

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

7 David C. Solinger (SBN: 73833)
Erik S. Mroz (SBN: 229241)
8 **RESOLUTION LAW GROUP, P.C.**
21800 Oxnard St., Suite 780
9 Woodland Hills, CA 91367
Telephone No.: (818) 598-8340
10 Facsimile No.: (818) 598-8350
dsolinger@reslawgrp.com
11 emroz@reslawgrp.com

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13 Attorneys for Designated Party
PYRO SPECTACULARS, INC.

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15 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**
16 **OF THE STATE OF CALIFORNIA**

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

SWRCB/OCC FILE A-1824

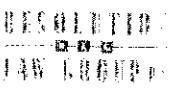
19 **MOTION NO. 13: MOTION FOR**
20 **ADDITIONAL PRE-HEARING**
21 **PROCEDURES AND ORDER OF PROOF**
22 **AT HEARING**

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

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

25 Motion Cutoff: March 5, 2007

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27 Various meritorious motions regarding the impropriety of this hearing proceeding as
28 scheduled are pending before the Hearing Officer. If these motions are denied,



1 this motion requests changes in the pre-hearing procedures identified in the February 23,
2 2007 Notice of Public Hearing (the "Notice") and procedures for the order of proof at the
3 hearing. The changes and additional procedures requested in this motion will:

- 4 • Promote a more organized and efficient presentation of the evidence;
- 5 • Be the least inconvenient to witnesses, the parties and the Hearing
6 Officer; and,
- 7 • Discourage the introduction of surprise testimony and exhibits.

8 **I. ADDITIONAL PRE-HEARING PROCEDURES**

9 The following additional pre-hearing procedures are requested:

- 10 1. Consistent with the State Water Board policy to discourage the introduction of
11 surprise testimony and exhibits, Cal. Admin. Code tit. 23, § 648.4, and the
12 authority cited in concurrently filed motions, discovery from designated
13 parties, including the Team Santa Ana Regional Water Quality Control Board
14 ("Advocacy Team"), should be permitted.
- 15 2. City of Rialto and Rialto Utility Authority (collectively "Rialto") and Center for
16 Community Action and Environmental Justice and Environment California
17 (collectively the "Citizen Groups") should not be designated as "parties" for
18 the reasons set forth in MOTION NO. 8-OBJECTIONS AND MOTION FOR
19 ORDER THAT RIALTO AND CITIZEN GROUPS ARE NOT "PARTIES." If
20 they remain designated as "parties," Rialto and Citizen Groups should be
21 required to file a pleading that sets forth their claims. Rialto and Citizen
22 Groups are part of the prosecution and should be required to set forth the
23 basis for their case-in-chief like the Advocacy (Notice, pp. 3-4). In the
24 alternative, Rialto and Citizen Groups should be limited to the claims in the
25 draft Amended Cleanup and Abatement Order that the Advocacy Team
26 confirmed on February 27, 2007 is its pleading.
- 27 3. The Notice requires all pre-hearing motions be filed by March 5, 2007. There
28 are no provisions in the Notice for parties to file opposition or reply briefs. We

1 request procedures be adopted requiring opposition briefs be filed by March
2 12 and reply briefs, if any, by March 15, 2007. It is unfair and prejudicial not
3 to allow parties to file opposition and reply briefs.

4 4. The Notice does not require submission of witness lists, expert witness
5 qualifications, witness testimony, deposition transcripts and briefs until March
6 13, 2007 and rebuttal evidence until March 20, 2007. These filings will no
7 doubt give rise to the need for further pre-hearing motion practice, especially
8 bearing on admissibility of evidence and expert qualifications. Dates should
9 be established for additional pre-hearing motions to address issues that arise
10 out of submissions on March 13 and March 20, 2007.

11 5. A mechanism is needed to make sure evidence that is not admitted into
12 evidence is not part of the administrative record. We request a hearing on
13 admissibility of evidence issues that are not resolved by the parties. All
14 admissibility issues should be resolved before the hearing.

