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12 BURRTEC WASTE INDUSTRIES, INC.

13 **STATE WATER RESOURCES CONTROL BOARD**

14 **IN THE MATTER OF:**

15 **CALIFORNIA REGIONAL WATER QUALITY**  
16 **CONTROL BOARD, SAN DIEGO REGION;**  
17 **ADOPTION OF ADDENDUM NO. 1 TO CLEANUP**  
18 **AND ABATEMENT ORDER NO. R9-2013-0122,**  
19 **AN ADDENDUM ADDING RESPONSIBLE**  
20 **PARTIES, ADDING BURRTEC WASTE**  
21 **INDUSTRIES, INC. AS A RESPONSIBLE PARTY /**  
22 **DISCHARGER**

)  
) **PETITION AND REQUEST FOR REVIEW AND**  
) **ACTION BY THE STATE WATER**  
) **RESOURCES CONTROL BOARD**  
) **AND**  
) **REQUEST FOR STAY OF ACTION**  
) CAL. WATER CODE § 13320  
) 23 CAL. CODE REGS. §§ 2050, 2052

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I.

**INTRODUCTION**

This Petition is submitted on behalf of Burrtec Waste Industries, Inc. (“Burrtec”). On July 14, 2017, Burrtec was improperly added as a named discharger to Cleanup and Abatement Order No. R9-2013-0122. In 2011, Burrtec contracted with Organic Ag, Inc. (“Organic Ag”) to supply and deliver a mulch product made up of green trimmings to the property located at 39801 Reed Valley Road, Aguange, California 92536 (the “Pike property”). Organic Ag had contracted directly with James Pike (“Pike”) to arrange for the supply of the green trimmings material, and to subsequently spread the material on the Pike property. Burrtec’s delivery of green trimmings to the Pike property called for Burrtec to unload the material into piles at locations directed by Organic Ag. These locations were at least 200 feet from the nearest tributary or water of the state. Following the delivery of the green trimmings, Organic Ag spread the material from the piles throughout the Pike property, including directly into the tributary.

A site inspection by the San Diego Regional Water Quality Control Board (“RWQCB”) in 2013 revealed that green trimmings had been spread by Organic Ag and Pike into the waters of the state and that neither Organic Ag, nor Pike, had obtained the requisite approvals and permits for the spreading of the green trimmings on the Pike property. A Notice of Violation and subsequent Cleanup and Abatement Order was issued to Pike<sup>1</sup> for violations of the Water Code.

In 2016, following demands by Pike that the RWQCB add Burrtec as a discharger to the Cleanup and Abatement Order, the RWQCB issued a Tentative Addendum to the Order, proposing to name Burrtec as a discharger based solely on the fact that Burrtec was a supplier of green trimmings to the Pike property. In July 2017, an Amended Cleanup and Abatement Order was issued. Burrtec was improperly named to that Order as a discharger for the simple act of delivering a product to a site, with no control over the ultimate use or disposition of that product. This Petition followed.

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<sup>1</sup> The Notice of Violation and Cleanup and Abatement Order was also issued to Prairie Avenue Gospel Center (“PAGC”) for similar violations on the PAGC property. Burrtec did not deliver material to the PAGC property and has no information regarding the activities which occurred on the PAGC property.

1 II.

2 **INFORMATION REQUIRED BY SECTION 2050**

3 In support of this Petition, Burrtec provides the following information, as required by  
4 Title 23, California Code of Regulations, § 2050:

5 **A. Name, address, telephone number and email address of Petitioner.**

6 Petitioner is Burrtec Waste Industries, Inc., 9890 Cherry Avenue, Fontana, CA 92335,  
7 (909) 429-4200, tsweeney@burrtec.com. All inquiries and communication should be directed  
8 through Petitioner’s counsel, Suzanne R. Varco of Varco & Rosenbaum Environmental Law  
9 Group LLP, whose information is provided in the caption on this Petition.

10 **B. RWQCB’s specific action or inaction for which review is sought.**

11 Burrtec seeks review of: 1) the San Diego Regional Water Quality Control Board’s  
12 (“RWQCB”) adoption of Addendum No. 1 to Cleanup and Abatement Order No. R9-2013-0122,  
13 An Addendum Adding Responsible Parties, in which the RWQCB identified Burrtec as  
14 Discharger and Responsible Party (attached as Exhibit A); and 2) the RWQCB’s adoption of  
15 Cleanup and Abatement Order No. R9-2013-0122 for James V. Pike and Prairie Avenue Gospel  
16 Center, Inc., as Amended by Addendum No. 1 (attached as Exhibit A). The Addendum No. 1 to  
17 Cleanup and Abatement Order No. R9-2013-0122 and Cleanup and Abatement Order No. R9-  
18 2013-0122 for James V. Pike and Prairie Avenue Gospel Center, Inc., as Amended by  
19 Addendum No. 1, are collectively referred to herein at the “Amended CAO.”

20 **C. The date on which the Regional Board acted.**

21 The RWQCB adopted Addendum No. 1 to Order No. R9-2013-0122 on July 14, 2017,  
22 and also adopted Order No. R9-2013-0122 as Amended by Addendum No. 1 on July 14, 2017.

23 **D. Statement of reasons why the action was inappropriate or improper.**

24 The adoption of the Amended CAO was improper because: a) there is no evidence that  
25 Burrtec deposited waste in a location where the waste would cause or permit, or threaten to cause  
26 or permit, the waste to be discharged into the waters of the state and, therefore, there is  
27 insufficient evidence to support the allegations; and b) declining Burrtec’s request for a hearing  
28 to present on this matter and to cross-examine witnesses violated Burrtec’s due process rights.

1 **E. The manner in which Petitioner is aggrieved.**

2 Burrtec is aggrieved because it is being asked to prepare, submit and implement a  
3 Restoration Plan for the cleanup and abatement of waste discharged to the Pike and PAGC  
4 properties. While the costs associated with such efforts are unknown, they are expected to be  
5 significant. However, since there is no evidence that Burrtec deposited waste in a location where  
6 the waste could be discharged into the waters of the state, Burrtec should not be responsible for  
7 such efforts. Burrtec is also aggrieved because the process through which the RWQCB adopted  
8 the Amended CAO violated Burrtec's due process rights and prevented Burrtec from presenting  
9 relevant evidence and challenging unsupported allegations regarding the claimed discharge.

10 **F. Specific action by the State and Regional Board requested by the Petitioner.**

11 Burrtec requests that the State Board: 1) find that the RWQCB's identification of Burrtec  
12 as a Discharger and Responsible Party through the adoption of the Amended CAO was  
13 inappropriate and improper; 2) find that the process in which the RWQCB adopted the Amended  
14 CAO violated Burrtec's due process rights; 3) set aside the Amended CAO and remove Burrtec  
15 from the Amended CAO or remand the matter back to the RWQCB with instructions that  
16 Burrtec shall not be named as a Discharger / Responsible Party.

17 **G. Statement of points and authorities in support of legal issues raised in the Petition.**

18 Burrtec's statement of points and authorities follows the nine categories of information  
19 requested by 23 Cal. Code Regs. § 2050 and is incorporated herein by reference.

20 **H. Statement that Petition has been sent to the Regional Board and the discharger.**

21 Burrtec certifies that a true and correct copy of this Petition was provided electronically  
22 on August 11, 2017 to the RWQCB at the following address:

23 Mr. David Gibson  
24 Executive Director  
25 Regional Water Quality Control Board, San Diego Region  
26 2375 Northside Drive, Suite 100  
27 San Diego, CA 92108-2700  
28 Email: [david.gibson@waterboards.ca.gov](mailto:david.gibson@waterboards.ca.gov)

On August 11, 2017, electronic copies of this Petition were provided to the other named  
dischargers at the following email addresses:

1 Mr. James Pike  
2 c/o Erick Altona, Esq., [era@lfap.com](mailto:era@lfap.com)

3 Organic Ag, Inc.  
4 c/o Thomas Kearney, Esq., [tjk@amclaw.com](mailto:tjk@amclaw.com)  
5 c/o Leslie McAdam ([lmcadam@fcoplaw.com](mailto:lmcadam@fcoplaw.com))

6 Ecology Auto Parts, Inc.  
7 c/o John T. Griffin, Esq., [jgriffin@greenhall.com](mailto:jgriffin@greenhall.com)  
8 c/o Jim Macdonald, Esq., [jmacdonald@boismac.com](mailto:jmacdonald@boismac.com)

9 **I. The substantive issues raised in the Petition were raised before the RWQCB.**

10 All substantive issues raised in this Petition were raised before the RWQCB in written  
11 testimony prior to the RWQCB's adoption the Amended CAO.<sup>2</sup> Burrtec reserves the right to  
12 present additional evidence in support of this Petition at the hearing, in accordance with 23  
13 California Code of Regulations section 2050.6. Such additional evidence will include testimony  
14 elicited from RWQCB staff which Burrtec was precluded from obtaining previously due the  
15 denial of its due process rights by the RWQCB's failure to provide a hearing on this matter. The  
16 RWQCB declined to provide reference to specific evidence in making its findings in the  
17 Amended CAO. Because Burrtec was denied a hearing, it was not able to cross-examine  
18 RWQCB staff on the basis of the findings or the specific facts and evidence which the RWQCB  
19 alleges support its findings. Burrtec is entitled to know what this evidence is and test the  
20 credibility and sufficiency of this evidence, as discussed in detail below in Burrtec's Points and  
21 Authorities.

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26 <sup>2</sup> Exhibits A-F, X and EE are all documents prepared by the RWQCB. Exhibits G-W and Y-DD are  
27 documents which were previously provided to the RWQCB by Environmental Law Group LLP. Each is  
28 separately listed in, and attached to, the Petition for ease of reference. Additionally, some referenced  
deposition transcripts were previously provided to the RWQCB in "rough" form; the Court Reporter  
certified copies are provided as exhibits to this Petition.

1 **III.**

2 **STATEMENT OF POINTS & AUTHORITIES IN SUPPORT OF LEGAL ISSUES**

3 **A. Factual Background**

4 **1. Burrtec Contracted with Organic Ag to Supply Material.**

5 In March of 2008, Organic Ag, Inc. (“Organic Ag”) and Burrtec entered into a Green  
6 Waste Delivery Agreement, wherein Burrtec agreed to deliver material defined as “organic waste  
7 material generated from gardening, agriculture or landscaping activities, including but not  
8 limited to, grass and plant clippings, leaves, tree and shrub trimmings and plant remains,”  
9 (hereafter referred to as “green trimmings”) to facilities designated by Organic Ag. Organic Ag,  
10 upon receipt of the green trimmings, agreed to “process and otherwise manage all green  
11 trimmings delivered by Burrtec, in accordance and compliance with all applicable federal, state,  
12 or local laws and regulations.” (Exhibit G, p. 1.) The Agreement stipulated that Organic Ag  
13 would be responsible for: (i) processing the green trimmings into mulch and soil amendments;  
14 (ii) management of the green trimmings once delivered to facilities designated by Organic Ag;  
15 and (iii) proper disposal of all green trimmings. (Exhibit G, p. 1.) Organic Ag warrantied that it  
16 would “receive, process, manage, recycle, sell, apply and use” the green trimmings “in full  
17 compliance with all valid and applicable federal, state and local laws, ordinances, orders, rules  
18 and regulations;” and that it had been issued and would maintain “all permits, licenses,  
19 certificates or approvals required by federal, state and valid and applicable laws, ordinances and  
20 regulations necessary” to allow Organic Ag to accept, process, and apply the green trimmings.  
21 (Exhibit G, p. 2.)

