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7 KWIKSET LOCKS, INC., KWIKSET CORPORATION,
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10 BEFORE THE CALIFORNIA
11 STATE WATER RESOURCES CONTROL BOARD

12 IN THE MATTER OF PERCHLORATE
13 CONTAMINATION AT THE 160-ACRE
SITE IN THE RIALTO AREA

SWRCB/OCC FILE A-1824

MOTION NO. 15

**CORRECTION NOTICE OF PUBLIC
HEARING**

Hearing Dates: March 28-30, and April 4-5,
2007

18
19 This motion is submitted by Emhart Industries, Inc. ("Emhart"), Kwikset Locks, Inc.
20 ("KLI"), Kwikset Corporation ("Kwikset"), and Black & Decker (U.S.) Inc. ("BD(US)I").

21 **I. The Motion**

22 The Notice of Public Hearing dated February 23, 2007, ("Notice") contains a
23 Background Statement. Given the purpose of that document (notice of a hearing), that
24 statement was necessarily brief and incomplete. There are a number of critical facts,
25 however, which the State Board should be made aware of to assist it in selecting the
26 proper next step in this proceeding and ruling on the other motions filed simultaneously
27 with this motion.
28

1 Accordingly, Emhart, KLI, Kwikset, and BD(US)I respectfully request that the State
2 Board correct the Background Statement in the Notice and affirmatively consider, when
3 ruling on the accompanying motions, the facts set forth below.

4 **II. Additional Facts**

5 **A. There Is No Exigent Public Health Issue**

6 The City of Rialto, the Santa Ana Regional Board, and the state and federal courts
7 all continue to agree that there is no exigent public health issue in connection with the
8 perchlorate discovered in the Rialto/Colton Groundwater Basin.

9 The City of Rialto states (without qualification) on its web site that:

10 [N]o detectable perchlorate is allowed into the Rialto Water System and the
11 citizens served by Rialto may rest assured that their water is safe.

12 (www.ci.rialto.ca.us/perchlorate/water_2635.php.)

13 At public hearings, Ms. Beswick, Chair of the Santa Ana Regional Board, Mr.
14 Thibeault, its Executive Officer, and Mr. Berchtold, its Assistant Executive Officer,
15 confirmed that the perchlorate poses no exigent issue:

16 Kurt Berchtold: . . . [W]e don't see a water quality problem with the water
17 supply based on what we know about the current state public of health goal,
18 and we don't think the people of Rialto should be concerned about the
19 quality of their drinking water.

18 * * *

19 Gerard Thibeault: And Kurt explained that with respect to the quality of
20 water being provided in Rialto, and I agree with you, I don't think that the
21 school children should be thinking that this water is going to kill them when
22 the concentrations are so much lower than the State standard at which no
23 public health effect will occur.

22 * * *

23 Carole Beswick: Can I say at the outset, I have to second Gerry's
24 comments.

25 (11/16/05 Regional Board Meeting Tr. at 117-118.)¹

26 The Riverside County Superior Court and the federal district court in Los Angeles
27 have also found that there is no exigent public health issue. On November 8, 2004, the

28 ¹ This hearing transcript is Ex. 32 to Emhart's Amended Joint Petition filed on June 2, 2006, in
SWRCB/OCC Nos. A-1732, *et al.*

1 Riverside County Superior Court ruled that the Santa Ana Regional Board's attempt to
2 order various parties to investigate the 160-acre site under Water Code Section 13267
3 without a hearing was unconstitutional because, in part, there was no immediate public
4 health concern:

5 In this case, given the large size of the burden (many thousands of dollars)
6 [now estimated by the City of Rialto at between \$200 and \$300 million], the
7 demand for testing over square miles of land not owned by Respondent,
8 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."

9 (See footnote 1, Ex. 21.)

10 On November 1, 2006, the United States District Court for the Central District of
11 California (Los Angeles) dismissed the City of Colton's action for recovery of past and
12 future remediation costs on the merits because such costs the city had failed to comply
13 with CERCLA's national contingency plan. In its decision, the Court held: "Given the
14 complete absence of evidence of an immediate threat to public health or the
15 environment, the activities undertaken by Plaintiff cannot be characterized as a removal
16 action."

17 In short, the fact that the drinking water served to the public is safe allows for an
18 orderly process of site investigation, and the considered development of the appropriate
19 and most cost effective basin-wide remedy.

20 **B. Completion of The Ongoing Site Investigation Now Being Conducted**
21 **By Emhart, Goodrich, and Pyro Spectaculars Is The Critical First Step**
22 **That Should Be Completed Before Any Further Action Is Taken**

23 Commencing in 2004, and continuing through 2007, three environmental
24 consulting firms retained by Goodrich, Emhart, and Pyro Spectaculars have been
25 investigating the 160-Acre Site. To date, these three parties have spent collectively in
26 excess of \$10 million on that investigation.

27
28

1 At the April 21, 2006 Santa Ana Regional Board meeting, Robert Holub, a
2 technical member of the Board's staff, described this effort and the cooperation of the
3 parties in 2006 as outstanding:

4 In February of 2006 Emhart and Pyro Spectacular submitted a joint
5 investigation work plan. And in that work plan Emhart proposed to perform
6 over a hundred shallow soil samples from 53 locations at the 160-acre site.
7 Almost 300 [additional] shallow soil samples from 52 locations from the
8 excavation of trenches and soil borings. . . . And Emhart was also going to
9 install two groundwater monitoring wells at the site. And those wells are
10 going to be installed after the soil gas sampling was done and after Pyro
11 Spectacular installed the three groundwater monitoring wells that they were
12 going to install in accordance with the work plan.

