

## Bill Guerry

25 MS. MILLER: Next up, Bill Guerry. And Mr. Enger

ARB 10-12-09.txt

40

1 has seeded his time to you, so you have up to 20 minutes.

2 MR. GUERRY: Good morning. My name is Bill  
3 Guerry. I'm with the Washington D.C. law firm of Kelley  
4 Drye. I'm a Clean Air Act lawyer.

5 I'm here today speaking on behalf of a new  
6 coalition, Californians for Enforcement Reform and  
7 Transparency, or CERT. I've put out in the table in the  
8 back there materials including a press release we just  
9 issued and a detailed position table, which is now a  
10 seven-page position paper with 28 questions that we  
11 developed largely so that all of us could be better  
12 informed, not just at this particular workshop, but moving  
13 forward as part of a constructive dialogue.

14 And we appreciate the time and effort that Ellen  
15 Peter and the CARB Enforcement staff have put into this  
16 presentation.

17 And I was delighted in terms of the remarks this  
18 morning from Kirk and Chairwoman Nichols that we all I  
19 believe agree on the fundamental goals that the CERT  
20 Coalition is trying to achieve that we believe all the  
21 stakeholders, including the environmental groups, should

22 all want to achieve. And those core elements are  
23 evaluating through a consensus process whether  
24 improvements can be made in the way we go about  
25 consistently and transparently as a matter of good

ARB 10-12-09.txt

41

1 government having the best focus in our Enforcement  
2 Program so that limited resources are spent addressing the  
3 greatest compliance problems. And if there is an  
4 efficient process that is consistently applied and that  
5 there is a distinguishing between administrative paperwork  
6 violations from air quality violations.

7           We believe as a matter of good government, the  
8 manner in which CARB assesses penalties, and equally as  
9 important, the way in which those penalty funds are spent  
10 and allocated should all be part of some oversight and

11 control that there should be clear policies that the  
12 regulated community and the environmental community and  
13 elected officials can all look to and make sure that the  
14 program is being implemented in a way to achieve these  
15 goals.

16           If I could quickly go through the position  
17 paper -- which by the way, these materials for those of  
18 you on the webcast available on the following website:  
19 [www.kelleydrye.com](http://www.kelleydrye.com).

20           We have put together this position paper largely  
21 in response to Ellen Peter's request on behalf of the 12

22 associations. This reflects the experience as well of my  
23 colleague John Dunlap and I, the prior CARB Chairman, who  
24 have together worked on 30 or 40 EPA and CARB enforcement  
25 matters.

ARB 10-12-09.txt

42

1           And what I've done here -- and I want to just hit  
2 the one point. It is CERT's desire to strengthen, not to  
3 weaken, CARB's Enforcement Program and policies. And  
4 specifically, we would like to strengthen and preserve and  
5 enhance CARB's credibility and integrity through the  
6 adoption and implementation of consistent, fair, and  
7 transparent penalty policies, which support the commitment  
8 made by Chairman Nichols at the July 23rd Board hearing.

9           If I can go next -- next page. I just want to  
10 hit on some of the elements that we think should be  
11 included in a written penalty policy.

12           First, the proper incentives to promote  
13 compliance, one of our core missions, is to do everything  
14 we can to make sure that companies in these challenging  
15 economic times spend the extra money and time to take the  
16 reasonable prudent precautions to avoid compliance  
17 problems. To that end, we think that the CARB position  
18 papers -- the CARB policies on penalties should be  
19 tempering strict liability to recognize that where  
20 companies have taken all reasonable and prudent  
21 precautions to achieve compliance and to avoid problems.

22 And if there are glitches, there should be some  
23 recognition and incentivation so that companies spend the  
24 extra time, money, and effort to avoid those problems.

25           And our first policy question relates to that

ARB 10-12-09.txt

43

1 issue in making sure the system is incentivizing companies  
2 to spend the extra time and effort to achieve full  
3 compliance.

4           Bullet two here deals with formal penalty  
5 policies. Right now, to my knowledge, we have not been  
6 able to see any written policy that explains how CARB goes  
7 about distinguishing between different types of violations  
8 in terms of air quality impacts, in terms of avoided  
9 compliance costs, in terms of culpability. I understand  
10 there is a strict liability statutory framework, but  
11 clearly strict liability should be tempered and should be  
12 not blindly applied. And we should look at the critical  
13 factors. And we believe the most important critical  
14 factor is air quality and the impact on air quality.

15           In that regard, we believe that the U.S. EPA has  
16 adopted a 50-page penalty policy matrix. This was done  
17 over a several year period. It was developed by George  
18 Lawrence, who was head of the EPA Mobile Source Division.

19           There is a note on the table and on the website I  
20 gave you earlier prepared by George Lawrence which  
21 explains the benefits of the EPA penalty policy. And that

22 policy was developed in large part with the risk of  
23 grossly noncompliant product coming in from off-shore from  
24 mostly new market entrance that were deliberately  
25 uncertified and high emitting and trying to figure out how

ARB 10-12-09.txt

44

1 to develop a policy that hit those grossly noncompliant  
2 products with the maximum penalties and distinguish those  
3 from paperwork glitches.

