defense Bunker Complex ("DOD Bunker Complex"). (Roadmap, § 4.3.) The Roadmap states that:

> The former RASP bunker complex occupied approximately 96 acres in the west central portion of Section 28 and the northeast portion of Section 29, T1N, R5W, San Bernardino Baseline and Meridian.

(Roadmap, p. 69.) By way of comparison, the Roadmap states that the 160-Acre Property comprises "the southwest quarter of Section 21, T1N, R5W, San Bernardino Baseline and Meridian." (Roadmap, p. 46.) A map provided in the Roadmap clearly shows that the DOD

Bunker Complex is located some distance south of the 160-Acre Property, approximately 3000 feet from the main PSI warehouse. (Roadmap, Fig. 9.) An earlier draft of Rialto's Opening Brief indicates that Rialto was keenly aware that the DOD Bunker Complex is not located at the 160-Acre Property. (Exhibit P 154, p. 6.) However, Rialto allowed this obvious misrepresentation of the facts to be included in its Opening Brief submitted to the Hearing Officer. This represents yet another instance of Rialto misrepresenting the facts in this proceeding.

D. Rialto Further Misrepresents PSI's Limited Activities At The McLaughlin Pit

Rialto resorts to unfounded accusations and misrepresentations of witness testimony in an attempt to show that PSI is somehow responsible for the illegal closure of the McLaughlin Pit. As explained above, and in more detail in PSI's Opening Brief, the evidence is clear that KTI, the Regional Board and Rialto are responsible for the illegal closure of the McLaughlin Pit. (PSI Opening Brief, pp. 51-68 at PSI 1000054-71.)

In its Opening Brief, Rialto states that aerial shells were present in the McLaughlin Pit at the time it was illegally closed to give the impression that the shells belonged to PSI. (Rialto's Opening Brief, 72:6-9, 72:16-18.) Rialto provides no evidence that the alleged aerial shells came from PSI. The only evidence cited by Rialto is generic testimony from Ralph Apel that shells were in the McLaughlin Pit. (Rialto's Opening Brief, 72:9, citing Apel Depo. Vol. 1, August 29, 2005, 137:12-18.) However, it is clear from subsequent testimony that Mr. Apel does not believe the shells came from PSI:

MR. CARRIGAN: Now, when you say "professional shells," that's the aerial display shells that we talked about?

MR. APEL: Yes.

Q.: And do you know how those got in the pond?

A.: No.

(Apel Depo., Vol. 1, August 29, 2005, 151:2-6.)

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MR. CARRIGAN: Okay.

Who used the pond – Well, do you know if PSI put anything in the pond?

MR. APEL: As far as I know, they did not.

(Apel Depo., Vol. 1, August 29, 2005, 154:16-18.)

According to William McLaughlin, who observed the McLaughlin Pit on approximately 10 separate occasions, including the day it was illegally closed, all of the fireworks remaining in the McLaughlin Pit belonged to Apollo. (McLaughlin Depo., December 1, 2006, Vol. 1, 86:2-8, 101:23-102:7.) Mr. McLaughlin testified seeing the following fireworks materials inside the McLaughlin Pit at the time of its illegal closure: damaged skyrockets (McLaughlin Depo., December 1, 2006, Vol. 1, 89:12, 99:11; McLaughlin Depo., February 22, 2007, Vol. 2, 366:11-14); firecrackers (McLaughlin Depo., December 1, 2006, Vol. 1, 100:12); and, assorted cardboard waste. (McLaughlin Depo., February 22, 2007, Vol. 2, 426:3-9.) These materials are not used in professional fireworks displays and could not have come from PSI. PSI's aerial shells are generally spherical in shape and Mr. McLaughlin testified that he does not recall seeing any spherical shaped fireworks in the McLaughlin Pit at the time it was closed. (McLaughlin Depo., December 1, 2006, Vol. 1, 101:5-7.) He believes that Apollo was responsible for the fireworks in the McLaughlin Pit. (McLaughlin Depo., December 1, 2006, Vol. 1, 101:23-102:7.)

