THE WHITE HOUSE

WASHINGTON

November 30, 1982

MEMORANDUM FOR THE ADMINISTRATOR
ENVIRONMENTAL PROTECTION AGENCY

SUBJECT: Congressional Subpoenas for Executive Branch Documents

I have been advised that the Subcommittee on Oversight and Investigations of the Energy and Commerce Committee of the House of Representatives has issued a subpoena requiring you, as Administrator of the Environmental Protection Agency ("EPA"), to produce documents from open law enforcement files assembled as part of the enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") against three specific sites which have been utilized in the past for the dumping of hazardous wastes located in Michigan, California and Oklahoma. I further understand that you have also received a subpoena from the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee of the House of Representatives apparently intended to secure similar files regarding an additional approximately 160 hazardous waste sites.

It is my understanding that in response to requests by the Energy and Commerce Subcommittee during its investigation of the EPA's enforcement program under CERCLA, the EPA has either produced or made available for copying by the Subcommittee approximately 40,000 documents. I am informed that in response to the Public Works and Transportation Subcommittee, the EPA estimates that it has produced, will produce, or will make available for inspection and copying by the Subcommittee approximately 787,000 documents at a cost of approximately $223,000 and an expenditure of more than 15,000 personnel hours. I further understand that a controversy has arisen between the EPA and each of these Subcommittees over the EPA's unwillingness to permit copying of a number of documents generated by attorneys and other enforcement personnel within the EPA in the development of potential civil or criminal enforcement actions against private parties. These documents, from open law enforcement files, are internal deliberative materials containing enforcement strategy and statements of the Government's position on various legal issues which may be raised in enforcement actions relative to the various hazardous waste sites by the EPA or the Department of Justice under CERCLA.

The Attorney General, at my direction, has sent the attached letter to Chairman Dingell of the Energy and Commerce Subcommittee setting forth the historic position of the Executive Branch, with which I concur, that sensitive documents found in open law enforcement files should not be made available to Congress or the public except in extraordinary circumstances. Because dissemination of such documents outside the Executive Branch would impair my solemn responsibility to enforce the law, I instruct you and your agency not to furnish copies of this category of documents to the Subcommittees in response to their subpoenas. I request that you insure that the Chairman of each Subcommittee is advised of my decision.

I also request that you remain willing to meet with each Subcommittee to provide such information as you can, consistent with these instructions and without creating a precedent that would violate the Constitutional doctrine of separation of powers.

Ronald Reagan

PERRY DEC. EXH. E

PAGE 2 OF 10

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

30 NOV 1982

Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to your letter to me of November 8, 1982, in which you, on behalf of the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of the House of Representatives, continue to seek to compel the production to your Subcommittee of copies of sensitive open law enforcement investigative files (referred to herein for convenience simply as "law enforcement files") of the Environmental Protection Agency ("EPA"). Demands for other EPA files, including similar law enforcement files, have also been made by the Subcommittee on Investigations and Oversight of the Public Works and Transportation Committee of the House of Representatives.

Since the issues raised by these demands and others like them are important ones to two separate and independent Branches of our Nation's Government, I shall reiterate at some length in this letter the longstanding position of the Executive Branch with respect to such matters. I do so with the knowledge and concurrence of the President.

As the President announced in a memorandum to the Heads of all Executive Departments and Agencies on November 4, 1982, "[t]he policy of this Administration is to comply with Congressional requests for information to the fullest extent consistent with the constitutional and statutory obligations of the Executive Branch. . . . [E]xecutive privilege will be asserted only in the most compelling circumstances, and only after careful review demonstrates that assertion of the privilege is necessary." Nevertheless,

it has been the policy of the Executive Branch throughout this Nation's history generally to decline to provide committees of Congress with access to or copies of law enforcement files except in the most extraordinary circumstances. Attorney General Robert Jackson, subsequently a Justice of the Supreme Court, restated this position to Congress over forty years ago:

> "It is the position of [the] Department [of Justice], restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the laws be faithfully executed,' and that congressional or public access to them would not be in the public interest.
>
> "Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain."

This policy does not extend to all material contained in investigative files. Depending upon the nature of the specific files and the type of investigation involved, much of the information contained in such files may and is routinely shared with Congress in response to a proper request. Indeed, in response to your Subcommittee's request, considerable quantities of documents and factual data have been provided to you. The EPA estimates that approximately 40,000 documents have been made available for your Subcommittee and its staff to examine relative to the three hazardous waste sites in which you have expressed an interest. The only documents which have been withheld are those which are sensitive memoranda or notes by EPA attorneys and investigators reflecting enforcement strategy, legal analysis, lists of potential witnesses, settlement considerations and similar materials the disclosure of which might adversely affect a pending enforcement action, overall enforcement policy, or the rights of individuals.

I continue to believe, as have my predecessors, that unrestricted dissemination of law enforcement files would prejudice the cause of effective law enforcement and, because the reasons for the policy of confidentiality are as sound and fundamental to the administration of justice today as they were forty years ago, I see no reason to depart from the consistent position of previous presidents and attorneys general. As articulated by former Deputy Assistant Attorney General Thomas E. Kauper over a decade ago:

> "the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation."

Other objections to the disclosure of law enforcement files include the potential damage to proper law enforcement which would be caused by the revelation of sensitive techniques, methods or strategy, concern over the safety of confidential informants and the chilling effect on sources of information if the contents of files are widely disseminated, sensitivity to the rights of innocent individuals who may be identified in law enforcement files but who may not be guilty of any violation of law, and well-founded fears that the perception of the integrity, impartiality and fairness of the law enforcement process as a whole will be damaged if sensitive material is distributed beyond those persons necessarily involved in the investigation and prosecution process. Our policy is premised in part on the fact that the Constitution vests in the President and his subordinates the responsibility to "take Care that the Laws be faithfully executed". The courts have repeatedly held that "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ." United States v. Nixon, 418 U.S. 683, 693 (1974).

The policy which I reiterate here was first expressed by President Washington and has been reaffirmed by or on behalf of most of our Presidents, including Presidents Jefferson, Jackson, Lincoln, Theodore Roosevelt, Franklin Roosevelt, and Eisenhower. I am aware of no President who has departed from this policy regarding the general confidentiality of law enforcement files.

I also agree with Attorney General Jackson's view that promises of confidentiality by a congressional committee or subcommittee do not remove the basis for the policy of nondisclosure of law enforcement files. As Attorney General Jackson observed in writing to Congressman Carl Vinson, then Chairman of the House Committee on Naval Affairs, in 1941:

> "I am not unmindful of your conditional suggestion that your counsel will keep this information 'inviolate until such time as the committee determines its disposition.' I have no doubt that this pledge would be kept and that you would weigh every consideration before making any matter public. Unfortunately, however, a policy cannot be made anew because of personal confidence of the Attorney General in the integrity and good faith of a particular committee chairman. We cannot be put in the position of discriminating between committees or of attempting to judge between them, and their individual members, each of whom has access to information once placed in the hands of the committee."

Deputy Assistant Attorney General Kauper articulated additional considerations in explaining why congressional assurances of confidentiality could not overcome concern over the integrity of law enforcement files:

> "[S]uch assurances have not led to a relaxation of the general principle that open investigative files will not be supplied to Congress, for several reasons. First, to the extent the principle rests on the prevention of direct congressional influence upon investigations in progress, dissemination to the Congress, not by it, is the critical factor. Second, there is the always present concern, often factually justified, with 'leaks.' Third, members of Congress may comment or publicly draw conclusions from such documents, without in fact disclosing their contents."

It has never been the position of the Executive Branch that providing copies of law enforcement files to congressional committees necessarily will result in the documents' being made public. We are confident that your Subcommittee and other congressional committees would guard such documents carefully. Nor do I mean to imply that any particular committee would necessarily "leak" documents improperly although, as you know, that phenomenon has occasionally occurred. Concern over potential public distribution of the documents is only a part of the basis for the Executive's position. At bottom, the President has a responsibility vested in him by the Constitution to protect the confidentiality of certain documents which he cannot delegate to the Legislative Branch.

With regard to the assurance of confidential treatment contained in your November 8, 1982 letter, I am sensitive to Rule XI, cl. 2, § 706c of the Rules of the House of Representatives, which provides that "[a]ll committee hearings, records, data, charts, and files . . . shall be the property of the House and all Members of the House shall have access thereto . . . ." In order to avoid the requirements of this rule regarding access to documents by all Members of the House, your November 8 letter offers to receive these documents in "executive session" pursuant to Rule XI, cl. 2, § 712. It is apparently on the basis of § 712 that your November 8 letter states that providing these materials to your Subcommittee is not equivalent to making the documents "public." But, as is evident from your accurate rendition of § 712, the only protection given such materials by that section and your understanding of it is that they shall not be made public, in your own words, "without the consent of the Subcommittee."

Notwithstanding the sincerity of your view that § 712 provides adequate protection to the Executive Branch, I am unable to accept and therefore must reject the concept that an assurance that documents would not be made public "without the consent of the Subcommittee" is sufficient to provide the Executive the protection to which he is constitutionally entitled. While a congressional committee may disagree with the President's judgment as regards the need to protect the confidentiality of any particular documents, neither a congressional committee nor the

House (or Senate, as the case may be) has the right under the Constitution to receive such disputed documents from the Executive and sit in final judgment as to whether it is in the public interest for such documents to be made public. 1/ To the extent that a congressional committee believes that a presidential determination not to disseminate documents may be improper, the House of Congress involved or some appropriate unit thereof may seek judicial review (see Senate Select Committee v. Nixon, 498 F.2d 725 (D.C. Cir. 1974)), but it is not entitled to be put in a position unilaterally to make such a determination. The President's privilege is effectively and legally rendered a nullity once the decision as to whether "public" release would be in the public interest passes from his hands to a subcommittee of Congress. It is not up to a congressional subcommittee but to the courts ultimately "'to say what the law is' with respect to the claim of privilege presented in [any particular] case." United States v. Nixon, 418 U.S. at 705, quoting Marbury v. Madison, 1 Cranch 137, 177 (1803).

