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PYRO SPECTACULARS, INC.

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

IN THE MATTER OF PERCHLORATE CONTAMINATION AT A 160-ACRE SITE IN THE RIALTO AREA	SWRCB/OCC FILE A-1824 **PYRO SPECTACULARS, INC.'S ("PSI") HEARING BRIEF** Date: May 8-10, 2007 - May 15-17, 2007 Location: San Bernardino County Auditorium 850 East Foothill Blvd. Rialto, CA

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In accordance with the Second Revised Notice of Public Hearing dated April 3, 2007, Pyro Spectaculars, Inc. ("PSI") submits its brief for the hearing in this matter.

I. INTRODUCTION

These proceedings potentially involve hundreds of millions in dollars. Rialto has estimated that cleanup of the 160-Acre Property potentially could cost hundreds of millions of dollars. (Holub Depo., Vol. 3, April 6, 2007, 248:23 - 249:2.) Even installing one monitoring well is well over $100,000. (Sturdivant Depo., Vol. 1, March 20, 2007, 42:4-22.) PSI is without the financial resources to participate in any such effort. (Declaration of Cheryl A. Samperio, PSI 2001802-04.)

PSI is a small family business owned by the Souza family. PSI has approximately 25 full-time employees and is in the business of putting on public fireworks displays. (Declaration of James R. Souza ("Souza Decl."), ¶¶ 6, 8.) As the Advocacy Team Admits:

> Pyro Spectaculars is a public display fireworks operator, fireworks importer/exporter, and fireworks wholesaler (Pyro Spectaculars, 2003). Pyro Spectaculars purchases and imports finished fireworks, stores them in approved facilities, and repackages them for displays and other professional, licensed users.

(Advocacy Team's Supplementary Evidence, Exhibit 1 at 49.)

Since 1979, PSI has operated on approximately 25 acres of leased land within the 160-Acre Property. (Souza Decl., ¶ 10, 20.) PSI never used TCE. PSI did not manufacture fireworks or any other perchlorate-containing products at the 160-Acre Property. (Exhibit P7; Souza Decl., ¶¶ 9, 10; Deposition of Kamron Saremi ("Saremi Depo."); Vol. 2, March 23, 2007, 372:1-10; 595:12 - 596:3; 676:10-13; Deposition of Robert Holub ("Holub Depo."); Vol. 1, March 8, 2007, 178:7-13.)

As we discuss more fully below, PSI's operations on the 160-Acre Property (or elsewhere) could not be responsible for the perchlorate contamination in soil or groundwater throughout the Rialto-Colton Basin. However, large-scale perchlorate contamination probably resulted from the fireworks manufacturing operations of the Apollo

Division of Pyrotronics Corporation ("Apollo") at the 160-Acre Property because Apollo's fireworks manufacturing operation handled "orders of magnitude" more perchlorate than PSI. (Holub Depo., Vol. 3, April 6, 2007, 783:12-785:13.) Apollo's operations have been well known for decades by three members of the Advocacy Team, Gerard Thibeault, Kurt Berchtold and Robert Holub, because those Advocacy Team members were involved with the inspection and alleged "closure" of what is now known as "the McLaughlin Pit," Apollo's fireworks manufacturing Class I surface impoundment. For example, according to Advocacy Team member Robert Holub's deposition testimony:

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

A. Yes.

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

A. I think some of it may have.

Q. How much?

A. I don't know.

Q. All of it?

(Objection omitted.)

A. I don't know.

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

In contrast, the Advocacy Team has no idea whatsoever how much of PSI's waste contained perchlorate. (Sturdivant Depo., Vol. 2, March 28, 2007, 14:3-9; Saremi Depo., Vol. 2, March 23, 2007, 374:13-16; Saremi Depo., Vol. 3, March 27, 2007, 726:12-16; Holub Depo., Vol. 1, March 8, 2007, 181:20-24.)

A. The Necessary Evidence To Prove A Case Against PSI Does Not Exist

The Advocacy Team does not have evidence to prove its case against PSI. In depositions, Advocacy Team witnesses have admitted that PSI did not manufacture fireworks on the 160-Acre Property. (Saremi Depo., Vol. 2, March 23, 2007, 372:1-10;

676:10-13; Holub Depo., Vol. 4, April 9, 2007, 1072:19-22.) The Advocacy Team admits PSI did not use TCE. (Saremi Depo., Vol. 2, March 23, 2007, 595:12 - 596:3; Holub Depo., Vol. 1, March 8, 2007, 178:7-13.) The only question for PSI is whether PSI actually discharged perchlorate to groundwater or onto the ground in a manner that "threatens" groundwater and such discharges of perchlorate created a condition of pollution or nuisance. Water Code Section 13304(a). Before any cleanup and abatement order can be issued to PSI for operations at the 160-Acre Property, the Advocacy Team must prove that perchlorate from PSI's operations at the 160-Acre Property either actually reached the groundwater 400 feet below ground surface or "threatens" the groundwater 400 feet below ground surface. "Threatens" is defined in the Water Code to mean "[a] condition creating a substantial probability of harm, when the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to persons, property, or natural resources." Id. (Emphasis added.) Advocacy Team member Robert Holub testified under oath that with respect to all three of the alleged dischargers, he does not know whether or not perchlorate from any of their operations is within a hundred feet of groundwater. (Holub Depo., Vol. 4, April 9, 2007, 956:2-6.) There is no evidence that perchlorate from any alleged discharges by Goodrich, West Coast Loading or PSI is within a hundred feet of groundwater. (Holub Depo., Vol. 4, April 9, 2007, 956:7-16.) Accordingly, the Advocacy Team cannot meet its burden that any perchlorate from PSI was discharged to or "threatens" groundwater.

Each and every Advocacy Team witness who was actually involved in the investigation[1] admits that they do not know whether PSI discharged perchlorate to groundwater or to soil in a manner that threatens groundwater. For example, Robert Holub, the Santa Ana Regional Water Quality Control Board's ("Regional Board") supervising water resource control engineer, one of the three primary persons at the Regional Board involved in the investigation and a drafter of the draft Amended Cleanup and Abatement Order that serves as the Advocacy Team's pleading ("Draft CAO"), testified:

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[1]Robert Holub, Ann Sturdivant and Kamron Saremi.

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

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

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

A. Yes.

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

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

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

A. In the water?

Q. Yes.

A. Probably not.

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

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

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

A. Yes.

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

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

Q. You can't do that; right?

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

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

No evidence exists of the amount of perchlorate, if any, that may have been released by PSI to the ground at the 160-Acre Property. There are no documents the Advocacy Team can introduce to prove the amount of perchlorate released by PSI either in total or at any one time at the 160-Acre Property. There are no witnesses to prove the amount of perchlorate released by PSI either in total or at any one time at the 160-Acre Property. There is no scientific evidence to establish perchlorate from PSI's operations either reached or may reach groundwater 400 feet below the 160-Acre Property. The Advocacy Team has no groundwater model. The Advocacy Team has no vadose zone model. Accordingly, it is not possible for the Advocacy Team to prove perchlorate from PSI's operations actually reached groundwater or "threatens" groundwater.

The Advocacy Team may be able to prove: (1) PSI handled finished products containing perchlorate at the 160-Acre Property; (2) PSI burned pyrotechnic waste at the 160-Acre Property, but not how much of the pyrotechnic waste was perchlorate and not how much perchlorate, if any, was left after burning; (3) PSI tested products containing perchlorate at the 160-Acre Property, but not how much perchlorate remaining after a test, if any, got to the ground; (4) PSI put a small but unknown number of dud aerial shells containing an unknown amount of perchlorate into the McLaughlin Pit over the course of no more than three years, but it was PSI's practice to remove the shells, the McLaughlin Pit was cleaned out from time to time and, Apollo, the fireworks manufacturer who built and operated the McLaughlin Pit, put massive amounts of fireworks manufacturing waste into the McLaughlin Pit from 1972 to about June 1983.[2] The Advocacy Team witnesses admit

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[2]As set forth above, this information comes from a January 24, 1985 Regional Board inspection report for Apollo. Bruce Paine of the Regional Board Staff memorialized a conversation with Pedro Mergil of Apollo. Mr. Paine recorded that Mr. Mergil said Apollo had not used the pond for 18 months or approximately until June 1983.

that they cannot distinguish the perchlorate in the soil or groundwater from Apollo and have no data to show that perchlorate from PSI's operations on the 160-Acre Property resulted in soil or groundwater contamination at the 160-Acre Property or in any well in the Rialto-Colton Basin. The facts listed above as to what the Advocacy Team may be able to prove are not enough to prove its Water Code section 13304 case against PSI.

Because the Advocacy Team has no actual evidence against PSI necessary to meet the requirements of Water Code Section 13304, the Advocacy Team attempts to wrongly create the impression that PSI had a large-scale fireworks operation typical of a manufacturer, including the use of a lot of raw perchlorate and the generation of large amounts of perchlorate-containing waste. The Advocacy Team's efforts in this regard are particularly troubling given that it seeks to make PSI legally responsible for the hundreds of millions of dollars it will allegedly cost to investigate and cleanup the Rialto-Colton Basin. (Holub Depo., Vol. 3, April 6, 2007, 248:23 - 249:2; Sturdivant Depo., Vol. 1, March 20, 2007, 42:4-22.)

In its Memorandum of Points and Authorities in the section entitled "Evidence of Waste Discharge by Pyro Spectaculars, Inc." at pages 86 to 90, the Advocacy Team engages in a less than complete discussion of the regulatory history of the McLaughlin Pit. This less than complete discussion of the regulatory history of the McLaughlin Pit in the Advocacy Team's Memorandum has nothing to do with PSI. Instead, it concerns the Regional Board Staff's involvement with Apollo, a manufacturer of fireworks at the 160-Acre Property with operations dating back to at least 1968, and Ken Thompson, Inc., which failed to properly close the McLaughlin Pit. By placing this regulatory history discussion in the section regarding PSI, the Advocacy Team seeks to make it seem as if PSI and Apollo are one company, even though the Advocacy Team knows this is not so. Worse yet, this discussion omits the evidence known to the Advocacy Team that: (1) Ken Thompson, Inc. is legally responsible for the closure of the McLaughlin Pit, not PSI; (2) The Regional Board Staff utterly failed to enforce the waste discharge requirements for the McLaughlin Pit against Apollo who violated them repeatedly; and, (3) The Regional Board Staff utterly

failed to require a proper Subchapter 15 closure of the McLaughlin Pit by Apollo or Ken Thompson, Inc., even though the Regional Board's own files insist a proper Subchapter 15 closure is required by law.

The Advocacy Team tries to give the false impression PSI had a much larger operation that actually disposed of large amounts of raw perchlorate on the 160-Acre Property. The Advocacy Team does this by the way it defines "pyrotechnic waste" in the Draft CAO. (See Paragraphs 40 - 49 of the Draft CAO.) The use of the term "pyrotechnic waste" by the Advocacy Team in allegations against PSI is particularly misleading because it wrongly suggests "pyrotechnic waste" is 100% perchlorate. As to PSI, this is not true. Most of PSI's waste was fuse (including Quickmatch) which does not contain perchlorate. (Exhibit 7; Souza Decl. ¶ 21.) In the Draft CAO, "pyrotechnic waste" is defined in Paragraph 39 which states:

> Prior to 1971, it was the practice among the various pyrotechnic companies that conducted business at, and adjacent to, the Property to utilize several earthen pits for the disposal of unusable, defective and excess fireworks, chemicals and other waste (hereinafter collectively referred to as pyrotechnic waste). The pyrotechnic waste was taken to the earthen pits, which were located south-southwest of what would become Pyro Spectaculars' 47-acre site, and burned.

(Emphasis added.) The definition of "pyrotechnic waste" is buried in a parenthetical. Thus, the term "pyrotechnic waste" used throughout the Draft CAO means "unusable, defective and excess fireworks, chemicals and other waste." (Deposition of Ann Sturdivant ("Sturdivant Depo."), Vol. 1, March 20, 2007, 186:23 - 187:7.) Notice that "chemicals" and "other waste" are not defined. (Draft CAO, ¶ 39.) According to the drafter of Paragraph 39 of the Draft CAO, "other waste" and "pyrotechnic waste," as used throughout the Draft CAO, could include other waste that is neither flammable nor hazardous. (Sturdivant Depo., Vol. 1, March 20, 2007, 175:19-21.) According to Ms. Sturdivant's testimony, the term "pyrotechnic waste" in the Draft CAO includes:

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

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

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

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

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

It is common knowledge that paper and cardboard do not contain perchlorate. In addition, Advocacy Team members admit that neither fuse nor black powder include perchlorate. (Sturdivant Depo., Vol. 1, March 20, 2007, 153:2-9; Holub Depo., Vol. 1, March 8, 2007, 181:16-19.)

The Advocacy Team also tries to make PSI's operation seem bigger than it is by repeatedly stating in the Draft CAO that PSI operated on 47 acres, more than 1/4 of the 160-Acre Property. (Draft CAO, ¶¶ 37, 39 and 42.) However, the Advocacy Team knows PSI only operated in the 160-Acre Property on 25 acres, as evidenced by numerous documents in Regional Board files, including the March 5, 2004 and April 8, 2004 letters signed by Advocacy Team member Gerard Thibeault, the Regional Board's Executive Officer. (Exhibits P12 and P13.) The "three contiguous parcels" listed in the Draft CAO as PSI's area include areas where PSI never operated and where Apollo did. Advocacy Team member Kamron Saremi admitted this in his deposition:

Q. Okay. You see where it starts in the second sentence of that paragraph, it says, "Pyro Spectaculars established operations in 1979 on three contiguous parcels, consisting of approximately 47 acres within the Property. The 47 acres on which Pyro Spectaculars operated was in the northwest half of the southwest quarter of Section 21, Township 1 North, Range 5 West, San Bernardino" and so forth. Do you see that?

A. Yes, I do.

Q. Okay. Now, based on your review of the plot plan we just looked at a minute ago, 3925, Pyro Spectaculars' operations does not constitute 47 acres, does it?

(Objection omitted.)

A. Not based on the parcel map and – and area that you asked me earlier, no.

Q. Pyro Spectaculars' operation is not more than a quarter of the 160 acres, is it? You've been out there.

(Objection omitted.)

THE WITNESS: That - That's what I believe.

(Saremi Depo., Vol. 3, March 27, 2007, 705:22 - 706:18.)

Even prior to the depositions of members of the Advocacy Team, the Regional Board Staff knew very well that PSI did not manufacture fireworks on the 160-Acre Property. (Draft CAO, ¶ 36; Exhibits P10, P12 and P13.) As stated in Gerard Thibeault's June 6, 2002 letter to Senator Nell Soto, the Advocacy Team is well aware that "the manufacture of fireworks is the type of activity that likely would have resulted in a release of perchlorate." (Exhibit P125.) For many years, members of the Advocacy Team personally have known that Apollo, a large-scale manufacturer of fireworks, operated on the 160-Acre Property from 1968 until its bankruptcy in 1986. Advocacy Team member Kurt Berchtold inspected the Apollo waste pond now known as the McLaughlin Pit. Advocacy Team member Robert Holub and Advocacy Team member Gerard Thibeault were involved in the alleged "closure" of the McLaughlin Pit. Apollo purchased tens of thousands of pounds of perchlorate at a time, used vast amounts of water in its operations and, in a 1985 Hazardous Materials Disclosure Form, reported that in any month it could have 25,000 pounds or more of perchlorate on hand. (Exhibits P23, P24, P44, P45, P65 at PSI 3000517 and P66.) Mr. Holub testified that the amount of perchlorate used by Apollo was orders of magnitude greater than that used by PSI. (Holub Depo., April 6, 2007, 279:11-281:12.) For example, by 1978 or sooner, Apollo was discharging 3,000 gallons per day of fireworks manufacturing waste to the McLaughlin Pit. (Exhibits P38, P39 and P40.) Similarly, the Advocacy Team has been well aware for decades that Ken Thompson took responsibility for clean up and closure of the McLaughlin Pit. (Exhibit P27 at PSI 3000288 and PSI 3000320.)

