THE ROLE OF THE EPA OMBUDSMAN IN ADDRESSING CONCERNS OF LOCAL COMMUNITIES

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON
FINANCE AND HAZARDOUS MATERIALS

AND THE

SUBCOMMITTEE ON HEALTH AND ENVIRONMENT

OF THE

COMMITTEE ON COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

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CONTENTS

Page

Testimony of:

Boggiatto, Kimberly 101

Bowers, Bret, Executive Director, Community Leaders for EPA Accountability Now! 106

Fields, Timothy, Assistant Administrator, Office of Solid Waste and Emergency Response, U.S. Environmental Protection Agency 39

Martin, Robert, Ombudsman, U.S. Environmental Protection Agency 44

Mosley, Mary 104

Material submitted for the record:

Dingell, Hon. John D., letter dated October 12, 2000, to Nikki L. Tinsley, Inspector General, U.S. Environmental Protection Agency, enclosing questions for the record, and responses to same 159

Shapiro, Michael H., Acting Assistant Administrator, EPA, letter dated February 5, 2001, enclosing response for the record, with attachments .. 136

THE ROLE OF THE EPA OMBUDSMAN IN ADDRESSING CONCERNS OF LOCAL COMMUNITIES

TUESDAY, OCTOBER 3, 2000

HOUSE OF REPRESENTATIVES,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON FINANCE AND HAZARDOUS MATERIALS, JOINT WITH
SUBCOMMITTEE ON HEALTH AND ENVIRONMENT,
Washington, DC.

The subcommittees met, pursuant to notice, at 10:10 a.m., in room 2123, Rayburn House Office Building, Hon. Michael G. Oxley (Chairman, Subcommittee on Finance and Hazardous Materials) presiding.

Members present, Subcommittee on Finance and Hazardous Materials: Representatives Oxley, Largent, Shimkus, Blunt, Ehrlich, Barrett, and Luther.

Members present, Subcommittee on Health and Environment: Representatives Bilirakis, Cubin, Bryant, Brown, Green, and DeGette.

Also present: Representatives Sawyer and Chenoweth-Hage.

Staff present: Robert Meyers, majority counsel; Amit Sachdev, majority counsel; Robert Simison, legislative clerk; Richard A. Frandsen, minority counsel; and Sarah A. Keim, Presidential Management Intern.

Mr. OXLEY. The subcommittee will come to order.

The Chair would recognize the cochair of our hearing today, Chairman Bilirakis, chairman of the Health and Environment Subcommittee, for an opening statement.

Mr. BILIRAKIS. Thank you, Mr. Chairman; and I want to thank you and your staff for your cooperation in holding this hearing. Your subcommittee has more jurisdiction in this matter than does ours, but I know that we are all greatly concerned about this particular issue, and I want to thank you.

I also want to welcome our witnesses and audience to today's hearing concerning the role of the U.S. Environmental Protection Agency's national hazardous waste and Superfund Ombudsman in addressing concerns of local communities.

Today, we will seek to address several basic questions.

First, we are interested in understanding the Office of the Ombudsman's interaction with the general public, as well as the relationship between this office and other offices within EPA. We are interested in hearing the services which the Office of the Ombuds-

man provides and whether the office is allowed sufficient independence. We are also interested in Assistant Administrator Fields' view of the Office of the Ombudsman and what EPA considers to be the permissible functions of the office.

One of EPA's stated goals is to ensure, and I am quoting, that all parts of society—communities, individuals, business, State and local government and tribal governments—have access to accurate information sufficient to effectively participate in managing human health and environmental risks, end quote.

Unfortunately, many citizens around the country would contend that EPA has failed in its relationship with local communities.

Chairman Oxley and I requested this joint hearing after becoming acquainted with several instances in which communities were unhappy with the EPA's responsiveness to their needs, particularly with regard to Superfund sites. In many cases, the EPA Ombudsman has become involved and opened up avenues of communication for the public's concerns to be taken into consideration. I have received letters from people all over the United States expressing their support for the EPA Ombudsman. I have those letters bundled, Mr. Chairman, and I ask unanimous consent to enter these into the record.

Mr. OXLEY. Without objection.

[The information referred to follows:]

TO:Congressman Michael Bilirikas

FROM: Doyne E. Shrader
18058 Stevensburg Rd
Culpeper, VA 22701
(540)399-1813

6/13/2000

Dear Sir,

You have my willing support in your efforts to take steps to hold the EPA accountable
for their mistaken policy of Biosolids land application by increasing the budget for the independent oversight of EPA's actions.

The following information is a statement I made to the Culpeper County Supervisors
and may help in support of my appeal to you:

On December 12 1999, my neighbor, Mable Harlow called and asked if I had a nasty smell coming from the water. The very same smell from the fields was coming from my water tap. I called the Lenn brothers, who are the property owners and informed them of the problem.

For the first thirty days, I was confidant that the Lenn brothers were doing the best they could to solve the problem. When they left for vacation, I was sure the health department would resolve the situation.

When I inquired as to the uses of the water and what type of filter system could be installed to remove the fecal coliform, I received the letter of which you have a copy before you. This is the first time the involvement of Bio Gro was mentioned and that the possibility existed that Land Application of BIOSOLIDS may be linked to the cause of the well contamination.

As of today, the families living in that area have no clean water. A new well is scheduled to be drilled in two weeks. And I am grateful for the fast action of those involved to gain the permit.

The only question remains how did the well become contaminated?

My request is a simple one. I stand here before you and appeal to you for support of a public investigation into the cause of the well contamination.

In closing, I would like to quote Herbert Spencer, "There is a principle which is a bar against all information, which is proof against all arguments and which cannot fail to keep a man in everlasting ignorance- that principle is contempt prior to investigation".

NOTE: I urge anyone who lives in or around land where BIOSOLIDS are applied to have their well tested and see their doctor for possible exposure to harmful chemicals contaminants and bacteria. Contact your local Health Department for assistance.

DOYNE E. SHRADER
STEVENSBURG VA
(540)399-1813

To:	Congressman Bilirikas	Fax:	(202)225-4085
From:	Pam Hood	Date:	June 13, 2000
Re:	My Support	Pages including cover page:	1
CC:			

☑ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply ☐ Please Recycle

Notes: **URGENT !**

The Honorable Congressman Michael Bilirikas,

I am a resident of Virginia and want to let you know that I support your plans for increasing the budget of the Ombudsman Office of the EPA and giving them subpoena power. This action is necessary and I thank you for all you are doing.

Pam Hood

Lara J. Saffo, Esquire
Post Office Box 336
North Woodstock, NH 03262
(603) 989-5337

June 13, 2000

Congressman Michael Bilirakis
202 225 4085

Dear Congressman:

I wish I lived in Florida so I could vote for you. I have been following the manner in which sludge has been regulated in the United States for the past four years, and am incredibly concerned. I wholeheartedly support your proposal to increase the budget to the EPA National Hazardous Waste Ombudsman Office, and to give them subpoena power. Best of luck! Lara Saffo

Subject: Undeliverable: EPA
Date: Tue, 13 Jun 2000 18:38:14 -0400
From: System Administrator <postmaster@mail.house.gov>
To: horr@du.edu

Your message

To: fl09@mail.house.gov
Cc: DeGette (Public Box)
Subject: EPA
Sent: Tue, 13 Jun 2000 18:45:18 -0400

did not reach the following recipient(s):

fl09@mail.house.gov on Tue, 13 Jun 2000 18:38:08 -0400
The recipient name is not recognized
The MTS-ID of the original message is: c=US;a= ;p=U.S. House of Re;l=HRMIMS010006132238MN1VPXM3
MSEXCH:IMS:U.S. House of Representatives:U.S. House:HRMIMS01 0 (000C05A6) Unknown Recipient

"Teeth for the Ombudsman"

Message-ID: <3946B97E.2A5DEC5F@du.edu>
From: Helene Orr <horr@du.edu>
To: fl09@mail.house.gov Congressman Biliraki's
Cc: "DeGette (Public Box)" <DeGette@mail.house.gov>
Subject: EPA
Date: Tue, 13 Jun 2000 18:45:18 -0400
X-Mailer: Internet Mail Service (5.5.2650.21)
X-MS-Embedded-Report:

Congressfolk,

It has come to my attention that you will offer an amendment to the EPA appropriations bill this week that would provide funding and subpoena power to the EPA's Office of the Ombudsman. How can I possibly convey to you how critical it is that Congress do just that.

As a long-time resident of the Overland neighborhood in Denver and a neighborhood warrior in our decade-long battle with the EPA, I know that without the assistance of the ombudman's office, our concerns would never have been heard. On Friday we anticipate the announcement that the EPA will reverse its earlier Record of Decision and declare a new ROD specifying removal of the waste from our neighborhood and city. This will be precedent-setting decision in the annals of EPA history.

The EPA's original decision to bury 80,00 cubic yards of radioactive and toxic waste in our neighborhood was not only a very bad decision, it was a decision made in secret meetings in back rooms with representatives of the PRP (otherwise known as the Polluter), Shattuck/Salomon/Citigroup. Though we knew from our own research that these meetings very likely had taken place, we were unable to prove it. We were denied access to those documents. Until the ombudsman stepped in. The ombudsman was able to read the documents, to make them public or at least available to members of Congress. It was the ability of the ombudsman to investigate our allegations, to see all the documents in the administrative record, and to question regional EPA staff and state health department officials that brought the sad tale of this site fully into the light. If that office had full subpoena capabilites it would greatly expedite the process and, in the long run, save taxpayer dollars.

Perhaps if we had a more fully empowered and funded ombudsman's office, some of the more egregious acts of EPA employees would not even be perpetrated on the very citizens they are charged to protect. My neighbors and I were repeatedly lied to by the regional office of the EPA. When we dared to question the efficacy of mixing the waste with concrete and burying it in the neighborhood, the EPA project manager told us we were too stupid to understand the "remedy." We never once felt that we were listened to by the EPA until Bob Martin and Hugh Kaufman came to town. Finally, we were heard and not disrespected, stonewalled and sloughed off.

It may seem ironic or unfortunate that we need to have a fully active and autonomous ombudsman's office to protect us from the arrogance of the very agency that is supposed to protect us. But in fact, that is the case. For whatever reasons, the EPA has chosen too often to go to bed with the polluters and offer them cheap clean-up alternatives at the expense of the communities affected.

Nowhere, to my knowledge, in CERCLA is the term "cost-effective" defined strictly in terms of the polluter or the government. In my mind, what is cost-effective can only be what is best for the health and welfare of the people and the land. Give the Ombudsman's Office the power and the money to keep the EPA honest and working in the interests of the people not the corporations.

If I can be of further help or information or if you ever need someone to testify to this experience with the EPA, I would be happy to do so.

Sincerely,

Helene Orr

Helene Orr

horr.vcf	**Name:** horr.vcf **Type:** VCard (text/x-vcard) **Encoding:** x-uuencode

RE: 3 page fax

JUNE 14TH, 2000

TO: CONGRESSMAN BILIRAKIS

FROM: CONCERNED CITIZENS OF LAKE TWP.' /
UNIONTOWN INDUSTRIAL EXCESS LANDFILL
SUPERFUND SITE -

UNIONTOWN , OHIO

NOTE: Dear Congressman Bilirakis,

Please find enclosed two letters to our two local Congressman that have been involved with IEL over the years. I want to let you know how much we appreciate your work regarding this very important issue! Good luck today!

Yours truly,

Chris Borello and "CCLT"

CONCERNED CITIZENS OF LAKE TWP./
UNIONTOWN IEL SUPERFUND SITE
UNIONTOWN, OHIO 44685

6/14/00
The Honorable Congressman Ralph Regula
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Regula:

Our organization is writing in support of H.R. 3656, the Ombudsman Reauthorization Act of 2000 or any amendments to the VA-HUD and Independent Agencies Spending Bill that are made on the House floor by Congressman Bilirakis, that would support H.R. 3656. We respectfully urge you to support any such legislation.

The EPA National Ombudsman receives requests and complaints from Members of Congress and citizens concerning Superfund and other hazardous waste programs and conducts investigations into those complaints.. The Ombudsman then makes findings of facts and non-binding recommendations to the EPA on how to resolve the disputes. Using the Model American Bar Association (ABA) Statute, this bill will greatly assist citizens who require help in ensuring that their needs and views are fully considered in the EPA-decision-making process.

As you know, both citizens and local officials view the US EPA Ombudsman as our one remaining hope of obtaining the truth regarding the serious controversy concerning radiation at our Superfund Site, Uniontown Industrial Excess Landfill after 17 years of almost constant battling with US EPA Region 5 for the real facts surrounding this issue. We therefore believe that it is imperative that the Ombudsman be given the authority by Congress as described above. It is clear that such independence, powers and resources are essential tools for a thorough and competent investigation, but to date have been sorely lacking, thus severely limiting the Ombudsman's ability to do his work. Over the years, we have been appalled by the sheer arrogance of US EPA and its total disregard concerning accountability. Granting the US EPA Ombudman such powers will go a long way to help hold US EPA accountable to the citizens of not only Stark County, but similar communities across the nation. We believe the health and welfare of thousands of Americans is literally in the balance.

Once again, we urge your support for this legislation and its model statute that includes the essential characteristics of adequate staffing, subpoena power, and independence from the EPA.

Sincerely,
Chris

Chris Borello President
CONCERNED CITIZENS OF LAKE TWP./
UNIONTOWN IEL SUPERFUND SITE

CONCERNED CITIZENS OF LAKE TWP./
UNIONTOWN IEL SUPERFUND SITE
UNIONTOWN, OHIO 44685

6/14/00
The Honorable Congressman Tom Sawyer
United States House of Representatives
Washington, D.C. 20515

Dear Congressman Sawyer:

Our organization is writing in support of H.R. 3656, the Ombudsman Reauthorization Act of 2000 or any amendments to the VA-HUD and Independent Agencies Spending Bill that are made on the House floor by Congressman Bilirakis, that would support H.R. 3656. We respectfully urge you to support any such legislation.

The EPA National Ombudsman receives requests and complaints from Members of Congress and citizens concerning Superfund and other hazardous waste programs and conducts investigations into those complaints. The Ombudsman then makes findings of facts and non-binding recommendations to the EPA on how to resolve the disputes. Using the Model American Bar Association (ABA) Statute, this bill will greatly assist citizens who require help in ensuring that their needs and views are fully considered in the EPA-decision-making process.

As you know, both citizens and local officials view the US EPA Ombudsman as our one remaining hope of obtaining the truth regarding the serious controversy concerning radiation at our Superfund Site, Uniontown Industrial Excess Landfill after 17 years of almost constant battling with US EPA Region 5 for the real facts surrounding this issue. We therefore believe that it is imperative that the Ombudsman be given the authority by Congress as described above. It is clear that such independence, powers and resources are essential tools for a thorough and competent investigation, but to date have been sorely lacking, thus severely limiting the Ombudsman's ability to do his work. Over the years, we have been appalled by the sheer arrogance of US EPA and its total disregard concerning accountability. Granting the US EPA Ombudman such powers will go a long way to help hold US EPA accountable to the citizens of not only Stark County, but similar communities across the nation. We believe the health and welfare of thousands of Americans is literally in the balance.

Once again, we urge your support for this legislation and its model statute that includes the essential characteristics of adequate staffing, subpoena power, and independence from the EPA.

Sincerely,

Chris

Chris Borello President
CONCERNED CITIZENS OF LAKE TWP./
UNIONTOWN IEL SUPERFUND SITE

JULIAN C. HOLMES
RR #1 BOX 3870
WAYNE, MAINE 04284
Tel: 685-9057

June 14, 2000

Hon. Michael Bilirikas
United States Congress
Washington, DC

FAX: 202-225-4085

Dear Congressman Bilirikas:

In view of the extensive, well-documented corruption at the United States Environmental Protection Agency, I wish to register my support for:

1. increasing the budget of the EPA Ombudsman Office, and

2. providing that office with subpoena power.

Thank you for your leadership on these matters.

Sincerely,

Julian C. Holmes

Michael Bilirikas

Greetings from
Maine! Having first hand knowledge of EPA arrogance and corruption, we wholeheartedly support increasing the budget of the Ombudsman Office and giving them subpoena power. These actions are LONG OVERDUE ! Merry Welch, Parsonsfield, ME

Congressman Bilirakis

- June 13, 2000
- Hello from Warren, Ohio.
- I am in support of increasing the budget of the Ombudsman Office.
- I am also in support of giving them subpoena power.
- Please help stop the EPA from poisoning us.

- Thank you;
- Deborah L. Burns

Pi-Pa-TAG, Inc.
Pinellas & Pasco Counties Technical Assistance Grant

1015 Wideview Ave.
Tarpon Springs, FL 34689

June 14, 2000

The Honorable Michael Bilirakis
United States House of Representatives
Washington, DC 20515

Dear Representative Bilirakis:

PiPaTAG, Inc. is writing in support of H.R. 3656, the Ombudsman Reauthorization Act of 2000 or any amendments to the VA-HUD and Independent Agencies Spending Bill that you may make on the House floor that would support H.R. 3656.

As our citizens group, PiPaTAG, Inc, saw first hand in the Anclote area of Pinellas and Pasco Counties with the Stauffer Superfund site, the EPA has sometimes proven to be unresponsive to those citizens who are most affected by their decisions. Until the Ombudsman stepped in, the community was unable to get disclosure of important public documents regarding our site. Actual ownership of the site as well as the entity responsible for the financial aspect of the 'cleanup' was unclear. In fact, the ownership of the corporation changed during the process of the Ombudsman's investigation and EPA did not divulge that fact for months. EPA was willing to sign a Consent Decree without fully checking into the ability of the new ownership to fund the 'cleanup' and the monitoring process.

EPA officials also failed to pay attention to comments and complaints from the community about unresolved health issues relating to contamination from the Stauffer Superfund site. In our own situation, the Ombudsman's office has helped local citizens to understand the EPA's processes, and has proven enormously helpful to members of the community living in Southern Pasco County and Northern Pinellas County.

Once again, we urge your continued efforts to pass this important legislation and its model statute that includes the essential characteristics of adequate staffing, subpoena power, and independence from the agency over which the Ombudsman has jurisdiction.

Sincerely,

Heather Malinowski

Heather Malinowski
Secretary, Pi-Pa-Tag

Phone (727) 937-2988 Email: chimal@flasuncoast.net Fax (727) 942-3978

6/14/00

Congressman Bilirakis
(202) 225-4085 FAX

Dear Congressman Bilirakis:

I fully support your plan to grant subpoena power and an increased budget to the EPA National Hazardous Waste Ombudsman's Office, to investigate EPA's outrageous record and lack of credibility with the public in Congressional hearings and elsewhere (everywhere).

EPA corruption is beyond belief. I have been a regulatory consultant dealing with EPA for 28 years. They no longer serve any purpose other than social and political design. Carol Browner is the worst. Her behavior; lies, half truths and blatant misrepresentations; before Congress recently were unconscionable. People like this do not deserve to serve the people of this country. We demand better.

I have particularly disgusted with EPA's 503 regulations which were a premeditated plan to pollute this country's food production with industrially contaminated sewage sludge. Secondly, their polluting groundwater with MTBE further validates my point. EPA is the biggest polluter in the United States.

Sincerely,

Reed Smith

Reed Smith
322 Arboles Way
Oakdale, CA 95361
(209) 848-0142

South Belt-Brio Community Group

11555 Beamer Houston, Tx 77089 281-481-5656

Brio Community Group
11555 Beamer
Houston, Tx 77089
Marie Flickinger

June 14, 2000

The Honorable Tom DeLay
United States House of Representatives
Washington, DC 20515

Dear Tom,

I am certain you remember my involvement with the Brio Superfund Site. You may also remember the help we got from Bob Martin, the EPA Ombudsman who works out of Washington.

Had it not been for his assistance as well as your own help with the air monitoring, San Jacinto College South campus would be closed today -- for an anticipated period of three to five years. Additionally, Memorial Hermann Hospital Southeast would be in major financial straits, if not closed also. What sick person would want to visit a hospital next-door to a college closed due to toxic air emissions?

The accepted remedy which had not only been approved by EPA, but approved by Justice and the federal court would have allowed the burning of dioxin in a 99.99 incinerator instead of the required 99.9999 incinerator. The South Belt community, instead of thriving as it is today, would have become a blighted area.

Brio is the first site that Ombudsman Bob Martin worked on. With his help the community succeeded in turning around a remedy which would have been disastrous for the community.

I have served as a community representative for our site for 12 years. What saddens me the most on discussing sites with others is that the story still has not changed. EPA needs an objective mediator (ombudsman) to assist the community which is totally out-gunned when fighting EPA. The community is always the victim. Without help from people like Ombudsman Bob Martin and yourself, communities have no chance.

Tom, you of all people understand the fight of the little people against EPA.

I am writing today to ask you to support H.R. 3656, the Ombudsman Reauthorization Act of 2000 or any amendments to the VA-HUD and Independent Agencies Spending Bill that are made on the House floor by Congressman Bilirakis that would support H.R. 3656. I respectfully urge you to support this legislation.

Using the Model American Bar Association (ABA) Statute, this bill will greatly assist citizens who require help in ensuring that their needs and views are fully considered in the EPA decision-making process. As our citizens' group saw first hand in Houston with the Brio Superfund Site, the EPA has frequently proven to be unresponsive to those citizens even when the need is real— and ultimately scientifically provable. I urge your support for this legislation and its model statute that includes the essential characteristics of adequate staffing, subpoena power, and independence from the EPA.

I am counting on your past experience with EPA as a reason to support this bill.

Sincerely,

Marie Flickinger
Chairman, South Belt-Brio Community Group

P.S. I also serve as chair of the EPA Brio Community Assistance Group which is not connected to this group.
P.P.S. We frequently use your press releases. A recent one is enclosed. Stand firm on the Houston rail issue!

AMERICAN FRIENDS SERVICE COMMITTEE
NORTHEAST OHIO OFFICE
Humanity House
513 West Exchange St.
Akron, Ohio 44302
330-253-7151 or 330-253-7204
Fax 330-996-4684

Post-it™ Fax Note 7671	Date	# of pages ▶ 1
To Rep Bilirakis	From	
Co./Dept.	Co.	
Phone #	Phone #	
Fax # 202-225-4085	Fax #	

15. June. 2000

Tom Sawyer
United States House of Representatives
Washington, DC 20515

Dear Representative Sawyer,

I write in support of H.R. 3656, the Ombudsman Reauthorization Act of 2000 or any amendments to the VA-HUD and Independent Agencies Spending Bill that are made on the House floor by Congressman Bilirakis, that would support H.R. 3656. Please support any such legislation.

The EPA National Ombudsman receives requests and complaints from Members of Congress and citizens concerning Superfund and other hazardous waste programs and conducts investigations into those complaints. The Ombudsman then makes findings of facts and non-binding recommendations to the EPA on how to resolve the disputes. Using the Model American Bar Association (ABA) Statute, this bill will greatly assist citizens who require help in ensuring that their needs and views are fully considered in the EPA decision-making process.

Over the past five years, our organization has had enormous difficulties with Region 5 of the EPA in getting to the bottom of the issue of radiation at the Industrial Excess Landfill (IEL) Superfund site in Uniontown, Ohio. Human persons connected to our organization and community residents have been treated less fairly and openly than corporate persons in access to information and officials and in securing water samples. This has resulted in us submitting several FOIA requests and legal appeals to withheld information.

The involvement of those connected to the US EPA Ombudsman's office has had the effect of forcing Region 5 to respond more openly to public concerns. The Ombudsman has also been genuinely open to receiving direct written information and testimony related to long-standing concerns at the IEL -- and is in the process of acting on this information through a preliminary investigation into past practices at the IEL. The US Ombudsman has not treated human persons as second class citizens compared to corporate persons.

It is essential that such an Ombudsman exists independent from EPA, other federal agencies and as far removed as possible from the reach of corporations which, as nothing more that artificial legal fictions, serve to corrupt the political process and often promote science that serve their own narrow interests at the expense of the common good.

We urge your support for this legislation and its model statute that includes the essential characteristics of adequate staffing, subpoena power, and independence from the EPA.

Sincerely,

Greg Coleridge

Greg Coleridge
Director
Economic Justice & Empowerment Program

cc: U.S.. Representative Michael Bilirakis

The American Friends Service Committee is a Quaker social action organization seeking non-violent solutions to human problems through promoting understanding and peace and helping those ill and oppressed.

HARMONY TOWNSHIP ENVIRONMENTAL COMMISSION
3003 BELVIDERE ROAD, PHILLIPSBURG, NEW JERSEY 08865
Phone: (908) 213 - 1600 Fax: (908) 213 - 1850

"Living Together in Harmony"

June 19, 2000

To: Representative Michael Bilirakis

From: William Rosebrock, Chairman
Harmony Township Environmental Commission

I am in support of proposed legislation would make the Ombudsman's position independent of EPA, provide him subpoena power and increase his budget to conduct investigations.

Thank you for your interest in this matter.

PhoneTools

BVRP software

Phone:

Fax:

Message :

Dear Rep. Bilirakis:

As a citizen of Washington State I am outraged by the arrogance of the EPA! Please accept the attached letter as support for your efforts to reauthorize the USEPA Ombudsman's position.

Thank you.

Patricia Anne Martin
Former Mayor, City of Quincy
509-787-4275

From: User	**To:** US House of Representatives Rep. Michael Bilirakis
Date: 6/19/00	**Page(s):** 3

June 18, 2000

Representative Michael Bilirakis
Washington, DC 20515
202-225-4085

RE: USEPA Ombudsman Reauthorization

Dear Representative Bilirakis:

Thank you for supporting the reauthorization of the USEPA Ombudsman, and the only hope citizen's have for EPA accountability!!

As former Mayor of a small agricultural community in Washington State I have experienced first hand EPA's arrogance, and lack of accountability to the people. As Mayor I tried unsuccessfully to ascertain the origin and constituents of hazardous waste being shipped to a fertilizer distributor located adjacent to our Junior and Senior High Schools.

So much for Community Right to Know!! It's meaningless if EPA isn't going to enforce it. And as you know, "they darn well do what they please" because they have no accountability.

Anyway, in our particular situation, EPA intentionally failed to test fields of farmers who had suffered crop losses from these hazardous fertilizer materials, leaving them at the mercy of the corporations and with little useful evidence for litigation. Field tests, which had been requested by the injured farmers as part of EPA's investigation, were never done. Critical analytical data, necessary to this investigation, and which may have saved their farms, their livelihoods and their dignity, was conveniently never conducted.

EPA even failed to conduct a comprehensive sampling protocol on the hazardous waste site itself. The presence of heavy metals, and even outlawed chemicals, that were found on site were downplayed through evasive answers and in at least one case, higher than normal detection limits. This "slight of hand" continues today.

My experience with the EPA has left me wondering if the relationship between polluters and the EPA hasn't become too close. Perhaps, this lack of accountability is largely to blame. Whatever the reason, this agency needs a watchdog.

It has been said that "absolute power corrupts absolutely". As Americans concerned for the environment, our children and the future of our nation, we cannot afford to risk that type of abuse in the agency charged with protecting those very values.

The Ombudsman's position, restructured to allow him subpoena power and independence from the agency, is imperative to keeping the EPA on the course originally envisioned by Congress.

Your courageous stand to see this accomplished is greatly appreciated.

Sincerely,

Patricia Anne Martin
Former Mayor, City of Quincy
617 H Street SW
Quincy, WA 98848
509-787-4275

Olympic ENVIRONMENTAL Council

19 June 2000

Congressman Michael Bilirakis
Washington D.C.
FAX: 202-225-4085

Dear Representative Bilirakis:

The Olympic Environmental Council from the North Olympic Peninsula of the State of Washington supports your efforts to amend the VA HUD appropriation bill to make the national USEPA Ombudsman position independent of EPA, provide him subpoena power and increase his budget to conduct investigations.

Mr. Robert Martin has been invaluable to us, as we know he has been to other citizen groups around the nation. In fact, it was through a Florida citizen group that we learned of the national Ombudsman and how he might help us. We were most fortunate to have reached him and obtained his assistance.

Beforehand, citizens were repeatedly denied help by our local and state agencies in stopping the output of dioxin and other harmful toxics into our community by one of the state's and nation's worst polluters of air, water and soil. Rayonier, Inc. (formerly ITT-Rayonier, Inc.) Region 10 EPA also ignored our pleas. All agencies ignored the contamination of people, private properties and natural resources. The corporation could do anything, even after it shut down its pulp mill in Spring 1997. No government wanted to inspect the level of hazardous waste this corporation would leave strewn throughout the community when exiting. The firm has been let to leave their toxic waste in other communities, only having to move a few shovels of dirt, fence the contaminated sites (that the firm determined contaminated), pay some officials a few hundred thousand dollars and exit.

When Region 10 EPA heard that we had gotten the Ombudsman interested in seeing to it Rayonier's contamination of our town was assessed, the agency tried to convince Martin things were not serious and the state was in control. Mr. Martin's persistence in going forward with his investigation caused the the Region to accept a citizen petition to implement Superfund assessments of the pulp mill, the adjoining Strait of Juan de Fuca, three landfills, four fresh water streams and private properties. That is how pervasive is the reach of the pollution.

Rayonier Hazardous Waste Cleanup Project
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email: darlenes@olympus.net · www.olympus.net/community/oec

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It was clear from the unorthodox sampling and analytical procedures carried on by the EPA contractors, they tried to minimize the extent of the pollution they might find. Even so, what they found was so serious that in the end, the mill sit/Strait and three landfills attained Superfund level status.

Throughout EPA's presence and actions it was necessary for citizens to have several meetings with the staff and with the Region 10 Administrator. We do wish to insert that the Administrator did avail himself and his staff for meetings with our statewide coalition and we are appreciative of this. Mr. Martin attended certain of those meetings and his presence helped move the process forward. Indeed, his involvement helped us succeed in getting the mill/Strait recommended for the Superfund National Priority List.

Local politics won out in the end by pressuring the State Governor to insist the site not be listed on the NPL, but deferred to the State -- the very agency that allowed Rayonier to pollute in the first place. The deferral process stunk. EPA did not follow its own guidelines. The staff ignored the overwhelming public voice and substantive arguments to list the site on the NPL. While the Region 10 staff was quick to want to drop this "hot potato" in the state's lap, our continued meetings with the Regional Administrator -- to insure he heard other voices than his staff's -- and Mr. Martin's involvement effected strong deferral language which could cause the site to yet wind up on the NPL.

This scenario is now being repeated over the fate of the Superfund level landfills and surrounding contaminated communities. EPA headquarters would like to stop Mr. Martin's involvement in this. We need to make sure he retains his independence and is properly budgeted to continue his assistance in helping restore life and dignity to this community.

We wish you success in achieving your goal. We have encouraged citizens around the country to support your legislation. We would appreciate hearing from your office the outcome of your proposed legislative amendments.

Respectfully submitted.

Darlene Schanfald

P. 2 of 2

Pi-Pa-TAG, Inc.
Pinellas & Pasco Counties Technical Assistance Grant

1015 Wideview Ave.
Tarpon Springs, FL 34689

September 28, 2000

Honorable Rep. Michael Oxley, Chair
Subcommittee, Finance & Hazardous Materials
2233 Rayburn House Office Bldg.
Washington DC 20515

Honorable Rep. Michael Bilirakis, Chair
Subcommittee, Health & Environment
2369 Rayburn House Office Bldg.
Washington DC 20515

Dear Sirs:

This letter is presented by the Board of PiPaTAG, Inc. to the House Commerce Committee's Finance & Hazardous Materials and Health & Environment Subcommittees for their October 3, 2000, joint hearing entitled "The Role of the EPA Ombudsman in Addressing Concerns of Local Communities." We request that this letter be included as testimony in the Joint Committee hearing record.

Pi-Pa-Tag, Inc., holds a Technical Assistance Grant to provide information to the affected community concerning cleanup of the Stauffer Chemical Superfund Site in Pinellas County, Florida, under EPA Assistance Agreement number 1994931-01-0. Our newsletter reaches over seven hundred concerned citizens at the intersection of Florida's Pinellas and Pasco counties.

The community affected by the Stauffer Chemical Superfund Site near Tarpon Springs, Florida, is shocked at the treatment it has received at the hands of EPA Region 4. Though EPA Region 4 has attempted to portray itself as being in a partnership with the community, observed behaviors point to the partnership actually being between EPA Region 4 and Stauffer Management Company (SMC), the Potentially Responsible Party (PRP).

For years, members of the community have asked reasonable, legitimate questions about the Stauffer Chemical Superfund Site and the surrounding area, and for years they have received very few satisfactory answers. At a number of public meetings, EPA Region 4 told citizens that their questions would be answered at a later date, after further study. Most questions were never answered. Thus, the community was patronized and denied meaningful participation in the Superfund process. Though an EPA Technical Assistance Grant was awarded, reports and comments from the public and from the environmental scientists under contract as Technical Advisors were, for the most part, ignored. In some instances, those comments were used as excuses to weaken parts of the proposed containment project. EPA Region 4 staff has turned

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Pinellas & Pasco Counties Technical Assistance Grant

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citizens' comments about contamination from the site that has spread into the surrounding community into excuses to reduce the level of the remediation on the site itself.

EPA Region 4 promised to clean the site (located within a residential community) to Residential Standards, yet they released a Record of Decision (ROD) with no soil cleanup level for arsenic, the main chemical contaminant, then resorted to intellectual obfuscation while they adopted a less-stringent cleanup standard

Without performing the studies needed to determine potential short- or long-range safety issues, EPA Region 4 agreed to the remedy chosen by Stauffer Management Company's (SMC) contractor. While EPA Region 4 staff have staunchly defended the acres of monstrous concretized mounds of heavy metal and radioactive contaminants included in the proposed remedy, they evaded questions about the need for hydrogeological studies to determine the flow of groundwater and the potential for sinkhole formation beneath those mounds. In spite of obvious lack of scientific, fiscal, or common sense and ignoring the fact that the site is over an extremely vulnerable part of the Floridan Aquifer (the major source of the area's drinking water), they attempted to convince the community that a second operational unit, begun only AFTER the huge mounds were completed, would determine the safety of the remedy.

EPA Region 4 professed a strong commitment to working with community members, yet they sent the Consent Decree to the Department of Justice over the community's strenuous objections.

Actual proof of the irresponsibility of the actions of EPA Region 4 was not available until the EPA National Ombudsman responded to the appeals of local citizens and agreed to investigate the situation. Suddenly, unanswered questions began to be raised in a more public arena. New questions emerged: through the efforts of the Ombudsman's office, the community learned that EPA Region 4 has shielded the PRP by not taking into account or publicly revealing its knowledge of certain financial maneuverings of the ownership of the Stauffer Chemical Superfund Site, maneuverings which place the long-range (and, indeed, possibly the short-range) fiscal accountability for the site in serious jeopardy.

Only because of the investigation by the Ombudsman's Office, EPA Region 4 agreed to: withdraw both the original Consent Decree and the Amended Consent Decree; perform the hydrogeological tests required to determine the suitability of the proposed remedy for the geological characteristics of the site prior to implementing the remedy; bring in special hydrogeological consultants, including the US Geological Survey; compromise with the Florida Department of Environmental Protection to use Florida's Commercial standards for arsenic cleanup. They have delayed but have not abandoned the original proposed remedy, nor have they reopened the Record of Decision (ROD). Without continued oversight of this project by the Ombudsman's Office, we citizens know that EPA Region 4 will eventually resort to 'business as

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usual,' ignoring the evidence of scientific tests and shielding the true reasons for decisions in the project.

Documentation for these and other problems associated with Region 4 EPA's handling of this Superfund site can be found posted on Pi-Pa-TAG's web site, www.nucleicassays.com/eco/TAGindex.htm or can be obtained by request to Pi-Pa-TAG at the address on this letterhead..

We respectfully urge action to protect the public from Region 4 EPA's deliberate or accidental behavior that benefits the polluter at the expense of the affected citizens.

Sincerely,

No signatures on fax / electronic copies

John "Chuck" Lehr
President, Pi-Pa-TAG

Rose Mary Ammons, Ed.D.
Vice President, Pi-Pa-TAG

Heather A. Malinowski, D.N.
Secretary, Pi-Pa-TAG

Cc: Members, House Commerce Committee: Subcommittees
Finance & Hazardous Materials
Health & Environment Subcommittees
Rep. Karen Thurman
Robert Martin, EPA National Ombudsman

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A Times Editorial

Vigilance wins in Superfund

© St. Petersburg Times, published August 30, 2000

No one will ever accuse the U.S. Environmental Protection Agency of learning a lesson the easy way. While seeking judicial approval of a controversial cleanup plan for the Stauffer Chemical Superfund site, EPA officials offended U.S. Rep. Mike Bilirakis, fought with the Florida Department of Environmental Protection, ignored Pinellas County health officials and angered Tarpon Springs residents.

Now, the EPA has withdrawn the proposed plan from federal court, ordered more testing and said it wants to work with all interested parties. Regaining trust is not going to be that easy.

The cleanup plan was incomplete, if not outright flawed. The EPA and Stauffer's corporate owner both favored piling 300,000 cubic yards of contaminated soil into mounds and sealing them below and above ground to prevent leaks. But the EPA ombudsman shattered confidence in that plan by exposing weaknesses in the "pile and cap" method at a comparable site in Denver, saying pollutants could leak into the ground without being detected.

Stauffer is Pinellas County's only Superfund site and an obvious threat to human health. It sits on a bank of the Anclote River, surrounded by houses, businesses and an elementary school. Yet the EPA ignored county health officials and residents who feared the piled pollutants would leak into the aquifer or be undermined by a sinkhole. The federal agency fought state environmental officials who wanted to reduce the amount of arsenic left in the soil. And two EPA officials walked out of a public hearing held by Bilirakis rather than answer residents' questions.

Given such behavior, EPA officials shouldn't be surprised that much of the public has lost confidence in the agency. The EPA did the right thing by stopping the legal process, requiring Stauffer officials to study the site's geology and signing a cooperative agreement with the DEP. But EPA project manager John Blanchard won't rule out a return to the same "pile and cap" plan. The burden is on the EPA to persuade everyone that the next proposed cleanup will protect the environment and human health.

Call it a temporary victory for residents such as Mary Mosley (who has been fighting Stauffer pollution for 22 years), politicians Bilirakis (who supported the EPA ombudsman's intervention) and state Sen. Jack Latvala (who pressured the DEP to get involved) and county Health Department official Mike Flanery (who questioned the plan's attention to drinking water safety).

We now know there is no substitute for vigilance in the Superfund process.

Tampa Tribune Editorial

Aug 31, 2000

Finally, a logical move by EPA

The decision this week by the U.S. Environmental Protection Agency to formally withdraw its plan for cleaning up the Stauffer Chemical site near Tarpon Springs may not qualify as a true miracle, but it is darn close.

After years of insensitivity and downright stubbornness, the country's chief environmental regulatory agency finally pulled the official consent decree that allows Stauffer Management to leave an estimated 300,000 cubic yards of hazardous soil on site. The shelved plan consists of rounding up an estimated 300,000 cubic yards of hazardous soil, putting it in a mound, sealing it and then injecting it with cement.

After prodding from persistent resident activists, EPA decided additional tests are needed, including studies to determine the risk of sinkholes and whether drinking water supplies would be protected. EPA officials don't deserve much praise for this decision, because these most important studies should have been undertaken long ago - certainly before the so-called mound-and-cap method was chosen. As activist Mary Mosley told a reporter: ``It's a victory for the community. We knew that you can't fit a remedy without testing for the most obvious."

But caution and continued persistence is needed in the communities surrounding the hazardous waste site, which is on the EPA's Superfund list as one of the nation's most contaminated. Some EPA officials were quick to point out Monday the proposed mount-and-cap cleanup method has not been totally ``scrapped." Such comments are disheartening, because they do not reflect an open mind - one reason many in the community are distrustful of EPA officials. EPA officials must keep an open mind during this review and study period.

The EPA is charged with protecting the environment and health of residents, and it has a duty to require Stauffer Management to undertake a cleanup method that will accomplish that without any doubt - no matter the cost to the company. As U.S. Rep. Mike Bilirakis, R-Palm Harbor, said in a statement: ``We must all remain actively involved in this process to secure a cleanup of the Stauffer site consistent with the public health and safety."

DSC

Subject: Ombudsman Legislation

Sept. 29, 2000

To: Rep. Michael Oxley, Chair, Subcommittee on Finance & Hazardous Materials

From: Doris Cellarius
621 Park Avenue
Prescott, AZ 86303

I am writing in support of legislation that will give full support to the EPA National Ombudsman Office, with adequate funding, powers, and independence from the agency.

It is my understanding H.R. 3656 and S. 1763 address the ombudsman issue.

For several years I worked for the Washington Environmental Council assisting citizens who live adjacent to toxic waste sites. We helped them form community groups to comment on the cleanups and we helped them find technical help to understand the state and EPA cleanup plans. I was then appointed to a three-year term as a Community Consultant to ATSDR's Board of Scientific Counselors. In all of this work I learned how important the assistance of Ombudsman Robert Martin has been to citizens who needed additional resources and help in negotiating a
bureaucracy that is often intimidating and unresponsive to the human needs and health problems that toxic waste sites have caused.

Citizens in Superfund communities must have access to fair, impartial hearings and solutions to their legitimate and fact-based concerns regarding EPA's often inadequate cleanup plans. responsible parties and vested interests dominate the negotiations. Citizens and community groups become exhausted, yet they persist in the hope that the truth will be understood, that someone will come to their rescue. Family life suffers, and children are exposed to the frustration thier parents feel as well as to toxins. The National Ombudsman helps in cases like this. His knowledge and experience grows as he helps each site. Regional ombudsmen cannot do nearly as good a job.

I have seen regional ombudsmen who, though well meaning, were so overworked and immersed in local polictics that they were unable to do anything for community groups. They need the perspective that an "outsider" can provide when they try to meet community needs.

I believe it is very cost effective to have a program that will make it clear that EPA is humane and cares about children and families. Please look at National Ombudsman legislation with these thoughts in mind.

Please include my letter in the hearing record. Thank you.

Doris Cellarius

Simison, Robert

From: Darlene Schanfald [darlenes@olympus.net]
Sent: Friday, September 29, 2000 6:20 PM
To: Simison, Robert

Legislative Clerk Robert Simison

2125 Rayburn House Office Bldg.

Washington DC 20515

Phone: (202) 225-2927

Fax: (202) 225-1919

RE: "The Role of the EPA Ombudsman in Addressing Concerns of Local Communities

To the Honorable

US Rep. Michael Oxley, Chair

(Subcommittee on Finance & Hazardous Materials)

US Rep. Michael Bilirakis, Chair

(Subcommittee on Health & Environment)

The Olympic Environmental Council (OEC) is a coalition of citizens in Jefferson and Clallam Counties in the State of Washington. We work to protect human health and the environment for present and future generations. OEC has formed a coaltion with western WA educational, health and environmental organizations working to protect our community and state and federal aquatic lands that have been contaminated by a pulp mill.

OEC is writing in support of the reauthorizing and expansion of powers for the U.S. EPA Ombudsman under consideration by your committees. We want to ensure the future functioning of the EPA National Ombudsman Office, with adequate funding, powers, and independence to function appropriately under the nationally and internationally recognized American Bar Association (ABA) guidelines.

The Ombudsman Office is an important part of a democratic system of government. It serves Superfund communities and others most directly affected by toxic exposure, serving as a "watchdog" and final recourse when citizens feel they have not received justice elsewhere in their cases. In many cases the National Ombudsman has been the first agency person to actually listen to the complaints of citizens and elected officials' and to work towards resolution. In our case, it was only through the auspices of this Office, and after 8 years of trying to get government help, that citizens succeeded in getting us government help.

A well known pulp mill polluter for over 60 years, Rayonier, Inc., WA State's primary polluter for a number of years they were in operation, smothered our air, waters, state aquatic lands, and soils with highly toxic materials (dioxin/furans, PCBs, heavey metals, etc.), impacting the lives of workers, residents, the nearby medical community, and others. For years citizens tried to get various governments to work with us to make Rayonier operate more responsibally. No government, local, state or federal, wanted to tangle with Rayonier. In government documents personnel write, "They have money."

Since 1988, three citizen groups formed. The first two did amazing public information work and data collection, including the establishment of a hotline for residents impacted physically by the mill air plumes. No government would look at the 5 years of data (3000 calls). In 199I, OEC stepped in to stop the expansion of Rayonier's industrial landfill in a residential area and to stop Rayonier, who was closing their mill operation, from leaving town without cleaning its wastes. We faced the same stonewalling from governments as the previous local citizen groups, until a Florida citizen group, CATE, told us about the US EPA Ombudsman. We luckily connected with Bob Martin in November 1996. Then things began to change for us. Region 10 cooperated and conducted Superfund Assessments of the mill, the Strait of Juan de Fuca, three industrial landfills the state and county allowed in residential areas, nearby streams impacted by stormwater from the landfills, as well as private properties. EPA used methods of sampling and analysis that were not protocol; that were designed to minimize the contamination levels. Nevertheless, all were Superfund level. Unfortunately, because EPA could use minimized levels, the company and other governments are now squealing, there is not very much; it is not very serious.

We temporarily have the mill-Strait cleanup process in place. But we are still trying to get EPA to do the right thing by the citizens impacted by the landfills in their back/front yards. We have some very sensitive matters, such as one landfill is poised to slide downhill on to homes and into a stream containing endangered species of salmon. EPA keep wanting to brush their hands of these sites.

Still, today, EPA and other governments come to the rescue of the corporation to save it dollars, rather than the sick and dying citizens who have impaired health and property investments due to the operation of this mill, leaving us needing the Ombudsman's help to insure governments overseeing assessments and cleanup do it right.

EPA has ignored citizens most directly affected by toxics in their community across the country. EPA employees hazardous waste site assessments are often flawed--as was ours, allowing the agency to both under estimate the seriousness of the contamination and limit the options for cleanup and remediation.

National Ombudsman help across the country in Washington, Pennsylvania, Idaho, Montana, Florida, Colorado and elsewhere proves that the role of the National EPA Ombudsman must be adequately secured with reauthorization, funding, independence according to American Bar Association standards and from the agency it must watchdog and, finally, subpoena power. The Ombudsman should also be in charge of the workings of the countries ten (10) regional EPA ombudsmen.

I am highly in favor of strong environmental regulation in our country and necessary appropriations for ongoing programs and enforcement capabilities. An important part of this work is the independent position and funding for a National Ombudsman that brings us accountability of the EPA agency itself and how this agency meets its mandate to protect this nation's health and envronment.

From Tim Field on down through the regional office staff, including the former (not present) regional ombudswoman and ATSDR, we have not been well served. The Ombudsman needs independence from the others to be a true Ombudsman, and he needs to have resources to select regional ombudsmen/women that work under him, as well as staff at the national level. Indeed, his office is the one citizens can agree on to which tax dollars should be given.

We urge you to support the functioning and expansion and independence of this Office. Thank you for your consideration and please include this testimony in the record. I would also appreciate being updated by your office on the progress of this matter.

Sincerely,

Darlene Schanfald

Project Director

Darlene Schanfald, Project Director

Rayonier Hazardous Waste Cleanup Project

Olympic Environmental Council

3632 O'Brien Road

Port Angeles WA 98362

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www.olympus.net/community/oec

10/4/2000

US Rep. Michael Oxley, Chair
Subcommittee on Finance & Hazardous Materials

US Rep. Michael Bilirakis, Chair
Subcommittee on Health & Environment
2125 Rayburn House Office Building
Washington, D.C. 20515

Chairpersons and Members of the Joint Committees:

My name is Helene Orr. I live in the Overland neighborhood of Denver, Colorado, just a stone's throw from the now famous Shattuck Superfund site. Due to the investigative efforts of the national EPA ombudsman, a very bad EPA decision to bury radioactive waste in the middle of my neighborhood- a decision, I might add, made behind closed doors in secret collusion with the polluter-has been reversed. And this is a first in EPA history.

I had hoped to deliver my testimony and support for the ombudsman in person to the committee but unfortunately my secretarial wages could not cover the plane fare and lodging. This fact alone is argument enough to safeguard the independence of the Ombudsman's office and to expand its budget and investigative powers. We did not need to bring our case to Bob Martin in Washington. He came to us, to Denver, to our neighborhood, to our homes, and listened to our story. And what he heard he found disturbing enough to warrant investigation.

This is the story that he heard. After declaring the Shattuck Chemical Company location a Superfund site and placing it on the National Priorities List in the early eighties, and after a lengthy remedial investigatoin, the EPA recommended excavation and removal of the radioactive and hazardous materials out of the naighborhood to a licensed facility in Utah.

Mr. BILIRAKIS. Mr. Chairman, I have also experienced the work of the Ombudsman firsthand at the Stauffer Superfund site in my hometown of Tarpon Springs, Florida. At this site it became increasingly clear over several years that many of my constituents were shut out of the cleanup process. They felt that their concerns were not heard by EPA officials in charge of the site. Therefore, at my request, the EPA Ombudsman is conducting an independent review of the Stauffer cleanup plant. To date, public meetings with the Ombudsman have successfully highlighted the need for additional scientific studies and increased local residents' confidence in the Superfund process.

My concern is to ensure that the Ombudsman's Office is allowed to continue to provide assistance to local communities in holding EPA accountable. While EPA officials have publicly and privately assured me of their full support for the Ombudsman's efforts, their actions suggest a different attitude. Over the past several months, EPA and Justice Department officials have nearly derailed the Ombudsman's investigation of the Stauffer site and other cases.

Shortly before a scheduled public meeting in June of this year, EPA national officials indicated to the Ombudsman that insufficient funds were available for him to continue his investigation at the Stauffer site. Only after Chairman Oxley, Chairman Tauzin and I intervened did the Agency make a commitment to provide the necessary resources.

At the June meeting in Tarpon Springs, Florida, EPA Region 4 representatives made a brief presentation regarding the Stauffer site. After only 10 minutes they abruptly walked out in the middle of a question. Naturally, my constituents and I were outraged by this display of contempt, dare I say arrogance, on the part of EPA representatives.

While I am certainly concerned about the Stauffer site and the well-being of my constituents, my experiences, Mr. Chairman, also led me the to question whether Stauffer is an isolated case or is symptomatic of local concerns across the country; and that is the key point of this hearing. Are Stauffer and the other sites where the Ombudsman has been involved isolated cases or do they represent just the tip of the iceberg? Are we dealing with a true exceptional case or is this business as usual at the EPA?

At this point, Mr. Chairman, I would like to extend a very warm welcome to one of my constituents, Mary Mosley, a Tarpon Springs resident and former city commissioner. Ms. Mosley will testify in more detail about the EPA and the Ombudsman's involvement in the Stauffer case. We look forward to hearing her statement as well as the statements of the other citizen witnesses, Mr. Bret Bowers from Coeur d'Alene, Idaho, and Ms. Kimberly Boggiatto from Denver, Colorado. I want to thank you all for your time and effort in traveling to testify here today.

I also want to welcome, Mr. Chairman, Mr. Timothy Fields, Assistant Administrator of EPA's Office of Solid Waste and Emergency Response, and also the Ombudsman, Mr. Robert Martin. Mr. Fields is no stranger to this committee, and I know we all look forward to hearing the administration's views on the role of the Office of the Ombudsman and its relationship with EPA.

Thank you, Mr. Chairman.

Mr. OXLEY. I thank the gentleman and now recognize the ranking member for the Health and Environment Subcommittee, gentleman from Ohio, Mr. Brown.

Mr. BROWN. Thank you, Mr. Chairman.

Today we are holding an oversight hearing on the Office of the Ombudsman at the EPA. This office was created 16 years ago with the passage of the Hazardous and Solid Waste Amendments of 1984.

The function of the EPA Ombudsman is to receive individual complaints, grievances and requests for information submitted by any person with respect to the hazardous waste program, to render assistance and to make appropriate recommendations to the EPA administrator. I support the function of the Ombudsman. People need a place to go if an agency bureaucracy is not responding to inquiries from the public and is not functioning in an open manner. The Ombudsman provides an opportunity for citizens to express their views and a channel for those views to be taken into consideration.

The Ombudsman is currently involved in 14 cases around the country, including two in my own State of Ohio. To appropriately and effectively fulfill the function of the office, the Ombudsman must also perform his duties impartially and responsibly, gathering facts and information in an objective manner and treat all parties, including employees of the executive branch, fairly.

I welcome our witnesses today and look forward to their testimony.

Mr. OXLEY. I thank the gentleman.

The Chair would now recognize himself for an opening statement; and I am also pleased to be holding the joint subcommittee hearing today with my colleague, Mr. Bilirakis, chairman of the Health and Environment Subcommittee, on the role of the EPA Ombudsman in addressing concerns of local communities. This is a hearing that goes to the heart of the public's faith in government. People who live near Superfund sites have turned to the government for explanations on health. Responsiveness of EPA to these citizens has been a concern of my mine for a long time.

With the goal of promoting faster and safer cleanups, I, along with many colleagues, have introduced Superfund reform bills that would increase local participation in the remedy selection process and that would make community involvement a more integral part of EPA's cleanup criteria.

The Ombudsman's Office within EPA plays an important role. It serves as a citizen watchdog and as a backstop to ensure that the best decisions are being made for their community. Trust in the process is heightened when people know they have an independent voice to closely examine an agency decision. Mistrust often leads to controversy and cleanup delays.

