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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,	)	
	)	Case No. CR-09-235-BR
Plaintiff,	)	
	)	
v.	)	July 22, 2010
	)	
DENNIS BEETHAM and D.B. WESTERN,	)	
INC.,	)	
	)	
Defendants.	)	
	)	Portland, Oregon

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TRANSCRIPT OF PROCEEDINGS  
(Motion Hearing)

BEFORE THE HONORABLE ANNA J. BROWN, DISTRICT JUDGE

COURT REPORTER:	AMANDA M. LeGORE, RDR, FCRR, CRR, CE
	U.S. Courthouse
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APPEARANCES:  
FOR THE PLAINTIFF:

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1 (Thursday, July 22, 2010; 1:00 p.m.)

2

3 P R O C E E D I N G S

4

5 THE COURT: Please be seated.

6 MS. KERIN: Good afternoon, your Honor.

7 This is the time and place set for United States  
8 versus Dennis Beetham and D.B. Western, Incorporated, Case  
9 No. 09-235.

10 Janet Hoffman and Sarah Adams are present in the  
11 courtroom for the defendants. Michelle Kerin and Ron Sutcliffe  
12 for the Government.

13 This is the time for the oral argument on the parties'  
14 proposed jury instructions.

15 THE COURT: I should note that I received the waiver  
16 of appearance for the defendant, Dennis Beetham, personally.  
17 And that's noted. Thank you, Counsel.

18 MS. HOFFMAN: Thank you.

19 THE COURT: Bonnie, may I have a new pad, please.

20 And, Counsel, I wanted to inquire, did you receive the  
21 e-mail message I sent late yesterday afternoon, indicating a  
22 couple of questions I would like the benefit of your  
23 perspectives on? Yes?

24 MS. KERIN: Yes, your Honor.

25 MS. HOFFMAN: Yes, your Honor.

1 THE COURT: And so to that end, I think it would be  
2 useful for the Government to begin by giving me some background  
3 factual information.

4 I know I've received this in parts at different places  
5 along the way. But in light of the fact that these significant  
6 issues are coming up before I've had a full introduction to the  
7 evidence, I think we need to retreat a bit, to give you that  
8 orientation, and then to hear from the defense.

9 So, Mr. Sutcliffe, are you prepared to do that?

10 MR. SUTCLIFFE: I am, your Honor. And may I remain  
11 seated?

12 THE COURT: Yes. If you expect me to see what's out  
13 there, though, I won't be able to see it. I have copies here?

14 MR. SUTCLIFFE: What I gave the Court was just a copy  
15 of a flow chart that we can discuss later on.

16 THE COURT: All right. If it's necessary for me to  
17 see that, we'll have to do something else, because I can't see  
18 that far.

19 MR. SUTCLIFFE: Okay. At that point, I'll try to  
20 bring it closer.

21 THE COURT: Or I can -- I can come to it, if  
22 necessary.

23 Anyway, go ahead.

24 MR. SUTCLIFFE: Your Honor, I'll start with the last  
25 e-mail that we got from Ms. Boyer last night. There were two

1 questions.

2 THE COURT: Yes.

3 MR. SUTCLIFFE: And I think it would be better -- is  
4 it okay if I start with No. 2?

5 THE COURT: Whatever is meaningful to you.

6 MR. SUTCLIFFE: Just by way of background, as to what  
7 we know about the manufacturing facility, D.B. Western is one  
8 of the largest formaldehyde manufacturers; certainly in the  
9 United States, as far as we can tell.

10 And they have plants -- have had plants around the  
11 country. They now have one, in particular, in Houston that's  
12 very large, supplies a lot of the formaldehyde for DuPont and  
13 numerous corporations. They have a pipeline straight to it, is  
14 my understanding.

15 The -- what we know about what D.B. Western may -- may  
16 have produced at its Minnesota facility, or other facilities,  
17 we know from looking at the Chemical Manufacturers Association.  
18 They have listings of different chemical manufacturers, and in  
19 that, they list what sorts of chemicals that the companies  
20 make. I don't imagine that that's dispositive completely, but  
21 I think it's an indication of what they make.

22 Those listings in the chemical manufacturers suggest  
23 that D.B. Western only makes formaldehyde, the aqueous type of  
24 solution.

25 We also looked at their website, which seems to

1 indicate that they make mostly aqueous commercial formaldehyde,  
2 and also -- maybe on occasion -- do make paraformaldehyde.

3 There's some indication they make paraformaldehyde.

4 We've also talked to competitors of theirs. And it's  
5 our understanding they make mostly this aqueous formaldehyde,  
6 and may on occasion make paraformaldehyde.

7 That's all we really know about -- without -- we have  
8 actually talked to the son of the owner, and we know from him,  
9 at least, that they do make aqueous formaldehyde. That seems  
10 to be their main business that's used.

11 Those materials -- the aqueous solution is used in  
12 mostly like resin-type stuff. The housing industry, that sort  
13 of thing, makes a lot of resins. That being said, I will go on  
14 to what our theory of -- I guess it's our theory of the case.  
15 I'm not used to telling the defense my theory of the case  
16 before trial, but --

17 THE COURT: It might be useful for you to let the  
18 judge know what it is, as we try to figure out where we're  
19 going.

20 MR. SUTCLIFFE: Yes, your Honor.

21 THE COURT: Okay.

22 MR. SUTCLIFFE: This is the part where I'm going to go  
23 up and get that chart. Okay?

24 THE COURT: All right. Well, if you would like me to  
25 come -- step down, I can be closer to it.

1 Is that a map? Or is that -- what is it?

2 MR. SUTCLIFFE: What this is -- this, your Honor, is a  
3 map showing the general outline of the Cinder Lakes Ranch with  
4 some of the topography built in.

5 I'm just going to refer to two spots on the map, to  
6 give the Court a better idea of where certain items were found.

7 THE COURT: All right. And tell me about the ranch,  
8 relative to the commercial operations.

9 MR. SUTCLIFFE: There was no commercial operation out  
10 there, other than, I think, horse raising.

11 And correct me --

12 They did have a large barn down at one part of the  
13 facility, where they were raising horses. And then there's  
14 other buildings, like shop buildings and storage buildings.

15 And the house is actually up here (indicating), on a  
16 hill, with a lake behind it. And I believe they were building  
17 another lake in front of it.

18 THE COURT: How large a parcel is this?

19 MR. SUTCLIFFE: I want to say 500 acres.

20 THE COURT: And remind me, which county is this?  
21 Crook County?

22 MR. SUTCLIFFE: Crook County.

23 THE COURT: And this shows the topography here. I  
24 don't know if the Court can see it.

25 Right here, there's a natural cinder cone pit that's

1 an implosion from a volcanic event.

2           And down in here (indicating), there was a -- there is  
3 like a storage -- there was a building. And over on one side,  
4 here, there was formaldehyde -- paraformaldehyde, we believe,  
5 was found in this pit, what's called pit No. 2.

6           MS. HOFFMAN: Excuse me, your Honor. Do you mind if  
7 we come forward?

8           THE COURT: Oh, not at all. Bring your chairs around,  
9 or just move to this table, perhaps.

10          MS. HOFFMAN: Sure. We just can't see --

11          MR. SUTCLIFFE: I'm sorry.

12          THE COURT: So you're saying paraformaldehyde was  
13 found in pit No. 2.

14          MR. SUTCLIFFE: Pit No. 2, here.

15           The reports vary, but it's like at least a dozen  
16 bags -- black bags and some crushed drums.

17           I don't think there was any evidence, that I can  
18 recall, that -- that the black bags were actually inside of  
19 drums, but they were in this area. They were down -- down a  
20 ways. They had excavated soil and other materials, and gotten  
21 to that point and started -- they actually smelled it, I think,  
22 first, when one of the bags broke open. And that's when they  
23 started digging around and --

24          THE COURT: And when you say "black bags," are you  
25 talking about the kind of black leaf bags or garbage bags --



1 MR. SUTCLIFFE: That's my understanding.

2 THE COURT: All right. So -- and back up just a bit.

3 I'm sorry. Back up just a bit.

4 Why was anyone looking there, in the first instance?

5 MR. SUTCLIFFE: Well, there --

6 THE COURT: Or was someone looking there, or were they

7 found inadvertently.

8 MR. SUTCLIFFE: They were looking all around here,

9 because after Mr. and Mrs. Beetham had marital problems and

10 then a divorce started and there was an allegation that

11 material had been dumped out here. And that became a big issue

12 in the divorce, because, as I understand it, if Mr. Beetham had

13 dumped the material there, that was waste of the -- that

14 marital asset. And so --

15 THE COURT: By damaging the acreage?

16 MR. SUTCLIFFE: Right.

17 THE COURT: Was the theory?

18 MR. SUTCLIFFE: That was --

19 THE COURT: The wife's theory?

20 MR. SUTCLIFFE: Yes.

21 THE COURT: And that somehow diminished the value of

22 the property, and that should have been considered by the state

23 judge as he or she was trying to come to an equitable

24 disposition? Is that the idea?

25 MR. SUTCLIFFE: That's the idea, your Honor.

1 THE COURT: Okay.

2 MR. SUTCLIFFE: So once the investigation got rolling,  
3 the DEQ --

4 THE COURT: And just back up a bit then. So someone  
5 went out looking after the wife made the allegations?

6 MR. SUTCLIFFE: Yes. They hired a contractor --

7 THE COURT: "They" being the wife?

8 MR. SUTCLIFFE: The wife. Initially hired a  
9 contractor.

10 THE COURT: All right.

11 MR. SUTCLIFFE: Started to dig. And then Mr. Beetham  
12 had -- had a restraining order, and couldn't go on the  
13 property, so there was a discussion about who was going to pay  
14 for it. And it went back and forth.

15 But after a while, Mr. Beetham did in fact take over  
16 the cleanup of the site and hired these contractors.

17 THE COURT: But now you've skipped many steps. So,  
18 first, someone's looking, because the wife alleges there's been  
19 dumping, that the --

20 MR. SUTCLIFFE: (Nods head.)

21 THE COURT: -- that Mr. Beetham's responsible for.  
22 That in dumping the material, it somehow diminished her rights  
23 in the property.

24 MR. SUTCLIFFE: Right.

25 THE COURT: So an investigation ensues, first, at her

1 behest?

2 And then remind me, now, how DEQ becomes involved.

3 MR. SUTCLIFFE: They were initially -- whenever there  
4 is a spill -- an alleged spill like this, the contractor would  
5 immediately notify the DEQ. They have to -- in order to do any  
6 sort of cleanup, they have to obtain a generator ID number.

7 THE COURT: So the contractor -- hired by  
8 Mrs. Beetham -- in looking at pit 2, finds these eight garbage  
9 bags and some crushed drums, you say?

10 MR. SUTCLIFFE: Yes.

11 THE COURT: And they know enough to call DEQ at that  
12 point?

13 MR. SUTCLIFFE: It may have been before that, your  
14 Honor.

15 THE COURT: All right.

16 MR. SUTCLIFFE: There's also allegedly buried -- well,  
17 there were. There were other materials in larger sacks called  
18 super sacks of urea formaldehyde, which is not --

19 THE COURT: At issue?

20 MR. SUTCLIFFE: It is in the state case, but it's not  
21 a hazardous waste. It's more of a fertilizer.

22 So at some point the -- the -- after Mr. Beetham -- at  
23 some point, when they're digging in here, the contractors come  
24 across these plastic bags -- I'm going to say at least 12.  
25 There may have been more -- of this material that has

1 polymerized, and it has the appearance of paraformaldehyde.

2 THE COURT: And when you say it has polymerized, tell  
3 me what you mean, in light of the testimony I've heard from  
4 Mr. Boling, and the like.

5 MR. SUTCLIFFE: That it's essentially --

6 THE COURT: Hard?

7 MR. SUTCLIFFE: Not hard, but it's a putty-like  
8 substance.

9 THE COURT: Goo?

10 MR. SUTCLIFFE: Goo.

11 THE COURT: The goo you talk about, G-O-O. Goo.

12 Okay. Go on.

13 MR. SUTCLIFFE: So they -- and apparently there was  
14 also some soil contamination, too. Because Mr. Beetham ends up  
15 having to pay for remediating the soil and digging up all of  
16 the contaminated --

17 THE COURT: In the context, then, of the dissolution  
18 case, that you indicated he assumed responsibilities for --  
19 financial responsibility for cleaning up the property?

20 MR. SUTCLIFFE: That's my understanding.

21 THE COURT: All right. And do you happen to know the  
22 status of those dissolution proceedings? Are they done and  
23 over with?

24 MR. SUTCLIFFE: My understanding is they're done and  
25 over with, they settled, and I even believe the cleanup is

1 complete.

2 THE COURT: Who acquired ownership of the property as  
3 between the husband and wife?

4 MR. SUTCLIFFE: Mr. Beetham.

5 THE COURT: All right. So Mr. Beetham no longer has  
6 an ownership interest in the property?

7 MR. SUTCLIFFE: No, your Honor.

8 THE COURT: All right. I'm sorry. Go ahead.

9 MR. SUTCLIFFE: Well, it even gets more complicated,  
10 if you want.

11 THE COURT: Well, go ahead.

12 So -- so the contractor brings in the DEQ people. At  
13 what -- at -- are all of the original findings still there? I  
14 mean, the bags, the crushed --

15 MR. SUTCLIFFE: When the DEQ shows up?

16 THE COURT: Yes.

17 MR. SUTCLIFFE: Yes, your Honor.

18 THE COURT: All right. And then remind me, Mr. Boling  
19 took how much and where?

20 MR. SUTCLIFFE: He didn't take the samples. The  
21 contractor took -- DEQ may have -- DEQ, Mike Renz, and Jeff  
22 Engles (phonetic), who recently passed away, took some of the  
23 samples for identification.

24 THE COURT: And we're talking samples out of the bags?

25 MR. SUTCLIFFE: Out of the bags, yes.

1 THE COURT: Or from the soil or both?

2 MR. SUTCLIFFE: From out of the bags. I imagine they  
3 took soil samples, too, but we haven't -- I haven't paid any  
4 attention to those.

5 THE COURT: And then whatever Mr. Boling took and he  
6 tested and he's preserved what he has -- he has whatever he  
7 has -- what became of the rest?

8 MR. SUTCLIFFE: It was disposed of. Some of it  
9 went -- for instance, the urea formaldehyde went to a landfill,  
10 a normal subtitled de-landfill -- state landfill.

11 The other -- the hazardous waste and the soil that was  
12 contaminated went to a hazardous waste facility. I want to say  
13 in Utah.

14 THE COURT: All right. Now, someone made a  
15 determination that this was hazardous waste for purposes of  
16 this cleanup.

17 MR. SUTCLIFFE: Correct.

18 THE COURT: Who did that?

19 MR. SUTCLIFFE: The contractor, your Honor.

20 THE COURT: And what was the determination of the  
21 contractor?

22 MR. SUTCLIFFE: On the manifest, they wrote down U-122  
23 waste.

24 THE COURT: And how did the contractor come to that  
25 conclusion? Do you know?

1 MR. SUTCLIFFE: By testing it.

2 THE COURT: In what manner?

3 MR. SUTCLIFFE: I believe using the Hantzsch method  
4 that we talked about.

5 THE COURT: All right. So they did that on -- at the  
6 field testing, there? Or did they take it back somewhere? Do  
7 you know?

8 MR. SUTCLIFFE: They took it to a lab, Neilson Labs,  
9 and had it tested there.

10 THE COURT: Okay. So then all of the material is  
11 taken away and disposed of, according to protocols that someone  
12 else sets up, yes?

13 MR. SUTCLIFFE: Yes, your Honor.

14 THE COURT: And then whatever remains of what was  
15 found there was with the DEQ? Yes?

16 MR. SUTCLIFFE: The samples went with the DEQ, yes.

17 THE COURT: All right. I'm just trying to get an idea  
18 of whether today -- what remains today of what was found then,  
19 and I've been deducing that the only thing remains -- that  
20 remains today, of what was found then, is whatever's left in  
21 the DEQ custody?

22 MR. SUTCLIFFE: That's correct, your Honor. Except  
23 it's not in their custody right now.

24 THE COURT: All right. It's somewhere else. The  
25 defendants are testing it, or something, or someone else?

1 MR. SUTCLIFFE: The lab in Denver is testing it.

2 THE COURT: A lab?

3 MR. SUTCLIFFE: The National Environmental  
4 Investigation Center in Denver is testing it.

5 THE COURT: All right. Work continuous, in other  
6 words.

7 All right. So this material is found.

8 MR. SUTCLIFFE: There's another issue that -- that  
9 will probably come up, so I'll just briefly touch on it. It's  
10 that DEQ and Mr. Beetham got into a dispute about the cleanup,  
11 here --

12 THE COURT: Okay.

13 MR. SUTCLIFFE: -- that resulted in a lawsuit.

14 The allegation was that they had initially used --  
15 told Mr. Beetham clean up -- this is my understanding of it --  
16 clean up to what's called nondetect levels. That means at some  
17 point where you can't detect the formaldehyde. And they told  
18 him to use the Hantzsch method.

19 And then after Mr. Boling used the sodium sulfite  
20 method, they changed -- DEQ changed their mind and told  
21 Mr. Beetham he had to go back and sample the soil again, to  
22 make sure it met nondetect under the sodium sulfite method. So  
23 that resulted in a lawsuit.

24 THE COURT: As between --

25 MR. SUTCLIFFE: DEQ and D.B. Western.



1 THE COURT: And DEQ brought the lawsuit?

2 MR. SUTCLIFFE: No. Mr. Beetham essentially -- my  
3 understanding is he sued them for sort of a breach of contract  
4 issue, saying, Before, you told me this was the level. I  
5 relied on this. I did all of my tests, and now you're telling  
6 me to test it again.