22 Title to all green trimmings and processed mulch material transferred to Organic Ag upon  
23 delivery and receipt by Organic Ag. (Exhibit G, p. 3.) Organic Ag processed, managed, and  
24 disposed of the green trimmings in whatever manner Organic Ag determined appropriate.  
25 (Exhibit G, pp. 1-2.) The Agreement also noted that Organic Ag would obtain signed written  
26 documentation from the owners or managers of land allowing for Organic Ag’s placement of the  
27 green trimmings and mulch product on the owner’s property for agricultural application.  
28 (Exhibit G, p. 2.)

1 The Agreement makes clear that Burrtec’s role is solely to supply and deliver the green  
2 trimmings to Organic Ag’s designated facilities. (Exhibit G.) Nothing in the Agreement  
3 addresses, much less governs, the methods by which Organic Ag would process, place and  
4 dispose of the green trimmings and mulch product. (Exhibit G.)

5 **2. Burrtec was Not a Party to Any Contractual Agreement between Mr. Pike**  
6 **and Organic Ag.**

7 In 2011, Organic Ag and James Pike signed an agreement for Organic Ag to deliver and  
8 spread green trimmings as a mulch product on approximately 90 acres of land owned by Mr.  
9 Pike. (Exhibit H.) Burrtec was neither a party to, nor a beneficiary of, this agreement. Burrtec  
10 had no contractual privity with Mr. Pike; Burrtec was simply a supplier of material.

11 The Agreement between Organic Ag and Mr. Pike required Organic Ag to remove any  
12 “excess trash” from the green trimmings, making clear that the supplied green trimmings would  
13 contain some inorganic material. (Exhibit H.) Moreover, Organic Ag, Inc. was responsible for  
14 all contractual obligations with Mr. Pike, including processing, spreading, handling and  
15 management of the material. (Exhibit H.) Consequently, the removal of trash and the spreading  
16 and cleanup of the green trimmings was subject to the specific terms of the agreement between  
17 Organic Ag and Mr. Pike. The failure to remove the “excess trash” from the green trimmings  
18 falls on Organic As. Additionally, the decision to spread the material on the Pike property,  
19 including into the tributary, was Organic Ag’s and Mr. Pike’s alone. (Exhibit H.)

20 Mr. Pike admits that his contract was with Organic Ag, and that it was Organic Ag’s  
21 obligation to spread the green trimmings on the Pike property. (*See* Exhibit I, ¶¶ 11, 14; Exhibit  
22 I, ¶¶ 11, 14; Exhibit Y.) Mr. Pike does not claim that any spreading activities were conducted by  
23 Burrtec; he only claims that Burrtec delivered the green trimmings to the Pike property and that  
24 Burrtec unloaded the material at locations specified by Organic Ag. (*See* Exhibit Y.) While  
25 Burrtec did supply green trimmings to the Pike property, Burrtec did not spread green trimmings  
26 on the Pike or PAGC properties.

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1           **3.     Nature of the Discharges**

2           Green trimmings were delivered to the Pike property beginning in 2011, and were spread  
3 on the Pike property by Organic Ag. (Exhibit H.) As a result of inspections conducted by the  
4 RWQCB in 2013 at the Pike and PAGC properties, on June 3, 2013, a Notice of Violation was  
5 issued to Pike and PAGC for failure to submit a Report of Waste Discharge, initiating a new  
6 discharge of waste to land, and failure to comply with the San Diego Basin Plan. (Exhibit B.)  
7 On September 5, 2013, the RWQCB issued Cleanup and Abatement Order No. R9-2013-0122  
8 (the “Original CAO”). The Original CAO defined the discharges that occurred on the Properties  
9 in Findings 6 and 9. (Exhibit B, pp. 2-3.) The RWQCB determined that the discharge occurred  
10 when “waste consisting mostly of plant clippings (i.e. landscaping waste) and to a lesser extent  
11 municipal solid waste (glass, plastics, metals, and construction debris) was **spread** on the  
12 properties by Organic Ag, Inc.” (Exhibit B, Finding 6 (emphasis added).) In Finding 9, the  
13 RWQCB explained that the unauthorized discharge of waste resulted from “waste **spreading**  
14 activities into tributaries to Wilson Creek.” (Exhibit B, Finding 9.) These findings are mirrored  
15 in the Amended CAO issued on July 14, 2017. (*See* Exhibit A, Finding 6; Finding 9.)

16           The Amended CAO, issued on July 14, 2017, alleges that Burrtec contracted with  
17 Organic Ag to **supply** green waste to Organic Ag (Exhibit A, Finding 1.e. (emphasis added));  
18 that “Burrtec trucks delivered and deposited green waste to various locations on the properties”  
19 (Exhibit A, Finding 1.c.); and that “Organic Ag **spread** the green waste piles deposited by  
20 Burrtec” (Exhibit A, Finding 1.e. (emphasis added)). Notwithstanding the above findings that  
21 Burrtec merely supplied green trimmings and that Organic Ag performed the spreading of that  
22 material, the RWQCB identified Burrtec as a Discharger, finding Burrtec responsible under  
23 Water Code Section 13304, for its role in “depositing” the green trimmings in violation of Water  
24 Code section 13260 and in a manner where the material “is or probably will be discharged into  
25 the waters of the state in violation of Water Code Section 13304.” (Exhibit A, Finding 2.)

26           The RWQCB’s findings state that the unauthorized discharge into the tributaries of  
27 Wilson Creek was a direct result of the “spreading” of the green trimmings (*see* Exhibit A,  
28 Findings 6 and 9) – the **spreading** activities which were conducted by Organic Ag and

1 authorized by Mr. Pike. As discussed in greater detail below, the simple “deposit” of green  
2 trimmings by Burrtec was not done in a manner where the material was, or would be, discharged  
3 into the waters of the state.

4 **B. Burrtec Is Not a Discharger.**

5 Burrtec cannot be named a Discharger or Responsible Party because there is insufficient  
6 evidence to support the allegations that Burrtec deposited waste in a location where it would  
7 cause or permit, or threaten to cause or permit, waste to be discharged into waters of the state.

8 **1. Liability Under Water Code Section 13304 Does Not Extend to Parties Who**  
9 **Supply or Deliver Products Without Control Over Those Products’ Use.**

10 The legal requirements necessary to establish Burrtec’s liability as a discharger under the  
11 Water Code have not been met. Burrtec’s mere supply of green trimmings does not constitute a  
12 discharge. Liability for cleanup and abatement of a discharged waste is governed by the Porter-  
13 Cologne Water Quality Control Act – specifically Section 13304(a) of the California Water  
14 Code, which states:

15 “A person who has discharged or discharges waste into the waters of this state in  
16 violation of any waste discharge requirement or other order or prohibition issued by a  
17 regional board or the state board, or who has caused or permitted, causes or permits,  
18 or threatens to cause or permit any waste to be *discharged or deposited where it is, or*  
19 *probably will be, discharged into the waters of the state* **and** *creates, or threatens to*  
20 *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.)

21 Section 13304(a) has two requirements: (1) that there be a deposit that “is or probably  
22 will be, discharged into the waters of the state;” **and** (2) such deposit must create or threaten to  
23 create a condition of pollution or nuisance. Both requirements must be satisfied to establish  
24 liability under section 13304(a).

25 California courts have explained that the Porter-Cologne Act “must be construed in light  
26 of the common law principles bearing upon the same subject,” and as such, “not only is the party  
27 who maintains the nuisance liable but also the party or parties who create or assist in its  
28 creation.” (*City of Modesto Redevelopment Agency v. Superior Court* (2004) 119 Cal.App.4th

1 28, 38 (quotations and citations omitted).) The *City of Modesto* court noted that “[w]hile liability  
2 for nuisance is broad, however, it is not unlimited.” (*Id.* at 39.) Liability stops well short of  
3 applying “mere but-for causation.” (*Team Enterprises, LLC v. Western Investment Real Estate*  
4 *Trust* (9th Cir. 2011) 647 F.3d 901, 912 (citations omitted).) “Section 13304 is to be read in light  
5 of the common law principles of nuisance and these principles include a causation requirement.”  
6 (*Santa Clara Valley Water Dist. v. Olin Corp.*, (N.D. Cal. 2009) 655 F.Supp.2d 1048, 1064.)

7 Liability does not extend to those “who merely placed [products] in the stream of  
8 commerce without warning adequately of the dangers of improper disposal.” (*City of Modesto*,  
9 119 Cal.App.4th at 43.) “[T]he law of nuisance is not intended to serve as a surrogate for  
10 ordinary products liability.” (*Id.* at 39.) In finding dry cleaning solvent manufacturers and  
11 distributors were not liable for a dry cleaners’ discharge of those solvents into public sewer  
12 systems, the Court of Appeal ruled that only those who “took affirmative steps directed toward  
13 the improper discharge of solvent wastes . . . may be liable under [Section 13304].” (*Id.*)

14 These principles have been reaffirmed in subsequent cases interpreting section 13304.  
15 Exxon was found not liable (and not a responsible party under section 13304(a)) for a nuisance  
16 created by spilled or leaked gasoline that it had sold and distributed, because Exxon never  
17 “instructed purchasers of its MTBE-containing gasoline to *use* it in a hazardous manner,” nor did  
18 Exxon “affirmatively promote any such *use*.” (*City of Merced Redevelopment Agency v. Exxon*  
19 *Mobil Corp.* (E.D.Cal. 2015) 2015 WL 471672, at \*22 (emphasis in original).) Similarly, in  
20 *County of Santa Clara v. Atlantic Richfield Co.*, the court explained that lead paint manufacturers  
21 could not be held liable for “their mere manufacture and distribution of lead paint or their failure  
22 to warn of its hazards.” (*County of Santa Clara v. Atlantic Richfield Co.* (2006) 137 Cal.App.4th  
23 292, 310; see also *Redevelopment Agency of City of Stockton v. BNSF Ry. Co.* (9th Cir. 2011)  
24 643 F.3d 668, 674 (quoting *County of Santa Clara* and holding, “We cannot agree that [] passive  
25 but-for causation is sufficient for nuisance liability to attach.”).)

