



Vermont Yankee

Office of the Attorney General's
Criminal Investigation Report

July 6, 2011

INTRODUCTION

In late January 2010, then-Governor Douglas, then-Senate President *pro tem* Shumlin and Speaker Smith requested the Attorney General's Office (AGO) to examine whether Entergy Nuclear Vermont Yankee (ENVY) or ENVY personnel had committed crimes when company personnel repeatedly had denied the presence of underground piping carrying radionuclides at the plant.

The following is a brief overview of the investigation conducted and our present conclusion that, unless more evidence is forthcoming, we lack sufficient proof to charge and convict ENVY and/or its personnel with having violated Vermont's criminal statutes.

FACTUAL BACKGROUND

Act 160 (2005, Adj. Sess.), effective July 1, 2006, gave authority to the General Assembly to authorize the operation of ENVY beyond March 21, 2012. The Public Service Board (PSB) was empowered to conduct proceedings but prohibited from issuing a Certificate of Public Good (CPG) for relicensing of ENVY, absent legislative approval.

Act 189 (2007 Adj. Sess.), effective June 5, 2008, provided for a Comprehensive Vertical Audit and Reliability Assessment (CRA) of the reliability of the systems, structures, and components of ENVY, in order to assist the General Assembly in deciding whether to grant its required approval under Act 160. A Public Oversight Panel (POP) was created and by January 30, 2009 was to report to the General Assembly its findings and evaluation of the CRA.

Pursuant to section 3(a)(7) of Act 189, the CRA was to include an "in-depth inspection" of "An underground piping system that carries radionuclides."

The Department of Public Service (DPS) retained Nuclear Safety Associates (NSA) as independent consultants to conduct the CRA. According to representatives of DPS, NSA and POP, beginning in the summer of 2008 and through much of 2009, ENVY personnel advised that the plant had no underground piping systems carrying radionuclides. In the PSB's relicensing proceeding, both in response to discovery requests and in sworn testimony, similar representations were made.

On January 6, 2010, ENVY received a test result indicating the presence of tritium in a groundwater monitoring well. DPS and POP personnel soon

realized that the likely source of this tritium was underground piping – piping that ENVY had repeatedly denied existed.

On January 13, 2010, ENVY personnel informed the State Nuclear Engineer that there are underground pipes carrying radionuclides at ENVY. On January 14, 2010, the Commissioner of DPS wrote to Entergy noting “It has come to the attention of the Department of Public Service that [ENVY] did not provide accurate information to the Department or its contractor, Nuclear Safety Associates regarding Section 3(a)(7) of Act 189.”

On April 1, 2010, ENVY filed with the Public Service Board an affidavit from Norm Rademacher, the Director of Engineering at the plant. Attached to the affidavit was a list of 14 “below grade operational piping systems” at the plant that contained radionuclides.

THE INVESTIGATION

In early February, 2010, the AGO met with Entergy’s general counsel and an attorney from the law firm of Morgan Lewis & Bockius (MLB), retained by Entergy to conduct an internal investigation into the misrepresentations regarding piping by ENVY personnel. The AGO received assurances of full cooperation by ENVY, including delivery of the MLB report and supporting documentation, waiver of attorney-client privilege and access to ENVY personnel for interviews. The MLB report was completed in late February, 2010 and, with the permission of the AGO, was released to the public. <http://pbadupws.nrc.gov/docs/ML1016/ML101650132.pdf>

During the course of the investigation, the AGO requested and received approximately two million pages of documents from ENVY, DPS, NSA, the POP and others. Dozens of interviews were conducted and applicable law was researched.

Entergy and others deserve credit for the nature and extent of cooperation with the AGO investigation. There was one former ENVY employee who had worked as an in-house counsel but declined to be interviewed by either MLB or the AGO. Due perhaps to the passage of time, a number of individuals interviewed, including both ENVY employees and others, expressed a lack of clear recollection of the specifics of various conversations, statements and actions potentially key to an accurate understanding of issues relevant to the AGO investigation.

POTENTIAL CRIMINAL VIOLATIONS

The AGO reviewed a number of criminal statutes that might have been violated by ENVY and/or its employees. For a variety of reasons, the main focus has been on the question of whether perjury was committed.

