

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

In re PETITION of ALLIANCE OF NUCLEAR WORKERS ADVOCACY GROUPS; ROCKY FLATS DOWNWINDERS; CANDELAS GLOWS/ROCKY FLATS GLOWS; ENVIRONMENTAL INFORMATION NETWORK (EIN) INC.; ROCKY FLATS NEIGHBORHOOD ASSOCIATION; ROCKY FLATS RIGHT TO KNOW; AND ROCKY MOUNTAIN PEACE & JUSTICE CENTER

**PETITION FOR DISCLOSURE OF CERTAIN DOCUMENTS
PROVIDED TO SPECIAL FEDERAL GRAND JURY 89-2**

Petitioners, by and through their attorney, Patricia A. Mellen of Pat Mellen Law, LLC., hereby respectfully petition the United States District Court for the District of Colorado for the disclosure of certain documents that were provided to Special Federal Grand Jury 89-2 (“Grand Jury.”) This Grand Jury was impaneled to investigate alleged criminal actions by contractor Rockwell International Corporation at the Department of Energy’s (“DOE’s”) former weapons-grade plutonium-239 processing facility, Rocky Flats Nuclear Weapons Plant (“Rocky Flats”) in Jefferson County, Colorado. In support of this action Petitioners state as follows:

INTRODUCTION

The stalemate over the safety of Rocky Flats serves no one. Time alone will not resolve the decades-long dispute between advocates for continued development at or near Rocky Flats and concerned community groups who continue to strongly dispute the risk it still poses to public health and safety.

The crux of the stalemate is a site-wide determination made by federal and State of Colorado agencies at the end of the Rocky Flats “clean-up” that the property now held by the US Fish & Wildlife Service (“FWS”) as the Rocky Flats National Wildlife Refuge (“Refuge”) is “safe” for “unlimited use and unrestricted exposure.”¹

The Rocky Flats managing contractors’ public and business documents that now sit under the seal of Special Federal Grand Jury 89-2 are critical to evaluating the appropriate application of the agencies’ determination. As a preliminary matter in anticipation of further litigation, the Petitioners therefore are seeking disclosure of those documents as necessary and required to reasonably evaluate the remediation methodology and risk analysis used at Rocky Flats upon which the agencies’ determination and imminent threats to the region rely.

The statistically driven “safe” determination was made in support of a decision that no further action was required on that portion of the Rocky Flats property known then as the Peripheral Operable Unit (“POU.”) The complex risk analysis relies in part on models of hazardous substance exposure pathways, the geography of the site, the sites’ planned end use(s), and the data provided by the sampling protocol as actually implemented.

A single determination of “safe” was made for the entire POU property, which the FWS Rocky Flats Refuge website boasts spans 5,237 acres. The “clean-up” also left behind at the center of the Refuge the Rocky Flats Central Operable Unit (“COU,”) which likely will remain a hazardous waste Superfund site closed to the public far beyond any foreseeable future.

This “unlimited use and unrestricted exposure” determination for the POU enabled many domino actions, including the delisting of this property from the EPA’s Superfund National Priority List, the transfer of the property to the custody of FWS to manage as the Refuge, and the

¹ “Unlimited use and unrestricted exposure” is a critical technical designation within the U.S. Environmental Protection Agency’s (“EPA”) Superfund Program where an identified hazardous waste site no longer requires remediation or institutional controls to protect public health and safety.

transfer of a 300' slice of the easternmost edge to the Jefferson Parkway Public Highway Authority ("JPPHA") as a transportation right-of-way ("ROW.")

What is not reflected in this "safe" determination is that no hazardous substance sites on the Refuge ever received any remediation during the "clean-up."² It also does not reflect that the verification sampling protocol provided to the risk analysis for the POU property consisted substantially of five (5) soil samples for every thirty (30) square acre plot on a gridded map, which were then averaged to one sample to represent each square.³

Development advocates, whether government agencies or commercial economic interests, now point to this determination of "safe" as justification that the entire Refuge and the ROW property may be treated as any other parcel of land, as if the openly acknowledged contamination and admitted criminal environmental conduct never happened.

Petitioners, who are concerned community groups, argue that this approach constitutes a dangerous "green-washing" of the site, where the agencies' statistically driven determination is being misapplied and grossly expanded to justify actions far beyond what it reasonably supports.

The documents obtained by the Grand Jury in its investigation of federal environmental crimes become essential to the Petitioners' expectation of litigation to protect their own and the public's health and safety from the misapplication of the "safe" determination and the data, models, and assumptions on which it is based.

The methodology eventually used to identify specific locations within Rocky Flats requiring remediation relied in large part on the managing contractors' documents related to

² See the Colorado Department of Public Health and Environment's website: <https://www.colorado.gov/pacific/cdphe/rocky-flats-current-configuration>: "The Peripheral Operable Unit consists of part of the former security Buffer Zone, **where contaminant levels did not require remediation.**" (emphasis added)

³ Kaiser-Hill, RCRA Facility Investigation – Remedial Investigation/Corrective Measures Study – Feasibility Study Report for the Rocky Flats Environmental Technology Site Appendix A – Comprehensive Risk Assessment, Volume 2 of 15 Methodology and Data Description," June 2006, Attachment 3, p. 3.

hazardous waste disposal, planned, accidental or clandestine. These Individual Hazardous Substance Sites (“IHSS”) were then evaluated and addressed. Outside reviews of the clean-up have raised material questions about its controls and methodology. Ongoing reports of contaminated locations that were never identified, evaluated, or addressed continue to raise the specter that the remediation was incomplete, and that the criteria upon which the agencies’ determinations were based were at best incomplete.

The openly acknowledged contamination of Rocky Flats and the efforts to remediate it date back decades. The remediation project deemed complete in 2006 was one of the first of its kind. Rocky Flats’ highly securitized contaminants and the early timing of the remediation efforts forced the project and its predecessors to develop custom methodologies to locate, characterize, and verify the hazardous waste treatment. At roughly 6,500 acres, the sheer size of Rocky Flats posed unique problems, and the contamination spread from the site to neighboring properties. DOE’s 1995 clean-up estimate was approximately 65 years and \$37 billion.

