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June 12, 2007

The Honorable Stephen L. Johnson
EPA Administrator
Peter J. Murtha
Director of Office of Criminal Enforcement, Forensics and Training
USEPA Headquarters
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Revising EPA's Criminal Enforcement Policy, Guidance, and Practices

Dear Administrator Johnson and Director Murtha:

Over the past several years, there have been a growing number of unwarranted and abusive criminal prosecutions, particularly against smaller businesses, their owners, and employees, for violations of federal environmental laws and regulations. Those cases should never have been criminally investigated by the Environmental Protection Agency (EPA), let alone referred to the Department of Justice (DOJ) for criminal prosecution. Indeed, in some of the cases described herein, criminal charges were dropped by DOJ when it became apparent that evidence supporting the charges was weak or non-existent, and criminal culpability was lacking.

Accordingly, in order to prevent future abuses of EPA's criminal enforcement discretion, the Washington Legal Foundation (WLF), as part of its CRIMINALIZATION OF FREE ENTERPRISE-BUSINESS CIVIL LIBERTIES PROGRAM, hereby petitions the EPA to revise its criminal enforcement policy, guidance, and practices in order to ensure that more appropriate non-criminal remedies be utilized, including administrative and civil remedies as Congress intended, to resolve alleged violations of the myriad of federal environmental laws and regulations. Environmental violations are not inherently wrong, or *malum in se* crimes, such as fraud, robbery, or assault. Rather, they are regulatory offenses, or *malum prohibitum*, which can be easily violated without knowing that the law or regulation exists, or without any resulting environmental damage. Such infractions can and should be addressed with more reasonable non-criminal remedies. After all, companies that are regulated by the EPA, and the people that manage them, are engaged in socially useful and desirable activities, such as producing energy, chemicals, and other goods needed by society, while providing jobs and stimulating economic

development at the local and national levels.

WLF submits that criminal investigations, and any subsequent referrals for criminal prosecution to DOJ, should be reserved for the rare and egregious case where the violation results in substantial environmental damage that is irremediable or causes serious bodily harm, and where there is culpable conduct reflected by past violations and a high degree or level of specific intent to deliberately violate the law. Proper use of administrative and civil remedies and penalties can also achieve appropriate levels of deterrence without resorting to criminal sanctions.

As a general matter, WLF submits that EPA's enforcement efforts should emphasize voluntary compliance and cooperation through its Office of Enforcement and Compliance Assurance (OECA), with the goal towards reducing harmful pollution and helping the regulated community navigate the complex regulatory maze.[1] Otherwise, the indiscriminate use of criminal enforcement investigations and prosecutions will continue to unjustly penalize and criminalize legitimate business practices and deter self-monitoring and voluntary disclosures.

Interests of WLF

WLF is a national non-profit public interest law and policy center based in Washington, D.C., with supporters in all 50 states, many of whom are subject to regulation and the enforcement of local, state, and federal environmental laws. WLF devotes substantial resources to promoting free enterprise principles, a limited and accountable government, and civil and criminal justice reform.

As part of WLF's CRIMINALIZATION OF FREE ENTERPRISE-BUSINESS CIVIL LIBERTIES PROGRAM, WLF litigates environmental cases supporting individuals and businesses charged with environmental infractions, particularly where there is an absence of harm or lack of criminal intent or mens rea. *See, e.g.*, *Riverdale Mills Corp. v. Pimpare*, 392 F.3d 55 (1st Cir. 2004) (suit filed against EPA after criminal charges were dropped following discovery that EPA agents altered pH level readings of wastewater); *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993) (lack of criminal intent), *cert. denied sub nom*., *Mariani v. United States*, 513 U.S. 1128 (1995); *United*

[1] In that regard, WLF commends EPA's Web-Based Compliance Assistance Centers designed to increase understanding of confusing EPA regulations and the adoption of environmental management practices resulting in pollutant reductions. *See* EPA FY 2006, COMPLIANCE & ENFORCEMENT, ANNUAL RESULTS 15 (Nov. 15, 2006).

