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ONE HUNDRED TENTH CONGRESS

U.S. House of Representatives
Committee on Energy and Commerce
Washington, DC 20515-6115

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March 12, 2008

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The Honorable Michael B. Mukasey
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave, N.W.
Washington, D.C. 20530

Dear Attorney General Mukasey:

Under Rules X and XI of the Rules of the U.S. House of Representatives, the Committee on Energy and Commerce and its Subcommittee on Oversight and Investigations are investigating the conduct of the Department of Justice (DOJ) regarding the plea agreement reached with British Petroleum (BP) concerning its criminal violations of provisions of the Clean Air Act. Since DOJ's public announcement on October 25, 2007, regarding this plea and two other BP cases, this Committee, which has jurisdiction over the Clean Air Act, has been concerned about their adequacy. As noted in our press release of that date:

"Congress has held hearing after hearing about BP's mismanagement, and now DOJ, CFTC and EPA have imposed criminal fines. However, we continue to wonder what it will take to bring a meaningful change in culture at BP. It is troubling that many of the same BP executives who were responsible for the management failures that led to the criminal charges and settlements announced today are still employed by BP, and, in some cases, have been promoted to the highest levels of the company."

Accordingly, we have examined the plea agreement with respect to BP's admitted criminal conduct that led to the March 23, 2005, explosion at its Texas City Refinery, which killed 15 and injured more than 170 workers. We question whether DOJ has followed Congressional intent by recommending this plea agreement, since it does not appear to either protect the safety of workers and residents near this refinery or ensure that a proper signal is sent to BP's senior management whose budgeting decisions led to this tragedy.

In addition to the needless loss of life and property, massive oil refinery accidents also drive up gasoline and diesel prices and impose a tax on every consumer in the country. Every

worker and consumer has a deep and abiding interest in the Government taking all necessary measures to deter the kind of reckless conduct exhibited by BP in managing its refining business.

We also have questions about whether DOJ has fulfilled its responsibilities to victims. In particular, we want to understand whether DOJ met its obligation to give victims a timely opportunity to confer *before* it negotiated a plea agreement, as required by the Attorney General's Guidelines. This concern was not resolved in the U.S. District Court's February 21, 2008, Order regarding the adequacy of DOJ's implementation of the Crime Victims Rights Act.

The plea agreement in question provides for "BP Products," a fourth-tier subsidiary of BP, to plead guilty to a felony violation of the accident prevention requirements of the Clean Air Act, pay a \$50 million fine, and accept a 3-year probation. Probation requires BP to comply with two related settlement agreements—one with the Occupational Safety and Health Administration (OSHA) and one with the Texas Commission on Environmental Quality (TCEQ).

This letter requests that you respond to questions in five key areas:

I. Did decisions made by executives of the parent company, BP Plc, aid and abet BP's noncompliance at Texas City and, if so, do the executives have culpability, and should they have been held to account?

The U.S. Chemical Safety Board (CSB) conducted an exhaustive investigation of the Texas City oil refinery disaster. While CSB found that hydrocarbons exploded because of mechanical failures during the restart of a gasoline-refining unit, the 341-page Investigation Report noted that, "*Cost cutting, failure to invest and production pressures from BP Group executive managers impaired process safety performance at Texas City.*" CSB also found that a 2002 proposal to modify the refinery would have avoided this tragedy, but the money was not spent.

BP executives were repeatedly forewarned.

- A 2005 Health and Safety business plan warned management that the refinery will "likely kill someone in the next 12–18 months."
- In 2004, three major incidents caused three fatalities.
- A 2003 report that found the refinery infrastructure and assets were in poor condition.
- A 2002 assessment requested by BP executives stated that the refinery had serious deficiencies with mechanical integrity, inspections, and instrumentation, as well as a high likelihood for a major incident.

Despite many red flags, BP executives issued a “budget challenge” in late 2004 to cut spending at Texas City by 25 percent. Despite pleas for adequate funding from the Texas City refinery manager, BP was unwilling to reinstate full funding.

