MANATT, PHELPS & PHILLIPS, LLP
CRAIG A. MOYER (Bar No. CA 094187)
PETER R. DUCHESNEAU (Bar No. CA 168917)
11355 West Olympic Boulevard
Los Angeles, CA 90064-1614
Telephone: (310) 312-4000
Facsimile: (310) 312-4224

GIBSON, DUNN & CRUTCHER, LLP
JEFFREY D. DINTZER (Bar No. CA 139056)
DENISE G. FELLERS (Bar No. CA 222694)
333 South Grand Avenue
Los Angeles, California 90071-3197
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

Attorneys for Respondent
Goodrich Corporation

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

IN THE MATTER OF PERCHLORATE CONTAMINATION AT A 160-ACRE SITE IN THE RIALTO AREA (SWRCB/OCC FILE A-1824)	Case No.: SWRCB/OCC FILE A-1824 **MOTION AND OBJECTION NO. 11** **GOODRICH CORPORATION'S NOTICE OF MOTION, MOTION, AND OBJECTIONS REGARDING THE SIMULTANEOUS EXCHANGE OF EVIDENCE** Date: TBD Date: TBD Place: San Bernardino County Auditorium

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

PLEASE TAKE NOTICE that on a day and time to be determined, before the Chair of the State Water Resources Control Board, Tam Doduc, Designated Party Goodrich Corporation ("Goodrich") will and hereby does move the Hearing Officer to (1) strike the simultaneous exchange of all parties' evidence on March 13, 2007; and (2) suspend the public hearing pending a revision of the dates for submission of the parties

written evidence. Goodrich further requests that any future Notice of Hearing be amended to require the Advocacy Team, City of Rialto and Center for Community Action and Environmental Justice and Environment California ("prosecuting bodies") to present their evidence in writing at least 30 days before the alleged dischargers are required to respond. As such, Goodrich requests that in the event the Hearing Officer orders that the prosecuting bodies present their evidence on March 13, 2007, the alleged dischargers should be able to respond on April 12, 2007.

This motion is made on the grounds that the current timeline for the submission of written materials violates Section 11425.10 of the Government Code (Administrative Adjudication Bill of Rights) as well as basic principles of law, justice and the Constitutions of the United States and State of California.

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

MEMORANDUM OF POINTS & AUTHORITIES

I. INTRODUCTION

Pursuant to the State Water Resources Control Board's February 23, 2007 Notice of Hearing ("Notice"), on Tuesday, March 13, 2007 **all** parties[1] must submit the following:

- A list of witnesses;
- Expert witness qualifications;
- Details of their witnesses' testimony;
- Deposition transcripts;
- Exhibits;
- Legal briefs; and
- Legal and policy arguments

Notice at 4. The plain language of the Notice is unequivocal – the Santa Ana Regional Water Quality Control Board Advocacy Team ("Advocacy Team") – a governmental entity acting in a prosecutorial function during the public hearing – will submit their evidence at exactly the same time as the alleged dischargers. The Notice provides no insight into the rationale for this fundamentally unfair procedure. This simultaneous exchange of the Advocacy Team's and all other parties' cases-in-chief is inconsistent with the manner of administering justice in civil, criminal and administrative proceedings. Indeed, this public hearing purports to be a proceeding akin to that in a court of law, in front of an impartial adjudicator. Yet, in all other proceedings where the government is before the court acting in a prosecutorial role, the government must present its case first – a fundamental element of the law.

In the present proceeding, where rebuttal is tightly constrained and very little time is provided for presenting each party's case in chief (only 4 1/2 hours are being given to each party at the hearing to make an opening statement, present evidence and/or cross-

[1] The Notice defines the following as designated parties: (1) Santa Ana Water Board Advocacy Team; (2) Goodrich Corporation; (3) Pyro Spectaculars, Inc.; (4) Emhart Entities; (5) City of Rialto and Rialto Utility Authority; (6) Center for Community Action and Environmental Justice and Environment California. Notice at 3.

examine witnesses), fairness dictates that the Advocacy Team produce its case in advance of the other designated parties. The reason for this is quite simple – how can any of the alleged dischargers[2] sufficiently prepare a defense without knowing the evidence against them? Such a lack of adequate notice of the cases in chief against the parties is contrary to the concept of "fundamental fairness" and due process under the United States Constitution. U.S. CONST. amend. XIV, § 1. ("No State shall ... deprive any person of life, liberty, or property, without due process of law."). The requirement that a party receive adequate notice is a bedrock principle of procedural due process jurisprudence. *See Lambert v. California*, 355 U.S. 225, 228 (1957) ("Engrained in our concept of due process is the requirement of notice."). Adequate notice must be designed "to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'" *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978). This simultaneous exchange is unfair and should be revised to enable the alleged dischargers an opportunity to receive appropriate notice and adequately prepare their respective defenses to the Advocacy Team's case in chief.