26 The court in *Redevelopment Agency of City of Stockton* confirmed that but-for causation  
27 is insufficient to impose liability for a discharge under Water Code section 13304. (643 F.3d at  
28 678.) Only those who engage in active and affirmative conduct may be liable under section

1 13304. (*Id.*) Liability cannot attach where the actions were passive and unknowing. (*Id.*)  
2 “Under California law, conduct cannot be said to ‘create’ a nuisance unless it more actively or  
3 knowingly generates or permits the specific nuisance condition.” (*Id.* at 674.) A defendant must  
4 take other “‘affirmative acts’ that contribute ‘directly’ to the nuisance.” (*City of Merced*  
5 *Redevelopment Agency*, 2015 WL 471672 at \*12, citing *In re Methyl Tertiary Butyl Ether*  
6 *(MTBE) Prods.*, (S.D.N.Y.2006) 457 F.Supp.2d 455, 463.) There must be “evidence that [the  
7 defendant] actively or knowingly caused or permitted . . . contamination.” (*Id.*, citing *City of*  
8 *Stockton*, 643 F.3d at 671.) Similarly, the court in *Santa Clara Valley Water Dist.* court held that  
9 where no evidence exists that the necessity for remedial action was **caused** by the alleged  
10 discharge, liability under Water Code section 13304 could not be maintained. (655 F.Supp.2d. at  
11 1064.)

12 Liability under Water Code section 13304 must be premised upon a showing of control  
13 over the activity causing the discharge. The court in *Wells Fargo Bank, N.A. v. Renz* (N.D. Cal.  
14 2011) 795 F.Supp.2d 898, found there was no evidence that the alleged responsible party had any  
15 authority to control the cause of the contamination at the time the hazardous substances were  
16 released into the environment (*id.* at 916), and that without evidence showing that the alleged  
17 responsible party had such **control or active involvement**, liability under section 13304 could not  
18 be shown. (*Id.* at 919, emphasis added.)

19 The courts in *Wells Fargo, Santa Clara Valley Water Dist.*, and the other cases cite above  
20 relied on *City of Modesto*. In *City of Modesto*, the court held that liability under Water code  
21 section 13304 **required a showing of affirmative action in the release causing the nuisance;**  
22 **mere placement of materials in the stream of commerce was not sufficient.** (*City of Modesto*,  
23 119 Cal.App.4th at 43, emphasis added.) The court further held, after reviewing the legislative  
24 history of the Porter-Cologne Act, that the legislative history “supports our conclusion that the  
25 Legislature did not intend the act to impose liability on those with no ownership or control over  
26 the property or the discharge, and whose involvement in a discharge was remote and passive.”  
27 (*Id.*) Moreover, “[t]he statute also provided **there would be no liability if the discharge were**  
28 **caused by events beyond the discharger’s control.**” (*Id.* (emphasis added).)

1 Most importantly, the State Water Resources Control Board itself has already determined  
2 that product suppliers are not responsible under section 13304 absent hazardous use. (*In the*  
3 *Matter of the Petition of Exxon Company, U.S.A., et al* (Order No. WQ 85-7, Aug. 22, 1985)  
4 1985 WL 20026.) After the Regional Water Quality Control Board adopted a Cleanup and  
5 Abatement Order naming gas station property owners, Exxon, and the gasoline supplier  
6 responsible for benzene contamination that resulted from corrosion in underground storage tanks,  
7 the State Water Resources Control Board found that there was not substantial evidence showing  
8 that either Exxon or the gasoline supplier had owned the corroded tanks. (*Id.* at \*6.)  
9 Accordingly, the Board ordered Exxon and the supplier removed from the Cleanup and  
10 Abatement Order. (*Id.* at \*7.) Only the property owners who actually had control over the use  
11 of the gasoline could be responsible for discharges from the gasoline tanks. (*Id.*) The California  
12 Court of Appeal later noted that “*In re Exxon* does suggest that a party who merely *supplies* a  
13 hazardous substance is **not** responsible under Water Code section 13304 . . .” (*City of Modesto*,  
14 119 Cal.App.4th at 41 (emphasis added, italics in original).)

15 This reasoning was echoed in *In re County of San Diego* where the State Water  
16 Resources Control Board held that a City could be treated as a discharger because it had  
17 *authority to control* a street and runoff from that street was adversely affecting water quality. (*In*  
18 *re County of San Diego* (Order No. WQ 96–2, Feb. 22, 1996) 1996 WL 101751 at \*5.)

19 The case law and Water Board orders are consistent. The Water Code also does not  
20 impose liability on a party who supplies materials to a third party, when that third party then  
21 independently places the material in a location where the material is discharged into “waters of  
22 the state.” A party who merely supplies a product (e.g. lead paint), or delivers a product to an  
23 end user (e.g. dry-cleaning solvent or gasoline), who has no control or authority to control the  
24 ultimate use or placement of the product cannot be treated as a discharger under the Water Code.  
25 Liability does not attach where the actions are passive and unknowing. (*Redevelopment Agency*  
26 *of the City of Stockton, supra*, 643 F.3d at 678.)

27 ///

28 ///

1           **2. Water Code Liability is Not CERCLA or HSAA Liability.**

2           In his June 9, 2017 Prosecution Team Response to comments presented by Burrtec,  
3 James G. Smith of the RWQCB asserts that Burrtec’s actions give rise to CERCLA liability and  
4 that “[i]n many ways, Water Code section 13304 is broader than both the Hazardous Substance  
5 Account Act and CERCLA . . . .” (See Exhibit F, p. 2.) This statement fundamentally  
6 misunderstands and misrepresents the scope of liability under Water Code section 13304  
7 compared to CERCLA.

8           Unlike the Hazardous Substance Account Act (Cal. Health & Safety Code § 25323.5)  
9 (“HSAA”), or the Comprehensive Environmental Response Compensation & Liability Act (42  
10 U.S.C. 9607(a)(4)) (“CERCLA”), the Water Code does not impose strict liability on a  
11 transporter. If the California legislature had intended to impose strict liability on transporters  
12 within the context of the Water Code, it could and would have done so. It did not.

13           As noted above, liability under Water Code section 13304 is interpreted in concert with  
14 California law on nuisance, which does not place responsibility on blameless parties. While  
15 CERCLA allows for a transporter to be found liable without fault (*see, United States v.*  
16 *Stringfellow* (C.D. Cal. Nov. 30, 1993) WL 565393 at \*121 [“CERCLA liability can be imposed  
17 upon blameless parties.”]), causation standards are applied more narrowly under nuisance law,  
18 and in turn under section 13304.

19           In contrast to the HSAA and CERCLA, traditional concepts of nuisance law apply to  
20 establish section 13304 liability. Passive, but-for causation is not sufficient to establish liability  
21 under nuisance or the Water Code. (*Redevelopment Agency of the City of Stockton*, 643 F.3d at  
22 674.) “Under California law, conduct cannot be said to “create” a nuisance unless it more  
23 actively or knowingly generates or permits the specific nuisance condition.” (*Id.*) Thus, when  
24 BNSF installed a French drain that allowed contamination to migrate passively from one location  
25 to another, such conduct did not create liability under the Water Code. (*Id.* at 674-675.)

26           By comparison, an entity that had “direct involvement in the design and installation of  
27 unsafe disposal systems” for chemicals used in a wood treatment process, “coupled with its  
28 claimed knowledge of the dangers involved in such practices” did have liability for creating a

1 nuisance. (*Id.* at 674.) In contrast, a defendant that “merely placed [hazardous substances] in the  
2 stream of commerce,” as opposed to those who “took affirmative steps directed toward the  
3 improper discharge of [hazardous] wastes” was not liable under nuisance. (*Id.*)

4 A transporter cannot be held liable for blameless conduct under the Water Code, as it can  
5 under CERCLA. Consequently, the RWQCB staff erroneously concluded that because a  
6 transporter has liability under CERCLA, it would also have liability under section 13304. There  
7 simply is no liability for transporters that merely transported and deposited hazardous materials  
8 to a site under section 13304. This legal conclusion was specifically confirmed in *W. Coast*  
9 *Home Builders, Inc. v. Aventis Cropscience, USA Inc.* (N.D. Cal. Aug. 21, 2009) WL 261238,  
10 where an owner of a landfill brought a nuisance claim against “the original generators,  
11 arrangers *and/or transporters* of the solid waste and hazardous waste that is present in soil and in  
12 the groundwater plume underneath the Property.” (*Id.* at \*6 (emphasis added).)

13 In *W. Coast Home Builders*, the plaintiff alleged that the simple transport of solid and  
14 hazardous waste to a landfill was enough to establish nuisance liability. The defendant  
15 generators and transporters argued that “the most that plaintiff can show is that the Generator  
16 defendants sent hazardous substances and waste to the Landfill. The Generator defendants argue  
17 that it is undisputed that they had no responsibility for the operations at the Landfill, and it is the  
18 operation of the Landfill that plaintiff claims gives rise to the groundwater contamination now  
19 existing under portions of its property.” (*Id.* at \*8.)

20 Much like the Prosecution Team here contends, the plaintiff landfill owner incorrectly  
21 argued “that a defendant may be liable for a nuisance without negligence.” (*Id.*) The *W. Coast*  
22 *Home Builders* court rejected this contention, stating “[w]hile plaintiff is correct that negligence  
23 is not a necessary element of a nuisance claim, in the absence of negligence there must be some  
24 intentional conduct that is unreasonable.” (*Id.*) The court held that simple disposal alone was not  
25 enough:

26 “Here, the Generator defendants are entitled to summary judgment because their  
27 conduct – disposing of their waste at the landfill – did not create or assist in the  
28 creation of the nuisance. Plaintiff has not submitted any evidence suggesting that  
defendants’ conduct was unreasonable. It is undisputed that the Generator  
defendants played no part in the operation of the Landfill, and it is undisputed that

1 the Generator defendants’ only role with respect to the Landfill was having their  
2 waste taken there for purposes of its disposal. . . . It is true that there would be no  
3 nuisance without the disposal of solid and hazardous waste at the Landfill.  
4 However, plaintiff claims that the *cause* of the nuisance was the improper handling  
of the waste at the Landfill . . . which is conduct flowing from the operation of the  
Landfill, not from the Generator defendants’ disposal of waste at the Landfill.”

5 (*Id.* at \*9 (emphasis in original).)

6 Like the defendants in *W. Coast Home Builders*, Burrtec’s only role with the Pike  
7 property was in delivering green trimmings to the site. The RWQCB claims that the *cause* of the  
8 nuisance was a result of the spreading of the green trimmings into and near the tributaries,  
9 conduct flowing from the direct actions of Mr. Pike and Organic Ag, not the simple delivery of  
10 green trimmings to the property by Burrtec.

11 **3. Burrtec Has No Liability for the PAGC Property.**

12 The Amended CAO pertains to two separate and distinct properties, the Pike property  
13 (Parcel No. 571-280-042) and the PAGC property (Parcel No. 570-280-014), which are  
14 collectively referred to as the “properties” in the Amended CAO. (Exhibit A, Findings 1 and 2.)  
15 Burrtec’s contract with Organic Ag was for the delivery of green trimmings to the Pike property  
16 only. Burrtec did not deliver any material to the PAGC property. (*See* Exhibit H, Exhibit I,  
17 Exhibit J, and Exhibit K.) The RWQCB has provided no evidence of any delivery of green  
18 trimmings by Burrtec to the PAGC property. Burrtec has no liability for any materials delivered  
19 or spread on the PAGC property.