7 THE COURT: And then what's the status of that matter?

8 MR. SUTCLIFFE: As far as I know, it's still ongoing.

9 THE COURT: In Crook County?

10 MS. HOFFMAN: Yes.

11 MR. SUTCLIFFE: It's in Crook County.

12 THE COURT: And are you representing him in that  
13 context?

14 MS. HOFFMAN: No, your Honor. Tonkon Torp is.

15 THE COURT: Okay. Do you know what the status is?

16 MS. HOFFMAN: Yes, it is, your Honor. Yes, I do. DEQ  
17 has filed a motion to stay all discovery. Defense -- I mean,  
18 counsel for --

19 THE COURT: On the basis of?

20 MS. HOFFMAN: Mr. Beetham has Fifth Amendment,  
21 Article --

22 THE COURT: Oh, so we're holding all of that up?

23 MS. HOFFMAN: We may be, because what Tonkon Torp  
24 responded is what's appropriate is to proceed with all  
25 discovery, except for putting in abeyance Mr. Beetham's

1 testimony. And then when this case is resolved, continue.

2           What's unusual is Beetham is the plaintiff, not the  
3 defendant, so it's his --

4           THE COURT: Right. But the defendant is asking for  
5 information obviously related to the plaintiff's claims, yet  
6 Mr. Beetham himself is --

7           MS. HOFFMAN: Is unavailable.

8           THE COURT: At the moment.

9           MS. HOFFMAN: At the moment.

10           THE COURT: All right. Now -- so that's that matter,  
11 and it's still pending.

12           Now, while we're diverting on other proceedings,  
13 there's the Crook County matter, the criminal case.

14           What's --

15           MS. VITOLINS: Yes, your Honor.

16           THE COURT: What's its status at the moment?

17           MS. VITOLINS: The status is Motions to Dismiss the  
18 Indictment were heard. Judge Neilson issued a ruling and  
19 essentially denied part of the motions. The -- I would say  
20 what I call the big motions about constitutionality of the  
21 statute, and other legal issues, those were all denied.  
22 However, he found that our Indictment was not specific enough,  
23 and we've got 30 days to amend it.

24           THE COURT: What are the -- the state theories,  
25 pleaded in the Indictment, you're seeking to amend?

1 MS. VITOLINS: And the state theories are essential.  
2 A count of unlawful burning and then solid waste  
3 disposal. All -- one felony, and essentially the rest are  
4 misdemeanors. And none of it has anything to do with the  
5 hazardous waste.

6 THE COURT: So they're different substances entirely?

7 MS. VITOLINS: That's correct, your Honor.

8 THE COURT: And where were they found, these --

9 MS. VITOLINS: In different -- in different pits,  
10 essentially six different pits around the property.

11 THE COURT: So the feds have pit 2, and you're taking  
12 care of the others? Is that the idea?

13 MS. VITOLINS: That's correct, yes.

14 THE COURT: All right. And so you're going back to  
15 the grand jury to address your Indictment issue?

16 MS. VITOLINS: Yes, that's correct.

17 THE COURT: And then what? What's the timing?

18 MS. VITOLINS: Set for trial as soon as possible.

19 THE COURT: And that means what?

20 MS. VITOLINS: Well, I'm hoping -- we're getting trial  
21 settings in -- in September through November --

22 THE COURT: Of this year?

23 MS. VITOLINS: Of this year, yes.

24 THE COURT: And, Ms. Hoffman, are you defending that  
25 case?

1 MS. HOFFMAN: Yes, I am, your Honor.

2 THE COURT: Well, okay.

3 Now --

4 MS. HOFFMAN: And of course we don't agree with the  
5 September --

6 THE COURT: I'm not even going there. I was just  
7 trying to figure out what else was out there, because we have a  
8 number of moving parts.

9 Sorry for the interruption, Mr. Sutcliffe. Go ahead.

10 MR. SUTCLIFFE: No, I just thought the Court needed  
11 the whole picture.

12 THE COURT: I'm trying to get it. Go ahead.

13 MR. SUTCLIFFE: So this pit No. 2, here, forms the  
14 basis for Count No. 1 in the Government's Indictment.

15 And the samples that would be referred to for those  
16 are 1022, which was taken early on in the investigation, and  
17 then the 2008-0402 sample.

18 Those are the two samples that are at issue here.

19 THE COURT: Remind me, what was the occasion for the  
20 taking of the 2008 sample?

21 MR. SUTCLIFFE: I think it had to do with the  
22 nondetect, attempting to --

23 THE COURT: To deal with those sodium hydroxide  
24 requests, et cetera?

25 MR. SUTCLIFFE: I think. Maybe.

1 THE COURT: Maybe. All right.

2 MR. SUTCLIFFE: So one of the questions you asked is  
3 whether the Government -- whether the -- these chemicals found  
4 in here, after the fact, are in the same chemical form.

5 THE COURT: Right. Because we're going to be debating  
6 what it is that is or isn't subject to the listing requirements  
7 of U122.

8 And because I know, from the testimony I've received  
9 so far -- and I know from my own knowledge -- that these  
10 materials can change form, depending on their environmental  
11 context; if they're exposed to air, or ground, or whatever.  
12 That the fact that they may have been found in a solid form  
13 does not necessarily mean that is the form in which they were  
14 deposited.

15 And so I was curious whether the Government was  
16 contending that what was allegedly disposed of illegally in the  
17 pit and what was allegedly stored illegally in the machinery,  
18 et cetera, was in the same form that the Government found and  
19 tested it later. That was where my inquiry was coming from.

20 Do you understand my point?

21 MR. SUTCLIFFE: Exactly.

22 THE COURT: All right. Sorry.

23 MR. SUTCLIFFE: Given the -- the properties of  
24 formaldehyde, we can't really tell your Honor or a jury, for  
25 sure, that he dumped liquid in there or whether it had already

1 been paraformaldehyde when it went in there. And maybe at some  
2 point we'll be able to tell somebody how many -- what it  
3 chained up to and what the final result was when we -- when it  
4 was found in 2007 and '8.

5 But -- and -- and I don't want to be held to this at  
6 trial. But it would seem that it was probably some form of  
7 paraformaldehyde by the time it went in there, given that it  
8 was put in plastic bags. It would be kind of hard to dump --

9 THE COURT: All right. So is your theory, or one of  
10 the hypotheses -- I'm not assuming this is the -- the state of  
11 the case to go to the jury, and I don't think the defendant  
12 should assume that either. But is a hypothesis that we start  
13 out with aqueous formaldehyde in connection with the -- the  
14 production work of Beetham, the company, and that in some  
15 manner that aqueous formaldehyde is left over, or something,  
16 and it ends up in these bags?

17 MR. SUTCLIFFE: The working theory is that it was  
18 paraformaldehyde that came from a facility in Minnesota.

19 THE COURT: And how did -- how did that happen?

20 MR. SUTCLIFFE: That --

21 THE COURT: How does Minnesota paraformaldehyde get on  
22 to this ranch?

23 MR. SUTCLIFFE: That leads us to the second, Count  
24 No. 3. And that will explain it a little bit.

25 No. 3 involves the equipment. I think we gave the

1 Court a picture of some of the machinery involved. Those were  
2 used reactor vessels. And there was piping. Scrap metal is  
3 essentially stored down here on the road, on the way to the  
4 shop.

5 THE COURT: So this equipment, is it equipment from  
6 the Minnesota facility or is it equipment that was original to  
7 the farm? That's what -- I'm trying to remember. Are we  
8 talking about material that was moved from Minnesota in  
9 equipment form that carried the formaldehyde, or are we talking  
10 about equipment that was on the ranch, in which this  
11 paraformaldehyde somehow resided?

12 MR. SUTCLIFFE: The working theory is -- based upon  
13 interviews of witnesses -- is that they -- they -- Mr. Beetham,  
14 D.B. Western had a plant -- a manufacturing facility for  
15 formaldehyde in -- in Virginia, Minnesota. It's called  
16 Virginia. I don't know why it's called Virginia, Minnesota.  
17 But just so we don't get confused. But I'm just going to refer  
18 to it as the Minnesota plant.

19 THE COURT: Okay.

20 MR. SUTCLIFFE: For some reason it was no longer  
21 working or for some reason they decided to dismantle the plant.

22 THE COURT: In?

23 MR. SUTCLIFFE: In Minnesota.

24 They took -- they took some of the materials, the  
25 scrap metals back to the ranch here, which, in Cinder Lakes --

1 presumably because it's valuable. A lot of it was stainless  
2 steel, and it would have scrap value.

3 The working theory is -- and this is, again, for Count  
4 No. 3 -- is that the material was never cleaned out of -- in  
5 these vessels. And in the piping, it's just the original  
6 manufactured --

7 THE COURT: So the theory is that at the time it was  
8 in Minnesota -- the -- this scrap metal, the equipment --

9 MR. SUTCLIFFE: Yes.

10 THE COURT: -- it contained a listed form of  
11 formaldehyde, and then it was moved from Minnesota to Oregon  
12 without a permit, and then stored? Is that the idea?

13 MR. SUTCLIFFE: It may have been lawfully moved.

14 THE COURT: All right. Skip -- skip the move part.  
15 We're not charged with interstate transportation of a U122  
16 substance. But somehow it moved in -- inside of the equipment.

17 MR. SUTCLIFFE: (Nods head.)

18 THE COURT: That which you contend is a listed  
19 material. And it -- the equipment, and thus the material, ends  
20 up at this site on the ranch. Yes?

21 MR. SUTCLIFFE: Correct.

22 THE COURT: And though -- and there it is, quote,  
23 stored?

24 MR. SUTCLIFFE: Yes.

25 THE COURT: Without a permit?



1 MR. SUTCLIFFE: Right.

2 THE COURT: So the form of the substance, while  
3 residing in the equipment, is obviously critical?

4 MR. SUTCLIFFE: Yes.

5 THE COURT: Okay. And how have we -- and -- I know  
6 about the materials that were seized from pit 2, and the  
7 testing there.

8 What about the equipment material? What kind of  
9 samples or securing of the -- that material exists?

10 MR. SUTCLIFFE: It was the same. There were samples  
11 taken from the reactor vessels. I think there was some taken  
12 from the piping. And that material was also taken to the DEQ  
13 laboratory, and Mr. Boling tested it. And those are samples  
14 that fall under the 2007-1088 -- 1088 series of samples.

15 THE COURT: And in what form did he find them? Remind  
16 me, please.

17 MR. SUTCLIFFE: They were solidified in the material.

18 THE COURT: So he's scraping things.

19 MR. SUTCLIFFE: Chipping and scraping.

20 And I can explain that in a minute. I just think I  
21 need to back up about -- you asked about the bags.

22 THE COURT: Yes.

23 MR. SUTCLIFFE: How they got from Minnesota.

24 THE COURT: Well, I didn't know that the bags came  
25 from Minnesota.

1           What you told me was that bags were in pit 2, and I  
2 don't know from whence they came.

3           MR. SUTCLIFFE: I'm sorry.

4           THE COURT: So I don't know if they were carried in  
5 bags from Minnesota or material came in some other form. Was  
6 it put in a bag and then dumped in Oregon?

7           MR. SUTCLIFFE: Okay. Our -- the working theory is  
8 that at the same time, when they were dismantling the  
9 equipment, that they -- there were some bags of -- I don't know  
10 if they were -- I don't think they were in bags. There was  
11 paraformaldehyde at the Minnesota facility, and that also got  
12 transported, initially someplace else other than the ranch, but  
13 ended up at the ranch.

14          THE COURT: And it got transported in -- in the bags,  
15 you're saying, in the form that it was found in pit 2.

16          MR. SUTCLIFFE: My recollection is it was not, it was  
17 transported in drums.

18          THE COURT: And then somehow --

19          MR. SUTCLIFFE: Got into bags.

20          THE COURT: Because it's poured, or what?

21          MR. SUTCLIFFE: It could have been poured as an  
22 aqueous solution into -- but that's unlikely, because we, at  
23 this point, think that it was probably paraformaldehyde in a --

24          THE COURT: Okay.

25          MR. SUTCLIFFE: -- semi-solid form.

1 THE COURT: So the Government, working backwards,  
2 then, has material seized from pit 2.

3 MR. SUTCLIFFE: (Nods head.)

4 THE COURT: And it has the material that's been  
5 scraped and chipped out of the equipment at the equipment  
6 place. Yes?

7 MR. SUTCLIFFE: Yes.

8 THE COURT: And the Government contends that there's a  
9 way, in terms of scientific reliability, to work backwards from  
10 there to allow a jury rationally to conclude, beyond a  
11 reasonable doubt, that at the time those materials were  
12 deposited in pit 2, or permitted to reside in the equipment at  
13 the equipment place, they were then and there in a form that  
14 constituted the listed waste, yes?

15 MR. SUTCLIFFE: Yes, your Honor.

16 THE COURT: I think I got it. I think I understand.  
17 Okay. So what else about background do you want to  
18 tell me?

19 MR. SUTCLIFFE: That was pretty much it.

20 THE COURT: You were saying you don't know the form in  
21 which the material was when it moved, allegedly, from  
22 Minnesota? You just know that in the form in which it  
23 arrived -- well, you don't know.

24 MR. SUTCLIFFE: It was described as paraformaldehyde,  
25 which suggests to me that it was already somewhat in the

1 goo-type form in the -- the linear polymeric form.

2 THE COURT: Okay. So it seems like all I end up with  
3 are more questions, as we continue to unpack this. And that's  
4 not being critical. It's just, I think, the nature of the  
5 beast.

6 The -- because I can see that what started out as a  
7 Daubert motion, to evaluate whether Mr. Boling and others have  
8 a sufficient scientific foundation to offer opinions about the  
9 properties of the material tested, we then ultimately, at some  
10 point, transition into whether all of that -- even if admitted,  
11 even if there is a basis to allow that testimony about the --  
12 what I've called differential diagnosis -- it smelled like  
13 formaldehyde. It became solid at certain temperatures.  
14 It's -- it's soluble, and all of those things.

15 Then the question is, what does that mean, in terms of  
16 when the material was deposited and when it was allowed to  
17 reside in the equipment, in the District of Oregon, without  
18 a -- a permit, such that, I guess -- I'm assuming the  
19 Government has a way to get there.

20 MR. SUTCLIFFE: To --

21 THE COURT: To be able to have a jury -- well, I guess  
22 the question first becomes is in the form in which it was found  
23 and resided in the pit, or in the equipment, is that a listed  
24 chemical?

25 MR. SUTCLIFFE: When we get to that point, I was going

1 to argue that it is.

2 THE COURT: All right.

3 MR. SUTCLIFFE: Go --

4 THE COURT: Right. Okay. But that's not today's --

5 or any motion.

6 Right now we're trying to figure out exactly what does  
7 the -- what is the standard for determining whether something  
8 is a U122 waste, because that's an element of both Counts 1 and  
9 3?

10 MR. SUTCLIFFE: Yes.

11 THE COURT: Okay. I thank you for that.

12 Was there anything else you wanted to add before  
13 Ms. Hoffman has a chance to give me some background, too?

14 MR. SUTCLIFFE: No, your Honor.

15 THE COURT: Okay. Would you like to --

16 MS. HOFFMAN: We would -- we would like to say very  
17 little by way of background.

18 THE COURT: That's fine.

19 MS. HOFFMAN: Our client does manufacture something  
20 called urea formaldehyde, which is a resin, or a UF  
21 concentrate. So -- the other thing is that the comment that  
22 was made regarding the consultants' declaring the material to  
23 be hazardous materials, that the contractors made the  
24 determination, that's going to be an issue for trial factually,  
25 because we believe that there was reliance on some of the

1 testing, that you're going to be analyzing early on in the  
2 disposal technique, and that there was compliance with what was  
3 considered the most prudent way to handle the material.

4 THE COURT: We are not -- your client is not accused  
5 of any criminal conduct, is he, after the material was  
6 discovered?

7 MS. HOFFMAN: Correct. But the Government --

8 THE COURT: The alleged crimes occurred when the  
9 material was left in the pit?

10 MS. HOFFMAN: Correct.

11 THE COURT: Or allowed to reside in the equipment that  
12 was present on the property?

13 MS. HOFFMAN: Correct.

14 THE COURT: And then it's discovered, and then efforts  
15 ensue.

16 MS. HOFFMAN: (Nods head.)

17 THE COURT: He's not being accused of continuing to  
18 store without a permit, or anything like that, is he?

19 MS. HOFFMAN: That is correct.

20 THE COURT: Okay.

21 MS. HOFFMAN: What we're a little touchy about --

22 THE COURT: Yes.

23 MS. HOFFMAN: -- is the representation that the  
24 contractors made the determination it was hazardous --

25 THE COURT: I -- I -- you've reserved all of your

1 arguments about that.

2 I'm just hearing Mr. Sutcliffe to be responsive to a  
3 specific question I asked: Why did it get disposed somewhere  
4 else?

5 It got disposed somewhere because contractors said it  
6 was X. And they said it was X because they undertook a  
7 process, none of which is yet before a jury and would all have  
8 to be vetted, to the extent the Government wanted to rely on it  
9 at trial.

10 MS. HOFFMAN: Correct.

11 THE COURT: Okay.

12 MS. HOFFMAN: We believe that the basic outline, as  
13 explained to the Court, by the Government, is the framework for  
14 analysis for the jury description -- jury description -- jury  
15 instruction discussion that we're having, as well as for the  
16 Daubert.

