IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
V.	§	CR. NO. 4:07-cr-434
	§	
BP PRODUCTS NORTH AMERICA INC.	§	

VICTIMS' JOINT MEMORANDUM IN OPPOSITION TO PLEA AGREEMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
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INDEX

Page

I. INTRODUCTION……………………………………………………..……………..01

II. FACTS…………………………………………………………………………………...04

A. Legal Background……………………………………………………………..04

B. The Root Causes………………………………………………………………05

C. The Explosion…………………………………………………………………09

III. CRIMINAL HISTORY (Supplement to Previous Submission)…………………………10

IV. JUDICIAL DISCRETION……………………………………………………………13

A. Evaluation of a Plea Agreement……………………………………………13

B. Sentencing Guidelines and Other Considerations…….……………………………17

C. Presentence Investigation…………………………………………………...19

V. REASONS FOR REJECTION…………………………………………………..21

A. Immunity for Future Events…………………………………………………...21

B. Vague and Uncertain Conditions of Probation…………………………………..25

1. Generally……………………………………………………………………25

2. The OSHA Agreement…………………………………………………...26

3. Improvements Don't Get "Phased In" at BP……………………………..29

C. Requested: Effective Ethics and Compliance Program and Appointment of Monitor Requested…………………………………………….……………30

D. Inadequacy of the Fine Amount……………………………………………….32

VI. ESTABLISHING A FINE AMOUNT……………………………………………...36

VII. RELIEF REQUESTED…………………………………………………………..39

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CASES

In re Ellis, 356 F.3d 1198 (9th Cir.,en banc 2004)……………………………………………...15, 16

In re Morgan, 356 F.3d 1198 (9th Cir. 2007)………………………………………….14, 15, 16

Gall v. United States of America, ___ U.S. ____ , ___ S.Ct. ____,
2007 WL 4292116 (December 10, 2007……………………………………………………17, 19, 39

Kimbrough v. United States of America, ___ U.S. ___, ____S.Ct. ____,
2007 WL 4292040 (December 10, 2007)……………………………………………………….17

Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495 (1971)……………………………………22

United States v. Adams, 634 F.2d 830, 835 (5th Cir. Unit A Jan. 1981)…………………………14

United States v. Booker, 543 U.S. 220, 245, 125 S.Ct. 738, 160 L.Ed. 2d 621 (2005)…………17

United States v. Caputo, 456 F.Supp. 970 (N.D. Ill. 2006)…………………………………...37

United States v. Crowell, 60 F.3d 199 (5th Cir. 1996)…………………………………...14, 15, 33

United States v. Ferranti, 98 F.Supp. 206 (E.D. NY 1996)……………………………………..37

United States v. Kraus, 137 F.3d 447 (7th Cir. 1998)……………………………………..14, 15

United States v. Miles, 10 F.3d 1135, 1139 (5th Cir. 1993)…………………………………...14

STATUTES

29 C.F.R. §1910.119…………………………………………………………………………...4
40 C.F.R. Part 68………………………………………………………………………………4
40 C.F.R. §68.65(d)(1)(vi)……………………………………………………………………..4
40 C.F.R. §68.65(d)(3)…………………………………………………………………………4

40 C.F.R. §68.69……………………………………………………………………………..4
40 C.F.R. §68.71……………………………………………………………………………..4
40 C.F.R. §68.73……………………………………………………………………………..4
40 C.F.R. §68.79……………………………………………………………………………..4
40 C.F.R. §68.81……………………………………………………………………………..4

18 U.S.C. §3553…………………………………………………2, 3, 17, 18, 19, 20, 33, 34, 35
18 U.S.C. §3553(b)(1)………………………………………………………………………...17
18 U.S.C. §3572……………………………………………………………………2, 3, 7, 34
18 U.S.C. §3563(a)(1)………………………………………………………………………....26

SENTENCING GUIDELINES

U.S.S.G., Chapter 8…………………………………………………………………3, 11, 17, 19
U.S.S.G. §2Q1.2……………………………………………………………………………18
U.S.S.G. §2X5.1…………………………………………………………………………3, 18
U.S.S.G. §5K2.1……………………………………………………………………………18
U.S.S.G. §5K2.2……………………………………………………………………………18
U.S.S.G. §6B1.3………………………………………………………………………...30, 34
U.S.S.G. §8A1.2……………………………………………………………………………33
U.S.S.G. §8A1.1…………………………………………………………………………3, 17
U.S.S.G. §8A2.1(a)…………………………………………………………………………19
U.S.S.G. §8A2.1(c)…………………………………………………………………………19
U.S.S.G. §8B1.2…………………………………………………………………………….25
U.S.S.G. §8B1.2(c)(2)……..…………………………………………………………………..33
U.S.S.G. §8B2.1…………………………………………………………………………….30
U.S.S.G. §8C2.5…………………………………………………………………………….19
U.S.S.G. §8C2.5(f)(1)………………………………………………………………………30
U.S.S.G. §8C2.10……………………………………………………………………...3, 17
U.S.S.G. §8C2.2-9…………………………………………………………………………17
U.S.S.G. §8C2.4(a)…..………………………………………………………………………..33
U.S.S.G. §8C4.2…………………………………………………………………………….18
U.S.S.G. §8C4.4…………………………………………………………………………….18
U.S.S.G. §8C4.11…………………………………………………………………………...18
U.S.S.G. §8D1.3(a)…………………………………………………………………………25
U.S.S.G. §8D1.4(c)……………………………………………………………………..30, 31

RULES

Fed. R. Crim. Proc. 32…………………………………………………………………………4
Fed. R. Crim. Proc. 11(c)(1)………………………………………………………..14, 15, 16
Fed. R. Crim. Proc. 11(c)(1)(C)……………………………………………...14, 16, 37, 38
Fed. R. Crim. Proc. 11(e)(1)(C)……………………………………………………………14
Fed. R. Crim. Proc. 32(c)(1)(A)……………………………………………………………20
Fed. R. Crim. Proc. 32(c)(1)(ii) ...…………………………………………………………20

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VICTIMS' MEMORANDUM IN OPPOSITION TO PLEA AGREEMENT

TO THE HONORABLE LEE ROSENTHAL, U.S. DISTRICT JUDGE:

I.

INTRODUCTION

The Texas City Refinery explosion ranks among the worst industrial disasters in American history, with 15 dead, hundreds injured and billions of dollars of damage, both to people and property. BP's criminal conduct was long-standing, conscious and deliberate, part of a corporate policy to disregard Federal law, human life and environmental quality for the sake of profit. The explosion was but one event in a long line of criminal, civil and regulatory violations which continues to this day in spite of BP's repeated, but unfulfilled, promises to conform its conduct to Federal law.

BP has an extensive history of prior, present and continuing misconduct involving numerous health, safety and environmental violations, many resulting in death or bodily injury; some cases involve fraud against the United States. BP has sought to conceal much of this history from the Court by revealing only two of over 30 cases. The full extent of its prior and present violation record is still unknown to the Court.

In the face of this history, BP asks this Court to waive a Presentence Investigation which would reveal the full history and to accept a Plea Bargain which:

1. Imposes no real punishment, but grants immunity for the parent company whose conduct the Government has found to have been the "root cause" of the disaster, while giving Court approval to an agreement so broad and vague that BP can claim a virtual license for continuing and future violations, something no Federal agency could grant;

2. Fails to impose conditions of probation such as:

   A) Requiring full compliance with Federal EPA and OSHA requirements within a specific and fixed time, under a Court-approved Monitor;

   B) Requiring an effective Ethics and Compliance Program under a Court-approved Monitor, thus allowing this serial offender to "self-supervise" its promised rehabilitation with no effective Court supervision;

3. Accepts a fine far below the statutory requirements, allowing BP to keep 95% of its unlawful profits in mockery of the adage that "crime does not pay."

Such a sentence does not adequately protect the public interest as defined by the objectives of 18 USC §3553 and §3572.