Walt Petitt, who was appointed by the Regional Water Quality Control Board to be the hearing officer in the proceeding before the Regional Board, was confronted with this exact issue when considering the appropriate procedure for a hearing on Amended Cleanup and Abatement Order R8-2005-0053. When asked by the Regional Board's Advocacy Team to provide for a simultaneous exchange of evidence, Mr. Pettit, the former Executive Officer of the State Water Resources Control Board, denied the request:

> As the primary designated party advocating for the issuance of the proposed CAO, the Advocacy Staff is uniquely positioned to set the stage for this proceeding in its prehearing statement. The Hearing Officer hopes that publicizing the Advocacy Staff's statement in advance will streamline the process of finalizing the framework for the hearing because instead of requiring all parties to prepare their statements in the same information vacuum, they can

[2] The alleged dischargers include (1) Goodrich Corporation; (2) Pyro Spectaculars, Inc.; and (3) Emhart Entities.

formulate their remarks in reaction to the Advocacy Staff's statement. Allowing others to all react to the same prehearing statement will logically lead to a collectively more focused set of prehearing statements which, in turn, will simplify the process of finalizing the various procedures for this matter.

See January 16, 2007 Email from Erik Spiess to Jorge Leon. Mr. Pettit thus understood the value in requiring the Advocacy Team to present its evidence first – it would allow the parties to "formulate their remarks in reaction to the Advocacy Staff's statement." Similarly, by requiring the Advocacy Team to present its evidence first in the instant proceeding, the alleged dischargers could respond in a focused manner, cutting out superfluous evidence. Instead, Goodrich Corporation ("Goodrich") and the other alleged dischargers will seemingly respond in an expansive manner (the Notice provides no page limit for the March 13, 2007 submission). This will undeniably lead to hundreds of thousands of pages of evidence before the Hearing Officer – a clearly avoidable event. In addition, each of the alleged dischargers will be required to incur enormous expenses, both from the duplicating of hundreds of thousands of pages of evidence and from the amount of attorney and staff time required to prepare all of the evidence. In the event the alleged dischargers could obtain the prosecuting bodies' evidence first, the alleged dischargers could narrow the amount of evidence based on the respective cases against them, significantly reduce the cost for duplicating, preparation of evidence, and attorney and staff time.

Goodrich hereby requests that the Hearing Officer amend the Notice and require the Advocacy Team, City of Rialto and Rialto Utility Authority and Center for Community Action and Environmental Justice and Environment California present their respective evidence in writing at least 30 days before the alleged dischargers are required to respond.

II. THE SIMULTANEOUS EXCHANGE OF EVIDENCE VIOLATES PRINCIPLES OF THE ADMINISTRATIVE ADJUDICATION BILL OF RIGHTS

The presently scheduled simultaneous exchange of evidence is a clear violation

1 of Section 11425.10 of the Government Code. Section 11425.10 provides that "[t]he
2 agency shall give the person to which the agency action is directed notice and an
3 opportunity to be heard, ***including the opportunity to present and rebut evidence***."
4 Cal. Govt. Code § 11425.10 (emphasis added). Implicit within the idea of being able to
5 "**present and rebut evidence**" is the idea that a party can call rebuttal witnesses and
6 introduce physical and documentary evidence into the record. But there is no specific
7 provision in the Notice that allows additional witnesses to be called in rebuttal. And,
8 although it remains unclear in the Notice, only "rebuttal argument" may be submitted as
9 "rebuttal" on March 20, 2007. Notice at 4. This ultimately leads to the untenable
10 situation where any witnesses that an alleged discharger wishes to call for live testimony
11 must be included on the witness list submitted **on March 13**, before the alleged
12 discharger has any knowledge of the case against them or, more specifically, the
13 witnesses and testimony used against them. Thus, the parties are left with trying to
14 anticipate every potential witness (including those presently unknown). This result
15 violates the tenets of fairness and is in direct conflict with the Government Code, which
16 applies to these proceedings.

