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Divider Title: _____

UNFUNDED MANDATES

1. ISSUE STATEMENT

Congress imposes many requirements on state and local governments and does not always pay the full cost of implementing them. These requirements are sometimes referred to as "unfunded mandates," but often the situation is that the federal government has begun helping the states meet an already recognized need. The dominant example is the Medicaid program, in which the federal government pays just under 60 percent of the cost of care for the eligible poor. Absent such contribution, the states would have to pay the entire public share of this cost, assuming they chose to. Much of the recent controversy surrounding so-called unfunded mandates has centered on the cost of complying with federal environmental statutes.

State and local governments argue that the cost of complying with environmental laws prevents local communities from investing adequately in public services such as police and fire protection. Some state and local officials believe that available scientific evidence fails to support the need for many of these prescriptive requirements. They also contend that such requirements often lack flexibility in implementation. Many state and local officials believe that most of their concerns could be addressed if federal regulators provided greater opportunities for their input prior to drafting regulations.

The issue pits state and local officials against environmentalists, who view the concern as part of an "unholy trinity" (along with takings and cost-benefit issues) that threatens to undermine efforts to protect human health and the environment. The controversy might derail reauthorization of several environmental statutes because environmentalists have threatened to withdraw support for key bills if amendments to control unfunded mandates are attached. An April 15, 1994 letter signed by nearly 100 leaders of environmental, labor, civil rights, and consumer groups characterizes unfunded-mandate bills as an attempt to undermine landmark legislation designed to protect public health, safety, and civil rights. These groups argue that federal contributions to state and local governments, including vast funding distributed with no mandates at all, far exceed the cost of unfunded mandates. They believe any unreasonable mandates should be addressed on an individual basis, rather than through broad-based legislation.

2. STATUS

Congressional interest in the issue is very strong. Several bills are pending that would control the number and cost of unfunded mandates. Senate and House committees have recently held hearings on the issue. One bill, introduced by Senator Kempthorne and cosponsored by 53 others, would prohibit the issuance of new federal regulations that impose unfunded

mandates. Democrats and Republicans alike have expressed considerable sympathy with the plight of state and local governments as they struggle to implement unfunded mandates, and they view certain environmental regulations as especially burdensome. Yet proponents of unfunded mandate amendments were recently unable to attach them to the Senate bill to reauthorize the Safe Drinking Water Act, probably because the bill already includes several measures to reduce the regulatory burden under the Act. The unfunded-mandate amendment was tabled by a vote of 56-43, largely along party lines.

3. DEPARTMENT POSITION

On October 26, 1993, President Clinton signed Executive Order 12875, "Enhancing the Intergovernmental Partnership," which generally prohibits the issuance of rules creating an unfunded mandate unless the agency documents the extent of prior consultation with state and local officials and the need for the unfunded mandate. The EO also provides for greater flexibility in applying regulations to state and local governments.

The Department has not played an active role in the debate over unfunded mandates. The Administration has not taken an official position on the pending bills, but it has informally expressed opposition to the more extreme legislative responses. As evidenced by the EO, the Administration is sympathetic to the concerns of state and local governments. But it does not want to see the problem overblown to the point of sacrificing environmental protection.

4. JUDICIARY COMMITTEE MEMBERS' INTEREST/POSITIONS

Any questions about unfunded mandates would likely come from Republican members. Every Republican Committee Member except Cohen voted in favor of the unfunded-mandate amendment to the Safe Drinking Water Act reauthorization bill. Every Democratic Committee Member except Heflin voted against the amendment.

REFERENCE MATERIALS

-- Executive Order 12875

Presidential Documents

Title 3—

Executive Order 12875 of October 28, 1993

The President

Enhancing the Intergovernmental Partnership

The Federal Government is charged with protecting the health and safety, as well as promoting other national interests, of the American people. However, the cumulative effect of unfunded Federal mandates has increasingly strained the budgets of State, local, and tribal governments. In addition, the cost, complexity, and delay in applying for and receiving waivers from Federal requirements in appropriate cases have hindered State, local, and tribal governments from tailoring Federal programs to meet the specific or unique needs of their communities. These governments should have more flexibility to design solutions to the problems faced by citizens in this country without excessive micromanagement and unnecessary regulation from the Federal Government.

THEREFORE, by the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to reduce the imposition of unfunded mandates upon State, local, and tribal governments; to streamline the application process for and increase the availability of waivers to State, local, and tribal governments; and to establish regular and meaningful consultation and collaboration with State, local, and tribal governments on Federal matters that significantly or uniquely affect their communities, it is hereby ordered as follows:

Section 1. Reduction of Unfunded Mandates. (a) To the extent feasible and permitted by law, no executive department or agency ("agency") shall promulgate any regulation that is not required by statute and that creates a mandate upon a State, local, or tribal government, unless:

(1) funds necessary to pay the direct costs incurred by the State, local, or tribal government in complying with the mandate are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of regulations containing the proposed mandate, provides to the Director of the Office of Management and Budget a description of the extent of the agency's prior consultation with representatives of affected State, local, and tribal governments, the nature of their concerns, any written communications submitted to the agency by such units of government, and the agency's position supporting the need to issue the regulation containing the mandate.

(b) Each agency shall develop an effective process to permit elected officials and other representatives of State, local, and tribal governments to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.

Sec. 2. Increasing Flexibility for State and Local Waivers. (a) Each agency shall review its waiver application process and take appropriate steps to streamline that process.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by a State, local, or tribal government for a waiver of statutory or regulatory requirements in connection with any program administered by that agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the State, local, and tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

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Divider Title: _____

TAKINGS ISSUES

1. ISSUE STATEMENT

Litigation: Mining and timber companies, developers, farmers, and other landowners largely in the West have organized a well-financed movement opposing our environmental laws and other government regulation. Asserting that the rapid increase in environmental regulation in the last 20 years has unduly restricted their right to use their own property, the landowners bring lawsuits to establish that such restrictions -- from wetlands and endangered species protection to historic preservation -- constitute a "taking" of property that requires compensation under the Fifth Amendment.

The scope of the Taking Clause is the subject of a rapidly growing part of our docket. In a widely reported 1992 case -- Lucas v. South Carolina Coastal Commission -- the Supreme Court reviewed state legislation that prohibited residential development on the plaintiff's beachfront property. The Court held that government regulation that deprives the landowner of all economically beneficial use constitutes a taking per se, irrespective of the "public interest advanced in support of the restraint." The government can avoid liability in such cases only if "the proscribed use interests were not part of [the] title to begin with," a relatively narrow inquiry that requires reference to expectations arising from "background principles of the State's law of property and nuisance."

This term, the Supreme Court will again address the Takings Clause in Dolan v. City of Tigard, which raises the issue of whether conditions imposed by the City in a land-use permit are sufficiently related to the expected adverse impacts of that use. Mrs. Dolan sought a permit to raze her existing hardware store and replace it with a much larger store. The City granted the permit, but required that she dedicate to the City a portion of her property for drainage improvements to a nearby creek, as well as an additional strip of land to be used as part of a pedestrian and bicycle pathway. The United States filed an amicus brief in support of the City, arguing that the required dedication is not a taking because there is an adequate nexus between the dedication and the anticipated adverse effects on traffic and flood risk from Dolan's proposed expansion and urban development generally. A decision is expected within the next month or so.

Legislation: There are several pending takings bills, which fall into two categories. First, the "compensation bills" would require the federal government to compensate owners of private property where regulation decreases property value by a specified percentage. One of the more extreme compensation bills, H.R. 1388, would require compensation for any decrease in value caused by regulatory activity under four specified programs. The second category consists of bills sponsored by Senator Dole and others that would codify or otherwise implement Executive Order 12630,

the Takings EO signed by President Reagan in 1988. This EO requires federal agencies to prepare a written "takings impact assessment" for various regulatory actions.

2. STATUS

In the courts, takings litigation has increased steadily over the last several years. The number of Tucker Act filings in fiscal years 1992 and 1993 is more than double the number for the previous two-year period. We expect the Lucas ruling to further accelerate that growth rate. But we continue to be highly successful in terms of takings liability: out of claims totalling more than \$7 billion over the last five years, less than \$244 million in judgments were awarded (roughly 3%). Pending regulatory takings awards would nearly double that total.

On the Hill, the Senate recently passed (by voice vote) a takings amendment to the bill to reauthorize the Safe Drinking Water Act. The amendment, a modified version of one of Dole's bills, would not impose burdensome administrative requirements, but the judicial review provision is poorly drafted and might spawn considerable litigation. Its fate in the House and in conference is unclear. Proponents of takings legislation will likely try to attach takings amendments to the Clean Water Act reauthorization bill and other environmental legislation.

3. DEPARTMENT POSITION

The Clinton Administration is committed to protecting private property rights as well as public health, safety, the environment, and other aspects of the public good. It rejects the suggestion that these goals are irreconcilable. The Department has expressed its "strong" opposition to one of the compensation bills, H.R. 1388, because it would seriously undermine environmental protection. The Department opposes legislation that would codify the EO because it would prevent this and future Administrations from revising the EO in light of case law developments. The Department also opposes Senator Dole's most recent takings bill (S. 2006), because it would require a detailed takings assessment for countless government actions, result in endless litigation, and undermine vital government functions such as military exercises and law enforcement.

4. JUDICIARY COMMITTEE MEMBERS' INTEREST/POSITIONS

On March 10, Senator Simpson introduced a substitute amendment to the Hollings Technology Bill (S. 4, the National Competitiveness Act) that included language codifying the Takings Executive Order. The Simpson substitute was tabled (56-42).

Several Republican Committee Members (Brown, Grassley, Hatch, Pressler, Simpson, and Thurmond) have cosponsored takings bills. Heflin (D-AL) also supports takings legislation.

REFERENCE MATERIALS

- Executive Order 12630 (March 15, 1988)
- the Takings Amendment (passed by voice vote) attached to the Senate bill to reauthorize the Safe Drinking Water Act
- S. 2006, The Private Property Rights Act of 1994
- Letter from Attorney General Reno to Senator Mitchell opposing S. 2006
- H.R. 1388, the Just Compensation Act of 1993
- Letter from DOJ to Congressman Studds opposing H.R. 1388

Presidential Documents

Title 3—

Executive Order 12830 of March 15, 1988

The President

Governmental Actions and Interference With Constitutionally Protected Property Rights

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to ensure that government actions are undertaken on a well-reasoned basis with due regard for fiscal accountability, for the financial impact of the obligations imposed on the Federal government by the Just Compensation Clause of the Fifth Amendment, and for the Constitution, it is hereby ordered as follows:

Section 1. Purpose. (a) The Fifth Amendment of the United States Constitution provides that private property shall not be taken for public use without just compensation. Government historically has used the formal exercise of the power of eminent domain, which provides orderly processes for paying just compensation, to acquire private property for public use. Recent Supreme Court decisions, however, in reaffirming the fundamental protection of private property rights provided by the Fifth Amendment and in assessing the nature of governmental actions that have an impact on constitutionally protected property rights, have also reaffirmed that governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required.

(b) Responsible fiscal management and fundamental principles of good government require that government decision-makers evaluate carefully the effect of their administrative, regulatory, and legislative actions on constitutionally protected property rights. Executive departments and agencies should review their actions carefully to prevent unnecessary takings and should account in decision-making for those takings that are necessitated by statutory mandate.

(c) The purpose of this Order is to assist Federal departments and agencies in undertaking such reviews and in proposing, planning, and implementing actions with due regard for the constitutional protections provided by the Fifth Amendment and to reduce the risk of undue or inadvertent burdens on the public fisc resulting from lawful governmental action. In furtherance of the purpose of this Order, the Attorney General shall, consistent with the principles stated herein and in consultation with the Executive departments and agencies, promulgate Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings to which each Executive department or agency shall refer in making the evaluations required by this Order or in otherwise taking any action that is the subject of this Order. The Guidelines shall be promulgated no later than May 1, 1988, and shall be disseminated to all units of each Executive department and agency no later than July 1, 1988. The Attorney General shall, as necessary, update these guidelines to reflect fundamental changes in takings law occurring as a result of Supreme Court decisions.

Sec. 2. Definitions. For the purpose of this Order: (a) "Policies that have takings implications" refers to Federal regulations, proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, or other Federal policy statements that, if implemented or enacted, could effect a taking, such as rules and regulations that propose or implement licensing, permitting, or other condition requirements or limitations on private property use, or that require dedications or exactions from owners of private property. "Policies that have takings implications" does not include:

- (1) Actions abolishing regulations, discontinuing governmental programs, or modifying regulations in a manner that lessens interference with the use of private property;
- (2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;
- (3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;
- (4) Studies or similar efforts or planning activities;
- (5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;
- (6) The placement of military facilities or military activities involving the use of Federal property alone; or
- (7) Any military or foreign affairs functions (including procurement functions thereunder) but not including the U.S. Army Corps of Engineers civil works program.

(b) Private property refers to all property protected by the Just Compensation Clause of the Fifth Amendment.

(c) "Actions" refers to proposed Federal regulations, proposed Federal legislation, comments on proposed Federal legislation, applications of Federal regulations to specific property, or Federal governmental actions physically invading or occupying private property, or other policy statements or actions related to Federal regulation or direct physical invasion or occupancy, but does not include:

- (1) Actions in which the power of eminent domain is formally exercised;
- (2) Actions taken with respect to properties held in trust by the United States or in preparation for or during treaty negotiations with foreign nations;
- (3) Law enforcement actions involving seizure, for violations of law, of property for forfeiture or as evidence in criminal proceedings;
- (4) Studies or similar efforts or planning activities;
- (5) Communications between Federal agencies or departments and State or local land-use planning agencies regarding planned or proposed State or local actions regulating private property regardless of whether such communications are initiated by a Federal agency or department or are undertaken in response to an invitation by the State or local authority;
- (6) The placement of military facilities or military activities involving the use of Federal property alone; or
- (7) Any military or foreign affairs functions (including procurement functions thereunder), but not including the U.S. Army Corps of Engineers civil works program.

Sec. 3. General Principles. In formulating or implementing policies that have takings implications, each Executive department and agency shall be guided by the following general principles:

- (a) Governmental officials should be sensitive to, anticipate, and account for the obligations imposed by the Just Compensation Clause of the Fifth Amendment in planning and carrying out governmental actions so that they do not result in the imposition of unanticipated or undue additional burdens on the public fisc.
- (b) Actions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that substantially affect its value or use, may constitute a taking of

property. Further, governmental action may amount to a taking even though the action results in less than a complete deprivation of all use or value, or of all separate and distinct interests in the same private property and even if the action constituting a taking is temporary in nature.

(c) Government officials whose actions are taken specifically for purposes of protecting public health and safety are ordinarily given broader latitude by courts before their actions are considered to be takings. However, the mere assertion of a public health and safety purpose is insufficient to avoid a taking. Actions to which this Order applies asserted to be for the protection of public health and safety, therefore, should be undertaken only in response to real and substantial threats to public health and safety, be designed to advance significantly the health and safety purpose, and be no greater than is necessary to achieve the health and safety purpose.

(d) While normal governmental processes do not ordinarily effect takings, undue delays in decision-making during which private property use is interfered with carry a risk of being held to be takings. Additionally, a delay in processing may increase significantly the size of compensation due if a taking is later found to have occurred.

(e) The Just Compensation Clause is self-actuating, requiring that compensation be paid whenever governmental action results in a taking of private property regardless of whether the underlying authority for the action contemplated a taking or authorized the payment of compensation. Accordingly, governmental actions that may have a significant impact on the use or value of private property should be scrutinized to avoid undue or unplanned burdens on the public fisc.

Sec. 4. Department and Agency Action. In addition to the fundamental principles set forth in Section 3, Executive departments and agencies shall adhere, to the extent permitted by law, to the following criteria when implementing policies that have takings implications:

(a) When an Executive department or agency requires a private party to obtain a permit in order to undertake a specific use of, or action with respect to, private property, any conditions imposed on the granting of a permit shall:

(1) Serve the same purpose that would have been served by a prohibition of the use or action; and

(2) Substantially advance that purpose.

(b) When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress.

(c) When a proposed action involves a permitting process or any other decision-making process that will interfere with, or otherwise prohibit, the use of private property pending the completion of the process, the duration of the process shall be kept to the minimum necessary.

(d) Before undertaking any proposed action regulating private property use for the protection of public health or safety, the Executive department or agency involved shall, in internal deliberative documents and any submissions to the Director of the Office of Management and Budget that are required:

(1) Identify clearly, with as much specificity as possible, the public health or safety risk created by the private property use that is the subject of the proposed action;

(2) Establish that such proposed action substantially advances the purpose of protecting public health and safety against the specifically identified risk.

(3) Establish to the extent possible that the restrictions imposed on the private property are not disproportionate to the extent to which the use contributes to the overall risk; and

(4) Estimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking.

In instances in which there is an immediate threat to health and safety that constitutes an emergency requiring immediate response, this analysis may be done upon completion of the emergency action.

Sec. 5. Executive Department and Agency Implementation. (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring compliance with this Order with respect to the actions of that department or agency.

(b) Executive departments and agencies shall, to the extent permitted by law, identify the takings implications of proposed regulatory actions and address the merits of those actions in light of the identified takings implications, if any. In all required submissions made to the Office of Management and Budget, significant takings implications should also be identified and discussed in notices of proposed rule-making and messages transmitting legislative proposals to the Congress, stating the departments' and agencies' conclusions on the takings issues.

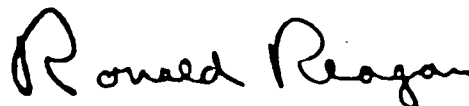
(c) Executive departments and agencies shall identify each existing Federal rule and regulation against which a takings award has been made or against which a takings claim is pending including the amount of each claim or award. A "takings" award has been made or a "takings" claim pending if the award was made, or the pending claim brought, pursuant to the Just Compensation Clause of the Fifth Amendment. An itemized compilation of all such awards made in Fiscal Years 1985, 1986, and 1987 and all such pending claims shall be submitted to the Director, Office of Management and Budget, on or before May 16, 1988.

(d) Each Executive department and agency shall submit annually to the Director, Office of Management and Budget, and to the Attorney General an itemized compilation of all awards of just compensation entered against the United States for takings, including awards of interest as well as monies paid pursuant to the provisions of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4801.

(e)(1) The Director, Office of Management and Budget, and the Attorney General shall each, to the extent permitted by law, take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in Sections 1 through 5 of this Order, and the Office of Management and Budget shall take action to ensure that all takings awards levied against agencies are properly accounted for in agency budget submissions.

(2) In addition to the guidelines required by Section 1 of this Order, the Attorney General shall, in consultation with each Executive department and agency to which this Order applies, promulgate such supplemental guidelines as may be appropriate to the specific obligations of that department or agency.

Sec. 6. Judicial Review. This Order is intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.



THE WHITE HOUSE,

March 15, 1988.

A- Modified

PENDING

AMENDMENT NO. _____

Calendar No. _____

Purpose: To provide a perfecting amendment.

IN THE

AMENDMENT No. 1735 Sess.

By Bumpers for Mitchell-Bumpers
Baucus

Bill/Res. No. _____

To read

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900 to Amdt No. 1729
pages

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taking

Wages, and for other purposes.

Mitchell - Bumpers Baucus

Referred to the Committee on _____
and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by
_____ to the amendment (No. _____) pro-
posed by _____

Viz:

1 Strike all after the first section heading and insert

2 the following:

3 (a) SHORT TITLE.—This section may be cited as the

4 "Private Property Rights Act of 1994".

5 (b) FINDINGS.—The Congress finds that—

6 (1) the protection of private property from a

7 taking by the Government without just compensation

8 is an integral protection for private citizens incor-

9 porated into the Constitution by the Fifth Amend-

1 ment and made applicable to the States by the
2 Fourteenth Amendment; and

3 (2) Federal agencies should take into consider-
4 ation the impact of Governmental actions on the use
5 and ownership of private property.

6 (c) PURPOSE.—The Congress, recognizing the impor-
7 tant role that the use and ownership of private property
8 plays in ensuring the economic and social well-being of the
9 Nation, declares that the Federal Government should pro-
10 tect the health, safety, and welfare of the public and, in
11 doing so, to the extent practicable, avoid takings of private
12 property.

13 (d) DEFINITIONS.—For purposes of this section—

14 (1) the term "agency" means an Executive
15 agency as defined under section 105 of title 5, Unit-
16 ed States Code, and—

17 (A) includes the United States Postal
18 Service; and

19 (B) does not include the General Account-
20 ing Office; and

21 (2) the term "taking of private property"
22 means any action whereby private property is taken
23 in such a way as to require compensation under the
24 Fifth Amendment to the United States Constitution.

1 (e) PRIVATE PROPERTY TAKING IMPACT ANALY-
2 SIS.—

3 (1) IN GENERAL.—The Congress authorizes
4 and directs that, to the fullest extent possible—

5 (A) the policies, regulations, and public
6 laws of the United States shall be interpreted
7 and administered in accordance with the poli-
8 cies under this section; and

9 (B) all agencies of the Federal Government
10 shall complete a private property taking impact
11 analysis before issuing or promulgating any pol-
12 icy, regulation, proposed legislation, or related
13 agency action which is likely to result in a tak-
14 ing of private property, except that—

15 (i) this subparagraph shall not apply
16 to—

17 (I) an action in which the power
18 of eminent domain is formally exer-
19 cised;

20 (II) an action taken—

21 (aa) with respect to property
22 held in trust by the United
23 States; or

1 (bb) in preparation for, or in
2 connection with, treaty negotia-
3 tions with foreign nations;

4 (III) a law enforcement action,
5 including seizure, for a violation of
6 law, of property for forfeiture or as
7 evidence in a criminal proceeding;

8 (IV) a study or similar effort or
9 planning activity;

10 (V) a communication between an
11 agency and a State or local land-use
12 planning agency concerning a planned
13 or proposed State or local activity
14 that regulates private property, re-
15 gardless of whether the communica-
16 ~~tion is initiated by an agency or is un-~~
17 ~~dertaken in response to an invitation~~
18 by the State or local authority;

19 (VI) the placement of a military
20 facility or a military activity involving
21 the use of solely Federal property;
22 and

23 (VII) any military or foreign af-
24 fairs function (including a procure-
25 ment function under a military or for-

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all

1 eign affairs function), but not includ-
2 ing the civil works program of the
3 Army Corps of Engineers; and

4 (ii) in a case in which there is an im-
5 mediate threat to health or safety that con-
6 stitutes an emergency requiring immediate
7 response or the issuance of a regulation
8 pursuant to section 553(b)(B) of title 5,
9 United States Code, the taking impact
10 analysis may be completed after the emer-
11 gency action is carried out or the regula-
12 tion is published.

13 (2) CONTENT OF ANALYSIS.—A private prop-
14 erty taking impact analysis shall be a written state-
15 ment that includes—

16 (A) the specific purpose of the policy, regu-
17 lation, proposal, recommendation, or related
18 agency action;

19 (B) an assessment of the likelihood that a
20 taking of private property will occur under such
21 policy, regulation, proposal, recommendation, or
22 related agency action;

23 (C) an evaluation of whether such policy,
24 regulation, proposal, recommendation, or relat-

1 ed agency action is likely to require compensa-
2 tion to private property owners;

3 (D) alternatives to the policy, regulation,
4 proposal, recommendation, or related agency ac-
5 tion that would achieve the intended purposes
6 of the agency action and lessen the likelihood
7 that a taking of private property will occur; and

8 (E) an estimate of the potential liability of
9 the Federal Government if the Government is
10 required to compensate a private property
11 owner.

12 (3) SUBMISSION TO OMB.—Each agency shall
13 provide an analysis required by this section as part
14 of any submission otherwise required to be made to
15 the Office of Management and Budget in conjunc-
16 tion with the proposed regulation.

17 (f) GUIDANCE AND REPORTING REQUIREMENTS.—

18 (1) GUIDANCE.—The Attorney General shall
19 provide legal guidance in a timely manner, in re-
20 sponse to a request by an agency, to assist the agen-
21 cy in complying with this section.

22 (2) REPORTING. —Not later than 1 year after
23 the date of enactment of this Act and at the end of
24 each 1-year period thereafter, each agency shall pro-
25 vide a report to the Director of the Office of Man-

1 agement and Budget and the Attorney General iden-
2 tifying each agency action that has resulted in the
3 preparation of a taking impact analysis, the filing of
4 a taking claim, or an award of compensation pursu-
5 ant to the Just Compensation Clause of the Fifth
6 Amendment to the Constitution. The Director of the
7 Office of Management and Budget and the Attorney
8 General shall publish in the Federal Register, on an
9 annual basis, a compilation of the reports of all
10 agencies made pursuant to this paragraph.

21 (f) RULES OF CONSTRUCTION.—Nothing in this sec-
22 tion shall be construed to—

23 (1) limit any right or remedy, or bar any claim
24 of any person relating to such person's property
25 under any other law, including claims made under

~~8~~ 9

1 section 1346 or 1402 of title 28, United States
2 Code, or chapter 91 of title 28, United States Code;
3 or

4 (2) constitute a conclusive determination of the
5 value of any property for purposes of an appraisal
6 for the acquisition of property, or for the determina-
7 tion of damages.

8 (g) STATUTE OF LIMITATIONS.—No action may be
9 filed in a court of the United States to enforce the provi-
10 sions of this section on or after the date occurring 6 years
11 after the date of the submission of the certification of the
12 applicable private property taking impact analysis with the
13 Attorney General.

103D CONGRESS
2D SESSION

S. 2006

To require Federal agencies to prepare private property taking impact analyses, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 25 (legislative day, FEBRUARY 22), 1994

Mr. DOLE (for himself, Mr. HEFLIN, Mr. CRAIG, and Mr. BROWN) introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

A BILL

To require Federal agencies to prepare private property taking impact analyses, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Private Property
5 Rights Act of 1994".

6 **SEC. 2. FINDINGS.**

7 The Congress finds that—

8 (1) the protection of private property from a
9 taking by the Government without just compensation
10 is an integral protection for private citizens incor-

1 porated into the Constitution by the Fifth Amend-
2 ment and made applicable to the States by the
3 Fourteenth Amendment; and

4 (2) Federal agencies should take into consider-
5 ation the impact of Governmental actions on the use
6 and ownership of private property.

7 **SEC. 3. PURPOSE.**

8 The Congress, recognizing the important role that the
9 use and ownership of private property plays in ensuring
10 the economic and social well-being of the Nation, declares
11 that it is the policy of the Federal Government to use all
12 practicable means and measures to minimize takings of
13 private property by the Federal Government.

14 **SEC. 4. DEFINITIONS.**

15 For purposes of this Act—

16 (1) the term “agency” means an Executive
17 agency as defined under section 105 of title 5,
18 United States Code, and—

19 (A) includes the United States Postal
20 Service; and

21 (B) does not include the General Account-
22 ing Office; and

23 (2) the term “taking of private property”
24 means any action whereby private property is taken

1 in such a way as to require compensation under the
2 Fifth Amendment to the United States Constitution.

3 **SEC. 5. PRIVATE PROPERTY TAKING IMPACT ANALYSIS.**

4 (a) **IN GENERAL.**—The Congress authorizes and di-
5 rects that, to the fullest extent possible—

6 (1) the policies, regulations, and public laws of
7 the United States shall be interpreted and adminis-
8 tered in accordance with the policies under this Act;
9 and

10 (2) all agencies of the Federal Government
11 shall submit a certification to the Attorney General
12 of the United States that a private property taking
13 impact analysis has been completed before issuing or
14 promulgating any policy, regulation, proposal, rec-
15 ommendation (including any recommendation or re-
16 port on proposal for legislation), or related agency
17 action which could result in a taking or diminution
18 of use or value of private property.

19 (b) **CONTENT OF ANALYSIS.**—A private property tak-
20 ing impact analysis shall be a written statement that
21 includes—

22 (1) the specific purpose of the policy, regula-
23 tion, proposal, recommendation, or related agency
24 action;

1 (2) an assessment of whether a taking of pri-
2 vate property may occur under such policy, regula-
3 tion, proposal, recommendation, or related agency
4 action;

5 (3) the effect of the policy, regulation, proposal,
6 recommendation, or related agency action on the use
7 or value of private property, including an evaluation
8 of whether such policy, regulation, proposal, rec-
9 ommendation, or related agency action requires com-
10 pensation to private property owners;

11 (4) alternatives to the policy, regulation, pro-
12 posal, recommendation, or related agency action that
13 would lessen the adverse effects on the use or value
14 of private property;

15 (5) an estimate of the cost to the Federal Gov-
16 ernment if the Government is required to com-
17 pensate a private property owner; and

18 (6) an estimate of the reduction in use or value
19 of any affected private property as a result of such
20 policy, regulation, proposal, recommendation, or re-
21 lated agency action.

22 (c) PUBLIC AVAILABILITY OF ANALYSIS.—An agency
23 shall—

24 (1) make each private property taking impact
25 analysis available to the public; and

1 (2) to the greatest extent practicable, transmit
2 a copy of such analysis to the owner or any other
3 person with a property right or interest in the af-
4 fected property.

5 (d) PRESUMPTIONS IN PROCEEDINGS.—For the pur-
6 pose of any agency action or administrative or judicial pro-
7 ceeding, there shall be a rebuttable presumption that the
8 costs, values, and estimates in any private property
9 takings impact analysis shall be outdated and inaccurate,
10 if—

11 (1) such analysis was completed 5 years or
12 more before the date of such action or proceeding;
13 and

14 (2) such costs, values, or estimates have not
15 been modified within the 5-year period preceding the
16 date of such action or proceeding.

17 **SEC. 8. RULES OF CONSTRUCTION.**

18 Nothing in this Act shall be construed to—

19 (1) limit any right or remedy, or bar any claim
20 of any person relating to such person's property
21 under any other law, including claims made under
22 section 1346 or 1402 of title 28, or chapter 91 of
23 title 28; or

24 (2) constitute a conclusive determination of the
25 value of any property for purposes of an appraisal

1 for the acquisition of property, or for the determina-
2 tion of damages.

3 **SEC. 7. STATUTE OF LIMITATIONS.**

4 No action may be filed in a court of the United States
5 to enforce the provisions of this Act on or after the date
6 occurring 6 years after the date of the submission of the
7 certification of the applicable private property taking im-
8 pact analysis with the Attorney General.

9 **SEC. 8. EFFECTIVE DATE.**

10 The provisions of this Act shall take effect 120 days
11 after the date of the enactment of this Act.

○



Office of the Attorney General
Washington, D. C. 20530

May 16, 1994

The Honorable George Mitchell
Majority Leader
United States Senate
Washington, D.C. 20510

Dear Senator Mitchell:

I am writing to express strong opposition to S. 2006, a bill that would require a "taking impact analysis" for every government policy, regulation, proposal, recommendation, or related action that might diminish property use or value. It is my understanding that this bill might be offered as an amendment to legislation to reauthorize the Safe Drinking Water Act or other environmental statutes.

This Administration is strongly committed to the protection of private property rights. We believe, however, that S. 2006 would impose an enormous, unnecessary, and untenable paperwork burden on virtually all aspects of government operations. To cite but a few examples, S. 2006 may require elaborate assessments for countless government actions relating to military actions or exercises; seizures of drugs, other contraband, or evidence of a crime; foreign sanction programs such as economic boycotts or freezing of assets; and property attachments and other actions in furtherance of litigation.

This inflexible and unnecessary bureaucratic burden would likewise apply to government efforts to protect public safety, human health, and other aspects of the public good. S. 2006 would severely undermine these efforts by imposing an incalculable paperwork burden. Moreover, the bill's enforcement provisions are confusing and could spawn endless legal challenges to all manner of government action, resulting in an enormous additional burden to the already overburdened federal docket.

This Administration has pledged to work with Congress as we continue to consider additional ways to protect property rights. In our view, however, S. 2006 is ill-conceived and unnecessary. Thank you for considering our views on these important issues.

Sincerely,

A handwritten signature in cursive script, appearing to read "Janet Reno", is written over the typed name.

Janet Reno

103RD CONGRESS
1ST SESSION

H. R. 1388

To compensate owners for the diminution in value of their property as a result of Federal actions under certain laws, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 17, 1993

Mr. SMITH of Oregon introduced the following bill; which was referred jointly to the Committees on Merchant Marine and Fisheries, Public Works and Transportation, and Natural Resources

A BILL

To compensate owners for the diminution in value of their property as a result of Federal actions under certain laws, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. SHORT TITLE.

4 This Act may be cited as the "Just Compensation
5 Act of 1993".

6 SEC. 2. FINDINGS.

7 The Congress finds that there are certain Federal
8 laws, regulations, and actions which substantially ad-
9 versely affect the value of private property.

1 SEC. 3. PURPOSE.

2 The purpose of this Act is to reduce the risk of undue
3 or inadvertent burdens on the public resulting from cer-
4 tain lawful governmental actions.

5 SEC. 4. PRIVATE PROPERTY.

6 As used in this Act, the term "private property" in-
7 cludes all property protected by the Fifth Article of
8 Amendment to the United States Constitution, including
9 (but not limited to) real and personal property and tan-
10 gible and intangible property.

11 SEC. 5. COMPENSATION FOR DIMINUTION IN VALUE OF 12 PRIVATE PROPERTY RIGHTS.

13 (a) IN GENERAL.—The head of any Federal agency
14 who takes an action under any of the provisions of law
15 specified in subsection (d), or regulations issued pursuant
16 to any of such laws, shall compensate the owner of private
17 property for any diminution in value caused by the action.
18 Action may cause the diminution in value of private
19 property—

20 (1) even though the action results in less than
21 a complete deprivation of all use or value or of all
22 separate distinct interests in the same private prop-
23 erty; and

24 (2) even if the action is temporary in nature.

25 (b) DUTY OF FEDERAL AGENCY HEADS.—The head
26 of each Federal agency shall, at the time of issuing regula-

1 tions or undertaking any activity under any of the provi-
2 sions of law specified in subsection (d), determine whether
3 such regulations or activity results in the diminution in
4 value of private property such that such diminution is
5 compensable under this Act.

6 (c) COMPENSATION.—(1) Within 60 days after the
7 date of issuance of any such regulation or the taking of
8 any such action which results in a diminution in value of
9 private property which is compensable under this Act, the
10 head of the Federal agency concerned shall make an offer
11 of compensation to the owner of the private property af-
12 fected. Any offer made under this paragraph shall be ef-
13 fective for one year.

14 (2) Such owner may reject the offer and, within one
15 year after such rejection, file a claim for compensation in
16 the United States Claims Court for a determination of the
17 value of the property affected. In addition to awarding fair
18 market value for the property affected, the court may
19 award reasonable attorney's fees and expenses of litiga-
20 tion.

21 (3) In any case in which the property affected in-
22 volves lands, such owner, in lieu of a claim under para-
23 graph (2), may exchange in accordance with applicable
24 Federal law lands affected by such law, regulation, or ac-
25 tivity.

1 (4) Such owner may also accept such compensation
2 as may be available under other laws for tax benefits, min-
3 eral rights credits, and comparable offers for value by the
4 United States.

5 (5) Any cash settlement or judgment from the United
6 States Claims Court pursuant to paragraph (2) shall be
7 paid as a matter of right from the land and water con-
8 servation fund established by section 2 of the Land and
9 Water Conservation Fund Act of 1965 (16 U.S.C. 4601-
10 5).

11 (d) LAWS.—The provisions of law referred to in this
12 section are the following:

13 (1) The Endangered Species Act of 1973 (16
14 U.S.C. 1531 et seq.).

15 (2) Section 404 of the Federal Water Pollution
16 Control Act (33 U.S.C. 1344) as it applies to wet-
17 lands.

18 (3) The Surface Mining Control and Reclama-
19 tion Act of 1977 (30 U.S.C. 1201 et seq.).

20 (4) Subsections (c), (d), (e), and (f) of section
21 9 of the National Trails System Act (16 U.S.C.
22 1248).

23 **SEC. 6. AUTHORIZATION OF APPROPRIATIONS.**

24 There is authorized to be appropriated such sums as
25 may be necessary to carry out this Act.

1 **SEC. 7. EFFECTIVE DATE.**

2 This Act shall apply to any activity of the United
3 States Government after the date of enactment of this Act.

○



U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D. C. 20530

29 SEP 1993

Honorable Gerry E. Studds
Chairman
Committee on Merchant Marine And Fisheries
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

Thank you for your letter of March 31, 1993, requesting the Department's views on H.R. 1388, the "Just Compensation Act of 1993," which is pending before the Committee on Merchant Marine and Fisheries. We are grateful for the opportunity to share the Department's views with you regarding this proposed legislation.

The bill would require federal agencies to compensate owners of private property "for any diminution in value" caused by any action under the Endangered Species Act of 1973, section 404 of the Federal Water Pollution Control Act, the Surface Mining Control and Reclamation Act of 1977, and subsections (c), (d), (e), and (f) of section 9 of the National Trails System Act. Compensation would be required even where the government action at issue results in less than a complete deprivation of use or value, and where the action is temporary. The bill would require compensation even where the government action at issue does not constitute a compensable taking under the Fifth Amendment.