To constitute perjury, a statement must:

1. Have been made under oath, and
2. The statement must have been willfully false.

Thus, to convict someone of perjury, the State must prove that the declarant, making the statement under oath, knew that what he or she was saying was not true. A statement of belief or opinion can only be perjury if the State can show that the person had no such belief or opinion. Similarly, perjury cannot be based upon a reply which, although incomplete, misleading, or unresponsive, is literally true or technically accurate.

Even if the person who made the statement purposely withheld part of the truth regarding the matter asked, or if for devious reasons the statement was intentionally misleading or was shrewdly evasive, thereby conveying false information by implication, it is not perjury.

BURIED AND UNDERGROUND PIPING

A critical issue in the investigation has been the meaning under section 3(a)(7) of "an underground piping system that carries radionuclides". The lay person's interpretation of "underground" means "subsurface". Buried piping is a narrower subset of underground piping referring, instead, to subsurface piping that is directly in contact with soil or that is encased in concrete that is directly in contact with soil. Despite the direction to review an underground piping system, ENVY proposed that the CRA consider the plant's Buried Pipe and Tank Inspection Program – a program that addressed buried rather than underground piping.

NSA accepted this narrower definition (see Attachment 1) as did POP member and former State Nuclear Engineer Bill Sherman. In a 1/30/10 email to other POP personnel, DPS and ENVY, he wrote as follows: "Act 189 3(a)7 designates "underground" piping. That's a term with some ambiguity and subject to interpretation. Underground could mean "buried" or it could mean "below grade." We did not interpret the term in any of our considerations that I am aware of, but I would take "buried" to be a much better fit than below grade because much of the plant piping is below grade...I would not have considered piping run in

concrete tunnels to have met the definition for underground piping. Below grade – yes, underground – no.”

Another issue is that DPS apparently accepted that the operative language was to apply to liquids only and not to radioactive gases. Thus, notwithstanding any lay interpretation, in any prosecution the State would be faced with a much narrower definition of the meaning of the section 3(a)(7) language.

SWORN TESTIMONY

Numerous of the ENVY communications denying the existence of underground piping carrying radionuclides, including those to POP, DPS and NSA personnel, were not under oath and therefore could not constitute perjury, even if knowingly false. ENVY officials did offer sworn testimony on this issue on two occasions before the PSB in its CPG proceeding.

On March 20, 2009, Entergy Vice President, Nuclear Operations Jay Thayer testified as follows:

Q. Does Vermont Yankee have any underground piping that carries radionuclides?

A. The reason I hesitate is I don't believe there is active piping in service today carrying radionuclides underground. There was a line that was contaminated, radioactive liquid, which did leak back in the period before we purchased the plant, that line was abandoned. That is the reason for some of the contaminated soil on site. But I don't – I can do some research on that and get back to you, but I don't believe there are active piping systems underground containing contaminated fluids today.

Q. Okay.

MR. MARSHALL: You can ask that question of Mr. Colomb next Tuesday.

THE WITNESS: We can confirm that.

NOTE: Thayer's testimony was that he *believes* there are no active underground piping systems carrying radionuclides. The AGO could find no evidence to suggest that he did not believe this to be true. It should be noted that both the witness and counsel for ENVY indicated that there would be follow up and an opportunity to ask a later witness the same question.

On May 26, 2009, ENVY Site Vice President Michael Colomb testified as follows:

Q. . . .You had one question referred to you from Mr. Thayer the other day and I know you weren't here. The discussion was about underground piping and possible contamination. He thought you would know the answer, so do you know if there's any underground piping at Vermont Yankee carrying radionuclides?

A. I believe we had identified one pipe that was underneath the chemistry laboratory that end – I believe leaked in the past, did contaminate some soil under the building, has since been sealed, and a new line that is not underground was routed.

NOTE: Colomb answered a question that he had been prepared to answer by his subordinates – a question regarding the chemistry drain line. Colomb did not, however, answer the question he had been asked. Furthermore, the statement is accurate in the sense that ENVY had identified one line that leaked. Thus, despite the fact that the answer is misleading, it does not, absent additional evidence to the contrary, constitute perjury.

DISCOVERY RESPONSE

The NSA, in compliance with its obligations relating to the CRA, issued a report dated December 22, 2008. At page 262 appeared the following: "Act 189 included an in-depth inspection of 'an underground piping system that carries radionuclides.' However, there are no underground piping systems carrying radionuclides at ENVY." ENVY personnel took no action to correct this statement.

