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# State Water Resources Control Board



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March 20, 2007

### VIA U.S. MAIL AND EMAIL

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Dear Messrs. Diaz, Duchesneau, Hunsucker, León, Sommer, and Wyatt:

### RULINGS ISSUED IN RESPONSE TO PRE-HEARING MOTIONS FILED IN THE MATTER OF PERCHLORATE CONTAMINATION AT A 160-SITE IN THE RIALTO AREA SWRCB/OCC FILE A-1824

The State Water Resources Control Board (State Water Board) received numerous pre-hearing motions from the designated parties in accordance with the procedures set forth in the Notice of Public Hearing In the Matter of Perchlorate Contamination at a 160-acre Site in the Rialto Area (SWRCB/OCC FILE A-1824) dated February 23, 2007. All motions are posted on the State Water Board's web page (<http://www.waterboards.ca.gov/wqpetitions/a1824motions.html>).

As the Hearing Officer for the evidentiary hearing on this matter, I issued rulings on several of the pre-hearing motions on March 8, 2007. I am issuing rulings on the following motions at this time. These rulings are being issued in the interest of efficiency for the parties and to allow for orderly discovery and progression to a hearing. Further rulings may be forthcoming.

1. A motion was filed objecting to the authority of the Hearing Officer and the validity of the proceedings set forth in the Notice of Public Hearing issued February 23, 2007. The motion was filed by Goodrich Corporation and joined by Emhart Industries, Kwikset Locks, Inc. Kwickset Corporation (Emhart) and Pyro Spectaculars, Inc. to move the State Water Board to rescind the Notice of Public Hearing and to object to the authority of the Hearing Officer based on the argument that the Hearing Officer and Executive Director have unilaterally usurped the authority of the Regional and State Water Boards in selecting a Hearing Officer for the hearing.

The motion is denied. The Notice of Public Hearing issued February 23, 2007 and revised March 8, 2007, states the legal authority for the hearing and selection of a Hearing Officer. (Hearing Notice, p.7)

2. A motion to stay the hearing on the grounds that it violates the due process clause of the fourteenth amendment of the United States Constitution was filed by Goodrich Corporation and joined by Emhart and Pyro Spectaculars, Inc. The motion argues that the timeline for the submission of written materials, the time limitations imposed for the presentation of evidence and rebuttal of other parties' evidence at the hearing, the lack of discovery and the appearance of prosecutors in this matter as witnesses at the hearing violate due process rights.

The motion to stay the hearing is denied. No constitutional conformity issues are posed by the hearing as scheduled.

3. A motion to disqualify the Santa Ana Regional Water Quality Control Board Advocacy Team (Advocacy Team) from prosecuting Cleanup and Abatement Order (CAO) R8-2005-0053 was filed by Emhart and Black & Decker (U.S.), Inc. and joined by Goodrich Corporation and Pyro Spectaculars, Inc.

The motion is denied.

4. A motion was filed by Pyro Spectaculars, Inc. and joined by Goodrich Corporation and Emhart to dismiss the proceedings for failure to include all suspected dischargers and potentially responsible parties (PRPs) in the Draft CAO R8-2005-0053 issued October 27, 2006.

The motion is denied. Title 23, California Code of Regulations, section 2907 states that Regional Boards will make reasonable efforts to identify dischargers and require said dischargers to investigate a discharge or threat of discharge pursuant to California Water Code 13304. No mandate exists that requires the State or Regional Water Board to include all PRPs in CAOs. As stated in the Notice of Public Hearing, the purpose of the hearing is to receive relevant testimony and evidence and to hear legal argument and policy statements on issues including legal responsibility for site investigation and remediation. (Hearing Notice, p. 2) The parties can present testimony and evidence supporting the inclusion of additional PRPs for the 160-acre Rialto site in a CAO. The Draft CAO does not limit the State Water Board from adding additional PRPs, if appropriate. In addition, if a

CAO is issued by the State Water Board and new evidence is later presented that substantiates including additional PRPs in the CAO, that CAO could be amended.

