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16 Goodrich Corporation

17 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

18 IN THE MATTER OF PERCHLORATE  
19 CONTAMINATION AT A 160-ACRE  
20 SITE IN THE RIALTO AREA  
21 (SWRCB/OCC FILE A-1824)

Case No.: SWRCB/OCC FILE A-1824

**MOTION AND OBJECTION NO. 7**

**GOODRICH CORPORATION'S NOTICE  
OF MOTION AND MOTION FOR FORMAL  
HEARING AND OBJECTION TO  
INFORMAL HEARING PROCEDURES**

Date: TBD  
Date: TBD  
Place: San Bernardino County Auditorium

22 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD IN THIS ACTION:

23 PLEASE TAKE NOTICE that on a day and time to be determined, before the  
24 Chair of the State Water Resources Control Board, Tam Doduc, Designated Party  
25 Goodrich Corporation ("Goodrich") will and hereby does move the Hearing Officer for a  
26 Formal Hearing under Government Code Chapter 5, Section 11500, et seq. and Objects  
27 to Informal Hearing Procedures as set forth in the February 23, 2007 Notice of Public  
28 Hearing in this matter.

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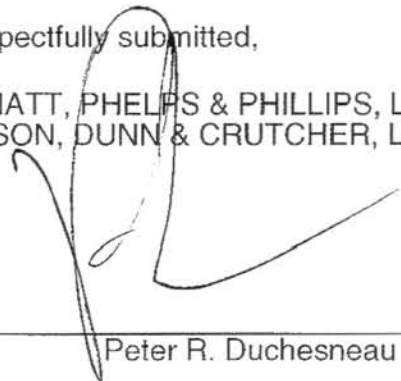
This motion is made pursuant to Section 648.7 of Title 23 of the California Code of Regulations and Section 11445.20 of the California Government Code on the grounds that the proposed hearing procedures violate Goodrich's right to due process, that the circumstances dictate that formal hearing proceedings pursuant to Government Code Section 11500, et seq. be employed, and that the need for cross examination require a formal hearing pursuant to Government Code 11445.50.

Goodrich also hereby objects to the Hearing Notice and the procedures set forth therein on the grounds stated herein.

This motion is based upon this Notice, the attached written Memorandum of Points and Authorities, and such other evidence as may be presented at or prior to the hearing on this matter.

Dated: March 5, 2007

Respectfully submitted,  
MANATT, PHELPS & PHILLIPS, LLP  
GIBSON, DUNN & CRUTCHER, LLP



By: \_\_\_\_\_  
Peter R. Duchesneau

*Attorneys for Respondent*  
GOODRICH CORPORATION

1 **MEMORANDUM OF POINTS & AUTHORITIES**

2 Goodrich Corporation ("Goodrich") hereby respectfully requests that the  
3 hearing and proceedings set forth in the February 23, 2007 Notice of Public Hearing (the  
4 "Hearing Notice") be held pursuant to the provisions for a formal hearing under  
5 Government Code Chapter 5, Sections 11500, *et. seq.* The Hearing Notice provides that  
6 the hearing will be conducted in accordance with the State Board's regulations  
7 governing adjudicative proceedings and incorporated provisions of Chapter 4.5 of the  
8 Administrative Procedure Act ("APA") and that the hearing will not be conducted under  
9 the formal hearing procedures set forth in Chapter 5 of the APA (commencing with  
10 Government Code section 11500). As explained below, under the circumstances in this  
11 matter, an informal hearing is prohibited as it would violate Goodrich's rights under the  
12 due process clauses of the federal and state Constitutions. Moreover, the factors set  
13 forth by State Water Resources Control Board regulations, including the complexity and  
14 significance of the issues involved and the need to create a record, and the need for  
15 cross examination mandate that the formal hearing procedures be invoked. Until a ruling  
16 is made with respect to the adoption of formal hearing procedures in this matter, the  
17 hearing and all related submittals cannot take place.

