GUIDELINES FOR JOINT STATE/FEDERAL CIVIL ENVIRONMENTAL ENFORCEMENT LITIGATION

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GUIDELINES FOR JOINT STATE/FEDERAL CIVIL ENVIRONMENTAL ENFORCEMENT LITIGATION[1/]

I. GENERAL STATEMENT OF PRINCIPLES

It is the policy of the U.S. Department of Justice, Environment and Natural Resources Division (ENRD) to work cooperatively with states in enforcing environmental laws. This document reflects the commitment of ENRD and state Attorneys General to strong coordinated and collaborative environmental enforcement programs.[2/] Although enforcement by a single sovereign is the most common means of enforcing civil environmental laws, these guidelines emphasize the importance, both in a general sense and in the context of particular cases, of coordinating ENRD and state Attorneys General environmental enforcement efforts.

These guidelines do not define when joint enforcement should be undertaken in a particular matter. Rather, they set forth a general framework and directions for litigators on how joint civil environmental enforcement actions can be beneficially conducted, with the goals of maximizing cooperation between federal and state enforcement agencies and minimizing, to the extent possible, the burden of litigation on the parties.

These guidelines were developed by a workgroup of ENRD and state Attorneys General litigators. The insights and suggestions in these guidelines are largely the result of lessons learned

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1/ These guidelines are intended to be used solely for the purpose of assisting state and federal attorneys in the development, litigation and possible settlement of joint civil judicial environmental enforcement cases. These guidelines do not constitute rules or formal statements of policy, are not binding on any person, and create no rights. Deviations from these guidelines may be justified depending on the circumstances of each case.

2/ These guidelines are premised on ENRD, generally the Environmental Enforcement Section, taking the lead federal role in civil judicial environmental enforcement litigation, in coordination with the U.S. Environmental Protection Agency headquarters and regional offices. The majority of federal environmental civil judicial litigation is conducted this way. ENRD's Environmental Defense Section generally takes the lead role in civil judicial enforcement in wetlands cases under Section 404 of the Clean Water Act, in cooperation with EPA and the Army Corps of Engineers. Other federal agencies that may participate in federal enforcement actions include the Coast Guard and Departments of Agriculture, Commerce, Housing and Urban Development, and Interior. Additionally, there are a number of United States Attorneys Offices (USAOs) that take a very active role in federal civil environmental enforcement cases, including acting in a "joint lead" role with ENRD or assuming exclusive lead authority based on delegation of the case by the Assistant Attorney General of ENRD. *See* Environment and Natural Resources Division Directive 16-99; U.S. Attorney's Manual (http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/). The general principles laid out in these guidelines would be equally relevant to USAOs that assume a lead or significant role in a given case, and USAOs are invited to adapt these guidelines for their use. In a few places, these guidelines specifically remind state and federal attorneys to coordinate with the USAOs. As a general matter, ENRD and state trial attorneys should integrate U.S. Attorneys offices and EPA regional offices into their collaborative efforts wherever appropriate. For example, even where USAOs do not take an active role in an environmental matter, they routinely provide invaluable assistance as "local counsel." ENRD attorneys rely heavily on them for their knowledge of the local courts and procedures, for assistance with filings, and for other litigation assistance.

from experience with joint enforcement cases in recent years.

Although these guidelines focus on the relationship between attorneys from ENRD and the state Attorneys General offices in civil cases, joint civil actions are just one way in which states and the federal government can cooperate in enforcement. Much of the information-sharing discussed in these guidelines already occurs between state and federal environmental agencies. In fact, this is where collaboration should (and generally does) begin. For example, most U.S. Environmental Protection Agency (EPA) Regional offices and their state counterparts conduct regular conferences to keep one another apprized of violations and planned and potential enforcement actions. Increasingly, EPA is encouraging its Regional offices to develop coordinated enforcement strategies with state environmental agencies.

A. CONSIDERATIONS WHEN DECIDING WHETHER TO PURSUE JOINT ENFORCEMENT

The federal government and the states share common goals of, and overlapping authorities for, protecting the environment. This fact is reflected in many of the federal environmental statutes, which are premised on cooperative federalism. It is therefore important that federal and state agencies collaborate to promote, within the regulated community and among the public, the notion of fair and evenhanded enforcement. Further, cooperation in environmental enforcement helps ensure that an action taken by one sovereign does not impair the overall goals of the other sovereign.

Joint enforcement can bring to the table both local and national perspectives. It can lead to synergy and an efficient allocation of litigation resources, including expert witness support. By speaking in a unified voice, the sovereigns can strengthen their case and potentially their influence on the court and the defendant.

As a practical matter, state and federal attorneys united against the resources of major corporate litigants can lead to faster and better settlements with even more significant penalties and broader injunctive relief. Often states have more flexibility in their ability to apply penalty dollars to innovative supplemental environmental projects ("SEPs"). Whether a case settles or goes to trial, the combined efforts of the state and federal government may result in a broader resolution of the potential claims while preventing the violator from playing one sovereign against the other.

During litigation, the combined efforts of the state and federal litigators can lead to more persuasive briefs, strengthened by diversity of perspective and combined knowledge across a broad spectrum of issues. State litigators will bring knowledge of local perspectives and sensitivities while ENRD trial attorneys will bring knowledge of national developments, as well as experiences from other states. State and federal attorneys working together on a case can help bridge any potential differences between their respective client agencies.

Joint enforcement can be helpful when a case is large and complex, involves multi-state facilities or national issues, or involves claims under several environmental statutes when federal and

state resources and authority can complement each other. It can fill potential legal gaps or clarify important questions of law under state-authorized environmental programs. In addition, when the case is an especially high priority matter, when long term oversight requires continued shared roles, or when factual development requires intensive investigation or shared resources of client agencies, the combined resources and experience of state and federal litigators can be invaluable.

B. MAINTAINING A STRONG COOPERATIVE AND COLLABORATIVE RELATIONSHIP

These guidelines recommend on-going collaboration and communication among federal and state environmental enforcement personnel in order to help ensure effective and efficient enforcement, avoid duplication of effort, reduce opportunities for state/federal conflict, and promote effective use of state and federal enforcement resources. These guidelines recommend that regular communication occur both as a general practice, apart from any particular case, and also in the context of a specific joint matter, from the early stages of case development through its resolution. Regular communication can help build good working relationships which can lead to successful case resolution, efficient and effective litigation, and an increased willingness among state and federal enforcement personnel to work together.

Litigators serve as ambassadors from one sovereign to the other. They can help foster an institutional commitment to routine communication which can lay the groundwork for a culture of collaboration.

To be sure, joint enforcement actions can also present challenges that may cause friction between federal and state litigators. Often, cases selected for joint enforcement are resource intensive. The state and federal agencies involved may have different expectations regarding the time frames for resolution of the case as well as how the case should be resolved. Decision-making regarding significant issues during settlement discussions or litigation may take longer because there are more players involved. These challenges collectively test the communication and diplomacy skills of the co-litigators, requiring each representative to give full consideration to the other's perspective. These challenges can be overcome, however, when the state and federal trial attorneys recognize that in resolving issues as complex and sensitive as those in environmental enforcement, they may have to work more diligently at communications and make extra efforts to be flexible to accommodate each other's needs in return for the benefits of joint enforcement.

It is impossible to avoid all disputes; however, experience has demonstrated that open, candid and regular communication among co-litigants leads to fewer conflicts and more rapid resolution of issues. To this end, states and the federal government should look upon each joint case as a learning experience from which insights can be gained that will lead to continued improvements in how joint state/federal litigation is conducted. Therefore, these guidelines are neither comprehensive nor set in stone, and will evolve as state/federal experience with joint environmental enforcement also evolves.

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For further information or questions about the guidelines, or to obtain an "electronic version" of the attached appendices, please contact ENRD attorneys Leslie Allen (202-514-4114; leslie.allen@usdoj.gov) or Jim Payne (202-514-3473); james.payne2@usdoj.gov) or Robert Kinney, NAAG Chief Counsel, Environment Project (202-326-6058; rkinney@naag.org).

II. GUIDELINES

A. ESTABLISHING A WORKING RELATIONSHIP

A first step toward enhanced cooperation is for state and federal environmental litigators to develop working relationships with each other. This can happen both in the context of a particular case, as discussed in Part II. B, and in general. ENRD and state Attorneys General managers and attorneys should establish regular lines of communication and acquaint themselves with each other and their respective organizations.

- Develop and Maintain Lines of Communication: Litigation Contacts
  - The Environmental Enforcement Section (EES) of ENRD[3/] is organized by litigating groups, which handle cases coming from one or more EPA regions. (See organizational chart attached as Appendix A.) Each litigating group is managed by an Assistant Section Chief (ASC), who is the first ENRD official a state official may contact concerning matters or cases in his or her state (unless, of course, the inquiry involves a case to which an EES attorney is assigned, in which case it is generally appropriate to contact that attorney first).
    - ASCs are assisted by several Senior Attorneys, who, in some groups, are assigned supervisory or coordinating responsibilities for matters in specified states. In addition, Senior Attorneys sometimes act as the primary contact for specific U.S. Attorneys offices.
  - State Attorneys General Environment Bureau/Division Chiefs are the primary points of contact in State AG offices. (See list of state Attorneys General and the primary contacts for civil environmental enforcement matters attached as Appendix B.)[4/]

[3/] As a practical matter, state civil litigators will have the most contact with EES, and thus, these guidelines are focused on the relationship between the Attorneys General offices and EES. The second most likely section to be involved in joint civil enforcement is the Environmental Defense Section (EDS). While EES handles most EPA civil enforcement matters, EDS enforces civil wetlands violations under Section 404 of the Clean Water Act, which are referred by EPA and the Army Corps of Engineers. EDS is organized similarly to EES, with Assistant Section Chiefs having responsibility for certain EPA Regions and the states in those regions. Other ENRD sections include: Appellate; Environmental Crimes; Natural Resources (fna General Litigation); Indian Resources; Land Acquisition; Law and Policy (fka Policy, Legislation and Special Litigation); and Wildlife and Marine Resources. At times, litigators may need to contact someone in one of these sections as well. The primary point of contact in EES can assist in this effort. ENRD also has an attorney assigned as Counsel for State and Local Affairs who is available to assist state and local officials with ENRD matters. Appendix A contains a description of ENRD's sections and points of contact within each Section.

[4/] The National Association of Attorneys General (NAAG) can be of assistance in developing and updating a list of contacts from environmental units of the state Attorneys General. NAAG has regular contact with these offices and

- United States Attorneys

  There are 94 United States Attorneys, one for each federal judicial district. The role of the U.S. Attorney in a civil environmental enforcement case ranges from lead counsel to local counsel. Assistant United States Attorneys (AUSAs) bring considerable experience with their district courts, including court procedures. The U.S. Attorneys Manual describes the roles of ENRD and U.S. Attorneys in more detail; *see* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/. This link also has contact information for each U.S. Attorney office.

- Communicate Regularly

  - Establish a mechanism for regular communication between the state Attorneys General offices, ENRD, and EPA regional office enforcement divisions outside the context of specific cases, such as periodic conference calls or e-mail groups.

  - Use regular communications to identify opportunities for joint effort, share information on new cases or policies, and foster an atmosphere of cooperation that will reduce the possibility of disagreements or tension once litigation has commenced.

  - Regular communication and cooperation can reduce the instances in which the federal and state agencies are separately investigating and/or prosecuting violations arising out of the same incidents or occurrences.

  - Include state and federal client agencies as appropriate.

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keeps current lists of environmental contacts. In a few states, civil environmental litigation is handled by the state environmental agency.

B. COORDINATING JOINT LITIGATION IN A SPECIFIC CASE

The importance of communicating early and often cannot be overemphasized. Regular communication will help establish a common approach and understanding, is vital for effective case management, and will reduce disputes between the plaintiffs and aid in resolving those that may develop.

1. Early State/Federal Coordination Efforts

- ☐ Determine whether joint federal/state enforcement action is appropriate.
  - ▫ Are the two governments likely to pursue common interests and goals?
  - ▫ Is the case likely to require or benefit from joint prosecution?
  - ▫ Is joint prosecution an efficient use of enforcement resources?
- ☐ Reach agreement on common goals in litigation as early as possible, and record these goals for reference.
- ☐ Wherever possible, discuss the case and the process for joint decision making early -- *well before the filing of the complaint or the beginning of settlement negotiations with actual or potential defendants.*
- ☐ *DO NOT* wait until the settlement is nearly concluded before contacting the other sovereign!
- ☐ Where prior coordination with a state or federal counterpart is not possible, contact should be made as soon as possible after the filing of the action to discuss the case and the potential for joint enforcement.
- ☐ Use established lines of communication (such as those already developed outside the litigation context, and contacts developed with EPA Regional enforcement offices and EPA and state program offices).
- ☐ Hold a "kick-off" conference call or meeting with the appropriate federal and state personnel.
  - ▫ Consider including counsel from ENRD (and as appropriate the USAO), the state Attorney General's office, a representative(s) from the relevant EPA Office of Regional Counsel, state agency counsel, if appropriate, and state and EPA regional program representatives.
  - ▫ People with background knowledge about the violator should be given the opportunity to share information about the company and the potential violations.

- Discuss the goals of the case, the expectations of each participant, settlement and penalty allocation issues, and a proposed schedule of activities.

- Consider executing at this meeting, or at a minimum discuss, a confidentiality agreement between or among the parties to protect against disclosure of documents. *See infra* Section II.D.

☐ Set up a mechanism tailored to your specific case to promote reliable day-to-day coordination.

- Regular (*e.g.*, monthly) conference calls (with a regular call-in time, number and agenda) are a proven mechanism for keeping everyone informed.

- E-mail groups are invaluable communications tools. (For e-mail to be effective, team members will need to ascertain whether there are software compatibility issues and, if so, will need to address them, *e.g.*, by translating attachments so that all team members can use them.)[5/]

☐ In multi-state enforcement efforts, chart contacts with each state agency and Attorney General's office in order to keep track of outreach efforts and communications among parties and between parties and defendants. (An example of a contacts chart is attached as Appendix C.)

2. Case Management

☐ Designate a lead attorney who will have overall administrative responsibility for case management.

- The lead attorney should be the primary manager of the day-to-day case activities and the person who coordinates the state and federal efforts.

- The lead attorney must be an effective facilitator and mediator.

- Because neither government can waive its sovereignty with respect to the positions taken in litigation, the lead attorney generally should not make any significant

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[5/] *A word of caution about email groups*: Although relatively secure e-mail groups can be established, as more people are added, the danger of inadvertent disclosure outside the group increases. In addition, some states' open records laws may make e-mail transmissions subject to disclosure, despite claims of privilege. Litigation teams should be aware of these limitations before using e-mail as a communications tool, and establish appropriate procedures on e-mail security and message content.

decision unilaterally, *i.e.*, without consulting with representatives of the other sovereigns.

- Decide which decisions are "team" decisions, and which can be handled by the lead attorney without team consultation.

- Conflict Resolution

  - Most disagreements can be avoided or resolved through OPEN and TIMELY COMMUNICATIONS among team members.

  - Discuss at the outset of the case the mechanism to be used to resolve intra-team conflicts, including to whom issues should be elevated, *e.g.*, raise issues promptly in a conference call with ENRD Assistant Section Chiefs, state Attorney General Bureau Chiefs, and EPA and/or state program representatives, as appropriate.

  - Establish a mechanism to keep litigation/negotiations on track while any intra-team conflicts are resolved.

  - Establish procedures for protecting privileges and confidentiality if a party must withdraw from the case (e.g., because of loss of common agreement on the goals of the litigation, counterclaims that raise issues that cannot be jointly pursued, or court rulings that affect one party and not the other).

  - Decisions to end the partnership and invoke these withdrawal procedures should be made by management (e.g., the State Environment Bureau/Section Chief and ENRD Assistant Section Chiefs), and termination of the joint effort should always be accomplished in a manner that does not leave either the federal or state government prejudiced or at a disadvantage in the litigation.

- Case Management Plans -- Establish a written, formal mechanism for keeping track of case activities that will be shared with all members of the litigation team.[6/]

  - List agreed-upon goals and outcomes

    - Note areas of potential disagreement for future resolution (e.g., penalty split/allocation issues, injunctive relief, SEPs, etc.).

    - Identify whether any partner has limits on its authority to participate, and develop a strategy to avoid problems (if possible).

[6/] This could be a formal Case Management Plan (see appendix D for examples), or a flow chart of some sort that enables the team to track multiple activities at a glance.

- Set schedules and assignments.
  - Identify which federal or state agency will assume the main responsibility for assisting in the litigation and which will perform support roles; or in multi-claims cases, identify which agency will assume primary responsibility for each component of the case.
  - Each organization (e.g., ENRD, State Attorney General's office, each client agency) should designate a spokesperson or primary point of contact, whose job it will be, among other things, to coordinate within his or her agency so that the agency can "speak with one voice."
  - Clearly establish the roles of each team member. An internal memorandum establishing roles should be considered.
  - Identify other legal and technical team members working on the case, and determine what support services are available.[7]
  - Identify expertise among team members,[8] and consider pairing federal and state team members to work together on discrete issues.
  - Draft a proposed schedule of activities and timetable for completion of specific tasks, noting who is responsible for each task.
  - Circulate the draft schedule within the team for comment (this gives each team member a voice in planning the case), then formalize the schedule as appropriate.
  - Consider a written agreement covering how costs of the litigation will be shared.

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[7] As appropriate, subgroups or teams with responsibility for discrete tasks can also be identified. For example, teams can be created to address injunctive relief, civil penalties, SEPs, or different claims or media covered by the case. Each subgroup should also have a team leader or primary point of contact.

[8] In multi-state cases, sometimes expertise in one state has effectively been used to support claims by other states, with the latter providing financial support.

- Motions, Witnesses, Supporting Documents and Evidence

  - Establish deadlines and time lines for particular activities, such as Rule 26 disclosures, document requests or production, interrogatories, depositions, etc. Anticipated motions (*e.g.*, Rule 12(b)(6), Rule 56, discovery motions) and the necessity for subpoenas should be discussed and the responsibilities for authoring or opposing them determined.

  - Discovery: Identify the categories of data, documents, and witness testimony that need to be obtained to support claims.

    - Discuss/develop strategies to obtain these and assign team members responsibility for obtaining the information.

    - Consider using a "proof chart" to aid in identifying and organizing categories of data, documents, and witness testimony. A sample is attached as Appendix E.

    - Determine where documents necessary to the litigation are located and who has the responsibility for reviewing and/or obtaining them.

    - Document Review: Divide the labor as to document review for content and privilege, as well as preparation of summaries and indices of the information contained therein and privilege logs. Develop a system to organize and label documents that must be produced by the federal and state governments to avoid confusion in production or bates numbering systems. State Attorneys General and ENRD should coordinate these assignments so that the workload is distributed fairly in light of available resources.

    - Assign the taking and defending of depositions, the propounding of interrogatories and the production of documents. *Be advised: Document production can often be very burdensome, and assignments and expectations should be discussed early and thoroughly.* An appropriate division of responsibility will have state attorneys defending the depositions of state employees and contractors, as well as other state-identified witnesses, while ENRD will defend federal employees and contractors and other federal witnesses. Likewise, ENRD ordinarily will be most responsible for responding to written discovery aimed at federal documents or witnesses, while the state Attorneys General will take the lead on responding to written discovery aimed at state sources of information. Each federal and state agency should be responsible for assisting in

responding to written discovery on relevant matters and identifying potentially relevant documents in their files, if requested, for producing in response to discovery requests.

- Develop necessary scientific theories of the case, and identify potential consulting scientists and testifying experts. The handling of experts should be divided up among the team members, subject to location, expertise and experience. State Attorneys General and ENRD should discuss early on whether to employ experts jointly or separately and how to pay for their services. All partners to the litigation should thoroughly check the reported background/credentials of expert witnesses in order to avoid unpleasant surprises later.

