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BEFORE THE CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

IN THE MATTER OF PERCHLORATE CONTAMINATION AT THE 160-ACRE SITE IN THE RIALTO AREA,	Case No. SWRCB/OCC No. A-1824 Hearing Officer: Tam Doduc Hearing Dates: May 8-10 and May 15-17, 2007

OPENING HEARING BRIEF

EMHART INDUSTRIES, INC., KWIKSET LOCKS, INC., KWIKSET CORPORATION, BLACK & DECKER (U.S.) INC., AND BLACK & DECKER INC.

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Emhart Industries, Inc. ("Emhart"), Kwikset Locks, Inc. ("KLI"), Kwikset Corporation ("Kwikset"), Black & Decker (U.S.) Inc. ("BD(US)I"), and Black & Decker Inc. ("BDI") (collectively the "Emhart Parties") hereby submit their Opening Hearing Brief.

I. The Emhart Parties

For purposes of this proceeding, the following facts set forth in this section concerning the historical connections among the Emhart Parties are admitted. The Hearing Officer, the parties, and the public should not be burdened with proof of that which is not in dispute.

In 1946, Kwikset Locks, Inc. ("KLI") was created to manufacture residential locksets. Its lockset facilities were located in Anaheim, California. In 1952, during the Korean War, KLI's founder, Adolf Schoepe, created a wholly-owned subsidiary corporation named West Coast Loading Corporation ("WCLC") to load and assemble munitions for the United States Government. WCLC's facilities were located in Rialto, California, on a portion of the northern half of the 160-Acre Site. In early 1957, WCLC ended all business activities and shut down the Rialto facility. On July 1, 1957, WCLC ceased to exist as a result of its statutory merger into KLI. On the same date, The American Hardware Corporation ("AHC"), a Connecticut corporation, located in New Britain, Connecticut, acquired all of the stock of KLI and Schoepe left the company. AHC was in the hardware business, not the munitions business. Within a few days thereafter, KLI completed the sale of the 160-Acre Site to Goodrich. A year later, on June 30, 1958, KLI was dissolved and its assets were transferred to AHC.

AHC continued to manufacture "Kwikset" locks in Anaheim in a corporate division called the Kwikset Division. In 1976, the corporation originally known as AHC changed its name to Emhart Industries, Inc. ("Emhart").[1] In December 1985, Emhart formed a new subsidiary corporation called Kwikset Corporation ("Kwikset'). Emhart capitalized the new Kwikset subsidiary with the net assets of the Kwikset Division at that time.

[1] Thus, for purposes of this proceeding, AHC will be referred to as Emhart.

In 1989, Emhart's former parent corporation was acquired by a subsidiary of The Black & Decker Corporation, which is also in the hardware business. Effective March 12, 2002, Emhart was dissolved and, as the result of a liquidating distribution to its then parent corporation, Black & Decker Inc. ("BDI"), a holding company, BDI acquired a substantial portion of Emhart's assets. To the extent Emhart may finally be adjudged liable herein under Water Code §§ 13304 or 13267, BDI will honor Emhart's obligation to the extent of the value of the Emhart assets received.

Black & Decker (U.S.), Inc. ("BD(US)I") is a subsidiary corporation of BDI that is completely unrelated to any Emhart business. It is in the business of manufacturing power tools and related products under the "Black & Decker" brand name. It has never owned any interest in Emhart or BDI. Nor has Emhart, Kwikset, BDI, or BD(US)I ever owned or operated at the 160-Acre Site.

Given these admitted facts, at the outset of the hearing, counsel for the Emhart Parties will ask that the parties stipulate to the dismissal of Kwikset and BD(US)I, neither of which is a proper respondent in this proceeding.

II. The Definition of Three Key Terms

This memorandum examines the empirical evidence, anecdotal evidence, and law essential to the Emhart Parties' defense.

The phrase "empirical evidence," as used herein, means observable facts that will be presented at the hearing such as: (a) data collected during the comprehensive investigation of the 160-Acre Site, which shows that only trace amounts of perchlorate, and no TCE, have been found in the shallow soil in three of the 28 WCLC Study Areas (Areas 11, 18, and 37); (b) data concerning precipitation and data concerning the soil moisture content and lithology at the 160-Acre Site, which establish that water percolates downward at an estimated rate of 0.15 inches per year; (c) aerial photographs of the 160-Acre Site which, when examined with today's technology, show that WCLC had no disposal ponds, pits, landfills, trenches, or impoundments; and (d) any other observable

facts, which often "speak for themselves," but which, when they do not, can be given significance and vitality through expert witness testimony.

The phrase "anecdotal evidence" means the testimonial memory of an eye-witness, which can, depending on the person and the passage of time, be clear, faded, confused, right, wrong, and any combination thereof. The phrase also includes documents, which can have all the traits of testimonial memory because they were created by human beings.

The phrase "the law" means the rules that govern and regulate human actions. Here, those rules include the State Water Board's regulations, Chapter 4.5 of the Administrative Procedure Act, Gov. Code §§ 11425.10 et seq., Water Code § 13304 and § 13267, and the statutory and common law rules (non-statutory rules created by courts) governing the actions of persons, contracts, liability of corporations, and, of course, the submission of evidence. Because the law is complex and voluminous it can be subject to misinterpretation and oversight.

III. Summary of The Emhart Parties' Defense

As to the Emhart Parties, the task of all present at the hearing will be to examine and weigh the empirical evidence, the anecdotal evidence, and the law to answer four questions:

1. Did WCLC's operations (circa 1952-1957) cause or permit, or threaten to cause or permit, a discharge of perchlorate or TCE to the groundwater in the Rialto/Colton Groundwater Basin that will adversely and unreasonably affect the beneficial uses of that groundwater?

2. To the extent WCLC discharged perchlorate or TCE, does that discharge require any further investigation or any remediation?

3. Is Emhart liable under Water Code §§ 13304 or 13267 for any necessary future investigation or remediation of WCLC's alleged discharges under the de facto merger theory?

4. Did AHC in 1958 expressly assume by contract KLI's alleged liabilities under Water Code §§ 13304 and 13267, which would not be enacted until many years later?

The answers to these questions are:

1. All empirical evidence establishes that only trace amounts of perchlorate, and no TCE, were released to the shallow soil in three limited areas, located in the northern portion of the 160-Acre Site, where it is known that WCLC (circa 1955-1956) handled potassium perchlorate or is suspected of handling TCE.[2] All credible and fairly presented anecdotal evidence is consistent with the empirical evidence.

2. All empirical evidence establishes that the trace amounts of perchlorate in the shallow soil in three limited WCLC Study Areas do not need further study and do not need remediation.

3. All credible and fairly presented empirical and anecdotal evidence establishes that the WCLC's munitions business at the 160-Acre Site was never acquired or continued by AHC. WCLC's munitions business was discontinued in March 1957, months before AHC on July 1, 1957, acquired KLI's stock and more than a year before June 30, 1958, when KLI was dissolved and its assets were distributed to Emhart. As a matter of law, the de facto merger theory of liability (a court created equitable doctrine) does not impose the alleged liabilities created by the WCLC munitions business on Emhart because AHC did not acquire or continue that business. Under the de facto merger doctrine, because AHC never acquired the benefits of WCLC's munitions business, it did not acquire its burdens (liabilities).

4. All credible and fairly presented empirical and anecdotal evidence establishes that AHC did not expressly agree in 1958 by contract to assume WCLC's liabilities under Water Code §§ 13304 and 13267, which were enacted many years later. Because the nature and scope of liabilities created by future statutes are unknown until enacted, the law requires that any contract by which such future-created legal obligations are to be assumed must expressly so state.

With this brief introduction, we turn to the details.

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[2] Potassium perchlorate, a salt, dissociates in water into potassium (K+) and perchlorate ions (ClO_4-) ions.

IV. Water Code § 13304 and § 13267

Water Code section 13304(a) provides in pertinent part:

> Any person who . . . has caused or permitted . . . any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste. . . .

Thus, as to existing "conditions of pollution," in order to establish liability under Water Code § 13304(a), the Advocacy Team must prove that the suspected discharger in fact discharged perchlorate to the groundwater, and that its discharge has adversely and unreasonably affected the beneficial uses of that groundwater.[3]

With regard to "threatened" conditions of pollution and nuisance, the Advocacy Team must prove that the suspected discharger in fact discharged perchlorate to a place, where there is a "substantial probability" that it will enter the groundwater, and that immediate action is reasonably necessary to prevent it from adversely and unreasonably affecting the beneficial uses of that groundwater.[4]

Water Code § 13267 provides in pertinent part:

> In conducting an investigation . . . , the regional board may require that any person who has discharged, discharges, or is suspected of having discharged or discharging waste . . . within its region, . . . shall furnish, under penalty of perjury, technical or monitoring program reports which the regional board requires.

In the fall of 2002, the Advocacy Team issued Water Code § 13267 orders to a large number of persons, including Emhart, directing each of them to investigate the entire 160-Acre Site, at a potential cost of millions of dollars. This order was issued to Emhart on October 23, 2002, one month after the Regional Board, following a full-day evidentiary hearing, rescinded the Advocacy Team's original CAO directed at Kwikset for

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[3] These two elements of liability are derived from Water Code § 13304(a) itself and from § 13050(l) which defines "pollution" to mean "an impairment of the quality of the waters of the State by sewage or industrial waste to a degree which does not create an actual hazard to the public health but which does adversely and unreasonably affect such waters for domestic, industrial, agricultural, navigational, recreational or other beneficial use." (Emphasis added.)

[4] These elements of liability are derived from Water Code § 13304(a) itself and from § 13004(e) which defines "threaten" to mean "a condition creating a substantial probability of harm, when the probability and potential extent of harm make it reasonably necessary to take immediate action to prevent, reduce, or mitigate damages to persons, property, or natural resources."

lack of proof establishing any discharge by WCLC or of successor liability. Thus, Emhart filed a petition for writ of mandate in the Riverside Superior Court challenging the 13267 order on a number of grounds. (E200.)

On November 8, 2004, the Court held that the Regional Board's 13267 order was unconstitutional. (E201, at Ex. 21.) Specifically, the Court found that, given the potential cost of the ordered investigation and the non-emergent nature of the public health threat, due process required that, before Emhart could be ordered to conduct any investigation under Water Code § 13267, the Regional Board find at an evidentiary hearing that (i) WCLC discharged pollutants to the groundwater and (ii) Emhart was liable for those purported discharges :

> In this case, given the large size of the burden (many thousands of dollars) [now estimated by the City of Rialto at between $200 and $300 million], the demand for testing over square miles of land not owned by Respondent, and the non-emergent nature 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.

(Id., at 3.) Thus, if no liability is established under Water Code § 13304(a), no liability arises under Water Code § 13267.

V. The Advocacy Team's Burden of Proof

The Advocacy Team alleges in its proposed 2007 CAO that:

> [T]he discharge of perchlorate and TCE, as described in this Order, creates, or threatens to create, a condition of pollution and nuisance, because it has interfered with, or threatens to interfere with, the use of water supplies for municipal and domestic beneficial uses.

(2007 CAO, ¶ 8, at 3.) Thus, to establish that one or more of the Emhart Parties is liable under Water Code § 13304(a) or § 13267, the Advocacy Team must first prove with competent evidence each of the following Liability Elements:

(1) WCLC discharged perchlorate or TCE to the soil and groundwater, and that such discharge has adversely and unreasonably affected the beneficial uses of that groundwater; or

(2) There is a substantial probability that a discharge by WCLC only to soil (a) will reach groundwater, and (b) will adversely and unreasonably affect the beneficial uses of that groundwater, and (c) immediate action is reasonably necessary to prevent the discharge from adversely and unreasonably affecting that groundwater;

(3) Additional investigation of WCLC discharges at the 160-Acre Site is necessary, and/or remediation of such discharges is needed; and

(4) One or more of the Emhart Parties is liable, under the successor liability theory of de facto merger or express assumption, for WCLC's liability for releases downgradient of the 160-Acre Site under Water Code § 13304(a).

Specifically, with regard to impacts downgradient of the 160-Acre Site to groundwater and the municipal wells of Rialto, Colton, and the West Valley Water District, in order to establish that one or more of the Emhart Parties is liable for such impacts under Water Code § 13304(a) or § 13267, in addition to the first, second, and fourth elements of liability listed above, the Advocacy Team must prove with competent evidence that:

(5) WCLC's discharge of perchlorate or TCE to the groundwater at the 160-Acre Site (a) has left the 160-Acre Site, and (b) has adversely and unreasonably affected the municipal water supply wells of the Cities of Rialto and Colton; and/or

(6) There is a "substantial probability" that WCLC's discharge of perchlorate and TCE to the groundwater at the 160-Acre Site (a) will leave the 160-Acre Site, (b) will adversely and unreasonably affect the municipal water supply wells of the cities of Rialto and Colton, and (c) immediate action is reasonably necessary to prevent WCLC's discharges from so affecting the municipal water supply wells.

VI. Summary of The Advocacy Team's "Evidence"

In the original and revised notices of this proceeding, the Hearing Officer directed the parties, among other things, to present at the May hearing:

> [R]elevant testimony and evidence and . . . legal argument . . . on . . . legal responsibility for the site investigation and remediation; technical evidence justifying site investigation and cleanup. . . .

(Rev. 4/3/07 Notice, at 2.) On April 6, 2007, the Hearing Officer rejected the Advocacy Team's plea to delay the hearing, making it clear, not unlike the Riverside Superior Court, that it is time for the Advocacy Team to prove its allegations or those allegations would be dismissed:

> From the submittals of the parties and prior petitions filed with the State Water Board, it is clear a significant amount of time and resources have been devoted to this matter over the past five years. This proceeding picks up largely where a prior proceeding before the Santa Ana Water Board—or its proposed delegate—dropped off. If the Advocacy Team intends to proceed with the proposed cleanup and abatement order that has served as its pleading before the Santa Ana Water Board for the last two years (since February 28, 2005), it must be prepared to proceed with the existing hearing schedule.

(4/6/07 Ruling, at 3.)

The Advocacy Team has failed to meet its burden of proof. The Advocacy Team all but ignores the empirical evidence because that evidence disproves the Advocacy Team's allegations against the Emhart Parties. The Advocacy Team offers only misstatements and misrepresentations of the anecdotal evidence and distortion of applicable law. Specifically, as to the elements of liability under Water Code § 13304(a), the Advocacy Team presents:

(1) No evidence (and the Advocacy Team no longer asserts) that WCLC discharged perchlorate or TCE to the groundwater at the 160-Acre Site or that such purported discharge has adversely or unreasonably affected the beneficial uses of that groundwater; the Advocacy Team's evidence consists only of misstatements of fact, half truths, and misrepresentations of inadmissible deposition testimony concerning alleged discharges of perchlorate or TCE to the soil;

(2) No evidence (and the Advocacy Team no longer asserts) that WCLC discharged perchlorate or TCE to a place on the 160-Acre Site that (i) threatens to discharge to groundwater under the 160-Acre Site, or (ii) threatens to adversely and unreasonably affect the beneficial uses of that groundwater;

(3) No evidence that WCLC's alleged discharge of perchlorate or TCE on the 160-Acre Site requires more investigation or any remediation;

(4) Only misrepresentations of fact and misstatements of the law to support its contention that the Emhart Parties are liable under the de facto merger and/or express assumption theories for WCLC's liability under Water Code § 13304;

(5) No evidence (and the Advocacy Team no longer asserts) that the purported WCLC discharge of perchlorate or TCE to the soil at the 160-Acre Site, has traveled 400 feet down through the vadose zone, entered the groundwater, traveled multiple miles downgradient, and adversely and unreasonably affected the municipal water supply wells of Rialto, Colton, or the West Valley Water District; and

(6) No evidence (and the Advocacy Team no longer asserts) that the purported WCLC discharge of perchlorate or TCE to the soil at the 160-Acre Site, has a substantial probability to travel 400 feet through the vadose zone, enter the groundwater, and then travel multiple miles downgradient to the municipal supply wells at issue, such that immediate action is reasonably necessary to prevent those releases from adversely and unreasonably affecting the beneficial uses of those wells.

VII. Argument

A. Liability Elements 1, 2 and 3: WCLC's Operations (circa 1952-1957) Did Not Cause, Nor Do They Now Threaten to Cause, a Discharge of Perchlorate or TCE to Soil or Groundwater at the 160-Acre Site That Requires Further Investigation or Any Remediation

1. There Is No Empirical Evidence that WCLC Discharged Any Significant Amount of Perchlorate to the Soil, Any TCE to the Soil, or Any Perchlorate or TCE to Groundwater

The Advocacy Team's findings regarding the empirical evidence developed over the past five years of comprehensive site investigation are set forth at the end of its Opening Brief, pages 93-100. The only Advocacy Team finding concerning the critical question of whether WCLC's historical operations caused or permitted perchlorate or TCE discharges at the 160-Acre Site is that trace amounts of perchlorate were found in the shallow soil (less than 25 feet bgs) in one limited part of the northern portion of the

160-Acre Site where WCLC had operated. The Advocacy Team repeats this finding twice at the end of its Opening Brief, stating:

> Soil investigations in the northern portion of the Property found that perchlorate was present in the shallow soil (less than 25 feet below ground surface (bgs)[)] at various locations associated with the manufacturing and salvaging activities of . . . WCLC;
>
> * * *
>
> Soil and groundwater investigations conducted to date lead to the following conclusions: . . . Perchlorate is present in shallow soils in the northern portion of the property where WCLC . . . conducted operations.