18 **I. AN INFORMAL HEARING VIOLATES GOODRICH'S RIGHT TO DUE**  
19 **PROCESS**

20 Use of the informal hearing procedures will violate Goodrich's due process  
21 rights under the federal and state Constitutions. Section 648.7 of Title 23 of the  
22 California Code of Regulations provides that "[a] matter shall not be heard pursuant to  
23 an informal hearing procedure over timely objection by the person to whom agency  
24 action is directed unless a formal hearing is authorized under subdivision (a), (b), or (d)  
25 of section 11445.20 of the Government Code." Section 11445.20 provides:

26 Subject to Section 11445.30, an agency may use an informal hearing  
27 procedure in any of the following proceedings, *if in the circumstances its*  
28 ***use does not violate another statute or the federal or state***  
***Constitution.*** (Emphasis added.)

1 As set forth in Goodrich's Motion and Objections Regarding Suspension of  
2 the Public Hearing on Grounds that it Violates Due Process, Motion and Objections  
3 Regarding the Simultaneous Exchange of Evidence, Motion and Objections Regarding  
4 Procedure for Pre-hearing Motions, Motion to Rescind Hearing Notice and Objection to  
5 Authority of Hearing Officer, and Motion and Objections Regarding Use of Rebuttal and  
6 other motions joined by Goodrich that implicate due process concerns, all incorporated  
7 herein by reference, the informal hearing procedures provided violate Goodrich's right of  
8 due process under the circumstances and are therefore prohibited from being used.

9 **II. FACTORS SET FORTH IN THE CALIFORNIA GOVERNMENT CODE AND**  
10 **STATE BOARD REGULATIONS MANDATE A FORMAL HEARING**

11 The factors set forth in Section 648.7 further demonstrate that the matter at  
12 hand should be addressed under the formal hearing procedures:

13 Among the factors that should be considered in making this determination  
14 [i.e., whether to utilize informal hearing procedures] are:

15 The number of parties,

16 The number of interested persons wishing to present oral comments at the  
17 hearing,

18 The complexity and significance of the issues involved, and

19 The need to create a record in the matter.

20 **A. The Matter Involves Significant Issues**

21 Most notably, these State Board regulations provide that "the complexity  
22 and significance of the issues involved" should be considered. It takes no stretch of the  
23 imagination to comprehend the significance of the issues at hand. To start with, the  
24 Regional Board and the City of Rialto allege that the cost to comply with the proposed  
25 Cleanup and Abatement Order is between \$200 million to \$300 million (*see, e.g.,*  
26 [http://www.ci.rialto.ca.us/perchlorate/water\\_rialto-perchlorate-plan.php](http://www.ci.rialto.ca.us/perchlorate/water_rialto-perchlorate-plan.php)).<sup>1</sup> The very

27 \_\_\_\_\_  
28 <sup>1</sup> By contrast, the California Government Code suggests that informal hearings are  
appropriate in proceedings concerning not more than \$1,000. Cal. Gov't Code §

1 reason the State Board claims to be taking over this matter in the first place is  
2 significance of the issues and that “[i]t is in the best interest of all participants that the  
3 hearings pertaining to this matter proceed in a fair, expeditious, and cost-effective  
4 manner.” Another obvious sign of the significance of the issues involved is the link  
5 placed front and center on the homepage of the State Board guiding interested persons  
6 to information on the proceeding.<sup>2</sup>

7 **B. There are Many Complex Factual, Technical and Legal Issues**  
8 **Involved**

9 With respect to complexity, there will be numerous factual and expert  
10 witnesses, countless pages of documentary evidence, and many precedential legal  
11 issues that will need to be sorted through and resolved. The proposed cleanup and  
12 abatement order by the Regional Water Quality Control Board staff (the “CAO”) covers  
13 an area extending six miles long and putting 22 drinking water wells at issue.  
14 Determination of the sources and fate and transport of the alleged contamination will  
15 alone be extremely complex. The vadose depth in the area is several hundred feet deep  
16 and the groundwater contains multiple zones spanning a depth of several hundred feet.  
17 There is no dispute that various operations in the Rialto-area from time-to-time handled  
18 perchlorate and TCE. These operations date back over the past 60 years on multiple  
19 parcels, not just the 160-acre parcel, starting with the U.S. military’s Rialto Ammunition  
20 Storage Point. The Regional Board and City of Rialto have identified dozens of alleged  
21 dischargers,<sup>3</sup> despite choosing to name only three as parties to these proceedings. The  
22 federal district courts consider matters such as this one as a textbook case for

23  
24 11445.20(b)(2). The same subdivision allows informal hearings in cases involving  
25 students not under the threat of expulsion, employees not under the threat of being  
26 discharged, and licensees not facing license revocation. Looking at these provisions  
27 together, it is clear that the Legislature intended informal proceedings for minor disputes  
28 without great consequences, and formal procedures for matters of significant  
consequence, such as the this one.