- Consider the use of Automated Litigation Support, such as computerized data bases (*e.g.*, document scanning, database management and retrieval) and automated computer trial aids, such as Trial Notebook or Concordance. Make sure systems and software are compatible and available to all team members.

- Counterclaims:

  - Defendants sometimes file counterclaims against federal and state agencies, such as in CERCLA cases. These counterclaims usually allege that the state or federal government should share in the liability. In addition, defendants sometimes file actions under 42 U.S.C. § 1983 or similar state causes of action either as a counterclaim or a separate action. Thought should be given to this possibility and its impacts on the proposed litigation.

  - Usually the allegations in a counterclaim raise different claims of liability against the state than the claims alleged against the federal government. Accordingly, each sovereign will have the responsibility to respond to claims made against it. This may have an impact on resources that are available to the case, as generally the attorneys defending against a counterclaim or a related separate action may not be the same attorneys bringing the enforcement action.

- Confidentiality: For more detail, see Section II.D.

  - Establish procedures for the exchange of privileged materials.

  - Research the potential impact of state public records laws, open meeting laws, the

Freedom of Information Act (FOIA), and Confidential Business Information (CBI).

- ▫ Execute confidentiality agreements.

- ☐ Communications/Press Strategy

  - ▫ Introduce each government's press people to one another.

  - ▫ Develop a coordinated strategy for handling public, press, or legislative inquiries. (See note above about FOIA and state public records requests.).

  - ▫ Consider joint press releases where possible. Strive for consistency in any information released by federal and state members of a joint prosecution team.

3. Settlement Issues

- ☐ Multi-party settlements are complicated and require special efforts.

  - ▫ Discuss early-on what each party needs to achieve in a settlement. Any differences in perspective or approach should be addressed early in case development and planning.

  - ▫ Settlement discussions should involve, at a minimum, counsel for each sovereign, and may also include appropriate personnel from state and federal agencies involved in the case.

  - ▫ Identify, as noted above, any particular state enforcement issues and consider what the states require in order to resolve the issues. This may mean insisting on particular injunctive relief or SEPs, and the assessment of civil penalties for state violations, as part of any settlement. Particular sensitivity should also be paid to any "penalty splitting" concerns.

  - ▫ Separate negotiations between the state or federal government and the defendant should NOT take place unless either (1) the communication has been discussed in advance and approved by the other plaintiff, or (2) there has been a full disclosure to team members that the federal-state-partnership is at an end and all reasonable efforts have been made to prevent prejudicing or disadvantaging either sovereign.

  - ▫ NO CONFIDENTIAL OR PRIVILEGED INFORMATION SHOULD BE DISCLOSED by one member of the team to secure a separate settlement without written authorization to use the information by the other members of the team.

C. PRE-FILING CONSIDERATIONS

In planning a joint enforcement action, the parties will need to consider both a basis for federal court jurisdiction over state claims and the procedure for state participation.

- Jurisdiction
  - A federal court will have jurisdiction over the United States' claims in jointly prosecuted actions.[9]
  - Federal Jurisdiction Over the State's Claims
    - Federal Question Jurisdiction - 28 U.S.C. § 1331. Where the federal environmental law authorizes a state to assert its own federal law claims in federal court, such as claims for recovery of response costs or natural resource damages under CERCLA or the Oil Pollution Act, the federal court has jurisdiction. The state could, for example, file its own complaint in federal court and the parties could move for consolidation under FRCP 42(a).
    - Supplemental Jurisdiction - 28 U.S.C. § 1367(a). The state can assert state law claims in addition to any federal claim it has (*e.g.*, a citizen suit claim to enforce the federal law as well as a state law claim for violation of state law), and can most likely join[10] the United States to assert only state law claims without a federal law claim.[11]
    - Diversity of Citizenship - 28 U.S.C. § 1332. A federal court could assert jurisdiction over state law claims if the requirements for diversity of

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[9] *See* 28 U.S.C. §§ 1331, 1345, 1355.

[10] Federal Rule of Civil Procedure (FRCP) 20 governs the permissive joinder of parties. FRCP 20 states that:

> All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action.

[11] 28 U.S.C. § 1367(a) provides that "[I]n any civil action of which the district courts have original jurisdiction, the district court shall have supplemental jurisdiction over all claims that are so related to claims in the action . . . that they form part of the same case or controversy. . . . Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties." Does § 1367(a) support the assertion of solely state law claims without a cause of action created by federal statute? Although this may have been an issue under previous case law concerning "pendent party" jurisdiction, the enactment of § 1367 has greatly extended federal court jurisdiction. *See, e.g.*, Jerry Kubecka, Inc. v. Avellino, 898 F. Supp. 963, 972 (E.D.N.Y. 1995); D. Siegel, Practice Commentary, 28 U.S.C.A. § 1367, p.832 (1993 ed.).

citizenship are met, although this may be rare since a state is not a citizen of any state for the purposes of diversity jurisdiction. *See* Postal Telegraph Cable Co. v. Alabama, 155 U.S. 482, 487 (1894).

- Mechanisms for a Joint Prosecution

  - *Joint Complaint.* The United States and a state can combine their claims in one complaint, signed by the appropriate officials of both. There must be careful coordination among the plaintiffs to ensure that the complaint is accurate and that all parties sign in a timely manner. This is a particularly useful mechanism for cases that are settled concurrently with the lodging of the complaint. *See, e.g.*, FRCP 20(a).

  - *Separate Complaint in Federal Court.* As long as the federal court will have jurisdiction over the claims in the state complaint, a state can file its own claims through a separate complaint in federal court.[12] Along with or soon after filing the complaint, the state could file a motion for consolidation, or, if possible, a stipulated order for consolidation signed by all parties. *See, e.g.*, FRCP 42(a).

  - *State as Plaintiff Intervenor.* FRCP 24(a) allows intervention by right: (1) when a statute of the United States confers an unconditional right to intervene (such as with citizen suit provisions, *discussed below*); or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. Permissive intervention is allowed pursuant to FRCP 24(b) when: (1) a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

  - *State as Citizen Suit Plaintiff.* Although procedurally a state could join a citizen suit claim to a federal lawsuit by any of the three means discussed above, certain aspects of citizen suit practice warrant further discussion here. Most federal environmental regulatory statutes have citizen suit provisions authorizing "any person," including a state, to bring an action for various causes, including violations of that law;[13] however, there are statutory procedural requirements (such as notice provisions) and potential limits on filing (such as the "diligent prosecution" bar) in each that vary,

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[12] Any separate complaint the state files should "stand on its own feet" with respect to federal jurisdiction. If the state plans to assert only state law claims, it should ordinarily be done through a joint complaint or intervention.

[13] *See, e.g.*, Clean Air Act, 42 U.S.C. § 7604; Clean Water Act, 33 U.S.C. § 1365; Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9659, Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046; Resource Conservation and Recovery Act, 42 U.S.C. § 6972, and Toxic Substances Control Act, 15 U.S.C. § 2619.

and counsel should research these carefully before proceeding. Most of the citizen suit provisions would allow a state to intervene as a matter of right in an ongoing federal environmental enforcement case and to assert a federal cause of action as a citizen plaintiff. *See, e.g.,* 42 U.S.C. § 6972(b)(1).[14]

- In any case in which a state brings a federal citizen suit action concurrently with ongoing or contemplated federal enforcement, the two sovereigns should closely coordinate consolidation. This is particularly important if a state wants to bring a citizen suit claim by means other than by intervening in ongoing federal litigation, *e.g.,* by filing its claims first (before the federal complaint is "commenced and [being] diligently prosecut[ed]"). Ideally, the two complaints should be filed, essentially, simultaneously (if not actually by means of a joint complaint). This would avoid the state suit proceeding too quickly in advance of the federal suit and, as discussed below, potentially giving defendants arguments concerning claim or issue preclusion in some jurisdictions.[15]

- *Separate Actions Should Be Avoided.* States and the United States can, of course, file separate actions in state and federal courts, respectively.[16] The United States and a state could either allege similar violations under federal and state law, respectively *(i.e.*, parallel actions), or could split counts and file separate but coordinated actions. However, there are significant potential drawbacks to these approaches, and assuming the sovereigns intend to pursue joint enforcement in a coordinated manner, separate filings should be avoided unless absolutely necessary. For example, as discussed below, with parallel or separate actions, one action may reach judgment or

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[14] States should consider the pros and cons of filing a citizen suit. For example, a state may decide against filing a citizen suit claim because if it does not "substantially prevail," it may risk paying defendants' attorneys fees or because any penalties obtained through a citizen suit under the federal environmental statutes must be paid to the federal Treasury. On the other hand, a state may wish to avail itself of the federal citizen suit provision because, for example, the state's law may not provide direct authority for enforcement, the federal penalties may be higher, or because the state could potentially recover its attorneys fees through a citizen suit. In many cases, if the state chooses to file a citizen suit, it will also want to bring related state law claims in the same action under the supplemental jurisdiction provision, discussed above. *See, e.g.,* United States v. City of Toledo, 867 F. Supp. 595 (N.D. Ohio 1994).

[15] Similar concerns can arise if a state proceeds administratively in advance of a federal action. For example, Section 309(g)(6) of the Clean Water Act precludes the United States from obtaining civil penalties for any violations "with respect to which a State has commenced and is diligently prosecuting an action under a State law comparable to this subsection [concerning administrative actions and administrative penalties]" or for which the "State has issued a final order not subject to further judicial review and the violator has paid a penalty assessed under . . . comparable State law."

[16] A defendant subject to two lawsuits could seek to remove the state action to federal court if there is federal court jurisdiction over the action. *See* 28 U.S.C. § 1441; Syngenta Crop Protection, Inc. v. Henson 123 S. Ct. 366 (2002); U.S. v. Newdunn Associates, 195 F. Supp. 2d 751 (E.D. Va. 2002) (appeal pending).

settlement before the other, giving defendants in some jurisdictions possible arguments concerning issue or claim preclusion in the remaining action. While ENRD disagrees with much of the case law restricting federal prosecution in these circumstances, a joint case approach could avoid having to defend against these arguments.

- Legal Issues that May Affect the Decision to Participate

  - Claim Preclusion and Issue Preclusion Issues With Separate Actions

    - *Claim and Issue Preclusion.* If the state and United States file separate actions in state and federal court, respectively, concerning the same or similar violations or violations that arise out of the same set of actions by the defendant, the governments risk a finding in some jurisdictions that the first judgment precludes the second and/or that issues litigated in the first action cannot be litigated again in the second.[17/]

    - *Choice of Law.* Another legal consideration that arises when the United States and states pursue separate filings concerns whether state or federal law applies to the preclusion analysis. In the Smithfield case, when faced with an argument in state court that a prior federal action precludes a subsequent state action, the state law of preclusion (*e.g.*, res judicata) and any applicable state statutory provisions governed. Conversely, as the United States has argued in Harmon and other cases, when faced with an argument in federal court that a subsequent federal action is precluded by a prior state action, the federal law of preclusion applies.[18/] Although there may be little or no meaningful difference in state and federal preclusion law in many cases, in some, the differences can be critical (*e.g.*, some states give preclusive effect only to prior matters that are fully adjudicated, while others give preclusive effect to

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[17/] *See* State Water Control Board v. Smithfield Foods, Inc., 261 Va. 209, 542 S.E.2d 766 (2001) (state water violations barred after similar federal claims were adjudicated by EPA in federal court, despite federal government's *amicus curiae* brief supporting Virginia's authority to enforce such violations); Harmon Industries, Inc. v. Browner, 191 F.3d 894 (8th Cir. 1999) (federal RCRA civil penalties claims barred where state settled claims involving the same conduct under state hazardous waste law). Although there is substantial case law to support the view that the Smithfield and Harmon decisions are incorrect, *see, e.g.*, U.S. v. Power Engineering, 303 F. 3d 1232 (10th Cir. 2002) (rejecting application of Harmon and giving deference to EPA's interpretation of RCRA that statute permits overfiling); U.S. v. Elias, 269 F.3d 1003 (9th Cir. 2001) *cert. denied,* 154 L. Ed. 2d 14, 123 S. Ct. 72 (2002) (rejecting application of Harmon to RCRA criminal action and criticizing Harmon for its marked lack of Chevron deference to EPA); United States v. Murphy Oil, 143 F. Supp. 2d 1054, 1087-92 (W.D. Wis. 2001)(same); United States v. LTV Steel Co., 118 F. Supp. 827 (N.D. Ohio 2000)(same), there is nevertheless a risk of claim preclusion in some jurisdictions if the sovereigns file separate actions.

[18/] *See* n. 17, *supra* and discussion of federal law of preclusion in Power Engineering, 303 F.3d 1232, 1240-41 (10 Cir. 2002).

judgments that occur as a result of settlement). Therefore, it is important to make sure research is based upon the correct body of preclusion law.

- *Preclusion through the "Laboring Oar" Test.* When the sovereigns are pursuing separate enforcement actions (i.e., not as co-plaintiffs), be aware that in some extreme situations a second action will be precluded pursuant to the "laboring oar" test outlined in Montana v. U.S., 440 U.S. 147 (1979).[19/] In Montana, the federal government was held bound to prior state tax litigation in which it was not a party where the federal government required the filing of the state lawsuit, reviewed and approved the state complaint, paid the state's attorneys fees and costs, and directed the filing and later abandonment of an appeal. As such, the federal government had a "laboring oar" in the state litigation and was precluded from bringing its own action later. Therefore, while state-federal cooperation is strongly encouraged throughout these guidelines, the governments should keep in mind that taking a "laboring oar" in the other's case within the meaning of Montana could result in preclusion.

- Citing Appropriate Law in Pleadings

  - Take care to cite to the appropriate state and/or federal provisions in the pleadings and state clearly which provisions are being enforced using state law authorities and which are being enforced pursuant to federal authorities. Federal judges may misinterpret references to state laws or regulations as meaning that state law alone is being enforced, when in fact the federal government must cite to state laws and regulations when they replace the federal regulations as the applicable body of law in states that are authorized to implement and enforce federal environmental statutes. *See, e.g.,* U.S. v. Elias, 269 F.3d 1003 (9th Cir. 2001), *cert. denied,* 154 L. Ed. 2d 14, 123 S. Ct. 72 (2002).

- 11th Amendment/Waiver of Immunity

  - The parties should evaluate the possibility that the state's involvement in the lawsuit could be viewed in some jurisdictions as a waiver of its rights under the Eleventh Amendment. The state should carefully research the law in the relevant federal circuit, as the circuits vary widely in how they have

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[19/] *See also* United States v. ITT Raynior, Inc., 627 F.2d 996 (9th Cir. 1980); Murphy 143 F. Supp. 1091-92 (EPA's close monitoring of prior state court litigation does not satisfy "laboring oar" test).

addressed this issue.[20]

- Inability of State to File in Federal Court: In State of Wisconsin, Department of Natural Resources v. Murphy Oil USA, Inc., Civ. No. C0408-C (W.D. Wis. Oct. 27, 2000), the court held that, under Wisconsin law, the Attorney General's powers are strictly limited to those that are prescribed by state law, and that the statute giving rise to the Attorney General's authority did not authorize the Attorney General to enforce any *federal* environmental laws. Thus, according to the Murphy court, the Wisconsin Attorney General can only enforce state laws, over which the court said it had no jurisdiction. (The opinion does not discuss whether the federal court would have had supplemental jurisdiction over related state law claims.) Although this case may be anomalous, as to Wisconsin and any other states whose attorneys general have similarly limited powers, a court may follow the Murphy decision and find them barred from filing suit in federal court or find that they need to satisfy certain procedural pre-requisites. If the state files a separate action in state court, then the governments need to be aware of the preclusion cases in some jurisdictions as discussed above.

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[20] In Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), the Supreme Court, overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), held that the Commerce Clause does not grant Congress power to abrogate the states' Eleventh Amendment immunity from suit in federal court. However, some cases say that when a state voluntarily seeks affirmative relief in the federal courts, it may be deemed to have "consented" to federal jurisdiction or, alternatively, to have "waived" its Eleventh Amendment sovereign immunity from suit. Clark v. Barnard, 108 U.S. 436,447-48 (1883); Gunter v. Atlantic Coast Line Railroad Company, 200 U.S. 273, 284, 292 (1906). The federal courts are divided on the scope of any such "consent" or "waiver" that might arise from the act of filing a complaint. *See* College Savings Bank v. Florida Prepaid, 131 F. 3d 353, 365 (3rd Cir. 1997).

Courts that interpret such waiver narrowly hold that the state only consents to allow the court to determine the state's entitlement to the relief being sought, and not to any counterclaim by a private party against the state. State of Alaska v. O/S Lynn Kendall, 310 F. Supp. 433, 434-35 (D. Alaska 1970). At the other extreme are those courts that find a broad waiver that would allow any counterclaim to be asserted against the state. This has been found where the state alleges state causes of action in the complaint. State of New Jersey Dept. of Envtl. Protection and Energy v. Gloucester EMS, 923 F. Supp. 651, 661. (D.N.J. 1995). Between these extremes are those courts that would allow a counterclaim that arises out of the "same transaction or occurrence" as the state's complaint. United States v. Iron Mountain Mines, Inc., 952 F. Supp. 673, 678. (E.D. Cal. 1996). Even among these courts, however, there is no consensus, because the term "same transaction or occurrence" has been interpreted broadly by some courts, and narrowly by others. Some courts only allow a counterclaim based on the same transaction or occurrence if it is purely defensive in nature and merely seeks recoupment against the state. United States v. Montrose, 788 F. Supp. 1485, 1493 (C.D. Cal. 1992); Woelffer v. Happy States of America, Inc., 626 F. Supp. 499, 502 (N.D. Ill 1985). Other courts would allow an affirmative recovery against the state so long as the counterclaim meets the "same transaction or occurrence" test. Burgess v. M/V Tamano, 382 F. Supp. 351, 356 (D. Me. 1974).

This issue can arise, for example, when a state files a complaint under CERCLA for recovery of response costs when it also is a potentially responsible party (PRP). Private PRPs have argued that the state's suit waives its 11th amendment sovereign immunity, thus also subjecting it to suit in federal court. *See, e.g.*, Montrose, Gloucester EMS, and Iron Mountain Mines, cited above.

D. INFORMATION SHARING

In order to bring civil cases jointly, the United States and states need to share confidential and privileged information. As discussed below, a number of steps must be taken to facilitate a free exchange of confidential information while protecting confidences and privileges. However, the parties should be aware that, even if these steps are taken, there are certain risks that shared information cannot be protected.

- Discuss Information Sharing Early
  - Discuss issues relating to the exchange of confidential and privileged information at the beginning of the cooperative effort, before documents are exchanged, in order to avoid waiving critical privileges or disclosing information or documents that are restricted from disclosure by federal or state statute.[21]
  - Common law privileges that should be protected while working together include the attorney-client privilege, the work product privilege and the deliberative process privilege. State and federal interpretations of the deliberate process privilege and means of invoking it may differ. Federal case law tends to construe the privilege more narrowly than some state law. Accordingly, the state and federal attorneys should discuss the reach of this privilege (as well as their understandings concerning the other privileges) early so that privileged documents and discussions can best be protected.
  - It is important that client agencies understand the scope of the various privileges to prevent the inadvertent disclosure of documents or information during discovery or in responding to FOIA requests. This is particularly important where the privilege is held by their federal or state counterpart, as may be the case with documents subject to the deliberative process privilege.
- Sharing Information Between Plaintiffs – the Common Interest Privilege
  - Asserting that the state and the United States have a common interest in an enforcement action may protect the exchange of privileged information from discovery (especially if this assertion is embodied in a confidentiality agreement -- *see below).*
  - In general, privileged communications can be shared with parties that have a

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[21] For example, federal regulations published at 40 C.F.R. Part 2, subpart B, and the Trade Secrets Act, 18 U.S.C. § 1905, restrict the disclosure of documents that have been claimed as confidential business information and/or trade secrets. The Privacy Act, 5 U.S.C. § 552a, restricts the disclosure of such information as an individual's social security number, medical history, education, financial transactions, and employment history.

common legal strategy without waiving confidentiality. This privilege (actually a doctrine of nonwaiver) provides that the confidential sharing of privileged information between persons who have a "common interest" does not waive the underlying privilege. [22]

- The party asserting the privilege must show that: (1) the communications were made in the course of a joint effort, (2) the statements were designed to further that effort, and (3) the underlying privilege has not been waived.[23]

- Before exchanging documents, check the law in your jurisdiction. Currently, the First, Second, Third, Fifth, Sixth, Seventh and Tenth Circuits have had occasion to adopt the common interest privilege only for attorney client material.[24] The Fourth, Eighth and D.C. Circuits have had occasion to adopt the common interest privilege for both attorney work product and attorney client communications.[25] It appears that there is increasing recognition of this principle, and research on the issue did not turn up caselaw rejecting the validity of the doctrine.