The cost of this stalemate has been enormous in terms of time, money, and the well-being of the community. The responsible agencies still are defending decisions and analyses made more than ten (10) years ago. Concerned community groups are still hosting demonstrations, speaking out in public, and litigating where necessary in their efforts to keep educating the public and newly elected or appointed government actors about the site’s history and disputed safety. Property owners, depending on their local knowledge and levels of disclosure, must invest in complex due diligence to avoid assuming an unknown risk. Many local governmental bodies are caught in the middle forced to debate the merits and risks of economic development proposals in a public process where they cannot ignore the disputed safety concerns.

The documents gathered by the Grand Jury and now under seal are a unique resource that provides the detailed evidence of whether specific locations or hot spots of unremediated or undiscovered hazardous substances must outweigh a site-wide “safe” determination made for other purposes. While theoretically statistically defensible, that site-wide “safe” determination will be small comfort should an unfortunate construction worker put a back-hoe shovel into a buried 55-gallon barrel of plutonium-laced transuranic waste that eluded the collection of the five (5) samples in that 30-acre quadrant.

The Petitioners now respectfully petition the Court to permit disclosure of the public and business documents currently under seal for Special Federal Grand Jury 89-2.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this petition under 28 U.S.C. § 1331 (federal question) and Fed. R. Crim. P. (6), because Petitioners’ cause arises under the laws of the United States, and because the Grand Jury was impaneled and convened in this judicial district; moreover, civil judicial proceedings brought regarding Rocky Flats regarding federal actions taken there in the past, present or future would be have been and would be brought in this judicial district. In addition, this Court has jurisdiction over this petition because the events occurring during the operation and remediation of Rocky Flats for this petition seeks the disclosure of information occurred within this judicial district.

2. Venue is proper in this judicial district under 28 U.S.C. § 1391(b)(2) because the Grand Jury was impaneled in this judicial district, and the events occurring during the operation and remediation of Rocky Flats for which this petition seeks information occurred within this judicial district. Venue also is property under 28 U.S.C. § 1391(c)(2) because the primary

location places of business of the plaintiffs are within this judicial district, and because venue is otherwise afforded by law pursuant to Fed. R. Crim. P. 6(e)(3).

PETITIONERS

3. Petitioner ALLIANCE OF NUCLEAR WORKERS ADVOCACY GROUPS (“ANWAG”) is a grass-roots organization based in Craig, Colorado. Founded in 2004, ANWAG’s members are advocates, claimants, and individuals with an interest in the health and well-being of nuclear weapons workers and the illnesses caused by their work. ANWAG also works collaboratively with other organizations to monitor the implementation of the Energy Employees Occupational Illness Compensation (“EEOIC”) Program.

4. Petitioner ROCKY FLATS DOWNWINDERS (“Downwinders”) is a non-profit organization based in Denver, Colorado. Founded in 2015, Downwinders advocates on behalf of those impacted by living downwind from the former Rocky Flats Nuclear Weapons Plant near Arvada, Colorado. Downwinders works with local medical providers and research universities to study the medical status of the affected local population, and to educate medical providers and local citizenry to recognize and address Rocky Flats-related medical risks.

5. Petitioner CANDELAS GLOWS/ROCKY FLATS GLOWS is an organization founded in 2013 whose focus remains on raising awareness of the ongoing radioactive dangers at Rocky Flats, while advocating for active and responsible stewardship of the site and the surrounding areas. Candelas Glows/Rocky Flats Glows seeks to keep the memory of the site's history alive while advocating for the open acknowledgment of the hazards still present. They remain committed to working to inform communities both near Rocky Flats and beyond, of risks the site poses to human health, as well as working with local and federal government agencies and officials. In the tradition of nuclear guardianship, they are looking to memorialize the site,

while honoring workers who put their lives on the line when the plant was in operation; and acknowledge the residents in the area who have suffered from the contamination of the site. They hope to convert Rocky Flats from a refuge and recreation area to sacrifice zone that remains closed for the safety and protection of current and future residents and Colorado visitors.

6. Petitioner ENVIRONMENTAL INFORMATION NETWORK (EIN) INC. is a non-profit now based in Lakewood, Colorado. Founded in 1986, formalized in 1991, EIN representatives chronicled and analyzed events and publications related to the Rocky Flats Nuclear Weapons Facility site and remediation since 1986. Avid networkers, archivists, historians and advocates, EIN representatives attended more than nine (9) years of DOE/CDPHE/HAP meetings and provided testimony focused on Rocky Flats contamination, health exposures, risks, and remediation. They hosted meetings with Congressional investigators, consulted for Frontline, Nightline, GMA, other national, international, and local media to keep these issues in the news and call for accountability. They provided key research resources to inform general public, Federal and local government agencies such as the DNFSB, ACNFS, Wolpe Committee, key stakeholders, and other citizen's organizations around the USA near similar sites about the risks and broader issues for the communities from these hazards.

7. Petitioner ROCKY FLATS NEIGHBORHOOD ASSOCIATION ("RFNA") is a grass-roots organization based in Arvada, Colorado. Founded in 2017 by Dale Simpson, who is an EEOICA program claim representative, RFNA brings a satirical and challenging viewpoint to Rocky Flats-related activities in the 80007 zip code. RFNA interacts with local residents to dispel false and manipulative information about the Jefferson Parkway, the Rocky Flats National Wildlife Refuge, local builders/developers, and perspectives of local government leaders.

8. Petitioner ROCKY FLATS RIGHT TO KNOW (“RFR2K”) is a grass-roots organization based in Arvada, Colorado. Founded in 2016 by two concerned grandmothers, this organization has rapidly evolved into a recognized community education and advocacy effort. RFR2K networks with other organizations and individual experts on Rocky Flats-related issues to inform local citizens about risks, particularly risks to children, through monthly meetings, colorful protests, and shoe-leather advocacy.