4           Unfortunately, George couldn't tie in today. I  
5 do have some slides he would have liked to have presented.  
6 But the questions if you see at the bottom as you go  
7 through questions one through four all relate to why we  
8 think that the EPA penalty policy would provide a much  
9 more efficient process, reach settlements sooner, ensure  
10 consistency, and you would ensure greater credibility and  
11 integrity in the process and system.

12           Some of the issues that come up in those  
13 questions, like question number three, raise questions I  
14 think should be answered and looked at in this forum. And  
15 that includes, is it fair and right to have duplicative  
16 penalties where, say, a manufacturer is hit with a penalty  
17 and a California retailer is hit with the exact same  
18 penalty for the same violation; is this a double and  
19 unfair scenario?

20           Should we be trying to ensure that the penalties  
21 fit the crime and punishment and their culpability issues?

22 And if folks like retailers have taken all reasonable

23 prudent precaution, should they be hit with the same  
24 amount?

25 Question four deals with the repeat violator

ARB 10-12-09.txt

45

1 policy.

2 And question five, I just want to note that, in  
3 California, most of the air quality management districts,  
4 including the South Coast, have for a long time had very  
5 effective penalty policies to address stationary sources  
6 that have worked very well in promoting fair, consistent,  
7 and transparent penalty policies. So I think those South  
8 Coast Air Quality District penalty policies would be also  
9 a great model for us to look at.

10 Next, bullet C, I just want to briefly go through  
11 administrative hearing process. I heard Kirk's earlier  
12 statement, and I respect the fact that CARB's Enforcement  
13 has been effective in reaching a lot of settlements.

14 Having said that though, we believe most all other  
15 California agencies have in place a formal administrative  
16 hearing process. We do believe that is a process that

17 U.S. EPA has had success with. We think that would  
18 provide an efficient forum to resolve settlements much  
19 more efficiently than judicial actions. And right now,  
20 more options would be better, and we site to the fact that

21 the Governor has repeatedly urged agencies to create

22 administrative hearing processes with ALJ judges to  
23 provide another forum to settle matters in lieu of a  
24 judicial action.

25 I'm now hitting on heading number three,

ARB 10-12-09.txt

46

1 transparent and open government. There's page three of  
2 our position paper. And in this discussion, we believe  
3 there should be a full evaluation of the public of how  
4 money is spent that is associated with penalties. It's my  
5 understanding that when CARB settles current matters, it  
6 retains all the funds that it receives from a settlement.  
7 And that's unusual for an agency.

8 And I think that has the perception in the public  
9 of creating the impression that the agency that's keeping  
10 the money is more concerned about making money and  
11 retaining it and using it than achieving its pure core  
12 mission, which should be air quality. We believe there  
13 should be an evaluation as to whether or not CARB's  
14 integrity and credibility would be further enhanced if all

15 penalty settlements were going to the State or going  
16 through some other public process that had a lot of input,  
17 in particular from environmental groups, so those of us in  
18 the environmental community can be carefully ensuring that  
19 the settlement funds went to air quality and did not go to  
20 projects or handled in a way that a public doesn't have a  
21 voice in, particularly at a time where the budget

22 obviously is under enormous strain here in California. We  
23 think every public dollar that comes in either from the  
24 taxpayer or from a settlement should be closely  
25 scrutinized and we should all make sure it's going to its

ARB 10-12-09.txt

47

1 best use.

2           And then I guess, in closing, I have a heading  
3 four, which is enhancing full compliance. And in this  
4 section, we believe that one way to achieve full  
5 compliance, which is one of CERT's core goals, is to make  
6 sure that CARB's administrative rulemaking procedures are  
7 always being fully complied and that enforcement actions  
8 are tied within the four square zones of what has been  
9 approved in a regulation and does not include either  
10 prematurely pulling ahead and applying proposed  
11 regulations or relying on test procedures that have not  
12 been part of a regulatory package.

13           Lead time, clarity, consistency, all of these  
14 principles are best served when you have an agency that  
15 follows the administrative procedures and makes sure that  
16 there is a closure and a regulatory process that has to go  
17 through the Office of Administrative Law and there's a  
18 defined effective date. There's defined regulations, and  
19 everyone receives equal, clear, and consistent notice in  
20 advance of any regulatory changes.

21           You're going to hear from several CERT members

22 that have specific concerns where they believe that CARB  
23 is currently applying interpretations outside the scope of  
24 the clear regulations. And I know that is an issue that  
25 CARB and the AG -- and we're delighted the AG is here

ARB 10-12-09.txt

48

1 today -- that the attorney general's office obviously  
2 wants to make sure that all agencies are fully following  
3 those important procedures.

4           So with that, I very much appreciate your  
5 comments. I look forward to working with all of you. And  
6 I'll be here if there are any questions. Thank you.

7           MS. MILLER: Thank you.