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Office of the Assistant Attorney General

Washington, D.C. 20530

April 3, 2008

✓ The Honorable John D. Dingell
Chairman
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Bart Stupak
Chairman
Subcommittee on Oversight and Investigations
Committee on Energy and Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Messrs. Chairmen:

This responds to your letter, dated March 12, 2008, concerning the Department's plea agreement with BP Products North America Inc. ("BP Products") in connection with criminal violations of the Clean Air Act. We are awaiting action by the U.S. District Court for the Southern District of Texas to accept or reject the agreement, which was filed on October 25, 2007. Issues affecting the entry of the plea agreement are also pending before the Court of Appeals for the Fifth Circuit. On February 27, 2008, victims' counsel petitioned the Fifth Circuit for a writ of mandamus directing the district court to reject the plea agreement. If the district court rejects the agreement, it must afford BP Products an opportunity to withdraw its guilty plea and the associated waiver of indictment. Fed. R. Crim. P. 11(c)(5)(B). We appreciate the Committee's interest in this matter, and we have endeavored to respond to the questions set forth in your letter, consistent with our law enforcement responsibilities and long-standing policies concerning the need for confidentiality in pending civil and criminal matters. We are not in a position to provide all of the requested information at this time, although our position would change in some respects if the district court accepts the plea agreement.

The catastrophic explosion on March 23, 2005, at the BP Products Texas City Refinery prompted several investigations, including the subject federal criminal investigation and administrative investigations by the U.S. Chemical Safety and Hazard Investigation Board, the Occupational Safety and Health Administration ("OSHA"), and the Texas Commission on Environmental Quality ("TCEQ"). The explosion also led to extensive civil litigation on behalf of victims and their families. Approximately 4,000 claims have been filed in federal and state court, approximately half of which have settled, resulting in civil damage awards (to date) in excess of \$1.6 billion.

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The federal criminal investigation against BP Products for Clean Air Act violations resulting in the explosion culminated in October 2007, when the company agreed to enter a plea agreement. This case was handled by the U.S. Attorney's Office for the Southern District of Texas, with assistance from the Environment and Natural Resources Division in Washington, D.C. The matter was investigated by agents from the EPA and the FBI. The criminal information charges knowing violations of Risk Management Plan ("RMP") regulations issued under the Clean Air Act program designed to prevent accidental releases of regulated substances. See, 42 U.S.C. § 7412(r)(7); 40 C.F.R. § 68.1 et seq. This is the first criminal case in which the United States has charged a knowing violation of the RMP regulations. If the plea agreement is accepted, the stipulated \$50 million fine will be the largest criminal fine ever imposed in a Clean Air Act case. The agreement also provides, as conditions of probation, that BP Products shall comply with a settlement agreement executed between BP Products and OSHA and an Agreed Order executed between BP Products and TCEQ.

While we are not in a position to disclose non-public information about our prosecutorial decisions nor our continuing criminal investigation relating to this matter, we can advise you about relevant Department of Justice policy. As set forth in the section of the Principles of Federal Prosecution entitled "Selecting Plea Agreement Charges," with certain narrow exceptions, when a prosecution is concluded pursuant to a plea agreement, the prosecutor should require the defendant to plead guilty to a charge "[t]hat is the most serious readily provable charge consistent with the nature and extent of [the defendant's] criminal conduct." Federal Principles of Federal Prosecution § 9-27.430. Likewise, the Principles of Federal Prosecution of Business Organizations (also referred to as the "McNulty Memorandum"), directs that "[i]n negotiating plea agreements with corporations, prosecutors should seek a plea to the most serious, readily provable offense charged." McNulty Memorandum § XIII. This was accomplished in this case. Indeed, counsel for the victims acknowledged at the plea hearing that BP Products pleaded guilty to the most significant criminal offense that could be charged. See Hearing Transcript, February 4, 2008, at 100.

Similarly, consistent with our practice, we required the guilty plea in this case from the highest corporate entity that could be held responsible for the criminal conduct. Under the McNulty Memorandum, prosecutors must consider "a corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges." McNulty Memorandum § VI. Moreover, "[i]n making this determination, the corporate structure itself, e.g., subsidiaries or operating divisions, should be ignored, and enforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates should be considered." Id. We took these factors into consideration and complied with the McNulty Memorandum in deciding to proceed only against BP Products. We appreciate your question relating to the prior conduct by other BP, plc ("BP") entities and note that, as described above, BP's noncompliance history was reviewed by the government. The government provided the court information on BP's criminal noncompliance with respect to its Alaska operations. Victims' counsel provided additional information on BP's civil and administrative noncompliance history to the district court.