The bill directs the appropriate agency head to make an offer of compensation to the property owner within 60 days of an action that results in any compensable diminution. The offer would remain in effect for one year. The owner could either accept the offer, or reject it and bring a claim for compensation in the United States Claims Court (recently renamed the United States Court of Federal Claims). In addition to awarding fair market value for the property affected, the court could award reasonable attorney's fees and litigation expenses.

The Department of Justice strongly opposes this proposed legislation for several reasons. First, it is unnecessary. The stated purpose of the bill is to reduce undue burdens on the public from government actions that affect private property. Yet the Just Compensation Clause of the Fifth Amendment to the Constitution already provides an adequate remedy -- just

value has occurred. Regulatory actions under these programs necessarily affect a broad range of property interests in varying degrees. To require compensation for any diminution in value -- however small, incidental, or attenuated -- without regard to the factors traditionally weighed by the courts under the constitutional analysis, would seriously undermine the ability of the Executive Branch to carry out its mandates under these programs. As stated by Justice Holmes in the landmark case of Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412 (1922): "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every change in the general law."

The bill's statutory standard also ignores the wisdom of appropriate valuation techniques developed by the courts over the years in takings case law. Fair market value is an appropriate measure in many cases. However, this rule -- unlike the bill's proposal -- is flexible. The constitutional standard for appropriate compensation is governed by basic equitable principles of fairness, which do not always coincide with fair market value.² Nor does the bill recognize that government regulation, even regulation that diminishes value, might confer benefits on the property owner that mitigate, or even outweigh, any loss in value.

Moreover, the bill unwisely foists responsibility for determining appropriate compensation in the first instance on Agency heads, who are ill-equipped to make such decisions. Responsibility for deciding compensation issues in takings litigation currently rests in the federal courts, particularly the United States Court of Federal Claims, which has developed broad and deep expertise in the area.

Finally, the bill's creation of a statutory right of action in the United States Court of Federal Claims for any diminution of value would severely encumber the already overburdened federal docket, thereby further delaying the resolution of claims under the Just Compensation Clause.

In short, we view the bill as unnecessary and unwise, and we respectfully recommend that it not be passed. Again, the Department appreciates the opportunity to express its views on H.R. 1388. We hope that this analysis assists the Committee in its consideration of the bill.

² See United States v. Fuller, 409 U.S. 488 (1973) (just compensation for property taken through condemnation does not include value created by government's grant of a permit to graze animals on adjoining federal land).

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ENVIRONMENTAL CRIMES SECTION OVERSIGHT AND INTERNAL INVESTIGATIONS

1. ISSUE STATEMENT

Two House Subcommittees and one Representative (now retired) have alleged that the Department's Environmental Crimes Section (ECS) has not been sufficiently vigorous in prosecuting environmental crimes. In addition, Chairman Dingell has complained that the Department was not cooperating fully with an inquiry into the environmental crimes program by his Oversight and Investigations Subcommittee, and in March, 1994, he subpoenaed documents from the Department.

Since the spring of 1992 the Subcommittee on Oversight and Investigations of the House Energy and Commerce Committee has been conducting an inquiry into the prosecution of environmental crimes by the Department and the Environmental Protection Agency. In September, 1992, the Subcommittee issued a report that was critical of the Department's handling of six specific cases (the "Dingell Report"). Similar allegations were contained in an October, 1992, preliminary report commissioned by Charles Schumer, Chairman of the Subcommittee on Crime and Criminal Justice of the House Judiciary Committee (the "Schumer Report"). In addition, a January, 1993, report by Howard Wolpe, then-Chairman of the Subcommittee on Investigations and Oversight of the House Committee on Science, Space and Technology (the "Wolpe Report"), raised questions about the Department's handling of a particular case involving the Department of Energy's Rocky Flats nuclear weapons plant. (The controversy surrounding the Rocky Flats grand jury is discussed in a separate briefing paper.) The thrust of these reports is the allegation that ECS is not aggressively prosecuting environmental crimes cases, and is hampering the enforcement efforts of EPA and the U.S. Attorneys' Offices.

2. STATUS

The Energy and Commerce Oversight and Investigations Subcommittee's inquiry is ongoing. In March, the Subcommittee subpoenaed documents from the Department. The Department is still in the process of complying with the subpoenas. Most responsive documents have already been provided; a very small number of documents containing grand jury information are still being redacted.

The Department has completed two separate internal reviews by career prosecutors from outside the Environment and Natural Resources Division. The report on the environmental crimes program and on the allegations and cases that were the focus of the Dingell and Schumer Reports, released March 10, 1994, found no evidence substantiating the allegations that Justice Department officials or employees relied on improper criteria in prosecuting or declining to prosecute environmental crimes cases.

The report also made a number of recommendations with respect to management of the environmental crimes program. The report on the investigation and prosecution of environmental violations at the Department of Energy's Rocky Flats nuclear weapons plant, released April 8, 1994, concluded that the fundamental decisions in the case involving the terms of the plea disposition reflected an appropriate exercise of prosecutorial discretion. Both reports also concluded that the Congressional and public criticisms were for the most part inaccurate and overstated.

Neil Cartusciello, the ECS Chief who was a target of much of the Congressional criticism, recently resigned. In a letter to the Attorney General, Mr. Cartusciello explained that he felt vindicated by the internal review and that he wished to leave his position to put an end to controversy and to allow the section to go forward with its mission.

3. DEPARTMENT POSITIONS

The Department is cooperating in the Dingell inquiry. Since mid-June, 1993, the Department has been making line attorneys available for informal interviews by Subcommittee staff. The Subcommittee has also made an extensive series of document and information requests, and the Department has voluntarily responded to the document requests by providing access to thousands of documents. The Department had declined to provide various internal memoranda which were prepared in response to the Subcommittee inquiry and after the cases under inquiry were closed, on the grounds that this is highly intrusive, unnecessary to the Subcommittee's legitimate oversight needs, and would compromise the Department's ability to discuss and plan for its response to Congressional inquiries. The Subcommittee responded in March by issuing subpoenas, and the Department has now produced (or is producing) the contested documents.

Relations with the Subcommittee remain strained. The Attorney General met with Chairman Dingell in March to attempt to personally address the Chairman's concerns and improve relations with the Subcommittee.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

Senator Hatch, through Senator Biden, has requested copies of all documents that the Department has provided to Chairman Dingell in connection with his inquiry into the environmental crimes program. Senator Hatch made his request in connection with Lois Schiffer's upcoming confirmation proceedings. Hatch has expressed concerns that the Department has not done enough to protect line prosecutors from congressional inquiries such as Chairman Dingell's. On May 19th, the Department provided Senator Hatch with copies of all documents the Department has voluntarily provided to Chairman Dingell, and declined to provide documents that were provided to Dingell under subpoena.

In connection with Lois Schiffer's request that Senator Leahy sponsor her nomination to be Assistant Attorney General for Environment and Natural Resources, Senator Leahy's staff contacted the Department with a general question about the status of these matters.

Senator Paul Simon wrote in 1993 to urge Department officials to meet with George Washington University law professor Jonathan Turley, who had written a report critical of the Environmental Crimes Section and who apparently represents some of the Rocky Flats grand jurors in their quest for immunity. Prof. Turley wrote in October 1993 requesting a meeting about the Rocky Flats internal review. In December 1993, then ASG Hubbell wrote to Prof. Turley and, without addressing his request for a meeting, asked him to submit "any specific factual evidence relevant to the [Rocky Flats internal] inquiry that is not already in the grand jury transcript." To our knowledge, Prof. Turley has not responded to this request.

5. REFERENCE MATERIALS

Internal Review of the Department of Justice Environmental Crimes Program (March 10, 1994)

Internal Review of the Rocky Flats Prosecution (April 8, 1994)



U.S. Department of Justice

Washington, D.C. 20530

To: Webster L. Hubbell
Associate Attorney General

From: Mark H. Dubester
Acting Chief
Public Corruption/Government Fraud Section
United States Attorney's Office for the
District of Columbia

Stevan E. Bunnell
Assistant United States Attorney
United States Attorney's Office for the
District of Columbia

Date: April 8, 1994

SUMMARY

By memorandum of July 21, 1993, Associate Attorney General Webster L. Hubbell requested that a review be conducted of the handling by the Department of Justice [DOJ] and United States Attorney's Office [USAO] for Colorado of the criminal prosecution of Rockwell International Corporation [Rockwell] for environmental crimes at Rocky Flats Plant, a Department of Energy [DOE] owned nuclear weapons plant. The purpose of this review was to determine whether the critical decisions made in connection with the prosecution, including the plea agreement, reflected a proper exercise of prosecutorial discretion. This Memorandum has been prepared in response to that request.¹

DOJ and the Colorado USAO's handling of this case has been criticized in a Report prepared by the House Subcommittee on Investigations and Oversight of the Committee on Science, Space, and Technology under the direction of former congressman and subcommittee chairman Howard Wolpe (referred herein as the "Wolpe Report"). The Wolpe Report was highly critical of the plea agreement, in particular the terms involving the non-prosecution of individuals, the amount of the fine paid by Rockwell, and the global nature of the settlement. The Report also alleged that

¹ A copy of the memorandum from Mr. Hubbell to Lois J. Schiffer, then Special Assistant to the Attorney General, is attached as "Attachment 1."

DOJ's "extreme conservatism and lack of aggressiveness" was a "major -- perhaps the overriding -- factor," which influenced the investigation and disposition of the case. Specifically, the Report questioned DOJ's decision not to authorize a special grand jury report despite the line prosecutors' strong support for a such a report.

In the course of this review, we examined the Wolpe Report's criticisms and attempted to find support for its allegations. We also looked more broadly for any evidence of improper influences -- political or otherwise -- that might have tainted either the investigation or the ultimate disposition of the case.

As detailed below, no basis existed for the sweeping criticisms by the Wolpe Report. The evidence demonstrated that neither DOJ nor anyone else improperly influenced the prosecution. Although DOJ monitored the case closely, almost all major decisions regarding the investigation and plea negotiations were made by the prosecutors in Colorado. The plea agreement between Rockwell and the government was the product of extensive negotiation between the parties and was reviewed and approved by a wide range of experienced and senior officials not only within DOJ, but also at the Environmental Protection Agency [EPA], and the Colorado Department of Health [CDH]. The final agreement, which resulted in Rockwell's conviction of multiple felony and misdemeanor offenses and payment of \$18.5 million in fines without the possibility of indemnification by federal taxpayers, provided substantial benefits to the government and constituted a proper exercise of prosecutorial discretion.

DOJ's decision to oppose issuance of a special grand jury report was the only notable example of Main Justice overruling the line prosecutors. Decisions on the issuance of special grand jury reports, however, are required by the United States Attorneys' Manual to be made by the Criminal Division. There was nothing improper about the process or the substance of the decision, which was made by a senior career official based on a reasonable and longstanding Criminal Division interpretation of the special grand jury statute.

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I. Introduction - Nature of Review²

In conducting this review, the following individuals were interviewed:

Michael Norton, Former United States Attorney for the District of Colorado

Kenneth Fimberg, Assistant United States Attorney (Colorado)

Kenneth Buck, Assistant United States Attorney (Colorado)

Peter Murtha, Trial Attorney, Environment & Natural Resources Division

William Hassler, Former Trial Attorney, Environment & Natural Resources Division

² Mark H. Dubester, Acting Chief, Public Corruption/Government Fraud Section of the United States Attorney's Office for the District of Columbia, worked on this review from the beginning. He was present for all the interviews with the individuals listed above. Originally, Mr. Dubester worked at the direction of Ms. Schiffer, who was initially responsible for the matter. Ms. Schiffer participated in several interviews during the fall of 1993. In late December, it became necessary for Ms. Schiffer to withdraw from this review because of her nomination to be Assistant Attorney General for the Environment and Natural Resources Division (ENRD). When Ms. Schiffer could no longer work on this project, Mr. Dubester assumed the leading role in conducting the review, and James F. Simon, counsel to the Assistant Attorney General for Environment and Natural Resources, was brought in to work on the matter. Mr. Simon participated in one interview and toured Rocky Flats with Mr. Dubester. Mr. Simon had to withdraw because of a potential conflict of interest arising from the fact that the organization for which he had previously worked had taken positions in the Rocky Flats litigation adverse to DOJ. This relationship was discovered by Mr. Simon after his involvement in this project commenced, and he promptly withdrew from this review.

Thereafter, Stevan E. Bunnell, an Assistant United States Attorney in the United States Attorney's Office for the District of Columbia, was assigned to assist with the completion of the investigation. He participated in several interviews, and helped revise and edit this memorandum. The vast bulk of this document was written by Mr. Dubester.

In addition, David Margolis, Associate Deputy Attorney General, reviewed this document after it was substantially completed for "Rule 6(e)" issues and provided other information relating to the DOJ's decisions concerning cooperation with the Waipae Subcommittee. He provided no other substantive input.

Barry Hartman, Former Acting Assistant Attorney General,
 Environment & Natural Resources Division
 William Smith, Special Agent, Environmental Protection Agency
 Jon Lipsky, Special Agent, Federal Bureau of Investigation
 Paul Coffey, Chief, Organized Crime & Racketeering Section
 John Keeney, Deputy Assistant Attorney General, Criminal
 Division

Also reviewed was the testimony of those individuals who testified before the Wolpe Subcommittee,³ the documents provided to the Wolpe Subcommittee as well as some core evidentiary documents and transcripts of grand jury proceedings not available to Congress. The grand jury proceedings included digests of witness testimony as well as transcripts of numerous colloquies between the prosecutors and the grand jury in which witnesses were not present. It was not feasible to review all the evidence in this case -- a task which took a team of prosecutors and agents years. On certain issues, core grand jury materials and evidentiary documents were examined. In general, it was necessary to rely on the characterizations by the prosecutors -- primarily by Fimberg, who had the strongest view of the case⁴ -- as to the evidence in the case. Individual grand

³ Norton, Fimberg, Lipsky and Murtha testified under oath before the Wolpe Subcommittee in executive session. The testimony is set forth in: Environmental Crimes at the Rocky Flats Nuclear Weapons Facility: Hearings Before the Subcomm. on Investigations and Oversight of the House Comm. on Science, Space and Technology, 102d Cong., 2d Sess. [hereinafter "Hearings"]. The same four individuals thereafter participated in sworn and recorded interviews with Wolpe Subcommittee staff. These interviews are transcribed and set forth in: Environmental Crimes at the Rocky Flats Nuclear Weapons Facility: Staff Interviews Conducted by the Subcomm. on Investigations and Oversight of the House Comm. on Science, Space and Technology, 103d Cong., 1st Sess. (1993) [hereinafter "Staff Interviews"].

⁴ Reliance on Fimberg's view of the evidence is based on the following considerations: 1) Fimberg, along with Murtha, had the broadest understanding of the facts of the case, and was the de facto lead attorney; 2) Fimberg was by far the most experienced prosecutor and, in our view, had the best appreciation of the significance of evidence in preparing a case for trial and assessing its impact in front of a jury; 3) Fimberg had an aggressive view of the facts and the egregiousness of the conduct at issue; 4) Fimberg's positions through the negotiations and his handling of the investigation were generally praised by the Wolpe Subcommittee; 5) Fimberg could not be said to have the "Main Justice" biases criticized by the Wolpe Report. To the extent, therefore, that certain criticisms are based on perceptions that DOJ gave away too much -- by settling for too little a fine or by giving up its right to prosecute individuals -- these criticisms

jurors were not interviewed.⁵

INVESTIGATION: PROCESS AND RESULTS

II. Overview -- From Investigation to Present

A. Rocky Flats. The United States, through the Department of Energy, owns Rocky Flats Plant ["Rocky Flats"]. For decades, the plant produced nuclear weapons components. Rocky Flats is located outside Denver, Colorado, near Boulder. The plant covers over 6550 acres and consisted of more than 100 buildings. All production activities at the plant have been shut down.

Although DOE owns Rocky Flats, during most of the 1980s, DOE contracted the operation of the plant to Rockwell. About 6000 Rockwell employees worked at Rocky Flats. In contrast, DOE had roughly 50 employees on site during the time period under investigation for this case. Of the 50 DOE employees, only a handful were specifically involved in monitoring or assuring compliance with the environmental laws.

B. Pre-search warrant investigation. This case commenced in 1987 when Special Agent William Smith of the Environmental Protection Agency obtained a Department of Energy memo which casually referred to "patently illegal" environmental practices at Rocky Flats. Smith approached Assistant United States Attorney Fimberg in the Denver United States Attorney's Office and Special Agent Jon Lipsky of the Federal Bureau of Investigation. Fimberg, Lipsky and Smith had previously worked together on a successful environmental prosecution. Smith needed FBI assistance as a matter of necessity, since in 1987, EPA had roughly 35 criminal investigators nationwide, and only four in the Denver office.

After the case was opened in 1987, the agents maintained secrecy as they started to investigate. They were concerned that if the targets -- who at that time were unknown and may have included government employees -- were aware of the investigation,

can be assessed against an aggressive view of the evidence.

⁵ The reasons for not interviewing the grand jurors include:

- 1) the grand jury is a deliberative body which speaks as an entity; it is not 23 individuals on individual fact-finding missions;
- 2) the grand jury exists as an entity so long as it is empaneled; it has no life after its term has expired;
- 3) absent a credible allegation of corruption or misconduct no basis exists to probe internal grand jury deliberations, which are secret and should be kept secret;
- 4) no basis exists to conclude that grand jurors possess information other than the evidence presented by the prosecutors.

evidence would be destroyed or concealed. The scope of potential misconduct was unknown.

Throughout primarily the latter part of 1988, the investigators attempted to gather evidence in a covert fashion. Part of this effort involved monitoring waters entering and leaving the plant site. Other efforts included an infra-red videotaped overflight of the plant in an attempt to identify the waste stream processes at the plant and to analyze whether these streams were in compliance with regulatory requirements. In addition, the investigators reviewed the extensive regulatory filings and reports. One of the key documents that was analyzed was a thirteen-volume analysis of the waste processes throughout the Rocky Flats plant. The investigators concluded that this document revealed various irregularities suggesting unlawful waste disposal practices. For example, certain wastes appeared to enter into buildings without the correct facilities or permits to treat or handle the waste. Furthermore, analysis of the regulatory documents suggested that the "numbers" simply did not "add up": more wastes of certain types appeared to be produced than were accounted for by treatment and/or disposal, thereby suggesting the potential of illegal or unauthorized waste disposal.

By late 1988, Peter Murtha of the Environmental Crimes Section of the Lands Division joined the investigatory team assigned to this case.⁶ Murtha and Fimberg ostensibly had joint responsibility for the investigation and in theory this "joint lead" role continued until the end. In practice and over time, especially by 1991 when the plea negotiations commenced in earnest, Fimberg was the de facto "lead" attorney running the investigation.⁷

⁶ Fimberg, Murtha, Lipsky and Smith had worked together in the criminal prosecution and trial in United States v. Protex Industries, Inc. This was one of the first "knowing endangerment" prosecutions under the environmental laws. The case is reported at United States v. Protex Industries, Inc., 874 F.2d 740 (10th Cir. 1989).

⁷ We agree with Fimberg's characterization:

Mr. FIMBERG. [I] was the chief prosecutor in charge of the investigation throughout the investigation and until -- through sentencing. I had the chief day-to-day responsibilities for directing the investigation, for making decisions in close consultation with Mr. Murtha who is very close to co-counsel. But I would have to say, with no offense to Mr. Murtha, the final decisions at the line level so to speak were mine. Hearings at 1313 (testimony of Fimberg).

The prosecutors and investigators concluded there was probable cause to believe that a host of environmental crimes were being committed at Rocky Flats, including significant and willful misconduct such as secret and unlawful burning of hazardous waste, as well as a variety of other crimes involving improper treatment and storage of hazardous wastes.

In late 1988, the investigatory team -- Fimberg, Murtha, Smith and Lipsky -- decided to seek a search warrant of the plant, a decision supported by Norton.⁸ Because of the significance and difficulties associated with a search warrant on a government-owned nuclear weapons plant, a meeting was held in Washington in early 1989, attended by Norton, Fimberg, Murtha, Lipsky, Smith, Assistant Attorney General for the Lands Division and Natural Resources Division Richard Stewart,⁹ as well as participants from the Criminal Division. The purpose of this meeting was to talk through the strategic decision to proceed by warrant (as opposed to grand jury subpoena or other administrative or consensual methods), as well as the practical difficulties that needed to be addressed prior to executing the warrant. The decision to proceed by warrant was supported by Main Justice.¹⁰

Numerous logistical difficulties had to be ironed out prior to executing the warrant. These issues included the very practical problems of how to gain access to a heavily armed, secret nuclear

Fimberg's "lead" status derived in great part from the fact that he was closer to United States Attorney Norton, and that, for all practical purposes, Norton made the final decision at the supervisory level on nearly every issue associated with the case.

⁸ It was unclear whether a warrant was necessary. Since Rocky Flats was government owned, heavily and pervasively regulated, and had consented to certain inspections of its activities, it was arguable that Rockwell did not possess such expectations of privacy as to require a search warrant.

⁹ The Lands and Natural Resources Division is now called Environment and Natural Resources Division [ENRD]. Throughout this memorandum, with rare exception, this Division will be referred to by its current name.

¹⁰ The references to "Main Justice" in this memorandum typically refer to the supervisory review level at DOJ, including the Assistant Attorney General for ENRD, Chief and Deputy Chief of the ENRD Environmental Crimes Section, the Assistant Attorney General and Deputy Assistant Attorney General for the Criminal Division, and the Chief of the Organized Crime Section of the Criminal Division.

facility, and how to obtain the required security clearances for the searchers. One of the other issues was how to obtain necessary cooperation from DOE. This cooperation was seen as critical to the success of the search; yet, by the same token, disclosing the investigation to DOE was very sensitive since the prosecutors and investigators were unsure whether DOE employees had criminal culpability. Ultimately, the Secretary of Energy was personally informed of the investigation and the search, and facilitated the agents gaining access to the plant.

The search warrant was executed by agents of the FBI and EPA from June 6 through June 23, 1989. Well over 100 boxes of documents were seized.

C. Post-search warrant investigation. To investigate the allegations of environmental crimes at Rocky Flats, at United States Attorney Norton's request, a Special Grand Jury was empaneled in July 1989, pursuant to 18 U.S.C. § 3331. In his charge to the grand jury, Chief Judge Sherman G. Finesilver instructed that among the grand jury's tasks could be the preparation of a report relating to its findings.

Through the fall of 1989, the investigation focused on the allegations in the search warrant -- particularly the allegation involving secret unlawful use of an incinerator ("midnight burning"). The investigators also began their review of the documents seized in the warrant and issued numerous subpoenas for additional documents. The document review was tedious and required the establishment of a database as well as numerous systems for storing and handling the documents.

By spring of 1990, additional resources had been added to the investigation. Norton requested and DOJ agreed to fund an additional position in the United States Attorney's Office in Colorado for an Assistant United States Attorney dedicated to the case, and Ken Buck was hired and assigned to the case.¹¹ William Hassler was hired by ENRD and also assigned to Denver full-time to work on the investigation. Additional FBI agents and EPA agents were also assigned. On paper, the composition of the task force consisted, roughly, as follows: attorneys Fimberg, Murtha, Hassler and Buck, a paralegal (provided full-time by Main Justice), 4 FBI Agents, 4 EPA Agents, 4 support personnel, document coders and computer entry personnel, a DOE Auditor and an agent the DOE Office

¹¹ A copy of a letter from Norton to AAG Stewart requesting additional resources is attached as "Attachment 2." There was some uncertainty as to whether or not Buck was supposed to be full-time or part-time on the Rocky Flats investigation. In our interview, Norton stated that Buck was supposed to be full-time, but he was also supposed to have exposure to some other criminal matters to round out his criminal experience.

of Inspector General. In reality, the additional EPA agents and FBI agents, although useful to some extent, to varied degrees lacked enthusiasm for the investigation, especially insofar as it required extensive and tedious document review, and there was never a situation of 20 "full-time" dedicated agents and task force personnel devoted to the case.¹² The core individuals who had responsibility for the line investigative decisions (as distinct from the "prosecutive decisions") in the case were Fimberg, Murtha, Smith and Lipsky.¹³

By 1990, the investigation turned its focus to environmental problems not explicitly contemplated by the warrant but discovered in the search or suggested by the document review. These issues included the storage of "pondcrete" and "saltcrete" and the "spray irrigation" system for disposing of sewage treatment plant effluent. In addition, the investigation attempted to review other areas of Rockwell's treatment and storage of waste for which there were no allegations of misconduct.

Ultimately, the investigation revealed various potential criminal violations in the following areas: storage of pondcrete

¹² Fimberg on occasion complained to Norton, and Norton in turn on occasion contacted the FBI to seek additional resources. Norton's view, as he expressed it in his interview, was that sufficient personnel resources were assigned to the case.

¹³ In the Hearings, Lipsky described the decision-making process after the search as follows:

Mr. WOLPE. Could you say a little bit more about the specific lines of authority and differentiation of responsibilities of the elements of this task force? Let's begin with the first part.

Mr. LIPSKY. At the first part, there was really no definitive lines of responsibility between Bill Smith and I. We talked about things we wanted to do and discussed it and -- you know, with the attorney, but there was not a delineation there. After the search there were. There were issues, investigation issues, that basically made a cut and doled out the responsibility.

Mr. WOLPE. How -- who made those judgments as to who did what at that point?

Mr. LIPSKY. I would say that it was the four of us I just mentioned, Murtha, Fimberg, myself and Mr. Smith, and we had input as to what we were going to do and it was just agreed on, I guess, by committee. Hearings at 404 (testimony of Lipsky).

and saltcrete, illegal discharge of sewage treatment effluent, illegal storage of certain hazardous wastes and a particular "chromic acid" spill. The facts surrounding these violations are set forth, infra.

D. Factual and legal problems of the investigation and the joint defense agreement. The factual issues in this case were complex, especially because the investigation was historical and was not based on an undercover or covert investigation of ongoing misconduct. It was not possible to obtain historical information as to the chemical composition of waste discharges if such measurements were not made contemporaneously. The government was forced to rely on internal company or regulatory documents and testimony of company employees as witnesses. In addition, where environmental problems were found, the investigation into potential individual culpability was complicated by Rockwell's bureaucratic structure, characterized by pervasive secrecy and compartmentalization of function.

The legal issues (which framed the factual issues) were likewise complex. The primary statutes under consideration were the criminal provisions of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901 et seq.¹⁴ and the Clean Water Act (CWA), 33 U.S.C. §§ 1251 et seq.¹⁵ Both statutes involved complicated regulatory schemes. The lines between lawful and unlawful conduct were not always clear, engendering good faith disagreements as to whether a particular practice was permitted by the statute (let alone whether a violation was negligent or knowing). The applicability of criminal statutes turned on

¹⁴ The applicable criminal provisions of RCRA are set forth at 42 U.S.C. § 6928(d): "Any person who -- ... (2) knowingly treats, stores, or disposes of any hazardous waste identified under this subchapter either (A) without having obtained a permit ... ; or (B) in knowing violation of any material condition or requirement of such permit ... [shall be subject to fine and imprisonment]."

¹⁵ The Act's formal name is the "Water Pollution Prevention and Control Act," though it is popularly known as the "Clean Water Act." The applicable criminal provisions are located at 33 U.S.C. § 1319(c), which provides in pertinent part: "(1) Negligent violations. Any person who -- (A) negligently violates [certain statutory provisions] or any permit condition [shall be guilty of a misdemeanor]; (2) Knowing violations. Any person who -- (A) knowingly violates [certain statutory provisions] or any permit condition [shall be guilty of a felony]."

complicated implementing regulations.¹⁶

The investigation was made particularly difficult by the operation of a joint defense agreement between the attorneys for Rockwell and the attorneys for Rockwell's employees. Nearly every Rockwell employee who was approached as a witness was provided an attorney paid by Rockwell. In addition, there was deep suspicion by Rockwell employees toward the government investigators. Under the joint defense agreement, the statements made by the witnesses to the prosecutors were immediately shared with counsel for Rockwell, enabling Rockwell to keep current with the government's investigatory efforts. The employees in most cases, regardless of their role in the corporation, insisted on immunity. The fact that nearly all witnesses were represented by counsel, and the need for immunity for nearly all witnesses, slowed the investigation.

The prosecutors attempted to deal with the joint defense agreement in various ways. First, the prosecutors minimized the interviews that were conducted with counsel present, and instead conducted the bulk of the interrogation under oath away from counsel. This did not stop counsel from debriefing the witness/client and learning what the witness told the grand jury, but it offered some ability to provide the witness freedom to be forthcoming and to keep the precise direction of the investigation away from counsel. Second, on occasion, the government offered immunity conditioned on the withdrawal from the joint defense agreement. This strategy was not successful. The degree to which the joint defense agreement frustrated prosecutors is illustrated by the following incident: Fimberg offered one witness immunity, conditioned on the witness' withdrawal from the joint defense agreement. Remarkably, this was rejected by the witness (through counsel). In addition, the witness, through counsel, sued Fimberg civilly to enjoin this practice on the grounds it interfered with the witness' right to counsel. Whatever the merits of the witness' suit, the government concluded this was simply not worth the

¹⁶ RCRA involves a comprehensive scheme to regulate the handling of certain solid wastes. Certain wastes fall within the ambit of RCRA by their characteristics -- flammability, toxicity, corrosivity and reactivity. These are referred to as "characteristic wastes." Other wastes are covered by RCRA by virtue of being "listed" in regulations as covered by RCRA, and are referred to as "listed" wastes. In this memorandum, the term "RCRA regulated waste" refers to solid wastes covered by RCRA. RCRA does not cover plutonium or other radioactive materials.

In terms of the CWA, one of the aspects of the investigations involved determining whether certain discharges of waters were consistent with "good engineering practices." This is hardly the "bright line" measure by which criminal conduct -- especially personal criminal culpability -- is typically determined.

trouble to litigate, and withdrew its request for the witness to withdraw from the agreement.¹⁷

E. Plea negotiations. By the end of 1990, the investigation had fairly well established the contours of criminal conduct at Rocky Flats. At that time, and for the first time, plea overtures were exchanged between attorneys for Rockwell and the government.

Because of the range of issues and the technicalities associated with the statutes and Rockwell's contract with DOE, the plea negotiations were protracted -- spanning all of 1991 and into 1992. The critical terms included the charges to which Rockwell would plead, the amount of the fine, whether individuals would be prosecuted, other aspects of civil or contractual liability of Rockwell, and terms related to statements by the government as to aspects of the investigation which, in effect, cleared Rockwell.

The plea negotiations put the investigation in a "stop and go" mode throughout 1991. When progress seemed to be occurring on the negotiating front, the investigation slowed down and attention was paid to the negotiations; as negotiations faltered, the investigation picked up pace.

In April of 1991, when the negotiations were stalled, the prosecuting team sent out "target letters" to certain employees of Rockwell advising them of their status as a "target" in the case. At about the same time, the investigators prepared "target memos" summarizing the evidence against the individuals.

In June of 1991, Fimberg and Murtha put together a very preliminary draft prosecution memo. This document was in very rough form, containing blanks and question marks where the evidence or legal and factual analysis was still not complete. However this document, along with the Sentencing Memorandum,¹⁸ constituted the most complete statement of the facts uncovered in the investigation and was virtually the only document which

¹⁷ The suit would appear to lack merit. The government may condition agreements with witnesses and defendants on the foregoing by the individual of any number of rights. A plea agreement, for example, requires the defendant to give up his right to silence, give up his right to the presumption of innocence and a jury trial. It would appear logical that the government can condition immunity on the promise the information would not be shared with others, even to the extent this arguably implicates a Sixth Amendment right.

¹⁸ References to the "Sentencing Memorandum" refer to Plaintiff's Sentencing Memorandum filed in connection with the plea in this case on March 26, 1992.

discussed the underlying evidence. The draft indictment which accompanied this memo named individual defendants.

By July of 1991, agreement appeared to be reached in principle on terms dealing with: 1) the amount of the fine, 2) the charges to which Rockwell would plead, 3) Rockwell's commitment to pay the fine without the possibility of contractual indemnification from DOE, and 4) the government's commitment not to prosecute individuals. The parties thereafter commenced difficult negotiations to hammer out an agreement on issues relating to Rockwell's collateral exposure.

Throughout the fall of 1991, the investigation had slowed considerably, though there was some effort by Fimberg to continue to keep alive cases against individuals in event the plea negotiations broke down, or in the hope that even at that late date evidence might be discovered which would dramatically strengthen the cases against individuals.

By December of 1991, the agreement was almost finished when it was nearly undone by an unexpected ruling by the D.C. Circuit Court of Appeals in Shell Oil.¹⁹ Shell Oil threw out some of the regulations upon which agreed counts of convictions had been based. The negotiators went back to the table, and finally, in March 1992, the agreement was finalized.

Rockwell entered its plea pursuant to the agreement on March 26, 1992. The plea was pursuant to Rule 11(e) Federal Rules of Criminal Procedure, whereby the Court could either accept the plea and the proposed sentence, or reject it in its entirety. The plea was accepted and sentence pursuant to the plea agreement was imposed June 1, 1992.

¹⁹ Shell Oil Co. v. Environmental Protection Agency, 950 F.2d 741 (D.C. Cir. 1991). Part of the RCRA scheme defining wastes regulated by RCRA include the "mixture" and "derived from" rules promulgated by EPA. In simplified form, the "mixture rule" provided that a listed waste mixed with a non-hazardous waste remained a RCRA-regulated hazardous waste. The "derived from" rule provided that a solid waste derived from the treatment of a listed hazardous waste remained a RCRA-regulated hazardous waste. These rules were set aside by Shell Oil on the grounds that EPA failed to comply with appropriate notice and comment procedures in promulgating these rules. As of December 1991, all the RCRA counts that had been agreed to by the parties were based on the mixture rules or the "derived from" rules. See Staff Interviews at 278 (testimony of Murtha). After Shell Oil, further investigation was conducted which revealed that some of the wastes were also listed wastes and thus remained covered by RCRA. However, the Shell Oil decision necessitated the removal of one of the counts that had been agreed to by the parties as part of the disposition.

F. Grand jury report. Throughout the life of the grand jury, Fimberg, Murtha and Norton believed that the grand jury would have the opportunity to write a report. They believed the grand jury would feel its function had been usurped if there were a plea and the grand jury was not provided the opportunity it had been promised to write a report.

The issue as to the propriety of the grand jury's preparation of a report reached Main Justice in fall 1991, pursuant to the requirement in the United States Attorney's Manual that such reports had to be approved by the Criminal Division. Fimberg, Murtha and Norton all argued that such a report was authorized, and received additional support from Chuck DeMonaco, Assistant Chief of the Environmental Crimes Section of ENRD. This issue was referred to Paul Coffey, Chief of the Organized Crime and Racketeering Section of the Criminal Division. Ultimately, by letter of Deputy Assistant Attorney General John Keeney, the Criminal Division determined that a report was not legally proper in this case.

Subsequently, the grand jury prepared its own report and submitted it to the Court. The Court refused to accept the report as drafted. After various rounds of litigation, the grand jury report was unsealed in a redacted form on January 26, 1993. The report set forth numerous allegations of DOE and Rockwell misconduct not encompassed by the plea. DOJ's response was included in the version released by the Court.²⁰

G. Wolpe Subcommittee. In the summer of 1992, Rep. Howard Wolpe, Chairman of the Subcommittee on Investigations and Oversight, made a series of requests to the FBI for access to line agents and investigatory materials. Rep. Wolpe also made a series of requests to DOJ to produce documents for review and to make attorneys available for interview and testimony.

Four witnesses -- Fimberg, Murtha, Norton and Lipsky -- ultimately testified before the Subcommittee. In their September 1992 appearances, the four witnesses testified at length, but, on instructions from DOJ, declined to answer questions concerning internal deliberations.²¹ Thereafter, the Subcommittee insisted that either President Bush formally invoke executive privilege or the Subcommittee would hold the witnesses in contempt. DOJ declined to seek to have the President invoke executive privilege. An agreement was thereafter reached with the Subcommittee where the

²⁰ The redacted version with DOJ's response is attached as "Attachment 14."

²¹ The DOJ's position was set forth in a letter from Assistant Attorney General W. Lee Rawls, attached as "Attachment 3."

four witnesses were made available to Subcommittee staff for "on the record" interviews, in which the witnesses were free to discuss the decision-making process. The four witnesses provided sworn interviews to the Wolpe Subcommittee staff in October and November 1992. In both their hearings testimony and in the interviews, the four witnesses invoked Rule 6(e) in reference to questions implicating the disclosure of grand jury information.