To further bolster its unfounded claim that PSI was involved in the illegal closure of the McLaughlin Pit, Rialto resorts again to misrepresentation of the evidence. Rialto states that "The Air Quality Management District's permit authorized Red Devil and PSI to burn the up to 5.5 tons of hazardous waste estimated to remain in the [McLaughlin Pit]." (Rialto's Opening Brief 72:19-20.) This is not true for two reasons. First, the November 1987 burn permit clearly indicates that it was issued to Red Devil Fireworks, a division of Apollo, not PSI. (Exhibit P 103.) The application for the November 1987 burn permit was signed by Pedro Mergil, an employee of Apollo. (Id.) PSI had no role in the permitting process. Rialto's

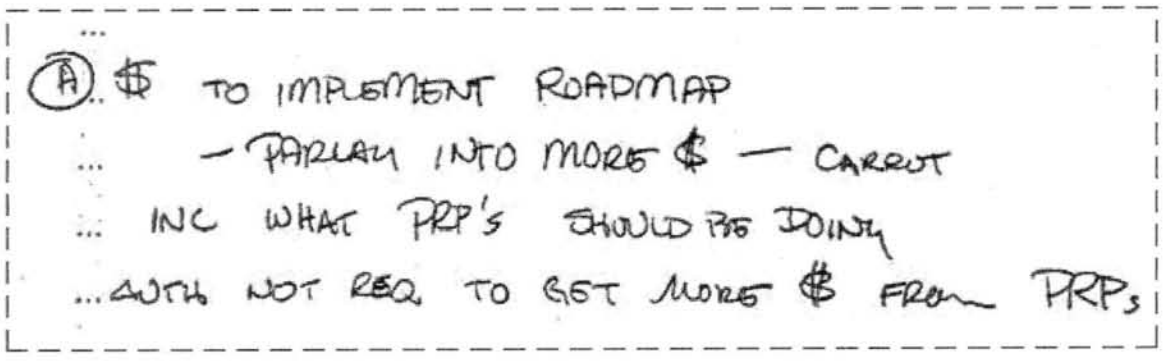
misrepresentations to the contrary cannot be believed. Second, the Rialto Fire Department, not SCAQMD, issued the November 1987 burn permit. (Exhibit P 103.)

VIII. THERE IS NO BASIS FOR FURTHER INVESTIGATION BY PSI

These proceedings cannot be about investigation. Goodrich agreed to put in four additional multi-port wells, but the Regional Board has never asked Goodrich to put in those wells. Similarly, Emhart and PSI agreed to put in a sixth multi-port well at the160-Acre Property, if needed, but the Regional Board has not asked that the sixth well be installed. Despite this,

By its Roadmap, seeks tens of millions of dollars in additional investigation for the 160-Acre Property. In part, Rialto claims 16 additional Westbay multi-port wells and 12 additional multi-depth wells are needed to complete the investigation. (Roadmap, ES-9 to ES-16.) Due to the depth and difficult drilling conditions, the cost of a single Westbay well easily could exceed $1 million each. (Stephens Depo., Vol. 3, May 16, 2007, 803:1-804:14.)

Rialto submitted the Roadmap for the improper purpose of driving up the investigation costs in order to get more money from the suspected dischargers. Rialto's plan is made clear in the notes of Jenny Sterling, Rialto's consultant, of a conversation she participated in with Rialto's counsel on January 30, 2007. Ms. Sterling recorded that the "$ to implement Roadmap – Parlay into more $ – Carrot" and it was to "...get more $ from PRPs." (Exhibit P 149.) An excerpt of these notes is reproduced below.



There is no doubt this explains why the Roadmap seeks investigation for areas at the RABSP other than the 160-Acre Property. Investigation for areas outside of the 160-Acre Property are

beyond the scope of this proceeding. (Draft CAO, ¶1; Notice of Public Hearing dated February 23, 2007, pp. 1-2; Second Revised Notice of Public Hearing dated April 3, 2007, pp. 1-2; Third Revised Notice of Public Hearing dated April 24, 2007, pp. 1-2.)

In furtherance of its improper purpose, Rialto suggested that its expert, Dan Stephens, and his staff, not focus on potential dischargers at the 160-Acre Property that are "judgment proof," and instead to keep focused on Goodrich, WCLC and PSI. (Exhibit P 153.) On February 24, 2007, Jenny Sterling sent an e-mail to Rialto's counsel advising that the Broco disposal pit in the Southeast corner of the 160-Acre Property had "a significant release of perchlorate" and "presents a threat to groundwater." Sampling results for soil at the Broco disposal pit were as high as 212,000ug/Kg. Ms. Sterling also stated that neither the lateral nor vertical extent of the perchlorate contamination at the Broco disposal pit had been determined.