During the course of discovery in the PSB relicensing proceeding, ENVY was asked specifically about the statement in the NSA Report about underground piping. In early 2009, ENVY submitted a response stating: "There have not been any underground piping systems carrying radionuclides during ENVY's ownership of VY Station. Prior to 1992, the Chemistry Laboratory Drain Line carried radionuclides."

This response was consistent with prior statements during the CRA regarding the absence of underground piping systems. Apparently some months after the discovery response was filed, ENVY employee James Rogers, Manager of Design Engineering, was chosen to swear to the ENVY affidavit. He does not believe that he reviewed the affidavit before attaching his signature. He acknowledged during his AGO interview that the affidavit is accurate only in part and is inaccurate in other respects. Based on the available evidence,

the State cannot establish that he knowingly swore to a false affidavit at the time of his signature.

This is not to say that other ENVY personnel were unaware that the discovery response was inaccurate. On May 23 and 24, 2009, prior to the Colomb testimony referenced above, Henry (Mike) Metell, technical lead of the License Renewal Project, emailed several ENVY personnel, including in-house counsel Kim Bykov and the private law firm representing ENVY in the PSB proceeding. The email string and an attached "Underground Pipe Summary" included the following: "...It appears that we may have overstated answering VPIRG EN 4-6 Part a, unless you consider the function of the AOG, SBT, and Stack sump condensed water return lines as returning primarily water." and "One problematic statement – VPIRG EN 4-6a asked if there had been underground piping systems carrying radionuclides at VY in the past. We could have answered the above bullet, but did not." (See Attachment 2.)

The AGO did not find evidence that this email string was forwarded to Mike Colomb prior to his testimony.

CORPORATE KNOWLEDGE AND RESPONSIBILITY

Under Vermont law, a corporation may be charged with perjury if personnel with sufficient corporate responsibility can be shown to have knowingly and willingly entered into a plan to provide false sworn testimony and such testimony was presented on behalf of the corporation. Consequently, much of the AGO investigation focused on who knew what at ENVY relating to the misrepresentations regarding the underground piping.

As reflected above, the AGO investigation revealed that various ENVY personnel were aware of the existence of underground piping systems carrying radionuclides. More troublingly, the investigation also revealed that ENVY personnel identified the fact that there had been potential misstatements as early as May 2009 and ENVY did nothing to clarify the record.

In March 2009, an ENVY lawyer identified a potential concern with the accuracy of the discovery response referenced above. The concern was relayed to the ENVY license renewal technical lead who responded "I believe there is a context issue here." (See Attachment 3.)

Despite the fact that this response appears to confirm that there had been misrepresentations or a lack of clarity, no further effort was made to address the issue by ENVY.

On May 20, 2009, in response to Jay Thayer's testimony and in preparation for the testimony of Mike Colomb, ENVY Head of Government Relations David McElwee sent an email to Colomb and other ENVY personnel noting:

"...you may be asked during your testimony up here if we have any underground piping carrying contaminated material. We have said no but used to have a chemistry sink drain line that was leaking back in the 80's but has been abandoned once it was identified it was leaking."

Various subordinate personnel identified McElwee's statement as problematic. Later that day, for example, an engineer forwarded a spreadsheet to various personnel noting that it contained "piping sections that are potentially contaminated. Most of the piping is associated with the Offgas System that carries gaseous effluents." In response, another engineer noted that he was "not sure how this corresponds to previous testimony that Dave mentioned, that said there was none." Both John Dreyfuss, ENVY Director, Nuclear Safety and Licensing and Head of the License Renewal Project, and McElwee were included on these email exchanges but the string was apparently never forwarded to Colomb. (See Attachments 4 and 5.)

As noted above, the AGO investigation revealed a troubling failure of ENVY personnel to ensure that important information reached the people who needed it. Two critical examples are identified above. The failure of ENVY personnel to ensure that the Site Vice-President had necessary information before he testified is unacceptable corporate conduct.

