

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention). Ex. 2. Specifically, counsel for the United States advised that, if Dr. Portier is a U.S. national, and not a dual U.S.-Italian citizen, “Article 15 of the Hague Evidence Convention permits a U.S. diplomatic officer or consular agent to take evidence of U.S. nationals without compulsion in order to aid U.S. proceeding in civil or commercial matters.” *Id.* The United States further stated that the Department of Justice attorneys must “obtain an official passport, receive e-country clearance, and comply with applicable visa requirements,” before attending a deposition in a foreign country. *Id.* Accordingly, “[g]iven the expense and procedures required for this deposition,” counsel for the United States requested that PLG “describe the relevance of Dr. Portier’s anticipated testimony.” *Id.* PLG responded on May 19, 2024, with PLG’s interpretation of applicable international law and their reasoning for why Dr. Portier’s testimony is relevant. Ex. 3. The parties met and conferred on May 20, 2024. PLG disagreed that the Hague Evidence Convention requires coordination through the consulate or that Dr. Portier’s testimony would be irrelevant to the issues in this case.

Standard of Review

“Discovery is not limitless.” *McDougal-Wilson v. Goodyear Tire & Rubber Co.*, 232 F.R.D. 246, 249 (E.D.N.C. 2005). Federal Rule of Civil Procedure 26(c) authorizes a court to grant, “for good cause,” a protective order restricting or prohibiting discovery in order “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P. 26(c). The party moving for the protective order “has the burden of making a particularized showing of why discovery should be denied, and conclusory or generalized statements in the motion fail to meet this burden.” *Jones v. Campbell Univ., Inc.*, No. 5:20-CV-29-BO, 2020 WL 4451173, at *2 (E.D.N.C. Aug. 3, 2020) (citation omitted).

Argument

A. The United States Has Standing.

The United States has standing under Rule 26(c) to seek a protective order to prevent the deposition of non-party Dr. Portier because the United States' own interests would be jeopardized if this deposition were to move forward.

“A party can, however, move for a protective order in regard to a subpoena issued to a non-party if it believes its own interest is jeopardized by discovery sought from a third party and has standing under Rule 26(c) to seek a protective order regarding subpoenas issued to non-parties which seek irrelevant information.”

G.K. Las Vegas Ltd. P'ship v. Simon Prop. Grp., Inc., No. 2:04-CV-01199-DAE, 2007 WL 119148, at *3 (D. Nev. Jan. 9, 2007). Additionally, “[t]o the extent that Defendants would be required to incur third party discovery costs that rise to the level of an undue burden for Defendants, Defendants have standing to quash on those grounds.” *Auto-Owners Ins. Co. v. Se. Floating Docks, Inc.*, 231 F.R.D. 426 (M.D. Fla. 2005). Here, the United States' own interests would be jeopardized because Dr. Portier's deposition has little, if any relevance, and PLG has not exhausted less burdensome means of obtaining information that Dr. Portier allegedly possesses. Consequently, because the undue burden and costs associated with Dr. Portier's deposition at this time would outweigh its potential benefits, the Court should enter the proposed Protective Order. These burdens will be explained in the section below.

B. Federal Rules 26(b) & (c) Permit this Court to Limit Discovery Where the Burden Outweighs its Benefit.

The United States' motion should be granted because the undeniable burden and expense of proceeding with this deposition in Italy at this time far outweighs any possible benefit. Rule 26(b)(1) defines the scope of discovery and permits “discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case[.]” Fed. R. Civ. P. 26(b)(1). “However, simply because ‘requested information is

discoverable under Rule 26 [(b)] does not mean that discovery must be had.” *Norton v. Rosier*, No. 7:14-CV-260-FL, 2018 WL 10323049, at *2 (E.D.N.C. Aug. 17, 2018) (quoting *Nicholas v. Wyndham Int’l Inc.*, 373 F.3d 537, 543 (4th Cir. 2004)). Courts should consider “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1). Rule 26(b)(2)(C)(i) & (iii) instructs that a court “must limit the frequency or extent of discovery otherwise allowed ... if it determines that ... the discovery sought ... can be obtained from some other source that is more convenient, less burdensome, or less expensive ... or the proposed discovery is outside the scope permitted by Rule 26(b)(1).” Lastly, Rule 26(c) provides that “[t]he court may, for good cause, issue an order to protect a party or person from ... undue burden or expense ... ,” including by “forbidding the disclosure or discovery.” Fed. R. Civ. P. 26 (c)(1)(A).

