

# SAN GABRIEL VALLEY WATER COMPANY

November 28, 2012



Ms. Jeannine Townsend  
Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24<sup>th</sup> Floor [95814]  
Post Office Box 100  
Sacramento, CA 95812-0100

Re: Comments to A-1824 – December 4, 2012 Board Meeting  
Preservation of Fontana Water Company Rights

Dear Ms. Townsend:

## 1. INTRODUCTION

Fontana Water Company requests that the SWRCB's proposed settlements with the PRPs in the Rialto-Colton groundwater basin not impair the rights and remedies of Fontana Water Company for contamination of its wells and groundwater supply, because the proposed settlements do nothing to remediate or compensate Fontana Water Company for contamination of its wells. Similarly, the SWRCB should not limit its own ability to protect Fontana Water Company and its customers from past or future groundwater contamination.

Fontana Water Company, a division of San Gabriel Valley Water Company, provides water utility service to a population of 210,000 in its 52-square mile service area, encompassing most of the City of Fontana, portions of Rancho Cucamonga and Rialto, as well as adjacent unincorporated areas of the County of San Bernardino ("County"). It is the largest water supplier in the area contaminated by perchlorate and other contaminants from the County's Mid-Valley Sanitary Landfill and the 160-acre BF Goodrich Superfund site.

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Many Fontana Water Company groundwater wells are already contaminated by perchlorate and other contaminants, and 11 of them have been shut down due to perchlorate levels that reached or exceeded the maximum contaminant level of 6 ppb, and cannot be used without first treating the water. Fontana Water Company has lost more wells and more groundwater production capacity than any of the other affected water suppliers. The existing and proposed remedies for groundwater contamination from the 160-acre Goodrich Superfund site and the County landfill only treat wells southeast of those pollution sites, but not Fontana Water Company wells located south of and threatened by those known sources of pollution. Nor do the proposed settlements provide any compensation for our past or future groundwater treatment costs.

## **2. FONTANA WATER COMPANY'S PRIOR LITIGATION AND NEGOTIATIONS**

In 1998, Fontana Water Company entered into a Settlement Agreement with San Bernardino County, whereby the County accepted responsibility for volatile organic compounds ("VOCs") and certain other chemicals leaking from the County Landfill, which contaminated our wells. Fontana Water Company pumps and treats three production wells pursuant to this Settlement Agreement to assure a safe and reliable water supply and to enable the County to meet its VOC cleanup obligations to the RWQCB. However, this 1998 Settlement did not directly resolve the County's responsibility for perchlorate contamination of Fontana Water Company's wells.

Fontana Water Company was initially a plaintiff in the U.S. District Court CERCLA litigation, but Fontana Water Company withdrew its claims without prejudice in late 2007, in the expectation that the state and federal enforcement agencies (e.g., EPA, SWRCB, and DTSC) would adequately investigate and implement a remedy, and that the County would negotiate with Fontana Water Company in good faith to resolve its liability for perchlorate contamination. But that has not happened yet. Until now, the enforcement agencies have failed to adequately address contamination of Fontana's local groundwater supplies.

## **3. THE PROPOSED SETTLEMENTS SHOULD NOT IMPAIR THE RIGHTS OR REMEDIES OF FONTANA WATER COMPANY OR THE SWRCB.**

Pursuant to CERCLA §9613(f)(2), SWRCB's Proposed Administrative Settlement Agreement with Pyro Spectaculars and other PRPs ("Proposed Settlement") would give them contribution protection regarding "matters addressed" in the settlement. Similarly, in

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Section 18 of the Proposed Settlement, SWRCB covenants not to take any action against the settling parties for the "Matters Addressed." However, Section 17 defines the "Matters Addressed" very broadly to include all response costs, demands, claims for remediation, etc. arising out of or relating to the "RABSP," which includes both the Goodrich site and the County landfill. Consequently, even if the ongoing isotope and hydrologic studies demonstrate that Fontana Water Company wells are contaminated or threatened by contamination from either site, the rights and remedies of both Fontana Water Company and the SWRCB to obtain remediation or compensation will be impaired, even though none of the proposed settlements remedy or compensate for contamination of Fontana Water Company's wells. The contaminated Fontana Water Company wells are outside of the scope of the claims in the federal litigation and beyond scope of the proposed remedies, i.e., southwest of the so-called "2 plumes." Section 17D of the Proposed Settlement states that it does not provide contribution protection to the settling parties, but that provision may not be able to override CERCLA §9613(f)(2).

