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8

9 BEFORE THE CALIFORNIA
10 STATE WATER RESOURCES CONTROL BOARD

11 IN THE MATTER OF PERCHLORATE
12 CONTAMINATION AT A 160-ACRE SITE
IN THE RIALTO AREA

SWRCB/OCC File A-1824

MOTION AND OBJECTION NO. 2:

**VACATE PRE-HEARING SCHEDULE,
HEARING SCHEDULE, AND TIME
LIMITATIONS ESTABLISHED FOR THE
HEARING FOR VIOLATION OF GOV.
CODE § 11425.10(a)(1) AND § 11513(b)
AND 23 CCR § 648(b)**

Hearing Dates: March 28-30, 2007 and April
4-5, 2007

19
20 This motion and objection are submitted by Emhart Industries, Inc. ("Emhart"),
21 Kwikset Locks, Inc. ("KLI"), Kwikset Corporation ("Kwikset"), and Black & Decker (U.S.)
22 Inc. ("BD(US)I").

23 **I. The Motion and Objection**

24 The pre-hearing submission schedule, the hearing schedule, and time limitations
25 placed on each party during the hearing set forth the Notice of Public Hearing ("Notice"),
26 issued on February 23, 2007, by the Clerk of the State Water Resources Control Board
27 ("State Board") violate Chapter 4.5 of the Administrative Procedure Act, specifically Gov.
28

1 Code § 11425.10(a)(1) and § 11513(b) and State Board Regulation 23 CCR § 648(b).

2 Thus, Emhart, KLI, Kwikset, and BD(US)I respectfully move the State Board for an order:

3 (1) Vacating the pre-hearing submission schedule, the hearing schedule,
4 and the time limitations imposed on each of the parties during the hearing;
5 and

6 (2) Requiring the parties to meet and confer and attempt to agree upon a
7 date certain upon which all pre-hearing discovery and pre-hearing motions
8 shall be completed. If the parties agree, they shall submit their agreement
9 for consideration by the Hearing Officer. If the parties cannot agree, they
10 shall submit their respective positions to the Hearing Officer. The parties'
11 submissions shall be submitted to the Hearing Officer for consideration no
12 later than March 20, 2007.

13 If this motion is denied, Emhart, KLI, Kwikset, and BD(US)I hereby object to proceeding
14 as set forth in the Notice of Public Hearing for the reasons set forth below.

15 II. The Law

16 The Notice declares that the adjudicatory hearing (March 28-30 and April 4-5,
17 2007) shall be conducted "in accordance with the State Water Board's regulations
18 governing adjudicative proceedings and incorporated provisions of Chapter 4.5 of the
19 Administrative Procedure Act ["APA"]." (Notice, at 7.) State Board regulation 23 CCR
20 § 648(b) provides: "all adjudicatory proceedings before the State Board . . . shall be
21 governed by these regulations, chapter 4.5 of the [APA] (commencing with section 11400
22 of the Government Code), section 801-805 of the Evidence Code, and section 11513 of
23 the Government Code."

24 Gov. Code § 11425.10(a), among other things, requires the State Board to "give
25 the person to which the agency action is directed notice and an opportunity to be heard,
26 including the opportunity to present and rebut evidence." Gov. Code § 11513(b) further
27 provides:

28 Each party shall have these rights: to call and examine witnesses; to
introduce exhibits; to cross-examine opposing witnesses on any matter

1 relevant to the issues even though that matter was not covered in the direct
2 examination; to impeach any witness regardless of which party first called
him or her to testify; and to rebut the evidence against him or her.

3 These rights are part of the "minimum due process and public interest requirements that
4 must be satisfied in a hearing that is subject to [chapter 4.5]." (California Law Revision
5 Commission Comments, Deering's Gov. Code § 11425.10, at 170.) Essential to all such
6 notices and opportunities to be heard is that they are reasonable:

7 Subdivision (a)(1), providing a person the opportunity to present and rebut
8 evidence, is subject to reasonable control and limitation by the agency
conducting the hearing. . . .

9 (*Id.*, at 171.) Essential to their reasonableness is that they be meaningful and provide an
10 adequate time to prepare. The notice and hearing must be fair. (*Mathews v. Eldridge*
11 (1976) 424 U.S. 319, 333 ("The fundamental requirement of [administrative] due process
12 is the opportunity to be heard at a meaningful time and in a meaningful manner.");¹
13 *Memphis Light, Gas & Water Div. v. Craft* (1978) 436 U.S. 1, 14 (The notice in an
14 administrative adjudicatory hearing must "apprise the affected individual of, and permit
15 adequate preparation for, an impending 'hearing.'"); *Nightlife Partners, Ltd. v. City of*
16 *Beverly Hills* (2003) 108 Cal.App.4th 81, 90 (Due process "always requires . . . [the]
17 'constitutional floor' of a 'fair trial in a fair tribunal,' in other words, a fair hearing before a
18 neutral or unbiased decision-maker." (*Id.*, quoting *Bracy v. Gramley* (1997) 520 U.S. 899,
19 904-905, and *Withrow v. Larkin* (1975) 421 U.S. 35, 43).)