BP and the Government seek to justify this shockingly lenient plea bargain by false or misleading claims such as:

- This is the largest environmental fine in a case resulting in death (Holscher, Hearing Transcript p.18-19, Ex. 1) – in fact, the 1989 Exxon

Valdez criminal fine ($125 million) and civil penalties were over $900 million. The criminal fine was more than double the proposed fine here, for the misconduct of a ship's captain which caused no human death or injury, with no profit to Exxon;

- The U.S. Sentencing Guidelines do not apply to this crime (BP Sentencing Memo, p. 3) -- although the fine calculation is directed, by the Sentencing Guidelines, to be made pursuant to 18 U.S.C. §3553 and §3572, and Chapter 8 of the Guidelines applies to "the sentencing of all organizations" for felonies, USSG §8A1.1, USSG §8C2.10. USSG §2X5.1 directs the Court to apply the Guidelines for the "most analogous offense"); this Plea Agreement deviates substantially from recommendations intended to protect the public from recurring events;
- The crime was limited to the ISOM Unit – in fact, BP's own 2002 "Veba" study found that the safety and mechanical integrity problems charged in the criminal information were "site-wide" (Chemical Safety Board (CSB) Final Report, pp. 155-156, Ex. 2);
- BP has a history of only two violations (Government & BP Joint Motion to Waive Presentence Investigation) – but the actual number is at least 30 violations (Ex. 3).

In fact, the plea bargain is clearly contrary to the statutory and Guidelines' intent that a criminal corporation fine equal its unlawful profit and that the company be strictly supervised while being required to change its conduct and culture to avoid continuing criminal violations.

The Victims appear, as permitted by the Court, pursuant to the Crime Victims Rights Act, asking that this Court exercise its statutory rights to reject the Plea Agreement, and the Victims invite the Court to discuss its reasons for rejecting the Plea Agreement, as permitted by Rule 32, Federal Rules of Criminal Procedure.

II.

FACTS

A.
Legal Background

BP is charged with violation of the Risk Management Plan provisions of the Clean Air Regulations, codified at 40 CFR Part 68. Knowingly violating the regulations, as BP admits, is a Federal felony.

The regulations codify a comprehensive system, known in the industry as "Process Safety Management" (PSM), for prevention of chemical and petro-chemical plant upsets and releases. PSM is an engineering management system which was developed by industry following the Bhopal catastrophe in 1984. The regulations require, among other things, that management document that equipment conforms to appropriate engineering design codes (40 CFR §68.65(d)(1)(vi) and (d)(3)) including pressure relief systems (40 CFR §68.65(d)(1)(vi)); that the mechanical integrity of equipment be maintained by appropriate testing and maintenance (40 CFR §68.73) that all equipment have appropriate up-to-date written operating procedures (40 CFR §68.69); that personnel be trained in the use and operation of equipment, (40 CFR §68.71); that periodic compliance audits be conducted and that deficiencies be corrected (40 CFR §68.79); and that incidents of actual or potential catastrophic releases of substances be investigated and corrective action taken (40 CFR §68.81). The OSHA regulations include similar and largely overlapping requirements (29 CFR §1910.119).

Although implementation of PSM (or "process safety") is mandatory under Federal law, BP treated the statutory requirements as little more than inconvenient and costly impediments to profit and to be avoided where possible. BP Global upper-level international management caused or knowingly tolerated a widespread culture of "casual compliance" with Federal law. "After the March 23, 2005 incident OSHA conducted an inspection of the Texas City facility and identified over *300 egregious willful violations of OSHA standards,* many of which were related to PSM non-compliance" (CSB p. 200, Ex. 2).

B.
The Root Causes

The agreed Statement of Facts ignores the fundamental "root causes" of the tragedy. The Government's investigation arm, the Chemical Safety Board, squarely placed the primary root causes at the door of the BP parent company: BP p.l.c, a/k/a BP Global, or BP Group, headquartered in London,[1] for, among other things, budget cuts and refusal to provide resources needed to comply with process safety. The effect was company-wide; the resulting criminal conduct at Texas City was plant-wide and not, contrary to the Government's statements to the Court, limited to the ISOM Unit.

BP acquired the Texas City Refinery in 1999 (Timeline from CSB Report, p. 218, Ex. 2). The plant had a prior history of repeated releases from various atmospheric vent stacks, including but not limited to, the ISOM Unit one of which resulted in a fire in the ISOM Unit. OSHA had cited the plant for the unsafe conditions of a similar blowdown drum and vent stack and recommended replacement with a flare system, but the flare was not installed (CSB, Timeline 1990-99, p.218, Ex. 2). Upon acquisition, BP Global directed a 25% cut in fixed cash

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[1] The named defendant, BP Products North America Inc., is a relatively low-level subsidiary. The chain of ownership is set out in answers to discovery in a civil case which is attached as Ex. 4.

costs (CSB, Timeline, 1999; p.158). Some refinery managers, but not Texas City, resisted the 25% cut (on top of earlier cuts made in the 90s) as unsafe and refused to implement them (CSB, p.158, Ex. 2). Texas City aggressively cut costs:

> "Items cut included turnarounds[2]; safety committee meetings; the central training organization; fire drills; maintenance, engineering, supervision, and inspection staff; plant maintenance; and training courses. Safety and maintenance expenditures were a significant portion of the cuts. *The refinery's capital expenditures to maintain safe plant operation and to comply with HSE legal requirements were cut $33 million, or 45 percent, from 1998 to 1999.*" (CSB, p.159, Ex. 2).

In the process, plant management dismantled and decentralized the existing process safety management structure, obtaining cost savings but diminishing the role of PSM in the plant (CSB Final Report, p. 146-147, Ex. 2).

BP's Management Framework included a "sub-strategy" of limiting the capital input to the refineries:

> "This sub-strategy would make it more difficult for the Texas City refinery to get the capital it needed to repair its aging infrastructure (CSB, p.152, Ex. 2)."

BP Global even established a compensation plan by which refinery executives received greater rewards for reducing costs than increasing safety performance. At CSB page 153:

> "BP Group implemented an incentive program based on performance metrics, the Variable Pay Plan (VPP), which was in place at the Texas City refinery for several years prior to the ISOM incident. Payouts under the VPP were approved by the refining executive managers in London. 'Cost leadership' categories accounted for 50 percent and safety metrics for 10 percent of the total bonus."

The CSB Report found that responsibility for failing to correct deficiencies at the Texas City refinery, showed a trail to London. At page 155:

> "The new [BP] director ... observed in 2002 that the Texas City refinery infrastructure and equipment were 'in complete decline.'"

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[2] A "turnaround" is a planned shutdown of a unit for scheduled maintenance.

In consultation with London managers, the director ordered a study (known as the "Veba" study) that looked at mechanical integrity, training, safety, and economic opportunities. The 2002 study, which was shared with London executives, concluded that mechanical integrity (charged in this Criminal Information) was one of the biggest problems. As summarized by the CSB:

> "... its findings were *'urgent and far-reaching with important implications for the site,* including the integrity of the on-going site operations,' and warned about vulnerability in both the process units and infrastructure. It indicated that 'there were *serious concerns about the potential for a major site incident due to the large number of hydrocarbon releases (over 80 in the 2000-2001 period).*' The study also found that many inspections were overdue, and that 'known reliability issues,' including instrumentation, needed to be addressed.
>
> **The study concluded that these problems were site-wide** ..." (CSB, p. 156, Ex. 2).

Directly rebutting the claim now being made to justify the low fine, the CSB wrote: "The disaster at Texas City had organizational causes, which extended beyond the ISOM Unit, ..." and repeatedly noted that "BP Group executive management became aware of serious process safety problems at the Texas City refinery starting in 2002 and through 2004 when three major incidents occurred (CSB, p.143, Ex. 2).

BP's "Getting Health, Safety, and the Environment Right" (GHSER) program was intended to provide for health, safety and environmental management throughout the entire BP group. Although the GHSER policy promised much, it delivered little. The 2003 GHSER audit determined that the Texas City refinery denied the onsite staff adequate resources to assure safety. At CSB page 161:

> "The 'checkbook mentality' meant that the budgets were not large enough to address identified risks, and that only the money on hand would be spent, rather than increasing the budget. The audit team was concerned about 'insufficient resources to achieve all commitments and goals. The South Houston site leader was disappointed about the audit findings because 'many things have shown up before.'

> An overall conclusion of the audit was that a coordinated self-monitoring process was not evident; therefore, management was leaving some risks unaddressed." (Footnote omitted).

Since there was insufficient budget to make needed repairs, it is not surprising that:

> "Many of the safety problems that led to the March 23, 2005, disaster were recurring problems that had been previously identified in audits and investigations" (CSB, p.142, Ex. 2).

