GUIDELINES FOR JOINT STATE/FEDERAL CIVIL ENVIRONMENTAL ENFORCEMENT LITIGATION

January 2017

Prepared by:

National Association of Attorneys General
National Attorneys General Training & Research Institute

United States Department of Justice
Environment & Natural Resources Division

TABLE OF CONTENTS

Appendices

ACRONYMS AND ABBREVIATIONS

The following is a list of acronyms and abbreviations used throughout this document:

AUSA – Assistant United States Attorney

CAA – Clean Air Act

CBI – Confidential business information

CERCLA – Comprehensive Environmental Response, Compensation, and Liability Act

CWA – Clean Water Act

EDS – Environmental Defense Section, ENRD, U.S. Department of Justice

EES – Environmental Enforcement Section, ENRD, U.S. Department of Justice

ENRD – Environment and Natural Resources Division, U.S. Department of Justice

EPA – U.S. Environmental Protection Agency

FOIA – Freedom of Information Act (federal)

FRCP – Federal Rule of Civil Procedure

SEP – Supplemental Environmental Project

NAAG – National Association of Attorneys General

NAGTRI – National Attorneys General Training and Research Institute

NEPA – National Environmental Policy Act

RCRA – Resource Conservation and Recovery Act

USAO – United States Attorney's Office

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 maintaining a strong, cooperative, and collaborative relationship with each other regarding 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 environmental enforcement efforts between ENRD and state attorneys general.

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

[1] These guidelines are intended to be used solely for the purpose of assisting state and federal attorneys in the development, litigation, and 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 (EES), taking the lead federal role in civil judicial environmental enforcement litigation, in coordination with the U.S. Environmental Protection Agency (EPA) headquarters and regional offices. The majority of federal environmental civil judicial litigation is conducted this way. ENRD's Environmental Defense Section (EDS) generally takes the lead role in civil judicial enforcement in wetlands cases under Section 404 of the Clean Water Act (CWA), in cooperation with the 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 Attorney's 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 generally* U.S. Attorney's Manual Title 5 (https://www.justice.gov/usam/title-5-enrd). 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 USAOs 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.

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.

A workgroup of litigators from ENRD and state attorney general offices developed these guidelines. The insights and suggestions in these guidelines are the result of lessons learned from experience with joint enforcement cases over the years.

Although these guidelines focus on the relationship between attorneys from ENRD and the state attorney 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 EPA regional offices and their state counterparts conduct regular conferences to keep one another apprised of violations and planned and potential enforcement actions. Increasingly, EPA encourages 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 the concept of 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.

ENRD and state attorneys can 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.

Joint enforcement actions can also present challenges that may cause friction between federal and state litigators. Cases selected for joint enforcement can be 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 may test the communication and diplomatic skills of the co-litigators, requiring each representative to give full consideration to the other's perspective. State and federal trial attorneys can overcome these challenges when they recognize that, in resolving issues as complex and sensitive as those in environmental enforcement, they may have to work harder 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; but 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 all participants can gain insights that will lead to continued improvements in how joint state/federal

litigation is conducted. Therefore, these guidelines are neither comprehensive nor set in stone; they will evolve as state/federal experience with joint environmental enforcement evolves.

. . . . .

For further information or questions about the guidelines, or to obtain an electronic version of the attached appendices, please contact ENRD attorneys Andrea Berlowe, Counselor for State and Local Matters (202-305-0478, andrea.berlowe@usdoj.gov), or Leslie Allen, Senior Attorney (202-514-4114; leslie.allen@usdoj.gov); or Jeanette Manning, NAGTRI Program Counsel, NAAG (202-326-6258; jmanning@naag.org).