The Wolpe Subcommittee issued a report dated January 4, 1993, which was highly critical of DOJ's handling of the case.²²

III. Allegations in the Search Warrant

The June 6, 1989, search warrant affidavit was sworn to by Special Agent Jon Lipsky. The primary allegations were as follows:

A. General allegations of knowing treatment, storage or disposal of hazardous and mixed wastes in violation of RCRA (primarily based on the regulatory analyses);

B. Three related allegations involving the use of the "771 incinerator": first, the incinerator had been unlawfully used to burn RCRA-regulated (mixed) waste without a RCRA permit or "interim status"²³; second, the ash generated from the incineration was RCRA-regulated (mixed) waste which was illegally stored without a RCRA permit or interim status; and, third, the incinerator had been operated during a period when it was supposed to have been shut down completely. The last of these allegations -- the so-called "secret burning" or "midnight burning" -- generated enormous publicity. It was based on infra-red photographic analysis performed by a private contractor, which supposedly revealed the smokestack to be "hot" in a manner that could only be explained by clandestine use;

C. Illegal discharge of sewage treatment wastes into Walnut Creek (one of the creeks crossing the plant and leaving the plant) without a permit, in violation of the Clean Water Act;

D. False statements, particularly in regards to a November 1985 certification by DOE that Rocky Flats was "in compliance with all applicable [RCRA] groundwater monitoring [requirements]", and in otherwise failing to report certain discharges of chemical pollutants in violation of the CWA;

²² The Wolpe Report's criticisms are discussed in detail in Section XVII, infra.

²³ Storage of RCRA-regulated waste was permitted by a permit granted by the EPA. Storage was also permitted under what is known as "interim status" if the company has filed the appropriate permit application.

E. Other illegal use of certain closed evaporation ponds. The infra-red surveillance supposedly revealed that one of the evaporation ponds which should have been shut down was still being used. The infra-red analysis supposedly revealed this pond (the 207A Pond) to be thermally active, i.e., warm, at a time when the outside temperature was 7 degrees Fahrenheit.

IV. Resolution of the Allegations in the Search Warrant Affidavit.

Virtually none of the allegations in the search warrant were confirmed by investigation as having occurred in the manner described in the warrant. Similar violations to those alleged in the affidavit were uncovered.

A. Allegations involving the incinerator. Lipsky and Fimberg based their conclusions as to the secret use of the 771 incinerator on the analysis performed by the contracted expert in infra-red photographic analysis. Prior to the search, the contractor had provided a strong opinion that the infra-red photographs evidenced the use of the incinerator. This opinion was provided to Lipsky and Fimberg separately. After the execution of the search, this witness reversed himself and backed away from his prior opinion. In addition, two Rockwell employees came forward after the search and provided seemingly detailed information about the alleged secret burning. None of the details -- such as the identities of other Rockwell employees supposedly working when this burning occurred -- were corroborated. Finally, if secret burning had occurred, numerous Rockwell employees would have been aware of it. The government found no one -- other than the two employees -- to support the allegation.

The investigation did uncover a potential RCRA violation for the incineration of "mixed-wastes" (containing RCRA-regulated constituents and plutonium) and the storage of the resulting incinerator ash. The government maintained the incinerator ash was covered by RCRA since it "derived from" the treatment (burning) of other RCRA-regulated wastes. Rockwell did not have a RCRA permit or interim status for either the burning of the residues or the storage of the ash. The storage of the ash would have been one of the counts of conviction. However, the Shell Oil decision invalidated the "mixture" and "derived from" rules and eliminated this potential basis for a criminal charge related to the storage of incinerator ash.²⁴

²⁴ Because of the dangers associated with handling the plutonium, it was not feasible to test the ash to determine whether it contained any "listed" or "characteristic" wastes.

This issue is discussed in greater detail in the portion of the Memorandum addressing the Wolpe Report. See Section XVII,

B. Illegal discharges into Walnut Creek. The search warrant affidavit was predicated on the agents' and prosecutors' beliefs that there was direct discharge of sewage treatment plant effluent containing "exotic chemicals" into the creek. The precise source of the "exotic chemicals," believed to be medical wastes, was not identified. The investigation found problems with various industrial chemicals entering the sewage treatment plant and thereafter reaching the creeks because of problems in the "spray irrigation" system, as will be discussed.

C. The false statements. The false statements counts associated with the 1985 certification were found not to warrant prosecution, since, though literally false, the actual conditions surrounding the ground-water monitoring were well known to the EPA and the Colorado Department of Health. This area is discussed infra in connection with the discussion of DOE's role at Rocky Flats.

D. The unlawful use of the 207A pond. The investigatory team did not establish unlawful use of the 207A pond.

E. Other unlawful storage and treatment. The investigation revealed that the documents relied on by the investigators suggesting unaccounted-for wastes were simply unreliable. The investigation did not support the inferences the investigators had drawn from these documents.

V. The Environmental Crimes that were Uncovered.

A. Storage of crumbling pondcrete [Count One of the Information].²⁵ Pursuant to a 1986 agreement with state and federal regulators, Rockwell was supposed to clean up certain of the "solar ponds." These were man-made ponds into which various liquids containing hazardous wastes had been stored. At the bottom of the ponds were all sorts of low-level RCRA-regulated hazardous waste sludge. Rockwell mixed this sludge with concrete to form a substance called "pondcrete." This pondcrete was molded into a large block, put in a cardboard box, covered with plastic, and stacked on a "pad," i.e., a cement surface like a parking lot. This was supposed to be a temporary storage situation, but no solution was forthcoming. Storage of pondcrete on the "750 Pad" was permitted by means of Rockwell having obtained "interim status."

infra.

²⁵ The facts surrounding the pondcrete violations are set forth in the Sentencing Memorandum at 28-51.

A recurring problem with the pondcrete was that it would not cure correctly, apparently because of problems calibrating the correct ratio of concrete to sludge. Thus, instead of having a hard concrete-like block of a solid, what instead would be created was a box of putty/sludge which would on occasion run and leak. Estimates of the amount of improperly stored pondcrete ran as high as 20% of the boxes. The pondcrete boxes were stacked and covered with non-waterproof tarp. A major rainstorm in May 1988 caused a significant spill. This environmental mishap was reported to DOE. The pondcrete storage problems were thereafter addressed through better waterproof tarps. The allegations of improper pondcrete storage at the 750 pad relate to the pre-May 1988 spill time frame. The count of conviction alleged a violation of hazardous waste storage under RCRA, specifically that the storage was not in a manner as to prevent leakage, and that remedial action was not taken immediately.²⁶

B. Storage of pondcrete without a RCRA permit [Count Two]. Rockwell also stored crumbling pondcrete (and saltcrete -- see Section C, *infra*) at the "904 pad." The 904 pad did not have "interim status" to permit storage of pondcrete or saltcrete until July 1989, after the search warrant was executed. The straightforward allegation was the storage of pondcrete and saltcrete without a permit.

C. Transfer of salt brine concentrate to the 207(C) pond without a permit [Count Three].²⁷ As a result of a compliance agreement related to cleaning up the solar ponds, the ponds no longer had interim status, and were supposed to be taken out of use. Under Rockwell policy, no hazardous wastes were allowed to be added to the ponds.

Salt brine concentrate, a low-level RCRA-regulated waste (because of its corrosivity), was a by-product of the evaporation of other liquid wastes in one of the "evaporators" which treated hazardous wastes in Building 374. Ordinarily this concentrate is mixed with concrete and processed into saltcrete (akin to pondcrete). On some occasions, however, when the evaporator was broken, the salt brine concentrate could not be processed, interfering with the ability of the plant to get rid of its waste product. Without a place to move the salt brine concentrate, the plant would have gradually ground to a halt. On several occasions when the dryer in Building 374 broke down and the concentrate began

²⁶ As originally conceived, the pondcrete charge was going to be brought under the "mixture rule." After Shell Oil threw out the "mixture rule," the investigators were able to determine that pondcrete was also covered by RCRA by virtue of it being toxic for chromium.

²⁷ Sentencing Memorandum at 51-54.

to back up, it was transferred to Solar Pond 207C, in violation of RCRA.

D. Storage of vacuum filter sludge without RCRA permit [Count Four].²⁸ Vacuum filter sludge was a RCRA mixed waste also generated by some of the filtering processes in Building 374. The vacuum filter sludge was stored by Rockwell by cementation in 55 gallon drums. At the time of the search, approximately 1400 drums of vacuum filter sludge were stored in Building 964. Rockwell never obtained a permit or interim status for the drums stored in Building 964, and the storage of this sludge in this fashion thus violated RCRA. This was understood by the prosecutors and investigators as being the least significant of the counts, since there was no risk of environmental harm and no motive for Rockwell not to have complied with the interim status and permit scheme.

E. Discharge of pollutants to sewage treatment plant [Count Five].²⁹ Rockwell's sewage treatment plant was supposed to handle human wastes -- not hazardous, toxic or industrial wastes. After the waste treatment process, the remaining effluent was piped to Pond B-3 on South Walnut Creek. On several occasions, including the chromic acid spill alleged in Count Ten, various industrial wastes, including hazardous wastes and toxic wastes, went through the sewage treatment plant and into Pond B-3. Anecdotal evidence from the sewage treatment plant employees reflected incidents where odorous chemicals were sent to the sewage treatment plant. There were also occasions where the B-3 pond was "killed" or "dead," presumably from industrial wastes contained in the effluent that had come from the sewage treatment plant. The misuse of the sewage treatment plant and the discharge of sewage treatment plant effluent into Pond B-3 was charged in the plea as a CWA violation, not a RCRA violation, since it was not possible to identify the necessary RCRA characteristics of these wastes to support a RCRA violation.

F. Exceeding permit limits for biological oxygen demand and/or fecal coliform [Counts 6-8].³⁰ As stated, the sewage treatment plant effluent was piped to Pond B-3. Although the waters in Pond B-3 were usually "spray irrigated," i.e., piped out of Pond B-3 and sprayed on the adjacent fields, there were occasions when the waters in Pond B-3 were discharged directly downstream, past a monitoring point.

In the winter months the sewage treatment plant did not run efficiently, in part because of the effect of the cold whether on

²⁸ Sentencing Memorandum at 54-56.

²⁹ Sentencing Memorandum at 66-75.

the biological organisms used to treat the wastes. In addition, the plant's performance was impaired because of industrial and toxic wastes (see Count Five), which the plant was not designed to treat.

Rockwell discharged waters from Pond B-3 downstream during periods in ten months in 1987 and 1988. In five of the months, the company exceeded the biological oxygen demand level, and in one of these months Rockwell exceeded the fecal coliform level, all in violation of misdemeanor provisions of the Clean Water Act.

G. Violation of obligation to use "good engineering practices" in spray water irrigation [Count Nine].³¹ As indicated, Rockwell disposed of its sewage treatment water -- which was not supposed to contain hazardous waste -- by piping it to Pond B-3 on South Walnut Creek. Although occasionally the waters in Pond B-3 were discharged downstream, past a monitoring point, more typically waters from Pond B-3 were spray irrigated. "Spray irrigation" was the term used to describe the spraying of the Pond B-3 waters on fields, where the effluent was supposed to either evaporate or be absorbed in the vegetation. Spray irrigation was not considered a "discharge" into the "navigable waters" under the Clean Water Act, since in theory, the waters which were spray irrigated were not supposed to return to the creek or other "navigable waters."

One of the advantages to Rockwell of spray irrigating was that this process avoided the monitoring otherwise required for a direct downstream discharge. As discussed, the water in Pond B-3 had come from the sewage treatment plant and frequently could not pass the discharge standards to permit discharge downstream (see discussion surrounding Counts Six through Eight). Thus, Rockwell had little choice but to spray irrigate.

The problem for Rockwell was that the amount of water that had to be spray-irrigated was far in excess of what could be absorbed effectively. Spray irrigation took place in winter months when the ground was frozen. As a result, on numerous occasions spray-irrigated waters ran off the grounds and back into the creek downstream of the Pond B-3 monitoring point.

Under the CWA, a criminal violation would lie if there were 1) discharges into waterways which bypassed certain monitoring points, 2) other unauthorized discharges, or 3) other violations of the permit conditions requiring the exercise of "good engineering practices." Whatever the precise import of the phrase "good engineering practices" in the permit, the government's theory was that spraying more water than could possibly be absorbed was not a "good engineering practice." Furthermore, by spray irrigating

³¹ Sentencing Memorandum at 83-98.

from Pond B-3, and having the water thereafter run back to the creek downstream of the B-3 monitoring point, the effect of "spray irrigation" was to "bypass" the monitoring requirements in the statutes.

H. Chromic acid spill [Count Ten]. Between February 25 and February 28, 1989, a green substance showed up in the sewage treatment plant. This substance was chromic acid. Even after the substance was discovered and after it was identified as a toxic substance (on a Friday), the spray irrigation continued over the weekend.

VI. Cases against Individuals.³²

By early 1991, the prosecutors and agents had identified approximately nine potential individual "targets." In April, the prosecutors sent out "target letters" under Fimberg's signature to these individuals, informing them of their status as targets in the investigation and inviting them to testify.³³ Further

³² It is impossible to provide evidentiary detail in the following discussion. First, Rule 6(e) of the Federal Rules of Criminal Procedure prohibits disclosure of matters occurring before the Grand Jury. Nearly all the evidence, other than the search documents, was obtained by subpoena. Second, on a more fundamental level, it is not proper for a government prosecutor to publicly identify and discuss the potential criminality of an uncharged individual. (For example, it is generally not proper for prosecutors to identify by name "unindicted coconspirators.") Finally, for reasons stated at the outset, there were limitations on the ability to replicate the entire investigation, and no attempt to discuss the evidence in detail would adequately capture all the circumstantial detail.

In connection with the below discussion, numerous digests of grand jury transcripts have been obtained and reviewed and several core evidentiary documents were reviewed. This review was necessarily limited by the basic fact that the review process cannot assess witness credibility. The review process was able to confirm the significant attention paid by the prosecutors to developing facts and evidence on the charged topics.

³³ A copy of one of the target letters is attached as "Attachment 4."

The United States Attorneys' Manual defines a "target" as a "putative defendant." The term does not have identical meanings among prosecutors -- some prosecutors will not deem an individual a target until the charging decision is all but made; others might use the term far earlier in the investigation to denote more

generally an individual against whom the government is gathering evidence in the prospect of bringing criminal charges or whom the government "expects" to charge. The individuals in this case were targets not because the quantum of evidence already obtained demonstrated likely indictment, but because the prosecutors and agents had identified these individuals as the most likely to have committed criminal offenses and against whom they were attempting to build cases.

The decision whether or not to inform someone of his or her status as a "target" has strategic import. In an undercover investigation, "targets" -- for obvious reasons -- are not notified of their status. In many instances, there is no need for a prosecutor to volunteer to an individual his or her status as a target in the investigation since the target well knows his or her status. In this case, however, several reasons supported sending out the target letters. First, the prosecutors and agents had been met with stiff resistance obtaining cooperating witnesses from among the Rockwell employees. Sending out "target letters" was an attempt to develop an insider witness who might feel pressure to come forward. (In fact, the government did obtain "proffers" from some of the targets.) Second, the practice in the jurisdiction was to inform "targets" of their status to provide an opportunity to testify prior to indictment, and similar oral commitments had been made in connection with the investigation. Finally, the prosecutors and agents, Fimberg in particular, knew it was important to send a signal to Rockwell in the negotiations that the government was aggressively pursuing all charges, including charges against individuals, and sending the "target letters" when the investigation stalled served that purpose.

Lipsky stated that he felt that sending the target letters was tantamount to a decision that these individuals would be prosecuted. According to Lipsky, Fimberg was concerned that the government proceed cautiously against individuals and thus Fimberg wanted to be utterly confident of the quantum of evidence obtained to support charges against the individuals prior to sending out the target letters. Lipsky thus pointed to Fimberg's decision to send out target letters as support for the proposition that Fimberg believed "enough evidence" existed to charge individuals. Norton, by contrast, stated in our interview that he did not view the state of the evidence as rising to "probable cause" levels, but understood that the persons receiving the letters were seen as the most culpable and letters were sent for that reason.

Fimberg's actual view of the quantum of evidence involved is nowhere near that attributed to him by Lipsky. Indeed, by fall 1991, after certain proffers and after the investigation developed, Fimberg concluded that some of the individuals who received target letters were no longer, in fact, targets. The target letters

investigation occurred, including "proffers" where some of these individuals were interviewed pursuant to use immunity agreements.³⁴ By July of 1991, it appeared the government would not bring cases against individuals as part of the plea agreement in this case, though certain investigatory steps occurred throughout the fall of 1991.

In the most general sense, the nature of the evidence known to the prosecutors by mid-summer 1991 can be summarized as follows:

A. Pondcrete storage allegations. The evidence demonstrated that the pondcrete crumbled. The Rockwell employees who dealt firsthand with the crumbling pondcrete would have had direct knowledge of this problem.

The evidence of knowledge up the supervisory chain became more attenuated. There were no "smoking gun" documents or direct evidence of conversations implicating supervisors up the chain, although statements by witnesses tended to indicate that certain of the higher-ranking supervisors would have been aware of these problems by virtue of their roles in the command structure.³⁵

B. Illegal use of Pond 207C. Various Rockwell workers described the procedure whereby in an emergency situation occasioned by the breakdown of the evaporator in Building 374, the salt brine concentrate would be pumped to Solar Pond 207C. According to the workers, special approval was needed up the chain of command. The perception of the lower-level employees was that Rockwell's upper-level supervisors would in turn inform DOE.

DOE employees denied knowing of this procedure or giving approval to Rockwell. Although the prosecutors credited the DOE employees, successful prosecution of this count would have involved a swearing contest between Rockwell employees and DOE employees (with one DOE employee deceased), where Rockwell would have argued that DOE employees were simply protecting themselves.

themselves are careful to say: "This letter advises you that you may be a target of a federal grand jury investigation in the District of Colorado, ..." (emphasis supplied).

³⁴ These are typically referred to as "proffer" agreements.

³⁵ Lipsky stated generally that the proffers obtained as a result of the target letters advanced the investigation. However, this was not the case involving the pondcrete/saltcrete allegations. When one of the lower-ranking supervisors (against whom Fimberg and Murtha believed the government had one of the better cases) was debriefed pursuant to a proffer agreement, he denied personal knowledge of the crumbling pondcrete, and he did not implicate higher-ups.

C. Spray irrigation - sewage treatment plant. The basic background of the spray irrigation problem is that from 1986 through 1989, the various divisions at Rockwell which dealt with the sewage treatment plant knew there was far more spray irrigation than could be absorbed or evaporated. A series of studies in 1986-1989 explored alternatives. Although collectively these reports evidence several Rockwell employees' knowledge and notice that the spray-irrigation practices were ineffective, resulted in runoff and "by-passed" the monitoring points, these documents also suggest less than hard-core culpability. Even though Rockwell never did anything about the problem, the fact that a recognized environmental problem was frequently studied and discussed did not easily equate with personal criminal culpability of the participants involved in the problem. This was not, for example, an instance where the responsible individuals sought to cover up the problem, destroyed documents, or had a personal financial stake in letting the environmental problem persist. Rather, nothing was done since the alternatives, including extensive replumbing and recycling of waste waters, were expensive and because bureaucratic inertia kept these difficult decisions from being made.

D. Potential defenses common to all the potential defendants. Although the strength of the evidence varied among the defendants, by 1991, when the plea negotiations were underway, the government knew that, at a minimum, all the individual potential defendants had arguments along the lines that: 1) the government could not prove actual individual knowledge of environmental violations; 2) they had no actual (specific) intent to violate the environmental laws and at all times tried in good faith to comply with the laws; 3) they were being made scapegoats for years of government inattention; 4) the prosecutors were protecting the real villain -- DOE; and 5) the government lacked any evidence in the form of documents or testimony of subjectively bad intent -- no conspiratorial meetings, no document destruction, no evidence of personal financial motive.

VII. Possible False Statement Charges Based on Pleadings in the Sierra Club Litigation.

The Wolpe Report alleged the government inadequately investigated certain issues relating to the burning of residues in the 771 incinerator and the storage of the resulting incinerator ash.³⁶ The Wolpe Report focused on two statements -- one by a Rockwell employee, one made by outside counsel for Rockwell in a pleading -- that were made in the context of a civil lawsuit against Rockwell. The Report alleged the government inadequately considered these statements' potential as actionable false statements and inadequately recognized their investigatory or

³⁶ Other criticisms by the Wolpe Report are discussed in Section XVII, infra.

evidentiary significance.

In order to address the Report's allegations, it is necessary to understand the regulatory issues and the context of the litigation.

A. Background -- The regulatory scheme. Prior to 1987, DOE and Rockwell had resisted implementation of the environmental laws at Rocky Flats. In particular, Rockwell and DOE had argued that RCRA did not apply to those solid wastes that were a mixture of radioactive components regulated by the Atomic Energy Act (AEA) and other hazardous wastes normally regulated by RCRA. In 1987, DOE recognized the applicability of RCRA to these "mixed" wastes. Thereafter, the handling of RCRA-regulated constituents of the "mixed" wastes was governed by RCRA; the handling of AEA-regulated components, by AEA. As a practical matter, this meant all "mixed" wastes were regulated by both RCRA and AEA, unless the statutes and regulatory schemes were in conflict.

The applicability of these basic principles was complicated by a different regulatory issue. The operations at Rocky Flats produced numerous items contaminated with plutonium -- filters, "kim wipes," rags, and gloves. These also had RCRA-regulated constituents. If the plutonium content of these items was greater than a specified amount (the "Economic Discard Limit" as determined by DOE), these items -- called "residues" -- were required to be recycled for the recovery of the plutonium.

After 1987, when DOE and Rockwell conceded that RCRA applied to mixed wastes, DOE and Rockwell took the position that RCRA did not apply to the storage and treatment of these residues. DOE and Rockwell argued that the residues did not contain RCRA-regulated wastes since these materials were not in fact "waste" but were stored and handled for recycling purposes. DOE and Rockwell relied on American Mining Congress (AMC),³⁷ in which the United States Court of Appeals for the District of Columbia Circuit held that a substance does not become a RCRA-regulated waste until it is in fact discarded; the storage or handling of materials for purposes of reuse or recycling is not covered by RCRA.

B. The plutonium recovery operation and the use of the 771 incinerator. There were two steps in recovering plutonium from the residues. The first step was incineration of the residues in the 771 incinerator. This produced an ash rich in plutonium. (This ash also was also considered a "residue.") The second step was a chemical leaching process to remove the plutonium from the ash. Rockwell, however, had experienced various problems with the second stage of this process, and despite the ongoing incineration of

³⁷ American Mining Congress v. Environmental Protection Agency, 824 F.2d 1177 (D.C. Cir. 1987).

residues, no plutonium had actually been recovered from the ash since prior to 1980.

The prosecutors viewed the handling of residues in this fashion as violating RCRA. The prosecutors read American Mining Congress as contemplating a continuous recycling operation, not the sort of two-step practice engaged in by Rockwell, where "mixed wastes" were simply stored indefinitely awaiting the date that plutonium would actually be recovered. The prosecutors also took the position that whether or not the recycling rationale would apply to exempt these residues from RCRA regulation in the context of a bona fide plutonium recovery operation, in this case, no bona fide recovery was in operation. The prosecutors argued that the "recycling" or "plutonium recovery" rationale was simply a pretext, and therefore, the use of the 771 incinerator to burn residues containing RCRA-regulated characteristics, and the subsequent storage of the resulting incinerator ash (which was "derived from" RCRA-regulated wastes and hence covered by RCRA) violated RCRA.³⁸ This allegation would have been a count of conviction pursuant to the plea agreement as negotiated by mid-December 1991. However, Shell Oil set aside the "mixture" and "derived from" rules upon which this count would have relied.³⁹ It was not feasible to actually analyze these residues because they contained plutonium.

C. The allegations of the Wolpe Report as to Rockwell's filings in the Sierra Club litigation. In February 1989, the Sierra Club filed suit against Rockwell and DOE. The Sierra Club argued that the incineration of the hazardous constituents of the mixed wastes constituted an illegal disposal of hazardous wastes and violated RCRA. Rockwell and DOE responded along the lines set forth above, namely, this was a recycling operation and RCRA did not apply. In its opposition to Sierra Club's summary judgment motion, Rockwell stated its position as follows: "Rockwell is simply asserting that the combustible materials containing valuable quantities of plutonium that are processed to recover the plutonium or are stored prior to reprocessing, are not discarded, and therefore, are not subject to hazardous waste regulation."⁴⁰

In connection with the Sierra Club litigation, two documents were filed which the Wolpe Report contended were either actionable or, at a minimum, provided the prosecutors "tantalizing leads" which the prosecutors overlooked.

³⁸ The prosecutors also came to the conclusion that it was not feasible to prosecute any individual for participating in this process, which was the subject of regulatory dispute and sanctioned by DOE.

³⁹ See note 19, supra.

⁴⁰ The pleading is attached as part of "Attachment 13."

The first document cited by the Wolpe Subcommittee was an affidavit by the Director of Plutonium Operations in the Sierra Club litigation. This affidavit described certain uses of the 771 incinerator. The Wolpe Report characterized this affidavit as falsely stating: "[the 771 incinerator] did recover plutonium..." Wolpe Report at 57. The Wolpe Report's characterization of the affidavit should be contrasted with the affidavit itself, which was more ambiguous than the Subcommittee suggested.

Paragraph 9 of the affidavit stated:

With regard to [residues from which plutonium is to be recovered], the Rocky Flats Plant recovers valuable plutonium from a variety of materials The plutonium-bearing material is typically stored in 1 liter canisters. These canisters are then sorted into airtight drums containing like material. The drums are stored in specially-designated concrete buildings which have been evaluated for structural integrity against possible accidents. Since the need for plutonium metal is dependent on weapons demand and Plant capacity to recover the plutonium metal, some of these materials may be stored before being recovered in the recovery process. Ultimately, these plutonium-bearing materials are to be used as feedstock for the recovery process. Once the material enters the plutonium recovery operation, second or subsequent generation material may also be generated and recycled again as feedstock if containing plutonium in concentrates above the EDL.⁴¹ (emphasis added)

It is not clear whether the affidavit referred to storage of residues prior to or subsequent to the initial incineration, nor is it clear whether the term "recovery process" encompasses both the incineration and chemical process or just the chemical process. Although the statement may imply ongoing plutonium recovery, this representation cannot realistically form the basis for a false statements charge since the statement that the materials "ultimately ... are to be used" for plutonium recovery, is not false. The Subcommittee's characterization of the affidavit is not accurate.⁴²

⁴¹ Incinerator ash is a good example of a "second or subsequent generation material" which is recycled again.

⁴² The Subcommittee did not show Murtha the affidavit, and mischaracterized it in questioning him:

Mr. ROACH. ... Now I guess what I am trying to figure out is where does someone take advantage of regulatory claims to cloak themselves from illegal activity? Was there any thought on the part of the

Paragraph 10 of the affidavit, stated, in pertinent part:

.... For certain plutonium-bearing materials classified as combustibles, this recovery process, prior to March 31, 1989, began with incineration in the [771] Incinerator which produced a plutonium-containing ash, which is then stored pending further chemical processing. (Emphasis supplied.)

prosecution team to bringing false claim charges against either the Department of Energy or Rockwell, or both, as a result of the representations made with respect to this incinerator and the recovery of the ash?

Mr. MURTHA. I don't believe that we saw any false statements that were made. So the answer was, no, it really wasn't considered.

Mr. ROACH. There wasn't a false statement?

Mr. MURTHA. To the best of my knowledge, we didn't see any false statements on that.

Mr. ROACH. What about to the court in the Sierra Club suit?

Mr. MURTHA. ... I have not combed through the Sierra Club pleadings, and I, frankly, don't know exactly what they all say, ...

Ms. HOLLEMAN. ... Do you know if ... an affidavit was filed in the Sierra Club basically stating that, of this person's personal knowledge these facts are correct?

Mr. MURTHA. I just don't know.

Ms. HOLLEMAN. If they had said, we are recovering plutonium, this is a plutonium recovery system, would you have been interested in that as a possible false statement?

Mr. MURTHA. It would very much have depended on who said what. It would depend on what the person's actual knowledge was. It would depend on how the statement was couched. Hearings at 1177-78 (testimony of Murtha).

After mischaracterizing the document and not showing it to Murtha, the Subcommittee accused him in its report of a "lack of familiarity" with it. Wolpe Report at 60. The Wolpe Subcommittee did not publish the affidavit in any of its reports. It is attached as part of "Attachment 13."

Although this statement may imply that ongoing recycling was taking place, the statement itself was ambiguous, and by its terms represented the ash "is then stored pending further chemical processing." This statement did not provide the basis for a criminal charge.

The second document the Wolpe Report suggested constituted a false statement in the Sierra Club litigation was Rockwell's response to interrogatories, prepared and signed by outside counsel to Rockwell. The Sierra Club had requested that Rockwell "admit that DOE does not have operational technology to safely and economically recover plutonium for all of the combustibles and residues stored at the Rocky Flats Plant;" to which, counsel for Rocky Flats responded: "Denied."⁴³ Similarly, the Sierra Club requested for Rockwell to admit that "combustibles and residues are stored at the Rocky Flats Plant in anticipation of development, testing and implementation of technology to safely and economically recover plutonium from such combustibles and residues," in response to which counsel again responded "Denied."

These answers, taken as a whole, were not accurate, although the questions are not entirely free of ambiguity. The term "operational technology" in #10, or the compound purposes and intents associated with #11 could permit counsel to stake out factual positions that the answers were true as he understood the questions. Moreover, this unsworn statement -- by outside counsel setting forth a factual position for purposes of litigation -- is somewhat remote to the central inquiry as to what went on at Rockwell, and did not constitute an overlooked "tantalizing lead."

The prosecutors, primarily Murtha, had spent considerable efforts on the issue of Rockwell's storage of the residues, including the knowledge of the drafter of the affidavit. The two statements cited by the Wolpe Report in the Sierra Club litigation could not reasonably have assisted in this inquiry, nor would the statements have provided independent bases for prosecution.

VIII. Culpability of DOE

Until the execution of the search warrant and the ensuing interviews, it was simply unknown whether Department of Energy employees would have culpability. Ordinarily DOE employees would have been the most logical initial witnesses in pre-search warrant investigatory activities, as a source of necessary background information concerning how the plant operated. Because DOE's

⁴³ This document, entitled Defendant Rockwell International Corporation's Responses and Objections to Plaintiff's Third Set of Discovery Requests, was reprinted starting at page 1194 of the Hearings. The question and answer are found at page 8 of the pleading and page 1201 of the Hearings.

complicity was unknown, no such interviews were conducted.

After the execution of the search warrant, it became quickly apparent to the prosecutors that despite the fact that DOE in theory "owned" the Rocky Flats plant and Rockwell was "merely" the contractor, in truth and in fact, Rockwell was wholly responsible for the day-to-day operations of the plant and its environmental compliance. The DOE presence amounted to about 50 individuals, only two or three having responsibility for environmental enforcement. In contrast, Rockwell had about 6000 employees.

The Sentencing Memorandum made a compelling argument that DOE historically put weapons production above environmental compliance, and that DOE felt that it was more of a partner than a regulator of Rockwell, in resisting applicability of the environmental laws. Nonetheless, after the search warrant, the reality as to how Rocky Flats was run was apparent to the investigatory team, and the consensus was quickly reached that with the limited exception noted in the next paragraph, no DOE employees had criminal exposure at Rocky Flats.

There is one exception. In 1985, a DOE official filled out a report to the EPA in which he stated that the groundwater monitoring system was in full compliance with all regulatory requirements. An accompanying footnote qualified this statement by indicating that the facility complied with the "spirit" of RCRA. At the outset, this document appeared to be a promising area for a "false statements" charge since DOE knew that Rockwell was not in compliance with the groundwater monitoring. However, the investigation uncovered that the EPA placed no reliance on this document or representation. To the contrary, the EPA was well aware of the actual status -- and problems -- with groundwater monitoring at Rocky Flats. Furthermore, the groundwater monitoring problems had been actively addressed since 1985. The decision on charging this count had to be made by November 1990, because of the five-year statute of limitations. By fall 1990, the prosecutors reached a deliberate decision to let the statute of limitations run and not bring charges.

IX. Institutional and Personal Relations During Investigation

In assessing the overall disposition in this case, and in assessing the Wolpe Subcommittee's criticisms that the results were tainted by Main Justice interference, it is notable that there were a range of views among the prosecutors as to the prosecutive merit of this case.

A. The divergence of views among the investigatory team. The different prosecutors held widely divergent views as to the whether the evidence revealed violations, and whether the violations were serious. On the one hand, the case was seen as a series of

criminal acts, perhaps each not particularly egregious, but reflective of persistent institutional indifference of the environmental laws for which criminal punishment was in order. This view was held by Fimberg, Murtha, Lipsky and Smith.

On the other extreme, the case was seen as a series of no-harm technical, permit-type violations, ordinarily the sort which would be handled administratively and for which criminal prosecution was marginally justified if at all. This view was shared, to some extent, by Hassler and Buck.⁴⁴ In this regard, the failures to obtain RCRA interim status for the vacuum filter sludge storage or the pondcrete storage on the 904 pad were seen as insignificant, and a result of bureaucratic oversight. Moreover, Rockwell had received no administrative sanction other than a warning letter for the CWA biological oxygen demand violations.⁴⁵ Hassler suggested that as far as individual culpability is concerned, he was unsure whether there was a single person at Rockwell who did not believe

⁴⁴ Hassler was interviewed by the Wolpe Subcommittee but not called as a witness. Buck, whom the Wolpe Subcommittee knew believed this case to have been over-prosecuted, was not even interviewed.

⁴⁵ Murtha considered these counts weak for the same reason. When asked why his December 28, 1990, memo discussed indictment in several areas, but did not include the biological oxygen demand [BOD] violations, Murtha testified:

Mr. MURTHA. Well, I guess that reflected my bias that those would have been weak charges to bring to trial.

The reason I felt that way was because the violations, from a numerical standpoint, were relatively marginal. More significantly, from my standpoint, EPA was completely aware of these violations and essentially after the violations occurred had sent Rockwell a warning letter.

And it was my thought as a criminal prosecutor that if these things only provoke from the regulatory authorities a warning letter, and not even a civil fine or some sort of corrective action, that there certainly is the possibility that skillful defense counsel will be able to make those facts known to a jury, who is going to be wondering "What's the big deal about that we're in criminal court if in fact this activity, known to the EPA, did not provide civil action?" Staff Interviews at 288 (testimony of Murtha).

he was in good faith subjectively attempting to comply with the environmental laws.⁴⁶

Throughout the investigation, and especially from spring 1990 when Hassler and Buck came on board, to spring 1991, when Hassler left and Buck became considerably less involved, there were numerous disagreements among the four attorneys. These disputes covered such basic issues as what topics should be investigated, what the evidence so far obtained demonstrated, and as plea negotiations commenced, what the case was "worth," and whether target letters should be sent.⁴⁷ Because of their fundamental perceptions concerning the case, Hassler and Buck each became disaffected and gradually wanted off the case. These disagreements among attorneys also caused friction between Lipsky and attorneys Buck and Hassler.⁴⁸ Finally, there were simply personality clashes.

⁴⁶ Ken Buck made the point that one of the indicia of the lack of criminality by the Rockwell employees and the lack of merit in the criminal prosecution was the fact that out of a plant with 6000 workers, not one witness came forward or was developed who provided hard evidence of manifestly bad subjective intent. Buck offered that perhaps the reason for the witness problems was that no such evidence existed.

⁴⁷ Buck and Hassler, because of their perceptions as to an utter lack of evidence against individuals, disagreed with sending out target letters, especially if any part of the stated reason included the fact that the letters would put pressure on Rockwell. Fimberg, Murtha and Norton, having identified certain employees as persons against whom the government was attempting to build cases, viewed target letters as appropriate, and at the same time recognized that the timing of sending the letters would send a signal to Rockwell.

⁴⁸ Lipsky was viewed by Hassler and Buck as unable to listen to reason as to the evidentiary difficulties with the case. Lipsky viewed the motives of Hassler and Buck with suspicion. He thought Buck made a disingenuous commitment to the case as part of his deal to be hired as an Assistant United States Attorney, and viewed Hassler as seeking to leave the case from the instant he joined it. Lipsky testified that during the plea negotiations, after Hassler and Buck had left, "I had better time working on [certain issues] after certain people left than while they were there." Staff Interviews at 18 (testimony of Lipsky). Hassler in fact came on board with the belief that this was a career move, and did not commence job-hunting until December 1990. He left in April 1991. Even Lipsky and Smith had problems. There were typical "turf-battles." For example, Smith felt that EPA had provided significantly more resources proportionally than the FBI.

No basis exists to find that anybody maintained his individual views of the merits of the case other than in good faith. Lipsky was asked this specifically in his interview and agreed that all the attorneys held their views of the case in honest good faith.