- Sharing Information Between Plaintiffs – Confidentiality Agreements

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[22] *See* United States v. Evans, 113 F.3d 1457, 1467 (7th Cir. 1997); Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A., 160 F.R.D. 437, 446-48 (S.D.N.Y. 1995). *See also* United States v. Schwimmer, 892 F.2d 237, 243 (2d. Cir.1989), *aff'd,* 924 F.2d 443 (1991), *cert. denied,* 502 U.S. 810 (1991); Transmirra Products Corp. v. Monsanto Chemical Co., 26 F.R.D. 572, 578 (S.D.N.Y. 1960).

[23] *See* In re Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 126 (3d Cir. 1986), (*citing* In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F. Supp. 381 (S.D.N.Y. 1975)).

[24] *See* Cavallaro v. United States, 284 F.3d 236, 250 (1st Cir. 2002); Federal Deposit Insurance Corporation v. Ogden Corporation, 202 F.3d 454, 461-462 (1st Cir. 2000); United States v. Weissman, 195 F.3d 96, 99-100 (2nd Cir. 1999); United States v. Moscony, 927 F.2d 742, 753 (3rd Cir. 1991); In re Grand Jury Proceedings Jean Auclair, 961 F.2d 65, 69-71 (5th Cir. 1992); In re Santa Fe Intern. Corp., 272 F.2d 705, 711-12 (5th Cir. 2001); Reed v. Baxter, 134 F.3d 351, 357-358 (6th Cir. 1998); United States v. Evans, 113 F.3d 1457, 1467-1468 (7th Cir. 1997); In re Grand Jury Proceedings, 156 F.3d 1038, 1042-43 (10th Cir. 1998). *See also* United States v. Aramony, 88 F.3d 1369, 1392 (4th Cir. 1996);

[25] *See* In re Grand Jury Subpoenas, 902 F.2d 244, 249 (4th Cir. 1990); In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910, 922-23 (8th Cir. 1997); In re Bruce R. Lindsey, 158 F.3d 1263, 1282-83 (D.C. Cir. 1998). *See also* Brill v. Walt Disney Pictures and Television, 2000 WL 1770657 (9th Cir. 2000)(unpublished opinion). Numerous district courts within the other circuits have also recognized the application of the common interest rule to the work product doctrine. Transmirra Products Corp. v. Monsanto Chemical Co., 26 F.R.D. 572, 578 (S.D.N.Y. 1960); U.S. Information Systems, Inc. v. Intern. Brotherhood of Electrical Workers Local Union 2002 WL 31296430 at *3 (S.D.N.Y. Oct. 11, 2002); Katz v. AT&T Corp., 191 F.R.D. 433,437 (E.D. Pa. 2000); LaSalle Bank Nat. Ass'n v. Lehman Bros. Holdings, Inc., 209 F.R.D. 112, 116 (D. Md. 2002); Bowman v. Brush Wellman, Inc., 2001 WL 1339003 at *3 (N.D. Ill. 2001); Power Mosfet Technologies v. Siemens AG, 206 F.R.D. 422, 424 (E.D. Tex. 2000); Filanowski v. Wal-mart Stores, Inc., 1999 WL 33117058 at *1 (D.Me. 1999); In re Imperial Corp. v. Shields, 179 F.R.D. 286, 289 (S.D. Cal. 1998).

- We strongly recommend that parties to a joint prosecution enter into a confidentiality agreement.[26] As a general rule, the agreement should include: a clear statement that the United States and the state(s) have a common interest in the enforcement of particular claims; a clear statement that the parties are exchanging information in anticipation of litigation; a definition and description of the documents that are covered; a specific agreement not to reveal any information to third parties; a non-waiver provision; a dissolution provision that continues to protect the confidentiality of documents exchanged under the agreement; a notice provision which states that any party subpoenaed to produce documents under the agreement must notify the other parties to the agreement; and references to relevant FOIA and state public records provisions that may protect confidential information from public information requests.[27]

- Freedom of Information Act Requests

  - Asserting a common interest privilege may protect certain documents from being discoverable in a litigation context. However, this protection does not necessarily extend to privileged information that is requested pursuant to FOIA[28] or state public record statutes.[29]

  - FOIA mandates disclosure of records held by federal agencies unless the records fall within one of nine FOIA exemptions. These exemptions are narrowly construed because the goal of FOIA is to provide broad public access.[30]

  - FOIA Exemptions 5 and 7 are usually asserted for privileged material exchanged

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[26] Attached as Appendix F are sample confidentiality agreements and orders that have been used in the past and that may aid in drafting an agreement or order. However, as discussed *infra*, these samples may have to be modified based on the relevant state public records law(s). Keep in mind, however, that no confidentiality agreement can prevent disclosure of documents or materials that would otherwise be subject to disclosure under FOIA or state laws.

[27] In addition to the confidentiality agreement, it is advisable also to mark documents, where appropriate, as "prepared in anticipation of litigation," "attorney work product," or, where the appropriate determination has been made, "deliberative process."

[28] 5 U.S.C. § 552.

[29] Appendix G contains a list of citations for state public record statutes.

[30] *See* Department of Interior v. Klamath Water Users Protective Assn., 532 U.S. 1, 8 (2001) (citing FBI v. Abramson, 456 U.S. 615, 630 (1982)).

between the United States and a State during joint enforcement.[31]

- Exemption 5 under FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Exemption 5 has been construed to allow withholding documents that a private party could not discover in litigation with the agency.[32] Therefore, generally, attorney-client privilege and work product and deliberative process material are exempt from disclosure under Exemption 5. Typically, courts have also construed the inter- or intra-agency language to include documents exchanged between government agencies and "outside consultants."[33] Note also that certain courts have held that documents can be protected from FOIA disclosure if the state agency with whom the documents have been shared is the "functional equivalent" of a sister agency.[34]

- Exemption 7 protects information compiled for law enforcement purposes, if access to such information could reasonably interfere with the enforcement proceedings. Exemption 7 has been applied not only to information compiled for criminal enforcement purposes, but also to that compiled for civil enforcement purposes. *See* Abraham & Rose, P.L.C. v. U.S., 36 F. Supp. 2d 955, 956 (E.D. Mich. 1998); General Electric Co. v. EPA, 18 F. Supp. 2d 138, 143 (D. Mass. 1998). To show that disclosure of documents could interfere with enforcement proceedings, the government must demonstrate: (1) the law enforcement proceedings are pending or prospective, and (2) release of the information could reasonably be expected to result in an

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[31] Courts commonly refer to the nine FOIA exemptions, 5 U.S.C. 552(b)(1)-(9), as Exemptions 1-9. Other exemptions that may be relevant here include Exemptions 4 (commercial information), 6 (privacy information), and 9 (geological and geophysical information and data concerning wells). Appendix H contains the text of the FOIA exemptions.

[32] Klamath, 532 U.S. at 8 (*citing* United States v. Weber Aircraft Corp., 465 U.S. 792, 799-800 (1984)); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 148 (1975).

[33] *See* Klamath, 532 U.S. at 9-10, (2001) (*citing* Hoover v. Department of Interior, 611 F.2d 1132 (CA 5 1980); Lead Industries Assn. v. OSHA, 610 F.2d 70 (2d Cir. 1979)). Note, however, that the Klamath Court found that this exemption did not apply to communications between Indian Tribes and the Department of Interior. Klamath, 532 U.S. at 11-14. The Court held that Exemption 5 did not apply to documents that the Tribes forwarded to the Department because they were not "intra-agency" documents. The Court reasoned that the Tribes' documents represented the Tribes' self interest, whereas consultants are wholly uninterested parties who operate like employees of the government. As such, documents that contained attorney work product, and that were subject to a confidentiality agreement, were not exempt from public disclosure under Exemption 5. For a synopsis and DOJ analysis of this important case, go to: http://www.usdoj.gov/oip/foiapost/2001foiapost5.htm.

[34] *See* Ryan v. Department of Justice, 617 F.2d 781, 790-91 (D.C. Cir. 1980); General Electric Co. v. EPA, 18 F. Supp. 2d 138, 142 (D. Mass.1998).

articulable harm. *See* Wichlacz v. Department of Interior, 938 F. Supp. 325, 331 (E.D. Va. 1996), *aff'd,* 114 F.3d 1178 (4th Cir. 1997). This exemption will protect documents so long as potential harm to the enforcement proceeding is shown.[35]

- State Public Records Laws

  - State public access laws should be reviewed carefully before exchanging documents. Each state has a public record statute that requires the disclosure of information upon public request, and many have open meeting laws that may also dictate disclosure of certain information.[36] These statutes vary considerably from state to state and may provide less protection than FOIA to documents that are exchanged.[37]

  - In multi-state cases, every state public record statute should be reviewed and each state should have its own confidentiality agreement that is tailored to include the state public record statute.

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[35] On October 12, 2001, Attorney General Ashcroft transmitted a memorandum that urges all federal agencies to carefully take into account national security, law enforcement, sensitive business information, personal privacy, and other considerations when making disclosure determinations under FOIA. The memo further assures agencies that DOJ will defend decisions to withhold documents in whole or in part under FOIA "unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records." The October 12th memorandum expressly supersedes the DOJ's October 4, 1993 FOIA memorandum by Attorney General Reno and represents a shift in the presumption that the 1993 Reno memorandum established in favor of "strongly encouraging" the discretionary release of documents that "might technically or arguably fall within an exemption" to FOIA, except "where the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption." For a discussion of and text of this memorandum,*see* http://www.usdoj.gov/oip/foiapost/2001foiapost19.htm.

[36] A list of state public record laws is attached as Appendix G.

[37] *See, e.g.,* ARCO Environmental Remediation, L.L.C., v. Department of Health and Environmental Quality of the State of Montana, 213 F.3d 1108 (9th Cir. 2000). In ARCO, the United States and Montana entered into a confidentiality agreement to pursue enforcement claims. Under the agreement, drafts of an Ecological Risk Assessment with comments were exchanged. ARCO requested access to these documents pursuant to Montana's public record law and open meeting law. Access was refused relying on the confidentiality agreement. ARCO then sued in state court under the public access laws. The Montana state court held that by agreeing to the 1993 stipulation, ARCO had waived any right to seek documents relating to the Clark Fork Basin sites, including the sought-after drafts. However, this case may have questionable precedential value for other cases, especially under other state laws, because it is based on the wording of the Montana Constitution and the ARCO stipulations. ARCO Environmental Remediation, LLC v. Department of Environmental Quality of the State of Montanta Cause No. BDV-1999-374, slip op. (Mo. 1st Judicial Dist. Ct., Lewis and Clark County Oct. 23, 2002). *See also, e.g.,* State ex rel. Cincinnati Enquirer v. Dupuis, 98 Ohio St.3d 126 (2002) (Court required city to produce DOJ settlement proposal finding, *inter alia*, that document was a "public record" under Ohio Public Records Act, was not exempt under various exemptions, was outside the scope of a confidentiality order in another case, and was not protected from release by a confidentiality agreement).

- If the state public records law provides broad access, the risk of disclosure must be discussed and evaluated. This may impede exchanging certain sensitive or critical documents, but it is not fatal to working jointly through a carefully crafted confidentiality agreement. For example, if necessary, a workable approach could be to have state team members review documents at EPA's offices. As another example, under some state laws, disclosure can be made to state Attorney General team members, but not to agency personnel. Additionally, appropriately redacted documents may be exchanged.

- Sharing Information With Defendants:

  - Although it is often critical to share sensitive information with opposing counsel, such as during settlement negotiations, attorneys should consider the possible implications of FOIA and state public record laws before exchanging documents with opposing counsel.[38/]

  - FOIA does not provide a specific exemption for information exchanged between adversaries during settlement negotiations. Some courts have been reluctant to extend FOIA Exemption 5 to include settlement communications. *See* Madison County, N.Y. v. Department of Justice, 641 F.2d 1036, 1040 (1st Cir. 1981); Center for Auto Supply v. Department of Justice, 576 F. Supp. 739, 746 (D.D.C. 1983); Center for International Environmental Law v. Office of the United States Trade Representative, 237 F.Supp.2d 17 (DC DC 2002).

  - The Supreme Court's recent Klamath decision may further affect the plaintiffs' ability to protect such shared documents. As a recent DOJ FOIA bulletin about Klamath notes, the Klamath decision "surely casts some doubt on the viability of protecting certain settlement-related records [that have been shared with an opposing party] on the basis of the 'settlement privilege' under exemption 5."[39/] Of course, the United States can still maintain that documents shared with opposing counsel during settlement discussions are protected by FOIA Exemption 7.

  - A minority of courts have recognized a "settlement privilege" that protects settlement communications from civil discovery requirements. *See* Allen County, Ohio v. Reilly Industries, Inc., 197 F.R.D. 352, 353 (N.D. Ohio 2000); Cook v. Yellow Freight System, Inc., 132 F.R.D. 548 (E.D. Cal. 1990); Bottaro v. Hatton Associates, 96 F.R.D. 158 (E.D.N.Y. 1982). These cases rely on the "well established privilege" set forth in Federal Rule of Evidence 408. The relevance test under FRCP

[38/] Similar issues can also arise, for example, if a third part is allowed to intervene in the action and propounds discovery concerning settlement documents that have been exchanges.

[39/] *See* weblink to this memo at footnote 31 above.

26(b) may also provide a basis for withholding from discovery. *See* Morse/Diesel Inc. v. Trinity Industries, Inc., 142 F.R.D. 80, 84 (S.D.N.Y. 1992) ("particularized showing" under Rule 26 required to obtain settlement documents).

- "Three-way" confidentiality agreements: Where the focus of the parties from the outset is on settlement, plaintiffs may wish to include defendants in a confidentiality agreement. (Appendix F also contains a model "three-way" confidentiality agreement.) However, although this can protect the parties to the order from later claiming that the exchange of documents has waived privileges as among themselves, it may not protect against disclosure to a third party under federal or state freedom of information laws.

- For additional protection, attorneys may consider using court alternative dispute resolution (ADR) programs (including potential involvement of a third party neutral) to gain confidentiality protections under the local court rules and the ADR Act. See 28 U.S.C. § 652(d). *See also* ENRD Policy on Use of Mediators for ADR and Model Mediation Process Agreement, ENRD Dir. No. 00-19 (attached as Appendix I).

- Confidential Business Information (CBI)

  - Federal regulations generally prevent government agencies from disclosing documents claimed as CBI. EPA regulations mandate how federal agencies handle CBI. *See* 40 C.F.R. Part 2, subpart B.[40/]

  - Generally, the United States *cannot* disclose CBI to states that are engaged in a joint enforcement action. However, the regulations do provide certain contexts that may permit the United States to divulge CBI to its state partner.

  - EPA regulations allow a business to consent to the release of its CBI. 40 C.F.R. § 2.209(f). Therefore, it may be wise to consider including the defendant company as a party to a confidentiality agreement to facilitate sharing of CBI. The confidentiality agreement can state that the company agrees to waive the confidentiality of its CBI with regard to the parties to the agreement. This way the United States can freely exchange any CBI with a signatory state under the agreement.

  - As another example, EPA's CBI regulations state that information requested under certain environmental statutes, even if it contains CBI, may be disclosed to a state agency if the state has been delegated duties or responsibilities under that act, or regulations that implement the act under certain conditions. *See, e.g.,* 40 C.F.R. §§ 2.301(h)(3)(concerning the Clean Air Act), 2.302(h)(3)(concerning the Clean Water

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[40/] Note that "Exemption 4" of FOIA also provides protection to trade secrets or confidential commercial information. 5 U.S.C. § 552(b)(4).

Act), 2.305(h)(3)(concerning the Resource Conservation Recovery Act).

APPENDICES

NOTE: To obtain an electronic version of an appendix, please contact ENRD attorneys Leslie Allen (202-514-4114; leslie.allen@usdoj.gov) or Jim Payne (202-514-3473); james.payne2@usdoj.gov) or Bob Kinney, NAAG Chief Counsel, Environment Project (202-326-6058; rkinney@naag.org)

Appendix A

ENRD Section Descriptions, Organizational Charts, and Contacts

Environment and Natural Resources Division

- ENRD Home Page
- About ENRD
- Current Topics
- Legal Documents
- Press Releases
- Proposed Consent Decrees
- Frequently Asked Questions
- FOIA
- Employment
- DOJ Home Page

HISTORY

On November 16, 1909, Attorney General George Wickersham signed a two-page order creating "The Public Lands Division" of the Department of Justice. He assigned all cases concerning "enforcement of the Public Land Law" including Indian rights cases to the new Division, and transferred a staff of nine -- six attorneys and three stenographers -- to carry out those responsibilities. As the nation grew and developed, so did the responsibilities of the Division and its name changed to the "Environment and Natural Resources Division" to better reflect those responsibilities. The Division, which is organized into nine sections, has offices in Washington, D.C., Anchorage, Denver, Sacramento, San Francisco and Seattle, and a staff of over 600 people. It currently has over 10,000 active cases, and has represented virtually every federal agency in courts all over the United States and its territories and possessions.

RESPONSIBILITIES

Nearly one-half of the Division's lawyers bring cases against those who violate the nation's civil and criminal pollution-control laws. Others defend environmental challenges to government programs and activities and represent the United States in matters concerning the stewardship of the nation's natural resources and public lands. The Division is also responsible for the acquisition of real property by eminent domain for the federal government, and brings and defends cases under the wildlife protection laws. In addition, the Division litigates cases concerning Indian rights and claims. Many of the cases handled by the Division are precedent-setting and challenge and hone the skills of the Division's dedicated corps of lawyers.

Prevention and Clean Up of Pollution One of the Division's primary responsibilities is to enforce federal civil and criminal environmental laws such as:

- the Clean Air Act to reduce air pollution
- the Clean Water Act to reduce water pollution and protect wetlands
- the Resource Conservation and Recovery Act to ensure that hazardous wastes are properly stored, transported, and disposed
- the Comprehensive Environmental Response, Compensation and Liability Act (or "Superfund"), which requires those who are responsible for hazardous waste sites to pay for their clean up
- the Safe Drinking Water Act and the Lead Hazard Reduction Act,

The main federal agencies that the Division represents in this area are the United States Environmental Protection Agency and the United States Army Corps of Engineers. The Division Sections that carry out this work are the **Environmental Crimes Section**, the **Environmental Enforcement Section**, and the **Environmental Defense Section**.

Challenges to Federal Programs and Activities. The Division's cases frequently involve allegations that a federal program or action violates Constitutional provisions or environmental statutes. Examples include regulatory takings cases, in which the plaintiff claims he or she has been deprived of property without just compensation by a federal program or activity, or suits alleging that a federal agency has failed to comply with the National Environmental Policy Act (NEPA) by, for instance, failing to issue an environmental impact statement. Both takings and NEPA cases can affect vital federal programs such as the Nation's defense capabilities (including military preparedness exercises, weapons programs, and military research), the NASA space program, recombinant DNA research, and beneficial recreational opportunities such as the rails-to-trails program. These cases also involve challenges to regulations promulgated to implement the Nation's anti-pollution statutes, such as the Clean Air Act and the Clean Water Act, or activities at federal facilities that are claimed to violate such statutes. The **General Litigation Section** and the **Environmental Defense Section** share responsibility for handling these cases. The Division's main clients in this area include the Department of Defense and the United States Environmental Protection Agency.

