

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CAROL VAN STRUM, PAUL MERRELL,
et al.,

Plaintiffs,

v.

LEE M. THOMAS, in his official
capacity as Administrator of
the United States Environmental
Protection Agency,

Defendant.

Civil No. 84-6484

AFFIDAVIT OF
CAROL VAN STRUM

I, CAROL VAN STRUM, being first sworn, depose and state:

I am co-plaintiff in the above-captioned case, which seeks information from the U.S. Environmental Protection Agency regarding herbicide pollution in the Oregon Coast Range and related public health problems.

In February, 1979, after examining a preliminary report on the link between human involuntary abortions and forest herbicide spraying in the 1,600-square-mile area surrounding my

home (the Alsea Study), EPA ordered an emergency suspension of forestry and rights-of-way uses of the dioxin-contaminated herbicides 2,4,5-T and Silvex.^{1/} That suspension resulted in a lengthy administrative hearing to examine EPA's basis for permanently cancelling those herbicide's registrations. In Re: Dow Chemical Co., et al., USEPA FIFRA Consolidated Docket No.'s 415 et seq. Those proceedings were suspended in March, 1981, and went into secret negotiations. In October, 1983, Dow Chemical Co. abruptly sought and was granted a voluntary cancellation of registration for the herbicide 2,4,5-T.

This lawsuit seeks government records relevant to the Alsea Study, and related subjects.

I reside with my husband and children on our 20-acre farm in the Five Rivers Valley on a major tributary of the Alsea River. I have resided there continuously since 1974. In 1976, disturbed by a consistent pattern of serious health problems following forest spraying nearby, my neighbors and I filed suit against the U.S. Forest Service and were granted an injunction against Forest Service use of dioxin-contaminated herbicides in 1977. Citizens Against Toxic Sprays v. Bergland, 408 F. Supp. 908 (D. Or. 1977). Two years later, EPA suspended the registration of 2,4,5-T, largely on the basis of the Alsea Study.

The Alsea Study, which was not completed at the time of EPA's emergency suspension, involved both epidemiological data

1. 44 Fed. Reg. 14436 (March 9, 1979).

collection (scheduled to last through 1980) and a series of sample collections for dioxin and herbicide chemical analysis during 1979. This effort continued through several years of administrative hearings, and was characterized by Dow Chemical Co., the main proponent of continued 2,4,5-T registration, as "the centerpiece" of EPA's case against 2,4,5-T.^{2/}

Science magazine said that if the 1979 sampling effort found positive levels of TCDD, EPA would have the "smoking gun" needed to ban 2,4,5-T forever.^{3/} In pursuit of that "smoking gun," Bill Wheeler, an EPA contract researcher from Colorado State Epidemiological Studies Program (ESP), visited the Five Rivers Valley in January 1979 to collect samples for EPA's 2,4,5-T study.^{4/} That summer, he returned to the valley and collected numerous water, sediment, and animal samples. I am one of the numerous people from whom Mr. Wheeler collected samples in the

2. See Dow brief in cancellation proceedings, Appendices, pg. 441.

3. See Appendices, pp. 220-21.

4. In April, 1979, my neighbor Irene Durbin was informed by the Lane County Health Department that EPA had found 17-20 parts per trillion (ppt) TCDD in sediment from her family's water supply, and Dr. Eldon Savage, an epidemiologist under contract to EPA, advised her that the water was unsafe to drink. A month later, the Forest Service sprayed heavily in the area with herbicides 2,4-D and picloram; within weeks of the spraying, every woman in the valley who was in the first trimester of pregnancy miscarried, and widespread health problems developed, including two nearly fatal cases of spinal meningitis in children. Along with other valley residents, I wrote to EPA about these events. See Durbin testimony, Appendices, pp. 435, 438; see also 1979 letter from Five Rivers residents, Appendices, pg. 439.

summer of 1979.^{5/}

For four years, I and my neighbors attempted fruitlessly to obtain results of EPA's lab tests on our samples, through informal requests, petitions, and congressional inquiries, then under the Freedom of Information Act and discovery in Merrell v. Block, Civil No. 81-6138-E (D. Oregon). Throughout this time, the only records EPA provided were some documents identifying samples from Five Rivers only. EPA's Pesticide Program Director himself denied that any further records existed.

In July, 1983, shortly after Merrell v. Block was decided at the trial court level, Mike Axline, the attorney handling our case on appeal, obtained some results of our 1979 samples from Dr. Michael Gross, an EPA contract chemist at the University of Nebraska (Lincoln). The results, compiled on two pages labeled "Table VII, Alsea Study Phase II," showed alarming levels of TCDD in sediment and sludge samples, and trace levels in wildlife and in tissues of an anencephalic baby.^{6/} On August 3, 1983, I presented Table VII to the court in my testimony in a related case, Northwest Coalition for Alternatives to Pesticides v. Block, Civil No. _____ (D. Oregon), prompting

5. Mr. Wheeler executed a written agreement with me, still in my possession, in which he agreed that EPA would provide within 90 days analytical results of chemical residues on the body of my four-eyed kitten. Similar promises were made to numerous members of my community in exchange for samples, many of them in my presence. These promises were not kept.

6. See Appendices, pp. 284-85.

considerable publicity and also prompting inquiries from Congressman Jim Weaver.

Two days later, on Friday, August 5, 1983, EPA announced that the high level samples on Table VII were not from Oregon after all, but were instead -- due to a mixup -- from "somewhere in the upper Midwest." This announcement raised several questions: where were the samples from? What happened to the samples from Oregon? Dr. Gross said the samples had been analyzed in 1980; why was such an error not noticed before, and why had EPA not provided the results to us?^{7/}

On Monday morning, August 8, I called EPA, trying to find someone who could provide some answers. I talked to a woman whose name I do not remember -- a secretary or clerk, I believe -- who told me that "the person who's running the show on this one is, Dr. Donald Barnes," and gave me his phone number. I called Dr. Barnes without revealing that I lived in Five Rivers. He was quite jovial and pleasant, and when I told him I was interested in how the wrong samples wound up on Table VII, he laughed and said that actually Mike Dellarco was busy in the next room conducting the initial decoding of the samples "and maybe we'll know pretty soon," or words to that effect.

Dr. Barnes's revelation that the samples were at that

7. See e.g., Chemical Week articles, Appendices, pp. 410-413 (page numbers out of order); see especially pg. 413 ("EPA acknowledges that it knew of the mistake in 1980").

moment in the process of being decoded for the first time raised an even more disturbing question: without first decoding and identifying the origin of the samples, how had EPA known there was a "mixup?" My husband called several officials at EPA -- accusing them of "flying by the seat of their pants" in issuing the unfounded mixup story -- and demanded a retraction. The next day, an EPA press statement was carried by United Press International, acknowledging that the mixup story might not be true.^{8/}

The same day, however, Judith Wheeler filed an affidavit in the NCAP case, reiterating the initial EPA "mixup" story, without revealing where in the upper Midwest the confused samples purportedly came from. Her August 9, 1983, affidavit is appended as Exhibit A to EPA's Summary Judgment brief in this case.^{9/}

Nearly two weeks after announcing the mixup, EPA finally responded to Congressman Weaver's demands for an explanation of the source of the samples, and announced that the high-level samples on Table VII were from Dow Chemical Co. and surrounding rivers in Midland, Michigan.^{10/} Several months later, EPA released two reports^{11/} intended to explain how the Table VII

8. See Appendices, pg. 1.

9. Ms. Wheeler's August 9, 1983 affidavit appears in the Appendices to this affidavit at pp. 189-193.

10. That announcement was apparently made verbally to the press. To my knowledge, no EPA official has ever stated in writing, prior to the most recent affidavit of Judith Wheeler, that the disputed samples are in fact from the Midland area.