(Advocacy Team's Opening Br., at 93 and 99.)

Importantly, WCLC has not been identified by the Advocacy Team in any other of its findings based on the empirical evidence as: (i) having released TCE to the soil at all; (ii) having released perchlorate to the soil anywhere in the southern portion of the 160-Acre Site where the McLaughlin Pit and other disposal pits and trenches (that no one associates with WCLC operations) have been discovered; or (iii) having caused or permitted, or threatening to cause or permit, a release of perchlorate or TCE to groundwater anywhere at the 160 Acre Site. (Id., at 93-100.)

(a) The Environ 2007 Report: WCLC

On March 19, 2007, Environ submitted, on behalf of Emhart, its "Focused Summary Report of Investigation of WCLC Use Areas, 160-Acre Site, Rialto, California" ("Environ 2007 Report"). The Environ 2007 Report was the culmination of over three years of exhaustive field work at the 160-Acre Site. (E1.)[5] As set forth therein, Environ's investigation included "the collection and analysis of 730 soil samples and 288 soil gas samples from 48 study areas on the 160-Acre Site." (Id., at 1.) It also reported the installation and sampling of nine groundwater monitoring wells on and in the immediate vicinity of the 160-Acre Site (two by Environ, three by Adverus (PSI), and four by Geosyntech (Goodrich)). (Id., at 15, 16) The Environ 2007 Report particularly focused

[5] On March 30, 2007, the Environ 2007 Report was resubmitted with errata corrections. The March 30, Revised Environ 2007 Report is Exhibit E1 and is referred to herein as the Environ 2007 Report.

on 28 of the 48 study areas, within the approximate 28-acre area on the northern portion of the 160-Acre Site, where WCLC was known to have operated:

> The focus of this report is on 28 of the 48 study areas that relate to known or suspected historical activities on the approximately 28-acre portion of the 160-Acre Site utilized by [WCLC]. At 17 of these 28 study areas, WCLC is known or suspected to have used, handled, or stored perchlorate. The presence of perchlorate was detected in three of these 17 study areas. The possible presence of TCE was investigated at 21 of the 28 WCLC study areas where deposition testimony suggested TCE may have been used. No TCE was detected in the WCLC areas investigated. There was no information to support TCE sampling in the remaining seven areas.

(E1, at 1.)[6]

The 48 study areas were selected by Environ in consultation with the US EPA and Regional Board staff. No suspected WCLC area of historical use or alleged release was overlooked. Kamron Saremi, the Regional Board staff engineer who supervised the investigation of the 160-Acre Site for the past five years, confirmed that every place relating to WCLC' operations that needed investigation has been examined:

> Q. . . . Did you ever request ENVIRON to sample additional locations, which they refused to do?
>
> [Objections]
>
> THE WITNESS: I don't think so.

(E9, at 645-646.) In April 2006, Robert Holub, Mr. Saremi's immediate supervisor at the Regional Board, publicly confirmed the thoroughness and cooperation of Emhart's technical consultant Environ:

> In February of 2006 Emhart and Pyro Spectacular submitted a joint investigation work plan. And in that work plan Emhart proposed to perform [it its second phase of investigation] over a hundred shallow soil samples . . . at the 160-acre site. Almost 300 [additional] shallow soil samples . . . from the excavation of trenches and soil borings. . . . [will be taken.] And Emhart was also going to install two groundwater monitoring wells at the site. And those wells are going to be installed after the soil gas sampling was done

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[6] It is important to understand that the thousands of pages of deposition testimony generated by exhaustive questioning of more than 40 elderly witnesses, which often resulted in conflicting and clouded answers, was taken into account in Environ's investigation. That testimony, along with available historical documents and aerial photographs, was used by Environ to select and study all suspected areas which turned out to be the 48 Study Areas. Simply put, if a witness, regardless of the fuzziness of his or her memory, pointed a finger in a particular direction at the 160-Acre Site and identified WCLC, Environ studied that area to determine if any perchlorate or TCE had been released.

> and after Pyro Spectacular installed the three groundwater monitoring wells that they were going to install in accordance with the work plan.
>
> * * *
>
> The cooperation and interaction we've had with Goodrich, Emhart, and Pyro's consultants and the drilling contractors out in the field this past six weeks has just been outstanding. They have been very cooperative, very receptive to recommendations from our staff. . . . And in . . . the case of Emhart, they've actually done more work out there than was proposed in the work plan. There were several other areas of interest that came up as work was going on out there. And we suggested they go dig in another area. And they were very receptive in just moving the equipment over and digging trenches in other areas and grabbing samples. So we have been very pleased.

(E201, at Ex. 42, at 44 and 52; emphasis added.)

In short, the thoroughness of the investigation described in the Environ 2007 Report is not in doubt.

As reported, Environ found only trace amounts of perchlorate in the shallow soil in three of the 17 WCLC Study Areas (Study Areas 11, 37, and 18) examined for perchlorate. It found no detections of perchlorate in the soil in any other WCLC Study Areas. No TCE was found in any of the 21 WCLC Study Areas examined for TCE. Nor was perchlorate found in the groundwater immediately downgradient of the WCLC Study Areas where trace amounts of perchlorate had been found in shallow soil above 25 feet. The only exception was a single initial detection of 2.2 ppb in the shallow aquifer (at 440 bgs), which the Advocacy Team concedes is a background level.

> In two of the three WCLC study areas, perchlorate was found in low concentrations in two shallow samples (58 ppb in Area 11, 110 ppb in Area 37). No perchlorate was detected below 10 ft in either of these areas. In the third area, Area 18, perchlorate was detected in 32 of 197 soil samples, with the highest concentration in shallow samples and no detections below 25 feet. Perchlorate has not been detected in the monitoring well located approximately 300 ft downgradient of Area 18 except for an initial detection of 2.2 ppb, which is below the detected concentrations in upgradient well PW-1, well within the background range for perchlorate suggested by the RWQCB (10-15 ppb), and below the state action level and proposed MCL of 6 ppb.

(E1, at 1.)

Study Area 11 included Building 40 where WCLC is reported to have screened and dried perchlorate for Grand Central Rocket. (E10, at 252.) Ten soil samples were

taken to a depth of 15 feet. All samples reported no detection for perchlorate, except for one, between 5 and 10 feet, which was reported at 58 ppb. (E1, at 6.)

Study Area 37 included a soil and rock pile identified by US EPA and Regional Board staff for investigation, which between 1952 and 1957 was under the control of WCLC. Thirteen soil samples were taken, all of which reported no detection for perchlorate, except one, between 0 and 6 feet, which was reported at 110 ppb. (Id., at 6-7.) The two detections in Areas 11 and 37 were bounded by deeper samples all of which reported as no detection. (Id.)

Study Area 18 included Building 42 where WCLC loaded M112 photoflash cartridges for a total of 10 months between late January 1955, and May 8, 1956. Production of the M-112 was interrupted for about seven months starting on April 12, 1955, by an explosion that destroyed Building 42, which was then rebuilt. Production resumed in October 1955. (E2, at ¶ 11A.) Environ collected 197 soil samples to a depth of 50 feet in Area 18. (E1, at 7.) Here is the Study Area 18 data:

TABLE 5 Area 18 – Depth Profile of Maximum Detections at Building 42[7]

Area	Operator	Depth Interval (ft bgs)	Perchlorate			
			No. of Samples	No. of Detections	No. of Non-Detects	Max (ppb)
Area 18 - Building 42	WCLC	0-2	35	14	21	12,000
		2-5	34	9	25	4,700
		5-10	36	4	32	350
		10-15	19	2	17	76
		20-25	25	2	23	21
		25-30	6	0	6	ND
		30-35	7	0	7	ND
		35-40	6	0	6	ND
		40-45	5	0	5	ND
		45-50	7	0	7	ND
TOTAL			**197**	**32**	**165**	

(E1, at 7.)

[7] See E1, Figure 3, at 13 for the location of Study Area 18.

Environ found no perchlorate in the soil in the remaining 14 Study Areas, where WCLC was either known or suspected to have handled it. Table 2 in the Environ 2007 Report summarizes the data gathered from all WCLC specific Study Areas that were investigated for perchlorate:

TABLE 2 – WCLC Perchlorate Data[8]

			Perchlorate		
Area	Previously Used Area Designations / Building No.	Sampling Rationale	No. of Samples	No. of Detections	Max (ppb)
18	M2, Building 42	Filling of Photoflash Cartridges, Barrels of Unknown Contents Visible in Historical Aerial Photos	197	32	12,000
37	F1	Soil and Rock Pile	13	1	110
11	M3, Building 47	Screening & Drying of Perchlorate, Discoloration Visible in Historical Aerial Photos [W,G]	10	1	58
5	M8, Building 41	Formulating Photoflash Mix	3	0	ND
7	N4A	Northernmost of 2 Former Incinerators, Identified as Possible Location for VOC Release	2	0	ND
8	M7, Building 15	Testing of Flares and Possibly Other Pyrotechnics	4	0	ND
9	N2, Buildings 33, 28	Deposition Testimony of Suspected Trench and Disposal Area	9	0	ND
10	M4, Building 48	Weighing of Perchlorate	3	0	ND
13	M1, Building 40	Weighing & Blending of Photoflash, Barrels of Unknown Contents Visible in Historical Aerial Photos	9	0	ND
14	M6, Building 28	Reported Inspection of Potassium Perchlorate	2	0	ND
17	N4B	Southernmost of 2 Former Incinerators, Identified as Possible Location for VOC Release	3	0	ND
19	N1, Building 34	Former Press Building, Discolored Soil and Barrels of Unknown Contents Visible in Historical Aerial Photos	4	0	ND
21	M5, Building 30	Weighing of Perchlorate	2	0	ND

[8] See E1, Figure 3, at 13 for the location of each of these Study Areas.

			Perchlorate		
Area	Previously Used Area Designations / Building No.	Sampling Rationale	No. of Samples	No. of Detections	Max (ppb)
29	L3, Building 43	Deposition Testimony of Former WCLC Employee - Potential Use of Solvents	13	0	ND
42	N5B	Historical Aerial Photo Review Shows Former Railroad Spurs that Appear to Have Been Used for Waste Disposal - Easternmost Spur	10	0	ND
43	E1, Building 26	Former Boiler House, Liquid Discharge Visible in Historical Aerial Photos	17	0	ND
44	N5A	Historical Aerial Photo Review Shows Former Railroad Spurs that Appear to Have Been Used for Waste Disposal - Westernmost Spur	10	0	ND
TOTAL			311	34	

(E1, Table 2, at 11.)

In summary, as set forth in the Environ 2007 Report:

> [Environ] has completed the investigation of shallow soils and soil gas in recognized WCLC use areas where the use of perchlorate and/or TCE is known or suspected; these investigations included all areas where the USEPA or RWQCB requested sampling. . . .

(Id., at 18.) The empirical evidence (data) gathered by Environ regarding the WCLC Study Areas was then summarized:

> In soil, the three areas with detectable concentrations of perchlorate have all been bounded vertically and laterally, including Area 18 where detections up to 12,000 ppb were found in the shallow soil. Ground water from well CMW-3, which lies approximately 300 ft down gradient of Area 18 has, to date, produced no perchlorate levels in excess of I) the background range as identified by the RWQCB (10-15 pb), ii) data from the upgradient well PW-1, and iii) the state action level and proposed MCL of 6 ppb.

(Id., at 19.) The Advocacy Team offers no contrary or other empirical evidence. Thus, all of the empirical evidence, and there is no other, establishes that only trace amounts of perchlorate, and no TCE, were found in the shallow soil (less than 25 feet bgs), in one limited part of the northern portion of the 160-Acre Site, where WCLC had operated and

was known or suspected to have handled potassium perchlorate, or suspected of having used TCE.

(b) The Environ 2007 Report: McLaughlin Pit

In sharp contrast to the WCLC Study Areas, Environ reported massive amounts of perchlorate throughout the vadose zone at and near the McLaughlin Pit (Study Area 46) (which no one suggests is in any way related to WCLC operations). The McLaughlin Pit was located well to the south of the 28-acre northern area where WCLC conducted its operations.

TABLE A2 - Areas with Perchlorate Detections in Soil >100 ppb[9]

Area	Depth Interval (ft bgs)	Perchlorate (ppb)			TCE (ppb)			Other VOCs
		No. of Samples	No. of Detections	Max	No. of Samples	No. of Detections	Max	
Area 46 - McLaughlin Pit (Figure A3)	0-5	5	3	8,860	0	-	-	-
	5-10	3	2	189,000	1	0	ND	-
	10-20	7	5	205,000	2	0	ND	-
	20-50	3	1	16,000	2	0	ND	-
	50-100	6	6	12,000	2	0	ND	-
	100-200	11	11	24,000	8	0	ND	-
	200-300	11	11	730	8	1	8.7	-
	300-400	9	8	1,900	7	0	ND	-
	400-440	2	2	1,800	1	1	4.5	-
AREA TOTAL		57	49		31	2	-	

(Id., at App. A, Table A2, at A-5.) In March 2006, monitoring well PW-2 down gradient of the McLaughlin Pit reported 10,000 ppb of perchlorate – the highest concentration of perchlorate ever found in the groundwater in the Rialto/Colton Groundwater Basin. (Id., At Table A6, at A-16.) Again, the Advocacy Team has acknowledged repeatedly and, as recently as Mr. Thibeault's deposition, that the perchlorate releases from the McLaughlin Pit were not caused or permitted by WCLC:

> Q. Do you have any evidence that Goodrich and/or Kwikset [Corporation, one of WCLC's alleged successors] are in any way responsible for the operational history of the McLaughlin pit which started in 1971 and the

[9] See E1, Figures A-2, A-3, at A-4 and A-6 for the location of Study Area 46 and the McLaughlin Pit.

releases that occurred from it thereafter?

A. I don't.

(E11, at 466.) It is undisputed that large volumes of water and perchlorate waste were discharged repeatedly to the McLaughlin Pit over at least a 14 year period (1971-1985). (E 202, Ex. 1.)

(c) Dr. Powell's Expert Opinion: (1) The Trace Releases of Potassium Perchlorate Found in the Three WCLC Study Areas Remain in the Shallow Soil after 50 years; (2) They Have Not Impacted Groundwater and Do Not Threaten To Do So

In connection with this proceeding, Emhart retained Dr. Robert Powell, who holds a Ph.D. in Civil Engineering (Groundwater Hydrology) and has over 30 years of experience as a practicing consultant in the fields of environmental engineering, surface and groundwater hydrology, hazardous waste management, contaminated site investigations/remediation, risk assessment, and environmental risk management. (E4, at ¶ 4, Ex. A.)

Much of Dr. Powell's work has been in the semiarid regions of southern California. (Id., at ¶ 5, Ex. A.) He is currently working for, among many other clients, the California Environmental Protection Agency and the Department of Toxics Substance Control ("DTSC") in connection with completion of DTSC's supplemental feasibility study for the final closure of the Stringfellow NPL Site in Glen Avon, California, which includes, among its prominent contaminants, perchlorate and TCE. (Id.) For further details regarding Dr. Powell's qualifications see his declaration and attached Curriculum Vitae. (Id., Ex. A.)

Dr. Powell was asked to answer the following questions:

Question No. 1: Is there any empirical evidence of any significant release of potassium perchlorate between 1952 and 1957 at the 160-Acre Site in the WCLC Study Areas which are the subject of the 2007 Environ Report?

Question No. 2: Has any perchlorate released in the areas in which WCLC formerly operated at the 160-Acre Site migrated deeper into the vadose zone and adversely impacted the beneficial uses of the groundwater?

Question 3: Will the perchlorate released into soil in the area in which WCLC formerly operated at the 160-Acres Site eventually reach groundwater to the degree that it will interfere with or adversely affect the beneficial uses of the groundwater in the Rialto-Colton Basin?

Question 4: Is there any empirical evidence of a release of TCE between 1952 and 1957 at the 160-Acre Site in the WCLC Study Areas which are the subject of Environ's March 30, 2007 report?

(Id., at ¶9.) Dr. Powell's answers to each of these questions is "No." The detailed bases which support his answers are set forth in his declaration, Exhibit E4.