Team morale is an intangible, and it would have been better if the relations had been more harmonious. Although disagreements can be healthy in causing constant evaluation of the case, the amount of dissension appears not productive and may have exacted some unquantifiable drag on the investigation. Over time Fimberg became frustrated by the views of Buck and Hassler.⁴⁹ On the line level, however, no neat alignment existed between the Washington prosecutors (Murtha and Hassler from ENRD) and the Denver prosecutors (Fimberg and Buck). Nor is there any basis to conclude that the inter-attorney conflicts at the line level stemmed from any Main Justice "influence." Indeed, Hassler and Buck appeared to have less "aggressive" views of the case than supervisory officials at DOJ, such as Block and Hartman. Moreover, Hassler viewed Murtha and Fimberg as nearly equally aggressive in their views of the case.

After April 1991, when the critical plea decisions were made, Buck and Hassler no longer had real input into the direction of the case. Even in the pre-April 1991 time-frame, during the early stages of the plea negotiations, Buck and Hassler had virtually no influence on the negotiating positions of the government.

B. Main Justice's role in the case prior to the plea negotiations. This was a case of enormous significance, involving the criminal prosecution of the environmental laws at a government-owned nuclear weapons manufacturing facility. At the outset, Main Justice was consulted concerning the execution of the search warrant, and fully supported that decision.

Thereafter, in connection with the investigation, Main Justice provided further support in the form of funding the Denver slot (for Buck), hiring Hassler to work full-time, and dedicating a full-time paralegal for document control purposes.

Aside from these personnel matters, virtually no substantive decisions required Main Justice's concurrence during the investigatory phase of this case. Nor were there investigatory matters into which Main Justice asserted itself.

Throughout the investigation, informational meetings were held approximately every three months to inform the AAG for ENRD and

⁴⁹ Hassler had never tried a criminal case, though he had significant environmental experience and had worked for the Iran-Contra Independent Counsel. Buck had worked as an attorney for the House of Representatives and as an attorney in the Tax Division.

supervisors in the Environmental Crimes Section of the progress of the case. Despite being kept informed as to the progress of events, Main Justice provided no real input into the direction of the investigation.⁵⁰ Norton was explicit that he made the management decisions in the case:

Mr. NORTON. I took great pains, as you will recall, in my testimony [executive session] last time to take credit for, if you will, or to say that virtually all the decisions that were made were decisions I made.

And the reason that I did was not necessarily because I had necessarily the authority to do that, but I was concerned with the reputation of the Lands Division to become bureaucratic, to become cumbersome, to require all kinds of memoranda back and forth, and to and from people in the process. And I did not want our investigation to be encumbered by those kinds of policy issues.

So while I must say that I essentially cleared every decision that was made in the investigation with the Lands Division, I was given because, I think, I forced the issue, great autonomy to proceed in whichever fashion we thought appropriate. Staff Interviews at 300 (testimony of Norton).

* * *

Mr. ROACH. You mentioned that you were concerned about the reputation that the Lands Division had to be bureaucratic, and therefore you were trying to maintain as much autonomy as possible with respect to this investigation.

Could you elaborate a little bit more on specifically what kind of concerns you had about that?

Mr. NORTON. Well I don't know that I can, because I frankly thought that the latitude that we ultimately were given and had in this investigation and prosecution were fairly significant. Staff Interviews at 301 (testimony of Norton.)

In our interview, Norton reaffirmed that he viewed himself as the prime decision-maker and that the main purpose of the various informational meetings was to keep Main Justice informed. In our interview, Hartman stated he essentially ratified the consensus decisions which reached him.

⁵⁰ See Hearings at 1320-1321 (testimony of Fimberg).

Each individual -- Fimberg, Murtha, Norton and Lipsky -- was questioned about possible efforts of Main Justice to limit or control the scope of the investigation, and each denied any such events occurring. Fimberg testified as follows:

Mr. ROACH. Did any of those gentlemen, and by those gentlemen I am referring to Mr. Hartman or Mr. Stewart, or anyone else from the Justice Department, express to you the opinion or recommendation or provide any communication that the Government couldn't or shouldn't indict Government personnel in this case?

Mr. FIMBERG. No, sir, no, sir, not at all. Let me take the opportunity to say, as I have said repeatedly in the past, as I said in open court in Denver on June 1st this year at the sentencing hearing, and as a matter of public record, ... I have said then, and I have said repeatedly, at no time during this investigation did anyone direct me to do anything other than do my job and to follow the investigation wherever it led.

At no time did anyone ever say stay away from the Department of Energy, back off of this, don't pursue this Fimberg, et cetera, et cetera. At no time was there any direct instruction to that effect or any suggestion or implication of that.

* * *

Mr. FIMBERG: [N]o one, and I say it categorically, no one ever said to me or gave me an instruction or by implication suggested that I should not pursue something to protect the Government or DOE or anybody else. Frankly, if that had happened, I would have been outraged. Hearings at 1327-28 (testimony of Fimberg).

Lipsky testified consistently:

Mr. ROACH. [D]id any of the prosecution team or Main Justice personnel express the opinion that any individual DOE person should be indicted?

Mr. LIPSKY. I don't believe that anyone told us that anyone should be or should not be indicted. There seemed to be a certain amount of latitude provided to us to go out and do the whole gamut, turn over all the rocks. No one said, "Focus only over in this area." No one said, "Yes, we are going to have to get some DOE officials out of this." But, on the other side, on one said "That's off base" either. Staff Interviews at 52 (testimony of Lipsky).

Main Justice's deference to Norton and the line prosecutors is also illustrated by several occasions when counsel for Rockwell attempted to go around the Denver prosecutors and seek an audience with Main Justice.⁵¹

PLEA NEGOTIATIONS AND THE PLEA AGREEMENT

X. Plea Negotiations Re: Counts of Conviction, Amount of Fine, and Non-Prosecution of Individuals.

The first plea overtures were made somewhat informally in the end of 1990. As Norton recalled, Lee Foreman, Rockwell's Denver counsel, made a brief oral overture expressing an interest in settlement. Fimberg described the overture as "very vague," in the nature of "'well, we should sit down and talk.'" Staff Interviews at 116-117 (testimony of Fimberg).

In January 1991,⁵² Rockwell made a proposal, the salient terms of which were that: Rockwell would plead nolo contendere to a series of misdemeanors, pay a one million dollar fine, the government would not prosecute individuals, and the government would agree to certain public statements in which the government would disavow some of the more sensational allegations in the search warrant. This offer was not considered realistic. Norton stated in our interview he was surprised that Rockwell came in with such a low offer.

In late 1990, at the outset of negotiations, there were discussions among the government attorneys as to the monetary worth of the case. The various prosecutors had widely divergent views as to the settlement value of the case, and the recollections now are not entirely consistent. As a general matter, Fimberg was looking for an amount greater than \$20 million, while Murtha saw the settlement value as around \$5 million. Hassler viewed the case as worth less than Murtha, and Buck saw the case as having practically no value at all.⁵³ Norton stated in our interview that from the outset he was looking for a fine in the \$15 to \$20 million range.

⁵¹ See Section XIV, infra.

⁵² It appears these proposals were set forth at meetings on January 14, 1991, and January 17, 1991. The evolution of the plea negotiations is set forth in the correspondence and internal memoranda. See "Attachment 5" (chronological compilation of documents relating to the plea negotiations).

⁵³ Fimberg testified that he was originally looking for a fine from between \$21 million and \$27 million. Staff Interviews at 207-208 (testimony of Fimberg).

Aside from the amount of the fine, the critical terms for the prosecutors were: 1) Rockwell would have to plead guilty, not nolo; 2) the plea would be to multiple felonies; 3) Rockwell would pay the fine and not seek indemnification for the fine from DOE.⁵⁴

As far as Rockwell's demand for a corporate-only disposition, the prosecutors had acknowledged this possibility as early as August 1990. In an August 14, 1990, memorandum from Fimberg to Norton, Fimberg recounted that at an August 10, 1990, meeting including the four line prosecutors, Barry Hartman and Jerry Block: "the possibility of a corporate-only plea was briefly mentioned for the first time. Everyone agreed that this was a possible option, with or without a report." Although by 1991, no decisions had been made concerning the prosecution of individuals, it was understood that in light of the cases against individuals that had been developed so far, a corporate-only disposition was an option to be considered as part of a settlement in this case. Norton thus appeared receptive to a corporate-only disposition. What appear to be Fimberg's notes of a January 14, 1991, meeting with Norton and Rockwell attorneys recount that Rockwell wanted "No individual charges." The notes described Norton's reaction as: "Mike [Norton] encouraged this more than I'd like to." In his analysis of the Rockwell January 1991 offer as contrasted with the DOJ "bottom line," Fimberg allowed for the possibility that the government might agree that: "No Rockwell individuals will be charged, or misdemeanors only."⁵⁵

As indicated, the prosecutors differed as to the fine that should be sought. Murtha and Hassler wrote a memorandum to Hartman dated December 28, 1990, and another memorandum to Norton and Block dated January 21, 1991. In these memoranda, Murtha and Hassler set forth their arguments in favor of a \$5 million fine.⁵⁶ Fimberg had originally wanted to respond to Rockwell's offer with a counter-offer in the neighborhood of \$70 million. Murtha thought this was excessive, even as a negotiating strategy. Main Justice took no steps in response to these memoranda. Norton stated he was unaware of the communications to Main Justice on this issue but

⁵⁴ For discussion of the indemnification issue, see Section XI, infra.

⁵⁵ The August 14, 1990, Fimberg-Norton memorandum, the notes of the January 14, 1991, meeting and the January 18, 1991, Memorandum discussing the Rockwell January 17, 1991, offer and DOJ's "bottom line" are attached to this Memorandum among the plea negotiation documents as part of "Attachment 5."

⁵⁶ The December 28, 1990, memorandum argues for a fine in the range of \$5 to \$7 million; the January 21, 1991, memorandum advocates a fine in the range of \$4 to \$6 million. Copies of these memoranda are attached as part of "Attachment 5."

that even if he had been aware he would not have been bothered.

In a letter signed by Norton dated February 7, 1991, Norton, relying primarily on Fimberg's recommendation, counter-offered with multiple felonies and a \$52 million fine.⁵⁷ The parties met on February 12, 1991, and Rockwell asked for justification for the fine, and in a letter from Norton to Rockwell attorneys dated March 7, 1991, the fine was justified as constituting over 1000 days of various RCRA violations at \$50,000 per day.⁵⁸

Fimberg stated that Rockwell's offer to plead nolo to misdemeanors and pay one million dollars was "categorically rejected." He described the basis for the \$52 million counter-offer as a "reasonable place to start, given the realities of the negotiations, so \$52 million, I thought, was a pretty good place to start." Hearings at 1603-04 (testimony of Fimberg). Norton likewise testified that he made the decision to respond with \$52 million, based on Fimberg's advice:

Mr. NORTON. [I] decided to tilt toward Fimberg and his number of \$52 million, because I had great trust and confidence that he, being the most aggressive of the prosecutors, would help bring this about. And I wanted to start at the highest level from a negotiating perspective.

Mr. ROACH. Was it your sense that generally the positions advocated by the other individuals whom you recall being present in the conversation were much lower than Mr. Fimberg's?

Mr. NORTON. Well, I recall Mr. Hassler's -- I think Mr. Hassler participated. His view of the case was that it was a marginal case, as was Mr. Buck's, and they were at the extreme low end of the range.

Mr. Murtha and Mr. Block were in the \$5 to \$4 million range with what they thought was an appropriate fine level.

I probably started somewhere in the \$40 million range. Staff Interviews at 304 (testimony of Norton).

⁵⁷ A copy of the February 7, 1991, letter from Norton to Lee Foreman, attorney for Rockwell, is attached as part of "Attachment 5."

⁵⁸ A copy of the March 7, 1991, letter from Norton to Lee Foreman, attorney for Rockwell, is attached as part of "Attachment 5."

On April 9, 1991, Rockwell attorneys made a major presentation to DOJ and USAO personnel, including Stewart, Hartman, Block, Fimberg, Murtha and Hassler. They argued primarily that: 1) the search warrant allegations were totally overblown, and if DOJ had known at the time of the search what it had come to learn through the investigation, the case never would have proceeded criminally; and 2) Rockwell for years had performed exactly as DOE expected Rockwell to perform and that criminal charges were not appropriate. As a follow-up to the meeting, Rockwell sent correspondence amplifying its positions.⁵⁹

In April of 1991, the government sent out "target letters." These would have been understood by the lawyers for the Rockwell employees and Rockwell as suggesting that critical prosecutive decisions were going to be made in June. Fimberg pushed the view that despite the occasional contacts between government attorneys and Rockwell attorneys on the possibility of a plea, it was incumbent for Rockwell to propose something in writing.

On June 27, Rockwell came forward with an offer to plead nolo to four RCRA felonies, pay a fine of \$5 million, and pay an additional \$5 million in civil "assessments or contributions."⁶⁰ Rockwell further proposed that individuals not be prosecuted. The reaction of Fimberg was that this reflected some movement, but not nearly enough. Fimberg was cautious that the agreement not so specifically link the disposition with the non-prosecution of individuals.⁶¹

On July 9, Norton responded with a proposal that Rockwell plead guilty to seven felonies (both RCRA and CWA) and pay a fine of

⁵⁹ Rockwell's position was set forth in a letter dated April 22, 1991, from Vince Fuller, counsel to Rockwell, to ENRD AAG Richard Stewart. This letter is attached as part of "Attachment 5."

⁶⁰ A copy of the June 27, 1991, letter from Harold Haddon and Lee Foreman, counsel for Rockwell, to Norton, is attached as part of "Attachment 5."

⁶¹ As Fimberg wrote in a Memorandum to Norton dated July 1, 1991, analyzing Rockwell's offer: "[The proposed term involving non-prosecution of individuals] creates linkage between the corporate plea and the individuals, and we should duck this for now. We have to be careful what we say, to avoid an allegation that we are holding the individuals hostage. Clearly we're not -- target letters were sent with a good faith basis for doing so, but that doesn't mean that someone won't argue this at some point. Misdemeanor dispositions with some individuals may be possible." A copy of this memorandum is attached as part of "Attachment 5."

\$15.5 million.⁶² The government did not include a promise of non-prosecution of corporate employees.

On July 16, 1991, Rockwell offered to plead nolo to RCRA and CWA counts, and pay \$12 million. Rockwell again proposed that individuals not be prosecuted.⁶³

On July 17, 1991, the government responded, again insisting on guilty pleas and a \$15.5 million criminal fine. At this time, and for the first time, the government agreed that in return for Rockwell's plea, the United States would not bring criminal charges against Rockwell employees.⁶⁴ These terms thereafter embodied the outline for the settlement.

The evaluation of the decision to forgo the prosecution of individuals is discussed in detail, infra. Norton understood the basis for this decision as being rather straightforward -- that not enough evidence existed to support charging individuals. Fimberg and Murtha, though, thought that there might be sufficient evidence to prosecute some individuals.⁶⁵ On occasion, Fimberg suggested the possibility of prosecuting individuals for misdemeanors, but

⁶² A copy of the July 9, 1991, letter from Norton to Foreman is attached as part of "Attachment 5."

Fimberg thought the government "dropped" too quickly. He attributes this decision to Norton. Staff Interviews at 209-210 (testimony of Fimberg). Norton stated he believed that this decision was made in consultation with Fimberg and does not recall Fimberg not being in agreement. The contemporaneous documents generally support Fimberg's recollection. See July 3, 1991, Memorandum from Fimberg to Norton, attached as part of "Attachment 5."

⁶³ A copy of the July 16, 1991, letter from Haddon and Fuller to Norton is attached as part of "Attachment 5."

⁶⁴ A copy of the July 17, 1991, letter from Norton to Haddon is attached as part of "Attachment 5."

⁶⁵ In our interview with Norton, we probed to see if Norton's view was really different from Fimberg's and Murtha's (since his understanding of the evidence would necessarily have come from them) or whether he simply was using different terms to describe the same state of evidence. It appears that Norton was aware that there were "stronger" cases against lower-level employees and that "fairness issues" weighed against charging them. As a general matter, Norton used more categorical terms to describe the lack of evidence.

Norton rejected this.⁶⁶

Throughout the fall of 1991, the negotiations bogged down on issues involving indemnification. In addition, Rockwell wanted assurances that this plea would satisfy outstanding liability with the State of Colorado. Ultimately, Fimberg negotiated the fine "up" from \$15.5 million to \$18.5 million, by bringing in the state of Colorado and providing certain additional assurances concerning indemnification and collateral exposure. Two million dollars of the resulting fine would thereafter go to Colorado. Furthermore, the agreement remained at 5 felonies and 5 misdemeanors, even after Shell Oil.

XI. Plea Negotiations Re: Indemnification of Fine and Attorneys' Fees, Global Disposition, and Agreed Statements.

One of the major issues during the plea negotiations for both the government and Rockwell was whether criminal fines, attorneys' fees and related civil liabilities of Rockwell would be indemnified by the terms of Rockwell's contract with DOE. The prosecutors were adamant that any plea agreement include a provision at least precluding Rockwell from seeking indemnification for the amount of the criminal fine. Indeed, the possibility that the government might successfully obtain convictions of Rockwell at trial only to have the criminal fine reimbursed by the U.S. taxpayer was a major -- perhaps the primary -- factor motivating the government to try to reach settlement of the case. Hearings at 1150 (testimony of Murtha). A "successful" prosecution that ultimately left the government as a whole empty handed would not only fail to punish or deter Rockwell in a meaningful way, it would also make the whole prosecution look like a pointless and expensive academic exercise.

A. Contract provisions relating to indemnification. Under the "Allowable Costs" section of the DOE-Rockwell contract, specifically paragraph 54(d)(16), the following costs were reimbursable:

All costs incurred by the Contractor with respect to any and all liabilities, claims, demands, damage costs, or penalties (such as civil sanctions including fines), arising out of, or related to environmental, safety and health activities,

⁶⁶ Since Norton did not believe evidence existed to support individual culpability, he viewed it as "an improper exercise of the prosecutorial function, to essentially squeeze misdemeanor pleas out of individuals to avoid felony prosecutions; and that if the evidence isn't there, we shouldn't charge individuals." Norton further believed misdemeanor pleas "would denigrate the significance of this investigation." Staff Interviews at 309 (testimony of Norton).

including costs incurred with respect to investigations, removal, remedial action, ground and surface water or other clean-up of hazardous, toxic or contaminated material(s), except for those costs that result from conduct identified in subparagraph (e)(17)(ii). . . . (emphasis added).

Subparagraph (e)(17)(ii) provides that the following are non-reimbursable costs:

Losses (including litigation expenses, counsel fees, and settlements) on, or arising from the sale, exchange, or abandonment of capital assets . . . and losses where such losses or expenses:

* * *

(ii) result from willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel (emphasis added).⁶⁷

Although the contract did not explicitly address the issue of criminal fines, the contract by its terms prohibited reimbursement where the fines resulted from "willful misconduct" or "lack of good faith" on the part of "managerial personnel." The prosecutors' concerns were twofold. First, even if Rockwell were convicted for "knowing" violations of environmental laws, it might succeed in arguing that the violations were not "willful," in the sense of a specific intent to violate the law, and that therefore any fines from mere "knowing" violations are reimbursable under the terms of its contract. The highly technical nature of RCRA and CWA as regulatory offenses made this a distinct possibility.

A second, and perhaps more serious problem was the extremely narrow contractual definition of the term "managerial personnel." In an earlier civil dispute with Rockwell involving Rocky Flats, DOE had taken the position that the only person at the entire Rocky Flats facility who could be consider "managerial personnel" under the contract was the manger of the entire Rocky Flats plant. Under

⁶⁷ The contract defined managerial personnel as:

[T]he Contractor's directors, officers and any of its managers, superintendents, or other equivalent representatives who have supervision or direction of (1) all or substantially all of the Contractor's business; or (2) all or substantially all of the Contractor's operation at any one plant or separate location at which this contract is being performed; or (3) a separate and complete major industrial operation in connection with the performance of this contract; or (4) a separate and complete major construction, alteration or repair operation in connection with performance of this contract.

that interpretation, the only way to prevent reimbursement of a criminal penalty was for the prosecution to prove "willful misconduct" or "lack of good faith" by the top manager of the plant, who was a single individual during the relevant period. Although there was some evidence that this individual knew about some of the environmental violations, it was not clear whether the government could show that he acted "willfully" or in "bad faith." Moreover, this individual died in 1990, making it impossible for the government to convict him and further complicating the indemnification issue. Even if the definition of managerial personnel were broadened, the prosecutors were concerned that they nonetheless would not be able to establish criminal wrongdoing by other than relatively low-level employees.

In February 1991, during the early stages of the plea negotiations, the prosecutors consulted with officials from DOE's general counsel's office and learned that DOE would resist indemnification for criminal fines. There was no precedent, however, involving claims for indemnification for criminal penalties under DOE's contracts. It was unclear whether DOE's resistance, based on public policy grounds, would be sufficient to overcome the specific language and prior DOE interpretations of the contract. DOE's lawyers were not optimistic they would have prevailed with a public policy argument in court.⁶⁸

B. Specific plea negotiations concerning indemnification of attorneys' fees and civil liability. The government insisted from the beginning of the plea negotiations that any agreement would require Rockwell to waive its right to seek indemnification for the amount of the fine. Rockwell acquiesced on that basic issue in its first written offer in June 1991.⁶⁹

C. Civil liability and global settlement. After roughly July 1991, the negotiations focussed primarily on issues associated with the impact of the plea on Rockwell's rights to indemnification of attorneys' fees and related civil liability. From Rockwell's perspective, a critical concern was that DOE would seek to deny Rockwell indemnification for civil liability (potentially from the EPA, the State of Colorado and from citizens' suits) and clean-up costs because of the guilty pleas. DOE had made it clear to the government that it would be hard-pressed to refuse to reimburse Rockwell for such civil liability, but Rockwell was concerned that DOE would bow to political pressure or take a novel position in

⁶⁸ Counsel for DOE believed that Rockwell also would have had public policy arguments, *i.e.*, a very broad indemnification provision is critical to the government's ability to retain a private contractor to build nuclear bombs.

⁶⁹ See June 27, 1991, letter from Haddon and Fuller to Norton, attached as part of "Attachment 5."

light of the highly publicized Rocky Flats prosecution. Rockwell repeatedly sought for the government to agree to nolo contendere pleas, which would help reduce its exposure to such liability and also facilitate reimbursement from DOE for any civil judgments or other costs related to third-party claims.

Even after Rockwell had agreed in principle to felony guilty pleas, Rockwell sought DOE interference to attempt to persuade the government to back away from guilty pleas. Rockwell attorneys wrote to DOE pointing out that nolo pleas may lessen DOE's resulting exposure if DOE had to reimburse Rockwell for matters of civil liability. In a September 4, 1991, letter to Norton, Deputy Secretary of Energy W. Henson Moore, echoing Rockwell's argument, noted that nolo pleas might have the effect of potentially limiting DOE's exposure.⁷⁰

Norton regarded DOE's input as "improper" and disregarded it. Nolo pleas were categorically ruled out by the government. Norton made clear to Rockwell that one of the basic terms of any plea agreement would be guilty pleas to felony counts. By October 15, 1991, Rockwell had again acquiesced and agreed to enter pleas of guilty, but only after receiving written assurances from DOE that guilty pleas would not "be determinative" in denying them reimbursement for related civil liability.⁷¹

To the same end, Rockwell wanted to bring the EPA into the process in order that it would achieve finality insofar as the environmental problems discovered at Rocky Flats were concerned. Very early in the negotiations, the government contacted EPA, and worked with EPA in negotiating with Rockwell the precise language whereby the EPA gave up its right to pursue additional civil penalties on the conduct covered by the plea, and those areas where the EPA remained free to investigate and seek such penalties as may be appropriate.⁷²

D. Attorneys' fees and litigation costs. The issue of indemnification of attorneys' fees and litigation costs was also the subject of extensive negotiations and grew increasingly complicated, both legally and factually, as the negotiations progressed. There were two separate but related issues. The first involved Rockwell's right to seek indemnification for attorneys'

⁷⁰ The letter from Rockwell's attorneys to DOE, and from the DOE to Norton are attached as part of "Attachment 6."

⁷¹ See September 19, 1991, letter from John J. Easton, Acting General Counsel, DOE, to Fuller and Haddon, attached as part of "Attachment 6."

⁷² The correspondence between the EPA and the prosecutors on this topic is included as part of "Attachment 12."

fees -- both for corporate attorneys and attorneys representing individuals -- under the terms of its contract with DOE. The second involved the impact of the Major Frauds Act on the enforceability of these indemnification provisions.

1. Attorneys' fees for corporate attorneys. The government's early plea proposals included a general prohibition on Rockwell seeking indemnification for attorneys' fees and costs incurred defending the criminal investigation and implementing the plea agreement.⁷³ By July 17, 1991, the government had narrowed its demand and sought to preclude reimbursement only for fees and costs connected with the charged criminal conduct. Rockwell contended this formulation was not workable, since Rockwell's attorneys' fees could not be broken down into fees related to the counts of convictions and fees for non-charged conduct.

Rockwell sought a "bright-line" solution to the fee-allocation problem. In an offer in October 1991, Rockwell proposed that it would be permitted to seek reimbursement for corporate attorneys' fees prior to May 1, 1990, but not thereafter. The government ultimately agreed with the Rockwell approach, but negotiated the cut-off date to January 1, 1990. The plea agreement thus barred Rockwell from seeking indemnification for any corporate attorneys' fees after January 1, 1990, concerning the counts of conviction, but, Rockwell would be permitted to submit claims for fees and costs prior to that date even if directly related to the charged conduct.⁷⁴

The prosecutors' agreement to Rockwell's "bright-line" approach was based on the following considerations: first, the January 1, 1990, date was relatively early in the investigation, covering only the first six months after the execution of the search warrant; second, the prosecutors believed that the bright-line date in fact provided administrative convenience for the government; and, third, the first six months of the investigation focused primarily on issues associated with incinerator use -- uncharged conduct for which Rockwell would have been entitled to reimbursement in any event.

The plea agreement was not carefully drafted on this matter. Fimberg is insistent that the January 1, 1990, date represented a firm cut-off for seeking corporate attorneys' fees, and that this was a device to avoid allocation issues. Fimberg stated this was the clear understanding of himself and Lee Foreman, the primary

⁷³ See February 7, 1991, letter from Norton to Foreman, and July 9, 1991, letter from Norton to Foreman, attached as part of "Attachment 5."

⁷⁴ See December 5, 1991, letter from Fimberg to Foreman, attached as part of "Attachment 6."

negotiator for Rockwell on this issue. This is not quite the way the agreement was drafted. Paragraph 7 of the agreement stated as a general proposition that Rockwell would not seek attorneys' fees on the counts of conviction; paragraph 8 stated that notwithstanding paragraph 7, Rockwell could seek attorneys' fees prior to January 1, 1990. The plea agreement thus did not specifically preclude Rockwell from seeking indemnification for attorneys' fees concerning non-charged conduct (however these fees were allocated or determined by Rockwell) after January 1, 1990.⁷⁵

2. Attorneys' fees for attorneys provided to Rockwell employees. Rockwell also sought the right to seek indemnification of attorneys' fees for the attorneys paid for by Rockwell and provided to past and present Rockwell employees. Although the prosecutors considered resisting this request, or attempting to limit it to the "mere witnesses" (and not the targets), the prosecutors felt that under the DOE-Rockwell contract, they did not have a strong basis for asking Rockwell to forgo seeking indemnification of these fees. Accordingly, the government agreed to permit Rockwell to seek reimbursement of attorneys' fees for the individuals, including the targets. However, in making this concession, which Fimberg insisted provided additional value to Rockwell, the government negotiators were able to get Rockwell to agree to an increase in the fine, up from \$15.5 million.⁷⁶

3. The applicability of the Major Frauds Act. A separate issue of concern to Rockwell was whether DOE would continue to honor the indemnification provisions of the contract.

In September 1991, DOE informed DOJ that it believed that the Major Frauds Act (MFA) of 1988 would determine whether Rockwell's attorneys' fees and defense costs would be reimbursable.⁷⁷ The

⁷⁵ Rockwell has never attempted to exploit this drafting problem, and has not submitted claims for attorneys' fees and costs concerning non-charged conduct after January 1, 1990. Rockwell's conduct in this regard suggests Rockwell's understanding was consistent with Fimberg's.

⁷⁶ There is not a direct one-for-one correlation between this indemnification and the increase in the fine from \$15.5 million to \$18.5 million. This concession by the government, as well as the provisions making this a global disposition and including the EPA and the State of Colorado, were all aspects of the increased "value" to Rockwell. According James Stout, former chief counsel for DOE at the Albuquerque Operations Office, Rockwell's total claims for indemnification for fees for representation of individuals was \$3.7 million.

⁷⁷ See September 4, 1991, letter from W. Henson Moore to Norton, attached as part of "Attachment 6."

MFA expressly provided that fees and costs incurred "in connection with" a criminal investigation are not reimbursable whenever the investigation results in a conviction. If DOE prevailed in its interpretation of the MFA, Rockwell would lose its right to be indemnified for fees and costs.

Fimberg and Murtha believed the DOE's position on the applicability of the MFA was legally untenable and was being advanced by DOE so that DOE could avoid being responsible for any reimbursement, throwing the responsibility back on DOJ and the prosecutors. The MFA, on its face, applied to contracts entered into after November 19, 1988. The Rockwell contract most relevant to the investigation was entered into on January 1, 1986 and continued in effect until December 31, 1989. DOE maintained the Act would apply because Rockwell's legal fees and costs were, for the most part, accrued after December 31, 1989. In Fimberg and Murtha's view, however, the terms of the January 1986 contract would control because the legal fees and costs related to the investigation of conduct that primarily occurred during the pendency of that contract. DOJ's Defense Procurement Fraud Unit in the Criminal Division's Fraud Section, the Civil Division's Commercial Litigation Branch, and ENRD's Environmental Crimes Section all agreed with Fimberg and Murtha.

Fimberg and Murtha also believed that DOE's position on the Major Frauds Act was inconsistent with previous positions that DOE had taken in discussions with Rockwell and DOJ and could be seen by Rockwell as bad faith by DOE. Moreover, it exacerbated Rockwell's uneasiness about whether DOE would generally honor the indemnification provisions in their contract consistent with prior practice.

As a result, Fimberg and Murtha proposed language in the agreement that specifically allowed Rockwell, under an exception to the MFA for settlement agreements, to submit claims for reimbursement for attorneys' fees in the categories discussed above.⁷⁸

E. Statements concerning physiological harm and "secret burning". From the outset of negotiations, Rockwell sought for the government to make statements, in connection with the agreement 1) disavowing the allegations of secret burning and 2) stating that the investigation found no evidence of harm to the surrounding population. The prosecutors agreed with Rockwell on these terms. These were not seen as major or costly concessions. First, the

⁷⁸ See November 14, 1991, letter from Norton to Foreman, setting forth government's revised plea offer, attached as part of "Attachment 6." Also included was a term permitting Rockwell to seek reimbursement for a computer system and database used in both criminal and civil litigation.

prosecutors had not found evidence to support the allegations of secret burning or harm to persons. Rockwell merely sought for the prosecutors to state something which the prosecutors believed to be true. Second, the prosecutors felt it was responsible to make such statements to make sure there was no "panic" or irrational hysteria as a result of the plea.

The actual statements embodied in the plea agreement were quite narrow. As to physiological harm, the agreement stated:

Based on information [1] presently known to the Department of Justice, the conduct [2] to which Rockwell has pleaded guilty did not and has not resulted in [3] substantial [4] physiological harm, to members of the public residing and working outside Rocky Flats' boundaries.

This statement was limited in four ways. It referred to harms 1) presently known 2) resulting from the counts of conviction, that are 3) substantial and 4) physiological.

The statement regarding incinerator use was:

The investigation has not revealed that hazardous or mixed wastes were burned in the Building 771 incinerator during the period October 1988 to January 1989, or, at any time, in the Building 776 fluidized bed incinerator.

Though the prosecutors knew these statements had public relations value to Rockwell, the prosecutors viewed the statements as true. Accordingly, the prosecutors did not view agreement on these terms as having any significant "cost" to the government.

XII. The Plea Agreement.

As a result of the negotiations, the plea agreement⁷⁹ embodied the following terms:

- 1) Rockwell would plead guilty to ten criminal violations of RCRA and CWA (five felony, five misdemeanor);
- 2) Rockwell would pay an \$18.5 million fine, \$2 million of which would go to the Colorado Department of Health;
- 3) The government would not prosecute Rockwell employees;
- 4) EPA and the Colorado Department of Health agreed not to

⁷⁹ A copy of the plea agreement is attached as "Attachment 7."

seek additional penalties based on the counts of conviction or other conduct known to the United States at the time of the plea; however, these agencies were free to seek any other "clean-up" costs associated with Rockwell's operation of Rocky Flats;

5) Rockwell would not seek reimbursement of the fine from DOE;

6) Rockwell agreed not to submit claims for indemnification of attorneys' fees and defense costs incurred on behalf of the corporation concerning the criminal investigation concerning that charged subject areas. An exception was made for fees and costs incurred prior to January 1, 1990. The agreement also specifically authorized submission of claims for fees and costs incurred by Rockwell in providing legal representation for past and present employees and for costs concerning a computer Rockwell had used in both criminal and civil matters;

The parties specifically agreed that the application of the indemnification provisions of the DOE contracts would be a matter left to DOE, and that the agreement was not intended to predetermine contractual issues concerning the existence of "willful misconduct or lack of good faith" by Rockwell "managerial personnel;"

7) The government agreed to statements that "the conduct to which Rockwell has pleaded guilty ... has not resulted in substantial physiological harm" and that the investigation did not reveal any unlawful burning of hazardous wastes as alleged in the search warrant.

XIII. Evaluation of the Agreement not to Prosecute Individuals.

A. How to evaluate the decision. In assessing the prosecutors' decision not to prosecute individual defendants, it is essential to view the decision in the context in which it was made, i.e., as part of a complex plea negotiation in which both parties obtained valuable concessions from the other. Much of the Wolpe Report's criticism of the decision not to charge individuals is misdirected because it focuses on the artificial issue of whether technically there was "enough evidence" to prosecute individuals without giving consideration to the relevant question, which is whether as part of the negotiated plea agreement, the government's commitment not to prosecute individuals was a sound exercise of prosecutorial discretion. To answer that question, it is first necessary to assess the real value of what the government gave up, which is not the technical sufficiency of the evidence against individuals, but the overall prosecutorial value of preserving the right to proceed against individual defendants in the wake of a corporate plea, including the likelihood that the government would

have ever chosen to exercise that right. Second, the value of what the government gave up must be weighed against the overall benefits of the plea agreement, all of which might have been lost if the government had insisted on preserving the right to proceed against individuals.

B. What the government actually gave up. The starting point in analyzing what the government gave up requires some evaluation of the cases against individuals. Much of the questioning by the Wolpe Subcommittee focused on whether there was "enough evidence" to prosecute individuals. The term "enough evidence" is ambiguous, and unless further defined can be understood as meaning anything from bare probable cause to proof beyond a reasonable doubt.

The relevant definition is found in the United States Attorneys' Manual "Principles of Federal Prosecution":

The attorney for the government should commence or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because:

1. No substantial federal interest would be served by prosecution.⁸⁰

The factors to be considered under "Substantial Federal Interest" include:

In determining whether prosecution should be declined because no substantial federal interest would be served by prosecution, the attorney for the government should weigh all relevant considerations, including:

...

2. The nature and seriousness of the offense;
3. The deterrent effect of prosecution;
4. The person's culpability in connection with the offense;

...

7. The probable sentence or the consequences if the person is convicted.⁸¹

⁸⁰ United States Attorneys' Manual [USAM], 9.22-220(A).

⁸¹ USAM 9-27.230(A).

These considerations -- whether the evidence as to whether it would "probably be sufficient to obtain and sustain a conviction," and whether consideration of the related factors associated with the prosecutive decision justify declination -- are matters of the prosecutors' individual and collective judgments. In this case, as indicated, the views of the various prosecutors varied widely as to the evidence and merits of prosecution. Fimberg, in his testimony, discussed the process of a prosecutor's evaluation of evidence, as follows:

Mr. FIMBERG: The amount of evidence, prosecutive decisions are not scientific Mr. Roach. They are extremely subjective. They are matters of art, if you will, as opposed to science. You get ten prosecutors in the room, you will likely -- you may get ten different opinions. But -- so, yes, there were disagreements at times, and there was a free flow, free exchange of information and statements of position and opinion. ...
Hearings at 1328 (testimony of Fimberg).

See also Staff Interviews at 147 (testimony of Fimberg).

The final charging decisions as to individuals were never squarely addressed. In the spring of 1991, as negotiations with the company were ongoing, target memos were sent out to nine individuals perceived to have the most culpability. The government obtained "proffers" from some of the targets in an attempt to see if these individuals could provide evidence against their superiors. As the plea negotiations progressed throughout the summer and fall of 1991, Fimberg had Lipsky continue, sporadically, to seek evidence against individuals in case the negotiations broke down or in case some evidence could be uncovered that would dramatically change the evidence against any single "worthy" target. Ultimately, however, the plea negotiations arrived at an agreement. The final hard decisions as to who should be indicted and the structure of the final indictment -- absent a plea agreement -- were never reached.