9. Petitioner ROCKY MOUNTAIN PEACE & JUSTICE CENTER (“RMPJC”) is a non-profit organization based in Boulder, Colorado. Founded in 1983, members of the RMPJC have played key roles in organizing protests, representing the public interest during the Rocky Flats remediation efforts, and resisting the agencies’ efforts to desensitize the public to and normalize the history and dangers of Rocky Flats. RMPJC has played a strong role using peaceful protests, public speaking, and litigation where necessary to protect and educate the public and local governments on the public’s behalf.

RELEVANT FACTUAL BACKGROUND

A. Five of the Imminent Threats at Rocky Flats

10. The Jefferson Parkway Project (“Parkway.”) The Jefferson Parkway Public Highway Authority (“JPPHA”) was recognized in October 2010 as a cooperative contractual agreement between the County of Jefferson, the City and County of Broomfield, and the City of Arvada.⁴ JPPHA’s goal is to construct a section of limited-access highway to bring Denver closer to a complete outer-belt around the metropolitan area. The segment’s current routing runs in part along the eastern edge of Rocky Flats. This land was the subject of a disputed transaction

⁴ Amended and Restated Establishing Contract for the Jefferson Parkway Public Highway Authority, effective October 4, 2010.

in January 2012 where the FWS quit-claim deeded to JPPHA the 300' wide transportation ROW established by the Rocky Flats National Wildlife Refuge Act. The JPPHA member agencies have contributed millions in development funds, along with untold staff time and effort, to bring this project to fruition. JPPHA also needs the Parkway project to meet progress deadlines to unlock \$100 million dollars of related funding contractually owed or escrowed by the operators of the adjacent Northwest Parkway.⁵

Local municipalities who have made multi-million dollar investments through JPPHA cannot be expected to now waive the conflict of interest inherent between this investment and evaluating any threat to public health. JPPHA has openly stated that it plans no soil testing or other safeguards as a defense against any unanticipated unremediated contaminants.

The Petitioners oppose this routing of the Parkway. The eastern edge of Rocky Flats, including but not limited to the Windblown Area, has been well documented to have the most residual contamination from the fires, and to have the “hottest” hotspots. The East Gate ingress from Indiana Street was a main thoroughfare for receipt of nuclear materials and other contaminants.

11. The Rocky Mountain Greenway (“Greenway.”) Announced in 2011 by then Governor John Hickenlooper and then Interior Secretary Ken Salazar, this trail from the Rocky Mountain Arsenal to Rocky Mountain National Park is part of former President Barack Obama’s America’s Great Outdoors Initiative. The original routing of the Greenway went around the east and north perimeter of Rocky Flats along Indiana Street and Colorado Highway 128. While the specific route keeps changing, the first public indication of an intended route through Rocky Flats was announced by refuge manager David Lucas to a surprised audience at a Rocky Flats

⁵ See “SUMMARY OF NORTHWEST PARKWAY CONCESSION AND LEASE AGREEMENT” at p. 3. available at: <http://www.northwestparkway.org/PDF/SummaryCLA.pdf.pdf>.

Stewardship Council meeting in April 2016. Six (6) local municipalities have since coordinated with FWS to obtain \$5 million in US Department of Transportation Federal Highway Administration Federal Land Access Program (“FLAP”) grant funding to subsidize the building of two highway crossings for the Greenway. These municipalities imposed various environmental analyses and/or soil analysis requirements as conditions before committing matching funds to the project. The Town of Superior declined to participate.

Refuge Manager David Lucas has long served as the co-chair of the Greenway project committee. The local governmental agencies that have committed funds to the project again cannot be expected now to waive any conflict of interest to balance the economic commitment against public health and safety.

The Petitioners object to the routing of the Greenway through Rocky Flats. This type of high speed aggressive mountain biking use was never contemplated during the Comprehensive Conservation Planning (“CCP”) process completed in 2005. This use has never been authorized by a Compatibility Determination (“CD”) as required by the National Wildlife Refuge System Administration Act. The FWS has failed to comply with its obligations under the National Environmental Policy Act to assess the environmental impact of this decision.

12. The Rocky Flats National Wildlife Refuge Trail Buildout (“Trails.”) Opened in September 2018 despite pending litigation and public protest, the Rocky Flats Refuge trail system remains in development and dispute. The robust public engagement process that resulted in the 2005 CCP governing FWS’ management of the Refuge approved the selection of a specific set of limited trails. CDs were evaluated and issued authorizing the selected uses documented in the CCP. The Trails CD expired in 2014, and expressly stated that any

reconfiguration of the trails would require significant environmental analysis, which has not happened.

In 2016 Refuge representatives hosted four contentious “Listening Sessions” that both severely restricted public comment and telegraphed the position that the FWS would open the Refuge despite any public resistance. At the December 2016 listening session blue sky input was sought from lay persons with mountain biking interests and no knowledge of the contamination issues to suggest trail routes based on appealing terrain.

The Petitioners object to the build out of the Refuge trail system until a thorough environmental analysis of the routes has been completed. It is undisputed that no remediation was done on the Refuge itself, and any residual contamination, known or unknown, poses a threat to the health and safety of the Refuge visitors, their families, and when tracked back through and to local communities.

13. The Rocky Flats National Wildlife Refuge Visitor Center (“Visitor Center.”) Still in the proposal stage, the current design for the Visitor Center has far exceeded the one approved in the 2005 CCP. The approved Visitor Contact Station was described as:

A small structure (approximately 750 to 1,000 square feet) will house an interpretive display and staff office space. The contact station will be the primary orientation point for visitors where they will collect information about the Refuge. The station also will serve as the meeting ground for guided tours and other Refuge programs. Located outside the main parking area, the contact station will be staffed seasonally (e.g., weekends from May through October), to provide visitor contact with Refuge staff.⁶

Without further public involvement, in August of 2015 the FWS entered into an Interagency Agreement with DOE, in exchange for \$8.3 million, in a completely different location at the Refuge, to:

⁶ U.S. Fish & Wildlife Service, “Rocky Flats National Wildlife Refuge Final Comprehensive Conservation Plan,” April 2005, p. 75.