II. GUIDELINES

A. ESTABLISHING A WORKING RELATIONSHIP

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

☐ Develop and Maintain Lines of Communication: Litigation Contacts

- ☐ EES[3] is organized into litigating groups, which handle cases coming from one or more EPA regions. (*See* contact list attached as Appendix A.) Each litigating group is managed by an assistant section chief, who is the first ENRD official a state official should contact concerning matters or cases in his or her state (unless, of course, the inquiry involves a case to which an EES attorney is already assigned, in which case it is generally appropriate to contact that attorney first).
  - ☐ Assistant section chiefs 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 USAOs.
- ☐ The head of the environment unit typically is the primary point of contact in state attorney general offices. (*See* list of the ENRD primary contacts and the National Association of Attorneys General (NAAG) contact 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 state attorney general offices and EES. The second most likely ENRD section to be involved in joint civil enforcement is EDS. While EES handles most EPA civil enforcement matters, EDS enforces civil wetlands violations under Section 404 of the CWA, 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 (formerly "General Litigation"); Indian Resources; Land Acquisition; Law and Policy (formerly "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 Counselor for State and Local Matters 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.

[4] NAAG can be of assistance in contacting environmental units of state attorney general offices. NAAG has regular contact with these offices and keeps current lists of environmental contacts. In some states, civil environmental litigation is handled by the state environmental agency.

☐ United States Attorneys

There are 93 United States Attorneys, one for each federal judicial district.[5] The role of the United States 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 United States Attorneys Manual describes the roles of ENRD and U.S. Attorneys in more detail. *See* http://www.justice.gov/usam/united-states-attorneys-manual. The DOJ website also has contact information for each USAO. http://www.justice.gov/usao/find-your-united-states-attorney.

☐ Communicate Regularly

☐ Establish a mechanism for regular communication between state attorney 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.

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?

[5] The president appoints a United States Attorney to each of the 94 federal judicial districts. While Guam and the Northern Mariana Islands are separate judicial districts, they share a United States Attorney. http://www.justice.gov/usao/about-offices-united-states-attorneys.

- ☐ Is joint prosecution an efficient use of enforcement resources?

☐ Discuss the nature and extent of litigation holds for relevant agencies and document custodians.

☐ 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 – *i.e.*, *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, make contact 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).

☐ Consider entering into or, at a minimum, discuss a joint enforcement, common interest, or confidentiality agreement between or among the parties so they can share confidential information and documents without waiving applicable privileges. *See infra* Section II.D.

☐ 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.

- ☐ Give people with background knowledge about the violator 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.

- ☐ Direct the relevant federal and state agencies to implement litigation holds (unless holds are already in place).

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

coordination.

- ☐ Regular (*e.g.*, monthly or bi-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, however, team members must ascertain whether software compatibility issues exist and, if so, how to address them (*e.g.*, by translating attachments so that all team members can use them).[6]

☐ In multi-state enforcement efforts, chart contacts with each state agency and attorney general's office 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 for each sovereign 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 sovereign authority to determine its positions in litigation, the lead attorney generally should not make any significant decision 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

- ☐ Team members can avoid or resolve most disagreements through *open* and *timely* communications.

- ☐ Discuss at the outset the mechanism the team will use to resolve intra-team

[6] *A word of caution about email groups*: Although attorneys may establish relatively secure e-mail groups, the danger of inadvertent disclosure outside the group increases as more people are added. 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.

conflicts, including who will address issues requiring elevation within each organization (*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 resolving any intra-team conflicts.

- ☐ 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).

- ☐ Include management (*e.g.*, state environment bureau/section chief and ENRD assistant section chiefs) in any decision to end the partnership and invoke these withdrawal procedures. Make every effort to terminate the joint effort 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 to track case activities that will be shared with all members of the litigation team.[7]

- ☐ 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).

  - ☐ Identify any efficiencies the parties may achieve by coordinating or sharing discovery requests and responses.

- ☐ Set schedules and assignments.

  - ☐ Identify which federal or state agency will assume primary responsibility for assisting in the litigation and which will perform support roles; or, in multi-claim 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 who will, among other things, coordinate within his or her agency so that the

[7] For example, this could be a formal Case Management Plan (see appendix D for an example) or a flow chart that enables the team to track multiple activities at a glance.

agency can "speak with one voice."

