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## VIA HAND-DELIVERY, EMAIL AND U.S. MAIL

Mr. Benjamin H. Grumbles  
Director  
Arizona Department of Environmental Quality  
1110 West Washington Street  
Phoenix, Arizona 85007

Re: **Roosevelt Irrigation District's (RID) Response to Comments from Potentially Responsible Parties on RID's Early Response Action**

Dear Mr. Grumbles:

The Roosevelt Irrigation District (RID) has reviewed the comments submitted by the Salt River Project (dated December 4, 2009), Univar (dated December 21, 2009), the City of Phoenix (dated December 23, 2009), Air Liquide (dated January 4, 2010), Lewis & Roca (dated January 4, 2010), and Milum Textile Services (dated January 6, 2010) regarding the RID Early Response Action (ERA). RID submitted the ERA Work Plan to ADEQ for approval in order to mitigate the impacts and threatened impacts on RID's production wells from the widespread groundwater contamination in and from the West Van Buren Area (WVBA) and West Central Phoenix Area (WCPA) Water Quality Assurance Revolving Fund (WQARF) sites and the Motorola 52<sup>nd</sup> Street (M52) federal Superfund Site and the public health issues associated with that contamination. Contrary to the erroneous information contained in these comments, RID has proposed an ERA that is not only consistent with the requirements of state law, but RID's proposed ERA is extremely reasonable and cost-effective when compared to the ERA that RID could legally pursue under state law.

However, RID understands why the potential scope and cost of the proposed ERA are such major issues in the comments submitted to ADEQ, given that the parties submitting the comments have had documented "releases" at their facilities of the hazardous substances that will be addressed by the ERA. Under federal law, these documented "releases" classify the parties submitting the comments as potentially responsible parties

(PRPs), subject to joint and several liability for the response costs incurred by RID, including the costs relating to the ERA.

In their comments, the PRPs assert that the size and scope of RID's proposed ERA are excessive and inappropriate. The PRPs repeatedly state that the ERA process is intended only for localized, relatively quick, short-term source control actions to protect human health and the environment. As a result, the PRPs contend that that RID's ERA is unnecessary, too large, too costly, too complex, and too long-term to be approved hastily and without substantial stakeholder involvement. Based on these false allegations and the significant amount of erroneous information contained in the PRPs comments, RID is compelled to provide this response in order to correct the record and inform all interested parties of the applicable laws, which have been completely disregarded in the PRP comments submitted to ADEQ.

### **ERA v. Final Remedy**

The PRPs consistently fail to distinguish between the two separate reports submitted to ADEQ by RID: the Groundwater Response Action (GRA) Implementation Plan and the ERA Work Plan. These two reports have different objectives and are subject to different statutory and regulatory requirements. The GRA was submitted to clearly identify impacts of the WVBA/WCPA/M52 contamination on RID and to provide context for the ERA. The ERA Work Plan was submitted to provide the rationale for the ERA and meet the substantive requirements of WQARF rules regarding ERAs.

It is fundamentally important to understand that the objective of the proposed ERA is not to achieve a final regional remedy for the site. The ERA is a voluntarily action to quickly restore and protect RID's water supply and to protect human health and the environment from the impacts of groundwater contamination in accordance with state law. The ERA has very limited and specific requirements, and state law requires agency approval when the ERA requirements are met. On the other hand, RID's GRA is an initial proposal for a reasonable, cost-effective final remedy to address the regional groundwater contamination that has impacted or threatens to impact RID's wells. PRP requests for detailed analyses and stakeholder consensus will be addressed during the lengthy final remedy selection process that includes a feasibility study, stakeholder input and the evaluation of various remedial alternatives prior to agency approval.

Given the continued impact to RID's water supply and threat to human health and the environment, RID must act expediently because a final remedy could take years or decades to be approved and implemented. Although not required by the applicable ERA regulations, RID is seeking ADEQ's input on the ERA. Likewise, RID is willing to continue to inform the public of RID's efforts to restore and protect its water supply and to protect human health and the environment from the impacts of what ADEQ has described as one of the largest contaminated groundwater plumes in the United States.

### **Objectives of the ERA**

The objectives of RID's ERA include restoring a portion of RID's water supply that has been impacted by hazardous substances in the WVBA/WCPA/M52 groundwater contamination plume and protecting other RID wells from being contaminated. RID's ERA objectives to "protect [and] provide a supply of water" and "to address sources of contamination" so other RID wells are not contaminated are objectives expressly authorized for an ERA. Ariz. Admin. Code R18-16-405(A). RID's ERA also is deemed "necessary" as a matter of state law because RID's wells are impacted and/or threatened by contamination. Ariz. Admin. Code R18-16-405(I). In fact, 21 RID wells are impacted and 11 RID wells are threatened by hazardous volatile organic compound (VOCs) contamination in the groundwater in the WVBA/WCPA/M52 sites. RID relies on these wells as a valuable and long-standing water supply for critical farmland and the growing West Valley communities.