Design and construction of a Multipurpose Building at or on the Rocky Flats National Wildlife Refuge for the combined benefit of the DOE and FWS missions at the site. The Multipurpose Building will be designed in accordance with USFWS suite of facilities of approximately 3,500 square feet, consisting of-1,500 square feet of lobby and display area, with accessible exhibits designed and fabricated specifically for the Rocky Flat NWR. Multipurpose Building: -150 square feet of exhibit/display storage; -750 square feet of class/meeting room; - 240 square feet for two, 120 square feet for each office for DOE and USFWS use, 860 square feet for restrooms, break room, copy room, mechanical room and hallways; utilities, parking and access to conform with usage; exterior signage; display design/development and construction. DOE and USFWS expect that current FWS, DOE and DOE contractor employees, as well as former DOE/contractor employees. Cold War Museum Board volunteers, and USFWS volunteers will work together to develop and operate the Multipurpose Building, design exhibits/displays, and function as volunteer tour guides. DOE and USFWS will work together to develop and implement the Multipurpose Building operation plan, including a 75-year budget baseline for operation and maintenance; use of volunteers/friends of the Refuge and other potential partnering organizations; USFWS will be responsible for design and construction and have sole jurisdiction of the Multipurpose Building for the purpose of providing education, interpretation, and meeting facilities at the Refuge.

Representatives of FWS have stated that challenges related to the Visitor Center are premature as the design had not yet been completed.

The Plaintiffs oppose the construction of any visitor facilities, and strongly object to the cavalier lack of public involvement in this significant change to the approved CCP plans.

14. The Colorado Oil and Gas Conservation Commission (“COGCC”) Oil and Gas Development Permit Applications. In October 2018, Highlands Natural Resources Corp., a UK-based company, filed location assessment and drilling permits intended to access oil and gas reserves in the area adjacent to and directly beneath Rocky Flats. These permits likely would have resulted in the use of industry standard hydraulic fracturing (“fracking”) techniques to aid production of the minerals. There is significant scientific debate over the relationship between hydraulic fracturing, wastewater disposal, and induced earthquakes. Seismic studies of Rocky

Flats indicate that five faults are in the immediate area; the Golden-Boulder fault, the Valmont fault, the RMA/Derby Source, the Walnut Creek fault and the Rock Creek fault.⁷ The 2006 RI/FS published by Kaiser-Hill openly acknowledges that radioactive and other hazardous substances were left buried underneath Rocky Flats in the form of building foundations, duct work and transportation tunnels. The Rocky Flats Cleanup Agreement standard allowed unlimited residual contaminants below six feet to be left buried in place with no containment.

The Rocky Flats DOE site manager, Scott Surovchak, offhandedly dismissed the possibility that fracking could disturb the residual contamination, though it is unclear what scientific knowledge or experience supports his opinion.⁸ Mike Leonard of the COGCC confirmed at a November 25, 2018, public opposition meeting that, while currently withdrawn, these permit applications could be resubmitted at any time.⁹

The Petitioners oppose any oil and gas production at or near Rocky Flats, particularly any use of hydraulic fracturing that might lead to induced earthquakes. The potential for disturbance of the uncontained residual contaminants, migration of those contaminants to the surface or into the watershed, or unanticipated accidental interaction of these special nuclear or other contaminants with catastrophic results is unacceptable.

B. Rocky Flats “Safe” Designation Sampling Protocol Dispute

15. In September 2006 the Corrective Action Decision/Record of Decision (“CAD/ROD”) was issued by the DOE, EPA and CDPHE documenting their determination that

⁷ Risk Engineering, Inc., “Seismic Hazard Analysis for Rocky Flats Plant, Final Report,” September 29, 1994, pp. 19-20.

⁸ Schlossberg, Josh, “Locals wary despite company promise to not frack Rocky Flats,” Boulder Weekly, November 21, 2018.

⁹ *Id.*

the POU, now known as the Refuge, was found to meet the Superfund’s “unlimited use and unrestricted exposure” standard.^{10 11}

16. The CAD/ROD also determined that while the COU did not meet the “unlimited use and unrestricted exposure” standard, the chosen remedy of “institutional and physical controls, incorporating continued monitoring and maintenance” was sufficient to protect human health, thereby ending any further large-scale remediation efforts.¹²

17. Kaiser-Hill’s sampling protocol for the Refuge area, which had vast acreage with few to no identified IHSS’s was:¹³

After review of the existing surface soil sampling locations, a Sampling and Analysis Plan (SAP), Addendum 04-01, was prepared in February 2004 (DOE 2004a) to address the criteria of CRA DQO Decision Rule #1, **and to support conclusions that releases to the environment did not occur outside historical potential release areas.** The Addendum was approved by the U.S. Environmental Protection Agency (EPA) on February 26, 2004. The SAP was implemented in 2004, **where for each 30-acre block across RFETS, five individual samples were collected and composited**, one from each quadrant and one in the center. The compositing provided a more representative sample for the entire 30-acre block. The samples were analyzed for radionuclides and metals to complement the extensive data that had been collected in the Industrial Area and within IHSSs, and allow exposure point concentration (EPC) calculations in the outlying EUs to be performed. (emphasis added)

C. Environmental History of Rocky Flats

18. It is openly acknowledged that “Over the decades, manufacturing activities, accidental industrial fires and spills, and support activities such as waste management resulted in

¹⁰ Corrective Action Decision/Record of Decision for Rocky Flats Plant (USDOE) Peripheral Operable Unit and Central Operable Unit (“CAD/ROD”), p. 5. available at: https://www.lm.doe.gov/Rocky_Flats/Regulations.aspx#CAD.

¹¹ “The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund, was enacted by Congress on December 11, 1980.” Available at: <https://www.epa.gov/superfund/superfund-cercla-overview>

¹² CAD/ROD at p. 3.

¹³ Kaiser-Hill, RCRA Facility Investigation – Remedial Investigation/Corrective Measures Study – Feasibility Study Report for the Rocky Flats Environmental Technology Site Appendix A – Comprehensive Risk Assessment, Volume 2 of 15 Methodology and Data Description,” June 2006, Attachment 3, p. 3.

the release of contaminants to the air, soil, sediment, groundwater, and surface water at Rocky Flats.”¹⁴

19. In April 1970, E. A. Putzier, Health Physicist of Dow Chemical (“Dow”) published “A Summary of On Site Radioactive Waste Disposal,” which was created as:

... a compilation of extracted information from records, extrapolation, calculations and estimates from existing data along with a test of memories of a number of people in an attempt to piece together a fairly accurate account of on-site disposal of materials containing radioactivity. There are obvious omissions in the records, but I believe they are complete enough to lead to a fairly accurate story.

