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ADVOCACY TEAM
13

14 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**
15 **OF THE STATE OF CALIFORNIA**

16 IN THE MATTER OF:
17
18 PERCHLORATE CONTAMINATION
19 AT A 160-ACRE SITE IN THE RIALTO
20 AREA
21 _____

SWRCB/OCC File A-1824
PRE-HEARING MOTION
FOR CONTINUANCE AND
FOR PROTECTIVE ORDER
(Gov. Code § 11450.30;
Wat. Code § 1100; Code
Civ. Proc. § 2025.420)

22 **INTRODUCTION**

23 The Santa Ana Regional Water Quality Control Board Advocacy Team
24 (“Advocacy Team”) makes two prehearing motions: (1) the submittal and hearing
25 dates in this matter should be continued in order to accommodate reasonable
26 discovery; and a protective order should issue to ensure that discovery proceeds in
27 an orderly fashion and without undue burden to the Advocacy Team or other
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1 parties; and (2) alternatively, without a continuance that the Hearing Officer issue a
2 protective order to impose reasonable limits on discovery and prevent undue
3 burden on the parties.¹

4 **STATEMENT OF FACTS**

5 The State Water Resources Control Board (“State Water Board”) took up
6 this matter for review upon its own motion on February 5, 2007, expressing its
7 intent to hold a hearing on an “expedited” basis. On February 22, 2007, Hearing
8 Officer Doduc convened a Pre-Hearing Conference at which she announced an
9 ambitious schedule: opening briefs due March 13, rebuttal materials due a week
10 later on March 20, and then five days of hearings barely a month following the pre-
11 hearing conference. Several parties--other than the Advocacy Team--objected to
12 the pace of this schedule based in part on a lack of time to conduct reasonable
13 discovery. The Notice of Public Hearing issued by the Hearing Officer the day after
14 the Pre-Hearing Conference kept the schedule the same as announced and did not
15 provide an opportunity for, or place limits on, discovery.

16 The Notice’s silence did not deter certain parties from launching a flurry of
17 deposition notices, however. On February 27, Emhart Industries, Inc., and Kwikset
18 Locks, Inc., (collectively “Emhart”) noticed the deposition of Gerard Thibeault for
19 March 8 and also the deposition of Robert Holub. Not only did the notice specify
20 two full days for Mr. Holub’s deposition, it set the second day for a Saturday.²
21 Goodrich Corporation (“Goodrich”) followed suit, noticing two depositions of its
22 own—on dates partially overlapping those noticed by Emhart: Kurt Berchtold for

23 _____
24 ¹ Because there is no procedure set forth in the Notice of Public Hearing for
25 opposing other parties’ pre-hearing motions, the Advocacy Team submits this
26 motion at this time and requests the opportunity to rebut arguments raised in pre-
27 hearing motions by other parties if the Hearing Officer reconsiders allowing
28 opposing papers.

² As it turns out, Mr. Holub is out of state in Arizona on the dates noticed for his
deposition. He is unavailable beginning at noon on March 9 and not returning
until the evening of March 11.

1 March 8, 2007, and Kamron Saremi for March 9 and 15. These depositions were
2 also noticed for different locations, with Berchtold and Saremi in Los Angeles and
3 Thibeault and Holub in Riverside. The dates of these depositions conflict with the
4 schedules of these witnesses and the attorneys, who will at that time be deeply
5 engaged in preparing the Advocacy Team's opening submittals due on March 13.

6 An added complexity to these depositions is that they were noticed
7 simultaneously in two fora. In addition to the State Water Board subpoena form,
8 each notice came accompanied by a separate subpoena requiring testimony under
9 the federal perchlorate litigation filed by local municipalities under CERCLA
10 (42 U.S.C. §§ 9607 and 9613), RCRA (42 U.S.C. §§ 6901 et seq.) and state laws.
11 The broader focus of the federal case, which extends beyond the 160-acre parcel,
12 and the vastly greater number of parties to that litigation who may wish to question
13 each witness promised to exponentially complicate the subjects of the depositions
14 and to greatly expand the amount of time each witness would be diverted from the
15 preparation of the Advocacy Team's case. Under the case management order for
16 that litigation, each witness could be subjected to up to three days of deposition by
17 all parties to the federal litigation, regardless of whether the noticing party promises
18 to limit questioning to only topics relating to the state proceedings.