In addition to restoring and protecting RID's water supply, the ERA is necessary to protect human health and the environment from exposure to hazardous substances that would otherwise continue to contaminate the groundwater and be released to air.

### **Scope of the ERA**

According to the rulemaking authorizing ERAs, "early response actions are certain remedial actions initiated by the Department or any person prior to selecting a remedy at a site." 8 A.A.R. 13, 1496 (March 29, 2002). Arizona law expressly requires that a "selected remedial action shall address, at a minimum, any well that at the time of selection of the remedial action either supplies water for municipal, domestic, industrial, irrigation or agricultural uses [and that] the specific measures to address any such well shall not reduce the supply of water available to the owner of the well." 49-282.06.B.4(b).(emphasis added)

The supply of water available to RID from the impacted and threatened wells exceeds 80,000 gpm. According to state law, any remedial action at the WVBA/WCPA WQARF sites needs to restore and protect, at a minimum, the supply of water available to RID from its impacted and threatened wells. Therefore, the scope of RID's proposed ERA appears to be extremely reasonable in that it addresses less than ¼ of the water supply that would need to be addressed by any selected remedy. RID's ERA will immediately begin mitigating the adverse impact of the widespread groundwater contamination on RID's operations and minimize the potential of an adverse impact on RID's threatened wells by treating the 10 most highly contaminated RID wells.

### **Treated Water End Use**

PRPs also raise an issue about treated water end use that is not relevant to the ERA. PRPs are concerned with RID's transition from an irrigation water provider to providing

a drinking water supply, even though other irrigation districts have made similar transitions. Contrary to PRP comments, RID is not the only entity to anticipate such a transition as indicated in SRP's Land and Water Use Study Questionnaire for the WVBA WQARF site: "*Currently, the wells provide water for irrigation but SRP anticipates that the wells will transition to drinking water supply as the area develops.*" In short, RID is transitioning to a drinking water supply as contemplated by other water providers, including some of the PRPs.

RID has the legal right to use its groundwater for any beneficial use, including as a drinking water supply. Contrary to the assertions of the PRPs, the treatment of contaminated groundwater to a drinking water standard under the ERA will not impose additional cost because state law requires water treatment under the ERA "...to allow the maximum beneficial use of the waters of the state" regardless of the actual end use. A.R.S. 49-282.06(A). Therefore, as a matter of state law, RID is entitled under the ERA to have its water supply sufficiently treated to meet the maximum beneficial use, (*i.e.*, to drinking water quality). Such a situation is currently occurring at other groundwater remediation sites in the Phoenix area including the Motorola 52<sup>nd</sup> Street Superfund Site Operable Unit 2 (OU2) and the Phoenix-Goodyear Airport - North (PGA-N) Superfund Site. At these sites, liquid-phase granulated activated carbon (GAC) treatment is required to achieve Arizona Aquifer Water Quality Standards and federal Maximum Contaminant Levels even though the end use is irrigation. Therefore, it is unclear how RID's proposed ERA is unnecessary or overly designed when the ERA is consistent with the United States Environmental Protection Agency's (EPA) approved groundwater remediation at these federal Superfund Sites, which is required, as a matter of federal law, to be consistent with all "applicable and relevant and appropriate requirements."

RID is voluntarily undertaking the ERA to restore and protect its water supply, to maintain control over its operations and to determine how best to serve its customers. RID is unwilling to have PRPs, whose "releases" have impacted or threaten to impact RID's wells, dictate how RID should operate its wells or use its water.

### **Proposed Cost of ERA**

Although the referenced PRP comments insist that an ERA must be an inexpensive, short-term action, such a conclusion is inconsistent with the expectations of ADEQ when ERAs were authorized and codified. In fact, the notice to the preamble states that "ERAs may be relatively inexpensive short-term actions, such as fencing or providing bottled water, or they may involve expensive large-scale groundwater treatment systems." 8 A.A.R. 13, 1496 (March 29, 2002).