Therefore, I was very disturbed when my friend Mr. Bilirakis told me that EPA appears to be impeding the helpful work that the Ombudsman's Office has been doing in his District. We had a telephone conversation with Administrator Browner on that subject. Yet that conversation did not prevent the inexcusable conduct of regional EPA personnel who subsequently walked out of a public meeting in my colleague's district. Since then I have learned of a

Department of Justice letter that threatens to disrupt the Ombudsman's investigative work at the Coeur d'Alene site in Idaho.

These situations speak directly to the independence of the Ombudsman and to the credibility of the Agency. No one, not elected officials, not appointed agency bureaucrats, should be afraid to have their decisions subjected to public scrutiny.

I look forward to hearing firsthand from the citizens who have been dealing with EPA and the Ombudsman regarding Superfund sites in their community. I will be looking for EPA assurances that the Ombudsman's Office has the resources and the independence to play a constructive role in communities with Superfund sites.

I welcome our witnesses today—Mr. Fields, welcome back to the subcommittee; we are looking forward to your testimony—and now recognize the gentleman from Ohio, Mr. Sawyer.

Mr. SAWYER. Thank you, Mr. Chairman. Although I am not a member of either subcommittee, I do serve with you on the full committee; and I appreciate your forbearance in allowing me to take part in these hearings today. I have a statement I will submit for the record. I look forward to hearing from our witnesses.

Mr. OXLEY. We thank you for your participation.

Are there other opening statements?

The gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman. Thank you for holding this very important hearing.

You know this is an issue that—not just the Ombudsman but small business regulatory relief is something near and dear to my heart. Since February 1999, I have been working to help 159 innocent small businesses in Quincy, Illinois, to obtain freedom from the Superfund litigation nightmare. And it has been a nightmare, and it continues to be a nightmare.

Last week, when the EPA Administrator Carol Browner disproved the Small Business Liability Relief Act, killed its chances in the House and the measure failed, I lost all faith that EPA really wanted to work toward small business relief.

Yesterday, when I heard the Keystone Pennsylvania lawsuit had settled and the EPA was touting a small business victory, I was appalled but not surprised that the settlement explicitly preserves waste management's lawsuit against Barbara Williams, another famous name in the fight against the bureaucracy, restaurateur from Gettysburg, Pennsylvania. I just wish Chairman Goodling was here to join us, the restaurant owner who we all heard about numerous times.

Let me read from some of the release of the EPA: EPA is pleased to conclude this extensive, expensive and contentious litigation. That is why we need Superfund reform—because it is expensive, extensive and contentious.

Here's another quote from their release: But Congress still needs to address the basic deficiency in the Superfund law which allowed this huge number of defendants to be sued. Hence, House Resolution 5175 which the EPA fought to defeat on the floor.

Also, listen to this, the part of the release: When the United States sued 11 parties, these parties then sued 130 additional parties, and these 130 additional parties sued 500 additional parties. That is the problem with—that is why we need Superfund reform.

I understand this hearing is to investigate the role of the EPA Ombudsman and addressing concerns of local communities. I would just ask, where were you in Quincy, Illinois?

I look forward to hearing about how the office has been successful, and I am sure we will hear where it has failed. And I will look for asking questions of how it can be improved so that you know the people who are caught in this type of litigation trap can get some relief from the Federal Government.

I want to welcome the two panels. I do appreciate you coming.

Mr. Chairman, I thank you for calling the hearing. I appreciate Chairman Bilirakis also being here, and I yield back the balance of my time.

Mr. OXLEY. Gentleman yields back.

The gentlelady from Colorado.

Ms. DEGETTE. Thank you, Mr. Chairman.

I would like to, first of all, welcome Kim Boggiatto for being here today. She is a resident of the Overland Park community in my home city of Denver and was instrumentally involved in successful efforts to force the Environmental Protection Agency to remove radioactive wastes from the Shattuck Superfund site in Denver, Colorado, which both Mr. Fields and Mr. Martin have extensive experience with; and I am glad to see them here with us today as well. I am really pleased to have her insight on the role of the EPA Ombudsman's Office today.

Since 1986, the residents of Overland Park community in Denver have tried to get the Environmental Protection Agency and other responsible parties to remove radioactive wastes from the Shattuck Superfund site. Today, that waste still is in the middle of a residential neighborhood. Radioactive soil in the area was mixed with fly ash, then clay and covered with a pile of rock. A study released in September 1999 by the EPA's 5-year review panel confirmed what residents of Overland Park had been saying for years, we cannot be sure that the entombment of radioactive dirt at the Shattuck Superfund site will protect human health and the environment.

Thanks to the diligent efforts of the neighborhood association cleanup, many devoted citizens and the joint efforts of the elected officials, both city, State and Federal, the EPA announced June 16 of this year that the waste will be removed. However, questions continue to arise about what the Agency and the parties involved in the Shattuck site knew about the characteristics of the waste and when they knew it.

Most recently, the Department of Energy revealed, for example, that the Shattuck Chemical Company was one of hundreds of companies that it secretly contracted with to do nuclear weapons work in the 1940's and 1950's to process radioactive and toxic materials. During the discussions concerning reopening the Shattuck chemical site record of decision, it was well-known that the Shattuck facility did receive radioactive waste from the Federal Government. However, a full accounting of what waste the Shattuck site accepted and disposed of has been impossible because of missing and inadequate records.

The DOE's disclosure is troubling but not perhaps surprising to those of us who have been involved with the site. I will reiterate

today what I said to Mr. Fields in a letter last month upon learning of the DOE report, which is that the citizens who have worked so long to see this waste removed have a right to expect that the EPA's promise to move the waste in a timely fashion will be fulfilled. While I think that there needs to be additional investigation into some of these sites, we cannot use it as an excuse to leave this waste onsite.

I sound like a broken record. I have no doubt that the government intends to move it, but I think we all need to be ever vigilant to make sure that the poor decision is reversed and that this waste is removed.

The EPA Ombudsman's Office played an important role in securing the EPA's commitment to remove the waste by providing the community with the resources and advocacy to compel the Agency to act. The independent oversight provided by an Ombudsman's Office is essential to provide individuals and communities like Overland Park with an additional voice and an additional advocate inside an agency like the EPA, particularly in cases like Shattuck where you are looking at questionable decisions by a Federal agency.

The role of the Ombudsman must, therefore, be preserved to ensure that Federal agencies have an internal mechanism that will be vigilant and make sure that agencies act in the best interests of the public. The public needs a resource to help interface with the Federal Government to help obtain information and to investigate potential malfeasance or remedy inefficiencies. It is equally important for the Ombudsman's Office to uphold the highest ethical standards because, after all, this is the office responsible for maintaining the integrity and the mission of the Agency.

Mr. Chairman, I want to thank you for having this hearing. I want to congratulate again Clean-It! and the neighbors and also the EPA Ombudsman for coming to the right decision in the Shattuck site, and I yield back anytime I might have left.

Mr. OXLEY. Further opening statements?

The gentleman from Missouri, Mr. Blunt.

Mr. BLUNT. Thank you, Mr. Chairman. Thank you for holding this hearing and particularly for focusing on the role of the Ombudsman in solving problems and eliminating needless problems for people who are caught in the periphery of legitimate EPA actions.

As you know, Mr. Chairman, the office of ombudsman's authority expired in 1988. I think that is why this hearing would be particularly helpful to determine how the exiting system is working, what we need to do to reauthorize in the best possible way a system that meets the needs of people who are again caught on the edges of EPA decisionmaking.

We took a bill to the floor recently that was designed to eliminate problems for third-party defendants. That bill was opposed by the Agency. Hopefully, we can even hear some of the reasons that that happened and what we can do effectively to solve the kinds of problems that have been mentioned by my colleagues here today and the individual trauma, cost and devastation that can be created by misguided and misdirected targeting on the part of the EPA and what the Ombudsman's Office can do to see that that doesn't hap-

pen and to help third parties extricate themselves from this kind of involvement.

I am glad you have held this hearing. I look forward to the testimony and to the questions.

Mr. OXLEY. Further opening statements?

Mr. Green will submit a statement.

Other opening statements?

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. PAUL GILLMOR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Mr. Chairman, I want to thank you for calling this hearing on the role of the Environmental Protection Agency (EPA) Ombudsman in addressing local concerns. It is essential that governmental agencies are responsive to the needs of the citizens that support them.

The role of the EPA ombudsman was created in 1984 in the Hazardous Waste and Solid Waste Amendments. This position was established to create a place where people could issue complaints and request information on the various programs that EPA operates. Even more so, while the ombudsman was not supposed to be a policy or decision-maker, the position did allow the ombudsman to make suggestions directly to the EPA Administrator. The job of Ombudsman was, statutorily, intended to end in November of 1988.

Over the last 12 years, Congress has continually funded this office. As I have had a long-standing interest in the operations of the EPA, I am intensely curious in knowing whether the Ombudsman's response to the public and its role as liaison and citizen advocate is justifying its continued existence. Particularly as the ombudsman's place in the Superfund debate in concerned, I want to know whether the people that have used the EPA ombudsman's office feel they have received an appropriate response. I look forward to their testimony today.

Mr. Chairman, I believe today's hearing offers us a chance to answer a couple of important questions about the role of ombudsmen in our governmental system. First, while the position of ombudsman was first created over two hundred years ago, why did the United States wait until ten years ago to consider it an important position for our government? Second, the ombudsman is supposed to be a job which is independent of politics and the Executive Agency it is supposed to serve, does this separation between politics, policy, and performance still exist. Third, as Superfund is probably one of the EPA programs that receives greater community attention than some of the others, how has the EPA ombudsman responded at specific Superfund sites? And last, since the EPA ombudsman has operated without a congressional authorization for many years, should this program be affirmed with a reauthorization or cancelled entirely?

I look forward to the testimony and comments of our two panels and thank you, Mr. Chairman, for bring attention to this important issue.

PREPARED STATEMENT OF HON. TOM BLILEY, CHAIRMAN, COMMITTEE ON COMMERCE

Mr. Chairman, I want to thank you for holding this Subcommittee hearing today about the role of the EPA Ombudsman in helping local citizens get answers from EPA about Superfund sites in their communities.

As I have said many times over the past eight years, the Superfund law and the Superfund program administered by EPA remain badly broken. As a result, many Superfund cleanups take too long to complete and cost too much. Even worse, as we have heard from scores of witnesses, one of the biggest problems with Superfund has to do with all the lawyers. For years the program has been inefficient because of the wasted time and resources as a result of waves of litigation, lawyer fees, excessive administrative costs and outrageous overhead.

Often the people that stand to suffer the most are citizens who live in communities across the country that are located near Superfund sites. Today, I am pleased that we will hear from some of these residents concerning their experiences with the Superfund program, with EPA, and with the Superfund Ombudsman.

The Ombudsman was created by law to ensure that affected the citizens would have a "lifeline" within EPA. To be effective, Ombudsman must be there to help at times when citizens have difficulty getting their voices heard within the maze of federal bureaucracy. And the Ombudsman must be able to help bring forward legiti-

mate concerns when the government creates bureaucratic obstacles that hinder adequate public participation and ultimately delay cleanups.

I look forward to today's hearing to assess the effectiveness of the Superfund Ombudsman over the years, and identify areas in which improvements are needed. I welcome each of the witnesses, especially the citizens who have traveled a great distance to be here today, and look forward to their testimony.

Mr. OXLEY. Let me recognize now our distinguished colleague from Idaho who has joined us today for the committee hearing and obviously has a particular interest in the Coeur d'Alene site, Mrs. Chenoweth-Hage.

Mrs. CHENOWETH-HAGE. Mr. Chairman, I want to thank you and Chairman Bilirakis very much for giving me the opportunity to participate with your committee in this hearing today, and I commend you both for your tremendous leadership on this issue. You have been a godsend to those of us who have labored and labored under the EPA up in northern Idaho.

I want to especially thank all the members of panel No. 2 for coming so far at their own expense. I look forward to hearing the testimony of Bret Bowers from Coeur d'Alene who will speak on this issue, and he also has a short film that would be most interesting to the committee if he is allowed to show it.

If there was ever an example, Mr. Chairman, of the need for an independent Ombudsman process to keep a check on the EPA, that example exists in northern Idaho. Now picture this: A beautiful, picturesque lake whose water measures above drinking water standards is the place where this out-of-control agency is treating this area as if it is a toxic waste dump, and yet we just heard the testimony from my colleague from Denver about the refusal to clean up the Shattuck Superfund site or their drawing out the process.

So on one end we have a beautiful lake that measures above drinking water standards that they want to make a toxic waste dump, yet we had the Shattuck situation over here where they drug their heels.

Obviously, I can spend several hours today going over with you the numerous abuses, whether it be livestock feeder areas or whatever it might be, but the fines, the misrepresentations that the people of my district have experienced at the hands of the EPA—in fact, I have for years investigated the issue involving the North Idaho Lake Coeur d'Alene Superfund area. The bottom line is that the Agency has created a tremendously drastic solution in search of a problem up there. It is a beautiful area to live, and they can't find the problem, and it is leading to havoc and distress in the communities spread throughout the whole Coeur d'Alene basin.

Mr. Chairman, I have worked for years to expose the misdirected policies by the Federal Government in that basin, but I strongly believe that only when the Ombudsman Bob Martin and his chief investigator Hugh Kaufman entered into this process at our request that we achieved a breakthrough on this issue, and your direct intervention—yours and Chairman Bilirakis's—certainly helped to elevate this issue.

The sole purpose of the Ombudsman from the very beginning has been to get to the truth of this matter, asserting that by only finding the truth can we make good public policy and not harm the citizens that we are meant to serve. They have not been afraid to ask

the tough questions, as you will see in the film, no matter what threats they are receiving from their own agency or even from the U.S. Justice Department.

Mr. Chairman, as you will hear about today, in August of this year, Mr. Martin and Mr. Kaufman conducted a 15-hour hearing in Idaho on the Superfund issue, finally bringing to the surface many troubling questions that have plagued this area. So, as a result, we are working together and we are forcing EPA to answer some very important and critical questions.

Mr. Chairman, I have more in my opening statement. I would like to submit it for the record.

At this time, I will yield back the balance of my time. Thank you.

Mr. OXLEY. Gentlelady's full statement will be made part of the record, without objection.

[The prepared statement of Hon. Helen Chenoweth-Hage follows:]

PREPARED STATEMENT OF HON. HELEN CHENOWETH-HAGE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IDAHO

Mr. Chairman, I want to first thank you and Chairman Mike Bilirakis for giving me the opportunity to participate in today's hearing. I commend you both for your tremendous leadership on this issue. I am confident that because of your efforts the EPA will change the way that it does business.

I also want to especially thank Bret Bowers, a constituent of mine from Coeur d' Alene, Idaho, who has come to testify about the ombudsman process in Northern Idaho. I encourage the Committee to pay close attention to his testimony. He is a vocal leader on this issue and knows first hand the harms of EPA policy in the region, and the need for an ombudsman process.

Mr. Chairman, if there was ever an example of the need for an independent ombudsman process to keep a check on the EPA, that example exists in northern Idaho—where this out-of-control agency is treating one of the most beautiful river basins in the country as if it were a toxic waste dump.

I could spend several hours today going over with you the numerous abuses and misrepresentations that the people of northern Idaho have experienced at the hands of the EPA. In fact, I have for years investigated this issue. The bottom line is that the agency has created a drastic solution in search of a problem—and it is leading to havoc and distress in the communities spread throughout the Coeur d'Alene Basin.

Mr. Chairman, I have worked for years to expose the misdirected policies by the federal government in the Basin. But I strongly believe that when the Ombudsman, Bob Martin, and his Chief Investigator, Hugh Kauffman, entered into the process at our request, we achieved a break through on this issue. Their sole purpose has from the very beginning has been to get to the truth of this matter, asserting that by only finding the truth can we make good public policy and not harm the citizens we are meant to serve. They have not been afraid to ask the tough questions, no matter what threats they are receiving from their own agency or even from the U.S. Justice Department.

Mr. Chairman, as you will hear about today, in August of this year Mr. Martin and Mr. Kauffman conducted a fifteen hour hearing in Idaho on the Superfund issue, finally bringing to the surface many troubling questions that have plagued this issue for years but have received little attention.

As a result of their work, we are finally forcing the EPA to answer these questions. For instance, why did the EPA prepare a plan to take over a private mine without even informing the owner of the mine? Or, why has the agency not even considered the bioavailability of lead in determining the health and environmental hazards of mixture of minerals in the soil? Why has the agency not tested for the natural occurrence of lead in this mineral rich area? Why does it continue to push for an expansion of the process when there are no discernible health and environmental problems? What did the agency do with $80 million worth of Indium?

Mr. Chairman, shutting this process down before we have had a chance to answer these and many other critical questions would be nothing short of irresponsible, costly and even tragic. For the sake of the numerous impacted communities throughout this nation, this $7 billion dollar agency requires an independent inves-

tigatory wing—with much more resources than a shoestring budge of $300,000 and a couple of public servants expected to cover several investigations at once. I strongly encourage the committee to support an independent ombudsman process, and keep these numerous governmental abuses of the people at bay. Again, I thank you for giving me the opportunity to be here today.

Mr. OXLEY. Are there other opening statements?

If not, we now recognize the aforementioned Mr. Tim Fields, Assistant Administrator for the Office of Solid Waste and Emergency Response with U.S. EPA, and Mr. Robert Martin, the Ombudsman with U.S. EPA, as well. Gentlemen, welcome.

Mr. Fields, we will begin with you.

STATEMENTS OF TIMOTHY FIELDS, JR., ASSISTANT ADMINISTRATOR, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. ENVIRONMENTAL PROTECTION AGENCY; AND ROBERT MARTIN, OMBUDSMAN, U.S. ENVIRONMENTAL PROTECTION AGENCY

Mr. FIELDS. Thank you, Mr. Chairman. It is a pleasure to be here today before both of your subcommittees to talk about this very important topic, namely the functions of the OSWER Ombudsman at EPA.

I am pleased to be here with Mr. Robert J. Martin, the National Ombudsman for the EPA Office of Solid Waste and Emergency Response; and I would like to start by just giving a brief summary of how this function has evolved over the years since Congress enacted it in legislation in 1984 as part of the amendments to the Resource Conservation and Recovery Act.

That office was established to address public inquiries or complaints regarding the Resource Conservation and Recovery Act of that time. The statutory authority did expire about 5 years later and EPA, though, believed the function was very valuable so we agreed to continue this function as a part of EPA's operation, even though the congressional mandate had expired.

In 1991, the Office of Solid Waste and Emergency Response expanded the functions of the Ombudsman to include not just the RCRA hazardous waste and solid waste programs but also Superfund, underground storage tanks and other elements of our national environmental cleanup and waste management program.

In 1995, the Administrator of the EPA, Carol Browner, announced an administrative reform to create 10 Regional Ombudsmen in our 10 regions that would be there to respond locally to public inquiries or concerns as well.

We fully support the National Ombudsman function in headquarters. That is why, when the statutory mandate for this expired more than 11 years ago, we agreed to continue it and have since that time.

To address the evolution of the Ombudsman function, though, which has expanded in authority based on our administrative policy to do so, we have tried to promote coordination between the National Ombudsman and the 10 Regional Ombudsmen that exist in the 10 EPA regional offices..

We are now developing new program guidance to supplement and update the outdated Hazardous Waste Ombudsman Handbook which we have been operating under since 1987. A work group was convened last year, including the National Ombudsman Bob Mar-

tin, some of the Regional Ombudsmen, other headquarters and regional officials of EPA, to develop an updated guidance document. The guidance is undergoing internal EPA review at the current time, and we hope to publish this in the Federal Register in the next several weeks, making it available for public comment for 60 days. We then intend to finalize this new updated Ombudsman guidance in terms of how the EPA Ombudsman both in headquarters and our regions would operate. The Agency plans to also publish this draft guidance on our EPA Web site to make it more available to the public as well.

Today, the National Ombudsman responds to numerous inquiries and complaints about programs administered by our waste programs and environmental cleanup programs both in headquarters and the regions. For the most part, the National Ombudsman obviously handles cases of national significance or cases where there is an actual or perceived conflict of interest on the part of a Regional Ombudsman. The ombudsman's role is primarily to focus on the Agency's practices and procedures and how citizens or other interested parties have been treated under those practices and procedures.

The Ombudsman strives to encourage and promote changes to policy, practices and procedures that will both impact and address the concerns of individuals as well as the community as a whole. I think the Ombudsman has been very successful at doing that over the years.

The Ombudsman has a wide latitude in terms of selecting and investigating complaints. The Office of Solid Waste and Emergency Response recognizes the importance of the Ombudsman function, and we want to try to make it as independent to the maximum extent possible under our laws and regulations.

EPA steadily over the years increased the funding for the Ombudsman function, and we continue to provide support to not only the National Ombudsman but also additional support to the 10 Regional Ombudsmen as well, to the tune of about a million dollars a year.

I believe the Ombudsman program is operating very successfully. I recognize it can operate even better. I assure you that the Agency will continue to support the Ombudsman function, irrespective of whether new legislation is enacted or not. We intend to continue to provide resources to make the function capable of assisting communities across the country as it has in the past.

I look forward to responding to questions that the subcommittees may have on this. I think we share a common goal with the two subcommittees convened today and Mr. Martin, which is to make the Ombudsman function as effective and efficient as it can be so that we can meet the needs of citizens across this country.

Thank you very much, Mr. Chairman.

[The prepared statement of Timothy Fields, Jr. follows:]

PREPARED STATEMENT OF TIMOTHY FIELDS, JR., ASSISTANT ADMINISTRATOR, OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, ENVIRONMENTAL PROTECTION AGENCY

INTRODUCTION

Good morning, I am Timothy Fields, Jr., Assistant Administrator for the Office of Solid Waste and Emergency Response (OSWER) at the Environmental Protection

Agency (EPA). I am accompanied this morning by Mr. Robert J. Martin, the OSWER National Ombudsman. Mr. Martin and I want to thank the Committee for the opportunity to appear before you today to discuss the national EPA Ombudsman program

HISTORICAL BACKGROUND OF THE OMBUDSMAN

The hazardous and solid waste management laws passed by Congress created some of the most complex programs administered by EPA and the States. Recognizing this, Congress established a National Ombudsman function in 1984 as part of amendments to the Resource Conservation and Recovery Act (RCRA). Establishing an Ombudsman provided the public with someone to contact with questions and concerns about the RCRA program. When the statutory authority for the National Ombudsman program expired in 1989, EPA's OSWER retained the function as a matter of policy. In 1991, OSWER broadened the National Ombudsman's scope of activity to include other programs administered by OSWER, particularly the Superfund program. The National Ombudsman is located in the EPA Headquarters office in Washington, D.C. and reports directly to the Principal Deputy Assistant Administrator for Solid Waste and Emergency Response.

The Ombudsman is authorized to provide information and investigate complaints and grievances related to OSWER's administration of the hazardous substance and hazardous and solid waste programs implemented under the following authorities:

- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) or Superfund;
- Resource Conservation and Recovery Act (RCRA), including UST;
- Emergency Planning and Community Right-To-Know Act (EPCRA) or Superfund Amendments and Reauthorization Act, Title III;
- Oil Pollution Act; and
- Clean Air Act, Section 112(r).

In 1995, a Regional Ombudsman position was created in each EPA Regional office as part of the Agency's Superfund Administrative Reforms effort. On June 4, 1996, Administrator Browner formally announced the appointments of the Regional Ombudsmen. The Regional Ombudsmen program, at a minimum, operates in support of the Superfund program. Depending on the Region, however, the Regional Ombudsman may also provide support to other programs, including RCRA, Underground Storage Tanks (UST), and chemical emergency prevention and preparedness.

We fully support the National Ombudsman program under the jurisdiction of the Assistant Administrator for OSWER. We believe that the Ombudsman function is a very important one for the Agency and the public. That is why when the statutory authorization for the Hazardous Waste Ombudsman function expired, EPA chose administratively to maintain the Ombudsman function and broaden the scope of the function.

PURPOSE AND STATUS OF DRAFT GUIDANCE

Soon after Congress established the Ombudsman program, the Agency issued the *Hazardous Waste Ombudsman Handbook* to help the newly created National and Regional Ombudsmen administer, and the public understand what to expect from, the Ombudsman program. During the initial years of the Ombudsman program, most of the assistance sought by the public was for help understanding the complicated RCRA program. The Ombudsmen spent most of their time responding to general questions and directing requests to the appropriate sources. The handbook reflected this role.

Over the years, the public gained a better understanding of EPA's hazardous waste programs. Requests for answers to basic questions became requests for resolution of complaints. The Ombudsman function has evolved to reflect the changing needs of its clients. The existing guidance no longer reflects the evolution of the Ombudsman function. In the Fall of 1999, the Assistant Administrator of OSWER established an internal EPA workgroup to look at updating the Hazardous Waste Ombudsman Handbook. The workgroup, chaired by Michael Shapiro, Principal Deputy Assistant Administrator for OSWER, includes several Regional Ombudsmen, the National Ombudsman, representatives from the Office of General Counsel, the Office of Inspector General, the Office of Enforcement and Compliance Assurance and several senior Regional Managers. In preparing the updated guidance, the workgroup met with representatives of the U.S. Ombudsman Association and evaluated and considered guidance documents from this organization as well as other organizations with Ombudsman programs and the American Bar Association's draft *Standards for the Establishment and Operation of Ombudsman Offices.* The workgroup has attempted to draft guidance which reflects key aspects of various ex-

ternal models in a manner that works for a civil service position within the Federal structure. We believe the draft guidance will provide for effective and fair implementation of OSWER's Ombudsman program.

The updated guidance will explain to the public the role of the National Hazardous Waste and Superfund Ombudsman and Regional Superfund Ombudsmen today, their scope of activity, and the guidelines under which they coordinate and carry out their responsibilities. The main objective in issuing this guidance is to improve the effectiveness of the program by giving the Ombudsmen, and those who may contact them, a clear and consistent set of operating expectations and policies.

The guidance is currently undergoing internal Agency review. The Agency expects this review to be completed in the next several weeks. EPA will then publish a notice in the Federal Register announcing the availability of the draft document and requesting public comment. I am anticipating a public comment period of 60 days. The Agency also plans to make the draft guidance available on EPA's internet website.

I will now share with you the Agency experience with the operation and role of the National and Regional Ombudsmen.

THE ROLE OF THE OMBUDSMAN

The Ombudsman is the Agency official designated to receive inquiries and complaints about the administration of an OSWER program. It is important to note, however, that the role of the Ombudsman is not that of decision-maker nor of a substantive expert for the Agency. The Ombudsman's role is primarily to focus on the Agency's procedures and how citizens and other interested parties have been treated under those procedures.

The Ombudsman is not an advocate for a community or any person or institution. Rather, the Ombudsman encourages and promotes changes he/she believes will serve both the individual and the public interest. The Ombudsman seeks to reform and improve management practices, policies, or administration of such policies that he/she believes are inefficient or unfair and that may have given or may give rise to a complaint.

Generally, the National Ombudsman handles cases of national significance and/or cases of actual or perceived conflict of interest on the part of the Regional Ombudsman. The Regional Ombudsmen handle the more routine requests for assistance and conduct more informal inquiries to investigate complaints. Nevertheless, the Ombudsmen may be called upon to serve in a number of capacities: 1) providing information and facilitating informal contact with EPA staff, 2) conducting informal fact finding inquiries and developing options to deal with difficult problems, 3) helping to mediate disputes, and 4) making recommendations to Agency senior management regarding procedural and policy changes that will improve the program. The goal of the Ombudsman is to respond to requests in an appropriate and objective manner as promptly, informally and privately as possible.

Providing Information

Many members of the public and regulated community either do not know how to get information about the solid and hazardous waste programs in OSWER or feel frustrated in their attempts to cope with the complexities of these programs. The Ombudsman may be asked to help a citizen understand how EPA operates, what the appropriate laws, rules, or policies are, or how a citizen may directly handle a complaint. The Ombudsman may answer general questions about any of the programs administered by OSWER, or may direct the person to the appropriate EPA staff to answer the questions. The Ombudsman may also facilitate the communication between a requester and EPA staff. In doing so, the Ombudsman assists members of the public to gain access to information about the solid and hazardous waste program that will help them participate more fully in established Agency processes.

Conducting Inquiries

The Ombudsman may look into a requestor's concerns with respect to any program or requirement under the solid and hazardous waste programs implemented by OSWER. The purpose of such an inquiry will be to ascertain the facts of the case and the perspectives of all the involved parties. Since the Ombudsman has no direct decision-making authority, if he/she finds that a policy or procedure has not been properly followed or someone has not been treated fairly, he/she may make recommendations to the appropriate Agency officials. In such cases, the Ombudsman will generally issue a report explaining the findings and supporting the recommendations made. The officials who administer activities being criticized will be given a chance to review the report prior to its release and attach comments to it.

Mediating Disputes

Many of the issues brought to the attention of the Ombudsman may be resolved through facilitated communication or informal mediation, with the Ombudsman serving in the capacity of a neutral third party. It is almost always in the best interests of those who ask the Ombudsman for assistance and the Agency if a mutually agreeable solution can be found. If the circumstances seem favorable, the Ombudsman will work with the parties and help them move toward agreement. The role of the Ombudsman is not to advocate for a particular outcome, but to try to increase understanding and to assist in the search for appropriate ways to reach closure.

Unlike formal mediation, the Ombudsman always retains the discretion to limit the issues which will be considered (in formal mediation the issues to be discussed are left to the parties to decide). Also, unlike formal mediation, the Ombudsman is as concerned about identifying and encouraging needed institutional reforms as in solving a specific problem.

Encouraging Institutional Reform

The Ombudsman is in a unique position to improve the management and implementation of the OSWER-related programs. On a regular basis, he/she hears issues, concerns and criticisms of the programs from a wide variety of sources. From this, he/she may identify policies and procedures which are causing problems as well as opportunities for making program operations more efficient or effective. Alerting senior EPA managers to what may be an unwise policy or practice, or unfair administration of a policy is as important as the resolution of the specific problem. By making well documented recommendations to EPA program managers, the Ombudsman can point the way to positive institutional change that should prevent or reduce future similar problems from arising in the future.

INDEPENDENCE OF THE OMBUDSMEN

No matter what capacity an Ombudsman is serving in at any given time, the Agency has worked to ensure the Ombudsmen's ability to operate independently. As you are probably aware, one of the main principles an Ombudsman operates under is the ability to operate independently in determining what cases to work on, how an inquiry should proceed and what are the findings of a inquiry.

From the time the National Ombudsman was established by Congress, this function has been a federal government employee reporting to a senior Agency official. Because the Ombudsman is a federal employee, the National Ombudsman cannot be completely independent in the normal course of relations between supervisors and their employees. But, OSWER recognizes the importance of an Ombudsman being and appearing to be independent from the organization he/she is investigating. For example, OSWER has given the National Ombudsman his independence to the maximum extent possible. The Assistant Administrator (AA) for OSWER does not monitor the Ombudsman's workload. The AA does not select which cases the Ombudsman will take, nor directs the Ombudsman how to investigate a complaint. The AA does not interfere with or attempt to influence the Ombudsman as he formulates his findings and recommendations.

The National Ombudsman reports to Deputy Assistant Administrator (DAA) Michael Shapiro. As his supervisor, DAA Shapiro is the approving official on all procurements requested by the National Ombudsman. Generally, for ongoing investigations, funding is approved on an as-needed basis. Where significant resources are requested, DAA Shapiro may become more involved in a case so he is able to determine that the resources requested are available and that the procurement is the effective mechanism to accomplish the Ombudsman's objective.

FUNDING FOR THE OMBUDSMAN PROGRAM

The EPA has provided adequate resources (funding, person-years, etc.) for the Ombudsman function since it was created. In all cases when the need has arisen, additional funds have been provided to the Ombudsman function. That includes the assignment of staff to support this function and the assistance of the ten Regional Ombudsman as needed. In addition, the Ombudsman, depending on the site and issues under review, has accessed the technical expertise of the EPA's Environmental Response Team to supplement his investigative efforts.

Over the years, funding for the National Ombudsman function has steadily increased despite the fact the Superfund program budget has been reduced. In fact, funding has gone from roughly $117 thousand in fiscal year 1993 to over $519 thousand in fiscal year 2000. The Regional Ombudsman function is funded at roughly $1 million a year, under the ten Regional budgets.

ACCOMPLISHMENTS OF THE PROGRAM

The National and Regional Ombudsmen receive many calls for assistance each year—ranging from routine questions about hazardous waste laws to specific complaints about unfair practices conducted at a site or facility. The Agency has frequently adopted recommendations put forth by the Ombudsman program. Before I close, I would like to share with you an example which demonstrates the success of the Ombudsman program.

In 1999, local residents asked the National Ombudsman to look into the EPA Superfund program activity associated with the Shattuck Chemical Site in Denver, Colorado. Community members did not feel the remedy adequately protected public health and the environment. As part of his investigation, the National Ombudsman held three hearings to hear the concerns of community members. He also interviewed government officials, local residents, and EPA staff and reviewed the administrative record of the site. In October 1999, the National Ombudsman issued his draft recommendations. Subsequently, EPA selected an alternative remedy for the Shattuck Chemical Site.

Is the program operating successfully? I believe so. Generally, as a result of the Ombudsman's involvement, a better decision is reached, communities are satisfied with the outcome and public health and the environment are protected. The Agency will continue to support the Ombudsman function and make resources available so that it may continue to assist communities across the nation.

Mr. OXLEY. Thank you, Mr. Fields.

Mr. Martin.

STATEMENT OF ROBERT MARTIN

Mr. MARTIN. Thank you, Mr. Chairman. I am pleased to be here this morning to appear before you and the honorable members of this committee.

In speaking just extemporaneously for a moment, I have been doing this job for 8 years; and in the course of doing that job I have talked to a lot of people, and I have met a lot of people all over the country and meeting with those people and working with them has enriched my life. I want to recognize them as I appear before you today, and I am very glad that you will be hearing from some of them in the course of this hearing.

I have a few things which I would like to speak to in the spirit of doing our job better and in doing what the EPA must do, which is to protect human health and the environment, that is its mission, particularly in the Superfund program. As we do that, I think it is critically important that we listen to people more, because I don't feel we have listened enough, and it is a very hard job to do, to listen.

I also feel that we need to be more compassionate, because we have so much power in the Superfund program. The Agency has so much power in that program, and we need to feel how we affect people's lives every day in the exercise of that power or by not exercising that power.

Third, I feel we need to be more thorough in our job. There have been countless times when I have undertaken cases in different parts of the Nation where I have heard that we have missed this or have missed that, and I think it is very important to catch it all in the front end. I think that people in the end want to know how big of a problem they are facing, if they are facing one. They may not be able to fix it right away, we may not have enough money, may not have enough resources, it may take a long time, but we need to stay in a place of truth with that, with people. And

also, obviously, where there may not be a problem we should not be focusing extraordinary resources to examine that.

So with that being said, I am very honored to be before you today and would be glad to respond to your questions, not only in this session but individually as well as afterwards and perhaps in meetings. Thank you sir.

Mr. OXLEY. Thank you, Mr. Martin, and job well done for 8 years. We appreciate your sincerity and your commitment to your job.

Mr. Fields, let me first indicate to you what appeared to be good news last week when the announcement came from U.S. EPA that the Keystone landfill site in Pennsylvania had been adjudicated and there was a settlement, and what appeared to be on the surface very good news turned out to be, based on the timing at least, rather interesting, to say the least.

Let me quote you from Mr. Campbell, Bradley M. Campbell, I am sure you know the EPA Administrator for Pennsylvania, for eastern Pennsylvania. He says, quote, EPA is pleased to conclude this extensive, expensive, contentious litigation. We are eager to shift more of our attention and resources from the courtroom to cleanup—EPA Administrator Bradley Campbell—but Congress still needs to address the basic deficiency in the Superfund that allowed this huge number of defendants to be sued. And indeed there were over 130 original defendants that ballooned to 580 additional parties.

He goes on to say, today's settlement reflects the fundamental Superfund reforms which made it fair to the little guys who never should have been sued by the large polluters in the first place, said Steve Herman, Assistant Administrator for EPA's Office of Enforcement, Compliance and Assurance.

Those quotes sound familiar, but most of those came from this side of the dais. By using these reforms, we protected small waste contributors from costly third-party lawsuits and deterred similar litigation in future cases.

It was particularly interesting because about that time, as you know, we were working with EPA to craft legislation that would not only take care of the small business folks at the Keystone landfill, including the now famous Barbara Williams and her restaurant, but indeed all of those folks who stood in their shoes or stand to be in their shoes over the next few years unless we solve this incredible morass that has encompassed many of these small business people whose only sin was sending chicken bones to the local landfill.

Now, as you know, we had that legislation, H.R. 5175, on the floor last week, and we worked very hard in trying to assuage some of the concerns that EPA had with the bill. But, frankly, I am disturbed that at the moment we thought we could move forward in a bipartisan manner your staff refused to meet with my staff, even though we requested a meeting to work on some of those changes. Matter of fact, the changes we made in the original legislation of the 1999 text were changes that EPA had requested.

What I am going to do is give you a copy of the bill that was unable to secure two-thirds votes in the House last week and ask you by the end of the week if you can make some written comments

back to this committee as to why EPA chose to oppose this very common-sense legislation, particularly in the face of statements that came out of the EPA about—beating their chest about how successful they were in this settlement in Pennsylvania.

I might also point out that, despite all of the apparent good work that was done, the aforementioned Barbara Williams, in actuality this settlement does nothing for her. As a matter of fact, it preserves the right of Waste Management to pursue their suit against her.

So let me first ask if you can provide us with some information in that regard, regarding the legislation and how it squares with that settlement in the statements therein, and also whether in fact that that is correct that Barbara Williams is still subject to litigation after over 5 years in this predicament.

Mr. FIELDS. Okay. I will be happy to—the three points you made there, I will be happy to provide written comments back on H.R. 5175 and the administration's concerns about elements of that bill that we would have, you know, we would have concerns about and we ran out of time.

[The following was received for the record:]

Attached is a letter from Timothy Fields, Jr., Assistant Administrator, Office of Solid Waste and Emergency Response, which provides legislative language that addresses the Superfund liability of small parties.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 2 4 2000

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

The Honorable Tom Bliley
Chairman
Committee on Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am responding to the request you made during the October 3, 2000, hearing before the Subcommittee on Finance and Hazardous Materials, to provide legislative language that addresses the Superfund liability of small parties. As you know, since the 103rd Congress, the Administration has supported numerous bills that addressed the Superfund liability of small parties.

I believe the enclosed language meets our goal of reducing litigation and transaction costs by exempting parties like Ms. Barbara Williams who sent trash and small amounts of hazardous substances in restaurant waste to the Keystone Landfill Superfund site. Notwithstanding many years of strong support of EPA and the Administration to enact legislation that addressed the liability of small parties, Congress has not enacted such legislation.

I hope this response from EPA helps the Committee reach a bipartisan agreement on legislation that addresses the Superfund liability of small parties.

Sincerely,

Timothy Fields, Jr.
Assistant Administrator

Enclosure

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SECTION 1. SHORT TITLE. This Act may be cited as the "Small Business Liability Protection Act".

SEC. 2. SMALL BUSINESS LIABILITY RELIEF.

Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607) is amended by adding at the end the following new subsections:

"(o) DE MICROMIS EXEMPTION.—

"(1) IN GENERAL.—Except as provided in paragraph (2), a person shall not be liable under this Act if liability is based solely on paragraph (3) or (4) of subsection (a), and the person can demonstrate that the total amount of the material containing hazardous substances that the person arranged for disposal or treatment of, arranged with a transporter for transport for disposal or treatment of, or accepted for transport for disposal or treatment, at the facility was less than 110 gallons of liquid materials or less than 200 pounds of solid materials (or such greater or lesser amounts as the Administrator may determine by regulation)

"(2) EXCEPTIONS. Paragraph (1) shall not apply in a case in which—

"(A) all or part of the disposal, treatment,

or transport concerned occurred after October 1, 2000;

"(B) the President, or the Governor of the State in which the facility is located, as appropriate, in his sole discretion, determines that—

"(i) the materials containing hazardous substances referred to in paragraph (1) have contributed significantly or could contribute significantly, either individually or in the aggregate, to the cost of the response action or natural resource restoration with respect to the facility; or

"(ii) the person has failed to comply with information requests or administrative subpoenas issued by—

"(I) the President under this Act; or

"(II) the Governor of the State in which the facility is located under applicable Federal or State law, as appropriate; or

(iii) has impeded or is impeding, through action or inaction, the per-

formance of a response action or natural
resource restoration with respect to the fa-
cility;

"(p) MUNICIPAL SOLID WASTE EXEMPTION.—

"(1) IN GENERAL.—Except as provided in para-
graph (2), a person shall not be liable
under paragraph (3) or (4) of subsection (a) for municipal
solid waste at a facility if the person is—

"(A) an owner, operator, or lessee of resi-
dential property from which all of the person's
municipal solid waste was generated with re-
spect to the facility;

"(B) a business entity (including a parent,
subsidiary, or affiliate of the entity) that, during its 3 taxable years
preceding the date of transmittal of written no-
tification from the President of its poten-
tial liability under this section, employed
on average not more than 100 full-time in-
dividuals, or the equivalent thereof, and is a 'small business concern' as defined under
the Small Business Act (15 U.S.C. 631 et. seq.);

"(C) an organization described in section
501(c)(3) of the Internal Revenue Code of 1986
and exempt from tax under section 501(a) of

such Code that, during its taxable year preceding the date of transmittal of written notification from the President of its potential liability under this section, employed not more than 100 paid individuals at the location from which was generated all of the municipal solid waste attributable to the organization with respect to the facility.

For purposes of this subsection and subsection 122(g)(1)(H), the term 'affiliate' has the meaning of that term provided in the definition of 'small business concern' in regulations promulgated by the Small Business Administration in accordance with the Small Business Act (15 U.S.C. 631 et seq.).

"(2) EXCEPTION.—Paragraph (1) shall not apply in a case in which—

"(A) the President, or the Governor of the State in which the facility is located, as appropriate, determines that the person:

(i) has failed to comply with any request for information or administrative subpoena issued by—

"(I) the President under this Act; or

"(II) the Governor of the State in

which the facility is located under applicable Federal or State law, as appropriate; or

(ii) has impeded or is impeding the performance of a response action or natural resource restoration with respect to the facility.

"(3) DEFINITION OF MUNICIPAL SOLID WASTE.—

"(A) IN GENERAL.—For purposes of this subsection, the term 'municipal solid waste' means waste material—

"(i) generated by a household (including a single or multifamily residence); and

"(ii) generated by a commercial, institutional, or industrial entity, to the extent that the waste material is essentially the same as waste normally generated by a household.

"(B) EXAMPLES.—Examples of municipal solid waste under subparagraph (A) include food and yard waste, paper, clothing, appliances, consumer product packaging, disposable diapers, office supplies, cosmetics, glass and

metal food containers, elementary or secondary school science laboratory waste, and household hazardous waste.

"(C) EXCLUSIONS.—The term 'municipal solid waste' does not include—

"(i) combustion ash generated by resource recovery facilities or municipal incinerators; or

"(ii) waste material from manufacturing or processing operations (including pollution control operations) that is not essentially the same as waste normally generated by households.

"(4) COSTS AND FEES.—A person that commences, after the date of the enactment of this subsection, a contribution action under section 113 shall be liable to the defendant for all reasonable costs of defending the action, including all reasonable attorney's fees and expert witness fees, if the defendant is not liable for contribution based on an exemption under this subsection or subsection (o).".

(b) EXPEDITED SETTLEMENT FOR DE MINIMIS CONTRIBUTIONS AND LIMITED ABILITY TO PAY.—

(1) PARTIES ELIGIBLE.—Section 122(g) of such Act (42 U.S.C. 9622(g)) is amended—

(A) in paragraph (1) by redesignating subparagraph (B) as subparagraph (E);

(B) by striking "(g)" and all that follows through the period at the end of paragraph (1)(A) and inserting the following:

"(g) EXPEDITED FINAL SETTLEMENT.—

"(1) PARTIES ELIGIBLE.—

"(A) IN GENERAL.—Whenever practicable and in the public interest, the President shall, as expeditiously as practicable, notify of eligibility for a settlement, and, offer to reach a final administrative or judicial settlement with, each potentially responsible party that, in the judgment of the President, meets 1 or more of the conditions set forth in subparagraphs (B), (C), and (E) and satisfies the additional conditions of subparagraph (D).

"(B) DE MINIMIS CONTRIBUTION.—The condition for settlement under this subparagraph is that the liability of the potentially responsible party is for response costs based on paragraph (3) or (4) of subsection (a) of section

107 and the potentially responsible party's contribution of hazardous substances at a facility is de minimis. For the purposes of this subparagraph, a potentially responsible party's contribution shall be considered to be de minimis only if the President determines that each of the following criteria are met:

"(i) The quantity of material containing a hazardous substance contributed by the potentially responsible party to the facility is minimal relative to the total quantity of material containing hazardous substances at the facility. The quantity of a potentially responsible party's contribution shall be presumed to be minimal if the quantity is 1 percent or less of the total quantity of material containing hazardous substances at the facility, unless the Administrator identifies a different threshold based on site specific factors; and

"(ii) The material containing a hazardous substance contributed by the potentially responsible party does not present toxic or other hazardous effects that are significantly greater than the toxic or other hazardous effects of other material containing hazardous substances at the facil-

ity.

"(C) REDUCTION IN SETTLEMENT AMOUNT BASED ON LIMITED ABILITY TO PAY.—

"(i) IN GENERAL.—The condition for settlement under this subparagraph is that the potentially responsible party is a natural person or a small business and demonstrates to the President an inability or a limited ability to pay response costs.

"(ii) CONSIDERATIONS.—In determining whether or not a demonstration is made under clause (i) by a natural person or a small business, the President shall take into consideration the ability of the natural person or small business to pay response costs and still maintain its basic business operations, including consideration of the overall financial condition of the natural person or small business and demonstrable constraints on the ability of the natural person or small business to raise revenues.

"(iii) INFORMATION.—A natural person or a small business requesting settlement under this subparagraph shall promptly provide the

President with all relevant information needed to determine the ability of a natural person or a small business to pay response costs.

"(iv) ALTERNATIVE PAYMENT METHODS.—If the President determines that a natural person or a small business is unable to pay its total settlement amount at the time of settlement, the President shall consider such alternative payment methods as may be necessary or appropriate.

"(D) ADDITIONAL CONDITIONS FOR EXPEDITED SETTLEMENTS.—

"(i) WAIVER OF CLAIMS.—The President shall require, as a condition for settlement under this paragraph, that a potentially responsible party waive all of the claims (including a claim for contribution under section 113) that the party may have against other potentially responsible parties for response costs incurred with respect to the facility, unless the President determines that requiring a waiver would be unjust.

"(ii) FAILURE TO COMPLY.—The President may decline to offer a settlement to a potentially responsible party under this paragraph if the President determines that the potentially responsible party has failed to comply with any request for access or information or an administrative subpoena issued by the President under this Act or has impeded or is impeding the performance of a response action with respect to the facility.

"(iii) RESPONSIBILITY TO PROVIDE INFORMATION AND ACCESS.—A potentially responsible party that enters into a settlement under this paragraph shall not be relieved of the responsibility to provide any information or access requested in accordance with subsection (e)(3)(B) or section 104(e).";

(C) in subparagraph (E) of paragraph (1) (as redesignated by subparagraph (A))—

(i) by redesignating clauses (i) through (iii) as subclauses (I) through

(III), respectively, and by moving such subclauses and the matter following subclause (III) (as so redesignated) 2 ems to the right;

(ii) by striking "(E) The potentially responsible party" and inserting the following:

"(E) OWNERS OF REAL PROPERTY.—

"(i) IN GENERAL.—The condition for settlement under this subparagraph is that the potentially responsible party"; and

(iii) by striking "This subparagraph (B)" and inserting the following:

"(ii) APPLICABILITY.—Clause (i)";

and

(D) by adding at the end the following:

"(F) BASIS OF DETERMINATION.—If the President determines that a potentially responsible party is not eligible for settlement under this paragraph, the President shall provide the reasons for the determination in writing to the potentially responsible party that requested a settlement under this paragraph.

"(G) NO JUDICIAL REVIEW.—Any action by the President under this paragraph shall not be subject to judicial review.

"(H) DEFINITION OF SMALL BUSINESS.—

In this paragraph, the term 'small business' means a business entity (together with its parents, subsidiaries, and other affiliates) that, during its 3 taxable years preceding the date on which the business entity first receives or received written notification from the President of its potential liability under section 107, employed on average not more than 100 full-time individuals or the equivalent thereof, and is a 'small business concern' as defined under the Small Business Act (15 U.S.C. 631 et. seq.).".

(2) SETTLEMENT OFFERS.—Such section 122(g) is further amended—

(A) by redesignating paragraph (6) as paragraph (9); and

(B) by inserting after paragraph (5) the following:

"(6) SETTLEMENT OFFERS.—

"(A) NOTIFICATION AND OFFER.—As soon as practicable after receipt of sufficient information to make a determination, the President shall, concurrently or separately,—

"(i) notify any person that the President determines is eligible under paragraph (1) of the person's eligibility for an expedited settlement; and

"(ii) submit a written settlement offer to such person.

"(B) INFORMATION.—At the time at which the President submits an offer under this subsection, the President shall make available, at the request of the recipient of the offer, to the recipient any information available under section 552 of title 5, United States Code, on which the President bases the settlement offer, and if the settlement offer is based in whole or in part on information not available under that section, so inform the recipient.

"(7) LITIGATION MORATORIUM.—

"(A) IN GENERAL.—No person that has received notification from the President under paragraph (6) that the person is eligible for an expedited settlement with respect to a facility under paragraph (1) shall be named as a defendant in any action under this Act for recov-

ery of response costs (including an action for
contribution) with respect to the facility during
the period—
"(i) beginning on the date of transmittal of
written notice from the President that the person is eligible for an expedited
settlement with respect to the facility; and
"(ii) ending on the earlier of—
"(I) the date that is 90 days
after the date on which the President
tenders a written settlement offer to
the person with respect to the facility;
or
"(II) the date that is 1 year after the date of transmittal of written
notice from the President
that the person is eligible for an ex-
pedited settlement with respect to the
facility.
"(B) SUSPENSION OF PERIOD OF LIMITA-
TION.—The period of limitation under section
113(g) applicable to a claim against a person
described in subparagraph (A) for response
costs, natural resource damages, or contribution
shall be suspended during the period described

in subparagraph (A).

"(8) NOTICE OF SETTLEMENT.—After a settlement under this subsection becomes final with respect to a facility, the President shall promptly notify potentially responsible parties at the facility that have not resolved their liability to the United States of the settlement.".

SEC. 3. EFFECT ON CONCLUDED ACTIONS.

The amendments made by this Small Business Liability Protection Act shall not apply to or in any way affect any settlement lodged in, or judgment issued by, a United States District Court, or any administrative settlement or order entered into or issued by the United States or any State, before the date of the enactment of this Small Business Liability Protection Act.

Mr. FIELDS. Obviously, as the Administrator has said, Mr. Congressman, as I have said many times, we do support targeted Superfund liability relief for small parties. However, this bill was different than the one that we were working on in terms of a draft last fall, and we ran out of time in terms of being able to resolve all of our issues.

We want to continue to work with this committee to provide liability relief for small businesses, and we would like to continue to work with you and others in Congress to do that in the future. However, we do have some concerns, and I think that was communicated in a letter the Administrator sent to Congress, went to Congressman Tauzin and others on September 22.

Two other points you made and I want to make clear, and I think this is a comment that Congressman Shimkus alluded to in his opening remarks. I want to make very clear that the statement is not correct about the Keystone settlement and the vulnerability of Barbara Williams' former restaurant. My understanding is that she has now sold that restaurant.

But in the consent decree, we explicitly required that the selling parties, Waste Management, the Noels, they would have to waive their claims against all parties, including the nonsettlers like Barbara Williams. We included similar waivers in our prior settlements with the original generator defendants, the selling third and fourth parties and the de micromis parties.

The truth is, we have done everything in our power to protect Barbara Williams and those who are similarly situated. No one who settled with EPA can sue any of the nonsettlers. So we want to clarify that, because we have seen some statements by NFIB which were incorrect on that point.

Mr. OXLEY. If I could interject, that statement came from EPA, not from NFIB; is that correct?

Mr. FIELDS. No. EPA is trying to set the record straight. We saw a statement from NFIB that, despite that settlement signed on Keystone, that Waste Management could still sue Barbara Williams.

I want to set the record straight and say EPA's position is and the settlement language says specifically—if you want I can give you the cite; it is in section 24, paragraphs 179 through 185—it makes very explicitly clear that the selling parties cannot sue Mrs. Williams or any other nonsettlers as part of this consent decree that has been signed. That is our position. That is our reading of that consent decree.

Mr. OXLEY. Now is your reading of our bill that Barbara Williams and all of those folks would be relieved of liability straight up?

Mr. FIELDS. Your bill and that particular element of your bill that you sponsored, Mr. Chairman, H.R. 5175, it would solve the problem of the small business like Barbara Williams who generated——

Mr. OXLEY. How come we couldn't get 290 votes for it?

Mr. FIELDS. H.R. 5175 was not the same bill that we were discussing.

Mr. OXLEY. No, it wasn't. Actually, we accommodated EPA on several issues, including, if I might point out, applying the de micromis exemption prospectively.

Now do you agree that H.R. 5175 addresses this concern? Because that was the concern that we were told by EPA—and we specifically addressed that.

Mr. FIELDS. Mr. Chairman, you did address that concern.