17 And I don't think, at this point, we have anything  
18 useful to add to that prior --

19 THE COURT: Okay. Very good.

20 MS. HOFFMAN: By the way, Ms. Adams, from my office,  
21 will be arguing the jury instruction issue.

22 THE COURT: Okay. That's fine. Thank you.

23 Do you want to go to is it a commercial waste?

24 MR. SUTCLIFFE: We could start there, your Honor.

25 THE COURT: Where -- where do you want to start,

1 Counsel, both of you?

2           Because I -- I'm going to defer to the fact that you  
3 probably have an interest in an order of analysis that doesn't  
4 matter to me at the moment.

5           I -- I only care about ultimately satisfying myself as  
6 to what the -- what the actual elements or correct legal and  
7 technical definitions are.

8           And let me just say, we're all going to do -- have to  
9 do way better than this before we could ever instruct a jury.  
10 Because if it takes me five readings -- and it did -- just to  
11 begin to try to parse out what is being explained, this will  
12 never do.

13           There isn't a jury on this planet that can be expected  
14 to take what you've offered in your -- with your expertise and  
15 simply run with it, compared to facts.

16           And so one thing that occurs to me, as an initial  
17 reaction to your proposals, is that much of what is embedded in  
18 your proposed jury instruction analysis is really expert  
19 opinion itself, and that the jury instruction may end up  
20 needing to be at a far more plain-speak level, to which an  
21 expert would be -- a qualified expert would be permitted to  
22 opine.

23           So I can't, for the life of me, see trying to instruct  
24 the jury in the manner you've described. I can't see that  
25 happening. But that's maybe because I'm -- I still don't get



1 it.

2 I just know that jurors are intent on following the  
3 instructions, and they will hang up when there is a place that  
4 they don't understand conceptually.

5 And so much of the technical material you're proposing  
6 may be accurate, but it may not be the basis to tell the jury.  
7 Instead, it may be the standard that has to be met by the  
8 Government in my evaluating the sufficiency of the evidence.

9 And it may be more meaningful for jurors to hear an  
10 expert, who is qualified, give an opinion as to whether a  
11 certain standard as we -- I ultimately have to determine ahead  
12 of time as a matter of law whether that standard was met, based  
13 on the evidence.

14 So that -- what the jury hears is -- is item -- you  
15 know, the Government has to prove whatever number of elements.

16 And -- and what they hear from you, in argument, is  
17 Witness A or B or C should be believed, and not Witness Q or X  
18 or Y. But I just can't -- I really can't follow what you're  
19 telling me in a -- in a big way.

20 So we have to unpack it, as I know you're prepared to  
21 do. And we also have to think ahead to how this gets presented  
22 to real people, assuming we go that far.

23 I'm exempting myself from that universe.

24 So which prong -- commercial, or whatever -- do you  
25 think we should start on?

1 MR. SUTCLIFFE: Your Honor, the -- the reason I gave  
2 the Court and defense counsel the flow chart is because of what  
3 you just said.

4 And as I went through those -- writing the  
5 instructions -- I had the very same thoughts about what the  
6 Court had, about how would a jury look at this.

7 So for my own benefit, I decided to try to make a flow  
8 chart. I never thought it would be interesting to give -- I  
9 started doing this in -- in the coral smuggling case, making  
10 flow charts of jury instructions, which I had never done  
11 before. And I find them very helpful.

12 I wish we could just hand them a flow chart. But this  
13 is my attempt to make it easy. I don't know if --

14 THE COURT: Well, there's nothing to prevent you from  
15 using your own flow chart for purposes of argument, at some  
16 point, if we get that far.

17 But, first, you have to get through me. And I don't  
18 mean that as a threat. It's more of a plea.

19 MR. SUTCLIFFE: Your Honor, I mean, I first heard of  
20 U-listed waste about ten years ago. And this is not easy  
21 stuff. I mean, it --

22 THE COURT: Okay.

23 MR. SUTCLIFFE: It's --

24 THE COURT: You want to start with is it a commercial  
25 chemical?

1 MR. SUTCLIFFE: I think that's the place to start.

2 THE COURT: And, Ms. Adams, is that all right with  
3 you? Can we focus on that one? And then we'll go to other  
4 matters?

5 MS. ADAMS: Yeah, I think that's as good a place as  
6 any.

7 THE COURT: Okay. Very good. So let's go,  
8 Mr. Sutcliffe.

9 And then, Ms. Adams, you'll get a chance, I promise.

10 MR. SUTCLIFFE: The reason I did -- I opened to  
11 261.33, the discarded commercial chemical products, and that's  
12 what it talks about.

13 THE COURT: You should refer to -- make your reference  
14 complete for the record, the regulation --

15 MR. SUTCLIFFE: Oh, 40 CFR 261.33. Any time I talk  
16 about 261.33, it's referring to that 40 CFR -- or any -- any of  
17 the 260s I refer to are parts -- part 260 to 261 of 40 CFR.

18 THE COURT: Thank you.

19 MR. SUTCLIFFE: It seemed to me that the first thing  
20 you really have to figure out is that -- whether this is a  
21 commercial chemical product. And so I made the first stab at  
22 this by -- and I apologize that the lines aren't really even  
23 there on the arrows. I don't know how this program works,  
24 but --

25 THE COURT: Well, you're a lawyer, not a word

1 processor. So go ahead.

2 MR. SUTCLIFFE: So anyway, I felt it -- the first  
3 question you needed to ask is whether it's -- was this  
4 substance manufactured or formulated for commercial or  
5 manufacturing use?

6 If the answer to that is no, I think it's pretty much  
7 game over. So --

8 THE COURT: Let's stop there.

9 Do you agree?

10 MS. ADAMS: We agree.

11 THE COURT: That's step one.

12 MR. SUTCLIFFE: And then the evidence from that would  
13 be the fact that he owns a manufacturing facility and had these  
14 items available to him.

15 If you find that it is a manufactured --

16 THE COURT: The answer is yes. Then we go to the --  
17 the turquoise box. Is that right?

18 MR. SUTCLIFFE: And this is where it gets problematic  
19 with the defense.

20 THE COURT: Okay.

21 MR. SUTCLIFFE: Now, these come straight from  
22 261.33(a), (b). There's actually (c) and (d), also.

23 I don't think you need to refer to (c) --

24 THE COURT: Hold on. Hold on just a minute. I need  
25 to be oriented.

1           Where do I look?

2           MR. SUTCLIFFE: 261.33.

3           (Pause, Court and law clerk conferring.)

4           THE COURT: All right. So I am at 261.33(a) and (b).

5           MR. SUTCLIFFE: (a) and (b).

6           And (c) would come into play if they were going to

7 have an empty container, sort of --

8           THE COURT: So that's Count 3?

9           MR. SUTCLIFFE: That would be for Count 3 only.

10          THE COURT: Let's start with Count 1.

11          MR. SUTCLIFFE: Okay. Count 1, only (a) and (b).

12          So it would have to meet -- the chemical that's  
13 manufactured for commercial use would have to meet one of these  
14 three following criteria there.

15                 The -- the -- the problem we have between us -- the  
16 defense and the Government -- is that they want to say that  
17 it's a commercially pure grade of formaldehyde only, and the  
18 Government has added in the paraformaldehyde or the alpha  
19 polyoxymethylenes, which I'll refer to them as the FPAs.

20                 This is a point in contention, because if you look in  
21 the instructions, they don't want to include any  
22 formaldehyde -- anything that has any of the polymers for  
23 formaldehyde, which the Government thinks is incorrect, because  
24 any commercially manufactured formaldehyde -- the aqueous or  
25 the para, or -- we don't need to talk about the trioxanes.

1 That's another -- that's not at issue in this case.

2 But the -- the two main ones, the formaldehyde -- the  
3 aqueous and the paraformaldehyde are all going to have some  
4 form of polymerization. They just cannot exist in that form.

5 THE COURT: So let's stop.

6 It sounds like that would be a good place to take some  
7 argument, just as a threshold point, as to whether the  
8 defendants' contention has merit, that you have to have  
9 completely pure, and not any -- any polymer version of the  
10 formaldehyde in order to be qualifying under A or B. Isn't  
11 that really your issue?

12 MR. SUTCLIFFE: Yes.

13 THE COURT: Okay. And so you know the issue.

14 What I would like to do is give Ms. Adams the  
15 opportunity to make the argument as to why it has to be only  
16 the very pure form. And then I'll hear back from you. Is that  
17 all right?

18 Can we do it that way?

19 MS. ADAMS: Okay. Thank you, your Honor.

20 THE COURT: And remember to speak to me at a sixth  
21 grade level, because I lose track very quickly here.

22 MS. ADAMS: Well, I always start out nervous, so I  
23 will probably speak at a sixth grade level, like it or not.  
24 I'm just joking. I'll attempt to speak at a sixth grade level,  
25 but from the perspective of someone educated in law.

1 Do you have 40 CFR 361.33 open in front of you still?

2 THE COURT: Yes.

3 MS. ADAMS: So the Government's inclusion of  
4 paraformaldehyde and alpha polyoxymethylene in this first prong  
5 analysis is contrary to this statute. And I won't say that  
6 what we're requiring is that it be pure, because that's also  
7 contrary to this statute.

8 What our jury instruction and what the statute -- or I  
9 should say, regulation requires is that it be the product with  
10 the listed -- the generically named listed chemical.

11 THE COURT: And where are you reading that?

12 MS. ADAMS: I'll show you exactly. So if you're at  
13 261.33 --

14 THE COURT: Yes.

15 MS. ADAMS: -- the first sentence there is "the  
16 following materials or items are hazardous wastes." And then  
17 it says a lot more, but you can actually skip down into (a).

18 Any commercial chemical product -- and the  
19 Government's actually said that they are not going to be  
20 raising --

21 THE COURT REPORTER: I'm sorry. I need you to speak  
22 slower, please.

23 THE COURT: The Government said they are not going to  
24 be raising, quote, manufacturing chemical intermediate, close  
25 quote, in the case.

1           So (a) triggers the standard "any commercial chemical  
2 product."

3           MS. ADAMS: So what I'm going to do, just for purposes  
4 of making the argument a little simpler to follow --

5           THE COURT: Any commercial chemical product, then,  
6 that --

7           MS. ADAMS: Having the generic name --

8           THE COURT: Listed in (e) or (f).

9           MS. ADAMS: Now, (e) or (f) refer to the two lists  
10 talked about in the briefing, which would be the P list.

11          THE COURT: Right.

12          MS. ADAMS: And the P list is a list for acute  
13 hazardous wastes; and the U list, which is the list at issue in  
14 this case, is the list for nonacute but still toxic --

15          THE COURT: Right.

16          MS. ADAMS: -- hazardous wastes.

17          THE COURT: Which is way down the page, 28 or 29 of  
18 the reg.

19          MS. ADAMS: Way back there.

20          So any commercial chemical product having the generic  
21 name listed -- and if you look at the list for U122, the  
22 generic name listed is formaldehyde.

23          THE COURT: The 50-00-0.

24          MS. ADAMS: Right. And that's called the Chemical  
25 Abstract Registry Service number, 50-00-0. I said it right off



1 from memory.

2 THE COURT: Chemical Abstract --

3 MS. ADAMS: -- Registry Service number.

4 THE COURT: Thank you.

5 MS. ADAMS: And that's the number for formaldehyde.

6 Other formaldehyde polymers are found -- formaldehyde  
7 cyclic trimers have different numbers.

8 So paraformaldehyde has its own CAS number CAS is  
9 C-A-S, standing for Chemical Abstract Registry Service.

10 And trioxane also has its own number, just as an  
11 example.

12 But back to the -- back to the 261.33.

13 THE COURT: Okay. Any chemical -- commercial chemical  
14 product having the generic name listed in paragraph (e) or (f).  
15 And any off-specification is the (b). Right?

16 MS. ADAMS: And (b) is just the same, having the  
17 generic name listed.

18 THE COURT: What does "off-specification" mean in this  
19 context, from your perspective?

20 MS. ADAMS: Now, that's an additional and, I think,  
21 complex argument. I'm happy to tackle it now.

22 THE COURT: Let's not go there.

23 MS. ADAMS: I would say let's table it and go --

24 THE COURT: That's an eighth grade argument, instead  
25 of sixth grade. Go on.

1 MS. ADAMS: So the way these regulations read is that  
2 step one, to be U listed, you have to have a commercial  
3 chemical product that has the generic name listed, or not spec  
4 form of that commercial chemical product.

5 And per the Government's stipulation, we're skipping  
6 (c) for now, and I agree that that's a good idea. So then you  
7 go down to the comment, under subsection (d).

8 THE COURT: I'm there.

9 MS. ADAMS: And the comment tells you what that means.

10 THE COURT: The phrase "commercial chemical product."

11 MS. ADAMS: Yes, so it says, "The phrase 'commercial  
12 chemical product,' having the generic name listed in."

13 So we're referring to the commercial chemical product,  
14 having the generic name formaldehyde, refers to a chemical  
15 substance which is manufactured or formulated for commercial or  
16 manufacturing use. And that's where you get into the  
17 Government, on its flow chart, showing a pure grade of that  
18 chemical, a technical grade of that chemical, or a formulation,  
19 so a mixture, where the chemical is still the sole active  
20 ingredient.

21 And then there is another part that refers -- that  
22 tells you, though, that commercial chemical product does not  
23 mean a manufacturing process waste. I'm paraphrasing, but it's  
24 right here in the plain language.

25 And it even says even if the listed chemical is an

1 ingredient in that waste, it's still not a commercial chemical  
2 product for purposes of the U list.

3 And if that listed -- if that product -- I mean, if  
4 that process waste is hazardous, it's going to be listed,  
5 actually, in a different list.

6 These lists --

7 THE COURT: Right. I got that part.

8 I did actually understand that from your writings.

9 MS. ADAMS: Okay. So just from the plain language of  
10 261.33, it's telling you that the -- that you have to have a  
11 commercial chemical product with the generic name  
12 "formaldehyde."

13 And the regulation even lists for you the generic name  
14 "formaldehyde," and then it gives the CAS number, C-A-S, CAS  
15 number.

16 So there's a couple of things that happen, that the  
17 Government has done, I think, to expand that list and to  
18 include things that have -- have a different commercial -- or  
19 different generic names, which are -- in their brief they  
20 argue, paraformaldehyde and trioxane, T-R-I-O-X-A-N-E.

21 In the flow chart, they actually have argued it a  
22 little differently and are arguing that it's paraformaldehyde  
23 or alpha polyoxymethylene.

24 And the first reason why it would be legal error, at  
25 this step, to say that something can be U listed if it has

1 these other generic names is because it simply goes against the  
2 plain language of the regulation.

3 I have more citations and more analysis that I can  
4 provide. But right there --

5 THE COURT: So why don't we stop and let Mr. Sutcliffe  
6 say why he contends what he is asserting in his  
7 turquoise-colored box is in fact within the plain meaning of  
8 the statute. If it's an argument that goes outside of the  
9 plain meaning, then what I would like to do is go back to  
10 Ms. Adams and let her explain what I need to listen for from  
11 you.

12 But tell me why -- do you contend that the plain  
13 meaning of the words she just has been emphasizing includes the  
14 parameters you've laid out?

15 MR. SUTCLIFFE: I don't think you can consult simply  
16 the plain meaning.

17 THE COURT: So your answer is no?

18 MR. SUTCLIFFE: Yes.

19 THE COURT: Good. Thank you. Let's move on.

20 Why, then -- maybe we should have Mr. Sutcliffe tell  
21 me where -- where he -- how he took the next step to -- to add  
22 to what these plain words say, the concepts he's eliminating,  
23 and then you can come back.

24 Okay. Thank you. I'm sorry this is so elementary,  
25 but I need to be led here.

1 Go ahead.

2 MR. SUTCLIFFE: I didn't take that step. It was the  
3 EPA.

4 THE COURT: Well --

5 MR. SUTCLIFFE: Because they -- in -- when they did  
6 the original listing for the U-listed waste, they prepared  
7 what's called a background document. That was included in our  
8 exhibits to the Court.

9 THE COURT: Right.

10 MR. SUTCLIFFE: Well, in that background document,  
11 they talk specifically about including at least  
12 paraformaldehyde and the trioxane, which is the cyclical  
13 polymer which really isn't at issue here.

14 But they did include para -- they considered  
15 paraformaldehyde. Now, I can't sit here and tell the Court why  
16 they didn't bother to list paraformaldehyde 2 as a different U  
17 number and -- because, as Ms. Adams points out, it does have a  
18 different -- different CAS number.

19 I don't know why they didn't do that. They referred  
20 to it in the background document, and then there was a  
21 subsequent RO 11368.

22 THE COURT: RO meaning?

23 MR. SUTCLIFFE: The RCRA online interpretation, in  
24 which they again repeated that paraformaldehyde would -- should  
25 be part of the listing.

1           They -- they never say alpha poxy -- polyoxymethylene.  
2 And we'll get to that after we resolve this one, if the Court  
3 wants.

4           THE COURT: Okay.

5           MR. SUTCLIFFE: The reason -- the reason, as we  
6 explained in our brief, is that any of these -- the  
7 formaldehyde or the paraformaldehyde, certainly, are soluble in  
8 water. And so those are the forms that pose a danger to the  
9 environment, and that's why EPA listed them in the -- in their  
10 background document. And that's why we think they're --  
11 they're included as part of the U122 --

12           THE COURT: So what -- take me to the law and the  
13 legal transition from how one goes -- uses a background  
14 document, which is not itself in the regulation, as the basis  
15 for the law that the jury would use in deciding the case. Take  
16 me through that legal analysis.