RID's ERA proposes the use of a liquid-phase GAC system to treat the highest VOC-contaminated groundwater impacting RID's wells. Although PRPs claim that the GAC treatment system is an expensive groundwater treatment technology, the GAC treatment system has been selected because it meets the regulatory requirement that the treatment

system must be designed “based on an evaluation of potential treatment system failure that could affect public health and incorporates safeguards including ...engineering and operation controls necessary to assure protection of public health against such failure.” Ariz. Admin. Code R18-16-412. Due to intrinsic reliability of the GAC treatment technology in assuring the protection of public health (as opposed to other less expensive, but less reliable treatment options), EPA has required a GAC treatment system to be utilized at OU2 and the PGA-N Superfund Sites.

### **Conformance with Arizona Department of Water Resources (ADWR) Groundwater Policy**

Several PRPs expressed concerns regarding the impacts of “mining” additional groundwater. However, RID’s ERA does not require groundwater pumping in excess of current annual rates. In order to maximize the removal of VOC mass, to restore RID’s water supply, to protect RID’s threatened wells from impact and to minimize public health exposure, the ERA prioritizes the pumping of the impacted wells that contain the highest concentration of VOCs. Nevertheless, all RID pumping will be based on water demands, which will likely necessitate that other peripheral RID wells pump less.

PRPs also have asserted that RID’s ERA is inconsistent with ADWR’s substantive policy statement that encourages the least amount of groundwater necessary to facilitate a project’s remedial goal and that ADWR will prevent new permanent uses that would not have occurred without the incentive to use remediated groundwater. Contrary to these false assertions, RID’s proposed ERA is consistent with both ADWR policies and state law. As discussed before, state law requires any groundwater remedial action, at a minimum, to restore the water quantity and quality available to the owner of a well impacted by groundwater contamination. A.R.S. 49-282.06.B.4(b); A.R.S. 49-282.06(A). Furthermore, under the ERA, RID will not increase net groundwater pumping, but will continue to exercise its water right as it has done for over 80 years, which includes compliance with ADWR’s water management rules.

### **Lack of Comparative Analysis of Potential Remedies**

RID’s proposed ERA follows a presumptive response strategy designated by EPA<sup>1</sup>. A presumptive response strategy uses remedial technologies that have been demonstrated to be efficient, economical and effective. The use of presumptive response strategies reduces the need for detailed and comparative analysis of potential remedies, which is consistent with the intent of the Superfund Accelerated Cleanup Model.

RID’s proposed ERA uses existing RID infrastructure to facilitate treatment of VOCs in groundwater via a new GAC treatment system, a presumptive remedial technology

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<sup>1</sup> See Presumptive Response Strategies and Ex-Situ Treatment Technologies for Contaminated Ground Water at CERCLA Sites, Final Guidance, Directive 9283.1-12, EPA 540/R-96/023, October 1996

utilized in EPA/ADEQ-approved response actions at other regional groundwater contamination sites in Arizona. Of particular relevance are the ongoing regional groundwater response actions at the Motorola 52<sup>nd</sup> Street, Phoenix-Goodyear Airport, and North Indian Bend Wash Superfund Sites. At these sites, large volumes of groundwater contaminated by VOCs are pumped via extraction wells to treatment systems (that use presumptive technologies) to reduce contaminant concentrations to levels acceptable for all beneficial uses.

Although RID looked for equally feasible and economically comparable alternatives to restore RID's impacted water supply, such alternatives do not exist. Conceptually, if RID is unable to exercise its water right to pump sufficient groundwater to satisfy its customer's needs, a new replacement water supply would need to be provided by other groundwater or surface water (e.g., Central Arizona Project water). Practicably, the development of a new replacement water supply would face insurmountable administrative and legal impediments, which would require PRPs to expend substantially more than required in RID's proposed ERA.

### **Stakeholder Involvement**

RID appreciates the PRPs' noted support for a regional solution to the groundwater contamination in the WVBA,, WCPA and M52. As a harmed party, RID is interested in participating in a technical working group to address the larger and more complex issues associated with the development of the final regional groundwater remedy to address restoration of the aquifer. However, contrary to the PRPs' suggestions, any final remedy would still have to abide by the requirements of state law. RID continues to believe that RID and ADEQ should undertake the WVBA/WCPA Feasibility Study in parallel with implementation of RID's ERA. RID looks forward to working with stakeholders of WVBA, WCPA and M52 sites to appropriately evaluate and formally select the final groundwater remedy for the WVBA/WCPA sites. RID firmly believes that the ERA will not only provide more immediate restoration and protection of RID's water supply, but will likely be identified in the feasibility study as an essential element in any reasonable, cost-effective final groundwater remedy.