20 Because the Amended CAO lumps both the Pike and PAGC properties together as the  
21 “properties,” Burrtec has been improperly named a Discharger for a property with which it has  
22 no affiliation or liability. At a minimum, the Amended CAO must be rescinded and revised to  
23 separate the obligations with respect to the two separate properties.

24 **4. Burrtec Delivered Green Trimmings to the Pike Property But Did Not Place**  
25 **that Material In or Near the Waters of the State.**

26 California Water Code Section 13304(a) regulates any person who “has caused or  
27 permitted, causes or permits, or threatens to cause or permit any waste to be discharged or  
28 *deposited where it is, or probably will be, discharged into the waters of the state **and** creates, or*

1 *threatens to create, a condition of pollution or nuisance.*” (Emphasis added.) As noted above,  
2 the statute has two requirements. The first is that there must be a deposit that “is, or probably  
3 will be, discharged into the waters of the state.” The evidence does not support that Burrtec  
4 engaged in such conduct.

5 The Amended CAO identifies the “waters of the state” as the “Tributaries to Wilson  
6 Creek.” (Exhibit A, Finding 3.) The April 27, 2017 RWQCB Memo (Exhibit E) prepared by  
7 James G. Smith states the following on pages 2 and 5 (bolding added):

8 **“Therefore the discharge of the waste into and additionally where it was likely to**  
9 **be discharged into the unnamed ephemeral streams tributary to Wilson Creek**  
10 on each property was in violation of the San Diego Water Board’s Basin Plan  
11 Prohibitions 1, 2, and 7, and Water Code section 13264 for failing to file a report of  
12 waste discharge requirements prior to discharging the waste.”

13 \*\*\*

14 **“Burrtec did not merely supply the waste materials to a distributor, Burrtec physically**  
15 **transported the waste to and placed it on the Pike property, and in some instances**  
16 **directly into “waters of the state,” or probably could have, given rain and wind.”**

17 \*\*\*

18 In response to these unsupported allegations by the RWQCB, Burrtec provided a  
19 declaration from Mr. Nick Burciaga, the Division Manager for Burrtec’s Agua Mansa facility,  
20 the facility from which all Burrtec trucks that delivered the green trimmings originated. (See  
21 Exhibit L.) Mr. Burciaga testified that the Burrtec trucks did not unload the green trimmings into  
22 the tributaries of Wilson Creek. In fact, the trucks could not unload in those areas because there  
23 was a risk that they would get stuck in loose dirt or tip over due to the angle of the Property.  
24 (Exhibit L, ¶¶ 9, 10.) The closest that Burrtec unloaded any green trimmings to the “waters of  
25 the state” was at least 200 feet from the Wilson Creek tributaries. (Exhibit L, ¶ 9.) No party has  
26 produced evidence to the contrary, and no evidence to the contrary exists.

27 The evidence that does exist shows that, at least as of March and May 2017, there were  
28 no green trimmings within the tributary, nor within 15 feet of the tributary. At that time, two  
environmental consultants walked the Pike property and confirmed that the closest the green  
trimmings existed to the tributaries was approximately 15 feet. (See Exhibit U, March 10, 2017  
Restoration Plan prepared by Advantage Environmental Consultants, p. 4; Exhibit V, May 1,  
2017 Evaluation and Comments on the Advantage Environmental Consultants’ Site Restoration

1 Plan by SoundEarth Strategies, p. 11-12.) Moreover, Mr. Pike testified in deposition that the  
2 green trimmings, *which had been placed in the tributary by Organic Ag*, had been successfully  
3 removed. (Exhibit O, 298:18-299:8.) Finally, the only evidence the RWQCB provided with  
4 respect to the placement of green trimmings in the tributary was their own inspection where they  
5 documented Organic Ag spreading the material. (See Exhibit B.)

6 In support of the issuance of the Amended CAO, the RWQCB's Mr. Smith alleges, in his  
7 April 27, 2017 Memo, that:

8 "Burrtec argues that materials were not located where they will be or probably will  
9 be discharged into 'waters of the state' . . . . However, Burrtec admits that Mr. Pike  
10 'confirmed that all green trimmings have been successfully removed from the  
waterways' . . . . This statement concedes that material was *in the waterways*."

11 (Exhibit E, p. 4 (italics in original).) While material may have been in the waterways in 2013,  
12 this fact is not evidence that Burrtec put the material either in the waterways or in a location  
13 where it was likely to reach the waterways due to wind and rain. Instead, the evidence is that  
14 Burrtec unloaded the material in a location where it would not reach the waterways and that  
15 *Organic Ag moved the material into the waterway*. (See Exhibit K, ¶¶ 9-13; Exhibit L, ¶¶ 9-11;  
16 Exhibit M, ¶¶ 7, 8; Exhibit N, ¶¶ 3-6; Exhibit O, 298:18-299:8; Exhibit P, 46:24-47:1, 50:16-19;  
17 Exhibit Q, 216:4-18.)

18 Moreover, but for ensuring that its trucks and drivers were safe in the selection of  
19 unloading locations, Burrtec did not determine the locations at which the green trimmings would  
20 be unloaded. Upon arriving at the Property, Organic Ag directed Burrtec to the locations where  
21 Organic Ag wanted the green trimmings to be unloaded. (Exhibit K, ¶ 10; Exhibit L, ¶ 8; Exhibit  
22 P, 46:24-47:8; Exhibit Q, 76:10-13, 103:2-15, 216:16-18, 217:3-11; Exhibit S, 42:2-6; Exhibit T,  
23 29:6-13, 29:24-30:11, 31:24-31:2; Exhibit Y, ¶ 4.)

24 Mr. Smith of the RWQCB also alleges that:

25 "Burrtec has repeatedly argued that it only supplied the materials and that Organic Ag  
26 placed it, but Mr. Pike provided a declaration that Burrtec trucks deposited waste  
27 materials onto his property and Burrtec impliedly admitted that it did deposit such  
28 materials. . . . [I]t appears from reviewing all appropriate evidence that (1) Burrtec  
deposited waste material onto the Pike property and (2) the waste materials were  
placed where they were, in fact, discharged into "waters of the state."

1 (See Exhibit E, p. 4.) Again, Mr. Smith draws conclusions without evidence. Mr. Pike’s  
2 declaration merely states that Burrtec unloaded “green trimmings” onto his property. (Exhibit Y,  
3 ¶ 4.) Burrtec does not dispute this fact.<sup>3</sup> However, neither the Pike Declaration, nor any other  
4 evidence supports a finding that the green trimmings were placed by Burrtec either into “waters  
5 of the state” or where they would be discharged into “waters of the state.” In fact, Burrtec  
6 unloaded the green trimmings at a location where they would not be discharged into “waters of  
7 the state.” (See Exhibit L, ¶¶ 9, 10; Exhibit M, ¶¶ 7, 8.) The only reason the alleged waste  
8 material reached the “waters of the state” was because Organic Ag put it there. As Mr. Pike  
9 testified, “there are three . . . tributaries . . . Organic AG filled those up with the mulch.”  
10 (Exhibit O, 298:16-22.) Burrtec does not have liability under the Water Code for the  
11 independent and affirmative actions of Organic Ag.

12 Similar unsupported allegations are presented by Mr. Smith on page five of the April 27,  
13 2017 Memo:

14 “Burrtec further argues that a recent site visit determined that no waste materials were  
15 in the waterway. This does not mean that such materials were not originally placed  
16 where they were or probably could be discharge into ‘waters of the state’ in 2013. *As*  
17 *stated by Mr. Pike’s counsel*, ‘the main waterways were promptly cleared by [Mr.  
18 Pike] when the CAO was issued. They remain clear for the most part but future  
migration of trash back into the waterways is possible, probably inevitable, unless it  
is removed from the rest of the property.’ The Prosecution Team agrees.”

19 (Exhibit E, p. 5, emphasis added.) Again, Burrtec does not dispute that materials may have been  
20 placed in the waterways, but there is **no** evidence that Burrtec placed the materials there; there is  
21 undisputed evidence that Organic Ag placed the materials there. (Exhibit O, 298:16-22.)  
22 Additionally, opinions supplied by Mr. Pike’s counsel are neither fact nor evidence and reliance  
23 on those unsupported opinions is inappropriate. Mr. Pike’s counsel has no first-hand knowledge  
24 of the site conditions at the time of Burrtec’s delivery of green trimmings and is not an expert on  
25

26 <sup>3</sup> Burrtec closely monitored the material being delivered for excess waste. When source-separated green  
27 material arrives at a Burrtec facility, it goes to a separate green processing area where it is unloaded,  
28 inspected and picked for trash, screened, ground up, and inspected again. (See, Exhibit K, ¶ 3; Exhibit T,  
19:9-16, 51:20-52:3; Exhibit S, 157:10-21.) Burrtec inspectors reject whole deliveries of green waste  
when they are found to contain an unacceptable amount of trash materials. (See, Exhibit T, 21:19-23).

1 such issues and is not qualified to opine on such matters.

2 Finally, Mr. Smith, on page five of the April 27, 2017 Memo, asserts:

3 “Burrtec has admitted that it placed the waste materials on the property at issue.  
4 Burrtec did not merely supply the waste materials to a distributor, Burrtec physically  
5 transported the waste to and placed it on the Pike property, and in some instances  
6 directly into “waters of the state,” or probably could have, given rain and wind.  
7 Burrtec states that “[l]iability under Water Code section 13304 must be premised  
upon a showing of control over the activity causing the discharge.” Burrtec does not  
indicate, nor can it credibly claim, that it was not in control of its trucks, drivers, or  
ability to contract with Organic Ag.”

8 (See Exhibit E, p. 5.) Burrtec admits that it placed green trimmings on the Pike property, but  
9 there is **no** evidence that Burrtec placed the green trimmings “directly into ‘waters of the state’ or  
10 probably could have, given rain and wind.” The evidence is to the contrary.

11 The closest that Burrtec placed the green trimmings to the “waters of the state” was 200  
12 feet away (Exhibit L, ¶ 9), and the placement of the green trimmings in that location would not  
13 have resulted in the discharge of the green trimmings into the “waters of the state” due to rain or  
14 wind. (See Exhibit M, ¶¶ 7, 8.) Burrtec was in control of its trucks and drivers, and they did **not**  
15 place the green trimmings into “waters of the state” or in a location where it could have been  
16 discharged into “waters of the state.” (Exhibit L, ¶¶ 9, 10.) Burrtec, however, did not and could  
17 not control Organic Ag’s spreading of the material on the Pike property. (See Exhibit O, 298:16-  
18 22; Exhibit P, 18:19-20, 32:16-33:5, 45:4-6, 49:20-24, 53:10-16; Exhibit Q, 216:4-15.)