11. As a result of the publicity, congressional interest, and

samples were "misidentified" as Alsea Study samples and why the results of analyses on Oregon samples completed in 1980 had not been provided to us despite three years of concerted efforts on our part to obtain them. These reports left our basic questions about the samples and the "mixup" story unanswered. Our FOIA action -- requesting information concerning the Oregon samples and epidemiological data, the Region V (Midland) samples, and other relevant material -- sought information that could answer such questions.

EPA'S RESPONSE TO OUR FOIA

EPA's release of documents has been sporadic and reluctant from the beginning. Paul Merrell's FOIA and discovery requests in 1981 resulted in only a few sample collection "lists" of Five Rivers samples; following Congressman Weaver's 1983 inquiries, we received several packets of records cited in the OPP report; Mike Axline's February 29, 1984 request resulted in several more packets, and after we filed suit in November, 1984, the large boxes started arriving.

EPA has provided some 34,000 pages of documents in response to our request. Well over two-thirds of these were heaped in large boxes, each box containing from 2500 to 3000 pages

transparent mishandling of the samples, two internal reviews were initiated by EPA, one by its Office of Pesticide Programs (OPP), the second by its Office of Inspector General (OIG).

with no indication -- in most boxes not even a cover letter -- of what material is in the boxes, what categories of our requests the documents are responsive to, or from what office or whose file the documents came. I have maintained all documents in the order received. With the assistance of a neighbor, I have individually numbered and read every page, reviewing most pages two or more times. I have prepared approximately 900-1,000 cross-referenced subject and author index cards, roughly indexing the jumbled material received from EPA and from other sources, as discussed below. My husband and I have prepared in excess of 200 pages of referenced memoranda comparing EPA's version of events to their documents. This has been a thankless task that has already consumed several thousand hours of tedious work.^{12/}

In addition, I have also reviewed over 10,500 pages of relevant EPA documents obtained from sources other than EPA. These include documents from Mark Van Puten, attorney for National Wildlife Federation in Ann Arbor, Michigan,^{13/} and from Mrs. Diane Hebert, a concerned resident of Midland, Michigan, who is also coordinator of the Environmental Congress of Mid-Michigan and Regional Toxics Coordinator for Greenpeace, an international

12. I object personally to the responsible officials' cavalier attitude toward the prohibitions against such jumbling of discovery documents, set forth in Fed. R. Civ. P. 34. See especially 1980 Rules Advisory Committee Note on Rule 34(b).

13. Mr. Van Puten is representing several national organizations in a lawsuit intended to force EPA to adopt standards for the regulation of dioxins, rather than continuing to rely on its informal "level of concern," discussed infra.

environmental membership organization. These documents, upon information and belief, were released by EPA to others in response to FOIA requests. I have also reviewed some 8,000 pages of documents from EPA's 2,4,5-T administrative cancellation hearing record, supplied by the Northwest Coalition for Alternatives to Pesticides, an intervenor in that action and party to this action. I have also reviewed several thousand pages of relevant Congressional committee investigation reports, relative to dioxin and EPA's attempts to regulate it. Numerous documents in the above material were directly responsive to our FOIA request, yet were not provided to us by EPA.

Having reviewed all the material provided by EPA as well as that obtained from other sources, I have concluded that the claims made by EPA to this Court -- and in the EPA reports on the handling of the Five Rivers samples -- are contradicted by the evidence EPA has provided. Further, I am in possession of documents that are directly responsive to our FOIA request but have not been provided.

EPA'S STORY

The evidentiary basis for EPA's conclusion that the dangerously high levels of dioxin reported on Table VII came from Midland, Michigan, rests entirely on the hearsay affidavits of Judith Wheeler and two pages purportedly from Dr. Aubry Dupuy's shipping and receiving logbooks at EPA's Bay St. Louis,

Mississippi, laboratory.^{14/} EPA's explanation for its failure to provide results of the samples for three years rests solely on a claim that there was a "mixup," and that the results of these samples -- which were absolutely critical to an ongoing cancellation proceeding -- somehow got "lost in the shuffle."

Pared to its essentials, EPA's story of events surrounding Table VII can be fairly summarized as follows:

1. The "Five Rivers Study" and the "Alsea Study" are two separate entities, and only Five Rivers samples were gathered in the summer of 1979;^{15/}
2. Dr. Gross mistakenly included 15 EPA Region V sample results in "Table VII: Alsea Phase II Project" of his June 24, 1983 "Final Report;"^{16/}
3. Dr. Gross's "error" was not noticed until August 5, 1983 because no one at EPA had seen Table VII before it was introduced in the NCAP case;^{17/}
4. The sample results reported by Dr. Gross in 1980 were "lost in the shuffle" along with the 2,4,5-T cancellation proceedings, due to reorganization and lack of coordination among

14. See Dupuy's log pages at Appendices, pp. 57 and 71.

15. See note, EPA's summary judgment brief at pg. 3.

16. The fifteen samples were numbered UN 159 through 173; see Ms. Wheeler's affidavit in Appendices, pp. 189-193.

17. Wheeler affidavit, Appendices pp. 189-193.

different EPA programs dealing with dioxins. ^{18/}

DISCUSSION

EPA's mixup story can not withstand scrutiny even if EPA provides more records. Whether or not the samples in question were in fact from Midland -- and not from the Alsea area as stated on Table VII -- numerous samples from the Alsea area are unaccounted for, and EPA has clearly withheld numerous responsive records relevant to the Midland samples. Furthermore, EPA's explanation of events is so absurd as to call into question the integrity of responsible officials.

The notion that EPA might "lose track" of the 2,4,5-T cancellation proceedings and the samples on Table VII, part of the major agency pesticide regulatory effort in the late 1970's, is doubtful at best. It is not surprising, therefore, to learn that the agency's version of events does not comport with the evidence.

EPA HAS WITHHELD CRUCIAL RECORDS OF THE ALLEGEDLY 'MISLABELED' REGION V SAMPLES

EPA has not documented that the supposedly "mislabeled" samples on Table VII are from Region V, and has not provided records relating to those samples, whether those are the samples

18. See OIG Report, exhibited to EPA's summary judgment brief, pp. 101-105, which also presents the same basic version of these events.

on Table VII or not.

EPA claims that fifteen of the samples on Table VII are not from Oregon, but are instead from Dow Chemical Company's Midland, Michigan facility and the surrounding area (EPA Motion for Summary Judgment, memo pg. 5). The sole basis for this claim is an affidavit submitted by EPA attorney Judith Wheeler in NCAP v. Block on August 9, 1983 (the same day EPA issued a press statement suggesting that might not be the case).^{19/} This category of our FOIA request was intended to obtain EPA's evidence supporting Ms. Wheeler's claim. EPA has not provided documents proving that claim. Either EPA's story about the origins of those fifteen samples is untrue, or, if it is true, extensive records must exist and are being withheld.

The records I have reviewed contradict EPA's "mislabeling" claim.

