Douglas J. Simpson, Bar No. 133576
Brandon J. Vegter, Bar No. 234708
THE SIMPSON LAW FIRM
A Professional Corporation
1224 10th Street, Suite 201
Coronado, California 92118
Phone: (619) 437-6900 ext. 201
Fax: (619) 437-6903
dsimpson@simpsonlawfirm.com

Attorneys for alleged Dischargers, William and Lori Moritz

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
FOR THE SAN DIEGO REGION

IN THE MATTER OF: THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, SAN DIEGO REGION, AS TO TENTATIVE CLEANUP AND ABATEMENT ORDER R9-2008-0152, v. WILLIAM MORITZ, and LORI MORITZ	WILLIAM AND LORI MORITZ'S EVIDENTIARY OBJECTIONS FOR CONSIDERATION BY RWQCB AS TO CAO R9-2008-0152 Date of RWQCB Hearing: February 11, 2009

William ("Bill") Moritz and Lori Moritz submit the following Evidentiary Objections for Consideration by the California Regional Water Quality Control Board for the San Diego Region (hereinafter "RWQCB") as to tentative Cleanup and Abatement Order ("CAO") R9-2008-0152.[1]

REQUESTED RELIEF

1. Exclusion of RWQCB's hearsay evidence, including the City of Poway's complaint; and
2. Exclusion of evidence obtained from warrantless searches.

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[1] On January 26, 2009, RWQCB moved the January 28, 2009 deadline to January 30, 2009.

FACTUAL BACKGROUND

The RWQCB relies in part on allegations set forth in the City of Poway's complaint. But the allegations are hearsay, not within any hearsay exception. The City of Poway's complaint should be excluded by virtue of California Government Code section 11513 and California Evidence Code section 1200.

The RWQCB relies in part on evidence gathered from City of Poway warrantless searches, evidence that ought to be excluded.

Administrative searches generally require search warrants. *Los Angeles Chemical Co. v. Superior Court* (1990) 226 Cal. App. 3d 703, 715-716 (affirming suppression of evidence in felony trial where fire department and health services inspectors seized evidence during warrantless administrative inspection of chemical company facility). The constitutional prohibition against unreasonable searches and seizures applies to administrative inspections as well as to police searches of individuals and private homes. *Camara v. Municipal Court of the City and County of San Francisco* (1957) 387 U.S. 523, 534. Warrantless administrative searches cannot be justified on the grounds that they make minimal demands on occupants; that warrants are unfeasible; or that inspection programs could not function under reasonable search warrant requirements. *Id.* at 531-33. *Camara* involved the inspection of a residential apartment dwelling.

The California Legislature codified the United States Supreme Court's *Camara* decision in California Code of Civil Procedure sections 1822.50 et seq., which provides for the issuance of administrative inspection warrants. *People v. Firstenberg* (1979) 92 Cal.App.3d 570, 583.

The constitutionality of a search is determined by whether a person has exhibited a reasonable expectation of privacy and, if so, whether that expectation has been violated by unreasonable government intrusion. *People v. Chapman* (1984) 36 Cal. 3d 98, 106. A private area for this purpose includes homes, enclosed backyards, and a home's curtilage. *See Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 177; *Viadurri v. Superior Court of San Diego County* (1970) 13 Cal.App.3d 550, 553; and *People v. Cook* (1985) 41 Cal.3d 373, 385.

1 The RWQCB conduct a warrantless search on June 9, 2008. Evidence obtained from that
2 warrantless search should be excluded. The Moritzes' property is surrounded by private roads, one of
3 which, Crocker Road, has no trespassing signs. The Moritzes had a reasonable expectation of privacy.
4 But RWQCB conducted a warrantless search nonetheless. No exigent circumstances were present to
5 justify a warrantless search. RWQCB could have, and should have, obtained an inspection warrants
6 pursuant to California Civil Code section 1822.50.
7 The RWQCB also relies on the City of Poway's multiple warrantless administrative inspections
8 of the Moritz property. Such evidence should be excluded.
9 Evidence obtained by administrative personnel during an unconstitutional search of residential
10 property may not be used in a criminal trial. *Vidaurri v. Superior Court* (1970) 13 Cal.App.3d 550, 552-
11 554 (marijuana plant seen by Department of Agriculture pest inspector during warrantless inspection of
12 defendant's fenced backyard was not admissible as evidence in criminal trial because search was
13 illegal). The exclusionary rule is the remedy that allows the individual to enforce his or her rights when
14 the government transgresses the constitutional limits on administrative inspections.
15 Evidence obtained during an unconstitutional administrative search should also be excluded in a
16 civil suit seeking to decree and abate a condition of property as a statutory and common law nuisance.
17 *See City and County of San Francisco v. City Inv. Corp.* (1971) 15 Cal.App.3d 1031, 1039 (objection to
18 admission of evidence in civil nuisance abatement trial was heard but properly overruled when evidence
19 of remains of a fire-gutted building were in plain view).
20 The United States Supreme Court, in *U.S. v. Janis* (1976) 428 U.S. 433, held that application of
21 the exclusionary rule in civil proceedings is determined on a case-by-case basis. (*Id.* at 446.) The
22 Court, recognizing that the rule excluding evidence obtained in violation of the Fourth Amendment is
23 designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than
24 personal constitutional rights of the party aggrieved, held that a determination of whether the
25 exclusionary rule should be applied in a civil proceeding involves a balancing test weighing the
26 deterrent effect of application of the rule against the societal costs of exclusion, as well as the effect on
27 the integrity of judicial process. The court recognized that it had never applied the exclusionary rule to
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exclude evidence from a civil proceeding, federal or state, although it acknowledged that it has applied the exclusionary rule to civil forfeiture proceedings, characterizing such proceedings as "quasi-criminal." (*Id.* at 447 n.17.) The court, nevertheless, did not explicitly rule out applicability of the rule to civil proceedings which were not "quasi-criminal." The court suggested that a determinative factor is whether the searching government official has any responsibility or duty to, or agreement with, the sovereign seeking to use the evidence, stating that in the absence of such agreement or duty, suppression of the evidence seized may not be warranted. (Id. at 448.)