I do want to point out, though, that the bill we were discussing with NFIB, that was not really a bill but a draft proposal of October, 1999, that was different than H.R. 5175, was introduced this session. It is true that you and your staff worked with us heroically to try to address a lot of our concerns. We do still have some lingering concerns, though.

For example, the Administrator is concerned that the burden of proof has shifted to the government. The government must prove that a business that sent over a hundred pounds of waste—that a business that sent over a hundred pounds of waste is not exempt.

You know, I will give you comments specifically on the bill this week, but there were elements in this bill that we could still not support.

Mr. OXLEY. So it is EPA's position that the burden of proof should be on Barbara Williams and not on the Federal Government, is that your position?

Mr. FIELDS. Well, we don't think that the government——

Mr. OXLEY. Is that yes or no? Is that yes or no?

Mr. FIELDS. The answer is, we do not believe that the government should have to prove that a business sent over a hundred pounds of waste.

Mr. OXLEY. That is a unique and very interesting theory in American law. Because you know when I went to law school a long time ago, we studied that people were innocent until proven guilty and that the burden lay on the government to prove that those people were indeed guilty. So, basically, the EPA is turning this legal concept on its head, is it not?

Mr. FIELDS. Well, the problem, Mr. Chairman, is that oftentimes the business records are not—oftentimes not available. This would cause litigation because we would be disputing whether or not——

Mr. OXLEY. You wouldn't want litigation. We certainly haven't had a whole lot of litigation.

Mr. FIELDS. We want to avoid that, and we think this particular element of the bill would encourage litigation.

Mr. OXLEY. Would encourage litigation. You mean, even more litigation than we already have?

Mr. FIELDS. Because of the unavailability of adequate records to document how much material actually went to a material site.

Mr. Chairman, we will be happy to give you some comments by the end of the week as you request on your bill, but I wanted you to share with you that, as the Administrator said in her letter, there are elements like that we believe would increase transaction costs and promote litigation. We will be happy to give you a letter for the record that gives you specific elements of how we believe that bill, H.R. 5175, would promote litigation and increase transaction costs. That is what you are requesting. We are willing to do that.

Mr. OXLEY. This is, as the Four Tops sang, "the same old song," Mr. Fields, 1965, I think, by the way.

Mr. FIELDS. I heard it.

Mr. OXLEY. But we have been through this, and it just seems to me from where I sit that our efforts to try to make some common sense in this Superfund law which we have been at for it seems my entire adult life, it is always a moving target. If it is not the de micromis settlement prospectively, then it is burden of proof.

So I get the sense that we are in a game where the goal posts keep being moved on us, even like Charlie Brown, where we get set to kick the field goal and Lucy, a/k/a Carol, pulls a football out and I end up flat on my keister.

You know, I am getting pretty damn tired of that. It is the same old story. We try to get a reasonable bill on the floor of the House that was supported by virtually all Republicans and 46 or so Democrats, that made a lot of sense and would get these small business people out of the litigation nightmare, not create more litigation, create less litigation. This is not brain surgery here. Yet we found a situation where we couldn't get it done because somebody had a political agenda, and I just find that unfortunate.

Let me yield to the gentlelady from Colorado.

Ms. DEGETTE. Thank you, Mr. Chairman.

Let me just say that that particular bill, H.R. 5175, when it came to the floor was not a bill that the minority had seen or had the opportunity to work on. People like me really felt like it was a good step toward resolving some of these liabilities for the small folks like the restaurant owners who have been mentioned today and others. However, there were some other details in the bill that were really problematic.

I think we could have worked those details out had we known about it before it came to the floor, but, as we all know, Superfund is very technical. There is a long established body of law, and the last thing we want to do is upset the equities in existing laws which would encourage litigation.

So I would offer—Mr. Chairman, for next year I would offer personally to work with you on this issue. It is an issue, as you know, I have worked on a lot; and I will guarantee you if we come up with an agreement I won't pull the football out and leave you on your keister.

Mr. OXLEY. Thank you.

Ms. DEGETTE. You are welcome, Charlie.

Let me get back to the topic at hand a little bit. I would like to ask Mr. Fields, you heard me talk in my opening statement about these new findings by the Department of Energy about some States that processed radioactive materials; and I am wondering if the recent disclosure by the DOE needs to be investigated by the EPA as regards the Shattuck site so that we can properly characterize and dispose of the waste.

Mr. FIELDS. Yes, Congressman DeGette, we are including Shattuck. We initially, through the USA Today article, had identified 153 sites. We have now discovered in discussions with DOE several hundred others. We are investigating all those sites, one of which was Shattuck; and the Department of Energy is also doing

a file review on a parallel track to determine what information they have about this waste disposal area so—as well.

So I assure you there is an ongoing investigation by EPA, DOE and others trying to assess exactly what is the situation regarding radiation waste at Shattuck in light of this disclosure in recent weeks.

Ms. DEGETTE. How will this affect the timetable for removal of waste at Shattuck?

Mr. FIELDS. We don't believe it will affect, in any way, the timetable for removal of waste. We are in the design phase right now. We committed to the community we would have this material moving away within 2 years. That is the same time schedule we are on. We are doing this effort aggressively, on a parallel track, with the design being done.

We will have to make sure, however, the waste is properly characterized. Any waste that goes offsite will have to be characterized to determine exactly what is there and whether or not the facility we are going to take it to is properly licensed to take that material. So it is critical we get this investigation that you alluded to done quickly. So that can factor into the schedule for moving this material offsite.

Ms. DEGETTE. But it is your view today the removal schedule should not be affected.

Mr. FIELDS. We do not intend for the removal schedule to be updated.

Ms. DEGETTE. I think that is pretty clear.

Mr. Martin, let me ask you if you have any sense why your office's investigation of the Shattuck site did not uncover any of the information that the DOE just released.

Mr. MARTIN. When I undertook my review of the Shattuck site, which began last June, we did meet with officials from the company, this W.S. Shattuck Company, were provided a tour of the site; and since that time I can tell you I have had suspicions that the waste at the site was other than as described on the basis of questions that we have asked and also on the basis of documents that we reviewed in the administrative record in the region. It is a concern that we have had, and we are investigating.

Ms. DEGETTE. Mr. Martin, to follow up a little bit, I know that there were a number of statements by you and by the chief investigator about potential criminal activity at the Shattuck site made in the press and other places. I am wondering if, to your knowledge, there have been any reports made to local law enforcement or Federal law enforcement officials about criminal activity or anything you have uncovered at the site.

Mr. MARTIN. I made no statements about potential criminal activity in the course of the hearings which we undertook for the Shattuck site. However, to the extent we have any reason to believe through our review of the record or otherwise by talking to officials within the region, the State or the company that there may be, you know, criminal activity, we will refer them to the Inspector General of the EPA.

Ms. DEGETTE. But to your knowledge no referrals have made to date.

Mr. MARTIN. I have made no such referral.

Ms. DEGETTE. Thank you.

Let me ask you generally, I know the ABA is looking at general Ombudsman standards and the subcommittee issued a report this past July to the American Bar Association House of Delegates recommending a set of standards for the Ombudsman office to follow.

On the one hand, the recommendations stated that the Ombudsman should not conduct an investigation that substitutes for administrative or judicial proceedings; and an Ombudsman review should not serve as the foundation for disciplinary activity or civil action or a determination of a violation of law or policy. The report goes on to say, and, by the way, the subcommittee says that the ABA supports the greater use of ombudsmen; and it says that ombudsmen should review allegations of unfairness, maladministration, discourteous behavior, incivility, inappropriate application of law or policy, inefficiency or decision unsupported by fact.

I am wondering, Mr. Fields, if you can tell me, does the EPA Ombudsman follow these guidelines? And if not, do they intend to in the draft report that you are working on? And if not, tell me how it operates differently.

Mr. FIELDS. Well, the EPA has looked at the American Bar Association Ombudsman guidelines. We have looked at this report that you have referred to as well. We are looking at all those sources. We are looking at the guidelines of the U.S. Ombudsman Association. We are looking at those elements of those guidelines that are the best components, and we intend to apply those and incorporate those into the EPA guidance we are developing that we will make available to the public shortly.

We think there are certain elements of those guidelines that fit the EPA structure, but there are some elements that do not. Complete confidentiality, for example. We cannot provide complete independence, for example. We are working to try to make sure those elements of those various models that have been published by various organizations including ABA are incorporated into our guidance that we are developing and make sure that they are compatible with Federal law and EPA policy and procedure.

Ms. DEGETTE. Mr. Martin, would you have any comment on that?

Mr. MARTIN. Yes, I would.

I served and still serve on the Working Committee for the American Bar Association for Ombudsmen, and I was integrally involved in the development of the language which you have spoken of just a moment ago. And I think the direct point is that once an Ombudsman becomes an adjudicatory body it is no longer an Ombudsman. Therefore, an Ombudsman cannot be a judge, cannot make recommendations which are binding upon the entity that it reviews. This function has never done that and I don't believe ever will.

Mr. OXLEY. Gentlelady's time has expired.

The gentleman from Florida, the chairman of the Health Subcommittee.

Mr. BILIRAKIS. Thank you, Mr. Chairman. I will just continue in that vein.

In 1990, as I understand it, the Administrative Conference for the United States recommended that all government agencies with

frequent contact with the public consider establishing an Ombudsman service. The conference also indicated that, and I quote, Mr. Fields, "it is important that Ombudsmen be independent of the line offices and that they are seen as independent."

Well let me just say, this is difficult. It is difficult for those of us who have worked with, and developed relationships with, the Ombudsmen over many months, to get them in a position where they are sitting here to the right hand of their boss, not under oath and asking them to basically say what is in their hearts. And in all honesty—that makes it very difficult for me.

Because, let me just put it this way, Mr. Fields, with all due respect—this is not intended to be any kind of a threat or coercion or anything of that nature. I don't really know what Mr. Martin is going to testify to here today. He was asked to testify, and apparently accepted the invitation to testify. Ordinarily, a written statement is submitted to this committee prior to that testimony. We did not receive a written statement. We were told he was not going to be able to testify. Then, of course, this morning he is here to make an oral statement. You know, a reasonable person would certainly read an awful lot into all of that.

I would hope that no matter what happens here today or during the process of reauthorizing and maybe putting into law specifics in terms of the functions of the Ombudsman, that there would not be any repercussions on Mr. Martin or any members of his staff. And I know that you will tell me there won't be, but you and I know that sometimes things are said and other things happen, whether the person who made the comment means it or not.

You were asked, Mr. Martin, to testify before this committee. You did not provide a written statement. Now you are here today to speak orally. Is there anything you would like to share with this committee in that regard? It is true you were invited to testify.

Mr. MARTIN. That is correct, Mr. Chairman.

Mr. BILIRAKIS. It is true that you planned to testify.

Mr. MARTIN. That is correct, Mr. Chairman.

Mr. BILIRAKIS. And it is true that that changed and then this morning you are to give an oral statement.

Mr. MARTIN. There was confusion, Mr. Chairman, about the submission of testimony to the committee. I had a discussion with our Office of Congressional Affairs in which they indicated that a statement or statements would be prepared for Mr. Fields and myself. That discussion occurred around September 23. I then understand from my staff that there had been a joint statement prepared by the Agency as late——

Mr. BILIRAKIS. Joint statement for the two of you.

Mr. MARTIN. Yes, sir, yeah. That had been prepared by the Agency.

Mr. MARTIN. Yes, and as of last evening, in fact, the joint statement was still prepared; and then I understand a statement was submitted that was from Mr. Fields alone.

Mr. BILIRAKIS. Did you feel that you should provide your own statement?

Mr. MARTIN. I feel the Office of Ombudsman—I feel, as Ombudsman, that I should be able to provide my own statement to this committee. I understand that because of legal difficulties within

the agency, perhaps the administration, any such statement would have to be cleared through the Office of Management and Budget and perhaps other entities as well. I understand those difficulties. But to answer your question, yes, I do feel I should be able to.

Mr. BILIRAKIS. Had you prepared your own statement and went through the process and just didn't make it through the process?

Mr. MARTIN. No, sir. I was led to believe that a joint statement would be prepared and submitted.

Mr. FIELDS. Mr. Chairman, could I enter this one and clarify this, just to add to this question?

Mr. BILIRAKIS. I suppose so.

Mr. FIELDS. Mr. Martin—and I—and we apologize. There was some confusion. Mr. Martin was on leave, and we did talk to staff in the Ombudsman. We assumed that one statement from the administration—obviously, Mr. Martin was not restricted in any way from being able to communicate with this committee.

We traditionally prepare one statement that allows several witnesses—whether it is me and Steve Herman or me and Lois Schiffer—when we get letters from committees of Congress we traditionally put together one statement and have both witnesses there to respond to questions. But I assure you there was not any attempt to try to stifle a statement from the Ombudsman.

Mr. BILIRAKIS. Mr. Fields, with all due respect, again, I don't think there is any confusion. The letter of invitation is right here; and it is pretty darn clear, the form of your testimony and that sort of thing.

You know, it gets again to the independence aspect. It gets to the problems that led up to this hearing, the problems that we ran into in our different sites in Denver, in Idaho and Florida, et cetera.

You know, you made the comment, sir, that the Ombudsman's Office is operating very successfully. Maybe some people would say in the eyes of EPA maybe too successfully. You know, I was part of this committee when we did the Superfund bill, as was Mr. Oxley. Not too many people up here were here at this time.

The Superfund bill took up all hours of several days and nights, and it was a very contentious type of a thing. It shouldn't have been, I suppose, but it was because partisanship always plays a part. But I do remember very clearly back when the Ombudsman concept was being brought up and a lot of us ended up supporting the Superfund bill; and many people who, frankly, were being blasted by various special interest groups were thanked after it all was done.

But in my mind I am not sure they understood what the role of the Ombudsman would be in Superfund program, and I sure understand it now from what I have seen in Tarpon Springs. Thank God for it and thank God for those people who—I wasn't one of them—came up with the concept. I suppose I supported it. I can't remember back to 1984. But my point is it has probably worked too well from what I have seen.

Now, you know, we have seen documentation, Mr. Fields, basically withholding funds from the Ombudsman's office. Maybe they are doing their job too darn well. I don't want this to be a militant type of hearing. Do you agree that the Ombudsman—as you have stated, Mr. Fields, is not an advocate for a community or any per-

son or institution? That is in your testimony. I believe you have said that.

Mr. FIELDS. That is in my testimony. That is my statement.

Mr. BILIRAKIS. It has also been in some of the communications I have read that your office sent out. Mr. Martin, do you agree with that?

Mr. MARTIN. An Ombudsman should not serve as an advocate for any particular person but can serve as an advocate for—to be frank, the truth, after an investigation is under way or has been performed and I may find facts that I believe are undeniable and if I feel those facts are being ignored by the Agency, I then advocate for those facts.

Mr. BILIRAKIS. When you feel that way, what sort of response are you accustomed to receiving from the Agency?

Mr. MARTIN. Well, the process at times can be long and arduous, but I feel that over the course of the past 8 years the Agency has adopted many of my recommendations—I would say 70 to 80 percent.

Mr. BILIRAKIS. Mr. Fields, just one last question. My time has expired. I appreciate the Chair's indulgence. Do you agree that the Office of the Ombudsman should be reauthorized?

Mr. FIELDS. We have no problem with the Office of the Ombudsman being reauthorized. We do have concerns with some of the legislative proposals, though, that would add elements to that reauthorization.

Mr. BILIRAKIS. In other words, you feel that your agency should continue to control their actions.

Mr. FIELDS. No. We think, though, that the ABA model statute is not the appropriate guideline to embody as the overarching body for the Ombudsman activities. We think there are elements of those provisions that cause problems for a Federal Government Ombudsman, but we support the Ombudsman function being reauthorized. We think it is a valuable function. We would continue to operate this function irrespective of whether or not Congress reauthorizes this legislation.

Mr. BILIRAKIS. I would like to get into funding and that sort of thing. My time has expired.

There will be further questions that I and others will be submitting to you; hopefully, you will respond to those in due time.

Thank you, Mr. Chairman. I am sorry to have taken up so much time.

Mr. OXLEY. Time of the gentleman has expired.

Chair now recognizes gentleman from Wisconsin first, right? No, the gentleman from Ohio, Mr. Sawyer.

Mr. SAWYER. Mr. Chairman, I was worried that you had forgotten where I was from for a second there.

First of all, let me say thank you to both of you gentlemen for being here. It is good to see you both.

Let me direct my first question to a matter of specific history within my district regarding the industrial excess landfill. Back in 1997 the concerned citizens of Lake Township, who had been working on the issues surrounding that site for some time, asked then Senator John Glenn and me to intervene on their behalf with the Agency to allow them to conduct tests of soil and water site. After

more than 6 months, in August 1997, we obtained permission for the testing to begin. I thought that was particularly—a particularly good idea because up to that time test results had been problematic.

Just about the time that the test permission was obtained, that same citizens group determined that it really did not want to undertake tests. Instead, they requested a review by the Ombudsman. That request was denied, and I pressed for the Ombudsman's participation. Senator Glenn at that point withdrew from that request, feeling that until the tests had actually been conducted he didn't want to pursue another avenue of inquiry.

I had hoped at the time that the Ombudsman could become in its very special way an active participant, not just reviewing the history of the site but, more importantly, in examining the site to decide how best to protect the public health and safety and the confidence of the residents in the area. So I pleaded the case with Administrator Browner, and the Ombudsman was given permission for a preliminary review in September 1998.

Mr. Martin, you advised me that your findings would be available shortly. You came to my office in October 1998 and repeated the same assertion. In January 1999, you conducted a hearing, all of which I am very grateful for. We met again in the spring of 2000 in May of this year when you suggested that your findings were imminent. Can you tell me what shortly or imminent means?

Mr. MARTIN. Means this week, sir.

Mr. SAWYER. Does it mean this week?

Mr. MARTIN. Yes.

Mr. SAWYER. I am looking forward to that. It has been frustrating as you, I am sure, can appreciate, particularly as we have seen other avenues of resolution move forward along parallel tracks.

Mr. Fields, has it been your experience that this kind of timetable is normal?

Mr. FIELDS. Well, obviously, the Ombudsman has a lot of major cases that are before him. I am sure that Mr. Martin has been—being the good public servant he is—is trying to balance all those priorities he has to deal with. He has a number of cases involving Superfund and RCRA sites across the country, and many members on these two subcommittees are aware of those cases. So I know that the history of the IEL matters go back more than 10 years.

I do want to say one of the reasons it took a while to even initiate the Ombudsman review was because this site, as you know, has been subject to four major reviews even before the Ombudsman got involved—the Science Advisory Board, the Office of Inspector General, Clean Sites Incorporated, EPA's radiation labs. So it is probably one of the most studied Superfund sites in the history of EPA.

But—I look forward to the Ombudsman's report, but I do know that, you know, Mr. Martin does have to balance a lot of major cases all going on at the same time in trying to make judgments as to which ones he does first, but sometimes the cases do get delayed necessarily just because of the need to balance competing priorities across the country.

Mr. SAWYER. Mr. Martin, do you have a comment?

Mr. MARTIN. Yes, sir.

I thank you for your patience and your forbearance. I also thank you for your intervention. Because when the request for my help came from citizens in your community, I was denied by Administrator Browner, and you did intervene, and that was a successful intervention.

Since that time, yes, I have done a public hearing in the community. I have completed my review of the reviews that Mr. Fields had just spoken of, and I am prepared to sit down with you this week and give you my preliminary recommendations.

Mr. SAWYER. I look forward to counselling with both of you when that report becomes available. Thank you very much.

Mr. MARTIN. The issue of resources——

Mr. SAWYER. I do understand that.

Mr. Chairman, I have been asked to pose one further question by the staff, if I might. The question revolves around the question of whether the Ombudsman and his employees have arrest powers and the right to take an individual into custody. This centers around an event on June 5 in a town meeting in St. Petersburg, Florida, where the chief investigator is characterized here as giving the Miranda warning to two EPA employees from Region 4.

I am not an attorney, but to my knowledge that warning is only given in the case of a criminal investigation. Was this intended to be a Miranda warning? Let me read it to you from the record.

The chief investigator speaking said, you have the right to remain silent. You have the right to counsel. Anything you say may be used against you in a court of law. Proceed to the witness.

Mr. FIELDS. Is that for me or Mr. Martin?

Mr. SAWYER. It is for both of you.

Mr. FIELDS. Your question is, does the Ombudsman function have subpoena powers or——

Mr. SAWYER. Or arrest powers.

Mr. FIELDS. The Ombudsman function, as currently constituted, does not have those authorities or powers.

Mr. SAWYER. What would be the purpose of a Miranda warning then?

Mr. FIELDS. I will have to defer to Mr. Martin on that. I was not at the hearing. I will let Mr. Martin speak to the purpose of the statement on June 5.

Mr. MARTIN. I will be glad to respond, sir.

To be clear, no, the Office of Ombudsman—the Ombudsman function has no arrest powers, has no detention powers, does not do criminal investigations.

I want to get to the specific point of what was said in the context of the hearing that I did in Tarpon Springs, Florida, earlier this year where the issue of the warning arose.

Prior to that meeting, Mr. Kaufman, who serves as my chief investigator, had met with staff from our Office of Inspector General with whom I have had a working relationship for many years in many cases; and I have done criminal referrals to the Office of Inspector General. Mr. Kaufman was advised—and I would also like to note that he has really the firsthand testimony which can be provided on this issue—was advised, and he is present behind me, that it may be necessary for us to give certain warnings to preserve

a potential criminal case that the IG would do in the event we made a referral after completion of our investigation.

Since that time, the Office of Inspector General, at our request and at the request of Mr. Fields, has provided us with a memorandum of instruction on when warnings can be issued.

Mr. SAWYER. Thank you very much.

Ms. DEGETTE. Would you yield?

Mr. SAWYER. I would, but if you could share with us that instruction.

Mr. FIELDS. We will be happy to share this for the record. It is a memo dated September 12, 2000, from the Office of Inspector General that we will be happy to provide for the record. Mr. Kaufman has also provided a response to this memo as well, and those could be provided for the record to this—to both subcommittees.

[The following was received for the record:]

Attached are two memorandum, the first is from Mark Bialek, Counsel to the Inspector General to Michael Shapiro, Principal Deputy Assistant Administrator. The second is from Hugh Kaufman, Senior Engineer to Mark Bialek. These memorandum explain the EPA Inspector General's position in regard to whether the OSWER National Ombudsman has subpoena or arrest power.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

SEP 12 2000

OFFICE OF
INSPECTOR GENERAL

MEMORANDUM

SUBJECT Employee Warnings in Ombudsman Interviews

FROM Mark Bialek
Counsel to the Inspector General

TO Michael Shapiro
Principal Deputy Assistant Administrator
Office of Solid Waste and Emergency Response

It has recently come to my attention that Hugh Kaufman gave a Miranda warning during an Ombudsman hearing on June 5, while questioning an EPA employee. As I previously informed Hugh Kaufman in a meeting on December 9, 1999, it is the responsibility of the Office of Inspector General (OIG) or the Criminal Investigation Division of the Office of Enforcement and Compliance Assurance (CID/OECA) (and implicitly, therefore, not the Ombudsman's role) to use Miranda or the other "advice of rights" warnings as set forth in this memorandum.

On December 9, 1999, Hugh Kaufman and I met, along with Assistant Inspector General for Management John Jones and Mr. Kaufman's colleague, Dean Gottehrer, to discuss the responsibilities of the Ombudsman and the need for coordination with the OIG. I told Hugh Kaufman at that meeting that the OIG is the EPA's statutory internal investigator. As such, only the trained OIG investigators are officially authorized to provide Miranda and other "advice of rights" warnings in interviews with employees and others in internal EPA investigations involving criminal violations or administrative misconduct (i e., matters for which disciplinary

action could be taken). Of course, CID/OECA is responsible for conducting criminal investigations of, and referring for prosecution, violations of environmental statutes. I discussed with Mr Kaufman that the Ombudsman has no authority to conduct investigations of potential criminal violations or administrative misconduct.

I The Responsibilities of the Ombudsman

As you know, the EPA Headquarters and Regional Ombudsman functions are set forth in the EPA's "Hazardous Waste Ombudsman Handbook " Although the mission is broadly described and seems to overlap other agency functions, the Office of Ombudsman is, "to ensure that the general public and regulated community are provided assistance with complaints or problems arising from EPA's hazardous waste programs " (Handbook, page 2-2) The agency Handbook also acknowledges that, "[o]n occasion, there will be issues or topics beyond the ability of the Ombudsman to address These should be referred to experts in the particular area " One of these issues is, "[a]llegations of wrongdoing, which should be investigated by the Inspector General " (Handbook, p 3-3) Accordingly, "[r]equests that are beyond the Ombudsman's authority should be referred to and coordinated with the appropriate office or official for handling " (Handbook, p 3-9)

II The Responsibilities of the Inspector General

The Inspector General Act, 5 U S C app 3, as amended, established the OIG at EPA One of the OIG's functions is to conduct internal investigations 5 U S C app. 3, Section 4(a) The EPA Handbook provides, "[g]enerally, the OIG investigates all criminal matters involving waste, fraud, and abuse by EPA employees, contractors, and grantees Pursuant to a memorandum of understanding, the OIG refers all matters relating to bribery or attempted bribery, and organized crime to the FBI Pursuant to a separate memorandum of understanding, the OIG refers all violations of environmental statutes to the EPA Office of Enforcement, which investigates such matters " EPA Manual 6500, Chapter 5, Sections 2 a and b *"After receipt and evaluation,* the OIG refers allegations of environmental crimes and minor instances of waste, mismanagement, or employee misconduct, which can be addressed by EPA program officials, to the responsible EPA program office " EPA Manual 6500, Chapter 5, Section 2.c. (Emphasis added)

III Ombudsman's Referrals to OIG or Others

Accordingly, when the Ombudsman encounters an issue of potential criminal wrongdoing, or administrative misconduct, he is obligated to refer it to the appropriate investigative authority, OIG or CID/OECA. He has no authority to conduct any investigation of potential criminal wrongdoing or administrative misconduct.

I understand that while the Ombudsman's job is mainly one of education and information, on occasion he may have to make inquiries into the nature of a complaint presented to him. One reason for such inquiry is to determine whether the issue is one that should be referred to another office This sort of inquiry is not an investigation as undertaken by the OIG or CID/OECA, and is appropriate for an Ombudsman, as long as it does not overlap with the OIG's internal investigative authority or CID/OECA's investigative authority, which are paramount If the Ombudsman's inquiry determines that an individual may have committed criminal or administrative misconduct, he is obligated to immediately refer the matter for appropriate investigation Part of such an investigation involves "advice of rights" warnings. This was the purpose of my meeting with Mr Kaufman on December 9 *The entire conversation revolved around this concept of the Ombudsman referring matters to the OIG. Not once did I state or intend to imply that the Ombudsman should consider using "advice of rights" warnings*

IV Use of "Advice of Rights" Warnings

It is my position that -- for the reasons set forth below -- it would be inappropriate for the Ombudsman, in the course of an Ombudsman inquiry, to invoke the following "advice of rights" warnings

The Fifth Amendment to the Constitution provides the right not to incriminate oneself in a criminal case. When the government can compel individuals to provide testimony, either through threat of force, or threat of termination of employment, and those individuals may incriminate themselves as criminal subjects, government investigators must provide "advice of rights" warnings. The purpose of the warnings is to protect any testimony provided so that it can be used for a criminal prosecution. If warnings are not given, and a criminal subject incriminates himself, the testimony will not be admissible against him in a proceeding. If the warnings are given, and the subject testifies knowingly, the testimony may be used. The warnings given vary, depending on whether the individual is in custody, whether a criminal prosecution is possible, and other circumstances.

Miranda warnings are given to preserve the Fifth Amendment rights of a criminal suspect who is in custody. Because the Ombusdsman does not conduct criminal investigations, and moreover, has no legal authority to arrest and take custody of a person, there is no situation under which it would be appropriate for the Ombudsman to provide a suspect with Miranda warnings. To provide such warnings in other, non-criminal situations, may mislead an individual, who, for example, may believe he has the right to a government-provided attorney when the Ombudsman is not in a position to provide one.

Kalkines warnings are given when the OIG has consulted with a prosecutor and has determined that a suspect may be granted immunity from criminal prosecution, permitting the OIG to proceed administratively. These warnings assure a suspect that he or she may not be prosecuted criminally and thus has no constitutional right to remain silent. Because the Ombudsman does not conduct criminal investigations, and does not consult with prosecutors to obtain grants of immunity from prosecution, the Ombudsman should not provide Kalkines warnings.

Other kinds of "advice of rights" warnings are given by OIG investigators to subjects in other circumstances. For example, when the OIG has not yet received a declination from a prosecutor, the investigator may provide Garrity warnings, which advise a subject that he or she has a constitutional right to remain silent, but that the silence could be considered adversely in an administrative proceeding. Additionally, the OIG investigator provides notice of the right to bargaining unit representation if an employee-subject is a member of the bargaining unit and asks for union representation under circumstances where the subject-employee reasonably believes he or she could be subject to disciplinary action.

V. Conclusion

In summary, "advice of rights" warnings should not be given without the authority to conduct the criminal or administrative misconduct investigation, as well as a thorough understanding of the entire criminal and administrative context of an investigation. As I said at the December 9, 1999 meeting with Messrs. Kaufman and Gottehrer, failure to give the warnings, or giving the wrong warnings, may result in the government's loss of testimony in subsequent criminal proceedings, or could cause problems in the administrative processing of a complaint based on such testimony. It is my position that at EPA, only qualified OIG personnel and investigators from the CID/OECA should be conducting investigations of potential criminal violations and administrative misconduct and, therefore, providing the above-cited criminal and administrative "advice of rights" warnings to employees. Because the Ombudsman does not possess legal authority to conduct such investigations, Hugh Kaufman should not be using these "advice of rights" warnings.

If you have any questions about this matter or wish to discuss it further, please call me at (202) 260-4733.

cc: Timothy Fields, Assistant Administrator, Office of Solid Waste & Emergency Response (OSWER)
Robert Martin, Hazardous Waste and Superfund Ombudsman, OSWER
Hugh L. Kaufman, Program Analyst, OSWER
Linda Algar, CID/OCEFT/OECA

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

September 20, 2000

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

MEMORANDUM:

SUBJECT: "Advise of Rights" Warnings

FROM: Hugh B. Kaufman
Senior Engineer/Principle Investigator

TO: Mark Bialek
Counsel to the Inspector General

I am very confused by your September 12, 2000, Memorandum to Michael Shapiro (see attachment). When Dean Gottehrer and I initiated the meeting with you and John Jones, it was for the purpose of enhancing coordination between the National Ombudsman's Office and the Office of Inspector General (OIG). In that meeting you raised the issue of "advice of rights" warnings. Neither Mr. Gottehrer, the co-chairman of the American Bar Association Committee on Ombudsman, nor I had any knowledge of this issue until you raised it. Specifically, you raised the concern that through the course of normal investigations, not criminal in nature, an investigation could elicit statements in interviews of individuals that inadvertently might violate their Fifth Amendment rights and/or inhibit a potential OIG investigation that might have to occur down the line. You then provided us a copy of a recent court decision and an Attorney General Opinion on the Garrity case and "advice of rights" warnings requirements. At no time during this meeting did you state that the reason you were bringing this up was because the OIG and/or CID were the only entities that you believed should issue these warnings. Quite the opposite, you were only concerned that individuals be warned if there is the slightest chance that the National Ombudsman's Office might have to refer part of a case it is working on to OIG or other appropriate law enforcement bodies. This advise you provided made sense to us, given the fact that you told us that criminal prosecutions had been unsuccessful because, during the course of routine non-criminal investigations, self-incriminating information was provided by interviewees, who were not provided with "advise of rights" warnings.

Let me be perfectly clear: you raised the issue of "advise of rights" warnings and you came to the meeting with documents discussing that issue to alert us that this is an issue we must deal with in performing our non-criminal investigatory work. I have no first-hand information why you would misrepresent what occurred at our meeting, but I do have suspicions.

[***It should be noted that subsequent to the individual you referred to being provided an "advice of rights" warning on June 5, the individual proceeded to make false, misleading, and inaccurate material statements in the interview.***]

As a result of our coordination discussions, I provided you at two meetings earlier this year, briefings on Ombudsman investigations that I wanted OIG to work with us on because I was concerned that part of those investigations could potentially be referred to OIG. You promised me both times that OIG would follow up and help us. However, you provided none of the promised help and the only tangible information we have received from OIG is your September 12, 2000, Memorandum to Michael Shapiro that misrepresents what occurred at our meeting to improve coordination between our two offices.

Finally, when you told me you were going to provide us a memorandum of procedures related to "advise of rights" warnings, I asked you if you could provide statutory and case law citations related to who is, and is not, empowered to provide such warnings during non-criminal investigations. You promised you would provide such citations, but you didn't.

Because of the seriousness and importance of this, and other related issues, I request that you set up a meeting between yourself, the Inspector General, Mr. Shapiro, our National Ombudsman and I at your earliest convenience. This is important to get our relationships in the future back on a positive and consistent tack.

Attachment

cc: Inspector General Tinsley
Assistant Administrator Fields (OSWER)
Deputy Assistant Administrator Shapiro (OSWER)
National Ombudsman Martin (OSWER)
Linda Algar, CID/OCEFT/OECA

Mr. SAWYER. Let me yield to the gentlelady.

Ms. DEGETTE. If the gentleman would yield, I, in fact, am a lawyer and used to do a fair amount of criminal work.

Frankly, the administration of the Miranda warning by someone who has no law enforcement or administrative authority is not going to be meaningful at all in a court of law. Because a knowing waiver can't be made by anybody who might give perjurious testimony or testimony that would cause them to self-incriminate. So, therefore, I would suggest, Mr. Fields, when you develop your new standards you include this issue in your new standards. Because unless you have an agent of a Federal, local or State law enforcement agency to administer the Miranda warning, this isn't going to have any effect anyway.

Mr. FIELDS. I agree—Mr. Chairman, I will respond quickly.

I agree with that, and it has been clarified now in this memorandum that came from the Office of Inspector General that only qualified Office of Inspector General personnel and criminal enforcement division personnel from the Office of Enforcement have the power and the authority to conduct investigation of potential criminal violations and administrative misconduct and issue such warnings, as you just pointed out; and that will be made explicitly clear in future guidance.

Mr. OXLEY. Gentleman's time has expired.

The Chair now recognizes the gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman.

Mr. Martin, I am glad that you are here. You have a very gentle spirit, and I say that with all due compliments because I think you probably need it in that job.

Also, we, as Members of Congress, there are 435 ombudsmen, and this is our job and in many different areas. This is why I have taken on the Quincy issue so fervently. I find it hard to be an effective Ombudsman if you are not even allowed to provide your own written statement. How can you be totally independent?

I understand that it would have to get vetted through some folks, but I just find that symptomatic of a problem that really, Mr. Fields, I hope you end up addressing at some time.

Mr. Martin, who is giving you advice behind your—who is the gentleman behind you with the beard and glasses and from what office does he come from?

Mr. MARTIN. It is Mr. Kaufman with the Office of Solid Waste and Emergency Response which Mr. Fields is representing and

which I am in, and he has served as my chief investigator in a number of cases.

Mr. SHIMKUS. Is he in the Office of the Ombudsman or is he in Mr. Fields' office?

Mr. MARTIN. He is technically in Mr. Fields' office, because my position description is such that I have no authority to supervise any EPA employees.

Mr. SHIMKUS. I thank you. I think that is also a telling issue of some independence or lack thereof.

Mr. Fields, how many times have I asked for some language from you in a hearing of this sort to relieve small business, provide them some liability protection? I can remember two times, and I can remember two times you providing the affirmative action assurance that you would provide me or this committee some language. Have I ever received language?

Mr. FIELDS. We have worked on language with committee staff, Mr. Congressman. I don't recall us providing language specifically to you. I do know that we had worked on language, but I don't recall whether we provided it.

I would just make one quick—this will be 30 seconds—just to clarify that Mr. Martin, his statement would not have to be cleared by any of the administration to submit a statement. That is not a requirement we have in terms of Mr. Martin being——

Mr. SHIMKUS. Let us don't go there because, obviously, it didn't happen today.

I would like to place in the record statements from the NFIB concerning EPA's lack of leadership on small business relief legislation.

[The information follows:]

NFIB.
The Voice of Small Business

WHAT DOES THE EPA SAY ABOUT THE SMALL BUSINESS EXEMPTION?

- "... EPA officials and officials from NFIB discussed an NFIB proposal for Superfund small business amendments. Although the discussions were very positive, EPA officials raised a concern about the prospective nature of the proposal's de micromis exemption. 'This remains EPA's position.'" EPA's Head of the Superfund Program, Timothy Fields, Jr., Letter to Congressman John Dingell in response to his request for an EPA position on small business liability relief legislation (August 18 2000). **Note: The Small Business Liability Relief Act mirrors the legislation discussed by NFIB and EPA, but DOES NOT CONTAIN A PROSPECTIVE DEMICROMIS EXEMPTION.**

- "The administration has asked Congress to pass bipartisan legislation that would exempt small parties from Superfund liability ... ." EPA's Head of the Superfund Program, Timothy Fields, Jr., Letter to the Editor, Washington Post (September 3, 1999)

- "The Administration supports liability reform for small volume contributors and generators and transporters of household municipal solid waste." EPA Administrator, Carol Browner, House Transportation Committee, Water Resources and Environment Subcommittee, Written Statement (May 12, 1999)

- "EPA has supported for the past six years, and continues to support, legislative reforms that remove from Superfund liability small parties who contributed trash to Superfund sites and parties who contributed small amounts of hazardous waste." Letter from EPA Administrator Carol Browner to Speaker of the House, J. Dennis Hastert (April 27, 1999).

- "... the Administration has consistently supported targeted efforts to remove the "little guy" from the Super-fund program ..." EPA Administrator, Carol Browner, House Commerce Committee, Finance and Hazardous Materials Subcommittee, Written Statement (March 5, 1998).

- "We want to protect the "little guys," the small businesses, the Mom-and-Pop operations, that we all agree have become unfairly entangled in Superfund litigation." EPA Administrator, Carol Browner, House Transportation Committee, Water Resources and Environment Subcommittee, Oral Statement (October 29, 1997)

- "... the Administration would support liability reform for certain generators or transporters of municipal solid waste, and for parties who sent less than 110 gallons or 200 pounds of hazardous waste ... ." EPA Administrator, Carol Browner, Senate Committee on Environment and Public Works, Written Statement (September 4, 1997)

- "The Administration would support liability reform for de micromis parties ... . We do not believe that [Ms. Williams, owner of a restaurant in Gettysburg] should be involved in the Superfund process ... ." EPA Administrator, Carol Browner, Senate Committee on Environment and Public Works, Written Statement (March 5, 1997).

National Federation of Independent Business
1201 F Street NW • Suite 200 • Washington DC 20004 • 202 554-9000 • Fax 202 554-0496 • www.nfib.com

Mr. SHIMKUS. I would also like to show you—and I am referring to Mr. Fields—and place in the record some draft text that we were provided in November 1999.

[The information referred to follows:]

DRAFT——————ENFORCEMENT CONFIDENTIAL——————DO NOT RELEASE—11/3/99 5 40 PM

TITLE I--SMALL BUSINESS LIABILITY RELIEF

SEC. 101. LIABILITY EXEMPTIONS.

Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9607) is amended by adding at the end the following:

'(r) DE MICROMIS EXEMPTION-

'(1) IN GENERAL- Notwithstanding paragraphs (1) through (4) of subsection (c), and except as provided in paragraph (2), a person shall not be liable under this Act to the United States or any other person (including liability for contribution) for any response costs incurred with respect to a facility if--

'(A) liability is based solely on paragraph (3) or (4) of subsection (a); and

'(B) such person demonstrates that the total of materials containing a hazardous substance that the person arranged for disposal or treatment of, arranged with a transporter for transport for disposal or treatment of, or accepted for transport for disposal or treatment, at the facility, was less than 110 gallons of liquid materials or less than 200 pounds of solid material.

'(2) EXCEPTION- Paragraph (1) shall not apply where the Administrator determines that--

'(A) the material containing a hazardous substance referred to in paragraph (1) contributed or could contribute significantly, individually or in the aggregate, to the cost of the response action with respect to the facility; or

'(B) the person has failed to comply with any request for information or administrative subpoena issued by the President under this Act or has impeded or is impeding the performance of a response action with respect to the facility.

(s) SMALL BUSINESS DE MICROMIS EXEMPTION-

'(1) IN GENERAL- Notwithstanding paragraphs (1) through (4) of subsection (a) and subsection (r), and except as provided in paragraph (2), a person (including any parent, subsidiary, or other affiliate of the person) that, during the three taxable years preceding the date of transmittal of written notification that the person is potentially liable, (A) employed on average not more than 100 full time individuals (notwithstanding significant fluctuations resulting from seasonal employment), or the equivalent thereof, and (B) had, on average, annual revenues of $3 million or less, as reported to the Internal Revenue Service, shall be liable under paragraph (3) or (4) of subsection (a) of this Act to the United States or any other person (including liability for contribution) for any response costs incurred with respect to a facility only if the total of materials containing a hazardous substance that the person arranged for disposal or treatment of, arranged with a transporter for transport for disposal or treatment of, or accepted for transport for disposal or treatment, at the facility, was greater than 110 gallons of liquid materials or greater than 200 pounds of solid material.

Not NED

(2) EXCEPTION- Paragraph (1) shall not apply if the Administrator determines that—

(A) the material containing a hazardous substance referred to in paragraph (1) contributed or could contribute significantly, individually or in the aggregate, to the cost of the response action with respect to the facility; or

'(B) the person has failed to comply with any request for information or administrative subpoena issued by the President under this Act or has impeded or is impeding the performance of a response action with respect to the facility.

'(t) MUNICIPAL SOLID WASTE EXEMPTION-

(1) IN GENERAL- Notwithstanding paragraphs (1) through (4) of subsection (a), and except as provided in paragraph (2), a person shall be liable under paragraph (3) or (4) of subsection (a) of this Act, for an arrangement for disposal or treatment of, an arrangement with a transporter for transport for disposal or treatment of, or an acceptance for transport for disposal or treatment at a facility of, municipal solid waste, to the United States or any other person (including liability for contribution) for response costs incurred with respect to a facility only if the person is not—

Not NED

'(A) an owner, operator, or lessee of residential property from which all of the person's municipal solid waste was generated with respect to the facility;

'(B) a business entity (including any parent, subsidiary, or other affiliate of the person), during the three taxable years preceding the date of transmittal of written notification that the person is potentially liable, employed on average not more than 100 full time individuals (notwithstanding significant fluctuations resulting from seasonal employment), or the equivalent thereof, and from which was generated all of the entity's municipal solid waste with respect to the facility; or

'(C) a small nonprofit organization that, during the taxable year preceding the date of transmittal of written notification that the organization is potentially liable, employed not more than 100 individuals, if the particular chapter, office, or department employing fewer than 100 individuals was the location from which was generated all of the municipal solid waste attributable to the organization with respect to the facility.

'(2) EXCEPTION- Notwithstanding paragraph (1), such person shall be liable if the President determines that the person has failed to substantially comply with any request for information or administrative subpoena issued by the President under this Act or has impeded or is impeding the performance of a response action with respect to the facility.'

'(3) DEFINITION OF MUNICIPAL SOLID WASTE-

'(A) IN GENERAL- The term 'municipal solid waste' means—

(i) waste material generated by a household (including a single or multifamily residence); and

'(ii) waste material generated by a commercial, institutional, or industrial source, to the extent that the waste material--

'(I) is essentially the same as waste normally generated by a household; or

'(II) is collected and disposed of with other municipal solid waste or municipal sewage sludge as part of normal municipal solid waste collection services, and, with respect to each source from which the waste material is collected, qualifies for a de micromis exemption under section 107(r).

'(B) EXAMPLES- Examples of municipal solid waste under subparagraph (A) include food and yard waste, paper, clothing, appliances, consumer product packaging, disposable diapers, office supplies, cosmetics, glass and metal food containers, elementary or secondary school science laboratory waste, and household hazardous waste.

'(C) EXCLUSIONS- The term 'municipal solid waste' does not include--

'(i) combustion ash generated by resource recovery facilities or municipal incinerators; or

'(ii) waste material from manufacturing or processing (including pollution control) operations that is not essentially the same as waste normally generated by households.

'(4) COSTS AND FEES.--A person that commences an action for contribution under section 113 of this Act against a person not liable under section 107 (r), 107(s), or 107(t), shall be liable to the defendant for all reasonable costs of defending the action, including all reasonable attorney's fees and expert witness fees.

SEC. 102. EXPEDITED SETTLEMENT FOR DE MINIMIS CONTRIBUTIONS AND LIMITED ABILITY TO PAY.

(a) PARTIES ELIGIBLE- Section 122(g) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9622(g)) is amended--

(1) in paragraph (1), by redesignating subparagraph (B) as subparagraph (D);

(2) by striking '(g)' and all that follows through the end of paragraph (1)(A) and inserting the following:

'(g) EXPEDITED FINAL SETTLEMENT-

'(1) PARTIES ELIGIBLE-

'(A) IN GENERAL- The President shall, as expeditiously as practicable, notify of eligibility for a settlement, and offer to reach a final administrative or judicial settlement with, each potentially responsible party that, in the judgment of the President, meets 1 or more of the conditions stated in subparagraphs (B), (C), (D), and (E).

'(B) DE MINIMIS CONTRIBUTION.--The condition stated in this subparagraph is that the liability of the potentially responsible party is for response costs based on paragraph (3) or (4) of subsection (a) and the potentially responsible party's contribution of hazardous substances at a facility is de minimis. For the purposes of this subparagraph, a potentially responsible party's contribution shall be considered to be de minimis only if the President determines that both of the following criteria are met:

''(i) The quantity of material containing a hazardous substance contributed by the

potentially responsible party to the facility is minimal relative to the total quantity of material containing hazardous substances at the facility. The quantity of a potentially responsible party's contribution shall be presumed to be minimal if the quantity is 1 percent or less of the total quantity of materials containing hazardous substances at the facility, unless the Administrator identifies a different threshold based on site-specific factors.

"(ii) The material containing a hazardous substance contributed by the potentially responsible party does not present toxic or other hazardous effects that are significantly greater than the toxic or other hazardous effects of other material containing hazardous substances at the facility.

"(C) REDUCTION IN SETTLEMENT AMOUNT BASED ON LIMITED ABILITY TO PAY-

"(i) IN GENERAL- The conditions stated in this subparagraph are that the potentially responsible party–

"(I) is–

"(aa) a natural person; or

"(bb) a small business; and

"(II) demonstrates to the President an inability or a limited ability to pay response costs.

"(ii) SMALL BUSINESSES-

"(I) DEFINITION OF SMALL BUSINESS- In this subparagraph, the term 'small business' means a business entity that, together with its parents, subsidiaries, and other affiliates, had an average of not more than 75 full-time equivalent employees, as reported to the Internal Revenue Service, during the 3 years preceding the date on which the business entity first received notice from the President of its potential liability under this Act.

"(II) CONSIDERATIONS- At the request of a small business, the President shall take into consideration the ability of the small business to pay response costs and still maintain its basic business operations, including consideration of the overall financial condition of the small business and demonstrable constraints on the ability of the small business to raise revenues.

"(III) INFORMATION- A small business requesting settlement under this paragraph shall promptly provide the President with all relevant information needed to determine the ability of the small business to pay response costs.

"(IV) DETERMINATION- To be eligible to be covered by this subparagraph, the business shall demonstrate to the President the inability of the small business to pay response costs.

"(V) ALTERNATIVE PAYMENT METHODS- If the President determines that a small business is unable to pay its total settlement quantity immediately, the President shall consider such alternative payment methods as may be necessary or appropriate.

"(D) ADDITIONAL CONDITIONS FOR EXPEDITED SETTLEMENTS-

"(i) WAIVER OF CLAIMS- The President shall require, as a condition of settlement under this paragraph, that a potentially responsible party waive ~~[illegible]~~ all of the claims (including a claim for contribution under section 113) that the party may have

against other potentially responsible parties for response costs incurred with respect to the facility, unless the President determines that requiring a waiver would be unjust.

'(ii) EXCEPTION- The President may decline to offer a settlement to a potentially responsible party under this paragraph if the President determines that the potentially responsible party has failed to comply with any request for access or information or an administrative subpoena issued by the President under this Act or has impeded or is impeding the performance of a response action with respect to the facility.

'(iii) RESPONSIBILITY TO PROVIDE INFORMATION AND ACCESS- A potentially responsible party that enters into a settlement under this paragraph shall not be relieved of the responsibility to provide any information or access requested by the President in accordance with subsection (e)(3)(B) or section 104(e).

'(iv) BASIS OF DETERMINATION- If the President determines that a potentially responsible party is not eligible for settlement under this paragraph, the President shall state the reasons for the determination in writing to any potentially responsible party that requests a settlement under this paragraph.

'(v) NO JUDICIAL REVIEW- A determination by the President under this paragraph shall not be subject to judicial review.'; and

(3) in subparagraph (E) of paragraph (1) (as redesignated by paragraph (1))--

(A) by redesignating clauses (i) through (iii) as subclauses (I) through (III), respectively, and adjusting the margins appropriately;

(B) by striking '(E) The potentially responsible party' and inserting the following:

'(E) OWNERS OF REAL PROPERTY-

'(i) IN GENERAL- The condition stated in this subparagraph is that the potentially responsible party'; and

(C) by striking 'This subparagraph (B)' and inserting the following:

'(ii) APPLICABILITY- Clause (i)'.

(b) SETTLEMENT OFFERS- Section 122(g) of the Comprehensive Environment Response, Liability, and Compensation Act of 1980 (42 U.S.C. 9622(g)) is amended--

(1) by redesignating paragraph (6) as paragraph (9); and

(2) by inserting after paragraph (5) the following:

'(6) SETTLEMENT OFFERS-

'(A) NOTIFICATION- As soon as practicable after receipt of sufficient information to make a determination, the Administrator shall notify any person that the Administrator determines is eligible under paragraph (1) of the person's eligibility for the expedited final settlement.

'(B) OFFERS- As soon as practicable after receipt of sufficient information, the Administrator shall submit a written settlement offer to each person that the Administrator determines, based on information available to the Administrator at the time at which the determination is made, to be eligible for a settlement under paragraph (1).

'(C) INFORMATION- At the time at which the Administrator submits an offer under paragraph (1), the Administrator shall, at the request of the recipient of the offer, make available to the recipient any information available under section 552 of title 5, United

States Code, on which the Administrator bases the settlement offer, and if the settlement offer is based in whole or in part on information not available under that section, so inform the recipient.

'(7) LITIGATION MORATORIUM-

'(A) IN GENERAL- No person that has received notification from the Administrator under paragraph (6) that the person is eligible for an expedited settlement under paragraph (1) shall be named as a defendant in any action under this Act for recovery of response costs (including an action for contribution) during the period--

'(i) beginning on the date on which the person receives from the President written notice of the person's potential liability and notice that the person is a party that may qualify for an expedited settlement; and

'(ii) ending on the earlier of--

'(I) the date that is 90 days after the date on which the President tenders a written settlement offer to the person; or

'(II) the date that is 1 year after receipt of notice from the President that the person may qualify for an expedited settlement.

'(B) SUSPENSION OF PERIOD OF LIMITATION- The period of limitation under section 113(g) applicable to a claim against a person described in subparagraph (A) for response costs, natural resource damages, or contribution shall be suspended during the period described in subparagraph (A).

Mr. SHIMKUS. On top of the first copy of the fax line, it says the Office of Administrator at EPA. The first copy is incomplete. So I have an additional complete copy that has both EPA and NFIB's name on the fax lines, and I want to know very clearly with a yes or no, if possible, was this paper produced at the EPA after discussions with the EPA?

Mr. FIELDS. This is November, 19—I see it says November 3, 1999.

Mr. SHIMKUS. November 3, 1999, EPA, AO and then—the same line—with another line from NFIB Government Relations.

Mr. FIELDS. I provided a letter for the record August 18, 2000 which said that NFIB and EPA had developed some language in November 1999. I don't know if this is the specific same language, but I assume this is close to or similar to language that we were working on at the time with NFIB staff and EPA staff. I would have to read this carefully and verify for you to know if that was exact same language, but I know we were working on language at the time.

Mr. SHIMKUS. Please do because we obviously believe that it is the same language and that really this committee has moved in great strides to try to meet many of the EPA's demands and especially in the bill we had on the floor.

The bill addresses a relationship with entities to parents, subsidiaries and affiliates as requested by the EPA. The bill addressed the potential effect of the bill on concluded actions as requested by administration staff. The bill withdraws liability protections if a small business fails to comply with administrator support orders to compel compliance with requests for information as requested by

EPA. The bill narrows the definition of households as requested by the EPA.

Finally, at the request of the Administrator's staff, the bill makes clear that settlement offers must be in the public interest.

I mean, we have moved really very far to meet your desires. I think the chairman's frustration has been experienced by myself, too, is we just want to know what you want. I mean, that is all. I think that is pretty clear.

So I want to follow up on the chairman's request that you take 5175 and tell us what you want; and if you can do that by the end of this week we may be able to run another shot at this on the floor.

As an Ombudsman for the citizens in my District—and I tell my colleagues and I said this on the floor—their time will come. Their time will come when the local restaurant owner is being the third party of a suit. As I mentioned in the opening statement, they will be in that block of 580 that are the third iteration of a suit in which their net income for the year will be at risk, either through a settlement offer by the EPA or countless litigation to get them out of this fund, and we have all agreed they don't need to be there.