The Advocacy Team seeks to make PSI bear all responsibility for the McLaughlin Pit to conceal the Regional Board Staff's own failure to follow the law. Contrary to claims in the Draft CAO, PSI never used the McLaughlin Pit for waste disposal. PSI only placed a very small number of dud aerial shells in the McLaughlin Pit for the limited purpose of soaking them in order to soften the adhesive so that the aerial shell could then be removed from the McLaughlin Pit, opened and burned elsewhere. (Souza Decl., ¶¶ 23-24.) In contrast, Apollo constructed the McLaughlin Pit for the purpose of disposing its perchlorate-laden fireworks manufacturing waste with the Regional Board Staff's blessing. (Exhibits P38, P39 and P40.) At the request of Apollo, in 1978, the Regional Board, on Staff's recommendation, permitted Apollo to increase its industrial waste disposal from 150 gallons per day to up to 3,000 gallons of perchlorate-laden waste per day to the McLaughlin Pit, which Regional Board staff knew only had a total capacity of 12,000 gallons. (Exhibits PP31, P36, P38, P39, and P40.)

When it came time for Apollo and the subsequent owner, Ken Thompson, Inc., to close the McLaughlin Pit, the Regional Board Staff (including Advocacy Team members) knew the legal requirements imposed by Subchapter 15 (Exhibits P68, P69, P73 and P81), but failed to enforce them. In addition, Rialto required proper cleanup and closure of the McLaughlin Pit as a mitigative measure included in the California Environmental Quality Act ("CEQA") negative declaration for Ken Thompson, Inc. The proper cleanup and closure of the McLaughlin Pit was required to be completed before development could begin on the entire Southern half of the 160-Acre Property. (Exhibit PP85 and P86.) Rialto and Ken Thompson, Inc. failed to meet these CEQA requirements. Now, instead of owning up to Regional Board Staff's failures, the Advocacy Team seeks to place the burden of Apollo's operations not on Ken Thompson, Inc., who agreed to take care of closing the McLaughlin Pit, but on PSI, who only had very limited use of the McLaughlin Pit.

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B. PSI Was Added To The Draft CAO In October 2006, After Significant Cooperation By PSI, Especially Considering Its Limited Financial Resources

In or about October 2006, PSI was very surprised when it was notified it would be included in the Draft CAO. The initial Cleanup and Abatement Order was issued in February, 2005 and did not include PSI. The initial Cleanup and Abatement Order was amended in December 2005 and still did not include PSI. Only an investigation directive under Water Code Section 13367 had been issued by the Regional Board to PSI.

PSI, despite limited financial resources, took soil samples in its operational areas and installed three multi-depth groundwater monitoring wells at three locations that were necessary to investigate the nature and extent of contamination. Because the depth to groundwater is in the 400 feet below ground surface range and the soil is full of large boulders and cobbles, installing even one monitoring well is time consuming and expensive.

PSI performed the investigation work despite its potential for serious financial consequences in doing so. Between soil sampling, well installation and quarterly sampling of the wells, PSI has expended approximately $1,500,000.00 in responding to perchlorate and TCE conditions at the 160-Acre Property. (Declaration of Brian L. Zagon ("Zagon Decl."), ¶ 2.) PSI's investigation was done with the with the full knowledge and support of the Regional Board Staff, including members of the Advocacy Team. (Holub Depo., Vol. 2, April 4, 2007, 308:16-19.; Sturdivant Depo., Vol. 1, March 20, 2007, 46:15 - 47:7; Saremi Depo., Vol. 2, March 23, 2007, 533:7-11.) The Regional Board Staff considered all of this work helpful and satisfactory. (Sturdivant Depo., Vol. 1, March 20, 2007, 46:15 - 47:7; Saremi Depo., Vol. 2, March 23, 2007, 577:4 - 578:23.) PSI continues to sample its wells quarterly and to submit the data to the Regional Board Staff. (Zagon Decl., ¶ 3.)

II. PSI'S OPERATIONS ON THE 160-ACRE PROPERTY

PSI is a small family business. PSI has approximately 25 full time employees. PSI was incorporated in 1979, a few months after the 4th of July Season. PSI purchased the non-manufacturing assets of the California Fireworks Display Company, a division of

Apollo, after PSI was incorporated. The asset purchase contract between PSI and Apollo makes it clear that there was no assumption of any of Apollo's liability by PSI. (Exhibit P142.) PSI was never an affiliated or subsidiary corporation to Apollo. PSI and Apollo each had separate operations on the 160-Acre Property from the time of PSI's formation in 1979 until Apollo ceased operations in the mid-1980's. (Souza Decl., ¶¶ 2, 4, 8.)

Since PSI began operations in the fall of 1979, PSI has been in the business of putting on public fireworks displays. As a fireworks display company, PSI imports, stores and repackages sealed fireworks display shells at its 25-acre leasehold on the 160-Acre Property. PSI always has purchased finished fireworks for use in its public display business. In finished fireworks, fireworks composition is inside a sealed fireworks container. The finished fireworks are sent to PSI in sealed boxes. (Souza Decl., ¶¶ 6, 11, 15.)

PSI only has used its leased property on the 160-Acre Property for storage of finished fireworks and for preparation of finished fireworks for use in public fireworks displays. These operations have never involved handling of fireworks composition, the chemicals used inside finished fireworks. PSI did not manufacture fireworks or any perchlorate-containing products at the 160-Acre Property. PSI never used TCE. (Souza Decl., ¶¶ 9, 10; Saremi Depo., Vol. 2, March 23, 2007, 372:1-10; 595:12 - 596:3; 696:10-13; Holub Depo., Vol. 1, March 8, 2007, 178:7-13.)

Public fireworks displays by PSI typically involve the use of aerial shells which are shot from a device called a mortar into the sky, using a lift charge attached to the bottom of the aerial shell. The lift charge attached to the aerial shell contains "black powder," which is a form of gun powder. The Advocacy Team admits that "black powder" does not contain perchlorate in any form. (Sturdivant Depo., Vol. 1, March 20, 2007, 153:7-9; Holub Depo., Vol. 1, March 8, 2007, 181:16-19.) Aerial shells typically are cylindrical or round in shape. (Souza Decl., ¶¶ 13, 14.) Pictures of examples of aerial shells are below.

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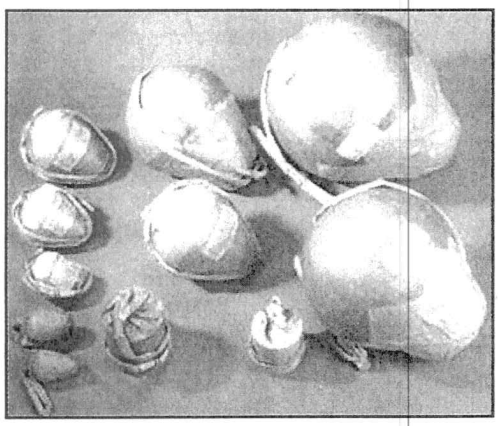

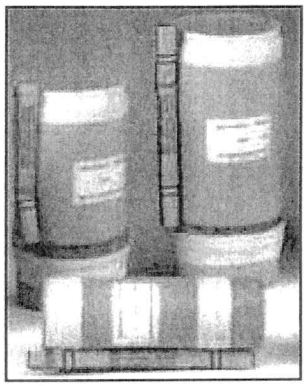

For aerial shells, fireworks composition is encased in a thick container, usually made of layers of pasteboard. Aerial shells used in public fireworks displays generally range from 3 inches in diameter to 12 inches in diameter. Generally, the larger the aerial shell, the thicker the pasteboard container. The thick container is necessary to hold the aerial shell together to withstand the thrust of the black powder lift charge and until the materials inside the aerial shell are ignited and propelled outside of the bursting shell, after the aerial shell is shot into the sky. (Souza Decl., ¶ 14; Exhibit P7.)

PSI purchases finished fireworks from manufacturers to use in its public fireworks display business. PSI never has manufactured any fireworks on the 160-Acre Property. Because it used finished fireworks, the vast majority of PSI's waste was fuse made of black powder and string that was snipped off of finished aerial shells so the aerial shells could be fired electronically. (Souza Decl., ¶¶ 15, 21.)

Aerial shells used in these public displays almost always perform as planned. On extremely rare occasions, aerial shells do not perform as expected. The vast majority of the aerial shells that do not perform as expected can be reused because the failure is due to an ignition issue before the shells leave the mortar. Only aerial shells that leave the mortar, but do not explode (called "duds") cannot be reused. A relatively small amount of duds were returned per year. PSI did not keep records of the type of shell that was a dud, so there is no way to know the type or total amount of fireworks composition in any of these duds. (Souza Decl., ¶ 23.)

PSI never used "the McLaughlin Pit" for waste disposal. The very small number of duds temporarily were placed in "the McLaughlin Pit" to soak, were then removed and disposed of elsewhere, via burning pursuant to duly authorized permits issued by Rialto Fire Department. It was PSI's custom and practice not to leave aerial shells in the McLaughlin Pit. The purpose of soaking the duds was to soften the adhesive so that the aerial shells could then be removed from the McLaughlin Pit, opened and burned elsewhere. (Exhibit P15 at PSI 30000121; Souza Decl., ¶¶ 23, 24.) According to the Regional Board's own records, the McLaughlin Pit was no longer used after about June 1983.[3] (Exhibits P27 at PSI 3000371 and P64 at PSI 3000511.)

PSI periodically burned wood, cardboard, pasteboard, fuse (including Quickmatch), black powder and a few defective finished fireworks on the 160-Acre Property. The materials burned by PSI mostly consisted of fuse (including Quickmatch) and black powder. Extremely small quantities of fireworks composition as a part of the small number of defective fireworks and duds were destroyed by PSI during these burns. All the burning of these materials by PSI was done pursuant to permits issued by Rialto Fire Department and in accordance with industry standards. (Exhibit P7; Souza Decl., ¶ 26.)

All soil samples from PSI's operational areas on its leasehold on the 160-Acre Property have been non-detect for perchlorate. (Exhibit P10.) Based on the data, Advocacy Team member Gerard Thibeault sent PSI a letter on March 5, 2005 stating that no additional soil samples were required at PSI's facility. (Exhibit P12.)

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[3]This information comes from a January 24, 1985 Regional Board inspection report for Apollo. Bruce Paine of the Regional Board Staff memorialized a conversation with Pedro Mergil of Apollo. Mr. Paine recorded that Mr. Mergil said Apollo had not used the pond for 18 months, placing the time of last use at approximately June 1983.

III. NO CAO CAN BE ISSUED AGAINST PSI UNLESS THE ADVOCACY TEAM PROVES BY A PREPONDERANCE OF THE EVIDENCE THAT RELEASES OF PERCHLORATE BY PSI ACTUALLY ARE IN GROUNDWATER OR "THREATEN" GROUNDWATER SUCH THAT AN IMMEDIATE RESPONSE IS REQUIRED

In order for any CAO to issue, the Advocacy Team must prove that PSI actually discharged perchlorate to groundwater or onto the ground in a manner that "threatens" groundwater and that such discharges of perchlorate created a condition of "pollution" or "nuisance." Water Code Section 13304(a). As discussed in detail below, admissions of Advocacy Team witnesses establish that there is no legal basis for issuance of any CAO. Possibility, speculation and conjecture are not sufficient proof, even of matters that need only be proven by a preponderance of the evidence (see generally Roddenberry v. Roddenberry (1996) 44 Cal.App.4th 634, 651; Regents of University of California v. Public Employment Relations Bd. (1990) 220 Cal.App.3d 346, 359; Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 35, p. 184.)

A. The Requirements For Issuance Of Any CAO Pursuant To Water Code Section 13304

In order to prevail, the Advocacy Team must prove that PSI violated Water Code Section 13304(a). Section 13304(a) provides in part:

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

(Emphasis added.)

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

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

(Emphasis added.)

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

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

(A) The waters for beneficial uses.

(B) Facilities which serve these beneficial uses.

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

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

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

(Emphasis added.)

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

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

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

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

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

(Emphasis added.)

The Advocacy Team must prove that all the requirements of Section 13304(a) are met by a preponderance of the evidence. Preponderance of the evidence is the evidentiary standard applied in civil cases and in adjudicatory proceedings before state agencies. See, Evid. Code Section 115; Ettinger v. Board of Medical Quality Assurance (1982) 135 Cal.App.3d 853; Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194; Pereyda v. State Personnel Bd. (1975) 15 Cal.App.3d 47, 52 (holding that "[t]he proceeding before the Board [was] a civil one, and hence the burden of proof requires...a preponderance of the evidence.") (abrogated on other grounds by California Youth Authority v. State Personnel Bd. (2002) 104 Cal.App.4th 575). The standard jury instructions on preponderance of the evidence given in civil cases in California states:

> Preponderance of the evidence means evidence that has more convincing force than that opposed to it. If the evidence is so evenly balanced that you are unable to say that the evidence on either side of an issue preponderates, your finding on that issue must be against the party who had the burden of proving it.

BAJI No. 2.60, BAJI (8th ed.)

The Advocacy Team must prove each of the requirements of Water Code Section 13304 by a preponderance of the evidence in order for any CAO to be issued against PSI. Admissions of the Advocacy Team alone show that the Advocacy Team cannot meet its burden of proof. Possibility, speculation and conjecture are not sufficient proof, even of matters that need only be proven by a preponderance of the evidence (see generally Roddenberry v. Roddenberry (1996) 44 Cal.App.4th 634, 651; Regents of University of California v. Public Employment Relations Bd. (1990) 220 Cal.App.3d 346, 359; Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 35, p. 184).

B. Water Code Section 13304 Liability Is Not Joint And Several

On the second to last page of its Memorandum of Points and Authorities, and without citation to legal authority, the Advocacy Team suggests that any potential order should

impose a joint and several obligation on the alleged dischargers. (Advocacy Team Brief, pp. 108-109.) There is no legal authority for this proposition. To start with, the text itself of Water Code Section 13304 imposes a several obligation. Second, "severable" liability is appropriate when any injury is divisible, as is the case here if there are violations of Water Code Section 13304. For example, the Draft CAO seeks remediation of perchlorate and TCE, but there is no evidence PSI used TCE, much less that PSI is liable for TCE in the groundwater. Finally, as an entity that contributed to the perchlorate contamination, the Regional Board is estopped from imposing joint and several liability.

1. Section 13304 Imposes a Several Obligation Only

California law provides for three types of legal obligations: joint, several, and joint and several. Civ. Code Section 1430. California law imposes a general presumption against joint and several obligations unless there are express words to the contrary. Civ. Code Section 1431. The interpretation of a several obligation, rather than a joint and several one, is consistent with the policy adopted by the People of California, as codified at Civil Code Section 1431.1, viewing the imposition of joint and several liability as frequently inequitable and unjust.

Water Code Section 13304 imposes only a several obligation. The text of Section 13304 clearly requires the Regional Board to demonstrate that each discharge of waste causes or permits, or threatens to cause of permit, the waste to be discharged or deposited where it is, or probably will be, discharged into waters of the state and creates, or threatens to create, a condition of pollution or nuisance. Section 13304(a) further provides that such person "shall upon order of the regional board, clean up the waste or abate the effects of the waste . . ." The language of the statute does not state that each proven discharger shall be responsible for cleaning up and abating the waste caused by all other discharges that ever occurred on the site.

The creation of a several obligation is further mandated by the conspicuous lack of text in Water Code Section 13304 making reference to or intention to impose a "joint and several" obligation. In fact, the statute is devoid of any mention of a joint and several

obligation which would be an obvious and necessary requirement for the imposition of such liability.

Gerard Thibeault, Executive Director of the Regional Board and a state official, testified in a manner that confirms his understanding that liability under Section 13304 is not joint. For example, Mr. Thibeault testified that neither Emhart nor Goodrich could be liable for the McLaughlin Pit because Apollo built it long after they left the 160-Acre Property. (Thibeault Depo., March 16, 2007, Vol. 2, 473:19-474:14.) Mr. Thibeault's testimony is consistent with the conclusion that there is no joint and several liability under Water Code Section 13304.

2. Severable Liability is Further Appropriate Because the Injury Imposed is Divisible

The evidence demonstrates, and Advocacy Team witnesses admit, that the appearance of perchlorate in the Rialto area's groundwater is likely to have come from a number of separate actions taken over decades by operators of various industries in different places in the greater Rialto area.

a. Traditional tort principles dictate that liability is severable in this proceeding.