Any possible benefit to PLG from deposing Dr. Portier as a fact witness at this time is outweighed by the undue burden and expense placed on the United States in preparing for and traveling to defend Dr. Portier’s deposition. This Rule 30(b)(1) deposition sought by PLG would require the United States to incur significant travel and lodging expenses. Additionally, any attorney from the Department of Justice traveling to Italy to participate in this deposition would require an official passport, e-country clearance, and any applicable visa. Further, special clearance will likely be required for video equipment. *See* U.S. Dep’t of State, Italy Judicial Assistance Information, Taking Depositions of Willing Witness, <https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Italy.html> (last visited May 20, 2024) (“If counsel intends to utilize videotape

equipment for the purpose of recording the deposition, please note that special customs clearances must be obtained from appropriate Italian customs authorities before such equipment can be taken into Italy.”). PLG has suggested that the United States could attend the deposition remotely, while PLG attended in Italy, thus minimizing the burden and costs to the United States. But Dr. Portier is a former high-ranking government employee who PLG has signaled will testify adverse to the United States’ interests in this litigation; if PLG were to proceed with this deposition in person, the United States would have a right, and strong interest, in being present in-person for this deposition.

In addition to the burden and expense, before the depositions of the two key scientists involved in the ATSDR’s Camp Lejeune studies have occurred, it is unclear what, if any, relevant information Dr. Portier will have to add. As the former Director of ATSDR, Dr. Portier had little firsthand involvement in the ATSDR Camp Lejeune studies, and the parties are already planning the depositions of the two ATSDR scientists with the most firsthand involvement, Dr. Frank Bove and Morris Maslia. *See, e.g., Camp Lejeune: Contamination and Compensation, Looking Back, Moving Forward: Before the Subcomm. on Investigations and Oversight of the H. Comm. On Science and Technology, 111th Congr. 77-78 (2010)* (“Dr. Portier is new to this task, but Mr. Bove has worked on Camp Lejeune analysis for many years.”)

<https://www.congress.gov/event/111th-congress/house-event/LC7000/text?q=%7B%22search%22%3A%22Portier%22%7D&s=1&r=11> (last visited May 23, 2024). PLG claims that Dr. Portier’s relevance is demonstrated by a letter to the Navy and U.S. Marine Corps signed by Dr. Portier that was critical in certain respects of the National Resource Council’s report “Contaminated Water Supplies at Camp Lejeune—Assessing Potential Health Effects.” Ex. 4. But until the ATSDR scientists are deposed regarding their

involvement in drafting the letter, the extent to which statements in the letter are based on the opinions of these scientists, as opposed to Dr. Portier's own opinions based on his personal review of the work, is unclear.¹ Without additional information, it appears that Dr. Portier's testimony would likely be of limited relevance and duplicative of other testimony. Moreover, PLG already has access to Dr. Portier's sworn testimony before Congress regarding Camp Lejeune and the subject letter. *See, e.g., Camp Lejeune: Contamination and Compensation, Looking Back, Moving Forward: Before the Subcomm. on Investigations and Oversight of the H. Comm. On Science and Technology, 111th Congr. 77-78 (2010)* (statement of Chris Portier, Director, ATSDR). Consequently, Dr. Portier's unclear benefit as a fact witness at this time does not justify PLG taking an in-person deposition in Domodossola, Italy.