BP created a panel to investigate the explosion, headed by former Secretary of State James A. Baker III. This panel published its findings, known as the Baker Report (260 pages, plus exhibits). At page 146, the CSB Report characterizes BP's safety approach as having a "lack of process safety management focus." The Baker Report agrees that "BP has not always ensured that it identified and provided the resources required for strong process safety performance at its U.S. refineries (Baker Report xii, quoted at CSB 146, Ex. 2).

More details of the effects of the budget cuts on the Texas City refinery, London's knowledge of the poor physical and safety condition of the plant, Plant Manager Don Parus' unsuccessful efforts to obtain funds from London by bribing to VP John Manzoni, and a trip to London were included in our previous filing "Victims Response to BP Sentencing Memorandum," at pp. 7-9. Without repeating those specifics here, we respectfully request the Court to consider that information as part of this presentation.

In the last few days, evidence adduced in a civil trial arising out of the explosion has revealed that the condition of the plant was so poor that BP obtained a $12 million property tax reduction, to only $38 million per year, based on the deteriorated (and unsafe) condition of the plant (Ex. 5). Notably, the proposed fine is less than the plant property taxes for two years.

The critical role of BP Global in choosing short-term profit over compliance with Federal law is made crystal clear by the CSB's summary:

> "Budget cuts and production pressures seriously impacted safe operations at Texas City. Studies and assessments presented to BP Group managers linked the history of budget cuts to critical safety issues: "The current integrity and reliability issues at [Texas City] are clearly linked to the reduction in maintenance spending over the last decade"(footnote omitted). Budget cuts also impaired training, operations staffing levels, and mechanical integrity. Budget pressures affected the decision not to replace the ISOM blowdown system on several occasions. BP's assessment of the 2004 UU4 accident, as well as events leading to the ISOM incident, show that safety critical repairs were not conducted because there "was no time" left in the turnaround schedule" (CSB, p.188, Ex. 2).

C.
The Explosion

The Government filed as Exhibit 4 with its Statement of Facts an agreed stipulation stating what the Government would prove if the matter went to trial. The stipulation demonstrates the results of budget cutting and lack of compliance with Federal process safety requirements: there were no proper written procedures, workers were not properly trained, relief valves did not function properly, and safety alarms and instruments did not work due to lack of mechanical integrity. Most egregiously, the Unit continued to use an atmospheric vent stack instead of a flare, notwithstanding many years of recommendations by plant engineers and OSHA to change the outdated, unsafe, system to a modern safety system, another violation of Federal law.

The explosion happened when volatile liquid hydrocarbons contained in a pressure vessel called the Raffinate Splitter escaped the atmospheric vent stack, akin to a smoke stack, and flowed down and pooled around the ISOM Unit at ground level. There was no "flare" to burn off excess emissions from the Splitter. In addition, when the overflow started, emergency sirens failed to operate. Imminent disaster could only be recognized through visual observation. Men started running, but not fast and far enough to avoid the blast. Ultimately, ignition was

apparently caused by a diesel truck that the company allowed to be improperly parked and idling in the area.

The atmospheric vent stack, instead of a flare system, was one of the major causes of the event. Its continued existence was due to the cost cuts already discussed:

> "During the 15 years prior to the March 2005 incident, a number of proposals were made to remove blowdown stacks that vent directly to the atmosphere at the Texas City refinery, but none were implemented, primarily due to cost considerations" (CSB, p.114, Ex. 2).

The stipulation ignores the pattern of plant-wide violations of regulations and law. For example, the stipulation never reveals that **eleven** improper vent stacks were operating in the plant when the explosion happened in March 2005 (Wundrow Deposition, p. 37, Ex. 6).

For years, BP Global rapaciously cut from the budgets of its subsidiaries funding required to comply with Federal law. BP Global was repeatedly informed by its own studies of the resulting effects on safety and compliance. Repeated requests for adequate safety funding, made personally from Texas City in detailed presentations and thick reports, were rejected as top management maintained its avaricious focus on short-term profits, demanding even more cuts. There can be no clearer case of a depraved intent to violate Federal law for corporate profit.

For this conduct, the Plea Agreement proposes that this Court grant immunity from prosecution for this and other crimes.

III.

CRIMINAL HISTORY

(Supplement to Previous Submission)

The Victims' previous submission, "Victims Response to BP Sentencing Memorandum" attached 30 publicized cases in which BP paid criminal and civil penalties, 28 of which were concealed when BP told this Court its history consisted of only two other cases. Again, without

repeating the prior filing, we ask the Court to consider it. For ready reference, we attach the list of violations from pages 3-6 of that filing, (Ex. 3) (and with BP's Answer to the 2003 TCEQ Summary of Continuing Violations, referring to ten blowdown stacks outside the ISOM Unit, Ex. 7, p. 5).

In the few days since that submission, new information about BP's continuing criminal conduct has surfaced. The last entry in the summary was a reference to the Alaska case, where BP was prosecuted for violating the Clean Water Act.

BP was attempting to resolve all of its problems in one day, November 29, 2007. Ironically, on that day, as the Victims were appearing before this Court, BP was entering its Plea Agreement in the U.S. District Court for Alaska promising immediate payment of $20 million dollars for violation of the Clean Water Act for failure to safely maintain its Alaska pipeline over a six-year period, resulting in an oil spill (Ex. 8).

On that day, new charges were made against BP by the U.S. Environmental Protection Agency (EPA) which announced its discovery of more violations of Federal law by this Defendant. The EPA's announcement (Ex. 9) summarizes the longer letter notice (Ex. 10) of the same date.[3] The notice and finding of violations details in 15 pages the EPA's findings that BP's Indiana refinery is operating in violation of Federal and state law.

In sentencing a corporation, one of the key factors is the Introductory Commentary to USSG, Chapter 8, which provides[4]:

> "The four factors that increase the ultimate punishment of an organization are: (i) the involvement in or tolerance of criminal activity; (ii) the prior history of the organization; (iii) the violation of an order; and (iv) the obstruction of justice."

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[3] The attached news articles state that these violations were discovered following public uproar after BP obtained a water discharge permit in connection with its planned $3.8 million expansion of its Whiting, Indiana refinery. According to the article, which is attached with the EPA Notice (Ex. 9) as (Ex. 11), BP planned to discharge ammonia and suspend its solids into Lake Michigan which is used by Chicago and other cities for drinking water.

[4] The victims will quote from the 2005 Sentencing Guidelines Manual.

In BP's case, the history reveals not merely a long "rap sheet," but a disturbing pattern incorporating all four factors: violation / promises to reform / violation / more promises / more violations. Consider, for example, the Alaska events:

- Feb., 2000 -- $15 million fine and five years probation for one of the worst environmental crimes in the history of North Slope oil development. "We are committed to insuring this never happens again," says BP.
- Jun., 2002 -- two years later (while on probation) -- $300,000 fine for failure to meet leak detection standards.
- Dec., 2002 -- Federal Court apparently provides investigators unrestricted access in effort to verify compliance with environmental laws.
- Feb., 2003 -- (while on probation) $7,000 maximum fine for explosion, injuring worker after previous death of another worker.
- Jan, 2005 -- $1.42 million fine for Prudhoe Field safety violation.
- Oct. 2007 -- $12 million fine, three years probation for Alaskan pipeline oil spills. BP admitted failure to use "smart pigs" (routine in the pipeline industry) to check pipeline corrosion (Ex.12).

The eight-year time period ends as it began -- with spills, fines, probation and the promise to do better. During the probationary period in Alaska, BP was nevertheless failing to use routine maintenance technology.

A similar pattern appears with the 2001 Clean Air Act consent decree in Indiana, followed by numerous Clean Air Act violations in the immediately following years, leading to the November 29, 2007 EPA charges. Similarly, the 1988 propane price-fixing cartel in Europe was followed by a 1998 conviction for manipulation of the oil futures market, and this year's U.S. diversion from prosecution for fraudulently manipulating the propane market. The propane market fraud was also not revealed in the BP's Sentencing Memorandum, although this very subsidiary is one of the BP entities which is subject to Court-ordered monitoring of its activities under the Plea Agreement (Deferred Prosecution, Northern District of Illinois, Ex. 13).