The United States Supreme Court in *INS v. Lopez-Mendoza* (1984) 468 U.S. 1032, 1034, applied the balancing test announced in *United States v. Janis*, 428 U.S. 433, whereby the likely social benefits of excluding unlawfully obtained evidence are weighed against the likely costs, and found the balance comes out against applying the exclusionary rule in civil deportation proceedings, where the sole issues are identity and alienage. However, the Court expressly left open the possibility that the exclusionary rule might still apply in cases involving "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." (*Id.* at 1050-51.) The Ninth Circuit has since "t[aken] up the Supreme Court's suggestion" and "held that, even in administrative proceedings in which ... the exclusionary rule [does not ordinarily apply], administrative tribunals are still required to exclude evidence that was obtained by 'deliberate violations of the Fourth Amendment or by conduct a reasonable officer should know is in violation of the Constitution.'" *Lopez-Rodriguez v. Mukasey* (9th Cir. 2008) 536 F.3d 1012, 1018-19 (holding that exclusionary rule applies in deportation proceedings where INS agents violated the Fourth Amendment deliberately or by conduct that a reasonable officer should have known would violate the Constitution when they entered the petitioner's home without a warrant).

Like its federal counterpart, the California Supreme Court has held that application of the exclusionary rule in civil proceedings should be determined on a case-by-case basis. *In re Conservatorship of Susan T.* (1994) 8 Cal.4th 1005. Following the United States Supreme Court precedent, the California Supreme Court applies a balancing test to determine whether application of the exclusionary rule would deter the type of misconduct alleged in the case, with the social costs of

1 applying the rule to civil proceedings, as well as the effect on the integrity of the judicial process. (*Id.* at
2 1018-19.) The Court announced in *Susan T.*: "The deterrent value of the rule is at its greatest when the
3 fruits of the search will be required in evidence at a proceeding to which the rule applies." (Ibid.) *Susan*
4 *T.* decided only that the exclusionary rule does not apply in conservatorship proceedings, because the
5 purpose of the rule—deterring future unlawful police conduct—is not served in the context of such
6 cases. A mental health worker's concern is focused on protecting the potential conservatee, not on
7 gathering evidence to secure a conviction. Not only would the deterrent effect of applying the
8 exclusionary rule in conservatorship proceedings be marginal at best, application of the rule would
9 frustrate the purposes of evaluating and treating gravely disabled persons. (*Susan T.* at p. 1019.)
10 Courts in California have applied the exclusionary rule in a variety of civil contexts including
11 administrative disciplinary proceedings [*Dyson v. State Personnel Bd.* (1989) 213 Cal.App.3d 711, 721
12 (concluding that the deterrent effect of exclusionary rule weighed in favor of its application to a
13 disciplinary proceeding against counselor in juvenile facility)], replevin actions [*Kohn v. Superior Court*
14 (1936) 12 Cal.App.2d 459, (writ issued to restrain inspection of illegally obtained private documents as
15 an unauthorized exercise of judicial power in a replevin action otherwise cognizable by the respondent
16 court)] and civil narcotic commitment hearings [*People v. Bourdon* (1970) 10 Cal.App.3d 878 (finding
17 exclusionary rule respecting evidence seized as a result of an arrest without probable cause applies to
18 civil narcotic commitment hearings)].
19 Admittedly courts in California have also declined to apply the exclusionary rule in civil
20 proceedings including DMV administrative proceedings to revoke a drivers license [*Park v. Valverde*
21 (2007) 152 Cal.App.4th 877, 887 (concluding that the deterrent effect of exclusionary rule was
22 outweighed by responsibility of DMV to get drunk drivers off the road to protect society at large)] and
23 administrative disciplinary proceedings [*Governing Board v. Metcalf* (1974) 36 Cal.App.3d 546,
24 (finding protection of children from teacher convicted of engaging in an act of prostitution outweighed
25 any deterrent effect on government officials from engaging in lawless conduct)].
26 In *Dyson v. State Personnel Bd., supra*, 213 Cal.App.3d at 722, the court held that the
27 exclusionary rule applied to preclude admission in an administrative disciplinary proceeding of evidence
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unconstitutionally seized (U.S. Const. Amend. IV) from a juvenile counselor's home by an agency peace officer searching for evidence of theft of the agency's property. The court found that the evidence seized was in no way the independent work product of police work, where: (1) the search was initiated on the basis of allegations of criminal misconduct made to the agency; (2) the search was directed by, and the evidence was seized and held by the agency; and (3) the agency turned the evidence over to prosecutorial authorities for use in a criminal prosecution, retrieved it following its suppression by the court in the criminal proceeding, and introduced it in evidence in the administrative disciplinary proceeding.

