

1 TODD KIM  
Assistant Attorney General

2  
3 BRANDON N. ADKINS  
PAUL A. CAINTIC  
4 United States Department of Justice  
Environmental Defense Section  
5 P.O. Box 7611  
Washington, D.C. 20044  
6 Tel: (202) 616-9174 (Adkins)  
7 Tel: (202) 514-2593 (Caintic)  
8 Fax: (202) 514-8865  
9 Brandon.Adkins@usdoj.gov  
Paul.Caintic@usdoj.gov

10 EMMET P. ONG  
Assistant United States Attorney  
11 United States Attorney's Office  
1301 Clay Street, Suite 340-S  
12 Oakland, CA 94612-5217  
13 Tel: (510) 637-3929  
14 Fax: (510) 637-3724  
Emmet.Ong@usdoj.gov

15 *Attorneys for Defendants*

16 **UNITED STATES DISTRICT COURT**  
17 **NORTHERN DISTRICT OF CALIFORNIA**  
18 **SAN FRANCISCO DIVISION**

19 FOOD & WATER WATCH, INC., et al.,

20 Plaintiffs,

21 v.

22 UNITED STATES ENVIRONMENTAL  
23 PROTECTION AGENCY, et al.,

24 Defendants.

Case No. 17-CV-02162-EMC

**DEFENDANTS' MOTION IN LIMINE  
TO EXCLUDE THE TESTIMONY OF  
BRIAN BERRIDGE**

Date: Tuesday, January 16, 2024

Time: 2:30 PM (PST)

Place: San Francisco Courthouse

450 Golden Gate Ave.

San Francisco, CA 94102

Courtroom 5, 17<sup>th</sup> Floor

1 **INTRODUCTION**

2 The Court should exclude testimony by former National Toxicology Program (“NTP”)  
3 employee Dr. Brian Berridge. Fed. R. Evid. 401, 402, 403. Plaintiffs disclosed Dr. Berridge as a  
4 fact witness regarding alleged political influence on the development of the draft NTP monograph.  
5 The Court already held that alleged political influence concerning the draft NTP monograph is not  
6 relevant. Plaintiffs have not sought leave to file a motion for reconsideration of that decision. *See*  
7 *Civil L.R. 7-9*. Plaintiffs instead attempt to circumvent the Court’s relevancy ruling by calling  
8 Dr. Berridge as a fact witness on the same subject. In reliance on the Court’s order, EPA forewent  
9 discovery on that topic, including by excusing Plaintiffs from disclosing third-party  
10 communications (including with Dr. Berridge) they withheld that were relevant to the issue.  
11 Permitting Dr. Berridge’s testimony would therefore be unfairly prejudicial to EPA.

12 **BACKGROUND**

13 In 2018, NTP named Dr. Berridge as its new associate director to manage day-to-day  
14 operations.<sup>1</sup> Dr. Berridge holds a doctorate in veterinary medicine. He is not an author of any  
15 version of the NTP draft monograph or meta-analysis. In fact, in Dr. Berridge’s words, he had “no  
16 real skin in the game other than supporting the scientists in [his] Division who have produced [the  
17 draft monograph].” Email from Brian Berridge to Tara Schwetz and Rick Woychik dated May 12,  
18 2022, Adkins Decl. Ex. B (see highlighted text).

19 Plaintiffs’ initial disclosures list Dr. Berridge and six other current and former NTP  
20 scientists as individuals likely to have discoverable information about alleged political influence  
21 on the draft NTP monograph. The disclosure states:

22 **Current and former NTP scientists who have knowledge of the Monograph,**  
23 including the history of its development, the peer review processes and scientific  
24 methodologies that it has employed, and the political pressures it has been subjected  
25 to by its officials and agencies with the strongest policy interests on fluoride. These  
26 scientists include, but are not necessarily limited to, Kristina Thayer, John Bucher,  
27 Brian Berridge, Kyla Taylor, Linda Birnbaum, Mary Wolfe, and Richard Woychik.

28 Pls.’ Initial Disclosures 2, Adkins Decl. Ex. D.

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<sup>1</sup> NTP, Brian Berridge Tapped to Manage National Toxicology Program, *available at*  
<https://www.nih.gov/news-events/news-releases/brian-berridge-tapped-manage-national-toxicology-program>.