17 The Notice also provides that additional documents submitted in rebuttal, "must
18 be accompanied by an explanation as to why their need could not have been foreseen."
19 Notice at 4. But it is clear that the documents submitted in rebuttal "could not have been
20 foreseen" because the alleged dischargers did not know what the prosecuting bodies'[3]
21 evidence consisted of until the day "all" parties submitted their evidence – March 13,
22 2007.

23 Equally egregious is the fact that each discharger can only submit a "rebuttal
24 argument" of 40 pages. And the Notice actually mandates that any "explanation" of
25 additional documents counts against the page limit – so the 40 page limit is actually less
26 if any significant explanation of additional documents is required. Although each alleged

27 [3] Besides the Advocacy Team, the City of Rialto and Rialto Utility Authority and Center for Community Action and Environmental Justice and Environment California are prosecuting bodies for purposes of this
28 proceeding.

discharger has only 40 pages (minus any explanation) for rebuttal, the three prosecuting bodies have 120 pages available to them as well as the unlimited amount of evidence they will likely submit on March 13, 2007. Thus, Goodrich, for example, will have 40 pages to object to the three prosecuting bodies limitless March 13, 2007 submissions. Yet, the prosecuting bodies have up to 120 pages to rebut Goodrich's submission. Such inequity is patently unfair and cannot satisfy the text or the meaning of Section 11425.10, which justly provides for "the opportunity to present and rebut evidence." This patently unfair procedure will not survive judicial scrutiny.

III. THE SIMULTANEOUS EXCHANGE OF EVIDENCE IS CONTRARY TO BASIC TENETS OF JUSTICE

It is well accepted that a party *must* produce to the opposing party the evidence it possesses and will rely on in trial. This is one of the fundamental precepts in the law and is found in various aspects of the law. *Cf Hickman v. Taylor*, 329 U.S. 495, 457 (1957) ("The various instruments of discovery now serve ... as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues. Thus civil trials in the federal courts no longer need be carried on in the dark."); Fed. R. Civ. P. 26 (rules on discovery); *Giglio v. United States*, 405 U.S. 150, 154 (1972) ("suppression of material evidence justifies a new trial'") (citations omitted); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that the suppression by the prosecution of evidence favorable to [a defendant] upon request violates due process...."). As one California court has noted:

> ***A defendant's right to pretrial discovery ... is well established in California.***
>
> This right is in accord with the philosophy expressed in People v. Riser ... that the defendant's right to discovery is a corollary to his right to a fair trial and extends to the names of the prosecution witnesses and reports of expert witnesses for the People.

People v. Morris, 37 Cal. Rptr. 741, 743 (2d Dist. 1964) (citations omitted) (emphasis added); *cf. Emerson Elec. Co. v. Super. Ct.*, 946 P.2d 841, 845 (Cal. 1997) (quoting *Greyhound Corp. v. Super. Ct.*, 364 P.2d 266, 275 (Cal. 1961)) ("Certainly, it can be

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ATTORNEYS AT LAW
LOS ANGELES

said, that the Legislature intended to take the 'game' element out of trial preparation while yet retaining the adversary nature of the trial itself. One of the principal purposes of discovery was to do away 'with the sporting theory of litigation – namely, surprise at trial.'").

Given the present timeline for "all parties" submissions to be made on March 13, 2007, the parties do not have a reasonable opportunity to review the evidence submitted by the Prosecution prior to the parties' own submission – in fact, the evidence that will be offered against Goodrich will remain a "surprise" until the very day Goodrich submits its own evidence. The rules for discovery in civil litigation as well in criminal proceedings are based on elements of fairness. Fairness requires a prosecuting body to disclose its case, not "surprise" its opponent. That element of fairness is plainly missing under the present March 13, 2007 submission date for "all" parties.

IV. CONCLUSION

The simultaneous exchange of "all" parties' evidence is patently unfair on its face and in violation of Government Code Section 11425.10. As a result, Goodrich requests that the Hearing Officer grant Goodrich's Motion and set a fair timeline for submitting evidence, which would provide at least 30 days between submission of the prosecuting bodies' evidence and the alleged dischargers' response. In the event the Hearing Officer orders that the prosecuting bodies must present their evidence on March 13, 2007, the alleged dischargers should be able to respond on April 12, 2007.

Dated: March 5, 2007

Respectfully submitted,

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

By: ______________________
Peter R. Duchesneau
Attorneys for Respondent
GOODRICH CORPORATION

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