States v. Ahmad, 101 F.3d 386 (5th Cir. 1996); *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000); *United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001), *cert. denied*, 535 U.S. 1111 (2002).

In addition, WLF's Legal Studies Division has published numerous articles and sponsored briefings on corporate criminal liability and environmental policy. *See, e.g.*, Richard Ben-Veniste and Raj De, *The "McNulty Memo": A Missed Opportunity To Reverse Erosion Of Attorney-Client Privilege* (WLF Legal Backgrounder, 2007); Thomas G. Echikson, *New DOJ Policies Increase Risk Of Parallel Environmental Prosecutions* (WLF Legal Opinion Letter, 1999); George J. Terwilliger, III, *Corporate Criminal Liability: A Handbook For Protection Against Statutory Violations* (WLF Monograph, 1998); Keith A. Onsdorff, *Abuse of Environmental Prosecutions Undermines Trust In Government* (WLF Legal Opinion Letter, 1996).

Abuses of EPA's Criminal Enforcement Discretion

As noted, WLF believes that the EPA has all too often resorted to criminal enforcement of federal environmental laws when non-criminal remedies were more appropriate. The following are a few examples of the more egregious cases of abusive criminal prosecution.

In *United States v. Knott*, 106 F. Supp. 2d 174 (D. Mass. 2000), a small business located in Northbridge, Massachusetts, and its owner were indicted on felony charges for allegedly violating an EPA regulation by discharging rinsewater from Riverdale Mills Corp.'s (RMC) facility into the public sewer with a pH level of less than 5.0 standard units. The indictment came following what the district court accurately described as a "virtual `SWAT Team'" raid on the small facility by some 20 armed EPA Special Agents, FBI, and other law enforcement personnel. *Id*. at 180.

The EPA did not claim that the town's wastewater treatment facility was damaged in any way by RMC's rinsewater. Nor were there any allegations that RMC's rinsewater caused the treatment facility to violate any EPA regulations governing its discharge of treated water into the nearby Blackstone River. Thus, even if there were violations of the pH levels, as EPA alleged, they would have been harmless technical infractions. Indeed, during the grand jury proceedings that led to the indictment of RMC and its owner, the manager of the town's treatment plant was initially called to testify before the grand jury, but he was told his testimony wasn't needed after informing prosecutors that the pH levels at the treatment facility were normal; thus, there was absolutely no adverse impact on the Blackstone River (which the pre-treatment regulations were designed to protect). Yet, when the indictment was issued, EPA and DOJ officials, with much

fanfare, announced in press releases that Riverdale Mills and Mr. Knott were polluters who were fouling public waterways.

In the course of defending themselves against the unprecedented felony criminal charges that called for substantial fines and prison terms for the alleged trivial infractions, Knott and RMC demanded that the government turn over the original log books of the EPA civil agents who took the initial pH readings a few days before the raid. The log books revealed that lawful and neutral pH readings of 7 were altered so that one 7 was made to look like a 4, and that other 7's were altered to look like 2's. The pH readings taken by the EPA during the raid on RMC all showed pH readings of 5 or above, in compliance with EPA regulations, where the public sewer line actually connects to the end of RMC's discharge pipe. The district court suppressed the evidence of the altered pH levels because they were taken in violation of RMC's and Mr. Knott's Fourth Amendment rights. All charges against RMC and Knott were suddenly dropped the week before the trial was to begin.