- ☐ Clearly establish the roles of each team member. Consider preparing an internal memorandum describing such roles.

- ☐ Identify other legal and technical team members working on the case, and determine what support services are available.[8]

- ☐ Identify expertise among team members,[9] 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 to give each team member a voice in planning the case, then formalize the schedule as appropriate.

- ☐ Consider a written agreement covering how the parties will share the costs of the litigation.

☐ 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. Discuss anticipated motions (*e.g.*, Rule 12(b)(6), Rule 56, discovery motions) and the necessity for subpoenas, and determine the responsibilities for authoring or opposing them.

- ☐ Discovery: Identify the categories of data, documents, and witness testimony necessary to support claims. [10]

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

---

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

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

[10] Where the team anticipates significant discovery of electronically stored information, coordinate before agreeing to production formats, collection standards, search terms or methods, or other technical aspects of discovery that will apply to all parties.

- ☐ 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.

- ☐ Confirm that the agency has implemented a litigation hold and determine whether any contractors, other agencies, or third parties also must receive a litigation hold notice. Make arrangements for custodians to receive periodic litigation hold reminders.

- ☐ 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 of 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 for production by the federal and state governments to avoid confusion in production or bates numbering systems. State attorneys general and ENRD should coordinate these assignments to distribute the workload fairly in light of available resources.

- ☐ Assign the taking and defending of depositions, the propounding of interrogatories and the production of documents, including e-discovery. *Be advised: Document production and e-discovery are often very burdensome, so discuss assignments and expectations 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 take primary responsibility 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 assist in responding to written discovery on relevant matters and identify for production potentially relevant documents in their files (including electronic files), if requested.

- ☐ Develop necessary scientific theories of the case, and identify potential consulting scientists and testifying experts. Divide the handling of experts 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 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. Ensure systems and software are compatible and available to all team members.

- ☐ Counterclaims:

  - ☐ Defendants sometimes file counterclaims against federal and state agencies, such as in Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or "Superfund") 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. Consider this possibility and its impacts on the proposed litigation.

  - ☐ Usually the allegations in a counterclaim raise different claims of liability against the state than those alleged against the federal government. Accordingly, each sovereign has the responsibility to respond to claims made against it. This may impact resources available to the case, as the attorneys defending against a counterclaim or a related separate action may not be the same as those bringing the enforcement action and, therefore, require additional coordination.

- ☐ 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) restrictions.

  - ☐ Execute confidentiality agreements and where appropriate, seek protective orders from the court.

- ☐ 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. Address any differences in perspective or approach 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 any particular state enforcement issues and consider what the states require in order to resolve the issues, including whether a state has the authority to obtain attorney's fees for state violations. This may mean insisting on particular injunctive relief or SEPs, and the assessment of civil penalties for state violations, as part of any settlement. Approach any "penalty splitting" concerns with particular sensitivity.[11]
  - ☐ Neither the state nor federal government should engage in separate negotiations with the defendant unless either (1) appropriate representatives of each sovereign have discussed and approved such communication, 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 team member should disclose confidential or privileged information to secure a separate settlement without written authorization from the other members of the team to use the information.

[11] EPA has useful guidance regarding joint penalty collection with state and local governments, as well as federally recognized tribes. https://www.epa.gov/sites/production/files/documents/jointcollectionofpenalties-mem.pdf.

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.[12]

- ☐ 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[13] the United States as a co-plaintiff to assert only state law claims without a federal law claim asserted by the state, provided that there is a "common nucleus of operative fact" with the claim that provides the basis for the federal court's original jurisdiction.[14]

---

[12] *See* 28 U.S.C. §§1331 (federal question jurisdiction), 1345 (United States as plaintiff), 1355 (jurisdiction over fees, penalties, and forfeitures).