As to the bottom line evaluations, it appears that both Fimberg and Murtha believed there was enough evidence -- or believed there ultimately would have been enough evidence -- under traditional charging standards discussed above, to have indicted some Rockwell employees on some counts. Fimberg described the cases against individuals as follows: "I think I said repeatedly, last time and today, I thought there were marginal cases on some individuals. Staff Interviews at 145 (testimony of Fimberg). See also id. at 203 (testimony of Fimberg) ("marginal cases and there were fairness issues involved"). Fimberg felt if the corporate plea had broken down, he might have been able to put together a

case which would have included individuals.⁸² Indeed, individuals were listed in the draft indictment prepared in June, and the prospect of indicting individuals was also alluded to in a September Murtha-Fimberg memorandum when it appeared the negotiations were breaking down.⁸³ They both recognized that the stronger cases were against the lower-ranking employees, whose knowledge of environmental misconduct was greater. They realized that these individuals would not make very attractive defendants. As Murtha testified:

Mr. MURTHA. [W]e did have substantial evidence with respect to low- and mid-level Rockwell managers. Part of what gave me a good deal of pause was that we could only follow this up to a certain level that I thought would leave us wide open to the possibility of having these people be able to argue that they were being made scapegoats for the faults of DOE and the faults of higher-level Rockwell management.

Our strongest evidence, of course was against the lowest ranked guy. The lowest ranked guy was a high school graduate. And it just struck us -- struck me -- that this person would not necessarily be a very appealing individual defendant in a case against a

⁸² As Fimberg testified:

Mr. FIMBERG. [I] am sure that if we had gotten to the indictment stage and it was --- if negotiations with Rockwell had totally broken down at some point and we really were up against writing an indictment, I am sure there would have been a lot of disagreement, but it never got to that point once negotiations seemed that they were going to be fruitful. ...

Mr. ROACH. I am still not clear what the significant disagreements were over because we still haven't resolved the issue of what is it that was in that [prosecution memo and draft indictment] that was being discussed?

Mr. FIMBERG. Whether particular counts, whether particular conduct would be charged, whether it would be a misdemeanor, whether it would be a felony? Would there be individuals, or if there were individuals, who would they be? The full gamut. Staff Interviews at 151 (testimony of Fimberg).

⁸³ See September 26, 1991, note from Murtha to Fimberg, attached as part of "Attachment 11."

Fortune 50 Company. Staff Interviews at 292.⁸⁴

They both viewed the cases against more senior management as far more problematic. As between Fimberg and Murtha, in each of these areas, Fimberg, with more trial experience and confidence, had a more aggressive view of the facts, more willingness to charge, and more confidence of his ability to prevail at trial.⁸⁵

Even though the charging decisions against the individual defendants were never finalized, and even though the sense from Fimberg and Murtha was that charging some individuals would have been a possibility, the prosecutors had numerous reasons to justify the conclusion that in light of all the circumstances, the viability of individual prosecutions was sufficiently weak to justify forgoing individual prosecutions to secure the company's guilty plea. In this regard, the following factors surrounding the evaluation of the cases against individuals, then known by the prosecutors, supported the decision to forgo criminal prosecutions of individuals as part of the resolution of the investigation:

⁸⁴ Fimberg expressed the same sentiments in a hypothetical context:

Mr. FIMBERG. [Where employees fit in the hierarchy is] always an issue in any criminal case, especially white-collar cases where you have a hierarchy of people -- and it was like we were talking earlier, where do you draw that line? Presumably there is some line somewhere and below that line you don't feel good about prosecuting because you take the attitude "these weren't decisionmakers." This was Joe Lunchbox who gets paid every day to come in and turn some valves and he didn't make a decision. He didn't make policy and it was not necessarily a very sympathetic person to prosecute. That's at one end of the spectrum and, again, where you draw that line, it's hard to tell. Staff Interviews at 145 (testimony of Fimberg).

⁸⁵ Norton's recollection is that he was told by Fimberg on more than one occasion that there was not enough evidence to indict individuals and that he (Norton) would not have authorized the corporate-only plea if he had understood there were viable or chargeable cases against individuals. This recollection appears to be inconsistent with Fimberg's recollections and testimony. However, Norton's and Fimberg's recollections are consistent to the extent that in conversations, Fimberg provided Norton with bottom-line conclusions that the evidence was insufficient to justify hanging up the plea, or that Norton at this time only recalls bottom-line conclusions. Norton did recall the prosecutors believed there was greater evidence against the lesser employees.

1) Rockwell -- the institution -- was the most culpable defendant. At bottom, the environmental crimes emanated from a corporate "culture." There was a culture of laxity in conforming with the environmental laws at Rockwell which had existed for years. The current Rockwell employees were part of that culture, but not individually responsible for its creation or perpetuation. A good example is illustrated by the spray irrigation problems, where the inadequacy of spray irrigation was known for years, the various individuals kept on studying how to rectify the problem, and nothing was ever done. The subjective intent of the individuals was not venal; yet the overall responsibility was best attributed to the collective corporate entity and the collective knowledge of the entity.⁸⁶

⁸⁶ The decision that the prosecutors should not base a charging decision on the "responsible corporate officer" doctrine did not affect the charging analysis. The "responsible corporate officer" doctrine has been applied in a few cases to hold corporate officers criminally responsible in certain circumstances where they fail in their duties and thus cause a crime to occur. The precise scope of this doctrine is unclear. At one extreme, this doctrine could be understood as implying "strict liability" -- holding the responsible corporate official criminally responsible for crimes by his subordinates even if he or she subjectively and in good faith tried to carry out the law and subjectively and in good faith believed the law was being followed. A narrower (and more reasonable) interpretation is that the doctrine does not really alter the quantum of actual subjective culpability required to attach criminal liability, but merely takes into account the peculiarities of decision-making in the corporate context and permits criminal liability where subjectively bad intent of the responsible corporate officer permits environmental crimes to occur.

Fimberg understood that to support charging an individual, he would have to be satisfied that the individual was genuinely, subjectively culpable; in other words, the individual had to have knowledge of his environmental obligations (either personally or as a supervisor) and knowingly fail to carry them out. He insisted he would not have brought charges on any sort of theory which approached "strict liability." He viewed the "responsible corporate officer" doctrine more as a weapon to be used in arguing to and instructing the jury and not as a substitute for evidence of actual subjective knowledge and intent. The decision by Main Justice that he should not use the "responsible corporate official doctrine" made no real difference in the charging analysis. See Staff Interviews at 307-309 (testimony of Norton); Staff Interviews at 163-166, 211-12 (testimony of Fimberg).

In our interview, Lipsky minimized the significance of the decision not to use the "responsible corporate official doctrine,"

2) There was no core criminal behavior or evidence of willful intent for any individual. There was no evidence of conspiratorial meetings, no evidence of personal enrichment by the employees, no evidence of concealment or coverup.

3) There was an absence of off-plant harm for which personal accountability was necessary. Furthermore, evidence of off-plant harm would have had powerful trial impact, significantly strengthening the cases.

4) As far as the evidence at trial is concerned, all the potential individual defendants had significant factual defenses as to their respective individual criminal knowledge, intent or culpable acts. The government was forced to rely on hostile, immunized witnesses, effectively represented by the defendant's counsel by virtue of the joint defense agreement.

5) As a more general proposition, each one had to varying degrees a host of substantial "equitable defenses" that: a) they were simply doing what DOE wanted (a factual proposition the prosecutors would have to rebut); b) DOE or other regulators knew exactly what was going on, making it unfair to brand as criminal the very conduct that the regulators permitted to occur (again a factual proposition the prosecutors would have to rebut); c) the individuals were scapegoats for longstanding DOE environmental nonfeasance and the "real criminals" are not on trial.⁸⁷ On a more subtle basis, the defense could portray the history of Rocky Flats somewhat as the government did: for years the government (DOE) did not give Rockwell enough money to carry out necessary environmental tasks, and for years DOE judged Rockwell (and rewarded Rockwell) solely on bomb-making efficiency. In this world, individual employees who were not given the resources to accomplish their tasks should not be held criminally liable. These defenses also correlate to "fairness" reasons to hesitate on individual prosecutions, especially for the lower-level employees.

6) As factual matters, the cases against the highest ranking targets were considered circumstantial and weak. Again, there were no "smoking gun" documents, meetings in which documents were altered or conspiracies hatched, or evidence of personal financial gain which flowed from the violations.

deferring to Fimberg's prosecutorial judgment and experience in bringing charges. Lipsky's statements in our interview were at variance with his testimony before the Wolpe Committee, in which he indicated that the decision not to use the responsible corporate official doctrine "gutted" the case. Hearings at 93 (testimony of Lipsky).

⁸⁷ The prosecution memorandum discussed the applicability of the "DOE" defense in relation to most of the acts.

7) Finally, the resources required to prosecute were enormous, and the prospect of convictions uncertain. The case would have consumed several attorneys, support staff and numerous agents for months. It was the belief of the prosecutors that any individual found guilty would have received probation.

C. What the government received. The concession not to charge individuals was part of a package, in which the government received: 1) guilty pleas to ten counts, including five felonies, 2) a fine of \$18.5 million, and 3) assurance that the fine would be paid by Rockwell and not reimbursed by DOE. All the prosecutors, including Norton and Hartman, as well as S/A Smith, agreed -- and continue to agree -- that this result, when weighed against the weaknesses in the cases against individuals, justified forgoing the individual prosecutions.

The fact that Rockwell pled guilty tends to interfere with the evaluation of the costs and benefits of the agreement. The Wolpe Subcommittee seemed to conclude that everything obtained by plea would necessarily have been obtained at trial. Obviously, if these results at trial were a certainty, then the government simply made concessions and received nothing of value.⁸⁸ To the contrary,

88 Fimberg expressed his frustration with this reasoning as follows:

Mr. FIMBERG. [O]ne of the problems I have personally with some of the judgments that have been made about the case -- and I'm not just talking about the subcommittee -- you know, the media and the press, the other constituents -- is that there seems to be an impression that this was absolutely a hands-down killer case, and why would we give up such a great case that ultimately, clearly, a lot of people would have been convicted and a lot of people would have gone to jail. How could you give that up?

That is just a fundamental misconception. This was an extremely difficult, very problematic case.

It did become clear, as I testified last time, by December of 1990, it's fair to say it was clear to the Department, to myself, that if a good settlement could be reached, that was the way to go.

There were lots of litigation risk [sic] here. There was the risk, as I said last time, that even if we went to trial, even if we charged Rockwell, even if we charged individuals and we litigated back and forth in the Court of Appeals, et cetera, et cetera, and ultimately won the case, there was a very real risk that

the government obtained the certainty of the felony guilty verdicts and Rockwell's payment of the fine, and Rockwell obtained other certainties as to the limits of the prosecution, through negotiations involving concessions by both parties.

There is no neat clean scale which determines what fine is appropriate for what conduct, or what concessions are justified to obtain the particular fine.⁸⁹ As a practical matter, from the government's view, the fine simply had to be of sufficient magnitude as to satisfy the traditional goals of punishment and deterrence. In the Sentencing Memorandum, the government described the fine as follows:

The \$18.5 million fine involves the largest hazardous waste fines in U.S. history, by almost a factor of four. [footnote omitted] In fact, the \$18.5 million fine almost equals the total \$19.5 million of all hazardous waste fines collected by the Justice Department nation-wide from October 1, 1985 to September 30, 1991.

In the nuclear power industry, the Nuclear Regulatory Commission (NRC), from 1987 to 1991, collected total administrative penalties, nation-wide, of \$18.5 million. The single ROCKWELL fine equals this entire

they would all be indemnified by DOE. We didn't think that was a very good result.

So if I could somehow disabuse people of the notion that this was a hand's down winner case that we kind of gave away, that would be something I would really like to do. Staff Interviews at 196 (testimony of Fimberg).

Moreover, if the fact of a "plea" of guilty in any case is used to establish the base line of what the government necessarily would have achieved at trial, then every plea agreement is subject to criticism that the government "gave away" everything "above" the settled disposition, and gained absolutely nothing.

⁸⁹ Indeed, in contrast to the Wolpe Committee's concerns that the government somehow inadequately pursued individual culpability, Buck and Hassler felt the potential culpability of individuals was so marginal that they were not comfortable with sending the "target letters," especially since Fimberg was explicit in acknowledging the significance of this act for negotiating purposes. Nonetheless, Fimberg, Murtha and Norton were quite careful that the decision to send "target letters" was justified by an independent evaluation of the evidence supporting potential culpability of the individuals, even if it sent a signal to Rockwell, and this decision was documented and communicated to Main Justice.

amount, and the largest NRC fine was \$1.25 million.

Sentencing Memorandum at 18 (emphasis in original).

Furthermore, the concession by Rockwell that the company would pay the fine was viewed by all as critical. Every prosecutor and agent knew that justice would not be done, and the government would look ridiculous, if millions of dollars and numerous years of prosecutorial resources were devoted to a costly trial only to have any fines reimbursed by DOE. Whether or not the prospect of indemnification of a criminal fine was substantial or remote, exaggerated or understated, because the possible consequences would have been devastating this concession was critical.⁹⁰

It is particularly difficult to factor in the government's concession not to prosecute individuals as part of the overall analysis of the terms of the plea, since the non-prosecution of individuals may have been "worth" more to Rockwell than to the government,⁹¹ and the government could not hold the individuals "hostage" to extract concessions. This was well understood by both Norton and Fimberg. See Staff Interviews at 331 (testimony of Norton); Staff Interviews at 140 (testimony of Fimberg). It is necessary to compare what the government achieved against some external measure of what the case is "worth" and what punishment is "appropriate" in the abstract -- bearing in mind this was a plea -- and not simply by how much could have been extracted from Rockwell.

Against this background, the evaluation by the prosecutors as to the merits of prosecution of the potentially chargeable individuals -- including the assessment of the strength of the evidence, their roles in the company, and the jury appeal of all their defenses -- and the prosecutors' conclusions that it was worth sacrificing the uncertainties associated with the prosecutions of those individuals as part of the resulting disposition, was well within the range of professional prosecutorial judgments.⁹²

⁹⁰ See Section XI, supra.

⁹¹ If the government did not have a case against individuals -- as advocated by Buck and Hassler -- it gave away nothing.

⁹² We recognize that these conclusions rely in large part on the prosecutors' views of the evidence. As stated, this review could not encompass an independent examination of the underlying evidence. To a certain extent, this is a limitation inherent in the process. It is not feasible to revisit years of investigation by a team of agents and prosecutors, nor is it possible, in hindsight, to evaluate the credibility of the witnesses as they testified or were interviewed.

XIV. Plea Negotiations: Role of Main Justice and Acting Assistant Attorney General for ENRD Hartman.

Acting AAG Hartman, who had replaced Stewart by summer of 1991, had a less "aggressive" view of this case than the Denver prosecutors. Hartman's views were reflected in written comments he made to Attorney General Barr in advance of the plea:

Virtually none of the allegations contained in the search warrant were borne out after a full investigation.⁹³ For example, the most celebrated allegation -- that of midnight burning of hazardous

However, in virtually all "indictment reviews" or "prosecution reviews" which occur prior to bringing charges, the reviewers do not personally examine the underlying evidence; rather, the evidence is accepted as presented by the line prosecutors. The discussion of the evidence here was of the same nature.

The only incentive Fimberg and Murtha would have had in discussing the evidence against individuals would have been to diminish its significance, thereby conceivably diminishing the extent of the concession regarding non-prosecution of individuals. In fact, Fimberg did not diminish his assessment of the viability of individual prosecutions, but insisted he believed individuals could have been charged and that if plea negotiations had broken down he would have advocated them being charged. Despite this view, Fimberg concluded the settlement that was reached was clearly superior to holding out for the individuals. There was no reason to conclude Fimberg and Murtha were not candid as to how they viewed the evidence. Moreover, Fimberg's and Murtha's expressed views of the cases against individuals tracks the contemporaneous documents and memoranda.

⁹³ The issue whether or not the investigation "confirmed" the allegations in the search warrant frequently enters into the analysis of the results of this case. For example, Rockwell took the position that the allegations were not confirmed and that but for the search warrant this matter would have been handled civilly. The argument was made that the government had raised the stakes so much by the highly publicized search that it had to get a criminal disposition. To a certain extent, this sentiment was shared by Buck and Hassler. Norton stated that the case which developed was different than the expectations of the search. Norton stated he had believed prior to the search that the search would yield evidence of midnight burning and secret dumping, and the violations which were ultimately uncovered and prosecuted were simply not of the same criminal quality. Fimberg, Murtha and Lipsky argued that though the precise allegations did not bear out, closely related crimes were discovered which were fairly in the target-zone of the affidavit.

wastes -- was based on aerial infra-red monitoring of the site. As it turned out, the monitoring equipment was defective. ...

If the level of the fine and number of guilty pleas are an appropriate measure, I can assure you the result we have reached by plea agreement is considerably better than what we could have expected had we indicted the company and various individuals, and gone to trial. There were no "high level" officials involved who had sufficient knowledge to be charged and convicted of knowing violations. Additionally, the company had some quite persuasive defenses to many of the corporate charges to which they are nonetheless pleading guilty. Quite frankly, although we can meet standards under the Principles of Federal Prosecution, had we known at the time of the warrant what we now know, it is likely this matter would have been resolved civilly. That is primarily because of the marginal evidence of criminal intentional misconduct, and the lack of any significant environmental harm. (footnote and emphasis added)⁹⁴

In our interview, Hartman stood by these sentiments, stating, in substance, that his understanding of the evidence was that there was no significant environmental harm, these were by and large "storage" or technical offenses, and that typically these would have been handled civilly. Hartman contrasted the facts of this case with the numerous other criminal cases which he approved while Acting AAG for the ENRD. Norton, Fimberg and Murtha were aware that Hartman did not appear to have a particularly aggressive view of the worth of the case.⁹⁵

Nonetheless, no area was discovered where Main Justice -- including Hartman -- took steps to influence the plea negotiations, either to soften the demands that were being made by Norton in consultation, primarily, with Fimberg, or otherwise undermine the negotiations. Other than the issues surrounding the fine, there were no real disagreements among the prosecutors concerning the terms of the disposition, except as occasionally reflected in efforts of Fimberg to put the prospect of misdemeanor dispositions back on the table.

⁹⁴ A copy of the memorandum is attached as "Attachment 8."

⁹⁵ Fimberg, for example, believed that Hartman viewed the case as worth \$4 or \$5 million. Staff Interviews at 210 (testimony of Fimberg). Murtha stated he thought Hartman "had some real profound doubts about the case." Staff Interviews at 290 (testimony of Murtha). Hartman recalled that he had no fixed view of the fine, only that it be justifiable and not simply a number "backed into."

As to the level of the fine, the testimony is unequivocal that Norton made the decision to counter Rockwell's original offer with \$52 million, as he did all the decisions concerning the negotiations of the fine in this case. In addition, the internal documents reveal that Fimberg was working toward a \$20 million settlement, and this goal was nearly achieved in this case. In his testimony, Norton stressed that Hartman provided him latitude to proceed in the negotiations -- as in the investigation -- as he (Norton) saw fit:

Mr. ROACH. Did you ever have the sense -- I mean, whether or not it was ever formally expressed or clearly expressed, did you ever have the sense that there were certain parameters in dealing with this investigation and the settlement that should remain in, or otherwise, the Justice Department -- Main Justice might --

Mr. NORTON. No.

Mr. ROACH [continuing]. Might decide to become more actively involved in the process?

Mr. NORTON. No. I never had that sense or that understanding or communication with anybody. Staff Interviews at 323 (testimony of Norton).

Fimberg likewise viewed Norton as the decision-maker throughout the negotiations:

Mr. FIMBERG. [M]y sense is, Mr. Roach, that Mr. Hartman largely gave Mr. Norton a free rein. And in terms of these numbers, as we discussed a few minutes ago, he kind of said what his bottom line was and pretty much gave Mr. Norton free rein to do better than that if he could.

* * *

The fact that I disagreed, or the fact that I recommended a higher number than Mr. Norton, again, while I recommended a different number, that is not to say that I don't understand where Mr. Norton was coming from. Mr. Norton was the decision-maker. And as you can tell from what I have said so far, he found himself in the middle of a wide range of opinion, and lot of numbers down a this end and my number at the other end. And there were various people who had their own opinions and whose opinions should be respected. Staff Interviews at 212-13 (testimony of Fimberg) (emphasis supplied).

Murtha had the same view:

Mr. MURTHA. But the bottom line was that Mike Norton called the shots on the case, and what Mike did was largely, though not always, a reflection of what Ken Fimberg wanted. Staff Interviews at 281 (testimony of Murtha).

* * *

Mr. MURTHA. [H]artman never quoted a figure at these times that I can recall. I certainly always got the impression that he thought the case was worth less rather than more. But at the same time he very much deferred to Mike [Norton] and Ken [Fimberg] on the issue of what the money should be. And he did this not once but several times. When I was concerned that settlement might fall apart altogether, and I would mention my view of what the state of the negotiations were, Barry would pretty much universally, and pretty much unflappably say, "Well, you know, that's Mike [Norton]'s call." Staff Interviews at 287 (testimony of Murtha).

See also Staff Interviews at 226 (testimony of Murtha).

Hartman was careful to present a united front with Denver so that Rockwell would not perceive it could go behind the backs of the Denver prosecutors and find an easier reception in Washington. Notes of the April presentation by Rockwell in Washington to attorneys from Denver and Main Justice, including Hartman, reflect Hartman as stating, in substance: "as case sits today, there is a case and we are going forward with it."⁹⁶

In addition, there were several occasions during the plea negotiation process where Rockwell attorneys and attorneys for the targets attempted to communicate with Main Justice (i.e., Thornburgh, Stewart and Hartman) and get around Norton and Fimberg.⁹⁷ In each such instance, the attorneys were sent back to Denver. In connection with the plea, as in connection with the investigation, there is no discernible impact of the views of Main Justice, and no evidence of acts by Main Justice which affected the disposition.

⁹⁶ A copy of these notes, believed to be Fimberg's, is attached as part of "Attachment 5."

⁹⁷ A copy of the meeting minutes reflecting Hartman's comments is attached as part of "Attachment 5." Copies of some of the correspondence are attached as "Attachment 9."

GRAND JURY REPORT

XV. The Grand Jury Report.

In our interview, Norton recalled it was his idea to seek a special grand jury. Norton believed the nature of the case required the devotion of a single grand jury to a long-term investigation, and it would not have been feasible to use the two sitting grand juries typically empaneled in Denver. Furthermore, Norton was aware of the provisions which permitted a special grand jury to issue a report and believed a report would be appropriate.

Pursuant to the provisions of the United States Attorneys' Manual, Norton requested authorization from the Criminal Division. In a letter dated June 22, 1989, signed by Deputy Assistant Attorney General John Keeney, to Chief Judge Finesilver, the Department requested a special grand jury be empaneled. At the same time, in a letter from Keeney to Norton, Keeney specifically cautioned as to the narrowness of the circumstances for which a report should issue:

Because this Special Grand Jury will be impaneled in connection with a single investigation, the question of the grand jury's issuance of a report may arise. In view of the fact that it appears that this is the first Special Grand Jury to be impaneled in your district, it is appropriate that I call your attention to the detailed requirement and restrictions concerning such reports, set forth in 18 U.S.C. § 3333 and in Sections 9-11.440 and 9-11.441 of the United States Attorneys' Manual. In particular, you should note that all such reports must be submitted for approval by the Organized Crime and Racketeering Section in Washington, D.C., prior to being presented to the grand jury.⁹⁸

Keeney recalled that including this language in the authorization letter was somewhat unusual, although he did not recall specifically why that language was included or that he specifically intended to caution the Denver prosecutors. Norton did not recall this language, but stated he would not have understood it as an attempt to caution him on elevating expectations concerning the issuance of a grand jury report. Instead, Norton stated he would have read the letter as generally supportive of a grand jury report. Fimberg likewise did not recall this language, and stated he would have seen this as mere "boiler-plate," not cautionary. When the grand jury was empaneled, it was told by the Chief Judge it would be given the opportunity to write a report.

⁹⁸ "Attachment 10" consists of a series of documents related to the issue of the grand jury report. A copy of the letter from Keeney to Norton is attached as part of "Attachment 10."

Throughout the investigation and during the plea negotiations, Fimberg, Murtha and Norton all believed a report would be issued.

In October 1991, as plea negotiations approached the final stages, Fimberg and Murtha prepared a memorandum outlining the law surrounding the issuance of a grand jury report. Fimberg recalled that Norton mentioned this memorandum to Judge Finesilver, who showed an interest in the memorandum. As a result, Fimberg reworked the memorandum and submitted it to the Court.⁹⁹ Although the memorandum also indicated it was submitted in the name of Hartman, Hartman stated he did not authorize his name to be on the document.

A. The position of the Criminal Division and Hartman. Under the requirements of the United States Attorneys Manual, the prosecutors needed the approval of the Assistant Attorney General of the Criminal Division for the issuance of the report.¹⁰⁰

Deputy AAG for the Criminal Division Keeney recalled that when he was first made aware of the issue, his initial judgment was that a report was not appropriate, and that the further research of the Organized Crime and Racketeering Section, through the Acting Chief Paul Coffey, confirmed this conclusion.

The reasoning of Coffey was as follows:

1. The report was not authorized under 18 U.S.C. § 3333(a)(1). The Special Grand Jury statute allows for the issuance of a report in two specified circumstances. The first is set forth in 18 U.S.C. § 3333(a)(1). That provisions contemplates a report "concerning noncriminal misconduct, malfeasance or misfeasance in office involving [1] organized criminal activity by an appointed public officer or employee as [2] the basis for a recommendation of removal or disciplinary action." In Coffey's view, there were two defects in the applicability of this section. First, Coffey felt he knew what Congress intended by the term "organized criminal activity" in this context, especially since the Special Grand Jury provisions of Title 18 were enacted as part of the Organized Crime Control Act, and were part of a legislative package which included such items as immunity, witness protection and wiretaps. He concluded that the activities of DOE did not constitute "organized criminal activity." Second, even if there was some flexibility in the term "organized criminal activity,"

⁹⁹ A copy of the Fimberg memorandum to Norton and the Memorandum submitted to the Court is attached as part of "Attachment 10."

¹⁰⁰ The pertinent provisions of the United States Attorney's Manual, Sections 9-11.300 et seq., are attached as part of "Attachment 10."

Coffey concluded this section was inapplicable since the purpose of this section was to "name names" of government employees for purposes of discipline or to rectify a problem. Coffey understood that the prosecutors did not want to "name names" since the present DOE employees associated with Rocky Flats regulation were not subject to removal or disciplinary action and that problems with environmental non-compliance at Rocky Flats had ameliorated.¹⁰¹

Even getting past the "organized criminal activity" hurdle, therefore, Coffey concluded a report was not authorized under 18 U.S.C. § 3333(a)(1).

2. The report was not authorized under 18 U.S.C. § 3333(a)(2). Section 3333(a)(2) permitted the special grand jury to issue a report "regarding organized crime conditions in the district." Whatever ambiguity was latent in the phrase "organized criminal activity" in (a)(1), Coffey was convinced he fully understood what was meant by "organized crime conditions" in (a)(2). He believed it was clear that whatever went on with DOE at Rocky Flats did not amount to "organized crime conditions" within the meaning of the statute. Coffey understood "organized crime" as meaning criminal activity akin to mob-related crime.¹⁰²

3. Other considerations. In addition, Coffey believed, as a matter of general philosophy, the proper functioning of a grand jury was to bring criminal charges, thereby putting the government's evidence to the test and permitting the accused to defend himself/herself. Coffey did not like having a grand jury write a report, thereby maligning and tarnishing reputations with no ability of the accused to respond. This view comports with one of the traditional justifications for grand jury secrecy, namely, to protect the reputation of an individual who is investigated yet not charged. Coffey did not believe it proper for the government to use the grand jury to effectively accuse government (or

¹⁰¹ In addition, an "(a)(1)" report required the opportunity for a named individual to present evidence on his or her own behalf, significantly complicating the ability to issue such a report.

Coffey's perception that the line prosecutors felt (a)(1) was inappropriate is borne out by a memorandum from Murtha to Coffey, dated November 20, 1991, in which Murtha stated: "We never favored an (a)(1) report because it was too limited in scope, i.e., officials for the purposes of disciplinary action, and because we did not wish to get bogged down with its procedural aspects, i.e., presentation of defense witnesses, that could greatly protract this proceeding." A copy of this memorandum is attached as part of "Attachment 10."

¹⁰² Another problem was that an "(a)(2)" report may not be critical of an identified person. 18 U.S.C. § 3333(b)(2).

Rockwell) employees who were not otherwise chargeable. That this was an environmental case and not a mob-type organized crime case was irrelevant to this consideration.

Because of this attitude toward the functioning of the grand jury, Coffey was similarly resistant to the preparation of a report under any "common law" right of the grand jury to issue a report. Even though such reports have occurred, they are disfavored. Moreover, since Congress had spoken to the circumstances under which a special grand jury could issue a report, congressional action effectively preempted any common law authority the grand jury may have otherwise retained to issue a report.

Coffey felt that other alternatives for getting the facts before the public were available, primarily by way of a sentencing memorandum. Though Coffey had been told the grand jurors might have expectations of participating in the report process, Coffey's view was that the grand jury's desires, though understandable, were legally irrelevant. Furthermore, if the legitimate concern of the prosecutors (and the grand jury) was to get the facts out in the public, this could be accomplished by other means -- such as a sentencing memorandum -- without doing violence to section 3333. The grand jury's desire that it be the source to disseminate information to the public -- rather than a sentencing memorandum -- was hardly controlling. In Coffey's mind, the reasons not to pursue this alternative were not fully rebutted by the prosecutors from ENRD and the United States Attorney's Office.

Lastly, Coffey stated that this is an issue (the scope of the term "organized crime conditions") which perhaps could have been decided either way and defended either way. Nonetheless, no reason exists to conclude that Coffey was motivated by any consideration other than what he concluded was the best interpretation of the purpose and intent of the statute, or to question that he decided the issue in a principled fashion as he saw it on the merits.¹⁰³

¹⁰³ Murtha testified he did not view Coffey as having any institutional agenda:

Mr. MURTHA. [I] didn't get a real sense that Mr. Coffey had a particular institutional agenda that would dictate at narrow definition.

* * *

I mean, frankly, it seemed to be simply a product of what his legal analysis was. And I think it was probably consistent with positions taken by the Justice Department in the past. Staff Interviews at 241 (testimony of Murtha).

Keeney, who reviewed Coffey's legal memorandum on the report issue, viewed the decision as more clear-cut than Coffey. Keeney believed that the law simply did not justify a report. Although he did not recall the details of the analysis during our interview, his general recollection was that the statute was not well drafted and created very narrow authority for grand jury reports. Indeed, he knew of no case in the last 30 years in which Main Justice had authorized such a report.

At the time the decision was being considered, Keeney was generally aware that the decision might impact other matters of concern to the prosecutors, and in a general sense he recalled that there were ongoing plea negotiations. He did not recall ever meeting with Hartman on the matter.

Keeney viewed himself as the final decider of the issue. Although Keeney was generally aware that Hartman had some conversations with AAG Mueller (Keeney's boss) on the matter of the report, and he believed Mueller and Hartman did not want a report to issue, he was unaware of the nature of these contacts and they were irrelevant to his decision-making process.¹⁰⁴ The fact that the letter is signed "Robert S. Mueller" (in type) and then stamped and signed by Keeney was the procedure of the Criminal Division, where much of the correspondence goes out in the name of the AAG, though signed by a Deputy AAG. He did not recall if Mueller actually even read the letter, and would not be surprised if Mueller did not read it, since this letter was really Keeney's matter.

Keeney knew that the line attorneys had fostered the belief in the grand jury that a report would issue and also that the prosecutors had already filed a memorandum with the Chief Judge advocating a much broader reading of the statute, one that would have permitted a report in this case. Neither of these factors, however, altered Keeney's decision -- although he recognized them as strong equitable arguments in favor of the report.¹⁰⁵ He denied that DOJ had an institutional bias or philosophy against reports. For Keeney, the legal issue was clear. He did not see it

¹⁰⁴ Chuck DeMonaco, the Assistant Chief of the Environmental Crimes Section, and Murtha, urged upon Keeney that a report was proper. See Memorandum from DeMonaco and Murtha to Keeney, dated November 11, 1991, noting such a meeting, attached as part of "Attachment 10." Considering that Murtha and Demonaco were under the direct supervisory chain from Hartman, it is notable that Hartman did not attempt to control their input into the Criminal Division's decision-making process.

¹⁰⁵ Keeney ultimately saw the problem as resulting from the line prosecutors having elevated the expectations of the grand jurors.

as a discretionary call. When asked whether consideration was given to simply leaving the decision to the Court, i.e., preparing a report and "punting" to the Court to decide whether the report met the statute, his reaction was that this would have been dishonest, and it was his obligation to call the issue as he saw it.

B. The views of Norton, Fimberg, Murtha and DeMonaco. The line attorneys in Denver and Washington, as well as Mike Norton and Chuck DeMonaco, Assistant Chief of the Environmental Crimes Section, were convinced that a grand jury report was appropriate and necessary. Their reasoning was as follows:

1. First and most fundamentally, they simply read "organized crime conditions" in section 3333(a)(2) more broadly than Keeney and Coffey, and drew on the definition in the United States Attorneys' Manual.¹⁰⁶

2. Second, whatever general validity existed in Coffey's views towards the functioning of grand juries, that approach simply was inapplicable on the instant facts, where a middle approach was called for. If Congress could have reasonably contemplated any facts as justifying a report, those facts were present at Rocky Flats.

3. They felt that commitments had been made to the grand jury which should be honored.

4. The line prosecutors had first-hand dealings with the grand jurors, and believed that to attempt to deprive them of the ability to prepare a report would court rebellion and potentially bigger problems down the road. They were concerned the grand jury might prepare a reckless report. The prosecutors felt that having a hand in the preparation of a report would permit some measure of responsibility in any allegations, and would also help the grand jury stay within the requirements of the statute. They also believed that public grand jury complaints would undermine the achievements in this case.

5. The line prosecutors were resistant to the use of a sentencing memorandum. First, they believed the grand jury would not accept such a document as an expression of their views. Second, the more strident or accusatory the tone in the memorandum

¹⁰⁶ USAM 9-11.330, "Reports of Special Grand Juries," does not define "organized crime conditions" in 18 U.S.C. § 3333(a)(2). However, in discussing "organized criminal activity" under section 3333(a)(1), the Manual states: "'Organized criminal activity' should be interpreted as being much broader than 'organized crime;' it includes 'any criminal activity collectively undertaken.'" This document is included as part of "Attachment 10."

-- especially to the extent the remarks implicated Rockwell -- the more likely the memorandum would either serve as a sticking point in the plea negotiations or would invite a reply by Rockwell, again undermining their achievements.

A meeting was held November 5, 1991, in which these arguments were fully fleshed out. Thereafter, pursuant to DOJ policy, the decision resided with the Criminal Division, and Coffey and his section prepared an analysis of this issue for the ultimate resolution by Keeney. Norton and DeMonaco weighed in by way of correspondence to Coffey in favor of the report. Although Hartman opposed the report, he was comfortable that the decision was left with the Criminal Division. Coffey obtained further factual input and arguments from Murtha, and consulted with Keeney.¹⁰⁷ On November 21, 1991, in a letter prepared by Coffey and signed by Keeney (for AAG Robert S. Mueller) to Norton, the decision was made that a report was not to be issued.

C. Evaluation. Both the process and the decision reflected a proper exercise of prosecutorial discretion.

To arrive at the decision, the key participants with a stake in the decision -- the line prosecutors, the United States Attorney, the AAG for ENRD, and representatives of the Criminal Division -- fully discussed the issue. There were meetings with everyone having a full opportunity to be heard, and there were memos and correspondence staking out the positions. At issue was not only the propriety of a report in the given case, but the precedent for all future cases. The line prosecutors and Norton were blunt in their assessment that the grand jury would be mutinous if it was not permitted to issue a report. Deputy AAG Keeney was fully aware of the line prosecutors' and Norton's strong support for a report. He simply did not believe the statute authorized it. There is no evidence that Keeney was influenced by anything other than a good faith reading of the law.

Nor is there any reason to conclude that any other aspect of the decision-making process was flawed or driven by a desire to undermine the prosecution at issue or environmental prosecutions in general or otherwise keep the facts from being known. The key decision-makers appear to have made their decisions well aware of the potential controversy and/or rancor the decision may cause. By

¹⁰⁷ Although Hartman also believed a report should not issue, he had little role in the decision. He understood that this was a call that had to be made by the Criminal Division. The Wolpe Subcommittee's attempt to portray Hartman as a significant decision-maker in this matter is inaccurate. The interpretation of this statute is the responsibility of the Organized Crime and Racketeering Section since the statute has particular implications in organized crime cases.

all accounts, this decision was simply a "by the book" decision, in which Keeney and Coffey were aware of the positions and desires of the line attorneys and grand jurors, but simply called the matter as they saw it, consistent with the longstanding Criminal Division interpretation of the statute.