1/ Your November 8 letter points out that in my opinion of October 13, 1981 to the President, a passage from the Court's opinion in United States v. Nixon, 418 U.S. 683 (1974), was quoted in which the word "public" as it appears in the Court's opinion was inadvertently omitted. That is correct, but the significance you have attributed to it is not. The omission of the word "public" was a technical error made in the transcription of the final typewritten version of the opinion. This error will be corrected by inclusion of the word "public" in the official printed version of that opinion. However, the omission of that word was not material to the fundamental points contained in the opinion. The reasoning contained therein remains the same. As the discussion in the text of this letter makes clear, I am unable to accept your argument that the provision of documents to Congress is not, for purposes of the President's Executive Privilege, functionally and legally equivalent to making the documents public, because the power to make the documents public shifts from the Executive to a unit of Congress. Thus, for these purposes the result under United States v. Nixon would be identical even if the Court had itself not used the word "public" in the relevant passage.

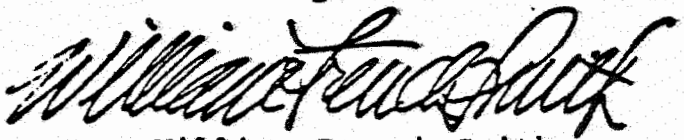
I am unaware of a single judicial authority establishing the proposition which you have expounded that the power properly lies only with Congress to determine whether law enforcement files might be distributed publicly, and I am compelled to reject it categorically. The crucial point is not that your Subcommittee, or any other subcommittee, might wisely decide not to make public sensitive information contained in law enforcement files. Rather, it is that the President has the constitutional responsibility to take care that the laws are faithfully executed; if the President believes that certain types of information in law enforcement files are sufficiently sensitive that they should be kept confidential, it is the President's constitutionally required obligation to make that determination. 2/

These principles will not be employed to shield documents which contain evidence of criminal or unethical conduct by agency officials from proper review. However, no claims have been advanced that this is the case with the files at issue here. As you know, your staff has examined many of the documents which lie at the heart of this dispute to confirm that they have been properly characterized. These arrangements were made in the hope that that process would aid in resolving this dispute. Furthermore, I understand that you have not accepted Assistant Attorney General McConnell's offer to have the documents at issue made available to the Members of your Subcommittee at the offices of your Subcommittee for an inspection under conditions which would not have required the production of copies and which, in this one instance, would not have irreparably injured our concerns over the integrity of the law enforcement process. Your apparent rejection of that offer would appear to leave no room for further compromise of our differences on this matter.

2/ It was these principles that were embodied in Assistant Attorney General McConnell's letters of October 18 and 25, 1982 to you. Under these principles, your criticism of Mr. McConnell's statements made in those letters must be rejected. Mr. McConnell's statements represent an institutional viewpoint that does not, and cannot, depend upon the personalities involved. I regret that you chose to take his observations personally.

In closing, I emphasize that we have carefully re-examined the consistent position of the Executive Branch on this subject and we must reaffirm our commitment to it. We believe that this policy is necessary to the President's responsible fulfillment of his constitutional obligations and is not in any way an intrusion on the constitutional duties of Congress. I hope you will appreciate the historical perspective from which these views are now communicated to you and that this assertion of a fundamental right by the Executive will not, as it should not, impair the ongoing and constructive relationship that our two respective Branches must enjoy in order for each of us to fulfill our different but equally important responsibilities under our Constitution.

Sincerely,



William French Smith
Attorney General

PERRY DEC. EXH. E

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

30 NOV 1982

Honorable Elliott H. Levitas
Chairman
Subcommittee Investigations and Oversight
Committee on Public Works and Transportation
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I have had occasion to reiterate, in the attached letter to Chairman Dingell of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, the historic position of the Executive Branch that it is not in the public interest for sensitive documents found in open law enforcement files to be given to Congress or its committees except in extraordinary circumstances. I am aware that your Subcommittee has issued to Administrator Gorsuch of the Environmental Protection Agency ("EPA") a subpoena apparently seeking copies of some 787,000 documents found in open law enforcement files related to approximately 160 hazardous waste sites located throughout the United States. At least 23 and probably more documents covered in your Subcommittee's subpoena are of that class covered by my letter to Chairman Dingell, since they reflect prosecutorial strategy and other internal deliberations regarding prosecution of the particular cases involved.

Because the principles articulated in the attached letter to Chairman Dingell are fully applicable to some of the documents arguably within the scope of your Subcommittee's subpoena, I believe it appropriate to provide you with a copy of that letter at this time. Because neither I nor my staff have previously communicated directly with you on this particular matter, I would also like to express my hope that, after you have had the benefit of my views on this issue, set in their historical perspective, you will no longer seek to compel production of this class of documents from the Administrator. Should you wish to discuss this matter further prior to the Subcommittee's scheduled December 2 hearing, I would ask that you contact Assistant Attorney General McConnell of my Office of Legislative Affairs at your convenience.

I would also add that I am confident that the legislative needs of your Subcommittee can be met without the production by the Administrator of sensitive documents in open law enforcement files. That is certainly the lesson that history teaches, and I believe you will agree that it is incumbent on both of our Branches to avoid constitutional confrontations so long as the needs and prerogatives of each Branch can be harmonized.

Sincerely,

William French Smith
Attorney General

PERRY DEC. EXH. F

PAGE 2 OF 10

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

30 NOV 1982

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and Investigations
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> "It is the position of [the] Department [of Justice], restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to 'take care that the laws be faithfully executed,' and that congressional or public access to them would not be in the public interest.
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I continue to believe, as have my predecessors, that unrestricted dissemination of law enforcement files would prejudice the cause of effective law enforcement and, because the reasons for the policy of confidentiality are as sound and fundamental to the administration of justice today as they were forty years ago, I see no reason to depart from the consistent position of previous presidents and attorneys general. As articulated by former Deputy Assistant Attorney General Thomas E. Kauper over a decade ago:

> "the Executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation."

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Notwithstanding the sincerity of your view that § 712 provides adequate protection to the Executive Branch, I am unable to accept and therefore must reject the concept that an assurance that documents would not be made public "without the consent of the Subcommittee" is sufficient to provide the Executive the protection to which he is constitutionally entitled. While a congressional committee may disagree with the President's judgment as regards the need to protect the confidentiality of any particular documents, neither a congressional committee nor the

House (or Senate, as the case may be) has the right under the Constitution to receive such disputed documents from the Executive and sit in final judgment as to whether it is in the public interest for such documents to be made public. 1/ To the extent that a congressional committee believes that a presidential determination not to disseminate documents may be improper, the House of Congress involved or some appropriate unit thereof may seek judicial review (see Senate Select Committee v. Nixon, 498 F.2d 725 (D.C. Cir. 1974)), but it is not entitled to be put in a position unilaterally to make such a determination. The President's privilege is effectively and legally rendered a nullity once the decision as to whether "public" release would be in the public interest passes from his hands to a subcommittee of Congress. It is not up to a congressional subcommittee but to the courts ultimately "'to say what the law is' with respect to the claim of privilege presented in [any particular] case." United States v. Nixon, 418 U.S. at 705, quoting Marbury v. Madison, 1 Cranch 137, 177 (1803).

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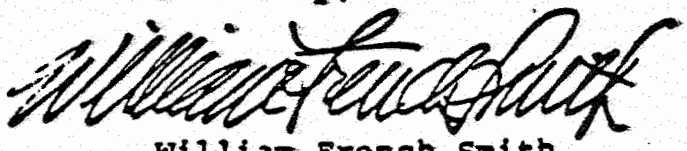

William French Smith
Attorney General

PERRY DEC. EXH. F

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Description of documents withheld from production pursuant to the subpoena received by Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency, on November 22, 1982, from the Subcommittee on Investigations and Oversight, Committee on Public Works and Transportation, U.S. House of Representatives requesting certain described documents for hazardous waste sites on a non-existant list but presumed to be the EPA Interim Priority List of 160 sites.

1. Memorandum dated September 2, 1982, from Jackson L. Fox, Attorney, Environmental Enforcement Section, Department of Justice, to Stephen D. Ramsey, Chief, Environmental Enforcement Section, DOJ, entitled "Litigation Strategy - U.S. v. Hooker Chemical and Plastics Corp. et al. (Love Canal)". This memorandum details EPA's and DOJ's litigation strategy for this case. 5 pages.

2. Memorandum dated November 10, 1982, from William J. Walsh and John H. Wheeler, Attorney-Advisors, Office of Enforcement Counsel, EPA, to R. Charles Morgan, Chief Technical Coordinator, Love Canal Litigation, Office of Waste Programs Enforcement, EPA, entitled "Initial List of Love Canal Technical Tasks". This memorandum outlines the government's techical case, discusses proposed exhibits and lists potential expert witnesses. 8 pages.

3. Memorandum (undated) from Jim Dragna, Attorney-Advisor, Office of Enforcement Counsel, EPA, to Edward A. Kurent, Associate Enforcement Counsel-Waste, Office of Enforcement Counsel, EPA, entitled "Chem-Dyne Settlement". This memorandum discusses the Agency's final settlement proposal in this case and highlights the issues to be considered before proceeding. It reveals the thought processes of the case attorney and the concerns of the Agency in multi-party settlements. 3 pages.

4. Memorandum (undated) from Robert B. Schaefer, Regional Counsel, Region V, EPA, and Edward Kurent, Associate Enforcement Counsel-Waste, to Michael A. Brown, Enforcment Counsel, EPA, entitled "Treatment of Non-Settling Responsible Parties at the Chem-Dyne Site". This memorandum discusses litigation strategy for this case. 5 pages.

