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FLORIDA CITIES WATER COMPANY
RATE APPLICATION FOR RECOVERY OF LEGAL EXPENSES

TESTIMONY OF
GARY H. BAISE

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TABLE OF CONTENTS

<i>Background of Gary H. Baise</i>	4
<i>First Contact With Case</i>	5
<i>The Permit Renewal Problem</i>	6
<i>Discussions With EPA</i>	8
<i>The Complaint and Answer</i>	9
<i>Beginning of Discovery</i>	11
<i>Depositions Begin</i>	15
<i>Expansion of the Litigation</i>	16
<i>Motion to Disqualify</i>	21
<i>Additional Depositions</i>	24
<i>The Amended Complaint</i>	35
<i>Revised Amended Complaint</i>	38
<i>FCWC's Motion for Partial Summary Judgment</i>	40
<i>Additional Discovery</i>	41
<i>Preparation for Trial</i>	50
<i>Joint Pretrial Statement</i>	51
<i>FCWC's Trial Brief and Proposed Findings of Law and Fact</i>	54
<i>Motions in Limine</i>	57
<i>The Months Before the Trial</i>	59
<i>The Trial</i>	60
<i>Post-Trial Activities</i>	71
<i>The Judgment</i>	75
<i>The Appeal</i>	77
<i>Overview of Litigation Effort</i>	79

1 **Q:** Please state your name and business address.

2 **A:** Gary H. Baise, Baise & Miller, P.C., 815 Connecticut Avenue, N.W., Suite 620,
3 Washington, D.C. 20006-4004.

4 **Q:** By whom are you employed and in what capacity?

5 **A:** I am a partner in the law firm of Baise & Miller, P.C.

6 **Q:** Have you previously testified before the Commission?

7 **A:** No.

8 **Q:** What is the purpose of your testimony?

9 **A:** The purpose of my testimony is to describe (1) my assessment of the alleged
10 violations of the Clean Water Act (“CWA”) pertaining to the Florida Cities Water
11 Company (“FCWC”) Waterway Estate Wastewater Treatment Plant
12 (“Waterway”) prior to the United States filing a complaint, as amended, against
13 FCWC on October 1, 1993 (Original Complaint), (2) the legal issues, legal
14 proceedings, and settlement discussions after the filing of the complaint by the
15 United States Department of Justice (“DOJ”) on behalf of the United States, and
16 (3) the outcome of the litigation. This testimony explains almost four years of
17 very complex litigation which took many legal twists and turns. The attempt here
18 is to provide detail sufficient to cover the most important aspects of the litigation.
19 See Exhibit _____ GHB-1 (which provides an outline of the various individuals
20 involved in the litigation).

21 **Q:** What was your role in this litigation?

22 **A:** I was retained by FCWC approximately four months prior to the complaint being
23 filed and was the lead attorney in defending FCWC against these allegations.

24 **Q:** What did you rely upon for your testimony?

25 **A:** I relied upon my first-hand knowledge, a review of applicable documents, as well

1 as the knowledge and efforts of the litigation team.

2 **Q: Did you prepare documents describing in summary form the most significant**
3 **events and activities from the time you were retained until the final**
4 **conclusion of this litigation?**

5 *A:* Yes. We prepared a document styled TIME LINE, U.S. v. Florida Cities Water
6 Company which is attached as Exhibit _____ GHB-2 and contains an overall
7 timeline and other outlines of the efforts undertaken.

8 **Q: Do you understand the purpose of FCWC's application in this docket?**

9 *A:* Yes.

10 Background of Gary H. Baise

11 **Q: Please describe your education and experience.**

12 *A:* I received my law degree from Indiana University in 1968. I was then hired by
13 the U.S. Department of Justice's Civil Division, where I served as an attorney in
14 the general litigation section. In this position, I handled cases for the U.S.
15 Department of Agriculture and other agencies. After serving approximately two
16 years in the U.S. Department of Justice, I was asked to help the new
17 Administrator organize and lead the then newly-created U.S. Environmental
18 Protection Agency ("EPA"). I was named Assistant to the Administrator, and
19 served as Chief of Staff at EPA from November 1970 until 1972. At the
20 beginning of 1972, Administrator Ruckelshaus asked me to lead the EPA Office
21 of Legislation, Legislative Counsel and Intergovernmental Affairs.
22 In 1973 I was asked to become Executive Assistant to the Director of the FBI.
23 Later that same year I became Associate Deputy Attorney General of the United
24 States. I then served as Acting Deputy Attorney General of the United States
25 from October 1973 to April 1974.

1 In April 1974 I left government service and entered private practice. I practiced
2 environmental law at the law firm of Beveridge and Diamond from 1974 until
3 April 1989 when I joined the Browning-Ferris Industries Corporation (“BFI”). I
4 served as BFI’s Vice President of External Affairs until December 1991. I then
5 resumed the private practice of law in the environmental field, where I continue
6 until this day. A copy of my resume is attached as Exhibit _____ GHB-3.

7 **Q: Please describe your experience and background relating to environmental
8 regulation and litigation.**

9 *A:* I have handled cases concerning the Clean Water Act (“CWA”), Clean Air Act,
10 wetlands, National Environmental Policy Act, pesticides, and Superfund issues,
11 and virtually every other area of environmental law. I have represented numerous
12 industries in filing challenges to EPA regulatory actions in the U.S. Court of
13 Appeals in Washington, D.C. I have also counseled companies and trade
14 associations on their problems with EPA. A list of my reported cases is attached
15 as Exhibit _____ GHB-4.

16 First Contact With Case

17 **Q: When did you first become aware of this case?**

18 *A:* Edwin Jacobson, president of Avatar Holdings Inc., contacted me in December
19 1992 and asked about my litigation experience relating to the CWA. He described
20 the difficulties that his company was having settling a case in EPA’s Region IV.
21 Mr. Jacobson indicated that settlement discussions had been occurring for some
22 time and looked increasingly futile. He said that the company may have no
23 alternative but to litigate the case, and wanted to know if I was available.

24 **Q: When were you retained to handle this case?**

25 *A:* I received a call from Dennis Getman and was retained in June of 1993. Mr.

1 Getman is General Counsel of FCWC and Executive Vice President and General
2 Counsel of Avatar Holdings Inc. As I recall, he asked me a number of questions
3 and requested that I review some documents, which would be sent to me by the
4 firm of Weil, Gotshal & Manges. I received a memorandum from Weil, Gotshal
5 and Manges on June 2, 1993, which provided a general outline of the facts and
6 suggested one possible defense that FCWC might have to this action.

7 **Q: With what firms (give periods) were you associated during your engagement**
8 **by FCWC?**

9 *A:* I was associated with the following firms:
10 Jenner & Block from initial engagement until December 1994
11 Gabeler, Baise & Miller from January 1995 until October 1995, and
12 Baise & Miller from October 1995 to present.

13 **Q: What did you do during the period following your engagement by FCWC**
14 **until the Original Complaint was filed by DOJ on October 1, 1993?**

15 *A:* In June 1993, we began reviewing documents sent to us by FCWC, and the law
16 firms of Alston & Bird, and Weil, Gotshal & Manges. These records showed that
17 Waterway, owned by FCWC, was a privately-owned and governmentally-
18 regulated wastewater treatment facility operating in N. Fort Myers, Florida. The
19 documents also indicated that on two prior occasions Waterway had been granted
20 CWA permits, known as National Pollution Discharge Elimination System
21 ("NPDES") permits, which allow a discharger to discharge treated wastewater
22 effluent into waters of the United States.

23 The Permit Renewal Problem

24 **Q: How did Waterway's situation change?**

25 *A:* In 1986, FCWC was required to renew its NPDES permit for Waterway to

1 discharge into the Caloosahatchee River adjacent to Fort Myers. In the summer of
2 1986, FCWC officials were notified by EPA Region IV that the permit renewal
3 application would be denied, which would require the facility to cease its
4 discharge into the river. EPA Region IV based its decision upon its understanding
5 that Waterway lacked a wasteload allocation from Florida Department of
6 Environmental Protection¹ (“FDEP”) that allowed the plant to discharge into the
7 canal that connected to the Caloosahatchee River. EPA’s understanding was
8 incorrect. Nevertheless, based upon this erroneous information, EPA denied
9 renewal of the NPDES permit for the facility in December of 1986, even though
10 the facility had no record of violating Florida water quality standards or its
11 NPDES permit.

12 FCWC officials immediately started working with the FDEP and EPA to develop
13 a resolution of the matter because this was a public health facility and, unlike a
14 manufacturing facility, could not shut down for repairs or cease operations.

15 **Q. What steps did you take to initiate your investigation of this case?**

16 A. In the summer of 1993, we began the development of a timeline of events, based
17 on documents provided by FCWC, to demonstrate that the company had moved
18 as expeditiously as possible to construct a new pipeline to the Caloosahatchee
19 River and meet the water quality limits of the new NPDES permit issued in
20 September 1989 (See Exhibit MA-9). This timeline served to prove that any
21 delay in compliance was not FCWC’s fault. We reviewed FCWC’s documents in
22 order to determine facts to take to DOJ to demonstrate that Waterway was
23 technically discharging into the Caloosahatchee River, not in an unapproved

¹Formerly known as the Florida Department of Environmental Regulation.

1 location as alleged by EPA. In this regard, we researched the specificity required
2 in defining “outfall location.” In addition, we researched and prepared
3 memoranda on the denotation of “receiving waters” and the definition of “outfall
4 location.” We also reviewed administrative decisions of what constitutes a
5 “receiving water” under the CWA and how such waters are designated in the
6 renewal of a permit. The facts that we developed contradicted DOJ’s position that
7 the company delayed its compliance with the CWA by taking too long meet these
8 requirements.

9 Discussions With EPA

10 **Q: Please describe any additional effort to settle this matter after you were**
11 **retained by FCWC?**

12 **A:** On July 21, 1993, we met with DOJ and EPA Region IV staff in Atlanta. DOJ
13 counsel’s key points at the meeting were that FCWC discharged pollutants
14 without an NPDES permit, discharged in the wrong location, and that FCWC
15 delayed its compliance efforts in order to save money. We demonstrated to DOJ
16 counsel that outside government regulatory bodies were responsible for much of
17 the delay in moving the discharge point from the canal to the middle of the river.
18 In addition, we pointed out how extremely rare it was for EPA to rescind an
19 NPDES permit from a facility that was meeting water quality standards and the
20 effluent limitations in its NPDES permit. We also suggested in this meeting that
21 EPA failed to follow its own regulations for rescinding an NPDES permit.
22 Finally, we raised with DOJ and EPA staff the fact that a discharge outfall could
23 be within the “15 second rule,” and therefore the current discharge location was
24 covered by the permit.

25 As a result of this meeting, DOJ counsel and EPA staff agreed to review our

1 arguments and the timeline we submitted. In the meeting EPA indicated that
2 there may be some time for which the agency would give credit to FCWC and not
3 seek a penalty.

4 On September 1, 1993 David Berz, of Weil Gotshal & Manges, representing
5 FCWC, and I met with DOJ counsel, Daniel S. Jacobs, to discuss our research on
6 a number of issues. We presented him with our results and memorandum which
7 we believed demonstrated that DOJ and EPA did not have a compelling case
8 against FCWC that merited substantial penalties under the CWA. We suggested
9 that given the facts we had developed for Waterway, the case did not support
10 penalties of more than two hundred thousand dollars, if that.

11 Mr. Jacobs stated that FCWC's position was not close to the number that DOJ
12 was seeking. DOJ had already demanded \$5 million in penalties from FCWC and
13 never moved from this amount at the meeting. We referred him to awards in
14 previous CWA cases in an effort to convince him that the settlement offer
15 presented by him in December 1992 was much too high. See Exhibit GSA-4.

16 **Q: What other actions did you undertake in August and September 1993?**

17 **A:** In September, in a telephone conference call, Mr. Berz and I again tried to
18 convince Mr. Jacobs that EPA and DOJ were in error with regard to the
19 allegations against FCWC. We discussed our continuing research and explained
20 to Mr. Jacobs that an NPDES permit could not be rescinded unless one of four
21 criteria set forth in EPA's regulations were met. Mr. Jacobs rejected our
22 arguments and made it clear that DOJ would be filing a complaint in U.S. District
23 Court, an action that he had been threatening for well over a year.

24 The Complaint and Answer

25 **Q: When and where was the complaint filed by DOJ and what did it allege?**

1 A: DOJ filed the complaint on October 1, 1993 in the U.S. District Court, Middle
2 District of Florida initiating an action for civil penalties under the CWA. The
3 complaint alleged that FCWC had been discharging without an NPDES permit at
4 Waterway, discharging in the wrong location, and violating the provisions of its
5 NPDES permit issued in September 1989. ("Original Complaint"). See Exhibit
6 GSA-3. Each of these allegations were asserted to be separate, daily violations of
7 the CWA. FCWC faced penalties of up to \$25,000 per day, per violation.

8 **Q: What steps did FCWC take to respond to the DOJ Complaint?**

9 A: In October and November 1993, we undertook substantial amounts of legal
10 research to determine and analyze potential defenses including statute of
11 limitations and other affirmative defenses. In addition, we reviewed a large
12 number of FCWC documents and on November 12 and 19 met with FDEP
13 officials concerning the compliance history at Waterway. We determined that
14 delays in state and local review of FCWC construction plans contributed to
15 FCWC's difficulties in coming into compliance with the EPA Administrative
16 Order issued in May 1987 and the 1989 NPDES permit. See Exhibit MA-8.

17 **Q: Did FCWC file a response to the Original Complaint?**

18 A: Yes. On November 22, 1993, we filed an answer to the Complaint. See Exhibit
19 GSA-2. FCWC denied the allegation that it was not authorized to discharge
20 pollutants into the Caloosahatchee River. FCWC also denied the allegation that
21 the unnamed canal was not a permitted discharge location. Regarding plaintiff's
22 claim that FCWC violated the 1989 NPDES permit, FCWC answered that these
23 allegations were conclusions of law requiring no response. FCWC pleaded ten
24 defenses, including that its application for the renewal of its permit was
25 improperly denied by EPA and that Plaintiff's claims were barred because FCWC

1 had paid penalties at the Waterway facility assessed by the FDEP under
2 comparable Florida law. In addition, we plead the following affirmative defenses:
3 the doctrines of impossibility, estoppel, waiver, and laches. FCWC also plead
4 that state, local and federal governments unnecessarily delayed issuing permits
5 and enacting zoning changes necessary before it could initiate construction of an
6 advanced wastewater treatment facility or relocate the outfall, which prevented it
7 from meeting compliance schedules. FCWC also plead that it had at all times
8 acted in a proper and reasonable manner, had caused no environmental harm,
9 exercised due care, and acted in good faith to fill all requirements of the CWA.

10 **Q: Did FCWC retain additional counsel following the filing of the Original**
11 **Complaint?**

12 **A:** Yes. In early 1994 FCWC retained the firm of Henderson, Franklin, Starnes &
13 Holt, located in Ft. Myers where the action was filed.

14 **Q: Why was this firm needed?**

15 **A:** We needed a firm to move our admission *pro hac vice* and to serve as local
16 counsel. The local rules for the Middle District require the retention of local
17 counsel. This firm was familiar with the Federal District Court, its rules and
18 procedures, and could respond rapidly to emergency filings. It also filed most
19 pleadings before the Court. Also, we sought and relied upon Henderson,
20 Franklin's advice regarding strategy on a regular basis.

21 Beginning of Discovery

22 **Q: What was your next action after answering the Complaint?**

23 **A:** We began the discovery phase of the case by interviewing potential witnesses at
24 FCWC and at FDEP with respect to wasteload allocation and CWA water
25 certification issues. We also began drafting initial document requests. We

1 reviewed an enormous number of documents at FDEP's offices in an effort to
2 prove that Waterway did have a wasteload allocation to discharge into the
3 Caloosahatchee River. FDEP officials such as Dr. Abdul Ahmadi and his
4 colleagues repeatedly stated that they were unaware of any reason that a waste
5 treatment facility would be issued a "no discharge" wasteload allocation because
6 the state permit contained an implicit wasteload allocation. Concurrently, we
7 filed Freedom of Information Act ("FOIA") inquiries with at least four EPA
8 regional offices. The purpose of these FOIA requests was to obtain EPA records
9 to demonstrate how rare it was to deny an NPDES permit and also to determine
10 the circumstances nationwide under which an NPDES permit had ever been
11 denied.

12 In November and December 1993, we began preparing responses to the Court's
13 standard interrogatories that required the Plaintiff to set forth a brief statement of
14 the case, describe the basis of federal jurisdiction, outline the discovery
15 anticipated by the Plaintiff, and describe any dispositive motions that the Plaintiff
16 anticipated filing. Exhibit _____ GHB-5. FCWC was asked to agree or disagree
17 with the Plaintiff's statement of the case, state whether all parties that should be
18 joined had been joined, outline the discovery anticipated by FCWC, and describe
19 any dispositive motions that the Defendant anticipated filing. The parties were
20 asked to estimate the time required to complete all discovery, the time required for
21 trial, and whether a preliminary pretrial conference was necessary.