One of the studies Dr. Powell relies on in connection with his opinions, is the recent study entitled, "Estimation of the Extent of Perchlorate Movement in the Vadose Zone at the 160-Acre Parcel Rialto, California," prepared by Dr. Jacob Chu. (E5, Ex. B.) Dr. Chu has a Ph.D in Environmental Science and Engineering from Stanford University, a M.S. in Environmental Engineering from Oregon State University, and a B.A. in Civil Engineering from National Taiwan University. (E5, Ex. A.) One of Dr. Chu's areas of technical expertise is chemical fate and transport modeling in the subsurface. (E5, Ex. A.) The details of Dr. Chu's qualifications are set forth in his Curriculum Vitae attached as Exhibit A to his declaration. (Id.)

Dr. Chu found, after reviewing and analyzing available soil, rainfall, soil moisture, and net recharge data relevant to the 160-Acre Site, which is located in a semiarid climate, that:

> The potential of perchlorate migration was analyzed by calculating the downward migration velocity at various net recharge rates. The estimated long-term average net recharge rates by U.S. Geological Survey and by the Darcian method show that the perchlorate migration distance under Site conditions may reach 5 to 8 feet over a period of 50 years. This is consistent with the site soil sampling results around Building 42, which show that most of detected samples were found to be within 10 feet below ground surface.

(Id., at Ex. B.) Dr. Chu thus concluded:

> It is thus concluded that the downward movement of perchlorate from surficial soil due to natural precipitation is very limited and has not adversely impacted regional groundwater quality. According to the

> projected perchlorate migration rate, it can be reasonably expected that perchlorate may only migrate an additional 5 to 8 feet downward in the next 50 years under natural precipitation conditions.
>
> Adding his more than 30 years of experience in this area, Dr. Powell found:
>
> Perchlorate is a persistent chemical that does not readily degrade in soil or water into some other chemical form. Perchlorate was only used by WCLC in a dry powder form. Once released onto soil, perchlorate would only migrate through the soil horizon by dissolution into water percolating through the soil. In arid regions like San Bernardino County this percolation is expected to be very slow and traces of perchlorate released even 50 years ago should still remain in shallow soils at the release site today, as confirmed by the data in Environ's 2007 Report and Dr. Jacob Chu's analysis set forth in Exhibit B hereto.

(E4, at ¶ 9d.)

In summary, both Dr. Powell's opinions and Dr. Chu's study conclude that the trace amounts of perchlorate found in three WCLC Study Areas in the shallow soil have not impacted groundwater and are not a threat ever to do so.

(d) An Advocacy Team Admission: Absent Large Volumes of Free Water, Perchlorate Will Take Hundreds, if Not Thousands, of Years To Reach Groundwater

The Advocacy Team has not retained or identified any experts to testify about the natural rate at which perchlorate released to the soil surface will travel down through the vadose zone to groundwater. It has, however, offered in evidence (and thus adopted) a report prepared by GeoLogic, Inc., dated March 2007, commissioned by the County of San Bernardino ("GeoLogic 2007 Report"). (Referenced as Attachment 2 in AT's Submission.) The GeoLogic 2007 Report states that, absent large volumes of free water discharged to the soil surface, the perchlorate transport rate within the vadose zone is expected to be very slow to zero:

> Transport of perchlorate within the vadose zone is largely a function of the availability of free water with transport rates expected to be very slow to zero in areas where regional rainfall is the only source of infiltration. Transportation rates are expected to increase dramatically in areas where water periodically concentrates (i.e., channels, ponds, or irrigated areas) and is expected to reach a maximum in areas where continuous ponded conditions exist or existed (*e.g.*, aggregate wash ponds).

(Id., at 16; emphasis added.) GeoLogic's data on this issue is compelling.

Figure 22 in the Geologic 2007 Report summarizes the sampling results for monitoring well F-6 over time. F-6 is immediately downgradient of two aggregate washing ponds installed, with Regional Board staff approval, in 1999 on County property. The ponds were placed directly over a historic bunker area where fireworks manufacturers had stored perchlorate and materials and products containing perchlorate. (Id.; E202, Ex. 1.) For three years prior to construction of the unlined ponds, F-6 reported only background level concentrations of perchlorate. (AT's Attachment 2, Fig. 22.) Within a year of the release of millions of gallons of aggregate wash water to the ponds, the perchlorate concentrations in F-6 rose rapidly from 1.9 ppb in April 2000, to 250 ppb in January 2001, to 800 ppb in September 2002, and to 1,000 ppb in January 2003. (Id., and E202, at Exs. 1 and 4.)

The Advocacy Team confirmed directly in Mr. Thibeault's deposition that, absent large volumes of water, precipitation is insufficient to mobilize perchlorate to groundwater:

> Q. Do you have an opinion sitting here today whether or not it [unlined settling ponds with a 13 million gallon water capacity] caused perchlorate to reach the groundwater underneath it?
>
> A. Yes.
>
> Q. And what is your opinion?
>
> A. I believe that the wash water from the aggregate operation mobilized perchlorate in the subsurface and pushed it down towards the groundwater.
>
> * * *
>
> Q. Prior to the gravel washing operation . . . and creation of the pond, is there any evidence that the perchlorate that was in the soil there got to the groundwater?
>
> A. I know of none.

(E12, at 59-60 and 64.)

(e) <u>A Second Advocacy Team Admission</u>: There Was No Empirical Evidence That Any Significant Amount of Water Was Discharged In WCLC Operational Areas Where Trace Amounts of Perchlorate Were Detected In Soil

The Advocacy Team also admitted on April 3, 2007, that it has no empirical evidence that large volumes of free water necessary to mobilize surface contaminants

into the vadose zone and to groundwater, were ever released in WCLC Study Areas 11, 18, and 37. As Ms. Sturdivant, a Regional Board hydrogeologist, testified:

> Q. Do you have any data which shows you whether perchlorate associated with West Coast Loading operations has traveled through the vadose zone?
>
> A. No.
>
> Q. Do you have any data which shows that perchlorate associated with West Coast Loading operations threatens to travel through the vadose zone to the groundwater?
>
> A. No unless the new data you may have provided . . . that you said you gave us [in] a new report and I haven't looked at it. So exclusive of that, no.

(E13, at 829-830.) Ms. Sturdivant also admitted that the Advocacy Team has no empirical evidence regarding the rate of perchlorate transport through the vadose zone:

> Q. Do you have any data with respect to the 160-acre site that tells you how rapidly perchlorate will move in the vadose zone?
>
> A. No.

(E14, at 1006.)

(f) Summary of Empirical Evidence Re WCLC

All the empirical evidence with regard to WCLC's operations (circa 1952-1957) at the 160-Acre Site establishes that only trace amounts of potassium perchlorate were released to the shallow soil in three locations (Study Areas 11, 18, and 37) where WCLC is known or suspected to have handled potassium perchlorate. That evidence, the cited experts, and the Advocacy Team admissions also establish that those trace amounts are still in the shallow soil above 25 feet bgs. All the experts further report that those trace amounts, if left undisturbed by large volumes of imported water, will take hundreds, if not thousands, of years to migrate in ever decreasing concentrations to groundwater, and if and when those trace amounts do, hundreds, if not thousands, of years from now they will not adversely affect the beneficial uses of that groundwater – they will not even be measurable.

2. The Advocacy Team Has No Credible Anecdotal Evidence

The Advocacy Team's Opening Brief characterizes and argues, but does not present, the anecdotal evidence (documents and deposition testimony) which it claims establishes that WCLC discharged potassium perchlorate and TCE to the soil. (AT's Opening Br., at 12-27.) Reduced to its essence, the Advocacy Team advances four specific claims against WCLC. It claims that:

(a) Even though the empirical evidence is to the contrary (only trace amounts of perchlorate have been found in three WCLC Study Areas), WCLC released at least 2,245 lbs. or 2,257 lbs. of potassium perchlorate to the bare ground at the 160-Acre Site (AT's Opening Br., at 14-19);

(b) Even though the empirical evidence is to the contrary (only trace amounts of perchlorate have been found in three WCLC Study Areas), WCLC incidentally released perchlorate and photoflash powders to the ground in buckets of mop water, as fugitive dust, as a result of the explosion of Building 42, and as the result of on-site fires (id., at 19-22);

(c) Even though the empirical evidence is to the contrary (and no "north disposal trench" or waste materials have been found), WCLC disposed of chemical soiled rags, gloves, cans, waste water, waste perchlorate, waste TCE, and water containing perchlorate waste by dumping and pouring these items into a large, deep trench, and then burning them in a "north disposal trench". (Id., at 23-27); and

(d) Even though the empirical evidence is to the contrary (and no "south disposal trench" or materials were found), WCLC disposed of chemical soiled rags, gloves, cans, waste water, waste perchlorate, waste TCE, and water containing perchlorate waste by dumping and pouring these items into a large, deep trench, and then sometimes burning that waste in a "south disposal trench". (Id., at 23-27.)

None of these claims are supported by the anecdotal evidence cited.

(a) The Phantom 2,257 lbs. of Scrap Potassium Perchlorate

The Advocacy Team claims that:

> [B]ased on contracts that are known to have existed, and the available information on production quantities for WCLC's M-112 photoflash and M-115 ground burst simulator, the potassium perchlorate that would have been considered scrap or spoilage from the manufacturing process, and would have been discharged as waste on the Property, was at least 2,257 pounds (1,832 pounds + 425 pounds + spoilage from the XF-5A photoflash cartridges).
>
> * * *
>
> WCLC processed large quantities of potassium perchlorate. As a result, potassium perchlorate waste was generated. It was estimated that this waste would have amounted to at least 2,245 [sic?] pounds of potassium perchlorate. This potassium perchlorate waste was discharged to the bare ground at the site.

(AT's Opening Br., at 19 and 62; emphasis added.)

The Advocacy Team's only proposed witness to testify about this asserted WCLC release is Advocacy Team member Ann Sturdivant. (AT's 4/6/07 Witness Statements, at 7.) Ms. Sturdivant is neither an industrial process engineer nor a forensic investigator, and the Advocacy Team has made no attempt to so qualify her. (Id., passim; E15, at 830-851.)[10] Even if her unqualified opinion could be considered, Ms. Sturdivant's estimate is demonstrably wrong because it is directly contradicted by WCLC's actual production and scrap generation records which the Advocacy Team has had since 2002.

Ms. Sturdivant's first error was to use initial scrap allowances (an engineering "rule of thumb" assumption) that appear in some early WCLC's production formulas prepared by its process chemist prior to the commencement of production. Her second error was to ignore the production records that contain detailed data on exactly how many WCLC munitions contained potassium perchlorate, exactly how many were made, exactly how much potassium perchlorate was needed for each unit, and exactly how much scrap was generated for 87% of those products. Her third error was to assume that between 1952

[10] Accordingly, the Emhart Parties object to Ms Sturdivant offering any opinion testimony on this issue because she has absolutely no specialized skill, knowledge, or experience in the field.

and 1957 WCLC did nothing but load and assemble products containing potassium perchlorate:

> It is evident from the records and witness testimony that WCLC manufactured thousands of explosive and incendiary devices, many of which contained perchlorate salts, at the Property.

(AT's Opening Br., at 17; emphasis added.)

Ms. Sturdivant acknowledged on April 3, 2007, that she was not aware of the detailed actual production records that the Advocacy Team has had in its possession since 2002. She also conceded that actual numbers should be used in the interest of accuracy:

> Q. Do you recall that Mr. Skovgard [the former WCLC chief chemist who devised the M112 scrap allowances] testified that in terms of these figures relative to scrap allowance part of the planning process is to provide for an allowance to make sure one has sufficient materials to complete production?
>
> A. Yes, I believe so.
>
> Q. . . .Did any (do any) of the figures here cited take into account the actual inventory measurements made by West Coast Loading personnel at the end of the [M-112] photoflash cartridge production process?
>
> A. I don't know the contract information might have been that I don't know.
>
> * * *
>
> Q. Would an actual inventory of left over materials at the end of the production process more accurately reflect what was consumed in the production than a planning document at the outset?
>
> [Objection.]
>
> The WITNESS: I think it could yes.

(E16, at 1047-1048.)

In order to evaluate Ms. Sturdivant's scrap estimates and "evident" assumptions, Emhart retained Dr. David Dillehay, a Ph.D chemist with 48 years of experience in munitions manufacturing processes, and asked him to examine WCLC's historical production records and answer the following questions:

> Question No. 1: Which products manufactured by WCLC at its Rialto facility contained potassium perchlorate as an ingredient?

Question No. 2: How much potassium perchlorate was generated as scrap during WCLC's production of products which contained potassium perchlorate?

Question No. 3: What were the generally accepted safe disposal practices in the 1950's for scrap potassium perchlorate or scrap powders containing potassium perchlorate in the munitions industry?

(E3.)[11] Emhart also retained Suzanne Ravano Thompson, a Certified Public Accountant and Certified Fraud Examiner, to review WCLC's historical production records and determine during what time periods WCLC produced the products that contained potassium perchlorate (E2).[12]

As set forth in their declarations, Ms. Thompson and Dr. Dillehay will testify at the May hearing as follows:

(i) Three Products Used Potassium Perchlorate

WCLC production records disclose that it manufactured 13 different munitions at the 160-Acre Site, only three of which contained potassium perchlorate: the M-112 photoflash cartridge ("M-112"), the M-115 ground burst simulator ("M-115"), and the XF-

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[11] Dr. Dillehay's qualifications are described in Exhibit E3 as follows: "I was awarded a B.A. in Chemistry from Rice University in 1958, and a Ph.D. in Chemistry from Clayton University in 1983. I have been professionally engaged for over 48 years in the field of propellants, explosives, and pyrotechnics. Prior to founding Technical Consultants in 1997, I was employed by Thiokol Corporation from 1958 to 1996. During my employ at Thiokol Corporation, I held the following positions: Chief Scientist (1994-1996), Advanced Engineering Manager (1984-1994), Processing Engineering Supervisor (1977-1984), and Development Chemist/Project Engineer (1958-1976). During my career with Thiokol Corporation, I supervised pyrotechnic manufacturing operations at the Longhorn Army Ammunition Plant in Marshall, Texas, and managed the production of illuminants, flares, and simulators which included the types of products manufactured by West Coast Loading Corporation ("WCLC"). My professional activities have included co-founding The International Pyrotechnics Society in 1980, and serving on the United States Navy investigating team for the 1989 USS Iowa gun incident. I hold eleven patents and have published over 52 technical papers in the field of pyrotechnics and energetic materials processing. I have recently co-authored a text called "Pyrotechnic Chemistry" published by the Journal of Pyrotechnics, Inc. in 2004."

[12] Ms. Ravano Thompson's qualifications are described in Exhibit E2 as follows: "I am a Certified Public Accountant, licensed in the State of California since 1998. I earned a Bachelor of Science degree in Accounting, Summa Cum Laude, from the University of San Francisco in 1996, and a Master of Business Administration from the University of Southern California in 2002. I have over 10 years of professional experience, primarily in financial and accounting analysis in claims and disputes. I am a member of the American Institute of Certified Public Accountants and the California Society of Public Accountants. I am also a Certified Fraud Examiner and a member of the Association of Certified Fraud Examiners."

5A photoflash cartridge ("XF-5A"). (E3, at ¶ 7.) WCLC's production records further show that munitions incorporating potassium perchlorate were not manufactured at the site for the entire period WCLC operated the facility: 347,530 M-112 cartridges were manufactured in 10 months between late January 1955 and May 8,1956, with a six or seven month interruption caused by the April 12, 1955 Building 42 explosion and the time needed to rebuild it; 50,250 M-115 simulators were manufactured in eight weeks ending January 14, 1957; and 250 XF-5A cartridges were manufactured in one week in September 1956. (E2, at ¶¶ 11, 11B; and E3, at 20, Ex. J.) The actual evidence demonstrates that the "evident" assumptions of the Advocacy Team simply did not in fact happen.

(ii) *M-112 Scrap Potassium Perchlorate*

Ms. Sturdivant's estimate that **1,832 lbs.** of scrap potassium perchlorate was generated during M112 production is based solely on an initial 4% "rule of thumb" scrap estimate used by WCLC's production chemist to anticipate how much potassium perchlorate should be ordered: 4% of 47,000 lbs. is 1,832 lbs. (AT's Opening Br., at 18.) This estimate simply ignores or grossly misrepresents information in WCLC's historical records that have been in the possession of the Advocacy Team since 2002. Moreover, no former WCLC employee ever so much as hinted at such a scenario in his or her deposition.

As Dr. Dillehay explains: The final "WCLC Material Status Report" for M112 production states that 47,000 lbs. of potassium perchlorate was purchased for M-112 production. That 47,000 lbs. is accounted for in this report as follows: 46,221 lbs. loaded into 347,530 cartridges; 628 lbs. remaining in inventory; **115 lbs.** accounted for in the Scrap Report; and **15 lbs.** recorded as unaccounted for at the end of production. (E3, at ¶¶ 13-16.) Dr. Dillehay then determined that the actual M-112 "scrap" rate was 0.25% of 47,000 lbs., or 115 lbs., which was calculated as follows: 115 lbs. divided by 46,351 lbs (47,000 lbs. minus the 628 lbs. still in inventory) equals 0.25%. Not 4%. (Id., at ¶ 16.)