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

> (1) *Plaintiffs.* Persons may join in one action as plaintiffs if:
> (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and
> (B) any question of law or fact common to all plaintiffs will arise in the action.

[14] 28 U.S.C. §1367(a) provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy.... Such supplemental jurisdiction shall include claims that involve the

- ☐ *Diversity of Citizenship* – 28 U.S.C. §1332. A federal court can assert jurisdiction over state law claims if the requirements for diversity of citizenship are met. This is not a useful basis for jurisdiction for states because states are not a citizen of any state for the purpose of diversity jurisdiction. *Postal Telegraph Cable Co. v. Alabama*, 155 U.S. 482, 487 (1894); *Moor v. Alameda Cty.*, 411 U.S. 693, 717 (1973). Political subdivisions, such as counties, are a citizen of a state for the purposes of diversity jurisdiction, however, unless the subdivision "is simply 'the arm or alter ego of the State.'" *Moor*, 411 U.S. at 717-18.

☐ Mechanisms for 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* FRCP 19 (required joinder), 20(a) (permissive joinder).

- ☐ *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.[15] 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* FRCP 42(a) (consolidation).

- ☐ *State as Plaintiff Intervenor.* A federal court must permit intervention pursuant to FRCP 24(a) (intervention of right) (1) when a statute of the United States confers

---

joinder or intervention of additional parties."

Where the United States is a co-plaintiff such that the district court has original jurisdiction pursuant to 28 U.S.C. §1345 (United States as plaintiff), §1367(a) supports the assertion by the state of solely state law claims in federal district court without the assertion by the state of a cause of action created by federal statute. The Supreme Court recognized in *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 558-61 (2005) that §1367(a) confers broad supplemental jurisdiction over "pendent" and "ancillary" claims and does not require that the supplemental claims have an independent basis for jurisdiction, except in specific situations explicitly spelled out in §1367(b) where diversity jurisdiction was the basis for the court's original jurisdiction.

[15] 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.

an unconditional right to intervene (such as with certain citizen suit provisions); 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. A federal court may allow intervention pursuant to FRCP 24(b) (permissive intervention) 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" or "any citizen," including a state, to bring an action for various causes, including violations of that law;[16] there are statutory procedural requirements (such as notice provisions) and potential limits on filing (such as the "diligent prosecution" bar) in each that vary, however, 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.[17]

[16] *See, e.g.*, Clean Air Act (CAA), 42 U.S.C. §§7602(e) (defining "person" to include a state), 7604 (citizen suit provision); CWA, 33 U.S.C. §1365; CERCLA, 42 U.S.C. §§9601(21) (defining "person" to include a state), 9659 (citizen suit provision); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. §§11046 (citizen suit provision), 11049(7) (defining "person" to include a state); Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§6903(15) (defining "person" to include a state), 6972 (citizen suit provision); Toxic Substances Control Act, 15 U.S.C. §2619. *See also U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 613 n. 5 (1992) (discussing that a state is a "person" under RCRA and a "citizen" under the CWA).

[17] 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, *see, e.g.*, 42 U.S.C. §6972(e) (RCRA), 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).

- ☐ 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 potentially giving a defendant arguments concerning claim or issue preclusion in some jurisdictions.

- ☐ Similar concerns may 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." 33 U.S.C. §1319(g)(6)(A). Note that this limitation on penalties does not apply to a citizen suit that has already been filed. 33 U.S.C. §1319(g)(6)(B).

- ☐ *Avoid Separate Actions.* States and the United States can, of course, file separate actions in state and federal courts, respectively.[18] 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 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.

[18] 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 (removal); *Syngenta Crop Prot., Inc. v. Henson*, 537 U.S. 28, 33 (2002); *United States v. Newdunn Assocs.*, 195 F. Supp. 2d 751 (E.D. Va. 2002), *rev'd sub nom. Treacy v Newdunn Assocs., LLP*, 344 F.3d 407, 414 (4th Cir. 2003) (remanding to state court because claim not properly removed due to lack of subject matter jurisdiction).