BP’s process safety problems were not confined to Texas City. BP commissioned former Secretary of State James Baker to lead an assessment of safety at BP’s U.S. refineries. The January 16, 2007, report concluded, “significant process safety issues exist at all five U.S. refineries, not just Texas City.” OSHA assessed BP a \$2.4 million fine for 32 “willful” violations at its Toledo, Ohio, refinery in 2006. In announcing this penalty, the Administration of OSHA said, “It is extremely disappointing that BP Products failed to learn from the lessons of Texas City to assure their workers’ safety and health.”

At the same time BP executives were cutting funds for safety at Texas City, they were cutting safety costs at the Prudhoe Bay, Alaska, oil field. On March 2, 2006, approximately 201,000 gallons of crude oil were found leaking from an oil transit line in Prudhoe Bay. What started as a single spill ended in the discovery of widespread corrosion in BP’s pipelines, and the temporary shutdown of the Prudhoe Bay oil field. This caused oil and gasoline prices to skyrocket due to the loss of 8 percent of U.S. oil production. This shutdown occurred because BP allowed its oil transit lines to become unserviceable.

The Committee on Energy and Commerce obtained internal BP e-mails showing that BP’s executives had issued “budget challenges” and directed “top down cost cutting” in Alaska without regard to the safety of its oil pipelines. BP’s own consultant, Booz Allen, found that “budgeting was largely driven by top down targets” rather than based on an analysis of risks, and “top down targets were considered sacrosanct and rarely exceeded.”

The “McNulty Memorandum” on Federal Prosecution of Business Organizations states, “Only rarely should provable individual culpability not be pursued, even in the face of an offer of a corporate guilty plea...”

BP Product’s ability to comply with the terms of this plea agreement is dependent upon funds from its parent, BP Plc, and its Board of Directors. The Government, however, charged a fourth-tier subsidiary, even though it cannot make budgeting decisions related to process safety.

In its January 22, 2008, brief in support of this plea agreement, BP stridently defends the legal protections it created through a multi-layered corporate structure that immunized the corporate parent and points to 35 other plea agreements that exclude the parent company. BP asserts:

“[I]t is a standard provision for a corporate plea agreement. The reason for the provision is obvious—a corporation has no reason to plead guilty when its parent or subsidiary corporations could be potentially charged for the same conduct.”

Please respond to the following questions regarding this plea agreement:

1. Did DOJ intentionally exclude the parent company from this plea agreement? Is this exclusion consistent with DOJ policy? Please explain the basis for failing to pierce BP's corporate veil.
2. Did DOJ or the Environmental Protection Agency (EPA) investigate the role of the parent company, BP Plc, in connection with repeated cost-cutting decisions given its knowledge that there were degraded safety conditions at this refinery?
3. Has DOJ or EPA investigated whether there was potential culpability by individual BP executives and managers in connection with cost cutting and their knowledge of degraded safety conditions at this refinery for more than 7 years? Has this investigation been concluded?
4. Did OSHA or EPA make any criminal referrals to DOJ for individual BP executives or managers?
5. Has DOJ provided EPA with the necessary legal resources to investigate BP executives in the U.S. and United Kingdom?

II. By sidestepping the corporate parent in favor of charging a fourth-tier subsidiary, did the Justice Department consider the totality of BP's corporate misconduct when assessing "the history and characteristics of the defendant" as part of the criminal penalty process under 18 U.S.C. 3553?

BP's near-term history contains dozens of civil and criminal violations. However, the documents filed with the District Court only mention two violations involving BP in Alaska.

1. Were environmental and safety violations at the refineries in Ohio, Indiana, and California not relevant? Were price fixing, pipeline safety, and oil royalty violations not relevant?
2. Did DOJ review the history and characteristics of all BP corporate affiliates operating in the U.S. when evaluating BP's history of civil and criminal violations? Was a comprehensive review provided to the Court by the U.S. Attorney?
3. If this information was not provided to the Court, did DOJ fail to pierce the corporate veil with respect to BP's history of violations—both civil and criminal?