5. A motion was filed by Goodrich Corporation and joined by Emhart and Pyro Spectaculars, Inc. to move the Hearing Officer to conduct a formal hearing under Government Code Chapter 5, section 11500 et seq. and to object to the informal hearing procedures as set forth in the February 23, 2007 Notice of Public Hearing.

The motion is denied.

6. A motion was filed by Goodrich Corporation and joined by Emhart and Pyro Spectaculars, Inc. to move for an order allowing for the completion of discovery prior to any hearing on the Draft CAO.

The motion is denied. However, the revised Hearing Notice issued March 8, 2007, grants all parties additional time to prepare and submit documents, testimony and exhibits, rebuttals, and PowerPoint and computer displays for the hearing on this matter. (Revised Hearing Notice, pp 3, 4).

7. A motion was filed by Goodrich Corporation and joined by Emhart and Pyro Spectaculars, Inc. to move the Hearing Officer to change the procedure for pre-hearing motions under the February 23, 2007 Notice of Public Hearing to allow for oppositions, replies, and oral hearings on the motions; to permit sufficient time for the hearing officer to consider and rule on the motions; and provide parties adequate time to incorporate rulings on motions into their case in chief.

The motion is denied.

8. A motion was made by Goodrich and joined by Emhart and Pyro Spectaculars, Inc. that the rebuttal provisions in the February 23, 2007 Notice of Public Hearing are vague and ambiguous.

The motion is denied. The language of the Notice of Public Hearing issued February 23, 2007 and revised March 8, 2007 is clear. The purpose of rebuttal testimony is to respond to another party's previously submitted testimony or evidence. (Hearing Notice, p. 4; Revised Hearing Notice, p. 4.) The Hearing Officer may strike any rebuttal testimony, evidence, or argument that exceeds this scope. (*Id.*) New written evidence that is responsive may be submitted, but it must be accompanied by an explanation as to why its need could not have been foreseen. This explanation shall be part of the forty-page limit. (*Id.*) During the thirty-minute rebuttal oral presentation, the parties may use that time as they think is best.

9. A motion was filed by Pyro Spectaculars, Inc. and joined by Goodrich Corporation and Emhart to request changes in the pre-hearing procedures if other motions of the hearing proceeding are denied. The motion requests: discovery of the Advocacy Team, that the City of Rialto (Rialto) and Center for Community Action and Environmental Justice (CCA EJ) and Environment California not be included as designated parties, provision for opposition or reply briefs to pre-hearing motions and additional pre-hearing motions, a hearing on

evidence admissibility, that the Advocacy team, Rialto, CCAEJ and Environment California be required to submit case-in-chief first, additional time to submit rebuttal, and no page limitation for rebuttal.

To the extent the motion was not ruled on in the rulings issued March 8, 2007, this motion is denied. At least one week in advance of the proceedings, the Hearing Officer will provide a schedule of the hearing.

10. A motion was made by Goodrich and joined by Emhart and Pyro Spectaculars, Inc. that the hearing location is inadequate.

The motion is denied. The hearing will be held at the San Bernardino County Auditorium at 850 East Foothill Boulevard in Rialto.

11. A motion was filed by Emhart and Black & Decker (U.S.), Inc and joined by Pyro Spectaculars, Inc. to correct the background statement in the Notice of Public Hearing.

The motion is denied.

12. The motion filed by Emhart and Black & Decker (U.S.) and joined by Pyro Spectaculars, Inc. also included a motion to remove Black & Decker (U.S.) from this proceeding.

The motion is denied. As stated in revised Notice of Public Hearing, the purpose of the hearing is to receive evidence to determine whether to amend or reissue the 2005 CAO and whether to adopt the 2006 draft CAO as written or amended. (Revised Hearing Notice, p.2) Black & Decker (US) was one of the parties issued Cleanup and Abatement Order R8-2005-0053. Since the purpose of the hearing includes determining whether to reissue the 2005 CAO, it is appropriate that Black & Decker (US) remain a party to this matter.