Fortunately, this problem can be easily solved. The simplest solution is to add a sentence in Section 17 of the Proposed Settlement stating that the "Matters Addressed" do not include contamination of Fontana Water Company wells.

Precedent – This same issue arose and was resolved last year when US District Court Judge Philip Gutierrez granted the County's Motion determining the good faith of its settlement with the cities of Rialto and Colton. After extensive negotiations, the County agreed to the attached Order, signed by Judge Gutierrez, containing this exception in Paragraph 4:

**"Notwithstanding other terms of this Order, this Order does not bar claims of Fontana Water Company/San Gabriel Valley Water Company or the regulatory claims of federal or state regulatory agencies." (Page 3.)**

If SWRCB does not clarify the "Matters Addressed" to exclude contamination of our wells, then its settlement agreements should clearly state that they do not bar or limit any groundwater contamination claims of Fontana Water Company. This problem may also be curable by other contractual provisions. We are flexible about the method, but the outcome must be clear, to avoid impairing the rights of Fontana Water Company and its customers to safe drinking water. The California legislature and Governor recently declared the "...established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes." Water Code §106.3(b) specifically requires the SWRCB and other state

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agencies to consider this "right to water" when adopting or establishing water policies. Impairing Fontana Water Company's legal remedies would violate its customers' right to safe, clean, and affordable water.

Very truly yours,



Timothy J. Ryan

Vice President and General Counsel

TJR:lc

Enclosure

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E-FILED 12/22/11  
#533/1083/1088

**NOTE CHANGES MADE BY THE COURT.**

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CITY OF COLTON, a California  
municipal corporation,

Plaintiff,

vs.

AMERICAN PROMOTIONAL  
EVENTS, INC., et al.,

Defendants.

AND ALL RELATED ACTIONS

Case No. ED CV 09-1864 PSG (SSx)

[Consolidated with Case Nos.: CV 09-6630 PSG (SSx), CV 09-6632 PSG (SSx), CV 09-7501 PSG (SSx), CV 09-7508 PSG (SSx), and CV 10-824 PSG (SSx)].

**[AMENDED PROPOSED] ORDER  
DETERMINING GOOD FAITH  
SETTLEMENT AND BARRING  
CLAIMS**

Judge: Honorable Philip S. Gutierrez  
Hearing Date: July 25, 2011  
Time: 1:30 p.m.  
Courtroom: 880

The County of San Bernardino (“County”), Robertson’s Ready Mix, Inc. (“RRM”), and the Schulz Trust Parties<sup>1</sup> (collectively “Settling Defendants”<sup>2</sup>) filed a

<sup>1</sup> The Schulz Trust Parties include the following: Edward Stout; Edward Stout as the Trustee of the Stout-Rodriguez Trust; Elizabeth Rodriguez; John Callagy as Trustee of the Fredricksen Children’s Trust Under Trust Agreement Dated February 20, 1985; John Callagy as Trustee of the E.F. Schulz Trust; Linda Fredricksen; Linda Fredricksen as Trustee of the Walter M. Pointon Trust Dated 11/19/1991; Linda Fredricksen as Trustee of the Michelle Ann Pointon Trust Under Trust Agreement Dated February 15, 1985; Linda Fredricksen as Trustee of the E.F. Schulz Trust; John Callagy; Mary Callagy; Jeanine Elzie; Stephen Callagy; Michelle Ann Pointon; and Anthony Rodriguez.

1 Motion for Determination of Good Faith Settlement and Barring of Claims  
2 (“Motion”) in the above-captioned action (“Consolidated Action”). The Motion  
3 relates to the settlement agreement (“Settlement Agreement”) entered into by and  
4 between the City of Colton, the City of Rialto, and the Rialto Utility Authority on  
5 the one hand, and Settling Defendants on the other hand. The Settlement  
6 Agreement is attached as **Exhibit 69** to the Declaration of Martin Refkin, submitted  
7 with the Motion.