- ☐ 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.[19]
    - ☐ *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 court held that the state law of preclusion (*e.g.*, res judicata) and applicable state statutory provisions governed. 261 Va. at 214. 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.[20] 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

[19] *See State Water Control Bd. 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 Indus., 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). Substantial case law supports the view that the *Smithfield* and *Harmon* decisions are incorrect. *See, e.g., United States v. Power Eng'g*, 303 F.3d 1232 (10th Cir. 2002) (rejecting application of *Harmon* and giving deference to EPA's interpretation that it may pursue its own RCRA enforcement action regardless of the existence of an authorized state program and initiation of a state enforcement action); *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001) *cert. denied*, 537 U.S. 812; (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) (rejecting application of *Harmon* to a CAA action); *United States v. LTV Steel Co.*, 118 F. Supp. 2d 827 (N.D. Ohio 2000) (same). There is nevertheless a risk of claim preclusion in some jurisdictions if the sovereigns file separate actions.

[20] *See supra*, note 19, and discussion of federal law of preclusion in *Power Eng'g*, 303 F.3d at 1240-41.

to judgments that occur as a result of settlement). Therefore, it is important to research 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. United States*, 440 U.S. 147 (1979).[21] 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 the *Montana* decision 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., United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001), *cert. denied*, 537 U.S. 812 (2002).

[21] *See also United States v. ITT Rayonior, Inc.*, 627 F.2d 996 (9th Cir. 1980) (applying res judicata to bar federal action by United States of FWPCA claim where "the issue [was] already resolved in state court"), superseded by statute for narrow issue of preclusion of administrative penalties under the Clean Water Act (CWA) 33 U.S.C. § 1319(g)(6) recognized in *Thiebaut v Colorado*, not reported (D. Colo. 2007); *Murphy Oil* 143 F. Supp. 2d at 1091-92 (holding that EPA's close monitoring of prior state court litigation does not satisfy "laboring oar" test); *Historic Green Springs, Inc. v. U.S. E.P.A.*, 742 F. Supp. 2d 837, 850 (W.D. Va. 2010) (holding that the U.S. EPA oversight role in NPDES permitting did not mean "laboring oar" test was satisfied).

- ☐ 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 addressed this issue.[22]

---

[22] In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66 (1996), the Supreme Court, overruling *Pennsylvania v. Union Gas Company*, 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 R.R. Co.*, 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 Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 131 F.3d 353, 365 (3d Cir. 1997) (discussing the different circuits' holdings), *aff'd* 527 U.S. 666 (1999). Though the language and reasoning of the courts differ, the scope of the waiver is generally construed to only allow the court to determine the state's entitlement to the relief being sought, including counterclaims for setoff or recoupment by the private parties that involve the same transaction or occurrence as the state's claim, but not to any counterclaim for affirmative relief by a private party against the state. *See Alaska v. O/S Lynn Kendall*, 310 F. Supp. 433, 434-35 (D. Alaska 1970); *New Jersey Dept. of Envtl. Prot. & Energy v. Gloucester Envtl. Mgmt. Servs.*, 923 F. Supp. 651, 661 (D.N.J. 1995); *United States v. Montrose*, 788 F. Supp. 1485, 1493-94 (C.D. Cal. 1992); *Woelffer v. Happy States of America, Inc.*, 626 F. Supp. 499, 502-03 (N.D. Ill. 1985); *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*, 788 F. Supp. at 1491; *Gloucester Envtl. Mgmt. Servs.*, 923 F. Supp. at 664-65; *United States v. Iron Mountain Mines*, 952 F. Supp.673, 678 (E.D. Cal 1996).