22 The U.S. filed its answers to the Court's standard interrogatories in January 1994.
23 Exhibit _____ GHB-6. DOJ anticipated that following a period of informal
24 discovery it would commence formal discovery, including interrogatories,
25 document requests, oral depositions, and requests for admissions.

1 FCWC filed its answers to the Court's standard interrogatories in February 1994.
2 Exhibit _____ GHB-7. FCWC stated that it did not believe that it had committed
3 the violations of the CWA alleged in the Complaint. FCWC told the Court, "[t]he
4 crux of this litigation is the U.S. Environmental Protection Agency's improper
5 denial on December 8, 1986 of FCWC's application to renew its NPDES permit."
6 FCWC advised the Court that settlement negotiations had taken place and would
7 continue as events warranted, and that discovery was required by both parties.
8 FCWC anticipated that it would need to take 15 fact depositions, a number of
9 expert depositions, and serve written discovery, including interrogatories and
10 requests for admissions. FCWC stated that it anticipated filing a motion for
11 summary judgment.

12 **Q: Did DOJ respond to FCWC's answer and affirmative defenses?**

13 **A:** Yes. On December 15, 1993, DOJ filed a Motion for an Extension of Time in
14 which to file a motion to strike FCWC's affirmative defenses. Exhibit _____
15 GHB-8.

16 **Q: Did the DOJ move to strike FCWC's affirmative defenses?**

17 **A:** Yes. On February 3, 1994, DOJ filed its motion to strike FCWC's affirmative
18 defenses. Exhibit _____ GHB-9. DOJ argued that all of FCWC's affirmative
19 defenses should be stricken as a matter of law. DOJ filed a 16-page memorandum
20 in support of its motion. Exhibit _____ GHB-10.

21 **Q: Did the DOJ file a request to produce documents?**

22 **A:** Yes. On February 14, 1994, FCWC received the DOJ's first request for
23 production of documents, which contained 45 separate document requests.
24 Exhibit _____ GHB-11. These were extensive requests, which required FCWC to
25 undertake massive efforts to obtain, for example, "all financial reports, statements,

1 balance sheets, budgets, prepared by or on behalf of FCWC since January 1,
2 1980.” This encompassed reviewing data developed over a period of 14 years.
3 DOJ also requested: all noncompliance reports submitted by Defendant to EPA
4 or the State of Florida; all documents relating to discussions, meetings, and
5 correspondence between FCWC and its contractors and subcontractors; all
6 documents relating to any test results, laboratory analyses, flow measurements or
7 concentration analyses of any pollutants discharged from the facility; all designs,
8 including any plans and specifications, and modifications thereof, for the
9 treatment elements and processes at the Facility; all documents that identify,
10 describe or explain the treatment processes and operations at the Facility; all
11 documents relating to all operating, maintenance and inspection procedures at the
12 Facility, and any and all changes in these procedures, which were designed to, or
13 had the effects of, preventing, increasing, reducing, or otherwise affecting
14 discharges, violations of water pollution laws, regulations, or violations of your
15 NPDES Permit. Each of these requests required a substantial effort to search and
16 review FCWC files which covered a six to fourteen year period.

17 **Q: What did you do after receiving the document request?**

18 **A:** We asked FCWC to use its staff to retrieve as much of the material as possible in
19 order to hold down costs. Notwithstanding this effort, we still had to review what
20 amounted to tens of thousands of pages of material, which were assembled, for
21 the most part, by FCWC, reviewed in part by counsel, and submitted to the DOJ
22 pursuant to its request.

23 **Q: What was the next step you took on behalf of FCWC?**

24 **A:** During March and April of 1994, we continued our document review and filed
25 additional FOIA requests to EPA regional offices regarding other NPDES permit

1 denials. By April 6, 1994, we had produced all the documents in response to
2 DOJ's first document production request. My estimate is that we turned over tens
3 of thousands of pages of material. In addition, in April 1994, we filed our first
4 request for production of documents to DOJ and we started preparing for the first
5 of what became approximately fifty (50) depositions taken by both sides.

6 **Q: What occurred next in the litigation?**

7 **A:** On April 12, 1994, FCWC submitted its first request for production of documents
8 to DOJ covering 30 different categories. FCWC wanted all documents relating to
9 the denial or issuance of permits for Waterway; all documents relating to EPA's
10 analysis of any impacts that Waterway's discharges may have had on the
11 receiving waters or public health; all documents relating to water quality impacts,
12 water quality certifications, waivers of water quality certification, determination
13 of significant noncompliance, water quality based effluent limitations
14 ("WQBELs"); wasteload allocations; compliance/noncompliance indexes; and
15 memoranda of agreements between EPA and the State of Florida regarding the
16 approval process for wasteload allocations under the permitting programs. FCWC
17 also sought documents regarding all communications among various agencies,
18 federal and state, about this facility.

19 Depositions Begin

20 **Q: When did DOJ begin its depositions?**

21 **A:** DOJ took its first deposition on April 21, 1994, when it conducted the
22 examination of Julie Karleskint. Exhibit _____ GHB-12. Ms. Karleskint,
23 FCWC's Manager of Operations, was the person knowledgeable about the
24 FCWC's discharges and alleged exceedences and could explain the apparent
25 toxicity exceedences at Waterway. Her testimony demonstrated that FCWC was

1 not necessarily responsible for those exceedences. In addition, Ms. Karleskint
2 was questioned at length on construction issues at Waterway; and about her
3 knowledge of Fiesta Village, Golden Gate, Southgate, Poinciana, Barefoot and
4 Carrollwood even though these facilities were not at issue at this time. Ms.
5 Karleskint was also questioned about environmental audits and audit programs
6 undertaken by FCWC. She was asked about components of a typical
7 environmental audit and what she had done to audit FCWC's facilities. She also
8 discussed her job responsibilities regarding regulatory compliance and how she
9 reviewed all discharge monitoring reports and operating reports looking for
10 exceedences. DOJ asked about other individuals within FCWC who would be
11 knowledgeable and attend meetings regarding regulatory compliance. DOJ asked
12 what caused the nitrogen violations and some of the modifications which had
13 been undertaken to resolve exceedence issues at Waterway. She was also
14 questioned by DOJ on what steps FCWC undertook to bring Waterway into
15 compliance with EPA's Administrative Order.

16 Expansion of the Litigation

17 **Q: Did DOJ then attempt to expand its discovery requests to include FCWC**
18 **facilities other than Waterway?**

19 **A:** Yes. DOJ did this for the first time during the deposition of Ms. Karleskint,
20 stating that it would seek information on other FCWC facilities. In response to
21 this expansion FCWC filed a motion for a protective order to limit the
22 government to documents relevant to the Complaint at that time, which concerned
23 only Waterway. Exhibit _____ GHB-13. DOJ further demanded production, in
24 two days, of all previously redacted documents in their entirety, including
25 documents relating to other FCWC facilities. FCWC objected, noting that the

1 complaint was limited to claims concerning Waterway, and that the schedule to
2 produce these additional documents was patently unreasonable. FCWC opposed
3 this substantial expansion of discovery, as it had already produced more than
4 100,000 pages of documents for inspection and copying by DOJ. On April 18,
5 1994, the Court granted, in part, FCWC's motion for a protective order. Exhibit
6 _____ GHB-14. This order granted FCWC's request, in part, by not requiring
7 FCWC to immediately produce all redacted documents in their entirety. The
8 documents did, however, have to be produced within 20 days of the Court's order,
9 subject to claims of confidentiality and privilege.

10 **Q: During this time did you become aware that DOJ counsel was attempting to**
11 **contact former FCWC employees?**

12 **A:** Yes. In April of 1994, we became aware that DOJ was calling and pressuring
13 former employees to meet with its counsel. DOJ urged these former employees
14 not to inform FCWC of these meetings or to permit FCWC counsel to attend these
15 meetings. In our letter of April 19, 1994, we objected to DOJ's efforts to
16 undertake *ex parte* contacts with former FCWC employees, which was
17 specifically prohibited under Florida caselaw and the Canons of Ethics. Exhibit
18 _____ GHB-15. In a letter of April 20, 1994, DOJ acknowledged that there could
19 be a conflict with appropriate procedure and acquiesced in our request until they
20 completed their study of the matter. Exhibit _____ GHB-16.

21 After its review of this matter, DOJ, in June 1994, moved to allow such *ex parte*
22 contacts. Exhibit _____ GHB-17. The DOJ filed an 11-page memorandum in
23 support of its motion, with attachments, arguing that it had a right to have *ex parte*
24 contacts with former employees of FCWC. DOJ took exception to the cases in
25 the Middle District of Florida prohibiting such *ex parte* contacts, and attempted to

1 distinguish them from the facts in FCWC's case. DOJ's memorandum discusses,
2 in great detail, the applicable rule of the Florida Rules of Professional Conduct,
3 the ABA model rule on which it was based, the ABA interpretation of this model
4 rule, the Florida Bar opinion on the Florida rule, and the caselaw. The general
5 rule is that a lawyer may not contact a party the lawyer knows to be represented
6 by counsel, unless the lawyer has the consent of the other lawyer. For corporate
7 parties, this rule applies to persons with managerial responsibility on behalf of the
8 organization. In the Middle District of Florida the prohibition applies to former as
9 well as current employees.

10 On July 15, 1994, FCWC filed its memorandum in opposition to DOJ's request.
11 FCWC explained the facts concerning DOJ's contacts with former FCWC
12 employees and its interest in protecting privileged information from disclosure.
13 See Exhibit _____ GHB-18.

14 On August 5, 1994, DOJ sought permission to file a reply memorandum, in
15 conflict with the local practice. Exhibit _____ GHB-19. This reply brief did not
16 effectively attack our legal arguments, but rather contained spirited arguments
17 about whose version of the facts was correct. On August 17, 1994, FCWC filed a
18 memorandum in opposition to DOJ's reply motion, arguing that local practice
19 does not permit reply memorandum and defended FCWC's view of the facts.

20 Several months later, on February 13, 1995, the Court granted a protective order
21 barring DOJ from *ex parte* contacts. See Exhibit _____ GHB-20. On March 16,
22 1995, the Court issued an order denying DOJ's motion to allow *ex parte* contacts,
23 and specifically required DOJ to give FCWC counsel notice before it contacted
24 former FCWC employees. The Court also denied FCWC's motion to disqualify
25 DOJ due to these *ex parte* contacts which are discussed below. Exhibit _____

1 GHB-21.

2 **Q: When did FCWC begin taking depositions and for what purpose?**

3 *A:* On May 5, 1994, we deposed John Marlar, one of the key EPA Region IV water
4 experts. Exhibit _____ GHB-22. I considered Mr. Marlar one of the three or four
5 most knowledgeable persons in EPA on permitting issues under the CWA.
6 Therefore, I wanted to use Mr. Marlar's deposition to demonstrate how wasteload
7 allocations are developed under Sections 201 and 303 of the CWA. I questioned
8 Mr. Marlar about the 1975 "Lower Florida River Basin Water Quality
9 Management Plan, December 1975" that demonstrated how wasteload allocations
10 were developed and approved by EPA and the state. The deposition also
11 demonstrated that EPA was not following its regulations regarding wasteload
12 allocation approvals. Mr. Marlar testified that it was EPA's general practice that
13 all wasteload allocations to be approved by the agency before including them in
14 an NPDES permit. Mr. Marlar stated that the wasteload allocation approval
15 process was necessary to keep the process orderly. Mr. Marlar also testified that a
16 1981 document was a planning document and not a requirement for EPA to use in
17 issuing an NPDES permit. This key document, entitled "The Caloosahatchee
18 River Wasteload Allocation Documentation, Lee County," was relied upon by
19 Ms. Kagey to deny renewal of Waterway's NPDES permit. His admission in this
20 first deposition that the 1981 document was a planning tool convinced me that we
21 were on the right track regarding the entire wasteload allocation issue. I also
22 questioned him on how EPA could rescind an NPDES permit when there was no
23 evidence of Florida's water quality standard being violated and no effluent
24 limitation violations. He admitted that denial of a permit renewal appeared to be a
25 rare event. Mr. Marlar had signed some of the documents denying the renewal of

1 Waterway's permit; therefore, we wanted to determine what he knew about
2 Waterway and to explore his knowledge relating to the general issue of the
3 number of permits for which renewal had been denied where a facility was
4 meeting water quality standards and effluent limitations set forth in the NPDES
5 permit and the specific issue of the authority EPA used to deny renewal of
6 FCWC's permit. We questioned Mr. Marlar in detail about the process for issuing
7 administrative orders and NPDES permits and about FCWC's permit renewal
8 application and the basis for the denial of that permit.

9 On May 17, 1994, we deposed Peter McGarry, who was Chief of the Region IV
10 Enforcement Unit from 1982 to 1992. He had referred the matter to DOJ for an
11 enforcement action against FCWC regarding the Waterway facility. Exhibit
12 _____ GHB-23. He did not participate in the EPA denial of FCWC's permit
13 renewal application. In his testimony, Mr. McGarry did not recall whether
14 anyone contacted FDEP to determine FCWC's wasteload allocation.

15 Additionally, he did not have knowledge of any other situation when a facility's
16 NPDES renewal application was denied while it was meeting effluent limitations
17 and water quality standards. I questioned Mr. McGarry about his knowledge
18 regarding EPA's wasteload allocation process and how that process related to
19 Section 303 of the CWA. Mr. McGarry also testified about how a wasteload
20 allocation is developed and about his knowledge regarding Waterway's wasteload
21 allocation. I also questioned Mr. McGarry about the DOJ charge that Waterway
22 was discharging in the wrong location. He could not point to any aspect of the
23 Waterway NPDES permit which indicated that Waterway was discharging in the
24 wrong location. Finally, Mr. McGarry identified additional individuals in EPA
25 who would be knowledgeable regarding enforcement issues related to Waterway.

1

2 **Q: What steps did you take after the depositions of Ms. Karleskint, Mr. Marlar**
3 **and Mr. McGarry were taken?**

4 *A:* During the months of May, June, and July of 1994, we reviewed the documents
5 produced by EPA Region IV as well as FOIA materials from several EPA
6 regional offices. The documents obtained through FOIA requests confirmed my
7 view that it was exceedingly rare for EPA to rescind or deny renewal of an
8 NPDES permit where the facility was meeting water quality standards and
9 NPDES permit effluent limitations. We also examined all of EPA's manuals,
10 policy directives and training course materials that in any way explained EPA's
11 permitting process, water quality standards setting, wasteload allocation
12 development, total maximum daily load studies, and state approval procedures as
13 they related to water quality management plans. During this time, FCWC
14 received the DOJ response to our first request for production of documents.

15 Motion to Disqualify

16 **Q: Did you have occasion to move to disqualify DOJ counsel?**

17 *A:* Yes. On October 25, 1994, FCWC moved to disqualify DOJ counsel from further
18 participation in this case because of his possible violation of ethics rules and case
19 law. Exhibit _____ GHB-24. As discussed above, plaintiff's counsel had *ex*
20 *parte* communications with a former high level managerial employee of FCWC.
21 *Ex parte* contacts with parties represented by counsel, without advance notice to
22 the counsel, are inappropriate and may be grounds for dismissal from
23 representation. FCWC's memorandum set forth the facts regarding a trip to
24 Australia by DOJ counsel and his contact, while allegedly on vacation, with Mr.
25 Robert H. French, former Senior Vice President of FCWC who was living in

1 Australia. We argued that under the law in the Middle District of Florida relating
2 to such contacts, these contacts should result in the disqualification of the DOJ
3 attorney. DOJ opposed this motion to disqualify. On February 15, 1995, the
4 Federal Magistrate held a hearing on DOJ's motion to allow *ex parte* contacts and
5 on FCWC's motion to disqualify DOJ counsel. Exhibit _____ GHB-25.
6 Although the judge did not issue an order that day, he made it clear that he was
7 not pleased with DOJ counsel's activities in Australia and in the United States and
8 indicated that there should be no more *ex parte* contacts by DOJ's counsel with
9 FCWC's former employees. In court, Magistrate Judge Swartz stated that he
10 would only disqualify counsel if their actions were "unconscionable" and
11 indicated, however, that he did not agree with DOJ's actions stating: "[they don't]
12 have carte blanche authority to go contact every witness in a lawsuit." The court,
13 on March 16, 1995 denied our motion to disqualify counsel, because the court did
14 not see Mr. Jacobs' actions as sufficiently unconscionable. Exhibit _____ GHB-
15 26.