THE MIDLAND SAMPLES' HISTORY

In mid-1978, Dow Chemical Company reported to EPA and to the State of Michigan tests showing alarming levels of TCDD in fish from the Tittabawassee River in the vicinity of and downstream from Dow's plant. In the same report, Dow found no measurable levels of TCDD in river sediments from the same

19. Appendices, pg. 1. (Associated Press August 9, 1983 wire report) ("Although he said Friday that the samples in the study introduced in court had been mislabeled as being from Oregon, [EPA spokesman] Brashear said Monday that he was not sure that was the case.")

area.^{20/} EPA Region V officials immediately initiated their own study of dioxins in fish and river sediments from the same area and same specific locations as the Dow study; stressing the critical importance of these samples, Region V officials arranged for necessary lab work to be done at Bay St. Louis and Research Triangle Park with top priority status.^{21/} All samples were to be split with Dow.^{22/}

During the summer and fall of 1978, EPA Region V officials obtained samples of fish and sediment from Midland-area rivers, and water and sludge "in-plant" samples from Dow premises.^{23/} These samples were sent to Aubry Dupuy at Bay St. Louis with chain-of-custody forms designating Research Triangle Park as their ultimate destination; the sample collection

20. See Appendices, pp. 2-21 (Dow Chemical June 30, 1978 letter to Karl Bremer, EPA Region V, and attached Dow June 9, 1978 "letter report," both attached to Bremer's August 4, 1978 request for analyses of Midland samples). See also Appendices, pp. 22-30 (Michigan Dept. of Natural Resources Briefing Memo; September, 1980 chronological review of "Dioxin Problem at Dow Chemical Co." from 1977 to 1980). Although released to others by EPA, these documents were not provided to us.

21. See Appendices, pp. 31-36 (January 19, 1979 letter from EPA Region V Official James O. McDonald to Assistant Administrator for Toxic Substances Steve Jellinek) ("This matter is one of the most important enforcement cases in this Region and one which is being closely monitored by the public.").

22. See Appendices, pp. 40-64, particularly pg. 41 ("Dow Chemical will provide containers for duplicate stream sediment and in-plant samples"); pg. 47 ("Split samples with Dow Chemical"); pg. 48 ("Split samples from dredge with Dow Chemical"). We have not been provided results of Dow's analyses.

23. See Appendices, pp. 22-48.

instructions and protocols repeatedly emphasized that strict chain-of-custody was to be maintained through Research Triangle Park, as the sampling was part of an enforcement effort under the Clean Water Act.^{24/} These samples were tracked in EPA's dioxin monitoring system under Accession Number 4, which included fifteen Dow-Midland water, sediment and sludge samples.^{25/}

In early April, 1979, Research Triangle Park reported its final analyses for all samples taken from the Midland area, noting that its report "completes the analyses for 2,3,7,8-TCDD on all environmental samples received from EPA Region V."^{26/} The Research Triangle Park reports on these samples record low levels of TCDD in some sediments and sludges, but recommend that the results were "highly questionable . . . due to [a] documented laboratory contamination problem" at Bay St. Louis.^{27/} The

24. See Appendices, pp. 22-48. See also Appendices, pp. 74 (EPA Regional Official Karl Bremer memo ("Primary authority for the sampling program was the Clean Water Act"). Region V chain-of-custody forms prepared for these samples included two spaces for signatures on receipt at Research Triangle Park. We have not received copies of these forms with any signatures from any analytical laboratory. See chain-of-custody forms at Appendices, pp. 49, 52 (signed by Regional officials) pp. 65-68 (signed by Bay St. Louis officials).

25. See e.g., Appendices, pp. 144, 149.

26. See Appendices, pp. 72-78. Bremer (see pg. 74) identifies these RTP samples as the same samples on his list (pg. 75), although the Research Triangle Park samples (pg. 77) are coded with EA05 numbers instead of EA06 (pg. 75); we have received no documents that explain this discrepancy.

27. See Appendices, pp. 72-78, 150-162 (Harless RTP reports).

Research Triangle Park reports were exhibited in the 2,4,5-T cancellation hearing record and discussed by EPA analytical chemist Robert Harless under cross examination.^{28/}

In early August, 1979, the results of all the Dow-Midland samples -- including at least fifteen water, sediment and sludge samples -- were summarized in the files for Accession No. 4, recording the status of the project as "Completed."^{29/}

Duplicate analyses of at least several of the samples split with Dow in accordance with the sampling plan were provided by Dow to EPA.^{30/}

28. See, e.g., In re: Dow Chemical Co., et al., USEPA FIFRA Consolidated Docket Numbers 415 et seq., Transcript at pp. 2336-40; 2404-23 (Harless cross-examination). Harless distinguishes between Dow/Midland samples sent by Bremer of Region V and Dow/Midland samples sent by Dupuy for the Dioxin Implementation Plan. The distinction is not fully explained, certainly not by any documents EPA has provided to us. On transcript pg. 2371, however, is a reference to a "Dow discovery trip to RTP" (Research Triangle Park; the possible irregularities in these sampling identities and sources prompted the Justice Department to take discovery on Dow concerning these samples in EPA's Clean Water Act suit against Dow in early 1984; see Appendices at pp. 166-167. No answer was ever provided by Dow because Dow immediately settled the lawsuit. See Appendices pg. 409 (Wall Street Journal article). EPA has provided no records from its attorneys in the Dow suit forming the factual basis for the discovery request.

29. See Appendices at pp. 169-73;

30. See Appendices at pp. 74. Bremer said, "[i]nformation available to us apparently indicates that duplicate analyses of several samples show no detectable levels of dioxin while the original analyses showed positive values." (Emphasis added.) The only duplicate samples recorded were those provided to Dow. We have not been provided with any of these records.

THE 'MISLABELING' STORY

In 1983, shortly after EPA identified the Midland samples as those "mislabeled" on Table VII, EPA Region V officials compiled a list of the fifteen 1978 Midland samples;^{31/} the Region V sample identification numbers and sample descriptions on that list correspond with the "Dow numbers" and sample descriptions in the pages of Aubry Dupuy's log book at Bay St. Louis,^{32/} where the samples were sent for extraction.^{33/} Dupuy's log pages are the linchpin of EPA's "mislabeled" story, because they are the only evidence linking the Midland samples with Dr. Gross or Table VII. Dupuy's log-book pages, however, are so internally inconsistent and so directly in conflict with contemporaneous records of the Midland samples as to raise serious questions about the integrity and accuracy of Dupuy's records.

1. Dupuy's purported log-sheets for the 15 Midland samples record receipt on October 31, 1978, but nowhere record shipments of these samples or extracts to Research Triangle Park, which clearly had not only received the samples but had completed

31. See Appendices, pg. 75 (Bremer's list).

32. See Appendices, pp. 57; 71.

33. To test for dioxin, samples are first prepared by extracting the fraction that would contain dioxin; this procedure is often performed at Dupuy's lab and the sample extractions are then sent to other labs (e.g., Dr. Gross's or Research Triangle Park) for the actual analysis. Only a very few laboratories in the U.S. are capable of detecting TCDD at its low, but still toxic levels in the environment.

analyses of them and reported results by August, 1979 -- before most of the Alsea Phase II or Five Rivers samples were even gathered. Dupuy's purported log-sheets show only that these samples were shipped to Dr. Gross at University of Nebraska in mid-1980. If in fact the Region V samples were sent to Nebraska, rather than their intended destination (Research Triangle Park), where did the Research Triangle Park samples come from?

2. Dupuy's purported log-book pages indicate that all of several samples were shipped to Dr. Gross in separate shipments of one-half each. Yet Research Triangle Park reported having received and analyzed these same samples over a year earlier. ^{34/} If Dr. Gross was analyzing the same samples, more than 100% of these samples would have to exist, a physical impossibility.