15 6. The simultaneous exchange currently ordered in the Notice is not consistent
16 with the State Water Board policy to discourage the introduction of surprise
17 testimony and exhibits. Cal. Admin. Code tit. 23, § 648.4. The Notice
18 requires all parties submit witness lists, expert witness qualifications, witness
19 testimony, deposition transcripts and briefs on March 13, 2007. The
20 Prosecution (which currently includes the Advocacy Team, Rialto and Citizen
21 Groups) should be required to submit their witness lists, expert witness
22 qualifications, witness testimony, first, with submissions of the responding
23 parties being due sixty (60) days later. The Advocacy Team and Rialto have
24 deposition testimony and documents relating to the responding parties from
25 the federal lawsuit filed by Rialto in 2004, so they should have no difficulty
26 providing the responding parties with their case in chief so as to avoid unfair
27 surprise. Responding parties have not been afforded any discovery from the
28 Advocacy Team and the draft Amended Cleanup and Abatement Order that

1 the Advocacy Team confirmed on February 27, 2007 in its pleading is silent
2 on the causation evidence it needs to prevail under Cal. Water Code § 13304.
3 Responding parties are left guessing at what they may need to submit to
4 oppose the prosecution's case-in-chief.

- 5 7. The Notice requires rebuttal argument and evidence be submitted in writing
6 on March 20, 2007, a mere seven days after receipt of unlimited amounts of
7 proposed evidence from the other parties. This requirement does not give the
8 parties full and fair opportunity to provide rebuttal evidence, especially on
9 technical issues that will be raised by experts with respect to fate and
10 transport. The hearing officer should follow the procedure set forth in Cal.
11 Admin. Code tit. 23, § 648.4(f) which provides:

12 Rebuttal Testimony generally will not be required to be submitted in
13 writing, nor will rebuttal testimony and exhibits be required to be
14 submitted prior to the start of the hearing.

- 15 8. In the event the hearing officer refuses to follow Cal. Admin. Code tit. 23, §
16 648.4(f) governing rebuttal, there should be no limitation on the amount of
17 rebuttal testimony that can be submitted. The fact there is no limitation on the
18 evidentiary submissions due March 13, 2007, and responding parties have
19 not been afforded any discovery from the Advocacy Team make it highly likely
20 that 40 pages will not be sufficient. The 40 page limitation is not consistent
21 with the State Water Board policy to discourage the introduction of surprise
22 testimony and exhibits. Cal. Admin. Code tit. 23, § 648.4.

23 **II. ORDER OF PROOF AT HEARING**

24 The following procedures are requested for presentation of evidence and argument
25 at the hearing:

- 26 1. The Advocacy Team, Rialto and the Citizen Groups should go first so that the
27 responding parties can hear all of the evidence against them before
28 presenting their defense. We request a schedule for presentation of evidence

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so we can schedule our witnesses and subpoena third-party witnesses for appearance.

2. The Notice requires presentation of all direct examination by all parties before cross-examination. Notice, p. 5. This process does not promote efficiency and will be very inconvenient for witnesses, including third-party witnesses, because they may have to be present for direct examination on one day and then come back for cross-examination on another day. We request that cross-examination take place following direct examination of a witness so they are not inconvenienced.
3. There are no provisions in the Notice for re-direct and re-cross-examination. Re-direct and re-cross examination should be permitted pursuant to Cal. Admin. Code tit. 23, § 648.5.

DATED: March 5, 2007

RESOLUTION LAW GROUP, P.C.

By: 

Brian L. Zagon
Attorneys for Designated Party
Pyro Spectaculars, Inc.

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

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

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

MOTION NO. 13: MOTION FOR ADDITIONAL PRE-HEARING PROCEDURES AND ORDER OF PROOF AT HEARING ,

On the following Person(s):

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

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

On the following Person(s):

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Lyris List

Perchlorate E-Mail List

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

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

26 
27 Marie Montoya
28