A knowing or intentional failure to reveal this extensive criminal record is, of course, a fraud upon the Court. State court proceedings in recent weeks have revealed that BP falsely

advised Texas Commission on Environmental Quality (TCEQ) regulators that all blowdown stacks in the plant were equipped with flares in order to obtain needed permits (Ex. 14), another false statement to public officials. Perhaps the latest disclosure of improprieties was the state court finding that BP's claim to have "lost" or destroyed documents related to its false statements while subject to discovery orders constituted spoiliation of evidence, and the state court instructed the jury that it could draw an adverse inference from that fact (Ex. 15).

The total record reveals at least nine cases of fines for safety violations, five of which involve death or injury, and at least 14 cases of environmental crimes and five cases of fraud crimes.

IV.

JUDICIAL DISCRETION

A.
Evaluation of a Plea Agreement

The Government seems to argue that rejection of its Plea Agreement would interfere with its prosecutorial discretion. Such an argument mistakes the proper role of the prosecution.

It is the Court, in the exercise of its judicial discretion, which sentences the Defendant. The Government's executive powers are constitutionally separated from the exercise of this Court's judicial discretion and sentencing power. The Court has not only the right but the duty to evaluate the Plea Agreement in light of the public interest which the Court, independently of the prosecution, has a duty to protect.

In the *Morgan* case (which this Court called to the attention of counsel), the 9th Circuit wrote:

> "Rule 11 vests district courts with considerable discretion to assess the wisdom of plea bargains, to which attaches a concomitant responsibility to exercise that

> discretion reasonably. We accordingly hold that district courts must consider individually every sentence bargain presented to them and must set forth, on the record, the court's reasons in light of the specific circumstances of the case for rejecting the bargain." *In re Morgan*, 356 F.3d 1198 (9th Cir. 2007).

The line of cases leading up to *Morgan* is instructive. The Fifth Circuit has discussed the Court's duty to "take an active role in evaluating a plea agreement, once it is disclosed." *United States v. Crowell*, 60 F.3d 199 (5th Cir. 1996) at 203, (citing *United States v. Miles*, 10 F.3d 1135, 1139 (5th Cir. 1993), which, in turn, quotes *United States v. Adams*, 634 F. 2d 830, 835 (5th Cir. Unit A Jan.1981)). Importantly here, *Crowell* informs as follows:

> "We have no doubt that the court's evaluation of the plea may include a consideration of the punishment allowable under the agreement, as compared to the punishment appropriate for the defendant's conduct as a whole." 60 F.3d 204.

Whether the court accepts or rejects the Rule 11(c)(1)(C) Agreement, the Court may not do so automatically or arbitrarily. As the Seventh Circuit (citing *Crowell* and *Adams*) wrote:

> "…if [the court] elects to reject a plea agreement, it must be able to 'articulate a sound reason' for doing so" (citations omitted). "Requiring the court to state on the record its reasons for rejecting a plea agreement 'is the surest way to foster the sound exercise of judicial discretion'" (citations omitted). "Naturally, it also facilitates appellate review when the defendant contends that the district court abused its discretion in rejecting a plea." *United States v. Kraus*, 137 F.3d 447 (7th Cir. 1998).

The *Kraus* opinion comments at page 452:

> "Of course once the parties have themselves negotiated a plea agreement and presented that agreement to the court for approval, it is not only permitted, but expected, that the court will take an active role in evaluating the agreement."

Kraus goes on to say:

> "Thus, where the parties have agreed to a particular sentence pursuant to Rule 11(e)(1)(C), for example, the court has the power-and under the Sentencing Guidelines, **the explicit obligation-to consider whether that sentence is adequate and to reject the plea agreement if the court finds it not to be."**

And, at 453, the *Kraus* opinion states:

> "So long as a plea agreement is properly before the court, then, the court may **and, under our precedent, must explain why it finds the agreement objectionable.** Pragmatically speaking, by signaling what has motivated the court to reject an agreement, the court's remarks no doubt will have an effect on any future negotiations." (See *Crowell*, 60 F.3d at 204). "The possibility that the parties may subsequently rely on the court's comments in crafting a new plea agreement does not alone establish a violation of Rule 11(c)(1), however. So long as the court speaks in the context of 'actively evaluating a plea agreement' (*id*), and its remarks are confined to the agreement before it, the court does not become a participant in the plea negotiations in violation of Rule 11."

Before *Morgan,* the Ninth Circuit, sitting *en banc*, had addressed what a Court may say and do when a Plea Agreement is presented in *In re Ellis*, 356 F.3d 1198 (9th Cir., *en banc*, 2004). Ellis involved count bargaining. The trial judge was unhappy that the government had agreed to a plea for second degree murder rather than first degree. However, the court did not defer accepting the plea pending a PSR. Instead, the court accepted the plea, but after receiving the PSR decided to vacate the plea. The Ninth Circuit held this was error. The Ninth Circuit's *en banc* opinion stated:

> "When the district court rejected the plea agreement, having previously accepted Ellis's plea, a number of options became available. The option the district court chose-injecting itself into the charging decision by vacating the plea and requiring Ellis to plead to higher charges-was not one of them."

It is clear from *Ellis* that a district court may reject a plea bargain that is based on dismissal of a count or counts. A court may also defer acceptance of a plea agreement and, after receiving the PSR, reject the Plea Agreement.

This leaves the Government with other options: Letting the criminal go free, presenting the Indictment and evidence to a grand jury, filing another Information or Complaint, re-negotiating with the defendants, going to trial on any greater charge that has not been dismissed, or whatever the Government (and defendants) may choose to do.

Morgan followed *Ellis*, holding that while a court is free to accept or reject a plea agreement, it may not do so on a piecemeal basis. *Morgan* recites that Rule 11 does not distinguish between bargaining over a sentence, and bargaining over the count on which a plea will be offered and what counts will be dismissed. *Morgan* also states that a determination whether to accept the Plea Agreement is really no different when there is a count bargain than when there is a sentencing bargain. In either case, the court is not fulfilling its judicial function of exercising discretion if it applies categorical rules.

Morgan gives this court advice about what to do when rejecting a Rule 11(c)(1)(C) agreement, without engaging in a violation of the Rule 11(c)(1) prohibition against judicial involvement in plea bargaining:

> "This petition therefore presents a question not directly answered by either Miller or Ellis: **Whether, when considering a sentence-bargain plea agreement, a district court must provide individualized reasons for rejecting the agreement, based on the specific facts and circumstances presented. The answer to that question is yes."**

In short, the Court has clear choices:

1) It may accept the Plea Agreement; as will be discussed below, if so it must, consider the Sentencing Guidelines and explain its reasons for any departure;
2) It may defer its decision pending a PSR; unless the parties insist that a PSR violates their Agreement;
3) Either now or after receiving the PSR, it may reject or accept the Plea Agreement, in which case it must state on the record its individualized reasons for doing so based on the facts and circumstances.

We note that at the Status Hearing the Government (P. 17) and the Defendant (p.21) stated they were not opposed, nor objecting, to a PSR.

B.
Sentencing Guidelines and Other Considerations

While the U.S. Sentencing Guidelines are no longer mandatory, they nevertheless serve as the benchmark and starting point for sentencing considerations:

> "While rendering the Sentencing Guidelines advisory, *United States v. Booker,* 543 U.S. 220, 245, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), we have nevertheless preserved a key role for the Sentencing Commission. As explained in…*Gall*, district courts must treat the Guidelines as the 'starting point and the initial benchmark,' *Gall* v. United States, ante, --- U.S., at ----11, --- S.Ct. ----, 2007 WL 4292116." *Kimbrough v. United States of America*, ____ U.S. ____, ____ S.Ct. ____, 2007 WL 4292040 (December 10, 2007).

Yet, here BP takes the position that the Court should ignore the Guidelines.

> " ... Sentences for corporate violations of environmental laws are not governed by the Federal Sentencing Guidelines. See U.S.S.G. §8C2.1 & commentary (specifically noting that guidelines addressing corporate fines do not apply to environmental offenses). ..." BP Products North America Inc.'s Sentencing Memorandum, p. 3.

The argument is rebutted by the specific language of the Guidelines which provide that Chapter 8 "applies to the sentencing of all organizations for felony ... offenses." See USSG §8A1.1. Certainly, it is true that the specific fine calculation provisions of §8C2.2-9 are not applicable to the offense charged in this Criminal Information, and, therefore, the provisions of USSG §8C2.10, which, in turn, refer to 18 U.S.C. §3553 and §3572 apply to the fine determination. But this does not support the conclusion that the Guidelines, in their entirety, are to be ignored.