1 In April 2023, the parties submitted their Seventh Joint Status Report that referred to a  
2 potential issue of whether Plaintiffs must seek leave to exceed the presumptive limit of ten  
3 depositions. Seventh Joint Status Report 3, ECF No. 350. Plaintiffs sought leave to conduct fact  
4 depositions of federal officials at the Department of Health and Human Services regarding alleged  
5 political pressures exerted on NTP in the leadup to its decision not to publish a May 2022 draft of  
6 the monograph. At the ensuing status conference, Plaintiffs argued (as they seek to do at trial) that  
7 evidence regarding alleged political influence goes to the weight and scientific merit of the draft  
8 monograph. Plaintiffs' counsel stated: "the only reason [the NTP monograph] wasn't in final form  
9 last May is because of . . . political pressures." Status Conf. Tr. 10:18–20 (Apr. 11, 2023), Adkins  
10 Decl. Ex. A. The Court correctly noted that the draft report, as well as the criticisms and the NTP  
11 authors' responses to them, are all public and asked, "what does it matter? It seems like it's water  
12 under the bridge." *Id.* at 10:21–24. The Court's instructions were clear: "I want to focus on the  
13 science, and that's what this is about . . . that's more important [than] whether politicians got  
14 involved to squelch this thing. Whether they did or not, I have to look at the science at the end of  
15 the day." *Id.* at 12:16–24. The Court rejected Plaintiffs' argument and ordered without prejudice  
16 that the depositions not be permitted because they have no obvious relevance now that the draft  
17 monograph and the comments thereto have all been made public. *Id.* at 15:13–16:11; *see also*  
18 Minute Entry 2, ECF No. 352. "Absent good cause, the Court stated that it must proceed on the  
19 merits of the science which does not require the information Plaintiffs seek . . ." *Id.* at 2.

20 Plaintiffs now identify Dr. Berridge as a fact witness they intend to call at trial. Plaintiffs  
21 explained that they will elicit testimony on the political influence issue and believe that the  
22 "principal relevance" of the testimony is how much weight to give to the NTP draft monograph.  
23 Adkins Decl. ¶ 3 (November 20, 2023 attorney conference). Plaintiffs offer Dr. Berridge to  
24 "explain why the May 2022 monograph was not published," "his assessment of the problems with  
25 not publishing the monograph at that time," and that he "considered the May 2022 monograph . .  
26 . to be NTP's final and complete monograph. Appendix A to Joint Pretrial Conference Statement.  
27 Further, several of Plaintiffs' proposed exhibits are emails for which Dr. Berridge is listed as the  
28 sponsoring witness; Plaintiffs' counsel described those same emails as evidencing "past political

1 interference with NTP.” Adkins Decl. ¶¶ 4–5. Plaintiffs have not sought leave to move for  
2 reconsideration of the Court’s relevancy order, as required by Civil Local Rule 7-9.

### 3 ARGUMENT

#### 4 I. THE COURT SHOULD EXCLUDE DR. BERRIDGE’S TESTIMONY.

5 *First*, Dr. Berridge’s testimony has nothing to do with the heart of this matter—the merits  
6 of the scientific evidence about the potential hazard of water fluoridation. The Court previously  
7 held that alleged “political influence” on NTP is irrelevant. Indeed, the Court denied Plaintiffs  
8 leave to depose government officials on that exact subject. Status Conf. Tr. 15:13–16:11, Adkins  
9 Decl. Ex. A; Minute Order 2, ECF No. 352. Consistent with its prior order, the Court should  
10 exclude Dr. Berridge’s testimony and any evidence relating to alleged political influence on NTP.

11 To be sure, the Court made its relevancy determination without prejudice to allow Plaintiffs  
12 to revisit the issue if appropriate. But no cause exists today to revisit the Court’s order. Plaintiffs  
13 cannot proffer any reason why alleged political influence on NTP has somehow become relevant.  
14 No additional drafts of the monograph have been released, nor have Plaintiffs alleged any new  
15 political pressures since the April 2023 status conference.

16 *Second*, a party must obtain leave of court to notice a motion for reconsideration. Local  
17 Rule 7-9. Plaintiffs have not done so. Thus, Plaintiffs’ attempt to reanimate their theory that the  
18 NTP draft was subject to “political influence” despite the Court’s order at the April 2023 status  
19 conference is also procedurally defective, and the Court could and should exclude Dr. Berridge’s  
20 testimony on this basis alone.