Stewardship of Public Lands and Natural Resources. A substantial portion of the Division's work includes litigation under a plethora of statutes related to the management of public lands and associated natural and cultural resources. All varieties of public lands are affected by the Division's litigation docket, ranging from entire ecosystems, such as the Nation's most significant sub-tropical wetlands (the Everglades) and the Nation's largest rain forest (the Tongass), to individual rangelands or wildlife refuges. Examples also include original actions before the Supreme Court to address interstate boundary and water allocation issues, suits over management decisions affecting economic, recreational and religious uses of the National Parks and National Forests, and actions to recover royalties and revenues from exploitation of natural resources. The Division represents all the land management agencies of the United States including, for instance, the Forest Service, the Park Service, the Bureau of Land Management, the Army Corps of Engineers, the Fish and Wildlife Service, the Department of Transportation, and the Department of Defense. The **General Litigation Section** is primarily responsible for these cases.

Property Acquisition for Federal Needs. Another significant portion of the Division's caseload consists of non-discretionary eminent domain litigation. This important work, undertaken with Congressional direction or authority, involves the acquisition of land for important national projects such as National Parks, the construction of federal buildings including courthouses, and for national security related purposes. The Division's **Land Acquisition Section** is responsible for this litigation.

Wildlife Protection The Division's **Wildlife and Marine Resources Section** is responsible for civil cases arising under the fish and wildlife conservation laws, including violations of the Endangered Species Act, which protects endangered and threatened animals and plants, and the

Marine Mammal Protection Act, which protects animals such as whales, seals and dolphins. The section also brings criminal prosecutions under these laws against, for example, people who are found smuggling wildlife and plants into the United States. There is a major worldwide black market for some endangered species or products made from them. The main federal agencies that the Division represents in this area are the Fish and Wildlife Service and the National Marine Fisheries Service.

Indian Rights and Claims The Division's **Indian Resources Section** also litigates on behalf of federal agencies when they are protecting the rights and resources of federally recognized Indian tribes and their members. This includes both defending against challenges to statutes and agency action designed to protect tribal interests and bringing suits on behalf of federal agencies to protect tribal rights and natural resources. The rights and resources typically at issue include water rights, the ability to acquire reservation land, hunting and fishing rights, and other natural resources. The Division's **General Litigation Section** also defends claims asserted by Indian tribes against the United States on grounds that the United States has failed to live up to its obligations to the tribes. The main federal agency that the Division represents in connection with this work is the Bureau of Indian Affairs.

Other Matters The Division also handles the initial appeals of all cases litigated by Division attorneys in the trial courts, and work closely with the Office of the Solicitor General on Division cases that reach the Supreme Court. These cases are handled by the **Appellate Section**. In addition, the Division is responsible for, among other things, supporting the work of the Assistant Attorney General in the development of policy concerning the enforcement of the nation's environmental laws, reviewing and commenting on legislation that would effect the work of the Division, reviewing litigation filed under the various citizen suit provisions in the environmental laws, and evaluating and responding to requests that the United States participate as an amicus in various matters. Most of this work is handled by the **Policy, Legislation and Special Litigation Section**.

SECTIONS (Organization Chart)

ENVIRONMENTAL CRIMES SECTION

The Environmental Crimes Section is responsible for prosecuting individuals and corporations that have violated laws designed to protect the environment. It is at the forefront in changing corporate and public awareness to recognize that environmental violations are serious infractions that transgress basic interests and values. The Section works closely with criminal investigators for the Environmental Protection Agency (EPA) and the Federal Bureau of Investigation (FBI) in dealing with violations of such statutes as the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act (RCRA), and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA, more commonly known as Superfund), among other statutes.

ENVIRONMENTAL ENFORCEMENT SECTION

The Environmental Enforcement Section is one of the largest litigating sections in the Department and includes nearly one-half of the Division's lawyers. The Section is responsible for

bringing civil judicial actions under most federal laws enacted to protect public health and the environment from the adverse effects of pollution, such as the Clean Air Act, Clean Water Act, Safe Drinking Water Act, Oil Pollution Act, RCRA and the Superfund law (CERCLA). The breadth of the Section's practice is extensive and challenging. It includes cases of national scope, such as cases against multiple members of an identified industry, to obtain broad compliance with the environmental laws. Through its enforcement of the Superfund law, the Section seeks to compel responsible parties either to clean up hazardous waste sites or to reimburse the United States for the cost of cleanup, thereby ensuring that they, and not the public, bear the burden of paying for cleanup. The Superfund law is also the basis of the Section's actions to recover damages for injury to natural resources that are under the trusteeship of federal agencies.

ENVIRONMENTAL DEFENSE SECTION

The Environmental Defense Section (EDS) prosecutes and defends a broad range of civil environmental litigation involving the United States, and periodically provides legal counsel on compliance matters to agencies in the federal government. With about 60 attorneys, EDS is the only section in the Environment Division that routinely handles cases in both federal circuit and district courts, and occasionally in state courts. EDS defends rules issued by EPA and other agencies under the pollution control laws, prosecutes those who destroy wetlands in violation of the Clean Water Act, and defends the United States against challenges to its cleanup and compliance actions at Superfund sites, federally-owned facilities and private sites. Examples of the section's work include defending EPA's more stringent clean air standards for heavy-duty trucks and diesel fuel, its safety standards for the Yucca Mountain nuclear waste repository in Nevada, and its administrative enforcement actions, such as a major clean air enforcement action against coal-fired power plants; defending challenges to the United States' implementation of international treaties involving the elimination of chemical weapons; and civil enforcement actions under the Clean Water Act that have restored or created hundreds of acres of wetlands and recovered millions of dollars in penalties.

GENERAL LITIGATION SECTION

The General Litigation Section, which is comprised of more than 65 lawyers working in five teams, manages litigation under a diverse and extensive group of more than eighty statutes and treaties out of Washington, D.C. and three field offices. The Section's docket includes cases in virtually every U.S. district court of the Nation, its territories and possessions, the U.S. Court of Federal Claims, and in state courts. The subject matters include federal land, resource and ecosystem management decisions challenged under a wide variety of federal environmental statutes and involving lands as large as the Forest Service's 191 million acre inventory to tracts as small as individual wildlife refuges; vital national security programs involving military preparedness, nuclear materials management, and weapons system research; billions of dollars in constitutional claims of Fifth Amendment takings covering a broad spectrum of federal regulatory and physical activities; Indian gaming and the United States' trust responsibility toward Tribes; a panoply of cultural resource matters including cases related to historic buildings, repatriation of ancient human remains or salvage of shipwrecks (even the R.M.S. Titanic); preserving federal water rights and prosecuting water rights adjudications; and ensuring proper mineral royalty payments to the Treasury). The Section's clients have included virtually every

major Federal executive branch agency. Attorneys coming to the Section will have the opportunity to develop their own challenging and varied case load.

WILDLIFE AND MARINE RESOURCES SECTION

The Wildlife and Marine Resources Section litigates both civil and criminal cases under federal wildlife laws and laws concerning the protection of marine fish and mammals. Prosecutions focus on smugglers and black market dealers in protected wildlife. Civil litigation, particularly under the Endangered Species Act and the Migratory Bird Treaty Act, often pits the needs of protected species against pressures for development by both the Federal Government and private enterprise.

INDIAN RESOURCES SECTION

The Indian Resources Section represents the United States in its trust capacity for Indian tribes and their members. These suits include establishing water rights, establishing and protecting hunting and fishing rights, collecting damages for trespass on Indian lands, and establishing reservation boundaries and rights to land. The Indian Resources Section also devotes approximately half of its efforts toward defending federal statutes, programs, and decisions intended to benefit Indians and Tribes. The litigation is of vital interest to the Indians and helps to fulfill an important responsibility of the federal government.

LAND ACQUISITION SECTION

The Land Acquisition Section is responsible for acquiring land through condemnation proceedings, for use by the Federal Government for purposes ranging from establishing public parks to creating missile sites. The Land Acquisition Section is also responsible for reviewing and approving title to lands acquired by direct purchase for the same purposes. The legal and factual issues involved are often complex and can include the power of the United States to condemn under specific acts of Congress, ascertainment of the market value of property, applicability of zoning regulations, and problems related to subdivisions, capitalization of income, and the admissibility of evidence.

POLICY, LEGISLATION AND SPECIAL LITIGATION SECTION

The Policy, Legislation and Special Litigation Section staff advises and assists the Assistant Attorney General on environmental legal and policy questions, particularly those that affect multiple sections in the Division. Working with the Office of Legislative Affairs, it coordinates the Division's response to legislative proposals and Congressional requests, prepares for appearances of Division witnesses before Congressional committees, and drafts legislative proposals in connection with the Division's work, for example, the implementation of litigation settlements. Other duties include responding to congressional and other correspondence, and FOIA requests as well as a myriad of citizens' requests, and serving as the Division's ethics officer and counselor, alternative dispute resolution counselor, and liaison with state and local governments. Attorneys in the Section also litigate amicus cases, undertake other special litigation projects, and coordinate the Division's involvement in international legal matters.

APPELLATE SECTION

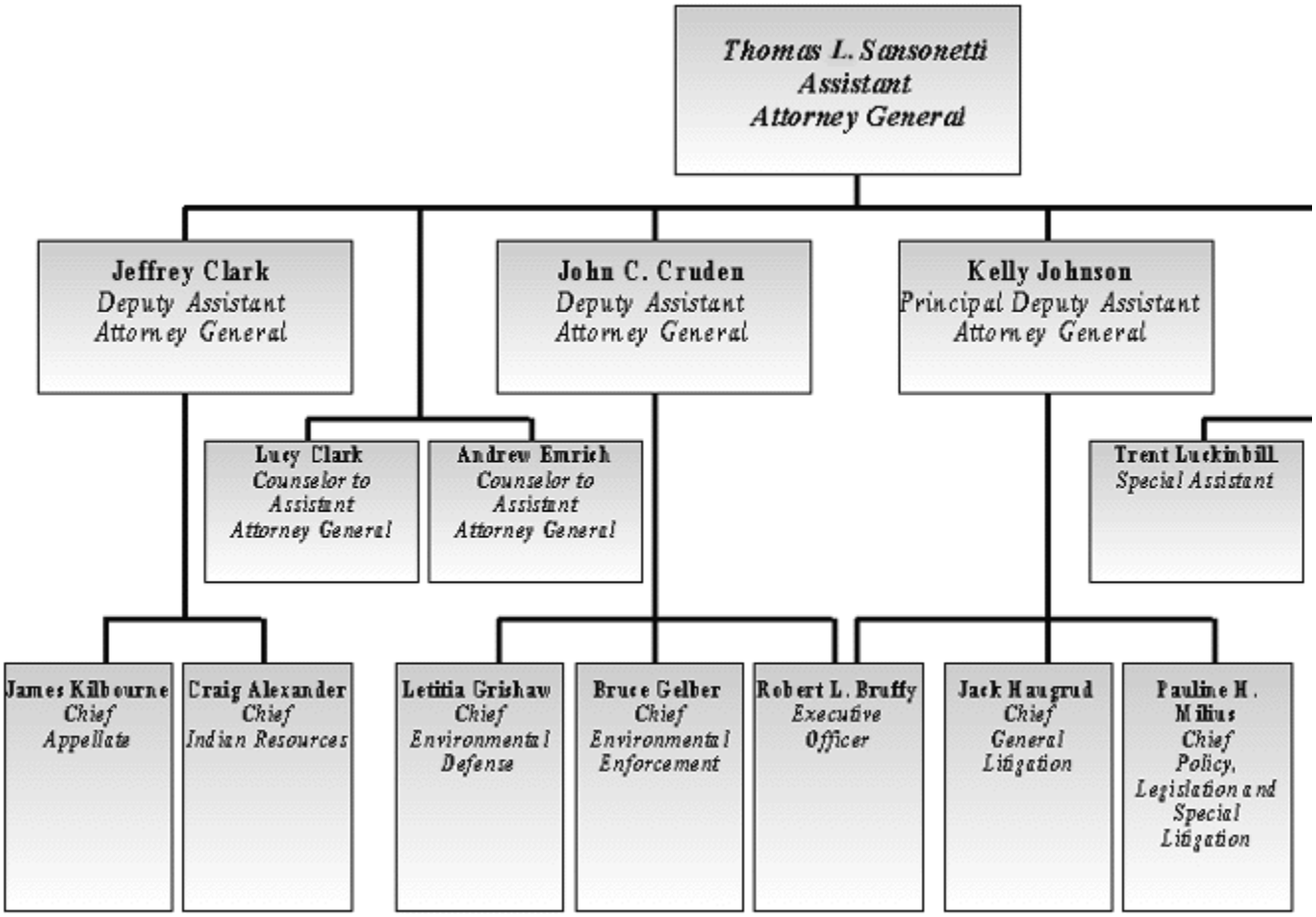
The Appellate Section's work involves cases arising under the more than 200 statutes for which the Division has litigation responsibility. Section attorneys brief and argue appeals in all thirteen federal circuit courts of appeals around the country, as well as in state courts of appeals and supreme courts. The Section handles appeals in all cases tried in the lower courts by any of the sections within the Division; it also oversees or handles directly appeals in cases within the Division's jurisdiction that were tried in the lower courts by U.S. Attorney Offices. The Section's responsibility also includes petitions for review filed directly in the courts of appeals in environmental or natural resource cases involving the Department of Energy, the Federal Aviation Administration, the Federal Energy Regulatory Commission, the Nuclear Regulatory Commission, and the Surface Transportation Board. The Section works closely with Justice's Office of the Solicitor General, making recommendations whether to appeal adverse district court decisions or to seek Supreme Court review of adverse appellate decisions. The Section writes draft briefs for the Solicitor General in Division cases before the Supreme Court.

EXECUTIVE OFFICE

The Executive Office provides management and administrative support to the Environment and Natural Resources Division, including financial management, human resources, automation, security, and litigation support. The Executive Office takes full advantage of cutting-edge technology to provide sophisticated automation facilities for its employees, including legal research, word processing, Internet access, electronic mail, litigation support, case management and timekeeping systems, to help the Division's attorneys continue to achieve exceptional litigation results for the United States.

Text only version

U.S. Department of Justice
Environment and Natural Resources Division



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doj/jmd/ls/jen

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North Carolina	**Allen Jernigan** Senior Deputy Attorney General Office of the Attorney General of North Carolina PO Box 629 Raleigh, NC 27602-0629	Tel: 919-716-6600 Fax: 919-716-6767 E-mail: ajern@mail.jus.state.nc.us

State	Contact and Address	Telephone, Fax, and E-mail Address
North Dakota	**Lyle Witham** Assistant Attorney General ND Department of Health 500 North 9th Street Bismarck, ND 58501-4509	Tel: 701-328-3640 Fax: 701-328-4300 E-mail: lwitham@state.nd.us
Ohio	**Dale Vitale** Assistant Attorney General Office of the Attorney General of Ohio State Office Tower 30 East Broad Street Columbus, OH 43215-3428	Tel: 614-466-2766 Fax: 614-644-1926 E-mail: dvitale@ag.state.oh.us
Oklahoma	**Kelly H. Burch** Chief, Environmental Protection Unit Office of the Attorney General of Oklahoma 4545 North Lincoln Boulevard Room 260 Oklahoma City, OK 73105	Tel: 405-522-4417 Fax: 405-528-1867 E-mail: kelly.hunter@oag.state.ok.us
Oregon	**Richard Whitman** Chief Counsel, Civil Enforcement Office of the Attorney General of Oregon Robertson Building 1162 Court Street, N.E. Salem, OR 97310	Tel: 503-378-4409 Fax: 503-378-3802 E-mail: richard.whitman@doj.state.or.us
Pennsylvania	**Glenn A. Parno** Chief Deputy Attorney General Office of the Attorney General of Pennsylvania Environmental Crimes Section 16th Floor, Strawberry Square Harrisburg, PA 17120	Tel: 717-787-1340 Fax: 717-705-7247 E-mail: gparno@attorneygeneral.gov
South Dakota	**Roxanne Giedd** Assistant Attorney General Office of the Attorney General of South Dakota 500 East Capitol Pierre, SD 57501-5070	Tel: 605-773-3215 Fax: 605-773-4106 E-mail: roxg@atg.state.sd.us
Tennessee	**Barry Turner** Deputy Attorney General Office of the Attorney General of Tennessee 425 Fifth Avenue North 2nd Floor, Cordell Hull Building Nashville, TN 32743-0386	Tel: 615-532-2586 Fax: 615-741-8724 E-mail: Barry.Turner@state.tn.us
Texas	**Karen W. Kornell** Division Chief Office of the Attorney General of Texas 300 West 15th Street, 10th Floor P.O. Box 12548, Capitol Station Austin, TX 78711-2548	Tel: 512-463-2012 Fax: 512-320-0911 E-mail: karen.kornell@oag.state.tx.us

State	Contact and Address	Telephone, Fax, and E-mail Address
Utah	**Fred Nelson** Assistant Attorney General Office of the Attorney General of Utah Heber Wells Building 160 E 300 Street, 5th Floor Salt Lake City, UT 84114	Tel: 801-366-0285 Fax: 801-366-0292 E-mail: fnelson@utah.gov
Vermont	**Wendy Morgan** Chief, Public Protection Office of the Attorney General of Vermont 109 State Street Montpelier, VT 05609-1001	Tel: 802-828-5507 Fax: 802-828-2154 E-mail: wmorgan@atg.state.vt.us
Virginia	**Roger L. Chaffe** Office of the Attorney General of Virginia 900 East Main Street 3rd Floor Richmond, VA 23219	Tel: 804-786-3880 Fax: 804-786-0034 E-mail: rchaffe@oag.state.va.us
Washington	**David K. Mears** Senior Assistant Attorney General Office of the Attorney General of Washington P.O. Box 40117 2425 Bristol Court SW, 2nd Floor Olympia, WA 98504-0117	Tel: 360-586-6743 Fax: 360-586-6760 E-mail: DavidM4@atg.wa.gov
Wisconsin	**JoAnne Kloppenburg** Director, Environmental Protection Unit Office of the Attorney General of Wisconsin 123 West Washington Avenue P.O. Box 7857 Madison, WI 53707-7857	Tel: 608-266-9227 Fax: 608-266-2250 E-mail: kloppenburgjf@doj.state.wi.us
Wyoming	**Thomas Davidson** Deputy Attorney General Office of the Attorney General of Wyoming 123 State Capitol Building Cheyenne, WY 82002	Tel: 307-777-6946 Fax: 307-777-3542 E-mail: tdavid@missc.state.wy.us

@PFDesktop\::ODMA/PCDOCS/ENV_ENFORCEMENT/597707/1

Appendix C

Sample Case Contacts Chart

DOJ Doc. No. 593773

Case Name Contacts List

[Affiliation]	Contact Name	Contact Address	Contact Telephone No.	Contact email
DOJ ENRD EES	[atty name]	Regular mail: U.S. Department of Justice Environmental Enforcement Section P.O. Box 7611 Washington, D.C. 20044-7611 Fed Ex: U.S. Department of Justice Environmental Enforcement Section 1425 New York Avenue, N.W. Washington, D.C. 20005	202-514-xxxx	xx.xxxx@usdoj.gov
[State] AG				
U.S. EPA ORC				

Appendix D

Sample Case Management Plans

DOJ Doc. No. 595993

_____
Date

PRELIMINARY CASE PLAN

Case Name: _____ **DJ#** _____

Statutes: _____ **EPA Region** _____

Nature of Violation/Claims: _____ **District:** _____

Team:

DOJ: _____ EPA/Reg. Program _____

DOJ/AUSA: _____ EPA/HQ Program _____

EPA/RC: _____ State Rep. _____

EPA/OECM: _____

		Name
A.	**Referral**	
	1. General Oversight	_____
	2. Drafting	_____
	3. Research of Important Issues	
	a. (list, e.g., Imminent/Substantial Endangerment)	_____
	4. Amassing Cost Documentation	_____
B.	**Document Management**	_____
C.	**Litigation**	
	1. General Responsibilities	
	a. General Oversight and Case Management (Review of all briefs and other filings; consultation on litigation negotiations strategy)	_____
	b. Principal Contact with Defendant on Litigation Matters	_____

c. Principal Contact with Defendant Regarding Settlement _____

d. Development of Technical Proof (list needs for liability and remedy case; assign by need) _____

e. Selection and Development of Experts (list needs) _____

f. Development of Liability Case (list elements; assign by element) _____

g. Development of Remedy Case (breakdown; assign by element where possible) _____

2. Complaint

Task	Name	Date
a. Drafting	_____	_____
b. Briefing Package	_____	_____

3. Press Relations _____

4. Preliminary Discovery Plan

Task	Name	Date
a. Offensive Discovery		
1) First Set of Interrogatories	_____	_____
2) First Set of Production Requests	_____	_____
3) First Set of Requests for Admissions	_____	_____
4) Foreseeable Offensive Depositions (List each deponent and assign by deponent)	_____	_____
b. Defensive Discovery		
1) Responses to Written Discovery	_____	_____
2) Depositions	To be assigned as they are noticed	

5. Preliminary Motions Plan

a. Motion to Strike Jury Trial Demand (If necessary)	_____	_____
b. Motion to Strike Defenses	_____	_____

c. Motion for Partial Summary Judgment _____ _____

d. Motion for Case Management Order _____ _____
(If appropriate)

e. Analyze Answer/Motion to Dismiss _____ _____

f. Response to Motion to Dismiss _____ _____

6. Preliminary Settlement Plan
(List near-term events and task relating
to settlement; assign as appropriate _____ _____

DOJ No. 596179

Privileged and FOIA Exempt

DRAFT CASE MANAGEMENT PLAN

(As of Feb. 1, 2003)

OBJECTIVE OF CASE AND OVERALL STRATEGY

Our complaint seeks recovery of removal costs for the [ ] Site (Site). Through [date], EPA had incurred costs of $_____, mostly for removal of [hazardous substance] contaminated soil. The primary objective of this action is to recover, through judgment or settlement, as much of the costs as possible. A secondary objective (though it might be earlier achieved) is to procure a favorable ruling from the court on CERCLA's _____ defense.