The appendices include a detailed chronological account of drums buried, drums accumulated in the 903 area and contaminated oil burned. Included also are those pieces of correspondence or extracts therefrom which relate to such things as authority for disposal on site and development of disposal methods related to problems of getting rid of contaminated oils and coolants.

20. In 1974, Dow employees J.B. Owen and L.M. Steward published a Draft “Environmental Inventory, A Historical Summation of Environmental Incidents Affecting Soils At or Near the U.S.AEC Rocky Flats Plant,” in partial response to:

On October 4, 1973, the request (by B.W.Colston, Area Manager, Rocky Flats Area Office, U.S. Atomic Energy Commission) was broadened to include the development of a comprehensive plan of action dealing with the investigation and unqualified location of all contaminated soil on the Rocky Flats plant site.

...

The (report) is the expanded and detailed information which was requested and is the result of searching records, reviewing literature, and numerous discussions with a large number of employees many of whom have been employed at Rocky Flats since 1952.

21. In 1974 and 1975 additional parcels adjoining Rocky Flats were purchased to expand the Buffer Zone (“BZ”) surrounding the plant’s main Industrial Area (“IA,”) resulting in the site’s final overall approximately 6,500 acres.¹⁵

¹⁴ CAD/ROD at p. 8.

22. Also in 1975, Dow, which had managed Rocky Flats since its development in 1951, was removed and replaced by Rockwell.¹⁶

23. By 1984 the EPA had already proposed that Rocky Flats be added to the Superfund: National Priority List, and the listing was announced in September 1989.¹⁷

24. In December 1989 nuclear production at Rocky Flats was abruptly halted, leaving materials as they lay in progress, though efforts were made to address environmental issues and bring the plant operations back on line.¹⁸

25. In August 1992 ChemRisk® submitted to CDPHE its Project Task 3&4 Final Draft Report: Reconstruction of Historical Rocky Flats Operations & Identification of Release Points that acknowledged in section “5.3 On-Site Waste Disposal Practices:

While most hazardous and radioactive wastes from Rocky Flats operations have been shipped off the site for disposal, there are about 178 inactive waste sites within the plant boundaries. Some of the involved areas have been the sites of storage, burial, incineration, detoxification, and land application of various forms of Rocky Flats waste. Some of the sites have been cleaned up, while others have not been disturbed since their period of activity ended.

It should be noted that the (partial list of) sites depicted in Figure 5-4 (from) Table 5-2 are those associated with incidents of purposeful disposal of waste. There are numerous documents describing cases of accidental spills, for example Own and Steward, 1974. For the purposes of this project, accidental spills have been evaluated as part of the accidents and incidents investigation described in Section 6.

Table 5-2 describes approximately 50 locations of on-site waste disposal at the Rocky Flats Plant. The locations of these areas are depicted in Figure 5-4. Some of the areas became operational in the early days of plant operation. Most disposal practices have ended, but several of the

¹⁵ U.S. Department of Energy: Legacy Management, “CERCLA/RCRA Fact Sheet, Rocky Flats, Colorado, Site (“Rocky Flats Fact Sheet,”)” p. 1. Available at: www.lm.doe.gov/rocky_flats/fact_sheet-rockyflats.pdf.

¹⁶ CAD/ROD at p. 12

¹⁷ CAD/ROD at p. 2

¹⁸ Rocky Flats Fact Sheet at p. 1.

noted areas remain active as part of modern-day operations of the facility. (Exhibit 1)¹⁹

26. In 1992, changes in the US military complex ended the need for continued production at Rocky Flats, and the final shipments went out in 1994.²⁰

27. DOE's estimate in early 1995 for "cleaning up" Rocky Flats stood at approximately 65 years and \$37 billion dollars.²¹

28. On August 7, 1997, then Energy Secretary Frederico Pena, who also was Mayor of Denver at the time of the 1989 FBI raid at Rocky Flats, announced in a public remarks in Denver that Rocky Flats had been chosen as one of three "Accelerated Closure Pilot Sites," and the "clean-up" would be completed within ten (10) years for only \$7 billion.²²

29. Kaiser-Hill was given an incentive-based contract with significant performance bonuses contingent on meeting the accelerated closure timeline and budget.

30. The accelerated closure forced tradeoffs and changes in the underlying commitments and assumptions about the thoroughness of the remediation process that form the roots of the current stalemate:

... the agency representatives and the contractor have consistently worked from the assumption that they would pursue the best possible cleanup within the limitations of available time (a cleanup deadline of 2006) and funding.

and

"It's all about this tradeoff. But certain groups reject the time line and reject the budget. The fact is that the fiscal constraints to this contract are so blatantly real that we just have to emphasize [the fact that]: Four billion

¹⁹ ChemRisk for the Colorado Department of Health, "Final Draft Report: Reconstruction of Historical Rocky Flats Operations & Identification of Release Points, Project Tasks 3&4 Draft Report, August 1992, p. 184-88, available at: https://www.lm.doe.gov/cercla/documents/rockyflats_docs/SW/SW-A-005267.pdf.