Rialto's counsel responded the next day. He told Ms. Sterling, and Dan Stephens and his staff that: (1) Broco was judgment proof; (2) under what factual scenarios he believed Goodrich, WCLC or the fireworks occupants could be liable for contamination detected in the Broco disposal pit; and, (3) "...we should also be thinking of who the responsible party is/should be, and what might happen if the costs of remediating this pit are 'orphaned' because there is no solvent responsible party."

Gerard Thibeault testified that if convincing evidence was provided that a suspected discharger had not "discharged or was not threatening to discharge in such a way that groundwater is, has been, or might be affected, then they wouldn't have to – it's my understanding they wouldn't have to proceed any further." (Thibeault Depo., Vol. 1, March 14, 2007, 208:15-209:9.) The evidence submitted by PSI and the total lack of evidence submitted against it establish that PSI has not discharged perchlorate to groundwater or in a manner that threatens groundwater. Accordingly, there should be no further investigation orders against PSI in connection with the 160-Acre Property.[41]

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[41]Water Code Section 13267(f) states "The state board may carry out the authority granted to a regional board pursuant to this section if, after consulting with the regional board, the state board determines that it will not duplicate the efforts of the regional board." There is no evidence that the Regional Board and State Board have ever had the

IX. RIALTO'S OPENING BRIEF CLAIMS TO THE CONTRARY, RIALTO IS A LIABLE PARTY

A. The Claim In Rialto's Opening Brief That Mitigation Measures Were Completed Is Bogus

In its Opening Brief, Rialto unconvincingly attempts to argue that the CEQA mitigation measures contained in KTI's mitigated negative declaration were completed. Rialto states: "McLaughlin presented the County's certification letter to the City of Rialto's Planning Department to demonstrate compliance with the conditions of [KTI's] development permit." (Rialto's Opening Brief, 73:2-4.) This is simply not the case.

That mitigated negative declaration required that all necessary approvals be obtained prior to grading at the property. The December 15, 1987 letter from the County, which Rialto argues satisfies the mitigation measure, was written after grading had begun in approximately June or July of 1987. (Exhibit P 88; Thompson Depo., April 16, 2007, 116:13-22.)

1. Rialto failed to enforce its own mitigated negative declaration to Ken Thompson, Inc.

Rialto does not dispute that it issued a CEQA mitigated negative declaration to the owner of the McLaughlin Pit, KTI. Indeed, Rialto admits as much in its Opening Brief:

> On March 3, 1987, the City issued a negative declaration for [KTI's] development proposal, but required mitigation measures to cleanup the Pit. In particular the City required that:
>
> > Prior to any grading, construction or installation of equipment on Parcel 11 [the parcel where the McLaughlin Pit existed at the property], the applicant shall have completed a satisfactory cleanup program of the fireworks residual pit [the McLaughlin Pit] on Parcel 11 and shall have certified the satisfactory completion of that program in a report to the City Engineer. As part of that cleanup program, **the applicant shall obtain all necessary permits or approvals from local, state and or federal agencies as required.**

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consultation required by the statute, or that the State Board has made the necessary determination regarding duplication of efforts. In the absence of these requirements being satisfied, the State Board has no authority to issue an investigation order.

(Rialto's Opening Brief, April 12, 2007, 71:26-72:4 (emphasis added by Rialto), citing March 3, 1987 Environmental Assessment Review (Ex. B, Declaration of Eric W. Benisek [p-46]).) Thus, as of March 3, 1987, KTI was required to have obtained all necessary approvals/permits to close the McLaughlin Pit, properly close the pit and provide a certification of the cleanup to the Rialto City Engineer before KTI could begin development of the property.

As an agency adopting a mitigated negative declaration, Rialto was responsible for ensuring that all conditions, including the mitigation measures, were met prior to issuing further development permits. (Deposition of Rodney Taylor ("Taylor Depo."), Vol. 2, April 4, 2007, 42:20-45:14.) Indeed, black-letter CEQA law states that "[a]gencies adopting mitigated negative declarations must take affirmative steps to ensure that approved mitigation measures are in fact implemented subsequent to project approval." Remy, Thomas, Moose & Manley, Guide to the Cal. Env. Quality Act (10th Ed. 1999), at 247. This is a continuing obligation, "until mitigation measures have been completed the lead agency remains responsible for ensuring that implementation of the mitigation measures occurs..." 14 Cal. Code Reg. § 15097(a).