(iii) M-115 Scrap Potassium Perchlorate

The Advocacy Team claims that the scrap allowance for potassium perchlorate needed for M-115 production was 5% (another "rule of thumb" initial estimate) which would result in a "total of **at least 425 pounds** of scrap potassium perchlorate," all of which "would have been discharged as waste at the property." (AT's Opening Br., at 18-19.) Ms. Sturdivant calculated 425 lbs. by assuming, because the "amount of potassium perchlorate used in each [M-115] is unknown," that 8,500 lbs. of potassium perchlorate, which was delivered to WCLC in February 1956, during M112 production, was "likely used for the [M-115] ground burst simulator contract," which would not be manufactured for another 11 months starting in November 1956. (Id., at 16; E2, at ¶ 11C.) Neither the assumption nor the calculus is supported by WCLC's actual production records for the M-115.

The "Operational and Material Breakdown Report" for the M-115 Contract (E3, at ¶ 18, at Ex. B-1) identifies two M-115 components which contained potassium perchlorate: the whistle charge – 0.00737 lbs. per unit; and the photoflash charge – 0.055 lbs. per unit. (E3, at ¶ 18.) As noted, WCLC production records report that 50,250 M-115 were produced in an eight week period ending in mid-January 1957 just before the facility was shut down. (E2, at ¶ 11C.) Thus, the amount of potassium perchlorate required for WCLC's production of the M115 would have been 3,134 lbs. (0.00737 x 50,250 + 0.055 x 50,250). (E3, at ¶ 18.)

WCLC's records do not contain a scrap report or final material status report for the M-115. In Dr. Dillehay's opinion, however, given WCLC's experience with the M-112 (which represents 87% of all WCLC produced units that contain potassium perchlorate), it is reasonable to assume that a similar scrap rate would have been achieved during the M-115 production--the products are similar and thus similar production processes would have been used. (Id., at ¶ 19.) In Dr. Dillehay's opinion approximately **9 lbs.** of scrap and unaccounted for potassium perchlorate could have been generated during M-115 production. (Id.) He calculates this number as follows: 1.0028 (potassium perchlorate

needed for the M-115 plus the 0.25% actual scrap rate for M112 production) times 3,134 lbs. yields a projected needed inventory 3,142 lbs. of perchlorate for M115 production; 3,142 lbs. minus 3,134 lbs. equals 8 lbs. (Id.)

(iv) *XF-5A Scrap Potassium Perchlorate*

The Advocacy Team asserts that the number of XF-5A photoflash units manufactured by WCLC is unknown; thus, it did not estimate the amount of scrap generated during production of this product. (AT's Opening Br., at 15.) On the contrary, WCLC's historical records disclose that WCLC's XF-5A contract was for 250 units, all of which were produced in one week in September 1956. (E2, at ¶ 11B; E3, at ¶ 20.) Those records further reflect that each unit required 0.3636 lbs. of potassium perchlorate. (E3, at ¶ 20.) Thus, Dr. Dillehay made the following calculation: 250 times 0.3636 lbs. per cartridge equals 90.9 lbs. of potassium perchlorate needed to produce the required number of XF-5A units. Next, 90.9 lbs. times 1.0025 equals 91.13 lbs., leaving **0.23 lbs.** of scrap and unaccounted for potassium perchlorate that reasonably could have been generated during the production of the XF-5A. (E3, at ¶ 20.)

In summary, the Advocacy Team's claim that "at least **2,257 lbs."** of scrap potassium perchlorate was generated during the 10 months of M-112 production, eight weeks of M-115 production, and one week of XF-5A production is rebutted by the actual records of WCLC and the opinions of someone who, unlike Ms. Sturdivant, is qualified to have them, Dr. Dillehay. This claim is also rebutted by the empirical testing data set forth in the Environ 2007 Report, the expert opinion of Dr. Powell, and the expert opinion of Dr. Chu. Indeed, this Advocacy Team's claim is inexcusable and indefensible given that the advocacy team knows from the testimony of Frank Gardner that when WCLC was closed down, Mr. Gardner personally inspected the warehouses, recorded the product inventories and did not see any potassium perchlorate remaining in WCLC's inventory:

> Q. Was any – was – do you know whether there was any potassium perchlorate remaining at West Coast Loading for this inventory you described?
>
> A. I did not see the inventory. I'm unaware of any being there.

(E17, at 222-223.)

(b) The Phantom Release of 2,257 lbs. of Waste Potassium Perchlorate "To Bare Ground"

The Advocacy Team's claim that "at least 2,245 or 2,257 lbs." of waste potassium perchlorate was dumped "to the bare ground" is based solely on its misguided estimate of scrap potassium perchlorate:

> WCLC processed large quantities of potassium perchlorate. As a result, potassium perchlorate waste was generated. It was estimated that this waste would have amounted to at least 2,245 pounds of potassium perchlorate. This . . . waste was discharged to the bare ground at the site.

(AT's Opening Br., at 62; emphasis added.) This claim contains three errors. As established, it grossly misstates how much scrap was in fact generated. It improperly equates scrap with waste. And, it demonstrates a total lack of understanding of the disposal practices in the munitions industry in the 1950's for scrap potassium perchlorate.

Again, we turn to Dr. Dillehay. First, as discussed above, only approximately 140 lbs. of scrap and unaccounted for potassium perchlorate was generated during a total of 12 months of production needed to manufacture the M-112, M-115, and XF-5A units. Second, he explains that scrap is not waste:

> . . . The manufacture of munitions, like the manufacture of almost any kind of product, produces scrap. Scrap is a term of art which refers to those raw materials or component parts used during production which do not make it into the final deliverable product. Typically, in the munitions industry, scrap could include cartridges which would fail to meet one or more specifications, component parts, and chemical ingredients which either did not meet specifications or after being mixed and/or loaded did not meet performance specifications. Scrap is distinct from remaining inventory which are raw materials acquired for production but never used.
>
> . . . [T]he fate of scrap chemicals generated during the manufacture of munitions is particularly important for at least three obvious reasons: (a) they could be explosive, (b) if not explosive in their own right, they could come into contact with other chemicals, the combination of which is explosive, and/or (c) they could have other characteristics which make them potentially harmful to human health or the environment. Thus, in my experience, if such chemicals are not recycled into the manufacturing process, which is often the case, procedures are developed to control their ultimate disposal.

E3, at ¶¶ 6, 21.) With regard to the disposal of scrap potassium perchlorate, Dr. Dillehay explains:

> With regard to the disposal of scrap potassium perchlorate or powder containing potassium perchlorate, WCLC's records report, and aerial photographs confirm, the existence of a "north Incinerator" located to the east of the WCLC parking lot. This incinerator was specifically identified in WCLC's operating procedures for the incineration of defective M-112 cartridge cases, black powder (which is not photoflash powder), and the M-112 primers. In the late 1950's through today the "burning" of energetic materials, including scrap potassium perchlorate or scrap powder containing potassium perchlorate, in an incinerator has been a generally accepted practice. The scrap chemicals containing potassium perchlorate typically would be mixed with a light diesel fuel or water, which desensitizes the material for explosion, and then this mixture is placed into the incinerator where it will combust without the risk of explosion. Potassium perchlorate, unlike some other forms of perchlorate, by itself, is not explosive or reactive under applicable regulatory standards. Potassium perchlorate does not burn unless mixed with a fuel. Rather, at approximately 752 degrees F, it begins to decompose into potassium chloride (salt) and oxygen.

(E3, at ¶ 22.)

Accordingly, in Dr. Dillehay's opinion the Advocacy Team's claim that all scrap potassium perchlorate powder or photoflash powder was simply dumped on the bare ground is unreasonable. (Id.) It is wholly inconsistent with the safe disposal of such scrap. It is wholly inconsistent with the generally accepted industry practice for its safe disposal. No evidence has been offered to establish that the limited amount of scrap potassium perchlorate, fully accounted for in the M-112 production records (115 lbs.), was thereafter dumped on the bare ground. The Advocacy Team's claim is also wholly inconsistent with the empirical field testing data in the Environ 2007 Report, which found only trace amounts of perchlorate in three WCLC Study Areas, no disposal pits or trenches, and no scrap materials of any kind in the shallow soil at the 160-Acre Site.

Finally, with regard to the 15 lbs. of potassium perchlorate which was unaccounted for at the end of M-112 production, Dr, Dillehay is of the opinion that it can be accounted for in the following ways: (a) some small amount was consumed in the explosion of Building 42 in April 1955, (b) some was fugitive dust generated during production, and/or (c) some could have been "lost" as a result of the use of multiple scales with different accuracy tolerances. (Id., at ¶ 23.) This opinion is fully consistent with the empirical data in the Environ 2007 Report. The Advocacy Team's claim is not.

(c) The Phantom Fire At Building 42

The transport rate of water down through the vadose zone is an important issue in this proceeding. The Advocacy Team is fully aware of that issue, and, as noted above, has conceded that precipitation in the Rialto/Colton Basin is insufficient in itself to transport potassium perchlorate from the surface through the 400-foot vadose zone to groundwater in 50 years, 500 years, or even 1,000 years. Thus, in the face of compelling empirical evidence that few if any discharges of trace amounts of potassium perchlorate ever occurred, the Advocacy Team has spent the last several years desperately searching for more water to support an argument that "the evidence is not there because it must have all washed away." Even though the profile of the trace amounts of perchlorate in the shallow soil in Study Areas 11, 18, and 37 (empirical evidence) is only consistent with net recharge caused by precipitation, the Advocacy Team appears poised to submit "proof" that due to a single incident, "significant" amounts of fire suppression water beyond precipitation were released at Building 42 and, apparently, everywhere else where no potassium perchlorate was found. Here is that proposed two part proof. The assumption:

> [I]t is reasonable to assume that some residue of perchlorate and other chemicals would have remained on the ground after the fires and explosions that occurred during WCLC's activities on the Property.

(AT's Opening Br., at 22.) The rank speculation:

> The porous soil at the Property is very conducive to infiltration, and would allow perchlorate and other chemicals at the ground surface to infiltrate and migrate toward the groundwater beneath the Property. The use of fire suppression water during a fire or after an explosion would further expedite this process.

(Id.) To support this "proof," the Advocacy Team has primed member Saremi to present, apparently as both fact and opinion testimony, the following contrived arguments against WCLC:

> Fires and explosions occurred at the property. Ash and residue are typically present at the ground surface in areas where fires or explosions occur. Contaminants in such residue can be dissolved and mobilized by the use of fire suppression water. This fact pertains to any fires and explosions that occurred during the operations at the 160-acre Property, including those of WCLC. . . .

> Board staff has participated in oversight of cleanup activities at industrial facilities where fires have occurred. It is common knowledge that chemical residue and ash are typically present after such fires have taken place. More specifically, a technical report prepared by TRC consultants, on behalf of the City of Rialto, verifies that high concentration of perchlorate (up to 131,000 micrograms per kilogram) were present in ash and residue after a 2004 fire at the Astro Pyrotechnics facility . . . located less than a mile away from the Property.

(Advocacy Team's 4/6/07 Witness Statements, at 4; emphasis added.)[13]

All the empirical and anecdotal evidence, however, is to the contrary. During the approximate 12 months of WCLC production of the M-112, M-115, and XF-5A, one explosion, and no fire, occurred that involved potassium perchlorate. On April 12, 1955, Building 42 (Study Area 18) was destroyed by an explosion. (E18, at 5, E19.) The WCLC employee eye-witnesses who have been asked about this event in deposition all confirm there was no fire; for most of them it is a vivid memory that has not faded with time. Mr. Davis, a former WCLC employee, who is now 92 and sometimes subject to suggestion when asked a leading question, still has a vivid and unshakable memory that there was no fire:

> Q. Did you go into the building [Building 42] while it was burning and assist one or more of these women out of the building while the building was on fire?
>
> [Objection]
>
> A. The building wasn't on fire.
>
> * * *
>
> Q. Was their smoke in the building?
>
> A. Not in the building, no. . . .
>
> Q. Do you recall whether or not anything was smoldering?
>
> A. No.
>
> * * *
>
> Q. Was photoflash powder that was in the hamper blown out of the building?
>
> A. Not blown out. Just blown up. It –

[13] The Emhart Parties object to this testimony insofar as Mr. Saremi is offering an expert opinion or purporting the be a fact witness on events where he has no personal knowledge.

Q. Blown up?

A. Right. And that's what actually caused the explosion to blow out the wall, see.

Q. . . And did the material, this whatever – Was it the result of the explosion going off out of the building?

A. It was gone.

Q. It went out the building?

A. It exploded in the building, see, and then the material was just gone.

(E20, at 485-487.) Although Mr. Davis is cited throughout the Advocacy Team's Opening Brief, the Advocacy Team has simply ignored his testimony on this issue. WCLC's records do not report any other explosion, let alone fire, involving potassium perchlorate, nor does the Advocacy Team cite to any such information.

Further, Dr. Dillehay, an expert in the field, unlike Mr. Saremi, has a very different opinion regarding whether "ash" was generated by the explosion at Building 42. In his opinion, there is no similarity between the 1955 explosion that destroyed Building 42 and the 2004 fire which is the subject of TRC's report:

> 26. With regard to the explosion at Building 42 in April 1955, it is my opinion that this explosion did not cause a significant release of potassium perchlorate to the environment. In fact, in my opinion all detectable (measurable) potassium perchlorate that may have been in Building 42 at the time of the explosion was destroyed in the explosion.
>
> 27. This opinion is based on the following: First, based upon a contemporaneous written report which attempted to reconstruct the events which brought about the explosion, by J. W. Rupert, WCLC's Safety Officer, the Building 42 explosion occurred at the end of a shift when there was likely to be only a relatively small amount of photoflash mixture remaining in the hopper of the M112 filling machine. Second, an explosion of the photoflash powder, which contains about 30% potassium perchlorate, inside a contained structure would almost certainly have led to the chemical destruction of all materials in that powder.
>
> 28. The Advocacy Team's suggestion that the April 12, 1955 explosion at Building 42 was similar to a June 2004 fire at Astro Pyrotechnics (and therefore would result in similar ash residue) is wholly unreasonable. As reported by eyewitnesses, the Building 42 explosion did not involve a fire; therefore, no ash was produced.
>
> 29. The chemical reaction which occurs during the explosion of photoflash powder is fundamentally different from the chemical reaction which occurs during a fire involving a multitude of fuels and chemicals, like that which occurred in June 2004 at Astro Pyrotechnics. When photoflash

> powder explodes, the potassium perchlorate in it is chemically destroyed—the chemical reaction which destroys the chemical ingredients is manifest by the explosion.
>
> 30. The fact that Building 42 was destroyed in the explosion suggests that significant destructive force was created by the ignition of the photoflash powder. Given what is known about the amount of photoflash powder in the building at the time, such a destructive force can only have been created by the complete destruction of the photoflash powder then in Building 42.
>
> 31. By contrast, an explosion and fire in a building where potassium perchlorate was present along with many other mixed and unmixed materials such as at Astro Pyrotechnics, will generate significant ash which could contain significant amounts of the many chemicals present that were not consumed by the fire, especially if fire suppressant measures were taken.

(E3, at ¶¶ 26-31.)

In short, Mr. Saremi's proposed testimony on this subject should be excluded. He is not qualified to offer such an opinion.[14] His purported opinion improperly relies on the assumption, dispatched by Dr. Dillehay, that ash generated by a fire in 2004 that burned through a building with some potassium perchlorate in it is similar to an unidentified residue, never found, that may have been generated by the ignition of photoflash powder and explosion that destroyed Building 42. He has also ignored the fact that there was no fire, no ash, and thus no fire suppression water used on Building 42.

(d) The Phantom WCLC North Disposal Trench

The Advocacy Team asserts that Mr. Davis identified a "WCLC trench," located just outside the north fence to WCLC's property, where, according to the Advocacy Team, he saw drums of mop water containing perchlorate waste, solvents, rags, gloves, cans, and other waste materials regularly and repeatedly poured, dumped, buried, and sometimes burned. Citing Mr. Davis's deposition testimony, the Advocacy Team claims:

> These drums [of mop water] were then transported to and dumped into a trench (burn pit) on-site. . . . The trench was bare earth, and approximately six to eight feet deep and 10 feet long. . . . Excess waste powder from the assembly process was taken to WCLC's trench for disposal. . . [R]ags and gloves . . . were taken to the trench for disposal.

[14] Accordingly, the Emhart Parties object to Mr. Saremi offering any opinion testimony on this issue because he has absolutely no specialized skill, knowledge, or experience in the field.

(AT's Opening Br., at 24.) This statement so grossly misstates Mr. Davis' testimony, it is tantamount to out-and-out fabrication. Stating that the trench was "six to eight feet deep," the Advocacy Team cites Attachment 8, Davis 184:7-185:2. (Id.) This passage contains no such testimony. A few pages earlier in his deposition, at page 164, which the Advocacy Team cites elsewhere, Mr. Davis testified that, while he saw a trench, it was shallow, only six to eight inches deep and 18 to 24 inches wide:

> Q. And how large would you say the trench was?
>
> A. Oh, I would say that it was a shallow trench, maybe 6 to 8 inch deep and maybe 18 to 24 inches wide, and I would say that probably it was 10 feet long.