In other states, courts have concluded that the exclusionary rule applies in civil nuisance abatement actions. *U.S. v. Phoenix Cereal Beverage Co.* (2d Cir. 1933) 65 F.2d 398 (holding judgment suppressing evidence obtained in illegal search and seizure was without bearing in later equity nuisance abatement suit, except to require exclusion of all evidence obtained in illegal search and seizure); *Carson v. State* (Ga. 1965) 144 S.E.2d 384 (evidence seized pursuant to deficient warrant must be excluded in a proceeding to abate public nuisance); *Carlisle v. State ex rel. Trammell* (Ala. 1964) 163 S.E.2d 596 (same); and *Jefferson Parish v. Bayou Landing Ltd., Inc.* (La. 1977) 350 So.2d 158 (holding evidence seized by sheriff's office in unlawful search was not admissible in an action to abate an enjoin a nuisance of obscenity alleged to exist at a bookstore).

Here the RWQCB should apply the exclusionary rule to exclude evidence unlawfully obtained by the RWQCB and by the City. Inspections without warrants where warrants are required violate the the Fourth Amendment. See e.g., *Lopez-Rodriguez v. Mukasey*, 536 F.3d at 1019. Courts have long held that administrative inspections of property and residential property, in particular, require search warrants and the City's inspectors should have known their conduct was in violation of the Constitution. *See Camara v. Municipal Court, supra,* 387 U.S. at 534 (inspections of apartment dwellings); *Los Angeles Chemical Co. v. Superior Court, supra,* 226 Cal.App.3d at715-716 (inspections of chemical facilities); *Viadurri v. Superior Court, supra,* 13 Cal.App.3d at 552 (inspections of residential backyards).

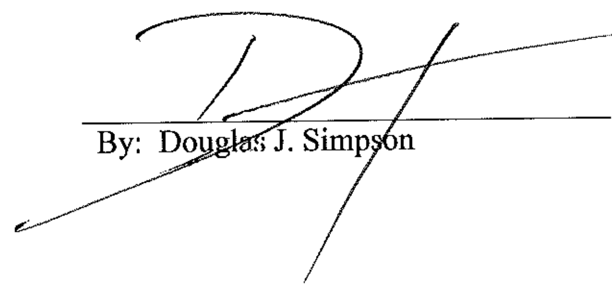
RWQCB and the City of Poway violated the Moritzes' Fourth Amendment rights by inspecting their residential property without first obtaining inspection warrants. Where the proceeding, although

"civil" in nature, is "quasi-criminal" in effect, i.e. where it involves penalties or forfeitures as is potentially the result in this administrative proceeding, the exclusionary rule is applied. *United States v. Jannis*, 428 U.S. 433, 447 n.17.) A proceeding to forfeit a vehicle used in illegal transportation of narcotics is not a criminal action, but its close identity to the aims of law enforcement makes the exclusionary rule applicable. *One 1958 Plymouth Sedan v. Pennsylvania* (1965) 380 U.S. 693. The RWQCB, once it has obtained its sought-after Cleanup and Abatement order, can then pursue penalties of thousands of dollars for noncompliance with the terms of the order.

The RWQCB's administrative proceeding is "quasi-criminal" in effect, and RWQCB consequently ought to exclude evidence from warrantless administrative searches.

Dated: January 29, 2009

THE SIMPSON LAW FIRM,
A Professional Corporation
Attorneys for Bill and LoriMoritz



By: Douglas J. Simpson