WLF assisted RMC and Mr. Knott in filing a subsequent lawsuit for malicious prosecution against the United States under the Federal Tort Claims Act for the criminal prosecution and a so-called *Bivens* lawsuit against the civil EPA agents who obtained the altered readings. Due to the difficulty in prevailing in such cases under legal standards immunizing the government from liability, the district court was constrained to deny the claim for malicious prosecution, although it reiterated that the two EPA agents violated the Fourth Amendment rights of the business and its owner by searching its premises without a warrant to test the company's wastewater. In its decision, the district court expressly "reproved [the EPA] for its sloppy recording of pH values . . . subsequent heavy-handed treatment of RMC, including the conduct of an unconsented and therefore unconstitutional search of the plant. That negligent conduct caused the Plaintiffs, a law enforcement agency and, ultimately, the taxpayers unnecessary expense." *Riverdale Mills Corp. v. United States*, No. 00-401237-NMG (D. Mass. 2004), slip op. at 21-22. The government appealed the findings against the EPA agents, and, again, due to qualified immunity protections of government agents, the court of appeals reversed the district court. *Riverdale Mills Corp. v. Pimpare*, 392 F.3d 55 (1st Cir. 2004).

The EPA's heavy-handed criminal enforcement tactics, used against Riverdale Mills and Mr. Knott, were featured in a special segment on CBS's "60 Minutes" news program. The show also reported a similar surprise EPA SWAT Team raid by some two dozen armed agents wearing flak jackets and riot gear, of a small family business in North Carolina, American Carolina Stamping. EPA agents threatened its owner, Steven McNabb, with criminal prosecution for a non-existent regulatory offense. No charges were filed.

In *United States v. Trinity Marine Baton Rouge, Inc*., Crim. No. CR99-60053, a small chemical company and two plant managers were indicted in U.S. District Court, Western District of Louisiana, for allegedly violating the Resource Conservation and Recovery Act (RCRA) for the improper transportation and storage or disposal of hazardous waste without a permit, in violation of 42 U.S.C. § 6928(d)(2). Similar to the criminal investigatory tactics employed against Riverdale Mills and American Carolina Stamping, a "SWAT Team" of almost two dozen armed Special EPA Agents from EPA's Criminal Investigation Division (CID), FBI, and other law enforcement officers raided the company; falsely accused Mr. Vidrine of storing hazardous waste and lying about it; preventing female clerical employees from the marketing department from using the restrooms for several hours; preventing those same employees from calling their homes and daycare centers to make plans to have children picked up; falsely telling the employees that Mr. Vidrine was poisoning them and giving them cancer; and threatening them with imprisonment if they did not provide damaging evidence against Mr. Vidrine.

Serious questions were raised about the way in which this case was initiated and prosecuted by EPA agents, employees, and consultants. As reported in the online version of *The Baton Rouge Advocate* (*www.2theadvocate.com*) of September 27, 2003 (Bruce Schultz, "*Marine Service Company Cleared; Charges in Hazardous Waste Case Dropped*"), it appears that the EPA's chief witness in the case, Mike Franklin, claimed that he had taken samples of the alleged hazardous waste and had it tested. However, neither the EPA nor federal prosecutors could produce the test results allegedly proving RCRA violations.

Nevertheless, federal prosecutors and the EPA insisted on using Mr. Franklin as their key witness even though subpoenas issued by the prosecutors to chemical testing laboratories in the area failed to turn up any lab results of the alleged hazardous waste in question. The government went so far as to place Mr. Franklin under hypnosis in a desperate attempt to obtain information about the alleged testing samples, but to no avail. Defense attorneys investigated the background of EPA's star witness and argued to the court, according to the news account, that "Mr. Franklin's credibility [was] questionable because of a history of cocaine addiction that causes hallucinations."

Unbelievably, and apparently with EPA's urging, federal prosecutors continued to insist that the government should be able to use Mr. Franklin as their key witness and appealed the judge's decision to exclude Mr. Franklin's testimony to the Fifth Circuit. They reluctantly withdrew the appeal when the Solicitor General's Office wisely decided not approve it. On September 17, 2003, on the eve of trial, federal prosecutors filed a

motion to dismiss the indictment against all three defendants because "[d]evelopments in this matter since the indictment have revealed facts and circumstances which, in the interests of justice, warrant dismissal of the indictment." On September 18, 2003, the district court granted the motion.