3. Dupuy's purported log pages on the Region V samples record shipping portions of three samples more than two weeks ^{35/} after Dr. Gross reported his results for these samples.

4. The enormous discrepancy between Research Triangle Park's and Dr. Gross's results for what Region V officials identified as the same samples from Midland strongly suggests that

34. E.g., sample numbers EAO 6S18A; EAO 6S28 on Appendices, pg. 57. Compare to RTP April 9, 1979 report at Appendices, pg. 77 (decoding of samples shipped to EPA-RTP on 2/7/79, identified in Bremer's memo as the same samples).

35. Compare samples UN 166 (EAO6S18A), UN 167 (EAO 6S18B) and UN 172 (EAO 6S28) on Appendices pp. 57 and 71, with Dr. Gross's August 5, 1980 Data Report, Appendices, pp. 177-83.

the two labs were not analyzing the same samples;^{36/} and therefore, that the fifteen numbers on Table VII identified as Midland samples by Dupuy are not in fact the Midland samples identified by EPA regional officials.

CONCLUSION ON MIDLAND SAMPLES

The records I have reviewed demonstrate unequivocally that the 15 Midland samples EPA claims were mistakenly listed on Table VII were analyzed and reported by Research Triangle Park more than a year before they were allegedly sent to Dr. Gross by EPA. EPA's story about the origin of the 15 Table VII samples rests solely on Dupuy's purported log-book pages. The numerous discrepancies outlined above strongly suggest that these log-book

36. For the only five Research Triangle Park samples for which decoding information has been provided, the sample results are compared here:

UN #	UN result (ppt)	RTP result (ppt)
159	ND (non-detect)	37 *
160	120	13 *
165	-- (trace)	5 *
166	220	ND *
172	--	ND *

* Discard results "due to documented problems with laboratory contamination."

Information derived as follows: Column One is from Appendices, pg. 71. Column two is from Appendices, pg. 284. Column three is from Appendices, pp. 161; 78.

Assuming the samples were the same, the results at RTP should have been higher levels than Nebraska's, rather than lower, due to the contamination problem. Certainly they should not be so wildly variant in any event.

pages are inaccurate^{37/} or have been doctored.

EPA has not provided the following information on the Midland samples crucial to the "mislabeling" story:

1. ~~Complete~~ Complete Chain-of-custody -- as required in the Midland sample protocols, sample collection instructions, and Region V chain-of-custody forms -- for the Midland samples sent to Research Triangle Park;^{38/}

2. Complete analytical results and decoding for all of the Midland samples analyzed by Research Triangle Park as of August, 1979;

3. All records relating to Dow's duplicate analyses of those samples and relevant communications between Dow and EPA;^{39/}

4. Other documents that would resolve or explain the numerous discrepancies in EPA's story outlined above.

Until EPA provides such information, its claim that fifteen samples on Table VII are from Midland is without foundation.

37. The Dupuy log-book pages are neither page-numbered nor dated, and no identifying log-cover-sheets or surrounding pages have been provided that would prove these pages were actually written during the same time period the Midland/Dow samples were collected and sent to Dupuy; if these pages reflect routine record-keeping procedures at Dupuy's lab, it is curious indeed that no comparable log-sheets have been produced on any of the Oregon samples.

38. See note 24, supra. Surely EPA can locate the chain-of-custody forms that were required to accompany the samples from their gathering through analysis, signed by the laboratory officials who performed the analyses.

39. See note 22, supra.

THE ALSEA STUDY

EPA insists that "the Agency does not consider the Five Rivers samples, collected from the summer of 1979 to early 1980, to be part of the Alsea Study . . . This Motion is based on the interpretation that the Alsea Study and the Five Rivers investigation are separate entities." ^{40/} EPA's January 15, 1986

40. EPA's Office of Inspector General's report expanded this perpetual "nomenclature" problem with its own bewildering explanation:

The fact that there was not a separate and identifiable Five Rivers investigation could be called a nomenclature problem. Several things contributed to this problem. The Alsea Study was conducted in two phases and began to be referred to as the 'Alsea I' and 'Alsea II' studies. Subsequently, the Five Rivers incident began to be referred to as either the 'Five Rivers Study' or the 'Five Rivers Investigation.' Persons outside EPA sometimes referred to both of these communities as being 'the Siuslaw National Forest area.' Added to this is the fact that some EPA personnel involved in the document searches in response to information requests were not aware that Alsea and Five Rivers were in the Siuslaw National Forest. This nomenclature problem resulted in EPA's confusion and delay in responding to requests for information in relation to the 2,4,5-T and Silvex cancellation hearings and in relation to litigation in which it is presently involved. [Merrell v. Block.]

OIG Report, pg. 4 (exhibited to EPA's motion for summary judgment) (emphasis added). EPA has produced a new "nomenclature" to suit its purposes at every turn of this interminable FOIA action since August 5, 1983. This affidavit therefore addresses the statement made in EPA's summary judgment motion memorandum quoted in the text above. As will be seen in this affidavit and its exhibits, there never was any "nomenclature problem," but simply a convenient and continuing excuse for not providing requested

"Memorandum in support of motion for summary judgment" at page 3
(note) (emphasis added).

EPA HAS NOT PRODUCED ALL RECORDS OF ALSEA STUDY SAMPLES AND
EPIDEMIOLOGICAL DATA COLLECTED IN OREGON
BETWEEN MARCH 1979 AND EARLY 1980:

The Alsea Study involved both epidemiological data on spontaneous abortions and analyses of environmental and human samples to correlate actual TCDD exposure to the epidemiological spontaneous abortion index. The Alsea Study area from which the epidemiological data and samples were drawn covered 1,600 square miles of western Oregon, roughly encompassing the Siuslaw National Forest and including the Five Rivers Valley in the Alsea River watershed.^{41/}

At the time of the 2,4,5-T emergency suspension, only the preliminary epidemiological portion of the study was completed. The first series of samples were in the process of being analyzed.^{42/} The protocol for the Alsea Study called for

records.

41. See Appendices, pg. 236 (Dr. Keefe's affidavit in cancellation proceedings); see also Appendices, pp. 194-218 (study plan).

42. See preceding note. See also Appendices, pp. 223-24 (EPA 1985 "Health Assessment Document for PCDD's;" pg. 221 (Science article) ("The EPA is just now beginning to analyze more rigorously samples of soil, water, deer [sic] and elk meat, and human mothers' milk from Alsea. *If TCDD dioxin turns up in any of them, EPA will have little difficulty upholding the suspension and perhaps banning the herbicides forever*") (emphasis added). See also OIG Report, pg. 3 ("In February 1979, EPA published a report

epidemiological data to be gathered through 1980; and at least three more series of samples, to be correlated to the epidemiological data.^{43/} This effort was to continue during EPA's cancellation proceedings on the herbicides 2,4,5-T and Silvex.

Dr. Gross reported results of 36 samples on Table VII, of which EPA has identified 21 as "Five Rivers" samples. Despite EPA's repeated assertions that Dr. Gross "mislabeled" the remaining 15 samples,^{44/} no revised or corrected version of Dr. Gross's Final Report has ever been produced. The only version of Table VII produced under Dr. Gross's name and direct authority is the Table VII in his June, 1983 report listing 36 samples from the "Alsea Phase II Project."^{45/} EPA has not provided documents

on the relationship between herbicide usage and spontaneous abortions from its Alsea Study, even though environmental sampling and analysis had not been completed" (emphases added).