²⁰ Rocky Flats Fact Sheet p. 2

²¹ Rocky Flats Fact Sheet p. 2

²² Text of Frederico Pena's Speech, Defense Nuclear Facilities Safety Board, Meeting Minutes, August 8, 1997.

dollars is what [Rocky Flats is] getting, it's irresponsible to ask for more. And that message has been conveyed by the congressional office,[and] on a one-on-one basis to some key people. But, you know, the way I look at it is: the government has basically said that they're willing to give Rocky Flats four billion dollars to clean this place up. And, that's a whole lot of money. And, we can get a great cleanup for that. And, there's a lot of possible outcomes on what the end-state looks like."

and

(Researchers) were explicitly informed by agency personnel that the DOE and Congress had produced an agreement that guaranteed yearly appropriation of funds for the Rocky Flats cleanup as long as three conditions were met: 1) the cleanup be completed by 2006; 2) the cost and scope of the cleanup be contained to the allocated amount; 3) conflict in the community be curtailed (particularly given the history of public protest at Rocky Flats). This agreement, made in trust, was (and continues to be) validated through ongoing annual appropriations to Rocky Flats. Rocky Flats was in an advantageous position in that very few of the other sites in the DOE complex had been guaranteed (albeit conditionally so) annual appropriations. But as those funds were "conditional", the contractor and the agencies were placed in the position of having to 'minimize conflict' while meeting bottom-line budget limitations regardless of any certainty that cleanup could actually be achieved with the available resources and within the agreed upon time line.²³

31. In October 2005 Kaiser Hill announced it had completed the accelerated closure on budget and ahead of schedule.

32. Upon information and belief Kaiser-Hill earned an estimated \$340,000,000 in fees and performance bonuses over the course of its contracts at Rocky Flats.

²³ Satterfield, Terre and Levin, Joshua, Risk Communication, Fugitive Values, and the Problem of Tradeoffs: Diagnosing the Breakdown of Deliberative Processes," p. 15. Available from the EPA at: <https://yosemite.epa.gov/SAB/sabcvpress.nsf/06347c93513b181385256dbf00541478/73220ad6bed9431385256e1c004540b1!OpenDocument>

D. Remediation Verification Concerns

33. Since its publication in August 2000, verification of the thoroughness of a Superfund site remediation is generally undertaken using MARSSIM, the EPA's Multi-Agency Radiation Survey and Site Investigation Manual:²⁴

The MARSSIM provides information on planning, conducting, evaluating, and documenting building surface and surface soil final status radiological surveys for demonstrating compliance with dose or risk-based regulations or standards.

The MARSSIM is a multi-agency consensus document that was developed collaboratively by four Federal agencies having authority and control over radioactive materials: Department of Defense (DOD), Department of Energy (DOE), Environmental Protection Agency (EPA), and Nuclear Regulatory Commission (NRC).

The MARSSIM's objective is to describe a consistent approach for planning, performing, and assessing building surface and surface soil final status surveys to meet established dose or risk-based release criteria, while at the same time encouraging an effective use of resources.

34. On September 14, 2004, Frazier Lockhart, Manager of DOE's Rocky Flats Project Office, sent a letter to Nancy Tuor, President and CEO of Kaiser-Hill, to both provide Kaiser-Hill with direction related to applying MARSSIM at Rocky Flats, but also specifically instructing Kaiser-Hill to "evaluate the current survey plan to determine additional data needs for incorporating MARSSIM" at no impact to the existing contract.²⁵

²⁴ U.S. Environmental Protection Agency, "Multi-Agency Radiation Survey and Site Investigation Manual (MARSSIM)," Revision 1, August 2000, Abstract.

²⁵ Frazier R. Lockhart, Department of Energy Rocky Flats Project Office, Memorandum, "Multi-Agency Radiation Survey and Site Investigation Manual Methodology for Site-Wide Surface Radiological Characterization and Independent Verification," September 14, 2004.

35. DOE also “commissioned the Environmental Survey and Site Assessment Program of the Oak Ridge Institute for Science and Education (ORISE) for Independent Verification (IV) of the Rocky Flats Surface Radiological Characterization.”²⁶

36. On February 25, 2005, ORISE reported its findings of a document review of Kaiser-Hill’s planned “verification” of its own remediation work at Rocky Flats, and it highlighted several shortcomings, including but not limited to:

ESSAP is performing independent verification (IV) activities at the Rocky Flats Environmental Technology Site (RFETS), and as such, it seems confusing for Kaiser-Hill (K-H) to refer to their plan for final status survey of the site as a ‘verification plan.’ The conventional name of the survey performed by the contractor to demonstrate that radiological conditions satisfy release criteria is the final status survey. Therefore, ESSAP recommends that K-H give due consideration to renaming the subject plan.

K-H makes the point that their survey approach exceeds the guidance in the Multi-Agency Radiation Survey and Site Investigation Manual (MARSSIM) for final status surveys. They justify this assertion based on the fact that a risk assessment will be performed to supplement the radiological survey. While they may be correct in that narrow context, in general, if the Rocky Flats final status survey were to follow the MARSSIM guidance the survey effort would be substantially greater than that offered in this draft plan.

37. In May 2005, before Rocky Flats was reconfigured from the IA and BZ to the COU and the Refuge, the Agency for Toxic Substances and Disease Registry published its final “Public Health Assessment for the entire Rocky Flats Environmental Technology Site,” and offered this evaluation:

Furthermore, on-site contamination levels will not be a public health hazard in the future, so long as site access is restricted. Any future plans to allow public access to REFTS property must be carefully reviewed, considering the amounts of environmental contaminants that remain on the site after DOE’s (sic) completes its cleanup projects.²⁷

²⁶ *Id.*

²⁷ Agency for Toxic Substances and Disease Registry, “Public Health Assessment for Rocky Flats Environmental Technology Site,” May 13, 2005, p. 55.

38. In June 2006 Kaiser Hill published its RCRA Facility Investigation – Remedial Investigation Corrective Measures Study – Feasibility Study Report, including multiple volumes of analysis of samples collected on or after June 28, 1991.

39. The verification sampling undertaken by Kaiser Hill in the Refuge was based primarily on five samples for every 30 square acre plotted, samples which also were then averaged to determine a single point of information.

40. In July 2006 the U.S. Government Accountability Office (“GAO”) published “Nuclear Cleanup of Rocky Flats: DOE Can Use Lessons Learned to Improve Oversight of Other Sites’ Cleanup Activities,” where it documented these shortcomings in DOE’s oversight of the vital verification data:

One of the most important aspects of the cleanup process was ensuring the validity of the data used to determine whether the site had been remediated to the agreed-upon levels. However, DOE did not complete the independent and management assessments required by the cleanup agreement to ensure that these data quality controls were working as intended.