16 **Q: What additional discovery work was done during this time?**

17 **A:** On June 16, 1994, DOJ launched a major expansion of the litigation by requesting
18 documents from many of FCWC's wastewater treatment plants and related
19 sewage systems. Exhibit _____ GHB-27. DOJ sought virtually every document
20 relating to the Fiesta Village, Golden Gate, Poinciana, Gulf Gate, South Gate,
21 Barefoot Bay, Carrollwood and Waterway facilities. In its 15-page, 62-paragraph
22 request, DOJ sought: all environmental audits of any FCWC wastewater
23 treatment plant, regardless of date; all federal and state permit requests; all
24 documents on test results of any discharges from any of these four facilities; all
25 documents on the treatment processes and operations at these four facilities; all

1 daily operation and maintenance logs for these facilities; all documents relating to
2 minutes, notes, and memoranda describing meetings held by the Defendants at
3 any of their facilities where compliance with the CWA was discussed; and all
4 documents relating to capital, operating or maintenance costs of water pollution
5 control equipment installed or considered for installation to achieve water quality
6 standards or water quality limits. DOJ even requested employee desk calendars
7 and appointment books.

8 Regarding the environmental audits prepared by FCWC officials, FCWC
9 seriously considered opposing the release of these audits to DOJ, as these audits
10 had been prepared under the protection of the attorney-client privilege. Yet after
11 reviewing the audits from all of the facilities, it appeared that the audits actually
12 helped FCWC. We also advised FCWC that if it opposed the request by DOJ for
13 the production of these documents, it would be a legal side-show and cost tens of
14 thousands of dollars. At the end of the effort a court would likely order disclosure
15 of the audits or allow FCWC to redact only small portions of the documents, and
16 FCWC would appear as if it had something to hide. Based on all of the facts,
17 FCWC produced the audit documents to DOJ.

18 This massive document request from DOJ appeared to be an attempt to put
19 pressure on FCWC to settle. The new expansion of the principle case suggested
20 that DOJ knew at this point that its initial case was weak and it needed to place
21 additional pressure on FCWC to force a settlement by attempting to increase
22 FCWC's legal and internal company costs.

23 By early July FCWC had begun its response to this request which required a
24 substantial effort by lawyers, paralegals and FCWC personnel. This document
25 production continued through July and August of 1994, and we completed our

1 response to the Second Request for Production of Documents on August 24, 1994.
2 We collected, reviewed, considered thousands of documents for privilege and
3 produced thousands of pages to DOJ. FCWC also produced significant amounts
4 of financial data from its computer database. FCWC personnel handled much of
5 this work, but we also spent substantial time on this request, particularly to ensure
6 that no privileged material was produced.

7 Additional Depositions

8 **Q: What occurred next?**

9 *A:* Throughout the fall of 1994, DOJ deposed a number of FCWC personnel. These
10 depositions were part of the expansion of the case and were intended to provide
11 DOJ with information regarding the operation of the Barefoot Bay and
12 Carrollwood facilities.

13 DOJ deposed Larry Good, regional manager at FCWC, on October 10, 1994, in
14 order to explore his knowledge of the facts surrounding the Carrollwood plant
15 during the 1980s. Mr. Good testified regarding FCWC's effort to connect with
16 the Hillsborough County wastewater system and the City of Tampa wastewater
17 treatment system, as well as FCWC's efforts to upgrade the Carrollwood facility
18 to advanced wastewater treatment ("AWT").

19 On October 11, 1994, DOJ took an extensive, 221 page deposition of William
20 Sansbury, the Division Manager of the Barefoot Bay Division of FCWC. DOJ
21 questioned Mr. Sansbury extensively about Barefoot Bay, its spray fields, and
22 overflows. Mr. Sansbury explained that major storms had caused problems at the
23 spray fields. DOJ also sought information as to who knew about the lack of
24 federal NPDES permits at Barefoot Bay. Mr. Sansbury was asked about the
25 discharge monitoring reports ("DMRs") and the exceedences relating to the

1 DMRs.

2 On October 12, 1994, DOJ deposed Glen Siler, one of the wastewater operators at
3 the Barefoot Bay plant. DOJ counsel questioned Mr. Siler about the history of the
4 Barefoot Bay facility as it related to spray fields and the operation of the facility,
5 and regarding toxicity testing and the Barefoot Bay discharge. DOJ attempted to
6 establish that there were a number of unpermitted discharges from Barefoot Bay.

7 **Q: What depositions did FCWC take during this period?**

8 **A:** We deposed Connie A. Kagey, the EPA permit writer who denied the Waterway
9 permit renewal application. Exhibit _____ GHB-28. Ms. Kagey testified that she
10 performed little or no investigation before denying the permit. Her file contained
11 the two pages that formed the sole basis for revoking the Waterway permit. These
12 two pages were from a 1981 non-binding planning study, (“The Caloosahatchee
13 River Wasteload Allocation Documentation, Lee County”), which assessed the
14 need for a regional wastewater treatment facility in the Fort Myers area. This
15 study did not in fact require a zero or no wasteload allocation for FCWC’s
16 Waterway facility. This study was merely a planning document, and, assuming
17 that the Waterway facility would be shut down at some point in the future, the
18 drafter of the study assigned a zero wasteload allocation to the Waterway facility.
19 This planning study had no effect on Waterway’s existing wasteload allocation.
20 Ms. Kagey never requested the entire document, did not determine that this was a
21 planning document, and from these two pages improperly denied FCWC’s
22 NPDES permit application for a new permit.
23 Dr. Abdul Ahmadi, Professional Engineer and Administrator of FDEP, later
24 testified that this 1981 report was a planning report, not an official document
25 which could be used to determine wasteload allocations for NPDES discharge

1 permits. A review of the report or a telephone call by Ms. Kagey to Florida state
2 officials would have revealed this fact. Instead, Ms. Kagey's failure to look
3 beyond the two pages in her file created havoc and substantial costs for FCWC.
4 Through her deposition we sought to determine Ms. Kagey's level of knowledge
5 with regard to writing NPDES permits. Her testimony confirmed that although
6 she had been writing these permits since 1984, she had a limited understanding of
7 EPA's regulations regarding permit writers.

8 It was very important to establish in her deposition that the 1986 Waterway permit
9 denial was based on either EPA effluent limitation guidelines or water quality
10 standards. If she admitted that fact, it would demonstrate that she had not written
11 an NPDES permit based on best professional judgment. Ms. Kagey, as a permit
12 writer, could have used the 1981 wasteload allocation if she was drafting a "best
13 professional judgment" permit. In her deposition testimony, she admitted that she
14 based her decision on effluent limitations, not upon her best professional
15 judgment. By this time we had determined that the Caloosahatchee River
16 wasteload allocation study of January 1981 had never been officially approved by
17 either the State of Florida or EPA's Region IV. Ms. Kagey's only excuse for
18 using the 1981 no-discharge wasteload allocation was that it was the most recent
19 information she had in her file. She also testified that she did not know for a fact
20 whether the 1981 wasteload allocation was approved by EPA. We also spent time
21 on questioning her about her review of the State of Florida operating permits
22 which were attached to the Waterway NPDES application. She knew that
23 Waterway had a valid state operating permit and yet she made no effort to make
24 sure her decision was consistent with FDEP's prior decisions. It was clear from
25 her deposition that she did not know what the status was of the 1981 document;

1 however, she proceeded to make a decision which was not reviewed by her
2 supervisors and that decision led to FCWC being forced to spend millions of
3 dollars which did not improve the water quality of the Caloosahatchee River. The
4 deposition also demonstrated that Ms. Kagey could not recall a single instance
5 where EPA had denied an NPDES permit to a permit holder who was in
6 compliance with state water quality standards and the permit's effluent
7 limitations. She admitted that she did not consider or use any of the four reasons
8 EPA can use to deny renewal of an NPDES permit to an applicant as the basis for
9 her decision.

10 **Q: What other depositions did you take that supported your position in the**
11 **case?**

12 *A:* In October of 1994, we deposed Bruce Barrett, who served as the Director of the
13 Water Management Division for EPA's Region IV from April 1985 to September
14 1989, and one of Ms. Kagey's supervisors. Mr. Barrett admitted that FCWC had
15 a unique situation, and that, knowing the circumstances as he did now, he would
16 not make the same decision again. He stated in his deposition that "I don't see the
17 basis for the federal action denying the permit based on the correspondence." He
18 was unable to name any circumstances in which the EPA had denied a permit
19 renewal and stated that such a decision is an "unusual event." He further stated
20 that "on the basis of the limited review that I've done today, there would appear to
21 be some inconsistencies." Exhibit _____ GHB-29.

22 **Q: Did you determine whether the denial of the permit to Waterway was a rare**
23 **event?**

24 *A:* Yes, we did come to a conclusion with respect to that matter. In testimony given
25 by several EPA officials, no one could remember more than possibly one NPDES

1 permit renewal being denied during the entire period of time they had served with
2 the agency. Through inquiries to several EPA Regions, we could never find any
3 evidence of a permit renewal being denied where the facility and its discharge did
4 not violate water quality standards or its effluent limitations as set forth in the
5 permit.

6 **Q: Where were the new facilities located that DOJ raised in its discovery?**

7 **A:** Gulf Gate and Southgate are in Sarasota County, Carrollwood is in Hillsborough
8 County (Tampa) and Barefoot Bay is in Brevard County.

9 **Q: Why did DOJ seek new information on the Barefoot Bay and Carrollwood**
10 **facilities, and what was the concern?**

11 **A:** The Barefoot Bay wastewater treatment plant (“Barefoot”) was placed into service
12 in the early 1980's using percolation ponds. Under certain conditions the ponds
13 overflowed, discharging treated effluent into a nearby agricultural canal. These
14 discharges were not covered by an NPDES permit. FDEP was informed by
15 FCWC of these discharges and had given the facility a temporary operating
16 permit (“TOP”). Throughout the 1980's, FCWC officials worked with FDEP to
17 develop alternatives to discharge; however, none of these options proved viable.
18 During this period, Barefoot had Florida TOPs but did not have an NPDES
19 permit.

20 From 1975 to 1984, Carrollwood operated pursuant to an NPDES permit as well
21 as under Florida's regulatory scheme. After 1984, FCWC was unable to obtain an
22 NPDES permit from EPA because Florida would only grant a TOP. Carrollwood
23 continued to operate under Florida TOPs as well as under an EPA administrative
24 order. Although DOJ argued that FCWC was not complying with the CWA, it
25 ignored EPA's own administrative record regarding these two facilities. EPA had

1 undertaken administrative actions against both facilities through Consent
2 Agreements and Orders Assessing Administrative Penalties, assessing a penalty
3 of \$6,000 against Barefoot Bay on November 6, 1991 and \$15,000 against
4 Carrollwood on March 3, 1992. The administrative record demonstrates that in
5 setting these penalties, EPA Region IV considered FCWC's good faith
6 cooperation and the lack of any environmental harm caused by any violations.
7 See Exhibit GSA-22 and Exhibit GSA-11.

8 Discovery later demonstrated that DOJ had failed to review key documents in
9 EPA files or talk with EPA's own employees who had knowledge of the facts at
10 issue at both Barefoot and Carrollwood. The administrative record showed that
11 an EPA enforcement officer, Roy Herwig, had issued the Administrative Order at
12 Barefoot which proposed the \$6,000 penalty. Mr. Herwig's notes indicated that
13 EPA had reviewed FCWC's actions in light of the statutory mitigation factors
14 under CWA § 309(g)(3). Mr. Herwig's notes also indicated that at Barefoot
15 FCWC's economic benefit from noncompliance was approximately \$73. Under
16 the mitigation factor "Other matters that justice may require," Mr. Herwig noted
17 on EPA's behalf: "The enforcement team considered the fact that Respondent
18 [FCWC] has been working closely with the Florida Department of Environmental
19 Regulation since 1985 to develop a solution to the problem. Since being
20 contacted by EPA, Respondent has been very cooperative. Consideration was
21 given to calculating liability on a daily basis beginning with the initial overflow in
22 1985. However, since the respondent had been working with DER and since the
23 effluent being discharged would have met the limitations contained in the permit
24 now being issued by EPA, it is believed that the true violation was limited to that
25 of not applying for an NPDES permit." Exhibit _____ GHB-30

1 Mr. Herwig concluded that he thought Barefoot was fully resolved and “none of
2 this would be revisited.” Exhibit _____ GHB-30

3 The administrative record for the Carrollwood Consent Agreement showed that
4 EPA estimated the delayed compliance penalty at the facility to be worth \$203.

5 The EPA official who investigated Carrollwood, Thomas Plouff, testified in his
6 deposition that “the case was settled, long since settled.” Exhibit _____ GHB-30 .

7 Based on this information it was clear that EPA and DOJ had failed to check with
8 the EPA enforcement officers before bringing new actions against FCWC. The
9 testimony of these key employees and the documents contained in the
10 administrative record demonstrated that DOJ failed to conduct a competent
11 preliminary review and factual inquiry before pursuing claims against these two
12 facilities.

13 **Q: What did DOJ do in an attempt to prove its case at Barefoot Bay and
14 Carrollwood?**

15 **A:** In addition to extensive requests for production of documents, discussed above,
16 DOJ deposed several additional FCWC employees with regard to Barefoot Bay
17 and Carrollwood.

18 DOJ continued to press its case by taking the depositions of additional FCWC
19 employees, including Johnny Overton, Paul Bradtmiller, Gerald Allen, Jack
20 Tompkins and Jim Elder.

21 Mr. Bradtmiller was deposed for two days by DOJ on November 18 and 21, 1994.
22 Exhibit _____ GHB-31. He was questioned about the various facilities’ discharge
23 monitoring reports, interaction with Avatar executives, organizational structure of
24 Avatar Utilities, and efforts by FCWC to bring Waterway into compliance. Mr.
25 Bradtmiller also discussed EPA’s negative attitude at its show cause hearing in

1 Atlanta and noted that Mr. McGarry did not have a favorable attitude toward
2 FCWC.

3 Mr. Overton was Executive Vice President of Avatar Utilities Services, Inc. and
4 reported to Mr. Allen at the time his deposition was taken. He had previously
5 been the Senior Vice President of FCWC. Exhibit _____ GHB-32. Mr. Overton
6 was questioned extensively about sprayfield overflows, FCWC's efforts to correct
7 the problems and the company's efforts to buy additional sprayfield capacity. In
8 addition, DOJ attempted to intimidate FCWC by staging inspections of the
9 Carrollwood, Southgate and Barefoot facilities. In addition to DOJ personnel, the
10 inspectors were accompanied by Mark Klingenstein, who later testified as an
11 expert witness for the government at trial on the issue of alleged environmental
12 harm.

13 Mr. Tompkins was the Operations Manager at FCWC and reported to Mr.
14 Bradtmiller. Exhibit _____ GHB-33. He was responsible for obtaining permits
15 for Waterway. He also handled construction issues at Waterway. In his
16 deposition, DOJ wanted to demonstrate that the delay in constructing Waterway's
17 new facilities caused the nitrogen violations at the facility and that various FCWC
18 employees knew that the facilities were discharging without federal permits,
19 particularly at Barefoot and Carrollwood.

20 **Q: In addition to the depositions already taken, was there a further dispute**
21 **concerning interviews of former employees?**

22 **A:** Yes. As I described earlier in my testimony, DOJ's attempts to undertake *ex parte*
23 contacts with former FCWC employees was a major issue in the conduct of this
24 litigation. After filing our papers on the matter in 1994, on January 30, 1995, I
25 was notified again by DOJ that it would no longer voluntarily refrain from

1 conducting interviews of former employees of FCWC and its parent company.
2 Exhibit _____ GHB-34. DOJ counsel stated that: “any such interviews will be
3 conducted without further notice to Florida Cities and its parent companies.” On
4 February 3, 1995, FCWC filed an emergency motion seeking a temporary
5 protective order preserving the status quo until the Court heard our motion. This
6 issue was intertwined with FCWC’s motion to disqualify government counsel
7 because DOJ counsel had been contacting former high-level, managerial
8 employees without notice to FCWC’s counsel, in contravention of caselaw in the
9 Middle District of Florida. DOJ counsel acknowledged that it had engaged in *ex*
10 *parte* contacts with FCWC’s former employees, and defended those actions,
11 claiming that specific DOJ regulations superseded the ethical rules and decisions
12 of the local courts. DOJ counsel replied to our motion on February 9, 1995. See
13 Exhibit GHB-35. On February 13, 1995, the Court granted our request for a
14 temporary protective order until a hearing could be held. See Exhibit _____
15 GHB-20. On March 16, 1995, U.S. Magistrate Judge Swartz issued an order,
16 discussed above, which barred DOJ counsel from interviewing former high-level
17 FCWC employees without notice to FCWC counsel. Magistrate Judge Swartz’s
18 order was affirmed by the Honorable Ralph W. Nimmons, Jr., the U.S. District
19 Judge assigned to try this matter. Exhibit _____ GHB-26.