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By its express terms, the plea agreement mandates future compliance with the criminal provisions of the Clean Air Act by the BP Products Texas City Refinery. As stated in paragraph 13 of the Plea Agreement, if BP Products “commits any federal (including those laws and regulations for which primary enforcement has been delegated to state authorities) environmental or process safety crimes relating to its Texas City refinery operations (excluding Class C misdemeanors and infractions, as defined by 18 U.S.C. § 3559), it will have breached this Agreement.”

In addition, under the conditions of probation, specifically those incorporating the Settlement Agreement with OSHA, BP Products must retain an independent auditor to perform a separate facility-wide relief valve study. A facility-wide relief valve study is believed to be the most relevant requirement to ensure BP Products’ compliance with the Clean Air Act. Another condition of probation is that BP Products is subject to an Agreed Order with the TCEQ to reduce emissions in refining units at the Texas City refinery. BP Products’ compliance with the Settlement is determined by OSHA, not by the independent auditor approved by OSHA. If BP Products fails to perform the facility-wide relief valve study as agreed, OSHA will notify the Department of Justice. Similarly, if BP Products fails to comply with the conditions of the Agreed Order to reduce emissions, TCEQ will notify the Department of Justice. The Department of Justice can proceed directly to the district court for a violation of probation. In such an instance, the court may order a revocation of BP Products’ probation or stricter conditions, if warranted. OSHA and TCEQ are the two agencies best suited to monitor BP Products’ compliance and will alert the Department of Justice if BP Products fails to comply with the conditions of its probation. See Government’s Response to Victims’ Joint Memorandum in Opposition of Plea Agreement. In addition, the agreement requires BP Products to continue to “provide cooperation to the Government in its ongoing investigation of possible criminal violations related to the explosion.” Plea Agreement, ¶ 3. You may wish to review the enclosed Plea Agreement and other pleadings for more information.

As your letter correctly notes, the plea agreement requires BP Products to pay a \$50 million dollar fine for violations of the Clean Air Act and its corresponding regulations. The Alternative Fines Act, 18 U.S.C. § 3571(d), is the relevant provision under which sentence would have been imposed had the case gone to trial and resulted in a conviction. This statute provides in pertinent part that “the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.” The \$50 million fine in this matter comports with our review and assessment of the various costs associated with BP Products’ likely savings from its failure to comply with the requisite risk management procedures in the Isomerization Unit, as well as our assessment of the litigation risks associated with establishing these losses in court. Among the most significant of BP Products’ relevant cost savings were those the company avoided by failing to replace the blowdown in question with a flare and those it avoided by failing to move contractors to an off-site facility. We approximated \$25 million as the costs BP Products saved attributable to the Isomerization Unit and the \$50 million fine reflects double those estimated cost savings. Doubling the relevant gain or loss is the maximum permitted under the Alternative Fines Act. For more information about the basis for the \$50 million dollar fine,

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you may wish to review the enclosed transcript of the plea agreement hearing (see particularly pages 120-21 and the surrounding discussion) and related pleadings (especially relevant are the Government's Response to Victims' Joint Memorandum in Opposition of Plea Agreement and Government's Response to Victims' Brief on Loss and Causation). As to BP Products' motivation to agreeing to the plea agreement, we would refer you to its public statements and pleadings.

While we believe that we charged the maximum provable violation in this case, you will note that the statement of facts in the plea agreement describes a wide range of conduct. It is not uncommon for a plea agreement to allege a single count, but include a statement of facts that encompasses all relevant conduct. Moreover, in determining whether to enter into a plea agreement, and in assessing the appropriate fine amount, the government must exercise its judgment in considering numerous factors, such as the litigation risks at trial, the practicalities of charging an indictment with multiple counts covering a pattern of conduct over a period of time, and the complexities of proving all facts beyond a reasonable doubt.

We appreciate the importance of victims' rights in this matter and believe that we took reasonable and appropriate measures to comply with the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. § 3771, and to ensure that the victims of the March 2005 explosion were afforded all their rights under that statute. We honored the Attorney General's Guidelines for Victims and Witness Assistance in our consultations with the victims in this case. The Guidelines provide that consultations regarding such matters as prospective plea negotiations "may be limited to gathering information from victims and conveying only *nonsensitive data and public information*" and emphasize the need to "consider factors relevant to the wisdom and practicality of giving notice and considering views in the context of the particular case." Art. IV.B.3.c. The Guidelines make clear that there is no mandatory duty for the United States to confer, in all cases, on the terms of a plea agreement prior to entering such agreement. The government sought to balance its obligations under the CVRA to provide the victims with a reasonable right to confer with its concomitant obligations to protect any putative defendant's Sixth Amendment right to a fair trial should plea negotiations fail and to ensure the integrity of the criminal investigation. To ensure that the Department achieved a correct balance, the government here took the additional step of securing advance court authorization for the procedures it adopted.