EPA's summary judgment memo is simply wrong in limiting the term "Alsea Study" to the preliminary and incomplete report excerpted in its February 29, 1979 emergency suspension order. EPA Summary judgment memo, pg. 3, footnote.

43: See study plan, Appendices, pg. 213.

44. See e.g., Judith Wheeler's August 9, 1983 affidavit, Appendices, pp. 189-191.

45. On August 31, 1983, Dr. Gross wrote to Michael Dellarco, EPA Dioxin Monitoring Program Coordinator, to "clear up the final report for 1979-80. Would you review it and be sure the tables are correct . . . When we receive your suggestions, we will output a new copy." Appendices, pg. 225.

Mr. Dellarco's reply of October 6, 1983, is curiously ambivalent: "It is my understanding that there may have been a clerical error in assigning some sludge samples from Region V to

proving that any of these samples came from anywhere but Oregon. Such Alsea Phase II records as EPA has provided show conflicting numbers of samples gathered for that study, ranging from 20 to as many as 66. Numerous records suggest not only that all the samples on Table VII came from Oregon, but also that more Western Oregon samples exist for which EPA has not provided records.

THE EPIDEMIOLOGICAL DATA

EPA has provided records of epidemiological data from the years 1972-1977; no epidemiological data for the years 1978, 1979, or 1980 have been provided. Numerous records -- including ^{46/} the only sworn statements on the subject -- establish that epidemiological records exist at least for 1978 and 1979, and indeed, the telephone notes of EPA attorney Judith Wheeler herself indicate that such records were provided to Dow Chemical Company, ^{47/} which spent two and a half months reviewing them. Surely if

the Five Rivers Study (Table VII of your report)." Appendices, pg. 226. Apparently Dr. Gross never saw fit to "output a new copy" of his report; if he did so, it was not provided to us.

46. See Keefe affidavit from 2,4,5-T hearings. Appendices, pp. 243-44. Curiously, Ms. Wheeler has listed in her Vaughn motion two draft pages of Keefe's testimony, as well as his curriculum vitae, which was attached to his testimony and entered as a public document in the 2,4,5-T record; see also Griffith testimony, pg. 248.

47. See Judith Wheeler telephone notes at Appendices, pg. 254. Ms. Wheeler has apparently put Dr. Keefe at CSU to inordinate trouble to locate and reconstruct computer tapes of this data, when clearly the same material was in EPA's possession, was critical to the 2,4,5-T proceedings, and was provided to Dow as

that data can be provided to Dow Chemical Co., it must exist; EPA should at least acknowledge that fact and advance its arguments for withholding.

THE ALSEA STUDY SAMPLES

EPA has provided us with records of the first round of samples collected for the Alsea Study in late January-early February, 1979, by Bill Wheeler of Colorado State University.^{48/} EPA would have us believe that these samples -- consistently tracked as "Alsea Phase I" throughout EPA records -- are the only samples EPA ever collected for the Alsea Study. This is absolutely not true.

By May, 1980, Mr. Wheeler had "revisited the study area on four occasions since February 1979 to obtain additional

well as to consultant Robert Duncan at University of Miami. See Keefe testimony in Appendices at pp. 243-244. Furthermore, if Ms. Wheeler has accurately described the tapes now provided, they are not only missing the 1972-73 data, they are also missing the 1978 through 1980 data.

The kinds of information included in Keefe's testimony (and presumably replicated in his draft testimony listed as withheld in EPA's Vaughn showing) strongly suggest that EPA is refusing to provide critical documents not because they are legally exempt, but instead because they disprove EPA's "mixup" and "lost in the shuffle" stories. Ms. Wheeler may indeed have conducted a diligent and thorough search for documents, as she claims; it is abundantly clear, however, that she is being extremely selective in what she chooses to provide.

48. See Keefe affidavit, Appendices, pg. 241. See also Table III of Gross's final report and his discussion of it as "Oregon Water and Sediment: Alsea Phase I samples." Appendices, pp. 278-79; 259.

environmental samples" for the Alsea Study.^{49/} Numerous EPA records list these "Alsea Phase II" samples under Accession number 12, "Hearing Support Activities" for the 2,4,5-T cancellation hearings, and several EPA officials discussed them in testimony^{50/} and under cross-examination in those proceedings.

EPA has provided records of samples collected from

49. See Keefe affidavit, Appendices, pg. 243.

50. see Griffith cross-examination transcript:

JUDGE FINCH: How many different kinds of samples were obtained during the Alsea study in both phases?

* * *

THE WITNESS (Dr. Jack Griffith): Some wild animal samples were obtained; some water samples were obtained; I believe some soil samples have been obtained; sediment samples have been obtained; I believe mothers' milk samples have been obtained . . ."

Appendices, pp. 251. From numerous references, it is clear that other witnesses -- e.g., Dellarco, Keefe, etc. -- also discussed these samples under cross-examination; EPA has not provided copies of any transcripts or direct testimony discussing these samples.

See also Appendices, pg. 219 (Charles Miller July 5, 1979 "Oregon Study/2,4,5-T" memo instructing ESP to "[c]ollect soil sediment samples from water supplies of individuals suffering spontaneous abortions. Other samples, such as field mice, could also be obtained if possible. This effort should be initiated as quickly as possible."

Dow Chemical emphasized that "the Alsea II Report is the centerpiece of the EPA suspension decision, and thus will be the centerpiece of the suspension hearings . . ." Appendices, pp. 441. Dow's sharpest criticism of the study published in the February, 1979 suspension order was directed at the lack of exposure data, and Dow fought bitterly to obtain EPA's sampling (exposure) records under discovery. See e.g., Appendices, pp. 440-455.

summer 1979 to early 1980 from Five Rivers only, clearly identifying them as separate from the Alsea Study. EPA motion for summary judgment, page 3 note. EPA has provided no records of samples collected in the study area by Mr. Wheeler "on four ^{51/} occasions since February 1979" as part of the Alsea Study. Numerous records identify at least 20 water and sediment, and an unspecified number of wildlife samples designated Alsea Study Phase II for 2,4,5-T hearing support. ^{52/}

EPA documents establish unequivocally that Mr. Wheeler, in accordance with the protocols for the Alsea Study, collected samples designated Alsea Phase I and Alsea Phase II as an integral and crucial part of the Alsea Study in support of the 2,4,5-T proceedings. These samples, Science magazine noted, were the potential "smoking gun" that could establish the causal link between human illness and dioxin-herbicides suggested by the epidemiological data. ^{53/} Our FOIA request sought records of all

51. See Appendices, pp. 243, 249, 251 (Keefe and Griffith testimonies).

52. See e.g., Phase II tracking records in Appendices at pp. 372; 375; 381; 384; 219; 144; 148-49. See also Dr. Miller's note to Dr. Davido (researchers from CSU already "on site collecting field samples for analysis of 2,4,5-T and TCDD" when letter from Five Rivers residents arrived. Appendices, pg. 317. In an August, 1984, telephone conversation with me, Bill Wheeler emphasized that he was most definitely in Oregon collecting samples for the Alsea Study in the summer and fall of 1979. In another phone conversation about that time, Robert Duncan confirmed this, exclaiming, "We had people out there collecting samples all over the place."

53. See Science article, Appendices, pp. 220-21; Griffith

samples collected in the Alsea Study area; EPA has provided no records of the samples collected by Mr. Wheeler between February, 1979, and May, 1980, for the Alsea Study.^{54/} Instead, EPA has selectively produced only records on the "Five Rivers investigation," which, according to Judith Wheeler, was a separate project altogether. Defendants' Motion for Summary Judgment at pg. 3.