CRITICISMS

XVI. Criticisms by FBI Special Agent Lipsky.

The significance of Lipsky's views lies in three areas. First, he testified before the Wolpe Subcommittee that he was told in roughly June or July 1991 that a decision that individuals would not be indicted had been made and implied this came from Washington D.C. Second, he complained that he was not kept informed as to what was happening on the plea negotiations front. Third, at bottom, he seems to claim that the agreement was not just and the concession not to prosecute individuals should have been a deal-breaker.

A. Lipsky's communications through FBI channels regarding prosecution of individuals. Lipsky testified before the Wolpe Subcommittee that in June of 1991, he spoke to his supervisor in the FBI about the status of the negotiations, his supervisor in turn called the FBI Headquarters in Washington, who in turn spoke to Neil Cartusciello, then Chief of ENRD's Environmental Crimes Section. The word ultimately returned back to Lipsky through FBI channels that the decision had been made that individuals would not be indicted.¹⁰⁸ According to Lipsky, when he approached Fimberg about this issue, Fimberg made a statement to the effect that he (Fimberg) had been "out-voted." This testimony was used by the Wolpe Subcommittee to form the basis for numerous questions of the witnesses as to whether a decision was made in Washington that Rockwell employees would not be prosecuted.

Fimberg's recollection is at odds with Lipsky's. Fimberg recalled that, although it appeared by summer of 1991 that a disposition was likely, he continued to investigate individuals and continued to seek Lipsky's assistance in this regard. Fimberg was firm that he always kept his eye on the prospect of individual prosecutions in case the plea negotiations broke down. Fimberg's view is corroborated by the correspondence in late fall between various counsels for the targets and Fimberg.¹⁰⁹ Although

¹⁰⁸ The sequence of conversations is set forth in Lipsky's interview with the Wolpe Subcommittee. Staff Interviews at 30-31 (testimony of Lipsky).

¹⁰⁹ Copies of this correspondence are attached at "Attachment 11."

Fimberg does not recall using the phrase that he (Fimberg) had been "outvoted," he does not deny that he could have used words to that effect to express to Lipsky his sentiment that his (Fimberg's) attempts to hold open the prospect of individual prosecutions or misdemeanor dispositions did not prevail. Finally, Fimberg testified that it would have been unusual for Lipsky to have received what he (Lipsky) could have reasonably understood to be "orders" from FBI Headquarters, especially concerning matters about which Headquarters had no first-hand knowledge, without consulting Fimberg. Fimberg stated that he and Lipsky were friends, that he (Fimberg) was unaware of orders having been issued from Washington D.C. and that Lipsky never told him of such orders coming from Washington D.C. Hearings at 1591-93 (testimony of Fimberg).

B. Lipsky's claim to have been excluded from the plea negotiations. Lipsky's claim to have been excluded from information surrounding the plea negotiations is vigorously disputed by Fimberg. Although Lipsky may have had the perception that decisions were being made in which he was not a participant, Fimberg had an open door, the two men at that time considered themselves friends, and Fimberg stated he and Lipsky had numerous discussions as to the progress of the negotiations.

C. Lipsky's disagreement with the plea agreement. Finally, the precise extent and reasons for Lipsky's disagreement with the disposition is somewhat difficult to pin down, because: 1) Lipsky is not specific as to the extent of his dissatisfaction or his reasons, and 2) he repeatedly stressed his respect for Fimberg and the deference he felt was due Fimberg as the prosecutor who would be trying the case in the courtroom.¹¹⁰

To the extent Lipsky's remarks are understood as a fundamental criticism of the agreement, such criticism rings hollow for three reasons. First, he never related this opinion to Fimberg prior to the entry of the plea. The two men had a close working relationship, and Lipsky felt free to approach Fimberg on any issue at any time.

¹¹⁰ In connection with Lipsky's reference to the alleged comment by Fimberg that he (Fimberg) was outvoted, Lipsky testified:

Mr. LIPSKY. [I] will say it now, because this is my firm belief that Mr. Fimberg's opinions on this held more water and I hold in higher regard because he worked the case. He had experience. I worked with him before and I enjoyed his style. I do enjoy his style and his direction that he's got. He has an uncanny way of not only seeing through the problem, but resolving it as well. Staff Interviews at 26 (testimony of Lipsky).

pointed to: (1) Main Justice's decision not to allow a grand jury report; (2) the fact that certain Main Justice officials and personnel were less aggressive about the value of the case and the size of the fine than Norton and Fimberg; (3) an "overall reluctance early on" by Main Justice to pursue cases against individuals; and (4) testimony that the Denver USAO took steps at the outset of the case to guard against interference from Main Justice. Wolpe Report at 21.

Although it may have been that the line prosecutors, particularly Fimberg, had a more aggressive view of the case than some of the DOJ officials who were monitoring the case, our review has established that Main Justice had no significant impact on the critical prosecutorial decisions in the case. Main Justice supported the investigation in seeking a search warrant, providing resources, and, on virtually every decision -- especially the decisions involving the plea negotiations -- deferred to Norton and the line personnel. Specifically, all the participants agreed that nearly every decision concerning the negotiation of the fine and the prosecution of individuals was ultimately made by Norton and Fimberg, with no significant input from Hartman or anyone else from Main Justice.

The only instance in which DOJ's input was determinative was the decision not to authorize the grand jury report. That decision, however, had nothing to do with Main Justice's (or ENRD's) approach to environmental crime. It was made by Deputy Assistant Attorney General John Keeney, an experienced Criminal Division official, based on a longstanding DOJ interpretation of the special grand jury statute and with no consideration of the environmental nature of the case. Finally, that the Denver prosecutors were conscious of their "turf" is natural and provides no inference that such interference was ever a factor.

B. The plea agreement. The Subcommittee alleged that in the course of reaching a plea agreement, the prosecutors met almost all of Rockwell's core demands, "bargained away their right to fully and accurately inform the public" about conditions at Rocky Flats, agreed to a global settlement that cost the government "millions," and ignored "indictable evidence" of off-site releases or pollutants." Wolpe Report at 12-13. The Report also criticized the prosecutors for settling for an \$18.5 million fine.

Again the Report's criticisms are either not supported by the evidence or overlook the context in which decisions were made.

1. Meeting Rockwell's core demands. It is simply not a fair characterization of the plea negotiations to say that the government "met almost all of Rockwell's core demands concerning type of charges, global scope of settlement and public statements." Wolpe Report at 12. Certain "core demands" were met on both sides, and both sides made concessions -- that is why there was an

agreement. Rockwell sought nolo pleas to misdemeanors and a \$1 million fine; the government obtained felony guilty pleas and an \$18.5 million fine, paid by the corporation.

2. The right to inform the public. Nor is it accurate for the Subcommittee to state that "the prosecutors bargained away their right to fully and accurately inform the public about the conditions, crimes and activities at the Rocky Flats plant." Wolpe Report at 12. The government set out the truth about Rocky Flats as the prosecutors understood it in a detailed 128-page public Sentencing Memorandum. The agreement placed no limitation on what was said in the Memorandum.

A lengthy criminal trial might have generated more media attention, but it almost certainly would not have provided a better opportunity for the public to be informed of the relevant facts of Rocky Flats. Jury trials involve very stylized contests circumscribed by rules of evidence and focused on the proof of facts related to narrow legal issues. Rarely does the whole truth emerge in a neat picture.¹¹⁴ By and large, the government can set forth its version of events more forcefully and more clearly in a document such as a sentencing memorandum. Moreover, even if a trial were a better forum in some respect for disseminating facts about Rocky Flats, it clearly is not proper for federal prosecutors to place citizens in jeopardy of felony convictions, loss of liberty and reputation so as to better inform the public. Other fact-finding processes -- including congressional hearings if necessary -- can be used to determine the truth apart from the criminal process.

3. The global settlement. The Report's criticism of the global nature of the plea agreement is also misplaced. The prosecutors in this case did not bargain away the rights of other federal and state regulators. The global agreement was entered into by the other entities. No one forced the Colorado Department

¹¹⁴ In most cases, the prosecutors and investigators have learned much more than can be set forth neatly in a criminal proceeding, which involves proof by particular rules of evidence of relatively narrow issues, and, in a criminal trial, much of the truth may not emerge at all. Witnesses who may have relevant information on one area of the case may not be called because they are damaging to the party's case on another; witnesses who have ample first-hand knowledge are not called because they are perceived as "loose cannons," reckless, or otherwise subject to impeachment; witnesses die and memories fade; reliable statements from witnesses who are not available cannot be adduced because of hearsay problems; and statements or information provided under "proffer" agreements cannot be introduced. In any event, a jury verdict on a charged offense would not constitute a finding, one way or the other, as to the role of DOE.

Second, Lipsky is effusive in praising Fimberg. In discussing Fimberg's handling of another trial in which Lipsky was the agent, Lipsky testified:

Mr. LIPSKY. He and I have worked on several cases since. I trust his judgment emphatically and I believe in what he says, in that he has worked other cases besides what I have worked with him and he's had quite a learning experience.

Some of the bigger cases in Denver have been as a result of him, whether good or bad, however anyone looks at them. He takes on the tough case. He is not afraid of it and that's good.

I have learned quite a bit from him and I have grown to trust his judgment is what I am trying to say. Staff Interviews at 53-54 (testimony of Lipsky).

Lipsky was asked repeatedly in our interview how it was that he was so critical of the plea, yet so respectful of and deferential toward Fimberg, who felt the plea represented a sound disposition. Lipsky did not answer this question straight on -- at one point when asked this question he replied "good question" -- but typically replied with long answers to the effect that Fimberg was in fact not satisfied with the disposition, that Fimberg wanted more, and that Fimberg believed there was enough evidence to indict individuals. This, of course, brings the matter full circle, since, as stated, Fimberg could have been dissatisfied that the government did not prevail on any or even every term in the negotiations, and even believed that some or all individuals were indictable, but still was comfortable that the agreement as a whole was the best disposition possible.

Third, although Lipsky testified that he would have liked to see a greater fine, he also acknowledged that the \$18.5 million fine was significant, especially against the possibility that any fine resulting from trial would be indemnified by the government:

Mr. LIPSKY: [After discussing a lot of ways the issue of the appropriate fine could be approached]. I mean, you can argue -- it sets itself up for a lot of debate whether [the fine] really was fair, but all I can say is that the numbers tend to indicate that Rockwell paid a pretty good fine, plus when you add in the fact about the indemnifications, that there was a clear indication by my prosecutors that Rockwell could have gone to civil court and prevailed and they wouldn't have paid--probably would have paid their fee, the cost plus. Staff Interviews at 61 (testimony of Lipsky).

On another occasion, he describes the case and its disposition as

"mixed":

Mr. LIPSKY. [A]s far as what I was involved in, it was quite a big deal, I think, to be able to do a search warrant at a nuclear facility and be able to walk out of this with something tangible, and a lot of the things have charges as a result of this, so for me it's mixed. It's not all good, it's not all bad, but I can think of a lot of things, coming out empty-handed, that would be worse. Staff Interviews at 57 (testimony of Lipsky).

Finally, Lipsky stated that as much as he disagreed with the views of Buck, Hassler and Murtha, he (Lipsky) did not believe that they maintained their views of the case other than in good faith. He also did not see or feel any political pressure to scuttle the prosecution. In fact, he was effusive about the support provided by DOJ to this prosecution.

XVII. The Wolpe Report¹¹¹

The Wolpe Report's criticisms of the prosecution fell into four general areas: (1) the role of Main Justice; (2) the terms of the plea agreement; (3) the lack of individual indictments of either Rockwell or DOE employees; and (4) the decision not to authorize a grand jury report. See Wolpe Report at 12-15 (Summary of Findings).¹¹² Although many of the Report's concerns were implicitly addressed in earlier sections of this memorandum, this section attempts to respond directly to some of the specific concerns highlighted in the Report:¹¹³

A. The role of Main Justice. The Wolpe Subcommittee's lead criticism of the prosecution was that "[t]he extreme conservatism and lack of aggressiveness of Justice headquarters was a major -- perhaps the overriding -- factor which influenced both the strategies adopted throughout the course of the investigation and, ultimately, the outcome of the case." Wolpe Report at 12. As evidence of this "extreme conservatism" and influence, the Report

¹¹¹ This memorandum has not attempted to survey all press criticisms, including the press accounts of grand juror criticisms. Those criticisms are generally encompassed by the Wolpe Report.

¹¹² The Report also sharply criticized DOE's management of Rocky Flats, its contracting practices, and its attempt to convince DOJ to accept nolo contendere pleas so as to minimize its own potential exposure.

¹¹³ The Wolpe Report's specific criticisms concerning possible false statement charges based on pleadings in the Sierra Club litigation are discussed in Section VII, supra.

of Health, DOE, or EPA to approve the agreement. The plea agreement in this case was reviewed by numerous other entities, presumably behaving responsibly in carrying out their assigned mission. EPA in particular had significant input into the plea negotiations involving the language as to those areas in which Rockwell still faced liability and those which were covered by the plea agreement.¹¹⁵

Moreover, Rockwell and the various government agencies had a legitimate interest in a global settlement that would result in an immediate, certain, single payment to cover both criminal and civil liabilities. As part of the negotiations, the government brought in the Colorado Department of Health, which had no pending investigations of the conduct at issue, and obtained \$2 million for the State in exchange for Colorado's covenant not to sue. As indicated, the government also obtained EPA concurrence. EPA had no pending investigations and historically had accomplished little in terms of environmental penalties at Rocky Flats. Indeed, on the Clean Water Act criminal counts involving violations based on biological oxygen demand, EPA had merely sent warning letters to Rockwell. Contrary to the Report's speculation, no evidence exists to suggest that either EPA or CDH had any realistic prospect of recovering "millions" of dollars in civil fines.

4. Evidence of Off-site Harm. The Report claimed that "several areas in which the prosecutors had collected indictable evidence [sic] showed that there had been off-site releases of pollutants," which were not included in the plea. Wolpe Report at 13. The Report, however, did not provide any basis for its statement that there were indictable offenses for off-site harm; nor was there any effort during the hearings or the staff interviews to confront Fimberg or Murtha with the evidence the Subcommittee believed they had collected and not pursued.

By all indications, the prosecutors and investigators were intent on finding chargeable evidence of off-site harm -- if such evidence existed -- and considerable effort was spent on this topic. They knew such evidence would have dramatically changed the overall worth of the case, and dramatically changed the constellation of evidence in front of a jury. However, the evidence of off-site releases -- which was for the most part spray-irrigation run-off of sewage treatment plant effluents¹¹⁶ -- did

¹¹⁵ See documents attached at "Attachment 12"; see also Section XI, supra.

¹¹⁶ As discussed in the body of this memorandum, monitoring of Walnut Creek prior to the search warrant had detected small quantities of exotic chemicals and medical wastes. The source of these chemicals could not be traced to a particular building or process within Rocky Flats, although the evidence suggested that

not establish any resultant harm.

Two creeks left the Rocky Flats plant: Walnut Creek, which flowed into the Great Western Reservoir, and Woman Creek, which flowed into Standley Lake. Authorities in the surrounding communities (and the populations of those communities) were well aware that waters leaving the Rocky Flats plant supplied their drinking water. Accordingly, the reservoirs were monitored continuously for a variety of substances which would be hazardous to health. The monitoring did not detect pollutants at levels that posed any health or safety risk to the population served by the reservoirs.

5. Amount of the Fine. The Report emphasized that the \$18.5 million fine agreed to in the plea was less than the potential fines that could have been meted out to Rockwell if the company were to have been assessed the maximum fine for every day each storage violation occurred. If so, the fines could have amounted to between \$68.85 million and \$78.85 million. As the Subcommittee saw it, "hundreds of days of violations were not charged. Thus, millions of dollars in potential additional criminal and civil penalties on the listed -- and easily provable -- violations were given away."

In a case involving a continuing offense that produced no significant environmental harm, and with the absence of hard-core corrupt or criminal intent, no reasonable likelihood existed that a sentencing judge would have imposed maximum daily fines after a trial. Moreover, the \$18.5 million was already many times larger than all prior environment criminal fines, with the sole exception of the Exxon Valdez disaster. The maximum theoretical fine was not an appropriate benchmark by which to evaluate the reasonableness of the fine.

In criticizing the amount of the fine, as stated, the Report lost sight of the negotiation context in which the fine was determined. It discussed what the government "gave away" without acknowledging the government obtained value in exchange for the concession. Labeling the government's negotiated agreement to the fine amount a "give away" of potential fine amounts is no more fair or accurate than saying Rockwell "gave away" \$18.5 million or "gave away" its acknowledgement of culpability.

6. Indemnification Provisions. The Report questioned whether the prosecutors exaggerated the risk that a criminal fine

the chemicals must have originated somewhere within the plant grounds. There was also no evidence to suggest that the chemicals, which were detected just outside the plant's perimeter, ever migrated into downstream drinking water supplies or posed any kind of health or safety risk.

would be indemnified and found it significant that no criminal fines had ever been reimbursed previously by DOE. But since DOE had never been asked to indemnify a contractor for a criminal fine, the absence of precedent does not cut one way or the other. What the Wolpe Report did not note was that the prosecutors extensively studied and discussed the indemnification issue. On August 28, 1991, Fimberg and Murtha wrote a detailed memorandum for Assistant Attorney General Hartman analyzing DOE's contract and discussing possible defenses to indemnification.¹¹⁷ Their conclusion that there existed a distinct risk that a court would find that Rockwell's contract entitled it to reimbursement for any criminal fines was not unreasonable and was reached after a careful, deliberative process.

Moreover, whatever the likelihood that DOE would have been required to reimburse Rockwell, this prospect was so disastrous to the entirety of the prosecution effort that this concession by Rockwell -- whatever its worth to Rockwell -- was critical to the prosecutors.

The Report highlighted the fact that as of November 1992, Rockwell had submitted to DOE claims totaling \$7.9 million in legal fees and other costs, which Rockwell claims are permitted under the plea agreement. Although it is unclear how much of that total will ultimately be reimbursed by DOE,¹¹⁸ the Report claimed that "it is significant that the taxpayer exposure is so high in a settlement where a major selling point and rationale for the settlement itself is its limitation on taxpayer exposure." Wolpe Report at 84.

In any event, the possibility that Rockwell would be entitled to be reimbursed for substantial legal fees, was not overlooked during the plea negotiations. Fimberg testified that although he did not get a specific estimate of Rockwell's fees and costs during the plea negotiations, he was pretty confident that the total figure would be in the tens of millions of dollars. Staff Interviews at 184 (testimony of Fimberg). But for the plea agreement, Rockwell would have been able to submit substantially more in claims for legal fees and costs.

¹¹⁷ A copy of this document is attached as part of "Attachment 6."

¹¹⁸ Rockwell originally submitted claims for attorneys' fees and defense costs as follows: \$1.1 million for corporate attorneys' fees and defense costs (pre-January 1, 1990); \$3.7 million for costs of providing representation to past and present employees; and \$4.2 million for costs of computer hardware and database used for both civil and criminal matters. DOE took no action on these claims when they were submitted and Rockwell did not press the issue. Rockwell has for now withdrawn these claims.

The indemnification provisions of the plea agreement, including those pertaining to legal fees and costs, reduced the taxpayers' exposure substantially, without granting Rockwell any material rights to indemnification it did not already have under its contract with DOE. The government agreed that Rockwell could submit claims to DOE under an exception to the Major Frauds Act for settlement agreement. The value of this concession to the government turned on whether the Major Frauds Act even applied to the DOE contract in this case. This legal issue was extensively reviewed by DOJ, including Fimberg and Murtha, and the clear consensus was that the Major Frauds Act was inapplicable in any event. This concession was not considered significant to the government.¹¹⁹

C. Lack of individual indictments/credibility of prosecutors. The Report criticized the non-prosecution of individuals, claiming that there was "enough evidence" to charge various individuals. The government's decision to agree to the non-prosecution of individuals as part of the plea agreement has been discussed and evaluated in detail in Section XIII, supra. As has been explained, the decision to forgo cases against individuals as part of a plea agreement was a sound exercise of prosecutorial discretion.

In the course of criticizing the decision not to charge individuals, the Report accused the prosecutors who testified of being "less than candid" about the linkage between the plea agreement and the decision not to pursue individual indictments. This attack on the credibility of DOJ attorneys, woven into the Report's discussion of the decision not to charge individual defendants, was without merit and bordered on reckless.

For instance, the Report stated as follows:

In their desire to protect the plausibility of the plea agreement, the prosecutors were less than candid with the public and the Subcommittee about the role of the plea bargain in their prosecution decisions about individuals. It was not credible that, in a case of this size, a department that normally requires a formal prosecution memo and review process before signing off on any proposed indictment came to a conclusion through "an evolving process" about the viability of criminal actions against several different individuals in a variety of subject areas involving different prosecutors, several investigators, numerous documents and witnesses.

Wolpe Report at 41 (emphasis added).

In this case, the issues involving charging individuals -- the

¹¹⁹ See Section XI, supra.

factual difficulties and fairness issues associated with holding individuals criminally responsible for carrying out tasks which involved corporate compliance with regulatory goals -- were apparent at the outset of the investigation. The possibility of a corporate-only disposition was acknowledged as early as August 1990. The various charging considerations and the viability of the defenses were discussed by the prosecutors among themselves and with agents and supervisors; these issues were raised specifically in a lengthy submission by Rockwell that set out reasons why the government would not prevail and should not charge; these issues were discussed in the draft prosecution memo; and the overall difficulties with individual prosecutions were well known to supervisors above the investigatory team. The Report provided no basis, and none has been found, to support its conclusion that the prosecutors' statement that the decision was made in an "evolving process" as part of the investigation of the case and process of plea negotiations was "not credible."

In addition, the Report stated that in their testimony before the Subcommittee, the "prosecutors attempted to tell a somewhat different story" from what they apparently had stated at prior dates concerning the justifications for the decision to agree not to prosecute individuals. Wolpe Report at 41. The Report juxtaposed what appear to be press accounts of prosecutors' statements at the time of the plea with the testimony before the Subcommittee. In particular, the Report appeared to allege that a statement at the time of the plea that individuals were not indicted for "fairness" reasons was in conflict with testimony at the hearings, where three reasons were given: 1) the death of the highest ranking official, 2) the fact that the potentially chargeable individuals were part of a corporate "culture," and 3) the cases were "marginal." First of all, these statements are not inconsistent. The corporate "culture" concern is at least in part a fairness concern, and one of the reasons the cases were "marginal" was precisely because of the "fairness" issues which would be presented to the jury.

Moreover, for reasons previously set forth, the decision to forgo individual prosecutions was based on a host of valid considerations -- evaluation of the evidence, evaluation of all defenses, likelihood of minor sentences, fairness issues, positions in the company -- weighed against the benefits to be gained by a corporate disposition. Before the Subcommittee, the various prosecutors at various times identified nearly all these reasons, and different prosecutors accorded different importance to these factors. Isolating a single sentence at the time of the plea -- without identifying the precise context in which the statement was made -- and comparing it to the pages and pages of discussion of the decision-making process is hardly a fair basis to state that

the prosecutors "attempted to tell a different story."¹²⁰

D. Grand jury report. The Wolpe Report suggested that Main Justice's decision not to authorize a grand jury report was motivated by Hartman's desire to avoid embarrassing DOE and the then-Secretary of Energy, Admiral Watkins. As discussed in detail above, the Subcommittee reached this conclusion without even interviewing the Criminal Division officials involved in the decision. Contrary to the Report's implications, the Criminal Division's decision was made based on a good faith interpretation of the relevant statute and case law.

The Report also criticized Judge Finesilver for sealing the grand juror's unauthorized report, thereby placing "jurors in the moral quandary of choosing between adherence to their oath of secrecy or surreptitiously releasing their work to the press to carry out what they saw as their charge to serve the public good."

The Report did not suggest the judge made a legally incorrect decision, or that he made such a decision for any improper motive. Indeed, Judge Finesilver, as a sitting federal Judge, is presumptively qualified to make the legal decision impacting grand jury practice in his Courthouse. Nonetheless, the Subcommittee concluded that the consequence of the judge's rulings (though not alleged to have been legally wrong) was to place the grand jurors in a "moral quandary." However, the supposed quandary was simply whether to follow the law or break the law. Furthermore, the Report did not suggest any criteria other than the subjective views of the grand jurors as to whether they should follow the law. The Wolpe Subcommittee provided no basis to support the notion that the grand jurors are free to decide for themselves whether to obey their sworn obligations of secrecy when they determine, pursuant to

¹²⁰ This is not the universe of such allegations. The Wolpe Report stated that prosecutors "have a duty to be honest about the reasons certain charges or defendants were not pursued." Wolpe Report at 40. Other than contrasting press explanations of the plea with the testimony, the Report did not explain how the prosecutors were not honest. All the reasons were testified to at length by the prosecutors.

The Report insinuated lack of credibility in other contexts as well. For example, in connection with the "771 incinerator" issue, the Wolpe Report stated: "It is baffling that federal prosecutors would not keep very close tabs on a civil case in the same court that involved one of the key allegations in their own case, but their lack of familiarity -- deliberate or otherwise -- with the documents of the Sierra Club litigation was evident in their testimony before the Subcommittee." Wolpe Report at 60 (emphasis supplied). There is no plausible basis for the suggestion the government deliberately ignored any evidence in this case.

wholly personal criteria, such a violation would "serve[] the public good."

E. Overarching considerations relevant to assessment of prosecutorial decisions. One basis for confidence in the overall process and disposition is the degree of consideration which went into nearly every issue. No decision has been identified by anyone that was made cavalierly or capriciously. Actions which had consequences were discussed and analyzed. Nearly every decision was discussed by Fimberg and Murtha, then, depending on the issue, reached Norton, and then, again depending on the issue, reached Main Justice, either through the Environmental Crimes Section (Block or Cartusciello) or directly from Norton to the Assistant Attorney General (Stewart or Hartman). The large number of individuals reviewing or actively participating in the critical decisions during the investigation and the negotiations makes it highly unlikely that any significant decision in this case was carelessly made or improperly motivated. Not one significant decision has been identified which was made by a single person in secret or over opposition of career personnel. Indeed, the extensive paper trail in this case documents the significant involvement and review which went into the various decisions.

In addition to the line prosecutor associated with the decision-making process, the following individuals were involved in the case:

1) At the time of the investigation:

Mike Norton
United States Attorney

Barry Hartman
Assistant Attorney General (ENRD)

Neil Cartusciello
Chief, Environmental Crimes Section

Charles DeMonaco
Assistant Chief, Environmental Crimes Section

2) Approval of and involvement with the plea agreement:

Environmental Protection Agency¹²¹

Herbert H. Tate, Jr.
Assistant Administrator for Enforcement
EPA Headquarters

¹²¹ The various documents reflecting EPA involvement are attached at "Attachment 12."

Jack McGraw
Acting Regional Administrator
Region VIII
Denver, Colorado

Robert L. Duprey
Director, Hazardous Waste Management Division
Region VIII
Denver, Colorado

Max Dodson
Director, Water Management
Region VIII
Denver, Colorado

Thomas Speicher
Regional Counsel
Region VIII
Denver, Colorado

Earl E. Devaney
Director of Criminal Enforcement
Washington, D.C.

Robert Van Heuvelen
Acting Director of Civil Enforcement
Washington, D.C.

State of Colorado¹²²

Gale A. Norton
State Attorney General
Denver, Colorado

Thomas P. Looby
Director, Office of Environment
Colorado Department of Health
Denver, Colorado

¹²² The Press release reflecting Colorado's concurrence is attached as part of "Attachment 12."

Department of Justice

Bruce S. Gelber
Assistant Chief
Environmental Enforcement Section (civil)

3) At the time of the hearings

David Margolis
Acting Deputy Assistant Attorney General
Criminal Division¹²³

¹²³ David Margolis, now Associate Deputy Attorney General to Deputy Attorney General Jamie S. Gorelick, represented Fimberg, Murtha and Hartman in their testimonies. He likewise concluded there were no fundamental flaws in this case. Though not a witness, his on-the-record comments at the conclusion of Norton's testimony are instructive:

I do know something about the way the Department investigates and prosecutes criminal cases. And having sat through the testimony and interviews of a great bulk of witnesses in these hearings, my conclusions, given the fact that I have an institutional bias in favor of my department, my conclusion still is that while this case and the crimes were unusual, there is nothing unusual about the handling of this matter.

From everything I have heard, it's the typical way my department investigates and prosecutes criminal cases. What surprises me a bit is that there was so much agreement on a very controversial issue.

There is always disagreement in criminal investigations among lawyers, between lawyers and investigators. And a certain amount of that tension is good. Sometimes that tension spills over and becomes dysfunctional. Not in this case.

So the lesson I draw from this is that I'm pleased by the way it was handled, and I'm proud of the way it was handled.

People can quarrel with individual judgments and decisions and perhaps find pieces of memorandums that on their face appear inconsistent with other memorandums, but that's always going to happen. That's the stuff of cross-examination in trials.

This case I am satisfied was handled, A, in the normal course of the Department's business and, B, in the

Although it was not within each individual's (or agency's) mission to acquire full and complete knowledge of every facet of the case, or to approve the prosecutorial decisions, not a single individual raised problems with the criminal disposition in this case along the lines suggested by the Wolpe Report or other critics. It is not plausible that each and every one of these individuals, entrusted by their agencies with significant environmental responsibility, were negligent in the performance of their duties, let alone deliberately turned a blind eye to a process and a result which contained the defects alleged by the Wolpe Report.

XVIII. Impact of the Wolpe Inquiry and Report on Line Attorneys.

The effect of the congressional hearings and Wolpe Report on line prosecutors should not be overlooked. Line prosecutors simply should not be put in the position of having to testify before congressional committees about the confidential thoughts and communications that go into the formation of prosecutorial charging decisions. Although it is appropriate for Congress to monitor the activities of the Justice Department and to ask the Department to explain decisions in specific cases, the hearings and Report in this case demonstrate the danger of permitting inquiry into the specific differences of opinions among individual attorneys. The prospect of such an inquiry can only undermine the free flow of ideas in collective decision-making processes. Sound judgments often arise out of good faith internal disagreements. Individual attorneys should not have to avoid expressing evolving views, putting them down on paper or playing the "devil's advocate" during internal debates for fear of being called "less than candid" or otherwise publicly embarrassed long after the fact. Prosecutors should not have to worry that attempts to consider "fairness" concerns, or to be candid in expressing views as to problems in the prosecution, will be misunderstood as a lack of prosecutorial vigor. The ease with which internal deliberations can be misunderstood and distorted in a political forum, especially where complex and subtle prosecutorial judgments are involved, has been dramatically illustrated by the aftermath of this case.

DOJ has an obligation to protect its line attorneys, particularly where there are no credible allegations of misconduct. Such support is even more appropriate where every critical decision was made with concurrence at the highest levels of the Department.

highest standards of the way the Department operates. And that makes me proud. Staff Interviews at 353 (statement of Margolis).

As Fimberg stated concerning the difficulties of prosecutors in making tough decisions:

[I] do think [these hearings] ha[ve] a very chilling effect when you think that every tough call you make and every judgment call you make in the thick of day-to-day warfare, that someday somebody is going to get every piece of paper that you wrote and every internal thought that you ever had, and impression, and you are going to have to justify that. It's a hard process.

And I think maybe there will be prosecutors around the country who -- and I have heard this said, so I'm not entirely speculating. The easy thing to do is avoid the controversial cases.

* * *

It would have been extremely easy, and none of us would be sitting here today, if Mr. Norton three years ago or three and a half years ago when this issue was first put on this desk, would have said, "I'm not going to touch that. It's very controversial, it's very emotional, it's a can of worms." And, "Fimberg, you're crazy. Get out of here." Then I wouldn't be here today. Staff Interviews at 216 (testimony of Fimberg).

The Department needs to impress forcefully on Congress the serious consequences of politicized attacks on individual line prosecutors. As Fimberg commented, the easy thing is to avoid controversial cases like Rocky Flats. The congressional maligning of the line prosecutors in this case provides strong incentives for prosecutors to stay away from politically charged environmental cases in the future.

CONCLUSION

Any settlement of a prominent environmental case -- especially one involving a top secret nuclear weapons plant -- is bound to invite criticism, whatever the results, on grounds that the government did not go far enough. This case in particular invited such criticism because public expectations had been raised by widely publicized allegations in the 1989 search warrant affidavit, the most sinister of which ultimately were not proven. In this particular case, those who viewed DOJ critically had additional grist by virtue of the sequence of events associated with the decision to oppose a grand jury report.

This case was not handled perfectly in the sense that any case of this nature with complicated investigatory and institutional issues is likely to have difficulties. In this case, the personnel

mix at the line level was not ideal; there were organizational difficulties getting started; the FBI and EPA could have devoted more highly motivated investigators; there could have been better coordination with the civil attorneys on the Sierra Club case; the plea agreement could have been drafted with more precision. None of these factors, however, was related to institutional breakdowns or improper political or personal influences. Moreover, in contrast with the wide range of tasks that were handled skillfully and professionally, these problems, on balance, were relatively minor.

Fimberg and Murtha were both highly committed to this prosecution and determined to achieve criminal convictions. The results in this case are primarily due to their significant efforts. Moreover, to achieve the results in this case, Fimberg and Murtha, with the support of Norton and Main Justice, overcame numerous challenging and complicated legal, factual, tactical and organizational difficulties.

The fundamental decisions in this case involving the terms of the plea disposition -- including the decision not to prosecute individuals, the amount of the fine, the charges of conviction, and the various indemnification issues -- reflected an appropriate exercise of prosecutorial discretion, both at the institutional level and by the constituent individuals. Nearly every significant decision associated with the plea in this case was subject to significant review with extensive input and was made at the appropriate level. Main Justice did not interfere with the investigators or negotiators in pursuing the investigation or negotiations in this case; to the contrary, there was enormous deference by Main Justice to the career line prosecutors and the USAO in Colorado. Finally, there was no evidence of any abuse of discretion in the substance or process of the decision not to assist the grand jury in preparing a report.

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THE ROCKY FLATS PROSECUTION

1. ISSUE STATEMENT

DOJ investigated potential environmental crimes at Rocky Flats, a Department of Energy ("DOE") nuclear weapons facility operated on DOE's behalf by Rockwell International, a private contractor. After an investigation by the U.S. Attorney for Colorado and the DOJ Environment and Natural Resources Division, the government entered into a plea bargain with Rockwell, concluding that the evidence warranted a disposition involving a corporate plea without indictment of individual corporate or DOE employees. Rockwell pled guilty to multiple environmental felonies and misdemeanors and paid a fine of \$18.5 million, the second-largest ever for an environmental crime.

The plea agreement has been criticized by a House Subcommittee and others for being insufficiently tough by, for example, failing to indict individual corporate employees or DOE employees and including an allegedly inadequate fine.

Some grand jurors, represented by counsel, have been lobbying to obtain a Congressional grant of immunity allowing them to testify before Congress about the grand jury proceedings. One or more grand jurors apparently violated grand jury secrecy rules by providing information to the press after federal prosecutors declined to indict individuals.

Background -- Rocky Flats, located just outside of Denver, is a DOE facility formerly involved in producing plutonium "triggers" for nuclear weapons. In 1989, a special grand jury was empaneled to investigate alleged environmental crimes at Rocky Flats. After a three-year investigation by the U.S. Attorney for Colorado and the DOJ Environment and Natural Resources Division, the government entered into a plea bargain under which Rockwell pled guilty to ten felony and misdemeanor charges under two environmental statutes: the Clean Water Act and the Resources Conservation and Recovery Act (RCRA), governing generation and disposal of hazardous waste. Rockwell paid a fine of \$18.5 million -- second in amount only to the criminal fine in the Exxon Valdez oil spill, and the largest fine by far in a clean water or hazardous waste case. No individual Rockwell or DOE employees were indicted.

On March 26, 1992, the government submitted a 128-page sentencing memorandum in connection with the plea laying out the crimes and how they had occurred. The sentencing memorandum was critical of DOE, stating for example that DOE had become "essentially 'captured' by the company [Rockwell]," that DOE had failed to exercise adequate oversight of the company's environmental practices, and that DOE had failed to take the company's poor environmental practices sufficiently into account in making discretionary contractual fee awards. The sentencing memorandum stated that DOE had had a "culture that had tended

over many years to place nuclear weapons production above all else, and especially environmental and hazardous waste compliance."