Finally, at least one court has held that, under state law, the Attorney General's powers are strictly limited to those 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. *State of Wisconsin, Department of Natural Resources v. Murphy Oil USA. Inc.*, Civ. No. 3:00-CV-0408-C (W.D. Wis. Oct. 2, 2000) (not reported). 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

D. INFORMATION SHARING

To bring civil cases jointly, the United States and states need to share confidential and privileged information. Attorneys must take a number of steps to facilitate a free exchange of confidential information while protecting confidences and privileges. Even if they take these steps, there are risks that shared information cannot be protected.

1. Discuss Information Sharing Early

- ☐ Discuss issues relating to the exchange of confidential and privileged information at the beginning of the cooperative effort, before exchanging documents, to avoid waiving critical privileges or disclosing information or documents that federal or state statutes restrict from disclosure.[23] Also discuss the scope of FOIA and applicable state public records laws to ensure a clear understanding of how such laws may affect the ability to protect shared documents from disclosure.[24]

- ☐ Common law privileges include the attorney-client privilege, the work product privilege, and the deliberative process privilege. State and federal interpretations of, and means of invoking, the deliberative process privilege may differ. Federal cases tend to construe the privilege more narrowly than some state laws.[25] Accordingly, the state and federal attorneys should discuss the reach of this

---

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 should be aware of the preclusion cases in some jurisdictions, as discussed above. Note that no court has explicitly followed this case.

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

[24] *See* Sections D.4. and D.5., *infra*. To fully understand the effect of federal and state public records statutes on information sharing, confer early with public records experts in ENRD and state attorney general offices.

[25] *See, e.g., N.Y. Times Co. v. DOJ*, 756 F.3d 100, 116 (2d Cir. 2014) ("[L]ike the deliberative process privilege, the attorney-client privilege may not be invoked to protect a document adopted as, or incorporated by reference into, an agency's policy.") (internal quotation marks omitted); *Republican Party v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, ¶ 26, 283 P.3d 853, 863 ("[T]he deliberative process privilege is a creation of the common law and is invoked primarily by executive agencies.").

privilege, as well as their understanding concerning other privileges, so they can protect privileged documents and discussions.

- ☐ Client agencies should understand the scope of the various privileges to prevent the inadvertent disclosure of protected documents or information during discovery or in responding to FOIA requests. Avoiding inadvertent disclosure is important where the federal or state counterparts hold the privilege.

2. Sharing Information Between Plaintiffs: The Common Interest Doctrine

- ☐ A prior agreement that the state and the United States have a common interest in an enforcement action may protect the exchange of privileged information from discovery. [26]

- ☐ In general, attorneys may share privileged communications with parties that have a common legal interest without waiving applicable privileges. This doctrine of non-waiver provides that the confidential sharing of privileged information between persons who have a common interest does not waive the underlying privilege.[27]

- ☐ The party asserting that the sharing of information did not waive a 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.[28]

---

[26] *See* Restatement (Third) of the Law Governing Lawyers, §76 (3rd ed., updated 2016) ("(1) If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication."); *see also Cavallaro v. U.S.*, 284 F.3d 236, 250 (1st Cir. 2002) ("The common-interest doctrine prevents clients from waiving the attorney-client privilege when attorney-client communications are shared with a third person who has a common legal interest[.]").

[27] *Teleglobe Communs. Corp. v. BCE, Inc. (In re Teleglobe Communs. Corp.)*, 493 F.3d 345, 364 (3d Cir. 2007) ("[T]he community-of-interest privilege allows attorneys representing different clients with similar legal interests to share information without having to disclose it to others.").