Mr. Vidrine was forced to spend his entire retirement savings of $180,000 on attorney's fees to defend himself over a period of four years against the questionable charges. "Anybody who has to go through this and not lose their sanity or life, it's just amazing," Vidrine was quoted as saying in the news article. "I didn't think it could happen in America," he added. After contacting WLF for counsel and advice, Mr. Vidrine filed a complaint in September 2005 with the EPA for malicious prosecution under the Federal Tort Claims Act. To date, the EPA has failed to act on the complaint, and a malicious prosecution lawsuit for damages under the Federal Tort Claims Act is expected to be filed soon.

In *United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999), *cert. denied*, 528 U.S. 1102 (2000), an independent contractor, hired to straighten a section of railroad track in Alaska, accidentally punctured a hole in a buried pipeline which began to leak oil. The accident was immediately reported and the pipeline was shut down within a matter of minutes; however, a small quantity of oil leaked into the nearby river, although no lasting environmental damage occurred. Mr. Hanousek, a company supervisor who was off-duty at home eating dinner that evening when the accident occurred, was criminally prosecuted for negligently discharging oil into navigable waters, and was given the maximum sentence of 12 months of confinement. On appeal to the U.S. Court of Appeals for the Ninth Circuit, he unsuccessfully argued that the trial court erred by letting the jury convict him based on what was effectively a civil negligence standard.

Unfortunately, the U.S. Supreme Court denied review, but the dissent from the denial of certiorari by Justice Thomas, joined by Justice O'Connor, illustrates the fundamental problem in all these environmental cases, namely, that a low level or absence of criminal intent or mens rea can trigger a criminal prosecution under environmental laws, characterized as "public welfare offenses." Under the "public welfare offense" doctrine, individuals can be held strictly liable and criminally prosecuted for violations of laws and regulations that govern the handling of inherently dangerous products, such as explosives or dangerous chemicals, but only if the punishment is a small fine or a short period of confinement. On the other hand, environmental violations, even for minor or technical violations that do not involve inherently dangerous products, such as wetland violations, can result in substantial fines of $50,000 per day and three-year prison sentences for a single count. Substantial prison sentences are called for under the harsh U.S. Sentencing Guidelines, even if they are no

longer mandatory under the post-*Booker v. United States* scheme.[2]

As Justice Thomas put it, "[t]he seriousness of these penalties counsels against concluding that the [Clean Water Act] can accurately be classified as a public welfare statute." *Hanousek*, 528 U.S. 1102 (2000). Justice Thomas further concluded that:

> [W]e have never held that any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to extensive regulation and that may involve a risk to the community. Indeed, such a suggestion would extend this narrow doctrine to virtually any criminal statute applicable to industrial activities. I presume that in today's heavily regulated society, any person engaged in industry is aware that his activities are the object of sweeping regulation and that an industrial accident could threaten health or safety. To the extent that any of our prior opinions have contributed to the Court of Appeals' overly broad interpretation of this doctrine, I would reconsider those cases. Because I believe the Courts of Appeals invoke this narrow doctrine too readily, I would grant certiorari to further delineate its limits.

Id. at 1104-05.

In *United States v. Hansen*, 262 F.3d 1217 (11th Cir. 2001), *cert. denied*, 535 U.S. 1111 (2002), a chemical plant owner and his son were prosecuted and sentenced to prison, serving four and eight *years* respectively as *first* offenders for an offense that more appropriately should have been handled, at best, as a negligence case or minor OSHA violation; instead, it was transformed into a "knowing endangerment" of an employee case under the Clean Water Act, even though there was no showing of any injury. Indeed, the

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[2] As one commentator noted:

> Public welfare offenses are "virtually always . . . crimes punishable by relatively light penalties such as fines or short jail sentences, rather than substantial terms of imprisonment." On the other hand, "knowing" violations are serious felonies. . . . Therefore, because violations of [the Clean Water Act] are punishable by fines of up to $50,000 per day, imprisonment of up to three years, or both, it is inappropriate to apply the general intent standard to such violations.