C. Plaintiffs' Obligation to Comply with Italian Law Adds to the Burden and Expense of the Deposition of Dr. Portier.

Lastly, because the proposed deposition is noticed to take place in Italy, PLG must comply with Italian law. Italy and the United States are both parties to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S No. 7444 (Hague Evidence Convention), which provides mechanisms for obtaining evidence in a manner consistent with Italian law.² As explained below, if PLG does not receive prior permission from the competent authority of the Italian state, the Hague Evidence Convention requires that the deposition of Dr. Portier, as a U.S. national, be taken pursuant to

¹ If it becomes clear after the depositions of Dr. Bove and Morris Maslia that Dr. Portier is the only person with relevant firsthand knowledge, the parties may agree that his deposition is justified.

² The purpose of the Hague Evidence Convention is "to establish a system for obtaining evidence located abroad that would be tolerable to the state executing the request and would produce evidence utilizable in the requesting state." *Société Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for the S.D. Iowa*, 482 U.S. 522, 530-31 (1987) (internal quotation marks omitted).

consular deposition procedures. PLG counsel have indicated that they do not intend to proceed with a consular deposition, and that Dr. Portier has been deposed in other cases in Italy without following the consular depositions procedure. However, attorneys for the Department of Justice cannot participate in a deposition unless the Italian law and U.S. foreign affairs procedures are followed, and Italian sovereignty is respected. This adds to the burden and expense of the deposition. Pending the Court's ruling on the present motion, the United States reserves the right to challenge the deposition, should PLG fail to comply with Italian law.

PLG's authority to take evidence from Dr. Portier does not extend beyond the territorial boundaries of the United States. Under customary international law, "a state may not exercise jurisdiction to enforce in the territory of another state without the consent of the other state." Restatement (Fourth) Foreign Relations Law of the United States § 432 (Am. Law Inst. 2018). *See also id.* Reporters' Note 1 ("Enforcement jurisdiction includes . . . the performance of coercive governmental functions. Examples include . . . taking depositions and witness statements, [and] executing an order for the production of documents . . .").

Chapter II of the Hague Evidence Convention (Chapter II), inclusive of Articles 15 through 22, provides a framework for interested parties to obtain evidence through lawful means in another country, such as Italy, without a formal Letter of Request seeking the assistance of a foreign authority to obtain evidence on its behalf.

Articles 15 and 16 of the Hague Evidence Convention contemplate the taking of "evidence without compulsion" by a "diplomatic officer or consular agent" (also called a "Consul") in the area in which the Consul exercises functions. Hague Evidence Convention, arts. 15-16. Pursuant to Article 15, the Consul may take such evidence from a national of the state the Consul represents without obtaining specific permission from the state of execution unless the

executing state declares that prior permission is required. *Id.* art. 15. In other words, “Article 15 permits a Consular Officer of the United States to take the voluntary testimony of a U.S. citizen in Italy” without the prior permission of the Italian state. *See* U.S. Dep’t of State, Italy Judicial Assistance Information, Taking Depositions of Willing Witness, <https://travel.state.gov/content/travel/en/legal/Judicial-Assistance-Country-Information/Italy.html> (last visited May 20, 2024).³ Alternatively, Article 17 allows “a person duly appointed as a commissioner for the purpose” (or “Commissioner”) to take evidence from a person of any nationality in the territory of a member state. *Id.* art. 17. However, prior permission from the state of execution, here Italy, is required before a Commissioner can take the evidence.

PLG has stated that it intends to move forward with the deposition of Dr. Portier under Article 15 of the Hague Evidence Convention. Ex. 3. However, during the meet and confer PLG stated that it did not intend to arrange to take the deposition through the U.S. consulate. If PLG proceeds in this manner it is not complying with Article 15, which expressly permits that evidence may be taken by a “diplomatic officer or consular agent” of a member state from a national of that same state. Hague Evidence Convention, art. 15. Proceeding with this deposition taken by any person other than a diplomatic officer or consular agent would not be pursuant to Article 15 and would be impermissible under the Hague Evidence Convention, unless PLG first obtained authorization from an appropriate Italian court, consistent with Italy’s declarations to the Hague Evidence Convention. *See* Hague Conference on Private International Law,

³ In contrast, pursuant to Article 16, the state of execution must give either general or specific permission before the Consul takes evidence from a national of any other state. Hague Evidence Convention, art. 16. PLG has represented that Dr. Portier is an American citizen. Thus, Article 16 is not applicable to this matter, but is briefly mentioned for context.