So since we are going to have probably another week here in Washington, we do have time to fix this; and so I will take you at your word that you——

Mr. FIELDS. We will provide comments, yes, Chairman Oxley.

Mr. SHIMKUS. Not just comments. We are not asking for comments anymore. We are done with comments.

Mr. FIELDS. That is what the chairman——

Mr. SHIMKUS. No, he didn't. He wants legislative language. He wants language that you would approve in a bill to exempt small businesses from this trap.

You know, the Administrator's position on this and the failure to fight for small businesses, to say that it would expand litigation, is the biggest red herring I have ever heard, when the whole intent is to leave liability—the whole intent of the——

Mr. FIELDS. There are elements of the bill——

Mr. SHIMKUS. [continuing] language. We don't want overviews. We don't want synopses. We want legislative language to fix the bill, and I will take you at your word.

With that, Mr. Chairman, I will yield back my time.

Mr. OXLEY. Gentleman yields back.

The Chair now recognize the gentlelady from Wyoming, Ms. Cubin.

Mrs. CUBIN. Mr. Chairman, I don't have any questions at that time.

Mr. OXLEY. Then the Chair turns to the gentleman from Oklahoma, Mr. Largent.

Mr. LARGENT. Thank you, Mr. Chairman. I do have some questions.

Mr. Martin, when you were asked a question earlier you said that you believe that your office was an advocate for the truth. And the question I had for you when you said that was do you feel if the Ombudsman's Office is controlled or manipulated by the EPA that you can still pursue the truth?

Mr. MARTIN. No.

Mr. LARGENT. Okay. Did you have written testimony prepared for this hearing this morning?

Mr. MARTIN. No.

Mr. LARGENT. You never had a testimony prepared for this hearing.

Mr. MARTIN. That is correct.

Mr. LARGENT. Did you seek permission to provide testimony for this hearing when asked?

Mr. MARTIN. I understood it was being prepared by the Agency.

Mr. LARGENT. Which agency?

Mr. MARTIN. The EPA.

Mr. LARGENT. The invitation went to you, and the Agency began preparing the testimony for you, is that what you are saying?

Mr. MARTIN. That was my understanding, yes.

Mr. LARGENT. Did you not think that that was odd or is that normal operating procedure, that your testimony that you would provide before this hearing would be provided by the Agency or perhaps the gentleman that is sitting behind you?

Mr. MARTIN. I did not receive the invitation letter directly.

Mr. LARGENT. Did your office receive an invitation directly? Because we have a copy of it. Maybe there is a problem with the Postal Service. Maybe we can get them here.

Mr. MARTIN. We did receive the invitation, I believe, yesterday; and it had been opened.

Mr. LARGENT. It had been opened.

Mr. MARTIN. Yes before we received the invitation.

Mr. LARGENT. Who opened the invitation?

Mr. MARTIN. I don't know, sir.

Mr. LARGENT. Do other people routinely open your mail before you receive it?

Mr. FIELDS. Mailroom—EPA's mailroom opens the mail oftentimes when it comes in, letters.

Mr. LARGENT. Well, Mr. Martin, have you had a chance to read the testimony that the Agency provided for this hearing?

Mr. MARTIN. Yes, I reviewed it this morning prior to the hearing.

Mr. LARGENT. And do you agree 100 percent with its contents provided to this committee?

Mr. MARTIN. I think there is some areas where clarification is needed.

Mr. LARGENT. What would those areas be and what would you say to clarify them?

Mr. MARTIN. I believe that in the area of the Regional Ombudsmen program, for example, there have been difficulties with the implementation of that program as it has been established by the Agency. The Regional Ombudsmen do not serve full time in those capacities. Instead, it is more like 5 to 10 percent of their jobs; and their regular job is to report to the people whom they would be reviewing in their particular regions. That is a problem, and I think that it needs to be addressed by the Agency, perhaps by Congress in its discretion.

Mr. LARGENT. So, basically, it would be similar to, say, having Firestone executives heading up NHTSA, overseeing the production

of tires and quality control on tires. Essentially that is what is taking place, is that right?

Mr. MARTIN. I think there are inherent conflict of interest problems, yes.

Mr. LARGENT. And it is my understanding that when this law was created back in 1984 that the original authorizing language required that the Ombudsman—you were to report directly to the EPA Administrator. Is that how you operate today?

Mr. MARTIN. No, sir.

Mr. LARGENT. Who do you report directly to?

Mr. MARTIN. I report to Mr. Fields deputy, Mr. Shapiro, and at times Mr. Fields.

Mr. LARGENT. Why is that? Why are we not following the original intent of the law from 1984? How did that get altered?

Mr. MARTIN. I cannot speak for the Agency about the reporting issue, but needless to say it is a decision of the Agency to have the reporting structure at this time.

Mr. LARGENT. That is the hand you were dealt?

Mr. MARTIN. That is correct.

Mr. LARGENT. Do you feel like it would lend to the autonomy of the Ombudsman position if you reported, in fact, directly to the EPA Administrator.

Mr. MARTIN. Yes, I do; and there is a study by the Administrative Conference of the United States which describes that as necessary.

Mr. LARGENT. Thank you, Mr. Martin.

Mr. Chairman, I yield back my time.

Mr. OXLEY. Gentleman yields back.

The Chair is now pleased to recognize the gentlelady from Idaho who has joined our deliberations today. Welcome.

Mrs. CHENOWETH-HAGE. Thank you, Mr. Chairman.

I wanted to follow the line of the questioning initiated by Mr. Largent.

I find it extraordinary that EPA was created under an executive order and yet the Congress thought so strongly about an Office of the Ombudsman that under Public Law 98-616 the office was created by the Congress, and so it is of great concern to those of us Members who are involved in these issues to make sure that the Ombudsman remains independent.

I also find it extraordinary, Mr. Martin and Mr. Fields, that under EPA publications it is—the Office of the Ombudsman—is described as a high-level employee who serves as a point of contact for members of the public that have concerns about Superfund activities and that the ability to look independently into problems and facilitate communication that can lead to solutions, end quote, is a responsibility of the Ombudsman. I find that word "independently" to be very, very important to us.

In addition, Mr. Fields, in 1990 the Administrative Conference of the United States, of which EPA participated in, published a report that states, it is important that Ombudsmen be independent of the line offices and that they are seen as independent.

Now, in your testimony you went to great lengths, Mr. Fields, to talk about the handbook and the standards that are going to be published with regards to the conduct and the job responsibilities

of the Ombudsman. I find that extraordinary. I find that to have EPA write rules and regulations and put forth standards for an Ombudsman whose office was created by the Congress whose—it has been stated very clearly they should remain independent, that is the antithesis of independence.

Mr. FIELDS. I should clarify that the Hazardous Waste Ombudsman Handbook that was written back in the late 1980's, 1987, was actually drafted by the first Ombudsman who was Mr. Martin's predecessor. Mr. Bob Knox was instrumental in drafting that first Ombudsman's handbook.

So it was not something that EPA management dictated in terms of how the Ombudsman functioned or operated. It was actually done by staff. And particularly the National Ombudsman at the time was integrally involved in developing a Hazardous Waste Ombudsman Handbook. It was felt that there needed to be some procedures and guidelines on how the function should operate and how the Ombudsmen should go about doing their business. In the event that a subsequent Ombudsman came along that new Ombudsman would not have to start from scratch as there would be a handbook.

As you know, Mr. Martin is now the second National Ombudsman we have had and that handbook was at least I think helpful when Mr. Martin began his job 8 years ago.

Mrs. CHENOWETH-HAGE. And I think that handbook clearly lays out the need for independence and the concern that the Congress had when they implemented and passed and voted on Public Law 98-616.

My concern is with the standards that you have testified to that Lois Schiffer, Assistant Attorney General here in Washington, DC, had indicated that the Ombudsman's investigative matters should not be at issue in any issue pending the—that has pending litigation or administrative proceedings. Well, almost everything the EPA does is administrative proceedings. So knowing that Lois Schiffer has a big bark and that she has sent communications with regards to that particular issue, I am concerned that this is the kind of standard that we are going to see published and noticed in the CFR.

Mr. FIELDS. Well, Ms. Schiffer has sent communications, I know, to you, Congresswoman, about that point and also to me.

As you know, we—EPA decided that we still could proceed with an Ombudsman investigation in the Coeur d'Alene basin that you and other members of the Idaho delegation requested. We believe you can do an effective Ombudsman investigation and not impede matters involving ongoing litigation. The government must speak with one voice during litigation. As you know, as we have tried to do that.

And I think we have tried to work with Mr. Martin's office to make sure that he can continue to conduct an investigation of the issues of concern to the public in Coeur d'Alene and not adversely impede ongoing litigation. That is an issue we are trying to continue to work with.

But in spite of the recommendation initially by the Department of Justice that we not proceed with the Ombudsman hearing, we agreed and I supported, as you know, the need for the Ombudsman's investigation and hearing to proceed.

Mrs. CHENOWETH-HAGE. Thank you, Mr. Fields.

I see that my time is almost up, but I do note that under the administrative regulatory news it states that the Ombudsman should facilitate communication between citizens and where there is systemic failure or systematic failure to propose more general reforms—I just have to say that from my own personal experience, information that we were not able to acquire, such as plans to seize mines without notice to the owner, lack of chain of custody with regards to how samples were drawn, that is the first thing that impressed me about this Ombudsman, was his first question to me was, has there been a chain of custody that you have been able to turn up? If not, I will investigate that. That is the kind of investigation the people are crying out for and I think the Congress needed when it passed public law.

Thank you.

Mr. OXLEY. Time of the gentleman has expired.

The gentlelady from Wyoming.

Mrs. CUBIN. Thank you, Mr. Chairman.

I am referring to the letter that Carol Browner sent regarding the legislation that Mr. Shimkus was discussing with you on H.R. 5175. I would like to just quote one sentence from it: For many years I have encouraged congressional committees in both the House and the Senate to pass reasonable, targeted legislation that addresses the Superfund liability of small parties. Can you be specific with me what the EPA has done, what those exact recommendations have been, other than the substance of the bill H.R. 5175? In other words, what didn't the Congress do that Administrator Browner wanted done?

Mr. FIELDS. Well, the Administrator was referring to in her September 22 letter that over the last 7 years now we have obviously implemented a set of reforms to provide liability relief for small parties——

Mrs. CUBIN. Name them. Name some for me, please, specifically, sir.

Mr. FIELDS. The administrative reforms we have implemented have provided de minimus settlements to more than 21,000 parties that are impacted by Superfund liability. We have implemented a program of de micromis settlements where we settled for zero dollars or one dollar for very small, tiny parties at Superfund sites.

Mrs. CUBIN. And how many small business, third-party defendants have actually been helped by some of the things that you have done? I personally believe you would have a very, very difficult time in identifying people for me that have been helped by those things.

Mr. FIELDS. Many of those 21,000 parties are, in fact, small businesses. We will be happy to get back to you for the record with an estimate of how many of those among that universe are small businesses.

Mrs. CUBIN. I would appreciate that very much.

Mr. Fields, you state that many people don't know how to get information on solid and hazardous waste programs, or that they are frustrated by program complexities. Why have EPA personnel failed to provide easy access to this information? How many employees work in providing information to the public on solid and

hazardous waste site s? And how many employees work in the National Ombudsman office?

Mr. FIELDS. I don't know precisely how many people are working in EPA's enforcement program trying to identify amounts of waste, I think that is what you are referring to, that have been shipped to Superfund sites. There are hundreds of them, I know, across the country. The old records are difficult to find. It is a hard task, doing the searches necessary to document those waste amounts. But I would provide for the record to the subcommittees precisely how many of our enforcement personnel are involved in doing those tasks.

[The following was received for the record:]

The Environmental Protection Agency (EPA) recognizes the need for people living near Superfund sites to be well-informed and involved in decisions concerning sites in their communities. Through years of implementation of the program, EPA has determined that early and meaningful community involvement in the cleanup decisions is important in order to have a successful Superfund site cleanup. On-Scene Coordinators, Remedial Project Managers and Community Involvement Coordinators work with community members to ensure they understand what Superfund activities being conducted at a site and how the community can participate in the process. Each year, EPA staff members conduct hundreds of public meetings and door-to-door visits, and distribute thousands of fact sheets to communities. Many times EPA establishes a satellite office near a Superfund site to ensure community members have easy access to Regional staff.

EPA also provides communities with technical assistance so that they are better able to meaningfully participate in cleanup decisions. The cornerstone of EPA's efforts is the Technical Assistance Grant (TAG) program. Under the TAG program, community organizations can apply for an initial grant of up to $50,000 to hire their own independent technical advisors. In FY2000, seven new TAGs were awarded, and approximately $1.25 million was given out for these new awards and for amendments to existing TAGs.

A corollary to the TAG program is the Technical Outreach Services for Communities (TOSC) program. Through TOSC, EPA funds the Hazardous Substance Research Centers to provide independent technical assistance for communities. In FY 2000, the TOSC program was funded at $1.300 million. TOSC was active at 118 sites in FY 2000.

EPA's Community Advisory Group (CAG) program seeks to bring together early in the process a broad group of stakeholders who are interested in the work going on at the site in their community. Started in June 1993, the CAG program is designed to enhance community involvement in the Superfund process. A CAG is designed to serve as the focal point for the exchange of information among the local community and EPA, the State regulatory agency, and other pertinent Federal agencies involved in cleanup of the Superfund site.

Additional components of EPA's Superfund community involvement program include translations of public documents, and access to neutral facilitators. Some of the Superfund sites have non-English speaking populations surrounding them. In these cases, EPA translates public information documents into the languages of the people living near the site and provides interpreters at public meetings. EPA also provides community members with access to neutral conveners, facilitators, and mediators.

In addition to the National Ombudsman, two full-time EPA employees, Senior Environmental Employee grantees and a number of student interns are assigned to assist the National Ombudsman. Also, the National Ombudsman has access to sources outside of EPA if additional assistance is needed to help him conduct an investigation. The Ombudsman function, depending on the sites and issues under its review during any one time, draws upon the existing technical resources of the Office of Solid Waste and Emergency Response, and particularly that of the Environmental Response Team, to supplement its investigative efforts. Each Regional Office has designated a Regional Superfund Ombudsmen as well.

Mr. FIELDS. In terms of the people involved in the National Ombudsman's program across the country, I will defer to Mr. Martin for more details on his immediate staff.

Mrs. CUBIN. If you could just submit that for me.

[The following was received for the record:]

The Office of Ombudsman was abolished by Acting Assistant Administrator Tim Fields on October 31, 1997, one week after my receipt of a subpoena to appear in my official capacity before a Federal criminal grand Jury on the Times Beach Ombudsman case. There has been no Office of Ombudsman, therefore, since October 31, 1997 (See, Attachment 2). During my entire tenure as Ombudsman, I have been and continue to be the only permanent EPA employee assigned to the National Ombudsman function.

ATTACHMENT 2

EPA Performance Agreement, Appraisal and Certification for Supervisors, Managers and Executives

Section A — Performance Agreement and Mid-year Review Commitments

Section B — Overall Performance Appraisal and Certification

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

January 9, 1998

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

NOTE TO TIMOTHY FIELDS JR.

I just received my copy of my "Performance Agreement, Appraisal and Certification for Supervisor, Managers and Executives" for the period of 10/01/96 through 09/30/97 and noticed that you had changed my job on Line 2 of the Form from "Director of the Ombudsman Office for OSWER" to "Ombudsman for OSWER" (see Attachment I).

We did not discuss any changes in my job in the October 31, 1997, evaluation meeting. On the face of the above referenced document, you made and initialed this change on October 31, 1997.

On October 23, 1997, I provided you a copy of my subpoena to appear before an empaneled Grand Jury of the United States District court for the Eastern District of Missouri (see Attachment II). I gave testimony on November 5, 1997, in which, among other matters relating to the Times Beach Superfund site, I described my job to the Grand Jury. My job has been and continues to be the Director of the Office of Ombudsman, Office of Solid Waste and Emergency Response, United States Environmental Protection Agency (see Attachment III).

I would be grateful if you would have the change which you initialed on October 31, 1997 appropriately corrected, and provide me a copy of the corrected version.

Thank you.

Robert J. Martin

Attachments

cc: Mr. Shaprio

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Mr. FIELDS. I know there are 10 people in the regions who are spending some of their time on this function as well.

Mrs. CUBIN. I think the question that I cared the most about is why the EPA has failed to provide easy access to this information, as you stated yourself.

Mr. FIELDS. Well, it is not easy information to get access to. Oftentimes, the records are not adequate to document how much waste has been shipped.

Mrs. CUBIN. When you say it is true that folks are being requested to give the information, they don't know what they are supposed to give.

Mr. FIELDS. Well, maybe we could provide—as you were indicating, maybe we could provide better guidance or clarity providing the precise types of information people ought to be submitting. That is probably something we can work on.

Mrs. CUBIN. The subcommittee asked you to provide funding figures for the Ombudsman office for the current year and for the previous 5 years. I wonder why you didn't provide this specific information but instead you chose to only provide fiscal year 1993 and 2000 information. Why is that?

Mr. FIELDS. I just did that just to summarize for the record. I have actually provided for this committee—I have with me today precise documentation that goes back for 10 years indicating the dollar figures for the Ombudsman's Office. It was roughly $230,000 in 1998, $360,000 in 1999, $519,000 in 2000. I have numbers going back to 1990. I think it was like $117,000 in 1990. So I will provide for the record this piece of paper that documents from 1991 through 2000 the precise amounts that have been allocated for the Ombudsman function.

[The following was received for the record:]

Below is the annual budget for the National Ombudsman for the past ten years:

FY91	$116,000.00
FY92	$113,000.00
FY93	$117,000.00
FY94	$136,000.00
FY95	$142,000.00
FY96	$158,000.00
FY97	$157,000.00
FY98	$262,000.00
FY99	$345,000.00
FY00	$519,000.00

Also, the National Ombudsman function, depending on the sites and issues under its review during any one time, draws upon the existing technical resources of the Office of Solid Waste and Emergency Response (OSWER), and particularly that of the Environmental Response Team, to supplement its investigative efforts.

There are Regional Superfund Ombudsmen in each Regional Office, as well. These functions are funded at a total of roughly $1 million a year.

Mrs. CUBIN. Okay. Two things—I am not sure that just those single figures will be adequate. Will you be willing to provide further accounting to the committee if so requested?

Mr. FIELDS. Sure.

Mrs. CUBIN. Then, last, do you believe that the office is being funded adequately at the levels that you——

Mr. FIELDS. The Ombudsman function has been funded now at roughly $500,000 to $600,000 this year. I think, you know, and I

will—we have got to make sure we provide the resources that Mr. Martin needs to do his functions.

Mrs. CUBIN. Do you think it is adequate?

Mr. FIELDS. I think the budget of what we provided this year, of 500,000 to $600,000, is an adequate amount.

Mrs. CUBIN. Mr. Martin, do you think it is adequate?

Mr. MARTIN. I want to clarify a question you had posed earlier about the number of people who work in my office. It is me—and Mr. Kaufman has been assigned at least half time to the office. I also have three interns whose term will be expiring near the end of this year who have been with me since the beginning of the summer. So this is the staffing. Given where the case load is going, it is extremely large, I think more resources will be needed.

Mrs. CUBIN. Doesn't seem like much of a commitment to me on the part of the EPA to actually try to work with constituents with one person across the United States officially working on their behalf to try to settle discrepancies between the Agency and citizens.

But thank you very much. My time has expired.

Mr. BILIRAKIS. Would the gentlelady yield?

Mrs. CUBIN. Certainly.

Mr. BILIRAKIS. I would agree with you. It certainly doesn't seem to be consistent with the mission statement EPA has regarding cleanup of these Superfund sites.

Mr. Fields, just very quickly, discussion took place regarding the Miranda warning and the instructions that were furnished to the Ombudsman's Office on the part of the Inspector General. We have a September 12 letter from Mark Bialek, Counsel to Inspector General. Is that the letter to which you referred?

Mr. FIELDS. That was the letter I was referring to.

Mr. BILIRAKIS. Is there another letter?

Mr. FIELDS. I said there was a response from Mr. Kaufman. I think we agreed we would provide that for the record as well.

Mr. BILIRAKIS. That was a response from Mr. Kaufman to Mr. Bialek.

Mr. FIELDS. Yes.

Mr. BILIRAKIS. Any further communications from Mr. Bialek in response to Mr. Kaufman?

Mr. FIELDS. I am not aware of any further communications. I saw this letter, and then there was another letter from Mr. Kaufman on this matter. I am not aware of any other communications on this.

Mr. BILIRAKIS. Well, the letter from Mr. Kaufman you are providing for the record.

Mr. FIELDS. I don't have a copy of that with me today, but we did agreed to provide it.

Mr. BILIRAKIS. Without objection, will the——

Mr. OXLEY. Without objection.

Mr. BILIRAKIS. Without objection, that will be the case.

All right, thank you very much.

Mr. OXLEY. Gentlelady from Idaho.

Mrs. CHENOWETH-HAGE. Mr. Chairman, I just did some quick math. Considering the fact that this Ombudsman has 14 major cases going on around the Nation, he is spending, on an average,

about $36,000 per case; and that includes travel, everything. It is—I think $500,000 is not much of a commitment to justice and truth.

Thank you very much.

Mr. FIELDS. Mr. Chairman, may I just add to that comment?

I want to point out there are 10 other Regional Ombudsmen that we are funding for about a million dollars across the country in addition to the $500,000 that I talked about for 2000. We have also supplemented Mr. Martin's support with support for the environmental response team at Edison, New Jersey, other EPA staff that also provide support. So it is not just that amount. There are other people across the country and in headquarters who are providing support over and above that $519,000 amount.

Ms. DEGETTE. Mr. Chairman, if I could add my two cents.

Mr. OXLEY. Very briefly, gentlelady from Colorado.

Ms. DEGETTE. I agree with my colleague to the north, Mrs. Cubin.

I would chime in, also, that with the increased caseload of the Ombudsman and with the burdens that we are putting on him at not just a regional level but also a national level and with the new rules and requirements that you are in the process of promulgating it would seem to me that the Agency would want the make a commitment at the national level to have assistance for the Ombudsman and professional, paid, full-time staff that could assist in these investigations.

I would echo, my view, too, if we are going in the direction of involvement in more cases for the Ombudsman, to be effective and responsible I think he is going to need to have adequate resources.

Mr. OXLEY. Gentlelady's time has expired.

Let the Chair, in closing, do two or three housekeeping—the Chair would like to enter into the record a copy of the transmission report. This was the transmission of the invitation to appear at the hearing today to Mr. Martin, care of Randy Deitz. Mr. Martin, is that Randy Deits?

Mr. FIELDS. Randy Deitz is the gentleman behind me here.

Mr. OXLEY. He work for you, Mr. Fields?

Mr. FIELDS. Mr. Deitz works in the Office of Congressional and Government Relations at EPA.

Mr. OXLEY. Okay. This is a copy of the hearing invitation letter. Just for the record, the document was confirmed and sent on 9/27 at 4:35 p.m. That was Wednesday afternoon, just for the record.

[The material follows:]

THE COMMITTEE ON COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES

FAX TRANSMISSION

September 27, 2000

To:	Mr. Robert Martin c/o Randy Dietz
From:	The Honorable Michael Bilirakis The Honorable Michael Oxley
Re:	Hearing Invitation Letter
Number of Pages: (Including This Sheet)	5
Notes:	501-1540

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1	2025011540	9-27- 0 4:35PM	1'56"	5/ 5	EC	COMPLETED 9600
		TOTAL	0:01'56"	5		

NOTE:
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PD : POLLED BY REMOTE SF : STORE & FORWARD RI : RELAY INITIATE RS : RELAY STATION
MB : SEND TO MAILBOX PG : POLLING A REMOTE MP : MULTI-POLLING RM : RECEIVE TO MEMORY

THE COMMITTEE ON COMMERCE
UNITED STATES HOUSE OF REPRESENTATIVES

FAX TRANSMISSION

September 27, 2000

To:	Mr. Tim Fields c/o Randy Dietz
From:	The Honorable Michael Bilirakis The Honorable Michael Oxley
Re:	Hearing Invitation Letter
Number of Pages: (Including This Sheet)	5
Notes:	501-1540

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		TOTAL	0:02'04"	5		

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MB : SEND TO MAILBOX PG : POLLING A REMOTE MP : MULTI-POLLING RM : RECEIVE TO MEMORY

Mr. OXLEY. Mr. Fields, as you know, my colleague Helen Chenoweth-Hage has been closely following EPA Superfund- related activities in northern Idaho. One of her concerns is the EPA's plans for the new Bunker Hill Mine in Kellogg, Idaho. Congresswoman Chenoweth-Hage is not satisfied that she has received all of the EPA documents relevant to this site. I am going to submit several requests for information to you on her behalf. Can I have your assurance that you will respond to the request in a timely manner sought by my colleague from Idaho?

Mr. FIELDS. I will do so, sir.

Mr. OXLEY. Thank you.

Finally, Mr. Fields, in the discussion about the funding for ombudsmen and the like, you had indicated you had all the funding records with you.

Mr. FIELDS. Yes, and our Congressional Affairs Office will make sure your staff are given those documents.

Mr. OXLEY. Can we have those submitted for the record?

Mr. FIELDS. Sure.

Mr. OXLEY. Thank you.

[The following was received for the record:]

Below is the annual budget for the National Ombudsman for the past ten years:

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Also, the National Ombudsman function, depending on the sites and issues under its review during any one time, draws upon the existing technical resources of the Office of Solid Waste and Emergency Response (OSWER), and particularly that of the Environmental Response Team, to supplement its investigative efforts.

There are Regional Superfund Ombudsmen in each Regional Office, as well. These functions are funded at a total of roughly $1 million a year.

Mr. OXLEY. The gentleman from Illinois.

Mr. SHIMKUS. Thank you.

I know we are trying to move forward, but I do want to ask Mr. Martin—and I appreciate—I really do appreciate you being here and the challenges, based upon current law, reading some of the descriptions, I am not sure how—I think it is a very tough job that you have. I would like, if you would then, to follow up with legislation to answer a question on whether the Ombudsman should be reauthorized. And if the answer is yes, what would be your suggestions of how it would change?

Now being an Ombudsman and being part of the EPA, I don't know how you effectively do that without allowing the EPA's hand to get involved in the recommendation. I have I think a good sense that you want to, you know, continue a role for the Ombudsman, and I think you probably had some ideas of how we can improve it.

And, Mr. Fields, I would respectfully ask that you allow him to submit those recommendations to us unedited so that we can look at the reauthorization and look at ways that we can improve it.

Mr. FIELDS. I have no problem with that at all.

[The following was received for the record:]

The Hazardous Waste and Superfund Ombudsman Office should be reconstituted and reauthorized consistent with H.R. 3656 for a period of ten (10) years. Moreover, the legislation to reauthorize the Office of Ombudsman should include, at a minimum:

* Re-establishment of the Office of Ombudsman;
* Allocation of resources under the control of the Office and as defined by the Office, to implement the function;

Authorization to perform duties consistent with the IRS Ombudsman function, already established by Congress.

Mr. SHIMKUS. Based upon the terminology or the language, the Ombudsman shall not affect any procedures or grievances, appeals or administrative matters which comes out of the current law, and I didn't get a chance to ask about your involvement with small businesses and individual aspects. It seems like the overall issue and the overall fight—but I think there seems to be—we need to develop some more independence and we need I think to broaden the scope a little bit.

Because a lot of us, we are Members, we are ombudsmen; and that is why we get so fired up about this. So I think there is a lot of sympathy for the battles that you have to fight, and I just appreciate you being here. It is usually not an enjoyable experience sometimes, but it is healthy as we move forward on legislation.

So if you would provide that—Mr. Fields, if you would allow that to occur, I would appreciate that.

With that, Mr. Chairman, I yield back my time.

Mr. OXLEY. The gentleman may respond very briefly.

Mr. FIELDS. We will definitely adhere to the Congressman's request in terms of Mr. Martin's providing his suggestions to the subcommittees on the views on how the Ombudsman operation should operate.

Mr. OXLEY. Gentlemen, thank you for your testimony. Appreciate it.

We will now turn over the Chair to the co-chairman, Mr. Bilirakis.

Mr. SAWYER. Mr. Chairman, just before, let me say thank you for the opportunity to participate in this way and thank you to both of our witnesses for their responses.

Mr. OXLEY. Next session you may want to join the subcommittee.

Mr. BILIRAKIS [presiding]. I would ask, as I move over to the main chair, that a representative of the administration stay in the room to hear the testimony, particularly in this case, of the citizens' panel. So, Mr. Fields, it would be great if you can stay, but if you can't, we understand. But hopefully, you will have someone here to take notes and all that. Because we are all working for the same people, that is the taxpayers; and we should all be greatly concerned.

Mr. FIELDS. I agree. I, unfortunately, cannot. I have to go to a meeting with our Administrator. But I will assure you we will have staff here to be available.

Thank you, Mr. Chairman.

Mr. BILIRAKIS. Next panel, Mr. Bret Bowers, Executive Director of Community Leaders for EPA Accountability Now! from Coeur d'Alene, Idaho; Ms. Mary Mosley, former city commissioner and

civic activist from Tarpon Springs, Florida; and Ms. Kimberly Boggiatto from Denver, Colorado.

I would hope as we go into your testimony that you will complement or supplement your written statement in your 5 minutes. Your entire written testimony, by the way, is part of the record.

We do have legislation to reauthorize the Office of the Ombudsman which would provide specifics in terms of its functions and an increase in funding, and I would hope that we can get the support of all the members of the subcommittee.

Having said all that, in view of the way you have lined up there, we will start off with Ms. Boggiatto. Please proceed, ma'am.

STATEMENTS OF KIMBERLY BOGGIATTO; MARY MOSLEY; AND BRET BOWERS, EXECUTIVE DIRECTOR, COMMUNITY LEADERS FOR EPA ACCOUNTABILITY NOW!

Ms. BOGGIATTO. Good afternoon, Mr. Chairman and members of the subcommittees. I am extremely honored by your invitation to testify before you today with respect to the role of the EPA National Ombudsman in addressing concerns of local communities.

I would also like to thank Congresswoman DeGette and her staff for her hospitality over the past couple of days.

I today am representing Clean-It!, which is our local citizens' group that was formed for the sole purpose of advocating for the removal of the radioactive and toxic waste at the Shattuck Superfund site in south Denver. And Congresswoman DeGette's office was nice enough to provide us with the beautiful picture over there of our very own radioactive waste dump.

Clean-It! stands for Citizens Loving Our Environment and Neighborhood—Invincible Together, and not only does it make a great acronym but I think it is pretty accurate as far as what we have been able to accomplish.

The Shattuck site is contaminated by radioactive and toxic wastes from a decade of radium processing. The contamination found at the Shattuck site is not unique in Denver. There were approximately 10 other Superfund sites with similar contamination. What makes Shattuck unique is that it is the only one of these sites where the EPA decided that the appropriate remedy was onsite disposal. EPA decided for all of the other sites that removal of the radioactive soils should be to a licensed, low-level radioactive waste disposal facility and that that was the only remedy that was—both satisfied existing laws and regulation and was protective of human health and the environment. In fact, EPA originally determined that the wastes at the Shattuck site should also be removed and then went to public comment with that preferred alternative back in the early 1990's.

However, after closing the public comment period, EPA decided, apparently, to reverse its decision and subsequently issued a decision that ordered the radioactive materials left on the site.

The Ombudsman's investigation was critical in discovering sort of behind-closed-doors meetings that EPA Region 8 held with the owner of the site, and these meetings appeared to have factored into EPA's reversal of their original recommendation.

In early 1999, the National Ombudsman Bob Martin and Investigator Hugh Kaufman came to Denver to listen to the citizens' con-

cerns regarding Shattuck. Mr. Martin and Mr. Kaufman were the first EPA officials who actually listened. They treated the citizens with respect and with dignity, and that was in sharp contrast to how the citizens had been treated by Region 8 officials over the previous decade.

Also, in the spring of 1999, EPA Assistant Administrator Timothy Fields began to look into EPA Region 8's management of the Shattuck site. Assistant Administrator Fields initiated a mediated stakeholder process that lasted roughly 6 months and included a thorough technical review of the existing remedy. I believe that the Ombudsman's investigation swayed EPA headquarters to focus attention and resources on Shattuck.

The Ombudsman's investigation was essential in exposing improperly withheld documents, which I hear is a theme at many of these other sites, as well as concerns about the kinds of waste that might be disposed of at the Shattuck site. And we have heard some talk from Congresswoman DeGette today about the potential defense waste and other such things.

In short, the Ombudsman's investigation of EPA Region 8's mismanagement of Shattuck was instrumental in the recent decision that Shattuck wastes must be removed from the site. The citizens knew that if an honest review were conducted the wastes would have to be removed. Bob Martin and his staff were the only EPA officials truly willing to look at the abuse of power by and gross incompetence of EPA Region 8 officials and staff. I believe that this abuse of power and incompetence not only extends up to Regional Administrator Bill Yellowtail but also emanates from him.

My experience working with the Ombudsman's Office has bought to my attention some changes that would improve the operation of the office. The improvements essentially fall within two categories: resources and independence.

It is clear from my experience that additional staff would be very useful for the Ombudsman's Office. This would allow for more thorough reviews and investigations as well as the ability to accept more cases. The office also needs a larger budget not only to fund the additional staff but also to hire experts and pay for independent laboratory analyses where appropriate.

Perhaps even more important is the issue of independence. It is imperative that the Ombudsman has the final decision as to which cases are investigated and how the office's budget is allocated. It is my impression that EPA too often attempts to exert influence over the cases that are accepted for review and the extent to which a case is investigated by constraining the activities that will be funded. Imagine if EPA could determine these subcommittees budgets so as to dictate which oversight hearings could be held or which bills could be considered. Such a situation would clearly hinder your ability to oversee the EPA and result in an enormous disservice to the citizens of this Nation.

Just this kind of disservice results when the Ombudsman's budget is manipulated so as to impede his investigations. The Ombudsman and his staff are uniquely prepared to review and investigate EPA's actions because of their extensive knowledge and applicable statutes and regulations as well as their broad technical and scientific knowledge. Because the Ombudsman's Office accepts cases

at the request of elected officials, it functions to support and enhance your ability to scrutinize the actions and decisions of the EPA.

Mr. BILIRAKIS. Please summarize, if you could, Ms. Boggiatto.

Ms. BOGGIATTO. Certainly. I would just like to add, there are guidelines out there that have been discussed of those of the EPA as well as some guidelines that appear to be relevant that were published in 1990 in the Federal Register on the role of the Ombudsman within Federal agencies that uphold the independence and integrity of this office. I do not believe that EPA administration is the appropriate place for the guidelines to be developed and that that would serve generally to diminish independence and compromise the integrity of the Ombudsman's Office.

Essentially, the argument for a strong EPA Ombudsman comes down to simple human nature: The best incentive for being honest is knowing you would be caught if you weren't. That is how I see the role of the Ombudsman, essentially, is that the further resources you give the Ombudsman's Office the more the EPA will realize that they have to make good decisions and they have to be accountable to the people. Because if they are not, we have an active and aggressive Ombudsman's Office who will expose the injustices, and I think that will serve to really reform the Agency and stop many of the situations we all have experienced.

[The prepared statement of Kimberly Boggiatto follows:]

PREPARED STATEMENT OF KIMBERLY BOGGIATTO

Good morning Mr. Chairmen and members of the subcommittees. I am extremely honored by your invitation to testify before you today with respect to the role of the Environmental Protection Agency (EPA) National Ombudsman in addressing concerns of local communities. My name is Kimberly Boggiatto and I am representing Clean-It! Clean-It! stands for Citizens loving our environment and neighborhood—Invincible together! We are a local citizens' group that formed to advocate for the removal of the radioactive and toxic waste from the Shattuck Superfund site in south Denver.

The Shattuck site is contaminated by radioactive and toxic wastes from decades of radium processing. The contamination found at the Shattuck site is not unique in Denver; there were approximately ten other superfund sites with similar contamination. What makes Shattuck unique is that it is the only one of these sites where the EPA decided that the appropriate remedy was onsite disposal. EPA decided for all of the other sites that removal of the radioactive soils to a licensed, low-level radioactive waste disposal facility was the only remedy that both satisfied existing laws and regulations and was protective of human health and the environment. In fact, EPA originally determined that the wastes should be removed from the Shattuck site as well. However, after closing the public comment period in which strong support for removal was expressed, EPA issued a decision that ordered the radioactive soil disposed of on site. The Ombudsman's investigation was critical in discovering the "behind closed doors" meetings that EPA Region VII held with the owner of the site which appear to have factored into EPA's final decision to bury radioactive waste only a block from residences, within the densely populated City of Denver.

In early 1999, the National Ombudsman, Bob Martin, and Investigator Hugh Kaufman, came to Denver to listen to the citizens' concerns regarding Shattuck. Mr. Martin and Mr. Kaufman were the first EPA officials who actually listened to the concerns of our community. They treated the citizens with respect and dignity, in contrast to the numerous EPA Region VIII officials and staff over the previous decade. Also in the spring of 1999, EPA Assistant Administrator for the Office of Solid Waste and Emergency Response (OSWER), Timothy Fields, began to look into EPA Region VIII's management of the Shattuck site. Assistant Administrator Fields initiated a mediated stakeholder process that lasted roughly six months and included a technical review of the existing remedy. I believe that the Ombudsman's investigation swayed EPA Headquarters to focus attention and resources on Shattuck.

The Ombudsman's investigation was essential in exposing improperly withheld documents as well as concerns about the kinds of waste that might be disposed of at the Shattuck site. In short, the Ombudsman's investigation of EPA Region VIII's mismanagement of Shattuck was instrumental in the recent decision that the Shattuck wastes must be removed from the site. The citizens knew that if an honest review were conducted, the wastes would have to be removed. Bob Martin and his staff were the only EPA officials truly willing to look at the abuse of power by and gross incompetence of EPA Region VIII officials and staff. I believe that this abuse of power and incompetence not only extends up to Regional Administrator Bill Yellowtail, but also emanates from him.

My experience working with the Ombudsman's Office has brought to my attention some changes that would improve the operation of the Office. The improvements essentially fall into two categories: resources and independence.

It was clear from my experience that the Ombudsman's Office would be well served by additional investigators. Additional staff would allow for more thorough reviews and investigations as well as the ability to accept more cases. The Office also needs a larger budget not only to fund the additional staff, but also to hire experts and pay for independent laboratory analyses as appropriate.

Perhaps even more important is the issue of independence. It is imperative that the Ombudsman has the final decision as to which cases are investigated and how the Office's budget is allocated. It is my impression that EPA too often attempts to exert influence over the cases that are accepted for review and the extent to which a case is investigated by constraining the activities that will be funded. Imagine if EPA could determine the subcommittees' budgets so as to dictate which oversight hearings could be held or which bills could be considered. Such a situation would clearly hinder your ability to oversee the EPA and result in an enormous disservice to the citizens of this nation.

Just this kind of disservice results when the Ombudsman's budget is manipulated so as to impede his investigations. The Ombudsman and his staff are uniquely prepared to review and investigate EPA's actions because of their extensive knowledge of the applicable statutes and regulations as well as their broad technical and scientific knowledge. Because the Ombudsman's Office accepts cases at the request of elected officials, it functions to support and enhance your ability to scrutinize the actions and decisions of the EPA.

Fortunately, there are guidelines that describe the proper role and operation of the Ombudsman. The American Bar Association has established guidelines that appear to be well suited to the EPA National Ombudsman. These guidelines would provide for the independence and integrity necessary for a constructive Ombudsman's Office. Also, in 1990 recommendations regarding the role of Ombudsmen within federal agencies were published in the Federal Register. These guidelines also appear to uphold the independence and integrity of the Ombudsman. Given that independent and appropriate guidelines already exist, EPA should not attempt to create its own set of guidelines for the operation of the Ombudsman's Office. Internal guidelines would inevitably diminish independence and compromise the integrity of the Ombudsman when just the opposite result is needed.

The argument for a strong EPA Ombudsman comes down to simple human nature: The best incentive for being honest, is knowing you would be caught if you weren't. This tenet conveys the vital role that the Ombudsman's Office plays within EPA. In order to continue in that role, the Ombudsman's Office needs support from Congress both in terms of a secure source of funding and a clear statutory mandate of independence.

Thank you again for the opportunity to testify before you today. I am happy to answer any questions that you may have.

Mr. BILIRAKIS. Thank you very much. Very well put.

Ms. Mosley, you are on. Please pull the microphone forward. We want to be able to hear.

STATEMENT OF MARY MOSLEY

Ms. MOSLEY. I want to thank the distinguished members of the two subcommittees for the opportunity to speak regarding the role of the Ombudsman's Office.

I have been involved in the Stauffer Superfund site in Tarpon Springs, Florida, for nearly 25 years. During that time, I learned that Environmental Protection Agency Region 4 is an agency out

of control and conducts their duties as though their allegiance is to the polluter rather than to the Superfund communities they are mandated to protect. The needs of our community have not been met; and, fortunately for us, Congressman Mike Bilirakis and Robert Martin have been holding hearings since last December asking questions that the EPA has not wanted to answer.

The EPA has withheld information from our community and is very polished at misrepresenting the truth, a fact which I am delighted to see has not escaped this panel. At one hearing, in response to Congressman Bilirakis's polite request to remain more than 10 minutes to answer the community's questions, EPA adamantly refused and flounced out of the meeting. The community was outraged that the EPA would treat an elected official acting on our behalf in such a manner.

The EPA chose a monolith as a remedy for our Superfund site which would cover 25 to 35 acres without having first conducted sufficient testing to determine if the site could ever support a mound of such magnitude. The site, which contains wastes such as asbestos, arsenic, radium 226 and more, already has sinkholes, is surrounded by sinkholes and is, coincidentally, located directly above two aquifers, one of which serves as the main drinking water source for a large portion of the State. Should the proposed monolith fail, it would be disastrous to important water supplies.

I might add there have been experts that have attended meetings that said that the monolith will not be successful, that the sinkholes have already opened communication between the two aquifers.

Robert Martin and his chief investigator Hugh Kaufman exposed the flaws of the monolith at Shattuck in Denver. After the investigation by the Ombudsman's Office, the EPA reversed itself and admitted that the only way to ensure the public health and welfare was for Shattuck's wastes to be hauled to a repository.

The elected officials of Tarpon Springs also feel that the removal of waste is the only safe solution for our community, but the wastes at our Superfund site are so toxic that they would have to be treated before a nuclear dump would accept it.

In conclusion, the EPA has worked for 6 years with insufficient investigations. They now admit to having data gaps. The EPA has neglected, to date, to adequately define the magnitude and extent of groundwater contamination originating from the site. Despite having a poor record of scientific approach, the EPA continues to decrease the number of contaminants of concern. There are other problems too numerous to mention in the brief time allotted today.

To counter the failure of the EPA to responsibly administer the Superfund Act, the Ombudsman's Office must be well funded and independent of any attempts that might be made to silence the voice of truth. The Ombudsman's Office is one of the best examples of good and honest government. Please give them the support needed to continue doing their job well.

Thank you.

[The prepared statement of Mary Mosley follows:]

PREPARED STATEMENT OF MARY MOSLEY

I would like to thank the distinguished members of the Subcommittee on Health & Environment and the Subcommittee on Finance & Hazardous Materials for the opportunity to speak regarding the role of the Ombudsman's Office.

I have been involved with the Stauffer Superfund Site in Tarpon Springs, Florida for nearly twenty five years. During that time, I learned that the Environmental Protection Agency (EPA) Region 04 is an agency out of control and conducts their duties as though their allegiance is to the polluter rather than to the Superfund communities they are mandated to protect. The needs of our community have not been met and fortunately for us, Congressman Mike Bilirakis and Robert Martin, EPA Ombudsman have been holding hearings since last December asking questions that the EPA has not wanted to answer.

The EPA has withheld information from our community and is very polished at misrepresenting the truth. At one hearing, in response to Congressman Bilirakis' polite request to remain more than ten minutes to answer the community's questions, EPA adamantly refused and flaunted out of the meeting. The community was outraged that the EPA would treat an elected official acting on our behalf in such a manner.

The EPA chose a monolith as a remedy for our Superfund Site which would cover twenty five to thirty five acres without having first conducted sufficient testing to determine if the Superfund Site could even support a mound of such magnitude. The Site which contains wastes such as asbestos, arsenic, radium 226 and more, already has sinkholes, is surrounded by sinkholes, and is coincidentally located directly above two aquifers—one of which serves as a main drinking water source for a large portion of the state. Should the proposed monolith fail, it would be disastrous to important water supplies.

Robert Martin and his chief investigator Hugh Kaufman exposed the flaws of the monolith at Shattuck in Denver, Colorado. After the investigation by the Ombudsman's Office, the EPA reversed itself and admitted that the only way to ensure the public health and welfare was for Shattuck's wastes to be hauled to a repository.

The elected officials of Tarpon Springs also feel that the removal of wastes is the only safe solution for our community, but the wastes at our Superfund Site is so toxic that it would have to be treated before a nuclear dump would accept it.

In conclusion, the EPA has worked for six years with insufficient investigations which they now admit to having "data gaps." The EPA has neglected, to date, to adequately define the magnitude and extent of groundwater contamination originating from the Site. Having a poor record of scientific approach, the EPA continues to decrease the number of Contaminants of Concern for the Site. There are other problems too numerous to mention in the brief time allotted today.

To counter the failure of the EPA to responsibly administer the Superfund Act, the Ombudsman's Office must be well funded and independent of any attempts that might be made to silence the voice of truth. The Ombudsman's Office is one of the best examples of good and honest government. Please give them the support needed to continue doing their job well.

Thank you.

Mr. BILIRAKIS. Thank you, Mary.

Mr. Bowers, you are on, sir.

STATEMENT OF BRET BOWERS

Mr. BOWERS. Thank you, sir. Thank you, Mr. Chairman. Good morning.

My name is Bret Bowers. It has been nearly 30 years since I have been to Washington, DC. I used to live here as a young boy. I am proud to be back.

I am a husband, and I am a father. I am a proud, third-generation Air Force veteran, and I love my country, and I love living in Coeur d'Alene, Idaho. However, the circumstances that have brought me here are very disturbing.

I am here on behalf of C.L.E.A.N.—Community Leaders for EPA Accountability Now—based in Coeur d'Alene, Idaho. I am here to tell our story, to tell you what EPA has done in our community and how they have failed to take action on our concerns. Even more,

I want to explain how important it has been to have an Ombudsman to whom we can appeal when no one else in the EPA would listen.

C.L.E.A.N. was created in 1998 in response to the EPA's intention of declaring Lake Coeur d'Alene and our entire region a Superfund site. It doesn't sit well, knowing that National Geographic magazine has named our lake one of the five most beautiful lakes in the world, and today the Idaho Department of Environmental Quality calls lake Coeur d'Alene a world-class lake.

C.L.E.A.N. organized with support of community and business leaders, the Chamber of Commerce, realtors, citizens and elected officials—including county commissioners, city councilmen, mayors and State legislators. We committed ourselves to understand the EPA's processes, recognizing the history that already exists with Superfund in neighboring Shoshone County, home of the Bunker Hill Superfund site and upstream of Lake Coeur d'Alene.

The problem that has brought me to here today took 100 years to create, 14 hours to explain during our Ombudsman hearing, and I have 5 minutes.

EPA and the Department of Justice actions threaten not only our economic stability but also our environment and the way others around the region and the world look at our region.

The EPA would like the Ombudsman and all of us to believe the Bunker Hill was never limited to the 21 square mile boundary the EPA helped create on the National Priorities List in 1983. After 17 years, $200 million has been spent in the box. The EPA now wants to start completely over and expand the site into a 1,500 square mile region, creating the Nation's largest Superfund site. Just when many of us thought the end was near, the EPA wants to start over by changing the rules.

Therefore, any legislation to reauthorize the Ombudsman is good news to us. But, sir, we need more than an internal EPA investigation on this. We welcome the Federal Government's help, not its heavy hand.

Until the Ombudsman hearing, our local elected leaders believed the only way they had their voices heard and concerns heard was to pay for the opportunity through friends of the court amicus briefs in litigation at the U.S. District and appellate court levels.

We recognize the need for cleanup. So do the mines. They have offered $250 million to settle a lawsuit and begin cleanup.

Many of us are working in cooperation with the State to finalize a plan that prioritizes cleanup and develops legislation for Federal funding that you will have the opportunity to vote on next year. But questions have been raised dealing with not just the environment, but human health.

How can the EPA discount the scientific, site-specific evidence showing children living in the Bunker Hill site have a much lower accumulation of blood lead than EPA's national default models show? Why won't the EPA consider lead-based paint as a potential source of exposure when the majority of homes in the Silver Valley were built before the 1970's?

Today, inside the Bunker Hill site, 94 percent of the children are within the EPA's remedial action goal. On average, communities

inside the Bunker Hill site have been under the Centers for Disease Control's standard since 1990.

On the environmental side, the discharge from the operating mines today account for less than 1 percent of the metal floating in the river system. But after $200 million have been spent in the box, we now know that EPA's central impoundment area has become the largest source of metals into the south fork of the Coeur d'Alene River.

Why should EPA be allowed to mandate a water quality standard State and industry must meet but the EPA cannot achieve itself at the Bunker Hill site?

Outside the box, science tells us the largest loader of lead into our watershed is the result of erosion from the river banks. So why did EPA stall and then reduce in size a stabilization project to the point there may not be any tangible results?

We are concerned because the threat of basin-wide Superfund could have devastating economic ripples throughout the inland Northwest.

Here are the facts for Shoshone County where hard-working families want to turn around the stigma Superfund has placed on them for the last 20 years. What used to be the world's largest lead, silver and zinc mining district with 90 operating mines is now down to just three; 7,500 miners are down to 800. In fact, it is the only county in Idaho with a population decrease, one of only four nationwide. Shoshone County has had the State's highest unemployment rate and highest child poverty rate and has seen its assessed value drop from $1.3 billion to less than $500 million.

Those facts have caught the attention of all of us, trying to overcome the onslaught of environmental regulations that have but all shut down our region's natural resource industries.

EPA believes they can expand the site even though Lake Coeur d'Alene meets Federal drinking water standards. EPA has studied and found our beaches are safe. We can swim and play in the lake all we want, and the Centers for Disease Control's ATSDR has determined our fish in the lake and in the river and the lateral lakes and the flood plain are safe to eat.

So why do Federal plans for cleanup call for dredging our river and the lake with a $3.8 billion price tag that will bankrupt not only businesses and communities but it will ruin water quality for decades to come? Why should the EPA be allowed to characterize our beautiful region in a negative light as they have done repeatedly in national publications?

The Ombudsman investigation put a spotlight on EPA's position onsite boundaries. EPA's view gives them an open-ended time line at further expense to our communities, our private property rights and our environment.

So it all boils down to trust. How can we trust the EPA when in 1991 Region 10 Administrator Dana Rasmussen wrote to Congressman Larry Larocco with, quote, let me state unequivocally, it is not EPA's intention to expand the boundaries of the site. We recognize that there are many other regulatory tools besides Superfund legislation to affect environmental improvements.

Yet, now we're facing major expansion.

Mr. Chairman, I will summarize in closing.

How can we trust the Department of Justice when they are the driving force behind the lawsuit and tried to prevent the Ombudsman from taking part in our recent hearing? We shouldn't be forced to spend the next 30 years paying off a debt our Federal Government helped create by sending troops to help mine metals during the world wars.

I ask you to ensure the National EPA Ombudsman's Office is reauthorized and that you pass new legislation that seeks to secure Federal funding for basin cleanup in our region, prevent further delays in remediation and restore citizens' faith in government. After all, had the Ombudsman's Office not been called in or if C.L.E.A.N. hadn't formed, do you think any of the concerns or questions raised here today by not only me but these other two ladies here would have been brought to anybody's attention?

Thank you very much.

[The prepared statement of Bret Bowers follows:]

PREPARED STATEMENT OF BRET BOWERS, COMMUNITY LEADERS FOR EPA ACCOUNTABILITY NOW,

Good morning, my name is Bret Bowers. It's been nearly 30-years since I lived in Washington D.C. I've returned, as a proud, 3rd-generation Air Force veteran, a husband and a father . . . who loves my family and these great United States.

However, the circumstances that have brought me here are very disturbing. I am here on behalf of C.L.E.A.N., Community Leaders for EPA Accountability now based in Coeur d'Alene, idaho.

I'm here to tell our story . . . to tell you what EPA has done in our community and how they've failed to take action on our concerns.

Even more, I want to explain how important is has been to have the Ombudsman to whom we can appeal to . . . when no one else in the EPA will listen.

CLEAN was created in 1998 . . . in response to the EPA's intention of declaring Lake Coeur d'Alene and our entire region a Superfund site. It does not sit well . . . knowing that National Geographic magazine has named our lake one of the five most beautiful lakes in the world. Today, the Idaho Department of Environmental Quality calls Lake Coeur d'Alene . . . a world class lake.

C.L.E.A.N. organized . . . with support of community and business leaders, the Chamber of Commerce, realtors, citizens and elected officials—including, county commissioners, city councilmen, mayors, and State legislators.

We committed ourselves to understand the EPA's process . . . recognizing the history that already exists with superfund in neighboring Shoshone County . . . home of the Bunker Hill Superfund site and upstream of Lake Coeur d'Alene.

The problem that has brought us to this point . . . took 100-years to create . . . 14-hours to explain during our recent Ombudsman hearing . . . and a problem I must describe in 5-minutes.