Abate & Dayna E. Mancuso, *It's All About What You Know: The Specific Intent Standard Should Govern "Knowing" Violations of the Clean Water Act,* 9 N.Y.U. ENVTL. L.J. 304, 311, 336 (2001).

employee who testified could not recall at trial what year he allegedly slipped in the allegedly contaminated wastewater at the plant.

The *Hansen*, *Hanousek*, and similar cases also raise the troubling issue of expanding the responsible corporate officer doctrine. That doctrine allows corporate officers to be criminally prosecuted for violations committed by company employees. As one commentator noted:

> Like their subordinates, corporate officers also risk being snared in a large net for "knowing" violations of federal environmental statutes. The responsible corporate officer doctrine, which pre-dates the enactment of federal environmental statutes, is the source of this potential danger. The mens rea standard for knowing violations in the context of corporate officers has been relaxed to allow two alternate sources of knowledge: 1) imputed knowledge; and 2) deliberate avoidance (or willful blindness). These two forms of knowledge eliminate the need for actual knowledge to secure convictions of corporate officers for "knowing" violations.

Randall S. Abate & Dayna E. Mancuso, *It's All About What You Know: The Specific Intent Standard Should Govern "Knowing" Violations of the Clean Water Act,* 9 N.Y.U. ENVTL. L.J. 304, 311 (2001). Applying the responsible corporate officer doctrine to prosecution of environmental felony offenses, in effect, confers "designated felon" status on industrial business managers. *See* Brenda S. Hustis & John Y. Gotanda, *The Responsible Corporate Officer Doctrine: Designated Felon or Legal Fiction?* 25 LOY. C. CHI. L.J. 169 (1994). WLF submits that indiscriminate criminal prosecution of plant managers or the threat of such prosecutions will make it all the more difficult for companies to attract competent personnel, and thus, could have negative consequences on the ability of a company to comply with numerous local, state, and federal environmental laws and regulations.

In short, because of the relative ease with which environmental violations can be criminally investigated and referred for prosecution, and the substantial risk of heavy fines and imprisonment that can be imposed on corporations, employees, and corporate officers, it is vitally important for the EPA to make sure that its criminal enforcement powers are not abused.

EPA's Criminal Enforcement Policy

EPA's Criminal Enforcement Policy is outlined in EPA's Memorandum, *The Exercise of Investigative Discretion*, from Earl E. Devaney, Director, Office of Criminal Enforcement, to All EPA Employees Working in or in Support of the Criminal

Enforcement Program (Jan. 12, 1994). The so-called Devaney Memo "sets out the specific factors that distinguish cases meriting criminal investigation from those more appropriately pursued under administrative or civil judicial authorities." *Id*. at 1. The Devaney Memo properly acknowledges that:

> [T]he Office of Criminal Enforcement has an obligation to the American public, to our colleagues throughout EPA, the regulated community, Congress, and the media to instill confidence that EPA's criminal program has the proper mechanisms in place to ensure the discriminate use of the powerful law enforcement authority entrusted to us.

Id. at 2. Indeed, the Devaney Memo further recognizes the seriousness of EPA's criminal enforcement duties, entrusted to it by Congress:

> The criminal provisions of the environmental laws are the most powerful enforcement tools available to EPA. Congressional intent underlying the environmental criminal provisions is unequivocal: criminal enforcement authority should target the most significant and egregious violators.

Id. The Devaney Memo further cites congressional intent noting that criminal enforcement is not appropriate for "minor or technical variations from permit regulations or conditions." *Id*. Accordingly, the memo specifies that the case selection criteria for criminal prosecution "will be guided by two general measures - significant environmental harm and culpable conduct." *Id*.

The Devaney Memo defines "significant environmental harm" as "actual harm" that "has an identifiable and significant harmful impact on human health and the environment" or the "threat" of such significant harm. *Id*. at 4. Simple failure to report emission data or information to the EPA, although a regulatory violation, should be subject to criminal investigation only when the failure to report "is coupled with actual or threatened environmental harm." *Id*.