5. Memorandum dated November 4, 1982, from Edward Kurent, Associate Enforcement Counsel-Waste, Office of Enforcement Counsel, EPA, to Michael A. Brown, Enforcement Counsel, EPA, entitled "United States v. Solvents Recovery Serviceof New England, (Civil No. H-79-704, D. Conn.) This memorandum discusses trial strategy in this case, including evidentiary deficiencies and legal issues relating to burden of proof. 2 pages.

6. Memorandum dated September 2, 1982, from Mitchell E. Burack, Attorney-Advisor, OLEC, to Ed Kurent, Associate Enforcement Counsel, entitled "Seymour Recycling". This memorandum is a discussion of settlement strategy, including weaknesses and unresolved issues in the settlement approach. 2 pages.

7. Document dated September 28, 1982, entitled "Litigation Report - American Surplus Sales Company". This is a detailed litigation report on a case sent to EPA Headquarters for review and referral to the Department of Justice for filing. It reveals the factual and legal basis for the referral, names of witnesses, anticipated defenses and the government's means of addressing these defenses, weaknesses in the government's case and the litigation strategy for the case. 19 pages.

8. Memorandum dated July 15, 1982, from Dick Whittington, P.E., Regional Administrator, Region VI, EPA, to Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel, EPA, entitled "Crystal Chemical Co., Houston, Texas; Cost Recovery Action Under Section 107(a) of CERCLA". This memorandum summarizes a potential cost recovery action under CERCLA for review by EPA Headquarters and possible referral to the Department of Justice for filing. It discusses weaknesses in the government's case and discussess defenses that the potential defendant's could raise. 20 pages.

9. Memorandum dated May 27, 1982, from J. Howard Beard, III, Environmental Scientist, Office of Waste Programs Enforcement, and Jim Kohanek, Attorney, Office of Legal and Enforcement Counsel, to The Record, entitled "Meeting with the Owner/Operator of Lenoir Refining Company", together with a Routing and Transmittal Slip to Jim Kohanek dated May 13, 1982, with attached listing of drums. This memorandum lists the number and source of drums at the above mentioned site. 4 pages.

10. Memorandum dated October 28, 1982, from Barbara L. Peterson, Attorney, Office of Regional Counsel, Region VII, EPA, to James Kohanek, Attorney, Office of Legal and Enforcement Counsel, entitled "Responsible Parties-Callahan Site", with attached listing of drums. This memorandum lists potentially responsible parties and the basis for linking these parties with drums at the above mentioned site. Further, weaknesses in the case and a basis for settlement are discussed. 6 pages.

11. Memorandum dated August 3, 1982, from Edward A. Kurent Acting Associate Enforcement Counsel-Waste, through Michael A.

Brown, Acting Enforcement Counsel, to Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel, entitled "Potential Settlement of U.S. v. Burns, et al. Civil Action No. 80-1424 (W.D. Pa., filed Oct. 3, 1980)". This memorandum discusses the weaknesses in the above mentioned case and the government's view concerning possible settlement of the case. 3 pages.

12. Memorandum dated May 21, 1982, from Michael A. Brown, Acting Enforcement Counsel, to William N. Hedeman, Director, Office of Emergency and Remedial Response, entitled "Superfund Spending Authorization - Miami Drum Services Company Site (Dade County, Florida)". This memorandum discusses the weaknesses in the government's case and potential defenses for the defendants at this site. 2 pages.

13. Letter dated September 3, 1982, to Ed Kurent, Acting Associate Enforcement Counsel-Waste, Office of Legal and Enforcement Counsel, EPA, from Lloyd S. Guerci, Assistant Chief, Environmental Enforcement Section, Department of Justice, regarding U.S. et al v. County of Hillsboro ("Taylor Road"): Technical Support for Trial Preparation. This letter discusses weaknesses in the government's case. 13 pages.

14. Memorandum dated October 25, 1982, from Edward A. Kurent, Acting Associate Enforcement Counsel, through Michael A. Brown, Acting Enforcement Counsel, to Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel, entitled "Status of Outboard Marine Corporation (OMC), Waukegan, IL". This memorandum outlines the government's negotiation/litigation strategy at this site, including an analysis of the government's evidence. 6 pages.

15. Memorandum dated November 8, 1982, from Robert Van Heuvelen, Attorney, Department of Justice, to Stephen D. Ramsey, Chief, Environmental Enforcement Section, et al, entitled "Resolution of Generator Cases Where Less Than Full Cleanup Is Committed by Responsible Parties". The memorandum discusses weaknesses in a government case. 5 pages.

16. Memorandum dated August 20, 1982, from Dick Emory, attorney, Office of Legal and Enforcement Counsel, EPA, to Mary Douglas Dick, Attorney-Advisor, entitled "Denver Radium Sites; Liability of Present Landowners". Discusses weaknesses in any potential case. 2 pages.

17. Memorandum dated November 15, 1982, from Dick Emory, attorney, Office of Legal and Enforcement Counsel, EPA, to Ed Kurent and Fred Stiehl, Acting Associate Enforcement Counsel-Waste and Acting Deputy Associate Enforcement Counsel-Waste, respectively, entitled "Accelerating the RI and the FS, and

Reconsidering the Role of Cost-Effectiveness". This memorandum discusses a problem with case preparation for two cases and the strategy and coordination needs for proving the remedial portions of cases under §106, CERCLA. 5 pages.

18. Memorandum dated November 16, 1982, from M. Elizabeth Cox, Attorney/Advisor, Office of Enforcement Counsel, to Edward A. Kurent, Associate Enforcement Counsel-Waste, entitled "Homestake Mining Co., Milan, N.M.". This memorandum discusses the government's negotiating position in ongoing negotiations. 4 pages.

19. Four (4) related letters/memoranda related to Raser Tannery, Inc., a case referred to EPA Headquarters from Region V, described as follows:

(1) Letter dated May 14, 1982, from Steven R. Baer, Attorney, Environmental Enforcement Section, DOJ, to James Bunting, Deputy Enforcement Counsel, EPA. This letter highlights unresolved issues in the case. 2 pages.

(2) Memorandum dated August 30, 1982, from Helen Keplinger, Attorney-Advisor, Office of Enforcement Counsel - Waste, to the File, entitled "Region V Meeting (7-22-82) - Raser Tannery, Ashtabula, OH". This memorandum discusses the case development and unresolve factual issues. I page.

(3) Letter dated September 1, 1982, from Eric P. Dunham, Assistant Regional Counsel, EPA Region V, to Helen Keplinger, Office of Enforcement Counsel, EPA, on Raser Tannery. This letter again identifies unresolved issues. 1 page.

(4) Letter dated October 21, 1982, from Pierre Talbert, Assistant Regional Counsel, EPA Region V, to Helen Keplinger. This letter discusses, in depth, EPA's basis for suit. 2 pages.

20. Memorandum dated December 15, 1981, from Julio Morales--Sanchez, Director of Enforcement Division, EPA Region II, to Christopher Capper, Assistant Administrator for Solid Waste and Emergency Response, EPA, and William Sullivan, Enforcement Counsel, EPA, entitled "Discussion of Settlement in Price's Landfill Case: Joint and Several Liability". This memorandum discusses settlement options and a settlement approach in this case. 4 pages.

21. Memorandum dated August 17, 1982, from Regional Counsel, Region IV, to Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel, EPA, entitled "PCB Roadside Spill Sites, North Carolina, Settlement Proposal of Robert Earl Ward, Jr.". This memorandum discusses the pros and cons of a settlement offer in this case. 13 pages.

22. Document dated August 6, 1982, entitled "Evidence Concerning Disposal by ICI Americas, Inc., at Tybouts Corner. United States v. New Castle County et al., Civ. No. 80-489 (D. Del.). (Supplement to Prior Memorandum Concerning Third Party Generators)". Distribution of this document is also restricted by order of the U.S. District Court. These documents summarize evidence gathered by a potentially responsible party at the above mentioned site. The documents are subject to an explicit protective order issued by the Court. 15 pages.

Also apparently intended to be covered by the above referenced subpoena and withheld from production are the documents withheld from the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives pursuant to a subpoena served on Anne M. Gorsuch, Administrator, U.S. Environmental Protection Agency on October 21, 1982, and further described in the attached document.

Description of documents withheld from production pursuant to the subpoena received by Anne M. Gorsuch, Administrator, Environmental Protection Agency, on October 21, 1982, from the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, U.S. House of Representatives requesting certain described documents on the Stringfellow, California, Tar Creek, Oklahoma and Berlin and Farro, Michigan sites.

1. Case Development Plan for Stringfellow, prepared by Sonia Crow, Region 9 Administrator, to Robert Perry, Associate Administrator for the Office of Legal and Enforcement Counsel. Withheld portions enumerate several "Anticipated Defenses" that the responsible parties could raise. Additional sections discuss elements of proof, legal issues/strategy, potential expert witnesses, and the bases for most evidence that the Government will introduce. Precedential issues are also raised and discussed, which would directly affect our settlement and/or litigation positions. All but 8 pages of this document have been turned over. Undated.

2. Internal EPA schedule labeled "Responsible Party Cleanup Plan." Prepared by Harlan Agnew, Attorney-Adviser, Region 9. This Plan sets forth a schedule of tasks to be accomplished by the Stringfellow Case Development Plan before the generator meeting, and for the follow-up negotiations with responsible parties. Disclosure of this document would identify continuing legal and strategy issues which would be harmful to the Government's case. 7 pages, dated September 17, 1982.