EPA and Dept. of Justice actions threaten not only our economic stability, but also our environment . . . and the way others around the country and the world look at our region.

The EPA would like the ombudsman and all of us to believe the Bunker Hill site was never limited to the 21-sq. mile boundary they helped establish on the national priorities list in 1983.

After 17-years at the site, $200-million dollars have been spent. The EPA now wants to start completely over, and expand the 21.sq-mile "box" into a 1500-sq. mile region . . . creating the nation's largest Superfund site. Just when many thought the end was near, the EPA is changing the rules.

Therefore, any legislation to reauthorize the Ombudsman is good news to us. But . . . we need more than an internal EPA investigation. We welcome the Federal Government's help . . . not its heavy hand.

Until the Ombudsman hearing, our local elected leaders believe the only way they had their concerns heard, was to pay for the opportunity . . . through "friends of the court" briefs in litigation at the U.S. District and Appellate Court levels.

We recognize the need for clean-up. So do the mines . . . they've offered $250-million to settle the lawsuit and begin clean-up.

Many of us are working in cooperation with the State of Idaho to finalize a plan that prioritizes clean-up . . . and develops legislation for Federal funding that you will have the opportunity to vote on next year.

But questions have been raised dealing with not just the environment, but human health also.

How can the EPA discount the site specific evidence showing children living in the Bunker Hill site have a much lower accumulation of blood-lead than EPA's national default models show?

Why won't the EPA consider lead-based paint as a potential source of exposure when the majority of homes in the Silver Valley, were built before the 1970's?

Today, inside the Bunker Hill Superfund "box" . . . 94% of the children are within the EPA's remedial action goal. On average, communities inside the Superfund site have been under the Centers for Disease Control's standard since 1990.

On the environmental side today . . . the discharge from the operating mines accounts for less than one-percent of the metals loading in the river system. But, after $200-million dollars have been spent in the box . . . we now know the EPA's central impoundment area has become the largest source of metals into the south fork of the river.

Why should EPA be allowed to mandate a water quality standard State and industry must meet, but the EPA cannot achieve itself . . . at the Bunker Hill site?

Outside the box . . . science tells us the largest loader of lead into our watershed . . . is the result of erosion from the river banks. So why did EPA stall and then reduce in size a stabilization project to the point . . . there may not be any tangible results?

We are concerned because the threat of basin-wide Superfund could have devastating economic ripples throughout the inland northwest.

Here are the facts for Shoshone County . . . where hard working families want to turn around the stigma Superfund has had on them.

What used to be the world's largest lead, silver and zinc mining district with 90 operating mines . . . is now down to just three in full-time production. 7500-miners are down to 800. In fact, it's the only county in Idaho with a population decrease, one of only four nationwide.

Shoshone County has had the State's highest unemployment rate and highest child-poverty rate. And it has seen its assessed value drop from $1.3-billion to less than $500-million dollars.

Those facts have caught the attention of all of us . . . trying to overcome the onslaught of environmental regulations that have all but shut down our region's natural resource industries.

EPA believes they can expand the site . . . even though Lake Coeur d'Alene meets Federal drinking water standards. EPA has studied and found our beaches are safe. We can swim and play in the lake all we want . . . and the Centers for Disease Control's A-T-S-D-R has determined our fish in the lake and the river are safe to eat.

So why do Federal plans for clean-up call for dredging our river and the lake . . . with a $3.8-billion dollar price-tag that will bankrupt businesses and communities and ruin water quality for decades to come?

Why should the EPA be allowed to characterize our beautiful region in a negative light as they have done in national publications?

The Ombudsman investigation put a spotlight on EPA's position on site boundaries. EPA's view gives them an open-ended timeline at further expense to our communities, our private property rights and our environment.

And so it all boils down to trust. How can we trust the EPA . . . when in 1991, Region-10 Administrator Dana Rasmussen wrote to Congressman Larocco with, "Let me state unequivocally, it is *not* EPA's intention to expand the boundaries of the site. We recognize that there are many other regulatory tools besides superfund legislation to affect environmental improvements." Yet, now we're facing major expansion?

How can we trust the Department of Justice when they are the driving force behind the lawsuit, and tried to prevent the Ombudsman from taking part in our recent hearing?

In closing, we shouldn't be forced to spend the next 30-years paying off a debt our Federal Government helped create . . . by sending troops to help mine metals during the world wars.

I ask you to ensure the national EPA Ombudsman's Office is reauthorized. and, that you pass new legislation that seeks to secure Federal funding for basin clean-up, prevent further delays in remediation and restore citizen's faith in government.

After all, had the Ombudsman not been called in, or if CLEAN hadn't formed . . . do you think any of the concerns and questions raised today would have been brought to your attention?

Mr. BILIRAKIS. Thank you, Mr. Bowers.

I am going to recognize myself.

I know that Ms. Mosley, for instance, has been a very active environmentalist in our area for a long, long time, very much concerned about the environment, very consumer oriented. I would wager to say that Ms. Boggiatto and Mr. Bowers have been in the same category. So the thing that has really amazed me about all of this is the fact that it is the people who are so very pro-environment who appear to have lost confidence in the credibility of the Environmental Protection Agency.

Now, any comments regarding that, Ms. Boggiatto?

Ms. BOGGIATTO. Yes, thank you.

Actually, when I first moved——

Mr. BILIRAKIS. Short comments, I only have 5 minutes.

Ms. BOGGIATTO. Sure. I have lost some confidence. I used to have a lot of faith in the Environmental Protection Agency to always use the best available science and data, and after the involvement with the Shattuck site I realized that that is not always the case, which is unfortunate.

Mr. BILIRAKIS. Yes, it is really unfortunate, isn't it? You start to lose faith in your government, so to speak.

Ms. Mosley.

Ms. MOSLEY. Congressman Bilirakis, before Mr. Martin's office was contacted, we tried to contact, many of us in the community, the Region 4 Ombudsman's Office; and, to my knowledge, none of our calls were returned. At least I can speak for myself, none were returned.

Thank you, sir.

Mr. BILIRAKIS. And that is significant because there are regional Ombudsmen, so to speak. Mr. Fields referred to them, with the idea of basically trying to convince us that it is really not just one Ombudsman but a number of them spread around the country. And what you are saying is that, for the longest time, they still didn't return your calls. I know your persistence and your perseverance, and I think that also speaks for many of the people in the group down there who have shown their concern in this regard.

Ms. MOSLEY. That is right.

Mr. BILIRAKIS. EPA is in the room, and I hope they are picking all that up.

Mr. Bowers.

Mr. BOWERS. Mr. Bilirakis, what I also would like to say is simply that, to give you an idea, just during the RIFS litigation, litigation for a lawsuit that is going to go to trial in January, and during the RIFS that we have been involved with over the Coeur d'Alene Basin, just in the last 2½ years EPA has spent roughly a million dollars a month on litigation and studies instead of cleanup. That should really summarize, hopefully, to you and to all the folks here on Capitol Hill that if they are so concerned about the environment then why are they spending more money fighting through litigation rather than helping the communities that know that some cleanup still may need to be done regardless of how it got there or who is responsible?

Mr. BILIRAKIS. I know Ms. Chenoweth-Hage will go into this, but when did the EPA's involvement in Coeur d'Alene start?

Mr. BOWERS. Well, the EPA started in 1983 with the Bunker Hill Superfund site. It was declared as the box on the NPL, as my testimony indicated, and now they want to start completely over and start from square one. And our communities, especially the communities surrounding the Bunker Hill site in particular, have had it; and they are literally at breaking point in terms of emotional stress over this issue and what lies ahead in terms of the next potentially 30 years.

Mr. BILIRAKIS. Are there EPA personnel located in the area that have been there for some time?

Mr. BOWERS. Yes, there are.

Mr. BILIRAKIS. I have always been wanting to get that clear in my mind. Go ahead. Why don't you explain that?

Mr. BOWERS. I am not sure exactly how long the personnel that have been there have been there. I know that, to give you an idea of the questionable judgment on their call by the EPA staff in our region serving at the Bunker Hill site, they have gone to great lengths not only in national publications to disparage our community with some of their negative comments, but they are actually handing out propaganda from extreme environmental groups critical of the natural resource industries. The EPA has been handing out that documentation.

Mr. BILIRAKIS. The EPA has been handing that out?

Mr. BOWERS. That is correct.

Mr. BILIRAKIS. And you know that for a fact?

Mr. BOWERS. Handed it right to me on a tour.

Mr. BILIRAKIS. EPA personnel?

Mr. BOWERS. That is right.

Mr. BILIRAKIS. And are they located there?

For instance, in our site down in Tarpon Springs, Florida, we don't have any EPA people that are actually located right in the site area. Do you have EPA people that are located right in the area and working on this effort?

Mr. BOWERS. I am not sure of how many of the ones that routinely work on our site at Bunker Hill live in the area.

I know that one, the gentleman I am referring to is Earl Liverman, he lives in Coeur d'Alene and commutes back and forth, which is about 40 miles upstream. But we can get folks flying over from Seattle Region 10 headquarters on a regular basis at the drop of a dime for the environmental groups to come over and help explain such things as the RIFS or whatever they want to come over and talk about. They will drop a dime and fly right over, but yet they are not necessarily responsive to our needs about the concerns we have for our environment.

Mr. BILIRAKIS. The expenditures have been approximately a million dollars a month and this goes back to the early 1980's?

Mr. BOWERS. No, no, sir. The million dollar a month figure that I gave you is just during the course of the RFIs which began late 1997.

Mr. BILIRAKIS. I see.

Well, my time is up. Gentlelady from Colorado.

Ms. DEGETTE. Thank you, Mr. Chairman.

Ms. Boggiatto, you were in the room when you heard Mr. Fields testify that the recent disclosures by the Department of Energy

about sites that were involved in processing radioactive and toxic materials should not change the timetable for cleanup. Do you think that that will give some reassurance to the neighbors who are concerned that this will be further delayed?

Ms. BOGGIATTO. The fact that Mr. Fields said it wouldn't be?

Ms. DEGETTE. Right.

Ms. BOGGIATTO. No.

Ms. DEGETTE. Why not?

Ms. BOGGIATTO. I am sure Mr. Fields has the best intentions, as he has been quite good in our community, coming out to talk with us and such. But the fact that EPA doesn't intend for something to delay their actions doesn't necessarily correlate to actual delays, in my experience; and I hope that it does not. But the citizens do want a full characterization of what is actually at that site; and, as I understand it, for the trainloads or the truckloads to move off the site they will have to know what exactly is in it so they will know what kind of facility is licensed. So I hope that can be done as quickly as possible. These sort of fears from the Ombudsman's Office about what kinds of things could be there have been coming up now for at least a year, and I would certainly like to see an aggressive investigation so that it wouldn't——

Ms. DEGETTE. Why it is important for the neighbors to have a cleanup schedule that has some certainty and also some efficiency, if you will?

Ms. BOGGIATTO. Well, we would like to see the waste dump gone. I mean, after all, no one needs to see that every day in your neighborhood; and it would be very nice to have that over with. There is still a lot of effort on the community's part, working with EPA and businesses around the area, on how all this will happen and how the waste is being characterized, if it is the same as the other sites. There are still some controversies that are sort of ensuing that take a lot of people's emotional energy as well as physical time, and we would all like I think for a nice, clean site and to see a developed site in this area.

Ms. DEGETTE. People have been concerned about what is on the site and whether it is leaking, whether the characterization was correct, for 8 or 9 years now, right?

Ms. BOGGIATTO. Oh, absolutely. In fact, they were told back in the early 1990's that the waste would be removed and that it was dangerous and that was what was necessary. They have been concerned for at lest a decade, and we would like to see this gone, both for the potential health effect as well as the environmental effects that that site would have as well.

Ms. DEGETTE. Thank you.

Mr. Bowers, just to clarify, it looks to me, in reviewing your testimony and also your vitae, that C.L.E.A.N. is basically a group that is put together by businesses and the Chamber of Commerce to make sure that their interests are being represented. Would that be a fair assessment?

Mr. BOWERS. Not only businesses and the Chamber of Commerce, ma'am, but certainly it includes our elected officials at the city and county and State representative level.

Ms. DEGETTE. Okay. But now you are actually on the payroll of the Chamber of Commerce and then C.L.E.A.N. is pretty much an arm of the Chamber of Commerce, would that be correct?

Mr. BOWERS. That is correct.

Ms. DEGETTE. Thank you, Mr. Chairman. I don't have any further questions and yield back the balance of my time.

Mr. BILIRAKIS. The gentleman from Illinois.

Mr. SHIMKUS. Thank you, Mr. Chairman; and I appreciate those testifying here today.

Ms. Mosley, you were here when Mr. Fields was testifying and obviously you followed a lot of the questions and the Ombudsman reports to his deputy. Do you believe people in the local community understand that the Ombudsman is just another EPA employee?

Ms. MOSLEY. Oh, I think they, the average person, thinks that he is an EPA employee, but he certainly is not average.

Mr. SHIMKUS. And following the discussions we had and using the terminology of the law, the Ombudsman was supposed to have access to the highest officials in the EPA. Do you think that is—based upon your observation of the testimony earlier today, do you think that occurs?

Ms. MOSLEY. Absolutely not.

Mr. SHIMKUS. Ms. Boggiatto, do you think that actually occurs, same question, based upon—I know you are a little bit—you are a little bit different because you had, if I am correct, a lot of frustration over many, many years, like many of us do, but you have actually seen some positive aspects and then now might be a change back as we look at—so the same question, do you think that the Ombudsman—the application of the statute and the authorization says he has access to the officials in the EPA. Do you think that is true?

Ms. BOGGIATTO. I think he has access to Mr. Fields, and he is one of the highest officials. Access is one thing. Actually being sort of listened to and respect and supported well is another.

Mr. SHIMKUS. Thank you.

Mr. Bower, same kind of question.

Mr. BOWERS. Sir, could you repeat the question for me?

Mr. SHIMKUS. Well, the basic tenet of the authorization legislation says that the Ombudsman should have access to the highest officials in the EPA. Do you think that that occurs?

Mr. BOWERS. Well, he might have access to the highest officials within the EPA, but I am afraid that, despite the efforts of that we have already seen in our communities with the Ombudsman and certainly with the tape that I have brought here today—and I hope I get a chance to show that or at least enter it into the record—I can certainly say for a fact that I am not so sure EPA Region 10, let alone headquarters right here in our Nation's capital, really does care about any of the findings that the Ombudsman's Office has.

Mr. SHIMKUS. And let me just follow up, again, you observed the discourse we had on small business liability relief and the trouble we have getting language from the EPA. Ms. Boggiatto, it reminded me of a comment you made that here we had promises in the 1990's that the waste would be removed; and then based upon those promises—those promises not being fulfilled or at least un-

certainty is pervasive. Those are kind of reaffirmation of the kind of frustrations we have with EPA and frustration and inability to get some clear guidance and affirmation of what is going to occur in the future and how we can move.

Tell me how that affects—and I think my colleague Diana DeGette mentioned this—how does this affect the community when there is uncertainty and, really, your association and organization——

Ms. BOGGIATTO. Well, as we all know, when you live next to a toxic or radioactive waste dump, you live—and I don't live right next to this site, but many of the citizens I work with do live within sight of it—that is emotionally stressful, to say the least, because you are in fear for your health and your children's health and the rest of your family's health; and I think that toll is a huge burden.

It also—the fact that in 1992 or so the citizens were told by EPA that the preferred alternative was removal and that they then changed, reversed course without going back to public comment on that and then said, "Tough luck, watch us bury it" there is—it is hard to—it is sort of hard to regain the faith in the administrative agency after that.

In fact, when I first moved to Denver, I did not get involved in this site because I was convinced the citizens had it wrong, that EPA could not have done what they were alleging, and waited a couple of years until 1998 to finally get involved, when I realized, you know, that I think there is something here.

Mr. SHIMKUS. Exactly the same experience I felt with the issue. The EPA comes in and says, "Tough luck, you settle or you get sued." That is just a bad way of doing business.

I would end with this, Mr. Chairman, and ask for our panelists here also to—if they could, in their reviewing of the process, what recommendations would you provide for us if we look at reauthorizing the Ombudsman—what more tools does he need? I mean, you are on the front lines. You are trying to deal with issues. How do we empower him to get the word to the highest officials in the Agency and not only get heard but have a receptive ear?

Mr. BILIRAKIS. Might I recommend a very, significant question? Might I recommend that they ought to give some thought to it based on their experiences, and hopefully they can furnish that to us in writing, John.

Mr. SHIMKUS. That is what I would request, Mr. Chairman.

Mr. BILIRAKIS. That is, I think, a very good idea. Would you be willing to do that? There will be additional questions that will be furnished to you. I don't know how we are on reauthorization because of what is happening up here, with only a few days to go and that sort of thing, but it may be on a fast track. Hopefully, it is. So the sooner you provide us your suggestions, and recommendations in response to Mr. Shimkus' question on the Ombudsman areas you feel ought to be changed or improved, the better.

I didn't mean to cut you off.

[The following was received for the record:]

Community Leaders for EPA Accountability Now!
CLEAN

Oct. 16, 2000

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, D.C. 20515-6115

Dear Committee Members,

Two weeks ago today, I had the honor and privilege of appearing before a joint subcommittee hearing on Capital Hill – relating to (HB-3656) the reauthorization of the National EPA Ombudsman.

At that time, Rep. Shimkus-IL charged each of us three community representatives with identifying additional suggestions to improve the EPA Ombudsman's ability to carry out his duties. C.L.E.A.N.'s thoughts/suggestions are as follows:

1. The National EPA Ombudsman and his staff need true independence from the EPA to prevent the agency from manipulating or preventing the Ombudsman from conducting his investigations or even appearing before committee hearings.
2. Because most of the Ombudsman's investigations involve Superfund-related issues and litigation, the Dept. of Justice should not be allowed to interfere in the Ombudsman's independent investigations.
3. EPA's Regional Ombudsman must be housed separately from EPA's regional administrator and headquarters.
4. EPA's Regional Ombudsman should operate under the authority of the National Ombudsman and not EPA's regional administrators.
5. The National EPA Ombudsman's budget should not be at the sole discretion of the agency itself.
6. Additional professional staff should also be considered for the Ombudsman, considering his department (with $500,000 annual budget) is charged with internal oversight of a $7-Billion agency.

In addition, there a few additional comments that I would also like you and the committee to consider as part of my testimony.

1. I was questioned by Rep. Degette-CO about being a paid employee of the Coeur d'Alene Chamber and C.L.E.A.N., but you should know that I appeared before your committee members on behalf of my region's residents (representing both political parties) not from one party. C.L.E.A.N. also has the support of our entire region's economic base, including Chambers of Commerce representing more than 500,000 people.

2. C.L.E.A.N. supports State and Local management (with EPA's help) over issues surrounding future clean-up in the Coeur d'Alene River Basin (the focus of the National Ombudsman's current investigation.) Support for C.L.E.A.N. comes not only from both political parties in North Idaho, but across State lines (into Eastern Washington).
3. If you want a true picture of what is happening in rural America, especially on communities dependent on natural resource industries, I recommend you contact the Shoshone Natural Resources Coalition (S.N.R.C.) to get a better understanding of why their communities are now extremely threatened. S.N.R.C.'s activism and success are based on the fact that it is a true grass-roots effort that has residents and the entire County's civic, business, and political leaders fighting for economic survival. Shoshone County is the home of the Bunker Hill Superfund Site – the same site that is now the focus of the National EPA Ombudsman's investigation and an upcoming hearing over serious allegations of criminal wrongdoing by the EPA

The focus of my recent testimony targeted the very real concern and public outcry over the EPA's intention to expand a 21.sq-mile Bunker Hill Superfund Site into the nation's largest Superfund Site.

The Ombudsman is investigating how the EPA could have listed the 21-sq.mile Bunker Hill Superfund Site "box" on the National Priorities List in 1983 – only to see the EPA change their definition of site boundaries in a rulemaking during litigation, that left our community concerns out of the decision-making process? And despite Rep. Degette's comment, site expansion, "is a moot point," you must understand that the future of our region is at stake, precisely why I stated in my testimony that we're very much in need of more than an internal EPA investigation.

We need your help and that of our entire federal government to solve an out-of-control crisis being levied on our region, by an out-of-touch with common-sense EPA. Superfund is too costly for many different reasons. We have already seen that the same clean-up work can be accomplished here (with built-in accountability) through the Silver Valley Natural Resource Trustees at one-fourth the costs incurred through the Superfund process. Please help your fellow lawmakers understand the concerns Idaho's Congressional leaders, (Rep. Chenoweth-Hage, Rep. Simpson, Sen. Craig and Sen. Crapo) share with Idaho Governor Dirk Kempthorne and the local citizenry worried about EPA's past and current actions. In turn, our elected leaders are developing legislation that will seek federal funds to supplement state and local clean-up efforts – without unfairly becoming home to the country's largest Superfund site. Please contact C.L.E.A.N. at the numbers identified below. To contact the Shoshone Natural Resources Coalition, please call Connie Fudge at 208-753-6022. Thank you.

Respectfully,

Bret C. Bowers
Community Leaders for EPA Accountability Now.

Mr. SHIMKUS. I have finished with my questions. I appreciate you taking the time to visit with us.

I yield back my time.

Mr. BILIRAKIS. The gentlelady from Idaho, Mrs. Chenoweth-Hage.

Mrs. CHENOWETH-HAGE. Thank you, Mr. Chairman.

Mr. Chairman, before I begin my questioning, I have a matter here. It is entitled, The Investigative Report Concerning Abuse of Federal Law and the Citizens of North Idaho by the EPA. It is an investigative congressional investigative report that I put together. It is in its draft final stage; and I would, without objection, like to enter the final report into the record.

It points out 18 different areas that this Ombudsman, who has an average of $35,000 a case, he is looking into 18 different issues. He looks into everything I want to him to, just in this one site. It is so massive.

Mr. Chairman, I remember a long time ago a judge said to me during a hearing, you never want to open a door in a line of questioning that you are not prepared to walk through as well as everybody else, let everybody else in. Well, that happened up in the hearing. That was a 14-hour hearing conducted by our Ombudsman, and that has been captured on film. I have referred to it, as has Mr. Bowers; and I wonder if, without objection, if we might be able to show that 3½ minute film of the questioning by the Ombudsman of an EPA attorney.

So I would yield back the balance of my time if, without objection, we can do that, Mr. Chairman.

Mr. BILIRAKIS. How long will that take?

Mr. BOWERS. Three and a half minutes.

Mr. BILIRAKIS. Three and a half minutes. Let us do it, if there is no objection.

Ms. DEGETTE. Mr. Chairman, if I can just—reserving my right to object. I am not going to object. Let me just say that we didn't learn about the videotape until this morning. It wasn't submitted as part of the prepared testimony of Mr. Bowers. But, having said that, I am always a proponent of sunshine.

Let me just add that the issue of the boundaries of the Bunker Hill site is moot, because the Court of Appeals overturned the challenge and no one challenged it in the District of Columbia. So the issues in the Asarco case, which is scheduled to start on January 22 of next year, are the liability and natural resources damage issues, and that is going to be happening in the District Court of Idaho.

So I would ask that a summary of the scope of the facility and the actual transcript sections where this issue was discussed at the Ombudsman hearing on August 19 of this year be inserted into the record to supplement the videotape so that we can have the full discussion rather than an edited portion. I think it is irregular to have edited portions of field hearings shown in hearings, but I won't object to it so long as the record——

Mr. BILIRAKIS. Without objection, that will be the case. Thank you very much for your consideration.

[The information referred to follows:]

United States v. ASARCO (D. Idaho)
Scope of the Bunker Hill NPL Facility

Background: The Coeur d'Alene Basin, also known as the Silver Valley, crosses the Idaho Panhandle and includes (flowing east to west) the South Fork of the Coeur d'Alene River and its many tributaries, the main stem of the Coeur d'Alene River, and Lake Coeur d'Alene, which has an outlet into the Spokane River flowing into Washington. For many decades, mines and mills in the South Fork drainage dumped wastes containing lead, zinc, cadmium and other hazardous substances into the river system. In addition, air emissions from several huge smelters in Kellogg and other towns on the lower South Fork deposited these hazardous substances on the surrounding area. These releases have contaminated the entire river system downstream of the mines, including the flood plains, adjoining wetlands, and the sediments of the Lake.

In the 1970's, children living in Kellogg and other towns near the smelters were found to have among the highest levels of lead in their blood ever detected in the United States. In 1983, citing these blood lead data and releases both from the smelters and in the river system, EPA listed the Bunker Hill Superfund Facility on the National Priorities List ("NPL"). Consistent with EPA's normal practice, the NPL listing document did not specify the Facility's size or boundaries. However, EPA confined its initial remedial investigation to a 21-square mile area around the smelters, which became known as "the Box." The United States and the State of Idaho eventually negotiated settlements with the mining companies and smelter operators to contribute towards cleanup work in the Box, and the remedial action in that area is well underway.

The State of Idaho sued a number of mining companies for natural resource damages in the Coeur d'Alene Basin in 1983 and settled that lawsuit in 1986, without completing a damages assessment, for a payment of approximately $4.5 million. In 1990, the Department of the Interior (DOI), the Department of Agriculture (USDA), and the Coeur d'Alene Tribe began a natural resource damages ("NRD") assessment covering most of the Basin. The Tribe filed a lawsuit for NRD against several mining companies in 1991. In 1996, the United States filed a lawsuit against the mining companies, seeking NRD on behalf of DOI and USDA and response costs outside the Box on behalf of EPA. In 1998, EPA announced that it was conducting a remedial investigation and feasibility study (RI/FS) that would examine the entire Basin beyond the Box.

Why is the Scope of the NPL Facility Important to EPA and the Trustees? CERCLA provides two alternative statutes of limitations for NRD claims: (1) for facilities listed on the NPL, federal facilities and other facilities where remedial action is scheduled, NRD claims may be filed up to three years after completion of the remedial action; and (2) for other facilities, a NRD claim must be filed within three years after discovery of the loss and its connection with the relevant release. The United States has relied on the first prong of the statute of limitations in the ASARCO case, arguing that the entire contaminated portion of the Basin is on the NPL. Thus, whether the Facility extends beyond the Box essentially determines whether the United States may continue to seek NRD in most of the Basin. In addition, the scope of the NPL Facility is important to EPA, because EPA can only spend Superfund money on remedial action at NPL facilities.

Litigation over the size of the NPL Facility. In the ASARCO litigation, the position of the United States was that the NPL Facility consists of all areas where hazardous substances in the listed releases "ha[ve] been deposited ... or otherwise come to be located[.]" See Section 101(9) of CERCLA, 42 U.S.C. § 9601(9) (definition of "facility"). In this case, that means that the Facility begins at the mines and mills on the upper South Fork and its tributaries and extends downstream at least through Lake Coeur d'Alene. The defendants argued that EPA's decision to limit its initial RI/FS to the Box fixed the boundaries of the NPL Facility. In September 1998, the District Court agreed with the defendants' arguments, holding that EPA had defined the Facility to be coextensive with the Box and could now expand the Facility only through notice and comment rulemaking. Accordingly, the District Court dismissed the United States' NRD claim outside the Box on the ground that it was barred by the statute of limitations. The United States sought, and was granted, the opportunity to appeal that decision immediately to the Ninth Circuit.

Because of the uncertainty created by the District Court ruling that the Bunker Hill Facility is limited to the Box, EPA began to consider formal action to expand the Facility or to list a further NPL facility in the Basin. EPA informed the public about this further listing process through published fact sheets, public meetings, and meetings with state and local public officials.

On June 15, 2000, the Ninth Circuit vacated the District Court's decision on the scope of the Bunker Hill Facility. United States v. ASARCO, 214 F.3d 1104 (9th Cir. 2000). The Court of Appeals held that the District Court lacked jurisdiction to consider the scope of the Facility, because the defendants' arguments amounted to a challenge to the description of the Facility in EPA's 1983 rule placing it on the NPL, and CERCLA requires any challenge to such a rule to be filed exclusively in the D.C. Circuit within ninety days of promulgation of the rule. The Court noted that, under D.C. Circuit precedents, EPA may at any time reassess site boundaries and follow the trail of contamination to its sources and end-points without engaging in rule-making. The Court concluded that the defendants' only remedy is to petition for review of the Facility designation in the D.C. Circuit, and it ordered that further action on NRD in the District Court be stayed for a reasonable period in order to permit defendants to file such a petition. The Court also observed, however, that, even if the defendants did not have notice of EPA's interpretation of the Facility in 1983, the United States' 1996 Complaint appeared to put the defendants on notice that EPA considered the Bunker Hill Facility to include all contaminated areas of the Basin, and the D.C. Circuit might determine that a petition by defendants to review this issue more than 90 days after such notice is untimely.

The defendants subsequently notified the District Court that they would not file a petition to review the Bunker Hill NPL listing in the D.C. Circuit, and the District Court issued an order indicating that the United States' NRD claims had been reinstated.

Trial of the liability and natural resource injury issues in the ASARCO case is scheduled to start on January 22, 2001, in the U.S. District Court in Idaho. The pre-trial conference will be held on December 18, 2000.

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SATURDAY, AUGUST 19, 2000

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194

1 says in the written testimony -- and I believe
2 you mentioned this today also -- that to your
3 knowledge there has never been a documented case
4 of death or sickness attributable to the metals
5 in the river.
6 COMMISSIONER PANABAKER: To my
7 knowledge.
8 COUNCILMAN MATHESON: I'm just
9 wondering if you -- let's say you have your
10 grandkids come over to your house and they play
11 in a sandbox you have in your backyard. And
12 your neighbor keeps dumping his garbage over
13 there in the sandbox. Do you wait until your
14 grandkids get sick or die before you clean that
15 up?
16 COMMISSIONER PANABAKER: What's
17 that?
18 COUNCILMAN MATHESON: In other
19 words, do you wait until somebody gets sick
20 before you clean up the mess in your backyard?
21 COMMISSIONER PANABAKER: The
22 only question I have about this whole thing, I
23 have never ever said I didn't think there was
24 some cleanup that needed to be done. As an
25 elected official I am responsible for people's

195

1 constituents told, in 1983, that that listing
2 included 1,500 square miles?
3 REPRESENTATIVE PISCHNER: No,
4 sir.
5 INVESTIGATOR KAUFMAN: To your
6 knowledge, you and your constituents were never
7 told?
8 REPRESENTATIVE PISCHNER: No, it
9 was pretty clear. The "Box" was the word.
10 INVESTIGATOR KAUFMAN: Mr.
11 Vergobbi.
12 COMMISSIONER VERGOBBI: The Box
13 was the only thing I ever heard at that time.
14 INVESTIGATOR KAUFMAN: Mr.
15 Panabaker.
16 COMMISSIONER PANABAKER: No.
17 INVESTIGATOR KAUFMAN: Mr.
18 Garitone.
19 MAYOR GARITONE: Even in the
20 papers and the press they showed a map of the
21 Silver Valley and depicted the 21 square mile
22 Box.
23 INVESTIGATOR KAUFMAN: Mr. Judy,
24 can you remember from playing?
25 (Laughter.)

196

1 lives. If we're going to do it, we ought to
2 do it the right way, we ought to do it the
3 fair way, and we ought to share information and
4 make sure that it's done right. We need
5 cooperation from everybody to do that. That's
6 what I've said.
7 COUNCILMAN MATHESON: Absolutely.
8 I agree with that 100 percent. I guess I don't
9 have anything further. Thank you.
10 INVESTIGATOR KAUFMAN: Ombudsman
11 Martin.
12 OMBUDSMAN MARTIN: No questions.
13 INVESTIGATOR KAUFMAN: I just
14 have one quick question.
15 If my memory serves me, the
16 Silver Valley Superfund site, Bunker Hill, was
17 put on the NPL in 1983. I think that's
18 correct. I would just want to go down the list
19 and see if you all know -- I know Mr. Judy was
20 probably in grade school then.
21 (Laughter.)
22 MAYOR JUDY: I think I might
23 have been in junior high.
24 INVESTIGATOR KAUFMAN: If you
25 know, Mr. Pischner, were you told, or your

197

1 MAYOR JUDY: No, but I have
2 consulted the graders.
3 (Laughter.)
4 MAYOR JUDY: It is clear that,
5 no, we were not.
6 INVESTIGATOR KAUFMAN: Mr.
7 Stanley.
8 SUPERINTENDENT STANLEY: Until
9 recently it was always the 21 square miles of
10 the Box.
11 INVESTIGATOR KAUFMAN: So, no
12 one from the EPA, to your knowledge, ever told
13 you or your community in 1983 that it was the
14 1,500 square miles.
15 Mr. Pischner, do you have a
16 comment?
17 REPRESENTATIVE PISCHNER: Mr.
18 Kaufman, I would add that as a legislator in
19 1996, we passed Idaho legislation to fund the
20 State's portion of the remediation. That
21 language clearly said that the funding would be
22 limited to the Box, as far as the State's
23 participation was affected.
24 INVESTIGATOR KAUFMAN: And
25 that's as a result of discussions with EPA,

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242

1 INVESTIGATOR KAUFMAN:
2 Representative Chenoweth-Hage.
3 REPRESENTATIVE CHENOWETH-HAGE: I
4 just have one comment and a reference to an old
5 paper.
6 Mr. Jaeger, these pictures speak
7 more than a thousand words. You know, nothing
8 could be made more clear. I want to thank you
9 and the company for the good work you have done
10 there.
11 I want to follow-up on one of
12 Senator Craig's questions. It has always been
13 my feeling that the United States Government
14 really should be the ones that are solving any
15 problems that we can identify up there.
16 I have here, and would like to
17 enter into the record, some news clips from 1942
18 and 1944, where it states here in the Wallace
19 Miner paper, that expansion of the armament
20 program, following entry of the United States
21 into the war, was made imperative; that unusual
22 steps be taken to further the output of these
23 metals because of their prime importance in the
24 production of armaments. The new program is
25 expected to increase the rate of production for

243

1 lead and zinc by at least 80 percent over the
2 current rate by the end of 1942. The gain in
3 copper output should be substantial, although
4 smaller than we expected in lead and zinc.
5 Rocky Mountain area production of lead is
6 expected to show the greatest gains.
7 They even had comics that
8 appeared in newspapers in the region. This is
9 one that shows Uncle Sam. It says, "The job we
10 do in '42 depends on you." And that means the
11 miner. It goes on to state, "Do not lose a
12 shift, and when on the job, give the best that
13 is in you."
14 And it defines morale. "Morale
15 is when a man believes his country is the best
16 country on earth; his government is the best;
17 his hometown is the best; his Army is the best;
18 and he himself is the best damn man in the
19 whole outfit, and he is ready to prove it if
20 need be. Americans prove it by production now."
21 The comedy goes on to state,
22 "Wake up miners. Work steady. Don't quit
23 producing copper. Don't wait for a bomb in your
24 backyard to make you see things."
25 Finally, it shows -- and this

244

1 is something that appeared in the paper. It
2 shows a miner here. It says, "Copper and zinc
3 make shells. Shells win wars. Produce copper
4 and zinc."
5 And then this is the last one I
6 will refer to, although I will submit all that I
7 have right now for the record. But this shows
8 Uncle Sam with a very long beard, and it shows
9 him speaking to a miner of the safe, steady
10 metal mines. He is saying to the miner, "You
11 have done a grand job, son. Your efforts should
12 be honored."
13 Well, that was over 50 years
14 ago, Mr. Magnuson. I guess I have to ask
15 today, are we honoring those men? Are we
16 honoring that industry? They really helped us
17 win the war. I think we have the shoe on the
18 wrong foot.
19 Thank you.
20 INVESTIGATOR KAUFMAN: I will
21 put on the record, I want the record to show,
22 that the Ombudsman and the Chief Investigator
23 were in diapers at that time.
24 (Laughter).
25 INVESTIGATOR KAUFMAN: Mr.

245

1 Ombudsman.
2 OMBUDSMAN MARTIN: More
3 questions?
4 INVESTIGATOR KAUFMAN: Oh, I'm
5 sorry. Councilman Matheson.
6 COUNCILMAN MATHESON: I'm just
7 wondering, I guess -- well, I wanted to thank
8 all of you for your comments. I know you are
9 all very respected businessmen in the region; and
10 we of the Tribe have a lot of respect for each
11 and every one of you; especially you, Mr.
12 Magnuson and Mr. Jaeger. You have long been
13 considered friends of the Tribe.
14 I am wondering if any of you
15 have ever commissioned or seen an economic
16 analysis of the impact a half billion or billion
17 dollar 30-year cleanup would have on the economy
18 of the region.
19 INVESTIGATOR KAUFMAN: Let the
20 record show their silence.
21 COUNCILMAN MATHESON: They are
22 shaking their heads no.
23 INVESTIGATOR KAUFMAN: Mr.
24 Magnuson, I think, had a comment.
25 MR. MAGNUSON: I think you

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246

1 asked if it would have an impact. I would say
2 definitely so. Anytime you have an expense of
3 money in this area, it helps, it rolls around.
4 So your question, if there was 250 million being
5 spent in the next few years, it would obviously
6 have an effect.
7 MR. POTTER: I agree with that,
8 and I wouldn't want to infer that it wouldn't.
9 But combine that -- but to put that stigma over
10 the rest of the ability to create investment,
11 that, in my opinion, would be a devastation for
12 the region. You are absolutely correct, though,
13 that would have an economic impact.
14 MR. MAGNUSON: Well, Mr. Potter,
15 I would assume that the money would be spent
16 without the stigma. We could have the state
17 doing whatever might be necessary, we could have
18 the money spent to do whatever needs to be done,
19 but we wouldn't have the stigma of the
20 Superfund.
21 MR. CARTER: Yes, we could have
22 the best of both worlds: the power to make
23 improvements without the negative stigma. It
24 could be a win-win.
25 COUNCILMAN MATHESON: Since May

247

1 5, 1998, when the base point Superfund listing
2 was released by EPA, is there any data showing
3 that the Coeur d'Alene economy has decreased
4 since then? For the last two years has Coeur
5 d'Alene's economy, the City of Coeur d'Alene, the
6 Coeur d'Alene region, has it decreased?
7 MR. POTTER: Well, the average
8 annual wage for an individual hasn't improved.
9 It is well below the national average, and it
10 seems to stay there.
11 MR. JAEGER: I don't think we
12 have the stigma right now of a publicly declared
13 Superfund site. I think if the lake were
14 publicly declared by the EPA, and I guess there
15 is some technical -- maybe, technically, they
16 have declared it, but certainly it hasn't been
17 of public record or a big media event that they
18 have declared it. If they did declare it, I
19 think it would be very harmful, extremely so.
20 COUNCILMAN MATHESON: I am aware
21 that the Coeur d'Alene River Basin outside of
22 Wallace -- two years ago is what I'm saying.
23 The point is if that has had an effect on the
24 economy locally, and apparently not.
25 MR. SCHUEMAN: I would like to

248

1 respond to that question. I think we have to
2 strongly distinguish between the City of Coeur
3 d'Alene and the Silver Valley and Shoshone
4 County.
5 COUNCILMAN MATHESON: Yes.
6 That's why I said the Coeur d'Alene area.
7 MR. SCHUEMAN: Well, Shoshone
8 County has been significantly impacted. Since I
9 have been there almost eight years, I think
10 there has been approximately a three percent
11 increase in population and we have seen
12 businesses exit.
13 COUNCILMAN MATHESON: That's why
14 I said specifically the "Coeur d'Alene area".
15 MR. BROWN: We're still at 10
16 1/2 percent or more unemployment in the Valley.
17 COUNCILMAN MATHESON: We have
18 you beat down our way.
19 MR. SCHUEMAN: Well, it's always
20 a toss-up between Benewah and Shoshone.
21 MR. POTTER: In that regard, we
22 sympathize with you in economic development.
23 INVESTIGATOR KAUFMAN: I just
24 want to clarify the record. At this time, the
25 Environmental Protection Agency does not have the

249

1 outside the Box area on the Superfund list. EPA
2 has discretion to expand the inside the Box and
3 identify other Superfund sites. But I just want
4 it to be very clear that right now, today, the
5 Environmental Protection Agency has not declared
6 anything outside the Box as a Superfund site on
7 the National Priority List.
8 Bob, did you have a comment?
9 OMBUDSMAN MARTIN: I think
10 Councilman Matheson does.
11 COUNCILMAN MATHESON: That
12 certainly wasn't my understanding. I was under
13 the impression that the reservation was listed as
14 of 1998.
15 INVESTIGATOR KAUFMAN: No, sir.
16 COUNCILMAN MATHESON: And that
17 that's what the court upheld recently.
18 INVESTIGATOR KAUFMAN: No, sir.
19 The 9th Circuit Court said that the Environmental
20 Protection Agency has the discretion, based on
21 their review, of expanding the site. But the
22 site has not been expanded today.
23 EPA has discretion not to expand
24 it; EPA has the discretion to pick certain areas
25 outside the Box; EPA has the discretion to do a

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250

1 whole host of things. Right now all of that is
2 up in the air and part of the negotiations
3 between the EPA and the State host. So that's
4 why I did want to make that statement to try to
5 clarify.
6 I have one question for Mr.
7 Magnuson. Was that a relative of yours I saw
8 on that PBS special about Burke the other night.
9 the town of Burke? It was a a fabulous
10 special.
11 MR. MAGNUSON: I think it was
12 my aunt, Aunt Magnuson. One of her daughters
13 helped -- granddaughters helped put together that
14 television special.
15 INVESTIGATOR KAUFMAN: That
16 helped me. That was terrific. Frankly, I do
17 real hazardous waste Superfund cases in places
18 like New Jersey, where the Superfund was designed
19 to really deal with. I don't know that much
20 about the industry in your area, but the other
21 night when I watched that, it really helped my
22 understanding of the history of the area.
23 You know, pass along to your
24 relatives that I thought they did a fabulous
25 job.

251

1 MR. MAGNUSON: I am happy to
2 hear that.
3 INVESTIGATOR KAUFMAN: Good. If
4 there are no further questions, let's go to the
5 next panel.
6 First, let's let the court
7 reporter rest his fingers. Let's take a break
8 for 10 minutes.
9 Thank you.
10 (Whereupon, a recess was taken.)
11 INVESTIGATOR KAUFMAN: Regional
12 Counsel from Region 10 has asked for an
13 opportunity to provide information that he
14 believes counteracts my statement on the NPL
15 listing issue.
16 For those of you who remember,
17 before the break 10 minutes ago I said that the
18 1,500 square mile area has not been listed as a
19 Superfund NPL site by the 9th Circuit Court of
20 Appeals, but rather provides EPA discretion.
21 Regional counsel has a different view on that,
22 and would like to state that to you. Then we
23 will have a colloquy to build a record for the
24 Ombudsman's review, fact-finding recommendations,
25 which is part of this particular investigation.

252

1 So if you could introduce
2 yourself for the record, sir, then we can have
3 your statement, then have colloquy. I thank you
4 very much for volunteering.
5 MR. KOWALSKI: Thank you, Mr.
6 Kaufman.
7 My name is Ed Kowalski. I am
8 an associate regional counsel with EPA Region 10,
9 Seattle.
10 I think it's important, because
11 this issue has been much debated and much
12 litigated, that we not mislead the public and
13 the people who are interested in this site and
14 what EPA is doing in the Basin.
15 It is the EPA's position that
16 the NPL's Superfund facility consists of those
17 areas where hazardous substances have come to be
18 located, and that includes areas within the 21
19 square mile Box and areas within the Basin
20 beyond the 21 square mile Box.
21 That is the position we have
22 consistently taken. It is the position we took
23 with the 9th Circuit Court of Appeals; it is the
24 position that was left standing by the 9th
25 Circuit Court of Appeals when it issued its

253

1 decision vacating and remanding the district
2 court's decision on that issue in June of this
3 year.
4 So I think it's important that
5 that position be clarified, because I believe you
6 spoke, Mr. Kaufmann, on behalf of the Agency. I
7 think we need to clarify what the agency's
8 position is.
9 INVESTIGATOR KAUFMAN: Okay.
10 Good. Could we start colloquy. Senator Crapo,
11 would you like to start or would you like me to
12 start?
13 SENATOR CRAPO: Why don't you
14 go ahead.
15 INVESTIGATOR KAUFMAN: To your
16 knowledge, sir, has the Environmental Protection
17 Agency always considered the 1,500 square miles
18 of the Basin as part of the Bunker Hill
19 Superfund site?
20 MR. KOWALSKI: Mr. Kaufman, the
21 history of the Environmental Protection Agency's
22 position and consideration is well documented and
23 is part of the court record, and there is
24 extensive litigation on this issue. We are not
25 going to discuss it, because it is still in

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254

1 litigation, nor anything beyond what is in that
2 record.
3 INVESTIGATOR KAUFMAN: Okay.
4 But you just discussed it.
5 MR. KOWALSKI: I clarified a
6 misstatement by you, Mr. Kaufman, for the public.
7 INVESTIGATOR KAUFMAN: What was
8 the misstatement that you claim I made, sir?
9 MR. KOWALSKI: I would rather
10 not paraphrase it, but would rather have the
11 court reporter read it back verbatim.
12 INVESTIGATOR KAUFMAN: Court
13 Reporter, could you go back to my statement, and
14 then give him another opportunity to identify
15 what statement he takes exception to so we have
16 an accurate record, sir. Is that possible?
17 COURT REPORTER: Yes. It will
18 take me just a second to find it.
19 INVESTIGATOR KAUFMAN: That's
20 fine. Take your time.
21 COURT REPORTER: "I just want
22 to clarify the record. At this time, the
23 Environmental Protection Agency does not have the
24 outside the Box area on the Superfund list."
25 INVESTIGATOR KAUFMAN: Keep

255

1 going.
2 COURT REPORTER: "EPA has
3 discretion to expand the inside the Box and
4 identify other Superfund sites. But I just want
5 it to be very clear that right now, today, the
6 Environmental Protection Agency has not declared
7 anything outside the Box as a Superfund site on
8 the National Priority List."
9 INVESTIGATOR KAUFMAN: Okay.
10 Now, could you tell me what's in error, for the
11 record, sir?
12 MR. KOWALSKI: What is in
13 error, for the record, Mr. Kaufman, is whether
14 the agency considers anything outside the
15 Superfund Box on the NPL.
16 INVESTIGATOR KAUFMAN: Has the
17 agency put on the Superfund National Priority
18 List any sites outside the 21 square mile Box?
19 MR. KOWALSKI: Mr. Kaufman, the
20 Agency's position, that has been acknowledged by
21 the 9th Circuit Court of Appeals, is very well
22 laid out in the Court's opinion of June 15,
23 2000, and I would submit that opinion for the
24 record. I would not sit here today and pretend
25 to paraphrase that opinion. It speaks for

256

1 itself.
2 INVESTIGATOR KAUFMAN: So, in
3 other words, you are not going to answer the
4 question?
5 MR. KOWALSKI: That's correct.
6 INVESTIGATOR KAUFMAN: Why
7 aren't you going to answer the question?
8 MR. KOWALSKI: Because the
9 answers to that question, and what I suspect are
10 the other questions you are going to ask, are
11 laid out in that opinion.
12 As a law professor once told
13 me, "One should never paraphrase the law when it
14 is readily available." So I will submit the 9th
15 Circuit Court opinion for the record. You can
16 read it.
17 INVESTIGATOR KAUFMAN: Do you
18 disagree with my statement that was just read by
19 the court reporter?
20 MR. KOWALSKI: I do disagree
21 with your statement, Mr. Kaufman.
22 INVESTIGATOR KAUFMAN: Can you
23 tell me why you disagree with that statement?
24 MR. KOWALSKI: Because I think
25 the 9th Circuit Court of Appeals disagrees with

257

1 that opinion.
2 INVESTIGATOR KAUFMAN: And could
3 you point me specifically to what in the 9th
4 Circuit Court of Appeals' decision you believe
5 counters my statement?
6 MR. KOWALSKI: It's actually a
7 relatively short opinion as far as opinions go.
8 INVESTIGATOR KAUFMAN: Well,
9 just give me your --
10 MR. KOWALSKI: No, Mr. Kaufman.
11 The opinion speaks for itself.
12 INVESTIGATOR KAUFMAN: So you're
13 not going to point to anything in that opinion
14 that backs you up. You're just going to make
15 the blanket statement that you believe that the
16 opinion disagrees with me, but you're not going
17 to point to anything or read any quotes,
18 correct?
19 MR. KOWALSKI: Correct.
20 INVESTIGATOR KAUFMAN: Do you
21 know if EPA has written letters to politicians,
22 PRP's and others indicating that it does not
23 intend to extend the boundaries of the Bunker
24 Hill Superfund site beyond the Box?
25 MR. KOWALSKI: I do not know of

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258

1 specific letters. I know letters have been
2 written to politicians numerous times in the
3 District of the site.
4 INVESTIGATOR KAUFMAN: So you
5 have no knowledge one way or the other whether
6 letters have been written to politicians, PRP's
7 and others indicating that it does not intend to
8 expand the boundaries? You don't know one way
9 or the other whether that has occurred from EPA?
10 MR. KOWALSKI: Mr. Kaufman, the
11 EPA's listing is consistent with the 9th Circuit
12 Court of Appeals' Opinion.
13 INVESTIGATOR KAUFMAN: And you
14 won't specifically read me those parts of that
15 list then?
16 MR. KOWALSKI: I believe the
17 higher opinion is important.
18 INVESTIGATOR KAUFMAN: Well, I'm
19 sure it is important. All court decisions are
20 important. But you're not going to read me any
21 quote from that, that you say counters what I
22 said; is that correct?
23 MR. KOWALSKI: That is correct.
24 I think the entire opinion does that.
25 INVESTIGATOR KAUFMAN: But you

259

1 just think I am incorrect?
2 MR. KOWALSKI: I do.
3 INVESTIGATOR KAUFMAN: Okay.
4 Well, it's a free country.
5 MR. KOWALSKI: Yes, sir, it is.
6 INVESTIGATOR KAUFMAN: You are
7 certainly allowed to have your opinion, sir. Do
8 you have anything else you would like to say in
9 that regard?
10 MR. KOWALSKI: No. I believe I
11 made the clarification that I thought was
12 necessary at the time.
13 INVESTIGATOR KAUFMAN: I have no
14 further questions. Senator Crapo.
15 SENATOR CRAPO: Thank you.
16 Mr. Kowalski, I have read the
17 9th Circuit opinion. As I understand it, the
18 opinion basically stated that the issue was to
19 be decided by the D.C. courts; is that correct?
20 MR. KOWALSKI: What the opinion
21 did, Senator Crapo, was vacate the district court
22 opinion and remanded it for consideration if a
23 petition was brought before the D.C. Circuit.
24 SENATOR CRAPO: As I understand
25 the correction that you wanted reflected in the

260

1 record, you indicated that it's the EPA's
2 position that the Superfund site is to follow
3 the pollution wherever located?
4 MR. KOWALSKI: Correct.
5 SENATOR CRAPO: And that the
6 9th Circuit opinion has left the EPA's decision
7 in that regard still standing. I don't think
8 that that necessarily answers the question of
9 whether the EPA has designated anything outside
10 the Box, which is what I believe the issue here
11 is.
12 I'll just tell you, for the
13 record, that the EPA has at least once, if not
14 twice, in writing, within the last year or so,
15 responded to me by saying that it has not yet
16 made that decision; has not yet made that list,
17 in response to my demand upon the EPA not to do
18 so.
19 On one of the occasions the EPA
20 stated it was waiting on the State of Idaho six
21 months to finish negotiations, and in some of
22 the other contacts I've had similar responses
23 from the EPA. So the clarification that I would
24 like to have made is whether you are stating
25 that the EPA has designated anything outside the

261

1 21 square mile box as a part of an NPL listing.
2 MR. KOWALSKI: The EPA has
3 designated that the NPL site consists of areas
4 where the hazardous substances from the releases
5 have come to be located, both within and outside
6 the Box. The 9th Circuit Court of Appeals
7 remanded that opinion for challenges to the
8 validity of that decision to the 13th Circuit
9 Court of Appeals.
10 SENATOR CRAPO: Let me just
11 read to you some language from a letter by the
12 EPA to me. This is dated October 14, 1999.
13 In the second paragraph -- this is a letter to
14 me from Chuck Clarke, Regional Administrator.
15 The second paragraph states, "I
16 can assure you that the EPA will not determine
17 the final listing status within the Basin without
18 considerable community input." He goes on to
19 state that the local communities need to be
20 involved.
21 Further on in the letter he
22 states that if the EPA Region 10 recommends EPA
23 headquarters to proceed with the NPL listing,
24 then that Superfund process will be formal
25 consultation with the State and with the Tribe.