In March 1992, the special grand jury, upon being discharged, submitted a proposed Report to Judge Sherman Finesilver, Chief Judge of the District of Colorado. DOJ initially opposed release of the proposed Report. In September 1992, a news article appeared containing portions of the proposed Report and quotes from anonymous grand jurors about the jury's proceedings, in apparent violation of Federal Rule of Criminal Procedure 6(e). After Judge Finesilver requested the Department to suggest redactions to the Report, DOJ altered its position and supported the release of the Report with redactions. Judge Finesilver did release the Report with redactions, finding that the redacted material should not be released because:

it accused individuals identifiable by name or position, including accusations against public officials that lacked the required recommendation for removal; dealt in rumor and conjecture; engaged in social and even legal argument; dealt with political and social issues outside the province of the special grand jury's duty of investigating crime; contained charges not based upon a preponderance of the evidence; and followed a serious breach of grand jury secrecy.

Order of Jan. 26, 1993 at 2 (summarizing findings of Order of Dec. 3, 1992). In addition, Judge Finesilver found that "the Report taken in isolation does not present a balanced view of the inquiry into possible criminal activities in the operation of Rocky Flats." *Id.* at 3. Under Judge Finesilver's Orders, the public now has access to approximately 80 percent of the Report, while the unreleaseable portions of the Report have been sealed, as required by 18 U.S.C. 3333. (The Department itself has no authority to release any grand jury materials to the public.)

The Department subsequently investigated the apparent violation of Rule 6(e) by some grand jurors. The Criminal Division closed the investigation when it failed to identify the specific individuals responsible for unauthorized disclosures. However, the Department announced that it would investigate any additional disclosures.

Some grand jurors, represented by counsel, have been lobbying to obtain a Congressional grant of immunity allowing them to testify before Congress about the grand jury proceedings. Chairman Dingell has indicated that he is considering whether to grant such immunity.

2. STATUS

An independent internal review of the Rocky Flats prosecution was completed on April 8, 1994. The review concludes

that the judgments made by the prosecution team were both within the law and within the proper exercise of prosecutorial discretion.

Chairman Dingell is considering whether to immunize the grand jurors and invite them to testify before his Oversight and Investigations subcommittee.

A Congressional Research Service report concluded that Congress cannot immunize the grand jurors from committing a crime prospectively, which would occur if grand jurors reveal 6(e) material in a Congressional hearing. Congressman David Skaggs of Colorado has publicly opposed the proposal to immunize grand jurors, and has been subject to intense criticism for this position. FBI Director Louis Freeh wrote to then ASG Hubbell in February, 1994, expressing his opposition to any grant of immunity and his support for Rep. Skaggs' position. His letter (copy attached) requests that the Department take a public position on the issue, which it has not yet done.

3. DEPARTMENT POSITION

The leadership of the Department supports the conclusions of the internal review that the Department's prosecutors acted properly.

The Department has not taken a position on the issue of whether Congress should immunize the grand jurors. Grand jury secrecy is a fundamental and long-standing tenet of our system of criminal justice. Among other things, it encourages free and open testimony by witnesses and protects the reputations of persons who are investigated but not indicted. Failure to protect these important values could compromise the integrity of the grand jury process. In addition, it could create the risk of losing the cooperation of jurors and witnesses, thereby undermining the effectiveness of grand juries as an investigatory and enforcement tool.

On the other hand, if the Department objects to immunizing the grand jurors, it must demonstrate that its objection is on principled grounds and is not a pretext for "covering up" government "misconduct" in the Rocky Flats case.

4. JUDICIARY COMMITTEE MEMBERS INTEREST/POSITIONS

Senator Paul Simon wrote in 1993 to urge Department officials to meet with George Washington University law professor Jonathan Turley, who had written a report critical of the Environmental Crimes Section and who apparently represents some of the Rocky Flats grand jurors in their quest for immunity. Prof. Turley wrote in October 1993 requesting a meeting about the Rocky Flats internal review. In December 1993, then ASG Hubbell wrote to Prof. Turley and, without addressing his request for a meeting, asked him to submit "any specific factual evidence

relevant to the [Rocky Flats internal] inquiry that is not already in the grand jury transcript." To our knowledge, Prof. Turley has not responded to this request.

To our knowledge, Senator Hank Brown of Colorado has not taken any public positions with respect to the Rocky Flats case or immunization of the grand jurors.

5. REFERENCE MATERIALS

Letter of February 10, 1994 from FBI Director Louis J. Freeh to Associate Attorney General Webster L. Hubbell.

(Copies of the Internal Reviews are provided as reference materials to the briefing book entry on the Environmental Crimes Section Oversight and Internal Investigations, above.)



U.S. Department of Justice

Federal Bureau of Investigation

Office of the Director

Washington, D.C. 20535

February 10, 1994

Honorable Webster L. Hubbell
Associate Attorney General
Department of Justice
Washington, D.C.

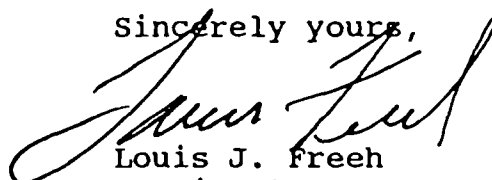
Dear Judge Hubbell:

A matter was recently brought to my attention by Congressman David E. Skaggs of Boulder, Colorado. This matter involves the Rocky Flats plutonium plant and the issue of Congress considering granting immunity to members of the Federal grand jury that investigated Rocky Flats and who now may be asked to testify before a House committee.

Congressman Skaggs is vehemently opposed to this idea and believes that granting immunity to these individuals would seriously undermine our Federal system of justice. The Congressman asked that I communicate his concerns directly to you and ask you to consider issuing a formal Department of Justice statement objecting to this proposal.

I strongly agree with the Congressman's position. I believe calling grand jurors before Congress about issues that came before the grand jury is totally inappropriate and contrary to the design of our jurisprudence system. Granting immunity for this purpose violates the integrity of a process sacred to our system of justice.

Sincerely yours,



Louis J. Freeh
Director



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THE ENVIRONMENTAL CRIMES "BLUESHEETS" (AMENDMENTS TO THE U.S. ATTORNEYS' MANUAL)

1. ISSUE STATEMENT

The Environment and Natural Resources Division ("ENRD") and the U.S. Attorneys Offices ("USAOs") are both involved in the prosecution of environmental crimes. In January 1993 (before the new Administration took office), the Department issued amendments to the U.S. Attorneys' Manual ("USAM") provisions governing coordination on environmental crimes prosecutions between the USAOs and the Assistant Attorney General of ENRD. The January 1993 Bluesheet requires prior approval by ENRD before a USAO can initiate certain "priority" types of cases. For all other cases, a USAO does not need prior ENRD approval. Priority cases are cases that raise unsettled legal issues, policy questions, or matters of national importance. For a detailed list of the 10 current priority categories, see the January 1993 Bluesheet, USAM 5-11.110 (E) (1993) (provided with attached reference materials).

The 1993 Bluesheet change was intended to be a relaxation of the 1988 USAM's requirement for prior approval in all cases, and was negotiated as a compromise between the ENRD and the Attorney General's Advisory Committee (AGAC). Indeed, the allocation of responsibilities embodied in the January 1993 Bluesheet is entirely consistent with the allocation of responsibility in the Department's other litigating divisions. The USAOs have significantly broader responsibilities for environmental crimes than they have in other highly complex regulatory areas such as tax and antitrust. See attached Testimony of Hon. Webster Hubbell at 12. Nevertheless, in April 1993 some AUSAs and a U.S. Attorney wrote to the Attorney General complaining about the prior approval requirement. In November 1993, Cong. Dingell made the Bluesheet a subject of a hearing of the Oversight and Investigations Subcommittee that he chairs. (In response to various 1993 requests, the Department has provided the Dingell Subcommittee with copies of all documents related to the development of the 1993 Bluesheet, including numerous deliberative documents.)

2. STATUS

The January 1993 Bluesheet is currently in effect. However, there is a plan underway to re-evaluate the Bluesheet and, if advisable, to revise it. The plan calls for negotiation between the ENRD and the Environment Subcommittee of the Attorney General's Advisory Committee (a committee of U.S. Attorneys), in consultation with interested U.S. Attorneys and investigative agencies. The product of this negotiation will be circulated to all U.S. Attorneys and to involved agencies for comment. After further revision based on comments and after approval by the full membership of the Attorney General's Advisory Committee, the plan calls for submission to the Deputy AG of revisions to the Bluesheet by July 1, 1994. The negotiations are just beginning,

following the direction of Acting ASG Bill Bryson on May 11, 1994.

3. DEPARTMENT POSITION

(a) Regardless of the precise formulation in the USAM, the Attorney General expects the USAOs and the ENRD to work as partners in building a strong environmental crimes program.

(b) As noted, the USAM is being re-evaluated.

(c) The internal committee established by Mr. Hubbell in June 1993 to review the Environmental Crimes Section included in its report an analysis of the 1993 Bluesheet. The internal review specifically addressed Cong. Dingell's concerns that the ENRD had imposed its will on the U.S. Attorneys in the 1988 and 1993 Bluesheets. The internal reviewers concluded that: there was some confusion and miscommunication between the ENRD and the AGAC concerning the 1988 Bluesheet; the 1993 Bluesheet was a compromise; and the "ENRD did not act improperly in either instance."

4. JUDICIARY COMMITTEE INTERESTS/POSITIONS

Senator Metzenbaum has expressed the view that Main Justice should not have any oversight or review authority over the U.S. Attorneys Offices.

5. REFERENCE MATERIALS

Then ASG Webster Hubbell's November 3, 1993 testimony before the House Oversight and Investigations Subcommittee.

USAM Excerpt (1988 version).

USAM Excerpt (1993 amendments).

(Copies of the Internal Reviews are provided as reference materials to the briefing book entry on the Environmental Crimes Section Oversight and Internal Investigations, above.)



Department of Justice

STATEMENT

OF

WEBSTER L. HUBBELL

ASSOCIATE ATTORNEY GENERAL

BEFORE

SUBCOMMITTEE ON OVERSIGHT AND

INVESTIGATIONS

COMMITTEE ON ENERGY AND COMMERCE

U.S. HOUSE OF REPRESENTATIVES

CONCERNING

THE ENVIRONMENTAL CRIMES ENFORCEMENT PROGRAM

PRESENTED ON

NOVEMBER 3, 1993

Mr. Chairman and members of the Subcommittee, I am pleased to appear before you today to talk about the Department of Justice's environmental criminal enforcement program. This Administration is deeply committed to protection of the environment. President Clinton, Attorney General Reno, and I strongly believe that criminal prosecutions are a key part of the environmental enforcement scheme. The environmental statutes provide a broad array of enforcement mechanisms, including: administrative enforcement by EPA, the Department of the Interior, the Corps of Engineers, and other agencies, and supported by the Department; civil enforcement; criminal prosecutions; and citizens suits against polluters. A goal of this Administration is to assure that all of these tools are used in an effective and integrated manner.

I am here today to respond to the Subcommittee's request for a summary of any preliminary findings and recommendations of the Department's internal review of the January 1993 revisions to Title Five, Chapter Eleven of the United States Attorneys' Manual. These revisions, known as the environmental crimes "Bluesheet," took place before the Inauguration, and they made several changes in the Department's internal policy for handling environmental criminal cases. The Subcommittee has also asked about the status of the Department's internal review of the environmental crimes program. I will discuss both of these questions today. Before I address these issues, I would like to describe the goals of the Justice Department's environmental enforcement program, and the important role of the Environmental Crimes Section in achieving those goals. I think it is particularly important that we focus on the future

and what the Department is doing to achieve these goals.

1. THE DEPARTMENT'S ENVIRONMENTAL ENFORCEMENT GOALS

The Justice Department is committed to an aggressive environmental enforcement program. The goal of our program is to protect public health and the environment by deterring violations and encouraging voluntary compliance. To accomplish compliance, we seek to ensure that violators are caught, violations are corrected, and punishments are imposed that both recoup any economic benefit the violator might have enjoyed and promote deference by imposing a substantial additional penalty. That approach assures that a company that complies with the law does not suffer a competitive disadvantage.

Criminal prosecutions are a key component of this multifaceted program. The reason for this is simple: Nothing works better at getting managers to pay attention to environmental compliance than the prospect of going to prison and the prospect of fines and other penalties for their companies.

2. HISTORY OF THE DEPARTMENT'S ENVIRONMENTAL CRIMES PROGRAM

The Justice Department's Environment and Natural Resources Division has a broad criminal enforcement program, which has developed over the past fifteen to twenty years as Congress has passed laws making criminal certain anti-environmental conduct. Early prosecutions in the environmental area were under the Rivers and Harbors Act of 1899--we prosecuted hundreds of violators in the early 1970s. Also, early cases were brought under wildlife statutes, such as the Lacey Act of 1900, the Black Bass Act of 1926, and the Migratory Bird Treaty Act of 1913. =

Starting with the Clean Air Act in 1970, Congress enacted a series of pollution control statutes imposing misdemeanor criminal penalties. The Clean Water Act followed in 1972, and in 1976 the Resource Conservation and Recovery Act was passed.

The Division's Wildlife Section was created in 1979, with responsibility for overseeing civil and criminal enforcement of wildlife laws nationwide. There was little criminal enforcement under the pollution control laws until the Division established the Environmental Crimes Unit in 1982. By litigating cases and providing assistance and training, the Unit was a catalyst for the tremendous growth of criminal enforcement that occurred during the next ten years. The Unit, which became a separate section in 1987, was also a key player in the Department's support for raising environmental criminal penalties to felony levels. Congress so amended Resource Conservation and Recovery Act in 1984, followed by the Clean Water Act in 1987 and the Clean Air Act in 1990. Once felony penalties became applicable, more U.S. Attorneys recognized that environmental prosecutions deserved high priority.

Of course, the U.S. Attorneys' offices also have played a significant role in environmental prosecutions. As the program has grown, their share of the effort has grown as well. They participate, or take the lead, in a majority of the investigations and prosecutions at this time. In addition to litigating, those prosecutors experienced in environmental litigation assist in training programs such as the recent successful program in Buffalo, New York.

In short, the Environment Division has been in the business of criminal enforcement of environmental laws, and of coordinating criminal prosecutions with civil litigation, for many years. Throughout that time, the Division has developed prosecutions in partnership with client agencies and with the U.S. Attorneys' offices.

3. THE ENVIRONMENTAL CRIMES SECTION

Criminal prosecution of the pollution control laws is handled by attorneys from the Environmental Crimes Section and the U.S. Attorneys' offices, working with agents and investigators from the FBI, EPA and other federal, state and local agencies. The Environmental Crimes Section is the Department's largest concentration of lawyers with special expertise in the prosecution of the pollution control laws.

In the nine months that I have been at the Department, I have had numerous opportunities to talk with the staff and management of the Environmental Crimes Section and review their work. I have also had the benefit of a preliminary briefing from the internal reviewers. Their review will include the six cases that have been the subject of review by this Subcommittee. On the basis of my own observations and what I have heard from the internal reviewers, I can tell you that the Section is a dedicated and highly competent group of professionals who are committed to the highest standards in prosecuting environmental cases and working with U.S. Attorney offices on criminal prosecutions. Of course, with the new management in the Division, we will work to make environmental

enforcement actions more integrated and stronger.

a. FY92 and 93 Indictments -- The number of defendants indicted for environmental crimes in FY 1992 was a record 195 individuals and corporations. The number indicted in FY 1993 was almost as high, at 181. A number of these cases are complex. While I do not want to put too much emphasis on numbers, I believe that they demonstrate that the Department's lawyers in Washington and the U.S. Attorneys' offices, together with agency investigators, scientists, and attorneys, are working effectively as partners to bring criminal prosecutions under the environmental laws. This level of enforcement could not have been achieved without this team effort.

b. The Special Role of the Section -- The Environmental Crimes Section serves several important functions in the Department's criminal enforcement program.

i) Litigating Cases -- First and foremost, the job of the Section's 33 attorneys is to litigate cases. Typically environmental crimes cases in which ECS attorneys are involved are handled jointly with the relevant U.S. Attorney's office, with an Assistant United States Attorney and an Environmental Crimes Section ("ECS") staff attorney sharing responsibility. In addition, ECS attorneys sometimes handle a case exclusively, with only logistical and "local counsel" help from an Assistant United States Attorney. Such exclusive cases can arise when a criminal environmental matter is so large that it would overwhelm the U.S. Attorney's office's resources, or when a particular district has

too many such cases at one time to handle even jointly.

ECS is also an invaluable litigation resource to investigators and prosecutors around the country. The Section's attorneys can provide the critical mass of expertise necessary to coordinate and integrate the Department's criminal prosecutions within the broader scope of the Administration's environmental program. ECS provides advice and litigation support to Assistant United States Attorneys in cases that the U.S. Attorney's offices handle exclusively, and serves as a source for copies of indictments, briefs, memoranda, jury instructions, grand jury subpoenas and other legal pleadings. ECS attorneys also provide advice to EPA and other investigative agencies.

ii) Coordination and Integration -- The Environmental Crimes Section monitors federal environmental prosecutions and tracks changes in case law and legislation. This gives the Section a nation-wide perspective on environmental prosecution and makes it a crucial resource in the formulation of the Department's litigating positions in criminal and civil cases.^{1/} The Section also assists the Assistant Attorney General in the review of key

^{1/} For example, ECS attorneys participate in working groups with EPA to study and develop proposed solutions for recurring problems. One such working group is studying the problem of global settlements -- resolution of litigation that provides for the disposition of both civil and criminal liability. Apart from working groups, both EPA and other investigative agencies call upon ECS attorneys for general advice and guidance in the area of environmental criminal law. In addition, ECS has devoted considerable attorney time to providing information sought by the United States Sentencing Commission with respect to environmental prosecutions.

decisions in priority cases, a function that is essential to ensuring consistent development in this complex and rapidly evolving area of the law.

iii) Providing Training -- Lastly, ECS devotes considerable effort to training federal and state prosecutors and investigators across the country in environmental criminal law. The U.S. Attorneys and their Assistants have told the Department that this training has contributed to the growth in the number of environmental crimes cases over the past few years. Over the years, ECS has helped to present four major enforcement conferences dealing with both civil and criminal enforcement of the environmental law. The most recent of these, held in January 1991 in New Orleans, attracted over 900 government lawyers and investigators. In conjunction with that conference, ECS attorneys wrote, edited and published an Environmental Crimes Manual, considered the most important work on federal environmental prosecution currently available. ECS attorneys also lecture, participate in panels and serve as discussion leaders in continuing legal education programs for federal prosecutors throughout the country. ECS attorneys also actively participate in training federal agents in the legal and practical aspects of criminal environmental enforcement. At the Federal Law Enforcement Training Center, where EPA operates a training facility, Section attorneys routinely lecture on legal topics and participate in practical exercises for EPA criminal agents and technical personnel.

4. THE JANUARY 1993 ENVIRONMENTAL CRIMES BLUESHEET

I turn now to the Bluesheet issued in January 1993 before the new Administration took office. As the Subcommittee knows, the term "bluesheet" refers to amendments and updates to the U.S. Attorneys' Manual. The Manual sets forth internal Department of Justice policy in a number of areas, including the division of litigation responsibilities between "Main Justice" and the U.S. Attorneys' offices. I must stress here that the Manual is not a creature of statute; it is an internal policy document. The Division and the U.S. Attorneys' Offices are a partnership, and the U.S. Attorneys Manual plays a role in interpreting that partnership agreement. As with any partnership, the interpretation of the agreement may be periodically modified based on new or changing circumstances. As the law develops and interests and events change, we review this partnership throughout the Department as well.

The January 1993 Bluesheet that the Committee has asked about amended Title 5 of the Manual, which sets forth policy relating to the Environment and Natural Resources Division. Chapter 11 of that title covers handling of environmental criminal cases, including coordination between the U.S. Attorneys' offices and the Assistant Attorney General of the Environment and Natural Resources Division and the U.S. Attorneys. To understand the January 1993 Bluesheet, it is helpful to know what it was amending.

a. The 1988 U.S. Attorneys' Manual -- The entire U.S. Attorneys' Manual was revised through a process that began in 1987. A new addition was included in the Manual (codified at Chapter 11,

former Section 5-11.303 of the USAM) dealing with coordination between the U.S. Attorneys' offices, the newly created Environmental Crimes Section, and the Assistant Attorney General of the Environment and Natural Resources Division. Under the revised Manual, the Assistant Attorney General had final approval authority over all indictments in criminal cases under the pollution laws handled by a U.S. Attorney's office.^{2/}

b. Reasons for the 1993 Bluesheet -- The January 1993 Bluesheet was promulgated before President Clinton was inaugurated and the new Administration came on board. I am advised that, from the time the 1988 U.S. Attorneys' Manual was issued, there was continuing disagreement between the Environment Division and some U.S. Attorneys' offices as to the allocation of responsibility for prosecuting violations of the pollution control statutes. After approximately two years of discussion and debate, the Deputy Attorney General directed the Division and the Environmental Crimes Subcommittee of the Attorney General's Advisory Committee^{3/} to work out their differences. Eventually, the Division and the

^{2/} Section 5-11.303(A) provided that the Assistant Attorney General had "supervisory responsibility over all criminal proceedings" under the relevant statutes, and "the final authority regarding the prosecution or declination" of these matters. Section 5-11.303(C) provided that a U.S. Attorney could commence prosecution of any matter arising under the relevant statutes "provided that notification is given" to the Chief of the Environmental Crimes Section unless the Assistant Attorney General requested that the prosecution not go forward.

^{3/} The Attorney General's Advisory Committee is a representative committee of U.S. Attorneys who represent the views of all U.S. Attorneys to the Attorney General and Department, and in turn convey Departmental policy to the U.S. Attorneys' offices.

Subcommittee reached agreement on changes to the Manual, and the Deputy Attorney General approved the agreement they reached.

The current Bluesheet, adopted by the Department on January 12, 1993, gives the Assistant Attorney General final authority over certain "priority" cases, and the U.S. Attorneys final prosecutorial authority over other environmental crimes cases. Priority cases are ones that raise unsettled legal issues, policy questions, or matters of national importance.

Several factors apparently contributed to the Department's decision to expand the scope of the U.S. Attorneys' responsibilities. First, the environmental crimes program had been in existence for ten years, and certain legal questions on matters such as criminal intent had been settled by the courts. Second, Assistant United States Attorneys around the country had developed expertise in environmental prosecutions, and many U.S. Attorneys had become strong supporters of such cases. At the same time, the requirement for Assistant Attorney General approval of "priority" cases reflects the fact that this remains a complex and rapidly evolving area of the law, requiring national consistency and careful coordination of the Department's criminal and civil litigating positions.

5. PRELIMINARY CONCLUSIONS REGARDING THE BLUESHEET

The internal reviewers who are looking at the January 1993 Bluesheet and the Environmental Crimes Section are completing their review for me, and I expect them to make a final report soon. They are conducting a thorough review of the available documents, and

have interviewed dozens of current and former Department employees, including every attorney in the Environmental Crimes Section.

Based on their preliminary briefing, and my own experience at the Department, where I have supervisory authority for criminal sections in Tax, Civil Rights, Antitrust and the Civil Division, as well as the Environment Division, I can offer several observations on what we have learned and how we intend to proceed.

a. Partnership of Division and U.S. Attorneys -- Coordination of the work of the Justice Department's various components is a core management concern. The Attorney General and I regard the U.S. Attorneys' offices and the litigating Divisions of Main Justice as partners in a single, unified mission -- the enforcement of the law. This is true whether we are talking about environmental crimes or tax or antitrust or civil rights or any other area of responsibility. The partners must work together. In allocating responsibility within the partnership, our goal is to strike the optimum balance between the values of consistency and uniformity of the Department's litigating positions on the one hand, and flexibility and local initiative on the other. Obviously, these are judgment calls -- there is no single right answer. It is up to the Attorney General and her subordinates to make these judgments.

b. January 1993 Bluesheet -- Our internal reviewers are aware that there were allegations that the new Bluesheet was issued for political purposes -- supposedly to put control over criminal cases in the hands of the political heads of the Division. The

internal reviewers have reported to me, based on their work to date, that they have found no evidence that decisions regarding the January 1993 Bluesheet were made for political or corrupt purposes.

c. Comparison with other USAM provisions -- I have reviewed the corresponding provisions of the U.S. Attorneys' Manual governing other Divisions. The allocation of responsibilities embodied in the January 1993 Bluesheet is entirely consistent with the allocation of responsibility in the Department's other litigating divisions. In fact, under the January 1993 Bluesheet, the U.S. Attorneys' offices have significantly broader responsibilities for environmental crimes than they have in other highly complex regulatory areas such as tax and antitrust. A review of the U.S. Attorneys' Manual shows that, in several divisions of the Department, the approval of the relevant Assistant Attorney General is necessary in a variety of designated areas before a U.S. Attorney can take significant action in a criminal matter. See, e.g., USAM 4-1.313(H) (Civil Division); USAM 6-4.243 (Tax Division); USAM 7-2.000, 7-5.100, 7-5.300, 7-5.400, 7-5.600, 7-5.610 (Antitrust Division); USAM 8-3.130 (Civil Rights Division). There are also several specialized criminal areas under the jurisdiction of the Criminal Division, where there is a need for uniformity and consistency and where, prior to indictment, the U.S. Attorneys must obtain the approval of the Assistant Attorney General for the Criminal Division. See USAM 9-2.132, 135.

d. Current experience -- Most importantly, the Division's experience thus far suggests that the January 1993 Bluesheet is

working fairly well. There have been no disputes brought to my attention with the U.S. Attorneys' offices over division of authority in specific cases since the January 1993 Bluesheet went into effect. As I described earlier, the January 1993 Bluesheet divides the universe of criminal cases under the pollution control statutes into two categories -- "priority" and "non-priority" matters -- with Assistant Attorney General approval required only in priority cases. The statistics on cases filed under the new Bluesheet show that under this scheme a significant number of cases are being handled by the U.S. Attorneys' offices directly, without prior approval by the Division:

- * Since March 1, 1993, with the entry of the first Case Initiation Report required under the Bluesheet's coordination procedures, the Department has opened 116 environmental crimes cases under the pollution control statutes.
- * Of that number, 25 (21.5%) are designated "priority" cases, and all others are non-priority cases.
- * Of the 25 priority cases, through delegations from the Division, 11 are handled by U.S. Attorneys' offices; 1 is handled solely by the Environmental Crimes Section; and the remaining 13 are "joint" cases.
- * Of the 91 non-priority cases, 63 are handled by U.S. Attorneys' offices; by agreement, 5 are handled solely by the Environmental Crimes Section; and 23 are joint cases.

e. The Role of Departmental Review -- The Bluesheet provides a framework within which the Environmental Crimes Section can carry out the key function of ensuring consistency and uniformity in the Department's litigating positions under the environmental statutes. These laws are relatively new and highly

complex with extremely potent criminal liability provisions. Decisions in criminal cases can affect the civil regulatory scheme under these statutes as well. The Attorney General and I are working with EPA and the other environmental agencies to use enforcement authorities aggressively consistent with effective development of the law. We must also ensure that they are used fairly and consistently across the country.

Accordingly, while we presently have no plans to change the January 1993 Bluesheet, we will of course review it if new information or circumstances warrant.

7. WHERE DO WE GO FROM HERE?

I have determined that certain steps should be taken to ensure that our environmental crimes program is fair and effective.

a. Policy on declining criminal prosecution --

A prosecutor's decision to charge an individual with a crime, to seek to deprive him of his or her liberty, is a solemn one. A prosecutor cannot be merely an advocate for a cause; as the Attorney General often says, a prosecutor must exercise discretion fairly, according to the law, the evidence, and a sense of what is right. Therefore we must have internal oversight of the decision whether or not to prosecute.

One thing that we have already concluded from our internal review is that we need to have procedures for communicating the decisions of our environmental prosecutors in the Environment Division and the U.S. Attorneys' offices to our client agencies. We will develop procedures to achieve that goal.

b. Continued adherence to the Principles of Federal Prosecution -- I want to stress that we will continue to adhere to the "Principles of Federal Prosecution," declining prosecution where the evidence does not support a reasonable probability of a conviction.

c. Effective use of the civil alternative -- We also need to make sure that prosecutors, investigators, and the public are aware that the decision not to go forward with a criminal prosecution does not necessarily mean the end of the case. We often have the option of proceeding civilly or having the agency proceed administratively. Indeed, under the "Principles of Federal Prosecution," even where the evidence is sufficient to support a conviction, a prosecutor may decline a case where no substantial federal interest would be served by prosecution, or where there is an adequate non-criminal alternative to prosecution, such as a civil fine.

Civil and administrative remedies can present a number of advantages from the government's perspective, and we have followed criminal investigations with civil cases in some situations. The burden of proof is lower, and there are fewer limits on admissibility of evidence. The penalties in civil actions can be quite substantial, with correspondingly high deterrent effect, and there is a broad range of injunctive relief available. Given the range of relief and penalties available, a decision to bring civil rather than criminal charges should not be viewed as a "weaker" enforcement approach. And given the complex and rapidly evolving

nature of environmental law, it may often be appropriate to use civil enforcement to clarify the law, explain regulations, and create legal standards before seeking to apply the law in a criminal context.

8. CONCLUSION

In closing, I can assure the Subcommittee that the Environmental Crimes Section and the U.S. Attorney's offices are generally working well together. U.S. Attorneys' offices are taking the lead on the majority of environmental prosecutions, and there have been no disagreements over approval of indictments during the past ten months. The vast majority of cases opened since the Bluesheet went into effect are not priority cases.

We want to devote our full energies to looking ahead and developing the most effective program of vigorous enforcement of our environmental laws -- a program that recognizes that environmental criminals must be prosecuted and punished under tough but fair procedures.

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5-11.000 ENVIRONMENTAL CRIMES SECTION

5-11.001 Establishment

The Environmental Crimes Section was created on April 24, 1987, at which time it assumed the responsibilities previously assigned to the Environmental Crimes Unit, which was organized in 1982.

5-11.002 Purpose and Functions

The Environmental Crimes Section was organized in order to provide a specialized legal staff capable of carrying out the effective enforcement of federal criminal laws relating to protection of the environment. The duties of Section attorneys with regard to cases arising under the statutes identified in USAM 5-11.101, *infra*, include the following:

A. Conduct of all phases of criminal litigation at the direction of the Assistant Attorney General, Land and Natural Resources Division, in all cases in which Section attorneys have lead responsibility;

B. Cooperation with U.S. Attorneys in the conduct of all phases of criminal litigation in all cases in which the U.S. Attorneys and the Land and Natural Resources Division have shared responsibility and in which Section attorneys are directly involved in the litigation;

C. Monitoring of all prosecutions under the statutes identified in USAM 5-11.101 in which Section personnel are not directly involved, in order to assure consistency of statutory interpretations and enforcement policy.

D. Assistance, advice, and policy guidance to U.S. Attorneys in support of criminal prosecutions, whether or not Section attorneys are directly involved in such litigation; and,

E. Processing of those items which, under the provisions of this manual, require action by the Assistant Attorney General or other personnel of the Land and Natural Resources Division.

5-11.100 AREA OF RESPONSIBILITY

5-11.101 Statutes Administered

The Environmental Crimes Section is responsible for criminal enforcement litigation arising under the following statutes:

A. Federal Water Pollution Control Act or Clean Water Act, 33 U.S.C. § 1251 et seq.;

B. Clean Air Act, 42 U.S.C. § 7401 et seq.;

C. Resource Conservation and Recovery Act, 42 U.S.C. § 6901 et seq. (also known as the Solid Waste Disposal Act);

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D. Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), 42 U.S.C. § 9601 *et seq.*;

E. Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*;

F. Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.*;

G. Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135(d) *et seq.*;

H. Rivers and Harbors Act, 33 U.S.C. § 401 *et seq.*;

I. Marine Protection Research and Sanctuaries Act, 33 U.S.C. § 1401 *et seq.*;

J. Noise Control Act, 42 U.S.C. § 4901 *et seq.*;

K. Atomic Energy Act of 1954, 42 U.S.C. § 2011 *et seq.*, insofar as it relates to the prosecution of violations committed by a company in matters involving the licensing and operation of nuclear power plants and affecting the environment;

L. Section 2 of the Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. § 791 *et seq.*;

M. Act of June 23, 1910, 33 U.S.C. § 421 *et seq.*;

N. Act of June 29, 1888, 33 U.S.C. § 441 *et seq.*;

O. Deepwater Port Act of 1971, 33 U.S.C. § 1501 *et seq.*, insofar as a violation of the Act or the rules and regulations promulgated pursuant thereto results in environmental pollution;

P. Section 5(a)(2) of the Outer Continental Shelf Lands Act of August 7, 1953, 43 U.S.C. § 1334(a)(2), where the violation of a rule or regulation results in environmental pollution.

Q. Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11001 *et seq.*

5-11.102 Principal Criminal Statutory Provisions

Although other criminal provisions are included in the statutes identified in USAM 5-11.101, *supra*, those which are most commonly enforced include the following:

A. Clean Water Act or Federal Water Pollution Control Act: 33 U.S.C. §§ 1319(c)(1) and (2) (knowing or negligent conduct in violation of specified sections of Act), 1319(c)(3) (knowing endangerment), 33 U.S.C. §§ 1319(c)(4) (knowingly submitting false information), and 1321(b)(5) (failure to notify of known discharge of oil or hazardous substance);

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B. Clean Air Act: 42 U.S.C. §§ 7413(c)(1) (knowing conduct in violation of specified sections of Act) and 7413(c)(2) (knowingly submitting false statements, etc.);

C. Toxic Substances Control Act: 15 U.S.C. § 2615 (knowingly or willfully committing any of the acts prohibited by 15 U.S.C. § 2614);

D. Resource Conservation and Recovery Act: 42 U.S.C. §§ 6928(d)(1) (knowingly transporting hazardous waste to unpermitted facility), 6928(d)(2) (knowingly treating, storing, or disposing of hazardous waste without permit or in violation of permit), 6928(d)(3) (knowingly making false statements), 6928(d)(4) (knowingly destroying, altering, or concealing records, etc.), 6928(d)(5) (knowingly transporting hazardous waste without a manifest), 6928(d)(6) (knowingly exporting hazardous waste without consent of receiving country or in violation of international agreement), and 6928(e) (knowing endangerment);

E. Comprehensive Environmental Response, Compensation, and Liability Act (''Superfund''): 42 U.S.C. § 9603(b) (failure to report known release of hazardous substance to the environment);

F. Federal Insecticide, Fungicide and Rodenticide Act: 7 U.S.C. § 1361 (knowing violations of specified sections of Act).

5-11.103 Other Criminal Provisions

Experience has shown that cases involving violations of the federal environmental laws identified in USAM 5-11.101, *supra*, also may involve violations of certain other federal statutes. Therefore, the Environmental Crimes Section is empowered to investigate and prosecute violations of additional criminal statutes when such violations arise within the context of criminal cases for which the Section is primarily responsible. Examples of some of the statutes which may be involved in those cases include, but are not limited to, the following:

<u>Statute</u>	<u>Subject Matter</u>
18 U.S.C. § 2	Aiding and abetting
18 U.S.C. § 287	False claims
18 U.S.C. § 371	Conspiracy
18 U.S.C. § 641	Theft or conversion of public property or money
18 U.S.C. § 1001	False statement
18 U.S.C. § 1341	Mail Fraud
18 U.S.C. § 1342	Wire Fraud
18 U.S.C. § 1505	Obstruction of administrative proceedings .
18 U.S.C. §§ 1621 to 1623	Perjury
49 U.S.C. § 1809	Transportation of hazardous materials

5-11.110 General Responsibilities

A. Primary responsibility for cases arising under the statutes identified in USAM 5-11.101 may rest with the U.S. Attorney's office, with the Environmental Crimes Section, or with both on a shared basis. That responsibility will be determined on a case-by-case basis. Experience has demonstrated that very satisfactory results may be obtained from a cooperative, joint effort, combining the U.S. Attorney's office familiarity with local practices and procedures and the Environmental Crimes Section's subject-matter expertise and experience gained in conducting grand jury proceedings and trials in similar cases.

B. There are no precise rules for determining how responsibility for a criminal environmental case is to be divided between the U.S. Attorney's Office and the Environmental Crimes Section. The decision for a given case will be made ultimately by the Assistant Attorney General of the Land and Natural Resources Division in consultation with the U.S. Attorney.

C. In cases handled entirely by the U.S. Attorneys, in which the Environmental Crimes Section takes no direct role in the litigation, Section resources are available to provide support for the efforts of the U.S. Attorneys. For example, Section attorneys may do legal research, prepare draft papers, and provide advice on policy questions and on related cases in other districts. In cases handled primarily by the Environmental Crimes Section the United States Attorneys' offices shall cooperate by assisting Section attorneys in scheduling sufficient grand jury time to allow investigations to proceed in timely fashion.

D. The Environmental Crimes Section also is responsible for the monitoring of criminal prosecutions under the statutes identified in USAM 5-11.101, *supra*, to assure consistency of statutory interpretations and of enforcement policy among the districts. In order for this function to be carried out effectively, it is imperative that U.S. Attorneys' offices keep the Section advised of any cases in which Section attorneys are not directly involved.