Where an injury is distinct or divisible, the liability is severable and the person is responsible for remedying only that portion of the injury. Restatement (Second) of Torts § 433A. "Comment b" of section 433A of the Restatement addresses "distinct harms":

> There are other results which, by their nature, are more capable of apportionment. If two defendants independently shoot the plaintiff at the same time, and one wounds him in the arm and the other in the leg, the ultimate result may be a badly damaged plaintiff in the hospital, but it is still possible, as a logical, reasonable, and practical matter, to regard the two wounds as separate injuries, and as distinct wrongs. The mere coincidence in time does not make the two wounds a single harm, or the conduct of the two defendants one tort. There may be difficulty in the apportionment of some

elements of damages, such as the pain and suffering resulting from the two wounds, or the medical expenses, but this does not mean that one defendant must be liable for the distinct harm inflicted by the other.

"Comment d" of section 433A of the Restatement addresses "divisible harms":

> There are other kinds of harm which, while not so clearly marked out as severable into distinct parts, are still capable of division upon a reasonable and rational basis, and of fair apportionment among the causes responsible. Thus where the cattle of two or more owners trespass upon the plaintiff's land and destroy his crop, the aggregate harm is a lost crop, but it may nevertheless be apportioned among the owners of the cattle, on the basis of the number owned by each, and the reasonable assumption that the respective harm done is proportionate to that number. Where such apportionment can be made without injustice to any of the parties, the court may require it to be made.

The Advocacy Team has not put forth any evidence in this proceeding demonstrating that PSI has caused any harm to the groundwater, and certainly no evidence that PSI has caused an "indivisible" harm.

b. Liability under California's primary hazardous waste remediation law is apportioned according to fault.

The policy of the State is clearly set forth by the Legislature in the Carpenter-Presley-Tanner Hazardous Substance Account Act ("HSAA"), California's primary law for the remediation of hazardous waste sites. Health and Safety Code Sections 25300-25395.45. Liability under the HSAA is apportioned according to fault:

> (a) Except as provided in subdivision (f), any party found liable for any costs or expenditures recoverable under this chapter who establishes by a preponderance of the evidence that only a portion of those costs or

expenditures are attributable to that party's actions, shall be required to pay only for that portion.

(b) Except as provided in subdivision (f), if the trier of fact finds the evidence insufficient to establish each party's portion of costs or expenditures under subdivision (a), the court shall apportion those costs or expenditures, to the extent practicable, according to equitable principles, among the defendants.

* * *

(f) Notwithstanding this chapter, any response action contractor who is found liable for any costs or expenditures recoverable under this chapter and who establishes by a preponderance of the evidence that only a portion of those costs or expenditures are attributable to the response action contractor's actions, shall be required to pay only that portion of the costs or expenditures attributable to the response action contractor's actions.

Health and Safety Code Section 25363. (Emphasis added). There is no valid reason for the Hearing Officer to diverge from the State's approach to hazardous waste sites that are remediated under the Health and Safety Code.

3. The State Board is Estopped from Imposing Joint and Several Liability

The State is estopped from imposing joint and several liability on the parties in this matter because of Regional Board Staff's contribution to perchlorate in the groundwater. The Regional Board Staff's actions that contributed to the contamination that is the subject matter of the Draft CAO are set forth in great detail in Sections VI.A and VI.B of this Brief. The actions of the Regional Board Staff, some of which were negligent and some of which were a knowing failure to comply with the law, preclude the State from seeking full payment from other entities. Alternatively, if parties to this proceeding are found to have violated Section 13304, the State itself must also be found to have violated the section and must share liability.

/ / /

The State via the conduct of the Regional Board Staff has violated Section 13304 and must share liability with all found to be responsible in this proceeding. Water Code Section 13304(a) provides in pertinent part, that "[a]ny person who . . . has caused or permitted . . . any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste. . . ." The word "person" is defined at Section 13050(c) to include "the state." The words "permit" and "permitted" are not defined in the statute. Thus, the words must be given their ordinary dictionary meaning. Black's Law Dictionary defines "permit" in its verb form to mean: "To suffer, allow, consent, let; to give leave or license; to acquiesce, by failure to prevent, or to expressly assent or agree to the doing of an act." Black's Law Dictionary, p. 789 (Abridged 6th ed. 1991).

Thus, because the State is a "person" under Section 13304, and can "permit" discharges within the meaning of the statute, the State too must be held liable if the other parties to this proceeding are found to have violated Section 13304. While PSI continues to maintain that direct evidence of an actual discharge to groundwater or that threatens groundwater is necessary to prove a violation of Section 13304, if the Hearing Officer or State Board conclude differently in this proceeding, then the State must bear responsibility for the discharges it permitted and exacerbated.

Separately, Government Code § 815.6 provides:

> Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

As set forth in Section VI.B of this Brief, Regional Board Staff repeatedly failed to enforce waste discharge requirements for the Apollo waste pond, now known as the McLaughlin Pit. Most egregiously, after repeatedly stating that the Apollo waste pond needed to be closed

in a manner that complied with Subchapter 15 regulations (Exhibits P68, P69, P73 and P81.), Regional Board Staff ignored their mandatory duty and failed to require a closure of the McLaughlin Pit that complied with Subchapter 15.

The State is now estopped from seeking and imposing joint and several liability. The doctrine of unclean hands is invoked when a plaintiff or prosecutor "has violated conscience, or good faith, or other equitable principle, in his prior conduct." General Electric Co. v. Superior Court of Alameda County, (1955) 45 Cal.2d 897, citing DeGarmo v. Goldman, (1942) 19 Cal.2d 755, 765, quoting from Pomeroy's Equity Jurisprudence, § 397. The doctrine can only be invoked when the prosecutor's misconduct relates directly to the subject of the complaint. see, Lynn v. Duckel, (1956) 46 Cal.2d 845. Here, two of the prosecutors in these proceedings, the Advocacy Team and Rialto, have contributed to the very same wrong they now accuse PSI and others of having performed. The wrongs committed by the Regional Board Staff (including members of the Advocacy Team) must be imputed to the State. The doctrine of unclean hands thus applies to limit the ability of the State to prosecute PSI under joint and several liability.

Adopting similar principles, in Fireman's Fund Ins. v. City of Lodi, 302 F.3d 928 (9th Cir. 2002), the Ninth Circuit held that the City of Lodi could not impose joint and several liability on parties found liable under its hazardous waste ordinance, MERLO. The Ninth Circuit Court of Appeals held that if the City of Lodi could be considered a potentially responsible party, it was prohibited from bringing a cost recovery action that would impose joint and several liability on other parties pursued by the City. Fireman's Fund, 302 F.3d at 947, citing Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301 (9th Cir. 1997). The Ninth Circuit Court of Appeals reasoned that allowing a party responsible for part of the contamination to impose joint and several liability on others would result in unfair cost shifting, inefficiency, and prolonged litigation. Id. Like the City of Lodi, the State should be prohibited from imposing joint and several liability where such enforcement results in unfair cost shifting and prolonged litigation. Because the State is responsible for the well-documented discharges to groundwater from the McLaughlin Pit, as well as the

discharges from the County (discussed in Section VI.A of this Brief), the State must shoulder its fair share of responsibility now.

IV. ADMISSIONS OF ADVOCACY TEAM MEMBERS ESTABLISH THERE IS NO BASIS FOR ANY CAO AGAINST PSI

A. The Advocacy Team Cannot Prove PSI's Perchlorate Was Discharged Or Threatens To Discharge To The Waters Of The State

The Advocacy Team's witnesses testified under oath that they do not know how much of PSI's perchlorate reached the ground or groundwater, if any. According to Advocacy Team member Ann Sturdivant who drafted the allegations in the Draft CAO regarding PSI, the documentary evidence the Advocacy Team has of Pyro Spectaculars' use of the McLaughlin Pit is limited to a letter dated January 17, 1984, Exhibit 3860 to her deposition (Exhibit P59.) According to that letter, "the materials disposed of in the McLaughlin Pit by Pyro Spectaculars are various aerial shells. The amounts would vary from zero per month up to about 15 or 20 per month at peak season (July-August.)" (Sturdivant Depo., Vol. 1, March 20, 2007, 145:4-11.) (Emphasis added.) However, the Advocacy Team:

- Does not know how many aerial shells over time Pyro Spectaculars may have placed in the McLaughlin Pit. (Sturdivant Depo., Vol. 1, March 20, 2007, 146:23-25; Saremi Depo., Vol. 3, March 27, 2007, 712:11-15.)
- Does not know how much pyrotechnic composition is in an aerial shell. (Sturdivant Depo., Vol. 1, March 20, 2007, 146:14 - 146:19.)
- Does not know how much perchlorate is in any individual aerial shell. (Sturdivant Depo., Vol. 1, March 20, 2007, 146:20-22; Saremi Depo., Vol. 3, March 27, 2007, 712:22 - 713:1.)
- Does not know how much perchlorate from the aerial shells was in the McLaughlin Pit. (Saremi Depo., Vol. 3, March 27, 2007, 713:3-9.)
- Does not know how much, if any, perchlorate got out of aerial shells from Pyro Spectaculars and into the McLaughlin Pit. (Sturdivant Depo., Vol. 1, March

20, 2007, 149:6-9; Saremi Depo., Vol. 2, March 23, 2007, 377:13-23; Vol. 3, March 27, 2007, 712:16-21.)

According to Advocacy Team member Ann Sturdivant, there are some records that would show waste from PSI, but those records would not tell you the amount of perchlorate in the waste. (Sturdivant Depo., Vol. 1, March 20, 2007, 149:21 - 150:7.) The Advocacy Team does not know how much waste, if any, Pyro Spectaculars put in the McLaughlin Pit containing perchlorate. (Saremi Depo., Vol. 3, March 27, 2007, 674:25 - 675:3.) Thus, any attempt to estimate the amount of waste containing perchlorate generated by PSI at the 160-Acre Property would be based on speculation. Speculation is not evidence. Possibility, speculation and conjecture are not sufficient proof, even of matters that need only be proven by a preponderance of the evidence (see generally Roddenberry v. Roddenberry (1996) 44 Cal.App.4th 634, 651; Regents of University of California v. Public Employment Relations Bd. (1990) 220 Cal.App.3d 346, 359; Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 35, p. 184).

Advocacy Team member Robert Holub, the Regional Board's supervising water resource control engineer, one of the three primary persons at the Regional Board involved in the investigation and a drafter of the CAO, testified that:

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

(Objection omitted.)

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

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

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

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

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

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

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

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

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

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

A. Yes.

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

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

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

A. I – I don't think so.

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

Advocacy Team member Kamron Saremi, the Regional Board's water resources control engineer, is the person on the Advocacy Team most involved in the investigation.

Kamron Saremi was a contributor of information for the Draft CAO. Other than cardboard dud shells, Kamron Saremi cannot tell any other type of pyrotechnic material that was put into the McLaughlin Pit by PSI. (Saremi Depo., Vol. 2, March 23, 2007, 376:1-12.) Other than aerial dud shells, Mr. Saremi is not aware of any other waste generated by PSI. (Saremi Depo., Vol. 3, March 27, 2007, 712:6-10.) According to Kamron Saremi:

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

Kamron Saremi testifed under oath that he does not know how much perchlorate waste Apollo put into the McLaughlin Pit. (Saremi Depo., Vol. 3, March 27, 2007, 673:7-15.) In addition, Kamron Saremi testified he has no way of knowing whether perchlorate underneath the McLaughlin Pit was from Apollo or PSI. (Saremi Depo., Vol. 3, March 27, 2007, 672:16 - 673:6.) Specifically, Kamron Saremi testified:

Q. And there's no way to tell whether an aerial shell that was put into the McLaughlin pit by Pyrotronics Corporation [Apollo] versus an aerial shell that was put into the McLaughlin pit by Pyro Spectaculars is a source of groundwater contamination in the Rialto-Colton-Fontana area, is there?

A. There is what -- There's no way of knowing, no.

(Saremi Depo., Vol. 3, March 27, 2007, 714:17-24.)

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The Advocacy Team bases its allegations in the Draft CAO against PSI based on three scenarios of discharge: (1) Disposal of "pyrotechnic waste" in the McLaughlin Pit; (2) testing of aerial shells; and, (3) burning, fires and explosions. The Advocacy Team has no evidence to prove that any perchlorate was released by PSI from any of its scenarios in an amount likely to reach the groundwater 400 feet below ground surface.

Unlike Apollo, PSI did not put perchlorate-laden firework manufacturing waste in the McLaughlin Pit for disposal. From late 1979 until about June 1983, a very small number of aerial shell "duds" were temporarily placed in the McLaughlin Pit by PSI to soak, were then removed and disposed of elsewhere, via burning pursuant to duly authorized permits issued by Rialto Fire Department. (Souza Decl., ¶ 24.) However, when the McLaughlin Pit was allegedly "closed" on December 4, 1988, Mr. McLaughlin reported that the only fireworks components in the pit were from Red Devil, which is part of Apollo and not PSI. (Exhibit P105.) Mr. McLaughlin did not report observing any aerial shells from PSI. (Id.)

A letter from PSI to the San Bernardino County Environmental Health Services Agency dated September 12, 1988 states:

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

(Exhibit P7.)

The Advocacy Team admits fuse does not contain perchlorate. (Sturdivant Depo., Vol. 1, March 20, 2007, 153:2-6.) Quickmatch is a type of fuse. (Souza Decl., ¶ 13.) PSI's September 12, 1988 letter contradicts the claims made by the Advocacy Team in the Draft

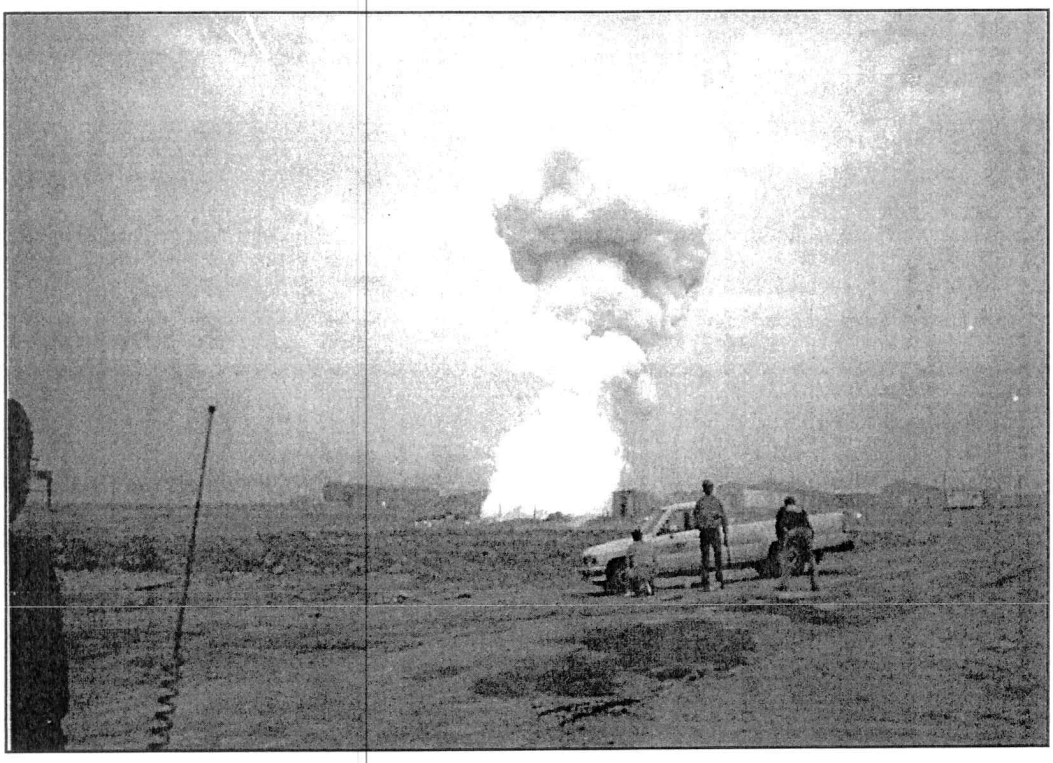
CAO and in the Advocacy Team's Memorandum of Points and Authorities. Testimony under oath by the Advocacy Team witnesses uniformly contradicts the allegations made by the Advocacy Team in the Draft CAO and in the Advocacy Team's Memorandum of Points and Authorities. Most importantly, the Advocacy Team admits they have no evidence to prove the amount of perchlorate, if any, released by PSI.