Declaration/Reservation/Notification, Italy (Hague Evidence Convention),
<https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=504&disp=resdn> (last visited May 20, 2024).⁴

Conclusion

Based on the foregoing, the United States requests that this Court enter a protective order to prevent the deposition of Dr. Christopher Portier in Domodossola, Italy.

Dated: May 23, 2024

⁴ Internal law would also dictate whether permission from a competent Italian authority is required before proceeding with an Article 15 deposition through remote means. According to Italy's 2022 video-link questionnaire [response](#) on the Hague Conference on Private International Law website (available only in French), depositions may be taken by video-link under Chapter II, but permission *is required* when seeking to depose a U.S. citizen by video through a U.S. Consul. *See* Profil d'État, Italie, Obtention De Preuves par Liaison Vidéo en Vertu de La Convention Du 18 Mars 1970 Sur L'obtention Des Preuves À L'étranger En Matière Civile Ou Commerciale, Partie VI(c) (Jan. 2, 2022), <https://assets.hcch.net/docs/d5cead86-20f5-425f-a685-6df5b3b93b46.pdf> (“L’autorisation est nécessaire pour les actes d’instruction qui concernent les citoyens de l’Etat de résidence (art. 15). Elle est requise à l’Autorité [sic] centrale.”) (rough translation: Authorization is necessary for the taking of evidence from citizens of the state of residence (Article 15). Authorization is solicited from the Central Authority.).

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2024, a copy of the foregoing document was served on all counsel of record by operation of the court's electronic filing system and can be accessed through that system.

/s/ Joshua Carpenito
Joshua Carpenito

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA

IN RE:)
CAMP LEJEUNE WATER LITIGATION) Case No: 7:23-cv-00897
)
)
This Document Relates To:)
ALL CASES)

DECLARATION OF JOSHUA G. CARPENITO

I, Joshua G. Carpenito, declare pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct under penalty of perjury:

1. I am a Trial Attorney for the United States Department of Justice. I have entered an appearance in this case. The facts set forth in this declaration are within my personal knowledge or based on documents and information that I have received in the course of litigating this case. Specifically, I am familiar with the documents attached as exhibits to the United States' Motion for a Protective Order, D.E. 211.

2. Exhibit 1 is the Notice of Deposition to Dr. Christopher Portier dated May 10, 2024.

3. Exhibit 2 is email correspondence between counsel for the United States and counsel for PLG dated May 14, 2024.

4. Exhibit 3 is an email from counsel for PLG dated May 19, 2024.

5. Exhibit 4 is the letter signed by Dr. Portier dated October 22, 2010.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 23, 2024

/s/ Joshua Carpenito
JOSHUA CARPENITO

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the Camp Lejeune Justice Act:
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
No. 7:23-CV-897

IN RE:)
)
CAMP LEJEUNE WATER LITIGATION)
)
This Document Relates to:)
ALL CASES)
_____)

PLAINTIFFS' NOTICE OF RULE 30(b)(1) INDIVIDUAL DEPOSITION NOTICE
DE BENE ESSE

TO: Defendant United States of America
c/o Adam Bain, U.S. Department of Justice
P.O. Box 340, Ben Franklin Station
Washington, D.C. 20044

PLEASE TAKE NOTICE that pursuant to Federal Rules of Civil Procedure 30(b)(1) and 26, the stenographic and video-recorded *de bene esse* deposition of the following witness will be taken as set forth below, and thereafter by adjournment until the same shall be completed:

WITNESS: Dennis Portier
DATE and TIME: May 28, 2024 at a time to be determined.
LOCATION: Domodossola, Italy at a location to be determined.
MANNER OF TAKING: In-Person

This deposition will be taken before an officer authorized by law to take depositions and will continue from day to day until completed. The deposition will be recorded via stenographic transcription and videotape for purposes of discovery and use at trial.