4. Was settlement facilitated by excluding the corporate parent, as claimed by BP's Counsel?
5. Please identify all environmental crimes plea agreements over the past 10 years where DOJ included and excluded totality of a parent company's noncompliance history in the statement of facts or other sentencing documents submitted to the Court?

III. Why is future compliance with the Clean Air Act not mandated by this plea agreement?

Even though BP Products was charged with violating the Clean Air Act's accident prevention requirements, the plea agreement does not require BP Products to come into full compliance with the Clean Air Act during the probation period. Moreover, it does not require full compliance with all Federal and State laws regarding refinery operations and safety. The McNulty Memorandum states, "Rehabilitation, of course, requires that the corporation undertake to be law abiding in the future."

Although the plea agreement requires BP to implement the OSHA and TCEQ settlement agreements, these agreements have not stopped process-related fatalities. On January 14, 2008, a veteran supervisor with 32 years of experience at the Texas City refinery died from "blunt force trauma" when a 500-pound steel lid was "suddenly and violently" blown from a vessel connected to an "ultracracker" that was being restarted. The Chemical Safety Board is investigating this as a process safety related explosion.

1. Please explain whether wall-to-wall compliance with the Clean Air Act's process safety requirements is the objective of this plea agreement? If so, please point to the provisions which mandate this result.
2. Please identify all environmental crimes plea agreements with corporations over the past 10 years where DOJ included and excluded future compliance with the particular environmental laws that were cited in the plea agreement.
3. We note that a court-appointed monitor was required in the settlement of the BP propane price-fixing case that was announced on October 25, 2007. Given numerous fatalities at the Texas City refinery and a seven-year history of noncompliance by BP with process safety requirements, what explains the decision not to request a court-appointed monitor? Did DOJ assess whether an independent monitor be more effective, for example, than the BP-hired consultant who was retained under the OSHA settlement?

IV. Is the \$50 million fine adequate to deter future noncompliance?

The plea agreement states that BP violated the Clean Air Act beginning the day it acquired the Texas City refinery on January 1, 1999, through March 25, 2005, the date of the explosion. This amounts to 2,639 consecutive days of noncompliance. While DOJ has stated this \$50 million fine is the largest fine under the Clean Air Act in its press statements and pleadings, this alone does not address whether the fine is adequate to achieve the goal of deterrence, particularly since this fine is less than a single day of profits for BP in 2006 and 2007.

Could larger penalties have been obtained under the Alternative Fines Acts (18 USC 3751(d))? That criminal provision states:

“[I]f any person derives pecuniary gain from the offensethe 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.”

Further, if the maximum penalty per violation is \$500,000, and DOJ charged BP for 2,639 days of violation, this would produce a potential maximum fine of \$1.31 billion. In this case, the \$50 million fine is 4 percent of the maximum potential fine.

1. How did DOJ arrive at the \$50 million fine? Please provide the method and basis for calculating this fine.
2. Does the \$50 million fine reflect the pecuniary benefits from avoided capital spending on equipment, engineering, maintenance, training, and staffing necessary to comply with the process safety requirements in Section 112r of the Clean Air Act for more than 7 years of noncompliance? If not, what are BP's pecuniary benefits?
3. Given that BP admits it was in noncompliance for more than 7 years with Section 112r of the Clean Air Act, why did DOJ charge BP with only 1 violation, when there were 2,639 days of noncompliance? By charging BP with only one violation, did DOJ charge the maximum provable violation?

V. Did DOJ evade the purposes and intent of the Crime Victim Rights Act (CVRA) and the Attorney General's Guidelines for Victim and Witness Assistance?

The CVRA provides, “The right [for victims] to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding,” “the reasonable right to confer with the attorney for the Government in the case,” and “the right to be treated with fairness.”