PSI acknowledges that it tested aerial shells from time to time in the area identified as Fire Zone 13 on Exhibit P135. Such testing was done by Apollo as well, prior to PSI's existence. (Hescox Depo., Vol. 1, 2005, 175:15-176:20.) However, there is no evidence that perchlorate from testing of aerial shells by PSI has discharged to groundwater or is a threat to discharge to groundwater. No soil or groundwater sampling data proves any perchlorate contamination from the testing of aerial shells by PSI. The Advocacy Team witnesses admit they have no evidence of how much of PSI's perchlorate, if any, was discharged to groundwater or is a threat to discharge to groundwater due to aerial testing by PSI. (Sturdivant Depo., Vol. 1, March 20, 2007, 183:3-23.) In fact, Advocacy Team witnesses have admitted under oath that all samples of perchlorate in the soil at the 160-Acre Property could have come from the 1987 massive burn of 54,000 pounds of pyrotechnic waste associated with the alleged "closure" of the McLaughlin Pit. (Exhibit P102.)

For example, Advocacy Team member Kamron Saremi does not know how much of the perchlorate that has been found in the soil on the 160-Acre Property comes from the 1987 burn at the McLaughlin Pit as part of its alleged closure. (Saremi Depo., Vol. 1, March 22, 2007, 307:9 - 308:1.) Similarly, Mr. Saremi has no way of estimating what percentage of the samples taken from the 160-Acre Property that contained perchlorate came from the 1987 massive burn at the McLaughlin Pit as part of its alleged closure. (Saremi Depo., Vol. 1, March 22, 2007, 308:2-13.)

This 1987 massive burn was permitted by the Rialto Fire Department. (Exhibit P103.) The 1987 massive burn was attended by Dan Brown of the Regional Board Staff. (McLaughlin Depo., Vol. 1, December 1, 2006, 87:10-14.) A photograph taken during this

massive burn shows a very large plume of smoke - see below:



(Exhibit P145 at PSI3001190.)

Not surprisingly, the Advocacy Team's untimely April 6, 2007 witness statements do not identify a single witness to testify about discharges to groundwater due to testing of aerial shells.

Rialto's expert witness, Daniel B. Stephens, estimates perchlorate released to the soil will take 320 years (400 feet ÷ 1.25 feet/year = 320 years) to reach groundwater, absent a source of water other than rainfall, to mobilize the perchlorate. ("Declaration of Daniel B. Stephens" submitted by Rialto on April 12, 2007, p. 14.) Any minimal amount of perchlorate remaining on the ground at the 160-Acre Property (or elsewhere in the Rialto-Colton Basin) does not meet the definition of "threaten" in Water Code Section 13304 because that section requires a "condition creating a substantial probability of harm, when the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to persons, property, or natural resources." If Rialto's

expert is to be believed, there is a minimum of hundreds of years before any threat requires immediate action.

PSI also acknowledges that it periodically burned wood, cardboard, pasteboard, fuse (including Quickmatch), black powder and a few defective finished fireworks on the 160-Acre Property. (Exhibit P7; Souza Decl., ¶ 26.) The materials burned by PSI mostly consisted of fuse (including Quickmatch) and black powder. (Exhibit P7; Souza Decl., ¶ 26.) Extremely small quantities of fireworks composition as a part of the small number of defective fireworks and duds were destroyed by PSI during these burns. (Exhibit P7; Souza Decl., ¶ 26.) All the burning of these materials by PSI was done pursuant to permits issued by the Rialto Fire Department and in accordance with industry standards. (Exhibit 7; Souza Decl., ¶ 26.)

PSI also acknowledges that it had a limited number of fires and explosions on the 160-Acre Property. Fires and explosions are a matter of public record. However, there is no evidence that perchlorate was involved in each of these events, was left on the ground after a fire, actually reached soil or groundwater or is a "threat" to reach groundwater. The Advocacy Team has no soil or groundwater sampling data to indicate any perchlorate contamination from these events on the 160-Acre Property. The Advocacy Team's person on the ground for the investigation was Kamron Saremi, but Mr. Saremi never saw a fire at PSI on the 160-Acre Property and never talked to anybody who saw a fire at PSI. (Saremi Depo., Vol. 2, March 23, 2007, 356:16 - 357:20.) Accordingly, the Advocacy Team's only evidence of fires and explosions is what is in documents. No document in evidence concerning a fire or explosion at the 160-Acre Property provides evidence of:

- How much perchlorate, if any, was released during any fire or explosion at the 160-Acre Property;
- How much perchlorate was left after any fire or explosion at the 160-Acre Property;
- How much perchlorate made its way to soil from any fire or explosion at the 160-Acre Property;

- How much perchlorate from any fire or explosion at the 160-Acre Property actually reached groundwater; or,
- How much perchlorate from any fire or explosion at the 160-Acre Property could reach groundwater in the next 300 years or more.

In short, the Advocacy Team cannot prove that perchlorate from PSI was discharged to groundwater or is a threat to be discharged to groundwater. Accordingly, there is no legal basis for issuance of any CAO to PSI.

B. The Advocacy Team Cannot Prove PSI's Perchlorate Has Created Or Threatens To Create A Condition Of "Pollution" Or "Nuisance"

The Advocacy Team bears the burden of proof by a preponderance of evidence to show that perchlorate from PSI was discharged or will be discharged to groundwater in an amount sufficient to create a condition of "pollution" or "nuisance". The Advocacy Team has no evidence that perchlorate from PSI reached or is a threat to reach groundwater. In fact, each and every Advocacy Team witness who was actually involved in the investigation[4] admits that they do not know whether PSI discharged perchlorate to groundwater or to soil in a manner that threatens groundwater. For example, Advocacy Team member Robert Holub testified:

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

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

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

A. Yes.

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

Similarly, Advocacy Team member Ann Sturdivant testified:

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[4]Robert Holub, Ann Sturdivant and Kamron Saremi.

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

A. In the water?

Q. Yes.

A. Probably not.

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

Advocacy Team member Kamron Saremi also testified:

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

A. Yes.

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

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

Q. You can't do that; right?

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

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

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

According to Advocacy Team member Robert Holub, if material was burned and there is so little of it left that it is never going to get to groundwater 400 feet below, then in terms of the Regional Board's regulation to protect waters of the State, it may not be

considered a problem. (Holub Depo., Vol. 3, April 6, 2007, 687:9-14.) If after a pit burn there are only small concentrations of waste material left which, because of the depth of groundwater, will not make it to groundwater for a very long, long time - under those circumstances, from the Regional Board's perspective, that likely would not represent a nuisance to the waters of the State. (Holub Depo., Vol. 3, April 6, 2007, 687:22 - 688:15.) It also would not be a pollutant with respect to groundwater under the same circumstances. (Holub Depo., Vol. 3, April 6, 2007, 688:17-21.) The same must be true for any perchlorate allegedly remaining on the ground after a burn or test of an aerial shell. Mr. Holub's testimony is consistent with the opinion of Rialto's expert, Dr. Stephens, that perchlorate released to the soil at the 160-Acre Property will take 320 years (400 feet ÷ 1.25 feet/year = 320 years) to reach groundwater, absent a source of water other than rainfall, to mobilize the perchlorate. ("Declaration of Daniel B. Stephens" submitted by Rialto on April 12, 2007, p. 14.)

The definitions of pollution and nuisance also include a health risk component. Rialto admits that there is no risk to human health because the water being served to the citizens of Rialto is "safe." (Rialto's website entitled "Rialto's Zero Tolerance Policy, Exhibit P130.) Advocacy Team member Kurt Berchtold, the Regional Board's Assistant Executive Officer, stated at a public hearing that the people of Rialto should not be concerned about the quality of their drinking water. (Transcript from RWQCB Special Board Meeting on November 16, 2005, 117:9-118:18, Exhibit P131 at PSI 3001100.) Similarly, the United States District Court for the Central District of California found there was complete absence of evidence of an immediate threat to public health or the environment as part of its November 1, 2006 order dismissing the City of Colton's case. (Exhibit P132 at PSI 3001110.)

Based on the foregoing, there is no evidence that perchlorate from PSI has created a condition of pollution or nuisance. Accordingly, PSI did not create a condition of "nuisance" or "pollution."

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C. The Advocacy Team Cannot Prove That PSI's Perchlorate Has Affected Any Water Supply Wells

The Advocacy Team seeks a replacement water order against PSI in this proceeding (Draft CAO, ¶¶ 64-66.) In order to prevail on this claim, the Advocacy Team must first prove the threshold requirements set forth in Section 13304(a). As discussed in Section IV.A and IV.B of this Brief, the Advocacy Team cannot meet these requirements, so there is no basis for a replacement water order against PSI.

In order to prevail on the replacement water claim, the Advocacy Team must also prove by a preponderance of evidence that a discharge of perchlorate by PSI has "affected" each water supply well for which replacement water is sought. Section 13304(a); July 13, 2004 email from the Regional Board Executive Officer Gerard Thibeault to the Regional Board. (Exhibit P128.) The Advocacy Team has no evidence of perchlorate discharged by PSI reaching groundwater, so it cannot possibly prove a single water supply well has been "affected" by perchlorate from PSI. In fact, the Advocacy Team admits that:

- No Fontana well is affected by contamination from the 160-Acre Property. All of the Fontana wells shown on PSI Exhibit P139 (F-18A, F-04A, F-25A, F-36A, F-03A and F15B) are on the southwest side of the Rialto-Colton Fault. These Fontana wells are not affected by any contamination from the 160-Acre Property. (Sturdivant Depo., Vol. 1, March 20, 2007, 81:2 - 82:2.)
- All the City of Colton and lower Rialto-Colton Basin West Valley Water District wells probably are contaminated as a result of the use of Chilean nitrate in agricultural operations that did not take place on the 160-Acre Property. (Holub Depo., March 8, 2007 Vol. 1, 129:19-131:12.)
- There is no evidence to prove that contamination in any well in the Rialto-Colton Basin results from any of the alleged dischargers, including PSI. Robert Holub, the Advocacy Team's most knowledgeable witness on Chilean nitrate has not concluded that any of the wells listed in Paragraph 55 of the Draft CAO were not contaminated by the use of fertilizer in the basin. (Holub

Depo., Vol. 1, March 8, 2007, 132:15-22.) Further, Mr Holub testified he cannot tell with respect to any well located in the Rialto-Colton basin that has shown concentrations of perchlorate, whether that perchlorate comes from any particular operation. (Holub Depo., Vol. 4, April 9, 2007, 933:8-13.)

The Advocacy Team:

- Does not know where the low concentrations of perchlorate in PW-6 come from – whether they are coming from the Mid Valley Landfill, from the 160-Acre Property or somewhere else. (Holub Depo., Vol. 4, April 9, 2007, 1055:20 - 1056:12.)
- Does not know whether Rialto-2 has impacted the direction of flow from the Mid Valley Landfill towards PW-5. (Holub Depo., Vol. 4, April 9, 2007, 1059:3-23.)
- Cannot link the perchlorate in any of the wells to any particular operation. (Holub Depo., Vol. 4, April 9, 2007, 933:19 - 934:20.)

In fact, according to sworn testimony by Advocacy Team witnesses, there is no data to indicate that PW-2 has perchlorate coming from PSI, Goodrich or West Coast Loading. The same is true for every single well on the map included on Exhibit 4256. (PSI Exhibit P 139.) (Holub Depo., Vol. 4, April 9, 2007, 934:21 - 935:15.) There is no basis for a water replacement order against PSI.

V. NO EVIDENCE EXISTS TO SUPPORT THE CLAIMS IN THE DRAFT CAO AGAINST PSI

Pursuant to the Advocacy Team's February 27, 2007 letter, the October 27, 2006 Draft CAO serves as the operative pleading against PSI. The allegations in the Draft CAO are false and totally without merit. PSI takes this opportunity to refute some of the most unsubstantiated allegations against it in the Draft CAO. This is by no means an all-inclusive list that PSI might be able to provide if: (1) PSI had been provided the Advocacy Team's evidence on time; (2) PSI had been given the Advocacy Team's evidence in an

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understandable form; and, (3) Advocacy Team witnesses had been forthcoming in deposition testimony.

The Advocacy Team repeatedly alleges PSI operated on 47 acres on the 160-Acre Property. (Draft CAO, ¶¶ 37, 39 and 42.) The Advocacy Team knows PSI operated in the 160-Acre Property on only 25 acres, as evidenced by numerous documents, including the March 5, 2004 and April 8, 2004 letters signed by Advocacy Team member Gerard Thibeault, the Regional Board's Executive Officer. (Exhibits P12 and P13 .)

The Advocacy Team alleges that PSI's operations on the 160-Acre Property included "assembling fireworks assortment packages." (Draft CAO, ¶ 36.) This allegation erroneously implies PSI manufactured and assembled consumer fireworks. Even the Advocacy Team's own evidence contradicts its allegation. Exhibit 1 in the Advocacy Team's Supplementary Evidence Binder correctly states:

> Pyro Spectaculars is a public display fireworks operator, fireworks importer/exporter, and fireworks wholesaler (Pyro Spectaculars, 2003). Pyro Spectaculars purchases and imports finished fireworks, stores them in approved facilities, and repackages them for displays and other professional, licensed users.

(Advocacy Team's Supplementary Evidence, Exhibit 1 at 49.)

The Advocacy Team alleges, after inaccurately stating what PSI does, that PSI "continues many of these same activities at the site today." (Draft CAO, ¶ 36.) The obvious implication is that PSI is discharging perchlorate now. The Advocacy Team knows full well PSI is not discharging perchlorate in any manner whatsoever. Advocacy Team member Kurt Berchtold, Assistant Executive Director of the Regional Board, recently made this point clear to Davin Diaz of CCAEJ in an e-mail dated September 1, 2006. (Exhibit P1.) The e-mail from Advocacy Team member Berchtold states: "Pyro Spectaculars is not discharging perchlorate."

The Advocacy Team alleges that fires and explosions on the 160-Acre Property resulted in the release of PSI's perchlorate to soil and groundwater. (Draft CAO, ¶¶ 38, 41.)

There is no evidence that perchlorate from these events, if any, was discharged to groundwater or is a threat to discharge to groundwater. The Advocacy Team has no soil or groundwater sampling data to indicate any perchlorate contamination resulted from these events. As discussed in detail in Section IV.A of this Brief, the Advocacy Team witnesses admit they have no evidence of how much of PSI's perchlorate, if any, was discharged to groundwater or is a threat to discharge to groundwater.

In its Memorandum of Points and Authorities, the Advocacy Team focuses on a tragic accidental explosion and resultant fire on September 9, 1996 that started in a 45-foot trailer parked at the PSI loading dock and warehouse. (Advocacy Team Brief, pp. 81-82.) The Advocacy Team has no evidence of how much perchlorate was involved. The Advocacy Team has no soil samples to support its position. The Advocacy Team claims the entire inventory of the warehouse was lost and speculates that water extinguished the fire before all perchlorate would have burned. (Advocacy Team Brief, p. 82.) However, the actual evidence, the Hazardous Materials Response Report dated September 9, 1996 relied on in the Advocacy Team's evidence, is to the contrary. The Hazardous Materials Response Report states that "all elements of the explosion were consumed in the fire" and "the fire was contained to two sections of a four section building." (Advocacy Team, Exhibit 27 at 10079.)

The Advocacy Team attempts to bolster its speculation by relying on a 2004 report by Rialto's consultant, TRC, that took surficial samples of soil and ash following a fire in an Astro Pyrotechnics' building on Stonehurst Avenue, not on the 160-Acre Property. (Advocacy Team Brief, p. 82.) The building was a research and development building and contained raw perchlorate. (Advocacy Team Exhibit 6, at p. 3.) Raw perchlorate was not used by PSI on the 160-Acre Property. (Advocacy Team's Supplementary Evidence, Exhibit 1 at 50.) Accordingly, the TRC data cannot be used to reach any conclusions about what could possibly be left after a fire on the 160-Acre Property. The TRC report is silent on how the perchlorate detected in surficial soil and ash could travel through the sub-surface materials to groundwater approximately 400 feet below. As the Advocacy Team

and Rialto are aware, all contaminated soil and ash from the 2004 Astro Pyrotechnics fire was cleaned up. Accordingly, using the TRC report for a different fire or explosion has no evidentiary value.