And

DOE’s failure to conduct independent assessments is particularly troubling because of the importance of the cleanup and residual contamination data. These data were not only the basis for EPA’s and Colorado’s approvals of the accelerated cleanup actions, but also the foundation for EPA’s and Colorado’s pending decisions about the overall sufficiency of the site’s cleanup. Without independent assessments of the contractor’s data quality control measures, DOE had no assurance that the controls were working as intended.

Also troubling was that EPA and Colorado—the regulatory agencies that jointly approved the site’s quality assurance project plan and are responsible for ensuring its implementation—were unfamiliar with these assessment requirements. When we discussed with EPA officials DOE’s failure to conduct independent or management assessments, they acknowledged that their confidence in the data quality would have been increased had DOE completed these assessments.

A DOE official said he had no explanation for DOE's not conducting the required assessments, other than that DOE officials had reviewed sampling and analysis plans, remediation plans, and closeout reports, and discussed with the contractor any data quality issues that arose.²⁸

41. This GAO report also points out that the DOE's planned independent verification of the cleanup was abandoned before it was complete.

OE's planned verification for the cleanup at Rocky Flats was twofold: First, DOE asked the contractor to develop a final scanning and sampling plan, and second, DOE asked its Oak Ridge Institute for Science and Education (ORISE) to develop a separate verification plan that included a review of contractor-conducted scans for remaining radiological contamination.

However, DOE chose not to complete several of the plan's objectives, including part of ORISE's review. A DOE official said they had decided that these activities would not provide sufficient additional information to justify their completion, but he had no documentation to support this decision. As a result, DOE lost the opportunity to independently verify the sufficiency of several aspects of the cleanup.

....

Lacking clear guidance, DOE's project manager at Rocky Flats said he took a common sense approach that, in his view, fulfills the intent of DOE's policy by cleaning the site up through the CERCLA and RCRA process. That is, he believes that the regulatory agencies' approvals of the radiological cleanup actions at the site constitute independent verification.²⁹

42. The September 2006 CAD/ROD accepted Kaiser-Hill's findings and endorsed the statistical extrapolation that the cumulative average of the samples taken according to Kaiser Hill's protocols the Refuge was safe for "unlimited use and unrestricted exposure."

²⁸ US Government Accountability Office, Report to Congressional Requestors, GAO-06-352, "Nuclear Cleanup of Rocky Flats: DOE Can Use Lessons Learned to Improve Oversight of Other Sites' Cleanup Activities," July 2006, at pp. 48-9.

²⁹ *Id.* at pp. 50-1

43. This determination of “safe” is the basic underlying assumption upon which the advocates of the imminent threats to Rocky Flats rely to proceed with plans for economic and other development at or adjacent to the site.

E. Special Federal Grand Jury 89-2

44. In June 1989, the DOJ, EPA and FBI conducted a raid at Rocky Flats where 135 boxes of records and other documents were seized.³⁰

45. On August 1, 1989, Special Grand Jury 89-2 was sworn in to investigate suspected environmental crimes at Rocky Flats.³¹

46. Concurrent with the raid at Rocky Flats an additional forty-nine (49) boxes of records and documents were seized from the DOE offices in Albuquerque.³²

47. During this investigation the Grand Jury gathered some public and business documents by use of its subpoena power, including but not limited to: (Exhibit 2)³³

Subpoena 9705 – Dated August 16, 1989
Subpoena 9706 – Dated August 16, 1989
Subpoena 1005 RF – Dated March 16, 1990
Subpoena 1045 RF – Dated July 23, 1990
Subpoena 1061 RF – Dated August 31, 1990
Subpoena 1064 RF – Dated September 4, 1990
Subpoena 1067 RF – Dated September 10, 1990
Subpoena 1106 RF – Dated November 29, 1990
Subpoena 1130 RF – Dated January 18, 1991

³⁰ U.S. v. Rockwell, U.S. District of Colorado, Criminal Case No. 92-CR-107, “Plaintiff’s Sentencing Memorandum,” March 26, 1992, p. 3.

³¹ *Id.*

³² *Id.*

³³ These subpoenas appear on the public record of: *Cook v. Rockwell Int’l Corp.*, 181 F.R.D. 473 (D. Colo. 1998), “Representative Plaintiffs’ Memorandum of Points and Authorities in Support of Motion to Set a Schedule for Further Proceedings Pursuant to Fed. R. Civ. P. 16 and 23,” Exhibit B, filed February 10, 1993.

48. Upon information and belief, the Grand Jury also received other business and public documents during the course of its investigation, such that:

By means of grand jury subpoenas and other formal and informal requests, the investigation gathered more than 760 boxes of documents and information, and the investigation reviewed an estimated three and a half million pages of documents.³⁴

49. On March 26, 1992, the DOJ announced that Rockwell had entered into a plea agreement pleading guilty to ten (10) criminal violations of federal environmental law, and Rockwell eventually paying a record \$18.5 million fine.³⁵

50. This plea agreement terminated the Grand Jury's investigation and service.³⁶

PETITIONERS' REQUEST FOR DISCLOSURE

51. This Court has discretion pursuant to Federal Rules of Criminal Procedure Rule 6 to order disclosure of Grand Jury Materials "preliminarily to or in connection with litigation."

Grand Jury materials otherwise sealed may be disclosed by order of a Court when "preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E)(1).

The Plaintiff must demonstrate that the request for disclosure is consistent with Rule 6's intent,

... the Rule contemplates only uses related fairly directly to some identifiable litigation, pending or anticipated. Thus, it is not enough to show that some litigation may emerge from the matter in which the material is to be used, or even that litigation is factually likely to emerge. The focus is on the *actual use* to be made of the material.

United States v. Baggot, 463 U.S. 476, 480, (1983).

³⁴ *Id.* at pp. 3-4

³⁵ *Id.* at p. 4

³⁶ *Id.* at pp 4-5.

Here, the Petitioners are requesting the disclosure of the Grand Jury documents directly related to identifiable pending and/or anticipated litigation. Plaintiffs anticipate litigation will be required to intervene as efforts short of litigation have not been fruitful. The documents are being sought as both evidence of specific harm and damages posed by those imminent threats, and as required due diligence under F.R.C.P. Rule 11. There is no use for financial or other gain intended by this disclosure request.