3. Memorandum to Files from K. Kenworthy, Team Leader for California, Hawaii, and Trust Territories, Region 9, to Files, 2 pages, undated, recording telephone conversation with Harry Schueller, California State Water Resources Control Board, regarding the Inspector General's audit of grant to the State of California. 2 pages, undated.

Available to Subcommittee: 2 pages, dated August 25, 1982.

4. Memorandum of telephone conversation from Kathy Kenworthy, Team Leader for California, Hawaii, and Trust Territories, Region 9, to Jim Winchell, State Water Resource Control Board, discussing potential defenses of a potential defendant in a cost recovery action. 1 page, dated September 23, 1982, 2:30 pm.

Available to Subcommittee: 1 page, dated September 23, 1982, 10:45 am.

5. Draft memorandum from Terry Brubaker, Chief, Emergency Response Section, Region 9 to "T-3, T-3-1, ORC, T-1" (various program offices and Office of Regional Counsel) regarding the Stringfellow Timetable for Responsible Party Negotiations. This memo establishes a timetable for proceeding with negotiations, including prospective activities which have yet to occur. It also contains evaluation and opinion of EPA staff concerning the possibility of settlement. 2 pages, dated August 26, 1982.

6. Enforcement and Funding Strategy Outline, with handwritten annotations. This document is a step-by-step outline which identifies issues and tasks that must be addressed for the generator meeting and follow-up negotiations and/or litigation. It sets forth litigation and negotiation strategy. 3 pages, dated September 9, 1982.

7. Documents from Headquarters EPA Legal Files regarding the Stringfellow site, containing copies of items #2, 5, and 6, plus handwritten notes discussing the cooperative agreement, and impressions of meetings wherein the structure of settlement negotiations was discussed. Some of these items come from the files of Kathy Summerlee, Chief, Branch "C", Office of Enforcement Counsel-Waste and are dated August 31, September 7, and 27, 1982. 21 pages total.

8. Copies of Notes for Stringfellow Case from Heidi Hughes, Attorney-Adviser, Office of Enforcement-Waste, EPA. These notes discuss negotiation and litigation strategies, including interactions and negotiations with the State, identification and evaluation of potential legal strategies of defendants, develops strategies for initial meeting with generators, and establishes schedule for negotiations. 11 pages, dated August 27 and 30, September 7 and 10, 1982.

9. Available to Subcommittee.

10. Handwritten draft of a memorandum from Jerome Muys, Attorney, Office of Enforcement Counsel and Kevin Garrahan, Engineer, Office of Waste Programs Enforcement to Edward Kurent, Acting Associate Enforcement Counsel-Waste, and Gene Lucero, Director, Office of Waste Programs Enforcement discussing recoverability of CERCLA expenditures at Berlin and Farro site. Disclosure of this document could reveal potential defenses for potential defendants in enforcement actions. 3 pages, dated August, 1982.

11. Notes of Jerome Muys, Attorney, Waste Enforcement Division of July, 1982 meeting with the Michigan Department of Natural Resources regarding enforcement history of Berlin & Farro site. This memorandum discusses evidence concerning disposal practices and potentially responsible parties at Berlin and Farro. 2 pages, undated.

12. Notes of Mitchell Burack, Attorney, Waste Enforcement Division discussing negotiations with generators for the Berlin & Farro site and the pre-meeting with the State. These notes discuss evidentiary bases of the Government's case and potential defenses, and the author's subjective analyses of both. 6 pages, dated July 29, 1982.

13. Available to Subcommittee.

14. Notes of Mitchell Burack, Attorney, Waste Enforcement Division, taken during a meeting with Michigan Department of Natural Resources, discussing strategy, scheduling of site activity, negotiations with potential responsible parties, and some discussion of evidence against potential generators. 4 pages, dated July 28, 1982.

Available to Subcommittee: 1 page, undated.

15 & 16. Typed versions of item # 10. 2 pages each, undated

17. Notes of Mitchell Burack, Attorney, Waste Enforcement Division, recording mental impressions of his meeting with Berlin and Farro generators, discussing potential for settlement without litigation and subjective analyses of the Government's evidence. 4 pages, dated July 29, 1982.

18. Draft Memorandum to William Hedeman, Director, Office of Emergency and Remedial Response, from Gene Lucero, Director, Office of Waste Programs Enforcement, prepared by Kevin Garrahan, Engineer, Office of Waste Programs Enforcement, discussing the time frame for proceeding with negotiations with potential defendants at the Berlin and Farro Site, as well as substantive positions to be taken in negotiation. 3 pages, undated.

19. Available to Subcommittee.

20. Typed version of item # 10. 2 pages, undated.

21. Memorandum from Kevin Garrahan, Environmental Engineer, Office of Waste Programs Enforcement and Jerome Muys, Attorney, Office of Legal Enforcement Counsel to Gene Lucero, Director, Office of Waste Programs Enforcement, Edward Kurent, Acting Associate Enforcement Counsel for Waste, and Karen Clark, Attorney, Office of General Counsel, containing advice of EPA legal and technical staff concerning remedial steps to be taken at Berlin and Farro, as well as mental impressions concerning pending negotiations among EPA-Region V, the State of Michigan and industry officials. 2 pages, undated.

22. Available to Subcommittee.

23. Handwritten draft of item #10. 2 pages, undated.

24. Available to Subcommittee.

25. Available to Subcommittee.

26. Notes of Gloria Small Moran, Attorney, Office of Regional Counsel discussing meeting with Kevin Garrahan, Engineer, OWPE, concerning progress of Berlin and Farro case development. This document discusses potential strengths and weaknesses of the Government's cost recovery action. 2 pages, dated September 7, 1982.

27. Notes of Gloria Small Moran, Attorney, Office of Regional Counsel of meeting with Jane Shulteis, Branch Chief, Office of Regional Counsel, discussing Berlin and Farro negotiation strategy. This document contains mental impressions of an EPA attorney about settlement negotiations and discusses evidentiary bases of actions against potential responsible parties. 2 pages, dated August 26, 1982.

28. Available to Subcommittee.

29. Notes of Gloria Small Moran, Attorney, Office of Regional Counsel of conference call with Richard Bartelt, Branch Chief, Office of Superfund, and Jerome Muys, Attorney, Waste Enforcement Division, discussing potential strategy to seek voluntary settlement. 3 pages, dated June 18 and July 2, 1982.

30. Notes of Gloria Small Moran, Attorney, Office of Regional Counsel of meeting with William Constantelos (Director) and Richard Bartelt, Branch Chief, Office of Superfund, and David Ullrich, Branch Chief, Roger Grimes, Section Chief, and

Jane Shulteis, Section Chief, Office of Regional Counsel, where substance of negotiations was discussed. 2 pages, dated July 12, 1982.

This document also includes notes of Gloria Small Moran, Attorney, Office of Regional Counsel, of conversation with Andrew Hogarth, Branch Chief, Michigan Department of Natural Resources regarding deadline for negotiations with generators. 1 page, dated July 14, 1982.

Available to Subcommittee: 2 pages of this document, dated July 13, 1982.

31. Notes of Gloria Small Moran, Attorney, Office of Regional Counsel, of meeting with Michigan Department of Natural Resources re Berlin and Farro negotiations. This document discusses evidentiary bases of the Government's claims of liability against potential defendants. 5 pages, dated July 9, 1982.

This document also contains notes of Gloria Small Moran, Attorney, Office of Regional Counsel, of conversation with Jerome Muys, Attorney, Waste Enforcement Division, regarding Berlin and Farro negotiation strategy. 1 page, dated July 18, 1982.

32. Internal legal memorandum from Joseph Freedman, Attorney, Water & Solid Waste Division, to William Hedeman, Director, Office of Emergency & Remedial Response, discussing issue of recoverability of response costs for seepage from abandoned ore mines. 6 pages, dated January 11, 1982.

33. Memorandum from James Bunting, Acting Deputy Associate Enforcement Counsel to Wiliam Hedeman, Director, Office of Emergency and Remedial Response, (cc: Pete Broccoletti, Bruce Diamond, Coke Cherney, Joseph Freedman), discussing the Enforcement Counsel's reactions to document 32 in the course of developing the agency's position on the issue. 1 page, dated February 5, 1982.

34. Memo from Colburn T. Cherney, Assistant General Counsel, to Bruce M. Diamond, Acting Associate General Counsel and Christopher Capper, Acting Assistant Administrator for Soild Waste and Emergency Response discussing the strengths and weaknesses of document 32. 1 page, dated March 9, 1982.

35. Handwritten note, discussing inter alia, negotiation strategy and Agency settlement documents to be drafted,

relevant to Tar Creek site. 1 page, undated.

36. Draft memorandum from Robert D. Wyatt, Acting Deputy Regional Counsel for Enforcement Coordination to Sonia F. Crow, Regional Administrator, through Robert Thompson, Regional Counsel and David Mowday, Director, Toxics and Waste Management Division, Region 9, discussing legal theories and potential liabilities of potential defendants, and the application of the CERCLA to the site. 6 pages, dated August 30, 1982.

37. Personal notes of meetings of Robert C. Thompson, Regional Counsel, Region 9, outlining various meetings held in Region 9 and Headquarters, in which were discussed negotiation schedules, available evidence and litigation strategy. These notes contain the mental impressions of the Regional Counsel of the Stringfellow case strategy discussed in the meetings. 16 pages, dated Aug. 2, 5, 16, Sept. 1, 9, 14, 21, 24, 1982.

38. Available to Subcommittee.

39. Memoranda of discussions of Sonia Crow's (Regional Administrator) with William Hedeman and Mary Nichols (California Department of Health Services) regarding Superfund cost-recovery action, 3 pages, dated January 28, 1982.

40. Same document as #36 with references to Stringfellow deleted.

41. Robert C. Thompson's (Regional Counsel) handwritten notes of meetings and telephone conversations, discussing Stringfellow Cleanup Plans and Settlement Strategies, 9 pages, dated July 29, 30, Aug. 2-5, 10-12, 1982.