That the TRC report has no evidentiary value for the 160-Acre Property is further proved by statements from Rialto's expert witness Daniel B. Stephens. Daniel B. Stephens estimates perchlorate released to the soil will take 320 years (400 feet ÷ 1.25 feet/year = 320 years) to reach groundwater, absent a source of water other than rainfall, to mobilize the perchlorate. ("Declaration of Daniel B. Stephens" submitted by Rialto on April 12, 2007, p. 14.) Any minimal amount of perchlorate remaining on the ground at the 160-Acre Property (or elsewhere in the Rialto-Colton Basin) does not meet the definition of "threaten" in Water Code Section 13304 because that section requires a "condition creating a substantial probability of harm, when the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to persons, property, or natural resources." If Rialto's expert is to be believed, there is a minimum of hundreds of years before any threat requires immediate action.

The Advocacy Team alleges that PSI burned "pyrotechnic waste" that resulted in unburned perchlorate that was somehow mobilized to groundwater. (Draft CAO, ¶¶ 39, 40, 42, 48, 49.) Once again, the Advocacy Team has no evidence to support this allegation. For example, Ann Sturdivant, the primary drafter of the Draft CAO, testified with respect to the allegations in paragraph 40 of the Draft CAO:

Q. In the next paragraph there's reference to a specific volume it says permits were also issued to Pyro Spectaculars in 1988 for burning of 400 to 700 pounds of pyrotechnic waste at their Locust Avenue address in Rialto. Have I read that correctly?

A. In the middle of finding 40 is that where we are?

Q. Yes.

A. I believe so, yes. Found it.

Q. Now, how much of the 400 to 700 pounds in that sentence is hazardous waste?

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A. I don't know. I'd have to look at the document. It may say hazardous waste on it. I don't know.

Q. How much of that 400 to 700 pounds referenced in that sentence was perchlorate?

A. I don't know.

Q. After the burn referenced in that sentence, how much perchlorate was left?

A. I don't know.

Q. There's also reference to a volume in the last sentence of that paragraph where it says a permit was also issued to Pyro Spectaculars in 1999 for burning 500 pounds of pyrotechnic waste over a one month period have I read that correctly?

A. Yes.

Q. How much of the 500 pounds referenced in that sentence was hazardous waste?

A. I'd have to look at the document. It -- it may say on there.

Q. How much of it was perchlorate?

A. I don't know.

Q. How much of the 500 pounds if it was burned how much perchlorate was left after the burn?

A. I don't know.

Q. Is there any way to tell at this point?

A. I don't know of a way.

(Sturdivant Depo., Vol. 1, March 20, 2007, 177:16-179:2.)

Again Ms. Sturdivant admitted the Advocacy Team has no evidence of how much of PSI's perchlorate was in its waste:

Q. The last sentence of paragraph 42 says the waste placed in the burn pits by Pyro Spectaculars would have contained perchlorate. Have I read that right?

A. Yes.

Q. How much perchlorate?

A. –

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Q. Well, how much perchlorate was in the waste that you reference in that sentence that I read a minute ago?

A. The waste placed in the burn pits?

Q. Yes.

A. I don't know.

(Sturdivant Depo., Vol. 1, March 20, 2007, 179:25-180:13.)

Ms. Sturdivant testified that her understanding was that some of PSI's waste included:

a. Fireworks containing "various chemicals including perchlorate salts." (Sturdivant Depo., Vol. 2, March 28, 2007, 12:3-15.)

b. Fuse. (Sturdivant Depo., Vol. 2, March 28, 2007, 12:16-18.) Fuse does not contain perchlorate and it is made using black powder. (Sturdivant Depo., Vol. 1, March 20, 2007, 141:25-142:4.)

c. Black powder. (Sturdivant Depo., Vol. 2, March 28, 2007, 12:19-21.) Black powder does not contain perchlorate. (Sturdivant Depo., Vol. 1, March 20, 2007, 142:5-7.)

d. Paper. (Sturdivant Depo., Vol. 2, March 28, 2007, 12:22-24.)

e. Cardboard. (Sturdivant Depo., Vol. 2, March 28, 2007, 12:24-13:1.)

The Advocacy Team has no idea whatsoever how much of PSI's waste contained perchlorate. (Sturdivant Depo., Vol. 2, March 28, 2007, 14:3-9; Saremi Depo., Vol. 2, March 23, 2007, 374:13-16; Saremi Depo., Vol. 3, March 27, 2007, 726:12-16; Holub Depo., Vol. 1, March 8, 2007, 181:20-24.)

The Advocacy Team alleges that PSI used the McLaughlin Pit as a disposal pit for perchlorate waste from 1979 until 1986. (Draft CAO, ¶¶ 43-44.) The Advocacy Team has no evidence to support this allegation. The Regional Board's own file shows that the McLaughlin pit was no longer in use after about June of 1983 (Exhibit P27 at PSI 3000317

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and P64 at PSI 3000511)[5] and that all PSI placed in the McLaughlin Pit were a limited number of aerial shells. (Advocacy Team Exhibit 30 at AP455.) The very small number of duds were temporarily placed in "the McLaughlin Pit" to soak, were then removed and disposed of elsewhere, via burning pursuant to duly authorized permits issued by Rialto Fire Department. (Souza Decl., ¶ 24.) Ms. Sturdivant reluctantly testified the Advocacy Team had information from the 2005 Kleinfelder report (Exhibit P15 at PSI 3000121) that the dud shells were removed:

Q. . . . See where it says "Pyro Spectaculars occasionally placed a very limited number of defective shells in the McLaughlin pit for softening the hard outer cardboard shell. These softened shells were then removed from the McLaughlin pit and taken back to the Pyro Spectaculars' facility where they were opened." Do you see that?

A. I see it.

Q. Okay. So do you have any information to suggest that the information in here about the shells being removed is incorrect?

A. I know this is what Kleinfelder said I don't have an opinion about it.

Q. Well, did you try to figure out whether what Kleinfelder said was right?

A. I don't understand that question.

Q. Did you try to figure out what Kleinfelder was telling you was correct?

A. I don't know.

Q. Who would know on staff?

A. I don't know who would have tried to figure out what a consultant said about a topic.

Q. Well, here's what I don't understand. The McLaughlin pit was a focus of your investigation; right?

A. Of this investigation that Kleinfelder did, yes.

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[5]As set forth above, this information comes from a January 24, 1985 Regional Board inspection report for Apollo. Bruce Paine of the Regional Board Staff memorialized a conversation with Pedro Mergil of Apollo. Mr. Paine recorded that Mr. Mergil said Apollo had not used the pond for 18 months or approximately until June 1983.

Q. Yes.

But wasn't it also a focus of the investigation of the regional board in connection with the Rialto-Colton-Fontana perchlorate?

A. It was one area of interest yes.

Q. And wasn't it of interest to the regional board what was going into that McLaughlin pit?

A. Yes.

Q. So wouldn't it be of interest to the regional board to try to figure out whether a consultant who was telling you something about what was going into the McLaughlin pit or coming out of the McLaughlin pit was accurate or not?

A. I believe that the assumption would generally have been that a consultant who has a license and registration would do their best to state fact –

Q. Okay.

A. – and we generally assume that.

Q. I understand.

So what you're saying is you have a tendency to want to trust what's in a consultant's report because there's fear if it's wrong they could lose their license?

A. I think that's fair.

Q. Okay. So you'd have a tendency then to believe Kleinfelder when they said that aerial shells were taken out of the McLaughlin pit; right?

A. I believe so.

Q. Okay. You don't have any reason to think that that was wrong do you?

A. I don't know.

Q. Well you don't have any evidence that it was wrong, do you?

A. I don't know one way or the other.

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

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The Advocacy Team admits it:

- Does not know how many aerial shells over time PSI may have placed in the McLaughin Pit. (Sturdivant Depo., Vol. 1, March 20, 2007, 146:23-25; Saremi Depo., Vol. 3, March 27, 2007, 712:11-15.)
- Does not know how much pyrotechnic composition is in an aerial shell. (Sturdivant Depo., Vol. 1, March 20, 2007, 146:14 - 146:19.)
- Does not know how much perchlorate is in any individual aerial shell. (Sturdivant Depo., Vol. 1, March 20, 2007, 146:20-22; Saremi Depo., Vol. 3, March 27, 2007, 712:22 - 713:1.)
- Does not know how much perchlorate from the aerial shells was in the McLaughlin Pit. (Saremi Depo., Vol. 3, March 27, 2007, 713:3-9.)
- Does not know how much, if any, perchlorate got out of aerial shells from Pyro Spectaculars and into the McLaughlin Pit. (Sturdivant Depo., Vol. 1, March 20, 2007, 149:6-9; Saremi Depo., Vol. 2, March 23, 2007, 377:13-23; Vol. 3, March 27, 2007, 712:16-21.)

The Advocacy Team does not know how much waste, if any, Pyro Spectaculars put in the McLaughlin Pit containing perchlorate. (Saremi Depo., Vol. 3, March 27, 2007, 674:25 - 675:3)

Finally, the Advocacy Team claims testing of aerial shells by PSI resulted in groundwater contamination. There is no evidence that perchlorate from testing of aerial shells by PSI has discharged to groundwater or is a threat to discharge to groundwater. The Advocacy Team has no soil or groundwater sampling data to indicate any perchlorate contamination from the testing of aerial shells by PSI. The Advocacy Team admits it has no evidence of how much of PSI's perchlorate, if any, was discharged to groundwater or is a threat to discharge to groundwater due to aerial testing. (Sturdivant Depo., Vol. 1, March 20, 2007, 183:21-23.) The Advocacy Team's untimely April 6, 2007 witness statements do not identify a single witness to testify about discharges to groundwater due to testing of aerial shells.

Assuming there actually were data to support a conclusion of contamination from testing, which there is not, for the same reasons it cannot differentiate between perchlorate from Apollo and allegedly from PSI at the McLaughlin Pit, the Advocacy Team would not be able to differentiate between the companies that tested fireworks in the area described as Fire Zone 13. In addition to PSI, Apollo tested fireworks in the area described as Fire Zone 13. (Hescox Depo., Vol. 1, February 14, 2005, 175:15-176:20.)

Lacking any site-specific data to support its claim, the Advocacy Team relies on the Massachusetts DEP draft report 2005 for the proposition that repeated fireworks displays would have resulted in perchlorate being on the ground. (Advocacy Team's brief, 84.) The Advocacy Team fails to mention that the average depth to groundwater in the Massachusetts study averaged about 4 feet. In the 160-Acre Property, depth to groundwater is approximately 400 feet, or 100 times that amount. The Advocacy Team offers only speculation about how any perchlorate on the surface would be mobilized 400 feet to the groundwater. Possibility, speculation and conjecture are not sufficient proof, even of matters that need only be proven by a preponderance of the evidence (see generally Roddenberry v. Roddenberry (1996) 44 Cal.App.4th 634, 651; Regents of University of California v. Public Employment Relations Bd. (1990) 220 Cal.App.3d 346, 359; Cal. Evidence (4th ed. 2000) Burden of Proof and Presumptions, § 35, p. 184).

The Advocacy Team does not have a vadose zone model, nor any scientific basis to support its unsupported assertion that the soil is "porous" so it is conducive for perchlorate to "readily" move toward groundwater. For example, on page 10 of its Memorandum of Points and Authorities, the Advocacy Team alleges: "Once applied to soil, perchlorate will be readily transported to groundwater with any water that percolates into the soil (e.g. precipitation) and travels to groundwater." (Emphasis added.) However, according to very grudgingly given testimony under oath by Advocacy Team member Ann Sturdivant, "readily" does not refer to speed," the statement pertains to the chemical solubility of perchlorate salts," not the speed by which the perchlorate moves through the soil to the groundwater. (Sturdivant Depo., Vol. 4, 1004:8-1008:10.) The Advocacy Team's attempts to imply that

perchlorate gets to groundwater quickly from 400 feet above are wrong and scientifically dishonest.

The Advocacy Team's shameless claim of "readily transported" perchlorate at the 160-Acre Property is further refuted by Rialto's expert Daniel B. Stephens who estimates perchlorate released to the soil will take 320 years (400 feet ÷ 1.25 feet/year = 320 years) to reach groundwater, absent a source of water other than rainfall, to mobilize the perchlorate. ("Declaration of Daniel B. Stephens" submitted by Rialto on April 12, 2007, p. 14.) Clearly, the Advocacy Team wanted to create a wrong impression that perchlorate on the surface of the ground on the 160-Acre Property threatens groundwater. This wrong impression has no evidentiary basis and must be disregarded.

VI. THE ADVOCACY TEAM IGNORES OTHER ESTABLISHED SOURCES OF CONTAMINATION

To date, there are three confirmed sources of the perchlorate in the Rialto/Colton Groundwater Basin:

- A gravel washing operation involving unlined settling ponds with a storage capacity of 13 million gallons of water, which the Advocacy Team knowingly and negligently authorized, and Rialto negligently permitted the County of San Bernardino ("County") and its tenant, Robertson's Ready Mix ("Robertson's"), to locate directly over historical bunkers where materials containing perchlorate had been stored and released (the "County Release");
- Releases from fireworks manufacturing by Apollo, including a Class I hazardous waste disposal pit, now known as the McLaughlin Pit, located on the 160-Acre Site into which the Regional Board Staff, with personal involvement of members of the Advocacy Team prosecuting this case: (a) negligently allowed Apollo to dump thousands of pounds of fireworks manufacturing waste, including perchlorate, and flood it with tens of thousands of gallons of water annually from 1972 to mid-1983 or later, which was released into the groundwater in direct violation of its waste discharge

requirements; and (b) then, failed to perform its mandatory duty to require closure of the pit as set forth in former Subchapter 15, 23 CCR § 2510 et seq., of the State Water Board's regulations (the "Apollo Releases"); and,

- Chilean fertilizer which contains naturally-occurring perchlorate that historically was used extensively for agricultural purposes throughout the basin.

Despite having no evidence that PSI caused any of these releases, the Advocacy Team seeks an order by issuance of the Draft CAO to compel PSI to undertake to spend potentially hundreds of millions of dollars to further investigate and remediate them. (Holub Depo., Vol. 3, April 6, 2007, 248:23:249:2.)

A. The County Release

In 1999, two years after the discovery of perchlorate in the Rialto/Colton Groundwater Basin, the Regional Board Staff approved a soil washing operation proposed by the County's landfill. The County, through Robertson's, proposed a massive excavation project which included soil washing and the installation of four unlined settling ponds, each 200 feet x 250 feet to 350 feet x 10 feet with a capacity of 13 million gallons. (Exhibit P117.) The proposed unlined ponds were directly over areas where materials and products containing perchlorate had been stored.

The direct causal connection between the mobilization of massive amounts of perchlorate to the groundwater and the millions of gallons of water discharged to the unlined ponds was admitted by Mr. Thibeault during his March 14, 2007 deposition:

Q. Do you have an opinion sitting here today whether or not it [the settling ponds] caused perchlorate to reach the ground water underneath it?

A. Yes.

Q. And what is your opinion?

A. I believe that the wash water from the aggregate operation mobilized perchlorate in the sub surface and pushed it down towards the groundwater.

(Thibeault Depo., Vol. 1, March 14, 2007, 59:24 - 60:6.)

At first, Mr. Thibeault denied in his deposition that the Regional Board even had any jurisdiction over the settling ponds:

Q. And in connection with that [the permitting of the settling ponds], what investigation, if any, did the regional board staff conduct prior to allowing that gravel washing operation to take place?

A. Well, I think I testified to you that we don't - I don't think we have a permitting jurisdiction. . . .

(Thibeault Depo, Vol. 1, March 14, 2007, 60:8-13.) When confronted with the letter approving the Robertson's request for the Regional Board's approval of the unlined settling ponds, Mr. Thibeault was forced to agree that on July 6, 1999, Dixie Lass of the Regional Board Staff authorized the County through Robertson's to place the four ponds directly over historical bunker areas where it was known that fireworks manufacturers had stored materials and products containing perchlorate. He was also forced to acknowledge that Dixie Lass approved Robertson's request that these ponds be unlined. (Thibeault Depo., Vol. 2, March 16, 2007, 435:1-11 and 452:22-457:20.) Dixie Lass's letter to Robertson's unambiguously provided: "After careful review, we [Regional Board Staff] have determined that the proposed project should not have any negative impact on water quality at the landfill." (Exhibit P118.)