17           MR. SUTCLIFFE: The Chevron case, which was decided --  
18 I forget how many years ago -- they basically said many of  
19 these hazardous waste type cases -- even Clean Water Act  
20 determinations, like wetlands, those sorts of things -- are  
21 very incredibly complex as -- obviously, decisions that have to  
22 be made.

23           And so they -- the Court decided that -- that courts  
24 should defer to the agency's interpretation of its own rules  
25 when it wrote those rules.

1           There's -- it's just guidance, your Honor. There are  
2 other cases that will say that guidance has no legal authority.  
3 You can't hold it up as law and say, You must follow this.

4 But --

5           THE COURT: So when we're talking about a criminal  
6 prohibition, what's the law relative to using agency  
7 interpretation as the standard a defendant is held to in the  
8 context of being accused of criminal activity?

9           If the statute itself doesn't -- doesn't put him on  
10 notice to go read regulations, or more -- even more remotely,  
11 to go online to read interpretations of regulations, as to  
12 which deference would be accorded in a -- in the context of a  
13 civil analysis, what's the criminal law counterpart to that  
14 rule?

15           MR. SUTCLIFFE: I think in this case we get to what --  
16 the as-applied vagueness, as applied in this -- in these  
17 particular circumstances, not just overall vagueness you apply  
18 the facts to the case. And what you're looking at is a man  
19 who, for all intents and purposes, is the formaldehyde king of  
20 America.

21           And a person in his position, with his advisors and  
22 attorneys and position in the formaldehyde industry, should be  
23 aware that there are these --

24           THE COURT: Go ahead.

25           MR. SUTCLIFFE: Okay. Ms. Hoffman -- but that's the

1 Government's position.

2 MS. HOFFMAN: I was talking to Ms. Adams. Forgive me.

3 MR. SUTCLIFFE: I --

4 THE COURT: I'm sorry.

5 This -- this feels a little bit like the Skilling kind  
6 of problem. You know, here is a person who's the head of  
7 Enron, and he was prosecuted and sentenced to prison. And  
8 then, long after the fact, the United States Supreme Court says  
9 the statute is read overbroadly, and it was applied overbroadly  
10 in the prosecution and all the way through his appeals.

11 And so this has a bit of that kind of feel, that  
12 you're saying here is a person who is more knowledgeable than  
13 you or I about formaldehydes, and he should have known that  
14 that which is at issue here, paraformaldehyde, which I guess is  
15 where the heart of your focus is. Am I right?

16 MR. SUTCLIFFE: For now, yes.

17 THE COURT: As to Count 1. Is -- is going to know  
18 that this is a hazardous waste within the meaning of U122. Is  
19 that your point?

20 MR. SUTCLIFFE: I wasn't really prepared to argue  
21 that. But when the Court --

22 THE COURT: I'm asking the question, because I'm still  
23 trying to track where's the authority for the standard I need  
24 to adopt to get the proper statement of the law for the jury?

25 And what you're saying is that if I'm -- let me



1 summarize it back, to make sure I'm understanding. You're  
2 relying on the RCRA online interpretation, which includes  
3 paraformaldehyde, under the -- in the interpretive application  
4 of U122 formaldehyde. And you're saying that's the origin of  
5 the basis for the defendant to have known that  
6 paraformaldehyde, to the extent he was storing it or disposing  
7 of it without a permit, would be a criminal act as alleged.

8 Am I close?

9 MR. SUTCLIFFE: It's close. Except not relying so  
10 much upon the RO, because those are more individualized sorts  
11 of -- I'm more relying on the -- the Government is more relying  
12 on the background document, formaldehyde and its health  
13 effects, that was published in 1980, which was taken into  
14 account when they made the original listing for formaldehyde.

15 This is the document that accompanied the listing and  
16 explained why they felt that formaldehyde should be included on  
17 the U list. And that background document -- it was  
18 Government's Exhibit E in the -- in our packet -- talks about  
19 how formaldehyde can cause tumors in lab animals.

20 THE COURT: Right. We're not even needing to debate  
21 that formaldehyde is a hazardous waste.

22 The question is, to the extent the Government is  
23 asserting the defendant illegally disposed of or stored  
24 paraformaldehyde, I think the primary -- the gateway argument  
25 Ms. Adams is wanting me to focus on is where -- where is the

1 authority that includes paraformaldehyde as a listed waste? I  
2 mean, isn't that your point, Ms. Adams?

3 MS. ADAMS: (Nods head.)

4 THE COURT: Okay. So you're saying, yes, formaldehyde  
5 is the explicit chemical that's on the U122 listing.

6 Now, can that be read or understood to include  
7 paraformaldehyde?

8 One way to answer that question is, Understood by  
9 whom? By chemists or by citizens? I -- you know, I don't  
10 know.

11 MR. SUTCLIFFE: By anyone who --

12 THE COURT: Could be charged that crime?

13 MR. SUTCLIFFE: Yes.

14 THE COURT: Okay.

15 MR. SUTCLIFFE: Based upon their reading of the  
16 background document, which includes paraformaldehyde.

17 THE COURT: So you're saying a person is charged with  
18 knowing what's in a background document, to support a  
19 regulation which is connected to a criminal statute?

20 MR. SUTCLIFFE: I don't -- I don't think the mens rea  
21 extends to their knowledge of the law.

22 THE COURT: No. I'm not suggesting he has to know it  
23 violates a particular regulation.

24 What I'm trying to figure out is whether the -- how  
25 does one determine whether the substance qualifies as a U122

1 listing when it's not on U122?

2 MR. SUTCLIFFE: Because it was included in the  
3 background document.

4 THE COURT: And am I right that the Government's focus  
5 as to Count 1 is in the form paraformaldehyde, as you've been  
6 describing it, or what?

7 MR. SUTCLIFFE: Well --

8 THE COURT: Because it seems like we keep moving  
9 through different formulations of what the -- what the thing  
10 is, whether it's a polymerized version or not. And I'm trying  
11 to --

12 MR. SUTCLIFFE: I understand the Court's frustration.  
13 And Ms. Hoffman has accused us of having a moving target  
14 before.

15 But that's, unfortunately, part of the nature of the  
16 substance that's involved, that -- that we can't come in and  
17 say that it was definitely poured out as -- absent somebody  
18 being there, absent Mr. Beetham telling us, Personally, yeah, I  
19 poured liquid formaldehyde onto the ground, we can only surmise  
20 that at some point this stuff had to be -- had to have been  
21 formaldehyde. Whether it was then turned into paraformaldehyde  
22 by a chemical process or it was just left to polymerize and  
23 then even polymerized further into an alpha, we can't tell yet.

24 I'm telling the Court that I think we should just, for  
25 purposes of these discussions, focus on saying, let's just

1 assume it's paraformaldehyde, and let the Court decide on an  
2 instruction as if it were para, or -- we can talk about the  
3 alphas in a minute, too. Because if the Court excludes -- if  
4 the Court ultimately --

5 THE COURT: Just a minute. I need to think about what  
6 you just said.

7 Okay. Go on.

8 MR. SUTCLIFFE: Because if -- if the Court excludes  
9 paraformaldehyde from the listing and says we have to prove  
10 it's formaldehyde, that -- the -- you know, the Government's  
11 going to have to think long and hard about that.

12 THE COURT: Right. Well, that's potentially another  
13 game over, is what you're saying.

14 MR. SUTCLIFFE: Right.

15 THE COURT: All right. So the issue -- so this is  
16 helpful to know, that the Government's primary focus at the  
17 moment, its working theory -- presumably the evidence on which  
18 the grand jury indicted the defendants -- is that this is  
19 paraformaldehyde and that paraformaldehyde is within the U122  
20 listing for formaldehyde.

21 Am I on track?

22 MR. SUTCLIFFE: Yes.

23 THE COURT: Okay. And you're saying it's within the  
24 U122 listing because the background -- although it's not  
25 explicitly listed individually, the background document,

1 focusing on the solubility of paraformaldehyde and  
2 formaldehyde, emphasizes its danger to the environment when  
3 it's left out there unattended.

4 MR. SUTCLIFFE: I would have to reread it again. It  
5 definitely emphasizes the danger to human health. I can't  
6 remember if it says anything about dumping it on the ground.

7 THE COURT: Okay. Ms. Adams was emphasizing that  
8 paraformaldehyde has its own CAS number.

9 Does the fact that it has its own CAS number --  
10 what -- what do you make of the fact that it is not listed by  
11 its own CAS number, if it was intended to be included within  
12 the U122 listings? What do you make of the fact that something  
13 that has its own CAS number is not on the list, when the  
14 Government's theory is that it should be viewed as on the list  
15 because -- as -- as a form of something else that's got a CAS  
16 number?

17 What's the significance of a CAS number, I guess, is  
18 what that means.

19 MR. SUTCLIFFE: Well, it does have some significance.  
20 I mean, that's not an un -- unwarranted argument that they're  
21 making.

22 I mean, I think that EPA, I mean, knew that there were  
23 these other chemicals. They talk about trioxane. That has its  
24 own CAS number, too. They talk about paraformaldehyde in the  
25 background document.

1 I can't tell you why they -- I mean, this all happened  
2 back in like 1980. And I can't tell you why they didn't  
3 explicitly include it in the U list, other than to tell you  
4 I've seen things like this plenty of times before.

5 I mean, when they're dealing with all -- you've seen  
6 the U list, how long it is. Not everything gets roped in on  
7 these. And then later down the road, they attempt to clarify  
8 by issuing things like ROs. And that's where the RO comes into  
9 place.

10 But, you know, agencies are criticized for doing that  
11 a lot of the times. I know --

12 THE COURT: So can you -- can you take me to a  
13 criminal case in which a comparable kind of jury instruction  
14 analysis was underway, where the -- the legal standard or even  
15 the elements of the offense were dependent upon a background  
16 document?

17 MR. SUTCLIFFE: Sure. I just did a trial in March.  
18 Maybe it was April.

19 They -- in a wetlands case, for instance, in order to  
20 delineate the wetland, you have to decide whether there are  
21 certain things avail -- certain -- there are three criteria,  
22 basically: Whether there is hydrophytic vegetation, whether  
23 there's certain soils, and whether there's a hydrological  
24 component to it.

25 In order to determine whether -- that, you generally

1 rely upon expert testimony. And in that case, they rely upon  
2 what's called the 1987 manual. There was a manual that was  
3 written by the Army Corps of Engineers. It explains how  
4 delineations are done. It's not law. It's just guidance. And  
5 it kind of gets back to the Court's argument about, well, maybe  
6 we need an expert to come in and opine directly on what the law  
7 is, which is in fact --

8 THE COURT: Well, no. I'm not suggesting experts  
9 opine on what the law is.

10 What I tell -- what I'm saying is it's the Court's  
11 obligation to define what the Government's burden of proof is.  
12 It may be within an expert's province to interpret the evidence  
13 according to sound scientific principles that say this evidence  
14 meets this legal standard, as a matter of expert opinion.  
15 That's what I was saying.

16 MR. SUTCLIFFE: I'm sorry. And then that's what I was  
17 trying to get at. But --

18 THE COURT: But the case you're talking about is  
19 obviously a trial judge's decision. Are there appellate cases  
20 that have talked about this kind of --

21 MR. SUTCLIFFE: I could find them. I don't know them  
22 off the top of my head.

23 THE COURT: I think we're going to need them in the  
24 nearer term rather than later, simply because if your premise  
25 is -- and I'm certain the defendant contests it -- that in

1 deciding what is to be included as criterion for determining  
2 whether the subject material is within the U122 listing for --  
3 for formaldehyde -- if in so deciding it is necessary to rely  
4 on agency interpretation that is not in fact explicitly  
5 incorporated in the listing, you know, are there appellate  
6 cases that have analyzed that from the perspective of a  
7 criminal defendant and these issues of notice? And how am I  
8 supposed to know that kind of problem, which you know is part  
9 and parcel of this larger inquiry that we've been trying to  
10 process?

11           So your contention is, go to the RO. Realize that  
12 paraformaldehyde is on the RO. That means it should be  
13 interpreted -- paraformaldehyde should be interpreted as part  
14 of the U122.

15           And then I get to consider whether the experts can say  
16 if that which they tested is paraformaldehyde, of the type  
17 that's on the RO?

18           MR. SUTCLIFFE: That's pretty close, except I would  
19 prefer that the Court use the background document first, and  
20 that the RO is more confirmatory.

21           THE COURT: I'm sorry. I'm sorry. I skipped that  
22 inadvertently. I didn't mean -- the background document is  
23 more of the agency's explicit analysis.

24           Okay. So that would include, then, paraformaldehyde.

25           What about the -- the other, the alpha



1 polyoxymethylene, FPA part? Where does that come from?

2 MR. SUTCLIFFE: Well, that kind of leads -- we have to  
3 talk about Count 3.

4 THE COURT: Then don't go there yet. Let's go back to  
5 paraformaldehyde, the background document, the RO, as your way  
6 to sweep that into what's on the list. Right?

7 MR. SUTCLIFFE: (Nods head.)

8 THE COURT: And Ms. Adams is going to tell me why  
9 that's not appropriate to include, I suppose.

10 Go ahead.

11 MS. ADAMS: Thank you, your Honor.

12 So there's a few issues that I think are really  
13 critical that have come up, that need to be addressed.

14 Let me just -- I'm just going to start by saying you  
15 raised the issue -- well, I raised it, and you responded about  
16 the CAS number being informative. And we talk about that in  
17 our brief, with some -- a citation. And I didn't come prepared  
18 to argue very much more about that.

19 What I would like to point out, though, is that  
20 there's other factors that are even more telling about why  
21 paraformaldehyde and other non-named substances aren't on the  
22 list, that even just the fact that you've got a formaldehyde  
23 CAS number -- and I just realized that I needed to slow down.  
24 So -- and I want to start by addressing the background document  
25 that's been talked about for a minute, here.

1           One is that -- my understanding of the rules of  
2 construction -- statutory and regulatory construction is that  
3 if the regulation is unambiguous and plain, the -- the inquiry  
4 ends with the regulation. So I believe it is unambiguous. It  
5 lists only formaldehyde.

6           But let's say we do look at the background document.  
7 The background document actually does not support the -- it --  
8 it is not -- actually, let me back up.

9           The background document is not an EPA interpretation  
10 of the U122 listing that says, based on our reasoned analysis,  
11 this listing includes paraformaldehyde.

12           So it isn't actually -- whether that's given deference  
13 or not in a criminal case, and whether that satisfies criminal  
14 notice, it doesn't even do that.

15           The background document is a background document for  
16 the listing of formaldehyde. It doesn't say anywhere in there  
17 that the agency is proposing to list paraformaldehyde. It  
18 comments -- it -- the word "paraformaldehyde" appears, and it  
19 does comment on paraformaldehyde. But it does not state in  
20 there that as a result of this background document,  
21 paraformaldehyde is being added to the U list, or the U list is  
22 interpreted to include paraformaldehyde.

23           And the -- the RO that -- that Mr. Sutcliffe mentioned  
24 doesn't say that either. And I can get to the RO later,  
25 because I want to refer a little bit more to this background

1 document.

2           The -- the background document, for the listing of  
3 formaldehyde, is -- is actually a pretty important document,  
4 and it is telling in some ways about what is included in the  
5 listing. And that is that EPA has to follow its own  
6 regulations which say how it can list a list. And it actually  
7 has to look at 11 factors. And two of those are duplicative,  
8 so it's really just ten factors. And it has to consider all  
9 ten of them. And it has to consider them in a public process.  
10 And then it has to promulgate a rule that says this is the  
11 waste we're listing, and name it, and then it receives  
12 comments. It has to actually substantively respond to the  
13 comments and then promulgate a final rule that says what's  
14 being listed.

15           So the background document, I believe, from looking at  
16 it -- which -- and I want to also -- well, I'll get to that in  
17 a moment.

18           So I believe, from looking at the background document,  
19 that it possibly satisfies that criteria for formaldehyde. It  
20 seems to purport to, and no one has challenged it. But it  
21 doesn't even purport to satisfy that criteria for any other  
22 substance. It mentioned other substances. It mentioned that  
23 formaldehyde exists in smog. It mentions that formaldehyde  
24 exists in car fumes. It mentions that paraformaldehyde is a  
25 formaldehyde polymer. It mentions trioxane, which is actually

1 found elsewhere on the U listing, not by itself, but combined  
2 with another substance.

3 It mentions numerous substances, but it is actually  
4 only the background document for formaldehyde. It's -- that's  
5 actually clear by its title and by much of its content.

6 And I want to just direct the Court to a case.  
7 It's -- it's a terribly long name. I'm going to say it, and  
8 then I'll spell it. It's ***Dithiocarbamate versus EPA***.

9 Dithiocarbamate is D-I-T-H-I-O-C-A-R-B-A-M-A-T-E. And --

10 THE COURT: Does it have an identifying number?

11 MS. ADAMS: It does. I'll give it to you.

12 That case is a case out of the D.C. Circuit, a 1996  
13 case. And its citation is 98 F.3d 1394. And it's an opinion  
14 by Judge Williams. It's also cited in our brief.

15 Now, in this case EPA had just listed numerous  
16 carbamates separately and in the -- in the F lists, as classes.  
17 But on the U list, it listed them separately.

18 And some parties in the ***Dithiocarbamate*** case  
19 challenged the listing, saying that EPA had not considered all  
20 ten of the factors for every single substance that they listed,  
21 and that the regulatory record did not adequately reflect and  
22 demonstrate that they had considered all of these factors for  
23 all of the substances they listed. And the Court of Appeals  
24 found that for some of those substances that was correct, and  
25 vacated the listing.

1 I actually -- I'm not sure if vacating is actually  
2 what they did, but they ruled that the listing was arbitrary  
3 and capricious.