Deponent(s) who are parties, are required by this notice to be present for their depositions. The deponent agreed to appear in person.

You are invited to attend and take such part as is fit and proper.

Respectfully submitted this 10th day of May 2024.

/s/ J. Edward Bell, III

J. Edward Bell, III (admitted *pro hac vice*)
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Notice of Videotaped Deposition to General Anthony Zinni was sent to Counsel for Defendant on the 10th day of May 2024, by electronic mail at the following electronic mail address: adam.bain@usdoj.gov.

/s/ J. Edward Bell, III
J. Edward Bell, III
Lead Counsel for Plaintiffs

From: [J Edward Bell](#)
To: [Bain, Adam \(CIV\)](#); [Zina Bash](#)
Cc: [Anwar, Haroon \(CIV\)](#); [Platt, Elizabeth K. \(CIV\)](#); [Mirsky, Sara J. \(CIV\)](#); [Ryan, Patrick J. \(CIV\)](#); [Lipscomb, Bridget \(CIV\)](#); [Dawn Bell](#)
Subject: [EXTERNAL] Re: Dr. Portier deposition
Date: Tuesday, May 14, 2024 3:48:15 PM
Attachments: [image001.png](#)
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[image003.png](#)
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Adam

Thank you for the note about Dr. Portier. I have included Robin Greenwald and would ask her to respond to your questions. I am aware of numerous depositions of Dr. Portier that have been taken in Italy and am not aware of the impediments to which you refer.

Again, maybe Robin can update us on this issue.

Thanks
Ed Bell



Ed Bell
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Image



Image



From: Bain, Adam (CIV) <Adam.Bain@usdoj.gov>
Date: Tuesday, May 14, 2024 at 2:50 PM
To: J Edward Bell <jeb@belllegalgroup.com>, Zina Bash <zina.bash@kellerpostman.com>
Cc: Anwar, Haroon (CIV) <Haroon.Anwar@usdoj.gov>, Platt, Elizabeth K. (CIV) <Elizabeth.K.Platt@usdoj.gov>, Mirsky, Sara J. (CIV) <Sara.J.Mirsky@usdoj.gov>, Ryan, Patrick J. (CIV) <Patrick.J.Ryan@usdoj.gov>, Lipscomb, Bridget (CIV) <Bridget.Lipscomb@usdoj.gov>
Subject: Dr. Portier deposition

Ed and Zina,

I'm writing pursuant to your request to take the deposition of former ATSDR Director Christopher Portier in Italy.

We have consulted with our Office of Foreign Litigation about taking a deposition in a foreign country.

We have been advised that the United States cannot participate in, and plaintiffs cannot move forward with, taking the testimony of a person in Italy (whether or not through remote means) without complying with Italian law. Italy and the United States are both party to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention). Chapter II (Articles 15-22) of the Hague Evidence Convention allows for the taking of evidence on a voluntary basis without submitting a request for compulsory action through the Central Authority (which is governed by Chapter I).

Article 15 of the Hague Evidence Convention permits a U.S. diplomatic officer or consular agent to take evidence of U.S. nationals without compulsion in order to aid U.S. proceedings in civil or commercial matters. Article 16 of the Hague Evidence Convention permits a U.S. diplomatic agent or consular officer to take evidence in aid of a U.S. proceeding in civil or commercial matters of nationals in the state in which the agent or officer exercises functions of a third state without compulsion **with the prior permission of a host state**.

Italy has not issued any specific declaration with respect to the applicability of Articles 15 or 16. Accordingly, prior permission is required for proceeding with a consular deposition of a non-U.S. national under Article 16 but not required if the deponent is a U.S. national (and not a dual U.S.-Italian citizen) under Article 15. The procedures for consular depositions are described [here](#).

Additionally, United States government attorneys traveling to the deposition need to obtain an official passport, receive e-country clearance and comply with applicable visa requirements, if any.