19 Even the evidence provided by the RWQCB does not support its allegation that Burrtec,  
20 or any other supplier, deposited green trimmings “directly into the waters of the state” or where  
21 they could have been discharged into waters of the state. The Original CAO documents the  
22 conditions identified in 2013, as well as attached photographs and narrative of the 2013 RWQCB  
23 site visit. While there are trucks visible in the photographs which were taken by RWQCB staff,  
24 there is no narrative that suggests that those trucks are depositing material “directly into the  
25 waters of the state” or where the material could have been discharged into waters of the state. In  
26 fact, the narrative is to the contrary, only stating that Organic Ag spread the material on the  
27 properties, and was observed by the RWQCB spreading the material on April 29, 2013. (Exhibit  
28 B, Finding 6 and Attachment 2, NOV narrative and photographs.) Moreover, the NOV narrative

1 does not state that wastes have been discharged to the waters of the state, but only states that  
2 “there is a potential for conditions of pollution to occur.” (Exhibit B, Attachment 2, p. 5.)

3 There is no evidence that the green trimmings placed by Burrtec on the Pike property,  
4 more than 200 feet away from the “waters of the state,” were placed in a location where they  
5 were likely to be discharged into the waters of the state, or where they “probably could have,  
6 given rain and wind.” The passive and unknowing action of Burrtec cannot give rise to liability  
7 under section 13304, particularly in light of the active and affirmative conduct by Organic Ag in  
8 moving the green trimmings directly into, and adjacent to, the waters of the state.

9 **5. Burrtec Did Not Spread Any Green Trimmings on the Pike Property.**

10 The Amended CAO states at Finding No. 9:

11 “[t]he discharge of waste *during waste spreading activities* into tributaries to Wilson  
12 Creek is a discharge of waste to waters of the state in violation of Water Code section  
13 13260 and the following waste discharge prohibitions contained in the Basin Plan:

14 ‘(1) The discharge of waste to waters of the state in a manner causing, or  
15 threatening to cause a condition of pollution, contamination or nuisance as  
16 defined in California Water Code Section 13050 is prohibited.’

17 ‘(7) The dumping, deposition, or discharge of waste *directly into waters of the*  
18 *state*, or adjacent to such waters in any manner which may permit its being  
19 transported into the waters, is prohibited unless authorized by the Regional  
20 Board.’”

21 (Exhibit A, Finding 9 (emphasis added).) The original NOV issued alleged that “waste  
22 **spreading** activities” violated the Water Code. (Exhibit A, Finding 8 (emphasis added).) The  
23 2013 RWQCB inspections revealed that “waste consisting mostly of plant clippings (i.e.  
24 landscaping waste) and to a lesser extent municipal solid waste (glass, plastics, metals, and  
25 construction debris) was **spread** on the properties by Organic Ag, Inc. Additional waste  
26 **spreading** by Organic Ag, Inc., was observed by the San Diego Water Board staff during an  
27 April 29, 2013, inspection of the properties.” (Exhibit A, Finding 6 (emphasis added).) The  
28 clear basis for the alleged violation and subsequent issuance of the Original CAO and Amended  
CAO was the **spreading** of the green trimmings into the waters of the state.

///

1 This is echoed in the memoranda prepared by RWQCB staff throughout the Amended  
2 CAO comment period. In the April 27, 2017 RWQCB Memo prepared by James G. Smith, the  
3 Prosecution Team asserts in various ways that, “it is reasonable to state that Burrtec and Ecology  
4 discharged and **spread** the waste into “waters of the state” or discharged and **spread** the waste  
5 such that the waste was likely to be discharged into “waters of the state.” (Exhibit E, p.2.)

6 While Organic Ag did spread the green trimmings into and adjacent to the waters of the  
7 state (*See, Exhibit Q*, 298:16-22), Burrtec had no involvement in the spreading of any material at  
8 the Pike property. (Exhibit K, ¶¶ 12, 13; Exhibit L, ¶ 11; Exhibit O, 298:16-22; Exhibit P,  
9 18:19-20, 45:4-6, 49:20-24, 50:9-19, 53:10-16; Exhibit Q, 216:4-15.) The evidence is clear on  
10 this fact. Even the RWQCB agrees that Burrtec supplied the green trimmings and Organic Ag  
11 spread them. (Exhibit A, Finding 1.e.)

12 Nevertheless, the RWQCB still attempts to suggest that Burrtec’s delivery of green  
13 trimmings to the Pike property amounted to “spreading.” The facts alleged by the RWQCB staff  
14 in Mr. Smith’s April 27, 2017 Memo are unsupported by any evidence. Mr. Smith asserts that:

15 “[c]onsidering that 5,500 green waste truckloads were dumped *across the entirety of the*  
16 *properties* it is reasonable to state that Burrtec and Ecology discharged and spread the  
17 waste into “waters of the state” or discharged and spread the waste such that the waste  
was likely to be discharged into “waters of the state.”

18 (*See Exhibit E*, p. 2 (emphasis added).) No evidence exists which supports this assertion. To the  
19 contrary, the evidence provided to the RWQCB shows that Burrtec: a) did not dump truckloads  
20 “across the entirety of the properties”; b) did not spread the waste; c) did not place the waste  
21 directly into waters of the state; and d) did not place the waste where it was likely to be  
22 discharged into “waters of the state.” (*See Exhibit K; Exhibit L; Exhibit M; Exhibit O*, 298:16-  
23 22; Exhibit P, 18:19-20, 45:4-6, 49:20-24, 50:9-19, 53:10-16; Exhibit Q, 216:4-15.) Mr. Smith’s  
24 assertion shows a complete disregard for the actual evidence which demonstrates that Burrtec did  
25 not place the material where it was likely to be discharged into the waters of the state.

26 **6. Burrtec Does Not Meet the Legal Standards for A Discharger.**

27 The mere unloading of green trimmings at the Pike property by Burrtec did not create or  
28 threaten to create a condition of pollution or nuisance. As discussed in detail above, the Water

1 Code liability derives from the common law of nuisance and must be construed consistent with  
2 that common law. (*Wells Fargo Bank, supra*, 795 F. Supp.2d at 918, citing *City of Modesto*  
3 *Redevelopment Agency, supra*, 119 Cal.App.4th at 38.) Such construction requires a showing of  
4 control or authority to control the use, which establishes causation. (*Id.*; *Santa Clara Valley*  
5 *Water Dist., supra*, 655 F. Supp. 2d at 1064; citing *City of Modesto, supra.*, 119 Cal.App.4th at  
6 37–38; *Portman v. Clementina Co* (1957) 147 Cal.App.2d 651, 656.)

7 Here, evidence of control is lacking. There is no evidence that Burrtec unloaded or  
8 otherwise “deposited” the green trimming material where it was, or probably would be,  
9 discharged into the waters of the state. In fact, the evidence submitted to the RWQCB shows the  
10 opposite – that Burrtec unloaded the green trimmings over 200 feet from the tributary. (Exhibit  
11 L, ¶ 9.) The evidence is clear that Burrtec had no involvement in the spreading of the green  
12 trimmings. (See, Exhibit K, ¶ 13; Exhibit P, 18:19-20, 45:4-6, 49:20-24, 50:9-19, 53:10-16;  
13 Exhibit Q, 216:4-15.) The evidence does show, however, that Organic Ag moved, relocated, and  
14 spread the green trimmings throughout the Property, including directly into the waters of the  
15 state. (See, Exhibit O, 298:16-22; Exhibit P, 18:19-20, 32:16-33:5, 45:4-6, 53:10-16.)

16 Burrtec did not know where Organic Ag was spreading the material and had no control  
17 over the ultimate location of the green trimmings spread by Organic Ag. (See, Exhibit Q, 216:4-  
18 18.) It was solely Organic Ag and Pike that spread and relocated the green trimmings in a  
19 manner which resulted in a discharge into the waters of the state. (See, Exhibit P, 32:16-33:5,  
20 45:4-6; Exhibit O, 298:16-22.) As a mere supplier of green trimming material, Burrtec’s  
21 involvement was both remote and passive. (See, Exhibit P, 50:9-19; Exhibit R, 126:15-18;  
22 127:8-9, 151:1-4; Exhibit S, 18:7-12, 168:6-11.) As Burrtec had no control over Organic Ag’s  
23 activities, Burrtec cannot be held liable for the direct actions of another party over which it had  
24 no control.

25 Under the standards expressed in the case law cited above, Burrtec does not have liability  
26 under the Water Code. Burrtec delivered green trimmings to a property and unloaded the green  
27 trimmings in a location where they would not be discharged into “waters of the state.” This  
28 conduct did not “actively or knowingly generate the specific nuisance condition” because the

1 nuisance condition was only created after Organic Ag physically moved the green trimmings in,  
2 and adjacent to, the waters of the state.

3 Furthermore, by delivering the green trimmings to the Pike property and unloading them  
4 in a location where they would not be discharged into “waters of the state”, Burrtec merely  
5 placed the green trimmings in the stream of commerce; Burrtec did not take “affirmative steps  
6 directed toward the improper discharge of the waste.” Burrtec placed the green trimmings in a  
7 location where they would not cause or create a condition of nuisance or pollution for “waters of  
8 the state.”

9 Absent the subsequent spreading carried out by Organic Ag at Mr. Pike’s behest,  
10 Burrtec’s delivery of green trimmings cannot be shown to have caused, or be likely to have  
11 caused, a discharge into the waters of the state. The independent action of Organic Ag to  
12 physically move the green trimmings into the waters of the state does not and cannot, as a matter  
13 of law, extend liability to Burrtec. No civil case nor decision by the State Water Resources  
14 Control Board has ever held a party liable under the Water Code because a third party  
15 affirmatively moved materials to a location where they could impact waters of the state. Such a  
16 determination would extend the law well beyond the scope of the statute, holding transporters  
17 and suppliers liable for the conduct of third parties over which they have no control. The statute  
18 does not support such a decision.

19 Burrtec’s delivery alone did not create nor threaten to create either a condition of  
20 pollution or nuisance. As such, Burrtec cannot be considered a discharger under Water Code  
21 section 13304.

22 **7. No Evidence Supports the Creation of a Nuisance.**

23 The Amended CAO identifies several potential impacts to water quality that could result  
24 from the “unauthorized discharge of waste to the properties”:

- 25 “a. The discharge of waste directly into waters of the state can alter or obstruct  
26 flows, thereby causing flooding, unwarranted sediment discharges, and/or  
27 affecting existing riparian functions (WARM and WILD).  
28

- 1           b. Surface water runoff from plant clippings contains nutrients, acting as  
2           biostimulatory substances that can cause excessive plant growth and decay in  
3           receiving waters, thereby increasing water turbidity and impairing aesthetic  
4           enjoyment (REC-2). The decaying process consumes large amounts of oxygen,  
5           causing a drop in water oxygen levels which is often lethal to fish and other  
6           water inhabitants (WARM and WILD). In some cases algal blooms can even  
7           result in the production of dangerous cyanotoxins, harmful to human health  
8           (REC-1 and MUN).
- 9           c. Excessive nutrients in plant clippings can also leach into groundwater, causing  
10           elevated levels of nitrates in drinking water supply (MUN), rendering it harmful  
11           to human health if ingested.”