The court here granted the United States' motion and issued an order directing that the victims not be notified of a potential criminal resolution prior to the execution of a plea agreement. Order, October 18, 2007. That Order further required the United States, in the event a plea agreement were executed, to then provide reasonable notice to all identifiable victims of their rights pursuant to the CVRA before entry of the guilty plea. Consistent with that Order, when the plea agreement was announced, the government announced that the United States Attorney's Office was setting up a website and phone contact for victims. The government sent notices to approximately 180 victims on three separate occasions. One hundred and thirty-four victim impact statements were filed with the court, and ten victims spoke at the February 4, 2008, hearing.

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A second district court judge later reviewed the procedures through which the United States had given effect to the CVRA here and found that those procedures “did not frustrate the purposes of the CVRA’s conferral provision.” Memorandum and Order, February 21, 2008, at 41. That judge confirmed that the ordering court had “found a cognizable threat to the plea negotiations and to the defendant’s Sixth Amendment right if the negotiations failed.” Id. at 39. The court explained:

In this case, the record shows that the unusual circumstances of the presence of multiple victims and the intense media coverage made it impracticable for the victims to receive notice of the plea negotiations and to confer with the government before the negotiations concluded. The record also shows that the government had been in communication with many of those affected by the explosion well in advance of any plea negotiations. . . . To read the right to confer as an inflexible right to express an opinion on specific terms that the government and defendant are negotiating would both endanger the confidentiality of plea negotiations and suggest that crime victims have a right to join in plea negotiations and to approve the proposed terms, inconsistent with the CVRA recognition of prosecutorial discretion.

Id. at 41-42.

The Department announced plea agreements in three separate criminal matters involving BP on October 25, 2007. Although the plea agreements were announced together, the agreements were not contingent on one another. While arrangements were being made to consolidate the announcement of these plea agreements during the time in question, preparations for the consolidated announcement did not preclude or otherwise affect in any way discussions with the victims during plea negotiations in this case.

We are enclosing pleadings the United States has filed in district court and in the Fifth Circuit in this case, as well as relevant court orders and additional documents responsive to your requests. We also have a few documents in which we have certain confidentiality interests that are likely to be of limited interest to the Committee, which we will make available for review at the Department. We are not including documents that reflect internal deliberations and communications about these matters because they implicate substantial confidentiality interests of the Department. Our search for documents is not yet complete and we will supplement this response if we identify additional responsive records.

We appreciate your request that we identify all environmental crimes plea agreements in which the Department included and excluded the totality of a parent company’s noncompliance history in court documents, as well as those in which we included and excluded future compliance with the particular environmental laws cited in the plea agreement. Our records do not classify plea agreements in these ways, and the complexity of circumstances associated with any individual case means that such agreements are not amenable to categorization or identification in this manner. For example, it is not necessarily discernible from the face of any particular plea agreement whether there was a parent corporation at all, whether there was a parent corporation but no relevant noncompliance to be considered, or if noncompliance of a

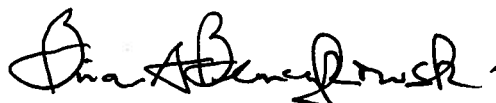
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parent was considered but not referenced in the agreement. Plea agreements may address such issues as the compliance history of related entities and future compliance with environmental laws in a variety of different ways and at different levels of specificity that do not fit easily into the classifications described in your letter.

We have located the environmental crimes plea agreements that the Environment and Natural Resource Division's Environmental Crimes Section (ECS) has entered into with corporations during the last five years and they are enclosed here. As we have advised Committee staff, a search for older agreements would involve substantial additional efforts because those records are not readily retrievable in our files or in computer systems. Similarly, the task of identifying plea agreements in the 93 United States Attorneys' Offices would be extremely time-consuming and likely result in significant duplication of the records enclosed with this letter. We would like to discuss the Committee's needs for these records and your priorities with Committee staff. We have not yet identified any plea agreements in which the government sought advance court permission to defer consultations with clearly identifiable victims, but, as noted above, our search for responsive documents is continuing.

We hope that this information is helpful, and we remain available to confer with Committee staff if you have any further information needs. Please do not hesitate to contact this office if we may be of further assistance on this or any other matter.

Sincerely,



Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Joe Barton, Ranking Minority Member
Committee on Energy and Commerce

The Honorable John Shimkus, Ranking Minority Member
Subcommittee on Oversight and Investigations