20 **Q: Did some witnesses called by DOJ for depositions avail themselves of their**
21 **rights under the Fifth Amendment and decline to testify at deposition?**

22 **A:** Yes.

23 **Q: Please explain.**

24 **A:** In January of 1995, I learned of the case of U.S. v. Weitzenhoff, 35 F.3d 1275 (9th
25 Cir. 1994), cert. denied, 115 S. Ct. 939 (1995). Exhibit _____ GHB-36. The

1 holding of the case was particularly troubling as it related to potential criminal
2 liability under the CWA. The case held that if a potential party was aware of the
3 requirement for an NPDES permit and had knowledge that the party's facility did
4 not have a permit or was violating the permit, such a person could be charged with
5 a criminal violation of the CWA. I immediately forwarded this case to the general
6 counsel of FCWC. In an abundance of caution, and because DOJ counsel had
7 suggested criminal action on occasion by alleging that a number of our employees
8 had knowingly violated the CWA, we recommended that current and former
9 employees discuss this matter with independent counsel. I believed it important
10 that each employee examine the Weitzenhoff case and his or her situation and act
11 accordingly. As a result, in the early part of 1995, a number of current and former
12 employees invoked their Fifth Amendment rights. However, these employees
13 were willing to testify if given immunity for the matters which were at issue in
14 this litigation. We formally advised DOJ counsel of our position on July 13,
15 1995. DOJ counsel never responded to our request for immunity.

16 **Q: What occurred next?**

17 **A:** During the first part of March 1995, we responded to interrogatories served by the
18 U.S. Exhibit _____ GHB-37. These interrogatories requested information on
19 "all directors, officers, and employees of Defendant from January 1, 1980 to the
20 present." It was an extraordinary undertaking to identify all employees over a 15-
21 year period. Moreover, for each employee DOJ counsel wanted to know the term
22 of employment, the reason for termination, total compensation, and each person's
23 responsibilities as they related to environmental laws and regulations. Another
24 interrogatory requested any violations of federal, state, or local environmental
25 laws or regulations from 1988 to the trial of this matter, by date and type of each

1 violation, including all violations of any permit at any facility owned or operated
2 by FCWC. Another request was to identify, for each violation, from 1980 to
3 present, the nature of the violation, the reason for the violation, any and all
4 measures taken to prevent the violation, persons who were aware of the violations,
5 and the date they became aware of the violation. FCWC was also requested to
6 identify each wastewater treatment plant owned or operated by it since 1980, and
7 the years the plant discharged into waters of the United States. We spent
8 substantial time in March 1995 preparing responses to these interrogatories and
9 reviewing documents for these responses and for upcoming document production.
10 We also prepared and filed our own interrogatories upon the U.S. and on March
11 22, 1995, we filed our second request for production of documents. See Exhibit
12 _____ GHB-38. FCWC's first set of interrogatories and second request for
13 production of documents represented an opportunity to determine the basis of the
14 Plaintiff's case against FCWC. We requested answers to basic questions, for
15 example: summarize the facts supporting allegations in the complaint; identify all
16 persons who have knowledge of the allegations in the complaint; identify persons
17 to be called as fact or expert witnesses; and identify the facts relevant to the
18 determination of the penalty. The documents requested included: the procedures,
19 practices and internal agency guidelines regarding water quality-limited stream
20 segments; coordination with state and local permitting authorities; Region IV
21 permit renewal denials; and environmental harm, if any, caused by FCWC's
22 discharges. The responses to these requests would provide FCWC with an
23 understanding of why Plaintiff thought that FCWC had violated the CWA and
24 with the evidence supporting that belief.

25 **Q: Did you undertake additional efforts to settle the case at this time?**

1 A: Yes. We believed that we had such a strong case that DOJ should reconsider
2 reducing its claim from \$5 million down to \$500,000 or less. We still believed
3 that the fine should be no more than \$100,000 to \$200,000, and FCWC and I
4 agreed that we should add an additional amount for the value of saving the
5 expense of further litigation. On March 14, 1995, FCWC served DOJ with a Rule
6 68 Offer of Judgment in the amount of \$500,000. That is, we offered to pay
7 \$500,000 to settle the case. Exhibit _____ GHB-39. We thought this offer would
8 add some pressure on the government to settle. The letter was handed to DOJ
9 counsel at the beginning of a deposition. DOJ counsel indicated that this was not
10 a "serious" offer and, I was told, proceeded to literally throw the letter across the
11 room without reading the three page offer. DOJ counsel then stated that he would
12 proceed to add other claims to his complaint.

13 The Amended Complaint

14 **Q: What steps did DOJ then take?**

15 A: On March 30, 1995, after engaging in extensive discovery, the U.S. amended its
16 complaint to include a number of charges against Barefoot and Carrollwood
17 which increased FCWC's liability to over \$100 million. (Amended Complaint).
18 See Exhibit GSA-7. At Barefoot the government claimed that from April 1, 1990
19 to November 1, 1991, FCWC discharged into Sebastian Creek without a federal
20 NPDES permit. The government further claimed that from November 1990 to
21 June 1991, FCWC violated provisions of an administrative order by exceeding the
22 order's allowance for total suspended solids, fecal coliform, dissolved oxygen and
23 biological oxygen demand. Finally, the government claimed that provisions of a
24 particular NPDES permit involving test methods for total residual chlorine were
25 also violated.

1 At Carrollwood, the government claimed that FCWC discharged effluent without
2 a federal permit from August 1990 to June 1991. It further claimed that during
3 October, November and December of 1991, FCWC discharged in violation of an
4 NPDES permit with regard to its allowances for total suspended solids, total
5 phosphorus, fecal coliform, total nitrogen, carbonaceous biochemical oxygen
6 demand and total residual chlorine.

7 **Q: Did the Amended Complaint name Avatar Holdings Inc. as an additional**
8 **defendant?**

9 *A:* Yes.

10 **Q: Did you provide Avatar Holding's defense to the allegations contained in the**
11 **Amended Complaint?**

12 *A:* No. Avatar Holdings retained Weil, Gotshal and Manges as its attorneys. We
13 believed DOJ counsel would subsequently argue that Avatar exercised complete
14 control over FCWC and we wanted to demonstrate there was a corporate structure
15 in place separating the two entities.

16 **Q: Did you coordinate the work involved with Weil, Gotshal and Manges**
17 **attorneys from the time after the Amended Complaint was filed until the**
18 **conclusion of the litigation?**

19 *A:* Yes, but neither myself nor any of my co-counsels provided services for Avatar
20 Holdings.

21 **Q: What action did you take to protect FCWC's interest with respect to the**
22 **Amended Complaint?**

23 *A:* On April 4, 1995, FCWC filed a Notice of Intention to Oppose the U.S. for leave
24 to file an amended complaint. See Exhibit _____ GHB-40. On April 14, 1995,
25 we filed a memorandum in partial opposition to plaintiff's motion for leave to

1 amend the complaint. *See* Exhibit _____ GHB-41. In our memorandum, we
2 argued that DOJ should be denied leave to amend the complaint under Federal
3 Rule of Civil Procedure 15(a). This rule sets forth the standard that leave to
4 amend be freely granted, unless there exists a substantial reason to deny such
5 leave. The futility of a proposed amended complaint, however, is sufficient
6 reason to deny a motion to amend. Applying these principles to our case, we
7 argued that it would be futile for the government to amend the complaint in light
8 of the CWA provision (Section 309(9)(b)(A)) that expressly forbids EPA from
9 seeking to collect in court penalties for which EPA has already collected in an
10 administrative proceeding. Specifically, EPA had issued a Consent Order for
11 \$6,000 at Barefoot on November 6, 1991. With respect to Carrollwood, EPA had
12 settled all claims for discharging without an NPDES permit for \$15,000; EPA
13 closed out the Carrollwood matter on March 3, 1992. FCWC further argued that
14 EPA's original case had suffered a potentially lethal blow from the improper
15 denial of the permit renewal for Waterway. We also argued that DOJ was
16 attempting to salvage its initial case by engaging in open-ended and massive
17 discovery in a transparent attempt to support its failed case by seeking to find any
18 technical violation, no matter how trivial, at any of the several other facilities
19 owned and operated by FCWC.

20 **Q: How did the court rule on your motion?**

21 **A:** On April 26, 1995, the Court granted FCWC's motion, and ordered DOJ to file a
22 Revised Amended Complaint on or before May 5, 1995. This Revised Amended
23 Complaint was to be filed with the limitation that paragraphs 16 and 30 of the
24 Proposed Amended Complaint and any allegations relating to paragraphs 16 and
25 30 that were not relevant to the remaining claims "shall not be permitted." See

1 Exhibit _____ GHB-42. Paragraphs 16 and 30 of the Amended Complaint
2 concerned discharges at Barefoot and Carrollwood without a permit, allegations
3 covered by the Consent Agreements and Orders Assessing Administrative
4 Penalties previously settled with EPA.

5 Revised Amended Complaint

6 **Q: Did DOJ file a Revised Amended Complaint?**

7 A: Yes. On May 4, 1995, DOJ filed its Revised Amended Complaint. Exhibit _____
8 GHB-43. To our surprise, the government filed substantially the exact same
9 complaint as it had proposed prior to the court's order.

10 **Q: Did FCWC respond to this new complaint?**

11 A: Yes. On May 9, 1995, FCWC moved to strike portions of the Revised Amended
12 Complaint. Exhibit _____ GHB-44. FCWC argued that the Court, in its April
13 26, 1995 order, had already ruled that certain claims regarding Barefoot and
14 Carrollwood would not be permitted. We relied on the Court's order,
15 incorporating into our motion the Court's own words for not permitting these
16 claims: "It is evident that even if the Plaintiff had viable claims against Barefoot
17 Bay and Carrollwood, it should have been aware of these claims at the time of the
18 filing of the original complaint. Raising such claims [shortly] before the
19 expiration of discovery is clearly prejudicial to the Defendant."

20 **Q: Did the government respond to this Motion to Strike?**

21 A: Yes. On May 12, 1995, DOJ moved for reconsideration of the Court's April 26,
22 1995 order disallowing claims for unpermitted discharges at Barefoot and
23 Carrollwood. Exhibit _____ GHB-45. DOJ filed a 20-page memorandum, with
24 more than 25 pages of exhibits supporting this motion. The main point of DOJ's
25 position was that the earlier consent decrees did not bar the present action because

1 the consent decrees only settled matters for the dates noted on the orders. For
2 Barefoot, the government argued that the Administrative Order only resolved the
3 violation on September 14, 1989. For Carrollwood, the government argued that
4 the Administrative Order in question only resolved violations during June 1987
5 through July 1990. As the dates of violations in the revised amended complaint
6 differed from the dates mentioned in the two Administrative Orders, the
7 government argued that the new complaint was not futile. The government
8 bolstered its argument with a basic principle of contract law that “the terms of an
9 unambiguous contract are exclusively contained within the four corners of the
10 document itself, and ‘the instrument must be construed as it is written.’”

11 **Q: Did FCWC answer the new DOJ amended complaint?**

12 A: Yes. On May 20, 1995, FCWC in its answer denied DOJ’s complaint. See
13 Exhibit _____ GHB-46. Additional affirmative defenses were added: 1) that
14 plaintiff’s claims were barred because FCWC had paid administrative penalties at
15 the two new sites and therefore could not be charged with the violations that DOJ
16 alleged in its complaint; 2) that plaintiff’s claims were barred because they were
17 the subject of earlier settlement agreements with EPA; 3) that plaintiff’s claims
18 were barred by the doctrine of *res judicata*; 4) that plaintiff in some instances
19 improperly sought duplicative penalties for the same violation; and 5) that
20 plaintiff violated the defendant’s Fifth Amendment due process rights.

21 **Q: Did the government respond to FCWC’s motion to strike portions of the**
22 **Revised Amended Complaint?**

23 A: Yes. On May 25, 1995, DOJ filed its opposition to FCWC’s motion to strike
24 substantial portions of their Revised Amended Complaint. See Exhibit _____
25 GHB-47. DOJ argued that in its April 26, 1995 order, the court sustained

1 FCWC's opposition to the Barefoot and Carrollwood unpermitted discharge
2 claims, but otherwise allowed the filing of the amended complaint. DOJ further
3 claimed that FCWC was belatedly seeking to preclude DOJ from asserting all
4 claims for violations of the CWA at the two additional facilities.

5 **Q: Did discovery resume?**

6 **A:** Yes. In addition to the controversy surrounding the amended complaint, a
7 number of other activities were ongoing in April and May of 1995. In terms of
8 discovery, in mid-April, FCWC responded to the U.S.'s Third Document Request.
9 Exhibit _____ GHB-48. The government's third request for production of
10 documents again required a substantial effort. This request sought: various
11 minutes of board of directors meetings; all FCWC monthly operating statements,
12 regardless of date; substantial financial records; and all documents reviewed by
13 any expert retained by FCWC for the purpose of testifying in this case.
14 Documents responsive to this request were made available throughout April 1995,
15 in Sarasota, Barefoot Bay, and Miami. Portions of the document request required
16 additional time, and production was made by June 1995.
17 Early in May, we prepared for further document production and also for
18 upcoming 30(b)(6) depositions.

19 FCWC's Motion for Partial Summary Judgment

20 **Q: Did FCWC file other motions?**

21 **A:** Yes. April 26, 1995, we filed a Motion for Partial Summary Judgment. Exhibit
22 _____ GHB-49.

23 **Q: Did the government respond to FCWC's motion for summary judgment?**

24 **A:** Yes. On June 7, 1995, DOJ filed its Opposition to FCWC's Motion for Partial
25 Summary Judgment. Exhibit _____ GHB-50. On June 21, 1995, the Court

1 denied FCWC's Motion for Partial Summary Judgment on the *void ab initio*
2 issue. Exhibit _____ GHB-51.

3 **Q: Did the Court respond to additional motions at this time?**

4 **A:** Yes. The Court also reversed its earlier rulings and allowed DOJ to proceed with
5 its causes of action for discharge without a permit at Barefoot and Carrollwood.

6 **Q: What happened next?**

7 **A:** The next day, June 23, 1995, DOJ filed its Motion for Partial Summary Judgment.
8 Exhibit _____ GHB-52. This massive brief and exhibits required substantial legal
9 and factual research to oppose. The main thrust of the government's motion was
10 to argue strict liability at three FCWC facilities and establish that Avatar
11 Holdings, FCWC's parent, could be held liable for violations under the CWA.
12 Under the CWA, the government noted, a strict liability standard is imposed for
13 all "violations." To the degree that the government could prove a "violation," it
14 argued that it should be afforded the benefit of summary judgment. The brief then
15 went on to demonstrate that FCWC did indeed violate the CWA as alleged in the
16 complaint. The District Court rejected DOJ's Motion because it exceeded the
17 applicable page limitations under the local rules.

18 **Q: Were additional efforts undertaken to settle the case during 1995?**

19 **A:** Yes. Earlier, FCWC had hired Richard Leon of the firm of Baker & Hostetler to
20 help with settlement negotiations. Mr. Leon, a former senior member of DOJ's
21 Environmental Enforcement section, was personally acquainted with Mr. Jacobs.
22 After several attempts by Mr. Leon to get settlement moving, he was unable to
23 convince DOJ that our position regarding the three facilities was correct; therefore
24 we suspended our efforts to settle the case for a period of time.

25 Additional Discovery

1 **Q: What other litigation activities were ongoing in or about May 1995?**

2 **A:** In addition to moving to strike portions of the Revised Amended Complaint, we
3 undertook an additional round of depositions (James Greenfield and Roosevelt
4 Childress), document production, research, and interrogatories.

5 The deposition of Roosevelt Childress, of EPA Region IV, was important in
6 establishing the facts of EPA's denial of FCWC's permit renewal, the process for
7 reviewing wasteload allocations in permit decisions at EPA, the status of
8 Waterway under Florida's water program, and the rarity of permit denials. Mr.
9 Childress agreed that Ms. Kagey had relied exclusively on two pages from a 1981
10 Florida planning document in denying FCWC's permit. He then explained the
11 method by which EPA is supposed to review wasteload allocation documents for
12 permit decision and described a special wasteload allocation unit within EPA
13 which determines the official, applicable wasteload allocation for permitting
14 decisions. According to Mr. Childress, Ms. Kagey did not follow EPA
15 procedures in relying on the 1981 planning document for a wasteload allocation,
16 without confirming this critical assumption through additional research. Mr.
17 Childress agreed that Waterway continued to have a Florida discharge permit
18 throughout the 1980s, and that FDEP did not require "no discharge" from the
19 Waterway facility. According to Mr. Childress, by certifying that a federal permit
20 for Waterway was acceptable to it, Florida indicated that it did not require that
21 Waterway cease discharging. Mr. Childress further testified that he was unaware
22 of any other permit renewal denial in Region IV, which had at that time more than
23 13,000 active NPDES permits.