Extraordinarily, contrary to this statement, the Regional Board Staff's action was taken without a public hearing, without the approval of the appointed members of the Regional Board, without the imposition of any waste discharge requirements, and without requiring confirmation that the soil in the bunker area underlying the proposed ponds did not contain perchlorate or any other hazardous material. (Thibeault Depo., Vol. 2, March 16, 2007, 435-438, 452-457, 462-463.)

On March 14, 2001, less than two years after the Regional Board Staff authorized the construction of four unlined settling ponds, the County wrote Dixie Lass a letter which

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advised that perchlorate was being detected in ever increasing numbers in a monitoring well immediately downgradient of the unlined ponds. (Exhibit P119.) In that letter, the County reported the following increasing perchlorate concentrations:

April 2000	1.9 ppb
July 2000	10 ppb
October 2000	51 ppb
January 2001	250 ppb

The County's letter asked for a prompt response.

One month later, on April 17, 2001, the County wrote to Regional Board Staff a second letter which restated its concern about the "serious nature" of the rising perchlorate concentrations in a monitoring well down gradient of Robertson's unlined ponds, and urged prompt action:

> The County . . . is writing this letter to advise the Regional Water Quality Control Board (RWQCB) that the concentrations of perchlorate have continued to rise in samples obtained from groundwater monitoring well F-6 at the Mid-Valley Sanitary Landfill ("MVSL"). Retest analyses . . . confirm that the concentration of perchlorate in groundwater samples obtained in January 2001 ranged from about 250 to 270 micrograms per liter (µ g/l). Before the latest detections, perchlorate was measured at 51 µ g/l on October 2000.
>
> * * *
>
> The SWMD is currently arranging meetings to discuss the current conditions with the aggregate processing contractor, and would like to meet with the RWQCB staff as soon as possible to discuss the same subject. . . .
>
> Please be assured that SWMD recognizes the serious nature of the current data and is committed to investigating the source of the impacts at well F-6.

(Exhibit P120.)

More than a year later, on September 26, 2002, within days of the Regional Board's order rescinding for lack of proof Mr. Thibeault's CAO R8-2002-051, which sought to place

all responsibility and liability for the perchlorate releases to the Rialto/Colton Groundwater Basin on Kwikset and Goodrich, Mr. Thibeault ordered the County to investigate the releases of perchlorate to the groundwater (then at a concentration of 800 ppb) mobilized by Robertson's unlined ponds. What had remained hidden by the Regional Board Staff suddenly was disclosed. Mr. Thibeault wrote:

> The evidence indicates that the bunkers adjacent to the MVSL [Mid-Valley Sanitary Landfill] were used for storing explosives, ordinance, propellant, and pyrotechnic chemicals (including perchlorate salts), on property that now belongs to the County. . . . In addition, gravel washing operations on county property may have contributed to mobilization or spread of perchlorate. Perchlorate has been detected in groundwater downgradient of the County's properties (the former bunker area, and the MVSL) . . . [in] concentrations in excess of 800 ppb.

(Exhibit P121.)

In January 2003, the Regional Board issued CAO R8-2003-0013 which required the County to clean up the perchlorate contamination coming from its property where the unlined settling ponds were located. What had been known by the Regional Board Staff since at least April 2001, now was suddenly crystal clear: "it is evident that perchlorate is being discharged to groundwater from property that is currently owned by the County." (Exhibit P122 at Finding 12.) By January 2003, the monitoring well downgradient of the settling ponds reported a concentration of 1,000 ppb of perchlorate. (Id. at Finding 9.)

Mr. Thibeault admitted that the Regional Board Staff's actions negligently caused the County Release:

Q. Dixie Lass's letter of June 6, 1999 permitted . . . this settling pond operation to go forward which resulted in significant quantities of perchlorate being released to the groundwater; isn't that correct?

A. Yes.

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Q. And so in that sense the mistakes that were made in connection with allowing this to happen . . . were the reason it happened isn't that correct?

[Objection] . . .

A. Allowed it to happen, yes.

* * *

Q. Isn't it the case Mr. Thibeault that every discharge to groundwater in your jurisdiction is something of concern to the staff and the regional board itself?

A. Yes.

Q. And any proposed discharge to the groundwater requires careful investigation to determine whether or not it's potentially harmful to the beneficial uses; isn't that correct?

A. Yes.

Q. And that wasn't done here was it?

A. It wasn't careful enough.

(Thibeault Depo., Vol. 2, March 16, 2007, 456:24 - 457:20; 463:5-18.)

Coincidentally, the Advocacy Team's position that the County Release caused a separate plume than releases from the 160-Acre Property would help protect the Regional Board Staff and Gerard Thibeault from the disastrous decision to approve unlined ponds for the County. Rialto and its consultants, which are a part of the prosecution team in this proceeding, disagree and contend there is one commingled plume. (See for example Exhibit P138.)

B. The Apollo Releases

The Regional Board Staff's mismanagement of the regulation of Apollo also caused massive releases of perchlorate to the groundwater. The only confirmed source of contamination from the 160-Acre Property is the McLaughlin Pit. (Saremi Depo., Vol. 1, March 22, 2007, 263:19 - 264:2.) To fully understand this issue, it is necessary to go back

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to the beginnings of Apollo, a large scale fireworks manufacturer that operated on the 160-Acre Property and ultimately installed and used the McLaughlin Pit to dispose of its fireworks manufacturing waste.

In 1966, Century Investments Company/Clipper Pyrotechnic Corporation (collectively "Clipper") purchased the 160-Acre Property. In 1968, Clipper was merged into Apollo. Between 1968 and 1987, Pyrotronics owned and operated related companies under the following names: Apollo Fireworks, Atlas Fireworks, California Fireworks Display Company, Red Devil Fireworks, United Fireworks, and Wild Cat Fireworks. Eventually, Apollo was comprised of three operating divisions: Red Devil Fireworks, Apollo Fireworks, and California Fireworks Display Company. Apollo used the northern portion of the 160-Acre Property for the design, manufacture, storage and testing of both Class B aerial fireworks and Class C consumer fireworks. Perchlorate was a component of Apollo's fireworks. (Exhibits P22 , P24, P41, P44, and P65.)

Potassium perchlorate is one of the powders used during the fireworks manufacturing process and was used at Apollo. (Hescox Depo., Vol. 1, Feb. 14, 2005, 241:20 - 242:13.) Pyrotechnic powder was accumulated during operations at Apollo. (Apel Depo., Vol. 1, Aug. 29, 2005, 112:11 - 113:1.) Pyrotechnic materials were spilled in the mixing rooms. (Mergil Depo., Vol. 1, May 2, 2005, 94:19 - 95:23.) In the mixing rooms, spilled powder was cleaned up every two mixes. (Mergil Depo., Vol. 1, May 2, 2005, 96:11-22.) The rooms were swept up, watered down and squeegeed out. (Mergil Depo., Vol. 1, May 2, 2005, 97:2-10.) In the pressing rooms, at the end of the day, water was used to hose out the rooms. (Hescox Depo., Vol. 1, Feb. 14, 2005, 116:3-7.) The water from the hoses went onto the cement floor, out the door, over the ground and into a sump. (Hescox Depo., Vol. 1, Feb. 14, 2005, 117:11-20.) Thus, pyrotechnic powders were washed out of the buildings and into sump. (Apel Depo., Vol. 1, Aug. 29, 2005, 109:9 - 110:3; Mergil Depo., Vol. 1, May 2, 2005, 84:12 - 85:7.)

There were two 1968 explosion accidents at the Rialto facility. (Hescox Depo., Vol. 1, Feb. 14, 2005, 25:12-23). These two accidents were "quite serious." (Hescox Depo.,

Vol. 1, Feb. 14, 2005, 24:10-22). These explosions were both on the 160-Acre Property. (Hescox Depo., Vol. 1, Feb. 14, 2005, 35:22-24).

One explosion was in February 1968 where an explosion destroyed Building 6, damaged many other buildings and killed three people. (Exhibits P26 at PSI 3000241-245.) The other was in May 1968, in which the 150-Gallon Mixer exploded killing two people. Exhibit P20 shows where these massive explosions took place.

A number of buildings were damaged in the 1968 explosion. (Hescox Depo., Vol. 2, Feb. 15, 2005, 323:1-3.) It occurred at closing, when Apollo employees were loading the finished product out of the building and bringing tomorrow's pyrotechnic mix into the building. It was such a catastrophe because it set off the maximum amount of pyrotechnic mix that would be in the building at any time and propagated some debris into several storage buildings. (Hescox Depo., Vol. 2, Feb. 15, 2005, 323:1 - 325:7.) Water was used by the Fire Department to put out the fire caused by the explosion and there was water on the ground when it was over. (Hescox Depo., Vol. 2, Feb. 15, 2005, 328:18 - 329:5.)

The second explosion in 1968 occurred in a press building where fireworks were being manufactured. (Hescox Depo., Vol. 2, Feb. 15, 2005, 385:16 - 386:16.) After this explosion occurred, the building was dismantled and the space was used to burn waste products, when they had permission to burn. Apollo burned scrap cones, defective cones and chemicals. Instead of taking scrap down to the burn pit, these were burned on a concrete pad. (Hescox Depo., Vol. 2, Feb. 15, 2005, 386:9-25.)

After the explosions, Mr. Hescox was involved in rebuilding the fireworks manufacturing plant. Almost every building in the plant had to be rebuilt. (Hescox Depo., Vol. 1, Feb. 14, 2005, 71:22 - 72:2.) Some of the buildings that had been there disappeared and debris was blown two or three blocks away. (Hescox Depo., Vol. 2, Feb. 15, 2005, 329:6-17.) The 1968 explosions were caused by an accumulation of too many chemicals in a small area. (Hescox Depo., Vol. 1, Feb. 14, 2005, 74:12-18.)

There was also a fire incident at Apollo on Christmas Eve in 1980. An individual went in a storage building of the manufacturing plant and lit some unfinished fireworks. The

building burned but was not completely destroyed. The building eventually was taken down. (Hescox Depo., Vol. 1, Feb. 14, 2005, 210:1 - 211:12.)

Other accidental fires during operations by Apollo at the site included a number of fires in the mid 1970's and early 1980's. (Exhibit P26 at PSI 3000246-273.)

Apollo used burn pits on the southern portion of the 160-Acre Property for disposal of its waste. Apollo also built the so-called eastern Burn Pit, which was built from a former U.S. Department of Defense railroad revetment. The eastern burn pit was used from time to time by Trojan Fireworks, a manufacturer of Class C consumer fireworks that operated in the Bunker Area. Stuart Carlton, former Plant Manager at Trojan, testified that Apollo and Trojan Fireworks used the Eastern Burn Pit. Trojan used it for the disposal of large (over 500 lbs.) quantities of pyrotechnic manufacturing wastes. Mr. Carlton described the area as an unlined pit measuring approximately one hundred feet by twenty feet by twelve feet. (Carlton Depo., Vol. 2, Dec. 13, 2005, 332:1-5.) Exhibit P17 (at PSI 3000144) and Exhibits P19 and P20 show the layout of the Apollo operational areas, including its burn pits.

At some point, the AQMD would no longer allow Apollo to burn its waste, so Apollo built the pond, now known as the McLaughlin Pit. (Hescox Depo., Vol. 1, Feb. 14, 2005, 114:4-16.) The pond was Apollo's solution to the AQMD's refusal to let it burn waste. It was the only way Harry Hescox could conceive to deactivate the combinations of chemicals they had in a powder dry form. He "didn't know what else to do with them." (Hescox Depo., Vol. 1, Feb. 14, 2005, 198:25 - 199:11.)

The McLaughlin Pit was installed in late 1971 or early 1972 by Apollo on real property owned and operated by Apollo, some 8 years after before PSI was incorporated. (Exhibit P32.) Apollo dumped waste material into the pond after it was built. (Hescox Depo., Vol. 1, Feb. 14, 2005, 105:10-17.) Apollo applied to the Regional Board for a permit to construct and operate a waste disposal pit for its manufacturing waste materials, which included perchlorate. Apollo's plan was to flood continually the waste placed in the pit with water to prevent explosions. (Exhibits P29 and P36.)

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On November 14, 1971, the Regional Board issued Waste Discharge Requirements, Order 71-39, which authorized the construction and operation of the proposed Apollo waste disposal pit which later became known as the McLaughlin Pit. Regional Board Order 71-39 expressly prohibited "all discharge of waste to surface waters, surface water drainage courses or areas which would allow percolation of waste." Order 71-39 also required Apollo to file quarterly monitoring reports which were to contain monthly daily averages of waste flows to the pit, and records of the depth of the waste in the McLaughlin Pit; it also required Apollo to obtain prior approval of the Executive Officer before disposing of wastes from the McLaughlin Pit either on or off site. (Exhibit P31.) Thereafter, Apollo contracted with a swimming pool contractor to construct the McLaughlin Pit. The McLaughlin Pit was simply a 20' x 20' x 4' plastered gunite swimming pool that had a 12,000 gallon capacity. (Exhibit P32.)

The Regional Board Staff advised Apollo that it was in violation of Order 71-39 on at least four occasions between 1972 and 1977. (Exhibits P33, P34, P35 and P36.) The Regional Board records reflect that Apollo failed to submit a number of monitoring reports and, based on actual observations, had failed to maintain sufficient freeboard in the McLaughlin Pit to prevent waste water overflow. (Exhibits P33 through P36.)

The Regional Board Order 71-39 was issued with the understanding that 150 gallons of fireworks manufacturing waste would be discharged to the pit per day. (Exhibit P31.) By December of 1977, however, Apollo reported to the Regional Board that its discharge of fireworks manufacturing waste had increased to 3,000 gallons per day. (Exhibits P38 and P39.) The Regional Board considered and adopted Order 78-96, which permitted Apollo to discharge 3000 gallons of fireworks manufacturing waste to the McLaughlin Pit per day. It also continued to prohibit the discharge of industrial wastes to the waters of the state: "industrial wastes shall not be discharged or caused to be discharged, in a manner which will allow the wastes to reach waters of the state." (Exhibit P40.)

Although complete records of the raw materials stored and used by Apollo on the 160-Acre Site have not been located, there is considerable evidence that Apollo used tens

of thousands of pounds per month of perchlorate. (Exhibits P44 and P65.) On September 21, 1979, Apollo purchased 21,000 pounds of potassium perchlorate from Kerr-McGee Chemical Corp. The shipment of potassium perchlorate arrived in 70 drums. (Exhibit P44.) Pedro Mergil, a long-time employee of Apollo, testified that receiving a delivery of 70 drums of chemicals at Apollo was not unusually large. (Mergil Depo, May 2, 2005, Vol. 1, 29:10-30:18.)

In 1985, Apollo reported to the Rialto Fire Department that it was using 25,000 pounds or more of potassium perchlorate per month in its fireworks manufacturing operations. (Exhibit P65.) Apollo used more perchlorate by "orders of magnitude" than PSI, Goodrich or West Coast Loading. (Holub Depo., Vol. 3, April 6, 2007, 785:1-13.)

During their depositions, neither Gerard Thibeault nor Kurt Berchtold could explain where all the waste water went, given that in 1978 Apollo had reported and the Regional Board Staff confirmed that 3,000 gallons of waste materials per day were being discharged to the 12,000 gallon pond. (Thibeault Depo., Vol. 1, March 14, 2007, 138:7 - 139:3; Berchtold Depo., March 8, 2007, 144:2 - 147:7; Exhibits P38 through P40.)

The Regional Board's records reveal, however, numerous repeated monitoring report violations. The records also contain a number of reported Regional Board Staff observations of violation of the freeboard requirement, including a 1983 report by Advocacy Team member Mr. Berchtold, in which he reported that "[t]he evaporation pond had no freeboard, and rainfall had caused a minor overflow (est. - 5 gallons)." (Exhibit P51.) Mr. Berchtold sent a follow-up letter to Richard Doerr, the Safety Manager at Apollo. Mr. Berchtold confirmed the overflow and even reminded Apollo of its waste discharge requirements, but took no action. (Exhibit P54.) Remarkably, there was no discussion of the fact that Apollo was discharging 3,000 gallons per day of fireworks manufacturing waste to the 12,000 gallon capacity pond. Following this violation, Apollo had the McLaughlin Pit pumped out by a liquid waste hauler and the contents transported to the BKK Landfill. (Exhibit P52 and P53.) The Regional Board files on the McLaughlin Pit contain no record of

any enforcement action taken as a result of any of the numerous violations of the waste discharge requirements. (Exhibit P27.)