The Vermont State Nuclear Advisory Panel is a state body established by Title 18. The DPS Commissioner chairs the panel, which meets periodically to consider issues relating to the present and future use of nuclear power in general, and of the Vermont Yankee Nuclear Power Station in particular. The Panel advises the Governor, General Assembly and agencies of the state with a written annual report. On November 20, 2008, VSNAP met at the Brattleboro Union High School. Present for ENVY were Mike Colomb, John Dreyfuss, Dave McElwee and others. The POP presented regarding the CRA that day. A POP member noted during the hearing that "We're told by the nuclear plant that there are no underground piping systems carrying radionuclides." No ENVY personnel attempted to correct this misunderstanding.

CONCLUSION

The AGO investigation, as did that of MLB, readily leads to the conclusion that ENVY and various of its personnel repeatedly misled State officials with direct misstatements and repeatedly failed to clarify misperceptions as to the existence of underground piping carrying radionuclides. These actions and inactions were at best negligent. But for reasons, including those stated in this report, the AGO presently lacks sufficient compelling evidence to establish that the crime of perjury or violations of other Vermont criminal statutes have been committed.

The active phase of this investigation has ended, but the matter should not be considered closed. Should additional evidence of criminal intent be forthcoming in the future and within the statute of limitations window, such evidence will be weighed and the potential of criminal charges will be revisited.



April 30, 2010

**Underground Piping Information Exchange Summary
as part of the Vermont Yankee 2008
Comprehensive Reliability Assessment (CRA).**

...

Explanation of item #2: The meaning of any of the following terms: underground pipe; buried pipe; piping system; underground piping system carrying radionuclides.

There were numerous discussions and meetings among NSA team members, the Vermont State Department of Public Service Nuclear Engineer (DPS), Entergy Vermont Yankee (ENVY) personnel involved in the assessment initiative and the Public Oversight Panel (POP) members regarding what is covered by Act 189 as "underground piping system that carries radionuclides" Key points discussed on numerous occasions by all four parties in an attempt to define the scope of the assessment that would meet Act 189 were as follows.



- There were discussions pertaining to the off-gas system large duct that carries off-gas to the stack. Participants agreed that the potential for ground contamination was low and that this would not satisfy the intent of the act pertaining to an underground piping system that carries radionuclides. The parties understood that the POP members requested a piping system with pressurized steam or liquid carrying radionuclides was to be included in the vertical assessment scope.
- Piping that is in pipe chases that are in contact with air not soil are not the focus of Act 189. All parties appeared to agree that Act 189 intended to include underground piping that was directly in contact with soil because of the potentially corrosive nature of soil and the inability to easily inspect these direct buried pipes.
- NSA Team members recommended Condensate Storage as a potential system that would typically have direct buried piping at a nuclear generating plant. However, ENVY informed all parties during various meetings and telephone calls to discuss scope requirements that the piping in this system is in pipe chases exposed to air and not buried. Therefore the POP decided not to include this system in the scope.
- To be considered buried piping that carries radionuclides, there was consensus that the piping had to be currently in service, normally in operation and pressurized.

In summary the principal NSA team members understood that the term "underground piping that carries radionuclides" in Act 189 meant buried piping (piping that is underground and directly in contact with soil) that carries pressurized steam or liquid with the potential to contaminate the ground. Also the NSA team believes that ENVY personnel involved in the assessment understood this same definition.

...

ATTACHMENT 2

From: Metell, Henry M
Sent: Sunday, May 24, 2009 5:02 PM
To: Mannai, David J <dmannai@entergy.com>
Cc: Bailey, Gary <gbaile3@entergy.com>; Dreyfuss, John R <jdreyfu@entergy.com>; McElwee, David K <dmcelwe@entergy.com>; Guglielmino, Peter <pgugl90@entergy.com>; Bykov, Kim <kbridg3@entergy.com>; 'Bob Miller' <rmiller@drm.com>
Subject: RE: Underground Piping Summary
Attach: Underground Pipe Summary.doc

I talked with Gary Bailey today. Gary confirmed that he talked with the NSA team, but mostly on a programmatic level on underground piping. NSA didn't specifically discuss underground radioactive piping except briefly on the Chem Lab line, and how that was not in Gary's program as it was not active.

Please see the modified outline attached. It appears that we may have overstated answering VPIRG EN 4-6 Part a, unless you consider the function of the AOG, SBT, and Stack sump condensed water return lines as returning primarily water.