8       ~~This matter came on regularly for hearing before this Court on~~  
9 ~~\_\_\_\_\_~~, 2011 in Department 880, before the Honorable Philip S.  
10 ~~Gutierrez.~~ After considering the moving and opposition papers and declarations of  
11 counsel, the Settlement Agreement submitted to the Court for approval, and the  
12 record as a whole, the Court hereby finds that the Settlement Agreement entered  
13 into by and between the Settling Defendants and the City of Colton, the City of  
14 Rialto, and the Rialto Utility Authority, was entered into in good faith and is fair,  
15 reasonable and consistent with the purposes of the Comprehensive Environmental  
16 Response, Compensation and Liability Act (“CERCLA”), 42 U.S.C. § 9601, *et seq.*,  
17 the Resource Conservation and Recovery Act (“RCRA”), Federal Common Law,  
18 California Code of Civil Procedure §§ 877 and 877.6(2), and state law theories for  
19 the apportionment of liability among alleged joint tortfeasors.

20       The matter having been briefed, argued and submitted for decision, and good  
21 cause appearing,

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23       **IT IS HEREBY ORDERED** that the Motion is **GRANTED**, and **IT IS**  
24 **FURTHER ORDERED** that:

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27 <sup>2</sup> The Settling Defendants include the Settling Defendants, together with certain related Defendants who  
28 are not defendants in the lawsuit, including: Robertson’s Management, LLC; RRM Properties, LTD; and  
Robertson’s Ready Mix, LTD.

1           1.     The Settlement Agreement is hereby approved as a good faith  
2 settlement and afforded all the rights and protections that accompany this  
3 determination.

4           2.     Section 6 of the Uniform Comparative Fault Act, 12 U.L.A. 147  
5 (1996), in pertinent part, is hereby adopted as the Federal Common Law in this case  
6 for the purposes of determining the legal effect of the Settlement Agreement.

7           3.     The Court further finds and determines that the Settlement Agreement  
8 has been entered into in good faith within the meaning of the California Code of  
9 Civil Procedure §§ 877 and 877.6 and the rule of *Tech-Bilt, Inc. v. Woodward-*  
10 *Clyde & Associates*, 38 Cal.3d 488 (1985).

11          4.     Pursuant to Section 6 of UCFA and Section 877.6 of the California  
12 Code of Civil Procedure, and CERCLA section 113, any and all claims for  
13 contribution or indemnity against the Settling Defendants (as defined in the Settling  
14 Agreement), arising out of the facts alleged in the Consolidated Action (except such  
15 claims which are specifically reserved by the terms of the Settlement Agreement),  
16 regardless of when such claims are asserted or by whom, are barred. Such claims  
17 by any non-settling Party are barred regardless of whether they are brought pursuant  
18 to CERCLA section 107, CERCLA section 113, or any other theory, as any claims  
19 against the Settling Defendants arising out of the facts alleged in the Consolidated  
20 Action are in the nature of contribution claims arising out of a common liability,  
21 whether framed in terms of federal or state statute or common law. Notwithstanding  
22 other terms of this Order, this Order does not bar claims of Fontana Water  
23 Company/San Gabriel Valley Water Company or the regulatory claims of federal or  
24 state regulatory agencies.

25          5.     All claims, cross-claims and counterclaims and/or any other claims  
26 which have been made or were deemed asserted and denied against the Settling  
27 Defendants in the Consolidated Action are hereby dismissed with prejudice, except  
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1 for claims expressly reserved in the Settlement Agreement.

2         6. In light of the complexity of this litigation, the public interest in  
3 prompt cleanup and the statutory goal of providing finality and certainty, the Court  
4 further finds that there is no just reason to delay the entry of final judgment.  
5 Pursuant to *Federal Rule of Civil Procedure* 54(b), judgment is hereby entered in  
6 favor of the Settling Defendants with respect to all claims, cross-claims and  
7 counterclaims against said parties in the Consolidated Action, except for claims  
8 expressly reserved in the Settlement Agreement.

9         7. The Court retains jurisdiction to oversee implementation of the  
10 Settlement Agreement.

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12                 **IT IS SO ORDERED.**

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14 Dated: 12/22, 2011

**PHILIP S. GUTIERREZ**

The Honorable Philip S. Gutierrez  
United States District Court

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