



# California Regional Water Quality Control Board

## Santa Ana Region



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**Arnold Schwarzenegger**  
Governor

### ORDER REQUIRING PREHEARING STATEMENTS

### PROPOSED AMENDED CLEANUP AND ABATEMENT ORDER FOR RIALTO-AREA PERCHLORATE CONTAMINATION

Staff of the Santa Ana Regional Water Quality Control Board (Regional Water Board) has prepared a proposed Cleanup and Abatement Order to require the abatement of effects of perchlorate and trichloroethylene (TCE) (collectively "perchlorate") discharged in the vicinity of the City of Rialto, California.

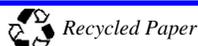
#### BACKGROUND

On February 28, 2005, the Regional Water Board Executive Officer issued a Cleanup and Abatement Order concerning perchlorate discharges at facilities located on a 160-acre site in Rialto. The Order named Emhart Industries, Inc., and Black & Decker (U.S.), Inc., as responsible parties. The Executive Officer issued an amended Order on December 2, 2005, that named Kwikset Locks, Inc., Emhart Industries, Inc., Kwikset Corporation, Black & Decker Inc., and Black & Decker (U.S.), Inc. (collectively the "Emhart Entities"). The amended Order did not, however, identify specific deadlines for investigative and remedial tasks. Rather than taking action on this issue himself, the Executive Officer chose to present the task schedule to the Regional Water Board for consideration.

Prior to convening a hearing, however, the Emhart Entities raised objections to the fitness of the Regional Water Board to adjudicate and render a decision on the amended Order. After considering alternatives, the Regional Water Board settled upon the appointment of a Deputy Executive Officer/Hearing Officer ("Hearing Officer") to consider the amended Order. In a resolution adopted on October 13, 2006, (Resolution No. R8-2006-0079) the Regional Water Board appointed Mr. Walt Pettit to serve in this capacity. Several petitions of the Resolution were filed with the State Water Board, but no orders, either to impose a stay of the Resolution or for other purposes, have been issued. Accordingly, the Resolution remains in effect and the Hearing Officer remains authorized to proceed.

Since the Resolution, the Hearing Officer has begun preparations to adjudicate issues with respect to the investigation and remediation of perchlorate in the Rialto area. Mr. Erik Spiess, Senior Staff Counsel in the Office of Chief Counsel for the State Water Board, will serve as legal advisor to the Hearing Officer. The Hearing Officer has not yet selected technical staff as advisors.

*California Environmental Protection Agency*



This Order is the next step in the process. The Hearing Officer wishes to have this matter presented for decision in the most efficient way possible. The efforts to address this contamination, which have already stretched over several years beginning in 2002, have presumably generated a large volume of technical information concerning the scope and extent of the perchlorate contamination. The apparent level of controversy throughout suggests that opportunities to fully air arguments and concerns about the conduct of the investigation and remediation have been similarly robust. The Hearing Officer wishes to make maximum use of this preexisting data and documentation, rather than require its re-creation, to permit this matter to be heard and resolved efficiently and expects the parties to respond to this Order in that vein.

This Order has two purposes. First, it outlines the principles and procedures that will apply to proceedings before the Hearing Officer on this matter. Second, the order directs all designated parties and those requesting designated party status to submit detailed prehearing statements to enable the Hearing Officer to finalize the hearing procedures. After reviewing the prehearing statements, the Hearing Officer may schedule a prehearing conference to facilitate the development of the final hearing procedure.

### **PRELIMINARY PROCEDURES**

#### **Separation of Functions**

For certain types of adjudicatory decisions, it is appropriate to institute a separation of functions to ensure the fairness of the proceedings. As announced in the Resolution, such a separation has been established in this matter as provided for in Government Code Sections 11425.10(a)(4). In this matter, the persons advocating for the issuance of the proposed amended cleanup and abatement order are grouped together as the Advocacy Staff. A different group, the "Advisory Staff" is also created to fulfill the role of advising the Hearing Officer. The composition of the two groups is as follows:

**Advocacy Staff:** Executive Officer Gerard Thibeault, Assistant Executive Officer Kurt Berchtold, and Senior Staff Counsel Jorge Leon, acting as legal advisor.

**Advisory Staff:** Senior Staff Counsel Erik Spiess, acting as legal advisor. The Hearing Officer may select technical staff to assist him and they will be members of this group.

The rule prohibiting ex parte contacts applies to these groups as explained below.

## Communication Protocol

The rule prohibiting *ex parte* contacts should be well understood by the main participants in this matter, most or all of whom are represented by counsel and have appeared before the Regional Water Board on numerous prior occasions.

Because of the controversy associated with this matter, the rule is worthy of repetition. In the context of the Rialto-area perchlorate investigation and remediation, an *ex parte* communication is “any communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication.” (Gov. Code, Section 11430.10(a); see also *Id.*, Section 11430.70.)