<sup>2</sup> State Board Website Homepage, *available at* <http://www.waterboards.ca.gov> (last  
accessed March 1, 2007).

<sup>3</sup> For instance, the City of Rialto has sued over 40 parties alleging that they have all  
contributed to one large perchlorate plume.

1 designating and managing as complex litigation. Manual for Complex Litigation, Fourth  
2 (2004), Particular Types of Litigation, Chapter 34, CERCLA (Superfund). There is no  
3 justification for the State Board to believe this matter is not complex and to attempt to  
4 informally hear the matter. Clearly the quantity and complexity of the disputed issues in  
5 this proceeding militate for a formal hearing.<sup>4</sup>

6 **C. There is a Need to Create a Record in the Matter**

7 Likewise, the “need to create a record in the matter” is a factor in  
8 considering the need for a formal hearing. Here, there is a vital need for creating a clear  
9 record in this matter as there is no doubt that the parties intend to challenge an adverse  
10 decision by bringing a petition for writ of mandate in Superior Court. Water Code  
11 Section 13330.

12 **D. There are Numerous Parties, Comments and Interested Persons**

13 Further, the other factors that should be considered warrant a formal  
14 hearing, including the number of parties, the number and nature of the written comments  
15 received, and the number of interested persons wishing to present oral comments at the  
16 hearing.

17 **III. A FORMAL HEARING IS NECESSARY GIVEN THE NEED FOR CROSS**  
18 **EXAMINATION**

19 The Hearing Notice already recognizes the need for cross-examination.  
20 Given that cross-examination is necessary for the proper determination of the matter and  
21 that the delay, burden and complication due to allowing proper and adequate cross-  
22 examination in an informal hearing would be more than minimal, formal hearing should  
23 be held. Government Code Section 11445.50. As indicated above, this matter will  
24 involve numerous factual and expert witnesses addressing lengthy and controverted  
25 factual histories and very complex technical matters. Informal hearing procedures will  
26 not afford a fair and proper hearing under the circumstances. Simply put, it is in every

27 <sup>4</sup> The California Government Code again weighs against an informal hearing here as it  
28 suggests that agencies reserve informal hearings for situations where that are no  
disputed issues of material fact. Cal. Gov’t Code § 11445.20(a).

1 party's interest to hold a hearing that will accurately resolve the issues.

2 **IV. UNTIL THIS OBJECTION IS RESOLVED, THE PROCEEDINGS CANNOT**  
3 **CONTINUE**

4 Prior to any other submittals called for under the procedures set forth in the  
5 Hearing Notice or the hearing being held, Goodrich's objection to the informal hearing  
6 must be resolved:

7 An objection by a party, either in writing or at the time of the hearing, to the  
8 decision to hold an informal hearing shall be resolved by the presiding  
9 officer ***before going ahead under the informal procedure. . . A matter***  
10 ***shall not be heard pursuant to an informal hearing procedure over***  
11 ***timely objection by the person to whom agency action is directed***  
12 unless an informal hearing is authorized under subdivision (1), (b), or (d) of  
13 section 11445.20 of the Government Code. (Emphasis added.) Title 23,  
14 Cal. Code. Reg., Section 648.7.

15 Accordingly, it is imperative that a ruling on this motion be made prior to  
16 the parties' list of witnesses, expert witness qualifications, details of testimony,  
17 deposition transcripts, exhibits, and legal briefs among other things currently due by  
18 March 13, under the Hearing Notice.

19 **V. CONCLUSION**

20 For the foregoing reasons, Goodrich respectfully requests that a formal  
21 hearing under Chapter Five, Sections 11500, et seq., of the Government Code be held  
22 in this matter.

23 Dated: March 5, 2007

24 Respectfully submitted,

25 MANATT, PHELPS & PHILLIPS, LLP  
26 GIBSON, DUNN & CRUTCHER, LLP

27 By: \_\_\_\_\_

28 Peter R. Duchesneau  
Attorneys for Respondent  
GOODRICH CORPORATION

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