[28] *Schaeffler v. United States*, 806 F.3d 34, 40 (2d Cir. 2015) ("While the privilege is generally waived by voluntary disclosure of the communication to another party, the privilege is not waived by disclosure of communications to a party that is engaged in a 'common legal enterprise' with the holder of the privilege. Under *United States v. Schwimmer*, 892 F.2d 237 (2d

- ☐ Check the law in your jurisdiction before exchanging documents. Some circuits take a more limited view of the common interest doctrine than others and there may be important limitations on its use.[29]

3. Sharing Information Between Plaintiffs: Confidentiality Agreements

- ☐ We strongly recommend that parties to a joint prosecution enter into a confidentiality agreement. The agreement should include: a statement that the United States and the states have a common interest; a statement that the parties are exchanging information in anticipation of litigation; a definition and description of the covered documents; an agreement not to reveal information to third parties; a non-waiver provision; a dissolution provision that continues to

---

Cir. 1989), such disclosures remain privileged 'where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel . . . in the course of an ongoing common enterprise . . . [and] multiple clients share a common interest about a legal matter.'").

[29] Several circuits apply the common interest doctrine in the context of attorney-client privilege. *See Cavallaro*, 284 F.3d at 250; *Schwimmer*, 892 F.2d at 243; *In re Santa Fe Int'l. Corp.*, 272 F.3d 705, 710 (5th Cir. 2001) (doctrine applies to "(1) communications between co-defendants in actual litigation and their counsel … and (2) communications between potential co-defendants and their counsel") (emphasis omitted); *Reed v. Baxter*, 134 F.3d 351, 357-358 (6th Cir. 1998); *U.S. v. BDO Seidman, LLP*, 492 F.3d 806, 815-16 (7th Cir. 2007); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997); *U.S. v. Henke*, 222 F.3d 633, 637 (9th Cir. 2000); *Frontier Refining, Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 705 (10th Cir. 1998). Other circuits have applied the common interest doctrine to attorney work product. *See Haines v. Liggett Group Inc.*, 975 F.2d 81, 94 (3rd Cir. 1992) (applying joint defense privilege to work product); *U.S. v. Deloitte LLP*, 610 F.3d 129, 141 (D.C. Cir. 2010) (same); *In re Grand Jury Subpoenas, 89-3 and 89-4, John Doe 89-129*, 902 F.2d 244, 249 (4th Cir. 1990) (same). *See also In re Steinhardt Partners, L.P.*, 9 F.3d 230, 236 (2nd Cir. 1993) (implying a willingness to apply doctrine to work product).

Although some circuits have not applied the doctrine to attorney-client privilege or work product directly, multiple district courts have done so. *E.g.*, *In re Commercial Money Center, Inc., Equipment Lease Litigation*, 248 F.R.D. 532, 536 (N.D. Ohio 2008) ("the common interest doctrine is an extension of the attorney-client privilege and work product doctrine."); *Costello v. Poisella*, 291 F.R.D. 224, 231-32 (N.D. Ill. 2013) (applying common interest doctrine to work product); *Pucket v. Hot Springs School Dist. No. 23-2*, 239 F.R.D. 572, 583 (D.S.D. 2006) (same); *Ken's Foods, Inc. v. Ken's Streak House, Inc.*, 213 F.R.D. 89, 93 (D. Mass. 2002) (same); *U.S. ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 25 (D.D.C. 2002) (same); *Medinol, Ltd. V. Boston Scientific Corp.*, 214 F.R.D. 113, 115 (S.D.N.Y. 2002) (same); *Griffith v. Davis*, 161 F.R.D. 687, 692 (C.D. Cal. 1995) (same). Note, however, that we are unaware of any federal court that has directly addressed application of the common interest doctrine of non-waiver to the deliberative process privilege.

protect the confidentiality of documents exchanged under the agreement; a notice provision stating that any party subpoenaed to produce documents under the agreement must notify the other parties; and any applicable references to FOIA and state public records exemptions that may protect confidential information from public information requests.

☐ The best way to assure protection of communications, however, is by court order. Thus, in a filed case, federal and state co-plaintiffs may wish to submit a stipulated confidentiality order for court approval to the extent such an order is supported by applicable law.