Certain communications are exempt from the rule: (1) those made at a noticed hearing on the item in question (Gov. Code, Section 11430.10(b)); (2) those concerning a matter of procedure or practice that is not in controversy (Gov. Code, Section 11430.20(b)); (3) those from an employee or representative of an agency that is a party for the purpose of advising the presiding officer. (Gov. Code, Section 11430.30(c).)<sup>1</sup>

Consistent with the separation of functions, members of the Advocacy Staff will be treated like any other party before the Hearing Officer throughout the proceedings, and may not have any contact with the Hearing Officer or members of the Advisory Staff on matters relating to the proceedings, except where those contacts are consistent with the limitations on *ex parte* contacts that apply to all other parties. For purposes of this memorandum, an “*ex parte* contact” is any written or verbal communication, pertaining to the Rialto-area perchlorate contamination, between a member of the Advocacy Staff and the Hearing Officer or a member of the Advisory Staff, unless the communication is copied to all other designated parties to the proceedings (if written) or made at a proceeding open to all other designated parties (if verbal). Communications regarding non-controversial procedural matters are not “*ex parte* contacts” and are not restricted.

As the proposed amended cleanup and abatement order is a quasi-adjudicative matter, *ex parte* contacts are strictly prohibited. Engaging in an *ex parte* contact is a serious matter punishable by contempt sanctions as specified in Title 23, California Code of Regulations, Section 648.8 and Government Code Sections 11455.10-11455.30.

Should a party have questions about the *ex parte* contact prohibition, it should present them in its prehearing statement.

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<sup>1</sup> As explained below, the latter exception does not apply to this proceeding because of the separation of functions. Only members of the Advisory Staff are permitted to provide off-the-record advice to the Hearing Officer.

## **PREHEARING STATEMENTS**

To better organize the proceeding in this matter, the Hearing Officer directs the submittal of prehearing statements addressing the topics presented below. Only those wishing to participate as designated parties are required to submit prehearing statements. Those who are content to participate as interested persons are **not** required to submit a prehearing statement.

### **1. Designated Party Status and Objections**

Participants at the hearing are either “parties” or “interested persons.” Parties to the hearing may present evidentiary testimony and are subject to cross-examination. Parties may also cross-examine other parties’ witnesses. Interested persons may present non-evidentiary policy statements that will be heard first, prior to the presentation of evidence by the parties. Interested persons are not subject to cross-examination and may not cross-examine other parties. **Status to challenge a decision of the Hearing Officer is not affected by classification as a designated party or interested party.**

The following participants are preliminarily designated as parties for this matter:

1. Advocacy Staff
2. Goodrich Corporation
3. Pyro Spectaculars, Inc.
4. Emhart Entities (collectively Kwikset Locks, Inc., Emhart Industries, Inc., Kwikset Corporation, Black & Decker Inc., and Black & Decker [U.S.] Inc.)
5. City of Rialto
6. County of San Bernardino

Persons may object to the above preliminary designations and to others requesting designated party status. Objections shall state supporting grounds. One potentially valid ground to object is that the party’s interests can be adequately represented by other designated parties and therefore should be eliminated or that the party should be consolidated with others to form a group party.

All other persons who wish to participate as parties must request party status. The request must explain the basis for party status, how the evidence to be presented will be distinct and of special assistance to the Hearing Officer, and the reason why the existing parties do not adequately represent the person’s interests. Objections to requests for designated parties must state supporting grounds and must be submitted by **January 29, 2007**, via email to the Hearing Officer ([wpettit@waterboards.ca.gov](mailto:wpettit@waterboards.ca.gov)), counsel Erik Spiess ([espiess@waterboards.ca.gov](mailto:espiess@waterboards.ca.gov)), and Kevin Heinemann ([kheinemann@waterboards.ca.gov](mailto:kheinemann@waterboards.ca.gov)).

## **2. Issues for Adjudication and Time Allocation**

Each statement shall identify the issues for adjudication by the Hearing Officer and shall identify a specific request of time for hearing participation. This time will be available for the party to use for any aspect of its participation (e.g., opening statement, direct and rebuttal testimony, cross-examination, authorized redirect and recross, and closing) and may be apportioned in whatever way the party desires.

## **3. Composition of the Administrative Record**

Much information and briefing have been previously prepared and circulated for this matter. Accordingly, the parties are requested, in preparing their submittals, to maximize the use of these materials for efficiency and to avoid duplication of effort.

The Hearing Officer wishes to minimize the burden on the parties of producing multiple copies of existing materials for submittal to other parties or the Hearing Officer. Accordingly, the parties are requested to propose methods to streamline the process of assembling the record. For example, one feasible alternative could consist of a document repository at the Regional Water Board office for background materials and then posting of selected key documents on the Regional Water Board's website.