### **ADEQ Role**

PRPs suggest that ADEQ should reject or at least delay the approval of RID's ERA, which will restore and protect RID's water supply and protect human health and the environment. As discussed in my letter to you dated December 23, 2009, RID's ERA clearly meets all statutory and regulatory criteria, which would require ADEQ's approval. Additionally, ADEQ should approve the ERA because RID and the community impacted by the contaminated groundwater have been waiting over 20 years for some sort of remedial action.

Although it appears that these PRPs now support a regional remedy, these PRPs have never volunteered to address the regional groundwater contamination. For the past 20 years, ADEQ has been unable to propose and implement a remedy because of prior budgetary issues and lack of collective PRP cooperation. It certainly appears that the State's current budget problems will deny ADEQ sufficient funding in the near future to assume a lead role in remediating the site, which would require the State to assume the liability for any orphan shares. Therefore, not only does RID have the right to protect its water supply under an ERA, but the ERA will be a significant step toward remediating one of the largest contaminated groundwater plumes in the United States.

### **RID's Water Right**

It appears that SRP and other PRPs would have ADEQ believe that an alleged dispute over RID's water right should prevent RID from restoring and protecting its water supply and protecting human health and the environment in accordance with state law. Although the PRP allegations are not true, the issue of water rights should have no impact on the ERA or any final remedy to be selected in the future. Nevertheless, RID would like to respond to this baseless claim.

Contrary to the false assertion of SRP and other PRPs that RID's "privilege" to pump water terminates in the year 2026, all pertinent deeds and agreements establish that RID, as a matter of state law, has the "right" to pump water into the future for all beneficial uses. Although RID has provided SRP with these pertinent documents, SRP fails to provide evidence to the contrary and continues to make this false assertion. For the record, in 1921, SRP entered into an agreement with Carrick & Mangham Agua Fria Lands and Irrigation Company (Carrick-Mangham), the predecessor to RID, where SRP agreed to deed certain lands in fee simple to Carrick-Mangham. Prior to the Arizona Groundwater Code, the right to withdraw groundwater and put it to beneficial use attached to the ownership of the land. In addition to agreeing to deed lands in fee simple, the 1921 agreement established a contractual obligation on Carrick-Mangham, for 99 years, to pump a minimum of 70,000 acre/feet per year from those deeded lands.

However, the 1921 Carrick-Mangham agreement was assigned to RID and amended in 1927. Among other things, the 1927 amendment deeded the referenced lands to RID in fee simple and deleted the portion of the 1921 agreement that contained the 99-year contractual obligation to pump a minimum of 70,000 acre/feet per year. A new provision was drafted imposing a contractual obligation on RID to pump a minimum of 85,000 acre/feet per year without any time limit. The final relevant contractual amendment was dated in 1950, when SRP and RID agreed to cap the amount of water that RID could pump and transport to its service area.

Another issue raised by the PRPs, in regard to RID's water right, concerns the authority for RID to transport water from SRP's service area to its own service area in the West Valley. SRP would have the agency believe that bylaws SRP adopted in 1935 would

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somehow retroactively impact the water right RID received in 1927 as a matter of state law with the deeded land. Furthermore, the Arizona Groundwater Code adopted in 1980, authorizes water providers to continue pumping water from another service area and transporting the water to its own service area if such a practice had been done historically. A.R.S. 45-494(1)(b). RID clearly falls under this exemption in that RID has adopted that practice since 1927.

Although not relevant to the ERA, SRP and other PRP claims as to RID's water rights are frivolous. RID's water right has been initiated and perfected under State law. The only limitations on RID's water rights come from the 1950 SRP/RID agreement and the limitation imposed by the State's Active Management Area designation.

### **Conclusion**

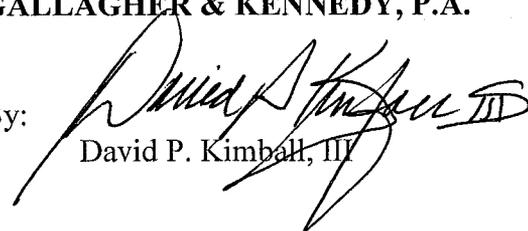
RID believes it is critical that the groundwater contamination impacting its wells and public health be addressed immediately through the ERA. RID voluntarily proposed the ERA as a reasonable, cost-effective response action, which utilizes existing RID infrastructure, to immediately restore and protect its water supply and to protect human health and the environment in accordance with state law. RID is committed to working with ADEQ, PRPs and the impacted community in order to address one of the largest groundwater contamination plumes in the United States . . . however, . . .RID is not prepared to delay the ERA as the PRPs request.

Thank you for your consideration of RID's response to the PRP comments.

Very truly yours,

**GALLAGHER & KENNEDY, P.A.**

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