Given the expense and procedures required for this deposition, we would request that you describe the relevance of Dr. Portier's anticipated testimony. We understand that Dr. Portier was not involved in personally performing the work for any ATSDR Camp Lejeune studies, but was performing an oversight role as Director of ATSDR. Therefore, his testimony is likely of limited relevance and duplicative of witnesses already identified for deposition who have more first-hand information, namely Morris Maslia and Frank Bove. We reserve the right to seek a protective order regarding this proposed deposition.

Best,

Adam



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Subject: [EXTERNAL] Deposition of Dr. Portier
Date: Sunday, May 19, 2024 1:42:24 PM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
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[image008.png](#)

Sent from my iPhone

Begin forwarded message:

From: J Edward Bell <edbell@belllegalgroup.com>
Date: May 19, 2024 at 12:19:18 PM EDT
To: "Bain, Adam (CV)" <Adam.Bain@usdoj.gov>; "Lipscomb, Bridget (CIV)" <Bridget.Lipscomb@usdoj.gov>; Zina Bash <zina.bash@kellerpostman.com>; Robin Greenwald <rgrgreenwald@weitzlax.com>; Dawn Bell <DBell@belllegalgroup.com>
Subject: [EXTERNAL] Deposition of Dr. Portier

Adam and Bridgett

I am responding to your email about the deposition notice for Dr. Portier. You raise two issues – that the deposition of Dr. Portier would not comply with Italian law and whether the deposition is relevant.

Hague/Italian law:

Dr. Portier is a U.S citizen who is voluntarily sitting for a deposition. As such, Italy allows for the deposition to occur in Italy without prior approval. Your email reaches the same result, as we are proceeding under Article 15.

The following links makes clear that Dr. Portier's deposition is authorized in Italy. [Italy, Judicial Assistance Information \(state.gov\)](https://www.state.gov/j/ia/italy-judicial-assistance-information), (U.S. Department of State Bureau of Consular Affairs). The tab for "Taking Voluntary Depositions of Willing Witnesses" states the following:

Voluntary depositions may be taken of willing witnesses. Such depositions may be taken on notice or pursuant to a commission or court order before any Consular Officer of the United States. Consular involvement is optional for all depositions. Consular depositions may be conducted in certain cases governed by Articles 15 through 18 of the Convention. Article 15 permits a Consular Officer of the United States to take the voluntary testimony of a U.S. citizen in Italy. Article 16 pertains to the voluntary testimony of an Italian or third country national. Either a Consular Officer or a commissioner (for example, a private American attorney) appointed by the American court may take the testimony of a witness of any nationality without compulsion. The U.S. consular officer abroad or commissioner (through local counsel) would have to secure the permission of the Court of Appeals with jurisdiction over the deponent in the case of non - U.S. citizens and arrange for someone authorized under Italian law to administer oaths to do so. No prior permission is required for the depositions of American citizens.

Thus, because Dr. Portier is a U.S. citizen who is voluntarily sitting for a deposition, the deposition of Dr. Portier can be taken **without prior permission**.

Relevance:

Dr. Portier's testimony is highly relevant to the issues in the Camp Lejeune litigation. First, Dr. Portier, as director of the ATSDR at the time of the 2009 NRC report, was highly critical of it, wrote a letter to the Deputy Assistant Secretary of the Navy and the Deputy Commandant, Installations and Logistics, at the time, and has relevant testimony on behalf of the Plaintiffs. This is especially the case in light of your stated purpose of deposing Plaintiffs' consultant Dr. Savitz. As you stated to the Plaintiffs' Leadership Group, the United States has noticed his fact deposition in his capacity chair of the NRC report.

Second, Dr. Portier oversaw the water modeling performed for Camp Lejeune. Just last week you informed Judge Jones that you would be challenging aspects of the water model. Dr. Portier's testimony about the water model is relevant to Plaintiffs' defense of the model.

Third, Dr. Portier is a biostatistician. He spent over thirty years in government service, including as ATSDR director, addressing the carcinogenicity of chemicals and other public health issues. He has relevant testimony about the ATSDR health assessment for Camp Lejeune as well as the recent Cancer Incident Study.