(E21, at 164.)

The Advocacy Team's claim that "[v]arious WCLC employees personally witnessed liquid, perchlorate-contaminated waste materials being poured into the trench" is false. No witness gave such testimony. (AT's Opening Br., at 24.) After identifying the location of the "north trench" on an aerial photograph of the 160-Acre Site, Mr. Davis testified:

> Q. Do you recall whether you observed that trench in the area you've just marked on the photograph more than the one time you described Mr. Rupert being at the trench?
>
> A. No. I couldn't say that I viewed it anymore than just that one time. That is, I may have, but I don't recall.
>
> * * *
>
> Q. Do you recall whether Mr. Rupert was holding any kind of container?
>
> A. No.
>
> Q. You recall that somebody was with him digging the trench, correct?
>
> A. I think he was holding a shovel.
>
> Q. Do you recall whether, apart form the powder you mentioned—you've described, whether anything else was thrown into that trench on that occasion?
>
> A. Not that I recall.
>
> Q. And do you have any way to estimate how much material you saw Mr. Rupert put into the trench?

A. Oh, I'd say probably a wastebasket full. We'll say a kitchen-size wastebasket.

* * *

Q. Did you see Mr. Rupert in fact burn anything in the trench on that occasion?

A. I'm trying to recall whether – I don't recall whether I actually saw things burning.

Q. You don't have any recollection of any burning –

A. No.

* * *

Q. Did you ever talk to Mr. Rupert about what he was doing at that time?

A. No.

Q. . . .Do you have any understanding of why Mr. Rupert was using the trench on that occasion?

A. No, I do not.

(E22, Davis Vol. III, at 798-800.) Mr. Davis was thereafter examined by other counsel, some of whom represented clients adverse to the Emhart Parties, and on cross-examination this testimony never changed.

Rather than challenge elderly witnesses as having too often said "yes" to a blizzard of leading questions or as having faded and confused memories, the Emhart Parties decided to resolve questions, like a dimly-recalled 6 to 8 inch deep by 18 to 24 inch wide by 10 feet long trench, by going out to the 160-Acre Site and looking for it. Thus, as part of its 2006 Work Plan, Environ identified, with the approval of Regional Board staff, the area Mr. Davis marked on an aerial photograph as the "north trench" location, and designated it Study Area 9.

On March 25, 2006, Environ dug four separate trenches in Study Area 9 (Davis' "north trench") in an effort to locate remnants of rags, gloves, waste powder, ash from a fire, or any other indication of buried or dumped waste. (E8, at ¶ 2.) Environ collected and analyzed nine soil samples to analyze for perchlorate and six separate soil gas samples to analyze for VOCs. (E1, at Table 2, at 11; and Table 9, at 16.) Nothing was

found in Study Area 9; no perchlorate, no TCE, no gloves, no rags, no cans, not any other kind of waste materials. (E8, ¶ 2.)

At this juncture in our examination of the Advocacy Team's evidence a comment is in order. It is very disturbing to the Emhart Parties that the Advocacy Team has made this assertion about a "north trench" when Environ's comprehensive investigation of Study Area 9 establishes that it, along with all the alleged wastes, is not there.

It is even more disturbing that the Advocacy Team would make this assertion knowing of the results of that investigation, which Advocacy Team member Holub has confirmed was thorough and did not find anything. On April 21, 2006, one month after Environ's investigation of Study Area 9 was completed, Mr. Holub advised the Regional Board as follows:

> [I]n the case of Emhart, they've actually done more work out there than was proposed in the work plan. There were several other areas of interest that came up as work was going on out there. And we suggested then go dig in another area. And, they were very receptive in just moving the equipments over and digging trenches on other areas and grabbing samples. So we have been very pleased.
>
> * * *
>
> [A]ll the soil gas samples and all the soil samples that we received analytical results for [TCE] have all been non-detect. So no TCE has been detected in the shallow soil. And most of the soil samples that we received analytical results for perchlorate were non-detect.

(E201, Ex. 42, at 52 and 44.)

> So when all this data comes in, and we can look at it comprehensively, we will be in a better position to make some type of conclusions or determination about what's going on out there.
>
> But two things stand out. One is that there was no TCE detected in any of the shallow soil samples. And Perchlorate was not detected in most of the locations that were looked at.

(Id., at 47.)

In short, not only is there no evidence of a "north trench," but there is mounting empirical evidence that the Advocacy Team has little to no regard for the truth.

(e) The Phantom WCLC South Disposal Pit

The Advocacy Team claims, without any supporting testimony from a former WCLC employee, that:

> According to WCLC's "Safety Regulations for Handling Azides, Styphnates, and Similar Explosives" (Attachment 8), the used sponges and cleaning rags, cleaning water and other waste liquids generated form operations, including mixing photoflash powder containing perchlorate, were to be taken to the disposal pit south of the plant site and drained into the ground."

(AT's Opening Br., at 24.) During her deposition in 2003, Ms. Sturdivant admitted that this 1954 document did not relate to perchlorate use or disposal. (E64.) Nevertheless, in 2006, Mr. Saremi asked Environ to investigate what he suspected might have been a drum disposal area located near historical rail spurs. (E8, Ex. D.)

Again, all of the Advocacy Team knows that the empirical evidence is to the contrary to its assertion that there was any south area disposal for azides, styphnates, or drums. On April 12, 2006, nine days before Mr. Holub's April 21, 2006 report to the Regional Board, Environ excavated a site where the Advocacy Team suspected that a "disposal pit south of the plant" was located. (E8, Ex. D.) This area is Study Area 42 in the Environ 2007 Report. (E1, at 11.) Environ's original work plan called for the excavation of a single trench. That was done and nothing was found. (E8, Ex. D.) Advocacy Team member Saremi, who was on the site, then asked Environ to dig ten additional trenches over the next two days in search of the missing "south disposal pit." Jack Robinson, one of Environ's field engineers, described his work in his daily e-mail log sent to Emhart with copies to Mr. Saremi and Wayne Praskins at Region 9 of the United States Environmental Protection Agency:

> On Wednesday April 12, 2006[,] trench excavation continued at the easternmost rail spur (Area N5) [subsequently renamed Study Area 44], located on B&B Plastics property. Five trenches were installed on Tuesday and an additional five trenches were installed Wednesday to identify the location and characteristics of the former railroad spur area. Of these ten, three deep trenches bisected the former spur exposing the former sidewalls and base of the incised railroad bed with fill material overlying undisturbed soil. Several of the trenches partially bisected the fill material in the spur area. **No material presence of debris was identified in any of the ten trenches**. Two of the shallow trenches were installed at locations to identify the nature of the soil at that locations as fill material or undisturbed soil. Two other shallow trenches and one deep trench were installed at

> locations where the geophysical survey indicated the presence of minor, near surface metal in soil. **Metal debris was noted at the surface in these areas and no subsurface debris was identified. Kamron Saremi observed and directed the excavation location and activities.**

(E8, Ex. D; emphasis added.) Ten soil samples were taken from these trenches; no perchlorate was found. (E1, at Table 2, at 11.) One additional sample was taken from inside a crushed drum found in this area for testing for VOCs; no TCE was detected. (Id., at Table 6, at 16.)

In short, the empirical evidence establishes that there is not and never was a "south disposal trench" or drum disposal area during WCLC operations on the 160-Acre Site.

B. Liability Element 3: The Advocacy Team Presents No Empirical or Anecdotal Evidence That Further Investigation of or any Remediation in the WCLC Study Areas Is Needed

At the end of its Opening Brief, the Advocacy Team asserts with regard to the 160-Acre Site that it seeks an order that the "Dischargers" "[c]onduct soil and groundwater investigations at . . . the Property" and "submit an interim remedial action plan for cleanup of soil and groundwater at or adjacent to the Property". (AT's Opening Brief, at 108.)

Over the past four years there has been, and there continues to be, a blizzard of unsupported and knowingly false accusations made by Advocacy Team members regarding the historical operations of WCLC. As noted, in a good faith attempt to end that onslaught, Emhart commissioned Environ to investigate the 160-Acre Site and directed them to study every possible area where someone pointed an accusing finger or a faded or confused memory suggested that perchlorate or TCE waste might have been dumped, poured, buried , or burned. Over the past three years, Emhart, at a cost of more than $2.3 million, has looked everywhere it was asked to look in the soil and groundwater. The results of this exhaustive investigation are summarized in the Environ 2007 Report. (E1.)

The Advocacy Team is fully aware of and has acknowledged the thoroughness of that effort. The Advocacy Team is also fully aware of the empirical results. Those results

should clarify all clouded, faded, or misbegotten memories regarding WCLC historical operations on the 160-Acre Site. For the Advocacy Team to ignore the empirical evidence in this proceeding is inexcusable and irresponsible. For it to continue to embrace anecdotal evidence that has been negated by hard data is inexcusable and irresponsible. And, to misstate and misrepresent facts is inexcusable and irresponsible.

The empirical and anecdotal evidence discussed herein compels but one conclusion: There was no discharge or release of potassium perchlorate or TCE by WCLC at the 160-Acre Site that requires further investigation or any remediation. If the Hearing Officer agrees, no analysis of the issues which follow need be conducted, and the 2007 CAO and all proceedings against the Emhart Parties now pending before the State Water Board should be dismissed with prejudice.

C. Liability Element 4: The Advocacy Team Has No Credible Evidence and Only Misstatements of the Law to Support Its Claim That One or More of the Emhart Parties Is Liable Under the Successor Liability Theories of De facto Merger and Express Assumption for WCLC's Alleged Liability Under Water Code § 13304

1. Summary of Argument

The Advocacy Team devotes 34 pages in its Opening Brief (28-62) to a confusing, dense argument with multiple subparts in an attempt to convince the State Water Board that KLI, Emhart, Kwikset, BDI, and/or BD(US)I are liable under Water Code §§ 13304 and 13267 for WCLC's alleged discharge of perchlorate to the shallow soil in the northern portion of the 160-Acre Site. Most of these 34 pages are irrelevant. The remainder are wholly without merit.

As set forth in Section I, above, there is no dispute that WCLC merged into KLI. There is no dispute that AHC is Emhart. There is no dispute that Kwikset, created in 1985, never owned Emhart, KLI, or WCLC. And, there is no dispute that BDI will honor final liability, if any, ultimately imposed on Emhart as the result of this proceeding. The dispute thus narrows to two questions which have been re-written slightly to reflect the evidence discussed in the preceding section,

The first question:

> Is Emhart liable under Water Code §§ 13304 or 13267 for any necessary future investigation or remediation of WCLC's alleged discharges under the de facto merger theory?

The answer to the first question is "No." The relevant facts and controlling rules governing the de facto merger theory of liability, which the Advocacy Team ignores and misstates, are not in doubt and are easily summarized:

The Facts: WCLC's munitions business at the 160-Acre Site was never acquired or continued by AHC. That business was discontinued in March 1957, months before AHC acquired KLI's stock on July 1, 1957, and more than a year before KLI was dissolved and its assets were distributed to AHC on June 30, 1958. WCLC's employees, management, interest in the 160-Acre Site, and its munitions business were never transferred to AHC. Ms. Thompson, as noted above, a Certified Public Accountant and a Certified Fraud Examiner, has been retained by Emhart to review WCLC's, KLI's, and Emhart's corporate records and present her findings to the Hearing Officer on each of these factual issues. Her proffered testimony is set forth in Exhibit E2.

The Law: The de facto merger theory of liability does not impose the alleged liabilities created by WCLC's munitions business on Emhart. Under the de facto merger theory (an equitable doctrine), because Emhart did not acquire the benefits of WCLC's munitions business, it did not acquire its burdens (liabilities). As we shall see, the equitable principle (one who takes the benefit should bear the burden) is the immutable guiding rule under the law of successor liability. (*Ray v. Alad* (1977) 19 Cal.3d 22, 34.)

The second question:

> Did AHC (Emhart) in 1958 expressly assume by contract KLI's alleged liabilities under Water Code §§ 13304 and 13267, both of which were enacted many years later, for any necessary future investigation or remediation of WCLC's alleged discharges?

The answer to this question is "No." The relevant facts and controlling rules of law governing liability assumption agreements, which the Advocacy Team again ignores and misstates, are also not in doubt and are easily summarized:

The Facts: In 1958, in connection with its dissolution, KLI entered into a contract whereby AHC assumed certain KLI liabilities. At the time, the California Corporations Code required a corporation that decided to wind up its affairs and dissolve to make provision for its known, and no other, debts and liabilities. Thus, there was a reason, although limited, for the KLI/AHC liability assumption contract. Despite diligent search, that contract has not been found. However, two key contemporaneous documents have been found. They both describe in detail the terms of the KLI/AHC liability assumption contract. While these descriptions differ slightly, that difference is not material to the legal issue here presented.

The first document is a copy of a resolution of the Board of Directors of AHC, dated June 5, 1958. (E31.) The resolution describes in some detail the terms of the then proposed liability assumption contract that AHC's Board of Directors authorized its officers to enter into with KLI in connection with KLI's pending dissolution. Specifically, the resolution authorized AHC's management to enter into a contract with KLI whereby AHC would assume all existing liabilities, whether known, unknown, or contingent. By its terms, the AHC board resolution did not authorize AHC officers to enter into a contract that expressly or otherwise assumed any KLI liabilities created by later-enacted statutes.

The second document is a copy of KLI's Dissolution Certificate. That document, dated June 30, 1958, was filed, under penalty of perjury, with the California Secretary of State as required by law. (E30.) This legal requirement, which continues today, has two purposes: It advised the Secretary (and thus the public) that KLI had dissolved and completed the winding up of its affairs. And, as required by law, it confirmed that KLI had accounted for all its known debts by having paid them and by having contracted with AHC to pay all known KLI debts that remained unpaid. The Dissolution Certificate does not state, expressly or otherwise, that AHC agreed to assume any KLI liability created by later-enacted statutes.

These two documents are the best evidence of the actual terms of the AHC liability assumption contract entered into with KLI between June 5, and 30, 1958. Neither

document states that AHC was authorized to or in fact agreed to assume any KLI liability created by a later-enacted statute.

The Law: Because the nature and scope of liabilities created by later-enacted statutes are by definition unknown, the law will not impose such liability on a party to a liability assumption contract unless its language expressly so states. (*Swenson v. File* (1970) 3 Cal.3d 389, 393-394.)

The Advocacy Team has ignored these facts and the law, even though the information has been set forth in detail for many years in the public records of the Regional Board (the 2002 CAO), the U.S. EPA, and the federal courts in both Riverside and Los Angeles. As the Hearing Officer has made clear, the Advocacy Team has had five years to make its case, and it is time for it to prove its allegations or they must be dismissed.

We turn then to the Advocacy Team's "proof" and set forth why its allegations of successor liability against the Emhart Parties must be dismissed with prejudice.[15]

2. Emhart Is Not Liable under Water Code §§ 13304 or 13267 for any Necessary Future Investigation or Remediation of WCLC's Alleged Discharges Under the De facto Merger Theory

(a) The Controlling Law of De facto Merger

Ray v. Alad (1977) 19 Cal.3d 22 is the seminal decision of the California Supreme Court on corporate successor liability. It is one of the modern cornerstones upon which the law in this area has been built since 1977. There, the Supreme Court addressed (in the context of the law of products liability) the question of whether Alad II, which had acquired the assets of Alad I, was liable for injuries caused by a defective ladder manufactured by Alad I. The Court described why its decision to impose successor liability on Alad II for the injuries caused by Alad I's defective ladder was fair and equitable:

> [T]he imposition upon Alad II of liability for injuries from Alad I's defective products is fair and equitable in view of Alad II's acquisition of Alad I's trade

[15] Attached hereto as Appendix A is a detailed statement of the relevant corporate and business events here at issue, along with citations to supporting exhibits.

> name, good will, and customer lists, its continuing to produce the same line of ladders, and its holding itself out to potential customers as the same enterprise. This deliberate albeit legitimate exploitation of Alad I's established reputation as a going concern manufacturing a specific product line gave Alad II a substantial benefit which its predecessor could not have enjoyed without the burden of potential liability for injuries from previous manufacturing units. Imposing this liability upon successor manufacturers in the position of Alad II . . causes the one "who takes the benefit [to] bear the burden."

(19 Cal.3d at 34.)

Here, unlike the defendant in *Ray v. Alad*, following KLI's dissolution and the distribution of its assets, AHC did not continue to produce WCLC's munitions which had shut down by 15 months earlier; nor did AHC hold itself out to its potential customers as engaged in that discontinued enterprise. (E2.) Thus, under *Ray V. Alad*, because AHC never took the benefit of WCLC's munitions business, Emhart does not bear its alleged burdens.