5-11.200 ORGANIZATION

5-11.210 General

The Section is administered by a Chief and an Assistant Chief. General information relating to the Section or to matters for which it is responsible may be obtained by calling the Chief at FTS (202) 633-2490. Information on a specific case should be requested from the staff attorney assigned to that case. When the staff attorney's name is unknown, his or her name and telephone number can be obtained by calling FTS (202) 633-2490. (Note that a quicker response to an inquiry may be forthcoming if the requestor can cite a Departmental file number, e.g., 90-5-1-2-40 or

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62-81-2, which generally appears in the upper left-hand corner of correspondence originating from the Department.)

5-11.300 HANDLING OF CRIMINAL ENVIRONMENTAL CASES, GENERALLY

5-11.301 Case Development

A. Criminal cases under the statutes identified in USAM 5-11.101, *supra*, may be investigated and developed by personnel of any of the agencies responsible for administering those statutes. Among those agencies are the Environmental Protection Agency, the United States Coast Guard, and the Army Corps of Engineers. Cases under those statutes also may be investigated and developed by the Federal Bureau of Investigation or by other federal agencies.

B. The primary source of criminal cases under the statutes identified in USAM 5-11.101 is the Environmental Protection Agency (EPA). Within EPA the special agents assigned to the Office of Criminal Investigations (OCI) are chiefly responsible for developing criminal cases. OCI investigators are located in field offices in various parts of the country. U.S. Attorneys who wish to make contact with the OCI special agents should make such requests through the Special-Agent-in-Charge of the appropriate field office. A current listing of field offices and their personnel can be obtained through the OCI office in Denver, Colorado (FTS) 776-3215 or (303) 236-3215.

C. When apparent violations of the statutes identified in USAM 5-11.101, *supra*, are brought to the attention of the Department of Justice by persons or agencies other than those with statutory enforcement responsibilities, the Department either forwards those reports to appropriate enforcement officials for evaluation and possible referral for legal proceedings or may itself undertake the necessary investigation and prosecution. The practice of forwarding reports of suspected violations to appropriate agencies allows the agencies to bring to bear their technical expertise to determine whether violations actually have occurred.

D. The Department of Justice retains the authority to develop enforcement actions through its own efforts.

5-11.302 Environmental Case Initiation

The ordinary procedure for initiation of criminal cases arising under the statutes identified in USAM 5-11.101, *supra*, and originating from EPA is by simultaneous referral to the Assistant Attorney General, Land and Natural Resources Division, and to the U.S. Attorney in the district with jurisdiction over the matter. Referral packages generally contain investigative reports and various exhibits which may aid in the understanding of

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the referral. However, in many instances it may be necessary to complete the development of the cases through the use of the grand jury.

Some cases, though, are initiated without or prior to a formal referral, for example, when investigators call upon the U.S. Attorneys' offices to secure search warrants or when exigent circumstances require early resort to grand jury proceedings. The U.S. Attorney's Office shall advise the Environmental Crimes Section of all such situations.

5-11.303 Authority to Prosecute; Retention of Authority; Requests for Assistance

A. The Assistant Attorney General for the Land and Natural Resources Division has supervisory responsibility over all criminal proceedings arising under the statutes identified in USAM 5-11.101. Therefore, the final authority regarding the prosecution or declination of any such matters shall rest with the Assistant Attorney General for the Land and Natural Resources Division. See 28 C.F.R. § 0.65.

B. The Assistant Attorney General of the Land and Natural Resources Division retains the authority to assume primary responsibility for handling any case within the jurisdiction of the Land and Natural Resources Division and arising under the statutes identified in USAM 5-11.101, *supra*.

C. The U.S. Attorney may commence the prosecution of any matter arising under the statutes identified in USAM 5-11.101, *supra*, provided that notification is given as set forth in USAM 5-11.304, *infra*, unless requested not to do so by the Assistant Attorney General of the Land and Natural Resources Division. The Assistant Attorney General may require that such prosecution not be undertaken or he/she may request that a U.S. Attorney not commence prosecution of such a matter if in the judgment of the Assistant Attorney General additional review of the referral is required by the Land and Natural Resources Division. In the latter situation U.S. Attorneys shall not proceed until the Assistant Attorney General has completed the necessary review. In any prosecution commenced by a U.S. Attorney, the U.S. Attorney may request Environmental Crimes Section assistance by either calling the Environmental Crimes Section or writing to the Assistant Attorney General, Land and Natural Resources Division, Attention: Chief, Environmental Crimes Section. Additionally, the Assistant Attorney General of the Land and Natural Resources Division may require that personnel of the Environmental Crimes Section take part in the development and prosecution of any matter arising under the statutes identified in USAM 5-11.101, *supra*.

5-11.304 Information to be Furnished to the Environmental Crimes Section by the U.S. Attorney's Office

With regard to cases being handled entirely by the U.S. Attorney, within 14 days of receipt of any referral under the statutes identified in USAM

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5-11.101, *supra*, the U.S. Attorney shall advise the Chief of the Environmental Crimes Section of the identity of any Assistant U.S. Attorney to whom the case has been assigned. Notification of decisions to either prosecute or decline cases shall be given by the U.S. Attorney or by an assistant to the Chief, Environmental Crimes Section. Notification of the presentation of evidence to a grand jury shall be given to the Chief, Environmental Crimes Section, or to the Section attorney assigned to the case. See USAM 5-11.313, 5-11.314, 5-11.331, and 5-11.341, *infra*, regarding other information which should be forwarded to the Environmental Crimes Section.

5-11.305 Parallel Proceedings

Because many of the environmental statutes specifically provide for criminal, civil, and administrative sanctions (*see, e.g.,* 33 U.S.C. § 1319(a), (b), (c), and (d)), this is an area of the law especially susceptible to parallel proceedings. Such proceedings may be appropriate, for example, when in the course of a civil case the government receives evidence of deliberate violations of the law meriting criminal prosecution or when a criminal investigation uncovers evidence of an on-going violation causing environmental contamination which should be stopped quickly through an injunctive action.

Although they may be appropriate in particular circumstances, parallel proceedings must be handled carefully in order to avoid allegations of improper release of grand jury material or abuse of civil process. Therefore, in any case under any of the statutes identified in USAM 5-11.101, *supra*, in which the possibility of parallel proceedings arises, the U.S. Attorney's office shall contact the Environmental Crimes Section in order to coordinate the potential parallel proceedings.

5-11.306 Cases Arising by Other Than Agency Referral

U.S. Attorneys retain their authority to prosecute cases under statutes listed in USAM 5-11.101, *supra*, which are not developed or referred to them from a federal agency. The U.S. Attorney shall notify the Assistant Attorney General of the Land and Natural Resources Division of the initiation of any such prosecution under the statutes identified in USAM 5-11.101, *supra*, to enable the Land and Natural Resources Division to perform its oversight responsibilities for prosecution under those statutes.

5-11.307 Other Cases Involving Environmental Violations

Whenever, in the context of a case not otherwise within the jurisdiction of the Land and Natural Resources Division, a U.S. Attorney becomes aware of information which indicates that such case may include violations of any statute identified in USAM 5-11.101, *supra*, the U.S. Attorney shall advise the Assistant Attorney General of the Land and Natural Resources Division

of that possibility. Upon request of the Assistant Attorney General, the U.S. Attorney shall forward to the Assistant Attorney General copies of relevant material, including grand jury transcripts.

5-11.308 Coordination with State Programs

Most states have environmental enforcement programs which overlap, in whole or in part, with federal programs. U.S. Attorneys should familiarize themselves with state environmental enforcement laws and state enforcement officials. Particular attention should be directed toward the following aspects of state-federal relations in the environmental enforcement field:

A. State environmental enforcement agencies may be a valuable source of information on suspected violations of federal environmental statutes. U.S. Attorneys may be in a position to assist in apprising state officials of the nature of the local federal enforcement program and in developing methods for exchanging information on suspected violations;

B. State authorities often possess evidentiary materials which are relevant to pending federal court proceedings. U.S. Attorneys should be aware of the nature and extent of the states' investigatory resources and should make provision in appropriate circumstances for the exchange of information on pending cases with state authorities;

C. Frequently a particular activity constitutes a violation of both federal and state law. When state officials are proceeding with an environmental enforcement case which may include violations of federal law, the U.S. Attorney in the affected district should monitor that state activity. If it appears that all federal interests in the case will be vindicated in the state court action, action in federal court may be an unnecessary duplication of effort. On the other hand, if federal interests will not be protected completely in state court, federal proceedings may be warranted. See also, USAM 9-2.142 and 9-27.240.

5-11.310 Conduct of Prosecution

5-11.311 Individual and Corporate Defendants

A. Congress has demonstrated its intent that individuals, as well as corporations, should be criminally prosecuted for violations of federal environmental laws, see, e.g., 33 U.S.C. §§ 1319(c)(5) and 1362(5), thereby recognizing the fact the unlawful acts or omissions of corporations actually can be traced to individual officers or employees. That Congressional intent should be given serious consideration in the development of prosecutions for violations of the statutes identified under USAM 5-11.101, *supra*.

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B. In any case against both a corporation and any of its individual employees the willingness of the offending corporation to enter a guilty plea is not a basis for dismissal as against the individual.

5-11.312 Attorneys Who May Represent the United States

A. All criminal environmental cases must be handled by attorneys who are either employed by the Department of Justice (including the U.S. Attorneys' offices) or are authorized by the Department to represent the United States. When circumstances require the use of agency attorneys in either a grand jury investigation or the actual litigation of any case involving violations of statutes identified in USAM 5-11.101, *supra*, prior notification shall be given to the Assistant Attorney General of the Land and Natural Resources Division. In any case in which the Land and Natural Resources Division has subject matter jurisdiction, authority for agency attorneys to participate in grand jury investigations or litigation shall be obtained prior to such participation from the Assistant Attorney General of the Land and Natural Resources Division through the Chief of the Environmental Crimes Section. Any letter of appointment of an agency attorney as a Special Assistant United States Attorney shall be processed through the Land and Natural Resources Division.

B. Any appointment of an agency attorney to a special status shall specify (1) the scope of the attorney's appointment in terms of subject matter and duration and (2) that the activities of the attorney under the appointment shall be subject to the direction of the U.S. Attorney and/or the Assistant Attorney General of the Land and Natural Resources Division.

5-11.313 Search Warrants

When search warrants are to be sought in cases arising under the statutes identified in USAM 5-11.101, U.S. Attorneys' offices are encouraged to contact the Environmental Crimes Section. The experience of Section attorneys with warrants in other cases may be of assistance in drafting affidavits for warrant applications and in preparing for searches, generally. Copies of warrant application papers and warrants shall be furnished to the Environmental Crimes Section in any such cases.

5-11.314 Grand Jury Subpoenas for Documents

When grand jury subpoenas for documents are being prepared in cases arising under the statutes identified in USAM 5-11.101, U.S. Attorneys' offices are encouraged to contact the Environmental Crimes Section. The experience of Section attorneys with such subpoenas in other cases may be of assistance to the U.S. Attorneys' offices. Copies of grand jury subpoenas for documents shall be furnished to the Environmental Crimes Section in any such cases.

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5-11.315 Witness Immunities

In any case arising under the statutes identified in USAM 5-11.101, in which immunization authority is sought for a witness pursuant to 18 U.S.C. §§ 6002, 6003, the material necessary for such authorization shall be transmitted to the Environmental Crimes Section of the Land and Natural Resources Division, which oversees the required departmental processing. This provision also applies to any agency requests for immunization approval under 18 U.S.C. § 6004, which may be directed through a U.S. Attorney's Office.

5-11.320 Dispositions

5-11.321 Declinations

A. The U.S. Attorney may decline to prosecute any case arising under the statutes identified in USAM 5-11.101, *supra*, which is being handled entirely by his/her office, by notifying the Assistant Attorney General of the Land and Natural Resources Division of his/her decision with an explanation of the reasons for that decision and an explanation of the referring agency's position regarding declination. Informal discussion of such situations between the U.S. Attorney's Office and the Environmental Crimes Section prior to a final decision by the former often facilitates coordination between the two offices.

B. The Assistant Attorney General may choose to prosecute any case declined by a U.S. Attorney, with attorneys of the Environmental Crimes Section conducting such prosecution. The Assistant Attorney General may request from the U.S. Attorney whatever additional information is deemed necessary in order to decide whether to proceed with the prosecution of a referral declined by a U.S. Attorney.

C. The procedures described in the preceding two paragraphs above also shall apply in any case in which a grand jury declines to return a true bill of indictment, if the U.S. Attorney is of the opinion that prosecution should not proceed in such case.

5-11.322 Dismissals

Indictments, informations, or complaints in criminal cases involving violations of the statutes identified in USAM 5-11.101, *supra*, shall not be dismissed without prior approval of the Assistant Attorney General of the Land and Natural Resources Division, except when a superseding indictment has been returned or an information or a complaint has been filed against the same defendant or when the individual defendant has died. Recommendations to dismiss criminal cases are the responsibility of the U.S. Attorney personally and must be signed by him/her. This provision does not apply to situations involving plea agreements which provide for the dismissal of

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certain counts of an indictment or information coupled with pleas of guilty to other counts.

5-11.323 Plea Negotiations and Agreements; 'Global Settlements'; Alternative Sentencing

A. Without the express approval of the Assistant Attorney General, Land and Natural Resources Division, in any criminal case arising under the statutes identified in USAM 5-11.101 no plea agreement will be negotiated which compromises the right of the United States to any civil or administrative remedies under those statutes. Efforts by defendants to effect such results may arise in the context of so-called 'global settlement' offers.

B. Without the express approval of the Assistant Attorney General, Land and Natural Resources Division, in any criminal case arising under the statutes identified in USAM 5-11.101 no plea agreement will be negotiated which provides for alternative sentencing. 'Alternative sentencing' in this context means sentencing other than fine, imprisonment, probation, or any combination of those sanctions. It includes, by way of example only, such things as monetary payments except to the United States Treasury and requiring the performance of an act otherwise required by law.

C. Review by the Land and Natural Resources Division of any potential agreement covered by subparagraph A or B of this section shall be on a case-by-case basis and shall be initiated through the Chief of the Environmental Crimes Section.

5-11.324 Sentencing Memorandum

Many probation officers and district judges do not have experience with sentencing for environmental crimes; thus, they have no context in which to determine the seriousness of the crimes or the sanctions which may be appropriate to them. In districts where local practice permits, a sentencing memorandum may be a useful means by which to assist the probation officer and the court. The Environmental Crimes Section can furnish samples of such memoranda or material, including case citations, statistics, and technical data, which may be helpful to the United States Attorneys' offices in drafting sentencing memoranda in environmental cases.

5-11.330 Coordination With the Environmental Crimes Section

5-11.331 Case Status

A. Once a case arising under the statutes identified in USAM 5-11.101, *supra*, has been initiated in a U.S. Attorney's Office, the Land and Natural Resources Division shall be kept informed of all its developments. In addition to the information called for in USAM 5-11.304, *supra*, the follow-

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ing information shall be furnished promptly to the Environmental Crimes Section with regard to all such cases:

1. A copy of any proposed indictment or information, such that the Division shall have at least 48 hours in which to review that document prior to its presentation or filing, and a copy of any indictment or information as it is finally returned or filed;
2. Date the indictment (or no bill) is returned or the information or complaint is filed;
3. Date of arraignment and kind of plea;
4. Date of trial;
5. Verdict;
6. Change of plea or plea agreement;
7. A copy of any motion which, if granted, (a) could be dispositive, (b) could affect the enforceability of the relevant statute(s), or (c) otherwise is considered significant by the U.S. Attorney;
8. Date of sentencing and terms of sentence;
9. A copy of any search warrant, including its supporting affidavit(s); and
10. Copies of such papers filed and correspondence exchanged as are requested by the Environmental Crimes Section attorney assigned to the case.

B. Significant developments should be reported immediately by telephone to the Chief, Environmental Crimes Section, in any case in which the Section requests such reports.

5-11.332 Copies of Documents

The copies of documents required to be furnished to the Environmental Crimes Section under various provisions herein relating to environmental crimes serve at least two important functions. First, they allow the Environmental Crimes Section to function in both an advisory capacity and as a clearing house for ideas which otherwise would not be shared among U.S. Attorneys' offices. Second, they aid the Environmental Crimes Section in performing its monitoring function to avoid the government's taking inconsistent positions on related matters.

5-11.340 Appeals

5-11.341 Handling of Appeals

All appeals in criminal cases arising under the statutes identified in USAM 5-11.101, *supra*, shall be handled as provided for in USAM 5-8.310 and

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Title 2, except that, upon the request of the U.S. Attorney and the approval of Assistant Attorney General, Land and Natural Resources Division, the United States Attorney's Office may take primary responsibility for the handling of an appeal. Any such request should be initiated through the Chief, Environmental Crimes Section. In any case handled by a United States Attorney's Office copies of all briefs shall be furnished to the Environmental Crimes Section and the Appellate Section of the Land and Natural Resources Division. Copies of any brief on behalf of the government and of any opposing brief(s) shall be forwarded to those Sections in sufficient time to allow review and comment by them prior to any further government briefing.

5-11.342 Notice of Appeals

A. The U.S. Attorney shall immediately notify the Chief of the Environmental Crimes Section of any notice of appeal by a defendant in any case arising under any statute identified in USAM 5-11.101, *supra*.

B. In any such case in which the U.S. Attorney believes that appeal by the United States is warranted, he/she shall make his/her recommendation to the Chief of the Environmental Crimes Section.

C. For purposes of subparagraphs A and B above, notifications and recommendations may be made by telephone in expedited appeal situations.

5-11.343 Record on Appeal

Whenever an appeal is taken in a case arising under any statute identified in USAM 5-11.101, *supra*, for which the U.S. Attorney has taken primary trial level responsibility, and that appeal is to be handled by the Land and Natural Resources Division, the U.S. Attorney is responsible for assembling and transmitting to the Land and Natural Resources Division those items which constitute the record of the case at the trial court level.



U.S. Department of Justice

Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

January 12, 1993

TO: HOLDERS OF UNITED STATES ATTORNEYS' MANUAL TITLES

FROM: George J. Terwilliger III *George J. Terwilliger III*
Deputy Attorney General

Vicki A. O'Meara *Vicki O'Meara*
Acting Assistant Attorney General (Environment and
Natural Resources Division)

Thomas W. Corbett, *Thomas W. Corbett*
Chairman, Attorney General's Advisory Committee

Attached is a Bluesheet which amends Chapter 11 of Title 5 of the United States Attorney's Manual. This Bluesheet is a final amendment to Chapter 11 and all Department attorneys should immediately begin to follow the procedures set forth in the amendment.

The amendment concludes the laudable efforts of many United States Attorneys, Assistant United States Attorneys, and Environment and Natural Resources Division attorneys, who have given extensive and detailed attention to ways to improve the Department's procedures for the investigation and prosecution of environmental crimes. The successful completion of this amendment is due in large measure to the efforts of J. William Roberts, the former Chairman of the Attorney General's Advisory Committee.

The new procedures emphasize the Departmental goal of cooperative efforts between U.S. Attorneys' offices and the Environment and Natural Resources Division in all cases, and set forth specific procedures for the handling of defined categories of cases. The attached bluesheet replaces certain subsections of Chapter 11 of Title 5; subsections of Chapter 11 that are not addressed in the bluesheet remain unchanged and in effect.

Subject: Procedures for the Handling of Environmental Criminal Cases By United States Attorney's Offices and the Environment and Natural Resources Division of the United States Department of Justice

Replaces: Chapter 11

Purpose: This Bluesheet replaces certain subsections of Chapter 11 of Title 5 identified herein to include new procedures to be followed by the Environment and Natural Resources Division ("the Division") and United States Attorney's Offices (USAOs") in environmental criminal prosecutions. These procedures are designed to ensure more efficient and effective handling of environmental prosecutions.

5-11.110 General Responsibilities

A. Primary responsibility for cases arising under the statutes identified in USAM 5-11.101 may rest with the U.S. Attorney's Office, with the Environmental Crimes Section, or with both on a shared basis. That responsibility will be determined on a case-by-case basis. Experience has demonstrated that very satisfactory results may be obtained from a cooperative, joint effort, combining the U.S. Attorney's Office's familiarity with local practices and procedures and the Environmental Crimes Section's subject matter expertise and experience gained in conducting grand jury proceedings and trials in similar cases.

B. There are no precise rules for determining how responsibility for a criminal environmental case is to be divided between the U.S. Attorney's Office and the Environmental Crimes Section. The decision for a given case will be made ultimately by the Assistant Attorney General of the Environment and Natural Resources Division in consultation with the U.S. Attorney. Investigations/cases are divided into three categories:

1. Environmental Crimes Section ("ECS") cases;
2. USAO cases; and
3. joint cases.

- ECS cases will be handled by the ECS attorney assigned, while the USAO will designate a liaison AUSA to assist with local rules and protocols and final review of the indictment, plea or other disposition.

- USAO cases will be handled by a designated AUSA, while ECS will designate an ECS attorney for consultation and

for final review of the indictment, plea or other disposition.

- Joint cases will be handled by a designated AUSA and a designated ECS attorney; all scheduling and planning will be done jointly by the attorneys.

C. Both the Division and the Environmental Crimes Subcommittee of the Attorney General's Advisory Committee acknowledge that optimum results in environmental cases historically have occurred in instances when cases are investigated and prosecuted as joint cases, and that such cases generally make the most efficient and effective use of the respective resources of the Division and USAOs. Accordingly, these Guidelines are intended not to discourage, but to encourage the formation of relationships that will lead to the development of working partnerships between AUSAs and ECS attorneys and the free and open discussion of all matters, with the likelihood that they will be handled jointly to the extent of available resources.

D. In cases handled entirely by the U.S. Attorneys, in which the Environmental Crimes Section takes no direct role in the litigation, Section resources are available to provide support for the efforts of the U.S. Attorneys. For example, Section attorneys may do legal research, prepare draft papers, and provide advice on policy questions and on related cases in other districts. In cases handled primarily by the Environmental Crimes Section, the United States Attorney's Offices shall cooperate by assisting Section attorneys in scheduling sufficient grand jury time to allow investigations to proceed in timely fashion.

E. It is recognized that there will be some USAO investigations/cases which will necessarily be more significant in scope, complexity or issues and thus subject to a need for greater review and control. The Division will identify those issues of importance which will require such scrutiny. Those cases which are currently subject to such review and control include:

1. Resource Conservation and Recovery Act violations, where a defense has been raised, or is reasonably likely to be raised, that an alleged hazardous waste is not "solid waste" under applicable statutes and regulations.
2. Wetlands violations;
3. Charges under the Clean Air Act Amendments except for asbestos cases;

4. Knowing endangerment charges;
5. Charges based on negligence (except where such charges are part of a charge reduction as a result of a plea agreement);
6. Violations based upon a strict liability theory (except where such charges are part of a charge reduction as a result of a plea agreement);
7. Charges based upon the "responsible corporate officer doctrine";
8. Federal facilities;
9. Matters involving evidence to be presented by the Government derived in whole or in part from self-auditing by regulated entities or otherwise implicating the July 1, 1991 Policy on Audits and Voluntary Disclosure; and
10. Any matter of national interest, for example, an initial prosecution under a particular statute or regulation, or a prosecution involving application of a regulation the validity of which is significantly in doubt.¹

Whenever there is to be a modification of these categories (hereinafter, "priority categories"), the Environmental Crimes Subcommittee of the Attorney General's Advisory Committee will be consulted by the Environment and Natural Resources Division. The Subcommittee will assist in the identification of issues that require greater scrutiny on the part of the Division. In any event, there will be an annual review of the aforementioned priorities at the Subcommittee meeting which immediately follows each U.S. Attorney's Conference.

5-11.200 ORGANIZATION

5-11.210 General

The Section is administered by a Chief and an Assistant Chief. General information relating to the Section or to

¹The term "national interest" is not intended to be a catch-all phrase to obviate these Guidelines. For any case designated as a priority case on the ground that it involves national interest, ECS will identify in writing to the USAO the specific factors upon which such a designation is based.

matters for which it is responsible may be obtained by calling the Chief at (202) 272-9877. Information on a specific case should be requested from the staff attorney assigned to that case. When the staff attorney's name is unknown, his or her name and telephone number can be obtained by calling (202) 272-9877. (Note that a quicker response to an inquiry may be forthcoming if the requestor can cite a Departmental file number, e.g., 198-13-12, which generally appears in the upper left-hand corner of correspondence originating from the Department.)

5-11.300 HANDLING OF CRIMINAL ENVIRONMENTAL CASES, GENERALLY

5-11.301 Case Development [unchanged]

5-11.302 Environmental Case Initiation

A. The ordinary procedure for initiation of criminal cases arising under the statutes identified in USAM 5-11.101, supra, and originating from EPA is by simultaneous referral to the Assistant Attorney General, Environment and Natural Resources Division and to the U.S. Attorney in the district with jurisdiction over the matter. Referral packages generally contain investigative reports and various exhibits which may aid in the understanding of the referral. However, in many instances, it may be necessary to complete the development of the cases through the use of the grand jury.

B. Some cases, though, are initiated without or prior to a formal referral, for example, when investigators call upon the U.S. Attorney's Offices to secure search warrants or when exigent circumstances require early resort to grand jury proceedings. The U.S. Attorney's Office shall advise the Environmental Crimes Section of all such situations by submitting a case initiation report.

C. The USAOs and ECS will each promptly advise the other of the initiation of any investigation, and will share information in a timely fashion as facts are developed.

D. Submission of a Case Initiation Report ("CIR"). Within two weeks of the initiation of a case by a USAO, it will submit a CIR to the Chief of ECS. Similarly, within two weeks of the initiation of a case by ECS, it will submit a CIR to the AUSA having supervisory authority for environmental prosecutions at the appropriate USAO. The CIR will include: (i) a summary of the investigation, including a statement of the available evidence to date, identification of subjects and targets, and the object and purpose of the investigation; (ii) an identification of the responsible investigative agency and case agent; (iii) a clear identification of the statute and regulations suspected to

have been violated; and (iv) a statement of the USAO's or ECS's view as to whether or not the case falls into one of the priority categories, supra. An investigation will be deemed initiated at the earliest of the following dates: (i) the date it is opened as a matter in the USAO Promis, Eagle or other internal docketing system or the Division's internal docketing system (LDTS); (ii) the date an AUSA or ECS attorney provides a prosecutive opinion to the investigating agency or agent; or (iii) the date the USAO or ECS attorney issues the first grand jury subpoena. When a case is initiated by ECS, the U.S. Attorney will designate a liaison AUSA immediately upon receipt of the CIR from ECS and notify ECS of that designation.

E. ECS will utilize a centralized internal docketing system which will document the receipt of the CIR from the USAO.

5-11.303

Authority to Prosecute; Retention of
Authority; Contact with Defense Counsel;
Requests for Assistance

A. Within twenty-one (21) days of the receipt of the CIR from a USAO, ECS will inform the USA whether the case falls within one of the priority categories, supra. A declaration that a case is a priority should be made in writing in order to clearly state the basis for that decision; such cases will be denominated as "PRIORITY CASES." For any investigation determined by ECS not to be a PRIORITY CASE, the USAO will promptly provide an updated CIR immediately to the Chief of ECS if and when an issue arises in the investigation that might arguably cause it to fall into one of the priority categories.

B. In all USAO cases designated as "PRIORITY CASES", the USAO will submit all indictments, pleas (including global settlements) or other proposed dispositions to ECS for approval so that they are received at least 10 business days before the anticipated action. With respect to each submission, the USAO shall submit two copies -- one to the attention of the ECS attorney assigned to the case, and the second to the attention of the Chief of ECS, or in his or her absence, the Acting Chief. ECS will complete its review within 5 business days following receipt of the submission, unless it determines that additional information is essential to that review, which determination it will communicate to the USAO by telephone and confirm in writing. Priority indictments or plea proposals will be submitted for review along with a brief prosecution memorandum. For those cases designated as "PRIORITY CASES", a veto of the United States Attorney's recommendation must be based upon specific reasons set forth in writing.

C. Non Priority Cases do not require approval. In all such cases, the USAO will promptly provide copies of indictments, informations, dispositions, and other significant pleadings to ECS, and is encouraged to consult with ECS.

D. Contact with defense counsel on cases being handled jointly by USAO and ECS will always include a representative of ECS and the particular USAO. In all USAO cases, all defense counsel contact should be referred in the first instance directly to the USAO. In all ECS cases, all defense counsel contact should be referred in the first instance directly to ECS. Furthermore, in all cases, whether USAO, ECS or joint, both the U.S. Attorney and the Assistant Attorney General of the Environment and Natural Resources Division ("AAG") retain discretion to meet with defense counsel, subject only to the following: if the AAG chooses to meet with defense counsel in a USAO or joint case, he or she will invite the U.S. Attorney to attend the meeting either in person or through a representative, and will schedule the meeting to facilitate that attendance; similarly, if the U.S. Attorney chooses to meet with defense counsel in an ECS or joint case, he or she will invite the AAG to attend the meeting either in person or through a representative, and will schedule the meeting to facilitate that attendance. Any such meeting, whether scheduled by the U.S. Attorney or the AAG will be held at a location to be mutually agreed upon by the U.S. Attorney and the AAG.

E. To the extent that either ECS or a USAO is in need of additional legal support for a particular case or matter, each will seek to obtain it from the other. Only in the event that no AUSA or ECS attorney is available will either resort to other resources, such as agency counsel.

5-11.304 Information Needed to be Furnished to the Environmental Crimes Section by the U.S. Attorney's Office [modified by revisions to other sections]

5-11.305 Parallel Proceedings [unchanged]

5-11.306 Cases Arising by Other Than Agency Referral

U.S. Attorneys retain their authority to prosecute cases under statutes listed in USAM-5.101, supra, which are not developed or referred to them from a federal agency. The U.S. Attorney shall notify the Assistant Attorney General of the Environment and Natural Resources Division of the initiation of any such prosecution under the statutes identified in USAM 5-11.101, supra, to enable to Environment

and Natural Resources Division to perform its oversight responsibilities for prosecution under those statutes as set forth herein.

5-11.307 Other Cases Involving Environmental Violations

Whenever, in the context of a case not otherwise within the jurisdiction of the Environment and Natural Resources Division, a U.S. Attorney becomes aware of information which indicates that such case may include violations of any statute identified in USAM 5-11.101, supra, the U.S. Attorney shall advise the Assistant Attorney General of the Environment and Natural Resources Division of that possibility. Upon request of the Assistant Attorney General, the U.S. Attorney shall forward to the Assistant Attorney General copies of relevant material, including grand jury transcripts.

5-11.308 Coordination with State Programs [unchanged]

5-11.310 Conduct of Prosecution

5-11.311 Individual and Corporate Defendants
[unchanged]

5-11.312 Attorneys Who May Represent the United States

A. All criminal environmental cases must be handled by attorneys who are either employed by the Department of Justice (including the U.S. Attorney's Offices) or are authorized by the Department to represent the United States. When circumstances require the use of agency attorneys in either a grand jury investigation or the actual litigation of any case involving violations of statutes identified in USAM 5-11.101, supra, prior notification shall be given to the Assistant Attorney General of the Environment and Natural Resources Division. In any case in which the Environment and Natural Resources Division has subject matter jurisdiction, authority for agency attorneys to participate in grand jury investigations or litigation shall be obtained prior to such participation from the Assistant Attorney General of the Environment and Natural Resources Division through the Chief of the Environmental Crimes Section. Any letter of appointment of an agency attorney as a Special Assistant United States Attorney shall be processed through the Environment and Natural Resources Division.

B. Any appointment of any agency attorney to a special status shall specify (1) the scope of the attorney's appointment in terms of subject matter and duration and (2) that the activities of the attorney under the appointment shall be subject to the direction of the U.S. Attorney and/or

the Assistant Attorney General of the Environment and Natural Resources Division.

5-11.313 Search Warrants [unchanged]

5-11.314 Grand Jury Subpoenas for Documents

When grand jury subpoenas for documents are being prepared in cases arising under the statutes identified in USAM 5-11.101, U.S. Attorney's Offices are encouraged to contact the Environmental Crimes Section. The experience of Section attorneys with such subpoenas in other cases may be of assistance to the U.S. Attorney's Offices. Copies of grand jury subpoenas for documents shall be furnished to the Environmental Crimes Section in any such cases.

5-11.315 Witness Immunities [unchanged]

5-11.320 Dispositions

5-11.321 Declinations

A. The U.S. Attorney may decline to prosecute any case arising under the statutes identified in USAM 5-11.101, supra, which is being handled entirely by his/her office, by notifying the Assistant Attorney General of the Environment and Natural Resources Division of his/her decision with an explanation of the reasons for the decision and an explanation of the referring agency's position regarding declination. Informal discussion of such situations between the U.S. Attorney's Office and the Environmental Crimes Section prior to a final decision by the former often facilitates coordination between the two offices.

B. The Assistant Attorney General may choose to prosecute any case declined by a U.S. Attorney, with attorneys of the Environmental Crimes Section conducting such prosecution. The Assistant Attorney General may request from the U.S. Attorney whatever additional information is deemed necessary in order to decide whether to proceed with the prosecution of a referral declined by a U.S. Attorney.

C. The procedures described in the preceding two paragraphs above also shall apply in any case in which a grand jury declines to return a true bill of indictment, if the U.S. Attorney is of the opinion that prosecution should not proceed in such case.

5-11.322 Dismissals

Indictments, information, or complaints in criminal cases involving violations of the statutes identified in USAM

5-11.101, supra, shall not be dismissed without prior approval of the Assistant Attorney General of the Environment and Natural Resources Division, except when a superseding indictment has been returned or an information or a complaint has been filed against the same defendant or when the individual defendant has died. Recommendations to dismiss criminal cases are the responsibility of the U.S. Attorney personally and must be signed by him/her. This provision does not apply to situations involving plea agreements which provide for the dismissal of certain counts of an indictment or information coupled with pleas of guilty to other counts.

- 5-11.323 Plea Negotiations and Agreements; "Global Settlements"; Alternative Sentencing [unchanged]
- 5-11.324 Sentencing Memorandum [unchanged]
- 5-11.330 Coordination With the Environmental Crimes Section
- 5-11.331 Case Status

A. In all USAO cases, the AUSA handling the case is encouraged to submit copies of indictments, information, motion papers, memoranda of law, briefs and other significant documents to ECS so that ECS can fulfill its function of serving as document bank and a clearinghouse of information regarding environmental prosecutions. In addition, the following information should be furnished promptly to the Environmental Crimes Section with regard to all cases:

1. Date the indictment (or no bill) is returned or the information or complaint is filed;
2. Date of arraignment and kind of plea;
3. Date of trial;
4. Verdict;
5. Change of plea of plea agreement;
6. Date of sentencing and terms of sentence;
7. A copy of any search warrant, including its supporting affidavit(s);
8. Copies of such papers filed and correspondence exchanged as are requested by the Environmental Crimes Section attorney assigned to the case.

B. Significant developments should be reported immediately by telephone to the Chief, Environmental Crimes Section, in any case in which the Section requests such reports.

5-11.332 Copies of Documents

The copies of documents required to be furnished to the Environmental Crimes Section under various provisions herein relating to environmental crimes serve at least two important functions. First, they allow the Environmental Crimes Section to function in both an advisory capacity and as a clearing house for ideas which otherwise would not be shared among U.S. Attorney's Offices. Second, they aid the Environmental Crimes Section in performing its monitoring function to avoid the government's taking inconsistent positions on related matters.

5-11.340 Appeals

5-11.341 Handling of Appeals

All appeals in criminal cases arising under the statutes identified in USAM 5-11.101, supra, shall be handled as provided for in USAM 5-8.310 and Title 2, except that, upon the request of the U.S. Attorney and the approval of Assistant Attorney General, Environment and Natural Resources Division, the United States Attorney's Office may take primary responsibility for the handling of an appeal. Any such request should be initiated through the Chief, Environmental Crimes Section. In any case handled by a United States Attorney's Office copies of all briefs shall be furnished to the Environmental Crimes Section and the Appellate Section of the Environment and Natural Resources Division. Copies of any brief of behalf of the government and of any opposing brief(s) shall be forwarded to those Sections in sufficient time to allow review and comment by them prior to any further government briefing.

5-11.342 Notice of Appeals

A. The U.S. Attorney shall immediately notify the Chief of the Environmental Crimes Section of any notice of appeal by a defendant in any case arising under any statute identified in USAM 5-11.101, supra.

B. In any such case in which the U.S. Attorney believes that appeal by the United States is warranted, he/she shall make his/her recommendation to the Chief of the Environmental Crimes Section.

C. For purposes of subparagraphs A and B above, notifications and recommendations may be made by telephone in expedited appeal situations.

5-11.343 Record on Appeal

Whenever an appeal is taken in a case arising under any statute identified in USAM 5-11.101, supra, for which the U.S. Attorney has taken primary trial level responsibility, and that appeal is to be handled by the Environment and Natural Resources Division, the U.S. Attorney is responsible for assembling and transmitting to the Environment and Natural Resources Division those items which constitute the record of the case of the trial court level.