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262

1 so forth.
2 So it seems to me that what you
3 are stating is in direct conflict with what I've
4 been told by the Region 10 administrator.
5 MR. KOWALSKI: What you were
6 reading, Senator Crapo, preceded the 9th Circuit
7 Court of Appeals' decision in June of this year.
8 SENATOR CRAPO: That's correct.
9 So, in other words, when the 9th Circuit case
10 came down, the EPA changed its position from
11 what the EPA was telling me in October; is that
12 what you're saying?
13 MR. KOWALSKI: The EPA had
14 taken its position before the Court's – from
15 the time the lawsuit was filed and until this
16 issue was raised, and that position is a matter
17 of extensive court documents.
18 SENATOR CRAPO: Well, either Mr.
19 Clarke's letter to me was correct and he was
20 telling me the truth, or it was not correct and
21 the EPA had taken a different position than this
22 letter indicates. Which is the case?
23 MR. KOWALSKI: I cannot speak
24 of the context of your correspondence with Mr.
25 Clarke, Senator Crapo. I can speak as a lawyer

263

1 as to what the legal history has been on this
2 issue.
3 SENATOR CRAPO: I see we have
4 been joined.
5 (Laughter.)
6 INVESTIGATOR KAUFMAN: We now
7 have two more people, two new people, who have
8 joined Regional Counsel. Would you identify
9 yourselves.
10 OMBUDSMAN MARTIN: Mike, if you
11 could identify yourself and, Cliff, if you could
12 identify yourself for the record.
13 MR. GEARHEARD: My name is Mike
14 Gearheard. I am the EPA Region 10 supervisor.
15 Senator, the only reason I came
16 up was – and I hope to leave quickly – is to
17 determine whether or not that letter included the
18 statement that we tried to include in all of
19 those letters, along the lines of, it, of
20 course, is the federal government's position that
21 all areas within the Basin where the
22 contamination has come to be located have been
23 parts of the site. We were, as a rule, trying
24 to include that lawyerese statement in all of
25 our letters. I don't know whether it was

264

1 included in that letter or not, Senator.
2 SENATOR CRAPO: In my brief
3 review of the remainder of the letter, I don't
4 find it. I will review it with more care in a
5 few moments. But let me just indicate, assuming
6 that statement were in the letter, or were
7 transmitted at a corresponding time with the
8 letter, wouldn't the two positions be entirely
9 opposite? I mean, this letter goes through a
10 very clear process of stating that – well, I
11 will read another sentence from the letter.
12 "We are at the early stages of
13 the Superfund decisionmaking process." We're
14 talking about outside the Box here. If we are
15 at the early stages in that process, that such a
16 decision won't be made without community input.
17 And the whole discussion in this letter is about
18 the fact that it hasn't been made yet and here
19 is the context in which it will be made.
20 If that is being said at the
21 same time that the EPA is saying, oh, by the
22 way, the decision has already been made and we
23 already consider the designation to be
24 established, isn't that a little bit
25 inconsistent?

265

1 MR. GEARHEARD: Senator,
2 Congressman, Chairman, it may appear inconsistent.
3 Our position on this matter of the site
4 boundaries for many years, or at least the last
5 several years after having these conversations,
6 is that we have a legal position that the
7 original listing included wherever the
8 contamination has come to be located.
9 The district court disagreed
10 with that decision. And it was after that
11 disagreement that we began to look at whether or
12 not we would have to do affirmative listing of
13 actions, which has generated a number of
14 additional letters and discussions and meetings.
15 We simultaneously – we, the federal government
16 simultaneously appealed the district court
17 decision to the 9th Circuit.
18 When the 9th Circuit decision
19 came down, we had basically concluded that we
20 did not need to proceed with additional listing
21 actions, because the 9th Circuit affirmed our
22 original federal government legal position. So I
23 know it appears like there's two different
24 directions going on.
25 SENATOR CRAPO: Well, I read

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266

1 the 9th Circuit case differently than any of you
2 read it. But I would say the interpretation you
3 have given to what I have here in the letter
4 certainly would have justified such an
5 interpretation being included with the letter
6 being sent to me.
7 I don't think that anybody in
8 this community, when they received the 1998
9 notice that there might be an effort to change
10 the designation, nor I and others who got
11 involved and received correspondence like this,
12 believed it was the position of the EPA that it
13 was already a done deal. Frankly, I think that
14 is quite an alarming revelation.
15 INVESTIGATOR KAUFMAN:
16 Congressman Chenoweth-Hage, do you want to ask a
17 question at this time?
18 REPRESENTATIVE CHENOWETH-HAGE: I
19 do.
20 Mr. Kaufman, gentlemen, I do
21 have a copy here of this decision. It's not
22 very difficult to read, and I would like to
23 enter it into the record.
24 INVESTIGATOR KAUFMAN: Yes,
25 ma'am. We will enter the opinion as well as

267

1 the letter into the record, the letter to
2 Senator Crapo from the Region 10 administrator.
3 REPRESENTATIVE CHENOWETH-HAGE:
4 The court order is very general. It simply says
5 this court lacks jurisdiction to adjudicate the
6 validity of including the Coeur d'Alene Basin
7 within the Bunker Hill site. They remand it to
8 the proper court of jurisdiction; and that is
9 the United States Court of Appeals for the
10 District of Columbia. That is not very hard to
11 figure out, Mr. Kaufman.
12 Furthermore, I have another
13 letter I would like to enter into the record, a
14 letter that was sent to Timothy Fields from a
15 Lois Schiffer of the EPA.
16 INVESTIGATOR KAUFMAN: Well, I
17 think that's Lois Schiffer, Assistant Attorney
18 General of the United States.
19 REPRESENTATIVE CHENOWETH-HAGE:
20 Oh, yes, it is. The letter is to Timothy
21 Fields of the EPA in Washington, D.C. The letter
22 is dated after the decision.
23 INVESTIGATOR KAUFMAN: That's
24 correct.
25 REPRESENTATIVE CHENOWETH-HAGE:

268

1 It states in here, in the second paragraph, that
2 the EPA has been actively considering publishing
3 a new rule confirming all of the contaminated
4 areas in the Basin are included in their NPL
5 listing. Parts of this letter certainly back up
6 the fact that it is under consideration, but has
7 not been listed.
8 I just want to say, too, for
9 the record, that I didn't have any law
10 professors, but I remember a lot of them. And I
11 remember a law professor saying you never want
12 to open up a door you're not prepared to walk
13 through. I just find it very startling that the
14 questions that Mr. Kaufman asked, that were very
15 elementary, were not properly answered. Because
16 you opened the door, you should have been
17 prepared to walk through.
18 Thank you, Mr. Kaufman.
19 INVESTIGATOR KAUFMAN: Thank
20 you, ma'am. I do have a question for anyone
21 who can answer it. Is EPA actively considering
22 publishing a new rule confirming that all of the
23 contaminated areas of the Basin are included in
24 the NPL listing?
25 MR. KOWALSKI: No.

269

1 INVESTIGATOR KAUFMAN: No. Are
2 you all familiar with the Garrett decision? I
3 don't have to ask you your impression of that
4 today?
5 OMBUDSMAN MARTIN: Don't do it.
6 INVESTIGATOR KAUFMAN: I'm not.
7 Do you all agree that the answer to that
8 question is no?
9 MR. KOWALSKI: We agree.
10 INVESTIGATOR KAUFMAN: I would
11 like to take a one-minute break.
12 COUNCILMAN MATHESON: I would
13 like to ask a question, if I may.
14 INVESTIGATOR KAUFMAN: Let's
15 just take a one-minute break, then you can jump
16 in for as long as you want. Okay?
17 (Whereupon, there was a brief
18 pause off the record.)
19 INVESTIGATOR KAUFMAN: We are
20 back.
21 Councilman Matheson, I apologize.
22 Go ahead.
23 COUNCILMAN MATHESON: I just
24 want to mention first that our attorney has
25 offered to walk through that door.

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270

1 (Laughter.)
2 COUNCILMAN MATHESON: He is
3 willing to do it.
4 My question is, I keep hearing
5 this 1,500 square mile superfund listing site.
6 And I'm wondering if you take a map and you
7 draw a big circle around it, and in that big
8 circle is 1,500 square miles, is every inch of
9 that 1,500 miles considered a Superfund listing?
10 MR. KOWALSKI: The answer is,
11 no, sir. The site is limited to those areas
12 where hazardous substances have come to be
13 located; and hazardous substances have not come
14 to be located over every square inch of the
15 1,500 square miles.
16 COUNCILMAN MATHESON: Good. A
17 little less, then, I guess?
18 MR. KOWALSKI: Yes.
19 COUNCILMAN MATHESON: All right.
20 OMBUDSMAN MARTIN: Councilman, I
21 would like to recognize your legal counsel. The
22 chair recognizes Mr. Ray Givens, counsel for the
23 Coeur d'Alene Tribe. Provide your name for the
24 record.
25 MR. GIVENS: My name is Ray

271

1 Givens of the law firm of Givens, Funke & Work.
2 We represent the Coeur d'Alene Tribe.
3 I have been both involved in
4 the litigation and the administrative proceedings
5 of the Coeur d'Alene Basin cleanup for roughly
6 10 years.
7 Mr. Ombudsman, Senator,
8 Representative, it is the Tribe's understanding
9 of the Superfund facility issue, and how it
10 relates to what we are dealing with here today,
11 is that many years ago EPA placed on the
12 National Priorities List the Bunker Hill
13 facility. That facility covered wherever the
14 hazardous substances would come to be located.
15 Those are the words out of the statute, as you
16 are all aware.
17 The first area the EPA chose to
18 clean up was the area right around the smelter,
19 the 3-by-7 mile area that has come to be called
20 the "Box". It was chosen because that was the
21 area that the smeltering emissions are primarily
22 located in.
23 Later, the Tribe filed a natural
24 resource damage lawsuit for the entire nation.
25 That was in '91. In '96, the United States

272

1 filed a similar lawsuit on behalf of the federal
2 trustees and interests. In that lawsuit the
3 defendant mining company said, United States, you
4 did not file your lawsuit soon enough because
5 you had to file it much sooner if it was not
6 tied to an EPA listed facility, and the only
7 listed facility is the 3-by-7 mile box.
8 The district court -- the EPA
9 opposed that and the United States opposed that.
10 They said, no, it's the whole wherever the
11 hazardous substance is. The district court
12 agreed with the mining company and threw out
13 part of the United States' case.
14 The 9th Circuit reversed that
15 technically on jurisdictional grounds. They
16 said, if you're going to bring that kind of
17 lawsuit about what is the extent of the
18 facility, you must do it in the Washington, D.C.
19 Circuit Court of Appeals, not in the 9th
20 Circuit.
21 They also went on -- at least
22 as I read that decision -- and they said, but --
23 if we were making the decision, we would say you
24 were wrong, mining company. The mining company
25 about two weeks ago filed a document with the

273

1 district court in Idaho saying they were not
2 going to proceed in the D.C. Circuit or any more
3 before the 9th Circuit.
4 The status of that then is, as
5 the Tribe understands it, is that the limitation
6 imposed by the district court that the facility
7 was only the Box was invalid. The facility is
8 wherever the hazardous substances have come to be
9 located.
10 Now, during that appeal process,
11 the EPA decided to take two alternative
12 approaches. They would appeal, but they would
13 also do what the district judge said they could
14 do, and that is begin an alternative listing
15 process. If, in fact, the facility was only the
16 hole of the donut, they would then list the rest
17 of the donut.
18 Once the 9th Circuit decision
19 came out, that alternative process seemed to be
20 unnecessary, and at least the copies of the
21 letters that I have seen go back and forth
22 between you, Senator, and the others members of
23 this Congressional delegation, in the last year,
24 were primarily dealing with that alternative
25 approach. Maybe they could have been better

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274

1 worded, and there were certainly some letters
2 earlier on that would give indication the EPA
3 thought that the facilities were in the box, and
4 then there were a lot of letters that in this
5 respect could have been written differently.
6 The good news of all of this is
7 that the facility is not 1,500 square miles; the
8 facility is not the City of Coeur d'Alene,
9 because there are no hazardous substances.
10 There's no mine tailings in the City of Coeur
11 d'Alene. There's no mine tailings on the vast
12 majority of that 1,500 square miles. The
13 facility is only where the hazardous substances
14 have come to be located, and that is in the
15 flood plain and the few tailings piles up on the
16 side of the hills and the creeks coming down.
17 It's probably only 20 or 30 square miles for the
18 whole Basin.
19 The other piece of good news is
20 that the -- what that does is make available,
21 without any other listings that could catch
22 headlines, all of the monies that are available
23 within Superfund to be brought to bear to clean
24 up the hot spots, if you will, or the trail of
25 tailings, or the points of pollution, or whatever

275

1 you want to call them, all of these places where
2 the tailings have come and are posing a health
3 threat and threat to the environment. So all of
4 the EPA's money is now available to implement
5 the State's plan as it may evolve through the
6 EPA process, without any further listings and
7 without any additional problems for the
8 community.
9 It's just the way it ought to
10 be. The facility is the area that's polluted,
11 and the money is available to clean up that
12 polluted area. We don't have to worry about any
13 other areas, people's homes or businesses.
14 INVESTIGATOR KAUFMAN: Does
15 regional counsel agree with counsel for the Tribe
16 on what he said?
17 MR. KOWALSKI: I don't know the
18 specific extent of the contamination, Mr.
19 Kaufman. That's why we are proceeding in doing
20 our RI/FS. The purpose of that investigation is
21 to determine where the contamination has come to
22 be located. I do agree with Mr. Givens in
23 terms of the site consists only of those areas
24 where hazardous substances have come to be
25 located.

276

1 INVESTIGATOR KAUFMAN: The areas
2 that he described?
3 MR. KOWALSKI: I'm not
4 specifically familiar with the results of the
5 RI/FS.
6 INVESTIGATOR KAUFMAN: In other
7 words, EPA at this time, Region 10, does not
8 know the extent. And so some of the statements
9 he said you agree with, but other statements you
10 don't have an answer for yet until you have
11 completed the RI/FS; is that what you're saying?
12 MR. KOWALSKI: That's what I am
13 saying, yes.
14 INVESTIGATOR KAUFMAN:
15 Councilman.
16 COUNCILMAN MATHESON: I think
17 Mr. Givens answered the other question I was
18 going to ask anyway.
19 Thank you.
20 INVESTIGATOR KAUFMAN: Ombudsman
21 Martin.
22 OMBUDSMAN MARTIN: So assuming
23 arguendo that your interpretation of the opinion
24 is correct, the reach of the site may only
25 extend to a 30 to 40 square mile area as

277

1 opposed to the entire 1,500 square mile area?
2 MR. GIVENS: Yes.
3 OMBUDSMAN MARTIN: And that
4 decision of the 9th Circuit did not reach the
5 issue of whether the site was listed, but did
6 reach the issue of whether it could be
7 considered, or do you feel it is both?
8 MR. GIVENS: Technically, all
9 the 9th Circuit said is it just did not have
10 jurisdiction to determine that issue at all.
11 OMBUDSMAN MARTIN: So it did
12 not reach the merits of the issue?
13 MR. GIVENS: That's correct.
14 We now know that the merits of that issue will
15 not be reached in this litigation, because we
16 have been so informed by the district court.
17 OMBUDSMAN MARTIN: Thank you.
18 INVESTIGATOR KAUFMAN: Senator
19 Crapo. We want to get as much information out
20 as possible, so go ahead.
21 SENATOR CRAPO: I would like to
22 ask a clarification, Mr. Givens. Any of you may
23 respond, if you feel you have the answer here.
24 Again, without accepting the
25 validity of the interpretation that has been put

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278

1 forth here with the statements that have been
2 put forth, assuming that what has been described
3 is accurate, then it is the EPA's position that
4 there is an NPL listing for everything where
5 there is now pollution located, contaminants
6 located, from the original box; is that accurate?
7 MR. KOWALSKI: That's correct.
8 SENATOR CRAPO: It has also
9 been evident, from the discussion that has just
10 taken place, that Mr. Givens has an opinion
11 about where that is, in general. I understand
12 the EPA is conducting an RI/FS to try to make a
13 specific determination of where that is, but
14 until somebody with authority does something to
15 make some kind of designation, how do people
16 know where the site is?
17 My point being this: The site
18 could be not 1,500 square miles, it could be
19 15,000 square miles, if you want to assume that
20 some dust got in the rain, the rain went over
21 the United States and then dropped. I realize
22 that's an outrageous example, but my point is,
23 outrageous positions have been taken in the past.
24 Someone could take the position that wherever it
25 rained from a location where something in the

279

1 site could have gotten into the air and into the
2 clouds, it could then extend the Superfund site.
3 I think you would probably agree that is not an
4 unreasonable position.
5 My point is that somewhere in
6 this process there has to be an ability to say,
7 what is it, where is this site, if the position
8 you take is the one that ultimately is legally
9 justified. Is the EPA taking the position that
10 that determination has been made, or is the EPA
11 simply taking the position that it has the right
12 to make that determination, and at some point
13 announce it unchallenged to the rest of the
14 world?
15 MR. DIAZ: My name is Cliff
16 Diaz, Senator. I am an attorney for the U.S.
17 EPA, Region 10. Our purpose for the RI/FS is
18 not only to determine where hazardous substances
19 have come to be located, but also to determine
20 where those hazardous substances pose a risk
21 either to human health or to the environment.
22 We would not propose to take
23 any action anywhere there is contamination if
24 that contamination would not pose a risk. So we
25 need the results of the RI/FS to determine not

280

1 only where those contaminants have come to be
2 located, but --
3 SENATOR CRAPO: But where they
4 also pose a risk.
5 MR. DIAZ: Exactly.
6 SENATOR CRAPO: Which I think
7 is a much better standard for the EPA to be
8 looking at.
9 MR. DIAZ: Absolutely. That is
10 why we are going through the RI/FS process in
11 conjuction with the State of Idaho presently.
12 SENATOR CRAPO: All right. So
13 then to clarify my question, is the EPA's
14 position, then, that given its interpretation of
15 the 9th Circuit court case and what has
16 transpired today, that it has the legal right to
17 conclude the RI/FS process and identify where
18 contamination has become located and is still a
19 risk, and then proceed to clarify that that is
20 part of the original NPL listing?
21 MR. DIAZ: There is no
22 intention at this point of drawing any lines on
23 a map to designate any further Superfund area.
24 What we need to do is designate the areas that
25 require cleanup.

281

1 SENATOR CRAPO: I understand
2 that. The question of what is the designated
3 Superfund site is a very serious question, as
4 you can see from the testimony that has been
5 presented here, because of the impact of simply
6 the designation. That's why I think it's very
7 important for us to clarify that a designation
8 doesn't yet exist until the EPA does something
9 to create it.
10 MR. DIAZ: It may also be
11 important to clarify the legal significance of
12 designation. All it means for the EPA is that
13 we can access funding for the Superfund. We
14 understand that there are other concerns about
15 that. Certainly, controversy over the Superfund
16 designation is a real concern that we need to
17 address. We need to address it by working with
18 the communities, providing information such as
19 the forum today, to say, what does the Superfund
20 designation really mean. It doesn't mean you
21 can't sell your house.
22 There are a lot of things we
23 need to work through one-on-one or in small
24 groups, where we could try to explain some of
25 the concerns about the Superfund.

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282

1 SENATOR CRAPO: Well, I think
2 you're right. I think the approach that you and
3 I have just been addressing is one which
4 alleviates a significant amount of concern and a
5 significant amount of economic upheaval. If we
6 were to make it clear to the public and to the
7 world that the EPA is not trying to designate
8 1,500 or 15,000 square miles, or even just lots
9 of major areas; but what instead, if I
10 understand you correctly to be saying in the
11 gist of this conversation, is that you are
12 trying to identify hot spots or areas where
13 there is contamination that is causing a risk
14 that needs to be addressed.
15 We could still debate over
16 whether or not that is going to be in the NPL
17 listing, but at least if we clarify those
18 limited things we have talked about, I think we
19 can solve a lot of problems.
20 MR. DIAZ: I believe we agree.
21 SENATOR CRAPO: All right.
22 Thank you.
23 INVESTIGATOR KAUFMAN: The issue
24 was raised that we had counsel for EPA and
25 counsel for the Tribe. I don't know if there

283

1 is a counsel here for the mining companies. I
2 see mining company representatives in the back.
3 I don't think, ma'am, you are
4 an attorney, but if you wanted to make a comment
5 or if you would like to have your attorneys
6 provide any and/or all information responding to
7 any of the issues raised, that will be made part
8 of the record, whatever you feel like.
9 MS. HOUSTON: I would like to
10 at least respond on the record now, and then I
11 can have the attorneys provide supplemental
12 information.
13 INVESTIGATOR KAUFMAN: Come on
14 up. If you could identify yourself.
15 MS. HOUSTON: Not that I want
16 to waste anyone else's time.
17 INVESTIGATOR KAUFMAN: This is
18 not wasted time. It's very important to build a
19 very good record, because we're trying to get to
20 the truth.
21 MS. HOUSTON: Well, the two
22 parties that have been talking have a
23 multi-billion dollar lawsuit—
24 OMBUDSMAN MARTIN: Could you
25 identify yourself for the record.

284

1 MS. HOUSTON: Hollice Houston
2 from the Basin Mining Information Office. I
3 represent Hecla, ASARCO and Sunshine Mining &
4 Refining Company.
5 I think the first thing is,
6 unequivocally, the mining company attorneys agree
7 unanimously that the size of the Box is 21
8 square miles, that we had been told by the EPA
9 that it will remain 21 square miles. When we
10 made a decision to deal with the EPA in the
11 Box, in the 21 square miles, when we decided to
12 do the yard work and we made the record
13 decision, we were told prior to that agreement,
14 before everything was signed, that they would not
15 be expanding the Box, that there would be other
16 remedies in the Box.
17 I can tell you that Dana
18 Rasmussen was the head of Region 10 at the time.
19 And in the 1991 letter she said, "Let the state
20 unequivocally that it is not EPA's intention to
21 expand the boundary of the site. We recognize
22 there are many other regulatory tools besides
23 Superfund legislation to effect environmental
24 improvements." As far as we know, that's what
25 it has been since.

285

1 INVESTIGATOR KAUFMAN: Can we
2 put that letter in?
3 MS. HOUSTON: I will get you a
4 copy. There is only one.
5 MR. KAUFMAN: Great. Thank
6 you, ma'am.
7 MS. HOUSTON: Also, I really
8 wanted to say, though I'm not an attorney, but
9 as far as we are concerned with the 9th Circuit
10 ruling, the 9th Circuit's return of its decision,
11 we had a federal judge that ruled with us. The
12 9th Circuit did not rule against us. The 9th
13 Circuit remanded it to another court. As far as
14 we're concerned, we still have it as a 21 square
15 mile basin. That's the Superfund.
16 INVESTIGATOR KAUFMAN: So, in
17 other words, the 9th Circuit, the original appeal
18 was brought by the EPA, right?
19 MS. HOUSTON: Right.
20 INVESTIGATOR KAUFMAN: I need
21 some help here, because I am not an attorney.
22 The 9th Circuit, according to the mining
23 companies' interpretation, said, we're not the
24 right court to hear this appeal?
25 MS. HOUSTON: That's right.

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286

1 INVESTIGATOR KAUFMAN: The court
2 in Washington, D.C. is the correct court to hear
3 the appeal?
4 MS. HOUSTON: That was the 9th
5 Circuit's opinion. That was not the opinion of
6 the mining companies.
7 INVESTIGATOR KAUFMAN: That's
8 the opinion the mining companies have of the 9th
9 Circuit decision.
10 MS. HOUSTON: That's right.
11 INVESTIGATOR KAUFMAN: So since
12 the person who appealed the district court
13 decision was the EPA -- help me here -- did EPA
14 go to the D.C. court and log their appeal?
15 MR. DIAZ: The answer is no.
16 The decision of the district court was appealed
17 by the Department of Justice on behalf of the
18 EPA.
19 INVESTIGATOR KAUFMAN: So the
20 Department of Justice went to the D.C. court and
21 appealed the district court decision?
22 MR. DIAZ: No.
23 INVESTIGATOR KAUFMAN: Help me,
24 I'm not a lawyer. You have just said it was
25 vacated. So there was nothing to appeal after

287

1 it was vacated?
2 MR. DIAZ: There was nothing
3 for the United States to appeal. The 9th
4 Circuit recognized that if anyone would like to
5 challenge the NPL listing, the proper forum for
6 challenging an NPL listing, which is in the form
7 of an administrative rule, can only be conducted
8 in the D.C. Circuit Court of Appeals.
9 The EPA would have no interest
10 in challenging its own rule; therefore, if anyone
11 else would like to challenge that rule, they
12 would have to do so before the D.C. circuit.
13 OMBUDSMAN MARTIN: So that
14 decision was probably jurisdictional in nature.
15 MR. DIAZ: The conclusion, I
16 believe, was jurisdictional.
17 SENATOR CRAPO: Let me add one
18 further clarification. The district court
19 granted what was a victory to the mining
20 company. The federal government appealed the
21 decision. The 9th Circuit vacated the district
22 court's grant of summary judgment and sent the
23 issue back to the district court, saying that it
24 didn't -- the issue had to be appealed again, I
25 guess, or reviewed again at the District of

288

1 Columbia Circuit Court level.
2 Neither side has chosen to move
3 in that direction. At this point, the litigation
4 is prepared to proceed at the district court
5 level as though the granting of summary judgment
6 had not been entered.
7 INVESTIGATOR KAUFMAN: I got it.
8 MR. GIVENS: I understood where
9 you were going, Mr. Kaufman. What the 9th
10 Circuit said is the district court did not have
11 jurisdiction.
12 INVESTIGATOR KAUFMAN: Right. I
13 got you.
14 MR. GIVENS: In effect,
15 challenge the EPA, overturn the EPA's
16 interpretation of the facility. Only the D.C.
17 Circuit did. So that took down the district
18 court's decision and left as the existing law,
19 EPA's interpretation of what is the facility.
20 INVESTIGATOR KAUFMAN: One of
21 the advantages of being a nonattorney is, I ask
22 very simple, basic questions that kind of help
23 all of the rest of the audience understand
24 better, because you lawyers use terms like de
25 novo. I try to use them and I get tongue-tied.

289

1 I hope, if nothing else, this colloquy that
2 we've all had on this legal issue has at least
3 helped the audience and whoever is going to be
4 reading this transcript, which will probably be
5 the Attorney General of the United States,
6 understand a little bit better.
7 If none of you have any further
8 statements or clarifications, I do look forward
9 to having your attorney for the mining companies,
10 if she so chooses, put something on the record
11 on some of the issues or all of the issues
12 raised here.
13 I thank everybody, and apologize
14 to this panel for taking this time, but the EPA
15 Regional Counsel did want to open this up for
16 clarification. I don't know whether we got
17 things clarified or not, but we will find out
18 when we read the transcript.
19 Thank you so much.
20 Okay. Let's get to the next
21 panel. I guess we are, then, going to go from
22 left to right or ladies first. We have Laura
23 Skaer, Northwest Mining Association.
24 TESTIMONY OF LAURA SKAER
25 MS. SKAER: Mr. Kaufman, Mr.

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[Video played.]

Mr. BOWERS. That is the end of the video.

Mrs. CHENOWETH-HAGE. Mr. Chairman, I see my time is up.

Mr. BILIRAKIS. I thank the gentlelady.

Well, I think our time is up, and we will excuse the panel.

I will just say Ms. DeGette is the only one of the members of the subcommittee left, but if she could have experienced—and she probably has, maybe even more so at Shattuck—what we have been going through down there regarding the premature decision-making without full and adequate research, I think we would all be pretty shocked and aghast at the overall picture.

Ms. DEGETTE. If the gentleman would yield, that was the part of the problem that we saw in Shattuck, was apparently in the late 1980's, early 1990's, under the Reagan/Bush, or at least the Bush administration, EPA, the initial record of decision was apparently made in back rooms between the Region 8 EPA administrator, Shattuck and heavens knows who else.

So, you know, one of the great things that we have really cherished in Denver is the community activists who just wouldn't take no for an answer ever and also the active involvement of the Ombudsman who really helped all of us who were working on it. So thank you for your leadership on this, and good luck to all your folks in Florida.

Mr. BILIRAKIS. And good luck to all your folks in Denver, and hopefully we can work together when it comes to reauthorization.

Mrs. CHENOWETH-HAGE. Mr. Chairman, before you bring the gavel down, I would just have one point that I would like to clarify that was brought up. That is the Asarco suit. That case was almost remanded—almost all of it was remanded back. So there are many, many other issues involved in the Superfund site in northern Idaho, and it will be in ongoing litigation. Thank you, Mr. Chairman.

Mr. BILIRAKIS. Thank you.

Mr. Bowers and ladies, Ms. Boggiatto and Ms. Mosley, thank you so very much for taking time away from your families—Ms. Mosley brought her family with her—and your jobs to come here. Some of you have traveled quite a distance, and we appreciate it very much.

Again, get that information to us and anything else that you feel you haven't already communicated here today which you feel might be significant in what we are going to do.

This hearing is adjourned.

[Whereupon, at 12:50 p.m., the subcommittees were adjourned.]

[Additional material submitted for the record follows:]

[EPA did not respond to questions 2, 3, 6, and 9 of letter sent by Chairman Bilirakis and Chairman Oxley.]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB - 5 2001

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

Honorable Paul Gillmor
Chairman
Subcommittee on Environment and Hazardous Materials
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Gillmor:

Enclosed are the Environmental Protection Agency's responses to a number of questions former Chairman Oxley submitted to us on December 6, 2000, as a result of testimony given by former Assistant Administrator Timothy Fields, Jr., at a hearing held on October 3, 2000 concerning "the Role of the Environmental Protection Agency (EPA) Ombudsman in Addressing Local Concerns." We will continue to work diligently to complete the remaining responses in a timely fashion.

If you have any questions regarding this response, please do not hesitate to contact me or Caroline Previ of my staff at (202)260-4610.

Sincerely,

Michael H. Shapiro
Acting Assistant Administrator

Enclosure

cc: Honorable Michael Oxley

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Question 1: Residents around the Stauffer Chemical plant site in Tarpon Springs, Florida, have been concerned that EPA has advanced a decision concerning remediation of the site without conducting critical hydro-geological studies. EPA claimed these studies have always been planned as part of the design phase of the remedy for the Stauffer site. Is it standard procedure for EPA to first pick a remedy and then conduct the necessary scientific studies? If not, what particular conditions at the Stauffer site warranted the above-mentioned process?

Answer: The EPA regulation governing the Superfund program, the National Oil and Hazardous Substances Pollution Contingency Plan (40 CFR Part 300), describes our approach to site assessment and remedy selection:

> "In managing CERCLA sites, EPA must balance the goal of definitively characterizing site risks and analyzing alternative remedial approaches for addressing those threats in great detail, and the desire to implement protective measures quickly. EPA intends to balance these goals with a bias for initiating response actions necessary or appropriate to eliminate, reduce, or control hazards posed by a site, as early as possible. EPA will promote the responsiveness and efficiency of the superfund program by encouraging action prior to or concurrent with conduct of an RI/FS *as information is sufficient to support remedy selection."* (Emphasis added)

EPA collects data in a phased approach, collecting the information we need to support the decision at hand. Specifically, EPA conducts the key scientific investigations required to select a remedy, then identifies and gathers such additional data as may be necessary to refine the remedy. This approach allows EPA to identify and immediately address the greatest risks posed by contaminated sites without delaying implementation of the cleanup remedy.

The Stauffer Chemical Plant site in Tarpon Springs, Florida, contains unknown amounts of buried air reactive materials (materials which might catch fire upon exposure to air) and shock sensitive (explosive) materials. During the remedial investigation of the site, under EPA's direction, Stauffer conducted numerous tests of area groundwater quality, depth, and flow direction necessary for implementation of the containment remedy. Subsequently, EPA identified containment, rather than excavation, as the most appropriate long-term solution to protect human health and the environment, and determined that further on-site and off-site study to further characterize site conditions could proceed concurrently with the remedial design.

Because of community concerns regarding the containment remedy, EPA withdrew the Consent Decree for Remedial Design and Remedial Action prior to its entry by the federal district court. Instead, EPA signed an enforceable agreement with the responsible parties to conduct additional studies at the site to further characterize site geology and groundwater flow to ensure long-term protectiveness of human health and the environment over the life of the remedy. These studies are ongoing and are expected to be completed by early 2002.

Question 4: During the hearing, it was indicated that Mr. Bob Martin did not provide testimony to the Subcommittees in accordance with the instructions put forth in his letter of invitation since he was informed by the Office of Congressional Affairs that his testimony or joint testimony would be prepared for him. This discussion occurred on September 22nd. Prior to this discussion, during this discussion, or at any point after this discussion, did you or any other employee of EPA tell or indicate in any manner to Mr. Martin that he was not allowed to provide a separate written statement and testimony to the Subcommittee?

Answer: It is common Agency practice to prepare joint congressional testimony for multiple EPA witnesses appearing together. Joint testimony is not intended to prevent witnesses from testifying, rather it is more efficient and a better use of Agency staff resources to prepare one written statement that addresses hearing issues than prepare duplicative testimony. This common practice was described in detail to Mr. Martin more than a week before the hearing. I am not aware of any instance where Mr. Martin was prevented from providing testimony to the committee.

Question 5: Is Mr. Bob Martin considered to be a employee of the Office of Solid Waste and Remmediation(sic) who is subject to your authority as Assistant Administrator of that office? Assuming adequate grounds, could you fire Mr. Martin? Can you determine or recommend the budget level for Mr. Martin's office?

Answer: Mr. Bob Martin is a career employee of the Office of Solid Waste and Emergency response and, as such, is subject to the same requirements as other career civil servants. Hired as a non-supervisory environmental protection specialist in 1992, Mr. Martin, who remains in this same title, series, and grade, is subject to the requirements of federal and Agency conduct and discipline policies as well as to the Agency performance management system requirements, detailed in each employee's performance standards. As reflected on his official position description cover sheet, Mr. Martin has, since the inception of his employment, been designated as a management official, as defined by Title VII of the Civil Service Reform Act. Management officials actively participate in shaping and interpreting the organization's policies, but are not supervisors of Federal employees.

As with any employee in my organization, I am responsible for taking appropriate corrective action when an employee's misconduct, delinquency, carelessness, or negligence are such that a separation from the service must be effected in order to promote the efficiency of the government. Likewise, as his supervisor, I am responsible for correcting any performance deficiencies.

In response to your question concerning the level of my involvement in determining the budget level for Mr. Martin's office, the fiscal year (FY) 2001 budget for this function was developed as part of our standard process for allocating resources across the Office of Solid Waste and Emergency Response. As a starting point, my staff looked at the actual expenditures

for this function in FY2000 and met with Mr. Martin and staff to explain the numbers and to give him an opportunity to identify other needs. In FY2000, direct funding for the OSWER National Ombudsman function, in Headquarters, was $500,000 (primarily staff salary, grantees, travel and hearing expenses). For FY2001, OSWER has budgeted more than $900,000 to directly support the ombudsman function. This represents a significant, almost two-fold, increase over allowances allocated for National Ombudsman investigations in previous years. The budget increase provides funding for an additional full-time staff person, two additional interns, a consultant, and more travel.

I would like to point out that historically, in all cases when the need has arisen, additional funds have been provided to the ombudsman function. In addition, the Ombudsman, depending on the site and issues under review, has accessed the technical expertise of EPA's professional staff resources, such as the Office of Emergency and Remedial Response, to supplement his investigative efforts. Because these needs vary from year to year, it is difficult to predict the nature and amount of these supplemental needs. In addition to the OSWER National Ombudsman, there is a strong Regional Ombudsman network, with a counterpart in each of the ten EPA Regional Offices. This network is available and fully funded.

Question 7: Congress originally provided that the Office of the Ombudsman report to the Administrator of EPA. Do you think the Office should retain this original statutory mandate? If not, why?

Answer: The Resource Conservation and Recovery Act (RCRA) did not/does not statutorily mandate that the Office of the Ombudsman report directly to the Administrator of EPA. The RCRA statute simply states "The Administrator shall establish an Office of Ombudsman, to be directed by an Ombudsman." Further, the House Committee on Energy and Commerce report (Rept. 98-198, May 17, 1983) which accompanied H.R. 2867, reiterates that "The Committee ... has adopted a provision establishing, within the Agency, the Office of Ombudsman." Because Congress did not specify/direct where the Ombudsman Office should be located within the Agency, we believe Congress felt it was best left to the Administrator's discretion.

Question 8: You state that many people don't know how to get information on solid and hazardous waste programs or are frustrated by program complexities. Why have EPA personnel failed to provide easy access to this information? How many employees work in providing information to the public on solid and hazardous waste sites on a full-time, permanent basis?

Answer: Former Assistant Administrator Timothy Fields, Jr.'s statements in his written testimony that members of the public and regulated community may either not know how to get information or may feel frustrated in their attempts to cope with the complexities of these programs were made in an effort to explain one of the numerous capacities the Ombudsman may be called upon to serve in by the public. This statement was made to convey that during the

initial years of the Ombudsman program, most of the assistance sought by the public was for help understanding the complexities of the relatively new hazardous waste cleanup programs. Over time, the Agency has worked hard to develop and put in place mechanisms to help the public and the regulated community understand these programs. As such, the function of Ombudsman has evolved and now is focused primarily on other activities.

The Office of Solid Waste and Emergency Response continues to work to provide interested parties with easy access to information. We maintain the EPA RCRA, Superfund & EPCRA Hotline which is a publicly accessible service that provides up-to-date information on several EPA programs. The Hotline responds to questions on the Resource Conservation and Recovery Act (RCRA) which includes the Underground Storage Tank (UST) program; the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund); the Oil Pollution Act (OPA); the Emergency Planning and Community Right-to-Know Act (EPCRA); and the accidental release prevention provisions of the Clean Air Act (CAA). The Hotline offers information to a broad audience including consultants, manufacturers, members of trade associations and environmental organizations, lawyers, health professionals, state and local government representatives, citizens, and other callers with diverse backgrounds and varying degrees of regulatory knowledge. The Hotline's automated message system supplies information on hot regulatory topics and directs each caller to the appropriate Hotline program area. Last fiscal year the Hotline received over 85,000 calls.

Callers can speak to a Hotline staff member who specializes in the RCRA/UST or the EPCRA/Superfund/OPA/CAA112(r) regulations. The Hotline's team of Information Specialists relies on federal regulations and various forms of EPA guidance to provide quick, accurate responses to questions on these regulatory programs. Hotline employees do not answer questions which require interpretation of EPA regulations or policies, demand legal analysis, involve unresolved issues, or pertain to state-specific requirements. Such questions are referred to the appropriate EPA office, federal or state agency, or other source. In addition, every month the Hotline compiles frequently asked regulatory questions for which EPA has provided answers and prepares them in a question and answer format. These questions and answers are then published in the Monthly Hotline Report. Reports also contain summaries of Federal Registers and publications. Parties interested in ordering EPA publications pertaining to any of the Hotline's program areas can speak to a Document Specialist.

EPA has done much to promote electronic accessibility to information. EPA makes a wide variety of resources available via the Internet through the Office of Solid Waste and Emergency Response Home Page. On the home page one can find the RCRA, Superfund & EPCRA Hotline Guide to Electronic Resources, which provides information on EPA's public-access Internet servers, bulletin board systems, and electronic mailing lists. The Guide also provides instructions for subscribing to the Hotline to receive automatic updates on regulations and program information. EPA also maintain the RCRA Online database which enable users to locate documents that cover a wide range of RCRA issues and topics.

Many times, for people living near Superfund sites to be well-informed and involved in decisions concerning sites in their communities, direct personal contact with an EPA staff members works best. Through years of implementation of the program, EPA has determined that early and meaningful community involvement in the cleanup decisions is important in order to have a successful Superfund site cleanup. On-Scene Coordinators, Remedial Project Managers and Community Involvement Coordinators work with community members to ensure they understand what Superfund activities being conducted at a site and how the community can participate in the process. Each year, EPA staff members conduct hundreds of public meetings and door-to-door visits, and distribute thousands of fact sheets to communities. Many times EPA establishes a satellite office near a Superfund site to ensure community members have easy access to Regional staff. Some Superfund sites have non-English speaking populations surrounding them. In these cases, EPA translates public information documents into the languages of the people living near the site and provides interpreters at public meetings.

EPA also provides communities with independent technical assistance so that they are better able to meaningfully participate in cleanup decisions. The Technical Assistance Grant (TAG) program and the Technical Outreach Services for Communities (TOSC) program are two examples of this effort.

Question 15: If the Office of Ombudsman decides to schedule a public meeting, is the Ombudsman required to get clearance within the Agency? If so, from whom?

Answer: Currently the Ombudsman is not required to get clearance within the Agency if he decides to schedule a public meeting. Subsequent to the October 3, 2000 hearing, the Agency made available for public comment the draft "Guidance for the National Hazardous Waste Ombudsman and Regional Superfund Ombudsmen Program." In this draft guidance the Agency is taking the approach that the Ombudsmen are generally precluded from investigating an issue or dispute which is in litigation, i.e., pending before a court unless concurrence is first obtained from the Assistant or Deputy Assistant Administrator for the Office of Solid Waste and Emergency Response or the appropriate Regional or Deputy Regional Administrator. The presumption is that Ombudsmen should not take action on an issue or dispute which is in litigation since that issue is in the hands of an independent tribunal for decision, as provided for by the relevant statute. In addition, the public has access to that tribunal to raise serious concerns. This approach also avoids creating the false impression that the Ombudsman's office is an alternative forum for arguing controversial issues, which would result in confusion, inefficiency, and potentially conflicting statements about the Agency's position.

It should be noted that this presumption against investigations would apply to an "issue or dispute" that is before a court for consideration. Thus, the fact that a site or facility is in litigation does not necessarily mean that the Ombudsman should refrain from conducting an investigation of all issues arising at that site or facility. For instance, if the issue before a court is the authority of the Agency to get access to a piece of property, that would not create a presumption against an investigation of alleged deficiencies regarding remedy selection.

I want to make it clear that the guidance is a draft, and until finalized, does not affect the current Ombudsman program. In addition, I assure you that we have no intention of making the guidance effective while it is out for public comment.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

February 12, 2001

TO: Michael Shapiro
Acting Assistant Administrator, OSWER

FROM: Robert J. Martin RJM
National Superfund and Hazardous Waste Ombudsman

SUBJECT: National Ombudsman's Response to House Commerce Committee Questions

I am writing in connection with your Office's request for me to respond to questions from Members of the Subcommittee on Finance and Hazardous Materials and the Subcommittee on Health and the Environment following the October 3, 2000 hearing. The following are the factually accurate answers to the questions you assigned to me (attachment 1):

10. *The relevant statute which created the Office of the Ombudsman has expired. Since the expiration of the statute, what changes, if any, have been made with respect to the procedures under which the Office of the Ombudsman operates? For example, the statute (42 U.S.C. 6917) directs the Ombudsman to make recommendations directly to the EPA Administrator. Can the Ombudsman still make any report or recommendations directly to the Administrator? If not, please describe what clearances the Ombudsman would have to obtain before making any recommendation or report to the Administrator.*

Answer: One (1) week after my receipt of a subpoena to testify before a Federal Criminal Grand Jury related to the Times Beach, Missouri Ombudsman case in September 1997, the Office of Ombudsman was abolished by Acting Assistant Administrator Tim Fields (Attachment 2). In February of 1998, Acting Assistant Administrator Fields signed a policy directive for my activities that severely constricted my Ombudsman procedures, which were in place over several years (attachment 3).

On January 3, 2001, the EPA Management published the proposed Guidelines for the National Ombudsman and the Regional Ombudsman in the Federal Register which would further constrict my functioning as a real Ombudsman at EPA (Attachment 4).

11. *When was the last time the Ombudsman met with the Administrator of EPA? What was the complaint, issue, or grievance that was discussed.*

Answer: Never.

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12. *When was the last time the Ombudsman made any report or recommendation directly to the Administrator of EPA? What was the content or subject matter of this report or recommendation?*

Answer: Never.

13. *Please indicate how many public complaints, grievances, and concerns have been received by the Office of the Ombudsman over the last five years. Please indicate whether these concerns, complaints, or grievances show any pattern or commonalities.*

Answer: The Ombudsman has received approximately 15,000 complaints, grievances and concerns in the past five (5) years. These complaints, grievances and concerns show a pattern that (1) EPA doesn't listen, (2) EPA shows no compassion, (3) EPA is not thorough, (4) EPA is less than forthright in dealing with the public and private sectors.

14. *Please describe the principal functions of the Office of Ombudsman as it functions today. We understand from reading your testimony that the main functions of the Office of the Ombudsman are to receive concerns, gather information, and investigate and mediate disputes. Please provide us with more specific information in this regard, including:*

a. Is there any hotline set up for people to call at EPA or within the Office of the Ombudsman. If a hotline operates outside of the Office of the Ombudsman, how and on what basis are calls or inquires referred to the Office?

Answer: The toll free hotline number for the Ombudsman is 1-800-262-7937. There are separate hotlines which are operated under the control of EPA Management and EPA management shares complaints with the Ombudsman at their discretion. The principal EPA management official responsible for the Superfund hotlines is the Superfund Director (OERR), Mr Steve Luftig.

b. When the Ombudsman receives a concern, complaint, or grievance, how does the Office and your Office decide how it will be handled, e.g., whether to investigate the concern, complaint, or grievance further, or whether to dismiss or mediate the dispute, or to otherwise seek resolution among the parties.

Answer: Please see attachment 3 [Memo dated February 27, 1998 describing the present policy outlined by (then) Acting Assistant Administrator Fields].

15. *If the Office of Ombudsman decides to schedule a public meeting, is the Ombudsman required to get clearance within the Agency? If so, from whom?*

Answer: The Ombudsman must get clearance from the Assistant Administrator of the Office of Solid Waste and Emergency Response (OSWER) and/or the Deputy Assistant Administrator of the OSWER. Specifically, travel must be approved and the Assistant Administrator and/or the Deputy Assistant Administrator must contract

for a room, court reporter, publicity for the event, etc., since I have no management authority to supervise resources.

16. *Do you believe the Ombudsman statute should be re-authorized? If yes, how would you change (improve upon, expand, reduce) your current job description?*

Answer: Yes, the Hazardous Waste and Superfund Ombudsman Office should be reconstituted and reauthorized consistent with H.R.3656 for a period of ten (10) years. Moreover, the legislation to reauthorize the Office of Ombudsman should include, at a minimum:

* Re-establishment of the Office of Ombudsman;
* Allocation of resources under the control of the Office and as defined by the Office, to implement the function;
* Authorization to perform duties consistent with the IRS Ombudsman function, already established by Congress.

Attachment 1–OSWER Request to Ombudsman to Answer selected Questions from Committee on Energy and Commerce.
Attachment 2–Document dissolving the Office of Ombudsman and Martin's Response.
Attachment 3–Present Policy Enacted by Acting Assistant Administrator Fields, February 28, 1998.
Attachment 4–*Canton Repository,* February 11, 2001, "New Guidelines for Ombudsman Crucial for IEL."

cc: Administrator Christine Todd Whitman
Acting Deputy Assistant Administrator Steve Luftig, OSWER
Acting Deputy Assistant Administrator Devereaux Barnes, OSWER
Special Assistant Caroline Previ
Congressional Affairs
✓ US House Energy and Commerce Committee

Attachment 1

January 12, 2001

Note

From: Caroline Prev Caroline

To: Bob Martin

In mid-December, I provided your staff with a copy of the letter from Congressman Oxley transmitting the follow-up questions from the October 3,2000 House Hearing (attached). I'm now starting to draft responses to the questions. There are several questions that only you and your staff can answer, specifically, questions 10, 11, 12,13, and 14. Of course, your input on the other questions would be greatly appreciated. We need to get our response over to the Hill as soon as possible. Please let me know ASAP, how soon you can provide me your draft responses.

Attachment

cc: Tim Fields
Mike Shapiro
Spencer Haynes

ONE HUNDRED SIXTH CONGRESS

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JAMES E. DERDERIAN, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

December 6, 2000

Assistant Administrator Timothy Fields, Jr.
Office of Solid Waste and Emergency Response
United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Assistant Administrator Fields:

On October 3, 2000, you testified before the Health and Environment Subcommittee and the Subcommittee on Finance and Hazardous Materials concerning "the Role of the Environmental Protection Agency (EPA) Ombudsman in Addressing Local Concerns.". As part of our review of this matter, we would request that you provide responses to the following questions by December 22, 2000.

(1) Residents around the Stauffer Chemical plan site in Tarpon Springs, Florida have been concerned that EPA has advanced a decision concerning remmediation of the site without conducting critical hydrogeological studies. EPA claimed these studies have always been planned as part of the design phase of the remedy for the Stauffer site. Is it standard procedure for EPA to first pick a remedy and then conduct the necessary scientific studies? If not, what particular conditions at the Stauffer site warranted the above-mentioned process? OERR

(2) On February 29, 2000, Chairman Bilirakis submitted a request for a list of all Superfund liabilities held by the primary responsible party (PRP) responsible for cleanup of the Stauffer site. As of the date of this letter, a response has not been received. Please provide a response to this request or a specific date by which a response will be received. OSRE

(3) Your statement of October 3, 2000, took credit for changing a failed "mound and cap" remedy at the Shattuck Superfund site. How does the decision with respect to Shattuck affect other sites, such as Stauffer, in which the same remedy has been proposed? In light of the action taken at Shattuck, does EPA plan to comprehensively review all other "mound and cap" remedies? If not, please explain. Please also indicate any applicable criteria or other conditions which affected the decision to change the "mound and cap" remedy at Shattuck. OERR 2

(4) During the hearing, it was indicated that Mr. Bob Martin did not provide testimony to the Subcommittees in accordance with the instructions put forth in his letter of invitation since he was informed by the Office of Congressional Affairs that his testimony or joint testimony would be prepared for him. This discussion occurred on September 23rd. Prior to this discussion, during this discussion, or at any point after this discussion, did you or any other employee of EPA tell or indicate in any manner to Mr. Martin that he was not allowed to provide a separate written statement and testimony to the Subcommittees? Pres! Deity

(5) Is Mr. Bob Martin considered to be an employee of the Office of Solid Waste and Remmediation who is subject to your authority as Assistant Administrator of that office? Assuming adequate grounds, could you fire Mr. Martin? Can you determine or recommend the budget level for Mr. Martin's office? Pres! Pres

(6) Please indicate on what specific matters the EPA Ombudsman is required to obtain prior approval from your office, or from any other office within EPA. Please indicate how any requirements for prior approval of Ombudsman actions are consistent with the intent of the statutory law which initially created the Office of the Ombudsman. Pres

(7) Congress originally provided that the Office of the Ombudsman report to the Administrator of EPA. Do you think the Office should retain this original statutory mandate? If not, why? Pres

(8) You state that many people don't know how to get information on solid and hazardous waste programs or are frustrated by program complexities. Why have EPA personnel failed to provide easy access to this information? How many employees work in providing information to the public on solid and hazardous waste sites on a full-time, permanent basis? How many employees work in the National Ombudsman Office on a full time, permanent basis? Pres

(9) Your statement indicates that the Ombudsman is not to advocate for a particular outcome at a site being investigated or to advocate with regard to a particular complaint, but that the Office should primarily focus on the Agency's procedures and how citizens and other interested parties are treated under those procedures. If, during one of the Ombudsman's investigations, this Office uncovered something seriously wrong – not in procedure, but in substance – does your statement mean that the Ombudsman is powerless to do anything about it? If the Office is not powerless, please describe what actions the Ombudsman Office is allowed to take with respect to a proposed remedy or a specific complaint with respect to a selected remedy. Pres! CGC! IG

(10) The relevant statute which created the Office of the Ombudsman has expired. Since the expiration of the statute, what changes, if any, have been made with respect to the procedures under which the Office of the Ombudsman operates? For example, the statute (42 U.S.C. 6917) directs the Ombudsman to make recommendations directly to the EPA Administrator. Can the Ombudsman still make any report or recommendations directly to Pres! Martin

the Administrator? If not, please describe what clearances the Ombudsman would have to obtain before making any recommendation or report to the Administrator.

(11) When was the last time the Ombudsman met with the Administrator of EPA? What was the complaint, issue or grievance that was discussed?

(12) When was the last time the Ombudsman made any report or recommendation directly to the Administrator of EPA? What was the content or subject matter of this report or recommendation?

(13) Please indicate how many public complaints, grievances, and concerns been received by the Office of the Ombudsman over the last five years. Please indicate whether these concerns, complaints, or grievances show any pattern or commonalities.

(14) Please describe the principal functions of the Office of Ombudsman as it functions today. We understand from reading your testimony that the main functions of the Office of the Ombudsman are to receive concerns, gather information, and investigate and mediate disputes. Please provide us with more specific information in this regard, including:

(a) Is there any hotline set up for people to call at EPA or within the Office of the Ombudsman. If a hotline operates outside of the Office of the Ombudsman, how and on what basis are calls or inquires referred to the Office?

(b) When the Ombudsman receives a concern, complaint, or grievance, how does that Office and your Office decide how it will be handled, e.g., whether to investigate the concern, complaint, or grievance further, or whether to dismiss or mediate the dispute, or to otherwise seek resolution among the parties.

(15) If the Office of Ombudsman decides to schedule a public meeting, is the Ombudsman required to get clearance within the Agency? If so, from whom?

(16) Do you believe the Ombudsman statute should be re-authorized? If yes, how would you change (improve upon, expand, reduce) your current job description?

Thank you for your assistance in this matter. If you have any questions regarding any matter involved in this request, please do not hesitate to contact Mr. Robert Meyers or Mr. Amit Sachdev of Committee staff at (202) 225-2927.

Sincerely,

Michael G. Oxley
Chairman
Subcommittee on Finance
and Hazardous Materials

Michael Bilirakis
Chairman
Subcommittee on Health
and Environment

ATTACHMENT 2

U.S. Environmental Protection Agency
Washington, DC 20460

EPA Performance Agreement, Appraisal and Certification for Supervisors, Managers and Executives

Employee's Name (Last, First, MI): [redacted]

Performance Period: From [redacted] To [redacted]

Title, Pay Plan/Series, Grade, Step: [redacted] Ombudsman for OSWER, EPS, GS-028-15-10

Organization (AA, Ofc, Div,Br): OSWER/OAA/Immediate Office

Section A. Performance Agreement and Midyear Review Certifications

Please sign and date the appropriate block below to certify completion of the events.