Rialto has never produced any documentation by KTI indicating that the mandatory certification was ever filed with the Rialto City Engineer. A subpoena requiring production of such information did not result in the production of any such documents. Rialto's current Planning Director, Mike Story, testified that he would assume such a report had been made, but no such report has ever been produced and Mr. Story did not recall finding one in his search of the files. (Deposition of Mike Story ("Story Depo"), Vol. 1, April 15, 2007, 122:10-132:4.) Rialto has never produced any other written (or oral) confirmation that it approved a submission from KTI regarding the mandatory CEQA mitigation measure adopted by Rialto in the Negative Declaration.

Although there is no record of KTI ever submitting the requisite certification of closure for the McLaughlin Pit before the approval of the grading plan, it is clear that KTI was able to begin grading the property at least as early as July of 1987, in comparison to the December 4, 1987 date the McLaughlin Pit was set afire as a part of KTI's "closure" and the purported December 15, 1987 alleged "sign off" on the "closure." (Exhibit P 88.)

The McLaughlin Pit was burned and buried by KTI, with the blessing and oversight of the Rialto Fire Department and the Regional Board in December of 1987, some five months after grading had commenced at the property. (Exhibit P 105.) Thus, at some point between June 8 and July 15, 1987, Rialto approved KTI's plans for grading the property without requiring KTI to conform to the CEQA mitigation measures, namely, that a proper closure be completed of the McLaughlin Pit, that all required agency approvals and permits be obtained and that a certification of completion be provided to the Rialto City Engineer.

In addition, Rialto did not require KTI to obtain the mandatory agency authorizations and permits during the closure process. The following statement is emphasized in Rialto's Opening Brief: "**the applicant shall obtain all necessary permits or approvals from local, state and or federal agencies as required**." (Rialto's Opening Brief, April 12, 2007, 72:3-4.) (Emphasis in original.) As the agency responsible for ensuring that all conditions, including the mitigation measures, were met prior to issuing further development permits, Rialto is obliged under the law to ensure that the McLaughlin Pit was closed pursuant to proper authorizations and permits issued by the required agencies. That was not done by Rialto.

The McLaughlin Pit was allegedly closed by KTI without any approval or permit from the County, SCAQMD, U.S. EPA or the California Department of Health Services (now DTSC) ("DOHS"). As discussed by William McLaughlin, the contractor hired by KTI to close the McLaughlin Pit, at his deposition, DOHS had the authority in 1987 to control the remediation of hazardous wastes and contaminated areas in the State of California. (McLaughlin Depo., December 1, 2006, Vol. 1, 145:21-146:6.) DOHS had to approve the closure plan for the McLaughlin Pit. (McLaughlin Depo., December 1, 2006, Vol. 1, 72:25-73:8, 145:21-146:6.) As explained further by Mr. McLaughlin, DOHS approval is necessary to ensure conformance with the regulations and conformance with technical goals. (McLaughlin Depo., December 1, 2006, Vol. 1, 146:12-13.)

However, DOHS did not approve the closure of the McLaughlin Pit. Indeed, DOHS rejected Mr. McLaughlin's proposal to treat the McLaughlin Pit on-site. (McLaughlin Depo. Vol. 1, December 1, 2006, 148:11-12, 151:3-6.) Thus, despite the fact that neither the County, U.S.

EPA, nor DOHS approved the closure of the McLaughlin Pit, Rialto allowed KTI to develop the property in violation of the CEQA mitigated negative declaration requirements. In doing so, Rialto failed in its obligation to ensure compliance with the law, violated its responsibilities under CEQA and permitted the discharge of perchlorate into the groundwater within the Rialto-Colton Basin.

Rialto's claim that th County of San Bernardino certified the closure is bogus. Steve Van Stockum, the author of the December 15, 1997 letter, testified at his deposition that the letter was not intended as the County's sign-off on the burn and approval to proceed with the development of the property. (Deposition of Steve Van Stockum ("Van Stockum Depo."), March 7, 2007, 152:14-153:3.) Mr. Van Stockum also testified that the County did not have the legal authority to approve the closure. (Van Stockum Depo., March 7, 2007, 46:3-7, 85:13-86:15, 90:5-20.) Even Mr. McLaughlin, the individual who provided the letter to Rialto, believed this to be the case. (McLaughlin Depo., December 1, 2006, Vol. 1, 187:25-188:4.) The County could not have authorized the on-site disposal of the McLaughlin Pit without concurrence of DOHS. (McLaughlin Depo., December 1, 2006, Vol. 1, 188:8-12.) It was beyond the County's authority, even as lead agency. (McLaughlin Depo., December 1, 2006, Vol. 1, 188:8-12.)