Marks v. Minnesota Mining and Manufacturing Co. (1986) 187 Cal.App.3d 1429, 1437, a case cited repeatedly by the Advocacy Team, reaffirms (again in the context of the law of products liability) the importance of the continuity of enterprise factor to the de facto merger theory of liability explained in *Ray v. Alad*. The Court of Appeal in *Marks* identified a five-part test to be used to determine whether a transaction (cast in the form of an asset sale) should nevertheless be treated as a de facto merger. One of the five elements was this question: "did purchaser continue the same enterprise after the sale." (187 Cal.App.3d at 1437.) In words almost identical to the Supreme Court's in *Ray v. Alad* , the Court of Appeal in *Mark's*, quoting Michigan law, explained the equity principle underlying it:

> "Public policy requires that [the asset purchaser], having received the benefits of a going concern, should also assume the costs which all other going concerns must ordinarily bear."

(187 Cal.App.3d at 1429.)

Here, the answer to the question posed in *Marks* ("did purchaser continue the same enterprises after the sale") is this: Following KLI's dissolution and distribution of its assets, AHC did not continue the WCLC enterprise which had been shut down 15 months

earlier; nor did AHC hold itself out to its potential customers that it was engaged in that discontinued munitions loading enterprise. (E2.) Thus, under *Marks*, because AHC never continued the WCLC enterprise, the de facto merger theory of liability will not impose the alleged liabilities created by the WCLC enterprise on Emhart.

Louisiana-Pacific v. Asarco, Inc., 909 F.2d 1260, 1264 (9th Cir. 1990), is one of the seminal federal Court of Appeal decisions in the Ninth Circuit (which includes California) on the imposition of environmental liabilities on alleged successor corporations. There, the Ninth Circuit set forth the four requirements under the de facto merger theory applicable in most courts throughout the United States. The first requirement is:

> [A] continuation of the enterprise of the seller in terms of continuity of management, personnel, physical location, assets, and operations.

(909 F.2d at 1264.) The Ninth Circuit refused to impose the environmental liabilities of IMP (the asset seller) on L-Bar (the asset purchaser) under the continuing enterprise theory of successor liability theory for two reasons:

> First, L-Bar [the asset purchaser] did not have actual notice of IMP's potential CERCLA liability. At the time of the asset sale, IMP had not been identified as a responsible party by any state or federal agency and no one had asserted or threatened a claim against IMP for clean up costs. Second, and perhaps more importantly, L-Bar did not continue IMP's slag business. In fact IMP had ceased its slag business nine months before L-Bar purchased its assets.

(909 F.2d at 1266.)

Here, the Advocacy Team has not proffered any evidence that on of before June 30, 1958, KLI had been identified as a responsible party by any federal or state agency with regard to any contamination on the 160-Acre Site, that in 1958 there was anything to clean up, or that AHC had been so informed. Perhaps more importantly, following KLI's dissolution and the distribution of it assets, AHC did not continue WCLC's munitions business, did not continue to employ WCLC's employees, its management, or had any business interest in having the 160-Acre Site transferred to AHC. (E2.) Thus, under *Asarco*, Emhart is not liable under any theory of successor liability for WCLC's alleged discharges.

Chrysler Corporation v. Ford Motor Co., 972 F.Supp. 1097, 1111-1112 (E.D. Mich. 1997) is the final de facto merger case we discuss because it involves Michigan law, which the *Marks* court found both relevant and persuasive, and it is another environmental liability case. There, the court identified the four requirements for de facto merger under Michigan law, the first of which is "continuation of the enterprise of the seller corporation, with continuity of management, personnel, physical location, assets, and general business operations." (972 F.Supp. at 1111.) The Court refused to impose successor liability under any theory on Chrysler Corporation for contamination at a manufacturing facility in Willow Run, Michigan (the "Willow Run Plant") owned by KFC. Chrysler was the admitted successor of its parent KMC, having acquired the assets of KFC in 1956 three years after KFC ceased all operations and sold its Willow Run Plant. Specifically, the Court held that the de facto merger theory of liability did not apply because:

> [T]he asset sale [did not] bring about a continuity in the operations of [Chrysler] and KFC. . . KFC's car production at Willow Run ceased in late 1953, when the plant was sold to GM, and its parts production stopped some two years before the 1956 assets purchase. . . . Thus, the 1956 assets purchase did not mark the onset of [Chrysler] assuming KFC's former production niche.

Here, following the KLI's dissolution and the distribution of it assets: (1) there was no continuity in operations of WCLC's Rialto plant which had shut down 15 months earlier and been sold; (2) nor did AHC's acquisition of KLI's assets mark the onset of AHC assuming WCLC's former production niche. There was no continuity of WCLC's business, management, personnel, physical location, assets, or general business. (E2.) Thus, under *Chrysler Corporation*, Emhart is not liable under any theory of successor liability for WCLC's alleged discharges.

(b) Expansion of Successor Liability Is Disfavored

In 1993, the California Supreme Court, in *Beatrice v. State Board of Equalization* (1993) 6 Cal.4th 767, 777-778, refused to apply successor liability in a tax liability case, rejecting the plaintiffs' attempt to expand the holding in *Ray v. Alad*:

> This proposition relies on an expansive and untenable reading of this court's holding in Ray v. Alad . . . . That decision arose out of a personal injury action brought on a theory of strict liability for a defective product by a plaintiff injured in a fall from an allegedly defective ladder. The corporate manufacturer of the ladder had been dissolved more than six months prior to the accident. The defendant corporation had acquired the assets of the manufacturer and continued to produce the line of products of the defunct manufacturer. There was no outward indication that a change of ownership had occurred and the defendant corporation held itself out as the same enterprise.
>
> We held that in those circumstances, where the injured plaintiff had no recourse against the actual manufacturer, tort liability existed. We expressly limited the holding to tort liability, and emphasized that this was an exception to the general rule that liability with respect to contractual obligations exists only if the liabilities are expressly assumed.

In 1999, the Court of Appeal, Fourth District, refused, in *Monarch Bay II v. Professional Service Industries, Inc.* (1999) 75 Cal.App.4th 1213, 1218, to expand the rules governing successor liability in a case involving engineering malpractice with this explanation:

> The criticisms levied at the product line exception, which, of course, we are bound to follow under the principles of stare decisis, militate against eroding the traditional rule even further. "Predictability is vital in the corporate field. Unforeseeable alterations in successor liability principles complicate transfers and necessarily increase transaction costs. Major economic decisions, critical to society, are best made in a climate of relative certainty and reasonable predictability. The imposition of successor liability on a purchasing company long after the transfer of assets defeats the legitimate expectations the parties held during negotiation and sale. . . .
>
> The trend in other jurisdictions appears to be away from expansion of successor liability. Although the product line exception was adopted by a number of courts following the Ray opinion, "recent cases from a variety of states have rejected the product line exception in favor of retaining the traditional rule on non-liability."

In 2001, the Court of Appeal, First District, refused in *Franklin v. USX Corporation* (2001) 87 Cal. App.4th 615, 625, to expand the rules of successor liability in a personal injury case:

> Predictability is vital in the corporate field. Unforeseeable alterations in successor liability principles complicate transfers and necessarily increase transaction costs. Major economic decisions, critical to society, are best made in a climate of relative certainty and reasonable predictability. The imposition of successor liability on a purchasing company long after the transfer of assets defeats the legitimate expectations the parties held during negotiation and sale. Another consequence that must be faced is that few opportunities would exist for the financially troubled company that wishes to

cease business but has had its assets devalued by the extension of successor liability.

(c) The De facto Merger Doctrine Does Not Apply To The Stock Acquisition Even When the Subsidiary Is Later Dissolved

In the two preceding subsections, Emhart assumed, for the purpose of argument, that the de facto merger doctrine, as the Advocacy Team asserts, applies to the facts here at issue. In fact, it does not. The de facto merger doctrine is an exception to the asset purchase rule of non-liability. The asset purchase rule states that when one corporation purchases the assets of another, the purchaser does not thereby assume the seller's liabilities unless, among other exceptions not here applicable, that transaction amounts to a de facto merger. *Ray v. Alad* (1977) 19 Cal.3d 22, 28. There are at least two California cases which have refused to apply the de facto merger theory to facts similar to those here at issue.

The Court of Appeal, Fourth District, in *Potlatch Corp. v. Superior Court* (1984) 154 Cal.App.3d 1144, 1150-1151, refused to apply the de facto merger theory where (i) corporation A (Potlatch) purchased the stock of corporation B (Speedspace), (ii) B, now the wholly owned subsidiary of A, continued to operate, and (iii) several years later B was lawfully dissolved and its assets distributed to A. The court explained that when A acquired the stock of B, "it did not acquire any of its assets, it acquired its capital stock" and B continued to operate its business with its own assets. (Id.) Then,

> [O]n December 31, 1978, some nine years after B ceased manufacturing the type of beams here involved, [B] was dissolved, its business discontinued and its physical assets liquidated by sale at auction. But [A] did not acquire the plant and equipments of [B] nor did it continue [B's] business.
>
> Because of the dissolution of [B] in accordance with California law, [A] ultimately received the net value of [B's] assets, but it did so as the sole shareholder of [B]. When a corporation has been duly and lawfully dissolved, its shareholders are not liable for debts of the corporation, nor is the rule changed on account of the fact that the shareholder happens to be another corporation, that is, that the dissolved corporation was a wholly owned subsidiary of another corporation.

(*Potlatch*, 154 Cal.App.3d at 1151; emphasis added.)

Here the facts are virtually the same. On July 1, 1957, AHC acquired the stock of KLI. Prior to that stock acquisition, KLI's subsidiary WCLC ceased all operations and liquidated its plant and equipment. (E2.) Thereafter KLI continued to operate as a subsidiary of AHC. Then, on June 30, 1958, KLI was lawfully dissolved. Thus, under *Potlatch*, because KLI was duly and lawfully dissolved, its shareholder AHC (Emhart) is not liable for KLI's debts under the de facto merger doctrine because the doctrine does not apply.

The Court of Appeal, First District, in *Phillips v. Cooper Laboratories* (1989) 215 Cal.App.3d 1648, also refused to apply the de facto merger theory to facts similar to those now here and the facts in *Potlatch*. The Court expressly rejected *Marks*:

> The Phillipses' reliance on *Marks. . .* does not change this conclusion. In Marks, the court discussed five factors which indicate whether a transaction cast in the form of an *asset sale* actually achieves the same practical result as a merger. [citations.] Here, Nestle never purchased Miller's assets. It only purchased Miller's stock. *Mark's* does not apply to the present transaction.

(215 Cal.App.3d at 1660.)

Here, the facts are the same. AHC never purchased KLI's assets. It only purchased KLI's stock. Thus, *Mark's* does not apply to the present transaction.

(d) Miscellaneous Advocacy Team Successor Liability Arguments

The Advocacy Team's selection of its "supporting" authorities speaks volumes regarding the merits (rather the total lack of merit) of its claim that Emhart is liable for WLCLC's alleged discharges under some form of successor liability. For example, at page 31, at the out set of its successor liability argument, the Advocacy Team asserts, without any supporting authority, that a parent corporation "bears full legal liability for all of [its subsidiaries] debts." On the contrary,

> It is a general principle of corporate law deeply "ingrained in our economic and legal systems" that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries.

(*United States v. Bestfoods* (1998) 524 U.S. 51, 61.) There are at least two authorities cited by the Advocacy Team that are wholly inapposite.

(i) Heating Equipment Mfg *and* San Joaquin Ginning

At pages 38-39 and 41-43, the Advocacy Team asserts that the 1957 acquisition of KLI's stock by AHC and the 1958 dissolution of KLI and accompanying liquidating distribution creating the Kwikset Division constituted an "express merger," thereby subjecting AHC to all of KLI's liabilities as a matter of law. In support of this argument, the Advocacy Team cites the case of *Heating Equipment Mfg. Co. v. Franchise Tax Board* (1964) 228 Cal.App.2d 290, 302, and Section 1107 of the Corporations Code. It also cites *San Joaquin Ginning Co. v. McColgan* (1942) 20 Cal.2d 254.

Reliance on both of these case is misplaced.

First, *Heating Equipment*, and *San Joaquin Ginning Co.* are tax cases that applied the unique definition of a corporate reorganization set forth in Revenue and Taxation Code § 23251. These cases indicate that a corporate dissolution accompanied by a transfer of the dissolved corporation's operating assets to a parent corporation will be treated as a "merger" *for tax purposes*. (*Heating Equipment*, 228 Cal.App.2d at 308.) The Advocacy Team offers no authority extending the application of this statutory definition in the tax code to any other types of cases, let alone, State Water Board proceedings under the Water Code.

Second, the law governing statutory mergers in 1958 can be found in the General Corporation Law that was in effect until December 31, 1976 (hereafter, the "Prior Law"). The Prior Law contained a number of mandatory procedures which a merging corporation was required to perform in accomplish a statutory merger.[16] See, e.g., Prior Law § 4103 (directors "shall" approve merger or consolidation agreement) and § 4113 (executed certificate of merger "shall" be filed with Secretary of State). It is undisputed that neither

[16] The Prior Law generally governs all corporate "acts, contracts or transactions occurring prior" to the effective date of the "new law" that took effect on January 1, 1977. Cal. Corps. Code § 2301(b). The Prior Law is available for review in the Appendix to Volume 24 of West's Annotated California Corporations Code (1990).

KLI nor AHC ever undertook to statutorily merge under Prior Law. Rather, as discussed above at length, in 1958 KLI duly and lawfully dissolved.

(ii) Arthur Spitzer et al.

At pages 45-47, the Advocacy Team cites *Arthur Spitzer et al.*, Order No. WQ 89-8 (SWRCB 1989) as support for its de facto merger theory. The *Arthur Spitzer* case is difficult to decipher, as the analysis blends a number of different theories of law, including a corporate veil-piercing analysis and a de facto merger analysis under *Ray v. Alad*. What emerges as most troubling to the State Board in that case, however, is that the subsidiary (Fashion-Tex) was apparently just abandoned and/or went out of business, without leaving assets or ongoing business to satisfy Fashion-Tex's creditors. That is not the case here. When KLI was dissolved, its business was duly wound up, and its creditors were paid or, as discussed below, adequate provision was made for all its known debts and liabilities, which were fully accounted for.

(e) Conclusion (No De facto Merger)

Assuming arguendo, as we did in subsection (a) above, that the de facto merger theory of liability (an exception to the asset purchase rule) is applicable to AHC's 1957 acquisition of the stock of KLI, and the 1958 lawful dissolution of KLI which resulted in the distribution of its assets to AHC, no de facto merger occurred between WCLC and AHC because AHC never continued WCLC's product line, enterprise, operations, management, employees, physical plant, or held itself out to be WCLC to AHC customers. Having taken none of the benefits of WCLC's enterprise, AHC is not to bear its burdens. Thus, the Advocacy Team's de facto merger argument must be rejected.

3. Emhart Did Not Expressly Assume Any KLI Liability Created By Later-Enacted Statutes, such as Water Code §§ 13304 and 134267

(a) The Controlling Law

Swenson v. File (1970) 3 Cal.3d 389, 393-394 is the seminal case regarding assumption by contract of liabilities created by later-enacted statutes. There, the

California Supreme Court held that liabilities created by later-enacted statutes will not be deemed to be part of a contract unless that contract expressly so states:

> "'all applicable laws in existence when an agreement is made, which laws the parties are presumed to know and to have in mind, necessarily enter into the contract and form a part of it, without any stipulation to that effect, as if they were expressly referred to and incorporated.'" [citations.] However, laws enacted subsequent to the execution of an agreement are not ordinarily deemed to become part of the agreement unless its language clearly indicates this to have been the intention of the parties. [citations.]

(3 Cal.3d at 393; emphasis added.) The Court explained:

> The parties are presumed to have had existing law in mind when they executed their agreement [citations]; to hold that subsequent changes in the law which impose greater burdens or responsibilities upon the parties become part of that agreement would result in modifying it without their consent, and would promote uncertainty in commercial transactions.

Id., at 394; emphasis added.)[17]

The Advocacy Team neither cites nor discusses *Swenson*.

(b) The Liability Assumption Contract

As noted above, in connection with KLI's dissolution, AHC entered into a contract with KLI whereby it assumed certain KLI liabilities. At the time, the California Corporations Code required a corporation that decided to wind up its affairs and dissolve to account only for its known, and no other, debts and liabilities. Thus, there was a reason, although limited, for the KLI/AHC liability assumption contract. Despite diligent search, that contract has not been found. Two key contemporaneous documents, however, have been found, which describe in significant detail the terms of the proposed assumption agreement between AHC and KLI: the June 5, 1958 AHC Board of Directors Resolution authorizing the assumption agreement; and the June 30, 1958 Certificate of Winding Up and Dissolution of KLI. (E31; and E30.) While these descriptions differ slightly, that difference is not material to the issue here presented.