As for "culpable conduct," the Devaney Memo lists several factors to consider, such as history of repeated violations and concealment of misconduct or falsification of records. Significantly, a "major factor" indicating culpable conduct is "deliberate" misconduct:

> Although the environmental statutes do not require proof of specific intent, evidence, either direct or circumstantial, that a violation was deliberate will be a major factor indicating that criminal investigation is warranted.

Id. at 5. As the Devaney Memo concludes:

> EPA has a full range of enforcement tools available - administrative, civil-judicial, and criminal. There is universal consensus that less flagrant violations with lesser environmental consequences should be addressed through administrative or civil monetary penalties and remedial orders, while the most serious environmental violations ought to be investigated criminally. The challenge in practice is to correctly distinguish the latter cases from the former.

Id. at 6.

On its face, the Devaney Memo appears to recognize that criminal enforcement should be the last resort, and only where there is *both* significant environmental harm *and* genuine culpable conduct. Yet many of the earlier-described criminal investigations, referrals, and prosecutions that were initiated over the last decade clearly do not meet the criteria spelled out in the Devaney Memo.

For example, as noted, there was no harm to the environment whatsoever in the Riverdale Mills case due to the alleged technical pH violation of the small amount of rinsewater. The Hubert Vidrine case is another example where no environmental harm was demonstrated. To be sure, the *Hanousek* case did involve some environmental harm, but it was minor and remediable. More importantly, "culpable conduct" on the part of Mr. Hanousek, who was off-duty and at home during the accidental oil spill, was totally lacking.

Missing from the Devaney Memo is any indication on how the investigative decisions are to be made to ensure that *both* the "significant environmental harm" *and* "culpable conduct" factors are met before the EPA resorts to criminal investigation and prosecution. The only way to explain such gross deviance from this guidance as well as the abusive exercises of criminal enforcement discretion, is the apparent lack of effective controls and supervision by EPA and its Office of Criminal Enforcement in Washington, D.C., over case selection and handling. For example, in the Riverdale Mills case, it appears that the Regional Office of EPA in Boston, with an overly aggressive EPA-CID resident agent in charge, was the driving force behind the criminal prosecution. A related problem is that once a criminal investigation has begun, the agency has "invested" criminal investigatory resources that it feels committed to continue pursuing, rather than a more reasonable course of non-criminal remedies or sanctions, in order to justify what may have been an unwarranted criminal investigation to begin with.

Accordingly, WLF requests that the EPA thoroughly review, update, and re-issue the 13-year old Devaney Memo to ensure that EPA's criminal enforcement program, both on paper and in practice, does not resort to the heavy hand of criminal investigation and referral when more appropriate administrative and civil remedies and sanctions are available, as Congress intended. All enforcement personnel should be given a copy of the revised memo and instructed on its contents and policies on a semi-annual basis at appropriate enforcement training sessions. Before any criminal investigation is undertaken, pre-approval and close supervision from EPA Headquarters of any investigation should be required.[3] In addition, written authorization by the EPA Administrator should be obtained before any criminal referral is made to DOJ. Before approving any such referral, the burden should be on the Director of Criminal Enforcement and the EPA General Counsel to demonstrate in writing to the EPA Administrator *both* the significant environmental harm *and* culpable conduct, and why administrative or civil proceedings, including any remediation and injunctive relief, or enforcement at the state and local level, are not effective in resolving the violation and achieving deterrence. In the meantime, WLF recommends that cases which are currently under criminal investigation should be immediately reviewed to determine whether they should continue as criminal matters or be handled by EPA's civil enforcement division.

While WLF believes that as a general rule, administrative and civil investigation and enforcement are more appropriate, and that EPA should resolve any violations in a non-criminal context, WLF has some concerns that even civil enforcement proceedings may be abused to gather evidence that could be used unfairly against companies and individuals to support criminal investigations.