12 (Exhibit A, Finding 11.) As noted in the two expert reports provided to the RWQCB and the  
13 deposition of Mr. Pike, as late as May 2017, no green trimmings were located in the waters of  
14 the state; instead, the trimmings were set back approximately 15 feet from the tributary. (*See*  
15 *Exhibit U*, p. 4; *Exhibit V*, p. 12; *Exhibit O*, 298:16-22.) Obstruction of the tributary has not  
16 occurred. Additionally, SoundEarth Strategies evaluated the nutrient content of the green  
17 trimmings and determined that the nutrient ranges were typical of soils and composts in the  
18 western United States, and were consistent with acceptable levels typically considered beneficial  
19 for agriculture. (*Exhibit V*, p. 7.) Consequently, there is no evidence that the green trimmings  
20 contain excessive nutrients which could negatively impact surface or ground water.

21           The Amended CAO also identified odor as a condition of nuisance. (*Exhibit A*, Finding  
22 12.) Neither of the inspections by environmental experts reported the detection of foul odors at  
23 the site. (*Exhibit V*, p. 10; *Exhibit U*.) None of the conditions of nuisance cautioned in the  
24 Amended CAO is present at the Pike property.

25 **C. The RWQCB Violated Burrtec’s Due Process Rights by Failing to Conduct a Hearing.**

26           The State of California (including its agencies) may not deprive any person of life,  
27 liberty, or property without due process of law. (U.S. Const. Amend. XIV, § 1; U.S. Const.  
28 Amend. V, Cal. Const., art. I, §7.) The exercise of a quasi-judicial power requires that an agency  
must satisfy at least minimal requirements of procedural due process. (*Beck Development Co. v.*  
*Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1188; *Horn v. County of*  
*Ventura* (1979) 24 Cal.3d 605, 612.) Minimum due process requires some form of notice and an

1 opportunity to be heard. (*Id.*) This is codified at Section 11425.10(a)(1) of the Government  
2 Code which mandates, “The agency shall give the person to which the agency action is directed  
3 notice and an opportunity to be heard, including the opportunity to present and rebut evidence.”

4 “[D]ue process generally requires consideration of (1) the private interest that will be  
5 affected by the official action, (2) the risk of an erroneous deprivation of such interest through  
6 the procedures used, and the probable value, if any, of additional or substitute procedural  
7 safeguards, (3) the dignitary interest in informing individuals of the nature, grounds and  
8 consequences of the action and in enabling them to present their side of the story before a  
9 responsible governmental official, and (4) the governmental interest, including the function  
10 involved and the fiscal and administrative burdens that the additional or substitute procedural  
11 requirement would entail.” (*People v. Ramirez* (1979) 25 Cal.3d 260, 269, citations omitted).

12 Due process includes a reasonable opportunity to know the claims of the adverse party  
13 and to present objections. (*See Ryan v. California Interscholastic Federation* (2001) 94  
14 Cal.App.4th 1048, 1072.) When an administrative agency conducts a hearing, the party must be  
15 “apprised of the evidence against him so that he may have an opportunity to refute, test, and  
16 explain it . . . .” (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1171-72.) This  
17 right is protected by Government Code Section 11513(b) which guarantees the right to cross-  
18 examine witnesses on any matter relevant to the issues. Indeed, an agency decision based on  
19 information of which the parties were not apprised and had no opportunity to controvert amounts  
20 to a denial of a hearing. (*Clark v. City of Hermosa Beach*, 48 Cal.App.4th at 1171-72.)  
21 Burrtec’s due process rights were violated because it was not given a reasonable opportunity to  
22 refute, test or explain the alleged evidence used against it.

23 A review of evidence detailed above demonstrates that the Prosecution Team relied  
24 heavily on unsupported opinions by RWQCB staff and opposing litigation counsel and ignored  
25 factual evidence presented by Burrtec. On May 26, 2017, Burrtec specifically requested a  
26 hearing for the specific purpose of testing the RWQCB’s allegations that Burrtec placed green  
27 trimmings “directly into waters of the state or into a location where they would migrate into  
28 waters of the state.” (Exhibit BB, p. 8.) Similarly, on June 15, 2017, Burrtec again requested

1 that the matter be scheduled for hearing (*see Exhibit DD*, pp. 1, 3), as (1) Burrtec had submitted  
2 information regarding site conditions, including information prepared by experts, which the  
3 RWQCB staff disregarded; (2) the RWQCB staff response to comments included statements  
4 such as “during the dry season most people would not realize if they were standing in the  
5 tributary or not,” which were not supported by the expert evidence submitted by Burrtec; and (3)  
6 the RWQCB staff response to comments and Amended CAO included unsupported allegations  
7 that Burrtec unloaded material in or near the dry creek bed, which allegations are in direct  
8 contradiction to direct evidence submitted by Burrtec.

9 Burrtec is entitled to know the evidence relied upon by the RWQCB in making its  
10 findings and to cross-examine the RWQCB staff asserting such evidence exists, as well as to test  
11 that evidence. While Burrtec’s submittals have identified and provided copies of deposition  
12 testimony, declarations, expert reports, contracts and the like, the RWQCB identifies no specific  
13 factual basis or evidence for its findings or allegations.

14 The facts on which the RWQCB relied for the allegations that Burrtec unloaded material  
15 into or near waters of the state are unclear. Burrtec has not been apprised of the evidence alleged  
16 against it, and therefore has not yet had “an opportunity to refuse, test, and explain it.” A hearing  
17 on these issues was necessary to ensure that Burrtec understood and had an opportunity to  
18 respond to the evidence alleged against it.

19 The exercise of a quasi-judicial power requires that an agency must satisfy at least  
20 minimal requirements of procedural due process. (*Beck Development Co.*, 44 Cal.App.4th at  
21 1188.) The basis to add Burrtec as a discharger to the Amended CAO involves highly technical  
22 and factual issues and there is significant risk of error, particularly when the findings are based  
23 on factual allegations without support. Furthermore, given these factual and technical issues,  
24 there must be interest in ensuring that Burrtec is informed of the facts that provide the basis for it  
25 being named to the Amended CAO.

26 Burrtec was denied the opportunity to examine RWQCB staff on the bases alleged in the  
27 Amended CAO, as well as the alleged facts upon which the RWQCB staff relied in making its  
28 recommendation to add Burrtec as a discharger to the Amended CAO. Due process includes

1 “the right to present legal and factual issues in a deliberate and orderly manner.” (*White v.*  
2 *Board of Medical Quality Assurance* (1982) 128 Cal.App.3d 699, 705.) Without the ability to  
3 examine RWQCB staff at a hearing regarding the factual basis for the allegations in the  
4 Amended CAO, Burrtec was denied “right to be heard at a meaningful time and in a meaningful  
5 manner.” (*Ryan, supra*, 94 Cal.App.4th at 1072.) A party must be “apprised of the evidence  
6 against him so that he may have an opportunity to refute, test, and explain it . . .” (*Clark, supra*,  
7 48 Cal.App.4th at 1172.)

8 The risk of an improper finding because Burrtec could not rebut evidence is significant.  
9 Moreover, the additional burden of conducting a hearing to allow Burrtec the opportunity to  
10 examine witnesses and rebut evidence would have been minimal. Instead, Burrtec’s due process  
11 “right to present legal and factual issues in a deliberate and orderly manner” was violated. The  
12 CAO should be set aside and remanded back to the RWQCB for a full and fair hearing.

#### 13 IV.

#### 14 **REQUEST FOR STAY OF ACTION**

15 Burrtec seeks a stay of the effect of Order No. R9-2013-0122 which improperly names  
16 Burrtec as a discharger and responsible party. As provided in Title 23 California Code of  
17 Regulations section 2053(a), a stay of the effect of an action of a regional board shall be granted  
18 if petitioner alleges facts and produces proof of all of the following:

- 19 (1) substantial harm to petitioner or to the public interest if a stay is not granted;
- 20 (2) a lack of substantial harm to other interested persons and to the public interest if a  
21 stay is granted, and
- 22 (3) substantial questions of fact or law regarding the disputed action.

23 All the factors are met here. A stay to maintain the status quo should be granted while the  
24 State Board evaluates Burrtec’s Petition on the Amended CAO.

#### 25 A. **There are Substantial Questions of Fact and Law in the Disputed Action.**

26 As discussed in thorough detail above, the law does not attach liability to a mere supplier  
27 of goods. A party must undertake affirmative acts that contribute “directly” to the nuisance.  
28 (*City of Merced, supra*, 2015 WL 471672 at \*12.) Without evidence of control or active

1 involvement, liability under Water Code section 13304 cannot be shown. (*Wells Fargo Bank,*  
2 *supra*, 795 F.Supp.2d at 919.)

3 The RWQCB insists that Burrtec can be liable under section 13304 simply for delivering  
4 and unloading green trimmings to the Pike property. This does not meet the rule set forth in *City*  
5 *of Modesto*, where the court required a showing of affirmative action in the release causing the  
6 nuisance; mere placement of materials in the stream of commerce was not sufficient. (*City of*  
7 *Modesto, supra*, 119 Cal.App.4<sup>th</sup> at 43.) Moreover, the law does not impose liability on a party  
8 whose actions were remote and passive, or where the discharge was caused by events beyond the  
9 party's control. (*Id.*)

10 The evidence provided to the RWQCB established several important facts: (1) Burrtec  
11 contracted only for the delivery of green trimmings to the Pike property; (2) Burrtec unloaded  
12 the green trimmings at the Pike property at least 200 feet away from the tributary; (3) Organic  
13 Ag and Pike performed all spreading activities, including spreading the green trimmings into the  
14 tributary and subsequently removing the green trimmings from the tributary; and (4) Burrtec did  
15 not participate in any spreading and had not control or authority over any spreading activities  
16 conducted by Organic Ag or Pike. The RWQCB disregards this factual evidence and instead  
17 relies on conjecture and unsupported opinion in alleging that Burrtec “dumped” material “*across*  
18 *the entirety of the properties*” and, thus, Burrtec must have “discharged and spread the waste into  
19 ‘waters of the state.’” (See Exhibit E, p. 2.) Significant issues of both fact and law are raised in  
20 this Petition.

21 Furthermore, as discussed above, the process followed in this case, deprived Burrtec of  
22 its due process rights, creating additional substantial questions of law. Minimum due process  
23 requires some form of notice and an opportunity to be heard. (*Beck Development Co., supra*, 44  
24 Cal.App.4<sup>th</sup> at 1188; *Horn, supra*, 24 Cal.3d at 612.) The Government Code mandates, “The  
25 agency shall give the person to which the agency action is directed notice and an opportunity to  
26 be heard, including the opportunity to present and rebut evidence.” (Govt. Code §  
27 11425.10(a)(1).) Due process includes a reasonable opportunity to know the claims of the  
28 adverse party and to present objections. (See *Ryan, supra*, 94 Cal.App.4<sup>th</sup> at 1072.)

1 Burrtec presented evidence to the RWQCB in the form of declarations, depositions and  
2 expert reports. Yet, the RWQCB disregarded that evidence and failed to provide any evidence  
3 which supported its contradictory claims and allegations. Mr. Smith provided many of his own  
4 opinions in his responses to Burrtec's comments, but failed to provide evidence to support those  
5 opinions. Without a hearing, Burrtec was denied the opportunity to cross-examine Mr. Smith  
6 and other representatives of the RWQCB who participated in the preparation of the Amended  
7 CAO. The RWQCB decision, based on information of which Burrtec was not apprised and had  
8 no opportunity to controvert, amounts to the denial of due process. (*Clark, supra*, 48 Cal.App.4th  
9 at 1171-72.) Burrtec was afforded no opportunity to know and rebut the evidence upon which  
10 the RWQCB was relying.