Moreover, contemporaneous documentary evidence supports Mr. Van Stockum's testimony. First, a December 3, 1987 letter (dated one day before the burn took place) from Mr. Van Stockum to Angelo Bellomo of DOHS clearly states that the County did not have the authority to approve the closure of the McLaughlin Pit and asks that DOHS respond to Mr. McLaughlin's request. (Exhibit P 104.) Second, the County's December 15, 1987 letter states:

> We suggest that [KTI] provide this Department with a letter from the Rialto Fire Department which explains why this burn was ordered, since no approval to "treat" the then hazardous waste was granted by [DOHS]."

(Exhibit P 106.)

It is clear that the McLaughlin Pit was never properly closed. Recent soil and groundwater sampling taken directly below and downgradient of the McLaughlin Pit indicate that the McLaughlin Pit is a past and present source of the perchlorate conditions at the 160-Acre Property. (Saremi Depo., Vol. 2, March 23, 2007, 590:6-10.)

Had Rialto enforced its own mitigation measures against KTI, KTI would have needed to receive approval that the McLaughlin Pit was closed in compliance with the Subchapter 15 Regulations, as well as any associated approvals for the closure of a Class I hazardous waste site from U.S. EPA and DOHS. Instead of complying with its obligations under the law, Rialto simply allowed KTI to burn and bury the McLaughlin Pit and build on top of it. Through its failure to enforce the McLaughlin Pit closure mitigation measures mandated by CEQA, Rialto has likely permitted the discharge of perchlorate into the waters of the State and should be named as an alleged discharger in the CAO, pursuant to Water Code Section 13304. For these same reasons, Rialto is also liable under Government Code Section 815.6 for injuries to the Rialto-Colton groundwater basin due to its failure in discharging its mandatory obligations under CEQA.

2. Rialto illegally permitted the burning of approximately 54,000 lbs. of material as part of the closure of the McLaughlin Pit

Without any authorization or permit from the County, SCAQMD, U.S. EPA or DOHS, the McLaughlin Pit was improperly closed pursuant only to a burn permit issued by the Rialto Fire Department, signed by then Fire Chief Thomas McVeitty. (Exhibit P 103.) This permitted, yet unauthorized and improper, "treatment" of hazardous waste was conducted with the blessing and oversight of the Regional Board.

Quite simply, the two agencies responsible for permitting the improper closure of the McLaughlin Pit, leading to the likely discharge of perchlorate into the groundwater basin, are the same two entities that now stand before the State Board as the "prosecution team." (See PSI's Opening Brief, pp. 51-68 at PSI 1000054-71.) As an entity that permitted the discharge of perchlorate into the waters of the State, Rialto should be named as an alleged discharger in the CAO, pursuant to Water Code Section 13304.

In November 1987, Rialto issued Red Devil Fireworks (an operating division of Apollo) a permit to burn 5.5 tons of "hazardous waste - pyrotechnic materials" between November 17 and December 17, 1987 in the McLaughlin Pit. (Exhibit P 103.) The permit was signed by Pedro Mergil on behalf of Red Devil Fireworks, (Mergil Depo., 111:10-112:6), and Thomas

McVeitty on behalf of Rialto. Mr. McLaughlin testified that SCAQMD authorization was required for the burn. (McLaughlin Depo., Vol. 1, December 1, 2006, 56:9 - 57:6., 75:12-21, 166:21-25, 182:1-11.) It is clear on its face that the November 1987 burn permit issued by Rialto was not approved by SCAQMD. Without the necessary SCAQMD approval, Rialto's issuance of the November 1987 burn permit was not proper.

Even with Rialto's burn permit in hand, KTI was still required to seek DOHS approval to close the McLaughlin Pit. This is evidenced by the established laws of this state, contemporaneous documentary evidence of the time, as well as Rialto's own mitigated negative declaration to KTI. As explained by Mr. McLaughlin, DOHS approval is necessary to ensure conformance with the regulations and conformance with technical goals. (McLaughlin Depo., December 1, 2006, Vol. 1, 146:12-13.)