Prima Facie Case

The defendants have in earlier litigation (and in communications to EPA) conceded most of elements of a *prima facie* case. Specifically, they have admitted in the past that: (1) [hazardous substance] was spilled and otherwise released and (2) defendants owned the property, both at the time of EPA's removal and at the time [hazardous substance] was being used (and spilled). In the defendants' lawsuit against the State of [ ] (State), the defendants admitted these facts, and the court so found after trial. While the defendants might appeal that decision on other grounds (see below), they probably will admit these facts in our case as well.

This leaves us with the need to prove (1) that the releases of [hazardous substance] caused the incurrence of response costs, and (2) the amount of EPA and DOJ costs. As for causation, the case is pretty straightforward, since the removal directly addressed [hazardous substance] contamination. Proving the amount of costs will probably present the same issues that usually arise (e.g., indirect costs, completeness/accuracy of documentation, etc...).

Affirmative Defenses

Defendants allege two affirmative defenses: (1) liability is defeated because U.S. cannot recover response costs resulting from _____ _____; and (2) some or all of EPA's costs were inconsistent with the NCP. Defendants allege following as actions inconsistent with the NCP: (1) EPA did not timely perform and review a removal site evaluation to determine whether removal action was appropriate; (2) EPA did not conduct the removal in a manner that to the extent practicable would contribute to the efficient performance of any anticipated long-term remedial action with respect to the release; and (3) EPA did not ensure an orderly transition from removal to remedial response activities.

Our responses to the first affirmative defense: (1) _____ _____. (2) _____ _____.

Possible responses costs defense: (1)_____; (2) _____ ___.

Counterclaims

Defendants filed three counterclaims. The first two basically track the two affirmative defenses -- they say that because of those defenses, if the US recovers, the defendants are entitled to recoupment. On the merits, these two counterclaims can be dealt with in the same way as the defenses. In addition, we can point out that the United States has not waived its sovereign immunity for the sort of recoupment claims alleged.

The third counterclaim alleges that if Defendants are liable for CERCLA response costs, they are entitled to recoupment from the US under the [State Superfund Law]. Our probable responses are (1) the US has not waived sovereign immunity, and (2) [factual defense].

SHORT-TERM GOALS

- File a motion(s) for summary judgment on liability in September.
- Serve and file reply to (or motion to dismiss?) counterclaims in October.
- Get "initial disclosure" document production from defts.
- Draft and serve initial discovery.

SHORT TERM TO DO

Action	Lead	Complete By
Get "initial disclosure" production from defendants.	[____]	__/__/02
Review EPA Site File for Privilege, prepare Privilege Log, and circulate to team	[____]	__/__/02
Review DOJ File for Privilege, prepare Privilege Log, and circulate to team	[____]	__/__/02
Coordinate to make sure draft privilege logs are consistent	[____]	__/__/02
Complete Privilege Log	[____]	__/__/02
Team to Internally Identify Fact Witnesses:		__/__/02
– Potential EPA and EPA contractor fact witnesses, including addressed, phone numbers, etc....	[____]	
– Decision to conduct removal		
– Performance of removal.		
– Costs		
– Other Fact Witnesses	[____]	
– Operation of Site		
Interview EPA employees and contractors identified as potential witnesses, and start witness binders	[____]	__/__/02
Comment on Draft Interrogatories and Document Requests.	**Team**	__/__/02
Finalize and serve Interrogatories and Document Requests	[____]	__/__/02
Serve and File Response to Counterclaims	[____]	__/__/02
Identify and/or hire expert witnesses:		__/__/02
– Selection/performance of Removal	[____]	
– EPA in-house		
– Do we need outside consultant?		
– Hydrogeologist		
– Use and handling of pesticides	[____]	
– Costs	[____]	
– EPA in-house		
– DOJ in-house		
– Outside Accountant	[____]	**Done __/__/02**

"DONE" LIST

File Complaint	[____]	Done __/__/02
Send Request for Waiver of Service	[____]	Done __/__/02
Prepare draft Case Management Plan and circulate to team.	[____]	Done __/__/02
Research affirmative defense and draft memo to Team	[____]	Done __/__/02
Comment on draft Case Management Plan.	[____]	Done __/__/02
File Defendants' Waivers of Service of Summons	[____]	Done __/__/02
Revise Case Management Plan and re-circulate to team.	[____]	Done __/__/02
Provide to Lead Atty Draft Motion for Partial Summary Judgment on Liability and Affirmative Defense Issues	[____]	Done __/__/02
Confer with defendant's counsel per court order and Rule 26(f)	[____]	Done __/__/02
Serve Court's Minute Orders on Defendants' Counsel	[____]	Done __/__/02
Circulate Draft Initial Disclosure to team.	[____]	Done __/__/02
Circulate Draft Combined Status Report to team.	[____]	Done __/__/02
Serve Initial Disclosure on defendants	[____]	Done __/__/02
Provide Draft Combined Status Report to defendants' counsel	[____]	Done __/__/02
Coordinate with defendants' counsel re Combined Status Report	[____]	Done __/__/02
FedEx Combined Status Report to Court for filing (Due 8/23/02)	[____]	Done __/__/02
Contact defendants' counsel to arrange for production of "Initial Disclosure" documents (both United States' defendants' documents).	[____]	__/__/02
Draft Interrogatories and Document Requests, and circulate to team.	[____]	Done __/__/02
Submit Joint Proposed Order for Bifurcation	[____]	Done __/__/02
File Motion for Partial Summary Judgment on Liability	[____]	Done __/__/02

File Motion to Dismiss Counterclaims	EDS	Done 1 **__/__/02**
Grant Motion for Partial Summary Judgment on Liability	Court	Done __/__/03
Grant Motion to Dismiss Counterclaims	Court	Done __/__/03

ELEMENTS OF PROOF/EVIDENCE OUTLINE

I. Prima Facie Case

1. The Defendants own the facility and owned and operated the facility at the time of disposal of [hazardous substance].

    Ownership:
    - Probably admitted.
    - If not:
        - Findings of state court – certified copy of decision.
        - Certified copy of title documents.
        - Mr. [ ]'s testimony at deposition and trial.

    Operation:
    - Probably admitted.
    - If not:
        - Findings of state court – certified copy of decision.
        - Mr. [ ]'s testimony at deposition and trial.
        - Former employees' testimony at deposition and trial.

    Time of disposal:
    - Probably admitted.
    - If not:
        - Findings of state court – certified copy of decision.
        - Mr. [ ]'s testimony at deposition and trial.
        - Former employees' testimony at deposition and trial.

2. Release or threatened release of [hazardous substance]

    Probably admitted.
    If not:
    - Findings of state court – certified copy of decision.
    - Testimony of Mr. [ ] and former employees.
    - EPA contractor reports.
    - EPA OSC
    - State OSC
    - EPA contractors.
    - Expert?
    - Sampling data
        - Reports
        - Raw data

4. [hazardous substance] is a hazardous substance.

CFR listings.

5. Releases of [hazardous substance] caused the incurrence of response costs.

Response Costs Were Incurred
- Cost Documents
- Testimony and summaries of EPA/DOJ employees.
- Testimony and summaries of outside accountant.

Caused by Releases of [hazardous substance]
- EPA contractor reports.
- EPA OSC
- State OSC
- EPA contractors.
- Expert?

6. Amount of Response Costs
- Cost Documents
- Testimony and summaries of EPA/DOJ employees.
- Testimony and summaries of outside accountant.

II Rebuttal of Defenses

[Under Construction – See Objectives and Strategy Section, above.]

COURT DEADLINES PHASE 1

Event	Calculation	Date
Send Request for Waiver of Service	Leave lead time to serve summons if Defts don't waive. FRCP 4(d).	**Done**
Defendants' Waiver of Service returned to plaintiff.	30 days after request for waiver of service, plus 3 days for service by mail. FRCP 4(d), 6(e).	**Done**
File Waiver of Service of Summons, or Proof of Service of Summons.	120 days after filing of complaint. FRCP 4(m).	**Done**
Defendants' Answer or Motion filed.	60 days after date of request where service timely waived on request under FRCP 4(d). FRCP 12(a).	**Done**
Conference of Parties per Rule 26(f).	Order (6/4/02) (Docket Entry 2).	**Done**
Discovery may commence.	After conference of parties. FRCP 26(d).	**Passed**
Initial Disclosures pursuant to Rule 26(a).	Order (__/__/2003) (Docket Entry 2).	**Done**
Serve on Defendants Counsel Two Minute Orders.	Per Order, 10 days after receiving notice of appearance.	**Done**
Joint Status Report and Discovery Plan per FRCP 16(c) and Court's Order.	Order, Part II (__/__/2003) (Docket Entry 2). As Scheduled by Court. Local CR 016(a).	**Done**
Submit Joint Proposed Order for Bifurcation	Order (__/__/2003).	**Done**
Serve and File United States' Response to Counterclaims	Per Rule 12(a)(3)(A), 60 days after service of counterclaims, which was __/__/2003. (+ 3 if served by mail).	**Done**
FILE Motion, if any, to join parties.	Bifurcation Order (__/__/2003).	Done
Disclosure of expert testimony per FRCP 26(a)(2).	Bifurcation Order (__/__/2003).	__/__/2003
Last day to SERVE written discovery requests, including RFAs.	In time for responses to be due before discovery completion date. Local Rule CR 016(f).	__/__/2003

COURT DEADLINES PHASE 1

Event	Calculation	Date
Deadline for FILING Motions related to Discovery.	Bifurcation Order	__/__/2003
COMPLETE Discovery.	Bifurcation Order (__/__/2003).	__/__/2003
FILE Dispositive Motions.	Bifurcation Order (__/__/2003).	__/__/2003
HOLD Settlement conference per CR 39.1(c)(2).	Bifurcation Order (__/__/2003).	__/__/2003
FILE United States' Pretrial Statement. MAKE AVAILABLE Exhibits to defendants' counsel.	30 days before Lodging Date for Proposed Pretrial Order. Local CR 016(h).	__/__/2003
Defendants' Pretrial Statement to be FILED.	20 before Lodging Date for Proposed Pretrial Order. Local CR 016(i).	__/__/2003 3
HOLD Mediation per CR 39.1(c)(3).	Bifurcation Order (__/__/2003).	__/__/2003
FILE Motions *In Limine*.	Bifurcation Order (__/__/2003).	__/__/2003
EXCHANGE list of stipulations and objections re opponents' exhibits.	Before Conference of Attorneys. Local CR 016(j).	__/__/2003
HOLD Conference of Attorneys.	10 days before Lodging Date. Local CR 016(k).	__/__/2003
FILE Letter of compliance per CR 39.1.	Bifurcation Order (__/__/2003) (9/20/03, which is a Saturday).	__/__/2003
Latest date on which Motions *In Limine* may be NOTED on Motion Calendar.	2nd Friday after 9/15/03, per Bifurcation Order (__/__/2003).	__/__/2003
LODGE Proposed Pretrial Order	Bifurcation Order (__/__/2003).	__/__/2003
FINAL PRETRIAL CONFERENCE	Bifurcation Order (__/__/2003).	__/__/2003 8:30 am Courtroom A
FILE Trial Briefs	Bifurcation Order (__/__/2003.	__/__/2003
Eight day BENCH TRIAL	Bifurcation Order (__/__/2003); Minute Order (__/__/2003).	__/__/2003 9:30 am

COURT DEADLINES PHASE 1

Event	Calculation	Date

COURT DEADLINES PHASE 2

Event	Calculation	Date
Phase 2 Discovery may commence.	Bifurcation Order (__/__/2004) (30 days after final judgment as to Phase 1, or 1/1/04, whichever is earlier).	__/__/2004
Disclosure of expert testimony per FRCP 26(a)(2).	Bifurcation Order (__/__/2004.	__/__/2004
Last day to SERVE written discovery requests, including RFAs.	In time for responses to be due before discovery completion date. Local Rule CR 016(f).	__/__/2004
Deadline for FILING Motions related to Discovery.	Bifurcation Order (__/__/2004)	__/__/2004
COMPLETE Discovery.	Bifurcation Order (__/__/2004).	__/__/2004
FILE Dispositive Motions.	Bifurcation Order (__/__/2004).	__/__/2004
HOLD Settlement conference per CR 39.1(c)(2).	Bifurcation Order (__/__/2004).	__/__/2004
FILE Motions *In Limine*.	Bifurcation Order (__/__/2004.	__/__/2004
HOLD Mediation per CR 39.1(c)(3).	Bifurcation Order (__/__/2004).	__/__/2004
FILE Letter of compliance per CR 39.1.	Bifurcation Order (__/__/2004).	__/__/2004
Latest date on which Motions *In Limine* may be NOTED on Motion Calendar.	2nd Friday after __/__/2004, per Bifurcation Order (__/__/2004).	__/__/2004
FILE United States' Pretrial Statement. MAKE AVAILABLE Exhibits to defendants' counsel.	30 days before Lodging Date for Proposed Pretrial Order. Local CR 016(h).	__/__/2004
Defendants' Pretrial Statement to be FILED.	20 before Lodging Date for Proposed Pretrial Order. Local CR 016(i) (20 days is __/__/2004, which is a Saturday).	__/__/2004
EXCHANGE list of stipulations and objections re opponents' exhibits.	Before Conference of Attorneys. Local CR 016(j).	__/__/2004
HOLD Conference of Attorneys.	10 days before Lodging Date. Local CR 016(k).	__/__/2004

COURT DEADLINES PHASE 2

Event	Calculation	Date
LODGE Proposed Pretrial Order	Bifurcation Order (__/__/2004) (__/__/2004, which is a Sunday).	__/__/2004
FINAL PRETRIAL CONFERENCE	Bifurcation Order (__/__/2004). This is the Friday before Labor Day.	__/__/2004 8:30 am Courtroom A
FILE Trial Briefs	Bifurcation Order (__/__/2004). Might want to check with court on this one, which has Trial Briefs filed more than 2 months before trial. And before pretrial stuff that should precede it.	__/__/2004
Four day BENCH TRIAL	Bifurcation Order (__/__/2004).	__/__/2004 9:30 am

STATUS NOTES

__/__/02	[ ] signed complaint EO Letter Sent
__/__/02	Complaint filed, filed EES Attorney's Motion for Conditional Admission
__/__/02	Scheduling Order re Initial Disclosures
__/__/02	Order re Discovery
__/__/02	US requested Waiver of Service from Defendants
__/__/02	Defendants signed waiver of service of Summons. Received at DOJ 6/24/02. Answer or motion due 60 days (+ 3) after request (8/13/02).
__/__/02	Defendants served Amended Answer, Counterclaims, and Third-Party Complaint
__/__/02	Bifurcation and Scheduling Order Entered.
__/__/02	Defendants filed Second Amended Answer, Counterclaims, and Third-Party Complaint
__/__/03	Court granted US Motion for Summary Judgment on Liability.
__/__/03	Court granted US Motion ro Dismiss Counterclaims

CONTACT LIST

Judge/Clerks/Courthouse contacts

DOJ Attorneys
Names/Addresses/Phone/email

EPA Attorneys and Key Program Personnel Names/Addresses/Phone/email

State Personnel Name/Addresses/Phone/Email

Defendants' contacts

SERVICE LIST

. . .

COURT LOCATION, ETC . . . .

address, phone, hours, directions, parking info

. . .

Appendix E

Sample Proof Charts

DOJ Doc. No. 593826

PROOF CHART

ELEMENT	DOCUMENT	WITNESS	EXPERT
LIABILITY			
Count I: counting bypass violations	Bypass Reports and summary chart from S.J. motion Large chart of violations	EPA person who wrote the guidance on filling out DMRs EPA program person?	
Count II: counting NPDES violations	DMRs and summary chart from S.J. motion Large chart of violations	EPA person who wrote the guidance on filling out DMRs EPA program person?	
Count III: Failure to Properly Dispose of Sludge	NPDES permits Monthly Sludge Reports Summary of sludge reports and comparison of proper sludge removal	[ ]	Engineer to confirm [ ] analysis?

Count IV: Failure to Properly Operate and Maintain Facilities	NPDES permits sludge removal records annual wasteload management reports Corrective Action Plans [ ] inspection reports Complaints to [ ] DMRs Bypass Reports PH contracting reports on repairs made	[ ]	Engineer
Count V: Failure to Monitor and Report	Falsified DMRs Documents proving faulty metering on bypasses	???	???
<u>PENALTIES</u>			

Seriousness of the Violation	Chart of DMR violations and % exceedances Chart of Bypass violations [ ] complaints on drinking water intake [State] Fish and Boat reports? Criminal convictions on falsifying DMRs and sludge removal	EPA program person [ ]	Pipes
Economic Benefit	sewer rates in comparable communities delayed capital expenditure — cost of preliminary injunction work		[economics expert]
History of Non-compliance	DMR violations prior to 1986 Bypassing prior to 1986	EPA program person [State] program person	
Good Faith Efforts - cash cow theory	sewerage revenue sewerage expenditures	[ ]	[economics expert]

Good Faith Efforts - poor management theory	see proofs on count 4		
Good Faith Efforts - who profited?		[ ]	
Economic Impact of the Penalty on the Violator	[ ] annual reports Comparison with other muni sewerage charges		[economics expert]
Other Matters as Justice May require			
<u>Injunctive Relief</u>			
Unauthorized Overflow Monitoring and Reporting		[ ]	Engineer?
Equalization Tank Usage Monitoring and Reporting		[ ]	Engineer?
Manhole Inspections and Reporting		[ ]	Engineer?
Reporting of New Taps		[ ]	Engineer?
Reporting of Operation and Maintenance and Capital Costs		[ ]	Engineer?
Reporting of Pump Station Alarms		[ ]	Engineer?