11 **B. There Will be Substantial Harm to Burrtec Without a Stay.**

12 The issues discussed above create substantial questions that must be resolved before the  
13 Amended CAO is given effect. There will be substantial harm to Burrtec if the State Water  
14 Resources Control Board does not issue a stay. The Amended CAO requires work to be  
15 performed on an expedited basis: (1) submittal of a restoration plan within 14 days after the  
16 issuance of the Amended CAO; (2) implementation of the restoration plan with two weeks from  
17 the date of its approval by the RWQCB; and (3) completion of all restoration activities no later  
18 than ninety (90) days after the adoption of the Amended CAO. (Exhibit 1, p. 8 of 13.) The  
19 estimated cost to remove the spread green trimmings from the Pike property is likely to be  
20 several million dollars. Without a stay, Burrtec will be required to expend significant funds  
21 within the next sixty (60) days to prepare and implement a restoration plan to address a discharge  
22 for which it is not responsible.

23 **C. There Will Be No Substantial Harm to Other Interested Persons or to the Public**  
24 **Interest if a Stay is Granted.**

25 Finally, there will be no substantial harm to others if a stay is granted. The Original CAO  
26 was issued in 2013 and names the property owner, Pike, as the responsible party. (Exhibit B.)  
27 The Amended CAO does not alter Pike's status as a responsible party. (Exhibit A.) Since the  
28 removal by Organic Ag and Pike in 2013 of the material within the tributary (Exhibit Q, 298:16-

1 300:17; Exhibit P, 32:16-33:5), the green trimmings have stabilized with the growth of  
2 vegetation on most areas of the Pike property and do not present a significant risk of migrating  
3 into the tributary (Exhibit V, pp. 6-7, 10, 12.) No substantial harm will result from a stay; a stay  
4 should be granted.

5 V.

6 **CONCLUSION**

7 The RWQCB has failed to meet the legal requirements necessary to establish Burrtec's  
8 liability as a discharger under Water Code section 13304. There is insufficient evidence to  
9 support the allegations that Burrtec deposited waste in a location where it would cause or permit,  
10 or threaten to cause or permit, any waste to be discharged into waters of the state. Moreover,  
11 Burrtec's due process rights to a fair hearing were violated.

12 Pursuant to section 13220 of the Water Code, the State Board is "vested with all the  
13 powers of the regional boards" and may take the appropriate action itself. (Water Code  
14 §13320(c).) The State Board may "set aside or modify the regional board order" or "direct the  
15 regional board to take appropriate action." (23 Cal. Code Regs. §2052(a)(2)(B) and (C).)

16 The law does not support the naming of Burrtec as a discharger and the State Board  
17 should remove, or direct the RWQCB to remove, Burrtec from Cleanup and Abatement Order  
18 No. R9-2013-0122 as Amended by Addendum No. 1. Finally, the State Board should stay the  
19 effect of the Amended CAO pending resolution of Burrtec's Petition.

20 Respectfully submitted,

21 DATE: AUGUST 11, 2017

ENVIRONMENTAL LAW GROUP, LLP

22  
23 BY: 

24 SUZANNE R. VARCO  
25 ATTORNEYS FOR PETITIONER,  
26 BURRTEC WASTE INDUSTRIES, INC.  
27  
28

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11 ATTORNEYS FOR PETITIONER  
12 BURRTEC WASTE INDUSTRIES, INC.

13 **STATE WATER RESOURCES CONTROL BOARD**

14 **IN THE MATTER OF:** )  
15 **CALIFORNIA REGIONAL WATER QUALITY** )  
16 **CONTROL BOARD, SAN DIEGO REGION;** ) **DECLARATION OF SUZANNE R. VARCO IN**  
17 **ADOPTION OF ADDENDUM NO. 1 TO CLEANUP** ) **SUPPORT OF PETITION AND REQUEST FOR**  
18 **AND ABATEMENT ORDER NO. R9-2013-0122,** ) **REVIEW AND ACTION BY THE STATE**  
19 **AN ADDENDUM ADDING RESPONSIBLE** ) **WATER RESOURCES CONTROL BOARD**  
20 **PARTIES, ADDING BURRTEC WASTE** ) **AND**  
21 **INDUSTRIES, INC. AS A RESPONSIBLE PARTY /** ) **REQUEST FOR STAY OF ACTION**  
22 **DISCHARGER** ) **CAL. WATER CODE § 13320**  
23 ) **23 CAL. CODE REGS. §§ 2050, 2052**  
24 )  
25 )  
26 )  
27 )  
28 )

29 I, SUZANNE R. VARCO, hereby declare as follows:

30 1. I am a Partner with the law firm of Varco & Rosenbaum Environmental Law  
31 Group LLP, and represent Burrtec Waste Industries, Inc. (“Burrtec”) regarding the Cleanup and  
32 Abatement Order as Amended by Addendum No. 1 R9-2013-0122 (the “Amended CAO”) issued  
33 on July 14, 2017 by the Regional Water Quality Control Board, San Diego Region (“RWQCB”).

34 2. I know the following of my own personal knowledge and if called as a witness, I  
35 could and would competently testify to the matters discussed herein. I further specifically attest  
36 that I have personal knowledge of the facts alleged in the Request for Stay of Action included

1 within the Petition and Request for Review and Action as required by Title 23 of the California  
2 Code of Regulations § 2053(a).

3 3. Attached as Exhibit A to this declaration is a true and correct copy of the July 14,  
4 2017 Letter from the RWQCB regarding Addendum No. 1 to Cleanup and Abatement Order No.  
5 R9-2013-0122 with the following attachments:

- 6 • Addendum No. 1 to Cleanup and Abatement Order No. R9-2013-0122, dated July  
7 14, 2017;
- 8 • Redline/Strikeout Cleanup and Abatement Order No. R9-2013-0122 showing  
9 changes resulting from Addendum No. 1, dated July 14, 2017;
- 10 • Cleanup and Abatement Order No. R9-2013-0122 as Amended by Addendum No.  
11 1, dated July 14, 2017.

12 4. Attached as Exhibit B to this declaration is a true and correct copy of the Cleanup  
13 and Abatement Order No. R9-2013-0122, dated September 5, 2013.

14 5. Attached as Exhibit C to this declaration is a true and correct copy of the  
15 Tentative Addendum No. 1 to Cleanup and Abatement Order No. R9-2013-0122, dated  
16 November 30, 2016.

17 6. Attached as Exhibit D to this declaration is a true and correct copy of the Revised  
18 Tentative Addendum No. 1 to Cleanup and Abatement Order No. R9-2013-0122, dated March  
19 10, 2017.

20 7. Attached as Exhibit E to this declaration is a true and correct copy of the April 27,  
21 2017 Prosecution Team Consideration of Revised Tentative Addendum No 1 to Cleanup and  
22 Abatement Order No. R9-2013-0122, Pike/Aguanga (SUPPLEMENT TO MARCH 10, 2017,  
23 SUBMISSION).

24 8. Attached as Exhibit F to this declaration is a true and correct copy of the June 9,  
25 2017 Prosecution Team Response to Ecology Auto Parts, Inc. and Burrtec Waste Industries,  
26 Inc.'s Comments on Revised Tentative Addendum No. 1 to Cleanup and Abatement Order No.  
27 R9-2013-0122, Pike/Aguanga.

28 ///

1           9.       Attached as Exhibit G to this declaration are true and correct copies of the Green  
2 Waste Delivery Agreement between Burrtec Waste Industries, Inc. and Organic Ag, dated March  
3 24, 2008 and Second Amendment to Green Waste Delivery Agreement dated February 23, 2009.

4           10.       Attached as Exhibit H to this declaration are true and correct copies of the Letters  
5 of Understanding Between James Pike and Organic Ag, dated January 17, 2011 and October 24,  
6 2011.

7           11.       Attached as Exhibit I to this declaration is a true and correct copy of the *Pike v.*  
8 *Organic Ag*, Riverside Superior Court Case No. MCC1401513, First Amended Complaint, dated  
9 September 1, 2015.

10          12.       Attached as Exhibit J to this declaration is a true and correct copy of the *Pike v.*  
11 *Organic Ag*, Riverside Superior Court Case No. MCC1401513, Second Amended Complaint,  
12 dated January 8, 2016.

13          13.       Attached as Exhibit K to this declaration is a true and correct copy of the  
14 Declaration of Richard Crockett, General Manager of Burrtec Waste Industries, Inc., dated  
15 March 24, 2017.

16          14.       Attached as Exhibit L to this declaration is a true and correct copy of the  
17 Declaration of Nick Burciaga, Division Manager for Burrtec Waste Industries, Inc.'s Agua  
18 Mansa Facility, dated May 25, 2017.

19          15.       Attached as Exhibit M to this declaration is a true and correct copy of the  
20 Declaration of Martin Hamann, Principal Hydrogeologist for SoundEarth Strategies, dated May  
21 24, 2017.

22          16.       Attached as Exhibit N to this declaration is a true and correct copy of the  
23 Declaration of Saul Gracian, Manager of Ecology Auto Parts, Inc., dated May 25, 2017.

24          17.       Attached as Exhibit O to this declaration is a true and correct copy of excerpted  
25 pages from the Deposition of James Pike, Owner of the Pike Property, Volume III, dated March  
26 15, 2017.

27 ///

28 ///

1 18. Attached as Exhibit P to this declaration is a true and correct copy of excerpted  
2 pages from the Deposition of Pedro Soltero, Employee of Organic Ag, Inc., dated March 21,  
3 2017.

4 19. Attached as Exhibit Q to this declaration is a true and correct copy of excerpted  
5 pages from the Deposition of Peter Holladay, Owner and Vice President of Organic Ag, Inc.,  
6 dated March 20, 2017.

7 20. Attached as Exhibit R to this declaration is a true and correct copy of excerpted  
8 pages from the Deposition of Levi Holladay, Owner and President of Organic Ag, Inc., dated  
9 March 21, 2017.

10 21. Attached as Exhibit S to this declaration is a true and correct copy of excerpted  
11 pages from the Deposition of Richard Crockett, General Manager of Burrtec Waste Industries,  
12 Inc. and designated Person Most Knowledgeable for Burrtec Waste Industries, Inc., dated March  
13 23, 2017.

14 22. Attached as Exhibit T to this declaration is a true and correct copy of excerpted  
15 pages from the Deposition of Robert Steven Hoyt, Former Truck Driver for Burrtec Waste  
16 Industries, Inc., dated February 22, 2017.

17 23. Attached as Exhibit U to this declaration is a true and correct copy of the Site  
18 Restoration Plan prepared by Advantage Environmental Consultants, dated March 10, 2017.

