



December 2, 2013

Patrick Pulupa  
Senior Staff Counsel  
State Water Resources Control Board  
1001 I St. Floor 22  
Sacramento, CA 95814

Re: Expert Testimony at December 5, 2013 Central Valley Regional Water Board  
Public Hearing

Dear Mr. Pulupa:

I am writing in response to your email, dated December 2, 2013, in which you conveyed, for the first time, the Central Valley Regional Water Quality Control Board's (the Board) inclination to hear the testimony of Dr. Daniel R. Tormey at the December 5, 2013 public hearing.

The email states that the Board is considering to permit oil industry representatives to introduce expert testimony nearly one month after the Revised Notice of Public Hearing's deadline for submitting testimony. This would provide the Center for Biological Diversity—a designated party to this proceeding—with 3 days' notice to prepare for cross-examination and to find, retain, and prepare its own expert witness. This would result in extreme prejudice for the Center. To avoid tainting the proceedings in this manner, we strongly urge the Board to enforce its deadline with respect to all parties.

In prior communications, the Center had been given the impression that the deadline for all testimony and evidence was November 4, 2013 and that no designated party has identified an expert witness. Until today, the Center had an understanding that the hearing would not entail expert witness testimony. For the Board to reverse course and allow an expert from the oil industry to testify is unfair and prejudicial to the Center, which is left with insufficient time to adequately prepare for such testimony.

The stated justification for potentially allowing expert testimony is that the Board issued a Revised Notice of Public Hearing. But the oil industry has already submitted comments; its comments focused on the appropriateness of drilling mud conditional waiver requirements. Those comments are equally applicable to the Revised Notice of Public Hearing. There is no need to allow the oil industry to belatedly attempt to bolster their comments with an expert testimony.

Moreover, the belated introduction of the expert is contrary to the California Code of Regulations (CCR) that govern these agency proceedings. The CCR states that parties "shall submit ... prior to the hearing ... required information [related to the expert] ... in accordance with the procedure specified in the hearing notice." *Id.* at § 648(b). Since the Notice's deadline for submitting testimony is long expired, it is improper to belatedly put forth an expert.

To date, neither the oil industry representatives nor the Board has provided a CV of the expert or a copy of his testimony. Without the submission of written testimony, the Center has no way of preparing for cross-examination. His testimony will be heard for the first time at the public hearing, severely

prejudicing any attempt to rebut his testimony. The CCR shuns this sort of practice, stating that it is the “policy of the State and Regional Boards to discourage the introduction of surprise testimony and exhibits.” 23 CCR § 648.4(a). Since today is the first notice to the Center that referred to an expert witness from the oil industry, it certainly violates the policy against surprise testimony.

It is also extremely unrealistic to expect a non-profit organization such as the Center to be able to find, retain, and prepare an expert witness in three days, as well as deal with the logistics of getting the expert to and from the hearing in Rancho Cordova. The late addition of an expert virtually guarantees that the other designated parties will have no opportunity to present their own counter expert testimony.

In order to prevent situations like the one we face here, the CCR mandates that the Board “*shall* refuse to [admit testimony] where there is a showing of prejudice to any party or the Board.” 23 CCR 648.3(e). Because the Center would be substantially prejudiced if the Board allows expert testimony, the Board must refuse to hear Dr. Tormey’s testimony.

Thank you for your attention to this matter.

Sincerely,

/s/ Hollin Kretzmann  
Hollin Kretzmann  
Staff Attorney  
Center for Biological Diversity  
351 California St., Ste 600  
San Francisco, CA 94110  
(415) 436-9682 ext. 333