EPA'S EXPLANATION FOR THE FAILURE TO NOTICE DR. GROSS'S 'ERROR' UNTIL AUGUST, 1983, IS DEMONSTRABLY INACCURATE

EPA's Memorandum relies solely on attorney Judith Wheeler's August 9, 1983, affidavit to support its claim that "[a]s soon as EPA reviewed [Table VII], it became apparent to the Agency that the table included some samples which were not in any way related to Oregon." (EPA summary judgment motion, memo at pg. 5). Ms. Wheeler's 1983 affidavit states that EPA's "review" of Table VII occurred on August 5, 1983, the same day Aubry Dupuy informed Ms. Wheeler's office that fifteen samples on Table VII "did not originate from the Oregon area."

A brief chronology demonstrates that both EPA's brief and Ms. Wheeler's affidavit are inaccurate:

1. By the end of 1980, Dr. Gross had completed and

testimony in Appendices at pp. 249-50; 251.

54. Such records clearly exist. See notes 51, 52, supra; see also Fentiman notes, Appendices, pg. 328.

reported his analyses of the samples included on Table VII.

2. From early 1981 until fall 1983, EPA refused to provide Dr. Gross's results to us under FOIA or discovery, or through congressional inquiries, although EPA attorney Linda Fentiman had clearly identified such records as responsive to our requests.^{55/}

3. On June 15, 1983, EPA attorney Judith Wheeler prepared a draft letter to Assistant U.S. Attorney Tom Lee, counsel of record for defendants in Merrell v. Block, in which Ms. Wheeler "outlined the background of the Five Rivers investigation."^{56/} Copies of Dr. Gross's 1980 data reports from the University of Nebraska were appended to Ms. Wheeler's draft letter as Exhibit C-8, "as well as a Table showing the results of the analyses (Exhibit C-9) . . ." Exhibit C-9 to Ms. Wheeler's draft letter is a copy of Dr. Gross's Table VII with the pages numbered 13 and 14 and a partially-deleted caption for "Table VIII" at the end.^{57/}

4. On June 24, 1983 -- nearly two weeks after Ms. Wheeler's draft letter was prepared -- Dr. Gross submitted his

55. See EPA attorney Fentiman's notes, Appendices, pp. 322-328. Four of those pages, 323-26, are claimed exempt in EPA's Vaughn motion but have already been provided. See also Colleli memo and attachments in Appendices, pp. 319-321; contract notes of Fentiman, Appendices, pp. 329-31.

56. See Appendices, pp. 174-88 (Judith Wheeler June 16, 1983 draft letter).

57. See Appendices, pp. 187-88; see also Vaughn index for Ms. Wheeler's final copy of this letter, dated July 6, 1983.

"Final Report" to EPA; the page numbers for Table VII in this June 24, 1983 report are 31 and 32. Table VIII does not begin until ^{58/}the following page on the final report.

5. In late July, 1983, Dr. Gross mailed our attorney Mike Axline a copy of the same Table VII that appeared in his June final report, page numbered 31 and 32. It was this version of Table VII that I submitted to the NCAP court on August 3, 1983.

6. On August 9, 1983, Ms. Wheeler filed her affidavit indicating that EPA had not received or reviewed Dr. Gross's final report or Table VII until August 5. Attached to Ms. Wheeler's affidavit was not a copy of the Table VII from Dr. Gross's June report, however, but a copy of the earlier Table VII appended as Exhibit C-9 to Ms. Wheeler's June 16 draft letter, with page numbers ^{59/}13 and 14.

7. Ms. Wheeler's own notes from the time period of her August 9 affidavit establish that she was well aware of the discrepancy in page numbers for Table VII, which she attributes to its being a "Computer Generated Table -- place in report changed ^{60/}as report was finalized."

Unquestionably, EPA -- and most significantly Ms.

58. See Appendices, pp. 284-85, Gross's final report.

59. See Appendices, pp. 192-93, Judith Wheeler's August 9, 1983 affidavit; compare to Appendices, pp. 187-88.

60. See Appendices, pg. 332 (Judith Wheeler's notes discussing the discrepancy in page numbers for Table VII).

Wheeler herself -- was in possession of a draft of Table VII well before August 5, 1983, and I can only conclude that Ms. Wheeler was being considerably less than candid in saying in her affidavit only that "Dr. Gross's [June 24, 1983] draft final report was received on August 5, 1983 by the Agency's Office of Research and Development" -- without mentioning that she herself had received an earlier draft at least two months previously, and had attached a copy of it to a draft letter to the U.S. Attorney responsible for Merrell v. Block.

We requested all earlier drafts of Dr. Gross's report under FOIA because it is critically important to know how long EPA was in possession of Table VII before suddenly "discovering" the alleged mislabeling of samples with appalling dioxin levels well above the action level that prompted the evacuation of Times Beach, Missouri, no matter where those samples are from. Certainly at the time Ms. Wheeler attached Table VII to her draft letter in June, 1983, she did so without the slightest indication that the Table VII samples came from anywhere but Oregon;^{61/} it is curious indeed that the "mislabeling" never surfaced until Table VII was made public.

EPA has not provided any earlier drafts of Dr. Gross's final report, not even the draft with in which Table VII appears on pages 13 and 14, which pages were attached to Ms. Wheeler's own

61. See Appendices at pp. 174-76 (Judith Wheeler draft letter to Thomas C. Lee).

affidavit. I am aware of at least three cases into which Ms. Wheeler's August 9, 1983, affidavit has been entered as evidence. In this case particularly, the glaring discrepancy between EPA's claim that no earlier drafts existed and the attachment of pages from precisely such a draft to Wheeler's 1983 affidavit makes ironically true EPA's claim that "Judith Wheeler is clearly the most knowledgeable individual in the agency with regard to the documents and where they might reasonably be located."

EPA HAS NOT PROVIDED RESPONSIVE RECORDS FROM THE CHLORINATED DIOXIN WORK GROUP, RELATED INTERAGENCY GROUPS, OR DONALD BARNES

EPA's briefs and Judith Wheeler's affidavits claim that an adequate search of CDWG's and Donald Barnes's files has been completed and all responsive documents provided to us. This is not true. After extensive review of EPA and CDWG records obtained from sources other than EPA, I am convinced that numerous documents exist that have not been provided, and it is clear to me that EPA is withholding such records because the material in them would conflict with the EPA's version of events surrounding Table VII and failures to provide study results to us from 1981 to 1983.

EPA's OIG report attributes EPA's failure to provide us with records of the Five Rivers and Alsea studies to a "lack of integration within OPTS, between OPP and OTS, and also between OPTS and other EPA offices . . . and poor communication and coordination between the Office of Pesticides and Toxic Substances and the Office of General Counsel." OIG claims also that this

"fragmented administration . . . also impeded the progress of the Alsea Study and the conclusion of the 2,4,5-T and Silvex cancellation action." OIG Report, pp. 101-05, EPA summary judgment brief.

The records I have examined establish unequivocally that OIG's "no-one-was-minding-the-store" explanation is a fiction. EPA's public statements and OIG report omit any mention of the Agency's Chlorinated Dioxin Work Group, an intra-agency body representing all involved program offices and created to perform the very functions that OIG claims were lacking. Voluminous CDWG records -- not provided to us by EPA -- tell a vastly different story about coordination and integration of dioxin-related activities in EPA.