From: Mannai, David J
Sent: Sunday, May 24, 2009 9:54 AM
To: Metell, Henry M
Cc: Bailey, Gary; Dreyfuss, John R; McElwee, David K; Guglielmino, Peter
Subject: Re: Underground Piping Summary

Ok but I would like to get this to Mike Colomb today.

Sent from my BlackBerry Wireless Handheld

From: Metell, Henry M
To: Mannai, David J
Cc: Bailey, Gary; Dreyfuss, John R; McElwee, David K; Guglielmino, Peter
Sent: Sat May 23 22:07:33 2009
Subject: Underground Piping Summary

Dave: Please see the attached. I would like to run this by Gary Bailey, as I have cobbled this information from several sources relating to some of his work. I will try to reach him tomorrow during the day-----Mike

<<Underground Pipe Summary.doc>>

Underground Pipe Summary

- The CRA report stated that there are no underground piping systems carrying radionuclides at VY.
- In disclosure, VPIRG EN 4-6-b asked if any previously used underground piping system carrying radioactive material leaked. Entergy noted that the Chemistry Lab Drain Line had carried radionuclides and had failed during VYNPC ownership. It was estimated to have conservatively contaminated about 58,000 cu-ft of soil under the Chem Lab. Since it was isolated by concrete and bedrock, VYNPC left it in place and the NRC okay-ed via a SER

The CRA team talked with Gary Bailey who is the cognizant engineer for underground pipe. Gary discussed his underground pipe program in general terms with the CRA team.

- Gary indicated to Peter G and me, that the following underground lines exist:
 - o Radwaste to River Discharge line – This line has not been used since 1981. Since it was used to discharge low radioactive fluids to the river, if it leaked, it would be inconsequential.
 - o CST to Radwaste line – Is in a trench.
 - o Piping to RW Hold Tanks (East Side) is above ground.
 - o AOG piping – Carries radioactive noble gases to the stack for release. Some of the gas decays into solid material.
 - o Drain lines from AOG, SBT, and Stack Sump return condensed water underground to Radwaste Equipment Drain Sump. Isotopes in this water would be dissolved gases which would have been allowed to be discharged to atmosphere.
- One problematic statement – VPIRG EN 4-6-a asked if there had been underground piping systems carrying radionuclides at VY in the past. We could have answered the above bullet, but did not.

ATTACHMENT 3

From: John Marshall
Sent: Wednesday, March 4, 2009 5:02 PM
To: Barclay Johnson <bjohnson@drm.com>
Subject: FW: Underground pipes
Attach: Entergy VY_s Responses to VPIRG 4th Round Requests 1-27-09_pdf.pdf

This should answer your question

From: Metell, Henry M [mailto:hmetell@entergy.com]
Sent: Wednesday, March 04, 2009 5:30 PM
To: John Marshall
Cc: Bykov, Kim
Subject: RE: Underground pipes

John. Both attachments from the previous email were the same attachment. I have attached one copy above.

I believe there is a context issue here:

- As I understand it, the underground radionuclides piping asked for in the CRA primarily referred to water systems. The chem drain line was the only water system and VYNPC dealt with that line before Entergy purchased the plant.
 - There are underground concrete headers that go out to the stack that carry radioactive gaseous material for release to the stack (e.g. Advanced Offgas or AOG). This is a common configuration for all boiling water reactors by GE. However, there is no particular aging mechanism as there would be for water systems (e.g. corrosion), and so leakage is not commonly considered an issue. This is probably why NSA did not identify this as an underground piping system subject to leakage.
 - The Chem lab pipe and the Advanced Offgas header systems are 2 different systems.

From: John Marshall [mailto:jmarshall@drm.com]
Sent: Wednesday, March 04, 2009 3:41 PM
To: Metell, Henry M
Subject: Underground pipes

Pages 9-11 of the attachment refer to pipes at the base of the stack having charcoal filters and pipes under the Chem lab. Entergy VY responded as indicated in the second attachment to a question about underground pipes containing radionuclides. Are the pipes referenced at those pages the same as the pipes referenced in the attached response and/or ones that did not include radionuclides?