Where, as here, there is no applicable fine calculation guideline, 18 U.S.C. §3553(b)(1) itself requires consideration of the Guidelines:

> "the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission."

Thus, the Court should consider the general rules which call for increased punishment for death, especially when intended or knowingly risked (as in this case), USSG §5K2.1 and for physical injury, USSG §5K2.2;

The Government also invites the Court to ignore USSG §2X5.1 which instructs the Court to apply "the most analogous offense guideline." The Background to the §2X5.1 Commentary instructs a Court using the §3553 factors, when there is no specific guideline, to "…have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines for similar offenses and offenders." This is statutory authority for the Victims asking the Court to look at the §2Q1.2 Guidelines for mishandling hazardous substances, recordkeeping and falsification, and refutes the contention that there are no guidelines that apply to determining the Total Offense Level if the explosion was the result of an environmental crime. Crimes related to hazardous substances carry Guidelines punishments and encourage departures. See USSG §8C4.2, upward departure for death, bodily injury or foreseeable risk of death; USSG §8C4.4, upward departure for threats to the environment; USSG §8C4.11, upward departure for exceptional culpability. As will be shown, in other environmental cases, the Government has also charged fraud, for which USSG Part B guides application of the Guidelines. This case also includes acts of fraud.

Exceptional culpability arises when high-level officers of a large organization participate in, condone or willfully ignore the crime, as VP John Manzoni and BP Global did, or when the organization (including separately managed businesses) has committed prior acts of similar misconduct. USSG §8C2.5. Considering both the high level participation and the many prior BP adjudications, BP's "culpability score" should be literally "off the chart."

(Other considerations in fixing the sentence specified in 18 USC §3553 and other statutory directives are reviewed in "Victims Reponse to BP Sentencing Memorandum." We respectfully ask that those issues be considered by the Court without being repeated here.)

Further, under USSG §8A2.1(a), in applying the Guidelines as "the starting point and the initial benchmark," *(Gall, supra)*, the starting point is in Part B when the Court considers remedial orders. USSG §8A2.1(c) further directs the Court to Part D with reference to organizational probation.

Clearly, both Parts B and D of Chapter 8 apply directly to this case. As will be seen below, both provide important guidance. BP proposes that such guidance be ignored.

When electing to depart from the Guidelines, the Court should explain its reasons on the record:

> "It is also clear that a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications. For even though the Guidelines are advisory rather than mandatory, they are…the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions. FN2 Id., at 127 S.Ct. 2456." *Gall, super.*

Thus, either when rejecting a plea bargain, or accepting one which departs from the Guidelines, as this does, the Court must explain its reasons.

C.
Presentence Investigation

Fed.R.Crim.Proc 32(c)(1)(A) states that "the probation officer must conduct a presentence investigation and submit a report to the Court before it imposes sentence…" The general rule is presented in mandatory terms. The Rule goes on to provide under Rule 32(c)(1)(ii) that a PSR is not required if "…the court finds that the information in the record enables it to meaningfully

exercise its sentencing authority under 18 U.S.C. §3553, and the court explains its finding on the record."

The Victims believe this record, at this time, does not contain sufficient information to allow the Court to accept the plea bargain. Should the Court choose not to reject the Plea Agreement, as we will argue it should, the Court should then overrule the request to waive a Presentence Investigation and obtain the benefit of the Probation Office's independent investigation.

The BP history presented to the Court by the Victims does not purport to be complete. Although lengthy and informative, it is based only on searches of news accounts by the undersigned counsel who has no access to official government records or databases, or to BP's own records. Of course, both the Government and BP (under its pledge of cooperation) should furnish full information to this Court. Yet, in this criminal case with 15 dead and hundreds injured, that has not happened.

The Joint Motion for Waiver which failed to inform the court of over 90% of BP's record, both past and recent, including the fraud charges involving this very subsidiary, was astoundingly deceptive (even if, as we presume, counsel were unaware of the deception). Certainly this undermines BP's credibility as to its record. The horrendous nature of this event, the massive public interest in its outcome, and the substantially incomplete "disclosure" in the Joint Motion, call for scrupulous adherence to unquestionably proper procedures. This is not where waiver of the Rules is appropriate.

V.

REASONS FOR REJECTION

A.
Immunity for Future Events

Bringing the plant into full compliance with Federal law is necessary for the adequate protection of the public. In this case, that should be the primary goal of this Court. The Plea Agreement undermines this goal by giving BP Global, holder of the purse-strings, responsibility compliance immunity, not only for past, but also for future events.

Item 5 of the Plea Agreement, the immunity from prosecution provision, in its entirety, is as follows:

> 5. Other than the offenses to which the Defendant agrees to plead guilty pursuant to this Agreement, the United States agrees not to charge the Defendant, **or any other affiliated or related corporate entity,** with any additional offenses **known to the Government** at the time of this Agreement that are based upon **evidence in the Government's possession at this time** and that **arose out of the conduct giving rise to the criminal investigation of the March 23, 2005, explosion** that occurred at the BP Products Texas City refinery. The Defendant understands that this provision does not bar prosecution by any other federal, state, or local jurisdiction. The Defendant also understands that this Agreement does not provide or promise any waiver of any civil or administrative actions, sanctions, or penalties that may apply, including but not limited to: fines, penalties, suspension, debarment, listing, licensing, injunctive relief or remedial action to comply with any applicable regulatory requirement. (Plea Agreement, Para. 5, emphasis added).

This is not a complaint that the Court should interfere with the act of prosecutorial discretion in charging one defendant but not another. The Victims realize that the prosecutor has the exclusive discretion to select whom to charge. We concede that failure or refusal to charge

the party which supervised, controlled and directed the crime, however lenient or unwise, is within the prosecutor's prerogative. We do not, because we cannot, ask the Court to reject the Plea Agreement for failing to charge BP Global.

But the Victims do complain that the immunity provision is wider in its effect. The effect of the plea agreement, if accepted by the court, will be to contractually grant immunity to all BP entities from repeat or similar events "based upon evidence in the Government's possession at this time," which "arose out of the conduct giving rise to the investigation of this explosion." This immunity grants BP Global and its subsidiaries, uncharged corporate "persons," immunity for crimes, even future crimes that are in any essential way based on evidence now possessed by the Government, or based on the same root causes. *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495 (1971) (specific performance available to enforce Plea Agreement).

The Texas City Refinery experienced at least two releases, including one fire with life-threatening potential, within months after the March 2005 explosion. In July 2005, there was a "major process-related hydrogen fire ... that had the potential to cause additional deaths and injuries" and forced a Level 3 community alert (CSB, p.237, Ex. 2); in August 2005 another Level 3 incident led to a community shelter emergency (CSB, p.238, Ex. 2). Prosecution for subsequent crimes is pre-empted by this Plea Agreement, if they arise from the same conduct which gave rise to this investigation. Evidence of conduct that contributed to these events was already in the Government's possession at the time of these subsequent emergencies.

Imagine that an explosion in another unit of the plant occurs in March, 2008, with more deaths and injuries. Imagine, for a moment, the potential thought process of a BP lawyer seeking to avoid a future prosecution. If BP claims immunity from prosecution, BP counsel argues:

1) The Agreement provides the Defendant and BP Global and all of its subsidiaries with immunity from any other prosecutions

a. not "that occurred before and are related to the explosion" of March 23, 2005;

b. not "that is based on the facts recited in the Statement of Facts"

c. BUT "that arose out of the conduct giving rise to the criminal investigation of the March 23, 2005, explosion."

2) "The conduct giving rise to the investigation..." is all of the pre-catastrophe activities described in the CSB Reports, the Baker Report, other reports, and the thousands or millions of pages of other documents in the Government's possession; most especially the acts and omission of BP Global and its officers. These were company-wide events including:

a. Repeated, across the board 25% cuts in funds for health, safety and environmental programs mandated by Federal law;

b. Refusal to provide capital investment to repair outdated and decrepit physical facilities;

c. Willful, knowing violation of regulatory requirements; and

d. False and misleading statements.

3) This evidence is in the Government's possession at this time, so that if there is a subsequent catastrophe, BP counsel can claim immunity unless conduct already known plays absolutely no part in the future event.