Shortly after EPA issued its emergency suspension of 2,4,5-T in February, 1979, the Chlorinated Dioxins Work Group began meeting on an ad hoc basis to address EPA's conflicting policy requirements on dioxins. EPA's dilemma at the time was that the "unsafe at any dose" dioxin policy, applied to risk-benefit analysis under the pesticide law, was incompatible with other statutes requiring development of enforceable standards for dioxins in air, water, wastes, and non-pesticide products, which required regulation on the basis of safety, rather than risk-benefit analysis. In other words, an honest risk assessment under a cost-benefit statute might trigger mandatory action under other environmental statutes that forbid consideration of economics.

In August, 1979, EPA Administrator Douglas Costle formally established the Chlorinated Dioxins Work Group (CDWG) as "an expansion of the role of headquarters dioxins coordinator." The Work Group's function, Costle emphasized, "will entail lead responsibility for coordinating the 2,4,5-T and Silvex cancellation proceedings, and the dioxins implementation plan." The overall functions of the work group included information exchange and review, regulatory program coordination, and development of regulatory policies, to meet the need for "program coordination" and "focused program integration."^{62/} Administrator Costle specifically mentioned "recent developments in . . . Midland, Michigan (Tittabawassee River) . . . and pending regulatory actions under FIFRA [the 2,4,5-T cancellation]" to^{63/} emphasize the urgent need for "coordinated agency efforts."

At the very time the Alsea Phase II and Five Rivers samples were being collected for the dioxins implementation plan and 2,4,5-T hearings, the CDWG was being created to coordinate and integrate the Oregon sampling with sampling and enforcement activities in Midland, Michigan. Both Midland and Oregon samples are referred to continuously in CDWG records from early 1980 at

62. See Appendices, pp. 482-83 (EPA Administrator July 24, 1979 memo defining CDWG).

63. See Appendices, pp. 97-98 (EPA Administrator August 10, 1979 memo establishing CDWG).

least through 1982.^{64/} It does not take a very cynical mind to surmise that the omission of CDWG from the OIG report was no mere oversight. EPA has provided only a few pages of CDWG documents relating to Oregon samples -- and those only relate to the 1984 follow-up study -- and has provided absolutely no CDWG records relating to the Midland samples. Such records clearly exist, and indeed, we have obtained some of them from other parties.^{65/} For example, the Newport and Waldport, Oregon sludge samples in CDWG's records have not been provided by EPA. See note 65, below. The fact that sludge samples were gathered from the Alsea Study area as well as from the Midland area should not have to be forced from the agency with a crowbar. We have received no records from EPA regarding these samples.

The story such CDWG records tell directly conflicts with EPA's OIG report and the agency's briefs and affidavits in this

64. See Appendices at pp. 98; 109; 144; 347; 349; 350; 379-83; 384-5; 386-7; 388; 389; 390; see also Newport, Oregon, sludge records in Appendices at pp. 340-41.

Newport and Waldport are located within the Alsea Study area, and sludge samples taken from those locations clearly fall under the scope of our request. An adequate search of CDWG records should have produced these records at least, and these sludge samples as well as numerous other samples (marine and estuarine sediments; shellfish, etc.) from the Yaquina Bay (Newport) should have been provided from the Corvallis/Newport Marine Science EPA laboratory, whether or not such samples were part of the Alsea Study, as they were collected within the geographical area identified in our request.

65. All the CDWG records we have obtained have been supplied by parties other than EPA, with the sole exception of a few of Donald Barnes' notes on the single 1984 followup sampling in Five Rivers, and the "Five Rivers, DMP & Me" document, discussed infra.

case.

RECORDS IN DONALD BARNES' FILES

In September, 1979, just as the Chlorinated Dioxins Work Group was formally established, Donald Barnes came to work at EPA in the Office of Pesticides & Toxic Substances and was assigned by OPTS Administrator Stephen Jellinek to "sit in on" CDWG

meetings.^{66/} By the end of the year, he was an active member of CDWG,^{67/} and in early January, 1980 he became co-chairman of the group.^{68/} In this capacity, Dr. Barnes was from that time forward

meeting regularly with the analytical chemists and was actively involved in review and decision-making procedures for all dioxin sampling, including sampling related to the 2,4,5-T cancellation effort -- such as the Pacific Northwest Deer & Elk study and the Alsea Phase II Study -- as well as the Midland, Michigan Study.^{69/}

All of these dioxin sampling efforts were conducted under the

66. See Barnes' "Five Rivers, DMP & Me" document, Appendices, at pg. 402.

67. See Inspector General interview with Barnes on Hernandez affair. Appendices, at pg. 396.

68. See Appendices at pg. 396, (Barnes' OIG interview on Hernandez affair); pg. 402 (Barnes' "Five Rivers, DMP & Me" document).

69. See e.g., Appendices, pp. 402, 396, 347, 349, 379-83, 384-85, 386-87, 388, 389, 390. See especially id. at pp. 415-18 (March 20, 1980 letter from Barnes to analytical chemists indicating that Barnes was meeting regularly with chemists (Gross, Dupuy, Harless, etc.) to review data for the 2,4,5-T cancellation.

direction of the Dioxin Monitoring Program (formerly Dioxin Implementation Plan).

In March, 1981, the files of the entire DMP were turned over to Dr. Barnes to "facilitate" their transfer from the pesticide branch to the Office of Research & Development (ORD).^{70/} During the months Dr. Barnes was in charge of the DMP, a number of relevant events occurred involving both Midland, Michigan and Alsea/Five Rivers, Oregon:

1. In EPA's Region V (upper Midwest) office, Dr. Milton Clark completed a draft report on dioxins in the Great Lakes area surrounding Midland; Dr. Clark's report, drafted in response to inquiries from the Governor of Michigan and pressure from the Canadian government, reviewed the extreme toxicity of dioxin, referring particularly to the Alsea Study and Agent Orange, and traced the Great Lakes dioxin contamination to Dow's doorstep in Midland. Dr. Clark's risk estimate on fish contamination emphasized that the dioxin levels found in Great Lakes fish could significantly increase cancer rates in consumers. During the very months he was in possession of DMP records of the completed Midland and Oregon dioxin samples, Dr. Barnes played a pivotal role in the suppression, alteration, and severe editing of Dr. Clark's report -- including deletion of references to the Alsea Study and to Dow's Midland plant as the source of widespread

70. See Barnes' "Five Rivers, DMP & Me" document, Appendices, pp. 402-08.

dioxin contamination of the Great Lakes.^{71/}

Dr. Clark later explained to a congressional subcommittee that "Dr. Barnes . . . called me and told me that these lines ['all references to the Alsea, Oregon studies'] had to be removed from the report."^{72/}

EPA Acting Administrator John Hernandez explained to Congress that Dr. Clark's discussion of the Alsea Study had been deleted because "[i]t appeared to me that what was in the first part of the report [referring to the Alsea Study] might be at odds with what kinds of conclusions we were going to draw" on the 2,4,5-T cancellation.^{73/}

2. During the same months that Dr. Barnes was engaged in changing the Region V report, EPA and Dow agreed to recess the 2,4,5-T cancellation proceedings in order to settle the matter

71. See OIG summary and typed interview with Barnes, July 14, 1983, Appendices, pp. 391-401; similar interview with Dr. Milton Clark, March 16, 1983, Appendices, pp. 458-462; congressional testimony of Clark and other Region V officials, pp. 463-472.