On January 24, 1985, Regional Board Staff reported being advised by Pedro Mergil that by mid-1983, the McLaughlin Pit had not been used for 18 months.[6] (Exhibits P27 at PSI 3000371 and P64 at 3000511.) On October 15, 2004, Ralph Apel, General Manger of Apollo, sent a letter to the County stating that Apollo was in the process of removing all hazardous waste from its property, that all liquid waste had been removed, but no one would take the solid waste because it could be explosive. (Exhibit P63.)

On April 2, 1985, Apollo was notified by Advocacy Team member Robert Holub that the then new Subchapter 15 regulations, promulgated by the State Water Board, imposed a number of new requirements on the McLaughlin Pit, which was classified as a Class I hazardous waste unit; those requirements included groundwater monitoring for perchlorate and other chemicals. (Exhibit P68.) On April 26, 1985, Apollo responded, advising that the pit was no longer in use. (Exhibit P73.) On June 27, 1985, there was a fire in the pit "used by Apollo for dumping all types of waste", which spread to the surrounding area. The Rialto Fire Department reported that it used 1,000 gallons of water to extinguish the fire. (Exhibit P70.) The solid waste left in the McLaughlin Pit had auto-ignited. (Exhibit P71.)

On October 1, 1985 and October 8, 1986, the Regional Board Staff sent additional letters to Apollo <u>again</u> stating that it needed to comply with the Subchapter 15 regulations, promulgated by the State Water Board. One of the letters pointed out that the certification of whether contamination existed had to be made by a registered civil engineer or registered geologist. (Exhibits P73 and P81.)

More than a year of back-and-forth letters followed concerning the required steps necessary to close the McLaughlin Pit. During this time, Apollo filed for bankruptcy protection and advised the Regional Board Staff of this situation, but apparently the

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[6]As set forth above, this information comes from a January 24, 1985 Regional Board inspection report for Apollo. Bruce Paine of the Regional Board Staff memorialized a conversation with Pedro Mergil of Apollo. Mr. Paine recorded that Mr. Mergil said Apollo had not used the pond for 18 months, approximately since June 1983.

Regional Board Staff took no action to protect the State's interests in the bankruptcy. (Exhibit P82; Berchtold Depo., March 8, 2007, 233:17 - 237:3.) Then, on May 26, 1987, Apollo sold its portion of the 160-Acre Site, which included the McLaughlin Pit, to Ken Thompson, Inc. Pursuant to the purchase agreement, Ken Thompson, Inc. assumed responsibility for closing the McLaughlin Pit and any necessary cleanup. (Exhibit P87.) The Regional Board Staff was so advised as Staff recorded in its file notes:

> Apollo no longer owns the concrete waste pit. They sold the property to Western Precast Products, Inc. [owned by Ken Thompson]. Western Precast Property assumed the investigation and cleanup . . . when they bought property from Apollo. McLaughlin Enterprises has been retained by Western Precast to do the investigation and cleanup.

(Exhibit P27 at PSI 3000288 and PSI 3000320.) The Regional Board's own files demonstrate that the Regional Board Staff knew in 1987 that the new owner of the McLaughlin Pit took responsibility for its clean up and closure from Apollo. (Exhibit P27.) Despite this assumption of responsibility, the Regional Board Staff did not seek financial assurances from either Ken Thompson, Inc., the purchaser of the McLaughlin Pit, or from Apollo, the previous owner and operator, even though the Regional Board Staff was well aware that the latter was in the process of going through bankruptcy, nor did it file a claim in bankruptcy court.

On February 25, 1987, Ken Thompson, Inc. submitted an Environmental Assessment Review to Rialto as part of its application for a permit to build a concrete pipe manufacturing plant on the 160-Acre Property, in part, over the McLaughlin Pit. (Exhibit P85.) Under "Health Hazards," the report states:

> Parcel 11 contains an open pit formerly used as a disposal area for fireworks-related wastes and other residual materials. <u>The project applicant will contract with a disposal firm to clean up and fill in the pit prior to implementation of portions of this project. Cleanup activities will include analysis of the pit's contents, burning of the residuals if possible or alternative</u>

disposal of the material at a certified waste disposal site, testing for possible groundwater contamination due to leeching, disposal of any remaining residuals onsite following chemical decontamination, and filling and closure of the pit. As such, the cleanup program will require permits, approvals and/or supervision from Rialto Fire Department, the San Bernardino County Department of Environmental Health Services, the South Coast Air Quality Management District, the Santa Ana Regional Water Quality Control Board, the California Department of Health Services, and possibly, the U.S. Environmental Protection Agency.

(Emphasis added.)

The Ken Thompson, Inc. Environmental Assessment Review report continued in the "Recommended Mitigation" section:

Prior to any grading, construction or installation of equipment on Parcel 11, the applicant shall have completed a satisfactory cleanup program of the fireworks residual pit on Parcel 11 and shall have certified the satisfactory completion of that program in a report to the City Engineer. As part of that cleanup program, the applicant shall obtain all necessary permits or approvals from local, state and/or federal agencies as required.

(Emphasis added.)

The environmental assessor determined that the proposed Ken Thompson, Inc. project could have significant effects on the environment, absent the required mitigation measures. (Exhibit P85 at PSI 3000559.) Thereafter, Rialto issued a negative declaration under CEQA requiring the cleanup program for the "fireworks disposal pit" as a mitigation measure and that a report showing completion of the cleanup be submitted to the Rialto City Engineer before any grading or construction take place. (Exhibit P86.) The CEQA conditions on Ken Thompson, Inc.'s development at the 160-Acre Property were never and are still not satisfied. Nevertheless, Rialto issued the permit to Ken Thompson, Inc. and it graded the area, likely moving contaminated soil all over the place as well as utterly failing

to close and cleanup the pit in accordance with Subchapter 15. It is also clear Ken Thompson, Inc. began grading operations in July 1987, well before any sampling or the alleged "closure" of the McLaughlin Pit. (Exhibits P88.)[7]

Negotiations between Ken Thompson, Inc.'s representatives and the Regional Board Staff resulted in the decision of the Regional Board Staff to require only two shallow soil borings for just four heavy metals in order to determine whether any waste had leaked or spilled from the pit during its 16 years of operation and reached the groundwater. (Exhibit P92.) Then, on the day of the actual sampling, the drill bit broke while drilling the first boring and before reaching the bottom of the planned sampling location and only one sample was retrieved that arguably could have been below the McLaughlin Pit. The drill point at the boring was approximately one to three inches below the McLaughlin Pit. (McLaughlin Depo., Vol. 2, February 22, 2007,405:17-19.) No other soil sampling was required by the Regional Board Staff to try to confirm whether the McLaughlin Pit was leaking. (Exhibits P94.)

Regional Board Staff did not request McLaughlin to do an investigation or analysis of the different ingredients in fireworks compositions. (McLaughlin Depo., February 22, 2007, Vol. 2, 235:19-21.) Regional Board Staff did not request McLaughlin to investigate the metals that might be specific to fireworks. (McLaughlin Depo., February 22, 2007, Vol. 2, 237:5-8.) Mr. McLaughlin was familiar with potassium perchlorate and oxidizers. (McLaughlin Depo., December 1, 2006, Vol. 1, 170:19-25). Mr. McLaughlin testified under oath that if requested by the Regional Board Staff he could have tested for potassium perchlorate in the soils at the time the McLaughlin Pit was closed. (McLaughlin Depo.,

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[7]Despite its failure to satisfy the mitigative measures required to comply with CEQA, Ken Thompson, Inc. is no longer named as a defendant in Rialto's federal litigation. Rialto inexplicably has given Ken Thompson, Inc. a free pass. Rialto initially sued Ken Thompson, Inc. in its federal case. After an email from Ken Thompson, Inc. to Robert Owen, City Attorney for Rialto, Rialto filed an amended complaint that no longer named Ken Thompson, Inc. as a defendant. (Exhibits P114 and P116.)

December 1, 2006, Vol. 1, 171:1-3.) Regional Board Staff never requested or required that McLaughlin sample for any oxidizers. (McLaughlin Depo., February 22, 2007, Vol. 2, 235:22-25.)

On December 4, 1987, Ken Thompson, Inc. burned over 54,000 pounds of Class I hazardous waste which had accumulated in the McLaughlin Pit as one of the final steps in the alleged "closure" of the McLaughlin Pit. Approval from the California Department of Health Services, now the Department of Toxic Substances Control ("DTSC") was required. (McLaughlin Depo.,Vol. 1, December 6, 2006, 72:25 - 73: 8; 145:21 - 146:6.) DTSC approval was never obtained. (McLaughlin Depo. Vol. 1, December 1, 2006, 159:2-6.) Indeed, DTSC previously had rejected Mr. McLaughlin's proposal to treat the McLaughlin Pit on-site. (McLaughlin Depo. Vol. 1, December 1, 2006, 148:11-12; 151:3-6.)

However, the Regional Board continued its involvement in the "closure" of the McLaughlin Pit after DTSC rejected Mr. McLaughlin's proposal for on-site treatment. (McLaughlin Depo., December 1, 2006, Vol. 1, 131:17-21.) The Regional Board Staff agreed with the burning of the McLaughlin Pit, (McLaughlin Depo., February 22, 2007, Vol. 2, 294:14-20); and, independently approved the "closure." (McLaughlin Depo., February 22, 2007, Vol. 2, 294:6-9.)

The only permit obtained for this burn of 54,000 pounds of Class I hazardous waste was issued by Rialto Fire Department, without the required endorsement by the AMQD and in open disregard of DTCS requirements. Moreover, the permit did not allow for the burning of 54,000 pounds of Class I hazardous waste and was limited to the burning of 50 pounds of material. (Exhibit P103.) Nevertheless, with Dan Brown of the Regional Board Staff and Rialto Fire Department present to observe this illegal step in the alleged closure, the hazardous waste was burned in a very intense fire lasting over four hours. (Exhibit P105.)

On December 9, 1987, without any further comment or decision by the Regional Board Staff, Ken Thompson, Inc.'s consultant, Mr. McLaughlin, who lacked the requisite training and engineering certifications mandated by Subchapter 15, declared, and the Regional Board Staff accepted, that the McLaughlin Pit had been "closed" and that the two

shallow samples taken proved that the pit had not leaked in 16 years. Despite "considerable concern that the material in the pit had possibly contaminated the soil and/or groundwater under the pit," Mr. McLaughlin concluded and the Regional Board Staff concurred that "neither the soil nor groundwater have been contaminated" and "there has been no leakage of material from the pit." (Exhibits P105 to P107.) All reporting and freeboard violations and the legally mandated closure requirements of Subchapter 15 simply were ignored and the groundwater was never sampled. Thereafter, with Rialto's approval, the McLaughlin Pit with ashes remaining was buried in place, and Ken Thompson, Inc.'s facility was constructed on top. (Exhibit P103 at PSI 3000610.)

Prior to December 1987, 23 CCR § 2580(a) required all Class I hazardous waste units to be closed in accordance with "the monitoring program requirements in Article 5 of this subchapter, throughout the closure and post-closure maintenance period. The post-closure maintenance period shall extend as long as the wastes pose a threat to water quality." 23 CCR § 2597(d) provided that the "regional board shall approve . . . the water quality aspects of closure and post-closure maintenance plans for Class I waste management units." Article 5, 23 CCR § 2557(e), provided that, "[f]or Class I waste management units, dischargers shall analyze samples from all monitoring points for all constituents identified in Appendix III of this subchapter. Such analyses shall be performed at least annually to determine whether additional hazardous waste constituents are present in ground water." In 1987, Appendix III, Table B, to Subchapter 15, listed potassium perchlorate as one of the toxic chemicals for which monitoring was required.

Subchapter 15 also required that closure be "under the direct supervision of a registered civil engineer or a certified engineering geologist." (Section 2580(b).) (Exhibit P.73.) Mr. McLaughlin, the consultant retained by Ken Thompson, Inc. was neither. Mr. McLaughlin's formal training was in physics and he was not certified as any kind of engineer. (McLaughlin Depo., December 1, 2006, Vol. 1, 26:14-27; 43:15-18.) It is beyond dispute that the Regional Board Staff failed to enforce and Ken Thompson, Inc. failed to comply with the mandatory requirements of Subchapter 15.

In 1991, Advocacy Team member Gerard Thibeault, who had been with the Regional Board Staff since 1985 and was then its Executive Officer, recommended to the Regional Board that the waste discharge requirements for the McLaughlin Pit be rescinded without any further investigation or compliance with Subchapter 15. (Thibeault Depo., Vol. 2, March 16, 2007, 477:25 - 478:3; Exhibits P108 and P109.) On February 8, 1991, the Regional Board rescinded the waste discharge requirements for the McLaughlin Pit without ever testing for perchlorate or any other chemicals in the soil or groundwater, other than two shallow soil samples for four heavy metals.

The McLaughlin Pit remained buried and forgotten by the Regional Board Staff until April 2002, when a consultant hired by the San Bernardino County Water District (now West Valley Water District) issued an investigative report prepared by GeoLogic on potential historical sources of perchlorate in the Rialto/Colton Groundwater Basin. (Exhibit P129.) The April 2002 GeoLogic report, submitted to the Regional Board Staff on April 17, 2002, identified Apollo, a number of other fireworks manufacturers, and the McLaughlin Pit as potentially one of the most significant sources of perchlorate releases which required further investigation:

> According to the MSDSs on file, RDF [defined in the report to include Apollo] stored and used numerous firework and explosive materials, which contain perchlorate salts. However, no records of soil or groundwater sampling, nor records of air quality monitoring were found within HazMat Division files. Within the files found at County HazMat, of particular concern is a report, included in Appendix G, regarding a closed-in place concrete lined pit [the McLaughlin Pit], which used to be filled with partially defective components of munitions and fireworks. . . . Although the report states that no leaching of contaminants from the pit to the underlying soils and groundwater occurred, no evidence of that exists in the data contained in the files. The pit was closed in place after residual materials were detonated within the pit in December 1987 and backfilled with clean soil.

(Exhibit P129 at PSI 3000777.) Based on these findings, the April 2002 GeoLogic report recommended "direct authoritative inquiries to Red Devil Fireworks . . . in order to obtain more information about their almost 40-years [sic] of operations at the site." (Exhibit P129 at PSI 3000778.)

The perchlorate release disaster at Robertson's gravel washing operation and unlined settling ponds also remained hidden by the Regional Board Staff. The April 2002 GeoLogic Report recommended, however, that the "[e]ntire area of the former Rialto Ammunition Backup Storage Point (RABSP) be investigated," including the "Broco/Denova sites." These areas included the bunkers over which the Regional Board Staff permitted the County's tenant to place its gravel washing operation and settling ponds. Indeed, the April 2002 GeoLogic Report contained diagrams that identified the historical occupants of each of the bunkers where the settling ponds were placed. (Exhibit P129 at PSI 3000779.)

On May 23, 2002, Senator Nell Soto wrote Gerard Thibeault asking a number of direct questions concerning the lack of progress by the Regional Board Staff in its investigation and cleanup of perchlorate in the Rialto/Colton Groundwater Basin. Senator Soto's letter specifically referenced the April 2002 GeoLogic Report and asked, among other questions: (1) what facilities is the Regional Board aware of as the result of its investigation, other than Goodrich and Kwikset, that are possible sources of perchlorate in the groundwater (Question 5); and (2), referencing the April 2002 GeoLogic report, "[w]hat effort had been made by the RWQCB to correlate the operations of Red Devil Fireworks and Broco/Denova to perchlorate contamination?" (Question 6.) (Exhibit P123.)

On June 6, 2002, Mr. Thibeault provided the following misleading response to Senator Soto's Question 5:

> We are not aware of any other facilities in the vicinity of the site that have been identified as having used perchlorate, or that were subject to a related regulatory enforcement action in the past. In addition, our investigation concluded that Goodrich and Kwikset are the most likely sources of perchlorate based on the time period they operated.

(Exhibit P125 at PSI 3000713.)