Eureka! Thinks our imaginary lawyer! The same conduct caused or contributed to the latest explosion. The Government knew about the conduct; the "root causes," and of the contributory misconduct. The Government has evidence of this conduct in its possession from

the CSB reports and the Baker reports. BP is immune from prosecution by virtue of the old Plea Agreement!

So, he or she looks more closely. Is the immunity limited to events which occurred before the date of the plea? No; no problem, there. For immunity, must the event related to the March 2005 explosion? No, no problem, there, either. How about being limited to the specific deficiencies in the ISOM unit? No, again; no problem, there.

The conclusion to the Agreement, Paragraph 14, recites that "This written Agreement constitutes the complete Agreement between the United States, the Defendant, and the Defendant's counsel." BP's history teaches that it will construe all Agreements in its favor.

Will it work? Wonders our BP lawyer: It is sure worth trying.

BP may also read Paragraph 13 of the Agreement, providing that the commission of other crimes would be a breach of the Agreement, as applying only to different conduct not immunized by Paragraph 5. Although the Government retains in Paragraph 13 discretion to accuse the Defendant of a violation, BP reserves the right to contest future charges with the Department of Justice and its constituent divisions, and the Agreement expressly states that any claim of a probation violation "…does not bind the United States Probation Office or the Court."

One more non-limitation. The immunity isn't limited to refineries. This company-wide conduct mostly likely affected virtually all company operations in the US as well as worldwide. BP is one of the nation's largest oil and gas producers, with production from Alaska to the Gulf of Mexico; and produces and imports more than 60% of the highly hazardous liquefied natural gas (LNG) imported into the United States. (BP in U.S., Ex. 16) An explosion on an LNG tanker in the Houston ship channel, or a well blowout in the Gulf of Mexico, or countless other

future events, committed in whole or in part in the Southern District of Texas, might well be immunized by this Agreement.

Future immunity for BP Global would tend to reinforce its already too great inclination to withhold compliance funds for its own profit. BP Global, by withholding needed funds, might well make it impossible for the Defendant to bring the plant into compliance with the law. Immunity would be counterproductive to that major public policy goal.

B.

Vague and Uncertain Conditions of Probation

1. Generally

> "…we seem to mourn for short periods of time and then move back to doing what we have always done" (BP Telos Report, Jan. 2005; Mike Sawyer Affidavit, p. 4, Ex. 17).

The most important obligation of the federal judicial system, in this case, is to be sure BP changes its culture. Public policy is that expressed by USSG §8B1.2, requiring "the organization to eliminate or reduce the risk that the instant offense will cause future harm." An outcome of this case which allows BP to "move back to doing what we have always done" would be a major failure of the judicial system, and would probably cost lives and injuries in the future.

While recognizing this need, the conditions of probation expressed in this Plea Agreement are totally inadequate to the task. Either the Plea Agreement should be rejected, or this Court should impose further, and far more specific and effective, conditions of probation.

The specific conditions of probation are not contained in the Plea Agreement or any filed documents, although some of the conditions are discussed in Item 1(c) (Plea Agreement, p. 2) One routine condition of probation is specified by USSG §8D1.3(a):

> "Pursuant to 18 U.S.C. §3563(a)(1), any sentence of probation shall include the condition that the organization not commit another federal, state, or local crime during the term of probation."

This condition is not mentioned in the Agreement. Ordinarily, it is presumed that this provision will be included, and nothing in the Plea Agreement should prevent the Court from including this provision in the sentence. However, the Plea Agreement at Paragraph 15, states that it "constitutes the complete Plea Agreement." Specific responsibilities are imposed on BP by the Agreement, and this is not one of them.

This is important because *there is no other provision requiring BP to immediately bring the Texas City Refinery into compliance with Federal law*, and such an order should be considered essential to reasonable conditions of probation.

2. The OSHA Agreement

The Plea Agreement requires BP to comply with its OSHA Agreement. However, that Agreement (remarkably) nowhere simply requires BP to bring the plant into compliance with the law within a specific period of time. Even worse, as already detailed in "Victims' Response to the BP Sentencing Memorandum," pp. 10-12, BP is already out of compliance with that Agreement shows no interest in actually complying with the agreement and is not subject to meaningful oversight.

The comprehensive audit which BP agreed to secure has never been performed; the spot audit which was performed was actually performed by BP rather than the independent auditor, Acu-Tech, which then relied on BP's work (contrary to the Agreement). The independent auditor has performed no additional work for over a year. OSHA has taken no action. This is reminiscent of the 1992 OSHA citation in which OSHA sought the replacement of the blowdown drum with a flare; the contest of the citation was settled with the plant's

assurance that the hazard had been corrected; although OSHA had the right to inspect for compliance it never did so. In fact, the condition had not been corrected. (CSB, p. 114-115, Ex. 2).

In simple fact, BP is back to its old ways. The depth of the problems are indicated by its deposition given in a civil case in December 2006, about 20 months following the explosion and six months following the Acu-Tech audit, through its corporate representative Walt Wundrow.

a. BP recognized its legal requirement to determine and document that every single piece of process equipment is designed, maintained, inspected, tested, and operating in a safe manner (Wundrow, Ex. 6, p. 9/12-17); this has not been done. (Wundrow, Ex. 6, 20/20-23).

b. Although BP had agreed to obtain a "comprehensive audit," it only hired Acu-Tech to do a "sampling" audit. (Wundrow, Ex. 6, 57/1-7, 77/8-16).

c. Acu-Tech's spot check found numerous compliance violations. (Wundrow, Ex. 6).

d. Even the limited audit found some violations in every unit examined. (Wundrow, Ex. 6, 74/8-20, 77/17 – 78/21).

e. Where violations were found in a given unit, Acu-Tech was not asked to and did not audit the remaining units for similar violations. (Wundrow, Ex. 6, 79/8-16).

f. Process Safety Information (PSI) is the PSM element which verifies safe equipment design. It is the element that should have found that the atmospheric vent stacks were unsafe. Operating under BP's instructions, AcuTech did not audit this element with respect to many operating units in the BP plant, including

the ARU A unit, AU 2, blending unit, CFHU unit, ULC1 unit, UU 4 unit. (Wundrow, Ex. 6, 52/1 – 54/16).

g. On the units that were audited with respect to process information, deficiencies were found in nine out of ten units. (Wundrow, Ex. 6, 58-59).

h. Mechanical integrity is the PSM element to verify equipment has been inspected, tested and is in good operating order. Operating units that got no mechanical integrity audit through the AcuTech project were ARU A, AU2, blending unit, environmental unit, cat cracker unit 3, marine unit, PS3A unit, power 2/OU, and UU4. (Wundrow, Ex. 6, 59/6 – 60/14).

i. For the units that did get mechanical integrity audits, it was found that control valves critical to the process were not included in BP's mechanical integrity program. (Wundrow, Ex. 6, 60/23 – 61/7).

j. BP has "closed the gap" on this and some other issues; however, "closure" meant that BP had written a document that it was going to check the mechanical integrity of the valves at some time in the future. (Wundrow, Ex. 6, 61/21-24).

k. In the units that did get mechanical integrity audits, it was also found that fans and blowers critical to the process were not included in BP's mechanical integrity program. (Wundrow, Ex. 6, 68/19 – 69/15).

l. Many items were found to be overdue for inspection or testing, including 3 pressure vessels, 2 storage tanks, 3 piping areas, 91 relief devices, 2 turbines, 53 instruments and controls, 139 critical instruments, 67 electrical items, and 21 analyzers. (Wundrow, Ex. 6, 69/25 – 70/20).

m. One of OSHA's critical topics was the subject of relief valves. BP has had programs in place to inspect and verify its relief valves for a number of years. Twenty months after the explosion, they had "looked at" some but not all. (Wundrow, Ex. 6, 47/4-13).

Perhaps nothing is more telling than Wundrow's evidence that "closing" an issue simply requires writing a paper that the equipment will be checked in the future. In fact, much of Acu-Tech's audit report consisted of repeatedly stating that "BP is addressing the problem as part of an on-going plan and Acu-Tech plans to review the adequacy of the plan" some time in the future. Acu-Tech's subsequent reports do not verify anything further. It is what experts in the field refer to as "pencil-whipping" the problem.

When initially enacted by the Government, PSM regulations allowed plants a period of 4 years to "phase-in" compliance according to a schedule included in the regulations. It has now been almost three years since the explosion, and one can find no meaningful work plan to accomplish full compliance within any foreseeable period of time.