The Clark and Barnes typed OIG interviews in the Hernandez investigation demonstrate the care and thoroughness which OIG is capable of applying to its investigations; it is discouraging indeed that OIG abandoned such procedures in its Table VII inquiry, particularly its practice of requiring sworn statements. Also, I find it curious that the OIG interviews in the Hernandez affair have been released with no deletions, but the handwritten interviews in the Table VII inquiry are predominantly blank pages because of the massive purging.

72. See Clark's congressional testimony, Appendices, pg. 467.

73. See transcript of Hernandez testimony before House Subcommittee on Investigations & Oversight, Appendices, pp. 456-58.

"out of court." As chairman of the group "with lead responsibility"^{74/} for the 2,4,5-T cancellation proceedings, Dr. Barnes played a central role in this action. While dioxin sample records that proved the basic conclusions of both the Alsea Study and the Region V report (the "smoking gun") were in Dr. Barnes possession, he was actively engaged in editing out of the Region V report all references to the Alsea Study and in reversing EPA's position in the 2,4,5-T proceedings.

3. During these same months, Paul Merrell filed his Complaint in Merrell v. Block, filing also the first of repeated discovery and FOIA requests for all sampling results from the Alsea/Five Rivers/Siuslaw National Forest area. The records Merrell requested were in Dr. Barnes' possession at that time. During the previous year, when the Five Rivers/Alsea Phase II analyses were completed, Dr. Barnes had been given control of all dioxin sampling information in EPA.^{75/} Dr. Barnes maintained in

74. See Appendices, pp. 482-83 (July 24, 1979 Administrator Costle memo) (The CDWG's function "will entail lead responsibility for coordinating the 2,4,5-T and Silvex cancellation proceedings and the Dioxin Implementation Plan") (predecessor of the DMP). See also Appendices, pp. 335-38 (draft Jellinek CDWG briefing document and attachments); pp. 118-24 (CDWG January 1980 briefing document, with attachments).

75. See draft "Summary of the Chlorinated Dioxins Wrok [sic] Group (CDWG) Meeting," April 25, 1980, in Appendices, pp. 477-481. See particularly, pp. 480-81, memo directing "that information concerning planned or actual field sampling and analysis of [TCDD], isomers of chlorinated dioxins or related precursor materials be reported in writing to Mr. Donald Barnes . . ."

See also chart, "The Wonderful World of Dioxins," Appendices, pg. 479, identifying the "Dioxin Task Force" as a subgroup of the

his files much of the information requested by Merrell at least until 1983, yet it was never provided to Merrell.

Ms. Wheeler is demonstrably wrong, therefore, in claiming that neither Dr. Barnes nor CDWG "were involved in any substantive way with the Alsea Study, the Oregon Water and Sediment Study, the Five Rivers investigation, or the Dow samples reported on Table VII." (EPA Reply to Plaintiff's Response on motion for protective order, pg. 14.) Dr. Barnes and CDWG were not on the scene to collect the Oregon or the Midland samples, but most decidedly assumed "lead responsibility" for -- and tight control over public disclosure of -- the lab results for those samples.^{76/}

The few CDWG documents EPA has provided also acknowledge CDWG's and Dr. Barnes' close involvement in the 1984 follow-up sampling in Five Rivers, in which five out of the six samples collected contained dioxin levels up to 78 parts per trillion -- a four-fold increase over 1979 levels from the same site. See pp. 172-83, exhibits to EPA motion for summary judgment. Dr. Barnes

CDWG, reporting to CDWG on "site specific dioxin related issues." This contrasts curiously with Ms. Wheeler's claim (pg. 14, EPA reply to plaintiff's response on protective order) that CDWG's function is somehow limited to "review[ing] selected data and studies upon the request of the Dioxin Management Task Force."

76. See Appendices, at pp. 480-81: "This indicates our present and long term need to promptly inform the Dioxin Sources Sub-Group [chaired by Donald Barnes] of any research task, active or planned which might involve dioxin, prior to public disclosure." (Emphasis added.) This document predates Gross's data reports on the samples listed on Table VII. (In Appendices, pp. 177-186).

concludes in the follow-up report that no further action is warranted because 78 ppt is below the agency's new 1 part per billion "level of concern." Ironically, and more than coincidentally, Dr. Barnes played a key role in developing this "level of concern" as a substitute for enforceable safety standards on dioxin (in direct contradiction to EPA's "unsafe at any level" policy in the 2,4,5-T hearings).

In September, 1982, Dr. Barnes was instrumental in strategic planning for Rita Lavelle's management of the Times Beach, Missouri dioxin crisis, for which the 1 ppb level of concern -- "based on cost and need for immediate action, not total health protection" -- was adopted because it "buys time" and "allows preparation of public for possible change in policy" on dioxins.^{77/} That change in dioxin policy, now reflected throughout federal agencies, traces its origins directly to Donald Barnes and CDWG, a change effected despite the resignations, firings, and criminal prosecutions of numerous political appointees.

There is no question that CDWG -- and Donald Barnes in particular -- have had strict control over public disclosure of all EPA dioxin data since well before our first FOIA and discovery requests were filed in the spring of 1981, when Barnes himself was in possession of the very information we requested. The

77. See September 24, 1982 briefing document for Rita Lavelle on Region VII Dioxin Issues, Appendices, pp. 473-76.

information we requested has to this date not been provided.

CONCLUSION

It was well-known in the regulatory community that 2,4,5-T was about to come back on the market at the time we finally obtained Table VII in 1983. Shortly afterward, Dow Chemical Co. and EPA -- on the same day -- announced the final cancellation of registrations for herbicide 2,4,5-T, ending Dow's decade-long, multi-million-dollar battle to defend its product, because "company officials recently came to believe that, with the EPA lately under renewed scrutiny, the chances of getting a reversal of the ban were slim." Appendices, pg. 414. We requested all records of communications between Dow and EPA regarding their simultaneous decision to abandon the 2,4,5-T battle, but have received none.

The documents appended to this affidavit establish that:

1. EPA has demonstrably failed to provide records of the Alsea Phase II samples and other samples collected in the study area -- samples crucial to the Agency's longest and most controversial regulatory effort.

2. EPA has demonstrably failed to provide records of the Dow/Midland samples, which involved one of the nation's largest multinational chemical corporations in a bitterly-contested, most important enforcement action.

3. EPA has demonstrably failed to provide responsive

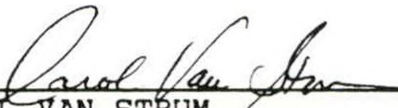
records held in the files of the Agency's Chlorinated Dioxins Work Group and has misled the Court about this Group's central role in the "coordination and integration" of all such records.

4. EPA has demonstrably failed to provide responsive records held in the possession of CDWG Chairman Donald Barnes, and has misled the Court about Dr. Barnes' central role in the development, review, and disclosure of the information we requested.

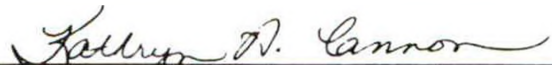
5. EPA has demonstrably failed to provide responsive records held in the possession of EPA attorney Judith Wheeler.

EPA in 1983 admitted to having made "incorrect" statements about the Oregon studies to this Court in Merrell v. Block. Since that time, EPA has not corrected its errors, but compounded them. This affidavit is intended at least to begin unraveling the tangled web of deceit and misinformation EPA has woven around Table VII and the Oregon and Midland samples.

Respectfully submitted,


CAROL VAN STRUM

SUBSCRIBED AND SWORN to before me this fourteenth day of May, 1986.


NOTARY PUBLIC, in and for the State
of Oregon, residing in _____,
County of Lane.

My commission expires 5-1-90.