42. Robert C. Thompson's handwritten notes of meetings and telephone conversations discussing Stringfellow strategy, 8 pages, dated Oct. 5, Aug. 19, 20, 25, 26, Sept. 1-3, 1982.

43. Handwritten notes of Robert Thompson, reflecting staff discussions regarding potential recovery from Stringfellow generators, 7 pages, dated September 15-17, 21, 24, 27, Oct. 21, 1982.

44. Handwritten notes of Robert C.Thompson, discussing his impressions of various meetings regarding cost-recovery strategy with Headquarters, Regional, and State personnel. 20 pages, dated October 7, 8, and 18, 1982.

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45. Draft Cost Recovery Plan for Stringfellow site, prepared by Robert C. Thompson, Regional Counsel. This document outlines a cost-recovery plan and addresses issues and tasks that are likely to arise before and during the negotiation and litigation processes. 6 pages, dated July 30, 1982.

46. Memo from Harlan Agnew, Attorney, Office of Regional Counsel, Region 9 through Robert C. Thompson, Regional Counsel to David S. Mowday, Acting Director, Toxics and Waste Management Division, entitled "Proposed Strategies for Cost Recovery - Stringfellow". The memo discusses tasks that must be accomplished and a timetable for doing them. It discusses notice letter mailings and projects' negotiation developments. 2 pages, undated.

47. Robert C. Thompson's draft entitled Cost Recovery Plan - Stringfellow site. This document lists the "three track" approach to settlement. It discusses near-term and long-term strategy issues. 3 pages, dated September 7, 1982.

48. Proposed "MOU Regarding Joint Negotiations and Litigation Concerning the Stringfellow site, Riverside, CA." This document describes how EPA and the California Department of Health Services will conduct negotiations with responsible party generators and attempts to establish operating procedures between the two agencies for this case. 5 pages, undated.

49. Memorandum from Susan Conti, Law Clerk, Office of Enforcement Counsel-Waste to Heidi Hughes, Attorney-Adviser, OEC-W. This document analyzes federal and California law on the issue of settlement and release of joint tortfeasors. 8 pages, undated.

50. Draft document entitled "Terms of Negotiation." This document delineates the contours of an acceptable agreement with the responsible parties. 2 pages, dated October 25, 1982.

51. Available to Subcommittee.

The above described documents have been reviewed by the following named individuals on behalf of the Environmental Protection Agency and these individuals have determined that the documents withheld meet the criteria set forth in the President's memorandum of November 30. 1982, to Anne M. Gorsuch, Administrator, Environmental Protection Agency as further described in the letter of William French Smith, Attorney General of the United States to John Dingell, Chairman, Oversight and Investigations Subcommittee, Committee on Energy and Commerce, U.S. House of Representatives, dated November 30, 1982.

DEC 13 1982

Robert M. Perry, Associate Administrator for Legal and Enforcement Counsel and General Counsel

DEC 13 1982

Michael A. Brown, Enforcement Counsel

These documents have been reviewed on behalf of the Land and Natural Resources Division, Department of Justice by the following individuals and determined to meet the criteria described above.

DEC 13 1982

Carol E. Dinkins, Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice

DEC 14 1982

Stephen D. Ramsey, Chief, Environmental Enforcement Section, Land and Natural Resources Division, U.S. Department of Justice

DEC 14 1982

Mary L. Walker, Deputy Assistant Attorney General, Land and Natural Resources Division, U.S. Department of Justice

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U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

9 DEC 1982

Honorable Elliott H. Levitas
Chairman, Subcommittee on
Investigations and Oversight
Committee on Public Works
and Transportation
House of Representatives
Washington, D..C 20515

Dear Mr. Chairman:

Thank you for meeting with Assistant Attorney General, Office of Legal Counsel, Theodore B. Olson, Associate Administrator for Legal and Enforcement Counsel and General Counsel of the Environmental Protection Agency, Robert M. Perry, and me yesterday afternoon regarding the apparent impasse which presently exists between your Subcommittee and the Administration regarding your Subcommittee's subpoena for copies of documents generated by the Environmental Protection Agency ("EPA"). Your Subcommittee is interested in receiving copies or examining all documents generated by the EPA in its enforcement of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"). The outstanding subpoena (the validity of which has not been conceded) seeks production of a large quantity of such documents and your Subcommittee has taken the position that none of them may be withheld from it. Your Subcommittee has voted to find the Administrator of the EPA in contempt of Congress for not producing some of the subpoenaed documents notwithstanding that she is acting in compliance with an instruction from the President and the advice of the Attorney General.

As you know, the President and the Attorney General have expressed the concern that a narrow range of documents contained in sensitive open law enforcement investigative files, the disclosure of which (at least while a case is pending or in the development stage) might adversely affect a pending or potential enforcement action or the rights of individuals, should not be released by the Executive Branch because doing so would be inconsistent with the President's constitutional obligation to take care that the laws be faithfully executed. These documents are few in number (undoubtedly less than 1% of the enforcement files) and relate primarily to tactics and strategy

in the development of a particular case against particular potential defendants (lists of prospective witnesses, legal discussions and the like). At the same time, the Administration does not and will not contest the right of your Subcommittee to the factual and technical information about which you and members of your Subcommittee (particularly Congressman Roe) expressed such concern at your hearing on December 2, 1982 as well as information regarding enforcement efforts, enforcement policy, and enforcement directions and results to date. Your Subcommittee, however, has determined that this is not sufficient and you continue to assert the right to inspect every document in EPA's enforcement files.

In the spirit of attempting to reach a compromise solution to this impasse, and with full reservation of the Subcommittee's rights and the rights of the Legislative Branch as a whole, yesterday you proposed an accommodation which would include the following solution:

1. Staff of your Subcommittee would be permitted to have access to all EPA documents relative to the 160 hazardous waste sites in issue.

2. Subcommittee staff would have the unrestricted right to examine the EPA documents and determine what documents it wished to have copied and produced for further staff work or made available to the Subcommittee.

3. EPA and/or Justice Department enforcement officials would then examine the documents which the Subcommittee staff designated for copying and designate those documents which were considered by the Executive Branch to be sufficiently sensitive to an open enforcement proceeding (including the case development phase) that dissemination beyond the Executive Branch would adversely affect the ability of the Executive Branch to enforce the law. Copies of those documents would be made and transferred to EPA headquarters in Washington but would not be provided to the Subcommittee. Copies of all the other documents designated by the Subcommittee staff would be furnished to the Subcommittee.

4. Members of the Subcommittee and staff members */ would be permitted to examine the particularly

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*/ You may have suggested that access at this point would be limited to the Chairman and the Ranking Minority Member and selected staff members. Our recollection on this point is not clear and we would welcome a clarification if we have misunderstood your position.

sensitive documents at EPA headquarters in Washington under Executive Session Rules so that the documents would not be physically turned over to the Subcommittee and would not therefore have to be made available to every member of the House of Representatives pursuant to the Rules of the House of Representatives.

5. If the Subcommittee thereafter determined that it needed to have copies of any of the particularly sensitive documents, it would then have the right to pursue efforts to obtain copies of those documents through the mechanism of a subpoena.

6. Members of the Subcommittee and the staff would treat the information contained in the enforcement sensitive documents as confidential but, as you noted in response to a question, the Subcommittee would not waive its right to utilize the information in any way which it found to be proper and appropriate.

I believe I have correctly summarized your proposal but, since I was not taking notes, I may have overlooked some aspect of it. If so, please correct me as promptly as possible because we wish to make sure that we respond to your proposal and not to something which we have misunderstood to be your proposal.

The principal problem which we have with the foregoing proposal is that it contemplates that the President will lose control over the contents of materials which those who assist him in enforcing the law have determined to be in a narrow category of documents the release of which would adversely affect the Executive Branch's ability to enforce the law. Accordingly, we are not in a position to accept your proposal. We believe, however, that a somewhat modified version of it would be acceptable to the President and should fully address your concerns. It may not eliminate <u>every</u> area of dispute, but it would narrow the focus of the dispute so substantially that any remaining areas of disagreement could, if absolutely necessary, be resolved in an appropriate fashion by the judiciary.

We observe in passing that one of our problems with your proposal is that we feel that it would be extraordinarily difficult to withhold access to a particular document to any committee or subcommittee of Congress if we made such access available to one Subcommittee and its staff or to some members of Congress. It is not for the Executive to distinguisn between the rights of particular members or particular committees. Second, as noted above, the proposal contemplates that the Executive would part

with control over the information in the sensitive enforcement documents. Members of the Subcommittee staff would, at the outset, have unfettered access to sensitive enforcement files. It is a logical and legal consequence of the President's responsibility faithfully to execute the law that material should not be released from his control if he determines that release of that material would impair enforcement efforts.

Your proposal contains an ingredient for postponing the dispute with respect to certain documents, i.e., those which the Subcommittee, after undertaking the process described above, decides that it must nonetheless have in its possession. Our counter-proposal similarly reserves the rights of the two branches to resolve at a subsequent time any remaining disputes as to any particular documents. Our proposal (which is, of course, predicated on the concept that it would resolve the pending dispute over all presently outstanding subpoenas) is as follows:

1. The Subcommittee staff would be given access to all EPA enforcement files relative to the 160 hazardous waste sites in which you have an interest. Those files would remain where they are now, either at EPA headquarters or at the regional offices, respectively. Your staff members would provide notice, in advance, of which files were going to be examined so that EPA officials could initially examine the files to isolate those documents which were particularly sensitive from an enforcement standpoint. Those documents would be removed from the files and the remaining balance of the EPA enforcement files would be made available to your Subcommittee staff and ultimately to the Subcommittee, subject to some appropriate understanding regarding confidential treatment with respect to certain materials in those files. We expect the vast majority, probably in excess of 99% of the enforcement files, would be made available to the Subcommittee and the staff in this fashion. After examining the remaining files and after having been advised what documents had been set aside from the files, and after a briefing on the general nature of the contents of such withheld materials, your staff could determine whether it was, in fact, necessary, in their judgment, to examine those files.