3. Improvements Don't Get "Phased In" at BP

In fact, nothing meaningful is being done to actually bring the plant into full compliance with Federal law according to Michael Sawyer, Safety Engineer. (Sawyer Affidavit, Ex. 17). As Mr. Sawyer wrote in his Affidavit, quoting BP's Telos report issued shortly before the explosion:

> The BP Products internal Telos report, dated January 2005, summarized BP Products' philosophy, stating that after a fatality "…we seem to mourn for short periods of time and then move back to doing what we have always done." History continues to repeat itself.

This is not surprising. Both the CSB Report and BP's Baker Report emphasize the widespread, long ingrained "culture" of "lack of focus on process safety;" i.e. an ingrained

culture of tolerating non-compliance with the law. Both CSB and Baker stress the importance of changing the culture.

The depth of the difficulty of changing that culture is made clear by the facts of BP's long and continuing record. In at least five prior cases, in 1991, 1998, 1999, 2000 and 2003 it was reported that BP was fined a record or maximum fine, yet the culture of non-compliance has continued. Many of the same offenses types of offenses, including fraud and safety violations, continue repeatedly. BP's operations manager, Mr. Wunderow, expressed no apology for the backlog of PSM work prior to the March, 2005 explosion, and gave no indication things are different today.

The Victims submit that meaningful change will occur only if forced by strict oversight through the court system.

C.
Requested:
Effective Ethics and Compliance Program and Appointment of Monitor Requested

USSG §8B2.1 defines an "Effective Ethics and Compliance Program," as a program by which the corporation shall

(1) exercise due diligence to prevent and detect criminal conduct; and;
(2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

The Guidelines further define the requirements of such a program in some detail.

Under Federal statutes, corporations are invited to voluntarily create such programs to monitor their operations, and are granted a reduction in their culpability score if they are able to show a crime occurred notwithstanding an effective such program, USSG §8C2.5(f)(1). On the other hand, where, as here, such a program obviously is needed, the Guidelines recommend that the creation and implementation of such a program be made a condition of probation, USSG

§8D1.4(c). This is not a part of the Plea Agreement, and there's a risk that BP might read its obligations under probation as limited by the Agreement, Paragraph 14.

The Victims request that this Court order BP to create and implement such a program as respects its PSM obligations under Federal law, and that the Court appoint an independent engineering expert, or experts, according to the need, knowledgeable in refinery operations and PSM requirements, to work under the direction of the Probation Office as a Monitor of the implementation of the program.

In a similar fashion, BP has agreed to, and the Court will appoint, an independent Monitor its operations involved in the propane trading fraud. (Deferred Prosecution, Northern District of Illinois, Ex. 13). The Monitor here, as in the propane case, should be totally independent of BP, and have no financial ties or other ties to BP. While the costs related to the Monitor should be paid by BP, the Monitor should be selected by the Court, all payments should go through the Probation Office, and it should be clear that the Monitor's sole responsibility is to the Court and not to BP. The Monitor should be provided whatever office space and administrative support the Monitor, with Court approval, finds necessary.

Victims further request that the Court include in the conditions of probation that the program shall include the immediate preparation of a work plan to bring the plant into full compliance with PSM with a target date no later than 4 years and before the period of probation expires. One of the primary duties of the Monitor should be to keep the Probation Office and the Court informed of the degree of timely progress. Failure to bring the Plant into compliance should constitute a violation of probation.

Finally, the plant cannot be brought into compliance absent adequate funding by BP Global. Adequate, after decades of neglect, will be substantial. BP Global, as the parent

company with control of the Defendant, should be required contractually to provide necessary funding to bring the plant into compliance with the law, and failure or refusal to do so should be a breach of the Plea Agreement.

D.
Inadequacy of the Fine Amount

All agree that the maximum fine for the offense charged in the Criminal Information is, as stated in the Plea Agreement, up to double the profit from the crime:

MAXIMUM PENALTY

> "6. The maximum penalty for a violation of Title 42, United States Code, Section 7413(c)(1) includes a period of probation of five years, the greater of a fine of $500,000 or up to twice the gross gain or loss resulting from the offense, and a $400 mandatory Special Assessment per count of conviction. Title 18, United States Code, Section 3551(c), 3561, 3571(d), and 3013(a)(2)(B)."

In "Victims Response to BP Sentencing Memorandum," we outlined and factually supported that the proposed fine amounts to only about 5% of the profit made by the plant for the 14th month period immediately preceding the explosion. During that time, plant profits exceeded $1 billion sufficiently that, after payment of the proposed fine, BP would still retain more than $1 billion in profit. The plant profit kept unsafe units in operation to reap the windfall profits of increased gas prices. Parus' Memo, Exhibit B to "Victims Response to BP Sentencing Memo."

The actual plant profits for the 6 year period charged by the Information are unknown. One of the reasons that a Presentence Investigation is needed before the Court decides whether to accept the Plea Agreement is that the Court should assess the actual proposed fine against the possible range of punishment. *Crowell*, 60 F.3d 204.

The basic Federal philosophy is that a corporate fine should at least equal the before-tax profit. The Introduction to Chapter Eight, Sentencing of Organizations of the Guidelines, includes the principle:

> "the fine range ... should be based on the seriousness of the offense and the culpability of the organization. The seriousness of the offense generally will be reflected by the greatest of the pecuniary gain, the pecuniary loss, or the amount in a guideline offense level fine table." (USSG Ch.8, Introductory Commentary).

"Pecuniary gain" is a defined term, under the Commentary to USSG §8A1.2:

> "(h) "Pecuniary gain" is derived from 18 U.S.C. § 3571(d) and means the additional before tax profit to the defendant resulting from the relevant conduct of the offense. ..".

The fine prescribed for similar offenders (corporations) under §8C2.4(a) is a base fine which is the greatest of three calculations, one of which is " the pecuniary gain to the organization from the offense."

Thus, both the principles of the Guidelines (which are directly applicable to this case) and the analogous relationship to similar offenders (applicable by direction of 18 USC §3553) indicate that the starting point for the fine should be the profit. Nothing filed with the Court provides any authority for doing otherwise. If the Court is to approve a markedly lesser fine, it should explain on the record its reasons for doing so, and why the Guidelines principle fine is excessive under the circumstances here. Under USSG §6B1.2(c)(2), before the Court may accept an agreed sentence recommendation outside the guidelines, the reasons should be specifically set forth in writing in a statement of reasons or the judgment. The Plea Agreement should not be accepted without a Presentence Investigation because on this record the Court cannot determine the amount of profit, compare that amount to the proposed fine, and consider whether the deviation is appropriate under these facts and circumstances of this case.

It may be argued that the amount which BP has expended to pay claims (reported in the newspapers to be $1.6 billion), should be deducted from the profit before the fine is fixed. Such an argument would be directly contrary to the teaching of the Guidelines:

> "The resources expended to remedy the harm should not be viewed as punishment, but rather as a means of making Victims whole for the harm caused." (USSG Ch.8, Introductory Commentary).

Nor is the amount paid for restitution a mitigating factor in setting the punishment:

> "The two factors that mitigate the ultimate punishment of an organization are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility." (USSG Ch.8, Introductory Commentary).

At the Status Conference, it was suggested that the plant-wide profit should not be the yardstick because "the crime was limited to the ISOM Unit." This argument is not meritorious:

1) Factually, nothing was limited to the ISOM Unit. The explosion itself, the location of the Victims and the ignition source extended all outside the ISOM Unit; most Victims were working outside the ISOM unit on work having nothing to do with the Unit; the criminal conduct which caused the explosion was plant-wide and, indeed, worldwide; the budget cuts were plant-wide and the unsafe conditions were plant-wide.

2) As charged, the Criminal Information charges are not limited to the ISOM Unit;

3) Even if the conduct outside the ISOM Unit is not charged, such uncharged, relevant conduct is to be considered in fixing punishment (USSG §6B1.3)

The "Victims' Response to BP Sentencing Memorandum" reviews a number of sentencing factors specified in 18 U.S.C. §3553 and §3752, many of which overlap with those discussed here. Without repeating that discussion, Victims respectfully request that the Court consider that information.