52. Disclosure of the requested business and public documents is supported by particularized need.

It is well settled law in the 10th Circuit that in order to overcome the presumption of secrecy to protect the functioning of the Grand Jury system the Petitioner for disclosure must demonstrate a particularized and not general need for the materials requested. *U.S. ex rel. Stone v. Rockwell Int'l Corp.*, 173 F.3d 757, 759 (10th Cir. 1999).

Here, Petitioners have a particularized need to demonstrate harm that will result from the aforementioned imminent threats at Rocky Flats. The advocates rely on a determination by the responsible agencies that the entire 5,237 acres of Refuge is safe for “unlimited use and unrestricted exposure.” Documentation published by those agencies acknowledges that determination is based on very limited sampling outside the COU and averages of millions of the entire sites’ samples. The CDPHE acknowledges that no remediation actions were taken on the Refuge. The harm posed by the imminent threats is localized to specific portions of the larger property. The business documents obtained by the Grand Jury for the purposes of investigating environmental crimes are exactly the specific records needed to identify and precisely locate hazardous waste on the Refuge site that was never remediated. Only a review of the source documents created by Rocky Flats’ managing contractor can provide accurate proof to contradict

the gross overall sampling approach used to determine the overall site is “safe” as relied on by the advocates of the imminent threats.

53. The specific public interest in the disclosure of these business and public documents to protect the public health and safety at Rocky Flats outweighs the generalize public interest in the need for Grand Jury secrecy.

“Once a party makes the required showing of particularized need, the court must weigh the particularized need against public interests ‘served by safeguarding the confidentiality of grand jury proceedings.’” *In re Special Grand Jury 89-2*, 143 F.3d 565, 571 (10th Cir. 1998).

Here, the Petitioners are seeking disclosure only of either public documents or documents created in the routine course of business by the managing contractors at Rocky Flats. The Petitioners’ purpose in seeking these records is to prevent harm to themselves and the public health and safety of the entire region. This public health and safety will be damaged if the imminent threats proceed based on a statistically based generalized finding that the entire Rocky Flats site is safe, only to discover that areas that were not remediated and not sampled contain dangerous hazardous waste. Petitioners’ request for disclosure of these documents, and not for any transcripts, reports, or other notes, poses no threat to any individual who appeared before or was investigated by the Grand Jury. The need to protect the public health and safety from a specific threat through the disclosure of limited information created for purposes unrelated to the Grand Jury system outweighs any threat this might posed.

54. In the alternative, these business and public documents should not be considered “matters before the Grand Jury” under *U.S. v. Dynavac, Inc.*

Although a matter of first impression in the 10th Circuit, the 9th Circuit has analyzed requests for disclosure of business documents to consider if the documents actually are “matters

before the Grand Jury” in the same manner as transcripts of witness testimony, deliberations, interview notes and reports. *United States v. Dynavac, Inc.*, 6 F.3d 1407, 1412 (9th Cir. 1993).

However, Rule 6(e) “is intended only to protect against disclosure of what is said or takes place in the grand jury room ... it is not the purpose of the Rule to foreclose from all future revelation to proper authorities the same information or documents which were presented to the grand jury.” *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52, 54 (2d Cir.1960). Thus, if a document is sought for its own sake rather than to learn what took place *1412 before the grand jury, and if its disclosure will not compromise the integrity of the grand jury process, Rule 6(e) does not prohibit its release. *Id. See also DiLeo v. Commissioner*, 959 F.2d 16 (2d Cir.) (reaffirming *Interstate Dress's* status as the law of the circuit), *cert. denied*, 506 U.S. 868, 113 S.Ct. 197, 121 L.Ed.2d 140 (1992).

Id. at 1411–12.

The distinction between documents created for other purposes is critical to avoid a situation where an entity under investigation by a Grand Jury could in fact provide unique incriminating documents that would then never be available to the civil litigation process. *Id.* at 1413 (‘... a savvy party under grand jury investigation could effectively insulate documents from anticipated civil discovery simply by turning over incriminating documents to the grand jury.’)

When the grand jury investigation is already terminated and an indictment has been issued, only “institutional” concerns are implicated by the documentary disclosure. *See generally Nervi, FRCrP 6(e) and the Disclosure of Documents Reviewed by a Grand Jury*, 57 U.Chi.L.Rev. 221, 230 (1990). The fear of compromising future grand jury proceedings is further reduced when the request is for business records created for purposes independent of grand jury investigations, which have legitimate uses unrelated to the substance of the grand jury proceedings. *In re Grand Jury Investigation*, 630 F.2d 996, 1000 (3d Cir.1980), *cert. denied*, 449 U.S. 1081, 101 S.Ct. 865, 66 L.Ed.2d 805 (1981); *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1382 (D.C.Cir.) (en banc), *cert. denied*, 449 U.S. 993, 101 S.Ct. 529, 66 L.Ed.2d 289 (1980). In sum, we think that the disclosure of business records independently generated and sought for legitimate purposes, would not “seriously compromise the secrecy of the grand jury's deliberations.” *DiLeo*, 959 F.2d at 19 (quoting *In re Special March 1981 Grand Jury (Almond Pharmacy)*, 753 F.2d 575, 578 (7th Cir.1985)).

Id. at 1411.

Here, the documents Petitioners request be disclosed were created in the regular conduct of the business of Rocky Flats' managing contractors. The disclosure is sought solely in support of litigation either planned or anticipated regarding the aforementioned imminent threats at Rocky Flats. These records obtained by Special Federal Grand Jury 89-2 of contamination at Rocky Flats provide the accurate and specific information needed to counter the generalized defense that the entire site has been determined to be safe for "unlimited use and unrestricted exposure."

PRAYER FOR RELIEF

For the foregoing reasons, the Petitioners respectfully request the disclosure of all public and business documents provided to the Special Federal Grand Jury 89-2, either in response to a subpoena or through any other means, and any other further relief that the Court may deem in these circumstances.

DATED this 10th day of January, 2019.

Respectfully submitted,

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