4 So my point being that the procedures for listing  
5 aren't a mere formality. They have to look at all sorts of  
6 criteria to list a substance. And in fact they have to look at  
7 criteria like solubility but, in addition, other criteria.

8 So the background document is doing that for  
9 formaldehyde. It's not doing it for para. It's not doing it  
10 for alpha.

11 And so the list, the proposed rule, the promulgated  
12 rule, the background document, and the rule that's in existence  
13 today includes only one thing on it, which is formaldehyde. So  
14 that's -- that's, I think, a key point and the primary point.

15 Additionally, EPA has since issued other, actually,  
16 official interpretations, as opposed to unofficial, and  
17 publicly available interpretations of what's on the list;  
18 whether it includes formaldehyde and/or paraformaldehyde. And  
19 in those interpretations, it has said it does not include  
20 paraformaldehyde.

21 So the only thing I also wanted to add is that  
22 background document is not easy to come by. I searched for  
23 that document and we've tried to get that document ahead of  
24 time, and we were only able to get that document when it was  
25 attached to the Government's Daubert brief.

1           So whether or not a background document is not part of  
2 the regulation can put a party on notice. I think it needs to  
3 be considered that it isn't even something that's readily  
4 available.

5           But now thinking about things that are readily  
6 available, that -- the two things I'm thinking of -- the EPA  
7 interpretations that are formal and which are readily  
8 available --

9           THE COURT: And that do not include paraformaldehyde  
10 as a U122 substance?

11           MS. ADAMS: Correct.

12           THE COURT: Or explicitly exclude them?

13           MS. ADAMS: They explicitly state that it is not  
14 regulated by RCRA on the U list.

15           THE COURT: And those are?

16           MS. ADAMS: Those are -- so you're aware of the  
17 statute CERCLA.

18           THE COURT: I did hear of that once.

19           MS. ADAMS: So the regulations under CERCLA are 40 --  
20 the one I'm going to refer to is 40 CFR 302.4.

21           And under that particular regulation, the EPA, in the  
22 regulation, has listed a -- numerous substances that are  
23 covered by CERCLA. And in that list, they actually are kind  
24 enough to tell you, in the table, whether or not it's also  
25 under RCRA, regulated under RCRA.

1           And if you were to look at that table -- and I only  
2 brought one copy, but -- but you can look it up, or I can.

3           THE COURT: Just tell me.

4           MS. ADAMS: If you look at the table and you look down  
5 the list, it's alphabetized. Formaldehyde -- you'll see  
6 formaldehyde. You'll see the CAS number. And then you'll see  
7 under the column for RCRA the -- the U number, U122.

8           THE COURT: Um-hmm.

9           MS. ADAMS: If you look down further, you get to  
10 paraformaldehyde, you'll see the CAS number for  
11 paraformaldehyde. And under the column where it has a space  
12 for the U listing, it's blank.

13           I'll also point out that the report --

14           THE COURT: So what am I to divine from that?

15           MS. ADAMS: I'm sorry. I divined -- I think that the  
16 plain -- I think unambiguously it's telling you that  
17 paraformaldehyde isn't listed as a U listed --

18           THE COURT: Or at least whoever filled out the form  
19 didn't know?

20           MS. ADAMS: Well, it's an EPA regulation.

21           THE COURT: Someone -- I don't know what that means.  
22 I don't have a rule of construction on a regulation table of  
23 contents.

24           MS. ADAMS: It's -- I'm sorry, your Honor. It's not a  
25 table of contents. It's a list of CERCLA-related wastes. And

1 under --

2 THE COURT: But in what -- I guess I'll -- I'll have  
3 to take a look at the context, to understand where this table's  
4 arising, if this is simply an editor's aid or if it's something  
5 that has the force of agency interpretation, such that it gets  
6 the Chevron deference.

7 MS. ADAMS: And, your Honor, I don't know if it's an  
8 editor's aid.

9 But I do know there is some explanation about the  
10 various columns and that the U listing is designated --

11 THE COURT: We'll make a copy of that shortly.  
12 What else -- you said there was a second.

13 MS. ADAMS: The second document -- and I apologize,  
14 because a moment ago I said it was an official -- like a  
15 regulation. It actually isn't.

16 THE COURT: Okay.

17 MS. ADAMS: But it is an EPA document that's available  
18 online and is -- is an easy document to find, and it's called  
19 the EPA list of lists.

20 And it is a document published by the Office of Solid  
21 Waste and Emergency Response. The most recent publication was  
22 May 2010. It's referred to in our brief with an Internet web  
23 citation.

24 I could also, though, send a copy over to the Court,  
25 if that --



1 THE COURT: Well, we're going to make copies of those  
2 shortly in a recess. So tell me about it.

3 MS. ADAMS: So the list of lists -- somewhat like  
4 CERCLA --

5 Give me one moment to find it.

6 The list of lists lists numerous chemicals, again, CAS  
7 numbers. And then it lists a number of federal environmental  
8 statutes and says -- designates on the table whether or not  
9 something is regulated by each of those statutes.

10 So if you look up on this list paraformaldehyde, you  
11 can then refer to the -- to the column that it has marked, and  
12 see that it's designated as being regulated under CERCLA. The  
13 column that designates for regulation under RCRA is blank.

14 Alternatively, if you look up formaldehyde, it's  
15 regulated under all of the statutes.

16 So it's shown that it's a U122, under RCRA. It's  
17 regulated under CERCLA --

18 THE COURT: So then going back to Mr. Sutcliffe's flow  
19 chart, you're continuing to support the argument that for  
20 purposes of the legal standard, it would be error to include in  
21 his prong -- or his item 1, and -- and the turquoise box, that  
22 the material is formaldehyde -- pardon me, form --  
23 paraformaldehyde, or the alpha polyoxymethylene form?

24 MS. ADAMS: Yes, your Honor. I do believe -- I  
25 believe, on the plain face of the statute, it would be -- or

1 regulation, it would be error --

2 THE COURT: And you're saying other documents are at  
3 least as persuasive as Mr. Sutcliffe's reliance on the  
4 background document. And at -- at best, it -- it creates an  
5 ambiguity about what -- what paraformaldehyde is relative to  
6 the U122 listing, because of these other matters. You've got  
7 the absence of it. You've got the affirmative blanks in the  
8 columns you're providing. And you're saying the background  
9 document doesn't meet the ten-factor test for including a  
10 material.

11 MS. ADAMS: Correct.

12 THE COURT: Okay.

13 MS. ADAMS: And the two other points that I think  
14 are -- are useful points that -- that also go to showing that  
15 it would be legal error to expand the list to include anything  
16 that's not the named chemical formaldehyde, which the lister is  
17 referring to the product, so the product known by that name  
18 formaldehyde -- the two other things I would point to is there  
19 are numerous references in the Federal Register to the list.  
20 Oftentimes they don't give a lot of context. So it's just  
21 one -- or some brief statements.

22 We've cited them all in our brief.

23 But they say, over and over, like the -- the list  
24 includes only the generically named substance. It doesn't  
25 include things that contain the substance. It must be the

1 generically named substance. There's a lot of repetition of  
2 that concept.

3 I cited in the brief a case from 1981 that came out  
4 just right after formaldehyde and many other substances were  
5 added to the list. It's -- it's the O'Leary versus Moyer's  
6 Landfill case, which is at 523 F.Supp. 642.

7 It's an Eastern District of Pennsylvania case, but  
8 it -- it does, I think, a good job, also, of talking about  
9 how -- citing to these regulations and Federal Register  
10 citations that say the intent of the list was to be clear and  
11 to put manufacturers on notice.

12 And the fact that something contains something is not  
13 enough. And I think that -- the case doesn't discuss it,  
14 because it -- I don't think that it's come up.

15 The fact that something is actually not even listed  
16 would seem to be even more anathema.

17 And all of this, combined, has actually put anyone  
18 who's regulated by this statute on notice that what's regulated  
19 is products known by the name listed and not things known by  
20 another name.

21 THE COURT: Okay.

22 MS. ADAMS: And you're aware, your Honor -- I'm sorry.

23 THE COURT: Go ahead.

24 MS. ADAMS: -- of U.S. versus Skilling. We've cited  
25 that in our brief as well, and we think that it's pertinent

1 here.

2 THE COURT: Seems to be cited for everything, at the  
3 moment. But we'll see how that sorts out.

4 Would you hand up, please, what you were referring to  
5 in terms of the indexes and lists of lists references.

6 And, Andrew, would you make copies, please. One for  
7 the Government, and one for me.

8 I would like to go back to Mr. Sutcliffe, then, if you  
9 don't mind, Ms. Adams, and back to the blue box on the table.  
10 All right?

11 MS. ADAMS: And, your Honor, both of these documents  
12 are actually really lengthy, and I've only brought copies of  
13 the pages that pertain.

14 THE COURT: That's fine. We understand you brought  
15 them for your benefit. We'll at least have a chance to see  
16 what -- what we're looking at.

17 So, Mr. Sutcliffe, back to your blue box.

18 Ms. Adams is telling me I need to stop after the  
19 phrase, "Commercially pure grade of formaldehyde," in item 1.  
20 And she's given me the reasons why she contends that's a  
21 correct legal conclusion.

22 Is there something you want to say on that point,  
23 further, before we go to your item 2?

24 MR. SUTCLIFFE: Just -- I don't -- in my experience,  
25 applying CERCLA definitions to RCRA definitions, it's -- those

1 two groups don't, like, go to lunch and discuss these things  
2 very often.

3 So -- and I do -- I've actually briefed that issue  
4 before, so I -- I can provide something on that.

5 THE COURT: All right. Well, I may be asking for  
6 focused supplemental arguments on specific issues. But right  
7 now we're still at a talking point, so to speak.

8 So let's move to your item 2.

9 The second category -- the second crit -- and these  
10 are additive. All three would have to be present. Correct?  
11 Or not -- they're optional?

12 MR. SUTCLIFFE: Any one of them.

13 THE COURT: All right. So it is a commercially pure  
14 grade of formaldehyde, and then if we omit the material  
15 Ms. Adams is referring to -- and I haven't decided yet whether  
16 we do or we don't. But if we did, we then move on to it is a  
17 technical grade of FPA that is produced or marketed. Right?

18 And, Ms. Adams, do you agree that that criteria, item  
19 2, is one option?

20 MS. ADAMS: (Nods head.)

21 THE COURT: Is that a yes?

22 MS. ADAMS: I'm sorry.

23 THE COURT: See --

24 MS. ADAMS: Could you repeat your question, please,  
25 your Honor.

1 THE COURT: Yes. I'm moving on to item 2.

2 MS. ADAMS: Yes.

3 THE COURT: Do you agree that that is a correct  
4 statement of one alternative standard? It is a technical grade  
5 of FPA that is produced or marketed?

6 MS. ADAMS: I don't, your Honor.

7 THE COURT: And the reason is?

8 MS. ADAMS: The reason is that the term "FPA" is a  
9 term that Mr. Sutcliffe has -- has created to mean  
10 formaldehyde, paraformaldehyde, or alpha polyoxymethylene.

11 THE COURT: So how would you phrase item 2, to be  
12 accurate?

13 MS. ADAMS: It is a technical grade that is produced  
14 or marketed as formaldehyde.

15 THE COURT: So you would delete the "of FPA," and you  
16 would add "of formaldehyde."

17 MS. ADAMS: Yeah, you -- you could say of -- right.  
18 It is a technical grade of formaldehyde that is produced or  
19 marketed.

20 THE COURT: Okay. Mr. Sutcliffe, do you think that's  
21 a correct statement? It is a technical grade of formaldehyde  
22 that is produced or marketed?

23 MR. SUTCLIFFE: If you're not going to go with --

24 THE COURT: I don't know whether I am or not. I'm  
25 trying to find out what you think of her proposition.

1 MR. SUTCLIFFE: It is a technical grade --

2 THE COURT: Of formaldehyde that is produced or  
3 marketed?

4 MR. SUTCLIFFE: Yes.

5 THE COURT: And that simply masks the question whether  
6 formaldehyde includes what you're calling EPA?

7 MR. SUTCLIFFE: (Nods head.)

8 THE COURT: Okay. So why do you contend what you call  
9 EPA should be one of the options, in its technical grade form?

10 MR. SUTCLIFFE: Well, one of the things you asked us  
11 to do is to focus on defining technical grade.

12 THE COURT: Right. Right.

13 MR. SUTCLIFFE: And technical grade is not -- it's not  
14 defined in RCRA.

15 THE COURT: So what -- what's the plain and ordinary  
16 meaning of "technical grade," for those -- let me rob a  
17 standard from patent law -- for those ordinarily skilled in the  
18 art.

19 MR. SUTCLIFFE: I just know what EPA says. And what  
20 EPA does -- their Office of Solid Waste, they use a definition,  
21 which supposedly -- we put this in the brief -- that is  
22 supposedly in common usage within the chemical industry. And  
23 it refers to all commercial grades of the product in various  
24 stages of purity, and that there really aren't any exact  
25 criteria for how much purity. And it varies from compound to

1 compound. That's -- you can find that in RO 11348.

2 That's where you get -- where the Government believes  
3 you can find the best definition of technical grade.

4 And it would be EPA's position that the technical  
5 grade is -- it includes paraformaldehyde and alpha -- we would  
6 need more testimony on that.

7 But certainly paraformaldehyde, we know, is produced  
8 and marketed. It's a form -- a linear form of the formaldehyde  
9 that's just got more chains. It's a technical grade.

10 THE COURT: Okay. So let me see if I can apply this.

11 If you're limited to formaldehyde as listed on U122,  
12 is it your contention that you still have a basis to proceed if  
13 your evidence is that the substance is a technical grade of  
14 formaldehyde in the form of paraformaldehyde?

15 MR. SUTCLIFFE: (Nods head.)

16 THE COURT: Yes?

17 MR. SUTCLIFFE: Yes.

18 THE COURT: Okay. That's what I thought you would  
19 say.

20 Okay. So technical grade is a big deal, too, then, in  
21 terms of trying to figure out what is or isn't included in a  
22 technical grade of formaldehyde?

23 MR. SUTCLIFFE: (Nods head.)

24 THE COURT: And is that a question of law or a  
25 question of expertise, by those who are skilled in this area?



1 MR. SUTCLIFFE: I think it's a question -- it's both.  
2 It's a mixed question of law and fact.

3 THE COURT: Ms. Adams, what about the technical grade  
4 of formaldehyde?

5 If there -- if there's -- let's assume -- and I don't  
6 know if there will be. But let's assume there is evidence that  
7 what Mr. Sutcliffe is calling FPA, or paraformaldehyde, is  
8 understood in the industry as a technical grade of  
9 formaldehyde, where -- where does that leave us?

10 MS. ADAMS: Well, one, it is not.

11 As a legal matter, though, not as a fact matter, it is  
12 not permissible to use the technical grade component of the  
13 definition of commercial chemical product having the generic  
14 name formaldehyde, to then include a product having a different  
15 generic -- a product having a different generic name, which is  
16 paraformaldehyde.

17 While it's true that the regulations do not include a  
18 definition of technical grade, both sides agree to that in  
19 their briefing. The EPA has explained the intent of the  
20 technical grade component of -- of 40 CFR 261.33.

21 And what EPA said -- and they said it in a Federal  
22 Register provision, which I don't actually have at my  
23 fingertips. I -- I believe it's the one I cited on our jury  
24 instruction, which is 45 Federal Register 78529, November 25th,  
25 1980.

1           If I find later that I'm citing the wrong one, I'll  
2 just alert the Court and the parties, if that's okay.

3           But what they say there is that we've had to expand  
4 beyond the pure grade of the generically named chemical to  
5 include the technical grade. Because it turns out that  
6 oftentimes products are sold not in a pure grade -- pure  
7 meaning 100 percent -- but in a technical grade.

8           And so formaldehyde -- the -- the thing that's  
9 generically known as formaldehyde is actually always sold in a  
10 technical grade. It's sold in what's called an aqueous  
11 solution, which is a mixture of formaldehyde and water. And --  
12 and so that is -- that's a technical grade. It's not 100  
13 percent pure formaldehyde. The sole active ingredient is still  
14 formaldehyde, and it meets all of -- therefore, that product,  
15 which is often sold under the trade name formalin, meets  
16 this -- this -- this commercial products definition.

17           What the -- what the EPA does not say in its -- in  
18 that portion of the Federal Register where it's explaining the  
19 intent of the technical grade regulation, it does not say that  
20 allows us to capture other products, known by different generic  
21 names, in which the chemical might be --

22           THE COURT: No. The technical grade -- the product  
23 whose technical grade suffices -- still has to be a technical  
24 grade of formaldehyde, yes?

25           MS. ADAMS: Correct.

1 THE COURT: That's your point?

2 MS. ADAMS: Yes, your Honor.

3 And both parties agree, I believe, on kind of the  
4 basic definition of technical grade. The -- the Government's  
5 definition comes out of this one treatise that Mr. Sutcliffe,  
6 in his brief, talks about a little bit, the McCoy's.

7 The -- the defendants' definition, which is very  
8 similar, comes out of a combination of the Federal Register and  
9 one of the -- the EPA interpretations. And it just refers  
10 to -- and it is a somewhat, I think, ambiguous definition that  
11 would probably -- well, I will just say that.

12 I mean, it's a technical grade. It is a grade of  
13 purity that is marketed or recognized in general usage by the  
14 chemical industry.

15 And -- and it has to also, though, be the sole active  
16 ingredient in the product, or in the technical grade has to be  
17 the -- the listed chemical. That isn't in that definition, but  
18 that's -- that's also referred to in other EPA interpretations  
19 and in the context of the whole 40 CFR 261.33.