Indeed, it is clear that Rialto knew that DOHS had rejected the proposal to treat the McLaughlin Pit on-site. This is evidenced by a letter written by Mr. McLaughlin and produced by the City of Rialto Fire Department, with the following notation by Sam Gutierrez of the Rialto Fire Department:

> Waste products in pit were burned 12-4-87. A second burn is scheduled later in month - after which - the pit will be removed. Previous request to State Environmental Health were denied, so burning the waste was decided upon.

(Exhibit P 180, emphasis added.) This notation, contained within Rialto's own files, as such documents are kept within the ordinary course of business, provides clear evidence that Rialto was aware that DOHS had denied the on-site treatment of the McLaughlin Pit. In apparent disregard of established environmental protection statutes, in existence at that time, and ignoring the mitigation measures it adopted when approving KTI's development project, the Rialto Fire Department issued the November 1987 burn permit without any indication that DOHS had approved of burning as a method of closure. (Exhibit P 103.) As Mr. McLaughlin has previously testified, "Rialto was happy with any conclusion that people would buy off on to declare the McLaughlin Pit no longer hazardous." (McLaughlin Depo., December 1, 2006, Vol. 1, 185:21-22.)

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X. PSI'S INABILITY TO PAY FOR COMPLIANCE WITH THE DRAFT CAO OR FUTURE INVESTIGATION

Rialto has estimated that cleanup of the 160-Acre Property potentially could cost hundreds of millions of dollars. (Holub Depo., Vol. 3, April 6, 2007, 248:23 - 249:2.) Even installing just one Westbay multi-port monitoring well is well over $100,000. (Sturdivant Depo., Vol. 1, March 20, 2007, 42:4-22.) Dr. Stephens admitted that the cost of one monitoring well could cost over $1 million. (Stephens Depo., Vol. 3, May 16, 2007, 803:1-21.)

Pursuant to Cal. Admin Code tit. 23, section 2907, 23 CA ADC § 2907, an alleged discharger's resources should be taken into account in determining schedules for investigation and cleanup and abatement. PSI does not have the financial resources to comply with the Draft CAO sought by the Advocacy Team. PSI's evidence of its lack of financial resources is submitted in the Declaration of Cheryl A. Samperio submitted on April 17, 2007. (PSI 2001802-04.) In the event the Draft CAO becomes final or additional investigation is required by PSI, PSI requests that its lack of financial resources be taken into consideration.

XI. RESERVATION OF RIGHTS

This proceeding violates PSI's right to due process for the reasons previously set forth in each of the motions, objections and letters that were submitted to the Hearing Officer by PSI, Goodrich and the Emhart Parties. PSI incorporates all of the motions, objections and letters submitted to the Hearing Officer by PSI, Goodrich or the Emhart Parties as though fully set forth in this brief to the extent not inconsistent with this brief or PSI's Opening Brief. PSI reserves all of its rights to challenge the legality of this proceeding in any court of competent jurisdiction, and intends to do so, if necessary, at the appropriate time. PSI's participation in this hearing is not a waiver of its legal rights and remedies.

XII. PSI'S INCORPORATION OF OTHER SUBMISSIONS

PSI incorporates the submissions of Goodrich and the Emhart Parties, unless otherwise indicated by PSI or to the extent they are inconsistent with statements by PSI in its Opening Brief or in this brief. PSI does not incorporate the submissions of Goodrich and the Emhart

Parties addressing application of Water Code Section 13304(j) or the Emhart Parties' submissions on "successor liability issues."

XIII. PSI RESPECTFULLY SUBMITS THAT NO ORDER CAN BE ISSUED

For all the reasons stated in PSI's Opening Brief and submissions, PSI's Rebuttal Brief and submissions and PSI's motions, respectfully submits no order under Water Code Section 13304 or 13267 can be issued. No matter how much Rialto, the Advocacy Team, the community groups or water purveyors wish it were true, no matter how much passion is aroused to sway the Hearing Officer, neither Rialto nor the Advocacy Team have the facts – the necessary evidence – to prove PSI liable under Water Code Section 13304 or Section 13267.

DATED: June 7, 2007

RESOLUTION LAW GROUP, P.C.

By: _____

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