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[17] *Swenson* involved the interpretation of a covenant not to compete between an accounting firm and one of its partners. Shortly before the partner retired, the law governing the scope of permissible geographic restrictions in such agreements was amended. For the reasons noted above, the Supreme Court held that the law in effect at the time the covenant not to compete was executed governed. *Swenson*, 3 Cal.3d at 392-393.

(i) The AHC Board Resolution

On June 5, 1958, in connection with KLI's plan of dissolution, the AHC board of directors met and authorized its officers by resolution to enter into an agreement with KLI whereby AHC would assume all of KLI's "debts, liabilities and obligations . . . in existence on the date of such distribution and transfer of its assets and business, contingent or otherwise known or unknown." In pertinent part, that resolution provided:

> WHEREAS, the Board of Directors of KWIKSET LOCKS, INC. adopted a Plan of Dissolution to be effected by the distribution and transfer of all of its [KLI's] assets and business to this corporation [AHC] as the owner and holder of all of its issued and outstanding shares of capital stock upon the condition that this corporation expressly assume and guarantee in good faith to pay all debts, liabilities and obligations of KWIKSET LOCKS, INC. in existence on the date of such distribution and transfer of its assets and business, contingent or otherwise known or unknown. . . .
>
> NOW, THEREFORE, BE IT RESOLVED, that the President or any Vice President, and the Secretary or Assistant Secretary of this corporation [is] authorized and directed . . . (a) to execute and deliver to [KLI] an appropriate form of assumption agreement expressly assuming all the obligations and liabilities of [KLI] as aforesaid."

(E31; emphasis added.)

The Advocacy Team quotes this document in its Opening Brief, at pages 34-35, and then proceeds to fundamentally mischaracterize it twice. On page 34, it claims that this document is "the extrinsic evidence [which] establishes that AHC expressly assumed all the liabilities of KLI." On page 35, the Advocacy Team claims that: "The AHC Directors minutes make clear that AHC expressly intended to assume responsibility for the obligations – known and unknown – of KLI."

In making these assertions the Advocacy Team has left out the language which expressly limits the proposed liability assumption contract to only those KLI's "debts, liabilities and obligations . . . in existence on the date of such distribution and transfer of its assets and business, contingent or otherwise known or unknown." Necessarily, an agreement limited by its terms to the assumption of those liabilities "in existence" on June 30, 1958, does not include liabilities created by later-enacted statutes, such as Water Code §§ 13304 and 13267, neither of which would come into existence until many years later. *Swenson v. File*,

supra, 3 Cal.3d at 393 ("laws enacted subsequent to the execution of an agreement are not ordinarily deemed to become part of the agreement unless its language clearly indicates this to have been the intention of the parties" (emphasis added).)

Contrary to the Advocacy Team's claim, the AHC Board Resolution does not contain so much as a hint that the parties intended for AHC (Emhart) to assume any KLI liabilities that did not then exist, let alone, those liabilities to be created by later-enacted statutes, which can only be assumed expressly. Emhart agrees, however, that the AHC Board Resolution itself is clear, extrinsic evidence of the fact that the then proposed liability assumption agreement was to be limited to only KLI's liabilities "in existence" on June 30, 1958.

(ii) *KLI's Certificate of Dissolution*

On June 30, 1958, KLI filed its Dissolution Certificate with the California Secretary of State. That Dissolution Certificate confirmed, under penalty of perjury, that pursuant to AHC's liability assumption agreement, executed on June 30, KLI had accounted for all its known and unpaid debts and liabilities by actually paying them and by obtaining AHC's agreement to assume all known liabilities:

> Said corporation's [KLI's] known debts and liabilities have been actually paid or adequately provided for by the assumption of all unpaid debts and liabilities by The American Hardware Corporation . . . pursuant to an agreement dated June 30, 1958, between [KLI] and [AHC] by virtue of which [AHC] assumed and became responsible for all of the debts and liabilities of [KLI] remaining unpaid as of June 30, 1958.

(E30; emphasis added.) The known and unpaid debts and liabilities as of June 30, 1958, is a subset of KLI's liabilities in existence on that date. The Dissolution Certificate does not contain language which states that AHC expressly assumed KLI liabilities created by later-enacted statutes, like Water Code §§ 13304 and 13267.

(iii) *Summary of The Contemporaneous Evidence*

The June 5, 1958 AHC board resolution is compelling contemporaneous documentary extrinsic evidence that AHC intended, in connection with the dissolution of KLI, to assume, at most, only those KLI liabilities in existence (contingent or otherwise

known or unknown) as of the date of KLI's dissolution, June 30, 1958. The KLI Dissolution Certificate does not conflict with the limited nature of the assumption agreement described in the AHC Board Resolution. That Certificate confirms, under penalty of perjury, that KLI complied with the then existing California Corporations Code, which required KLI only to account for its known and unpaid liabilities prior to dissolution. Read together, these two contemporaneous documents (one from each side of the table) establish KLI did just that through AHC's assumption of KLI's existing known and unpaid debts and liabilities. Obviously, debts which are known and unpaid, are "in existence."

Critically, the Advocacy Team presents no evidence that, between June 5, 1958, the date of the AHC Board's resolution, and 25 days later, June 30, 1958, the date of the assumption agreement, the AHC Board amended its resolution to authorize its officers to prepare and enter into a liability assumption agreement which would expressly assume KLI liabilities created by later-enacted statues, such as Water Code §§ 13304 and 13267. Thus, it is reasonable to conclude from these two contemporaneous documents that on June 30, 1958, AHC agreed to assume only those KLI debts and liabilities in existence on that date that were known and unpaid, as AHC's Board's Resolution directed and the KLI Dissolution Certificate states. Under *Swenson*, the only possible conclusion with regard to the liabilities under Water Code §§ 13304 and 13267, both of which were enacted many years after 1958, is that AHC (Emhart) never so agreed.

The Advocacy Team's decision to ignore *Swenson* is inexcusable.

(c) Miscellaneous Advocacy Team Liability Assumption Arguments

(i) *Iron Mountain Mines*

At pages 53-54, ignoring *Swenson*, the controlling California law, the Advocacy Team embraces a federal CERCLA case, *United States v. Iron Mountain*, 987 F.Supp. 1233. 1241 (E.D. Cal. 1997), as controlling in this proceeding, which, so it asserts, compels the conclusion that AHC contractually assumed in 1958 KLI liability under later-

enacted statutes. (AT's Opening Br., at 53-54.) *Iron Mountain* could not be more inapposite.

After stating, albeit incorrectly, that the federal CERCLA cases have uniformly held under federal law that agreements assuming "all liabilities" are sufficiently broad to include environmental liability, *Iron Mountain* identified this exception to its misreading of the cases:

> The only exception is where other clauses in attachments to the agreement make it clear that the parties did not intend to include environmental liabilities . . . [citations] . . . *United States v. Vermont Am. Corp.*, 871 F.Supp., 318, 321 (W.D. Mich. 1994) ("all liabilities" "reflected or reserved against on the December 31, 1979 balance sheet" or "disclosed in the Disclosure Letter" or "existing on the Closing Date" does not include later CERCLA liability.')

(987 F.Supp. at 1241; emphasis added.) Thus, even under *Iron Mountain's* analysis of federal law, because AHC's assumption agreement was limited to liabilities in existence on the date of KLI's dissolution, under federal law AHC did not contractually agree to assume in 1958 KLI's alleged liability under Water Code §§ 13304 and 13267, which would not be enacted for many years. The Advocacy Team simply has misread *Iron Mountain*.

Further, *Iron Mountain's* claim that the phrase "all liabilities" presumptively includes environmental liabilities created by later-enacted statutes like CERCLA is directly contrary to the controlling California law set forth in *Swenson*. Under *Swenson*, the presumption with regard to liabilities created by later-enacted statutes is the opposite of the presumption in *Iron Mountain*. As noted, *Swenson*, 3 Cal.3d at 393, held that "laws enacted subsequent to the execution of an agreement are not ordinarily deemed to become part of the agreement unless its language clearly indicates this to have been the intention of the parties." Thus, under *Swenson*, the phrase "all liabilities," which appeared in the *Iron Mountain* assumption agreement, and in the Advocacy Team's proffered secondary evidence, necessarily refers only to those liabilities created by statutes in existence on the date the contract was executed. As noted, under *Swenson*, liabilities created by subsequent statutes are presumptively not included as part of the

agreement, unless the "language clearly indicates this to have been the intention of the parties."

Iron Mountain Mines is also distinguishable on its facts. There, the court had before it two actual assignment agreements explicitly providing that Stauffer Chemical Company had assumed "all liabilities" of Mountain Copper following the dissolution of Mountain Copper. (Id. at 1241.) In addition, Stauffer had knowledge of environmental problems at the Iron Mountain mine site prior to entering into the assumption agreement (Id. at 1243), and Stauffer continued to operate Mountain Copper's business at the Iron Mountain mine after Mountain Copper was dissolved (Id. at 1237). Here, by contrast, there is no evidence that AHC was aware of any environmental issues associated with the Rialto site prior to entering into the assignment agreement, and all of WCLC's operations at the 160-acre Site were shut down well in advance of KLI's dissolution.

The Advocacy Team is simply speculating when they suggest that a brief AHC visit to the 160-Acre Site in 1957 "must have revealed" that WCLC stored and handled chemicals, that a 1955 aerial photo of the 160-Acre Site "illustrates the type of chemical staining" that AHC "would have seen" during its 1957 site visit, and AHC was on notice that "contamination at the Rialto facility could have resulted in liability." (AT's Opening Br., at 55; emphasis added.) Lawyer speculations are neither admissible nor probative of any issue now before this forum. Nor can they transform an agreement to assume then existing liabilities into an agreement to assume all future liabilities created by later-enacted statutes.

(ii) *Rank Speculation Re Director Liability*

At pages 57-59, the Advocacy Team speculates that AHC must have assumed all of KLI's liabilities, including all unknown future contingent liabilities arising under later-enacted statutes, because otherwise KLI's shareholders and directors would have "remain[ed] at risk of being held personally liable for the dissolved corporation's "unpaid" liabilities. However, none of the cases cited by the Advocacy Team involved unknown claims at the time of the distribution. Thus, none of KLI's directors were at risk. The gist

of the Advocacy Team's "argument" is that 50 years ago KLI's directors would have been foolish to approve a KLI agreement that did not protect them against personal liability for unknown post-dissolution claims, including claims arising under later-enacted statutes, such as Water Code §§ 13304 and 13267, as well as CERCLA. This argument, however, has no merit as a matter of law. Pointedly, the Advocacy Team offers no speculation about whether AHC's directors would have been foolish to agree to such a proposal.

In 1958, the only basis under the Prior Law for holding directors personally liable for a dissolved corporation's unpaid liabilities was in the event the liquidating distribution was not properly authorized as required by law. Prior Law §§ 824, 5012. However, the liquidating distribution that KLI directors authorized be made to AHC upon KLI's dissolution was in fact authorized by Division I of the Prior Law. Specifically, in the case of a corporate dissolution, Prior Law § 5000 provided:

> After determining that all the known debts and liabilities of a corporation in the process of winding up have been paid or adequately provided for, the directors shall distribute all the remaining corporate assets among the shareholders and owners of shares according to their respective rights and preferences. (emphasis added)

Thus, the directors were under a mandatory duty ("the directors shall") to distribute the liquidated corporate assets to shareholders "after determining that all the known debts and liabilities" were paid or adequately provided for. The Prior Law, in fact, required directors to certify under penalty of perjury in the dissolution certificate filed with the Secretary of State that they had made this determination. Prior Law § 5200. As *Ray v. Alad*, *supra*, 19 Cal.3d at 31, confirmed, such a liquidating "distribution of assets was perfectly proper as there was no requirement that provision be made for claims such as plaintiff's that had not yet come into existence."

(iii) *The Parrett and Hutchison Testimony*

At page 51, the Advocacy Team asserts that in 1958 Emhart assumed all KLI liability under later-enacted statutes, including Water Code §§ 13304 and 13267 because

two elderly witnesses, Mr. Parrett, 91, and Mr. Hutchison, 84, testified in 2006, some fifty years after the assumption agreement, that it was their "understanding" that as part of KLI's dissolution AHC assumed all of its liabilities

Subjective belief or "understanding" testimony is inadmissible, as a matter of law, to prove the terms of the assumption agreement. *Founding Members of Newport Beach Country Club v. Newport Beach Country Club, Inc.*, 109 Cal.App.4th 944, 956 (2003) ("The parties' undisclosed intent or understanding is irrelevant to contract interpretation"); *Posten v. Rassette*, 5 Cal. 467 (1855) ("In the case of lost instruments, . . . [i]t is sufficient if intelligent witnesses, who have read the paper, understood its object and can state it with precision.")

Mr. Parrett testified he had no personal knowledge or recollection of the terms of the assumption agreement, he had not participated in its preparation, never saw it, and never read it. (E61) Mr. Hutchison, a stroke victim, testified repeatedly that he had no recall of the events constituting any transactions between AHC and KLI. He testified that he did not remember (1) if there even was an assumption agreement; (2) signing any such form of assumption agreement; (3) being the secretary of KLI; (4) being a officer of West Coast Loading; (5) being a director of KLI; (6) being an officer and director of American Hardware; (7) how or when AHC and KLI became affiliated, stating, "I'm over my head now"; (8) what happened to KLI as a corporation; (8) when KLI was going to be wound up and the assets were going to be transferred to American Hardware. (E62.)

(iv) *Financial Statements and SEC Filings*

At pages 51-52, the Advocacy Team proffers a number of documents AHC filed with the SEC and IRS, after the dissolution of KLI, which all contained essentially this statement: "As of July 1, 1958, [KLI] was liquidated and all its assets and liabilities were transferred to the Company [AHC]." The Advocacy Team contends this evidence confirms, contrary to AHC's intent as expressed in its Board of Director's resolution and KLI's understand of the agreement as expressed it its Dissolution Certificate, that AHC nevertheless entered into an agreement whereby it assumed all of KLI's liabilities without qualification, including those liabilities created by subsequently enacted statutes.

The argument is without merit for three reasons.

First, as noted in the discussion of *Iron Mountain Mines*, *supra*, the phrase "all liabilities" does not presumptively includes environmental liabilities created by later-enacted statutes. Under *Swenson*, the presumption with regard to liabilities created by later-enacted statutes is that no such liabilities are part of a contract "unless its language clearly indicates this to have been the intention of the parties." (*Swenson*, 3 Cal.3d at 393.) The reason for such a rule is obvious: "to hold that subsequent changes in the law which impose greater burdens or responsibilities upon the parties become part of that agreement would result in modifying it without their consent, and would promote uncertainty in commercial transactions." (Id, at 394.) Thus, under *Swenson*, the phrase "[a]s of July 1, 1958, . . . all assets and liabilities were transferred" necessarily refers only to those assets and liabilities in existence on that date. To read the "all . . . liabilities transferred" portion of this phrase to include all liabilities created by later-enacted statutes would require a parallel expansion of the phrase "all assets . . . transferred" Such a result would promote the kind of "uncertainty in commercial transactions" that brought the Supreme Court in *Swenson* to reaffirm the rule that no later-enacted statute will be "deemed to become part of the agreement unless its language clearly indicates this to have been the intention of the parties." (Id.) The meaning of this passage is that all the assets and liabilities that existed on June 30, 1958 were transferred, whatever they may have been. It does not describe the nature of all liabilities any more than it describes the nature of all assets transferred that day.

Second, KLI's chief accountant in June 1958, Mr. Cleland Nelson, testified at his deposition as follows with regard to these statements. When asked what liabilities were included in KLI's financial statements just prior to its dissolution, he said: "All known liabilities." (E63.) When asked what liabilities were transferred from KLI's balance sheet to AHC's balance sheet, Mr. Nelson testified: "All liabilities that were on our books [and he was] was not aware of any other liabilities." (Id.)

Finally, under California law, the trier of fact is instructed to "rely heavily on the documents reflecting the negotiations between [the parties]. These documents more accurately reflect the parties' intent than" do hindsight recollections or later created documents which are devoid of foundation demonstrating that such statements describe the content of the agreement. *Brobeck v. Telex Corp.*, 602 F.2d 866, 871-874 (9th Cir. 1979). Unquestionably the best evidence of the terms of the liability assumption agreement is the AHC Board Resolution and KLI's Dissolution Certificate. Neither is reasonably susceptible to the Advocacy Team's proffered interpretation.

(v) AHC's Payment of Certain KLI Contingent Liabilities

At pages 59-60, the Advocacy Team argues that AHC's decision to honor KLI's lockset return policy and its decision to maintain KLI's employee pension trust plan, both of which the Advocacy Team asserts were, on June 30, 1958, unknown contingent liabilities, proves that AHC assumed on June 30, 1958, all KLI liabilities created by later enacted statutes. This argument is without merit.