In response to Question 6, Mr. Thibeault wrote:

> We have not yet pursued additional detailed investigations to correlate operations at Red Devil and Broco/Denova to perchlorate contamination. This is because the preliminary information we have indicates that these facilities may not be likely sources. However, we will attempt to obtain additional information on these sites. It appears that the assembly, storage and shipping of fireworks, and not necessarily the manufacture of fireworks, which is the type of activity that likely would have resulted in a release of perchlorate. We have no evidence of disposal or use of perchlorate at the current Pyro Spectacular facility. Based on our experience in this region, and the information obtained from perchlorate groundwater investigations that have been conducted outside of our region, it is apparent that solid rocket propellant manufacture and research facilities have generally been the primary sources of perchlorate found in groundwater.

(Exhibit P125 at PSI 3000714.)

Except for the sentence relating to PSI, these statements in Mr. Thibeault's letter to Senator Soto were false. With regard to the County Release as a significant source of perchlorate, which Mr. Thibeault and his staff completely omitted from their response to Senator Soto, as noted above, in March and April 2001, more than a year before Mr. Thibeault's June 6, 2002 letter, the County wrote Dixie Lass of the Regional Board Staff and reported rising concentrations of perchlorate (250-270 ppb in January 2001) in a monitoring well downgradient of Robertson's aggregate washing operations and settling ponds, and urged prompt action. Nor did Mr. Thibeault mention the Regional Board Staff had approved the settling ponds without liners, let alone, that in his opinion, Staff had negligently caused this release.

With regard to the the Apollo Releases, Mr. Thibeault did not report to Senator Soto that he, Mr. Berchtold, and Mr. Holub, all current members of the Advocacy Team, have

been aware for many years of Apollo's large-scale fireworks manufacturing operations on the 160-Acre Property, the disposal of thousands of gallons of Class I hazardous wastes at the McLaughlin Pit that contained perchlorate, and his and the Regional Board Staff's decision not to compel closure under Subchapter 15 of the State Water Board's regulations.

On June 8, 2002, Gerard Thibeault, Kurt Berchtold, Robert Holub, Ann Sturdivant, and Kamron Saremi, all members of the Advocacy Team, met with Senator Soto and her staff to discuss the progress of their investigation. On June 11, 2002 Mr. Thibeault wrote a detailed e-mail to the members of the Regional Board summarizing his meeting with Senator Soto, who, Mr. Thibeault reported, started the conversation by threatening to get him fired:

> The Senator said that she was thinking of going to the Governor and ask why he had me working for the Board, since I obviously didn't know what I was doing. She said that she was going to get to the bottom of this matter, and if necessary, she would hold Senate hearings.

(Exhibit P126.) Mr. Thibeault confirmed at his deposition that he felt threatened by the Senator's comments. (Thibeault Depo., Vol. 1, March 14, 2007, 191:3-21.)

In his e-mail to the members of the Regional Board, Mr. Thibeault attempted to deflect attention from the evidence regarding the McLaughlin Pit in the April 2002 GeoLogic report, which, if examined, would lead directly back to staff negligence. He wrote:

> [It] added very little to what [staff] already knew of responsible parties. . . [and that while] . . . [t]here have been a number of fireworks manufacturers at the site since Goodrich left, but information to date indicates that these were just fireworks assembly companies, and that no actualy [sic] manufacturing took place where perchlorate-containing liquids would have been present.

(Exhibit P126 at PSI 3000757.) This statement is false.

If the Regional Board Staff already knew and remembered Mr. Berchtold's and Mr. Holub's inspection and enforcement work at Apollo, then they also knew before the letter was written to Senator Seto that Apollo was the largest manufacturer in the 1970s and 1980s of

fireworks in the United States, and that Mr. Thibeault had recommended rescission of Apollo's waste discharge requirements without any compliance with Subchapter 15 whatsoever.

The Subchapter 15 McLaughlin Pit closure remains unaddressed. There is no record of the Advocacy Team ever having publicly advised members of the Regional Board of its negligent acts or omissions regarding the McLaughlin Pit. It is unknown whether the Advocacy Team, in either its prosecutorial or advisory capacity, has ever so advised the members of the Regional Board, the Office of Chief Counsel for the State Water Board, or the members of the State Water Board in closed session or otherwise.

For reasons known only to the Regional Board Staff, Ken Thompson, Inc., who owns the property where the McLaughlin Pit is located and who agreed in 1987 to close and clean up any releases from the McLaughlin Pit, has never been required to do anything and has never been the subject of a clean up and abatement order. In paragraph 7 of the closing instructions to the property purchase, Ken Thompson, Inc. ("Buyer") agreed:

> Buyer is aware that the subject property contains a fireworks residual pit of hazardous material, and Buyer is in possession of a letter dated January 26, 1987 from McLaughlin Enterprises outlining an approach for the cleanup of the fireworks residual pit. Buyer and Seller [Apollo] agree that seller shall credit to Buyer by a reduction in Buyer's note created in this escrow the sum of 29,800 in consideration of Buyer's full and complete release of all Seller's responsibilities related to the fireworks residual pit.

(Exhibit P87 at PSI 3000565.) The Advocacy Team is well aware Ken Thompson, Inc. is responsible for Apollo's use of the McLaughlin Pit, because it sent Ken Thompson, Inc. an investigation order on February 6, 2004 based on Apollo's use. (Exhibit P112.) Documents attached to the Advocacy Team's February 6, 2004 order make it clear that "Excerpts from Pyrotronics 1985 Hazardous Materials Disclosure Form includes the use of 25,000+ pounds

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per month of potassium perchlorate." Since issuing the investigation order in February 2004, nothing more has been required of Ken Thompson, Inc. by the Regional Board Staff. (Exhibit P115.)

C. Chilean Fertilizer

Since at least 2004, the Advocacy Team has been aware that a possible source of perchlorate in the Santa Ana region is from historical use of Chilean nitrate fertilizer. (Holub Depo., Vol. 1, March 8, 2007, 126:14 - 127:4; Saremi Depo., Vol. 2, March 23, 2007, 538:3-8.) Chilean nitrate fertilizer contains perchlorate in amounts of 0.2 percent or more. (Exhibit P134.) Chilean nitrate fertilizer was used for many, many years in the Inland Empire, particularly with respect to citrus. (Holub Depo., Vol. 2, April 4, 2007, 428:4-8.) Lots of citrus was grown on farms in Rialto, dating back as far as the early 20th Century. (Holub Depo., Vol. 2, April 4, 2007, 436:11-437:8.)

One way that the perchlorate and nitrate could leach out and get into the groundwater is through the irrigation process. Farmers put fertilizer out on the ground when the trees are growing. Then they introduce water irrigation to the area so that plants get watered. The perchlorate, which is very soluble, leaches out of the fertilizer and goes directly into the ground surface. Because of the constant irrigation, the water source pushes the nitrate and perchlorate down. (Holub Depo., Vol. 2, April 4, 2007, 431:1-19.) The other way perchlorate from Chilean fertilizer would reach groundwater, which would be much more accelerated, would be through agricultural wells or other wells that have not been properly abandoned during storm runoff. (Holub Depo., Vol. 2, April 4, 2007, 431:20-25.)

Low concentrations of perchlorate that are found in water wells in the Inland Empire likely resulted from the historical use of Chilean fertilizer on the citrus groves in those areas. (Holub Depo., Vol. 1, March 8, 2007, 128:19 - 129:3; 430:17-24.) It has been documented through analytical testing done by U.S. EPA and others that Chilean fertilizer contained low concentrations of perchlorate salts and Chilean fertilizer was used as a fertilizer on citrus groves historically in the Inland Empire. (Holub Depo., Vol. 1, March 8, 2007, 128:4-9.)

The Advocacy Team admits that perchlorate concentrations below about 15 parts per billion and more likely in the single-digit range are likely from Chilean fertilizer. (Holub Depo., Vol. 1, March 8, 2007, 128:10-18, Vol. 2, April 4, 2007, 435:18 - 436:1.) Within the Rialto-Colton basin, there are water supply wells in the lower Rialto basin that have low concentrations of perchlorate that the Advocacy Team believes were caused by perchlorate from Chilean fertilizer, not industrial sources. (Holub Depo., Vol. 1, March 8, 2007, 130:11-17.) These include City of Colton and West Valley Water District water wells in the lower Rialto-Colton basin. (Holub Depo., Vol. 1, March 8, 2007, 130:24 - 131:12.)

The Advocacy Team recently performed its own isotope testing on certain wells in the Chino Basin to analyze whether they are affected by industrial sources of perchlorate or perchlorate from Chilean fertilizer. (Exhibit P 134.) Not surprisingly, the Advocacy Team has not performed this testing on the water wells in the Rialto-Colton Basin allegedly affected by perchlorate released from the 160-Acre Property. (Thibeault Depo., Vol.1, March 14, 2007, 72:19 - 74:6.) Despite the fact Chilean nitrate fertilizer was used on farms in Rialto for over 100 years, the Advocacy Team has made no investigation to determine where the farms were located or how much Chilean nitrate fertilizer was used. (Holub Depo., Vol. 2, April 4, 2007, 436:11-437:8.)

D. Other Sources Of Perchlorate Ignored By The Advocacy Team

The April 2002 GeoLogic report, submitted to the Regional Board Staff on April 17, 2002 (Exhibit P129), identified many other potential sources of potential perchlorate contamination in the Rialto-Colton Basin. (Saremi Depo., Vol. 1, March 22, 2007, 120:10-19). Most of these have not been investigated by the Regional Board Staff to this day. These potential source of perchlorate contamination are listed on pages SAWB000422 through SAWB000446 of the April 2002 GeoLogic Report (Exhibit P129.) Other than American Promotional Events, Broco and Trojan, the Advocacy Team still does not know whether any of the companies listed on pages SAWB000422 through SAWB000446 of the April 2002 GeoLogic audit (Exhibit P129), used or disposed of perchlorate-containing wastes. (Holub Depo., Vol. 4, April 9, 2007, 930:16-24; Sturdivant

Depo., Vol. 3, March 29, 2007, 551:1 - 570:23; 582:4 - 587:9; Saremi Depo., Vol. 1, March 22, 2007, 156:4 - 211:24.) The Advocacy Team is aware that:

- APE handled perchlorate-containing wastes. (Sturdivant Depo., Vol. 3, March 29, 2007, 553:12-15.)
- Broco used or handled perchlorate-containing wastes at the site. Broco also disposed of perchlorate-containing material onto the bare ground. (Sturdivant Depo., Vol. 3, March 29, 2007, 560:6-11.)
- Trojan used, handled or stored perchlorate or perchlorate-containing wastes. (Sturdivant Depo., Vol. 3, March 29, 2007, 586:17-24.) Trojan had perchlorate-containing wastes and disposed of it onto the bare ground. (Sturdivant Depo., Vol. 3, March 29, 2007, 587:10-15).

The April 2002 GeoLogic Report spends two full pages discussing Broco/Denova Environmental. (Exhibit P129, SAWB000398-399.) The discussion includes the $2,494,318 fine and revocation of the company's authorization to accept and treat hazardous waste. (Exhibit P129, SAWB000650-51.) According to Rialto's expert, the maximum perchlorate concentration of 212,000 micrograms per kilogram (µ/kg) in soil was found in the southeast corner of the 160-Acre Property at the Broco Pit, a backfilled disposal Pit. (Declaration of Daniel B. Stephens, submitted by Rialto on April 12, 2007, p. 6.) According to deposition testimony from Advocacy Team member Ann Sturdivant, Denova operated a facility northwest of the 160-Acre Property. (Sturdivant Depo., Vol. 3, March 29, 2007, 471:15-20.) The DTSC was involved at the Denova site. (Sturdivant Depo., Vol. 3, March 29, 2007, 472:25 - 473:4.) Munitions were exploded in sealed containers, but Ann Sturdivant does not know whether Denova burned perchlorate-containing waste. (Sturdivant Depo., Vol. 3, March 29, 2007, 473:17- 474:7.) She does not know about the condition of the groundwater vertically below Denova. (Sturdivant Depo., Vol. 3, March 29, 2007, 477:2-8.)

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VII. THERE IS NO BASIS FOR AN AWARD OF DAMAGES IN THIS PROCEEDING

The Advocacy Team seeks recovery of its own costs and those incurred by Rialto, Colton, and West Valley Water District to clean up the alleged contamination. (Draft CAO, ¶ 73.) There cannot be a recovery of costs in this proceeding because the Advocacy Team cannot prove the threshold requirement that PSI violated Water Code Section 13304(a). In addition, the Advocacy Team's reliance on Water Code Section 13304(c) for its cost recovery claims is legally misplaced. Water Code Section 13304(c) is clear on its face that any cost recovery claims must be brought in a "civil action." A civil action takes place in a court. (Code of Civil Procedure Sections 22, 24 and 30.) This proceeding is not a "civil action" as required by Water Code Section 13304(c) for cost recovery claims. Accordingly, no award of clean up costs against PSI is permitted.

VIII. THERE IS NO BASIS FOR FURTHER INVESTIGATION BY PSI

The Draft CAO seeks an order under Water Code Section 13267 for additional investigation of soil and groundwater at the and downgradient of the 160-Acre Property to further delineate sources of perchlorate and TCE and the downgradient extent of the plume of perchlorate and TCE. There is no basis to order PSI to perform additional investigation.

First, it is undisputed that PSI never used TCE. Thus, there is no basis for requiring PSI to investigate sources of TCE or the extent of the TCE plume.

Second, all soil samples from PSI's operational areas on its leasehold on the 160-Acre Property have been non-detect for perchlorate. (Exhibit P10.) Based on the data, Gerard Thibeault sent PSI a letter on March 5, 2005 stating that no additional soil samples were required at PSI's facility. (Exhibit P12.) No basis has been given by Regional Board staff to change this position.

Third, Advocacy Team member Gerard Thibeault testified that if convincing evidence was provided that a suspected discharger had not "discharged or was not threatening to discharge in such a way that groundwater is, has been, or might be affected, then they wouldn't have to – it's my understanding they wouldn't have to proceed any further." (Thibeault Depo., Vol. 1, March 14, 2007, 208:15-209:9.) The evidence submitted by PSI

and the total lack of evidence submitted by the Advocacy Team establish that PSI has not discharged perchlorate to groundwater or in a manner that threatens groundwater. Accordingly, there should be no further investigation orders against PSI in connection with the 160-Acre Property. The Advocacy Team admits that a number of parties operated at the 160-Acre Property, including PSI, and they have not made an attempt and it probably is not technically possible to differentiate which perchlorate from which party or how much perchlorate from each party got to groundwater. (Holub Depo., Vol. 1, March 8, 2007, 184:4-20.)

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

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

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

X. RESERVATION OF RIGHTS

This proceeding violates PSI's right to due process for the reasons previously set forth in each of the motions, objections and letters that were submitted to the Hearing Officer by PSI, Goodrich and the Emhart Parties. PSI incorporates all of the motions, objections and letters submitted to the Hearing Officer by PSI, Goodrich or the Emhart Parties as though fully set forth in this brief. PSI reserves all of its rights to challenge the legality of this proceeding in any court of competent jurisdiction, and intends to do so, if

necessary, at the appropriate time. PSI's participation in this hearing is not a waiver of its legal rights and remedies.

XI. PSI'S INCORPORATION OF OTHER SUBMISSIONS

PSI incorporates the submissions of Goodrich and the Emhart Parties, unless otherwise indicated by PSI. PSI does not incorporate the submissions of Goodrich and the Emhart Parties addressing application of Water Code Section 13304(j) or the Emhart Parties' submissions on "successor liability issues."

DATED: April 16, 2007

RESOLUTION LAW GROUP, P.C.

By: _____
Philip C. Hunsucker
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 **April 17, 2007**, following ordinary business practice, I served the foregoing documents described as:

PYRO SPECTACULARS, INC.'S ("PSI") HEARING BRIEF.

On the following Person(s):

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

State Water Board (via Hand-Delivery)
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Senior Staff Counsel
Water Resources Control Board
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Rialto (via Hand-Delivery)
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Advocacy Team (via Hand-Delivery)
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__X__ (**FEDERAL EXPRESS BY OVERNIGHT MAIL**) I caused such envelopes to be delivered to an overnight service with delivery fees provided for, addressed to the person(s) whom it is to be served.

SARWQCB (via Federal Express)
Gerard J. Tibeault
Executive Director
Santa Ana Regional Water Quality Control Board
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X (**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.

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

Executed on **April 17, 2007** at Lafayette, California.

Marie Montoya