24 Mr. Greenfield, EPA Region IV wasteload allocation TMDL coordinator, also
25 testified in his deposition about the development and use of wasteload allocations.

1 His testimony explained the rules for determining whether a stream is a “water-
2 quality limited stream,” when wasteload allocations are required, the state role in
3 developing wasteload allocations, and EPA’s role in approving wasteload
4 allocations. Both Mr. Childress’s and Mr. Greenfield’s depositions were
5 important in understanding EPA’s wasteload allocation and permitting systems,
6 what happened when FCWC’s permit renewal was denied, and why that denial
7 did not follow EPA procedures or regulations.

8 We also responded to the U.S.’s second set of interrogatories and first request for
9 admissions. Exhibit _____ GHB-53. The government’s second set of
10 interrogatories required FCWC to gather substantial factual information. DOJ
11 requested: the facts supporting the denials by FCWC of the allegations in the
12 revised amended complaint; the facts supporting each of FCWC’s affirmative
13 defenses; and the facts supporting any denials in response to the government’s
14 requests for admission. FCWC counsel and FCWC personnel spent much of May
15 and June 1995 responding to these requests.

16 DOJ’s first requests for admission also required a substantial legal and factual
17 effort. DOJ made 41 requests for admission, including: the relationship of FCWC
18 to its parent corporations; the elements of a CWA violation, that is, whether
19 FCWC’s activities constituted a discharge of pollutants; the number and type of
20 exceedences by FCWC; the facts concerning the alleged discharges without an
21 NPDES permit; and the administrative orders at Barefoot and Carrollwood.

22 We also served the government with a request for Federal Rule of Civil Procedure
23 30(b)(6) depositions in order to get the agency on record regarding its position
24 was on wasteload allocations, EPA’s administration of its own regulations, and
25 the fact that the agency had contracts with states in the southeast which set forth

1 the procedures on how wasteload allocations were to be approved by EPA and the
2 states. That spring and summer our research also included a substantial legal and
3 factual inquiry into the inferences to be drawn from invoking the Fifth
4 Amendment at depositions; the legal standard for comparability between state and
5 federal enforcement under the CWA; the possibility of a Bivens claim against the
6 government; the upset defense; the effect of an administrative order on permit
7 requirements; the potential for Rule 11 sanctions against the government; claim
8 splitting and issue splitting under the CWA; the discoverability of expert reports;
9 the standard for scientific experts; attorney client and work product issues, and
10 other matters. Exhibit _____ GHB-54. Briefly, I'll explain why each subject of
11 legal research was important.

12 The comparability between state and federal enforcement was an issue because
13 the CWA states that the government may not impose a civil penalty for a violation
14 that has already been the subject of an administrative order. In addition to the
15 federal administrative orders, which we successfully argued barred a portion of
16 the government's case, there were state administrative orders applicable in this
17 case. We considered whether these state administrative orders might be used to
18 bar additional parts of the government's case.

19 The upset defense was a fact-based potential defense to some of DOJ's claims.
20 The CWA recognizes that equipment failures and the like may cause temporary
21 exceedences of permit limits, and under certain circumstances may excuse an
22 apparent violation. We considered whether this defense might be used to defend
23 against some alleged violations.

24 In a number of instances where an administrative order had been issued,
25 construction schedules and compliance limits were set forth that were at variance

1 with the permit limitations. We considered whether these administrative order
2 limitations might vary the permit requirements to some extent, thereby reducing
3 the number of alleged violations.

4 DOJ counsel had obstructed our discovery and had vexatiously multiplied the
5 proceedings. We therefore considered filing a motion for sanctions under Rule 11
6 of the Federal Rules of Civil Procedure. After some research, we concluded that
7 the Court was already aware of the conduct of DOJ counsel. We also decided that
8 it would not be cost-effective to pursue Rule 11 sanctions, particularly given the
9 1993 federal rule changes, which made imposition of monetary damages against
10 the government unlikely.

11 We also began researching EPA administrative decisions on claim splitting and
12 issue preclusion with the idea of knocking out a portion of the plaintiff's claims
13 should the Court agree with the government's Motion to Reconsider. We found
14 that several administrative and court decisions had held that if EPA had an
15 opportunity to pursue a claim administratively, but did not, then it was precluded
16 from pursuing the same claims later in court. Ultimately these decisions were
17 used, after a complex series of filings, to ensure that even if the EPA
18 administrative orders were held to cover only a limited set of violations, the fact
19 that EPA clearly knew of other alleged violations at the time of the administrative
20 orders prevented EPA from taking another bite at the same apple and bringing
21 these claims in a later action.

22 **Q: What was the result of this research?**

23 **A:** Our research culminated in FCWC's second Motion for Partial Summary
24 Judgment, filed on September 11, 1995. Exhibit _____ GHB-55. In this motion,
25 FCWC sought to dismiss the vast majority of the DOJ's claims related to Barefoot

1 and Carrollwood, particularly those claims which had been the subject of prior
2 administrative settlements. The memorandum of law that accompanied the
3 motion not only addressed FCWC's affirmative motion but also responded to
4 DOJ's earlier motion.

5 **Q: What did you do after filing the Second Motion for Partial Summary**
6 **Judgment?**

7 *A:* In the fall of 1995, we began to examine a number of discovery issues, including
8 discovery of expert reports and attorney-client privileged documents. DOJ and
9 FCWC fought over whether certain expert reports would be discoverable. As
10 noted above, FCWC produced to DOJ tens of thousands of pages of documents.
11 Finally, the standard for use of scientific testimony was likely to be an issue for
12 trial, as FCWC depended for its case in mitigation on the expert testimony of
13 engineers and others about the unavoidable construction delays that occurred.
14 Also, DOJ was relying on economic assumptions and calculations of dubious
15 merit; therefore, we knew we had to have experts to respond to DOJ's case.
16 Accordingly, it was important to understand the evolving legal standard for
17 offering expert scientific testimony.

18 **Q: What depositions were taken during the summer and fall of 1995?**

19 *A:* Numerous follow up depositions were taken and defended, including , in addition
20 to Roosevelt Childress and James Greenfield discussed in the forgoing, those of:
21 John Marljar, Branch Chief for EPA's Environmental Compliance Branch; Fritz
22 Wagener, Chief of the Water Quality Standards Section, EPA Region IV; Ken
23 Kwan, EPA Region IV Environmental Engineer, who testified both personally
24 and as EPA's Rule 30(b)(6) witness; Roger Pfaff, Acting Branch Chief for the
25 Water Permits and Enforcement Branch, EPA Region IV; Roy Herwig,

1 Environmental Engineer in NPDES Enforcement Section, EPA Region IV;
2 Thomas Plouff, EPA Region IV Environmental Engineer; and Michael Hom, EPA
3 Region IV Supervising Environmental Engineer. These depositions, all taken by
4 FCWC, required substantial preparation, including review of the relevant
5 documents, EPA regulations and policies, and permits. A summary of these
6 depositions is attached as Exhibit _____ GHB-56. DOJ took numerous
7 depositions as well, including those of Ed Jacobson, John Sladkus, Leon Levy
8 (two days), Julie Karleskint (two additional days), Paul Bradtmiller, Pat Lehman
9 (one and one-half days), Gerald Allen (two days), and our experts Douglas Smith
10 and Randall Armstrong. Exhibit _____ GHB-57. In Mr. Allen's deposition,
11 DOJ counsel sought information about FCWC company structure and
12 organizational information. The deposition included extensive questioning
13 concerning the NPDES permit situation at Barefoot, Carrollwood, and Waterway.
14 DOJ attempted to establish connections between the subsidiary, FCWC, and the
15 corporate parent, Avatar Holdings Inc., in an attempt to hold the parent liable for
16 knowing violations of the CWA. Mr. Allen's testimony highlighted the
17 extraordinary efforts to solve the problems at Barefoot.

18 **Q: During the fall of 1995, what major litigation activities were ongoing?**

19 **A:** During September 1995, we engaged in additional discovery activities. We
20 served our third set of interrogatories and fourth request for production of
21 documents upon EPA. Exhibit _____ GHB-58. The government, in turn, filed its
22 fifth request for production of documents. Exhibit _____ GHB-59. FCWC's
23 third set of interrogatories sought information on the referral by EPA to DOJ for
24 civil enforcement of this matter. FCWC's fourth request for production of
25 documents sought information on the government's experts and the referral by

1 EPA to DOJ for civil enforcement. In contrast to these limited, targeted requests,
2 DOJ sought a huge, additional amount of data in its fifth request for production of
3 documents. DOJ sought: complete audited financial statements for 1994;
4 documents on the effluent and influent at Barefoot during 1990 and 1991; all
5 documents regarding the negotiations between FCWC and EPA on the
6 administrative orders; and additional documents on the discharges at Waterway,
7 Barefoot and Carrollwood.

8 We also interviewed potential witnesses: Dr. Ahmadi, Jack Schenkman, Larry
9 Griggs, Patrick Lehman, Christianne Ferraro, and Al Castro. We also interviewed
10 FDEP officials in the Tampa regional office, and we met with Hillsborough
11 County officials to discuss Carrollwood.

12 **Q: What major litigation activities were ongoing in October of 1995?**

13 **A:** The dominant litigation activity during this month consisted of the taking and
14 defending of depositions. Julie Karleskint's deposition was reopened for two
15 additional days, October 2 and October 16, 1995. During these additional days of
16 testimony, Ms. Karleskint testified about the operation of and the upgrades to the
17 Barefoot and Carrollwood facilities. She reviewed the steps that FCWC took to
18 raise the performance levels of Barefoot during the construction of the AWT
19 facility, allowing both plants to operate at levels that provided treatment above the
20 level of secondary treatment. In addition, Ms. Karleskint was questioned
21 extensively by DOJ counsel regarding each of the permit (or administrative order)
22 exceedences at these two facilities. Ms. Karleskint's testimony established that
23 these exceedences were *de minimis* and did not result in violations of water
24 quality standards.

25 On October 3, DOJ deposed Paul Bradtmiller and Patrick Lehman. On October

1 17, Patrick Lehman was further deposed. On October 18, DOJ deposed Charles
2 McNairy. On the 20th, DOJ deposed Dr. Abdul Ahmadi. On October 23, we
3 deposed DOJ's expert, Mark Klingenstein. On October 26, FCWC deposed
4 DOJ's other expert, Eileen Zimmer. These depositions were all part of the push to
5 prepare for trial.

6 On October 31, FCWC filed a Notice of Dispositive Authority citing the just-
7 decided case Borough of Ridgway for the proposition that *res judicata* bars the
8 government from raising claims it could have raised in an earlier action. Exhibit
9 _____ GHB-60.

10 **Q: Did the District Court rule on any of the Motions the parties kept filing?**

11 **A:** Yes. On November 22, 1995 the District Court ruled on the various summary
12 judgment motions that each party had filed. This was a major victory for FCWC
13 because the Court virtually eliminated DOJ's case against Barefoot and
14 Carrollwood and eliminated over \$50 million in potential penalties. Exhibit
15 _____ GHB-61. Adopting the *res judicata* argument, the court granted FCWC's
16 request for summary judgment to FCWC on paragraphs 11-23 and 30 of the
17 second amended complaint. The court denied summary judgment to FCWC on
18 other claims and granted summary judgment in favor of the government on all
19 NPDES permit violations at each facility. The Court's order narrowed the case
20 considerably, and it signaled to us to focus on mitigation of penalties as to the
21 remaining claims at the three facilities. DOJ had, up to this point, focused almost
22 exclusively on Barefoot and Carrollwood. The Court's ruling changed the
23 direction of DOJ's case significantly.

24 **Q: What other major litigation activities were ongoing during November 1995?**

25 **A:** During November we were also preparing for the depositions of Gerald Allen (by

1 DOJ) and Bennie Shoemaker, FDEP, Department of Environmental Protection
2 (by FCWC). We deposed Mr. Shoemaker regarding his role in working with EPA
3 to provide information on Waterway. Mid-month we interviewed Michael
4 McWeeny, Director of the Hillsborough County Utility Department, and William
5 Schafer, Director of Planning for the Sanitary Sewer Department of the City of
6 Tampa, potential witnesses for trial. In addition, throughout November we
7 examined all the documents we had gathered in order to select trial exhibits. Also
8 in November, DOJ, FCWC and Avatar Holdings conducted our required pre-trial
9 meeting to exchange exhibits, provide witness lists and discuss settlement.
10 During this meeting, DOJ orally issued a revised settlement offer of \$2,200,000,
11 its first revised proposal since its initial offer of \$5,000,000 in 1993. This
12 reduction of the proposed penalty by DOJ indicated to me we were making
13 progress but this new proposal was still not reasonable in view of the facts
14 developed through discovery.

15 Preparation for Trial

16 **Q: What did you do in December 1995 to prepare for trial?**

17 **A:** In December 1995, we continued our ongoing trial preparation. We forwarded to
18 DOJ our list of exhibits. We designated portions of depositions and proposed
19 stipulations. Exhibit _____ GHB-62. There were also extensive discussions
20 regarding the proposed stipulations, which would have limited the scope of trial.
21 DOJ counsel asked FCWC to stipulate that the discharges from Waterway to an
22 unpermitted location were intentional. FCWC rejected this proposed stipulation.
23 In addition, DOJ wanted FCWC to stipulate that each discharge had the potential
24 to cause environmental harm. FCWC rejected this proposal as well because
25 FDEP personnel and our experts were prepared to testify that FCWC discharges

1 did not cause environmental harm. DOJ also sought agreement with a stipulation
2 that FCWC's parent, Avatar Holdings, had derived wrongful profits of more than
3 \$7 million during the period of the violations. Because DOJ's proposed
4 stipulations bore no relationship to reality, it was impossible to agree to any item
5 and therefore we were unable to agree to limit the issues in dispute at trial.
6 During November and December 1995, we were also reviewing DOJ's intended
7 trial materials. For example, in late November 1995, DOJ had identified more
8 than 900 potential trial exhibits. Exhibit _____ GHB-63. We were required to
9 understand and develop responses to the evidence represented by each of these
10 exhibits, a lengthy and complex process. Concurrently, FCWC continued to
11 narrow the list of exhibits it planned to use at trial. Prior to the Court's November
12 22, 1995 Order, FCWC had initially identified approximately 1800 trial exhibits
13 which would be used to defend FCWC's actions at Barefoot and Carrollwood.
14 After the Court's ruling, we refined that list, first to 600 exhibits, and then to 200
15 exhibits because various issues had been dismissed by the Court's November 22,
16 1995 decision. This refining process was needed both to clarify our points for
17 trial and because trial time was limited, because at that time the trial was
18 scheduled for the first week of January 1996.

19 Joint Pretrial Statement

20 **Q: Was there a Joint Pretrial Statement filed with the Court?**

21 **A:** Yes. On December 6, 1995, the parties filed a Joint Pretrial Statement that
22 described the respective viewpoints of the case. Exhibit _____ GHB-64. DOJ
23 claimed that the Court had found FCWC liable for NPDES permit violations at
24 Waterway, Barefoot, and Carrollwood. DOJ argued that Avatar, the parent
25 company, either directed or caused these violations, and pervasively controlled

1 FCWC's environmental practices. DOJ further claimed that applying CWA
2 Section 309 required the Court to reach the conclusions that (1) the violations
3 were serious, (2) Avatar had derived substantial economic benefit from the
4 violations, and (3) each defendant could afford a substantial penalty.

5 FCWC acknowledged that it was technically liable only for certain violations
6 under the CWA. The heart of FCWC's case, however, involved presenting
7 evidence in light of the six mitigation factors listed in Section 309(d) that the
8 Court must consider in determining a penalty. These factors are: (1) the
9 seriousness of the violations; (2) the economic benefit, if any; (3) any history of
10 violations; (4) any good faith efforts to comply; (5) the economic impact of a
11 penalty; and (6) such other factors as justice may require.

12 In the pretrial statement, DOJ indicated that it would call 11 witnesses at trial.
13 DOJ stated that it would rely on an expert witness, Mark Klingenstein, as its
14 principal witness to make its case against FCWC. DOJ was intending to call this
15 witness even though from our discovery it was evident that he apparently had
16 spent little time talking to EPA personnel about prior enforcement actions taken
17 against Barefoot Bay and Carrollwood. Indeed, Mr. Klingenstein had no
18 involvement with the three facilities until he reviewed the paper record contained
19 in the EPA file, some four years after the events at issue.