20 So you get this little bit of information. But the  
21 key point is that you can't take technical grade of the  
22 generically named chemical, which is formaldehyde, and somehow  
23 then, through that --

24 THE COURT: So your premise is that because  
25 formaldehyde has its own CAS number, and it specifically is not

1 listed on U122, there just isn't any way to capture  
2 formaldehyde, if it is formaldehyde that the Government's  
3 relying on as the substance at issue in Count 1?

4 MS. ADAMS: I might not have followed your question  
5 precisely.

6 THE COURT: So it doesn't help when Ms. Hoffman  
7 interrupts you when I'm speaking to you.

8 MS. ADAMS: Let me -- I was attempting to listen,  
9 but --

10 THE COURT: No, it's not your fault. It's hers. She  
11 shouldn't be interrupting you while we're trying to talk.

12 So your premise is that formaldehyde is a -- is a  
13 substance unto itself. It has its own CAS number. It is not  
14 assumed into the technical grade of formaldehyde, because it's  
15 its own substance.

16 MS. ADAMS: That's -- that's correct, your Honor. And  
17 the fact that it has its own CAS number is very telling. I  
18 think even more telling is the fact that formaldehyde and  
19 paraformaldehyde and other substances which have come up in our  
20 conversations -- trioxane; I'm going to say alpha pom, to make  
21 it easier; beta pom -- there's all of these other substances.  
22 They're all considered distinct chemical substances. If you  
23 look in chemical dictionaries, they're defined differently.

24 Some of them have different CAS numbers. None of them  
25 are included together into one CAS number, but not all of them

1 have been given CAS numbers, to clarify that statement.

2 But they're all distinct chemical substances. And 40  
3 CFR 261.33 says to be a U-listed substance, this thing has to  
4 be the commercial chemical product having the generically --  
5 generic name listed.

6 EPA could have listed paraformaldehyde. EPA could  
7 have listed alpha pom. EPA could have listed trioxane. And in  
8 fact they did list a combination of two chemicals that included  
9 trioxane in the U list. So there's -- the key point is simply  
10 that you can't take, then, this -- the definition of the  
11 phrase, "commercial chemical product having the generic name  
12 formaldehyde," and then say --

13 THE COURT: I understand your point. You can't  
14 inappropriately sweep in, under something called a technical  
15 grade, that which wasn't intended to be there in the first  
16 place. I get -- I get the point. But --

17 MS. ADAMS: And, your Honor, we brought with us today  
18 the -- the EPA interpretations that -- that the defense cited  
19 in its memo.

20 In the memo, I had just given the online citations.  
21 But I -- seeing that the Government gave theirs, I thought, oh,  
22 that looks like a good idea.

23 THE COURT: That's fine. You can hand it up at an  
24 appropriate --

25 MS. ADAMS: And I also brought, attached at the back,

1 the printouts from that condensed chemical dictionary that I  
2 cited in the brief, just because I thought it might be hard to  
3 get ahold of.

4 THE COURT: All right. Thank you.

5 So I want to take a break here, in a minute. And I  
6 want to see if there's anything else I need to hear from you.  
7 And then I want to go back to Mr. Sutcliffe, regarding this  
8 second category concerning technical grade.

9 You agree technical grade is the standard. Your  
10 dispute has to do with what is swept in under that umbrella?

11 MS. ADAMS: Yeah. To be very clear, I agree -- and  
12 the defense agrees -- that it -- part of what's on this flow  
13 chart is correct. It is a commercially pure grade of  
14 formaldehyde, period.

15 It is a technical grade of formaldehyde that is  
16 produced or marketed, period. Or you could go to the third  
17 one.

18 It's just that the trying to expand -- you know, using  
19 various hooks in the regulatory language to try to expand the  
20 listing to include paraformaldehyde or other chemicals,  
21 substances, is -- is unlawful, actually.

22 It -- I wanted to really quickly respond to something  
23 that Mr. Sutcliffe had said about the EPA CERCLA lawyers being  
24 different from the EPA RCRA lawyers.

25 And the point that -- that hit me when I heard that

1 was if the EPA's CERCLA lawyers aren't themselves on notice  
2 that paraformaldehyde is in the RCRA regulations --

3 THE COURT: He didn't say that. He just said they  
4 live in different worlds.

5 Look, you don't need to waste your breath talking  
6 about a colloquialism. What we need to worry about is what is  
7 a proper rule of construction that gets me to a place where I  
8 can correctly state the standard; and then, applying the  
9 standard, figure out what's in or out.

10 So let's -- let's just stay on that track.

11 Anything else on that item 2?

12 MS. ADAMS: My -- my focus is simply on the issue of  
13 notice. I think that there's nothing giving anyone any  
14 notice -- any potential defendant, and the defendants in this  
15 case, that paraformaldehyde was going to be covered as a -- as  
16 a -- you know, via the technical grade opening.

17 THE COURT: Okay. Anything else, Mr. Sutcliffe, as to  
18 item 2, especially responsive to what Ms. Adams has been  
19 arguing?

20 MR. SUTCLIFFE: Just what she said about aqueous  
21 solutions, formaldehyde being water and formaldehyde. It's  
22 actually water, formaldehyde, and meth -- a tiny bit of  
23 methanol, which serves to stabilize the polymerization.  
24 Because it's distilled from methanol, so some remains in -- in  
25 the product.

1 And that will become more important after the break.

2 THE COURT: Right. But in that aqueous solution that  
3 you've just described, is there what you contend to be  
4 paraformaldehyde?

5 MR. SUTCLIFFE: There are polymers of formaldehyde.

6 Until the product -- well, that's why we go back to  
7 the chart that I included in the brief. At a certain point,  
8 when it chains up maybe past eight, or so, and becomes goo, now  
9 it's not --

10 THE COURT: So here's something. Let's assume we have  
11 a listed substance, like formaldehyde, that in its technical  
12 grade is before us in an aqueous solution.

13 So there's formaldehyde. Right?

14 Its active ingredient, that's formaldehyde. There's  
15 water. There's a little methanol. Right? There might be  
16 something else in there, too.

17 What makes it a crime to dispose of that, without  
18 permit, is the presence of formaldehyde. Right?

19 MR. SUTCLIFFE: Yes.

20 THE COURT: Not the presence of paraformaldehyde?  
21 Unless --

22 MR. SUTCLIFFE: (Nods head.) No, no, no. You're  
23 right. That's the whole point.

24 THE COURT: Unless what? Unless --

25 MR. SUTCLIFFE: No. There's no unless.



1 THE COURT: Well, so -- so I was speaking of  
2 formaldehyde in its listed form, this commercially pure grade,  
3 or the technical grade, in the hypothetical -- and I don't know  
4 what all the technical grades are of formaldehyde. I assume  
5 that's a matter of subject to expert testimony.

6 I guess what my subject is leading to is the premise  
7 that a technical grade of formaldehyde, with formaldehyde as  
8 its sole active ingredient -- well, is there paraformaldehyde  
9 present in that? Do you know?

10 MR. SUTCLIFFE: There would not -- if you're talking  
11 about aqueous solution, it would not be considered  
12 paraformaldehyde.

13 THE COURT: Is there another technical grade of  
14 formaldehyde in which paraformaldehyde is present and  
15 formaldehyde is still a sole active ingredient?

16 I don't know enough to know the answer to that.

17 MR. SUTCLIFFE: No. The -- the paraformaldehyde is  
18 always going to show up as goo after it is chained past a  
19 certain -- usually eight or more chains.

20 THE COURT: So let's hypothesize that we had an  
21 aqueous solution of formaldehyde in its technical grade status.  
22 Formaldehyde, water, methanol. Right? And someone takes it  
23 and dumps it in pit No. 2. It becomes paraformaldehyde, goo.  
24 Right?

25 MR. SUTCLIFFE: When exposed -- when -- when the --

1 when the -- when the water molecules are evaporated from it.

2 THE COURT: So what's found is goo. But what is  
3 dumped is a technical grade of para -- of formaldehyde. I  
4 mean, that's theoretically chemically possible.

5 MR. SUTCLIFFE: Yes.

6 THE COURT: So that which is found may not be a listed  
7 U122 chemical if paraformaldehyde is not itself listed, because  
8 it's transformed due to the operation of the properties of  
9 nature on it in its prior listed form?

10 MR. SUTCLIFFE: (Nods head.)

11 THE COURT: Am I -- does that make sense?

12 MR. SUTCLIFFE: The record can reflect I'm nodding up  
13 and down, yes.

14 THE COURT: I can't tell, though.

15 MR. SUTCLIFFE: I am. I'm sorry.

16 THE COURT: Okay. So the crime would be committed in  
17 the pouring of the technical grade of formaldehyde, with its  
18 aqueous solution and methanol contaminants, into this place  
19 without a permit.

20 The proof would be in the form of taking the  
21 paraformaldehyde and saying, in order to get there in a puddle  
22 of goo, it had to fall in a liquid technical form, and it was  
23 done without a permit.

24 Am I --

25 MR. SUTCLIFFE: Yes. That's exactly the Government's

1 argument. And it even goes to the other --

2 THE COURT: Except -- except -- oh, I'm sorry. Go  
3 ahead. What did you want to say?

4 MR. SUTCLIFFE: It even goes the other way, because  
5 what you have is if you dump liquid aqueous formaldehyde on the  
6 ground, eventually it's going to chain up, it's going to become  
7 paraformaldehyde, and it's going to keep --

8 THE COURT: Why is the Government worrying about  
9 whether paraformaldehyde itself is listed if the theory is that  
10 the paraformaldehyde evidence that was found is simply the end  
11 product that occurred after the criminal conduct occurred;  
12 i.e., the dumping of the liquid technical grade formaldehyde?

13 MR. SUTCLIFFE: Because I think the jury is going to  
14 want an explanation of what was taken out there and dumped.

15 THE COURT: It may not be a crime to dump  
16 paraformaldehyde, is what Ms. -- Ms. Adams is arguing it's not  
17 a crime to dump paraformaldehyde, under the -- the statutes  
18 charged here. It may be a crime to dump formaldehyde in a  
19 technical grade that turns into paraformaldehyde.

20 MR. SUTCLIFFE: Correct.

21 THE COURT: Yeah. Okay.

22 My. Such -- such issues.

23 Okay. I think it's time for a break. Let's take 15  
24 minutes, please.

25 (Recess taken.)

1 THE COURT: So, Mr. Sutcliffe, have we adequately  
2 addressed what I'm calling the turquoise box on your chart?

3 MR. SUTCLIFFE: One and two, yes.

4 We're down to three, now.

5 THE COURT: Right.

6 So the question -- well, that's right. We have to  
7 address your introduction of the term "FPA," as the sole active  
8 ingredient in the waste sample. So --

9 MR. SUTCLIFFE: Okay. Just assuming for argument that  
10 you could change the FPA to para, that that's how they -- I  
11 mean, excuse me, to formaldehyde -- is what they would want.

12 But that's the third alternative way of showing that  
13 it's a commercially chemical product that would meet the  
14 listing. And the sole active ingredient -- we -- that's one of  
15 the few things that the defense and us completely agree on was  
16 the definition of "sole active ingredient."

17 And basically sole active ingredients are something  
18 that does the -- the -- the purpose of the chemical  
19 formulation. In the case of formaldehyde, it's the  
20 preservative, or the chemo biocide, or whatever.

21 And the only other thing -- so if the Government could  
22 prove that the sample contained only formaldehyde, water --  
23 which is obviously inert -- and methanol, which act -- acts as  
24 a stabilant, it would be the Government's position that that  
25 would meet the U122 list -- listing.

1 THE COURT: Because it is a commercially pure grade,  
2 it is a technical grade, it is the sole active ingredient, or  
3 just the last?

4 MR. SUTCLIFFE: Just the latter.

5 I mean, that's one of the three ways that we could  
6 prove it.

7 THE COURT: Wouldn't that also satisfy as a technical  
8 grade, if it was in water with methanol?

9 MR. SUTCLIFFE: It would, if you could prove that it  
10 was produced or marketed as that product.

11 THE COURT: Okay. All right.

12 So, Ms. Adams, I take it your issue with  
13 Mr. Sutcliffe's item 3 is the FPA terminology there. FPA is  
14 the sole active ingredient --

15 MS. ADAMS: Your Honor, yes. Looking at the turquoise  
16 box, that is the only issue I have. And I don't have to  
17 address this other issue at this time. But one thing that he  
18 was just mentioning was that if something contained  
19 formaldehyde and it was the sole active ingredient of the  
20 sample, then it would meet the prongs we've discussed so far.

21 And that does raise a -- the other issue, which is  
22 that the EPA's been quite clear that just containing it isn't  
23 enough. It has to be the commercial product, which is either  
24 one, two, or three. So it has to be known by the product name.

25 THE COURT: All right. I understand your point.

1           So, now, following the chart, Mr. Sutcliffe, let's  
2 assume we've met one of the three alternatives in the turquoise  
3 box.

4           If yes, we are going to the right. Or are we going --  
5 yes, we're going to the right, because that means it's a listed  
6 waste?

7           MR. SUTCLIFFE: And we go all the way to the bottom,  
8 yes.

9           THE COURT: Right.

10           And if none of the three apply, then your analysis is  
11 we go to the blue box, the next box?

12           MR. SUTCLIFFE: That's correct, your Honor.

13           THE COURT: And you agree, Ms. Adams, that if none of  
14 the three apply, there is yet another analysis that might ensue  
15 that would qualify for the listing?

16           MS. ADAMS: Yes, your Honor.

17           THE COURT: All right. And now we're getting into  
18 off-specification.

19           Again, these are alternate versions, as Mr. Sutcliffe  
20 have -- has -- has formulated these.

21           Would you explain the three alternates you've set out  
22 here in brief, Mr. Sutcliffe?

23           MR. SUTCLIFFE: Yes, your Honor.

24           This comes from 261.33, sub (b), which says that any  
25 off-specification commercial chemical product, or manufacturer

1 of a chemical intermediate -- which if it met specifications --  
2 would have the generic name, but only off-spec. The reason the  
3 EPA enacted this rule was to --

4 THE COURT: Well, before you get to the reasons, what  
5 I need is for you to be more specific as to why you have three  
6 items here for off-specifications and their -- and how they  
7 track to the statute.

8 MR. SUTCLIFFE: It's essentially the same as above,  
9 only these are now off-spec versions of what's above.

10 THE COURT: I see.

11 So all of the arguments we've been considering back  
12 and forth as to the first three formulations would apply  
13 equally to these, the only difference being we're talking about  
14 off-specification grade?

15 MR. SUTCLIFFE: Yes.

16 THE COURT: Do you agree, Ms. Adams, that that is a  
17 proper way to analyze the off-specification subsection (b)  
18 criteria, that it is off-spec'd -- spec grade of the  
19 commercially pure formaldehyde, off-specification grade of a  
20 technical grade of formaldehyde that is produced or marketed,  
21 or an off-specification form of formaldehyde in which  
22 formaldehyde is the sole active ingredient, something along  
23 those lines?

24 MS. ADAMS: I'm only hesitating, because it -- it does  
25 depart a little bit -- it does depart from the regulatory

1 language. I'm hesitating because I'm trying to -- I'm thinking  
2 about the significance of the departure. The --

3 THE COURT: Well, let me -- let me go back to  
4 paragraph (a).

5 Paragraph (a) is speaking in terms of the commercial  
6 chemical product having the specific generic name. And  
7 paragraph (b) is simply any off-specification commercial  
8 chemical product.

9 MS. ADAMS: Your Honor?

10 THE COURT: Um-hmm.

11 MS. ADAMS: I believe that this is one way that you  
12 could lay it out that would make sense. I mean, obviously I  
13 have the argument about FPA. But other than that --

14 THE COURT: I'm not -- I'm not needing that repeated.

15 But what Mr. Sutcliffe is positing is that all three  
16 of the analytical criteria described in the aqua or  
17 turquoise-colored box apply equally well and separately if the  
18 material is off-specification.

19 MS. ADAMS: Yeah. And I don't know if you want me to  
20 opine on this. But I think the reason you get there, via the  
21 regulatory language, is that comment to Subsection (d).

22 THE COURT: Um-hmm.

23 MS. ADAMS: Because the comment defines the phrase  
24 "Commercial chemical product having the generic name listed,"  
25 and it tells you that means each of these three things: Pure,



1 technical, or sole active ingredient. And that phrase is used  
2 in (a), of 261.33(a).

3 It -- that exact phrase isn't used in (b), but the --  
4 the commercial chemical product phrase is used again. So it  
5 seems to suggest that it's referring to the same definition.

6 THE COURT: All right. So let's assume that when I  
7 give you -- and my goal, Counsel, is to generate out of this  
8 argument a preliminary formulation of a jury instruction which  
9 is by no means final, and which is something about which you  
10 can continue to develop the record at appropriate stages  
11 whenever the issue arises, and specifically leading up to  
12 before trial, when I would hope to have jury instructions  
13 settled before we pick a jury.

14 I am going to just proceed, then, on this idea of the  
15 three prongs that are equally alternatively applicable to  
16 either the commercial -- the commercial form of the substance  
17 or the off-spec form of the substance.

18 So now let's -- let's continue with Mr. Sutcliffe's  
19 analysis progressively.

20 If it was neither qualifying under the aqua or the  
21 blue box, we're done?

22 MR. SUTCLIFFE: Yes.

23 THE COURT: Right?

24 All right. So what's on your second page?

25 MR. SUTCLIFFE: The second page, your Honor, is an

1 attempt to define what falls under the listing -- the 122  
2 listing.