## **4. Technical Advisor to Hearing Officer and Hearing Venue**

The Hearing Officer is searching for a technical expert to offer advice to him as this matter proceeds. The Hearing Officer may choose from State Board staff or from Regional Water Board staff who have not served in an advocacy capacity in this matter. The Hearing Officer requests that the Advocacy Staff provide a list of candidates who possess cogent technical expertise and have not served as members of the Advocacy Staff.

The Hearing Officer requests that the parties propose a suitable venue for the hearing on the CAO. The location should ideally be situated in or near the City of Rialto.

## **5. Discovery**

The prior proceedings have presumably enabled the parties to thoroughly brief their concerns and conduct sufficient discovery. Additional discovery is therefore not anticipated. Any requests for such discovery must be supported by a detailed justification.

Discovery requests shall be accompanied by a discovery plan. The plan shall specify document production and depositions, describe what documents would be sought and names of potential deponents, and propose a schedule to allow discovery to be

complete and evidence submitted in advance of the deadline for submittal of argument and evidence (see Draft Hearing Schedule below).

## **6. Email Service List for Designated Parties**

To permit the designated parties to easily serve documents on each other, the Hearing Officer and Advisory Staff, an Email Service List shall be established. Each party shall provide the names and email addresses of 1-2 persons to be placed on the list as contacts to receive service on behalf of that party and who will forward materials internally to other appropriate representatives of that party.

Once established, the email service list shall be used by the designated parties to serve all submittals regarding this matter, including letters, photographs, power point presentations, or any other documents or evidence of any kind.

## **7. Mailing List of Interested Persons**

The parties, particularly the Advocacy Staff, shall review the mailing list of interested persons for this order for completeness and provide contact information for any interested persons not included on the list. Once the list is complete, the interested persons will receive a letter directing them to either sign up for the email subscription list for "Perchlorate" (accessible through the following link): <http://www.waterboards.ca.gov/santaana/html/subscription.html>) or to request to continue to receive correspondence in paper form.

## **8. Draft Notice of Public Hearing**

Comments are requested on the attached Draft Notice of Public Hearing. In particular, comments are desired on the draft schedule for this proceeding (all dates are in 2007):

1/29 – Advocacy Staff Summary Report and Supporting Information and Witness List Due

1/29 – Objections to Requests for Designated Party Status Due

2/14 – Written Testimony, Evidence and Argument from Other Designated Parties and Interested Persons Due

2/20 – All Parties' Witness Lists Due

2/26 -- Advocacy Staff Response and Revised Proposed CAO Due

2/26 – All Parties' Objections to Witnesses Due

3/6 -- Rulings on Witness Objections and Final Hearing Procedure Issued

3/16 -- Tentative Decision and Order Circulated

3/21 -- Visual Aids Circulated

3/23 -- Hearing

4/4 -- Final Decision and Order Issued [tentative]

## **9. Draft Hearing Procedure**

Attached to this order is the Draft Hearing Procedure. All hearing participants are advised to carefully read and comment on it. The Hearing Procedure specifies deadlines for submission of witness lists and exhibits by parties and the order of proceedings. Once finalized after the pre-hearing statements are received, the Hearing Officer will strictly enforce the Hearing Procedure.

In addition to the procedures described in the enclosure, the Hearing Officer will conduct the hearing in accordance with the regulations governing adjudicative proceedings of the State Water Resources Control Board and Regional Water Quality Control Boards. These regulations are in the California Code of Regulations, title 23, sections 648 et seq. They are available at [http://www.waterboards.ca.gov/water\\_laws/](http://www.waterboards.ca.gov/water_laws/) or on request.

### **PREHEARING STATEMENT DUE DATES**

Prehearing statements are required to be emailed to the Hearing Officer ([wpettit@waterboards.ca.gov](mailto:wpettit@waterboards.ca.gov)), counsel Erik Spiess ([espiess@waterboards.ca.gov](mailto:espiess@waterboards.ca.gov)), and Kevin Heinemann ([kheinemann@waterboards.ca.gov](mailto:kheinemann@waterboards.ca.gov)) according to the following schedule:

Advocacy Staff: **January 19, 2007;**

Other Designated Parties (including those requesting Designated Party status):  
**January 26, 2007.**

Kevin Heinemann will distribute copies of the prehearing statements to interested persons and designated parties via the Perchlorate email subscription list or via regular mail if necessary.

January 10, 2007

**IF YOU HAVE ANY QUESTIONS**

Questions concerning the pre-hearing statements (being careful to observe the ex parte communication prohibition) may be addressed to Erik Spiess at (916) 341-5167.

It is so ordered.



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Walter Pettit  
Hearing Officer

Dated: January 10, 2007

Enclosures:           Draft Notice of Public Hearing  
                              Draft Hearing Procedure

File: CAO Prehearing Stmts Order-Signed.doc