19 Because of this conflict, the Advocacy Team scheduled an immediate meet
20 and confer teleconference on the deposition notices, which convened on March 2.
21 The Advocacy Team asked for the withdrawal of the federal deposition notices
22 consistent with the suspension of discovery evidently agreed upon by the parties in
23 that case. Mr. Thibeault's deposition would be allowed to proceed on schedule, but
24 the Advocacy Team vigorously opposed any depositions of the other witnesses
25 because their other duties briefing and preparing for the hearing did not permit
26 them to be made available. Emhart and Goodrich firmly pressed their position.
27 The federal deposition notices would not be withdrawn. The meet and confer

1 participants pointed out that no urgency existed because none of the witnesses is
2 aged or infirm. Emhart and Goodrich brushed such comments aside, persisting
3 that the federal notices were validly issued and should proceed as scheduled.

4 Emhart and Goodrich similarly displayed little flexibility with regard to the
5 schedule for the depositions. The participants explained that the witnesses were
6 vitally needed to prepare the Advocacy Team's case in accordance with the
7 expedited schedule, but the only accommodation was an oral representation by
8 Goodrich to limit the depositions to one day each. The Advocacy Team suggested
9 alternative means of discovery, such as written depositions, but they were rebuffed
10 by Goodrich.

11 If the burden posed by these depositions were not enough, the number of
12 deposition notices has almost tripled. As of this date, Goodrich, Emhart, and Pyro
13 Spectaculars, Inc., have between them noticed the depositions of eleven separate
14 witnesses for dates between now and the State Water Board hearing (up to three
15 on a single day):

- 16 Steve Van Stockum – March 7, in Riverside;
- 17 Gerard Thibeault – March 8, in Riverside;
- 18 Kurt Berchtold – March 8, in Los Angeles;
- 19 Kamron Saremi – March 9 and 15 in Los Angeles;
- 20 Robert Holub – March 9 and 10 in Riverside;
- 21 Richard Roberts – March 9 in Riverside;
- 22 Mark Adelson – March 10 in Los Angeles;
- 23 Richard Thrash – March 12, in Riverside;
- 24 Gary Lass – March 14, in Riverside (duces tecum);
- 25 William Schroeder – March 15, in Riverside; and
- 26 Gary Litton – March 16, in Sacramento.

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1 With no discovery plan or other controls in place, still more notices—or other
2 discovery (e.g., interrogatories, requests for production)—could show up at any
3 moment.

4 **MOTION I:**

5 **I. SCHEDULE FOR STATE WATER BOARD PROCEEDING SHOULD BE**
6 **CONTINUED TO PERMIT DISCOVERY; PROTECTIVE ORDER SHOULD**
7 **ISSUE TO PREVENT UNDUE BURDEN.**

8 **A. A Short Continuance is Appropriate.**

9 The presently noticed discovery, should it proceed on schedule, would
10 impose an undue hardship on the Advocacy Team. At the Pre-Hearing
11 Conference, some of the parties—not the Advocacy Team—protested that the
12 schedule announced by the Hearing Officer did not allow for reasonable discovery.
13 No change was made in the schedule which appears in the Notice of Public
14 Hearing and no provision was made for discovery. Accordingly, the Advocacy
15 Team had no reason to expect discovery in this matter. Yet it faces 11 depositions
16 and 13 days of testimony scheduled to occur in the middle of hearing submittals
17 and preparations.

18 The Advocacy Team will suffer immensely from this unexpected discovery.
19 The briefing and submittals called for by the hearing schedule placed the Advocacy
20 Team members under intense pressure. Now key technical members of the
21 Advocacy Team, Gerard Thibeault, Kurt Berchtold, Robert Holub, and Kamron
22 Saremi, must also face the prospect of surrendering six collective days of their time
23 to appear for depositions. Subpoenas to Mr. Holub and Mark Adelson (a non-
24 Advocacy Team member of the Regional Board staff) actually demand they be
25 produced for questioning on a Saturday. There is simply insufficient time to
26 reasonably comply with the hearing schedule and also submit to the depositions of
27 Advocacy Team members.