2. Those withheld documents considered sensitive would then be analyzed by at least four persons, two in EPA and two in the Land and Natural Resources Division of the Department of Justice. One person in EPA and one of the Justice Department individuals involved in this process would be professional, career attorneys engaged

in the EPA enforcement process and, at Justice, in that section of the Department responsible for enforcement of CERCLA. In addition, one EPA official and one Justice Department official responsible for examining the withheld documents would be persons holding policy level positions. The Justice Department official would be a Deputy Assistant Attorney General. If those four individuals concurred that a particular document was sufficiently sensitive that its release would adversely affect the ability of the Executive to enforce the law, that document would be considered for withholding by the Executive Branch. Thereafter, those documents would actually be withheld only if the conclusions regarding their sensitivity were concurred in by an additional member of the Department of Justice in the Office of Legal Counsel and by an attorney in the Office of Counsel to the President. In short, the document would be withheld only if the collective judgment of the foregoing individuals was that the document needed to be withheld under the foregoing standards. If so, that document would be described to you in detail and the Executive Branch would set forth its reasons why it believed that the document should not be disclosed.

3. If the Subcommittee and its staff disagreed with the Executive Branch's position concerning the need for confidential treatment of the document in question or if it had additional reasons for why the document should be produced, those conclusions and those reasons would be articulated to the Executive Branch and the document in question would be reviewed again with those additional considerations in mind.

4. Only if the foregoing process did not lead to a resolution of the dispute with respect to the document in question would it be necessary to proceed further. At that point if the Subcommittee was not satisfied with the good faith and the legitimacy of the position of the Executive Branch, the Subcommittee would retain all rights that it presently has to pursue all lawful efforts to obtain the document in question.

We believe that this process is reasonable. It insures that no document will be withheld unless career enforcement lawyers and policy officials at two separate agencies and an attorney in the Office of Counsel to the President believe that the document should be withheld. Documents will not be withheld in order to shield illegal conduct by Executive Branch persons. Furthermore, even after the process described above, EPA and the Department of Justice would remain willing to discuss factual information contained in any withheld documents and would be

willing to discuss particular needs that the Subcommittee may still have. Finally, the Subcommittee, under this process, will still have all rights which it presently has to seek the mandatory production of the document through legal processes.

We understand that you do not agree that the Executive Branch has the right to withhold any documents from the Legislative Branch and that you feel that it is not appropriate for the Executive Branch to make any "unilateral" determination relative to the withholding of any document. We respectfully disagree with your position that no documents may be withheld by the Executive Branch and the position which follows from it, that the documents must be given to the Legislative Branch so that the Legislative Branch might unilaterally determine how the documents will be handled. We believe that the position we have taken is the only one which is consistent with the Constitution. We submit that our position does not involve a final determination by the Executive Branch from which the Legislative Branch has no legal recourse, but it similarly does not allow for a final unreviewable determination by the Legislative Branch. In fact, our position is the only approach which allows for each Branch to maintain a legitimate difference of opinion regarding the release of any particular document and, if necessary, enables the Judicial Branch ultimately to resolve the issue without an irreparable waiver of the rights of either the Legislative Branch or the Executive Branch.

We thank you for your courtesy, and we hope that the foregoing will allow us to resolve what we regard to be an unnecessary dispute between co-equal branches of the government of the United States.

Sincerely,

Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

cc: Congressman Don H. Clausen
Ranking Minority Member
House Committee on Public Works and Transportation

PERRY DEC. EXH. H

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The Speaker's Rooms
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

The Honorable Stanley S. Harris
United States Attorney
District of Columbia

The undersigned, The Speaker of the House of Representatives of the United States, pursuant to House Resolution 632, Ninety-seventh Congress, hereby certifies to you the failure and refusal of Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, to furnish certain documents in compliance with a subpena duces tecum before a duly constituted subcommittee of the Committee on Public Works and Transportation of the House of Representatives, as is fully shown by the certified copy of the House Report 97-968 of said committee which is hereto attached.

Witness my hand and seal of the House of Representatives of the United States, at the City of Washington, District of Columbia, this seventeenth day of December, 1982.

Thomas P. O'Neill
Speaker of the House of Representatives

Attest:

Edmund L. Henshaw
Clerk of the House of Representatives

PERRY DEC. EXH. I

Edmund L. Henshaw, Jr.
Clerk

M. Raymond Calley
Deputy Clerk

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

I, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, do hereby certify, pursuant to Rule III of the Rules of the United States House of Representatives, that the attached is a true and correct copy of House Resolution 632, as adopted by the House of Representatives on December 16, 1982.

In witness whereof, I hereunto affix my name and the Seal of the House of Representatives, in the City of Washington, District of Columbia, this seventeenth day of December, Anno Domini one thousand nine hundred and eighty-two.

EDMUND L. HENSHAW, JR., Clerk
U.S. House of Representatives

PERRY DEC. EXH. I
PAGE 2 OF 9

H. Res. 632

In the House of Representatives, U. S.,

December 16, 1982.

Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Public Works and Transportation as to the contumacious conduct of Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, in failing and refusing to furnish certain documents in compliance with a subpena duces tecum of a duly constituted subcommittee of said committee served upon Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, and as ordered by the subcommittee, together with all of the facts in connection therewith, under seal of the House of Representatives, to the United States attorney for the District of Columbia, to the end that Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, may be proceeded against in the manner and form provided by law.

Attest:

Edmund L. Henshaw

Clerk.

PERRY DEC. EXH. I

PAGE 3 OF 9

Edmund L. Henshaw, Jr.
Clerk

M. Raymond Cooley
Deputy Clerk

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

I, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, do hereby certify, pursuant to Rule III of the Rules of the United States House of Representatives, that the attached is a true and correct copy of House Resolution 2, as adopted by the House of Representatives on January 5, 1981.

In witness whereof, I hereunto affix my name and the Seal of the House of Representatives, in the City of Washington, District of Columbia, this seventeenth day of December, Anno Domini one thousand nine hundred and eighty-two.

EDMUND L. HENSHAW, JR., Clerk
U.S. House of Representatives

PERRY DEC. EXH. I
PAGE 4 OF 9

H. Res. 2

In the House of Representatives, U. S.,

January 5, 1981.

Resolved, That the Senate be informed that a quorum of the House of Representatives has assembled; that Thomas P. O'Neill, Junior, a Representative from the Commonwealth of Massachusetts, has been elected Speaker; and Edmund L. Henshaw, Junior, a citizen of the Commonwealth of Virginia, has been elected Clerk of the House of Representatives of the Ninety-seventh Congress.

Attest:

Edmund L. Henshaw

Clerk.

PERRY DEC. EXH. 1

PAGE 5 OF 9

Edmund L. Henshaw, Jr.
Clerk

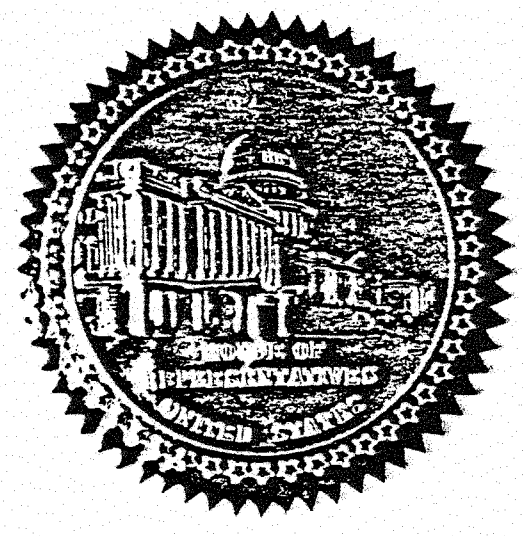
M. Raymond Culley
Deputy Clerk

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

I, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, do hereby certify, as evidenced by the Journal of the House of Representatives, that the following Members constitute the Committee on Public Works and Transportation: James J. Howard, New Jersey (Chairman); Glenn M. Anderson, California; Robert A. Roe, New Jersey; John B. Breaux, Louisiana; Norman Y. Mineta, California; Elliott H. Levitas, Georgia; James L. Oberstar, Minnesota; Henry J. Nowak, New York; Bob Edgar, Pennsylvania; Marilyn Lloyd Bouquard, Tennessee; John G. Fary, Illinois; Robert A. Young, Missouri; Allen E. Ertel, Pennsylvania; Billy Lee Evans, Georgia; Ronnie G. Flippo, Alabama; Nick Joe Rahall II, West Virginia; Douglas Applegate, Ohio; Geraldine A. Ferraro, New York; Eugene V. Atkinson, Pennsylvania; Donald Joseph Albosta, Michigan; William Hill Boner, Tennessee; Ron de Lugo, Virgin Islands; Gus Savage, Illinois; Fofo I. F. Sunia, American Samoa; Buddy Roemer, Louisiana; Wayne Dowdy, Mississippi; Barbara Kennelly, Connecticut; Brian J. Donnelly, Massachusetts; Ray Kogovsek, Colorado; Don H. Clausen, California; Gene Snyder, Kentucky; John Paul Hammerschmidt,

Arkansas; E. G. Shuster, Pennsylvania; Barry M. Goldwater, Jr., California; Tom Hagedorn, Minnesota; Arlan Stangeland, Minnesota; Newt Gingrich, Georgia; William F. Clinger, Jr., Pennsylvania; Gerald B. Solomon, New York; Harold C. Hollenbeck, New Jersey; H. Joel Deckard, Indiana; Wayne R. Grisham, California; Jim Jeffries, Kansas; Jack Fields, Texas, Guy Molinari, New York; Clay Shaw, Florida; Bob McEwen, Ohio; and Frank Wolf, Virginia.