In its October 18, 2007, *ex parte* motion, the U.S. Attorney told the U.S. District Court for the Southern District of Texas that because of the large number of victims in this case,

“consulting with crime victims prior to reaching a plea agreement would be impracticable” and that any “suggestion of an admission of criminal responsibility by BP Products prior to the actual signing of a plea agreement would prejudice BP Products.”

This is at odds with the Attorney General’s *Guidelines for Victim and Witness Assistance* which states, “Responsible officials should make reasonable efforts to notify identified victims of, and consider victim views about, any proposed or contemplated plea negotiations.”

The U.S. Attorney did not have to choose between conducting secret plea negotiations and protecting crime victim rights. The victim’s rights to confer were blocked until *after* the deal was finalized, and DOJ made its public announcement on October 25, 2007. It is curious that, at precisely the time DOJ was negotiating with BP on finalizing this plea agreement and arranging for a nationwide press conference to announce two other plea agreements involving BP’s criminal conduct, the U.S. Attorney argued in an *ex parte* communication with the Court that it was impractical to notify victims and consult their views.

Did DOJ public relations considerations trump substantive consultations with victims? Having been locked out of the process when consultations might have been meaningful, the victims now face a joint defense by DOJ and BP to fight off any challenge to the adequacy of this plea agreement.

1. Did DOJ honor the Attorney General’s *Guidelines for Victim and Witness Assistance* by consulting with the victims (or their representatives) about plea negotiations before the agreement was reached?
2. In the past two years, please identify all criminal plea agreements where DOJ sought court permission to avoid providing notice or avoid consulting with clearly identifiable victims (e.g., identifiable by having brought a civil suit) about the contents of a plea agreement before the plea agreement was reached.
3. Please provide the factual basis that supports the U.S. Attorney’s contention that it would have been impractical to notify the Texas City refinery victims in advance of a plea agreement and provide opportunity for input. What alternatives had DOJ considered and rejected? In a February 21, 2008, opinion, Judge Lee Rosenthal raised this same question.
4. Between October 18 and 25, 2007, when the U.S. Attorney told the Court that he could not consult with the victims because it was impracticable, is it true that DOJ was making arrangements to consolidate the announcement of three criminal matters involving BP at a Washington, D.C. press conference? To what extent did preparations for a major announcement preclude discussions with victims during plea negotiations?

Please provide answers to the questions outlined above within 10 days of receipt of this letter. In addition, please provide:


1. All documents, communications, spreadsheets, memoranda, or e-mails prepared by DOJ or EPA that estimate BP's pecuniary benefits enjoyed as a result of its noncompliance at Texas City.
2. All communications between or within the Office of the U.S. Attorney, Main Justice, or BP (or its counsel), including e-mails, memoranda, or letters that assess, evaluate, or discuss whether to notify victims prior to the conclusion of plea negotiations with BP.
3. All communications, including memoranda, e-mails, or letters within or between the Office of the U.S. Attorney or Main Justice and attorneys for BP Products regarding the possibility of consolidating the press announcement of deferred prosecution agreement involving the BP propane price fixing case, the BP Alaska misdemeanor plea, and the Texas City felony plea.

Please note that the Committee does not expect the production of documents, if any, which were prepared for a grand jury.


Finally, we respectfully request that you personally assess whether this plea agreement with BP has inherent weaknesses that leave both workers and the public inadequately protected, whether there is individual culpability, and whether DOJ has struck a deal that, given BP's long history of noncompliance, will be an ineffectual deterrent to future violations.

We also request that you brief the Committee on these issues. Please contact us or have your staff contact John F. Sopko or Richard Miller with Committee staff at (202) 226-2424, to arrange for a time to meet and discuss these matters in detail.

Sincerely,



John D. Dingell
Chairman



Bart Stupak
Chairman
Subcommittee on Oversight and Investigations

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

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