20 III. The Relevant Facts

21 State Board Proceeding A-1824 commenced on February 5, 2007, when Acting
22 Executive Director Thomas Howard, by letter, announced:

23 [The State Board] intends to hold a hearing on this matter at the earliest
24 possible date. It is considering reviewing this matter on its own motion,
25 including all actions and inactions of the Santa Ana Regional Water Quality
26 Control Board (Santa Ana Water Board) regarding the perchlorate
27 investigation and remediation in Rialto since the issuance of cleanup and
abatement order on February 5, 2005.

28 ¹ *Mathews v. Eldridge* was made applicable to State and regional board adjudicatory hearings in
Machado v. State Water Resources Control Board (2001) 90 Cal.App.4th 720, 725-726.

1 Abandoning all noticed intention to review the actions and inactions of the Santa Ana
2 Regional Board, on February 23, 2007, the Notice identified the issues to be adjudicated
3 at the hearing, not before the State Board, but rather only its Chair, over five days --
4 March 28-30 and April 4-5, 2007. Those issues are:

5 [L]egal responsibility for site investigation and remediation; the technical
6 evidence justifying site investigation and cleanup; the feasibility and
7 propriety of cleanup and other remediation requirements; and appropriate
8 cleanup standards for protection of public health and beneficial uses of
waters of the state. The scope of the hearing will cover the 160-acre Rialto
site, including but not limited to perchlorate and [TCE] contamination,
sources, responsible parties, investigation, and remedial actions.

9 (Notice, at 2.) The Notice advised the Advocacy Team that on or before February 27,
10 2007, it must confirm or amend the allegations in a 33-page draft CAO No. R8-2005-0053
11 ("2006 CAO"), which would then constitute the prosecution's "pleading." On February 27,
12 2007, the Advocacy Team announced its intention to "use" its draft 2006 CAO "as its
13 pleading."

14 The Notice further announced the following time schedules, which the parties were
15 advised would be strictly followed: (1) all pre-hearing motions must be filed in
16 Sacramento at the State Board no later than March 5, 2007 at 5 p.m., 6 working days
17 from notice and 4 working days from notice of the Advocacy Team's "pleading" (*id.*, at 4);
18 (2) all documentary evidence, witness lists, summaries of fact and expert witness
19 testimony, expert qualification statements, and opening briefs must be submitted no later
20 than March 13, 2007, at 5 p.m., 11 working days from notice (*id.*); (3) each party has 4.5
21 hours to cross-examine the evidence against them and present their defense; (4) Emhart,
22 KLI, Kwikset, BD(US)I, and Black & Decker Inc., all of which are separate legal entities,
23 are designated as a single party and thus allotted a total of 4.5 hours to cross-examine
24 the evidence against them and present their defenses (*id.*); and (5) the hearing will
25 commence on March 28, 2007, 23 working days from notice (*id.*).

26 The Notice does not identify any exigent public health circumstance. Rather, it
27 states only that "[i]t is in the best interest of all participants and the public who reside in
28 the Rialto area that the hearings pertaining to this matter proceed in a fair, expeditious,

1 and cost effective manner. Any investigation and remediation should likewise occur
2 expeditiously." (*Id.*, at 1.)

3 The absence of any exigent public health concern in connection with the noticed
4 adjudicatory hearing has been confirmed by the City of Rialto, the Santa Ana Regional
5 Board, and the state and federal courts which have addressed this matter. The City of
6 Rialto states (without qualification) on its web site that "no detectable perchlorate is
7 allowed into the Rialto Water System and the citizens served by Rialto may rest assured
8 that their water is safe."² At public hearings, Ms. Beswick, Chair of the Santa Ana
9 Regional Board, Mr. Thibeault, its Executive Officer, and Mr. Berchtold, its Assistant
10 Executive Officer, have repeatedly reaffirmed that the water is safe.³ The Riverside
11 County Superior Court and the federal district court in Los Angeles have also found that
12 there is no exigent public health issue with regard to perchlorate.⁴

13 _____
14 ² www.ci.rialto.ca.us/perchlorate/water_2635.php.

15 ³ At a November 5, 2005, Regional Board meeting, the following exchange took place between
16 Mr. Berchtold, Mr. Thibeault, and Ms. a water quality problem with the water supply based
on what we know about the current state public of health goal, and we don't think the people
of Rialto should be concerned about the quality of their drinking water.