In witness whereof, I hereby unto affix my name and the Seal of the House of Representatives, in the City of Washington, District of Columbia, this seventeenth day of December, Anno Domini one thousand nine hundred and eighty-two.

EDMUND L. HENSHAW, JR., Clerk
U.S. House of Representatives

Edmund L. Henshaw, Jr.
Clerk

M. Raymond Culley
Deputy Clerk

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

I, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, do hereby certify, pursuant to Rule III of the Rules of the United States House of Representatives, that the attached is a true and correct copy of House Report No. 97-968.

In witness whereof, I hereunto affix my name and the Seal of the House of Representatives, in the City of Washington, District of Columbia, this seventeenth day of December, Anno Domini one thousand nine hundred and eighty-two.

EDMUND L. HENSHAW, JR., Clerk
U.S. House of Representatives

PERRY DEC. EXH. 1
PAGE 8 OF 9

House Calendar No. 203

97TH CONGRESS, 2nd Session | HOUSE OF REPRESENTATIVES | REPORT No. 97-968

CONTEMPT OF CONGRESS

REPORT

OF THE

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

together with

ADDITIONAL VIEWS, MINORITY VIEWS,

and

ADDITIONAL MINORITY VIEWS

ON THE

CONGRESSIONAL PROCEEDINGS AGAINST ANNE M. GORSUCH, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, FOR WITHHOLDING SUBPOENAED DOCUMENTS RELATING TO THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980

DECEMBER 15, 1982.—Referred to the House Calendar and ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

12-608 O WASHINGTON : 1982

[REMAINDER OF REPORT DELETED FROM EXHIBIT]

PERRY DEC. EXH. I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al., Plaintiffs,	)	
v.	)	Civil Action No.
THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, et al., Defendants.	)	82-3583

DECLARATION OF STANLEY S. HARRIS

1. I am the United States Attorney for the District of Columbia.

2. At approximately 11:30 p.m. on the evening of December 17, 1982, I received at my home a written communication from the Speaker of the House, Thomas P. O'Neill, a copy of which is attached hereto as Exhibit A. I am informed, believe and therefore aver that the said communication was delivered to me by the Sergeant-at-Arms of the House of Representatives.

3. On December 27, 1982, I sent to Speaker O'Neill a letter, a copy of which is attached hereto as Exhibit B. On or about January 4, 1983, I received from Speaker O'Neill a letter, a copy of which is attached hereto as Exhibit C.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed January 10, 1982.

Stanley S. Harris

STANLEY S. HARRIS

The Speaker's Rooms
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

The Honorable Stanley S. Harris
United States Attorney
District of Columbia

The undersigned, The Speaker of the House of Representatives of the United States, pursuant to House Resolution 632, Ninety-seventh Congress, hereby certifies to you the failure and refusal of Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, to furnish certain documents in compliance with a subpena duces tecum before a duly constituted subcommittee of the Committee on Public Works and Transportation of the House of Representatives, as is fully shown by the certified copy of the House Report 97-968 of said committee which is hereto attached.

Witness my hand and seal of the House of Representatives of the United States, at the City of Washington, District of Columbia, this seventeenth day of December, 1982.

Thomas P. O'Neill Jr.
Speaker of the House of Representatives

Attest:

Edmund L. Henshaw Jr.
Clerk of the House of Representatives

HARRIS DEC. EXH. A

Edmund L. Henshaw, Jr.
Clerk

M. Raymond Culley
Deputy Clerk

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

I, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, do hereby certify, pursuant to Rule III of the Rules of the United States House of Representatives, that the attached is a true and correct copy of House Resolution 632, as adopted by the House of Representatives on December 16, 1982.

In witness whereof, I hereunto affix my name and the Seal of the House of Representatives, in the City of Washington, District of Columbia, this seventeenth day of December, Anno Domini one thousand nine hundred and eighty-two.

EDMUND L. HENSHAW, JR., Clerk
U.S. House of Representatives

H. Res. 632

In the House of Representatives, U. S.,

December 16, 1982.

Resolved, That the Speaker of the House of Representatives certify the report of the Committee on Public Works and Transportation as to the contumacious conduct of Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, in failing and refusing to furnish certain documents in compliance with a subpena duces tecum of a duly constituted subcommittee of said committee served upon Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, and as ordered by the subcommittee, together with all of the facts in connection therewith, under seal of the House of Representatives, to the United States attorney for the District of Columbia, to the end that Anne M. Gorsuch, as Administrator, United States Environmental Protection Agency, may be proceeded against in the manner and form provided by law.

Attest:

Edmund L. Henshaw

Clerk.

HARRIS DEC. EXH. A

PAGE 3 OF 9

Edmund L. Henshaw, Jr.
Clerk

M. Raymond Culley
Deputy Clerk

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

I, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, do hereby certify, pursuant to Rule III of the Rules of the United States House of Representatives, that the attached is a true and correct copy of House Resolution 2, as adopted by the House of Representatives on January 5, 1981.

In witness whereof, I hereunto affix my name and the Seal of the House of Representatives, in the City of Washington, District of Columbia, this seventeenth day of December, Anno Domini one thousand nine hundred and eighty-two.

Edmund L. Henshaw

EDMUND L. HENSHAW, JR., Clerk
U.S. House of Representatives

H. Res. 2

In the House of Representatives, U. S.,

January 5, 1981.

Resolved, That the Senate be informed that a quorum of the House of Representatives has assembled; that Thomas P. O'Neill, Junior, a Representative from the Commonwealth of Massachusetts, has been elected Speaker; and Edmund L. Henshaw, Junior, a citizen of the Commonwealth of Virginia, has been elected Clerk of the House of Representatives of the Ninety-seventh Congress.

Attest:

Edmund L. Henshaw

Clerk.

HARRIS DEC. EXH. A

PAGE 5 OF 9

Edmund L. Henshaw, Jr.
Clerk

M. Raymond Colley
Deputy Clerk

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

I, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, do hereby certify, as evidenced by the Journal of the House of Representatives, that the following Members constitute the Committee on Public Works and Transportation: James J. Howard, New Jersey (Chairman); Glenn M. Anderson, California; Robert A. Roe, New Jersey; John B. Breaux, Louisiana; Norman Y. Mineta, California; Elliott H. Levitas, Georgia; James L. Oberstar, Minnesota; Henry J. Nowak, New York; Bob Edgar, Pennsylvania; Marilyn Lloyd Bouquard, Tennessee; John G. Fary, Illinois; Robert A. Young, Missouri; Allen E. Ertel, Pennsylvania; Billy Lee Evans, Georgia; Ronnie G. Flippo, Alabama; Nick Joe Rahall II, West Virginia; Douglas Applegate, Ohio; Geraldine A. Ferraro, New York; Eugene V. Atkinson, Pennsylvania; Donald Joseph Albosta, Michigan; William Hill Boner, Tennessee; Ron de Lugo, Virgin Islands; Gus Savage, Illinois; Fofo I. F. Sunia, American Samoa; Buddy Roemer, Louisiana; Wayne Dowdy, Mississippi; Barbara Kennelly, Connecticut; Brian J. Donnelly, Massachusetts; Ray Kogovsek, Colorado; Don H. Clausen, California; Gene Snyder, Kentucky; John Paul Hammerschmidt,

Arkansas; E. G. Shuster, Pennsylvania; Barry M. Goldwater, Jr., California; Tom Hagedorn, Minnesota; Arlan Stangeland, Minnesota; Newt Gingrich, Georgia; William F. Clinger, Jr., Pennsylvania; Gerald B. Solomon, New York; Harold C. Hollenbeck, New Jersey; H. Joel Deckard, Indiana; Wayne R. Grisham, California; Jim Jeffries, Kansas; Jack Fields, Texas, Guy Molinari, New York; Clay Shaw, Florida; Bob McEwen, Ohio; and Frank Wolf, Virginia.

In witness whereof, I hereby unto affix my name and the Seal of the House of Representatives, in the City of Washington, District of Columbia, this seventeenth day of December, Anno Domini one thousand nine hundred and eighty-two.

EDMUND L. HENSHAW, JR., Clerk
U.S. House of Representatives

Edmund L. Henshaw, Jr.
Clerk

M. Raymond Calley
Deputy Clerk

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

December 17, 1982

I, Edmund L. Henshaw, Jr., Clerk of the United States House of Representatives, do hereby certify, pursuant to Rule III of the Rules of the United States House of Representatives, that the attached is a true and correct copy of House Report No. 97-968.

In witness whereof, I hereunto affix my name and the Seal of the House of Representatives, in the City of Washington, District of Columbia, this seventeenth day of December, Anno Domini one thousand nine hundred and eighty-two.

EDMUND L. HENSHAW, JR., Clerk
U.S. House of Representatives

HARRIS DEC. EXH. A

PAGE 8 OF 9

House Calendar No. 203

97TH CONGRESS 2nd Session	HOUSE OF REPRESENTATIVES	REPORT No. 97-968

CONTEMPT OF CONGRESS

REPORT

OF THE

COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

together with

ADDITIONAL VIEWS, MINORITY VIEWS,

and

ADDITIONAL MINORITY VIEWS

ON THE

CONGRESSIONAL PROCEEDINGS AGAINST ANNE M. GORSUCH, ADMINISTRATOR, U.S. ENVIRONMENTAL PROTECTION AGENCY, FOR WITHHOLDING SUBPOENAED DOCUMENTS RELATING TO THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980

DECEMBER 15, 1982.—Referred to the House Calendar and ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
12-406 O WASHINGTON : 1982

[REMAINDER OF REPORT DELETED FROM EXHIBIT]

HARRIS DEC. EXH. A

PAGE 9 OF 9

U.S. Department of Justice

United States Attorney
District of Columbia

United States Courthouse, Room 2800
Constitution Avenue and 3rd Street N.W.
Washington, D.C. 20001

December 27, 1982

The Honorable Thomas P. O'Neill, Jr.
Speaker
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

This is in response to your communication of December 17, 1982, certifying to me House Resolution 632 regarding the production of documents by The Honorable Anne M. Gorsuch, Administrator of the United States Environmental Protection Agency.