13. A motion was filed by CCAEJ and Environment California to move that handouts at the hearing be translated into Spanish, that an English-to-Spanish translator and equipment for simultaneous translation be provided, and that time be set aside for interested persons oral statements at the beginning and close of the eight-hour days and at the beginning of the hearing and after the second break on the eleven-hour days.

The motion is granted in part and denied in part. The Notice of Public Hearing, Hearing Schedule and other State Water Board handouts will be translated into Spanish and available at the hearing. An English-to-Spanish translator and equipment for simultaneous translation will be provided at the hearing. The request to set aside specific daily time periods for oral statements by interested persons is denied. The Hearing Officer will make accommodations for policy statements by interested persons.

14. A motion was filed by CCAEJ and Environment California to move that the deadline for the submittal of visual displays be set for 3-5 days following the rebuttal submittal due date. In addition, the Advocacy Team and Rialto requested that the deadline for submission of visual displays follow the submittal of summary statements of exhibits or for use in rebuttal.

The motion is granted. The revised Notice of Public Hearing dated March 8, 2007, requires the submittal of PowerPoint and other Computer Displays May 2, 2007, four working days following the due date for rebuttals. (Revised Hearing Notice, p.4) PowerPoint and other Computer Displays will only be accepted if they summarize the information contained in documents that were timely submitted in compliance with the deadlines and restrictions described on page 4 of the Hearing Notice. PowerPoint and Computer Displays will not be accepted if they contain any new testimony, evidence, or arguments. (Revised Hearing Notice, p.4)

15. A motion was made by the Advocacy Team to continue the hearing to permit discovery and for the issuance a protective order to prevent further discovery without obtaining leave of the Hearing Officer, limit all discovery to the 160-acre site, and require that all depositions be taken in writing or be limited to one day of live testimony to ensure the orderly discovery without undue burden to the parties.

The motion was granted in part in the revised Notice of Public Hearing issued March 8, 2007 and the remainder of the motion is denied. The Advocacy Team requested a short continuance and it was granted. The request for a protective order is denied. The Notice of Public Hearing and Revised Notice clearly state that the scope of the hearing is the 160-acre Rialto site. (Hearing Notice, p. 2; Revised Hearing Notice p.2)

16. A motion was made by the Advocacy Team to move the Hearing Officer to order the parties to exchange required documents in electronic format instead of paper copies.

Except as otherwise provided in ruling #19 on the City of Rialto's similar motion, this motion is denied.

17. A motion was filed by Rialto to admit discovery taken in federal litigation.

There is no need to rule on this motion. The Notice of Public Hearing issued February 23, 2007 and revised March 8, 2007, clearly states that the scope of the hearing is the 160-acre Rialto site. (Hearing Notice, p. 2; Revised Hearing Notice, p. 2) Evidence and testimony on the legal responsibility for site investigation and remediation, technical evidence justifying site investigation and cleanup, the feasibility and propriety of cleanup and other remediation requirements, and appropriate cleanup standards for the protection of public health and beneficial uses of waters of the state as it relates to the 160-site will be considered. (Id.)

18. A motion was filed by Rialto to quash the subpoenas for deposition testimony issued by parties to this hearing.

The motion is denied.

19. A motion was filed by Rialto to move that certain materials be submitted electronically.

This motion is granted in part and denied in part. Deposition passages cited in the parties' cases must be provided to the State Water Board in hard copy as exhibits. All other

portions of the depositions may be submitted electronically to the State Water Board and the parties.

In addition, as Hearing Officer, I reserve the right to make further revisions to these rulings in the future. If you have any questions on the above matter please direct them to Karen O'Haire, Senior Staff Counsel, in the Office of the Chief Counsel at [kohaire@waterboards.ca.gov](mailto:kohaire@waterboards.ca.gov).

Sincerely,



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