Collection and Treatment System Corrections		[ ]	Engineer?

Appendix F

Sample Confidentiality Agreements and Order

DOJ Doc. No. 533722

CONFIDENTIALITY AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE STATE OF _____ REGARDING CLAIMS AT Insert Company Name

1. This agreement reflects the mutual understanding between the State of _____ ("the State") and the United States with respect to privileges that may be asserted in potential civil enforcement actions, whether administrative or judicial, arising from violations of federal and state law at the _____ ("the Company").

2. The United States and the State share close and common interests in the enforcement of federal and state environmental laws at the Insert Company Name. The United States and the State accordingly agree that the sharing of information by their employees, consultants, agents and counsel will further their common enforcement goals.

3. Specifically, the United States and the State have been consulting with one another in anticipation of a potential enforcement action relating to Insert Company Name for violations of state and federal laws, and expect consultation to continue throughout the enforcement process.

4. The United States and the State expect that this consultation may lead to a joint prosecution of at least some of the claims against Insert Company Name.

5. The United States and the State recognize and agree that all written and oral communications related to any investigations regarding violations at Insert Company Name, litigation and settlement strategy related to any such violations, or any other matters related to potential judicial or administrative enforcement actions against Insert Company Name are being made in anticipation of litigation.

6. The State and the United States (including the United States Environmental Protection Agency) do not intend through their consultations, either before or after the initiation of litigation, to waive any privileges, such as, but not limited to, attorney-client and work product privileges, which would otherwise attach to any information, documents, or communications shared among our respective agencies. The State and the United States specifically intend that all such privileges shall be preserved, and that privileged information shall be protected from disclosure to Insert Company Name or to any third party, except with respect to disclosures agreed by both the United States and the State and disclosures which are otherwise mandated pursuant to State or federal statutes.

7. The State and the United States further agree to consult with each other and notify each other in writing before producing any documents relating to the Insert Company Name whether such production is made voluntarily, in response to any discovery request, or pursuant to any other law or regulation.

8. The State and the United States agree and acknowledge that the common interest privilege and

confidentiality established by this agreement is held jointly by both parties and that neither the State nor the United States is authorized to unilaterally waive the privilege with respect to any information or documents shared pursuant to this Agreement.

9. The State and the United States shall each take all necessary and appropriate measures to ensure that any person who is granted access to any confidential information or documents shared pursuant to this Agreement is familiar with the terms of this Agreement and complies with such terms as they relate to the duties of such person.

10. The State and the United States agree that any information or documents shared pursuant to this Agreement may not be subject to public disclosure pursuant to 5 U.S.C.A. § 552 because they are exempt pursuant to 5 U.S.C.A. 552 (b)(2);(b)(4);(b)(5); and/or (b)(7) and **Insert Applicable State Public Information Citations Here.**

11. The State and the United States agree that if documents and communications are exchanged that are otherwise privileged, immune from disclosure or subject to another legal claim of confidentiality, the party sending such documents shall identify the sender and stamp or otherwise mark each document as "privileged and confidential", and the party receiving the documents shall take measures to ensure that the documents and communications remain confidential, including, but not limited to: (a) maintaining such documents in separate files, and; (b) restricting access to privileged documents and information to the receiving party's attorneys or other legal or technical staff or consultants.

12. The confidentiality obligations established by this Agreement shall remain in full force and effect, without regard to whether the Agreement is terminated pursuant to Paragraph 13 and without regard to whether the Claims are terminated by final judgment or settlement.

13. Either the United States or the State may terminate this agreement subject to Paragraph 12, by notifying the other party in writing of its intention to withdraw from this Agreement.

14. This Agreement is intended to be executed on separate signature pages.

DOJ Doc. No. 574038

AGREEMENT AMONG THE UNITED STATES, THE STATE OF [ ], [CITIZEN PLAINTIFFS] AND THE CITY OF [ ]

WITH RESPECT TO CONFIDENTIAL SETTLEMENT DISCUSSIONS AND INFORMATION EXCHANGE

WHEREAS, the United States of America, on behalf of and including the United States Environmental Protection Agency, ("the United States") may have civil claims (the "potential claims") against the City of [ ] ("the City") under the Clean Water Act (the "CWA") and the Safe Drinking Water Act (the "Act");

WHEREAS, the State of [ ] ("the State") may also have claims arising under State law from the City's failure to comply with the CWA and the Act;

[Whereas clause re citizen plaintiffs]

WHEREAS, the United States, the State, and the citizen plaintiffs and the City (the "parties") wish to avoid unnecessary litigation and promote opportunities for settlement or compromise of the potential claims prior to the initiation of litigation;

WHEREAS, the parties have already expressed their agreement to keep all matters pertaining to settlement confidential during the course of settlement discussions, including the matters involved in the discussions and the documents prepared and exchanged for purposes of settlement;

WHEREAS, the parties believe that meaningful settlement or compromise discussions will require information exchanges, offers

of settlement or compromise, and other communications;

WHEREAS, the parties wish to provide for appropriate protection covering the confidentiality of such exchanges during the course of such settlement discussions;

WHEREAS, this Agreement is contingent upon a commitment by the Parties to engage in meaningful and good-faith settlement discussions;

IT IS AGREED that:

1. All settlement discussions among the parties, as well as documents prepared for settlement purposes by any of the parties and exchanged by the parties will be kept confidential and not disclosed to third persons by the parties, their elected and appointed officials, representatives, employees, agents or other persons associated with the parties for as long as such good-faith settlement discussions continue.

2. The fact that a party references, discusses, or produces documents or information during settlement negotiations will not render otherwise discoverable documents or information confidential, privileged, nondiscoverable, or inadmissible. If the document is identified by the producing party as "non-discoverable," then the referencing, discussion, or production of such documents or information shall not be considered a waiver of any privilege or an admission that such documents or information are discoverable or admissible. Nothing in this Agreement shall be construed to preclude the parties from using discoverable

documents or information in any future litigation.

3. Nothing in this Agreement shall be so construed to prejudice or limit the right of the United States or the State to take any action pursuant to the CWA or the Act, or any other statute or rule, to enforce the laws of the United States or the State to protect public health, safety, or welfare or the environment.

4. Any unauthorized disclosure of settlement discussions, documents, or information under this Agreement shall not result in a waiver of the confidentiality of such discussions, documents or information. Nothing in this Agreement shall be construed to prejudice or limit the full application of Fed. R. Evid. 408 to settlement or compromise negotiations relating to the potential claims.

5. This Agreement is entered into to facilitate settlement discussions. Should any party to the Agreement choose not to engage in good-faith settlement discussions, then this Agreement shall be voided.

City of [ ]

By:_____

United States of America

By:_____

State of [ ]

By:_____

[Citizen Plaintiffs]

By:_____

DOJ Doc. No. 574040

UNITED STATES DISTRICT COURT
DISTRICT OF [ ]

UNITED STATES OF AMERICA AND THE STATE OF [ ],	:	
Plaintiffs,	:	
[CITIZENS GROUPS],	:	
Plaintiffs/Intervenors,	:	
v.	:	CIVIL ACTION NO.
[ ],	:	
Defendants.	:	

ORDER

The United States; the State of [ ]; the State of [ ]; [Citizen Plaintiffs] filed claims against [Defendants], alleging violations of the federal Clean Water Act. In an effort to promote settlement of these claims, the parties jointly moved the Court to enter a confidentiality order covering certain information exchanged during settlement negotiations. For good cause shown, the motion is granted.

It is ORDERED:

1. This order covers "confidential settlement information," which means any statement, conduct, document, or other information disclosed during settlement negotiations by one party (the "disclosing party") to another party (the "receiving party") that is not otherwise public, discoverable, or available through other legal means. Confidential settlement information includes information disclosed prior to and subsequent to the date of this Order.

2. Confidential settlement information shall not be disclosed to third persons by the parties, their elected and appointed officials, employees, agents, or other persons associated with the parties, except as provided elsewhere in this Order, a subsequent court order, or with consent of the disclosing party.

3. A receiving party may disclose confidential settlement information to another party, unless prohibited by the disclosing party.

4. Disclosing information in settlement negotiations shall not waive any privileges, immunities, or other bases for confidentiality otherwise applying to the information.

5. Nothing in this Order shall be construed to prejudice or limit the right of the United States or the State to take any action to enforce federal or state law, or to protect public health, safety, welfare, or the environment. Further, nothing in this Order shall be construed to conflict with state or federal law.

DATE: _____

_____

UNITED STATES DISTRICT JUDGE

DOJ Doc. No. 574039

AGREEMENT AMONG THE UNITED STATES, THE STATE OF [ ], AND [DEFENDANT]

WITH RESPECT TO SETTLEMENT DISCUSSIONS AND INFORMATION DISCLOSURE

WHEREAS, the United States of America ("the United States"), on behalf of and including the United States Environmental Protection Agency ("EPA"), contends that it has claims ("the claims") against the [Defendant] ("[Defendant]") under [ ], related to [Defendant]'s [facility], located at [ ] ("the facility");

WHEREAS, the States of [ ] ("the State"), contends that it has claims ("the claims") against the Defendant under [ ], related to the facility;

WHEREAS, the United States, the State, and Defendant (collectively, "the parties") wish to avoid unnecessary litigation and discuss settlement of the claims;

WHEREAS, meaningful settlement discussions require the disclosure of documents and other information by and among the parties;

WHEREAS, the parties wish to provide appropriate protection for information disclosed to each other during settlement discussions;

The parties agree as follows:

1. This agreement applies to "confidential settlement information," which means any statement, conduct, document, or other information disclosed, during settlement negotiations regarding the claims, by one party ("the disclosing party") to another party or parties (collectively, "the receiving parties") that is not otherwise a public record, discoverable, or available through other legal means.

2. Confidential settlement information shall not be disclosed to third persons by the parties, their elected and appointed officials, representatives, employees, agents, or other persons associated with the parties, except as provided elsewhere in this agreement or with consent of the disclosing party.

3. In any litigation brought by the United States and/or the State in connection with the claims, the parties will not assert that any privilege has been waived, or any information rendered discoverable or admissible, because information has been disclosed during settlement negotiations.

4. By sharing confidential settlement information, the parties do not intend to waive any privileges otherwise applicable to confidential settlement information as against third parties requesting such information.

[5. Nothing in this agreement shall be construed to prejudice or limit the ability of the State to utilize, in the context of issuance of a [ ] permit to Defendant, information disclosed during settlement negotiations, unless that information was not available to the State through other legal means.]

6. Nothing in this agreement shall be construed to prejudice or limit the right of the United States or the State to take any action to implement or enforce state or federal law, or to protect public health, safety, welfare, or the environment. Further, nothing in this agreement shall be construed to conflict with state or federal law.

7. Any party may terminate its participation in this agreement by thirty days prior written notice to the other parties. However, the provisions of this agreement shall continue to apply to all confidential settlement information exchanged during the pendency of this agreement.

8. The undersigned representative of each of the parties certifies that he or she is fully authorized to enter into the terms and conditions of this agreement and to legally bind such party to all terms and conditions of this document.

9. This agreement may be executed in counterparts, with separate signature pages.

SIGNATURES

[Defendant] consents to the terms and conditions of this agreement by its duly authorized representative on this _____ day of _____, 200x.

[Defendant]

By: _____

The State of [ ] consents to the terms and conditions of this agreement by its duly authorized representative on this _____ day of _____, 200x.

State of [ ]

By: _____

The United States, on behalf of and including the United States Environmental Protection Agency, consents to the terms and conditions of this agreement by its duly authorized representative on this _____day of _____, 200x.

_____

Trial Attorney, Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice

Appendix G

Citations for State Public Record Statutes

State Public Records Laws

State	Description	Statute Reference
Alabama	The Alabama Open Records Law is codified in section 36-12-40 of the Alabama Code. In brief, it states that unless there is a state statute that closes a public record from public view, it is open to public inspection. In *Stone v. Consolidated Publishing Co.*, 404 So. 2d 678 (Ala. 1981), the court created certain exceptions including sensitive personnel records, pending criminal investigations and information received by a public officer in confidence. Statutory exemptions include: Banking records - Sections 5-3A-11 & 5-5A-43 Hospital records (subpoena) - Section 12-21-6 Identity of Medicaid recipients- Section 22-6-9 Reports concerning suspected cases of certain diseases- Sections 22-11A-2, 14 & 22 Tax returns & financial statements- Sections 40-1-33 & 55 Federal grant programs require that certain records or parts of records be kept in confidence. In addition, material which is copyrighted may not be copied without the permission of the copyright owner.	[1] Ala. Code 36-12-40 et. seq. (2001) Section 36-12-41 - the public has a right to a copy of public records. Section 41-13-1 - definition of public records.
Alaska	Alaska's "Public Records Act," provides generally that all records of an agency of state government "are public records and are open to inspection by the public under reasonable rules during regular office hours." A second statute, AS 40.25.120, sets out limited exceptions to the general rule of disclosure. These include AS 40.25.120(a)(4), which provides "records required to be kept confidential by a federal law or regulation or by state law." State law includes statutes, regulations and the Alaska Constitution. It also includes state common law. See *City of Kenai v. Kenai Peninsula Newspapers*, 642	Alaska Stat. 09.25.110 et. seq. (Michie 2001)

	P.2d 1316, 1319 (Alaska 1982). Alaska has two other statutes that address confidentiality in the consumer protection/antitrust context. The first relates to information obtained during an investigation conducted pursuant to our Unfair and Deceptive Trade Practices Act. AS 45.50.521 provides the Attorney General "cannot make public the names of persons under investigation for violations of our CP Act, nor are the records of investigation and intelligence information considered public records available for inspection by the public." The other relates to investigations conducted under our antitrust statute. AS 45.50.592(e) provides that documents produced pursuant to a civil investigatory demand ("CID") may not be produced for inspection and copying except to the person producing the material.	
American Samoa		
Arizona	Arizona's Public Records Law is found at Arizona Revised Statutes Annotated §§ 39-121 et seq. The statute provides that "public records and other matters in the custody of any officer shall be open to inspection by any person at all times during office hours." Access to records must be provided "promptly." Public records include books, papers, maps, photographs, or other documentary materials, including prints or copies of items on film or electronic media. Arizona's case law discusses items that should be withheld, which include records made confidential by statute or records that contain information that would invade a privacy interest and that invasion outweighs the public's right to know. Attorneys' fees may be awarded if the custodian acts arbitrarily, capriciously or in bad faith in refusing to disclose the records.	Ariz. Rev. Stat. 39.121 et. seq. (2001)
Arkansas	The Arkansas Freedom of Information Act (FOIA), codified at A.C.A. § 25-19-101 et seq., covers two broad areas: public records and public meetings. As a general matter, the FOIA controls access to records and meetings of state and local governmental entities, as well as to private bodies supported wholly or partially by public funds. It is construed liberally by the courts in favor of openness. Any citizen of the State of Arkansas may make use of the FOIA to obtain access to records within the act's scope. "Public records" under the act means "writings, recorded sounds, films, tapes,	Ark. Code Ann. 25-19-101 et. seq. (Michie 2001)

	electronic or computer-based information, or data compilations in any medium, required by law to be kept or otherwise kept, and which constitute a record of the performance or lack of performance of official functions…." A.C.A. § 25-19-103 (5) (A). Software is excluded from the definition. Id. at subsection (5) (B). The act recognizes several specific exemptions, and also incorporates by reference exemptions found in other statutes, judicial rules, and court orders. A.C.A.§ 25-19-105.	
California		Cal. Gov't. Code §6250 *et. seq.* (2001)
Colorado	Colorado Open Records Act appears at sections 24-72-101, et seq., C.R.S. (2002). Part 2 of that Act (sections 24-72-201, et seq.) deals with inspection and copying of public records. Part 3 of that Act (sections 24-72-301, et seq.) deals separately with Criminal Justice Records. Grounds for denial of inspection and copying or public records are found at section 24-72-204, C.R.S. (2002), which states, among numerous other grounds for denial, that the custodian may deny the right of inspection of any records or investigatory files compiled for any law enforcement purpose. Section 24-72-204(2)(a)(I).	Colo. Rev. Stat. §24-72-201 et. seq. (2001)
Connecticut	Connecticut's Freedom of Information Act calls for disclosure of public records, while providing a number of important exceptions found in Conn. Gen Stat. sec. 1-210. Of particular relevance is an exemption from disclosure where "any federal law or state statue" prohibits such disclosure. Other exemptions, allow for the confidentiality of trade secrets, commercial or financial information given in confidence, as well as "records pertaining to strategy and negotiations with respect to pending claims or pending litigation..." until the conclusion of the matter. In addition, Conn. Gen Stat. sec. 52-146r protects "all records prepared by [a Conn.] government attorney in furtherance of the rendition of legal advice" to [a Conn.] public agency, and establishes a statutory attorney-client privilege for "confidential communications" between a [Conn.] public agency and a [Conn.] government attorney.	Conn. Gen. Stat. §1-15, 1-18 et. seq. (2001)

	Unlike other jurisdictions, Connecticut has established an administrative agency, the Freedom of Information Commission, that is responsible for the initial adjudication of a dispute over disclosure.	
Delaware		Del. Code Ann. tit. 29 §10001 *et. seq.* (2001)
DC		D.C. Code Ann. §1/15/2021 *et. seq.* (2001)
Florida		Fla. Stat. Ch. 119.01 *et. seq.* (2001)
Georgia		Ga. Code Ann. §50-18-70 *et. seq.* (2001)
Guam		
Hawaii	The Uniform Information Practices Act ("UIPA"), Hawaii Rev. Stat. Chapter 92F, is Hawaii's public records law. Chapter 92F begins with the broad declaration that "...it is the policy of this State that the formation and conduct of public policy - discussions, deliberations, decisions, and action of government agencies shall be conducted as openly as possible." Section 92F-2. This section then lists the UIPA's "underlying purposes and policies", which include promoting "the public interest in disclosure" and enhancing "governmental accountability through a general policy of access to government records." Section 92F-2 (l),(2). Section 92F-11(a) imposes affirmative disclosure responsibilities on state agencies: The mandate for public access to governmental information is subject to exceptions. Relative to law enforcement, there are three applicable exceptions to disclosure. The first allows for the nondisclosure of government records "pertaining to the prosecution or defense of any judicial or quasi-judicial action to which the State or any county is or may be a party, to the extent that such records would not be discoverable." Section 92F-13(2). The second exception is where nondisclosure of government records is necessary because the records, "by their nature, must be confidential in	Haw. Rev. Stat. §92F-11 (2000) For more details, visit http://www.state.hi.us/oip/index.html

	order for the government to avoid the frustration of a legitimate government function." Section 92F-13(3). This exception covers records or information compiled for law enforcement purposes. But note that a determination of whether records or information compiled for law enforcement purposes is protected from disclosure under section 92F-13(3) must generally be made on a case-by-case basis after carefully examining the informational content of the records at issue. Finally, section 92F-13(4) protects against disclosure of government records "which, pursuant to state or federal law including an order of any state or federal court, are protected from disclosure."	
Idaho		Idaho Code 9-337 *et. seq.* (Michie 2000); 5 Ill.Comp. Stat. 140/1 *et. seq.* (2001)
Illinois	Illinois public records law is known as the Illinois' Freedom Of Information Act. It states specifically that "Public bodies shall make public records available for public inspection by, and provide copies of records to, any person who makes a written request therefore unless the records are exempt from disclosure under the Act." The Act requires that a public body respond to a request for information within 7 days. It contains over 36 exemptions, and specifically excludes from disclosure information that is exempted from disclosure by federal and state law, documents protected by attorney-client privilege and records prepared during the course of a criminal investigation.	5 Ill.Comp. Stat. 140/1 *et. seq.* (2001)
Indiana		Ind. Code Ann. §5-14-3-1 *et. seq.* (Michie 2001)
Iowa		Iowa Code §22.1 *et. seq.* (2002)
Kansas		Kan. Stat. Ann. §45-215 *et. seq.* (2001)
Kentucky		Ky. Rev. Stat. Ann. §61.87 *et. seq.*