1 The depositions also will unreasonably tax the legal representation
2 resources available to the Advocacy Team. The team currently has only the use of
3 Jorge Leon, Erik Spiess, and Deputy Attorney General Jennifer Novak, who was
4 only recently contacted in light of the surprise deposition notices to help defend
5 depositions as necessary. This matter presents complex legal issues, such as 50+
6 years of corporate succession, multiple potentially responsible parties, and a
7 vigorous defense witnessing a litany of procedural arguments. For the Advocacy
8 Team counsel to be tasked with preparing witnesses and defending 13 days' worth
9 of depositions will significantly hamper the level of legal assistance that can be
10 devoted to briefing and preparing for the State Water Board hearing.

11 The Advocacy Team supports a short delay in the hearing schedule to allow
12 reasonable discovery. While the Advocacy Team does not concede that any or all
13 of the above depositions are justified as a part of that discovery process, some
14 amount of discovery may be appropriate. Due process principles may not clearly
15 mandate the opportunity for discovery, but the Advocacy Team prefers that the
16 State Water Board immunize this proceeding from constitutional challenges by
17 permitting reasonable discovery rather than completely disallowing it. Because the
18 pace of the hearing schedule will not accommodate the level of discovery currently
19 requested, the Advocacy Team requests that the Hearing Officer issue a revised
20 Notice of Public Hearing delaying the schedule no longer than necessary to permit
21 reasonable discovery.

22 **B. A Protective Order Should Issue to Prevent Undue Burden.**

23 Even with a continuance, limitations are needed to prevent uncontrolled and
24 uncoordinated discovery from interfering with briefing and preparations for the
25 hearing. The Administrative Procedure Act gives the Hearing Officer broad
26 authority to issue protective orders to limit subpoenas and subpoenas duces tecum
27 "on terms and conditions that the presiding officer declares." (Gov. Code, §

1 11450.30, subd. (b).) The Hearing Officer should order the parties to develop a
2 joint discovery plan that outlines all of the discovery to be propounded and
3 proposes a schedule to allow the discovery to proceed without imposing an undue
4 hardship on the responding parties.

5 The protective order should additionally limit the scope of any discovery to
6 matters directly relevant to the 160-acre parcel. The federal CERCLA litigation
7 concerns other matters and parties not at issue in this proceeding. The parties
8 should not be permitted to bootstrap those additional matters into discovery
9 propounded in this proceeding.

10 **MOTION II:**

11 **II. ALTERNATIVELY, WITHOUT A CONTINUANCE, PROTECTIVE ORDER**
12 **SHOULD ISSUE TO ENSURE REASONABLE LIMITS ON DISCOVERY**
13 **AND TO PREVENT UNDUE BURDEN**

14 In the event the Hearing Officer remains committed to the schedule as
15 presented in the Notice of Public Hearing, a protective order is still necessary to
16 prevent undue burden on the parties.

17 The Hearing Officer should issue a protective order that: (1) prevents
18 further discovery (e.g., interrogatories, requests for production) without obtaining
19 leave from the Hearing Officer; (2) limits all discovery, including depositions already
20 noticed, strictly to matters directly relevant to the 160-acre parcel; and (3) requires
21 that all depositions be taken in writing instead of via live testimony, or alternatively
22 requires that all live depositions be limited to one day not falling on a holiday or
23 weekend and (with the exception of Gerard Thibeault and Mark Adelson), requires
24 that they be scheduled after March 13.

25 **CONCLUSION**

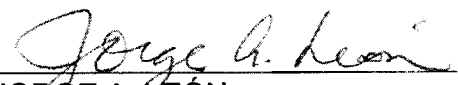
26 For the foregoing reasons, the Advocacy Team's motions (1) for
27 continuance to permit reasonable discovery and for protective order to ensure


1 orderly discovery without undue burden to the parties (see attached proposed
2 order); or (2) alternatively without a continuance, for a protective order to prevent
3 undue burden on the parties should be granted.

4 Dated: March 5, 2007

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