20 FCWC advised the Court that the evidence and admissions established the fact
21 that DOJ had no evidence that any of FCWC's actions had caused environmental
22 harm at any of the three facilities. FCWC stated that the evidence would further
23 establish that each of the facilities was authorized to discharge secondarily treated
24 effluent pursuant to rigorous regulation by the State of Florida. Moreover, FCWC
25 had evidence that established that it had received no economic benefit from any

1 violation. EPA's own documents demonstrated that FCWC was acting in good
2 faith to resolve the problems at issue. FCWC could also establish that even a
3 modest penalty would cause a severe economic impact on the company. Finally,
4 FCWC would be able to demonstrate that this entire action was the result of
5 EPA's failure to follow its own regulations when FCWC properly applied for the
6 Waterway NPDES permit renewal.

7 FCWC indicated that it might call as many as twenty-five (25) witnesses.

8 To counter DOJ expert Mr. Klingenstein's background and testimony, we advised
9 the Court that among others, we would be calling four expert witnesses who had
10 prepared expert reports: Roger Hartung, Douglas Smith, Randall Armstrong and
11 Keith Cardey. Mr. Hartung is a former EPA enforcement official, who had the
12 responsibility of overseeing thousands of enforcement cases within EPA. His
13 testimony would demonstrate that EPA had violated its own regulations regarding
14 wasteload allocation approvals, and that EPA did not normally pursue
15 enforcement cases against small facilities, such as those of FCWC. In his
16 testimony he also explained to the Court how the CWA actually worked so the
17 Court understood terms and the framework with which FCWC had to comply.

18 Douglas Smith, a senior partner with the consulting engineering firm Black &
19 Veatch, would testify as to FCWC's record in operating the facilities and how
20 well these facilities were run. He also could discuss the improvements at
21 Waterway and whether they had been undertaken in a reasonable amount of time.

22 Mr. Smith had both an academic background and practical experience with
23 respect to the design and environmental impacts resulting from the operation of a
24 wastewater treatment plant.

25 Randall Armstrong had worked at FDEP and would testify about water quality

1 issues and the development of the 1981 study relied upon by EPA to deny FCWC
2 an NPDES permit. He also was needed to give his analysis of water quality data.
3 Keith Cardey is an expert in the area of Florida Public Service Commission
4 regulation and the economic effects of PSC regulation on privately-owned,
5 publically regulated utilities. He was needed to show that FCWC had no
6 economic incentive to delay expenditures for CWA compliance at any of its
7 facilities.

8 In addition to preparing and filing the pre-trial statement, a number of pre-trial
9 disputes were ongoing at this time, including DOJ's efforts to depose six
10 witnesses after the close of discovery. Exhibit _____ GHB-65. FCWC opposed
11 this request, noting during the normal discovery period, that DOJ had ample
12 notice of all of these potential witnesses, except for Mike McWeeny, Director of
13 the Hillsborough County Utilities Department. FCWC consented to the
14 deposition of Mr. McWeeny. Exhibit _____ GHB-66. Magistrate Judge Swartz
15 agreed with our position and permitted the deposition of Mr. McWeeny only.
16 Exhibit _____ GHB-67. Additionally, DOJ filed two motions to compel
17 production of documents. FCWC filed its own motion to compel DOJ to
18 respond in full to our first set of interrogatories, and a motion for a protective
19 order to quash a deposition subpoena to Leon Levy.

20 FCWC's Trial Brief and Proposed Findings of Law and Fact

21 **Q: What else did you do to prepare for trial this month?**

22 *A:* In December 1995, FCWC began drafting its trial brief and proposed findings of
23 law and fact. During the preparation of these documents, DOJ filed a motion for
24 expedited reconsideration of the Court's November 22, 1995 opinion. Exhibit
25 _____ GHB-68. DOJ counsel moved for reconsideration, asserting that the claims

1 that the Court had dismissed on November 22, 1995 were not barred by the
2 doctrine of *res judicata*. DOJ filed an 11-page memorandum claiming that the
3 earlier administrative proceedings undertaken against FCWC's Barefoot and
4 Carrollwood facilities did not bar the later judicial proceedings.

5 The Court denied DOJ's motion within three days without waiting for a response
6 from FCWC. The Court made it clear to DOJ counsel that it had not "patently
7 misunderstood" DOJ's position, and that there had been no change in law or facts
8 since the prior submission. The Court ruled that it "has reviewed the Plaintiff's
9 additional arguments and finds them unpersuasive regarding [the applicability of
10 *res judicata*.]" Exhibit _____ GHB-69 .

11 On December 28, 1995, FCWC filed its findings of fact and conclusions of law,
12 and the following day we filed our pre-trial brief. Exhibits GHB-70, GHB-71.
13 The findings of fact set forth in detail the facts we had been able to establish at
14 Waterway, Barefoot, and Carrollwood which I shall summarize.

15 At Waterway, we were able to establish conclusively that in May 1986, seven
16 months before EPA denied Waterway's permit renewal because Waterway
17 supposedly had a zero or no discharge wasteload allocation, FDEP had sent a
18 letter to EPA Region IV indicating that Waterway had a wasteload allocation. We
19 argued that EPA made a mistake of monumental proportion and then the Agency
20 failed to consider its own record.

21 The facts at Barefoot established that DOJ was attempting to seek substantial
22 penalties based on a mistaken belief that Barefoot's discharges were violating
23 total residual chlorine levels. Our discovery efforts had established that the
24 Barefoot facility was using the correct chlorine testing equipment, and that it was
25 known that this equipment would not report accurate levels at certain

1 concentrations. EPA itself, in a memorandum that EPA officials had refused to
2 provide in discovery, required FCWC to report “nondetect” rather than an actual
3 number, which EPA knew would be flawed. DOJ also sought penalties for
4 FCWC’s reporting of the Carbonaceous Biochemical Oxygen Demand (“CBOD”)
5 rather than the Biochemical Oxygen Demand (“BOD”) parameter. The facts
6 indicated that CBOD was the more accurate indicator of wastewater treatment
7 plant performance. Indeed, EPA had revised the Barefoot NPDES permit to allow
8 FCWC to report CBOD as opposed to BOD, in accordance with the Florida
9 permit.

10 The most telling fact FCWC was able to put before the Court before trial was that
11 DOJ and EPA counsel had admitted that they had no evidence of environmental
12 harm at these three facilities. As a result of this admission alone, the facts and the
13 law entitled FCWC to a significant mitigation of the penalty requested by DOJ.

14 In FCWC’s pre-trial brief of January 2, 1996, we argued to the Court that
15 mitigation factors must be considered and that EPA had improperly denied
16 FCWC’s NPDES permit at Waterway. We directed the Court’s attention to a
17 Rule 30(b)(6) deposition where two supervisors in EPA’s Region IV had testified
18 that EPA staff member, Connie Kagey, had improperly denied FCWC’s permit
19 renewal, and she had failed to follow EPA’s own regulations and procedures.

20 Regarding Carrollwood, FCWC argued in its brief that the NPDES permit
21 exceedences which occurred between July 1991 and January 1992 were technical
22 violations that had to be considered in light of the permitting history of the
23 facilities. Carrollwood’s permit difficulties were created by one agency in
24 Hillsborough County being unwilling and unable to allow Carrollwood to connect
25 to Hillsborough County at the same time that FCWC was being ordered to

1 connect by another agency of Hillsborough County. DOJ counsel argued that
2 Carrollwood should have ignored its permit requirements and connected with the
3 City of Tampa. This was not economically feasible, and might well have been
4 considered an unreasonable expenditure of funds.

5 **Q: Was the trial conducted as scheduled in January 1996?**

6 *A:* No. Even though the Court's opinion on November 22, 1995 caused us to begin
7 readjusting our case, FCWC was prepared to go to trial; however the trial was
8 postponed until March 1996 due to the sudden illness of Gerald Allen, President
9 of FCWC and a key witness at trial.

10 Motions in Limine

11 **Q: What happened next?**

12 *A:* Before the trial began, FCWC and Avatar Holdings, submitted a motion in limine
13 and memorandum in support to exclude the expert testimony and report of Mark
14 Klingenstein in order to highlight the fact that DOJ's key witness could not meet
15 the test for expert testimony. Exhibit _____ GHB-72. We argued that under
16 Federal Rule of Evidence 702, large portions of Mr. Klingenstein's report
17 addressed DOJ allegations that had been dismissed by the Court. Accordingly,
18 the report was largely irrelevant and unhelpful. Moreover, Mr. Klingenstein's
19 opinions were stated as "possibilities," not to reasonable degrees of scientific
20 certainty. We concluded that Mr. Klingenstein's report was biased and based
21 upon nonexistent analysis and therefore did not meet the standard of Rule 702.
22 DOJ also filed a broad motion in limine, containing a multitude of requests.
23 Exhibit _____ GHB-73. First, DOJ attempted to bar any evidence regarding
24 EPA's unlawful denial of FCWC's 1986 NPDES permit renewal at Waterway.
25 Throughout this action, DOJ had characterized FCWC's actions at Waterway "as

1 the wanton violations of a renegade company that was operating outside of the
2 CWA's regulatory scheme." At this point, FCWC had clearly demonstrated that
3 it had cooperated with federal and state regulatory officials, and we raised this in
4 our response. Most importantly, however, we argued that DOJ's request
5 unreasonably sought to limit the scope of the trial and to prevent the full scope of
6 mitigating evidence permitted under the CWA.

7 In a particularly stunning move, DOJ next sought to exclude the testimony of
8 current and former EPA officials, who had stated that EPA had operated in
9 violation of its own regulations, including the testimony of Connie Kagey, Bruce
10 Barrett, James Greenfield, and Roosevelt Childress, all present or former EPA
11 employees. DOJ counsel knew that if these witnesses testified, they would
12 confirm that EPA's own employee, Ms. Kagey, had failed to follow EPA's
13 regulations for issuance of the Waterway permit renewal.

14 DOJ counsel further requested that all evidence relating to Barefoot's and
15 Carrollwood's administrative orders, and the testimony of EPA's own
16 enforcement officers, Roy Herwig and Tom Plouff, be excluded. We countered
17 with the argument that DOJ could not prevent the full scope of mitigating
18 evidence from coming into the trial.

19 DOJ further attempted to strike as witnesses any of FCWC's employees that it had
20 not deposed. We countered that this was merely an attempt to circumvent
21 Magistrate Judge Swartz's opinion of December 8, 1995, which barred
22 depositions of these individuals as too late, DOJ having had two years to depose
23 these individuals and not having done so. The Court disallowed the request to
24 depose them after the close of discovery.

25 Finally, DOJ sought to bar FCWC from presenting any evidence showing that

1 delays in coming into compliance were caused by third parties, including federal,
2 state, and local regulatory agencies. All of DOJ's motions in limine to limit
3 testimony were rejected by the Court on the day the trial began.

4 **Q: Did FCWC file any other motions in limine to exclude expert testimony?**

5 *A:* Yes. During this time, FCWC also moved to exclude portions of the report and
6 testimony of the government's expert witness Eileen Zimmer. Exhibit _____
7 GHB-74. This testimony was to have discussed the economic benefit allegedly
8 resulting from FCWC's violations. The stated goal of Ms. Zimmer's report,
9 entitled "Analysis of Wrongful Profits and Ability to Pay in U.S. v. Florida Cities
10 Water Company," was to quantify the so-called wrongful profits realized by
11 Avatar Holdings through its Barefoot Bay Development Corporation operations
12 and by FCWC, and to determine the ability of Avatar and FCWC to pay a civil
13 penalty for the alleged CWA violations. FCWC objected to Zimmer's testimony
14 and report in part because she calculated alleged wrongful profits on claims for
15 which the Court had already granted judgment for FCWC.

16 The Months Before the Trial

17 **Q: What other litigation activities were going on during late January and**
18 **February of 1996?**

19 *A:* We used this time to readjust our case in light of the Court's November 22
20 decision. This decision, as mentioned earlier, changed the focus of the entire
21 case. Given the extra time, we continued document preparation and developing
22 lists of proposed joint exhibits to be more efficient at trial. One effort that was
23 undertaken involved the substantial reduction of the number of trial exhibits in
24 light of the Court's November decision. We did maintain as exhibits some
25 documents from Barefoot and Carrollwood, however, because we believed we

1 would have to answer certain evidence in trial from DOJ counsel regarding these
2 facilities.

3 In February 1996, there were additional settlement discussions. Once again, we
4 attempted to convince DOJ counsel and a representative from the Assistant
5 Attorney General's office how strong FCWC's case was with regard to all three
6 facilities. We had specific arguments and documents that we made available to
7 David Berz, settlement counsel for Avatar Holdings, which he in turn discussed
8 with DOJ officials. Notwithstanding our efforts and evidence, settlement could
9 not be reached.

10 In mid-to-late February 1996, we continued preparation of questions for witnesses
11 at trial and cross-examination questions. We also continued preparation of a list
12 of joint exhibits for DOJ and FCWC to file in Court.

13 **Q: What activities occurred in March 1996?**

14 **A:** Early in March 1996, in our continuing effort to convince DOJ of the
15 incorrectness of its position, David Berz sent a letter on behalf of defendants to
16 DOJ in one final effort to settle this case and save additional expense of trial and
17 possible appeals. Exhibit _____ GHB-75. This effort was not successful, because
18 DOJ once again rejected FCWC's settlement position.

19 During this time we also continued our efforts in preparing to address DOJ's
20 objections to our exhibits, and we prepared our objections to their exhibits. We
21 also prepared to put on a moot court session for the general counsel of FCWC and
22 his colleagues, and to generally prepare for trial.

23 The Trial

24 **Q: When and where was the trial conducted?**

25 **A:** The trial was conducted on March 25, 27, 28, 29 and April 1, 3, 4, 5 (eight days),

1 1996 in the U.S. District Court for the Middle District of Florida in Tampa.

2 **Q: Is a transcript of the trial included as part of your testimony?**

3 **A:** Yes, at Exhibit _____ GHB-76.

4 **Q: Who represented FCWC at trial?**

5 **A:** I was lead trial attorney and was assisted by Alexander M. Bullock, Lance W.

6 High and Don G. Scroggin.

7 **Q: Were both FCWC and Avatar Holdings cases heard together?**

8 **A:** Yes.

9 **Q: Who represented Avatar Holdings at trial?**

10 **A:** Mr. David B. Hird was the lead trial counsel, and his co-counsel was Joanne M.

11 Tsotsos.

12 **Q: What happened on the first day of trial?**

13 **A:** The trial began with the Court ruling in FCWC's favor to exclude the wrongful
14 profits analysis of DOJ's expert Eileen Zimmer. The Court then denied DOJ's
15 motion to exclude any of our experts and their testimony. In addition, the U.S.
16 offered an official offer of proof in lieu of the testimony of witnesses who asserted
17 their Fifth Amendment privileges. Exhibit _____ GHB-77. DOJ argued that due
18 to the unavailability of knowledgeable Avatar officers, and the subsequent
19 absence of depositions or testimonial evidence, the U.S. should be able to draw
20 adverse inferences as it deemed necessary. DOJ further argued that Avatar
21 Holdings pervasively controlled the environmental practices of FCWC and must
22 therefore be held liable for FCWC's violations of the CWA. The Court requested
23 on the first day of trial we respond to this offer of proof. FCWC and Avatar
24 Holdings submitted a joint memorandum addressing this issue on April 5, 1996.
25 Exhibit _____ GHB-78. When we filed our response, we argued that adverse

1 inferences should not be drawn for several reasons. First, we noted that the
2 Weitzenhoff case created an extremely broad standard of criminal liability under
3 the CWA which triggered the personal decision of certain individuals to invoke
4 the Fifth Amendment. If the government removed the threat of criminal
5 prosecution, as requested by counsel, these individuals would have been willing to
6 offer their testimony. But the government refused to grant immunity. We further
7 noted that the government failed to ask these individuals particularized questions
8 at their depositions and could not subsequently ask the Court to speculate as to
9 what questions the government might have asked for the purpose of the Court's
10 drawing adverse inferences. We also pointed out that the government had not
11 been prejudiced by the invocation of the Fifth Amendment because it had a full
12 and fair opportunity to learn the facts of this case through numerous depositions
13 of high ranking corporate officials, broad document requests, and site inspections.
14 Ultimately, the Court ruled against DOJ with regard to this motion.

15 After these preliminary matters were raised by the Court and DOJ, FCWC filed its
16 witness list. Exhibit _____ GHB-79. The Court next called for opening
17 statements, which Mr. Jacobs handled for DOJ, I handled for FCWC, and Mr.
18 Hird handled for Avatar Holdings, Inc. In addition to the arguments already
19 mentioned in this testimony, I pointed out that this case came down to the Court
20 applying common sense in levying a penalty in light of the facts of this case,
21 particularly where the evidence showed that DOJ had a "real inability to be able to
22 get its facts straight." I told the Court that we would lay out the facts, which
23 would show that significant mitigation should be applied with regard to any
24 penalty assessed.