Virtually all of the considerations that would suggest adjusting and departing in calculating the fine from the base amount are serious aggravating factors:

1. Explosion causing deaths of 15 and injuries to hundreds, damages exceeding $1.6 billion;
2. Long-standing criminal conduct -- at least 6 years admitted;
3. Conduct not only life-threatening, but which had previously caused multiple deaths over a period of years
4. Known and tolerated if not caused by the highest management levels of this international company;
5. Caused in large part by upper management depriving lower management of funds needed to comply with the law, in order to maximize corporate profits;
6. Long and continuing history of criminal conduct, notwithstanding numerous fines and periods of probation;
7. Failure to fully disclose its criminal history to the Court;
8. The world's second largest oil and gas company, ranked #2 on the Global Fortune 500 (2005), more than 104,000 employees, market capitalization of $225 billion making it the fifth largest company on the NY Stock Exchange (BP in the United States, Ex. 16); net worth of $84 billion; recent annual profits over $20 billion; and
9. Failure to comply with OSHA Agreement intended to implement remedial measures.

Such aggravating factors seem to demand the maximum punishment.

By comparison with other cases, in two cases in which no human being was physically injured or killed.

1) Exxon agreed to pay a $125 million criminal fine for its 1989 Exxon Valdez event, from which it made no profit, in addition to over $1 billion in damages and cleanup costs. Significantly, according to the New York Times, the federal judge in Alaska refused to accept Exxon's first Plea Agreement with the Government because it was too lenient (Ex. 18).

2) BP has agreed to pay a $100 million criminal fine in the propane trading fraud case, plus roughly $200 more in penalties and restitution.

For all of the reasons discussed, the Plea Agreement does not adequately protect the public interest. The fine amount is far below the profits generated by the illegal operation of the plant, and highly inconsistent with the statutory and Guidelines policy to set the base corporate fine at least equal to the profit obtained. There are no specific conditions of probation which effectively guarantee that the Defendant will be a law-abiding corporate citizen during probation, or effectively require bringing the refinery into compliance with the law. The immunity provided to BP Global, which profited from and knowingly tolerated, the criminal conduct, and which was substantially responsible for causing the criminal conduct by withholding needed funds for compliance, remove the last remaining disincentive to BP Global to let it happen again.

VI.

ESTABLISHING A FINE AMOUNT

The Victims argue that for BP Global, the payment of money in the form of civil and criminal penalties is part of the ordinary cost of doing business.

This Defendant planned to pay $50 million dollars within three days of November 29, 2007 in this case, and simultaneously $20 million dollars for the Alaska case. That same day, BP was administratively charged with previously undisclosed environmental crimes in Indiana.

The list of recent and related cases filed previously includes the $300 million plus penalty for fixing the price of propane. The Victims acknowledge that a 28 penalty "laundry list" showing criminal history, filed in the Crime Victims' Response to BP Sentencing Memorandum, was compiled from news sources. The Victims believe their proffer is reliable, but it may be incomplete. The Victims did not then know of the recent EPA notice to BP's Indiana Refinery.

The Victims respectfully ask the Court to request that BP and the Government provide a complete list of all cases, criminal and civil, whether pending or closed, whether in the United States or overseas, and the substance of any payments and other remedies incorporated in those cases.

The Government was unduly and unnecessarily generous in these negotiations. If killing wildlife in Alaska and price fixing for propane is worth fines in the hundreds of millions when human death did not result, and an oil spill in Alaska is worthy of a $20 million dollar fine, only a very substantial penalty well in excess of $50 million dollars would send the message to BP Global and all its related entities and other multinational corporations that the laws of the United States of America are designed to take the profit out of crime.

This Defendant could pay a fine in of $1.6 billion dollars, or more. Although this Court cannot state at this time in the proceedings what penalty would be appropriate, the Court is allowed to indicate that the penalty proposed under the Rule 11(c)(1)(C) Agreement is so low that it fails to adequately protect the public interest.

Judge Jack Weinstein, Senior District Judge, wrote in a arson case that resulted in death as follows, *United States v. Ferranti*, 98 F. Supp. 206 (E.D. NY 1996) at 220:

> "Departure to a fine that equals double the amount of restitution ordered under count two, arson resulting in death, is appropriate in this case, given the degree of damage defendant has caused the community. See U.S.S.G § 8E1.2 cmt. N. 4. This was essentially a crime based on greed. General deterrence though heavy financial penalties is necessary."

Likewise, in *United States v. Caputo*, 456 F. Supp. 970 (N.D. Ill. 2006), Judge Castillo sentenced defendants for massive fraud upon the Food and Drug Administration. After observing that judicial discretion over sentencing must be limited to case specific circumstances, 456 F. Supp. at 979, Judge Castillo reviewed the national policy relating to white collar crime. He said at 456 F. Supp at 982:

> "Both Congress and the Sentencing Commission have targeted our nation's ongoing corporate crime rate. The average federal sentence faced by corporate executives has more than tripled in most instances as a direct result of the U.S. Sentencing Commission's 2002 Economic Crime Amendment and the Sarbanes-Oxley Legislative Initiative."

Judge Castillo imposed substantial prison sentences because the elaborate fraud scheme for which the defendant was convicted, marketing an ineffective medical appliance sterilizers:

> "…caused a multi-million dollar loss while corrupting an entire company and its employees. In addition, this case compromised the overall safety of the public. "

Last week, concluding his opinion for the majority in *Gall,* and writing in a different context, Justice Stevens recognized "The Government's legitimate concern that a lenient sentence for a serious offense threatens to promote disrespect for the law…" *Gall v. United States of America*, ____ U.S. ____, 2007 WL 4292116 (December 10, 2007). That is a proper concern for the Victims, as well as this Honorable Court.

VII.

RELIEF REQUESTED

The Victims respectfully urge the Court to reject the Rule 11(c)(1)(C) Agreement now proposed.

The Victims also ask that the Court, in discharging its duty to make inquiry about the Agreement, and when stating reasons for its rejection, to state the Court's concern and interest in the following:

1. A Presentence Report, unless the Plea Agreement is rejected on the pleadings and exhibits;
2. A complete list of past and present government investigations of BP, civil and criminal, in the United States and other countries, including all disposition or status;
3. A stipulation between the Government and the Defendant expressly stating their Agreement which does not limit the Court's discretion to include other conditions of probation, and including:
    a. Compliance with all applicable laws and regulations during the period of probation;
    b. An effective Ethics and Compliance Program, including full PSM compliance in the Texas City refinery;
    c. A court-approved Monitor that has no fiduciary or administrative loyalties to BP.
4. Contractual assurance that BP Global will provide BP Products North

Amercia, Inc. sufficient funding to comply with the conditions of probation; and

5. Such other relief as the Court may decide is appropriate.

Respectfully submitted,

/S/ David L. Perry

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December 2007, a copy of the Victims' Memorandum in Opposition to Plea Agreement was served upon all counsel of record by the e-filing process of the United States District Court for the Southern District of Texas.

/S/ David L. Perry

David L. Perry

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA	§	
	§	
V.	§	CR. NO. 4:07-cr-434
	§	
BP PRODUCTS NORTH AMERICA INC.	§	

APPENDIX

Exhibit 1: Holscher, Status Hearing Transcript

Exhibit 2: Chemical Safety Board (CSB) Final Report

Exhibit 3: Summary of Public Record

Exhibit 4: Interrogatory and Answer from Civil Case

Exhibit 5: Property Taxes and Property Tax Reduction

Exhibit 6: Wundrow Deposition

Exhibit 7: BP's Answer to the 2003 TCEQ Summary of Continuing Violations

Exhibit 8: Documents from U.S. District Court, Alaska Oil Spill Prosecution

Exhibit 9: Environmental Protection Agency's (EPA) Announcement

Exhibit 10: EPA's Letter to BP's Indiana Refinery

Exhibit 11: News Article Reporting about Indiana Violations

Exhibit 12: News Articles Reporting Failure to use "Smart Pigs" in Alaska

Exhibit 13: Court Documents, Deferred Prosecution, Northern District of Illinois

Exhibit 14: Flexible Permit Application, 2003 – 100% of Valves Routed to Flares

Exhibit 15: News Article Reporting that BP Lost the Engineering Diagrams used to obtain ISOM permit

Exhibit 16: BP in the United States

Exhibit 17: Affidavit, Mike Sawyer, Process Safety Engineer

Exhibit 18: News Article Reporting that Federal Judge Rejects Plea Agreement in Exxon Valdez Case