Prior to December 1, 2006, Rule 408 of the Federal Rules of Evidence specified that statements and conduct made during settlement negotiations in civil matters cannot be used against the party in civil or criminal proceedings, a salutary rule acknowledged by the EPA. For example, EPA's Guidance on Use of Alternative Dispute Resolution (ADR) Techniques in Enforcement Cases (1987) provides the Agency with a framework

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[3] As for the proper conduct of EPA Special Agents during the execution of a search warrant (once it is determined that criminal investigation is appropriate in the rare case), WLF requests that the EPA cease using unnecessary SWAT Team-like tactics. In addition, EPA Special Agents, in executing a valid search warrant, should inform targets of the investigations of their basic civil liberties, along the lines that WLF proposed to the EPA in a petition submitted in 2001, which included the following: the right to remain silent; the right to obtain split samples of any liquids or substances obtained by the investigators; and the right to videotape the inspections.

to use ADR methods involving a third neutral party to resolve enforcement cases that may not be resolved through traditional negotiations between the government and the alleged violator. WLF encourages the use of ADR and non-criminal resolutions of environmental violations. Candor and confidentiality are important in resolving or settling disputes. As the EPA noted in its ADR Guidance:

> Public policy interests in fostering settlement compel the confidentiality of ADR negotiations and documents. These interests are reflected in a number of measures which seek to guarantee confidentiality and are recognized by a growing body of legal authority.
>
> Most indicative of the support for non-litigious settlement of disputes is Rule 408 of the Federal Rules of Evidence which renders offers of compromise or settlement or statements made during discussions inadmissable in subsequent litigation between the parties to prove liability.

EPA's ADR Guidance at 11.

WLF agrees that statements during settlement negotiations and offers of settlement should not be used against the alleged violator. However, Rule 408 was recently amended, effective December 1, 2006, to allow statements and conduct to be used in criminal proceedings. This rule change was initiated by the Department of Justice and could have a chilling effect on settling alleged violations. Negotiations with alleged violators to settle a case administratively or civilly may be a trap for the unwary and leave the alleged violator exposed to criminal charges.

Accordingly, WLF recommends that EPA civil investigators and EPA attorneys advise alleged violators that information and statements provided to EPA civil investigators, including statements in settlement negotiations to resolve administrative or civil proceedings, could be later used against them in a criminal proceeding. However, because such warnings may discourage preferred settlements, WLF further recommends that EPA enter into a confidentiality agreement that ensures that none of the information or statements made during settlement negotiations will be later used against the company or individual in any criminal proceeding.

Finally, as a related matter, WLF also recommends that the EPA refrain from requesting that a party waive its attorney-client privilege as an indication of whether the alleged violator is cooperating with the EPA in any investigation into possible violations of the environmental laws. *Cf*. Memorandum of Paul J. McNulty, Deputy Attorney General on *Principles of Federal Prosecution of Business Organizations* (Dec. 2006).

CONCLUSION

For the foregoing reasons, WLF recommends that the EPA revise its criminal enforcement policies to ensure that the EPA's criminal enforcement discretion is not abused, and that administrative and civil remedies should be the preferred method to resolve violations of federal environmental laws and regulations. WLF would also appreciate the opportunity to meet with you and other EPA representatives to discuss the matters raised in this letter.

Respectfully submitted,

Daniel J. Popeo
Daniel J. Popeo
Chairman and General Counsel

Paul D. Kamenar
Paul D. Kamenar
Senior Executive Counsel

cc: The Honorable Roger R. Martella, Jr., EPA General Counsel
The Honorable Alberto R. Gonzales, U.S. Attorney General
The Honorable Paul J. McNulty, Deputy Attorney General
The Honorable Alice Fisher, Assistant Attorney General, Criminal Division
The Honorable Matthew J. McKeown, Acting Assistant Attorney General,
Environment & Natural Resources Division