		(Michie 2001)
Louisiana		La. Rev. Stat. Ann. §44:1x *et. seq.* (West 2002)
Maine		Me. Rev. Stat. Ann. ttl. 1 §401 *et. seq.* (2001)
Mariana Islands		
Maryland	The Maryland statute outlines three basic categories of exceptions to disclosure. First, exceptions in SG 10-615 authorize non-disclosure if a source of law outside the Maryland statute prevents disclosure (state statute, federal statute or regulation or order of court of record). Second, the mandatory exceptions in SG 10-616 and 10-617 impose an affirmative obligation on the custodian to deny inspection for specific classes of records. Third, SG 10-618 allows for discretionary non-disclosure. Many of the exceptions in the Maryland statute parallel those in the federal Freedom of Information Act. For requests to the Antitrust Division, in the Maryland Attorney General office, in addition to the confidentiality afforded to internal documents produced pursuant to CID, to the extent that documents are shared with the federal government, the federal law governing confidentiality governs and non-disclosure is mandatory. Requests are also denied on a discretionary basis. SG 10-618(f) allows Maryland to withhold records of an investigation conducted by the Attorney General into possible violations of state and/or federal law as contrary to the public interest. Also, SG 10-615(l) protects attorney work product from disclosure. Third, confidential financial and commercial information (trade secrets) are protected from disclosure pursuant to SG 10-617(d).	Md. Code Ann. Com. Law I §10-611 *et. seq.* (2001)
Massachusetts	The law in Massachusetts provides for the right of examination and inspection of public records held by a custodian of public records.	Mass. Ann. Laws Ch. 66 §10(b) see also ch. 4 §7 cl. 26 (2002)

	The central purpose of the law is to afford the public broad access to government records. A custodian has a legal duty to provide access to any public record or any segregable part thereof. The law requires access at reasonable times and without unreasonable delay. A custodian may not ask a requester why he/she wants the record or what the requester intends to do with the record once received, nor can that kind of information be taken into consideration when responding to a request. The applicable citations are: Massachusetts General Laws, chapter 66, section 10 , Massachusetts General Laws, chapter 4, section 7, Clause 26	
Michigan		
Minnesota		
Mississippi	The Mississippi Code has a broad public records policy. It provides as follows in § 25-41-5. Official meetings of public bodies: All official meetings of any public body, unless otherwise provided in this chapter or in the Constitutions of the United States of America or the State of Mississippi, are declared to be public meetings and shall be open to the public at all times unless declared an executive session as provided in section 25-41-7. The statute can only be enforced by a private lawsuit requiring an injunction. The legislature is currently discussing adoption of stricter enforcement mechanisms.	Miss. Code Ann. §25-61-1 *et. seq.* (2001)
Missouri		Mo. Rev. Stat. §109.180x *et. seq.* (2001)
Montana		Mont. Code Ann. §2-6-101 (2001)
Nebraska		Neb. Rev. Stat. §84.712.01 (2001)
Nevada		Nev. Rev. Stat. 239 *et. seq.* (2001)§
New Hampshire		N.H. Rev. Stat. Ann. §91-A (2000)
New Jersey	New Jersey's Open Public Records Act (OPRA) went into effect on July 8, 2002. It is based on the policy that all public records shall be made public unless they meet a permitted exception. Government records that meet this	N.J. Stat. Ann. 47:1A-1 *et. seq.* (West 2001) (relies heavily on common law right to access)

	exception include those that fall within the attorney-client privilege, proprietary information such as trade secrets or financial information and certain legislative records.	
New Mexico	New Mexico's law governing access to public records is the Inspection of Public Records Act, NMSA 1978, Sections 14-2-1 to -12. It provides that all persons are entitled to inspect public records of the state. "Public records" is broadly defined to include all records, regardless of form, held by or on behalf of a state or local government public body. All public records are subject to inspection unless otherwise provided in the Act or by another law. Among the records excepted from the right to inspect is information obtained under a civil investigation demand until an action under the state Antitrust Act is filed. NMSA 1978, Section 57-1-5(C). The Inspection of Public Records Act also describes the procedures for appointing records custodians to handle records requests; criteria for making inspection requests, procedures for complying with or denying requests, requirements for copying records and copying charges; procedures for enforcement and civil penalties for noncompliance.	N.M. Stat. Ann. 14-2-1 *et. seq.* (Michie 2001)
New York		N.Y. Pub. Off. Law §84-90 (Consol. 2001)
North Carolina	North Carolina's public records law is set out in Chapter 132, Public Records, of the General Statutes of North Carolina. The law contains several sections dealing with exemptions to the public records rule, including confidential information, § 132-1.2 and confidential communications, § 132-1.1. (a). Confidential communications "shall not be open to public inspection... unless specifically made public by the governmental body receiving such written communications; provided, however, that such written communications and copies thereof shall become public records as defined in G.S. 132-1 three years from the date such communication was received by such public board, council, commission or other governmental body. "	N.C. Gen. Stat. §132-1 *et. seq.* (2000)
North Dakota	The majority of North Dakota's Open Records and Open Meetings Laws can be found in North Dakota Century Code §§ 44-04-17.1 through 44-04-	N.D. Cent. Code §44-04-18 *et. seq.* (2002)

	21.3; however, several other sections throughout the various Titles relate to whether records are open, confidential or exempt. In addition, the Legislature is in session and is considering changes to several statutes relating to open records.	
Ohio	The Public Records Act of the state of Ohio is found in Ohio Rev. Code Section 149.43. The materials gathered in the course of an antitrust investigation pursuant to Chapter 1331 of the Ohio Revised Code fall under the "catch-all" exception to the Public Records Act, Ohio Rev. Code Section 149.43(A)(1)(v). Under the Code, "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in Ohio kept by a nonprofit or for profit entity operating such alternative school pursuant to section 3313.533 of the Revised Code. The Code includes a number of exceptions, including any records whose release is prohibited by state or federal law. The Code also states specific prohibitions to disclosure, the violation of which results in criminal liability (Ohio Rev. Code Section 1331.16, subsections (L) and (M); Section 1331.99). Additionally, Ohio Rev. Code Section 1331.16(N) specifically imposes on public officers and employees a statutory obligation to comply with the Attorney General's office in the course of an investigation.	Ohio Rev. Code Ann. §149.43 (Anderson 2002)
Oklahoma	The Oklahoma Open Records Act is built on the policy that "Except where specific state or federal statutes create a confidential privilege, persons who submit information to public bodies have no right to keep this information from public access nor reasonable expectation that this information will be kept from public access; provided, the person, agency or political subdivision shall at all times bear the burden of establishing such records are protected by such a confidential privilege." 51 O.S. section 24A.2. The Open Records Act, tit. 51 Okla. stat. sections 24A.1- 24A.26, contains several confidential privileges.	Okla. Stat. Tit. 51 §24A.19 (2002)
Oregon	The Oregon Public Records Law establishes a general rule that "every	Or. Rev. Stat. §192.41 *et. seq.* (2001)

	person has a right to inspect any public record of a public body. . . ." ORS 192.420(1). Then the statute lists various exceptions. Some of the exceptions are absolute; some require a balancing between the public's interest in obtaining the records and the need to withhold them from public inspection. If the requestor disputes the application of an exception, the Attorney General makes a ruling. If the requestor disputes the AG's ruling, then the requestor may initiate a lawsuit in a trial court.	
Pennsylvania	Pennsylvania's public record law is known as the "Right To Know Act" and is found at 65 P.S. 66.1, et seq. The statute is applicable to state and municipal government. There are two broad definitions of "Public Record;" documents relating to the release or disbursement of funds, and any minute, order or decision by an agency fixing the rights, privileges, immunities, duties or obligations of any person or group of persons. There are also a number of exceptions, including investigations, personal security, material protected by statute or court decree, and when release would result in the loss of federal funds. The records must be available for inspection, but only to a citizen of the Commonwealth. Recent amendments to the Act establish specific procedures and deadlines that must be followed by agencies in responding to citizen requests for access to public records. New civil and criminal sanctions are also available for non-compliance and bad faith.	65 PA Cons. Stat. §66.1-66.4 (2001)
Puerto Rico		
Rhode Island	Rhode Island's public records law is known as the Access to Public Records Act. It contains 23 exemptions and permits a public body to assess a charge of $15/hour with the first hour free, and $.15 per photocopied page; and requires a public body to respond to a request within 10 business days, which can be extended for an additional 20 business days for "good cause."	R.I. Gen. Laws §38-2-1 *et. seq.* (2001)
South Carolina	The purpose of South Carolina's Freedom of Information Act includes the following requirement: "provisions of this chapter must be construed so as to make it possible for citizens, or their representatives, to learn and report fully the activities of their public	S.C. Code Ann. §30-04-10 *et. seq.* (2001) Definition of Public Body - Section 30-4-20(a) Definition of Public Record -

	officials at a minimum cost or delay to the persons seeking access to public documents or meetings. " The Act specifically excludes from disclosure "matters specifically exempted from disclosure by statute or law." Section 30-4-40(a)(4)	Section 30-4-20(c)
South Dakota	South Dakota's open record law states that if the information is required by law to be maintained, the record is open to public inspection. If the record is one which the government chooses to keep, but is not required by the legislature to be kept, then it is not required to be available to the public for inspection. There are a number of exceptions to this rule e.g. records in a criminal investigation, which must be maintained by law, but are kept sealed and are not open to public inspection.	S.D. Codified Laws §1-27-1&3 (2001)
Tennessee	The main provision in Tennessee's public records act is Tenn. Code Ann. 10-7-503, which makes all state records open for inspection by any citizen of Tennessee "unless otherwise provided by state law." The test for determining whether information is a state record is as follows: whether it was made or received in connection with the transaction of official business by a governmental agency. Confidentiality provisions are found in Tenn. Code Ann. 10-7-504 and the statutes cross-referenced at the end of this statute. This list may be expanded depending on the statutes pertaining to the agency receiving the request, any privilege, court rule or federal law that might apply, and facts and circumstances. The main provision for confidentiality of records in the possession of the Attorney General's Office is Tenn. Code Ann. 10-7-504(a)(5). Information that is obtained during the "official discharge of Attorney General duties" may also have to be disclosed. In an antitrust investigation, documents and testimony are usually obtained pursuant to a C.I.D. This information will remain confidential unless it is used in legal proceedings in which the state is a party. (8-6-407).	Tenn. Code Ann. §10-7-503 *et. seq.* (2001)
Texas	The Texas Public Information Act centers on a legal presumption of openness- all public information is presumed open unless specific procedural steps are taken to withhold the information. Public	Texas Bus. & Com. Code §552 (2002)

	information subject to the Texas law, includes information collected, assembled or maintained by or for a governmental body (as defined by statute) or information that the governmental body owns or has a right of access to. If a governmental body wishes to withhold information it must ask the Attorney General of Texas, as a neutral third party, for a ruling/opinion as to whether or not the information is excepted from required public disclosure under an exception in the Public Information Act or by another statute. http://www.oag.state.tx.us/AG_Publications/pdfs/2002publicinfohb.pdf	
Utah	Utah's FOIA statute is called the "Government Records Access and Management Act," also known as "GRAMA". It is codified in Title 63, Chapter 2, Utah Code Annotated. It provides that "all records are public unless otherwise expressly provided by statute." Records which are not "public" are those which are classified as "private," "controlled," or "protected" under Utah Code Annotated Sections 63-2-301, 63-2-303, and 63-2-304, respectively, or which are subject to certain confidentiality provisions in parts of the statute. Section 63-2-304, defining "protected" records, provides the basis for most of the confidentiality protections available with respect to documents and information obtained in connection with antitrust enforcement. Among other things, it protects records which contain: "trade secrets;" "commercial information" under specified circumstances; records "created or maintained for civil, criminal, or administrative enforcement purposes;" records "provided by the United States or by a governmental entity outside the state [Utah] that are provided with a requirement that they be managed as protected records and with a certification from the providing entity that they would not be subject to public disclosure if retained by the providing entity; and records "that would reveal the contents of settlement negotiations." Section 63-2-206 also provides (subject to a few exceptions) that private, controlled and protected	Utah Code Ann. § 63-2-101 (2000)

	records can be shared with "another governmental entity, a government-managed corporation, a political subdivision, the federal government, or another state" under specified conditions, including a requirement that the receiving entity will be "subject to the same restrictions on disclosure of the record as the originating entity." The statute establishes procedures for requesting access to private, controlled, or protected records. Requests are subject to a review process within the Attorney General's office, and administrative appeals process outside the AGs Office and to appeals to the Courts. In addition, the disclosure of information obtained in connection with antitrust investigations is subject to confidentiality restrictions contained in the Utah Antitrust Act (Utah Code Annotated, Sections 76-19-911 through 76-10-926). In particular, Section 76-10-917 (8) provides that "any procedure, testimony taken, or material produced" in connection with a CID issued by the Attorney General "shall be kept confidential by the attorney general" unless confidentiality is waived, in writing, by the person who gave the information. Statutory exceptions to this restriction allow disclosure without consent of the person providing the information (but with 20 days prior notice of the disclosure to this person required), to any grand jury or to "officers and employees of federal or state law enforcement agencies" who certify to the Attorney General that the information disclosed will be maintained in confidence and used only for official law enforcement purposes.	
Vermont	Vermont's Open Meeting Law is found at 1 V.S.A. Sections 310 through 314. It states that all written or recorded matters produced or acquired in the course of the business of a state agency are public documents. However, the law provides that a number of specifically listed types of documents are not available to the public. The list of types of documents not available to the public includes: documents made confidential by any law, documents which are recognized as	Vt. Stat. Ann. Tit. 1 §315 *et. seq.* (2001)

	being privileged (such as medical records), documents dealing with criminal investigations, tax returns, trade secrets, records relevant to active litigation, records relevant to the negotiation of contracts, and records containing certain types of personal or financial information about individuals.	
Virgin Islands		
Virginia		Va. Code Ann. §2.1-340 *et. seq.* (Michie 2001)
Washington		Wash. Rev. Code §42.17 (2001)
West Virginia		W. Va. Code §29B-1-1 *et. seq.* (2001)
Wyoming		Wyo. Stat. Ann. §16-4-201 *et. seq.* (Michie 2001)

Appendix H

Freedom of Information Act Exemptions

FREEDOM OF INFORMATION ACT, 5 U.S.C. § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

. . .

(b) This section does not apply to matters that are--
(1) (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;
(2) related solely to the internal personnel rules and practices of an agency;
(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;
(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;
(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual;
(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or
(9) geological and geophysical information and data, including maps, concerning wells.

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made.

Appendix I

ENRD Policy on Use of Mediators for ADR and Model Mediation Process Agreement

ENVIRONMENT AND NATURAL RESOURCES DIVISION
DIRECTIVE No. 00 - 19

Policy on Use of Mediators for ADR

In September 1995, the Environment Division issued a policy statement to encourage the use of alternative dispute resolution (ADR) in appropriate cases. That policy directs Environment Division attorneys to consider and use ADR techniques if those techniques provide an effective way to reach a consensual result that is beneficial to the United States. It envisions that attorneys will make a well counseled decision whether ADR is appropriate for a specific case or issue, regardless of who in the litigation process proposes the idea.

Since 1995, Division attorneys have applied ADR across the spectrum of cases the Division handles - enforcement cases under the environmental laws, cases involving natural resources, wildlife, Indian resources, and land acquisition. Each of ENRD's civil litigation sections employs ADR in a broad range of disputes. The Division has met the challenge, embodied in the directives of the President (Executive Order 12988 § I (c)(I)-(3)) and the Attorney General (Attorney General's Order on ADR, OBD 1160.1 (1995)), to promote the use of ADR in civil litigation involving the United States. In doing so, we have learned a number of lessons. First, well-designed and well-implemented ADR can offer litigants quality solutions to difficult problems. Most importantly, we have found that ADR can provide a valuable tool for resolving environmental disputes and achieving compliance with the nation's laws. Incorporating ADR into the litigation process has resulted in more efficient and effective use of resources and has given us a larger capacity for accomplishing our Division's objectives.

In the Division's ADR policy statement I committed to assess ENRD's experience with the policy periodically. Consistent with that policy, this Directive codifies the existing process for hiring and selecting mediators and provides trial attorneys and their managers with information and resources to inform the decision-making process. It also establishes a uniform model ADR agreement to serve asa guide for and simplify negotiations over the ADR process.

As set forth in detail below, when employing a mediator Division attorneys must take two steps

- **Consult**. Division attorneys must consult with the Division's designated ADR Counsel and the attorney's section ADR Coordinator regarding negotiation of an ADR (Mediation) Agreement based upon the Model ADR Agreement (with certain required provisions on confidentiality, the Anti-Deficiency Act, and settlement authority), proposed mediators, ENRD references, and other information. Attorneys also should seek information from other sources in the attorney's section, the Environment and Natural Resources Division, and the Department. In addition, attorneys should consult with the ADR Counsel to provide feedback on ADR experiences and mediators, during and after the ADR process.

- **Seek Approval to hire the mediator.** Division attorneys must seek section management approval for the proposed ADR agreement and selected mediator, and obtain necessary Executive Office approval to hire the mediator (OBD 47 -- approval to contract with the mediator and pay the United States' share of the costs must be sought by your section management before mediation begins).

I. Selecting Mediators.

The following codifies existing practice for selecting mediators in ENRD.

A. Attorneys (and managers) must consult with the Division's designated ADR Counsel in PLSL when considering and selecting mediators to verify or seek information or to obtain information on ENRD/DOJ experience for mediators. This requirement does not preclude seeking information from other sources. Attorneys should seek information from others such as the section ADR coordinators, the U.S. Attorneys Offices, the Senior Counsel for Dispute Resolution for DOJ or other attorneys in ENRD or DOJ.

B. Attorneys must seek approval for the selected mediator from the appropriate section manager. Each section should follow the process for hiring mediators set forth in Section 11, below. In selecting and approving mediators, attorneys must ascertain and managers need to confirm that the mediator meets ENRD requirements *(e.g.,* the selected mediator should at a minimum have appropriate training, experience, and expertise to conduct the mediation process, must not be biased, must be available for the duration of the mediation process, and must charge reasonable fees. As may be appropriate before and during the mediation process, the Mediator should make disclosures to the parties of any potential or actual conflicts of interest). Attorneys should consider the following factors in selecting an appropriate mediator:

- **ADR Experience.** Consider factors such as training, affiliations, years of experience, etc.

- **Specific Experience** (with similar disputes). Consider factors such as experience with complex disputes, disputes involving governments/sovereigns, multi-party and multiple-issue disputes, and disputes involving litigation.

- **Mediation Expertise.** Look for someone who can work with many parties to help them reach their own agreement. Mediation/facilitation skills are important. Subject matter expertise may not be necessary and can sometimes affect the neutrality of the mediator *(e.g.,* an expert may try to decide the case or issues in the case, or offer biased and unsolicited opinions). Generally, the parties have expertise about the dispute and what needs to be considered to reach agreement. There may, however, be times when specific expertise or experience is useful *(e.g.,* the Division attorney may want to consider persons with some experience with matters involving Indian Tribes or environmental or natural resource matters). If expertise is desired, use of an early neutral evaluator may be more appropriate.

- **Style/Approach/Personality.** All parties should be comfortable with the selected mediator. There is a spectrum of mediation styles. Some mediators are more evaluative. Others have a facilitative, hands-off approach. Attorneys should consider the style or approach that will work for the case and parties. A mediator who is flexible and varies his/her style and approach may increase the opportunities for productive mediation sessions.

- **No Bias and No Conflicts of Interest.** Make sure that the mediator does not have actual or potential conflicts (or biases) that will or may impair the mediation process. If the mediator is a lawyer, ask questions about the mediator's practice of law (and clients) and that of the mediator's law firm to appreciate potential conflicts or bias.