As Mr. Nelson testified, KLI's long-standing lockset return policy was unquestionably known and accounted for and thus transferred to AHC, upon KLI's dissolution. (E39.) The liability associated with the KLI pension plan, which applied to KLI's lockset business employees, was also well known, having been disclosed by KLI's pre-dissolution financial statements. (E39, E44, E59.) The same was true with respect to KLI's potential income tax liability for prior open tax years; this was disclosed as a contingency in the pre-dissolution financial statements and could not have escaped the accountants' notice. (E31, E39, E44, E58, E59.)

In light of the Advocacy Team's assertion, Ms. Thompson, a Certified Public Accountant and Certified Fraud Examiner, was asked to review the testimony of Cleland K. Nelson, the financial statements, pertinent journal vouchers, and tax records of KLI and the Kwikset Division for the relevant time period. (E2.) Based on her review, Ms. Thompson found that KLI's financial records reflect that KLI considered the lockset return

policy, the Pension Plan obligation, and potential tax liability were in 1958 existing known contingencies. (E2.)

(d) Conclusion (No Liability Assumption)

Because the nature and scope of liabilities created by future statutes are by definition unknown until enacted, the law requires that any contract by which such future-created legal obligations are to be assumed must expressly so state. All credible evidence establishes that AHC did not expressly agree in 1958 by contract to assume KLI liabilities created by later-enacted statutes, such as Water Code §§ 13304 and 13267. Thus, Emhart and all other Emhart Parties are not liable for any alleged discharge caused or permitted by WCLC at the 160-Acre Site.

D. Liability Elements 5 and 6: WCLC's Operations (circa 1952-1957) Did Not Cause, Nor Do They Now Threaten to Cause, a Discharge of Perchlorate or TCE to The Downgradient Municipal Supply Wells of Rialto, Colton, or West Valley

The empirical and anecdotal evidence establishes the following: There was no discharge or release of potassium perchlorate or TCE by WCLC at the 160-Acre Site in any area where WCLC operated that requires further investigation or any remediation of the 160-Acre Site. Only trace amounts of potassium perchlorate were released to the shallow soil in three locations (Study Areas 11, 18, and 37) where WCLC is known or suspected to have handled potassium perchlorate. Those trace amounts, which remain in the shallow soil after 50 years, do not threaten the groundwater under the 160-Acre Site or downgradient of that site. Thus, none of the Emhart Parties are liable under Water Code §§ 13304 and 13267 for any investigation of the downgradient groundwater or its remediation.

E. Because The WCLC Releases Are Distinct, The Emhart Parties Are Not Jointly And Severally Liable With Any Other Discharger

The law in California will not impose joint and several liability on a party if the harm caused by that party to another person or property is distinct or there is a reasonable basis for dividing the damages. 6 Witkin, Summary 9th Ed. (1990) Torts, § 966, p.355;

Restatement (Second) of Torts, § 433A (1965); Restatement (Third) of Torts, § 26, Comment, f, Divisible damages ("All that is required is a reasonable basis for dividing the damages.")

Nevertheless, the Advocacy Team seeks, with regard to the 160-Acre Site, an order directing all liable parties to jointly and severally: (a) investigate the soil and groundwater at the 160-Acre Site; and (b) submit and implement an interim remedial action plan ("RAP") to clean up that soil and groundwater at the 160-Acre Site. (AT's Opening Br., at 108.) With regard to impacts downgradient of the 160-Acre Site, the Advocacy Team seeks an order directing all liable parties to jointly and severally: (a) investigate that soil and groundwater; (b) submit a feasibility study and submit and implement a RAP for the clean up of that soil and groundwater; (c) submit and implement a replacement water plan; and (d) reimburse cleanup costs incurred by Rialto, Colton, West Valley Water District, and the State Water Board. (Id., at 108-109.)

The Emhart Parties have four responses:

First, as set forth in detail above, WCLC has not caused or permitted a discharge of perchlorate or TCE at the 160-Acre Site that needs further investigation or any remediation.

Second, as set forth in detail above, WCLC has not caused or permitted a discharge of perchlorate or TCE that has adversely affected, or threatens to affect, the beneficial uses of the downgradient groundwater.

Third, the Emhart Parties submit that Water Code §§ 13304 and 13267 do not impose joint and several liability. The plain language of the statute is to the contrary.

Fourth, even if these code sections were so construed, it is undisputed, on the record in this proceeding, that whatever "impact" WCLC's operations may have caused is distinct and reasonably subject to division. Thus, it would be improper, on the record in this proceeding, to require the Emhart Parties to, jointly and severally, undertake with any other party further investigation, remediation, provision of replacement water, or reimbursement of costs to any person.

VIII. Remedy

The Emhart Parties respectfully request that the State Water Board issue the following Order:

1. All proceedings now pending before the State Water Board In the Matter of Rialto-Area Perchlorate Contamination At A 160-Acre Site in Rialto Area, A-1824, and all related proceedings shall be dismissed with prejudice as to KLI, Emhart, Kwikset, BD(US)I, and BDI.

2. All related proceedings now pending before the Santa Ana Regional Board shall be dismissed with prejudice as to KLI, Emhart, Kwikset, BD(US)I, and BDI.

3. CAO R8-2006-0053, dated February 27, 2007, and all previously related Santa Ana Regional Board CAOs, naming KLI, Emhart, Kwikset, BD(US)I, and BDI shall be rescinded and dismissed with prejudice on the ground that the evidence overwhelming establishes that: (1) WCLC's operations at the 160-Acre Site has not caused or permitted, and does not threaten to cause or permit, a release of perchlorate or TCE that needs further investigation or any remediation; (2) WCLC's operations at the 160-Acre Site has not caused or permitted, and does not threaten to cause or permit, a release of perchlorate or TCE to the groundwater or any downgradient municipal well; and (3) Emhart, Kwikset, BD(US)I, and BDI are not liable under the de facto merger, express assumption, or any other successor liability theory for the acts or omissions of WCLC at the 160-Acre Site.

4. That Emhart be awarded its costs against the Santa Ana Regional Board, which costs shall include the costs of copying, expert witnesses, deposition, and preparation of demonstrative exhibits for this proceeding and all earlier related proceedings since 2002.

Dated: April 17, 2007

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
ROBERT D. WYATT
JAMES L. MEEDER

By: _____
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Attorneys for Emhart Industries, Inc. Kwikset Locks Inc., Kwikset Corporation, Black & Decker (U.S.) Inc., and Black & Decker Inc.

IX. APPENDIX

CORPORATE HISTORY OF KLI AND WCLC

1946—1958

1. 1946: KLI Establishes Its Lockset Business in Anaheim

KLI was incorporated as a California corporation on June 6, 1946, to take over the lockset manufacturing business founded by Adolf Schoepe and Karl Reinhard in 1945. (E32, at 7.) From its inception, KLI's principal business was the design, manufacture, assembly and sale of residential locksets for use in moderate or low-priced homes, which were distributed nationally under the "Kwikset" trade name. (Id.) In 1948, KLI moved its office and manufacturing facilities to a new main plant in Anaheim. (Id.) Adjacent to the new plant, KLI had a powdered metal processing plant, which did custom manufacturing of components primarily for third parties. (Id.)

KLI attracted a large number of skilled machinists and other employees, and provided excellent employee benefits including, in addition to medical insurance, a Kwikset Pension Plan, Kwikset profit sharing plans, a Kwikset credit union, and various organized employee social activities and sports leagues. (E33; E34.) KLI also had a company newsletter, the *Kwikset Ink*, to which management and employees contributed articles. (E33, at 1; E36.)

2. 1952: Adolf Schoepe Establishes WCLC to Operate a Shell Loading Business in Rialto

In 1951, due to wartime shortages of lockset metals, and to support the Korean War effort, KLI bid on munitions supply contracts. (E35, at 1-2; E32, at 9.) KLI established its "Defense Division" to seek such contracts and manage them when bids were successful. The Defense Division was staffed by a small number of key employees, including Charles Schubert, who became the first Defense Coordinator in 1951, Merle Vernon, an Army munitions procurement officer, who joined KLI in mid-1952 as Defense Administrator to assist with obtaining defense contracts and who later replaced Schubert

as Defense Coordinator. Vernon served the primary liaison between KLI and the Department of Defense. (E36.) Max Rubin joined KLI in 1952 as its Vice President of Defense Engineering, as did Don Ransom, as a Defense Engineer. (E37; E38.) Schubert, Vernon, and Rubin reported directly to Mr. Schoepe, who was KLI's President and one of its two founders and controlling shareholders.

WCLC was incorporated by Mr. Schoepe in February 1952 to load and assemble pyrotechnic devices as a subcontractor on defense contracts obtained by KLI for such items. (E32, at 9.) For safety reasons, Mr. Schoepe decided to locate the shell loading operation outside Anaheim in a less populated setting. (Id.) WCLC thus in early 1952 took a five-year lease with an option to purchase the 160-Acre Site. WCLC then began hiring management and production employees and, during the second half of 1952, commenced shell loading operations. (Id.; E39.)

Shortly before WCLC commenced operations, in June 1952, KLI went public, registering and selling 125,000 common shares, including all of the shares of the second founder, Karl Reinhard, to outside investors, thus leaving Mr. Schoepe in control. (E32, at 12.) As part of the offering, Mr. Schoepe agreed to retain ownership of his shares of KLI and to remain the general manager of KLI for five years (through mid-1957), at which point he would be free to sell his KLI investment and take other employment. (Id., at 7.) Immediately after the public offering, Mr. Schoepe, who was also the President of WCLC, contributed the WCLC shares to KLI. (E32, at 9.) WCLC thus then became a subsidiary of KLI.

3. WCLC Operates in Rialto as a Separate Subsidiary Entity

WCLC conducted munitions loading operations in Rialto from the second half of 1952 until the end of February 1957 as an operating subsidiary of KLI. In addition to having its own plant, location and industrial operations in Rialto, WCLC had its own officers and management, employees, personnel files, financial statements, books and records, stationary, bank accounts, payroll, payroll tax returns, employee benefits, suppliers, contracts, and policies and procedures. WCLC had its own credit union for

WCLC employees. (E40.) WCLC was also the subject of union organizing activities and a strike, neither of which was directed at or affected KLI. (E41; E42.) WCLC employees were not eligible to and did not receive the employee benefits available to KLI employees in Anaheim, including, for example, the KLI Pension Trust and the KLI Profit Sharing Plan, and did not participate in the various KLI social activities and sports leagues which were extensively reported in the Kwikset Ink. (E40.)

4. January-June 1957: AHC Acquires KLI's Stock After WCLC Operations Are Discontinued

By January 1957, with his five-year commitment to KLI soon to expire, Mr. Schoepe moved to dispose of his investment in KLI and pursue other opportunities. (E43, at Schedule 1.)

At the end of January 1957, AHC senior executives visited southern California to negotiate preliminary terms for a proposed acquisition of KLI by AHC through an exchange of stock. (E43, at 1.) AHC, incorporated in 1902 as a Connecticut corporation, had its headquarters in New Britain, Connecticut. Its principal product was a line of builders' hardware for residential, commercial and institutional use, including locks, door closers, sash hardware, and other types of door and window fittings. (E44, at 13.)

AHC decided to acquire KLI in order to obtain a western manufacturing plant and warehouse, a substantial increase in distribution outlets, and the ability to benefit from sales in the low-cost housing market, in which AHC previously only had a small part. (E43, at 3; E44, at 7.) AHC expressed no interest in acquiring WCLC's shell loading business or, for that matter, the KLI defense products business. (E43, at 2-3; E44, at 7.) Indeed, Mr. Schoepe already had decided that these non-core businesses, which had proved to be unprofitable, would be discontinued and liquidated, not sold as a going concern. Thus, during the January 1957 negotiations, AHC was informed the WCLC plant would be shut down the following month. AHC also was told the Rialto lease was ending, and WCLC would shortly exercise its option to purchase the 160-Acre Site, which could then be sold at a profit above the option price. (E43, at 2; E45, at 5.) By the end of

January 1957, WCLC had reduced its workforce, which had been 166 a year earlier, to a skeleton force of 19 people. (E2, at 7(A).)

The acquisition of KLI by AHC, and the liquidation of WCLC, then proceeded in tandem. On February 16, 1957, Mr. Schoepe announced the closing of WCLC. (E45, at 5.) With the discontinuance of the defense business, KLI Defense Administrator Merle Vernon and KLI Defense Engineer Don Ransom resigned in February 1957. (E46; E47; E48.) On February 8, 1957, KLI's last remaining subcontract with WCLC for electric detonators was cancelled and transferred to Bermite Powder Company for completion at its plant. (E49.) Mr. Schoepe in February 1957 also demanded the resignation of Max Rubin, the Vice President of Defense Engineering.[18] (E50.)

At the end of February 1957, the AHC Board of Directors approved the final terms of its offer to acquire KLI's stock. (E51, at 1-2.) By February 28, 1957, WCLC had reduced its workforce to six people, and KLI management deemed operations there concluded. The last six WCLC employees were terminated by March 15, 1957. (E44, at 23-24; E2, at 7(A).)

On or about March 10, 1957, having exercised the purchase option under its five-year lease, WCLC acquired title to the 160-Acre Site. (E44, at 24.) On March 11, 1957, the KLI Board of Directors approved AHC offer to acquire KLI's stock. (E52.) AHC and KLI then cooperated to complete the transaction, including the registration of the AHC shares to be issued to KLI shareholders. (E54, at 8-10; E53.) The Prospectus for the AHC exchange offer was issued on May 6, 1957, with a stock tender deadline of June 28, 1957. (E44, at 4.) The Prospectus explicitly informed KLI's shareholders that WCLC operations had ended:

> Sales to the United States Government consisted principally of illuminating shells, float lights and photoflash shells. The manufacture of these products was entirely discontinued about February 28, 1957 due to completion of government contracts. Since there were no further requirements for these or similar items, the West Coast Loading Company's plant designed specifically for the production of these items, has been idle since February 28, 1957.

[18] Mr. Rubin finally departed KLI in May 1957 when his five-year employment contract expired. (E37, E38, E50.)

(Id., at p. 23.) The audited financial statements contained in the Prospectus likewise expressly confirmed that WCLC's "entire facilities . . . which had been used for loading shells under defense contracts . . . was taken out of service in February 1957." (E44, at 40.) During this transition period, AHC management informed KLI managers that they should liquidate defense operations and property as soon as possible, as AHC had no interest in continuing them. (E60, at 1049-52.) Management proceeded to do just that.

On June 26, 1957, The B.F. Goodrich Company ("Goodrich") agreed to purchase the 160-Acre Site, as well as all improvements, associated rights-of-way and certain equipment. (E54, at 1.) Also in June 1957, KLI donated surplus office furniture and equipment to the Boy Scouts, with the sole reason given being recorded as the "Discontinuance of Defense Operations." (E2, at 8.)

On July 1, 1957, with nearly all KLI shares having been tendered to AHC, AHC declared the exchange offer effective. Mr. Schoepe resigned his positions with KLI and left the company. New KLI directors were elected by AHC, and a new KLI management team led by senior executives from AHC was assembled. (E55, at 1; E44, at 5.)

As WCLC was defunct, having no operations and no employees and only surplus property no longer in use, and serving no further business purpose, on July 1, 1957, WCLC was merged into KLI. At that time, WCLC's books showed that it had only $177 in liabilities to third persons, which were transferred to KLI's books. These consisted of $123 in trade payables, $24 for accrued sales tax, and $29.98 for unclaimed wages. (E56, at 15; E2, at 7(D).)[19] Shortly thereafter, on July 19, 1957, KLI executed a grant deed conveying the 160-Acre Site to Goodrich. The deed was recorded on August 1, 1957. (E57.) Its last defense sale—the electric detonators from the Bermite subcontract—was made in February 1958. (E2, at 8 n.11.)

[19] WCLC's final balance sheet also showed as liabilities for inter-company payables owing to KLI (which were eliminated by consolidation) and expected Federal income tax amounts. (Thompson Decl. 7(D), n.8.)

5. June 30, 1958: KLI Is Dissolved and Its Anaheim Locksets Business Becomes the Kwikset Division of AHC

Then in April 1958, AHC decided to go forward with the dissolution of KLI and operate its remaining lockset and powdered metal businesses as a corporate division. (E57.) As part of the winding up of KLI, AHC's California counsel prepared and filed the required dissolution papers. In this connection, AHC agreed, as required by California law, to assume the known liabilities of KLI remaining unpaid at the date of dissolution, June 30, 1958. The current and accrued liabilities on KLI's balance sheet were then transferred to the balance sheet of the new Kwikset Division. (E57, at Schedule 7.) AHC also took on and later paid the contingent liabilities of KLI, all of which were known to and recognized by management and had earlier been disclosed and accounted for in the ordinary course of business. (E58, at 7 and 14; E59, at 2; E2, at 10.) These included potential lockset returns, income tax liabilities for unexamined tax years, and annual pension fund contributions. (E58; E59; E2, at 10.) Neither AHC's nor KLI's financial records, including their respective audited financial statements, contain any record or disclosure of any contingent environmental liability, whether relating to KLI operations in Anaheim or to the former operations of WCLC in Rialto. (E2, at 9.)