19 24. Attached as Exhibit V to this declaration is a true and correct copy of the  
20 Evaluation and Comments on the Advantage Environmental Consultants' Site Restoration Plan,  
21 prepared by SoundEarth Strategies, dated May 1, 2017.

22 25. Attached as Exhibit W to this declaration is a true and correct copy of the  
23 Environmental Law Group LLP Letter to the RWQCB, dated January 6, 2017.

24 26. Attached as Exhibit X to this declaration is a true and correct copy of the  
25 RWQCB email requesting a declaration from Mr. Pike, dated February 7, 2017.

26 27. Attached as Exhibit Y to this declaration is a true and correct copy of the  
27 Declaration of James Pike, dated February 9, 2017.

28 ///



# **EXHIBIT LIST**

**EXHIBITS TO PETITION AND REQUEST FOR REVIEW AND ACTION**  
**BY THE STATE WATER RESOURCES CONTROL BOARD**

**Submitted by: Burrtec Waste Industries, Inc.**  
**Re: Order No. R9-2013-0122**

A	<p>July 14, 2017 Letter from RWQCB re Addendum No. 1 to Cleanup and Abatement Order No. R9-2013-0122 with the following attachments:</p> <ul style="list-style-type: none"> <li>• Addendum No. 1 to Cleanup and Abatement Order No. R9-2013-0122, dated July 14, 2017;</li> <li>• Redline/Strikeout Cleanup and Abatement Order No. R9-2013-0122 showing changes resulting from Addendum No. 1, dated July 14, 2017;</li> <li>• Cleanup and Abatement Order No. R9-2013-0122 as Amended by Addendum No. 1, dated July 14, 2017.</li> </ul>
B	Cleanup and Abatement Order No. R9-2013-0122, dated September 5, 2013
C	Tentative Addendum No. 1 to Cleanup and Abatement Order No. R9-2013-0122, dated November 30, 2016
D	Revised Tentative Addendum No. 1 to Cleanup and Abatement Order No. R9-2013-0122, dated March 10, 2017
E	April 27, 2017 Prosecution Team Consideration of Revised Tentative Addendum No 1 to Cleanup and Abatement Order No. R9-2013-0122, Pike/Aguanga (SUPPLEMENT TO MARCH 10, 2017, SUBMISSION)
F	June 9, 2017 Prosecution Team Response to Ecology Auto Parts, Inc. and Burrtec Waste Industries, Inc.'s Comments on Revised Tentative Addendum No. 1 to Cleanup and Abatement Order No. R9-2013-0122, Pike/Aguanga.
G	Green Waste Delivery Agreement between Burrtec Waste Industries, Inc. and Organic Ag, dated March 24, 2008 and Second Amendment to Green Waste Delivery Agreement dated February 23, 2009
H	Letters of Understanding Between James Pike and Organic Ag, dated January 17, 2011 and October 24, 2011
I	<i>Pike v. Organic Ag</i> , Riverside Superior Court Case No. MCC1401513, First Amended Complaint, dated September 1, 2015
J	<i>Pike v. Organic Ag</i> , Riverside Superior Court Case No. MCC1401513, Second Amended Complaint, dated January 8, 2016

K	Declaration of Richard Crockett, General Manager of Burrtec Waste Industries, Inc., dated March 24, 2017
L	Declaration of Nick Burciaga, Division Manager for Burrtec Waste Industries, Inc.'s Agua Mansa Facility, dated May 25, 2017
M	Declaration of Martin Hamann, Principal Hydrogeologist for SoundEarth Strategies, dated May 24, 2017
N	Declaration of Saul Gracian, Manager of Ecology Auto Parts, Inc., dated May 25, 2017
O	Excerpts of Deposition of James Pike, Owner of Pike Property, Volume III, dated March 15, 2017
P	Excerpts of Deposition of Pedro Soltero, Employee of Organic Ag, Inc., dated March 21, 2017
Q	Excerpts of Deposition of Peter Holladay, Owner and Vice President of Organic Ag, Inc., dated March 20, 2017
R	Excerpts of Deposition of Levi Holladay, Owner and President of Organic Ag, Inc., dated March 21, 2017
S	Excerpts of Deposition of Richard Crockett, General Manager of Burrtec Waste Industries, Inc. and designated Person Most Knowledgeable for Burrtec Waste Industries, Inc., dated March 23, 2017
T	Excerpts of Deposition of Robert Steven Hoyt, Former Truck Driver for Burrtec Waste Industries, Inc., dated February 22, 2017
U	Site Restoration Plan prepared by Advantage Environmental Consultants, dated March 10, 2017
V	Evaluation and Comments on the Advantage Environmental Consultants' Site Restoration Plan, prepared by SoundEarth Strategies, dated May 1, 2017
W	Environmental Law Group LLP Letter to RWQCB, dated January 6, 2017
X	RWQCB email requesting Pike Declaration, dated February 7, 2017
Y	Pike Declaration, dated February 9, 2017
Z	Environmental Law Group LLP Letter to RWQCB, dated March 24, 2017

AA	Email from Erick Altona to RWQCB, dated April 3, 2017
BB	Environmental Law Group LLP Letter to RWQCB, dated May 26, 2017
CC	Email from Linda Beresford to RWQCB, dated June 8, 2017
DD	Environmental Law Group LLP Letter to RWQCB, dated June 15, 2017

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11 ATTORNEYS FOR PETITIONER  
12 BURRTEC WASTE INDUSTRIES, INC.

13 **STATE WATER RESOURCES CONTROL BOARD**

14 **IN THE MATTER OF:** )  
15 **CALIFORNIA REGIONAL WATER QUALITY** ) **DECLARATION OF RICHARD CROCKETT IN**  
16 **CONTROL BOARD, SAN DIEGO REGION;** ) **SUPPORT OF PETITION AND REQUEST FOR**  
17 **ADOPTION OF ADDENDUM NO. 1 TO CLEANUP** ) **REVIEW AND ACTION BY THE STATE**  
18 **AND ABATEMENT ORDER NO. R9-2013-0122,** ) **WATER RESOURCES CONTROL BOARD**  
19 **AN ADDENDUM ADDING RESPONSIBLE** ) **AND**  
20 **PARTIES, ADDING BURRTEC WASTE** ) **REQUEST FOR STAY OF ACTION**  
21 **INDUSTRIES, INC. AS A RESPONSIBLE PARTY /** ) **CAL. WATER CODE § 13320**  
22 **DISCHARGER** ) **23 CAL. CODE REGS. §§ 2050, 2052**  
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29 I, Richard Crockett, hereby declare as follows:

30 1. I am the General Manager of Burrtec Waste Industries, Inc. (“Burrtec”) and  
31 oversee Burrtec’s Material Recovery Facilities (“MRFs”) and Transfer Stations. I have a  
32 thorough understanding of Burrtec’s contractual obligations and activities with respect to the  
33 property located at 39801 Reed Valley Road, Aguanga, California 92563 (the “Pike Property”),  
34 which is the subject of Cleanup and Abatement Order (“CAO”) R9-2013-0122, and know the  
35 following of my own personal knowledge. If called as a witness, I could and would competently  
36 testify to the matters discussed herein.

1           2.     I have been employed by Burrtec for over twenty-two years and have been  
2 Burrtec's General Manager for twenty-two years.

3           3.     In my capacity as General Manager of Burrtec, I am aware of the proceedings by  
4 the San Diego Regional Water Quality Control Board ("RWQCB") regarding the CAO and the  
5 amendment to that CAO issued on July 14, 2017 (the "Amended CAO").

6           4.     I have previously submitted a declaration to the RWQCB in these proceedings,  
7 and have also been deposed in a related state court proceeding filed by James Pike, a named  
8 Responsible Party in the Amended CAO.

9           5.     It is my understanding that a Petition for Review has been filed on behalf of  
10 Burrtec to obtain an Order from the State Water Resources Control Board (the "State Board")  
11 finding that Burrtec is neither a Discharger nor a Responsible Party for any discharge which  
12 allegedly occurred at the Pike property.

13          6.     Burrtec has been aggrieved by the RWQCB's decision to name it as a Discharger  
14 and Responsible Party in the Amended CAO, in that the RWQCB erred in its legal findings,  
15 disregarded evidence submitted by Burrtec, failed to present substantial evidence to support its  
16 decisions, and denied Burrtec due process to properly challenge the RWQCB's decision to name  
17 Burrtec as a Discharger and Responsible Party.

18          7.     It is my understanding that the Amended CAO directs Burrtec to perform  
19 remediation of the green trimmings that were delivered to the Pike property. As a result, the  
20 RWQCB's actions, if not stayed, will unnecessarily and unfairly force Burrtec to incur  
21 substantial costs for remediation, and expose it to potential penalties and fines, that should  
22 instead be borne by parties that in fact engaged in negligent or unreasonable intentional actions  
23 in causing the alleged nuisance claimed by the RWQCB.

24          8.     Burrtec requests that the State Board immediately stay enforcement of the  
25 Amended CAO until the State Board has had an opportunity to consider and act upon Burrtec's  
26 Petition for Review. Given that a 270-day period is provided by law for the State Board's  
27 review, the RWQCB action, if not stayed, will potentially force Burrtec to proceed with a major  
28 expenditure of funds to implement a remediation plan, and potentially expose it to substantial

1 penalties, before the State Board's decision on the merits would be issued. Therefore, without a  
2 stay, Burrtec may be required to incur substantial financial costs for which the State Board  
3 ultimately determines it is not responsible. If Burrtec incurs these costs, there is no guarantee  
4 that it would ever be able to recover these funds from the actual Responsible Parties.

5 9. It is my understanding that evidence presented to the RWQCB has demonstrated  
6 that the green trimmings have previously been removed from the tributaries by Organic Ag, Inc.  
7 and James Pike, that the nutrient ranges for the green trimmings are consistent with acceptable  
8 levels considered beneficial for agriculture and do not present a risk to surface or ground water,  
9 and that there are no foul odors associated with the green trimmings.

10 10. It is my further understanding the Petition for Review involves substantial  
11 questions of law and fact:

- 12 a. In naming Burrtec as a Discharger and Responsible Party in the Amended  
13 CAO, the RWQCB erroneously concluded that, as a mere supplier of green  
14 trimmings, Burrtec is liable as a discharger under Water Code section 13304,  
15 which is a misinterpretation and misapplication of California law.
- 16 b. In naming Burrtec as a Discharger and Responsible Party in the Amended  
17 CAO, the RWQCB committed legal error in concluding that liability under  
18 Water Code section 13304 applied a strict liability standard similar to, or  
19 broader than, CERCLA.
- 20 c. The Amended CAO's findings and conclusions that Burrtec is a Discharger  
21 and Responsible Party under Water Code section 13304 are not supported by  
22 evidence in the record.
- 23 d. The RWQCB violated Burrtec's due process rights by failing to conduct a  
24 formal hearing to allow Burrtec to cross-examination witnesses, denying  
25 Burrtec the opportunity to test and refute claims made by the RWQCB in  
26 designating Burrtec a Discharger and Responsible Party in the Amended  
27 CAO.

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I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

Executed this 14<sup>th</sup> day of August, 2017 at Fontana, California.

  
Richard Crockett