13 * * *

14 Emhart began work on March 13[th]. All of the soil gas sampling has been
15 completed. And most of the shallow soil sampling has been completed.²

16 * * *

17 The cooperation and interaction we've had with Goodrich, Emhart, and
18 Pyro's consultants and the drilling contractors out in the field this past six
19 weeks has just been outstanding. They have been very cooperative, very
20 receptive to recommendations from our staff. . . . And in . . . the case of
21 Emhart, they've actually done more work out there than was proposed in
22 the work plan. There were several other areas of interest that came up as
23 work was going on out there. And we suggested they go dig in another
24 area. And they were very receptive in just moving the equipment over and
25 digging trenches in other areas and grabbing samples. So we have been
26 very pleased.

27 (See footnote 1, Ex. 42, at 44, 51 and 52.)

28 At the April 2006 meeting Mr. Holub also advised the Regional Board of the
importance of completing the site investigation before any conclusions are to be drawn:

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.

* * *

And what we are doing with the work that's going on there now [on the 160
Acre Site] is trying to find out exactly where those higher concentrations of
Perchlorate are in the soil and groundwater so that the responsible parties
will be able to come up with a plan to clean up or contain those

² Additional soil samples were taken in 2007.

1 contaminate[d] areas at the 160-acre site. . . . And that has been the plan
2 all along.

3 (See footnote 1, Ex. 42, at 47-48, and 49.)

4 Mr. Holub's observations about the need to first complete the site investigation
5 have been reinforced by the Regional Board's Assistant Executive Officer, Mr. Berchtold:

6 There is a need for Goodrich's bigger picture investigation [down gradient
7 wells] to better identify the plume, and there also is a need for source
8 investigation on the hundred and sixty acre site. And that is, I think, why –
9 why Board staff has advised Emhart that we support their going forward
10 with the work.

11 (See footnote 1, Ex. 3, at 35-36.)

12 In short, the next step in this process should be to complete the investigation of
13 the 160-Acre Site and the reports of the results of that investigation. Emhart is prepared
14 to complete its site investigation and reports.

15 **C. A Brief History of the Santa Ana Regional Board Proceedings**

16 On September 13, 2002, the Santa Ana Regional Board held an adjudicatory
17 hearing on CAO R8-2002-0051 ("2002 CAO"). (See Santa Ana Regional Board
18 Resolution R8-2003-0070, which sets forth the history of this proceeding.)³ At the close
19 of the evidence and after deliberation the Regional Board order the Executive Officer's
20 2002 CAO rescinded because the prosecution team, its staff, had failed to prove the
21 allegations against Kwikset and Goodrich. As the Regional Board found in Resolution
22 No. R8-2003-0070:

23 21. The evidence presented at the September 13, 2002 hearing of
24 culpability of Goodrich Corporation and West Coast Loading Corporation for
25 discharges at their respective facilities in Rialto was inconclusive;

26 22. The evidence presented at the September 13, 2002 hearing of the
27 corporate responsibility of Kwikset Corporation for the acts of West Coast
28 Loading Corporation was inconclusive."

(See footnote 1, Ex. 7, at 3.)

³ Resolution R8-2003-0070 is Exhibit 7 to Emhart's Amended Petition Requesting Hearing On Disqualification of Santa Ana Regional Board, dated June 2, 2006, in SWRCB/OCC Nos. A-1732 et al.

1 Thereafter, Regional Board staff, without any hearing, issued Water Code § 13267
2 letters directing 18 other suspected dischargers to undertake an investigation of the 160-
3 acre site (See footnote 1, Ex. 12.) On November 8, 2004, the Riverside County
4 Superior Court found the Regional Board's 13267 Orders unconstitutional. (See footnote
5 1, Ex. 21.) In pertinent part, the Court held:

6 In this case, given the large size of the burden (many thousands of dollars)
7 [now estimated by the City of Rialto at between \$200 and \$300 million], the
8 demand for testing over square miles of land not owned by Respondent,
9 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.

10 (*Id.*, at 3.)

11 On February 28, 2005, the Regional Board's Executive Officer issued CAO R8-
12 2005-053 to Emhart and BD(US)I ("2005 CAO"). The 2005 CAO, however, did not
13 require any party to do anything:

14 The Order is being issued at this time . . . to preserve the Regional Board's
15 claim against [Emhart], which filed for dissolution . . . on March 12, 2002.
16 Under Connecticut statutes, in order to remain valid, a proceeding to
17 enforce the claim must be initiated within three years of publication of the
dissolution notice. That deadline is March 12, 2005. The issuance of this
Order constitutes the commencement of the required action. . . .

18 Note that the Order does not include specific deadlines at this point; rather,
19 the first deadline will be set by future action of the Board. A detailed
20 hearing notice will be issued at a later date.

21 (See footnote 1, Ex. 26, at 1.)

22 On December 2, 2005, the Executive Officer issued an Amended 2005 CAO,
23 adding KLI, Kwikset, and Black & Decker Inc., and dismissing BD(US)I. (See footnote 1,
24 Ex. 1.) In May 2006, Emhart filed a petition with the State Board which sought a hearing
25 on its motion to disqualify the Santa Ana Regional Board because of the appearance of
26 bias and prejudice, if not actual bias and prejudice, from conducting any adjudicatory
27 hearing on the 2005 CAO. In June 2006, the Regional Board vacated its decision to hold
28 an adjudicatory hearing on the 2005 CAO.