	Employee	Supervisor	Approving Official
1. Discussion and/or approval of the performance agreement	Signature: Robert J. Martin	Signature: Michael Shapiro	Signature: Timothy Fields, Jr.
	Date: 9/22/97	Date:	Date: 9/22/97

2. Midyear performance review and career development discussion	Yes	No	
			Was standard for recertification discussed? *(SES members only)*
			Was previous IDP completed? *(Participated in 40 hours of development activities)*
			Has new IDP been Established? (Date_____)
			Comments Attached

Signature - Employee	Date	Signature - Supervisor	Date

Section B. Overall Performance Appraisal and Certification

Summary Performance Rating: (Definitions apply to GM employees only)

- [ ] Outstanding - One-half or more CJE's are rated Outstanding, none lower than Exceeds Expectations.
- [x] Exceeds Expectations - One-half or more CJE's are rated Exceeds Expectations or higher, none lower than Fully Successful.
- [ ] Fully Successful - Majority of CJE's are rated Fully Successful, none lower than Fully Successful.
- [ ] Minimally Satisfactory - One or more CJE's are rated Minimally Satisfactory, none are Unsatisfactory.
- [ ] Unsatisfactory - One or more CJE's are rated Unsatisfactory.

Type of Summary Rating:

- [x] End of annual cycle
- [ ] Employee Reassigned
- [ ] Employee Leaving Agency
- [ ] Other *(Specify)*_____

I. Supervisor: I have appraised this employee's performance and prepared a recommended rating.

Name and Title *(type or print)*	Signature	Date

II. Reviewing Official: (SES and PMRS Only) The recommended rating reflects my assessment of the employee's performance.

Name and Title *(type or print)*	Signature	Date
	Timothy Fields, Jr.	10/31/97

III. Approving Official: (All Employees) I approve the rating of record and related personnel decisions for this employee.

Name and Title *(type or print)*	Signature	Date
	Timothy Fields, Jr.	10/31/97

Privacy Act Statement: Disclosure of your Social Security Number on this form is voluntary. The number is linked with your name in the official personnel records system to ensure unique identification of your records. The Social Security Number will be used solely to ensure accurate entry of your performance rating into the automated record system.

IV. Employee: My Supervisor and I have discussed my performance for this period in relation to my performance standards and measures, and my supervisor has informed me of my rating of record.

Signature	Date	Comments Attached?	Social Security Number
	[illegible]	[ ] Yes [ ] No	[illegible]

EPA Form 3140-32 (9-92)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

January 9, 1998

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

NOTE TO TIMOTHY FIELDS JR.

I just received my copy of my "Performance Agreement, Appraisal and Certification for Supervisor, Managers and Executives" for the period of 10/01/96 through 09/30/97 and noticed that you had changed my job on Line 2 of the Form from "Director of the Ombudsman Office for OSWER" to "Ombudsman for OSWER" (see Attachment I).

We did not discuss any changes in my job in the October 31, 1997, evaluation meeting. On the face of the above referenced document, you made and initialed this change on October 31, 1997.

On October 23, 1997, I provided you a copy of my subpoena to appear before an empaneled Grand Jury of the United States District court for the Eastern District of Missouri (see Attachment II). I gave testimony on November 5, 1997, in which, among other matters relating to the Times Beach Superfund site, I described my job to the Grand Jury. My job has been and continues to be the Director of the Office of Ombudsman, Office of Solid Waste and Emergency Response, United States Environmental Protection Agency (see Attachment III).

I would be grateful if you would have the change which you initialed on October 31, 1997 appropriately corrected, and provide me a copy of the corrected version.

Thank you.

Robert J. Martin

Attachments

cc: Mr. Shapiro

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Attachment 3

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 27 1998

Received 7/5/97
10 PM

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

MEMORANDUM

SUBJECT: Clarification of Responsibilities of Regional Superfund Ombudsmen and Headquarters Hazardous Waste Ombudsman

FROM: Timothy Fields, Jr.
Acting Assistant Administrator

TO: Waste Management Division Directors
Regions I-X

Since the appointment of the initial team of ten Regional Superfund Ombudsmen in March 1996, there has been some confusion about the respective, and sometimes overlapping, roles of the Regional Ombudsmen and the Headquarters Hazardous Waste Ombudsman, Bob Martin. I am hopeful that the following clarifications will help reduce misunderstanding and will help increase the efficiency of the activities of both the Headquarters Ombudsman and the Regional Superfund Ombudsmen.

OSWER initially established the Headquarters Office of Ombudsman in May 1986, under the authority of the HSWA amendments of RCRA, "to receive [and provide assistance with respect to] individual complaints, grievances, requests for information submitted by any person with respect to [HSWA or RCRA]." As originally envisioned, the Headquarters RCRA Ombudsman was to collaborate with ten Regional RCRA Ombudsmen. However, these Regional RCRA counterparts did not remain fully operational. Subsequently, OSWER expanded the Headquarters Ombudsman function to include Superfund issues.

In October 1995, the Administrator announced a set of Superfund Administrative Reforms, including the creation of a new position in each Regional Office – the Regional Superfund Ombudsman. This initiative was in response to the need to provide increased and more direct access by stakeholders to the Regional Superfund programs. All Regional Administrators responded in a positive manner to this reform and appointed Regional Superfund Ombudsmen by March of 1996. Since that time, as envisioned, all ten Regional Ombudsmen have served as points of contact for the public and have helped resolve stakeholder concerns.

For the past two years, the Regional Ombudsmen have attempted to collaborate with the Headquarters Ombudsman. During this time, however, there has been some misunderstanding as to the respective roles and responsibilities of the Regional and Headquarters Ombudsmen, and there exists the potential for conflicting or duplicative actions by the Ombudsmen. With input

from the Regional Ombudsman and the Headquarters Ombudsman. I am today clarifying these respective positions.

There are, of course, some common attributes of both positions. For example, both the Regional and Headquarters Ombudsmen will receive, and provide assistance to, individual complaints, grievances, requests for information submitted by any person. The following quotes from the OSWER "Hazardous Waste Ombudsman Handbook" will also serve to clarify the common roles of both the Regional and Headquarters Ombudsmen:

> The ...Ombudsman must exhibit total objectivity in order to resolve differences between citizens, the regulated community and EPA. While striving to be objective, the Ombudsman must remember that he or she is part of EPA's mission and thus, must work within EPA's system to address problems rather than standing apart and criticizing the Agency...
> It must be emphasized that the Ombudsman lacks the legal authority to reverse or modify any program decision or actions, either those already taken or those that may be taken in the future...
> It is important to emphasize that the Ombudsman will not be an 'advocate' for the Agency or the public. He or she is not a substitute for the normal appeal process.

Within these accepted boundaries, the Regional and Headquarters Ombudsmen will be able to provide additional access to citizen concerns and information requests and thereby help the public better understand and participate in the Superfund process.

According to protocols developed by the Regional Superfund Ombudsmen over the past two years, the Regional Ombudsmen will serve as the primary source of response to citizen complaints and requests for information or assistance, whether these citizen contacts come first to the Regional or to the Headquarters Ombudsman. All Superfund-related contacts to the Headquarters Ombudsman will initially be forwarded to the appropriate Regional Ombudsman. The Headquarters Ombudsman will take the lead on only those major Superfund matters which the Regional Superfund Ombudsman recommends as nationally significant matters and after concurrence by the Assistant Administrator of OSWER. In addition, the Headquarters Ombudsman will continue take the lead in responding to citizen concerns and information requests related to the RCRA program.

The Headquarters Ombudsman will also, on at least a quarterly basis, advise the Regional RCRA and Superfund staff of progress on any matters he or she is handling. The Headquarters Ombudsman will always give the appropriate Regional hazardous waste program staff advance notice of Regional visits that the Headquarters Ombudsman plans to make.

I believe that this clarification of the roles and responsibilities of the Regional Superfund Ombudsmen and the Headquarters Hazardous Waste Ombudsman will help increase the efficiency of all these positions. I welcome your comments on this memorandum and your comments at any time as to how we might improve operation of these important functions.

cc: Regional Superfund Ombudsmen, Regions I-X
Headquarters Hazardous Waste Ombudsman

Attachment 4

CANTON REPOSITORY 2.11.01

New guidelines for ombudsmen crucial for IEL

By PAUL M. KRAWZAK Copley Washington correspondent

WASHINGTON — For the past 16 years, communities unhappy with decisions the U.S. Environmental Protection Agency made about local hazardous waste sites have turned to the national ombudsman in the EPA's Superfund office.

Many say the office has played an invaluable role as a check on controversial and possibly flawed plans on how to clean up toxic Superfund sites and other landfills that could affect the health of hundreds or thousands of people.

Now, some say, the independence, credibility and effectiveness of the ombudsmen are threatened by new guidelines proposed by the EPA.

Critics say they could cost the public a crucial independent voice by, for example, letting the EPA decide if the national ombudsman has jurisdictions and keeping the ombudsman out of sites where lawsuits have been filed.

Had the guidelines been in place in 1998 when Lake Township area residents asked for the ombudsman to review cleanup plans at the Industrial Excess Landfill, the guidelines would have made it more difficult to initiate and conduct an investigation, said Hugh Kaufman, former chief investigator for Ombudsman Bob Martin.

"We would not readily have been able to hold hearings and do what we did," Kaufman said.

The ombudsman can't overturn or modify EPA decisions. But he can make recommendations, suggest changes and identify problems with EPA plans.

Even without the proposed guidelines, the ombudsman's office has had to cut back on its work, and that has affected communities with Superfund sites, including Lake Township.

Martin opened the investigation at Lake's toxic landfill in early 1999. He suspended it late last year, saying the EPA's reassignment of Kaufman to other duties deprived him of the manpower needed to continue.

Threaten independence

But the new guidelines could threaten the most crucial aspect of the office — its independence.

"The crux of this is independence," said Dean Gottehrer, who is reviewing the guidelines for the U.S. Ombudsman Association, which represents government ombudsmen.

In order for an ombudsman to be effective, Gottehrer said, "nobody can instruct the ombudsman what to investigate and what not to investigate, how to conduct an investigation, whom to interview, whether to hold public meetings, whether to record interviews or meetings, what to put in public reports, things of that sort."

The 15-page guidelines say the ombudsman will be "free from actual or apparent interference in the legitimate performance of his/her duties."

But Gottehrer, whose office is preparing a letter asking the EPA to withdraw the guidelines, said they actually create loopholes allowing EPA officials to suppress investigations and criticism.

Not so, according to Michael Shapiro, acting assistant administrator of the EPA's Office of Solid Waste and Emergency Response, which oversees the ombudsman. He said the guidelines are needed to clarify the ombudsman role, but will preserve his independence.

Setting up structure

"What has happened over time is the nature of the work of the ombudsman has evolved past what any previously existing agency guidance dealt with," Shapiro said. "As a matter of good government, we felt it was important to articulate a framework ... consistent with the intent and nature of the ombudsman function, but at the same time allowing everyone to understand what parameters governed the ombudsman operation."

Congress passed a law creating the ombudsman in 1984 but did not renew the law when it expired in 1989. The office has continued to exist under the authority of the EPA, an agency that reports to the president.

Late last month, two lawmakers announced plans to introduce another law giving the ombudsman congressional authorization.

Gottehrer believes the provision in the guidelines with "the greatest potential of compromising the ombudsman's independence" is one that gives regional ombudsmen authority to investigate regional matters and puts the EPA in charge of resolving disputes between the national and regional ombudsmen over jurisdiction.

The EPA created the regional ombudsman office in 1995 and appoints ombudsmen in each of the agency's 10 regions. Unlike the national ombudsman, the regional ombudsmen report to regional EPA officials.

The guidelines say the regional ombudsmen are "situated to serve as the first point of contact for members of the public'' and will concern themselves with matters that "fall within the territorial boundaries of the region.''

If the matter "involves a nationally significant issue, the regional ombudsman should consult with the national ombudsman about who is best suited ... to take the lead on the inquiry."

And in "rare situations when there is not agreement,'' the EPA steps in to resolve the dispute.

EPA encourages national and regional ombudsmen to cooperate but, "right now, there is no process for resolving" disputes, Shapiro said.

But Gottehrer sees a potential for a regional ombudsman to insist on going to the EPA with any case where an inquiry by the national ombudsman could embarrass the EPA.

EPA's potential veto

"A regional ombudsman could prevent the national ombudsman from investigating just about anything,'' Gottehrer said.

That also concerns Danielle Brian, executive director of the Project on Government Oversight, which sent a letter to President Bush.

The guidelines "subordinate the national ombudsman below the regional ombudsmen,'' she said.

By limiting the national ombudsman's ability to get involved in regional cases, you keep him out of virtually all cases, she argues.

"You rarely find a Superfund site that is going to affect the entire nation. By definition, they are regional issues,'' she said. "It's a very blatant effort on the part of people who are hostile to (Martin's) office to remove what vestiges of power he has.''

The guidelines also make it more difficult for the ombudsman to hold public meetings, a key investigative tool for the office, according to Gottehrer.

"Because he doesn't have subpoena power, he needs to be able to hold public meetings and ask people to come to them and address'' questions.

No legalities require people to attend, but those who are invited and don't show up become conspicuous by their absence.

"It's a kind of sifting of evidence in public,'' Gottehrer said.

Shapiro said the guidelines do not prevent the ombudsman from holding public

meetings.

But they do require him to get permission to hold a meeting if it will address an issue that is in litigation or is the subject of active negotiations to settle a dispute.

They also require the ombudsman to "consult'' with EPA officials and provide details on the benefits and agenda of a meeting before it can be held.

Gottehrer said that requirement could lead to a situation where the ombudsman backs off from a meeting because officials are antagonistic toward it.

"If you're forced to consult and explain, say why you need to have this meeting, that may prove to be a barrier in having it,'' he said.

Lawyers in, ombudsman out

Kaufman believes the guidelines threaten the ombudsman's independence and ability to do his job other ways.

For example, he points to a provision saying the ombudsman "will avoid involvement in activities which might unduly impede ongoing legal proceedings.''

Kaufman said that's a "big problem'' because the most important cases investigated by an ombudsman are often in litigation.

The EPA's Shapiro said even if some issues at a site are under litigation, others may not be, and could be investigated by the ombudsman.

But he added that the "public may have to get an ombudsman involved earlier in certain situations ... in order to get the benefit of their involvement and avoid the potential that they could be restricted later" by lawsuits.'

Sharan Lee Levine, spokeswoman for the American Bar Association's ombudsman standards, hasn't had a chance to thoroughly review the EPA proposal. Based on a cursory review, she said, the ABA may have some "issues'' with the plan, but she added that the EPA has "done a tremendous amount of work in devising a standard for ombudsmen in the United States.''

Previous Story **Section Index**

Repository Staff Contacts Page

Printer Friendly Version of This Story

List of EPA National Ombudsman Major Cases

September 27, 2000
Prepared for the House Commerce Committee

Shattuck Chemical Site, Denver, CO–Region VIII–Three EPA National Ombudsman Hearings were held co-Hosted by Senator Wayne Allard, Congresswoman Diana DeGette, Mayor Wellington Webb, and Denver City Councilwoman Kathleen McKenzie. Recommendations were made on October 25, 1999.

Drake Chemical Site–Region III–A National Ombudsman Hearing was conducted at the request of Senator Arlen Specter. Final Recommendations were issued for this site.

Times Beach Site, Times Beach, MO–Region VII–Investigation was initiated in April 1996. Recommendations were made to the EPA in December 1996. Investigation requested by Congressman James Talant. A recorded meeting was conducted with EPA Region VII.

Brio Refining Site, Friendswood, Harris County, TX–Region VI–Investigation was initiated in 1993 and recommendations were issued in 1996. This independent Ombudsman review was asked for by citizens, Congressman Tom Delay and Governor Anne Richards of Texas.

Alberton Train Derailment/Mixed Chemical Spill, Alberton, MT–Region VIII–The first hearing for the Alberton train derailment case has not been scheduled. The National Ombudsman is working with Senator Baucus' staff to conduct a hearing on this matter. Additionally, the University of Utah, with the oversight of the Environmental Response Team, has proposed sampling protocols that are currently undergoing public comment. A hearing is tentatively planned for late October or early November of this year.

Coeur d'Alene Basin/Bunker Hill Superfund site (the Box), ID–Region X–A fifteen hour hearing was held on August 19th, 2000 co-hosted by Senator Larry Craig (ID), Senator Mike Crapo, Rep. Helen Chenoweth-Hage and the Coeur d'Alene Tribe.. A hearing in Washington State is expected to be held in November with the support of Senator Patty Murray, Senator Slade Gorton, Rep George Nethercutt, the Spokane Tribe and the City of Spokane local governments.

Industrial Excess Landfill, Uniontown, OH–Region V–One National Ombudsman hearing was held in January of 1999 at the request of Congressman Sawyer. The National Ombudsman recommendations are imminent.

Stauffer Chemical Superfund Site, Tarpon Springs, FL–Region IV–Four National Ombudsman hearings have been conducted on this site since December 1999. Congressman Michael Bilirakis has hosted all of these hearings.

Augusta, GA–Region IV–Senator Paul Coverdell and Congressman Charlie Norwood requested an independent Ombudsman investigation into allegations of loss of livestock and environmental degradation of farmlands. Currently, parts of the investigation may be referred to law enforcement officials due to potential criminal acts that may have occurred in this case.

Marjol Battery Site, Throop, PA–Region III–The first National Ombudsman hearing on this site was conducted on August 8, 2000 at the request of Senator Arlen Specter, Senator Rick Santorum and Don Sherwood. Congressman Sherwood co-hosted in addition to the staff of Sen. Specter and Sen. Santorum.

Waste Technologies Industry, East Liverpool, OH–Region V–At the request of The White House Council on Environmental Quality, Congressman Dennis Kucinich and Congressman James Traficant, the National Ombudsman is conducting a review of this site. The first hearing on this site was conducted on September 23, 2000 and was hosted by Congressman Traficant. Preliminary Recommendations are due out on or before October 23, 2000.

Rocky Mountain Arsenal, Commerce City, CO–Region VIII–One National Ombudsman hearing has been conducted to date with another hearing planned for November 6, 2000. The hearings are being done jointly with Ray Fatz, Deputy Assistant Secretary of the US Army.

Escambia Treatment site, Pensacola, FL–Region IV–At the request of Congressman Joe Scarborough, an independent Ombudsman investigation has been underway in this Environmental Justice case. The National Ombudsman was instrumental in the permanent relocation of citizens in this predominantly African American community.

McFarland, CA–Region IX–Senator Ted Kennedy and Congresswoman Maxine Waters requested an independent Ombudsman review. As a result of Ombudsman recommendations EPA Region 9 is nearing completion of a three-year multi-million dollar investigation of McFarland, CA (soil, air and water sampling are being done at the request of the Ombudsman).

ONE HUNDRED SIXTH CONGRESS

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U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

October 12, 2000

Ms. Nikki L. Tinsley
Inspector General
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W. (2441)
Washington, DC 20460

Dear Inspector General Tinsley:

I am writing to seek clarification for the hearing record of the Subcommittee on Health and Environment of an exchange of correspondence between Mr. Mark Bialek, Counsel to the Inspector General and Mr. Michael Shapiro, Environmental Protection Agency's (EPA) Deputy Assistant Administrator and a response from Hugh B. Kaufman of the EPA Ombudsman's office. The issue involves a June 5, 2000, Ombudsman hearing held in Tarpon Springs, Florida with respect to the Tarpon Springs Superfund site where Mr. Kaufman gave a *Miranda* warning while questioning two EPA employees. The relevant portion of the transcript is as follows:

> "**HUGH KAUFMAN**: ... Before Ms. Staes begins, as a result of discussions with the Inspector General's counsel, the Environmental Protection Agency, I would like to give you all a Miranda warning, Ms. Staes. Are you familiar with the Miranda warning. Ms. States. Are you familiar with the Miranda warning, so I don't have to read it?
>
> **MICHELLE STAES**: Please read it.
>
> **HUGH KAUFMAN**: Okay. You have the right to remain silent. You have the right to counsel. Anything you may say may be used against you in a court of law. Proceed, Ms. States.
>
> **MICHELLE STAES**: Again, good afternoon. My name is Michelle Staes, Assistant Regional Counsel in Region 4, the Atlanta office."

A short while later in the town meeting the following exchange took place between Mr. Kaufman and a second EPA employee.

> "**HUGH KAUFMAN**: You threatened to walk out. You can walk out any time you want.
>
> **JOANNE BENANTE**: And so I just want to make sure that we get the answers that people want to hear.

> **HUGH KAUFMAN:** Ms. Benante, I will also say that I have Miranda'd both of you, and you all do have the right to remain silent, and you do have the right to walk out, and you can certainly do so.
>
> Ms. Staes, I'm going to continue with this questioning. Are you familiar with and did you participate in writing that footnote? It's a yes or no question, Ms. Staes."

Subsequently, on September 12, 2000, Mr. Bialek sent the enclosed memorandum to Mr. Shapiro where he recounted a discussion at a December 9, 1999, meeting with Mr. Kaufman regarding the use of *Miranda* or other "advice of rights" warnings. The Bialek memorandum states:

> "As I previously informed Hugh Kaufman in a meeting on December 9, 1999, it is the responsibility of the Office of Inspector General (OIG) or the Criminal Investigation Division of the Office of Enforcement and Compliance Assurance (CID/OECA) (and implicitly, therefore, not the Ombudsman's role) to use Miranda or the other "advice of rights" warnings as set forth in this memorandum. ... I discussed with Mr. Kaufman that the Ombudsman has no authority to conduct investigations of potential criminal violations or administrative misconduct."

Mr. Kaufman sent the enclosed September 20, 2000, response to Mr. Bialek and made the following statements that differ significantly with Mr. Bialek's version of the December 9, 1999, meeting:

> "At no time during this meeting did you state that the reason you were bringing this up was because the OIG and/or CID were the only entities that you believed should issue these warnings. Quite the opposite, you were only concerned that individuals be warned if there is the slightest chance that the National Ombudsman's Office might have to refer part of a case it is working on to OIG or other appropriate law enforcement bodies. ...
>
> Let me be perfectly clear: You raised the issue of "advise of rights" warnings and you came to the meeting with documents discussing that issue to alert us that this is an issue we must deal with in performing our non-criminal investigatory work. I have no first-hand information why you would misrepresent what occurred at our meeting, but I do have suspicions."

In regard to this exchange, I request that you provide responses to the following questions no later than November 3, 2000:

1. In light of Mr. Kaufman's September 20, 2000, response, please have Mr. Bialek provide further clarification of his discussion with or instruction to Mr. Kaufman at the December 9, 2000, meeting with respect to Miranda or the other "advice of rights" warnings. Have there been any further communications, verbal, or written, between Mr. Bialek or other IG personnel and Mr. Kaufman or Mr. Martin with

respect to this subject? If so, please provide any written communications and a written summary of any verbal communications.

2. At the bottom of the first page the September 20, 2000, memorandum, Mr. Kaufman states: "It should be noted that subsequent to the individual you referred to being provided an "advice of rights" warning on June 5, the individual proceeded to make false, misleading, and inaccurate material statements in the interview.

   Has there been a criminal referral from the Office of the Ombudsman to the Office of the Inspector General with respect to the false statement referred to by Mr. Kaufman?

3. On page 2 of the September 20, 2000, memorandum Mr. Kaufman states:

   > "As a result of our coordination discussions, I provided you at two meetings earlier this year, briefings on Ombudsman investigations that I wanted OIG to work with us on because I was concerned that part of those investigations could potentially be referred to OIG. You promised me both times that OIG would follow up and help us. However, you provided none of the promised help and the only tangible information we have received from OIG is your September 12, 2000, Memorandum to Michael Shapiro that misrepresents what occurred at our meeting to improve coordination between our two offices."

   Please detail all investigatory efforts, if any, the Office of the Inspector General has made to follow-up on and investigate the two matters on which Mr. Kaufman wanted the OIG to work with the Ombudsman office.

4. On June 12, 2000, an article (also enclosed) appeared in the St. Petersburg Times which reported that:

   > "Kaufman said he believes EPA and Stauffer officials deliberately misled him in a February hearing in which they failed to note the change in ownership.
   >
   > Kaufman said he plans to investigate and lay out a potential felony case against Brian Spiller, president of Stauffer Management, and EPA officials who Kaufman said continued to list the old ownership. That amounts to defrauding the government and conspiracy to defraud the government, he said.

> 'I'm pursuing it,' Kaufman said, 'and at the appropriate time I will turn it over to the appropriate law enforcement officials.' "

Does the OIG or the Criminal Investigation Division of the Office of Enforcement and Compliance Assurance have any guidelines or policies which govern public statements by its personnel with respect to ongoing or potential criminal investigations? If so, please provide any such guideline or policy.

Thank you for your cooperation with the work of the Subcommittee.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER

cc: The Honorable Michael Bilirakis, Chairman
Subcommittee on Health and Environment

The Honorable Michael G. Oxley, Chairman
Subcommittee on Finance and Hazardous Materials

The Honorable Sherrod E. Brown, Ranking Member
Subcommittee on Health and Environment

The Honorable Edolphus Towns, Ranking Member
Subcommittee on Finance and Hazardous Materials

Mr. Robert Martin, Ombudsman
U.S. Environmental Protection Agency

Mr. Timothy Fields, Assistant Administrator
Office of Solid Waste and Emergency Response
U.S. Environmental Protection Agency

Mr. Hugh B. Kaufman, Senior Engineer/Principle Investigator
Office of Solid Waste and Emergency Response
U.S. Environmental Protection Agency

Attachment

Citation Search Result Rank 31 of 137 Database
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(Publication page references are not available for this document.)

St. Petersburg Times
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Monday, June 12, 2000

Congressman vows to investigate EPA
ROBERT FARLEY

U.S. Rep. Mike Bilirakis and an investigator with the agency's ombudsman's office cite possible misconduct and deception in dealings over the Stauffer site.

U.S. Rep. Mike Bilirakis intends to launch a congressional investigation of the U.S. Environmental Protection Agency and its possible interference with the agency's ombudsman's office, according to the congressman's chief of staff.

The announcement Thursday came three days after two EPA officials abruptly walked out of a hearing Bilirakis organized to discuss the latest changes to the cleanup plan for the Stauffer Superfund site on the Pinellas-Pasco border.

And it came just hours after Bilirakis received a letter from EPA Regional Administrator John J. Hankinson Jr. to explain the walkout and offer assurances "there was no intention to offend you or the public."

Bilirakis, through an aide, called the letter a "whitewash."

According to Bilirakis' chief of staff, Todd Tuten, Bilirakis intends to convene a joint subcommittee hearing on the issue before the Health and Environmental committee, which Bilirakis chairs, and the Finance and Hazardous Materials committee, chaired by fellow Republican Mike Oxley of Ohio.

The purpose of the hearing, Tuten said, will be to look into the EPA's role and oversight, and possible interference, with the ombudsman's office and whether the environmental agency is acting in the public's best interest.

"The failure of EPA to cooperate with the ombudsman's office is a serious problem," Tuten said.

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(Publication page references are not available for this document.)

Although an agency of the EPA, the ombudsman's role is to provide .ndependent evaluation of EPA cases. In December, EPA Ombudsman Bob Martin decided to review the EPA's cleanup plan for Stauffer.

That plan calls for piling and capping 300,000 cubic yards of toxic soil on the 130-acre Stauffer site, which was once home to a phosphorus-processing plant.

In two previous hearings, the ombudsman's office and the public have been highly critical of that plan.

Last month, the EPA offered several amendments to the cleanup plan. In his letter to Bilirakis, Hankinson stated the amendments offer a more stringent cleanup level for arsenic and "strengthen the scientific inquiry into issues related to sinkholes and the long-term integrity of the remedy, and accelerate review of the groundwater aspect of the cleanup."

Hankinson stated that he spoke to a Bilirakis staffer directly and that it was his understanding the EPA representatives would make a brief presentation about those changes and then field some questions related to those changes, after which they would be free to leave.

"EPA remains fully committed to working with you and the community to address issues related to the site," Hankinson wrote.

Bilirakis aide Christy Stefadouros said the congressman read the letter Thursday and "he feels it is a shame that Mr. Hankinson did not attend the meeting. Anyone there would know that the response is a complete whitewash.

"Instead of platitudes, Congressman Bilirakis wants to see change in the EPA's attitude and greater responsiveness to the concerns of local residents," Stefadouros said.

On June 5, Hugh Kaufman, the ombudsman's chief investigator, asked just three questions before the EPA's two representatives, Joanne Benante, an EPA official from the Region 4 office in Atlanta, and Michelle Staes, an EPA attorney, walked out, saying they had agreed to just 10 minutes of questions after their brief presentation.

Kaufman said the EPA's apparent attitude was "spit in Congressman Bilirakis' eyes and leave before Kaufman asks the hard questions."

All three of Kaufman's questions were about ownership of Stauffer's parent company, which changed hands in December. The new

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(Publication page references are not available for this document.)

company, Aventis CropScience USA Inc., along with Atkemix Thirty-seven Inc., are ultimately responsible to pay for the cleanup, Kaufman said, and it is important to know whether those companies can afford it.

Kaufman said he believes EPA and Stauffer officials deliberately misled him in a February hearing in which they failed to note the change in ownership.

Kaufman said he plans to investigate and lay out a potential felony case against Brian Spiller, president of Stauffer Management, and EPA officials who Kaufman said continued to list the old ownership. That amounts to defrauding the government and conspiracy to defraud the government, he said.

"I'm pursuing it," Kaufman said, "and at the appropriate time I will turn it over to the appropriate law enforcement officials."

It is unclear, he said, "whether the EPA was incompetent or whether they participated in the fraud. . . . . They're either the most incompetent people in government in the history of 35 years I have been in government, or politics is at play."

Mike Kelly, attorney for Stauffer Management Corp., called Kaufman's charge ridiculous and outrageous grandstanding.

"If anything should be investigated, it is the propriety of Mr. Kaufman," Kelly said.

"Stauffer doesn't keep up to date on all the corporate changes of that company," Kelly said. "Everything Mr. Spiller testified to was to the best of his knowledge at the time."

Said EPA spokesman Carl Terry: "I'm not aware of any fraudulent statements made by the EPA about ownership of the company."

---- INDEX REFERENCES ----

NAMED PERSON: BILIRAKIS, MIKE; HANKINSON, JOHN J JR; TUTEN, TODD; KAUFMAN, HUGH; KELLY, MIKE

ORGANIZATION: ALCOHOLICS ANONYMOUS

NEWS SUBJECT: Crime and Courts; Political and General News; Crime; Environmental News; Environmental News (GCRIM GCAT CRM GENV ENV)

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 27 2000

THE INSPECTOR GENERAL

The Honorable John Dingell
Ranking Member
Committee on Commerce
U.S. House of Representatives
Rayburn House Office Building
Room 2125
Washington, DC 20515-6115

Dear Congressman Dingell:

This responds to your October 12, 2000, letter seeking a clarification for the hearing record of the Subcommittee on Health and Environment. The questions you pose relate to correspondence from my Counsel, Mr. Mark Bialek, to U.S. Environmental Protection Agency (EPA) Deputy Assistant Administrator Michael Shapiro, as well as a response from the EPA Ombudsman's office. I asked Mr. Bialek to provide the enclosed statement responding to your questions.

If you have any further questions or need additional information, please do not hesitate to contact me at 202 260-3137.

Sincerely,

Nikki L. Tinsley

Enclosure

cc: The Honorable Michael Bilirakis, Chairman
Subcommittee on Health and Environment

The Honorable Michael G. Oxley, Chairman
Subcommittee on Finance and Hazardous Materials

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The Honorable Sherrod E. Brown, Ranking Member
Subcommittee on Health and Environment

The Honorable Edolphus Towns, Ranking Member
Subcommittee on Finance and Hazardous Materials

Mr. Robert Martin, Ombudsman
U.S. Environmental Protection Agency

Mr. Timothy Fields, Assistant Administrator
Office of Solid Waste and Emergency Response
U.S. Environmental Protection Agency

Mr. Hugh B. Kaufman, Senior Engineer/Principal Investigator
Office of Solid Waste and Emergency Response
U.S. Environmental Protection Agency

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 27 2000

OFFICE OF
INSPECTOR GENERAL

MEMORANDUM

SUBJECT: Reply to 10/12/00 letter from Congressman Dingell

FOR: Nikki L. Tinsley

FROM: Mark Bialek

This responds to Congressman Dingell's October 12, 2000, letter seeking a clarification for the hearing record of the Subcommittee on Health and Environment. The questions Congressman Dingell posed relate to correspondence from me to Deputy Assistant Administrator Michael Shapiro, as well as a response from the EPA Ombudsman's office.

As I stated in my September 12 memo to Mr. Shapiro, the purpose of the December 9, 1999 meeting was to discuss the general responsibilities of the Ombudsman and the need for coordination with the Office of Inspector General (OIG). The "advice of rights" issue was a relatively small part of that discussion.

I recently explained to Dick Frandsen of Congressman Dingell's staff that I made it absolutely clear to Mr. Kaufman and his colleague, Mr. Gottehrer, at the December 9th meeting that it is the OIG and Criminal Investigation Division (CID) which should issue "advice of rights" warnings. During the course of that meeting, Mr. Kaufman never stated or implied that he believed he should be able to utilize these warnings. Therefore, the thought never occurred to me to state explicitly to Mr. Kaufman that the Ombudsman should not use these warnings. The concept simply never came up. That is why I used the word "implicitly" in my September 12 memo to Mr. Shapiro in describing this portion of the Dec. 9th discussion -- that it was not the Ombudsman's role to use these warnings.

I explained to Mr. Kaufman at the December 9th meeting that the reason OIG and CID are the organizations which should be using these warnings is that these are the two offices within the EPA that have the training and experience, as well as the legal authority, to conduct criminal investigations. I carefully explained to Mr. Kaufman that any potential criminal issue or allegation must be brought to either the OIG or CID so that these offices could preserve the use of any evidence obtained from an interview, for a potential criminal prosecution. I explained that, without the proper use of these "advice of rights" warnings by authorized law enforcement agencies, individuals could, effectively, be immunized from criminal prosecution. Again, our conversation focused upon the referral of information from the Ombudsman to the OIG in order for the OIG to assure that any potential criminal issues could be appropriately and thoroughly investigated.

If Mr. Kaufman now says he heard something else, his recollection is incorrect. As stated in my September 12th memo to Mr. Shapiro, Assistant Inspector General for Management, John Jones, was also in attendance at the December 9th meeting and can attest to the content of the discussion reflected above.

Mr. Kaufman was also incorrect in asserting in his September 20th memo to me that I "came to the meeting with documents discussing the issue . . . ." To the contrary, I brought no such documents. Subsequent to the December 9th meeting, Mr. Gottehrer called me and inquired whether I could provide some materials to them which described these warnings in more detail than was discussed at the December 9th meeting. I obliged by faxing to Mr. Guttehrer a publication prepared in the IG community about the appropriate use of these warnings.

I have had subsequent communications with Mr. Kaufman and there are e-mails which describe those communications. In a September 28, 2000, e-mail from me to Assistant Inspector General for Investigations Allen Fallin, and Mr. Fallin's Deputy, Emmett Dashiell, I reflected the content of a telephone conversation I had with Mr. Kaufman earlier that day. The message read:

> Kaufman insists he hasn't heard back from Mike Hill on the investigative matters he spoke to Kaufman about many months ago. We should make sure we're handling this in as expeditious a manner as possible; given the Congressional / Media interest these days in Ombudsman issues. By the way, Kaufman promised he will not use "advice of rights" warnings ever again -- that he now has the "rule" from us (my memo to Mike Shapiro) and will abide by the rule now that he clearly understands what it is . . . .

On October 2, 2000, I sent the following e-mail message to Mr. Kaufman which contained the results of the above inquiry to Messrs. Fallin and Dashiell:

> OIG Special Agent Mike Hill has informed me that he spoke with you once and you told him you would be having a meeting with the U.S. Attorney in Augusta, GA. Mike said he told you he would like to attend and you agreed to let him know the time and place. You never called him back. Mike said he left you several voice messages advising you that he would like to get together with you and hear what you have to say. Mike's most recent message was left on September 11 and he informed you that he would be in Washington, D.C. on Sept. 12 - 14. Mike never received a return phone call.
>
> My understanding is that the Consent Decree in Tarpon Springs has been withdrawn. If true, does that mean you don't want to pursue your allegations anymore?

On October 12, 2000, I again e-mailed Mr. Kaufman because I had not received any response to my October 2 message. It stated:

> I wanted to close the loop on the issue of you using "advice of rights" forms. My Sept. 12th memo to Mike Shapiro set forth my position on this issue and you responded in a Sept. 20th memo. You and I spoke on Sept. 28. When we spoke, you told me that you now understand the rules -- as laid out in my 9/20 memo -- and you had no intention of using advice of rights again. Also, I haven't heard back from you in response to my 10/02 e-mail. Let me know.

On October 25, 2000, OIG Special Agent Mike Hill sent Mr. Kaufman the following e-mail message:

> During our last telephone discussion, you advised that you had information regarding fraudulent activity at Tarpon Springs, FL and Augusta, GA. You said you were suppose (sic) to meet the U.S. Attorney in Augusta, GA and that I could attend the meeting. Furthermore, you said you would notify me of the date and time of the meeting.
>
> I realize that the consent decree has been rescinded in Tarpon Springs, but if you had allegations of fraudulent activity, the rescission of the consent decree would not make the fraudulent activity go away. I have been to DC a couple of times and have left messages on your voice mail in an attempt to meet with you and obtain the information surrounding your allegations.
>
> Please advise if your allegations remain valid so that an investigation can be initiated if appropriate.
>
> Your assistance in this matter is greatly appreciated.

We have received no replies to these e-mail messages or any communication from Mr. Kaufman, other than as stated above. Although Mr. Kaufman made general statements to this office about false statements, you can see that Mr. Kaufman has not responded to our inquiries and attempts to elicit the particular information he said he had.

Regarding Congressman Dingell's question as to whether the OIG or CID, "have any guidelines or policies which govern public statements by its personnel with respect to ongoing or potential investigations," I am attaching copies of the Office of Inspector General Manual Chapter 201 ("General and Administrative Policies for Investigations"), Section 1-3 ("Special Agents' Responsibilities"), paragraph b ("Disclosure of Information") and Section 2-1 ("Media Inquiries"). I have forwarded Congressman Dingell's request for the same information from CID to Mike Wood for direct reply to Congressman Dingell's office.

If you have any questions or need additional information, please let me know.

Attachments: As stated

1-2. SUBPOENAS. The Inspector General has authority, under the IG Act of 1978, as amended, to issue subpoenas for documentary evidence. Inspector General subpoenas and grand jury subpoenas are usually served by an OIG special agent. (See the OIG manual chapter on using subpoenas during audits and investigations.)

1-3. SPECIAL AGENTS' RESPONSIBILITIES.

a. Conduct. As representatives of the OIG and as Federal law enforcement officials, special agents must maintain the highest standards of conduct and must avoid incurring any obligation or association which causes even the appearance of bias, favoritism, or conflict of interest. Special agents and other OI employees are required to know the regulations on employee conduct contained at 40 CFR Part 3. All OI employees are required to follow the instructions of supervisors and other management officials in their line of authority as well as written directives concerning the conduct of official business. For additional information, refer to the OIG manual chapter on standards of conduct.

b. Disclosure of Information. Official information must be protected at all times against unauthorized use and disclosure. All OI staff should guard against any unauthorized disclosures, whether intentional or unintentional. For example, draft interviews must never be discarded in a readable condition. Information about individuals must be maintained and used in accordance with the provisions of the Privacy Act and the IG Act. (See the manual chapter on standards of conduct about safeguarding information. Also see chapter 202 regarding the maintenance of investigative files during and after an investigation.)

c. Impartiality. In each case, special agents will conduct a fair and objective investigation and will prepare an impartial report. Special agents will advise their supervisors of situations where their objectivity may be adversely affected. (See chapter on standards of conduct, including the requirement for OIG employees to prepare an annual acknowledgment on personal impairments.)

It is an agent's duty to obtain all the relevant information material to the case, both inculpatory and exculpatory. Agents should be mindful that a significant number of allegations against

individuals prove to be unfounded and they should therefore make every reasonable effort not to unnecessarily damage the reputations of those individuals whose activities are being investigated.

d. Critical Information. Agents and other OI staff have a duty to report to their supervisors or team leaders any critical information requiring the supervisors' or team leaders' attention.

1-4. OATH ADMINISTRATION AUTHORITY. Pursuant to section 6(a)(5) of the IG Act, as amended, the Inspector General has designated all special agents, including the Assistant Inspector General for Investigations (AIGI), the Deputy Assistant Inspector General for Investigations (DAIGI), and all supervisory criminal investigators within the OI, as employees who may administer to or take from any person an oath, affirmation, or affidavit, whenever necessary in the performance of their assigned duties. (See chapter 205.)

SECTION 2. MEDIA INQUIRIES

2-1. Media Inquiries. OI employees below the Divisional Inspector General for Investigation (DIGI) level must not discuss investigations or other OIG business with the media. At this level, OI employees will refer all inquiries from the news media to the AIGI or the DIGI. (See the chapter on standards of conduct.)

When the media has a copy of an issued report of a closed investigation, DIGIs may respond to questions only to provide clarifying comments on statements, statistical tables, etc., which are contained in the report. DIGIs must ensure that the clarifying comments do not divulge any information that was excluded from the report, based on the Privacy or Freedom of Information Acts, when it was issued (e.g., names and addresses of witnesses). Should DIGIs have any doubt about whether the clarifying comments are appropriate, they should refrain from making them and refer the media representative to the AIGI. All other media inquiries will be referred to the AIGI, including those involving ongoing investigations.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 3 2000

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

The Honorable John Dingell
Committee on Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Dingell:

This letter responds to your letter of October 12, 2000, to EPA Inspector General Nikki Tinsley regarding certain activities involving Hugh B. Kaufman of the EPA Ombudsman's office. This letter supplements the Inspector General's letter to you dated October 27, 2000, in response to questions you posed.

In your October 12 letter, you asked whether the Criminal Investigation Division of the Office and Enforcement of Compliance Assurance has any guidelines or policies that govern public statements by its personnel with respect to ongoing or potential criminal investigations. I have enclosed three documents that are responsive to your request.

If you have any further questions or need additional information, please do not hesitate to contact me or Leo A. D'Amico, Director, Office of Criminal Enforcement, Forensics and Training, at (202) 564-2480.

Sincerely,

Steven A. Herman
Assistant Administrator

Enclosures:

1. Memorandum, December 22, 1989, from Assistant Administrator James M. Strock, Office of Enforcement and Compliance Monitoring, "Public Relations Policies Pertaining to EPA Criminal Investigations and Prosecutions."

2. Memorandum, October 30, 1990, from Deputy Asst. Administrator Edward E. Reich, Office of Enforcement, "EPA Ethics Advisory on Communications Regarding Matters Under Investigation, or in Pre-Litigation Stages, or in Litigation, transmitting EPA Ethics Advisory 90-2 ("Outside Communications Regarding Matters Under Investigation, in Pre-Litigation Stages, or in Litigation" by Deputy General Counsel Gerald A. Yamada)

3. Memorandum, March 31, 1995, from Earl E. Devaney, Director of the Office of Criminal Enforcement, "Office of Criminal Enforcement News Media Relations Policy."

cc: Honorable Michael Bilirakis, Chairman
Subcommittee on Health and Environment

Honorable Michael G. Oxley, Chairman
Subcommittee on Finance and Hazardous Materials

Honorable Sherrod E. Brown, Ranking Member
Subcommittee on Health and Environment

Honorable Edolphus Towns, Ranking Member
Subcommittee on Finance and Hazardous Materials

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DEC 22 1989

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

MEMORANDUM

SUBJECT: Public Relations Policies Pertaining to EPA Criminal Investigations and Prosecutions

FROM: James M. Strock
Assistant Administrator

TO: Assistant Administrators
General Counsel
Inspector General
Regional Administrators
Deputy Regional Administrators
Regional Counsels

The Agency's Enforcement Communications Task Force was established by then-Deputy Administrator Jim Barnes on June 9, 1988, for the purpose of enhancing the effectiveness of EPA's enforcement activities by increasing both the regulated community's and the public's level of knowledge regarding the Agency's civil and criminal enforcement successes. As an outgrowth of his participation on the Task Force, Paul R. Thomson, Jr., Deputy Assistant Administrator, Criminal Enforcement, has revised the Agency's public relations policy pertaining to criminal enforcement, reformatting it into two short directives. These policies replace GM-55, "Media Relations on Matters Pertaining to EPA's Criminal Enforcement Program" (December 12, 1986). Some issues which were addressed by GM-55, but not in the new policies, will be covered by internal directives to affected offices. Interested Offices and Task Force members are to be complimented for their superlative collegial efforts in developing this clear and concise guidance.

Accordingly, I hereby issue the attached policy statements governing public and media relations in this context.

I ask that you distribute the "Policy on Responding to Public or Media Inquiries Regarding Criminal Investigations" to all personnel in your respective offices or regions, and emphasize the importance of complying with this rule, which is

intended to protect both the rights of persons who may be under criminal investigation and the integrity of the Agency's criminal investigations. This policy directs Agency personnel to refer inquiries about criminal enforcement to appropriate personnel within EPA's criminal program. For your information, also attached is a listing of the referenced criminal program personnel.

The "Policy on Publicizing Criminal Enforcement Activities" is intended to emphasize to all Agency media-relations or public-affairs personnel (and all those who are responsible for providing them with pertinent information, i.e., primarily criminal program personnel) that - unless unusual circumstances warrant an exception - major events in criminal enforcement cases are to be publicized by timely regional press releases. This may be done jointly with the United States Attorney's office, but it should be carried out in a way which ensures that the Agency gets due credit for the case. Furthermore, appropriate Agency personnel must be prepared to respond to public inquires, which may follow the publicity, regarding the Agency's regulatory approach to the environmental problem at issue.

These policies are aimed at getting the message to the public that EPA is committed to using the full array of its legal authorities to compel compliance with the environmental laws, as well as deterring future environmental crimes. Informing the regulated community about the tough enforcement posture we are taking, while at the same time protecting the rights of individuals and the integrity of the criminal process, is the best way to achieve these national goals. I ask your assistance in ensuring that they are met.

Attachments

cc: Directors, Regional Offices of Public Affairs
Lew Crampton, Associate Administrator for Communications and Public Affairs
James L. Prange, NEIC Assistant Director for OCI
OCI Special and Resident Agents-in-Charge
Regional Criminal Enforcement Counsels
Office of Criminal Enforcement Counsel

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

Attention: All EPA Personnel

POLICY ON RESPONDING TO PUBLIC OR MEDIA
INQUIRIES REGARDING CRIMINAL INVESTIGATIONS

The Environmental Protection Agency's criminal enforcement program is spearheaded by trained law enforcement agents who investigate alleged or suspected criminal violations of Federal environmental laws. If and when the Agency determines that the subject of the investigation warrants criminal prosecution and/or grand jury investigation by the Department of Justice, the Agency refers the matter to the Department for action.

On occasion, a member of the public or of the news media, or a person associated with the subject of an investigation, will contact Agency personnel and seek information regarding the nature or existence of a criminal investigation. In those situations, EPA personnel should respond:

"EPA has a policy to neither confirm nor deny the existence of a criminal investigation."

Agency personnel may explain that the purpose of this policy is to protect the constitutional rights of persons who may be under investigation (and who may be innocent of any violation of Federal law) and the integrity of the Agency's criminal investigations.

All general questions regarding investigative procedures or the criminal enforcement program may be referred to OECM's National Enforcement and Investigations Center, Assistant Director for the Office of Criminal Investigations (OCI), at (303) 236-3215 (FTS 776-3215). EPA personnel may also refer general inquiries to the OCI Agent in Charge of the Region involved, and to OECM's Office of Criminal Enforcement Counsel at headquarters (202/FTS 475-9660).

Once it is known that criminal charges have been filed, all public or media inquiries regarding the case should be referred to the Office of Regional Counsel's Criminal Enforcement Counsel, or to the Office of Public Affairs.

This policy is effective immediately. Issues relating to the Freedom of Information Act, 5 U.S.C. Section 552, in the criminal context are not addressed by this policy.

This policy, and any internal office procedures which implement this policy, are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party to litigation with the United States. The Agency reserves the right to act at variance with this policy as the circumstances may warrant. In particular, nothing in this policy shall be interpreted to preclude the Agency from notifying the public, when necessary, as to any health or environmental hazard.

Prepared by: Paul R. Thomson, Jr.
Deputy Assistant Administrator - Criminal

Date: 12/22/89

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

POLICY ON PUBLICIZING CRIMINAL PROSECUTIONS

With the maturing of EPA's criminal enforcement program, it has become apparent that the public and the news media are becoming increasingly interested in Federal prosecutions of environmental crimes. It is in the Agency's interest to utilize this public interest. By promptly providing appropriate case-specific information as well as relevant programmatic materials to the media, the general deterrence effects of criminal enforcement will be maximized, and public awareness of EPA's activities to address environmental pollution concerns will be enhanced. At the same time, the rights of those suspected or accused of crimes must not be abridged, and the legally-mandated secrecy of the grand jury process must be maintained.

Because of the special considerations which apply in the criminal enforcement context, this guidance supplements the Agency's general media policy (GM-46), entitled "Policy on Publicizing Enforcement Activities," dated November 21, 1985. The policy (GM-55) entitled "Media Relations on Matters Pertaining to EPA's Criminal Enforcement Program," dated December 12, 1986, is revoked.

Statement of Policy

1) The filing of criminal charges (by indictment or information), verdicts or guilty pleas, and sentencings are considered major enforcement events which should be publicized in a timely manner by regional press releases, and will frequently warrant national press releases or press advisories. Such releases or advisories may be issued jointly by EPA and the Department of Justice.

2) In publicizing major criminal enforcement events, all Agency personnel must take care to help ensure that the constitutional and other legal rights of the accused are not violated. In addition, EPA personnel who have access to secret grand jury materials must take special care to prevent disclosure of any such information. Finally, EPA personnel must avoid releasing information which could compromise an ongoing

investigation by EPA's Office of Criminal Investigations or the Department of Justice. In order to carry out these objectives, the Office of Regional Counsel's Criminal Enforcement Counsel (or the Associate Enforcement Counsel for Criminal, at headquarters) must be consulted prior to Agency release of any criminal case-specific information.

3) In addition to case-specific information (which is limited in order to protect the rights of the accused and the integrity of the criminal enforcement process), the EPA Public Affairs Offices should make relevant regulatory or programmatic information available to the public and the news media in response to inquiries occasioned by the news-generating criminal case event.

4) Because of the primary role played by the Department of Justice in Federal criminal prosecutions, the content of any Agency press release regarding a criminal case event should be informally reviewed by the prosecuting attorney prior to publication. The ORC Criminal Enforcement Counsel, the OCI Special Agent assigned to the case, (and OECM's Office of Criminal Enforcement Counsel at HQ) are responsible for facilitating this consultation with Justice.

This policy, and any internal office procedures which implement it, are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party to litigation with the United States. The Agency reserves the right to take any action at variance with this policy or implementing procedures as the circumstances warrant. In particular, nothing in this policy shall be interpreted to preclude the Agency from notifying the public, when necessary, as to any health or environmental hazard.

Prepared by: Paul R. Thomson, Jr.
Deputy Assistant Administrator - Criminal

Date: 12/22/89

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 30 1990

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: EPA Ethics Advisory on Communications Regarding Matters Under Investigation, in Pre-Litigation Stages, or in Litigation

FROM: Edward E. Reich
Deputy Assistant Administrator

TO: Deputy Assistant Administrator for Federal Facilities
Office Directors
Scott Fulton
Associate Enforcement Counsel
Brian Runkel
Bill Frank

Please review the attached EPA Ethics Advisory and be sure that it is circulated to your staff.

Attachment

cc: James M. Strock

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

EPA Ethics Advisory 90-2

SUBJECT: Outside Communications Regarding Matters Under Investigation, in Pre-Litigation Stages, or in Litigation

FROM: Gerald H. Yamada
Deputy General Counsel
Designated Agency Ethics Official

TO: Deputy Ethics Officials

The purpose of this Ethics Advisory is to discuss how EPA employees should deal with verbal and written inquiries from outside parties (especially attorneys) concerning EPA matters known to be in litigation, in pre-litigation stages (e.g., negotiation), or under investigation. Unlike litigation between individuals, where an attorney's communication with a party represented by counsel is strictly limited,[1] an attorney representing a party in litigation with the Agency may not be prohibited per se from communicating with the Agency,[2] depending on the jurisdiction.[3] Accordingly, EPA employees

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[1] ABA Model Code of Professional Responsibility, Disciplinary Rule 7-104; ABA Model Rules of Professional Conduct, Rule 4.2.

[2] ABA Model Rule 4.2 states that communications "authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about a matter." The Comments on the Rule state that opposing counsel are otherwise generally barred from communicating "with persons having managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization...or whose statement may constitute an admission...." See also Upjohn Co. v. United States, 449 U.S. 383 (1981).

[3] Rule 4.2 of new District of Columbia Bar Rules effective January 1, 1991, require only that attorneys "disclose to such employee both the lawyer's identity and the fact that the lawyer represents a party with a claim against the employee's employer."

must be alert to situations where opposing counsel seeks to communicate with EPA attorneys or officers or employees in the affected EPA program office about a matter under investigation or in litigation.