21 *Third*, Plaintiffs cannot reframe Dr. Berridge’s testimony as relating to something other  
22 than the political influence issue. Plaintiffs’ counsel represented that the testimony is relevant to  
23 the alleged political influence issue as well as what weight the Court should give the NTP draft  
24 monograph. Adkins Decl. ¶ 3. Dr. Berridge is not one of the scientists who authored any draft of  
25 the monograph. And virtually all the proposed exhibits for which Plaintiffs identified Dr. Berridge  
26 as the sponsoring witness were previously identified *by Plaintiffs* as evidencing “past political  
27 interference with NTP.” Adkins Decl. ¶¶ 4–5. There can be no question that Plaintiffs seek to  
28 proffer evidence on the alleged political influence issue by calling Dr. Berridge as a witness.

1           *Fourth*, limiting Dr. Berridge’s testimony to the history of the draft monograph and peer  
2 review and scientific methodologies NTP has employed would not resolve this issue. Federal Rule  
3 of Evidence 403 allows the Court to exclude evidence if its probative value is substantially  
4 outweighed by the danger that it will confuse the issues, waste time, or be needlessly cumulative.  
5 At best, Dr. Berridge’s testimony will be irrelevant (consistent with the Court’s April 2023 order)  
6 and lack any probative value about whether fluoridated drinking water poses an unreasonable risk.

7           The history of the draft monograph has no bearing on a relevant issue. In any event, the  
8 parties have informed the Court of the draft monograph’s historical development throughout this  
9 case. Defs.’ Opp’n to Mot. to Lift Stay 13–15, ECF No. 309 (describing history of NTP’s  
10 monograph from first draft to the initiation of the BSC WG); Defs.’ Admin. Mot. to Govern  
11 Proceedings 3–5, ECF No. 332 (detailing BSC WG’s process); *see also* Joint Status Reports, ECF  
12 Nos. 295, 299, 304, 307, 316, 337, 350, 357, 366, 368 (providing updates on NTP’s progress).  
13 Moreover, public versions of the draft monograph detail the documents’ evolving history. It would  
14 be redundant at best to have Dr. Berridge survey the document’s past.

15           The peer review and scientific methodologies NTP employed are relevant but will be the  
16 subject of testimony by no fewer than four *expert* witnesses in this case. The Court correctly noted  
17 the same at the April 2023 status conference. Status Conf. Tr. 13:3–12 (“And I think the money is  
18 going to be in the expert explorations on the science . . . . And you know, each side’s position is  
19 going to be pretty obvious. Everybody gets their own expert.”), Adkins Decl. Ex. A. Dr. Berridge,  
20 however, was not disclosed as an expert witness and cannot testify on these matters. *See Malkin v.*  
21 *Fed. Ins. Co.*, No. 2:21-cv-00172-CAS (PDx), 2023 WL 6967458, at \*6 (C.D. Cal. Oct. 20, 2023)  
22 (excluding “any undisclosed expert evidence” from witnesses only disclosed as fact witnesses).

23           As a fact witness, Dr. Berridge can offer only “purely factual testimony” about the NTP  
24 monograph; he cannot “offer opinions based on his specialized knowledge.” *Titus v. Golden Rule*  
25 *Ins. Co.*, No. 12-00316, 2014 WL 11515698, at \*2–3 (D. Ariz. Apr. 4, 2014) (quotation marks  
26 omitted); *Zeiger v. WellPet, LLC*, 526 F. Supp. 3d 652, 677 (N.D. Cal. 2021) (“The definitions of  
27 lay and expert opinions are mutually exclusive.”). Dr. Berridge cannot testify about why NTP used  
28 the methodologies it used or drew the conclusions it drew, as that would require him to “offer an

1 opinion or an impression based on his specialized knowledge and skill.” *Titus*, 2014 WL  
2 11515698, at \*3 (finding doctor offered as a fact witness could testify that he performed a surgery  
3 on a patient but was barred from explaining why he did so); Fed. R. Evid. 701 (stating that fact  
4 witnesses cannot testify “based on scientific, technical, or other specialized knowledge”). Nor can  
5 Dr. Berridge offer his own conclusions about the fluoride science or explain the NTP monograph’s  
6 methodologies. In *United States v. Frantz*, two tax auditors who were disclosed only as fact  
7 witnesses could “not testify to what they found out during their audit to the extent that their  
8 findings are based on their background and expertise as IRS auditors.” No. 02-01267, 2004 WL  
9 5642909, at \*12 (C.D. Cal. Apr. 23, 2004) (cleaned up). So too here: Dr. Berridge cannot testify  
10 about what NTP found to the extent his testimony will be based on his background as a scientist.  
11 If Plaintiffs seek to introduce such testimony, it must be stricken as impermissible lay opinion. *See*  
12 *id.* (citing Fed. R. Evid. 701).