25 After the opening statements, DOJ called its first witness, Mark Klingenstein.

1 This testimony involved his review of all of the documents he had read with
2 respect to all three facilities. Mr. Klingenstein made the general arguments that
3 FCWC's violations were serious and possibly could have been prevented if
4 FCWC had been more concerned about the environment. Mr. Klingenstein's
5 general purpose seemed to be to show that FCWC could have moved much faster
6 had it adopted alternatives available to it, which had not been sufficiently
7 explored.

8 **Q: What happened on the second day of trial?**

9 *A:* The second day, March 27, 1996, Mr. Bullock conducted the cross-examination of
10 Mr. Klingenstein. From the cross-examination, it appeared that Mr. Klingenstein
11 had done little work in terms of interviewing EPA employees with respect to the
12 facts of the case and had not reviewed the complete administrative record for any
13 of these facilities. Throughout cross-examination Mr. Bullock established that
14 Mr. Klingenstein was unable to present any proof of environmental harm but
15 nevertheless offered a professional opinion that there was a potential for harm
16 from the discharges from Waterway. This testimony was later refuted by FDEP
17 officials who testified that they found no evidence of any actual harm created by
18 the Waterway facility. Mr. Klingenstein also offered an opinion as to
19 Carrollwood and Barefoot, although he had no personal knowledge of the
20 facilities other than the knowledge he gained from having read selected
21 documents provided to him by DOJ counsel. During his testimony, DOJ
22 stipulated that it had no evidence of environmental harm at any of the three
23 facilities. It was apparent that Mr. Klingenstein was straining to reach a
24 conclusion without having sufficient documentation and information to prove his
25 point.

1 **Q: What else happened on the second day of trial?**

2 A: DOJ had a short re-direct of Mr. Klingenstein and then called Jack Schenkman,
3 Chairman of the Board of North Fort Myers Utility. DOJ called Mr. Schenkman
4 in an effort to bolster Mr. Klingenstein's testimony that FCWC could have
5 connected Waterway with the North Fort Myers Utility wastewater treatment
6 plant very quickly and therefore would not have been discharging without an
7 NPDES permit and discharging in the wrong location for a long period of time.
8 FCWC had rejected this option based on a study of the options because the
9 company would have had to build a very expensive pipeline and pay substantial
10 connection fees to a utility which was financially unstable. Furthermore, these
11 substantial fees would have passed on to FCWC's customers.

12 **Q: What happened on the third day of trial?**

13 A: On the third day, DOJ called William Schafer, Director of Planning for the
14 sanitary sewer department for the City of Tampa. DOJ's purpose for calling Mr.
15 Schafer was to attempt to demonstrate that FCWC could have connected
16 Carrollwood to the City of Tampa at an earlier date than the facility actually was
17 connected to the Hillsborough County facility. DOJ's argument was that FCWC
18 could have avoided CWA violations by implementing different options sooner.
19 Our cross-examination demonstrated that the connection line would have been
20 over 15,000 feet long and would have to have been constructed through
21 residential areas, which would have been exceedingly expensive and difficult to
22 undertake because of disturbing roads and trees. Moreover, FCWC would have
23 been required to obtain building permits and easements, through commercial
24 districts and residential neighborhoods, which would take time to implement.
25 Trial Transcript, Exhibit _____ GHB-76, March 28, pages 12-13.

1 Next DOJ called Avatar Holdings Chairman of the Board, Leon Levy, in an
2 attempt to establish the respective roles and lines of authority and communication
3 between Avatar Holdings and FCWC. DOJ was unable to demonstrate that Mr.
4 Levy had any day to day control over the activities of Avatar's subsidiary FCWC.
5 DOJ's final witness on this day was Eileen Zimmer who offered her opinion as to
6 FCWC's and Avatar's ability to pay a penalty.

7 **Q: What happened on the fourth day of trial, March 29, 1996?**

8 **A:** On this day, DOJ called Roger Pfaff, an employee of U.S. EPA in Atlanta, where
9 he is the Chief of the Enforcement Section in Water Management. Although DOJ
10 attempted to use Mr. Pfaff to testify about the government's BEN model for
11 showing economic benefit of avoided or delayed costs during noncompliance, the
12 Court struck his testimony from the record because he had not been listed as a
13 witness on this subject.

14 On the same day, we began our direct case by calling Michael McWeeny, Director
15 of the Hillsborough County Utilities Department. The purpose of his testimony
16 was to establish that FCWC had attempted to hook up with the county, and the
17 county had in fact delayed the process for FCWC.

18 Our next witness was Douglas G. Smith, Senior Partner and Regional
19 Environmental Manager for Black and Veatch, an engineering consulting firm.
20 Mr. Smith explained to the Court how wastewater treatment facilities work,
21 defined terms, explained levels of treatment in a plant, described the types of
22 discharge, and, as an expert, offered his opinion on the environmental impacts
23 effluent from wastewater treatment facilities have on receiving waters. Exhibit
24 _____ GHB-80. Mr. Smith demonstrated to the Court the excellent job FCWC
25 had done in operating the three facilities at issue and he explained all the

1 engineering, chemical, and environmental actions undertaken by FCWC to the
2 Court. Mr. Smith testified with a reasonable degree of scientific certainty that
3 none of the discharges from any of FCWC's plants had a negative impact on the
4 receiving waters of Florida. He also testified that FCWC had taken a reasonable
5 amount of time to do its work at Waterway in contrast to DOJ's allegation
6 concerning substantial delay.

7 **Q: What happened on the fifth day of the trial, April 1, 1996?**

8 **A:** DOJ continued its cross-examination of Mr. Smith and FCWC conducted its re-
9 direct.

10 We then continued the presentation of FCWC's case by calling Randall
11 Armstrong, Executive Vice President of Phoenix Environmental Group. Mr.
12 Armstrong testified as an expert witness. He was employed by FDEP during the
13 1980s and participated in the 1980 and 1987 water quality surveys of the
14 Caloosahatchee River. Mr. Armstrong was also involved in the creation of the
15 1981 planning document upon which Connie Kagey relied to reject the NPDES
16 permit renewal. Mr. Armstrong testified that the 1981 study was for planning
17 purposes only, and had no effect upon any existing wasteload allocation. In
18 addition, Mr. Armstrong had reviewed over ten years of data for the section of the
19 Caloosahatchee River near the Waterway plant outfall and he found no diminution
20 in water quality. He was an expert on computer modeling and water quality
21 impacts on surface water and his opinion was important to show FCWC's
22 discharge into the canal caused no environmental harm.

23 FCWC next called Roger Hartung, who held a number of positions in EPA
24 Region VI during his twenty-three year tenure at EPA, including Deputy Water
25 Division Director. FCWC called Mr. Hartung because he is considered one of the

1 top enforcement and permitting experts in all of EPA. He testified on EPA
2 permitting and enforcement issues, how permit writers perform their job duties,
3 and how wasteload allocations are developed, approved, and inserted into NPDES
4 permits. He testified that in his twenty-three years experience with the EPA, he
5 had never known of an NPDES permit being denied whenever a facility treating
6 human wastes was meeting water quality standards and effluent limits. His
7 testimony demonstrated that in denying the Waterway NPDES renewal, EPA had
8 violated its own regulations.

9 **Q: What happened on the sixth day of trial?**

10 *A:* Our first witness was Patrick Lehman, the former Vice President for Operations at
11 FCWC during the period of time when the Waterway renewal application was
12 denied. Mr. Lehman testified as to the steps FCWC took in attempting to solve its
13 permitting dilemma. Mr. Lehman had been involved in developing a report that
14 reviewed all of FCWC's options, including the possible connection to North Fort
15 Myers Utility. He also testified on how FCWC had come to a decision to move
16 the Waterway discharge from the unnamed canal into the middle of the
17 Caloosahatchee River. Mr. Lehman's testimony demonstrated that FCWC took
18 its environmental responsibilities seriously, and knew that it could not shut down
19 its facility and thereby create a significant public health problem.

20 On the afternoon of April 3, 1996, FCWC called Connie Kagey, the EPA permit
21 writer who had caused the entire problem for FCWC at Waterway by relying on a
22 1981 Florida planning document to deny the NPDES permit application, in
23 violation of EPA's regulations. Ms. Kagey admitted, pursuant to Mr. Bullock's
24 cross examination, that she would not use a draft wasteload allocation in writing a
25 permit. Thee evidence established that the 1981 wasteload allocation was never

1 officially approved by EPA or FDEP, therefore it was a violation of EPA's
2 regulations to use this document to deny FCWC's 1986 permit renewal
3 application

4 After this testimony, we read in portions of depositions of EPA Region IV
5 employees, which further demonstrated that EPA had violated its own rules with
6 regard to denying the Waterway NPDES permit.

7 After reading these depositions, FCWC called Paul Bradtmiller, a Senior Vice
8 President, who joined FCWC in 1991. He testified as to how after a long and
9 tortuous process, FCWC was finally able to interconnect its Carrollwood facility
10 with Hillsborough County. He also testified as to the difficulties FCWC
11 experienced in reaching the point of building an advanced waste water treatment
12 facility at Carrollwood. However, the county finally decided to allow an
13 interconnect rather than an additional facility.

14 After this, FCWC called Ronald D. Blackburn, an environmental administrator for
15 FDEP, Fort Meyers District. The purpose of Mr. Blackburn's testimony was to
16 prove that the wasteload allocation number and document relied on by Ms. Kagey
17 was merely a planning document and not valid for use in an NPDES permit. He
18 also testified that FCWC's Waterway had always had a wasteload allocation to
19 discharge into the canal and the Caloosahatchee River and established that EPA's
20 1986 decision was based on incorrect information.

21 FCWC's next witness was Mike Acosta, Vice President of Engineering and
22 Operations for FCWC. The purpose of this testimony was to explain the
23 permitting procedure Waterway experienced, and to explain why it took several
24 years to obtain all the state, local, and federal permits to construct the facility.
25 Mr. Acosta outlined in detail the delays caused by the U.S. Army Corps of

1 Engineers, FDEP, and county authorities. His testimony demonstrated that
2 FCWC took its environmental responsibilities seriously and that FCWC was
3 frustrated by these delays.

4 Following Mr. Acosta, FCWC called Larry Good, Regional Manager for FCWC.
5 Mr. Good testified about FCWC's extensive efforts to connect Carrollwood with
6 one of the Hillsborough County regional wastewater treatment plants. He also
7 discussed FCWC's efforts to find other alternatives to discharge during the 1980s.
8 As our next witness, we called Gerald Allen, President of FCWC, whose
9 testimony covered several significant areas. Mr. Allen explained the process by
10 which a privately owned, governmentally regulated utility must approach all
11 decisions regarding substantial capital investment under the Florida Public
12 Service Commission's "prudence standard." Using a hypothetical scenario, Mr.
13 Allen performed a sample rate base calculation for the Court to demonstrate the
14 decision making process used by public utilities to determine the prudence of an
15 investment. Using this discussion as the basis of his testimony, Mr. Allen
16 explained why each of the options reviewed by FCWC at Barefoot during the
17 1980s was neither a feasible nor prudent alternative to discharge. His testimony
18 provided a clear picture of FCWC's efforts to convince FDEP to grant permission
19 for FCWC to upgrade its treatment plant to advanced secondary treatment and
20 then to AWT status. In addition, Mr. Allen also testified about the process to
21 upgrade the Waterway plant to AWT status and the reasons that any other
22 alternatives were neither prudent nor practical. His testimony lasted into April 5,
23 1996.

24 **Q: What else happened on the last day of trial, April 5, 1996?**

25 **A:** After Mr. Allen completed his testimony, FCWC called Julie Karleskint, the

1 operations manager for FCWC. The purpose of this testimony was to describe the
2 problems FCWC had with BOD/CBOD reporting, and the fact that what FCWC
3 had reported was more accurate than what EPA had required FCWC to report.
4 She testified that EPA was in fact attempting to assess penalties on a mere
5 reporting error. She also testified concerning the total residual chlorine violations
6 at Waterway and the fact that EPA had a document which exonerated FCWC's
7 reported TRC violations. She advised the Court that FCWC was using a testing
8 method required by EPA and if that method was used it was understood that it
9 would measure to the levels necessary to report accurately. Her testimony
10 destroyed DOJ's case with regard to CWA violations based on TRC exceedences.
11 FCWC then called Keith Cardey, an expert in the areas of Florida Public Service
12 Commission regulation and the economic effects of PSC regulation on privately-
13 owned, publically-regulated utilities. The purpose of this testimony was to show
14 that FCWC had no economic incentive to delay environmental expenditures at
15 any of its facilities.

16 After Mr. Cardey, FCWC called Dr. Abdul B. Ahmadi, the FDEP's engineer in
17 charge of domestic wastewater facilities for the state of Florida, South District.
18 Dr. Ahmadi testified that the Waterway facility had a wasteload allocation and did
19 not violate Florida water quality standards by discharging into the canal. He
20 further testified that the Waterway facility always had a wasteload allocation to
21 discharge in 1985 and 1986, in spite of EPA's determinations in 1986. This
22 testimony further undermined DOJ's position. Dr. Ahmadi then testified as to the
23 length of time it took Waterway to go through the permitting procedure and the
24 construction plan approval by FDEP. The testimony indicated that Waterway
25 could still be discharging into the canal leading to the Caloosahatchee River to

1 this day without violating the permit. Dr. Ahmadi was FCWC's final witness.
2 Mr. Ed Jacobson, President of Avatar Holdings Inc., was then called by Avatar to
3 explain the company's structure and the relationship of certain employees with
4 Avatar. Avatar also called Ms. Georgia Metcalf, President of Barefoot Bay
5 Development Corporation, to testify as to financial issues relating to the
6 development corporation.

7 Avatar then called Charles McNairy, a certified public accountant and chief
8 financial officer, of Avatar Holdings. He testified as to that company's income
9 and losses.

10 After this, DOJ moved to enter the deposition of Jack Tompkins as rebuttal
11 testimony to the testimony of Mr. Allen, Mr. Bradtmiller, and Ms. Karleskint.
12 Mr. Jacobs then proceeded to read in portions of Mr. Tompkins depositions, to
13 which we objected on the ground that the testimony was confusing, cumulative,
14 and misleading. Finally, the Court asked that the parties submit brief regarding
15 the admissibility of Mr. Tompkins' deposition. After some procedural issues
16 were discussed on the filing of post-trial briefs, the trial was concluded. This
17 occurred at approximately 7:00 p.m. on Good Friday evening.

18 Post-Trial Activities

19 **Q: Upon conclusion of the trial, what was the next work undertaken?**

20 **A:** Soon after the trial was concluded, DOJ filed a memorandum of law that once
21 again raised the issue of drawing adverse inferences from those who asserted the
22 Fifth Amendment privilege. In addition, on April 16, 1996, FCWC moved to
23 strike the deposition testimony presented in Court by DOJ of Jack Tompkins.
24 Exhibit _____ GHB-81. On April 18, 1996, the parties submitted proposals for
25 post-trial submissions. Exhibit _____ GHB-82. FCWC continued its review of

1 trial transcripts, in preparation for the filing of post-trial motions and its post-trial
2 brief.

3 **Q: Did the Court rule on any motions during this time?**

4 A: Yes. On May 8, 1996, the Court denied FCWC's and Avatar's motions to strike
5 the Jack Tompkins deposition. Also, by order of May 8, 1996, the Court denied
6 DOJ's motion to draw adverse inferences from the assertion of the Fifth
7 Amendment privilege, and ruled that depositions of several FCWC and Avatar
8 personnel deposed by DOJ were inadmissible. The Court found that Plaintiff's
9 assertions that the witnesses would have provided evidence in support of its
10 claims did not form a "sufficient predicate upon which to base adverse
11 inferences." The Court stated that "the mere fact that the witnesses held positions
12 of authority and responsibility does not without more lead to the conclusion that
13 they could have given testimony that would support Plaintiff's liability case. . .
14 Further, Plaintiff has not set forth the substance of any documentary evidence. . .
15 which demonstrates that the witnesses could have given adverse testimony."
16 Exhibit _____ GHB-83.

17 **Q: Did the government file a post-trial brief?**

18 A: Yes. On June 5, 1996, the Plaintiff filed a post-trial brief and proposed findings
19 of fact and conclusions of law, requesting that the Court impose a civil penalty of
20 \$4,861,500 on FCWC and a similar penalty on Avatar. Exhibits _____ and _____
21 GHB-84 and GHB 85. The key point expressed in this pleading was that "a
22 substantial civil penalty [was] warranted in this case, primarily because of the
23 extensive history of serious Clean Water Act violations at their plants and the
24 Defendant's lack of serious, timely efforts to remedy them." DOJ went on to state
25 that "[i]n each instance, Defendants simply chose not to take the steps necessary

1 to remedy long-standing problems, putting their short-term financial self-interest
2 ahead of compliance with the law and care for the environment.” DOJ’s brief
3 ignored the evidence developed at trial, failed to consider all of the mitigation
4 factors of the CWA, ignored the fact that EPA had violated its own regulations
5 with respect to Waterway, and that it had conceded that there was no actual
6 environmental harm caused by the discharges at the three facilities.

