



California Regional Water Quality Control Board

Santa Ana Region



Terry Tomlinson
Secretary for
Environmental
Protection

3737 Main Street, Suite 500, Riverside, California 92501-3348
(909) 782-4130 • Fax (909) 781-6288
<http://www.swrcb.ca.gov/rwqcb8>

Arnold Schwarzenegger
Governor

VIA FACSIMILE AND U.S. MAIL

November 18, 2003

Robert Wyatt, Esq.
Allen Matkins Leck Gamble & Mallory LLP
333 Bush Street, 17th Floor
San Francisco, CA 94104-2806

Gerard Thibeault, Executive Officer
CA Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501

Jorge A. Leon, Esq.
Office of Chief Counsel
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

RE: ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R8-2003-0096 ISSUED TO EMHART INDUSTRIES, INC.

On October 23, 2003, the Regional Board noticed a hearing to consider imposing administrative civil liabilities against Emhart Industries, Inc. ("Emhart"), a subsidiary of the Black & Decker Corporation, for its failure to comply with an order to conduct a perchlorate investigation ("investigation order"). In a letter dated October 30, 2003, Emhart asked that the administrative civil liability hearing be postponed until after Emhart has obtained a decision from the Superior Court in its pending petition for a writ of mandate challenging the investigation order. I conducted a prehearing conference with representatives of Emhart and the Regional Board staff on November 14, 2003, to discuss Emhart's request and other procedural matters.

I believe it is important to explain from the outset that the Regional Board remains resolute in its commitment to obtain prompt and complete investigation and remediation of this serious perchlorate groundwater pollution by all legally responsible parties. This effort has already consumed a significant amount of the Regional Board's limited staff resources, and all indications are that it will continue to do so for the foreseeable future. As is common in complex pollution cases, the list of responsible parties is still being developed as new evidence is being generated through discovery and physical

California Environmental Protection Agency

Robert Wyatt, Esq.

- 2 -

November 18, 2003

investigation of potential source areas. The Regional Board has directed its staff to take the initial step of requiring all potentially responsible parties to conduct investigations of the source areas for which sufficient evidence indicates that they may be responsible for perchlorate releases, and the staff has done so in admirable fashion.

Most of the potentially responsible parties are conducting their required investigations. A few are not, and the Regional Board has been in the process of considering the imposition of administrative civil liabilities for those violations. Emhart is the only potentially responsible party that decided to challenge the Regional Board's investigation order in the courts, rather than comply with it. The Regional Board firmly believes that the investigation order issued to Emhart is a valid order, but the Regional Board also respects Emhart's right to have the Superior Court decide the issue.

While the Regional Board would be justified in proceeding with an administrative civil liability hearing for Emhart's failure to comply with the investigation order at this time, Emhart's representatives made it clear that doing so would not induce Emhart to conduct the required investigation. Rather, proceeding with a hearing at this time would give Emhart an opportunity to litigate any resulting administrative civil liability order and further tie up the Regional Board staff in responding to the litigation. On the other hand, by waiting for the Superior Court's decision, the Regional Board would have the benefit of the Superior Court's perspective on the legitimacy and propriety of Emhart's litigation strategy. This would be a factor when the Regional Board considers Emhart's culpability in violating the investigation order and in determining the amount of any administrative civil liability. Finally, because the Superior Court has already issued a stay, Emhart is not currently accruing additional potential daily administrative civil liabilities for its continuing violation of the investigation order.

The Regional Board is confident that the Superior Court will uphold its investigation order. Once it has done so, Regional Board staff are directed to schedule a hearing for the Regional Board to consider imposing administrative civil liabilities for Emhart's failure to comply with the investigation order for the full period of noncompliance. In the interim, the Regional Board prefers that its staff focus its efforts in other directions that will help to directly achieve our mutual long-term goals, including further developing the evidence to support issuing Cleanup and Abatement Orders to all responsible parties. There should be no question that noncompliance with those Cleanup and Abatement Orders will face immediate and firm enforcement from the Regional Board.

After hearing from representatives of Emhart and the Regional Board staff, I have come to the following procedural determinations regarding the Administrative Civil Liability Hearing. First, in deference to the Superior Court, the hearing is postponed until after the Superior Court issues its decision in Emhart's petition for writ of mandamus

California Environmental Protection Agency

Robert Wyatt, Esq.

- 3 -

November 18, 2003

challenging the investigation order. Second, the parties to the hearing will each be provided a maximum of one and a half hours, to be allocated between direct testimony and cross-examination as desired by the parties. Upon a specific demonstration that it is necessary, additional time will be granted. Third, Regional Board staff and Emhart are limited to presenting the exhibits and witnesses identified in their submittals of October 31 and November 13, respectively, including the records existing in the Regional Board files as of November 13, except to the extent that either party can demonstrate that an exhibit or witness could not reasonably have been produced by those dates. The Regional Board will, of course, take judicial notice of the Superior Court's decision when it is issued.

Any questions regarding these issues should be directed to Phil Wyels, counsel to the Regional Board in this matter, at (916) 341-5178.

Sincerely,



Carole H. Beswick, Chair
Santa Ana Regional Water Quality Control Board

cc: Craig Moyer
Steve Elie
Senator Neil Soto
Gene Tanaka
Susan Trager

California Environmental Protection Agency