13 *Finally*, allowing Dr. Berridge to testify must be balanced against its risk of sidetracking  
14 this trial. EPA would likely offer one or more rebuttal witnesses regarding Dr. Berridge’s proposed  
15 testimony. Dr. Berridge’s testimony would create a satellite litigation divorced from what really  
16 matters in this case: the merit of the scientific studies on fluoride published since the first trial. *See*  
17 *Order Granting Mot. to Lift Stay*, ECF No. 3195 (“the narrow, targeted scope of discovery  
18 warrant[s] consideration of the scientific developments”). The Court has been clear: it “would  
19 rather spend [its] time looking at the science.” Status Conf. Tr. 15:22–25. This trial should not be  
20 expanded to include, at worst, Plaintiffs’ crusade against the Department of Health and Human  
21 Services, or, at best, Dr. Berridge’s irrelevant, cumulative testimony about the NTP monograph’s  
22 historical development. EPA is prepared to present its case based on the drafts of the NTP  
23 monograph that are now publicly available. The Court should exclude Dr. Berridge’s irrelevant,  
24 improper, and needlessly cumulative testimony.

## 25 **II. ALLOWING DR. BERRIDGE’S TESTIMONY WOULD BE UNFAIRLY** 26 **PREJUDICIAL TO EPA**

27 EPA would be unfairly prejudiced if the Court permits Dr. Berridge’s testimony. In  
28 reliance on the Court’s relevancy determination, EPA forewent certain discovery. Most obviously,

1 EPA would have deposed Dr. Berridge. But the Court’s relevancy determination influenced  
2 document discovery, too. For example, EPA excused Plaintiffs from logging withheld third-party  
3 communications (including at least one communication with Dr. Berridge). Adkins Decl. ¶ 6. In  
4 fact, Plaintiffs asserted that EPA lacked a “substantial need” for the withheld communications  
5 under the work-product doctrine because the Court had the prior month held that the political  
6 influence issue is irrelevant. *Id.* (“Further, as you reiterated during our call on Monday, it is EPA’s  
7 position that the political pressure exerted on NTP is irrelevant to this case. As such, it is hard to  
8 understand why you consider these communications to be relevant, let alone why EPA has a  
9 ‘substantial need’ for them.”). EPA then resolved the issue without Court intervention upon  
10 Plaintiffs’ confirmation that the withheld-but-not-logged communications dealt solely with  
11 Plaintiffs’ political influence theory. Adkins Decl. ¶ 6. Allowing Plaintiffs to resurrect that issue  
12 well after the close of discovery and after Plaintiffs used the Court’s relevancy determination as a  
13 shield to avoid producing a privilege log of withheld documents would be deeply unfair. *See also*  
14 Fed. R. Civ. P. 37(c)(1) (“If a party fails to provide information or identify a witness as required  
15 by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence  
16 . . . at a trial . . .”).

17 **CONCLUSION**

18 For these reasons, the Court should exclude Dr. Brian Berridge’s proposed testimony.

19 DATED: December 8, 2023

20 Respectfully submitted,

21 TODD KIM  
22 Assistant Attorney General

23 /s/ Paul A. Caintic  
24 PAUL A. CAINTIC  
25 BRANDON N. ADKINS  
26 United States Department of Justice  
27 Environment & Natural Resources Division  
28 P.O. Box 7611  
Washington, D.C. 20044  
Tel: (202) 616-9174 (Adkins)  
Tel: (202) 514-2593 (Caintic)  
Fax: (202) 514-8865  
Brandon.Adkins@usdoj.gov

Paul.Caintic@usdoj.gov

EMMET P. ONG  
Assistant United States Attorney

*Attorneys for Defendants*

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on this 8th day of December 2023, true and correct copies of the  
3 foregoing Defendants' Motion in Limine to Exclude the Testimony of Brian Berridge, Declaration  
4 of Brandon Adkins, and accompanying exhibits were served via email to Plaintiffs' counsel  
5 Michael Connett.

6  
7 */s/ Paul A. Caintic*  
8 PAUL A. CAINTIC  
9 United States Department of Justice  
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