- **Availability.** The mediator must be available for the duration of the mediation process. A great

mediator who has insufficient time for the case is of little use. Attorneys should also make sure that the mediator, and not the mediator's associates, will take responsibility for the mediation.

- **Cost.** The mediator's fees should be reasonable. Negotiate for a competitive rate and ask about government rates. Do not be fearful of suggesting that other mediators would be willing to charge a lesser rate. ENRD cases are important and the mediator may get recognition in helping to resolve one. Rates are, indeed, often negotiable.

II. Process to Hire a Mediator.

Currently, ENRD attorneys need Section and Executive Office approval to hire a mediator. As of the date of this Directive, attorneys also must obtain Section management approval for deviation from the model provisions for confidentiality, settlement authority, and Anti-Deficiency Act and for other substantive deviations from the model ADR Agreement. The process to hire a mediator is set forth below.

A. Negotiate an ADR (Mediation) Agreement. Management approval is necessary for the final ADR agreement (and, when selected, the proposed mediator). Work with the model ADR agreement and consult with the ADR Counsel in PLSL and designated section management regarding substantive deviations from that model. Certain provisions may require flexibility to suit a particular case, but others are not appropriate for extensive negotiation. The provisions of the model agreement relating to Confidentiality 9(a) - (e)], Settlement Authority [¶ 8(c) and the first sentence of ¶ 8(a)], and the Anti-Deficiency Act [¶ 6(b)(5)] are required. Attorneys cannot deviate from those provisions without Section management approval.

The following managers have authority to approve ADR process agreements and the selection of a mediator for Division cases. They are designated Section managers for ADR.

Appellate Section	Section Chief
Environmental Crimes Section	Section Chief
Environmental Defense Section	Assistant Section Chiefs
Environmental Enforcement Section	Assistant Section Chiefs
General Litigation Section	Assistant Section Chiefs
Indian Resources Section	Section Chief
Land Acquisition Section	Section Chief
PLSL	Section Chief
Wildlife and Marine Resources Section	Section Chief

B. Executive Office approval is necessary to fund the United States' share of the mediator costs. Section managers need to ensure that the Executive Office has approved any expenditure before

mediation commences. After the parties and the mediator have signed the ADR Agreement, fill out Part I and a portion of Part III of the OBD 47 and submit that document (along with a copy of the ADR agreement) to the Executive Office (the Director of Financial Management and Planning) for approval. Once the Executive Office has approved (signed) the OBD 47, have the mediator sign and return the original to the trial attorney. The OBD 47 and the ADR agreement constitute ENRD's contract with the mediator. Division attorneys should keep the originals in the DJ file and send a copy to the mediator and the Executive Office.

III. Feedback on Mediators and the Mediation Process.

Managers and attorneys must call or consult with the Division's ADR Counsel in PLSL to provide feedback on ADR experiences and experiences with mediators. The ADR counsel can then be a centralized source of information about ENRD experiences with mediators and ENRD references for mediators. Attorneys also need other sources to consult about ENRD experience (good or bad) with particular mediators. Therefore, attorneys should also provide feedback to their section ADR coordinator and others when consulted.

Date: 7/23/00

Lois J. Schiffer
Assistant Attorney General
Environment and Natural Resources Division

MODEL
MEDIATION PROCESS AGREEMENT

1. The United States and certain Non-Federal Parties hereby agree to enter into a process of alternative dispute resolution by engaging in mediation pursuant to this Agreement.

2. The Parties **[or the United States and _____ (if not all the parties)]** are currently in litigation in the United States District Court for the District of _____, in a lawsuit styled as _____, Civil Action No. _____. This lawsuit is related to _____ **[provide a one-sentence, neutral description of the case]**.

3. This Mediation Process Agreement sets forth the terms and conditions under which the Parties will conduct the mediation process, thereby avoiding future disputes and disagreements. Subject to the terms and conditions of this Agreement, the Parties, along with the attorneys representing each, agree as follows:

4. The Parties agree to seek an efficient and mutually beneficial resolution of the lawsuit and related issues through mediation with a third-party neutral mediator jointly selected by the Parties.

5. Participants in the Mediation Process

(a) **Parties**. The "Parties" to the mediation process shall be the United States on behalf of the Department of _____ [insert client agency or agencies] and the following "Non-Federal Parties": _____, _____, and _____ **[insert other party or parties].** The participants in the process, as necessary and appropriate during the course of mediation, include the following: for the United States, appropriate representatives of the Department of Justice and its client agencies and appropriate client representatives and counsel for each of the Non-Federal Parties. The Parties and their counsel are expected to be active participants in the mediation process. Each Party shall be represented during the course of the mediation process by at least one client representative and counsel, authorized to make recommendations concerning settlement or to bind that Party, as may be appropriate. Appropriate senior management for the Parties shall be reasonably accessible as necessary via telephone or in person during the mediation process.

(b) **Withdrawal from the Mediation Process.** Any Party may withdraw from the mediation process by giving written notice to the other Parties, the Mediator, and, if appropriate, the Court, provided however, that prior to withdrawing that party also shall contact the mediator to discuss the reasons for withdrawal. To the extent the Parties'engage in mediation pursuant to the Court's ADR program, the withdrawing party shall also file a notice and/or motion with the Court if required by the Court's ADR Plan or Program and/or Local Rules. Withdrawal shall be effective on the date that all of the following have received appropriate notice of withdrawal: the other Parties, the Mediator, and, if appropriate, the Court. Any Party who withdraws from the mediation process (1) shall remain bound by the confidentiality provisions of this Agreement; (2) shall within ten (10) days of notice of withdrawal return to the to the other Parties or the Mediator, as appropriate, all documents (and all copies of such documents) received from the other Party(ies) or the Mediator during the mediation process-, and (3) shall remain obligated to pay its share of the costs of the Mediator, up to the effective date of withdrawal, regardless of such withdrawal.

6. **Selection of the Mediator and Payment of Fees**

(a) **Selection of the Mediator**

(1) The Parties have selected _____ as the Mediator to conduct the mediation process.

(2) In the event that a Mediator has not been selected by the date all Parties have signed this Agreement, the Parties shall jointly select and retain a Mediator on an expedited basis. The Mediator shall be selected according to the following process, unless otherwise agreed by the Parties:

(i) The Parties shall select the Mediator by unanimous consent no later than 2000.

(ii) The Parties shall agree upon a pool of mediators to consider by _____, 2000. This pool of mediators shall consist of _____ **(suggested number -- three]** mediators proposed by each party. The Parties shall work together (using joint interviews, reference checks, conflicts checks, and other appropriate means) to narrow that pool of mediators to a pool of candidate mediators, not to exceed _____ **[suggested number -- three]** in number, all of whom the Parties find acceptable mediators to perform the mediation. The Parties shall first make best efforts to select a Mediator from this final pool of mediators by unanimous consent on or before _____, 2000. The Parties may repeat this process as is necessary to reach agreement on a Mediator.

[Optional paragraph to insert if you expect difficulty in jointly selecting a mediator. Note: This does not bind you to agree to submit a list to the magistrate. It creates another mechanism to assist **the parties in selecting a mediator if all parties agree.]**

(iii) In the event that unanimous consent is not reached by _____, 2000, the Parties may agree to jointly submit to the appropriate United States Magistrate _____ a list of four candidate mediators qualified to perform the mediation and request the Magistrate to assist the Parties in selecting the Mediator. That request shall be submitted no later than one week after all Parties have agreed on a joint list, unless otherwise agreed by the Parties. If the Magistrate agrees to act upon that request, the Magistrate may seek the Parties views on the appropriate mediator.

(3) The Parties agree that, after selection of the Mediator, the United States shall have an opportunity to seek the necessary approval within the United States government to fund the United States' share of the Mediator's fees and expenses. The United States will not unreasonably withhold its approval or funding of the Mediator.

(4) The selected Mediator must have appropriate training, experience, and expertise to conduct the mediati6n process, must not be biased, must be available for the duration of the mediation process, and must charge reasonable fees. As may be appropriate before and during mediation process, the Mediator will make disclosures to the Parties of any potential or actual conflicts of interest.

(b) **Payment of Mediator**

(1) Except as otherwise provided in this Agreement, each Party to the mediation process will pay an equal share for the cost of the mediation process. The Parties and the Mediator shall make best efforts to keep the cost of the mediation process fair and reasonable. To that end, mediation

sessions shall be held in _____ and/or in locations as may be appropriate to achieve that goal and accommodate the Parties.

(2) The Mediator shall be compensated by the Parties as follows:

a. $*** per hour for mediation and facilitation services;

b. $**per hour for travel **[Insert ¶ b. only when you expect extensive travel by the mediator in your case; Alternate Suggested Language -** -Mediation fees do not include the time required to travel to individual meetings or joint sessions unless actual mediation and facilitation services are being performed during such travel.];

c. The Mediator's necessary travel expense shall be reimbursed as follows:

i. Vehicle mileage costs, if required and necessary, shall be reimbursed at the then-current government rate of reimbursement, or actual rental car expenses if supported by a receipt.

ii. Lodging and Subsistence, if required and necessary, will be reimbursed at the then-current government rate if supported by actual receipts.

iii. Upon request, the United States will furnish the Mediator with the current government per them and subsistence reimbursement and mileage rates. If necessary, the United States agrees to make best efforts, as are appropriate and legal, to assist the Mediator to obtain government rates for travel expenses. Government rates shall apply in subsections i. and ii. unless after the best efforts by the Mediator and the United States such rates are unavailable. If government rates are not available the mediator shall attempt to obtain transportation and lodging at the lowest reasonably available cost.

(3) The Mediator shall provide to appropriate representatives of the United States and each Non-Federal Party monthly invoices, including a detailed description of all fees and expenses of the Mediator and the amount owed by each Party.

(4) Each party shall be independently responsible for its own expenses associated with the mediation process, including its respective share of the fees and expenses for the Mediator, its own attorneys fees, or any expert expenses that Party deems necessary for its participation in the mediation process.

(5) The above (or any) requirement for payment or obligation of funds by the United States shall be subject to the availability of appropriated funds legally available for such purpose, and no provision of this Agreement shall be interpreted to require obligation or payment of funds in violation of the Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, and 1511-1519. In the event the United States fails to meet its financial obligation to the Mediator, no other Party shall be responsible either to the Mediator or

the United States for such obligation.

7. **Procedure for the Mediation Process**

(a) **Schedule.** The Parties expect that the mediation process will begin on _____, 2000, and continue through _____ 2000. The Parties estimate that the mediation will take approximately ____ hours. This provision does not limit the duration of the mediation process. However, if the estimated time is to be exceeded, a supplemental estimate shall be agreed upon in order to facilitate obtaining necessary approval within the government for funding the United States' share of the Mediator's fees and expenses. The Parties shall work independently or with the Mediator, as necessary, to establish a schedule for the mediation process. The initial schedule may be amended, as necessary and in consultation with all Parties, to accommodate the needs of the. Parties and the Mediator.

(b) **Initial meeting.** The Parties and their counsel expect to have an initial meeting with the Mediator on _____, 2000. In the event the Mediator has not been selected by the effective date of this Agreement, the initial meeting with the Mediator shall take place within two weeks of hiring the Mediator or as soon as reasonably possible. The purpose of the initial joint session is for each Party to give a brief introductory oral presentation (no longer than 20 minutes), which may include discussion of the posture of the case, a brief summary of its position, and what that Party hopes to achieve in the mediation process.

(c) **The Mediator**

(1) The Parties, their counsel, and the Mediator understand that the Mediator has no authority to decide the case or any issues in the case and that the Mediator is not acting as an advocate or attorney for the United States or any Party.

(2) The Mediator will confer with the participants, review written information submitted by the Parties and counsel, and may request position papers from each Party outlining the legal and factual issues in the dispute or case as well as the range of options to settle the case or dispute. To the extent the Mediator requests position papers during the mediation process, a copy of each position paper shall be given to the Mediator and may be provided to each representative of the Parties. The Mediator shall conduct at least one face-to-face "joint session" where all Parties and their counsel shall be present. In the initial meeting at what is called the "joint session," each Party will be expected to present a brief summary of its view of the case, and respond to the Mediator's questions. After the initial joint session, the Mediator may hold private sessions with one or more Parties (and counsel) and/or additional face-to-face joint sessions to assist the Parties in trying to find a mutually acceptable solution. The Mediator may hold subsequent sessions and discussions with counsel for the Parties on the phone or in person. Any Party or counsel may request that the Mediator excuse the other Party or Parties and respective counsel from a session to discuss or share confidential information with the Mediator. If at any time, the Mediator requests or any party elects to submit confidential information to the Mediator, such information shall be held in confidence by the Mediator.

(3) The Mediator shall ensure that each Party shall have a reasonable amount of time during the mediation process to present its position with respect to the issues in mediation. The Mediator shall ensure also that each Party has a reasonable amount of time to provide a response to other Party's position.

(4) The purpose of this mediation shall be to assist the Parties in reaching their own

agreement, and the Mediator shall conduct the mediation in a fair and neutral manner to facilitate the resolution of this matter between the Parties. The Mediator shall work for the benefit of the Parties and be guided by the provisions of this Mediation Process Agreement.

(d) **Role of the Mediator.** In mediation, the Mediator shall act as a third-party neutral in a process in which the Parties, with the assistance of the Mediator, collaboratively and collectively seek to (1) identify issues; (2) develop potential alternatives and approaches to resolve those issues; (3) resolve those issues; and (4) achieve an appropriate resolution of matters in litigation. The Mediator shall assist the Parties to identify and communicate the interests underlying their dispute and help the Parties to develop their collaborative efforts into an overall settlement agreement.

8. **Agreement of the Parties**

(a) No Party or counsel for that Party shall be bound by anything said or done during the mediation process unless a written settlement is reached, executed, and approved by all the necessary Parties, counsel, and the appropriate government officials for the United States. If an agreement is reached by the Parties through mediation that agreement shall be reduced to writing.

(b) The Parties make no admission of fact or law, responsibility, fault, or liability by entering into and participating in the mediation process, by entering into any Mediation Process Agreement, or by submitting any final agreement for approval to the United States.

(c) It is explicitly recognized that the trial attorneys for the United States Department of Justice (and its client agencies) do not have the authority to compromise the claims of the United States. Therefore those attorneys for the United States do not have the ultimate, authority to agree to the terms of any proposed agreement or settlement. That authority is vested with the Assistant Attorney General of the Environment and Natural Resources Division and/or, as appropriate, the Deputy or Associate Attorney General of the United States and, for certain appellate matters, the Solicitor General of the United States. [*]However, if the mediation is successful and a final written agreement is reached by all the parties, the attorneys for the United States will promptly make appropriate recommendations within the government concerning settlement of the case. Upon signature by the Non-Federal Parties and final approval by the appropriate officials within the Department of Justice and its client agencies, the settlement agreement, if required, would be lodged (or filed) in suitable form with the Court, and an appropriate pleading concluding the case would be filed in the Court.

[*Optional suggested insert for EES cases or cases requiring a consent decree with public notice: If mediation is successful, a Consent Decree, representing the terms for settlement that the attorneys for the United States are able to recommend to the Assistant Attorney General to settle this case will be drafted and circulated for approval by the Non-Federal Parties. Upon signature by the Non-Federal Parties and final approval by the appropriate officials within the Department of Justice and its client agencies that Consent Decree would be lodged with the Court and published in the federal register for public comment as required under _____ [insert appropriate statute and/or regulations - e.g., Section 122 of CERCLA, 42 U.S.C. § 9622 and 28 C.F.R. § 50.7]. After the appropriate public comment period, a suitable pleading concluding the case or certain issues in the case would be filed with the court. Upon entry by the Court, that Consent Decree would represent a settlement of the United States' claims with respect to the Non-Federal Parties (or settling Defendants) in the U.S. v. _____ _____ civil action.]

(d) **Failure to Reach Agreement Through Mediation.** In the event that the Parties fail to

reach agreement in the mediation process, the Parties may request that the Mediator provide the Parties with a brief written report detailing the positions of each of the Parties and the Mediator's perceived impediments to achieving agreement. When consensus cannot be reached, the Parties shall seek to agree upon a description of the remaining issues.

(e) Nothing contained in this Mediation Process Agreement shall be construed to limit the authority of the United States to undertake any action pursuant to applicable law or regulation. This Mediation Process Agreement in no way affects or relieves any Party of its responsibility to comply with any federal, state, or local law or regulation. Nothing in this Mediation Process Agreement alters the rights and/or liabilities of the Parties with respect to the litigation.

9. **Confidentiality**

(a) The mediation process is a confidential process. That process, including any documents submitted to or prepared by the Mediator, and any statements made during that process are for settlement purposes only, are confidential, and shall be treated as compromise negotiations under Rule 408 of the Federal Rules of Evidence. All information provided to the Mediator is confidential provided however, that information which is otherwise admissible or discoverable or known or available to the United States or the Non-Federal Parties shall not be rendered confidential, inadmissible or non-discoverable because of its use in the mediation process.

(b) Except as otherwise provided for in this agreement, the Parties shall not disclose to any person not a Party to this Agreement, including but not limited to, the press, any information regarding the substance of the mediation process, including the Mediation Process Agreement, or the Parties' positions, negotiations, proposals, or settlement offers.

(c) The United States reserves the right to utilize any information from the mediation process to fully inform decision makers within the government and to make recommendations within the Department of Justice and its client agencies concerning settlement with respect to these matters or the case. The United States also reserves the right to provide public notice of any settlement achieved by, after, or as a result of the mediation process as may be required by law or established government policy, and to publish a press release concerning any final settlement achieved by or after the mediation process.

(d) No party may subpoena any documents prepared by or for the Mediator or subpoena the Mediator to testify as a witness regarding the mediation process. The Mediator shall not testify on behalf of any Party or participate as a consultant or expert in any federal or state judicial or administrative proceeding regarding the case or issues in or relevant to this case or the mediation process.

(e) The confidentiality provisions of this Mediation Process Agreement shall remain in full force and effect without regard to whether any legal actions or issues arising out of the case are settled or concluded by final judgment or otherwise, and shall survive termination of this Mediation Process Agreement.

10. **Miscellaneous**

(a) This Mediation Process Agreement will become final and effective once tile United States and the Non-Federal Parties have approved it (signature by the appropriate representatives shall represent approval) and it is signed by the Mediator.

(b) The descriptive headings of this agreement are included for convenience only and shall not affect the interpretation of any provision herein.

(c) The provisions of this Agreement shall apply to and be binding upon each Party to the mediation process, its officers, agents, employees, successors and assigns, and any person acting on its behalf, and upon the United States on behalf of _____ **[insert client agency(ies)].**

(d) This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which shall constitute one instrument.

(e) Each of the undersigned representatives of each Party to the mediation process and representatives of the United States represents that that representative is authorized to execute and bind that Party to this Mediation Process Agreement. By signature below, each representative acknowledges that that representative has read, understands and agrees to this Mediation Process Agreement.

FOR THE UNITED STATES:

_____ Date: _____

(Name)
Trial Attorney
U.S. Department of Justice
_____ Section
Environment and Natural Resources Division
P.O. Box _____ Ben Franklin Station
Washington, D.C. 20044
Tel.: (202) _____
Fax: (202) _____

FOR THE U.S. DEPARTMENT OF _____ (Client Agency)

Signature: _____ Date: _____
Name: _____
Title: _____
Office: _____
Address: _____
Telephone: _____
Fax: _____

FOR _____ (One page for each Non-Federal Party – **Get the appropriate signatories – need party and counsel)**

Party:

Signature: _____ Date: _____
Name: _____
Title: _____
Office: _____
Address: _____
_____
Telephone: _____
Fax: _____

Counsel:

Signature: _____ Date: _____
Name: _____
Title: _____
Office: _____
Address: _____
_____
Telephone: _____
Fax: _____

FOR THE MEDIATOR:

Signature: _____ Date: _____
Name: _____
Title/Firm: _____
Address: _____
_____
Telephone: _____
Fax: _____