From: McElwee, David K
Sent: Wednesday, May 20, 2009 5:25 PM
To: Dreyfuss, John R <jdreyfu@entergy.com>
Subject: Fw: underground piping
Attach: Potentially Contaminated Buried Lines.xls

David McElwee
Senior State Regulatory Affairs Engineer
Entergy VY
802 451 3112
Cell 802 258 0096

From: Meyer, Jeffrey T
To: Bailey, Gary
Cc: McElwee, David K; Hardy, Jeffery A; Skibniowsky, Stephen P
Sent: Wed May 20 14:34:41 2009
Subject: FW: underground piping

I am not sure how this corresponds to previous testimony that Dave mentioned, that said there was none. Anyway, Mike Colomb will need some briefing material so he can speak at hearings in Montpelier next week on the subject.
Thus, some summary information for Mike is what is needed.
Thanks
Jeff

From: Bailey, Gary
Sent: Wednesday, May 20, 2009 2:55 PM
To: Meyer, Jeffrey T
Cc: Hardy, Jeffery A; Skibniowsky, Stephen P
Subject: RE: underground piping

The attached spreadsheet is an excerpt from the Buried Piping and Tanks Program database.

I've included piping sections that are potentially contaminated. Most of the piping is associated with the Offgas System that carries gaseous effluents.

Note that the spreadsheet was developed IAW EN-DC-343, the fleet program document.

Gary Bailey
x3074

From: Hardy, Jeffery A
Sent: Wednesday, May 20, 2009 1:58 PM
To: Skibniowsky, Stephen P; Bailey, Gary
Subject: FW: underground piping

Can the two of please you funnel any applicable info to Jeff Meyer in Licensing?

Jeff H

From: Meyer, Jeffrey T
Sent: Wednesday, May 20, 2009 1:49 PM
To: Hardy, Jeffery A
Subject: FW: underground piping

Jeff,
Can you provide background for Mike Colomb on underground piping carrying contaminated materials?
Thanks
Jeff

From: McElwee, David K
Sent: Wednesday, May 20, 2009 1:43 PM
To: Colomb, Michael; Dreyfuss, John R; Mannai, David J
Cc: Meyer, Jeffrey T
Subject: underground piping

Mike, you may be asked during your testimony up here if we have any underground piping carrying contaminated material. We have said no but used to have a chemistry sink drain line that was leaking back in the 80's but has been abandoned once it was identified it was leaking. You may need to discuss during your time on the stand.

Jeff, I think chemistry can give you some supporting documents on it to brief Mike.

From: Skibniowsky, Stephen P
Sent: Thursday, May 21, 2009 7:12 AM
To: McElwee, David K <dmcelwe@entergy.com>
Subject: FW: underground piping
Attach: Chem Lab Drain Line Data 1991.pdf;IOG Filters.pdf

Steve Skibniowsky

Entergy-Vermont Yankee
320 Governor Hunt Road,
Vernon, Vermont 05354
Office: (802) 258-5592
Fax: (802) 258-5526
Cell: (802) 380-5398
sskibni@entergy.com
Please consider the environment before printing this email

From: Skibniowsky, Stephen P
Sent: Wednesday, May 20, 2009 10:45 PM
To: Hardy, Jeffery A
Cc: Meyer, Jeffrey T
Subject: RE: underground piping

Gentlemen,

I believe the attached file should provide the information on the Chem Lab Drain Line Leak. I have also attached the file providing the location of the Interim Off Gas system that is buried just north of the plant stack. This piping contained radioactive gases from the Air Ejector. We also have contaminated underground piping from Radwaste to the Discharge Structure (Liquid Radwaste Discharge line) and, as Gary previously mentioned, the lines from the plant to the plant stack for Gland Seal Exhaust, AOG and Building Ventilation. I am not sure about the status of the lines from the CST to Radwaste or Radwaste Outside Tanks. Perhaps an engineer has some information on the underground portion of these contaminated pipe systems.

If I can assist further, please contact me directly,
Steve

Stephen P. Skibniowsky
Environmental Specialist-REMP
Entergy Vermont Yankee
320 Governor Hunt Road,
Vernon, VT 05354
Office 802-258-5592
Cell 802-380-5398

From: Hardy, Jeffery A
Sent: Wednesday, May 20, 2009 1:58 PM

To: Skibniowsky, Stephen P; Bailey, Gary
Subject: FW: underground piping

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Cc: Meyer, Jeffrey T
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Jeff, I think chemistry can give you some supporting documents on it to brief Mike.