On December 16, 1982, Civil Action Number 82-3583 was filed by the Department of Justice in the United States District Court for the District of Columbia. In that case, the Department seeks to have the District Court declare that the compelled production of the documents sought by the House of Representatives unconstitutionally would contravene important separation of powers principles, and that the subpoena issued for those documents is constitutionally defective. Pursuant to Section 547 of Title 28, United States Code, I am responsible within this district for prosecuting, for the Government, all civil actions, suits, or proceedings in which the United States is concerned. Accordingly, although the principal work in the pending case is being done by the Civil Division of the Department of Justice, I nonetheless am in the posture of being legally responsible for the prosecution of that civil action for the Government.

Under the same statutory section, I also am responsible for prosecuting, within this district, all offenses against the United States. As part of the discretion which I must exercise as the chief prosecuting officer of this district, a determination must be made as to when a matter should be submitted to a grand jury.

I am keenly aware of the provisions of Section 194 of Title 2, United States Code. It should be noted that that section of the Code quite properly does not include a mandate as to the timing of submitting a matter to a grand jury.

I recognize the degree of interest which you and your colleagues have in this proceeding. Accordingly, as a matter of courtesy I wish to advise you that I have concluded that it would not be appropriate for me to consider bringing this matter before a grand jury until the civil action has been resolved. While I recognize the likelihood that we are in disagreement over the underlying merits of the controversy, we do have a common interest -- namely, achieving a resolution of the disputed questions as expeditiously as possible and with a minimum of adverse consequences to good government and to the country as a whole. Accordingly, I urge that you pursue with us the use of the pending civil suit as the most effective medium in which to advance the judicial resolution of the controversy.

You may be assured of my continuing and careful attention to this matter.

Respectfully,

Stanley S. Harris

STANLEY S. HARRIS
United States Attorney
District of Columbia

SSH:rm

Copy: Hon. Edmund L. Henshaw, Jr.
Clerk of the House of Representatives

Hon. J. Paul McGrath
Assistant Attorney General
Civil Division
Department of Justice

HARRIS DEC. EXH. B

PAGE 2 OF 2

The Speaker's Rooms
U.S. House of Representatives
Washington, D.C. 20515

January 4, 1983

Mr. Stanley S. Harris
United States Attorney
United States Department
of Justice
2800 United States Courthouse
Constitution Avenue and
3rd Street, N.W.
Washington, D.C. 20001

Dear Mr. Harris:

This responds to your December 27, 1982 letter concerning the congressional contempt citation of Anne M. Gorsuch, Administrator of the Environmental Protection Agency.

While concluding "that it would not be appropriate . . . to consider bringing the matter before a grand jury until the civil action has been resolved" you stated that you are also "keenly aware of the provisions of Section 194 of Title 2 United States Code."

You are therefore aware that Section 194 provides that the Speaker shall certify the statements of facts "to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action." As more fully set forth in the memorandum of points and authorities filed with the House Motion To Dismiss the Complaint, a copy of which was provided to you, it is the position of the House of Representatives that there is no legal basis for the civil suit and it neither precludes your office from discharging your responsibilities under law, nor affects in any way the validity of the statute.

Sincerely,

Thomas P. O'Neill, Jr.
Speaker

cc: Honorable Peter W. Rodino, Jr.
Honorable Elliott H. Levitas
Honorable James J. Howard

HARRIS DEC. EXH. C

PAGE 1 OF 1

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No.
	)	
THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, et al.,	)	82-3583
	)	
Defendants.	)	
	)	

DECLARATION OF CAROL E. DINKINS

I, Carol E. Dinkins, hereby declare as follows:

1. I am the Assistant Attorney General for the Land and Natural Resources Division ("the Division") of the United States Department of Justice ("the Department").

2. I have responsibility for conducting civil and criminal litigation which involves air, water, noise and other types of pollution and to which the United States or an officer or agency thereof is a party or is interested. 28 U.C.S. §§515(a) and 516; 28 C.F.R. §0.65. That responsibility includes the conduct of litigation arising under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. §§9601 et seq., commonly known as the Superfund Act. 42 U.S.C §9615; Executive Order 12316 (August 14, 1981), Section 8.

3. The Division is subdivided into discrete sections, each of which is responsible for a portion of the overall litigation conducted by the Division. Responsibility for the conduct of Superfund

Act and other environmental enforcement litigation generated by the United States Environmental Protection Agency ("EPA") is vested in the Environmental Enforcement Section. This section is comprised of staff attorneys and associated support personnel under the direction of a Chief, Stephen D. Ramsey, and three Assistant Chiefs.

4. Mary L. Walker is the Deputy Assistant Attorney General of the Division. She is an appointee of the Attorney General, who, subject to my supervision and direction, supervises the Chief of the Environmental Enforcement Section. She is responsible for providing and implementing policy direction and overall supervision to the Environmental Enforcement Section and the other sections for which she is responsible. She is one of three Deputy Assistant Attorneys General within the Division.

5. EPA and the Department have developed a system for case investigation, development and prosecution that is followed with respect to Superfund Act litigation. EPA is responsible for the initial identification and investigation of matters for potential judicial or administrative enforcement proceedings. The Department participates at an early stage in case development, first informally through regular meetings with EPA attorneys and technical personnel, and then later in a formal way after cases are referred to the Department with requests for the initiation of civil or criminal litigation. Both stages of the "case development process" are part of the overall process of enforcing the Superfund Act. Thus, whether a case has been formally referred

to the Department for litigation is not determinative of its status as an enforcement matter. Indeed, EPA frequently negotiates with potential defendants in an attempt to settle matters prior to the commencement of formal judicial proceedings and considers such matters to be enforcement cases at that stage.

6. In the course of the case development process both before and after a case is formally referred to the Department, there is regular contact and discussion among technical personnel, EPA attorneys and Department personnel concerning evidence, legal issues, plans, strategy and other matters involved in the preparation of the case for litigation. These exchanges are necessarily candid and frank in their evaluation of the strength and weakness of the Government's position in negotiation or litigation. The disclosure of information concerning such matters could provide defendants and potential defendants with candid insights into the strengths and weaknesses of the Government's position, the Government's plans (for example, likelihood of prosecution), the Government's strategy for negotiation and/or litigation, and other confidences which are normally subject to work product, deliberative or attorney-client privileges. The disclosure of such information could thus be of distinct value to such persons in evaluating their posture in negotiation or litigation with the Government. Disclosure of such information could, and most likely would, adversely impact the ability of the Government to prosecute Superfund Act enforcement cases effectively. Moreover, although some of such information might normally be disclosable after the passage of time, premature disclosure could have the same adverse impact.

7. In the course of my duties as Assistant Attorney General of the Land and Natural Resources Division, I was advised by officials of EPA and by Ms. Walker and Mr. Ramsey that documents which had been prepared in anticipation of or in the process of ongoing enforcement proceedings were being sought for examination by subcommittees of Congress. I was advised by both my professional staff and EPA staff that the revelation or disclosure of the information contained in some of the documents which had been requested by the congressional subcommittees could or would adversely affect the ability of the Government to effectively and successfully carry out its responsibilities with respect to enforcement matters under the Superfund Act.

8. In order to determine whether the disclosure of specific documents identified by EPA could or would have such adverse impact, I instituted a procedure for review of the documents in question by personnel within the Division. Copies of those documents were transmitted to the Division, where they were reviewed in the first instance by Mr. Ramsey with the assistance of his professional staff to determine whether disclosure of them would adversely affect the ability of the Government to conduct Superfund Act enforcement matters effectively. After Mr. Ramsey completed his review and made his recommendation to Ms. Walker, Ms. Walker reviewed the documents using the same standard. Thereafter, I reviewed the documents and considered the collective recommendation of Ms. Walker and Mr. Ramsey.

9. We determined that disclosure of certain documents, which are identified in Exhibit G to the Declaration of Robert M. Perry, would reveal governmental litigation and negotiation plans,

evidence, analyses, strategy, mental impressions, thought processes and other information which would not, absent extraordinary circumstances, be available to adverse parties prior to or in the course of litigation. It was our unanimous professional opinion that disclosure of those documents, or of the information contained in them, to adverse parties would give them a substantial advantage in negotiation and litigation with the Government and potentially damage the overall enforcement effort of the Government under the Superfund Act. We specifically concluded that their disclosure would adversely impact the ability of the EPA and the Department to effectively negotiate or litigate Superfund Act enforcement actions against such parties.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed on January 10, 1983 in Washington, D. C.

Carol E. Dinkins

CAROL E. DINKINS

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 1983, I served the foregoing Motion for Summary Judgment, Points and Authorities in Support Thereof and In Opposition to Defendants' Motion to Dismiss, Motion for Leave to Amend the Complaint and Join the Sergeant-at-Arms as a Party Defendant, Second Amended Complaint, and Motion for Leave to File Points and Authorities in Excess of the Page Limitation of Local Rule 1-9(e) by delivering a copy by hand to:

Stanley M. Brand
General Counsel to the Clerk
Office of the Clerk
U.S. House of Representatives
H-105, The Capitol
Washington, D.C. 20515

Betsy J. Grey

BETSY J. GREY