In addition to attorneys, outside parties may also include States or members of Congress, as well as the general public. Although EPA maintains a cooperative relationship with States, they may occasionally be adversaries in litigation. In addition, even where EPA could furnish such information to Congress itself,[4] inquiries from individual members of Congress or their staffs regarding matters which are under investigation, in pre-litigation stages or in litigation should be handled the same as any other outside communications.

When such communications occur, EPA employees must be careful not to disclose non-public information that will interfere with an investigation or litigation. Providing "expert opinions" and advisory interpretations in connection with such matters should also be avoided (unless such opinions and interpretations have been formally adopted by the Agency).

Communications concerning various types of matters should be handled as follows:

Federal Matters in Litigation

When a communication concerns a matter in litigation (either an enforcement action or defensive litigation), EPA employee's must coordinate any response with the lead EPA attorney for the matter. For defensive litigation, this attorney will be in the Office of General Counsel (OGC) or the Office of Regional Counsel (ORC); for enforcement matters, this attorney will be in the Office of Enforcement (OE) or the Office of Regional Counsel (ORC); for enforcement matters arising under Title II of the Clean Air Act, the lead attorney will be in the Office of Mobile Sources within the Office of Air and Radiation (OAR).[5]

When a case involving the Federal Government is before a court, the lead EPA attorney must consult with the Justice Department on the matter before providing any response.

---

[4] The "Congress" includes the Speaker of the House, the President pro tempore of the Senate, and chairs of committees and subcommittees.

[5] OAR enforcement attorneys will either be in the Field Operations Support Division (FOSD) or Manufacturers Operation Division (MOD).

Matters Affecting State Enforcement Actions

When a response may affect a pending State enforcement action, OE should be consulted before EPA provides any response.

Criminal Matters

When an outside communication concerns a criminal matter which has been referred to the Justice Department, EPA employees must simply refuse to provide a response. Such communications must be forwarded for response to the Department of Justice or the appropriate U.S. Attorney's Office -- through OE's Deputy Assistant Administrator for Criminal Enforcement for criminal enforcement matters or through the Inspector General Division in OGC for other criminal matters.

As for matters under criminal investigation, EPA employees must state: "EPA has a policy to neither confirm nor deny the existence of a criminal investigation." See OE memorandum dated December 22, 1989 from Assistant Administrator James Strock. Freedom of Information Act requests for documents concerning a criminal investigation should be directed to the Office of Criminal Enforcement or the Inspector General Division in OGC, as appropriate.

* * *

Finally, EPA attorneys must comply with the duty to maintain the confidences and secrets of the client (that is, EPA) and to keep appropriate EPA personnel informed of communications relevant to the client office. See ABA Model Rule 1.4(a). EPA attorneys ordinarily should not communicate (and must advise other EPA employees not to communicate) with opposing counsel about a matter known to be in litigation, in pre-litigation stages, or under investigation without first consulting with the lead attorney for the matter.[6]

Of course, when a matter is before a court, EPA attorneys must also consult with the appropriate attorney at the Department of Justice or the U.S. Attorney's Office.

cc: Office of Government Ethics

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[6] ABA Model Code of Professional Responsibility, Disciplinary Rule 7-104; ABA Model Rules of Professional Conduct, Rule 4.2.

TRANSACTIONS WITH PERSONS OTHER THAN CLIENTS

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

IN THE COURSE OF REPRESENTING A CLIENT, A LAWYER SHALL NOT KNOWINGLY:

(a) MAKE A FALSE STATEMENT OF MATERIAL FACT OR LAW TO A THIRD PERSON; OR

(b) FAIL TO DISCLOSE A MATERIAL FACT TO A THIRD PERSON WHEN DISCLOSURE IS NECESSARY TO AVOID ASSISTING A CRIMINAL OR FRAUDULENT ACT BY A CLIENT, UNLESS DISCLOSURE IS PROHIBITED BY RULE 1.6.

COMMENT:

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by failure to act. The term "third person" as used in paragraphs (a) and (b) refers to any person or entity other than the lawyer's client.

Statements of Fact

[2] This Rule refers to material statements of fact. Whether a particular statement should be regarded as material, and as one of fact, can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are in this category, and so is the existence of an undisclosed principle except where nondisclosure of the principle would constitute fraud. There may be other analogous situations.

Fraud by Client

[3] Paragraph (b) recognizes that substantive law may require a lawyer to disclose certain information to avoid being deemed to have assisted the client's crime or fraud. The requirement of disclosure created by this paragraph is, however, subject to the obligations created by Rule 1.6.

RULE 4.2 COMMUNICATION BETWEEN LAWYER AND OPPOSING PARTIES

(a) DURING THE COURSE OF REPRESENTING A CLIENT, A LAWYER SHALL NOT COMMUNICATE OR CAUSE ANOTHER TO COMMUNICATE ABOUT THE SUBJECT OF THE REPRESENTATION WITH A PARTY KNOWN TO BE REPRESENTED BY ANOTHER LAWYER IN THE MATTER, UNLESS THE LAWYER HAS THE PRIOR CONSENT OF THE LAWYER REPRESENTING SUCH OTHER PARTY OR IS AUTHORIZED BY LAW TO DO SO.

(b) DURING THE COURSE OF REPRESENTING A CLIENT, A LAWYER MAY COMMUNICATE ABOUT THE SUBJECT OF THE REPRESENTATION WITH A NONPARTY EMPLOYEE OF THE OPPOSING PARTY WITHOUT OBTAINING THE CONSENT OF THAT PARTY'S LAWYER. HOWEVER, PRIOR TO COMMUNICATING WITH ANY SUCH NONPARTY EMPLOYEE, A LAWYER MUST DISCLOSE TO SUCH EMPLOYEE BOTH THE LAWYER'S IDENTITY AND THE FACT THAT THE LAWYER REPRESENTS A PARTY WITH A CLAIM AGAINST THE EMPLOYEE'S EMPLOYER.

(c) FOR PURPOSES OF THIS RULE, THE TERM "PARTY" INCLUDES ANY PERSON, INCLUDING AN EMPLOYEE OF A PARTY ORGANIZATION, WHO HAS THE AUTHORITY TO BIND A PARTY ORGANIZATION AS TO THE REPRESENTATION TO WHICH THE COMMUNICATION RELATES.

(d) THIS RULE DOES NOT PROHIBIT COMMUNICATION BY A LAWYER WITH GOVERNMENT OFFICIALS WHO HAVE THE AUTHORITY TO REDRESS THE GRIEVANCES OF THE LAWYER'S CLIENT, WHETHER OR NOT THOSE GRIEVANCES OR THE LAWYER'S COMMUNICATIONS RELATE TO MATTERS THAT ARE THE SUBJECT OF THE REPRESENTATION, PROVIDED THAT IN THE EVENT OF SUCH COMMUNICATIONS THE DISCLOSURES SPECIFIED IN (b) ARE MADE TO THE GOVERNMENT OFFICIAL TO WHOM THE COMMUNICATION IS MADE.

COMMENT:

[1] This Rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between two organizations does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so.

[2] In the case of an organization, this Rule prohibits communication by a lawyer for one party concerning the matter in representation with persons having the power to bind the organization as to the particular representation to which the communication relates. If an agent or employee of the organization with authority to make binding decisions regarding the representation is represented in the matter by separate counsel, the consent by that agent's or employee's counsel to a communication will be sufficient for purposes of this Rule. *Compare* Rule 3.4(f).

[3] The Rule does not prohibit a lawyer from communicating with employees of an organization who have the authority to bind the organization with respect to the matters underlying the representation if they do not also have authority to make binding decisions regarding the representation itself. A lawyer may therefore communicate with such persons without first notifying the organization's lawyer. *See* D.C. Bar Legal Ethics Committee Opinion No. 129 (1983). But before communicating with such a "nonparty employee," the lawyer must disclose to the employee the lawyer's identity and the fact that the lawyer represents a party with a claim against the employer. It is preferable that this disclosure be made in writing. The notification requirements of Rule 4.2(b) apply to contacts with government employees who do not have the authority to make binding decisions regarding the representation.

[4] This Rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

[5] This Rule does not apply to the situation in which a lawyer contacts employees of an organization for the purpose of obtaining information generally available to the public, or obtainable under the Freedom of Information Act, even if the information in question is related to the representation. For example, a lawyer for a plaintiff who has filed suit against an organization represented by a lawyer may telephone the organization to request a copy of a press release regarding the representation, without disclosing the lawyer's identity, obtaining the consent of the organization's lawyer, or otherwise acting as paragraphs (a) and (b) of this Rule require.

[6] Paragraph (d) recognizes that special considerations come into play when a lawyer is seeking to redress grievances involving the government. It permits communications with those in government having the authority to redress such grievances (but not with any other government personnel) without the prior consent of the lawyer representing the government in such cases. However, a lawyer making such a communication without the prior consent of the lawyer representing the government must make the kinds of disclosures that are required by paragraph (b) in the case of communications with non-party employees.

[7] Paragraph (d) does not permit a lawyer to bypass counsel representing the government on every issue that may arise in the course of disputes with the government. It is intended to provide lawyers access to decision makers in government with respect to genuine grievances, such as to present the view that the government's basic policy position with respect to a dispute is faulty, or that government personnel are conducting themselves improperly with respect to aspects of the dispute. It is not intended to provide direct access on routine disputes such as ordinary discovery disputes, extensions of time or other scheduling matters, or similar routine aspects of the resolution of disputes.

[8] This Rule is not intended to regulate the law enforcement activities of the United States or the District of Columbia. A body of law has been developed that recognizes both the authority of the government to seek to obtain statements from a suspect, and the Fifth and Sixth Amendment rights of the suspect. The Rules of Professional Conduct do not apply to government conduct that is valid under this body of law. Generally speaking, Rule 4.2 will apply once a defendant is formally charged, elects to be represented by counsel, and obtains or is appointed counsel. But there are situations in which a defendant who is represented by counsel will seek to communicate with the government without defense counsel's being aware of the communication. Some communications will serve to protect the defendant and to identify sham representations. Although communications between charged defendants and the government without notice to defense counsel must be viewed with suspicion, such communications cannot be prohibited in all instances.

RULE 4.3 DEALING WITH UNREPRESENTED PERSON

IN DEALING ON BEHALF OF A CLIENT WITH A PERSON WHO IS NOT REPRESENTED BY COUNSEL, A LAWYER SHALL NOT:

(a) GIVE ADVICE TO THE UNREPRESENTED PERSON OTHER THAN THE ADVICE TO SECURE COUNSEL, IF THE INTERESTS OF SUCH PERSON ARE OR HAVE A REASONABLE POSSIBILITY OF BEING IN CONFLICT WITH THE INTERESTS OF THE LAWYER'S CLIENT;

(b) STATE OR IMPLY TO UNREPRESENTED PERSONS WHOSE INTERESTS ARE NOT IN CONFLICT WITH THE INTERESTS OF THE LAWYER'S CLIENT THAT THE LAWYER IS DISINTERESTED. WHEN THE LAWYER KNOWS OR REASONABLY

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 31 1995

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Office of Criminal Enforcement News Media Relations Policy — File: 3120.0000

FROM: Earl E. Devaney, Director
Office of Criminal Enforcement

TO: All Office of Criminal Enforcement Employees

I. POLICY OBJECTIVES

• This OCE news media relations policy addresses the need for OCE to have a clear system of communications that ensures that Headquarters receives significant case information in sufficient time for Headquarters to be able to convey that information in a news release format to the public.

• This policy is thus designed to ensure timely, accurate news media coverage, both on the national and local levels, of OCE criminal enforcement activity. Achieving this goal will greatly enhance the deterrent impact of the criminal enforcement program. Doing so will also serve the right of citizens to be informed about their governments' conduct of law enforcement while protecting the individual rights of defendants.[1]

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[1] On December 22, 1989, James M. Strock, Assistant Administrator, OECM, issued an Agency-wide policy memorandum entitled "Public Relations Policies Pertaining to EPA Criminal Investigations and Prosecutions". This new policy memorandum signed by Earl Devaney, and which applies primarily to OCE employees, is intended to supplement and update the Strock memorandum.

II. THE NEWS MEDIA NETWORK: THE PARTICIPANTS AND THEIR RESPONSIBILITIES

The adverse effects of environmental crime on a community's well-being and the environment are of obvious and legitimate concern to the general public. Historically, a major obstacle to providing the public with relevant and timely information has been the lack of clarity and certainty regarding the respective roles of Agency personnel in disseminating such information. Accordingly, in an effort to eliminate the uncertainty, the major Agency participants and their responsibilities are identified below:

- **Office of Public Affairs:** The chief Agency spokesperson to the news media is the headquarters Press Relations Division, which is part of the Administrator's Office of Communications, Education, and Public Affairs (generally referred to as OPA). OCE as an enforcement office looks to OPA for assistance in fostering positive media relations and actively soliciting the attention of the media.

- **The Regional Offices of Public Affairs:** Each EPA Region has a Regional Office of Public Affairs. The Regional OPA is part of the Office of the Regional Administrator, but coordinates with the Headquarters OPA. While the manner of operations of the Regional OPAs varies from Region to Region, the Regional OPA, being responsible for local media relations, is an essential player in ensuring that OCE case information reaches that level of the media.

- **CID Media Coordinators:** To facilitate the OPA's ability to convey OCE's enforcement information, each CID Area Office should actively network with the Regional OPA. This requires CID to increase its accessibility to the OPA. Toward this end, each Area Office SAC will be the CID Media Coordinator for each Region and a designated second Special Agent will be the back-up Media Coordinator. This back-up Agent is to be identified to the CID Assistant Director of Investigations.

The CID Media Coordinators are the key players in the endeavor to improve OCE media coverage. They are responsible for ensuring case information reaches the Regional OPA and the OCE Media Coordinator at Headquarters. This requires, first, providing advance notice directly to the OCE Media Coordinator of pending case or other enforcement activity that will be the subject of any news release. Secondly, they need to provide clearance for release of the information as soon as possible after the event occurs. The CID Media Coordinators also oversee responses to inquiries from the media.

- **Regional Criminal Enforcement Counsels:** RCECs may provide vital assistance to CID Media Coordinators, and the RCECs' participation should be actively encouraged. Since releases in

most instances will most frequently involve situations where charges have been filed, a RCEC may be in the best position to obtain information on the prosecution and to coordinate with an Assistant U.S. Attorney.

• **OCE Media Coordinator:** Headquarters will name an OCE Media Coordinator and a person to serve as back-up OCE Media Coordinator and identify these persons to the CID field offices. The OCE Media Coordinator depends on the CID Media Coordinators to provide advance information to them from the field which may warrant an OPA news release or advisory at Headquarters. The OCE Media Coordinator takes the lead in working with OPA and program offices on the Headquarters level.

• **Role of Program Offices:** While the OPA is the Agency's principal channel to the general media, certain program and other enforcement offices have established more narrowly focused channels to the regulated community. For instance, the Headquarters OPPTS Office of Pesticide Programs has a Communications Branch, which independently issues regulatory and enforcement press releases to parties ranging from industry groups such as the United Fresh Fruit & Vegetable Association to public interest groups such as Americans for Safe Food. Such program communications offices should not be overlooked as a vehicle for getting OCE's enforcement message to those specialized audiences whose type of business activity or interests are similar to that of a criminal defendant.

III. NEWS RELEASES

A. General Policies on News Releases

• **Timeliness of Information:** Generally, the likelihood of the OPAs including information about case events in their weekly news advisories or making such information the subject of a news release diminishes with the increase in the length of time between the event and when they receive such information. The sooner Headquarters or a Regional OPA is alerted to significant case activity, the more likely it is that the case information will continue to maintain its viability as news.

• **OCE's Role:** OCE's role is to provide complete, accurate, and timely information and assistance so that OPA can prepare and issue a factually accurate and compelling news release or an advisory. The OPAs will only know as much about a case as is provided to them. It is for OCE to be alert to the type of case information beyond traditional data only, such as jail time and fines, that helps to signify the importance of the action. Including case aspects such as environmental justice, public health, environmental harm, and compliance impact improves the OPAs' ability to make an otherwise bare bones enforcement story into a matter warranting media attention.

• **What is Newsworthy?:** Ultimately, the media determines what warrants time and resources in their medium of public communications. In this, the "information age," the opportunities to convey information about OCE activities are expanding. What may not be newsworthy to a local broadcast station alternatively may be viewed as quite newsworthy to a 24-hour local cable news channel. CID Media Coordinators should consult with the Regional OPA and Headquarters in assessing whether case activity possesses local or national interest as a news subject. Case information involving particularly egregious misconduct, widely known defendants, extensive environmental harm or other indicia of possible national interest should be discussed with the OCE Media Coordinator.

B. **News Releases on the Regional Level**

• **News Media Network:** Organizational structure and operations vary considerably among the Regions. Accordingly, each CID Media Coordinator should establish and maintain a system of communications that best facilitates an efficient flow of information between the Department of Justice (DOJ) or a U.S. Attorney's Office, the Regional OPA, and the OCE Media Coordinator.

• **EPA, DOJ, and the Media:** While the simultaneous issuance by EPA and DOJ of press releases is encouraged, OCE should not hesitate to pursue our own media efforts and to supplement any media efforts by DOJ. More importantly, whether OCE brings a matter to the attention of the OPAs on the Regional and Headquarters level should not depend upon whether DOJ or a U.S. Attorney's Office will be issuing a release. While there is some overlap in the audiences that DOJ and EPA releases are directed to, the Agency's primary environmental focus differs from DOJ's emphasis on broader federal enforcement issues.

• **Coordination with DOJ During an Investigation:** OCE public comment on a matter while it is still in an investigative stage, especially if the matter has been referred to DOJ for purposes of grand jury investigation, should be reserved for special circumstances. In such a situation, DOJ requires investigative agencies to consult and obtain approval from a U.S. Attorney or DOJ Division if an agency is to comment about or confirm an ongoing DOJ investigation. This should involve an unusual circumstance where the matter has already received substantial publicity or a matter about which a community needs to be reassured that the appropriate law enforcement agency is investigating the incident, or where release of information is necessary to protect the public interest, safety, or welfare. U.S. Attorney's Manual § 1-700(VI)(3)(b).

• **Coordination with DOJ During Prosecution:** DOJ does not require its approval for an investigative agency to issue a press release after an investigation has become the subject of a prosecution through the filing of an indictment, information, or

plea agreement. It is recommended, nonetheless, that the contents of a proposed press release be discussed with a U.S. Attorney's Office or the DOJ Environmental Crimes Section and that their concerns, if any, be addressed prior to OPA issuance of a news release.

The process of obtaining DOJ approval of a draft release relating to an investigation or conferring with DOJ about a release dealing with an environmental prosecution can be arranged on a case-by-case basis by the OCE and CID Media Coordinators. Insofar as the involved U.S. Attorney's Office usually takes the lead for DOJ in preparing news releases, likewise, the CID Media Coordinator should usually take the lead within EPA with regard to such coordination.

• **Exchanging Copies:** Copies of the weekly OPA regional news advisories and news releases concerning OCE/CID matters should be provided to the OCE Media Coordinator. The OCE Media Coordinator will reciprocate by providing copies of Headquarters' news advisories and news releases dealing with that Region's cases to the CID Media Coordinator. News articles should be provided to CID for inclusion in the quarterly OCE Criminal Case Highlights.

C. News Releases on the Headquarters Level

• **Headquarters and Field Coordination:** In most instances, the Headquarters' news release will parallel that of the Regional OPA or that of the U.S. Attorney's Office. The OCE Media Coordinator will consult with the CID Media Coordinators as to any significant variances from a local release. If there is any unresolved disagreement as to the contents of a draft release, OCE management will consult with the CID Office to which the case is assigned.

• **EPA Management Statements:** The OCE Media Coordinator will oversee the process of obtaining any statements from the Administrator, Assistant Administrator for Enforcement and Compliance Assurance, or OCE management for inclusion in a news release. All such statements must be approved by either the Director or Deputy Director of OCE. Furthermore, the Administrator encourages opportunities for the Administrator's personal participation in the field when OCE enforcement activity of major significance is to occur. The more advance notice to Headquarters, the more likely such a statement or such participation can be arranged. Five days notice to the Assistant Administrator of OECA is advisable and 90 days advance notice to the Administrator's Office usually will be needed. CID is strongly encouraged to be cognizant of case events or other activity, such as the presentation of a citizen award, where the Administrator can personally endorse CID's activities.

• **Weekly Report of Significant Activities:** Providing case information to the OCE Media Coordinator does not relieve a CID Area Office of its responsibility for preparing a separate case write-up for the Weekly Report of Significant Activities and ensuring its timely delivery to Headquarters.

IV. Information Which Can Be Released

• **The Public Record:** Only case information that is on the public record should be provided to OPA for inclusion in a news release. The greatest caution must be exercised from the time of the filing of charges until the conclusion of trial in order not to prejudice a defendant's right to an impartial judgment. But as a case progresses from indictment to sentencing, information on the public record about it and what can be included in a news release increases markedly. If information, such as a defendant's compliance history, has not been publicly disclosed or is not publicly accessible, the information is not on the public record. There is information beyond the substance of a charge and the immediate circumstances of the offense as described in the indictment which is part of the public record which should not be overlooked. Aspects such as remedial measures, environmental justice, fine sharing, cases of first time enforcement, and joint state/federal enforcement partnerships should be highlighted when provided to OPA.

• **Reliance on Professional Judgment:** As law enforcement professionals, OCE employees are trusted to be able to judge what information is appropriate for public disclosure. This excludes, for instance, subjective observations about an individual or organizational defendant's character or business attitudes, opinions about the strengths and weaknesses of either the defendant's or government's case, or other information which would be reasonably expected to influence the outcome of a pending trial. The focus is upon providing information which is objective and professional. For further guidance in this area, see the DOJ Guidelines on Release of Information Relating to Criminal Proceedings, as set forth in 28 C.F.R. § 50.2(b).

• **Case Specifics:** Specific descriptions about the nature of an offense makes information more comprehensible, e.g., 58,000 cubic yards of emissions dust communicates more than just stating mounds of dust were stored on site. Also, the identity of all participating investigative agencies should be provided to OPA at all stages of a case.

• **Warrants:** Approval from the CID Assistant Director of Investigations must be obtained before information about search and arrest warrants is provided to OPA. No advance information prior to the execution of a warrant should be provided to the media. Should an affidavit for a warrant and the accompanying warrant

become part of an unsealed, public court file, then confirmation of the facts concerning a warrant is permissible.

• **Marking Draft Releases:** Draft news releases and releases whose issuance is contingent on approval or on the occurrence of events must be plainly and boldly identified as such. Doing so minimizes any risk of inadvertent or premature release of information. To promote accuracy, case information or any draft releases should be faxed to the OCE Media Coordinator.

V. POLICY ON PUBLIC COMMENT

• **Off the Record Comments:** Generally, in reference to press matters, "off the record" refers to information given to the media as background which is not to be published or aired; "not for attribution" refers to the situation when a person provides information, but wishes not to be identified as the source. It is OCE policy that information should not be attributable in the media to unnamed "informed sources." If a statement is to be made to the media, it should only be done so on the record.

• **Comments on Policy Issues:** Any statements on unresolved or controversial national criminal enforcement policy issues should originate from Headquarters and not from CID area or field offices.

• **No Comment Responses:** A "no comment" response to an inquiry from the media about an investigation or case can be easily misinterpreted. Accordingly, where appropriate, a more precise response should be given. For instance, it may be more fitting and informative to state that existing EPA and DOJ policy will not allow comment on the matter (such as an ongoing investigation or grand jury proceeding), but when and if such information becomes available for public disclosure, it will be provided by EPA.

This policy, and any internal office procedure which implements this policy, are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party to litigation with the United States. The Agency reserves the right to act at variance with this policy as the circumstances may warrant. In particular, nothing in this policy shall be interpreted to preclude the Agency from notifying the public, when necessary, as to any health or environmental hazard.

§ 50.2 Release of information by personnel of the Department of Justice relating to criminal and civil proceedings.

(b) *Guidelines to criminal actions.* (1) These guidelines shall apply to the release of information to news media from the time a person is the subject of a criminal investigation until any proceeding resulting from such an investigation has been terminated by trial or otherwise.

(2) At no time shall personnel of the Department of Justice furnish any statement or information for the purpose of influencing the outcome of a defendant's trial, nor shall personnel of the Department furnish any statement or information, which could reasonably be expected to be disseminated by means of public communication, if such a statement or information may reasonably be expected to influence the outcome of a pending or future trial.

(3) Personnel of the Department of Justice, subject to specific limitations imposed by law or court rule or order, may make public the following information:

(i) The defendant's name, age, residence, employment, marital status, and similar background information.

(ii) The substance or text of the charge, such as a complaint, indictment, or information.

(iii) The identity of the investigating and/or arresting agency and the length or scope of an investigation.

(iv) The circumstances immediately surrounding an arrest, including the time and place of arrest, resistance, pursuit, possession and use of weapons, and a description of physical items seized at the time of arrest.

Disclosures should include only incontrovertible, factual matters, and should not include subjective observations. In addition, where background information or information relating to the circumstances of an arrest or investigation would be highly prejudicial or where the release thereof would serve no law enforcement function, such information should not be made public.

(4) Personnel of the Department shall not disseminate any information concerning a defendant's prior criminal record.

(5) Because of the particular danger of prejudice resulting from statements in the period approaching and during trial, they ought strenuously to be avoided during that period. Any such statement or release shall be made only on the infrequent occasion when circumstances absolutely demand a disclosure of information and shall include only information which is clearly not prejudicial.

(6) The release of certain types of information generally tends to create dangers of prejudice without serving a significant law enforcement function. Therefore, personnel of the Department should refrain from making available the following:

(i) Observations about a defendant's character.

(ii) Statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement.

(iii) Reference to investigative procedures such as fingerprints, polygraph examinations, ballistic tests, or laboratory tests, or to the refusal by the defendant to submit to such tests or examinations.

(iv) Statements concerning the identity, testimony, or credibility of prospective witnesses.

(v) Statements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial.

(vi) Any opinion as to the accused's guilt, or the possibility of a plea of guilty to the offense charged, or the possibility of a plea to a lesser offense.

(7) Personnel of the Department of Justice should take no action to encourage or assist news media in photographing or televising a defendant or accused person being held or transported in Federal custody. Departmental representatives should not make available photographs of a defendant unless a law enforcement function is served thereby.

(8) This statement of policy is not intended to restrict the release of information concerning a defendant who is a fugitive from justice.

Document 27 of 76.

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View Related Topics

June 06, 2000, Tuesday

SECTION: NORTH PINELLAS TIMES; Pg. 1

DISTRIBUTION: NORTH PINELLAS TIMES; CLEARWATER TIMES; PASCO TIMES; CITY & STATE; TAMPA & STATE

LENGTH: 991 words

HEADLINE: EPA staffers derided for leaving meeting

BYLINE: ED QUIOCO

DATELINE: TARPON SPRINGS

BODY:
(ran PW PS editions of Pasco Times)

Two agency representatives walk out of a public session on the Stauffer cleanup.

A crowd at Tarpon Springs City Hall booed and jeered Monday after two officials from the U.S. Environmental Protection Agency made a brief presentation about the cleanup of the Stauffer Superfund site and abruptly walked out of a public meeting.

The officials said at the start of the two-hour meeting that they would leave after taking 10 minutes of questions, an announcement that angered U.S. Rep. Michael Bilirakis, R-Palm Harbor, who sponsored the meeting.

"You are wrong as all hell for just wanting to walk out of here after 10 minutes of questions," Bilirakis told Joanne Benante, an EPA official from the Region 4 office in Atlanta and Michelle Staes, an EPA attorney from the same office. "I hope that the audience is not only disappointed but disgusted at that kind of attitude. I'm very disappointed."

But true to their warning, Benante and Staes marched out of the meeting after they made a limited presentation and took a few questions and stinging critiques from **Hugh Kaufman,** lead investigator for **EPA Ombudsman** Bob Martin.

As they left, the crowd booed. Someone in the audience made the mocking sounds of a chicken as another yelled, "You should be ashamed of yourself."

After the meeting, Martin, who decided in December to investigate the EPA Region 4 office's activities at Stauffer, said he has held several similar meetings all over the country and has never encountered what the EPA's officials did Monday.

"I need to say this for the record that I was deeply disturbed and offended that they walked out," Martin said toward the end of the meeting. "It was a wrong against this community. This is very serious."

At the heart of the issue on Monday was a federal court document called a consent decree, which essentially details the EPA's cleanup plan for the 130-acre site and calls for piling and capping 300,000 cubic yards of toxic soil on the site, which once held a phosphorus-processing plant.

Benante and Staes said they merely wanted to inform the audience of a handful of changes to the consent decree before fielding questions for 10 minutes. But Kaufman kept pressing them with specific questions and sounded like an attorney questioning witnesses.

Early on, Kaufman even read Benante and Staes the Miranda warning informing them that whatever they said could be used against them in court.

As he was trying to point out that most of the officials who signed the consent decree were not present at the meeting, he said Benante had suddenly cut him off. Kaufman, who had pointed out earlier that Benante was from New York, replied: "Excuse me, Mrs. Benante, I'm speaking now. This is not New York."

"I take exception to that remark," Benante said. "Your rudeness is uncalled for. Please discontinue it."

"Mrs. Benante, the record will show who is rude and who's not," Kaufman replied.

Kaufman was trying to hammer home the point that EPA officials had admitted in a letter to local resident Mary Mosley, who has been intensely involved in the issue for years, that one of the companies participating in the cleanup underwent a corporate merger and name change after signing the consent decree. In the letter to Mosley, dated a month after the decree was signed in April, EPA officials in Atlanta indicated they were requesting information about the corporate change.

Kaufman questioned why EPA officials would sign a consent decree with a company without knowing specifics about the company and its ability to pay for the cleanup.

Don Harris, environmental manager with the state Department of Environmental Protection, said at the meeting that the state department has been working with the federal EPA on the Stauffer cleanup. He said that the consent decree, as it currently is written, is a step in the right direction but may not go far enough to clean the site.

Kaufman said after the meeting that more studies are needed before the consent decree, which essentially lays out a remedy to the situation, is signed by U.S. District Judge Susan Bucklew. He said the studies need to be done before a remedy even is considered and encouraged residents to write Bucklew and urge that she

delay signing the consent decree. Kaufman said residents have until June 12 to send their comments to Bucklew.

Heather Malinowski, secretary of PI-PA-TAG, a local citizens watchdog group, said after the meeting that the way Benante and Staes walked out of the meeting as several television cameras rolled showed what residents have gone through for years with that EPA office.

"I feel like they walked out on us years ago," she said. "And now they go and do it again. But now it's on film."

Carlene Hobbs, a Tarpon Springs resident, said the EPA office showed a lack of respect to Bilirakis and the residents.

"It was embarrassing what they did in front of our congressman, but they have done it to us for years," Hobbs said. "There are a lot of sick people in this community and they are sick because of Stauffer."

This was the third public meeting Bilirakis has sponsored. He said things seemed to be working out among all sides of the issue after the two meetings and was somewhat blindsided when Benante and Staes walked out. About 70 people attended the meeting Monday.

Bilirakis also expressed his disappointed that U.S. Department of Justice officials did not attend the meeting. The Department of Justice also is a party in the consent decree.

Kaufman said that Benante and Staes were just following orders which, he theorized, probably came from high-level officials of the EPA and the Department of Justice. After the meeting, he said he was optimistic that the process still would work despite Monday's events.

"Democracy is stronger than any of these petty bureaucrats," he said.

- Ed Quioco can be reached at (727) 445-4183 or at quioco@sptimes.com.

GRAPHIC: COLOR MAP; BLACK AND WHITE MAP; locates the Stauffer plant site, (ran NT); locates the Stauffer plant site, (ran CT)

LANGUAGE: ENGLISH

LOAD-DATE: June 7, 2000

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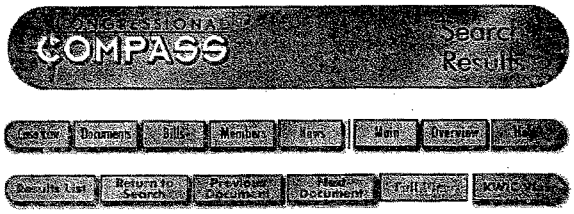

Document 2 of 5.

Copyright 1999 The Denver Post Corporation
The Denver Post

July 4, 1999 Sunday 2D EDITION

SECTION: PERSPECTIVE; Pg. G-03

LENGTH: 659 words

HEADLINE: The EPA's loose cannon

BYLINE: Al Knight

BODY:
Denver, following in a long line of other cities, is getting the **Hugh Kaufman** treatment.

Kaufman, who works in the ombudsman's office of the Environmental Protection Agency, has stirred up a hornet's nest with a variety of provocative comments on the agency's Shattuck Chemical Co. Superfund project in south Denver. Being colorful is something of a life's mission for Kaufman and his role here maintains the pattern.

Among other things, Kaufman has said the clay cap at Shattuck's plant that covers 50,000 cubic yards of low-level radioactive waste may be sinking. This he discovered by eyeballing the site one day. He went on to confidently predict that if there was some subsidence at this stage (not yet demonstrated), it was likely that there would be a more significant failure in 200 years, the projected life of the project. Kaufman also said that the EPA's remedy of burying the waste might not have been legal if the plant, as alleged, once treated depleted uranium from U.S. weapons plants.

These kinds of comments have naturally thrilled neighborhood critics of the Superfund project who want the waste dug up and relocated in another state.

It will take some time to sort out the facts. A Shattuck spokesman has said that depleted uranium was once treated at the site under permits issued by the Colorado Department of Health and that this activity was known to the EPA very early in the project. Shattuck has denied another scare story that it processed spent fuel rods from nuclear power plants.

Meanwhile, the EPA has noted that it did surveys and that those measurements of radioactivity were used

in fashioning the remedy of on-site burial.

As these controversies play out, Denver residents may want to keep a few facts about Kaufman in mind.

Recent press reports that he is a "top investigator" with the EPA don't provide either an accurate or complete picture. He is a career whistle-blower who, because of his past dealings with the agency, has been issued what amounts to a lifetime license to criticize the agency.

The EPA in 1982 agreed to a settlement of an employment suit that assured Kaufman of employment and the right to continue speaking his mind. Indeed, until the agency stepped in 1991, he was making critical speeches to a variety of private groups lambasting the agency and collecting travel and other expenses.

Here's a sampling of his comments:

In a case involving a New York firm trucking sludge to Texas, Kaufman announced that "the people of Texas are being poisoned," adding that the project was an "**illegal** haul-and-dump operation masquerading as an environmentally beneficial project." The company involved sued Kaufman for defamation. A jury assessed $ 500,000 in punitive damages against Kaufman, but on appeal the judgment was reversed.

Speaking about a project to treat contaminated groundwater at the Lowry landfill near Denver, Kaufman said, "On the one hand, the EPA is saying this waste is so dangerous it has to be cleaned up. Then they're saying it's safe enough to grow food on. That's ridiculous."

While in the middle of the 1982 controversies at the EPA, on the way to becoming something of a folk hero to environmental groups, Kaufman often told private groups, "We're on a collision course with wiping out our water supplies in 20 to 30 years. The people in the EPA now are a destruction crew."

In Pennsylvania, commenting on the state's willingness to allow the importation of garbage from other states, Kaufman said, the state was becoming the nation's "pay toilet."

Kaufman will be back in town next week, but his sound bites shouldn't be allowed to decide what happens at Shattuck. Those wastes should be moved only if it can be shown that the design of the current remedy threatens the public health and welfare. That's going to require more than brief tours followed by press conferences. Al Knight (aknight@chaffee.net) is a Denver Post columnist and editorial writer.

LOAD-DATE: July 06, 1999

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Document 28 of 35.

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June 30, 1999 Wednesday 2D EDITION

SECTION: DENVER & THE WEST; Pg. B-01

LENGTH: 636 words

HEADLINE: **Shattuck** remedy lacking, EPA says Key information on mop-up missing

BYLINE: By Mark Eddy, Denver Post Environment Writer

BODY:
The Environmental Protection Agency didn't have the all information it needed to properly decide how to cleanup the **Shattuck** Superfund site, a top investigator for the agency said Tuesday night.

The agency's record of decision, or ROD, states that the EPA didn't know what was processed at the **Shattuck** plant during the 1960s.

"If the ROD is accurate and our regional office and the state did not know what waste materials came to **Shattuck** in the 1960s, then they could not have accurately designed a remedy," said **Hugh Kaufman,** an investigator for the **EPA's ombudsman** who is looking into the **Shattuck** cleanup.

But local EPA officials said the cleanup is safe and that decisions were based on what was found at the site.

"When we did our initial investigations, we took samples and did radiological surveys on the site. That was the basis for the remedy," said Barry Levene, the EPA's local Superfund chief. "It wasn't the constituents in the waste material. It was what we found onsite, in the soils, that formed the basis for the remedy selection."

Denver EPA officials decided in 1992 to mix more than 50,000 cubic yards of radioactive dirt with concrete and flyash and entomb it at the former chemical processing plant at 1805 S. Bannock St. The monolith covers 6 acres and is 15-feet tall.

A former vice president of the company, Tom Millensifer, said Tuesday that Shattuck processed depleted

uranium from federal weapons plants during the 1960s.

That means the decision to entomb the waste onsite may not have been legal, Kaufman said.

"This does not appear to be an adequate remedy for compliance with the laws related to waste generated by the reprocessing of defense-contractor radioactive waste and Atomic Energy Commission-generated waste."

Cleanup of waste generated by weapons plants is governed by different laws and generally costs more because those statutes are more stringent than those that govern cleanup of mine tailings, which is what Shattuck was supposed to have had on site, Kaufman said.

The EPA should have known what was processed at Shattuck during the 1960s because it wasn't a secret, said Millensifer, who was vice president at the plant from 1958 to 1974.

"I can't believe that the record of decision would indicate 'unknown' for the 1960s when they knew so much about everything else," he said. "I have to believe they knew perfectly well what was going on."

If the EPA knew but didn't put the information in the record, that's a felony, Kaufman said.

"If the statement in the ROD was not true and the state and or regional office knew what waste had come to Shattuck in the '60s, then there are criminal ramifications, and just given the situation as it is, that increases the chances of a criminal referrals," he said.

"This case could go criminal real fast," Kaufman said.

Local EPA officials are reviewing the record of decision in an effort to determine what was known when it was signed Jan. 28, 1992, said Max Dodson, assistant regional administrator for the local office.

But even if engineers didn't know what was processed, they still knew what contaminants were at the site four miles south of Downtown Denver, he said.

"I don't know exactly how they proceeded," Dodson said. "Even if you didn't know the history of a facility, you still characterize the waste. ... You would apply the remedy to make sure it meshes with the character of the waste."

U.S. Sen. Wayne Allard, R-Colo., who pushed for the current probe into the cleanup, said Tuesday that the lack of information is another in a long list of concerns regarding Shattuck.

If the agency didn't know what was processed at Shattuck that raises serious questions about the cleanup, he said. "If you don't have all the information how can you even suggest that your remedy was adequate."

LOAD-DATE: June 30, 1999

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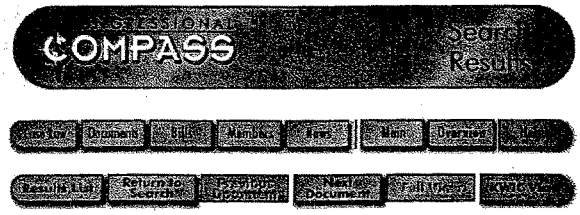

Document 1 of 3.

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St. Petersburg Times

June 19, 2000, Monday

SECTION: PASCO TIMES; Pg. 1

DISTRIBUTION: PASCO TIMES

LENGTH: 1574 words

HEADLINE: Dynamic duo force EPA to stay on guard

BYLINE: ROBERT FARLEY

BODY:
(ran PW, PS editions)

To their foes they're **loose cannons,** but the one-two punch

of EPA ombudsman Bob Martin and sidekick **Hugh Kaufman** are heroes to those they defend.

Residents have come to expect a bit of theater when the soft-spoken and pony-tailed EPA ombudsman Bob Martin and his sidekick, the sometimes caustic, often confrontational **Hugh Kaufman,** come to town.

But few foresaw the startling response that Martin and Kaufman recently encountered in Tarpon Springs. Its reverberations have put the little-known ombudsman's office - a small but feisty watchdog arm of the Environmental Protection Agency - in the national spotlight.

The new attention comes largely at the behest of U.S. Rep. Mike Bilirakis, who boiled for days after a perceived slight during a June 5 meeting to discuss recent changes made to the controversial cleanup plan for the Stauffer Superfund site.

With television cameras running in Bilirakis' home county, two EPA officials who had been aggressively questioned by Kaufman walked out of the meeting, saying they had agreed to just 10 minutes of questions.

"You're wrong as all hell to want to walk out of here after just a few minutes of presentation," Bilirakis

fumed.

Several days later, Bilirakis, who chairs the House Health and Environment Committee, announced he would launch an investigation into the EPA's alleged interference with the ombudsman's office.

But Bilirakis wasn't the only one steamed over the June 5 meeting.

On June 12, the EPA's Stephen D. Luftig wrote Martin of his concern over reports of "abusive, bullying tactics and the lack of impartiality shown by your office at recent meetings regarding Superfund sites."

Luftig, director of the Office of Emergency and Remedial Action, said he was shocked that Kaufman read the two EPA employees at the Tarpon Springs meeting their Miranda rights.

Kaufman says he did so because he anticipated an answer that could prompt him to file a complaint with the U.S. Attorney's Office. Specifically, he said EPA officials misled the ombudsman's office in February by failing to disclose a corporate merger and name change of the company that is ultimately responsible for paying to clean up the Stauffer site.

EPA officials say the charge is baseless.

"Mr. Kaufman has to recognize that when he does participate in ombudsman matters, he needs to be objective in gathering facts and not be stating prematurely his opinion on things," said Tim Fields, assistant administrator for EPA's Office of Solid Waste and Emergency Response. "I think that impacts the credibility of the ombudsman's office."

So which is it? Are Martin and Kaufman insightful, constructive critics or two **loose cannons?**

Bilirakis is convinced that Martin and Kaufman have changed the face of the debate over the proposed cleanup of Stauffer, and he plans to bring the debate front and center.

This week, Bilirakis - suddenly in the company of environmentalists who rarely agree with his votes - said he plans to speak on the House floor in favor of more than quadrupling the ombudsman's budget, and for carving out a more independent role for the two-man office.

"If they hadn't come into the picture," Bilirakis said, "the scope of work would already be finalized and we'd have a great big, ugly mound without having the proper hydrogeological studies and without taking into account the history of sinkholes. It potentially could have been a disaster if not for the ombudsman bringing this stuff out into the open."

Good cop, bad cop

Though relatively unknown, the ombudsman has emerged as a people's champion when local residents feel like the EPA has run roughshod over their community.

The national EPA ombudsman's office was created in 1985 to investigate and second-guess EPA plans for Superfund cleanups.

But to appreciate the way the office works requires an understanding of the two colorful characters behind it: the ombudsman of eight years, Bob Martin, and his chief investigator, **Hugh Kaufman.**

Martin, a member of the Makah Indian tribe in Washington state, had been representing American Indian

tribes in environmental matters before Congress prior to being appointed by EPA officials to the ombudsman post.

While Martin often plays the role of the stoic decisionmaker, Kaufman relishes playing David to the EPA's Goliath.

Kaufman calls EPA leaders "puffed-up, arrogant bureaucrats" and says too often they seem more interested in protecting the assets of polluting corporations than safeguarding the public's health. Kaufman's opponents, and there are many, call him a bully.

In contrast to Martin, who had no government experience when he became the ombudsman, Kaufman has been with EPA since the agency's inception in 1971 and helped write the Superfund legislation.

His history of defying the EPA dates to the Carter administration, when he testified before Congress that the EPA was dragging its feet at Love Canal. He later ruffled EPA feathers when he was among those who claimed members of Reagan's administration were manipulating the Superfund program for political purposes.

During hearings, Martin and Kaufman are a contrast in styles, playing their own version of good cop-bad cop.

"Bob (Martin) has got to be free and independent," Kaufman said. "He's got to be above the fray. He's in a more judicious role. My job is to ferret out the truth."

The ombudsman's office is a lean operation, consisting of Martin, Kaufman and two interns. Their budget includes Martin's and Kaufman's salaries - $ 100,000 and $ 95,000, respectively - travel expenses and court reporter expenses. That amounts to $ 300,000, though the office recently received another $ 200,000 to finance a high-priority investigation in Ohio. By comparison, Kaufman notes, the EPA has a $ 7.8-billion budget.

Though the office gets thousands of requests for intervention, it picks only a handful each year to investigate. The office currently has six cases on its plate, including Stauffer.

The office's other cases include one in Augusta, Ga., where Martin is investigating whether the city's wastewater program produced sewage sludge that was intended as fertilizer but instead killed cows.

In Coeur d'Alene, Idaho, Martin is looking into the EPA's efforts to create a massive Superfund site in an attempt to put financial obligations onto mining operations that left toxic waste. That effort makes no sense, Kaufman said, because the lead contamination in the soil there is far less than at a battery plant in western Pennsylvania the EPA has "walked away from."

Arena for the truth

Martin boasts that 80 percent of the recommendations he makes for changes to EPA cleanup plans are ultimately adopted.

On Friday, the office claimed another victory when the EPA announced it would follow Martin's recommendation to abandon a controversial mound-and-cap cleanup at the Shattuck Chemical Plant in Colorado, and instead haul the radioactive waste to a licensed waste site.

"They uncovered all the facts the EPA basically didn't want to come out," said Sean Conway, press

secretary for Sen. Wayne Allard, R-Colo.

But a string of controversial cases over the last few years has made his office's relationship with EPA leaders more tense, Martin said.

"I think the (EPA) administration is not interested in having a substantive ombudsman's office at this point," Kaufman said. "They want to starve us out because we're too effective."

Fields, the national program manager for Superfund, said the EPA supports the ombudsman's function, and he believes Martin has done an "exemplary job." But he said Bilirakis' proposal for a $ 2-million line-item in the federal budget for the ombudsman was "way too excessive."

Fields added that he welcomes Bilirakis' congressional investigation.

"I think the investigation will conclude that we (EPA) try to provide the maximum degree of independence to the ombudsman's office as can be expected," Fields said.

Fields also took issue with Kaufman's style in public meetings, and he is not alone.

Dave Lewandowski, a resident of Meyers Cove, a neighborhood that abuts the Stauffer site, is convinced Kaufman's meddling only delays the cleanup. Lewandowski believes the EPA ought to move forward with its proposed plan because every day that nothing is done, more contamination washes into the Anclote River.

"Everyone's talking and no one's doing," Lewandowski said. He said Kaufman seems more interested in "Stauffer- and EPA-bashing" than in getting a cleanup moving.

"Before this is over, I think (Kaufman) is going to screw up the whole affair," Lewandowski said.

But most local residents who follow the Stauffer case have a much different opinion.

"They have absolutely changed this around," said resident Mary Mosley, who has criticized EPA's involvement in the case for years. "I think they're saints that Bilirakis brought out of heaven to help this community."

Heather Malinowski, secretary of the Pinellas-Pasco Technical Advisory Group, a local citizens' watchdog group, said she is grateful for Kaufman's style, because "I see things finally moving."

"I think what they (Martin and Kaufman) have done is created an arena where the truth comes out," Malinowski said. ". . . Questions have been asked and answered that weren't before."

- Times researcher Caryn Baird contributed to this report. Robert Farley can be reached at (727) 445-4185 or at farley@sptimes.com.

GRAPHIC: COLOR MAP; BLACK AND WHITE PHOTO, (2); Map locating the Stauffer Chemical plant; Bob Martin; **Hugh Kaufman**

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EPA will be asked to 'cease and desist'

Delegation also seeks higher priority for GAO audit

By JEFF SELLE
Staff writer

Saturday, May 20, 2000

COEUR d'ALENE – Members of Idaho's congressional delegation are expected to send a letter to the Environmental Protection Agency next week, asking officials to "cease and desist all further unilateral plans to list the Coeur d'Alene River Basin" pending the results of an investigation of agency activities in the basin.

U.S. Sen. Mike Crapo's office issued a press release Friday saying he is talking with Idaho's other congressmen to craft a letter that would provide breathing room for EPA's national ombudsman to investigate inconsistencies he has discovered in the proposed listing of the basin.

"We want Region 10 to back off until we can get this investigation funded and finalized in the basin," Crapo said. "Considering the allegations that have been made, that seems to be an obvious step."

Hugh Kaufman, an investigator at the ombudsman's office, announced Thursday that his office intends to investigate the Coeur d'Alene River Basin Superfund listing – if they can straighten out what appears to be some political posturing with their funding (see related stories).

Calls to EPA's Region 10 Administrator Chuck Clarke were forwarded to Assistant Administrator Jim Werntz in the Boise office Friday afternoon.

"I can't speculate on what that letter would mean," Werntz said, referring to the delegation's expected cease-and-desist letter. "We certainly welcome the ombudsman to come in, but I don't understand where some of this really outrageous language is coming from."

Werntz said the Seattle office has been working collaboratively with the state of Idaho throughout the Superfund listing process.

He said the state may not want the listing, but the EPA believes the Superfund may be the only available option for cleaning up the Coeur d'Alene Basin if a settlement cannot be reached.

Werntz said the EPA has worked closely with the state of Idaho from the beginning to find a "clean solution to the environmental problems in the basin."

Kaufman said he doesn't think anyone at the EPA knows what to do at this

point.

"They weren't expecting the truth to be coming at them from so many sources like this," the investigator said.

Ultimately, Kaufman said he believes the Region 10 office will realize the best thing to do would be to delay the Superfund listing process for a year and allow this to play out.

"That would be the smart play," he said. "They should apologize and give this until June of 2001. That would release the pressure."

Meanwhile, U.S. Rep. Helen Chenoweth-Hage's office and Community Leaders for EPA Accountability Now (CLEAN) are turning up the heat on a separate General Accounting Office audit and investigation that will be conducted in the basin.

Chenoweth-Hage's office called for the investigation last month, and the GAO accepted. In light of the most recent allegations, however, she wants to see if the GAO can re-prioritize its efforts on the investigation, said Chad Hyslop, district director for Chenoweth-Hage's office in Boise.

"We want to bump the GAO and see if we can get the audit moved up," Hyslop said.

CLEAN is also calling on the GAO to step up the audit of EPA's actions in the Silver Valley, according to spokesman Bret Bowers.

The group sent a letter Friday to GAO Comptroller General David Walker explaining how they believe this week's activities constitute a higher priority for the investigation.

"In light of the allegations of partisan politics, we feel this is needed," Bowers said.

(return to top)

EPA investigation request accepted

By JEFF SELLE
Staff writer

5-19-00
CDA Press

COEUR d'ALENE — An investigator from the Environmental Protection Agency's National Ombudsman's Office said Thursday that his agency's efforts to list the entire Coeur d'Alene River Basin as a Superfund site reeks of politics.

The ombudsman's office officially accepted a request by the Idaho congressional delegation to investigate the EPA's efforts in the basin on Thursday citing two major concerns.

"There is certainly a problem here," said Hugh Kaufman, an EPA investigator with the ombudsman's office. "Our eyebrows raised on two particular points."

The first concern is over a letter addressed to Gov. Dirk Kempthorne from EPA's Region 10 Administrator Chuck Clarke. The letter, which was mailed last Friday, reiterated the EPA's intentions to list the Coeur d'Alene River Basin as a Superfund site if the state cannot negotiate an adequately funded cleanup settlement of its own.

"What is that? It sounds like they are saying you better get an agreement before we lace up the jack boots and start playing Waco with you," Kaufman said.

That is particularly interesting to his office, considering the agency's no-action stance on a separate Superfund investigation that was just wrapped up in Throop, Penn., he said.

In that case, Kaufman said the EPA investigated a battery plant where lead levels in the soil dramatically exceeded lead levels found in the soil of the Coeur d'Alene River Basin. There is also a federal court ruling concerning that case that directly links severe brain damage in children with the lead at the battery factory.

In that case, EPA decided not to get involved, Kaufman said.

On the second point, he said his initial investigation indicates Region 10 appears to be more cooperative with Washington Gov. Gary Locke, who happens to be Democrat.

"It looks like they are doing Superfund stuff in Washington and deferring it all to the state, but in Idaho they are ready to lace up the boots," Kaufman said. "These actions certainly imply they may be playing politics in Idaho.

"We are not making any judgments until we investigate this," he added. "But we can't forget Dan Rather's quote either: 'If it walks like a duck and talks like a duck, you probably have a duck.'"

Sen. Mike Crapo and Congressman Helen Chenoweth-Hage were glad to hear the ombudsman was stepping in.

"My office has been working on this for several months now," Crapo said. "And I am very pleased they took an interest in this.

He said: "The EPA has held a gun to the head of Idaho for far too long with this threat of a further listing, and I welcome a fresh look at the management of the Superfund activities in this basin."

Crapo was surprised by the letter's impact on the national level, and has offered to assist the U.S. House of Representative investigate any allegations of partisan politics in the agency (see related story on A1).

Chenoweth-Hage was also glad to hear the ombudsman is coming in. She signed on with Crapo's request, and has spearheaded a separate General Accounting Office investigation of EPA's entire actions in the basin.

"Obviously, we hit a nerve here," Chenoweth-Hage said. "This appears to be a last-ditch effort to hide something by playing politics."

Chenoweth-Hage said it is encouraging for her to see someone like Kaufman finally shedding some light on what is happening in the basin.

"It certainly builds my confidence in the office of the ombudsman being able to investigate its own agency," she said.