7 **Q: Did FCWC file a post-trial brief and proposed findings of fact and**
8 **conclusions of law?**

9 *A:* Yes. This brief, like the trial itself, focused on the mitigation evidence. We
10 argued that this evidence “demonstrates that none of Florida Cities’ actions
11 resulted in serious violations of the CWA, that none of those violations caused
12 any environmental harm or placed the State of Florida’s surface waters at risk, and
13 that Florida Cities at all times cooperated in good faith with EPA and FDEP.” We
14 further stated that “more than one-third of the violations at issue (those relating to
15 discharges without a permit at Waterway and total residual chlorine at Barefoot)
16 would not have occurred but for EPA’s own mistakes or omissions.” In light of
17 the evidence, we argued for a *de minimis* penalty. Exhibits _____ and
18 _____ GHB-86 and GHB-87.

19 **Q: Did DOJ file additional motions during this period?**

20 *A:* Yes. On May 16, 1996, DOJ filed a motion for reconsideration of the Court’s
21 order on adverse inferences and the Court’s imposed page limits for post-trial
22 brief submissions. Exhibit _____ GHB-88. In its memorandum in support of this
23 motion, the government reargues at length its position that Avatar Holdings
24 controlled the environmental policies of FCWC. DOJ did not really explain why
25 adverse inferences should be drawn, but rather just argued for finding Avatar

1 Holdings liable.

2 On May 21, 1996, FCWC filed a memorandum in opposition to Plaintiff's motion
3 for reconsideration. Exhibit _____ GHB-89. FCWC objected to DOJ's motion,
4 arguing that DOJ failed to explain either why the Court had fundamentally
5 misunderstood the government or that there had been a change in law or the facts
6 since the prior decision. On May 31, 1996, the Court denied the government's
7 motion for reconsideration on the drawing of adverse inferences. The Court
8 concluded that DOJ had argued for holding Avatar Holdings liable and not for
9 drawing adverse inferences, and had confused the issue by including evidence not
10 at all relevant to the inference issue. Exhibit _____ GHB-90.

11 **Q: Were there additional briefs filed by DOJ?**

12 **A:** Yes. On July 16, 1996, DOJ filed a brief citing additional authority--two cases
13 that it believed to be relevant that had been decided since the trial of this matter.
14 *See* Exhibit _____ GHB-91. One case dealt with the amount of the penalty
15 assessed against a defendant in a similar CWA case. The other case was relevant
16 to the unpermitted discharge violations at Barefoot and Carrollwood, where the
17 Court had held in its November 22, 1995 decision that certain claims were barred
18 by *res judicata*. On July 19, 1996, we responded that the penalty case, Dean
19 Dairy Products, had facts dramatically different from our own facts, and was
20 therefore distinguishable. In this case the Court assessed a penalty in excess of
21 four million dollars. Likewise, we argued that the *res judicata* case, Borough of
22 Ridgeway, was irrelevant on factual grounds. We also noted that this citation was
23 DOJ's seventh request for reconsideration in this case, and that DOJ had not set
24 forth any of the grounds necessary for reconsideration. Exhibit _____ GHB-92.
25 On July 23, 1996, the Court ordered the parties to brief the issues relating to *res*

1 *judicata*. Exhibit _____ GHB-93. Specifically, the Court directed us to file a
2 memorandum addressing the effect of In re: Borough of Ridgway and Manning v.
3 City of Auburn on the Court's November 22, 1995 Order precluding claims in the
4 Second Amended Complaint on the basis of *res judicata*. As a result of this Court
5 Order of July 23, 1996, DOJ filed a reply memorandum in support of
6 reinstatement of those claims on August 8, 1996. Exhibit _____ GHB-94. If we
7 lost this issue it meant FCWC would have to return to trial. On August 9, 1996,
8 FCWC filed a joint response with Avatar. Exhibit _____ GHB-95. We argued
9 that in both Ridgway and Manning, the courts would have applied *res judicata* if
10 the facts supported such application of the doctrine. We distinguished FCWC's
11 case from these two, demonstrating how the necessary factual prerequisites for
12 application of *res judicata* were met in FCWC's case. On August 16, 1996, the
13 Court reaffirmed its November 22, 1995 Order granting *res judicata* effect to
14 claims in paragraphs 16, 17-23, and 30 of the Second Amended Complaint,
15 agreeing with our argument that the facts in FCWC's case did indeed mandate
16 application of *res judicata*. Exhibit _____ GHB-96.

17 The Judgment

18 **Q: When did the Court issue its judgment on the litigation?**

19 **A:** On August 20, 1996, the Court issued its opinion. Exhibit _____ GHB-97. This
20 opinion described the statutory maximum penalty that could have been levied
21 against FCWC. The Court's computation concluded that FCWC could have been
22 liable for \$6,600,000 at Barefoot Bay for 264 violations. Yet, after reviewing all
23 of the statutory mitigation requirements, the Court assessed a penalty of only
24 \$5,610. The Court computed that the Carrollwood violations could have
25 amounted to \$14,675,000 for 587 violations. Incorporating the mitigation factors,

1 however, the Court assessed an actual penalty of \$14,675. At Waterway, the
2 Court computed 1281 violations, which could have amounted to a \$32,025,000
3 penalty. The Court assessed an actual penalty of \$289,425 for violations at
4 Waterway. This amounted to an assessed total penalty of \$309,710 out of a
5 potential penalty of \$104,325,000.

6 **Q: After the Court issued its opinion, did FCWC take all appropriate action to**
7 **recover legal fees and other litigation costs?**

8 **A:** Yes. Virtually immediately we began preparations to apply for costs and
9 attorneys' fees under Federal Rules 54 and 68. Exhibits _____ and _____ GHB-
10 98 and GHB-99. FCWC argued that it was entitled under Federal Rules of Civil
11 Procedure 54 and 68 to recover costs it incurred because the amount eventually
12 awarded was less than the Offer of Judgment FCWC had made in March 1995.
13 Under Federal Rule 68 a Defendant who makes an offer of settlement to a
14 Plaintiff, who then rejects the offer, and where the verdict at the close of the case
15 is for an amount less than the rejected offer, the Plaintiff is then liable to the
16 Defendant for all costs incurred by the Defendant after the offer was made.
17 FCWC argued that because the government rejected its \$500,000 Rule 68 offer of
18 judgment, and the ultimate judgment was for less than this amount, the
19 government must pay FCWC's costs, as specified in Rule 68. For fees we argued
20 that attorneys' fees are recoverable under the Equal Access to Justice Act
21 ("EAJA"), to "prevailing parties" that prove that the government has litigated in
22 "bad faith." FCWC argued that the government's repeated maintenance of claims
23 that were found to be barred by *res judicata* amounted to bad faith, and that
24 attorneys' fees were therefore recoverable. On September 23, 1996, DOJ
25 opposed FCWC's motion for costs and attorneys' fees. Exhibit _____ GHB-100.

1 On February 3, 1997, the Court reluctantly denied FCWC's motion for costs and
2 attorneys fees. Exhibit _____ GHB-101. The Court ruled that where the United
3 States is the Plaintiff, Rule 68 for costs cannot be put into effect without an
4 underlying waiver of sovereign immunity. Because the CWA is silent on this
5 issue, the Court concluded that the EAJA was the only other provision that could
6 provide such a waiver in this instance, and it held that the EAJA's waiver was
7 only for "prevailing parties." As FCWC was found liable for at least some
8 penalties, FCWC was held not to be a prevailing party, notwithstanding the offer
9 of judgment. On attorneys' fees, the Court ruled that the application of *res*
10 *judicata* was not clear cut, and that the government's action did not amount to
11 litigation undertaken vexatiously, wantonly or for oppressive reasons.

12 Accordingly, the Court ruled that FCWC was not entitled to recover its attorneys'
13 fees as a strict matter of law.

14 The Appeal

15 **Q: Did either party appeal the Court's decision of August 20, 1996?**

16 **A:** Yes. On October 18, 1996, DOJ filed an appeal, as appellant. Exhibit GHB-102.
17 The issues raised on appeal were the following: (1) did the district court impose
18 the proper standard of parent corporation liability under the CWA; (2) did the
19 district court err in determining that prior administrative orders should be given
20 *res judicata* effect in subsequent judicial proceedings; (3) did the district court err
21 in prohibiting the plaintiff from conducting interviews of ex-employees of the
22 defendants without allowing attorneys for the defendants notice and an
23 opportunity to attend the interviews; (4) did the district court err in not drawing
24 adverse inferences from the refusal of nearly all of Avatar's key officers to testify
25 based on Fifth Amendment grounds; (5) did the district court abuse its discretion

1 in applying the statutory penalty factors of seriousness and history of violations in
2 assessing the penalty in this case.

3 **Q: Did FCWC appeal?**

4 *A:* Notwithstanding that FCWC felt the penalty was not fully warranted, FCWC did
5 not initiate an appeal on the merits of the District Court's decision because the
6 opinion was well reasoned and well supported by the law and the evidence. In
7 effect, FCWC determined it had won in the District Court. Once the government
8 appealed, however, FCWC decided to file a cross-appeal regarding the District
9 Court's denial of its motion for costs and attorneys' fees on November 1, 1996.
10 Exhibit _____ (GHB-103). FCWC believed that there were strong arguments for
11 the Eleventh Circuit to reverse the District Court's ruling that the doctrine of
12 sovereign immunity prevented FCWC from recovering its costs against the
13 government under Rule 68.

14 **Q: Did anything else occur in December?**

15 *A:* Yes. DOJ then failed to file a civil appeal statement form on time. On
16 December 31, 1996, DOJ moved to file its civil appeal statement out of time. We
17 did not oppose this motion because we thought it would be expensive to argue,
18 unproductive, as the Court was likely to grant DOJ's motion to file out of time.
19 On January 29, 1997, the Court in fact granted DOJ's motion.

20 **Q: Were any settlement discussions undertaken after the filing of the appeal and**
21 **cross-appeal?**

22 *A:* Pursuant to the Eleventh Circuit rules, both parties agreed to attempts at
23 mediation. Mediation conferences were held on March 19, 1997, April 9, 1997,
24 April 25, 1997, May 9, 1997, and May 21, 1997. During these discussions, DOJ's
25 appellate counsel attempted to obtain FCWC's consent to a DOJ attempt to seek

1 vacatur of the opinion of Judge Nimmons of August 20, 1996. We believed that
2 DOJ was desperate to expunge this opinion from the record, specifically with
3 regard to *res judicata*. On occasion, there were discussions with DOJ about
4 whether FCWC's penalty could be significantly reduced or eliminated if FCWC
5 joined in DOJ's vacatur motion. DOJ, however, insisted on having it both ways;
6 it wanted FCWC's agreement to join or not oppose vacatur, but also wanted to
7 preserve its appeal if the vacatur motion was denied. DOJ wanted FCWC's
8 agreement essentially for nothing, since any reduction in penalty was contingent
9 on the Court granting the motion.

10 **Q: What was the outcome of these mediation efforts?**

11 *A:* After many telephone conference calls, and individual calls with appellate counsel
12 for DOJ, FCWC advised DOJ that it would not agree to any further extensions of
13 time for DOJ to file its appellate brief. After internal DOJ discussions, DOJ
14 counsel advised us that DOJ and EPA would agree to abandon its appeal if FCWC
15 abandoned its cross-appeal, and both parties would accept Judge Nimmons's
16 decision as final. FCWC agreed. On August 6, 1997, the Eleventh Circuit issued
17 an order dismissing the government's appeal and FCWC's cross-appeal with
18 prejudice. Exhibit GHB-104.

19 Overview of Litigation Effort

20 **Q: What is your estimate of the number of documents produced by FCWC in**
21 **response to discovery requests?**

22 *A:* Over 400,000 individual documents were produced by FCWC in response to
23 DOJ's discovery requests. These documents ranged from one page to over one-
24 hundred pages in length. My best estimate is that FCWC produced a million plus
25 pages to DOJ for review and copying. On occasion when FCWC produced the

1 documents, DOJ did not make a copy of the documents after review.

2 **Q: How many pleadings did FCWC and the DOJ file during the course of the**
3 **litigation?**

4 **A:** 132 pleadings were filed, which amounted to a total of 1,566 pages of written
5 material, plus an additional 751 pages of exhibits. See Exhibit _____ GHB-105.

6 **Q: How many witnesses did FCWC and the DOJ depose and how many days of**
7 **depositions did each represent?**

8 **A:** FCWC took 22 depositions of 17 witnesses (some witnesses being deposed more
9 than once). This represented approximately 20 days of depositions or 133.25
10 hours of deposition. See Exhibit _____ GHB-106. DOJ took 32 depositions of
11 26 individuals over 33 days.

12 **Q: Did you take steps to keep costs as low as possible?**

13 **A:** Yes. Throughout the litigation I examined the bills thoroughly and reduced legal
14 fees, quite substantially at times, whenever it appeared that any work was
15 duplicated or any billed time resulted in value not being added. See Exhibit
16 _____ GHB-107 for correspondence with the client about my ongoing reduction
17 of legal fees. Exhibit _____ GHB-108 provides a month-by-month breakdown of
18 the hours worked and the average hourly billing rate. In addition to reducing
19 hours billed when necessary, I never billed for dinner meetings with clients, nor
20 was non-working travel time (between Washington, D.C. and Florida, for
21 example) billed. I carefully monitored airline ticket charges and tried to get
22 attorneys to fly Valu Jet as frequently as possible to keep travel costs down. Soon
23 after it was determined that DOJ intended to review tens of thousands of
24 documents and after consultation with FCWC's general counsel, it was concluded
25 that substantial FCWC attorney time could be avoided and thus legal expenses

1 reduced if the DOJ was given substantial latitude in reviewing documents without
2 prior screening for confidential and privileged content which is the usual practice.
3 This practice was adopted for a substantial part of the discovery and significantly
4 reduced legal expenses. Finally, I reduced billed hours when it appeared time
5 was not being used by a given attorney as efficiently as it could have been. All
6 these matters are discussed in the cover letters to the bills. Exhibit _____ GHB-
7 109. In addition, rates for attorneys' fees and paralegal fees were set at levels
8 below market rates in Washington, D.C. at times to ensure that bills would not be
9 excessive. See Exhibit _____ GHB-110 for a discussion of one such reduction,
10 reducing my time from \$275 per hour to \$250. The rates discussed in this letter
11 actually came down further, and my time and Don Scroggin's time was billed
12 from this point on at a rate of \$200 per hour for us both. Finally, all assignments
13 were structured taking into account the billing rates of individuals and work was
14 shared with Avatar's attorneys whenever that proved most efficient.

15 **Q: In your opinion, did FCWC prevail in this litigation?**

16 **A:** Yes.

17 **Q: Why?**

18 **A:** We prevailed because we successfully barred more than half the government's
19 claims. Moreover, as to the remaining claims, we successfully put forth evidence
20 that compelled the judge to seriously mitigate all penalties to just \$10 and \$25 per
21 day. FCWC agreed to certain penalties in order to enhance its credibility with the
22 Court that it was not disagreeing with EPA on every issue. We were able to
23 reduce \$104,000,000 in potential penalties into \$309,710 in actual liability. It is
24 indeed ironic that the Court's finding of penalties was substantially less than
25 FCWC's settlement offer of \$500,000 made almost four years earlier in January

1 1993, nine months before the Original Complaint was filed by the U.S., and well
2 before FCWC had sustained legal expenses of any significance.

3 **Q: In your opinion, was the government overzealous in bringing this litigation**
4 **against FCWC?**

5 **A: Absolutely.**

6 **Q: Does this conclude your testimony?**

7 **A: Yes.**

Parts 2 - 8 of DN 13270-97
were pulled + marked as exhibits
for use in the record on appeal.
When the record is returned from
1st DCA, do not return the
documents to the file. They can
be found in the exhibit pouches.
KF 5-17-99

**FCWC LEGAL FEES AND SERVICES
PAID TO LAW FIRMS**

Alston & Bird	\$ 28,246
Baise & Miller	936,423
Baker & Hostetler	30,941
Gabeler, Baise & Miller	1,118,792
Gabeler, Battocchi & Griggs	252,787
Henderson, Franklin & Starnes	34,635
Hopping, Green, Sams & Smith	4,111
Jenner & Block	1,158,675
Landers & Parsons	5,404
Weil, Gotshall & Manges	45,250
TOTAL:	\$ 3,615,264

FLORIDA PUBLIC SERVICE COMMISSION
DOCKET
NO. 971663-WS EXHIBIT NO. 8
COMPANY: Geddie
WITNESS:
DATE: 8-12-98