Last, you mention that the attorney defending the deposition has to obtain a diplomatic passport to travel for this deposition. We could not locate a regulation that such passport is required; will you please provide that to us. Also, if required, it appears that such passports can be obtained on an expedited basis and obtained in 2-3 weeks. Thus, if a diplomatic passport is required, please start the process immediately. Finally, if the DOJ prefers not to travel to Italy for the deposition, the DOJ can defend the deposition remotely. We would agree not to be in the room with Dr. Portier when he is testifying.

We suggest that we schedule a meet and confer immediately so that we can find a new date for Dr. Portier's deposition. Because of Dr. Portier's health issues, we prefer to take his deposition as soon as possible.

Please advise

Thanks
Ed Bell



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GLOBAL MEMBER FIRM





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October 22, 2010

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Lt. General Frank A. Panter
Deputy Commandant, Installations and Logistics
3000 Marine Corps, Pentagon, Room 4E516
Washington, D.C. 20350-3000

Dear Mr. Schregardus and Lt. General Panter:

I recently met with Senator Kay Hagan (D-NC) regarding our work on the potential for health effects from exposure to contaminated drinking water at Marine Corp Base Camp Lejeune (Camp Lejeune). During our conversation, it became evident that there was still some confusion regarding the position of the ATSDR regarding the 2009 National Research Council (NRC) report, *Contaminated Water Supplies at Camp Lejeune – Assessing Potential Health Effects*. Because of our collaboration and joint concern regarding exposures to military personnel, their families and others at Camp Lejeune, I wanted to be certain you understood our position regarding this report. This letter is intended to clarify our position and to provide a brief explanation on how we reached this position.

There is one constraint and five conclusions in the NRC report that are essential to the issue of whether harm may be expected in populations exposed to Camp Lejeune contaminated drinking water. These relate to:

1. the contaminants and health outcomes considered by the NRC;
2. the dose-response assessment used by the NRC;
3. the water modeling for Tarawa Terrace published by the ATSDR;
4. the use of alternative modeling strategies;
5. the need for detailed statistical analysis plans;
6. the utility of the epidemiological studies proposed by the ATSDR.

I will address each of these issues in sequence.

The NRC report only focused on tetrachloroethylene (PCE) and trichloroethylene (TCE), without considering other drinking water contaminants at Camp Lejeune such as benzene, vinyl chloride and mixtures of volatile organic compounds (VOCs). As noted in the very recent International Agency for Research on Cancer (IARC) Monograph Volume 100, benzene causes acute myelogenous leukemia and is associated with other leukemias. The National Toxicology Program (NTP) Report on Carcinogens (ROC) reaches the same conclusion. Both reports reach a similar conclusion for vinyl chloride with regard to liver tumors. Both the IARC and the NTP label benzene and vinyl chloride as "known human carcinogens". The failure of the NRC Committee to consider these contaminants may lead one to conclude that the NRC findings of "*limited/suggestive evidence of an association*" pertains to all contaminants in the drinking water at Camp Lejeune. This conclusion would be incorrect based upon the evidence of the occurrence of these other exposures in Camp Lejeune drinking water. Thus, the review of cancer risks by the NRC was incomplete and only partially addressed concerns at Camp Lejeune. Finally, the NRC conclusions for PCE and TCE differ from the NTP and IARC which classify these chemicals as "probable human carcinogens" (IARC) or "reasonably anticipated to be a human carcinogen" (NTP) with various cancers including most notably kidney tumors.

Thus, let me be perfectly clear; there was undoubtedly a hazard associated with drinking the contaminated water at Camp Lejeune. The epidemiological studies and the associated exposure modeling will hopefully help us to decide on the level of risk associated with this hazard.

Although the availability of definitive reviews on other health endpoints besides cancer is limited, another shortcoming of the NRC review pertains to other health outcomes including adverse birth outcomes and immunotoxicity. In deciding what needed to be done to evaluate the potential health effects at Camp Lejeune, the ATSDR has taken all contaminants and all health outcomes into account and is acting accordingly.