17 * * *
18 Gerard Thibeault: And Kurt explained that with respect to the quality of water
being provided in Rialto, and I agree with you, I don't think that the school children
should be thinking that this water is going to kill them when the concentrations are
so much lower than the State standard at which no public health effect will occur.
19 * * *

20 Carole Beswick: Can I say at the outset, I have to second Gerry's comments.

21 (11/16/05 Regional Board Tr. at 117-118.)

22 ⁴ On November 8, 2004, the Riverside County Superior Court ruled that the Santa Ana Regional
23 Board's attempt to order various parties to investigate the 160-acre site under Water Code
24 section 13267 without a hearing was unconstitutional because, in part, there was no immediate
25 public health concern: "In this case, given the large size of the burden (many thousands of
26 dollars) [now estimated by the City of Rialto at between \$200 and \$300 million], the demand
27 for testing over square miles of land not owned by Respondent, and the non-emergent nature
28 of the public health threat, the court concludes due process requires that such testing cannot be
ordered absent a finding of current or past discharge on a Preponderance of Evidence
standard." (See Ex. 21 to Emhart's Amended Petition Requesting Hearing On Disqualification
of Santa Ana Regional Board, dated June 2, 2006, in SWRCB/OCC Nos. A-1732 et al., at 3;
emphasis added.) The Regional Board did not challenge this decision; thus it is now final. On
November 1, 2006, the United States District Court for the Central District of California (Los
Angeles) dismissed the City of Colton's action for damages on the merits because it had failed
to comply with CERCLA's national contingency plan. In its decision, the Court held: "Given
the complete absence of evidence of an immediate threat to public health or the environment,

1 **IV. Argument**

2 The unilaterally imposed pre-hearing submission schedule and the hearing
3 schedule are, on their face, arbitrary, unreasonable, prejudicial, and unfair in the extreme.
4 These schedules were created without any understanding of the number of proposed
5 exhibits, the number of proposed fact and expert witnesses, the length of witness
6 testimony, the complexity of the issues, or the history of the proceedings below before
7 the Santa Ana Regional Board.

8 No time for discovery of the evidence of the Advocacy Team, the City of Rialto,
9 and the Center for Community Action and Environmental Justice, all of which are
10 prosecution parties, has been allowed, even though Water Code § 1100 and Gov. Code
11 § 11450.05 expressly provide for discovery. Six working days is grossly inadequate to
12 prepare all motions and objections to charges in the Notice and the 33-page draft 2006
13 CAO. Five working days following the filing all motions (none of which have been ruled
14 on) is grossly inadequate to assemble all documentary evidence, prepare all expert
15 reports, secure and prepare all fact and expert witnesses, and prepare all legal briefs.
16 Five workings days thereafter is grossly inadequate to prepare all rebuttal evidence and
17 briefs. And, a total of 4.5 hours is grossly inadequate for one party, let alone the four
18 "designated" "Emhart Parties", to cross-examine all the prosecution's evidence and
19 present a defense to all the charges and allegations in the Notice and the draft 2006
20 CAO.

21 The issues identified in the Notice and the draft 2006 CAO are extraordinarily
22 broad and complex. They include party liability, site investigation, the feasibility of
23 various cleanup alternatives, and appropriate cleanup standards for the 160-Acre Site. In
24 the parallel federal court cost-recovery litigation, 42 parties, only seven of which have
25 been charged in the Notice, are in the middle of fact discovery regarding liability issues
26 only. The 160-acre site investigation has not been completed by the Regional Board staff
27

28

the activities undertaken by Plaintiff cannot be characterized as a removal action."

1 or the parties. Emhart, Goodrich, and Pyro Spectaculars have been diligently
2 investigating the 160-Acre Site, at a cost to date of in excess of \$10 million.

3 These facts, coupled with the lack of an immediate health concern, make it clear
4 that the Notice violates Gov. Code § 11425.10(a)(1) and § 11513(b) and State Board
5 Regulation 23 CCR § 648(b) and the most basic requirements of procedural due process
6 of law.

7 **V. Requested Order**

8 For all the foregoing reasons, Emhart, KLI, Kwikset, and BD(US)I respectfully
9 request that the motion be granted and the following order be entered:

10 (1) The pre-hearing submission schedule, the hearing schedule, and the
11 time limitations set forth in the February 23, 2007 Notice of Public Hearing
12 are vacated;

13 (2) The parties shall meet and confer and attempt to agree upon a date
14 certain upon which all pre-hearing discovery and pre-hearing motions shall
15 be completed. If the parties agree, they shall submit their agreement for
16 consideration by the Hearing Officer. If the parties cannot agree, they shall
17 submit their respective positions to the Hearing Officer. The parties'
18 submissions shall be submitted to the Chair for consideration no later than
19 March 20, 2007.

20 Dated: March 5, 2007

Respectfully Submitted,

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23 By: 

24 James L. Meeder
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26 BD(US)I
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