3 THE COURT: And that's sort of a different version of  
4 what we covered -- or in terms of Ms. Adam's arguments about  
5 what is or isn't. Right?

6 MR. SUTCLIFFE: Right.

7 THE COURT: Okay. So take me through your thinking  
8 here.

9 Well, this doesn't necessarily -- I mean, the law  
10 doesn't say, does the sample of solid waste dissolve in water.  
11 But what I'm trying to get at with this is the testimony that  
12 we heard during the -- the Daubert hearing, the first part of  
13 it, and going back to the table that appears in Walker.

14 If the Court will recall, we had testimony regarding  
15 how chained up a -- a particular form was, depending on whether  
16 you could dissolve it in water.

17 For instance, the 1022 sample from the pit did  
18 dissolve in water, whereas the 10 -- the 1088, the one that  
19 came out of the machinery, did not.

20 So if the sample did not -- if it does dissolve in  
21 water, that indicates that you should go down and use one of  
22 the methodologies to test it, and we can talk about those in a  
23 minute.

24 If it doesn't dissolve in water, then you have to see  
25 if it -- and I believe the testimony from the Daubert hearing

1 was that it readily dissolved in sodium hydroxide or sodium  
2 sulfite. If it didn't do -- if it didn't do that, then it's  
3 not one of those -- the listed U122s that we're alleging in  
4 this case, based on Walker's chart.

5 The -- the formaldehyde, the poly -- the para, and the  
6 alpha and beta polyoxymethylenes, if it -- if it didn't  
7 dissolve in one of those, you -- readily -- you've got yourself  
8 a guitar pick or a diacetate, or something above, and we  
9 shouldn't be here.

10 That's what I was trying to do with this chart here.

11 THE COURT: Let me think about that a minute.

12 The -- the analysis we did before the break, I think,  
13 leads to, at least, my preliminary conclusion that  
14 paraformaldehyde is not a listed waste.

15 I -- I want to think through this again, but I -- I'm  
16 finding persuasive Ms. Adams' argument simply about legislative  
17 construction and the plain meaning of the words. And this  
18 whole EPA, what's listed and what's not listed, I want to read  
19 all of that again in context for myself.

20 But I want you to assume for -- paraformaldehyde is --  
21 it's going to be my conclusion that paraformaldehyde is not a  
22 U122 listed waste. All right. Just assume that for the  
23 moment.

24 MR. SUTCLIFFE: (Nods head.)

25 THE COURT: Then the question is whether ultimately

1 there is evidence from which the jurors can find that the  
2 substances that were found, or their form before they turned  
3 into the substances that were found, constituted formaldehyde  
4 in the manner in which we just went through the commercial  
5 grade, the technical grade, or the off-spec grade.

6 If that's an appropriate means of analyzing the  
7 evidence and the law, what you've laid out on this second page  
8 here, I think, is one approach to helping the jury understand  
9 what was found.

10 And assuming we have competent expert testimony,  
11 jurors can draw reasonable inferences from what was found to --  
12 that is, assuming we have expert testimony to assist them, they  
13 can draw inferences of -- about what was found, to consider  
14 whether there is a basis to be convinced beyond a reasonable  
15 doubt that that which was disposed of by the defendant without  
16 a permit, or stored by the defendant without a permit,  
17 constitutes formaldehyde, as listed on U122.

18 So let's assume I do end up with a preliminary  
19 conclusion that paraformaldehyde is not itself U122 listed.  
20 But paraformaldehyde is maybe simply evidence that  
21 formaldehyde, in a -- in the listed form, was disposed of and  
22 turned into goo, the paraformaldehyde.

23 This kind of analysis, it seems to me, would be the  
24 kind of analysis a competent expert could provide to jurors,  
25 assuming it itself is reliable, that helps them infer from the

1 finding of paraformaldehyde that it -- it may have been  
2 formaldehyde in the listed form that was unlawfully disposed of  
3 or stored.

4           So that's how I would see this kind of chart as being  
5 helpful, and that's in trying to interpret what -- what the  
6 facts are.

7           Because if the law, correctly stated, means it's not  
8 illegal to dispose of or to -- to store paraformaldehyde -- at  
9 least not illegal under the statutes charged in Counts 1 and 3,  
10 but it is paraformaldehyde, primarily, that was found, it may  
11 still be very relevant for the jury to hear about the  
12 paraformaldehyde found.

13           Because one of the properties of formaldehyde, as  
14 described by Mr. Boling and others, is that it can --  
15 so-called -- engage in chaining-up processes that leads to the  
16 goo.

17           So the goo may not be the illegally disposed of  
18 material. It's simply the byproduct of that which was  
19 illegally disposed.

20           Am I making any sense?

21           MR. SUTCLIFFE: Completely.

22           THE COURT: Okay. So I don't think this kind of flow  
23 chart necessarily goes to a jury instruction. I think this is  
24 the kind of explanation that an expert might give to me at a  
25 Daubert hearing; or to the jury, if permitted, to help the jury

1 determine whether the Government has evidence that the  
2 defendant -- that -- that when the defendant disposed of or  
3 allowed to be stored, without a permit, certain materials,  
4 those materials were in a form that constituted formaldehyde.

5 Does that make sense?

6 MR. SUTCLIFFE: It does, but --

7 THE COURT: What am I missing? Or why is it too  
8 narrow? Or what are you -- what do I need to hear?

9 MR. SUTCLIFFE: The problem is the Government only  
10 ends up with what they find in the ground.

11 THE COURT: Sure.

12 MR. SUTCLIFFE: And showing that -- paraformaldehyde  
13 had to have been formaldehyde at one point. And the same is  
14 true for the polyoxymethylenes.

15 So if you are able -- this will lead into a discussion  
16 about why their argument about artifacts is important, when we  
17 continue with the Daubert hearing.

18 But it's difficult for the Government to say, okay, at  
19 the time it was disposed of, it was necessarily liquid  
20 formaldehyde.

21 THE COURT: Well, that may be a failure of proof kind  
22 of problem.

23 MR. SUTCLIFFE: Right.

24 THE COURT: And that may be exactly the kind of issue  
25 you were talking about before, in terms of getting to a place

1 where evaluation of the evidence, in the record, might cause  
2 people to talk.

3 But, you know, all I can do is try to understand what  
4 the legal formulations are that control and then consider what  
5 you have. And it -- it's not that the Government has done,  
6 necessarily, anything wrong or right. You have what you have.  
7 And in some cases, what you have is enough. And in some cases,  
8 what you have isn't enough.

9 And if the defendant -- if it's correct -- if -- big  
10 "if." If it's correct that paraformaldehyde is not U122  
11 listed, and if that was the premise under which the defendant  
12 was indicted, that could be a problem.

13 If paraformaldehyde is not a U122 listing, but its  
14 presence is evidence of the fact that the material had to be  
15 dumped in the form that it had to have been a listed waste,  
16 that's a different scenario.

17 So this is a -- I -- I get, is a very significant kind  
18 of problem. And far better that we look at it here, early,  
19 rather than when the witnesses are on the stand in front of the  
20 jury and people are committed.

21 MR. SUTCLIFFE: The only thing I would add is that we  
22 do have a case, W.R. Grace, that talks specifically about the  
23 Chemical Abstract Services numbers as applied to asbestos,  
24 wherein that case the defendant had been generically charged.  
25 So we will provide that and --

1 THE COURT: Well, what was the import of the W.R.  
2 Grace case as it would be helpful here?

3 MR. SUTCLIFFE: I haven't read it yet. But my brief  
4 understanding is that he was charged -- the -- the individuals  
5 in the company were charged with disposing of asbestos,  
6 generically, just based upon the Clean Air Act.

7 And the defense raised the issues of, hey, there's a  
8 whole bunch of different kinds of asbestos. There's tremolite.  
9 There's chrysotile. And I can't remember the other ones. And  
10 you can charge those. And vermiculite being the one that was  
11 at issue in that case, and they didn't specifically charge  
12 vermiculite.

13 And they raised the --

14 THE COURT REPORTER: I need you to speak slower,  
15 please.

16 THE COURT: They raised the Chemical Abstract Services  
17 number.

18 MR. SUTCLIFFE: Number at issue. And it was  
19 actually -- then it went up on appeal to the Ninth Circuit.  
20 And they said that it was essentially okay to charge in the  
21 generic, even though there were these other available --

22 THE COURT: So there may not be a charging issue. But  
23 the point is it still ends up being an issue of proof. If as a  
24 matter of -- of construction -- a burden I have -- I end up  
25 concluding paraformaldehyde is not listed, then there



1 wouldn't -- then I wouldn't be able to let the jury consider  
2 convicting the defendant of disposing of paraformaldehyde. But  
3 paraformaldehyde simply may be a form, as you're noting;  
4 something that was the listed version of formaldehyde.

5           Now, you know, if -- if for example, one went to a  
6 site like pit No. 2 and saw puddles of goo lying in the dirt, I  
7 think one could infer -- knowing what at least I've been taught  
8 in these hearings -- that the goo probably didn't get there in  
9 goo form. It was probably poured there and became goo and  
10 spread out, because of the properties that formaldehyde has  
11 when it's left unattended like that.

12           But if the goo comes in bags from another place, then  
13 we've got issues of when was it in the state of formaldehyde.  
14 And is this an issue that's just -- seems to be coming up over  
15 and over? And the last two trials I've had back-to-back,  
16 issues of continuing offenses -- is the offense begun in  
17 Minnesota --

18           MR. SUTCLIFFE: (Shakes head.)

19           THE COURT: An-d continued and completed here, for  
20 venue purposes?

21           Because if it's liquid there when it's poured into the  
22 black visqueen bags, but it's solid before it leaves Minnesota,  
23 I'm -- I'm -- I'm telling you, this is coming.

24           MR. SUTCLIFFE: I don't have an answer to that. But  
25 I --

1 THE COURT: Yeah.

2 MR. SUTCLIFFE: It is an issue. I mean, I think the  
3 Court has reason to be concerned. But, also, there's also the  
4 issue of whether paraformaldehyde is a technical grade or  
5 whether if you can test the paraformaldehyde and find that  
6 formaldehyde is the sole active ingredient in the subject,  
7 in -- in the waste, I think the Government could still make out  
8 its case as charged.

9 THE COURT: Okay. Well, I -- I don't want to get  
10 ahead of myself. But what I -- I guess -- I think, from your  
11 perspective, it would be helpful for me to lay out what I  
12 think, based on the arguments and the writings you've  
13 submitted, are the -- the primary legal standards that go to  
14 the jury determining whether the substance the Government is  
15 focusing on, as the basis for the charges in Counts 1 through  
16 3, were -- what they would look at in deciding whether the  
17 Government had proven them.

18 And so you've -- both sides have gone a long way to  
19 helping me understand this issue of commercial grade and  
20 technical grade and off-specification grade. I get what that  
21 is.

22 Really, there is still this elephant in the room, in  
23 terms of whether paraformaldehyde is or is not, in its  
24 paraformaldehyde form, formaldehyde as listed on U122.

25 And, you know, I think you've laid out your positions

1 about why it is or isn't adequately. I wasn't going to be  
2 inviting yet more briefing. But are you telling me there are  
3 more authorities out there that I should be aware of about this  
4 idea of --

5 MR. SUTCLIFFE: (Shakes head.)

6 THE COURT: -- going to the background document, and  
7 all of this -- no.

8 MR. SUTCLIFFE: No.

9 I mean, you've raised a few discrete issues that might  
10 be helpful. But I think we've covered the --

11 THE COURT: Well, as I say, I think my goal is to give  
12 you a preliminary articulation from whence you continue to  
13 develop the issues and the record. And at some point we get to  
14 a fish-or-cut-bait stage, and I make a ruling; and those who  
15 don't agree can take an exception and move on from there.

16 So what more can we do, now, relative to these issues  
17 of law that would be helpful for me to articulate, both for  
18 purposes of my completing the Daubert analysis, so that I know  
19 where the Daubert evidence fits in terms of what the jury would  
20 be told, and with respect to just whatever you think we -- you  
21 want me to try to articulate at this preliminary stage.

22 What -- what is the best use of your time, right now?

23 Mr. Sutcliffe?

24 MR. SUTCLIFFE: Your Honor, the -- their -- in terms  
25 of the Daubert thing, this kind of goes to the -- the box on

1 the second page, the blue box --

2 THE COURT: Yes.

3 MR. SUTCLIFFE: -- about the different methodologies.

4 I think at some point, when the Court determines  
5 what -- what your Honor feels the law is, then you -- we have  
6 to ask the questions of whether those methods, as modified or  
7 unmodified, support the -- the listing.

8 THE COURT: Well, I still feel strongly -- and I  
9 haven't heard yet the defendants' scientific approach. But  
10 it's -- here, the questions get mixed between questions of  
11 relevance, generally, and the sufficiency of the evidence,  
12 generally.

13 So a Daubert challenge simply says witness X can't  
14 testify. It doesn't say witnesses -- witness X -- X's  
15 testimony is insufficient to convict. That's a different  
16 motion.

17 To the extent the evidence I've heard from the  
18 Government's witnesses is helpful to the jury in evaluating  
19 whether the material found at the -- at pit 2 or in the  
20 machines was, at some point within the time frame charged in  
21 Counts 1 and 3, formaldehyde -- now that formulation assumes  
22 I'm concluding paraformaldehyde is not itself listed.

23 Even -- even if that's the case, the Boling evidence  
24 is relevant in that it helps to -- a layperson evaluate whether  
25 at some point in time, before the puddles formed and the goo

1 solidified, the material had the properties of formaldehyde in  
2 the commercial or technical or off-specification forms.

3 So I don't think -- I think -- I think the  
4 Government's evidence likely is going to turn out to be  
5 admissible for certain properties.

6 It might be narrowed, to the point where Boling and  
7 others are -- are talking about what are the properties of  
8 formaldehyde. You know, when I exposed this substance to base,  
9 it did this. When it was in an acetic solution, it did that.  
10 It -- when I heated it, it was this. And these are properties  
11 that are or aren't consistent with formaldehyde.

12 Whether that's going to be enough to get to the place  
13 where rational jurors could find beyond a reasonable doubt that  
14 formaldehyde was dumped illegally or stored illegally, I don't  
15 know. We're not there yet.

16 But Daubert doesn't raise a sufficiency of the  
17 evidence argument. It simply says, is it admissible?

18 The defendants' premise was the studies are -- the --  
19 the -- the methodology used by Boling is, you know, amateur.  
20 It was done instinctively. It was done in response to his own  
21 institution.

22 He used the Walker table. He used his own experience  
23 and he came up with a number of tests that he thought would  
24 generate results that were useful.

25 Now, he drew conclusions from that. I don't know if

1 the ultimate opinion he drew is sufficient, because, also,  
2 he -- he was proffered with a premise that paraformaldehyde was  
3 the -- was the gold standard, and that may not be permitted.

4 So we might have to end up re-doing all of this, to --  
5 to calibrate to the actual standard.

6 I don't know if I was answering a question or just  
7 hypothesizing, Mr. Sutcliffe. But, you know, I don't know that  
8 the Daubert process the defendants have raised is going to  
9 allow me to do anything other than make the kinds of  
10 observations I'm making now, which is to say a chemist of  
11 Mr. Boling's training and experience can perform laboratory  
12 tests that -- that produce results that are rep -- readily  
13 repeatable. They're reliable, because they're based on  
14 standard properties and chemical reactions and compounds, and  
15 all of that, you know. But what does that get us? It gets us  
16 factors that may be consistent with formaldehyde at a time when  
17 the defendant acted.

18 That may not be enough, in a sufficiency of the  
19 evidence kind of analysis, to say it -- beyond a reasonable  
20 doubt, this was formaldehyde, versus paraformaldehyde.

21 So I guess this takes me to the place where it sounds  
22 like it might be really important to everybody for me to make a  
23 decision about whether paraformaldehyde is listed in its --  
24 constitutes a listed waste.

25 Does that make sense? Yes?

1 MS. ADAMS: Yes, your Honor.

2 MS. HOFFMAN: Yes.

3 THE COURT: And I can do that in the context of this  
4 preliminary jury instruction.

5 And you've given me legal arguments in your proposed  
6 instructions and in your discussions today. But I don't know  
7 if that's a procedurally useful way for me to get to that place  
8 for you.

9 MR. SUTCLIFFE: I -- I just -- I think it's completely  
10 procedurally correct and a good idea. But I just need to make  
11 a pitch for the alpha polyoxies.

12 I assume if the Court is not going to include para,  
13 the Court would not include the alphas. But I just have to  
14 make the pitch, so that the PA --

15 THE COURT: I need to know what you need me to know.  
16 So go ahead.

17 MR. SUTCLIFFE: The alpha polyoxymethylene argument  
18 comes in with Count 3, that we haven't talked about. Because  
19 that's the material in the manufacturing equipment that had  
20 hardened in there. And that's the stuff that's harder. It's  
21 probably chained up a lot further than paraformaldehyde. So  
22 I'm assuming the Court would make the same ruling as to that  
23 material. But if the Court could address that --

24 THE COURT: And I will.

25 Let me ask you hypothetically, though. The

1 Government's evidence -- has the Government thought to try to  
2 identify when in the course of human events these materials  
3 chained up?

4 MR. SUTCLIFFE: I don't think -- yes.

5 THE COURT: You've sought to, and right now we don't  
6 know?

7 MR. SUTCLIFFE: Right now we don't know.

8 THE COURT: It's not like we have a witness who  
9 says --

10 MR. SUTCLIFFE: Yes.

11 THE COURT: -- there was liquid. We poured it in a  
12 bag. We were sent with the bags from Minnesota to Oregon. We  
13 put the bags in the cinder cone? Something like that? There's  
14 not that?