ATSDR has studied the NRC report regarding the remaining issues. The use of the "lowest observed adverse effect level" (LOAEL) from animal studies without consideration of the uncertainties inherent in the LOAEL and the appropriateness of the use of this metric for assessing genotoxic cancer risks is a major shortcoming of the NRC report. Most regulatory agencies would either address the uncertainty in the LOAEL through the use of multiplicative factors to reduce the acceptable exposure or use an entirely different metric, such as the slope of the dose-response curve or a confidence bound around this curve, to arrive at values for comparison against environmental exposures. By doing neither, the NRC report suggests a much wider difference between exposure and effect

than would normally be derived. In determining potential risks in order to develop power calculations for our epidemiological investigations, the ATSDR used the slope of the dose-response curve.

ATSDR disagrees with the NRC Committee's conclusion that the results of the water modeling for Tarawa Terrace were not sufficiently reliable to do dose characterization in the epidemiological studies. Modeling of the movement of contaminants through subsurface water is a well established area of science and has been used on multiple occasions to address exposures in communities throughout the United States [reference: Anderson, MP. 1979. Using models to simulate the movement of contaminants through ground water flow systems. *Critical Reviews in Environmental Control*, 9(2): 97-156.] The state-of-the-art modeling being conducted by ATSDR shows sufficient concordance between the modeled PCE results and the actual measurements of PCE in the finished water at Tarawa Terrace to conclude that one could characterize exposure into several different groups. This conclusion is critical to the future epidemiological studies since it allows ATSDR to separate highly exposed individuals from individuals exposed to moderate and/or low exposures from the drinking water thus limiting exposure misclassification and the resulting bias in the direction of no effect on the study populations. Without these different classifications, ATSDR would need to rely on a simple grouping of exposed versus unexposed, severely limiting the utility of the epidemiological evaluations.

ATSDR agrees with the NRC report that, due to the complexity of the situation at Hadnot Point, alternative modeling strategies should be considered. We have addressed this issue in the current modeling activities and are moving forward with a strategy that will yield sufficiently reliable estimates for this complex exposure scenario.

ATSDR also agrees with the NRC recommendation that detailed plans for the statistical analyses should be and have been developed by ATSDR for the re-analysis of the adverse pregnancy outcome study and the birth defect/childhood cancer case-control study. ATSDR disagrees with the NRC that these studies should be completed as soon as possible; data analysis will not proceed until the drinking water modeling has been completed and is available for both Hadnot Point and Tarawa Terrace.

ATSDR disagrees with the NRC report's conclusion that the mortality study and the health survey/morbidity study lack sufficient statistical power and would be so limited by biases that they would not produce useful scientific information or be definitive. In the June 2008 ATSDR report *Assessment of the Feasibility of Conducting Future Epidemiologic Studies at USMC Base Camp Lejeune*, statistical power calculations were presented showing that the studies would have sufficient power for the cancers of interest, in particular, cancers associated with benzene, vinyl chloride, TCE or PCE exposure such as kidney cancer, non-

Page 4 - Mr. Donald R. Schregardus and Lt. General Frank A. Panter

Hodgkin's lymphoma, leukemias, liver cancer, and esophageal cancer. Moreover, ATSDR emphasized that the studies would use standard research methodologies to minimize biases.

ATSDR is proceeding with the USMC Camp Lejeune Mortality Study and the Health Survey. ATSDR will establish a panel of experts to recommend adequate participation rates and consider potential biases in using the health survey for the follow-up morbidity study. We appreciate your financial support for these studies and your cooperation in the Data Discovery Technical Working Group. We are currently working on a request for additional FY 2011 funding requirements which should be completed soon.

Thank you again for your support.

Sincerely,

A handwritten signature in black ink, appearing to read 'Chris Portier', written in a cursive style.

Christopher J. Portier, Ph.D.
Director, National Center for
Environmental Health, and
Agency for Toxic Substances and
Disease Registry