15 MR. SUTCLIFFE: Not that I'm aware of.

16 THE COURT: What we have is cinder cones is  
17 investigated, because wife said to. Bags are found. In bags  
18 are -- is evidence of paraformaldehyde. That's -- that's the  
19 start of the process, and then it's trying to work backwards  
20 from there, to figure out what was done when and by whom?

21 MR. SUTCLIFFE: Yes.

22 THE COURT: And did it violate the law or not?

23 MR. SUTCLIFFE: Right.

24 THE COURT: All right. So is there anything else you  
25 want to say about the alpha materials?



1 MR. SUTCLIFFE: Just as long as I'm on the record as  
2 supporting it.

3 THE COURT: Well, you are.

4 And I -- you know, I'm --

5 MR. SUTCLIFFE: See, the problem, your Honor, with the  
6 alpha poly -- those are hardened because they're in the  
7 manufacturing equipment, which heated it up, which causes it to  
8 chain up instantly into a harder, different substance.

9 THE COURT: So at some point it was formaldehyde --

10 MR. SUTCLIFFE: That's --

11 THE COURT: -- in its liquid form. Right?

12 MR. SUTCLIFFE: Yes.

13 THE COURT: And in that chaining-up process, it became  
14 alpha polyoxymethylene. And that's what you found in the  
15 machine?

16 MR. SUTCLIFFE: We think, yes.

17 THE COURT: You think?

18 MR. SUTCLIFFE: Well --

19 THE COURT: Okay. You think.

20 MR. SUTCLIFFE: Unless you know the exact number of  
21 chains, it's kind of hard --

22 THE COURT: But it was a -- down the -- down the  
23 chart, the Walker chart form of formaldehyde? It's no longer  
24 liquid formaldehyde. Right?

25 So if -- if it is an accurate statement of the law

1 that U122 does not include that -- that polymerized form of  
2 formaldehyde, in order to prove the case under the -- under  
3 Count 3, there would have to be a basis to know that the  
4 defendant stored the liquid form in the machinery without a  
5 permit. Is that where my reasoning would lead, if I'm -- I'm  
6 trying to figure out the consequences of what I'm doing here.

7 Does that make sense?

8 MR. SUTCLIFFE: Yes, your Honor. It's -- it's close.

9 I mean, it had to have been liquid, because that's how  
10 they produce it. It's just leftover liquid.

11 And the Government's position would be if you can test  
12 that and show that it's -- it has a percentage of formaldehyde  
13 in it, that would qualify as -- that would -- you wouldn't get  
14 into the same arguments about whether it's a polyoxymethylene  
15 or whether it was a paraformaldehyde.

16 THE COURT: Okay. Well, I'm certain now that what I  
17 need to do is make at least a preliminary call on this  
18 question.

19 Do you think you need to do anything else for the  
20 record, in terms of briefing or argument, before I make that  
21 preliminary view? Realizing it -- it's preliminary. You'll  
22 have another opportunity before you -- if we get to -- when we  
23 get to the next stages. That is to say, at the latest, you  
24 would be able to make arguments at a pretrial conference about  
25 what should or shouldn't be the scope of the legal standards

1 around the proof you want to offer.

2 MR. SUTCLIFFE: May I talk to Ms. Kerin for just a  
3 minute?

4 THE COURT: Yes.

5 (Pause, counsel conferring.)

6 THE COURT: And?

7 MR. SUTCLIFFE: Your Honor, we can just give you the  
8 citation to the W.R. Grace case. It may not answer all of the  
9 Court's questions, but we would just ask --

10 THE COURT: Are you talking about the one Judge Malloy  
11 tried, and that went up to the Ninth Circuit?

12 MR. SUTCLIFFE: Yes.

13 THE COURT: We've got that.

14 MR. SUTCLIFFE: Okay. And then -- that's it.

15 MS. HOFFMAN: Yes, your Honor. As far as our Daubert  
16 hearing, as you know --

17 THE COURT: I haven't gone there yet.

18 I'm still trying to find out whether anybody wants a  
19 chance to give more input before I make a preliminary ruling on  
20 jury instructions, not Daubert, but just this jury instruction  
21 analysis.

22 MS. HOFFMAN: We're satisfied that you heard us.

23 THE COURT: So here's a question, hypothetically. A  
24 person has a drum of aqueous solution, formaldehyde, with some  
25 methanol in it, commercial grade aqueous formaldehyde, a drum.

1 It's covered and, therefore, not exposed to the air.

2           And then the person takes the cover off and exposes it  
3 to the air and temperatures and elements, and it begins to  
4 chain up, as you've said, and it becomes paraformaldehyde over  
5 time. (Pause.) The liquid form was a U122 waste. It was  
6 knowingly stored -- that is to say left -- without the lid on,  
7 and over time, it became the paraformaldehyde. Is a crime  
8 committed at the front end? Is a crime committed in the  
9 retention of the paraformaldehyde end product?

10           MR. SUTCLIFFE: This is a question that I've struggled  
11 with. And -- and I call it the self-fulfilling statute of  
12 limitations question.

13           THE COURT: Okay.

14           MR. SUTCLIFFE: I mean, essentially, if you pour out  
15 formaldehyde on the ground, it's going to chain up. It's going  
16 to turn out to something else.

17           So between the time that you pour it out on the ground  
18 and it turns to paraformaldehyde, that's -- you can't be caught  
19 for a crime. But as long as the Government doesn't stumble  
20 onto the stuff until it becomes paraformaldehyde, and that's  
21 the end of the statute of limitations for your crime.

22           So all you have to do is stand around and make sure  
23 nobody sees it, until it turns into paraformaldehyde. And that  
24 just doesn't sound right to me. But --

25           THE COURT: Well, if it isn't, then all of those

1 legislative liaisons the Department of Justice has to the EPA,  
2 and others -- if this is a problem, you know, it's -- there are  
3 a lot of holes in our statutes, and they have to be addressed  
4 when they're found. But I'm just wondering if in this  
5 hypothetical -- it's the passage of time that changes the  
6 product, the passage of time and the exposure to the elements.  
7 But the criminal conduct presumably occurs at the time that the  
8 liquid material is left unprotected without a permit.

9           You would say that a crime is committed then. If I  
10 know that this is liquid formaldehyde, and I leave it exposed  
11 to the elements and I don't have a permit to store it in this  
12 drum, exposed to the elements, you would say I've committed a  
13 crime, yes?

14           MR. SUTCLIFFE: Yes. Because when -- at the point  
15 that it's discovered, assuming it's chained up to  
16 paraformaldehyde, you could still find that that was a  
17 technical grade of the formaldehyde. Or you could analyze it  
18 and find that the sole active ingredient in the material at  
19 that time was formaldehyde.

20           So under either of those analyses, the person would  
21 still be guilty, even if you didn't --

22           THE COURT: Couldn't you also -- can't it be  
23 determined how long it takes to chain this up, under the  
24 circumstances?

25           Can't you say that it -- that the matter had to be in

1 a liquid form between a certain time period?

2 MR. SUTCLIFFE: I don't -- I don't know the answer to  
3 that, your Honor. I would have to talk to an expert, or finish  
4 reading Walker's treatise.

5 THE COURT: Do you want to comment on my hypothetical?

6 MS. ADAMS: If I may.

7 So, your Honor, I think that the key place to look for  
8 that -- that particular hypothetical -- and it sounds like  
9 you -- you might already be tracking, so I apologize if I'm  
10 repeating things you know.

11 But if you look at right at 40 CFR 261.33, right in  
12 the first paragraph --

13 THE COURT: Pull the microphone closer to you, please.

14 MS. ADAMS: I apologize.

15 If you look at 40 CFR 261.33, in the first paragraph,  
16 it says:

17 The following materials or items are hazardous  
18 wastes if and when they are discarded or intended  
19 to be discarded.

20 And then it talks about the commercial chemical  
21 products.

22 So the key is what was the thing at the time it was  
23 discarded, or intended to be discarded?

24 THE COURT: So my hypothetical, which then includes  
25 these additional facts that it's only after the polymerization

1 has occurred and the goo is formed and this mess sits  
2 unprotected in the bottom of the barrel, out in the world --  
3 it's only when it's discovered that the -- the conduct's known  
4 to be -- somehow, then, the Government, in order to act on that  
5 disposal, would have to be able to prove who left it there in  
6 the -- in the liquid form?

7 MS. ADAMS: Or what it was when it was discarded.

8 But -- and, you know, there's -- there's a couple of  
9 ways -- there's another way to get there, too, you know.

10 The EPA and the Government aren't completely left with  
11 no remedy if -- if there's some material like this sitting  
12 around. They could also test it to see if it's a  
13 characteristic hazardous waste. And if they could produce  
14 evidence that at the time it was discarded it was a  
15 character -- I mean, they always have to say what was it at the  
16 time of discard. But, you know, they can say either it's U  
17 listed, like they've charged in the Indictment here; or they  
18 can, under EPA's regulations, say it's characteristic.

19 And so -- and then they don't have to bother with  
20 saying exactly what the product was. Because under the U  
21 listing they have to say it was manufactured or formulated as  
22 the pure product, technical grade product, or --

23 THE COURT: Let's assume I can count on  
24 Mr. Sutcliffe's summary that the Beetham company is -- is a  
25 high-level manufacturer of -- of this commercial grade

1 formaldehyde, and that the material in the machinery was  
2 commercial grade formaldehyde, probably in liquid form, because  
3 it was in the machinery being used -- it's part of the  
4 commercial grade formaldehyde that was made. But because it  
5 was left at some point, it chained up and became this alphi --  
6 alpha, very long chain version of the product.

7           So at the time, you're -- you're saying at the time it  
8 was left for storage, it would have to be in a form of  
9 formaldehyde, the U122 listed chemical, its commercial grade,  
10 its technical grade, or an off-specification version in order  
11 for the Government to proceed with a Count 3 kind of charge.

12           That's what you're saying?

13           MS. ADAMS: Well, with a clarification.

14           THE COURT: Okay.

15           MS. ADAMS: It isn't the time that it's stored. It's  
16 the time that it's intended to be discarded.

17           So a person can store a commercial chemical product  
18 formaldehyde if they're not discarding it.

19           THE COURT: But I thought it's storing without a  
20 permit -- I'm sorry.

21           MS. ADAMS: Let me back up.

22           THE COURT: Okay. I'm on Count 3.

23           MS. ADAMS: Yeah, but still, storage -- the storage  
24 count still has to do with the storage of a -- of a hazardous  
25 waste.



1           A thing only becomes a hazardous waste if it meets  
2 EPA's definition of hazardous waste at the time --

3           THE COURT: So my hypothetical did. This was liquid  
4 formaldehyde.

5           MS. ADAMS: Well, it has to be discarded, though, your  
6 Honor. I'm sorry.

7           It's just --

8           THE COURT: It's discarded in a liquid form when the  
9 machine is turned off and now we're done. I'm discarding it.  
10 I'm not going to use the machine again. It's in a liquid form.  
11 Now we're done. We've shut off the lights of the plant. It's  
12 done. It's still liquid. It hasn't gotten hard yet. I don't  
13 know if that's even physically possible, but let's assume that.

14           You would have to be able to show that at the time the  
15 storage commenced, as part of discarding, it was in that form.  
16 Is that what you're contending?

17           MS. ADAMS: (Pause.)

18           THE COURT: If and when they are discarded or intended  
19 to be discarded?

20           MS. ADAMS: Sorry. I'm trying to follow the  
21 hypothetical, and I'm also trying to be careful and accurate.

22           THE COURT: Well, you don't need to answer the  
23 question.

24           MS. ADAMS: I apologize, your Honor.

25           THE COURT: No. It's not a very good question anyway.

1 All right. I think I should undertake this  
2 articulation of a preliminary set of standards.

3 Now, my question is we have August 6th set for a  
4 Daubert proceeding.

5 And where we are in that endeavor is that I understood  
6 the defendants wanted me to consider expert testimony as I  
7 evaluated the admissibility of the Government's expert  
8 testimony. Right?

9 MS. ADAMS: Correct.

10 THE COURT: And the defendant had two witnesses it  
11 wanted to offer. Dr. Jordi was going to testify today but is  
12 ill. We have another witness scheduled for August 6th.

13 The Government wants an opportunity to cross-examine  
14 those people. And, you know, these processes are going. I'm  
15 certain we're not going to finish on August 6th.

16 Is there a chance Dr. Jordi can be available on August  
17 6th, too?

18 MS. ADAMS: Your Honor, I've actually, immediately  
19 looked into that, and he isn't. He -- he is not available that  
20 whole week.

21 THE COURT: Okay. So, shall we then adjourn today, to  
22 reconvene on August 6th for the continuation of the evidentiary  
23 presentation regarding the Daubert issues? Yes?

24 MR. SUTCLIFFE: Yes, your Honor.

25 THE COURT: Yes?

1 MS. HOFFMAN: Your Honor, in a lot of ways, it makes  
2 sense to first know if you'll know a preliminary ruling as to  
3 the contour of the U122, because we've teed up that --

4 THE COURT: I'm going to do the best I can do, as soon  
5 as I can do it. You've got August 6th saved. You had a plan.  
6 We should proceed with it.

7 I don't want to cancel it in -- it's so hard to get  
8 all of these moving parts back together again. So if it's  
9 possible -- though I'm not in any way representing it will  
10 happen -- I will have a preliminary statement to you before  
11 August 6th. If not, you are going to do what you were going to  
12 do anyway.

13 MS. HOFFMAN: Because we're just worried it may not be  
14 relevant, ultimately, and we'll have to refocus what our  
15 focus --

16 THE COURT: You have an idea what I -- what I've been  
17 brought through today.

18 MS. HOFFMAN: Right.

19 THE COURT: And if your premise is that  
20 paraformaldehyde is not U122 listed, then asking the expert  
21 questions that have to do with what could be determined from  
22 what was found might be a very helpful approach. I don't know.

23 MS. HOFFMAN: Then, your Honor, one of the things that  
24 we had heard from you earlier was to use our written expert  
25 opinions basically as our affirmative evidence, and then the

1 Government would be free to cross-examine our experts.

2 It may make sense for us to open up some of our expert  
3 testimony to address some of the issues that we've touched  
4 on --

5 THE COURT: Why don't you all talk about what you  
6 think the best approach is at this point.

7 MS. HOFFMAN: Okay.

8 THE COURT: I have tried to set parameters, but  
9 that's -- those decisions have been made in part without,  
10 really, I think a fair understanding of the full lay of the  
11 land here. I don't want to waste anybody's time or resources.  
12 But I also don't want to lose the August 6th opportunity as  
13 the -- as one we've staked out to make some more progress on  
14 this Daubert issue.

15 The defendants' basic premise in Daubert is the  
16 Government doesn't have admissible expert opinion evidence to  
17 support the contention that the materials stored or dumped were  
18 U122. And I'm not sure that's a premise I can accept.

19 What I'm questioning is whether the Government's  
20 expert testimony that I've heard could be sufficient to prove  
21 directly or circumstantially that the material is formaldehyde  
22 at the time it was disposed of.

23 So we've got a couple of moving targets here, I agree.

24 And I will do what I can do, and you just have to do  
25 the best you can do.

1 MS. HOFFMAN: Thank you.

2 THE COURT: All right. Anything else for today?

3 You all look exhausted. If I look as tired as you  
4 look, then we're all in trouble.

5 Okay. Yes. Hold -- hold one minute. (Pause.)

6 I'm being reminded that I had a deadline in place for  
7 you to submit supplemental briefs on the Daubert proceedings on  
8 the 30th. And -- and I don't think that's really a useful  
9 thing.

10 I think you should just give me the evidence that  
11 you're going to give me, and we'll see where it goes, because I  
12 need to articulate these standards. Those -- those arguments  
13 are really -- those are more along the lines of what  
14 Ms. Hoffman was really just pointing to, that that's a kind of  
15 premature investment. So I'm striking your obligation to file  
16 briefs on August 30th, and I'm keeping August 6th on.

17 We'll hear from the experts as you think would be  
18 helpful to me.

19 MS. HOFFMAN: Thank you.

20 THE COURT: Okay.

21 MS. ADAMS: Your Honor -- I'm sorry.

22 May we file those briefs, then, after the Daubert, to  
23 summarize everything?

24 THE COURT: Well, we'll see. We'll see.

25 There may need to be another evidentiary hearing, if

1 you still think you need Dr. Jordi. I don't know.

2 We need to sort of take stock of where we are.

3 This -- this start-and-stop process isn't ideal, and I can only  
4 keep so much in my consciousness, in between all of the other  
5 things we're doing. But maybe, maybe not.

6 You know, it may end up, as I say, not being a rocket  
7 science sort of conclusion that I can draw.

8 I feel fairly firmly of -- that it's -- it is  
9 permissible for the Government to offer evidence about the  
10 properties of that which was found, and that that would be  
11 helpful to an inquiry in determining whether the material  
12 discarded or stored was a U122 material. But that may not get  
13 the Government enough. That doesn't warrant a lot of briefing.

14 Okay. Thank you.

15 MR. SUTCLIFFE: Thank you, your Honor.

16 MS. HOFFMAN: Thanks.

17 THE COURT: Have another demanding and challenging  
18 presentation.

19 All right. We're off the record.

20 MS. HOFFMAN: Thank you, your Honor.

21 (Conclusion of proceedings.)

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I certify, by signing below, that the foregoing is a correct transcript of the oral proceedings had in the above-entitled matter this 5th day of August, 2010. A transcript without an original signature or conformed signature is not certified. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

/S/ Amanda M. LeGore

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AMANDA M. LeGORE, RDR, CRR, FCRR, CE