4. Freedom of Information Act Requests

☐ FOIA[30] mandates disclosure of records held by federal agencies unless the records fall within one of nine FOIA exemptions.[31] Courts typically construe these exemptions narrowly because the goal of FOIA is to provide broad public access.[32] Under the FOIA Improvement Act of 2016, federal agencies may "withhold information…only if…the agency reasonably foresees that disclosure would harm an interest protected by [a FOIA] exemption." [33]

---

[30] 5 U.S.C. §552.

[31] *See Hull v. IRS*, 656 F.3d 1174, 1197 (10th Cir. 2011) ("FOIA generally requires federal agencies to disclose agency records to the public upon request, subject to nine exemptions.").

[32] *See DOI v. Klamath Water Users Protective Ass'n.*, 532 U.S. 1, 8 (2001) (citing *FBI v. Abramson*, 456 U.S. 615, 630 (1982)); *see also Rimmer v. Holder*, 700 F.3d 246, 255 (6th Cir. 2012) ("Only if one of the enumerated FOIA exemptions applies may an agency withhold requested records, [5 U.S.C.] § 552(d), and even then, the exemptions are to be narrowly construed[.]").

[33] The FOIA Improvement Act added the following paragraph to section 522(a):

(8)(A) An agency shall --

(i) withhold information under [section 522] only if

(I) the agency reasonably foresees that disclosure would harm an interest protected by an exemption described in subsection (b); or

(II) disclosure is prohibited by law; and

(ii)(I) consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of a requested record is not possible; and

(II) take reasonable steps necessary to segregate and release nonexempt information; and

(B) Nothing in this paragraph requires disclosure of information that is otherwise prohibited from disclosure by law, or otherwise exempted from disclosure under subsection (b)(3).

Pub. L. 114-185, § 2 (Jan. 4, 2016). The 2016 changes to FOIA are available at

- ☐ The federal government usually asserts FOIA Exemptions 5 and 7 for privileged material exchanged between the United States and a state during joint enforcement.[34]

- ☐ Exemption 5 protects "inter-agency or intra-agency memorandums or letters that 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). Thus, attorney-client privilege, work product, and deliberative process[35] materials generally are exempt from disclosure under exemption 5.[36]

- ☐ Despite its wording, courts apply exemption 5 to other records and do not strictly limit it to "memorandums or letters."[37] Courts further interpret the inter- or intra-agency language in FOIA to apply to documents exchanged between federal agencies and their outside consultants, but not necessarily other sovereigns.[38]

---

https://www.justice.gov/oip/freedom-information-act-5-usc-552. Current DOJ policy statements and other FOIA resources are available at https://www.justice.gov/oip/foia-resources.

[34] Courts commonly refer to the nine FOIA exemptions, 5 U.S.C. §§552(b)(1)-(9), as exemptions 1-9. Other relevant exemptions include exemptions 3 (specific statute exempting disclosure), 4 (commercial information), 6 (privacy information), and 9 (geological and geophysical information and data concerning wells). Appendix G contains the FOIA exemptions.

[35] The FOIA Improvement Act, among other things, restricted the deliberative process privilege in the FOIA context by making it inapplicable "to records created 25 years or more before the date on which the records were requested." 5 U.S.C. §552(b)(5).

[36] *See Loving v. Dept. of Defense*, 550 F.3d 32, 37-38 (D.C. Cir. 2008), *cert. denied*, 558 U.S. 945 (2009) (Exemption 5 protection extends to communications to which deliberative process privilege applies); *Mapother v. DOJ*, 3 F.3d 1533, 1538 (D.C. Cir. 1993) (same); *Zander v. DOJ*, 885 F. Supp. 2d 1, 15 (D.D.C. 2012) (holding that attorney-client privilege should be given "same meaning" in "both the discovery and FOIA contexts" to ensure that "FOIA may not be used as a supplement to civil discovery – as it could be if the attorney-client privilege were less protective under FOIA"); *Bloomberg L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 649 F. Supp. 2d 262, 281 (S.D.N.Y. 2009) (recognizing incorporation of various civil discovery privileges).

[37] *E.g.*, *Klamath*, 532 U.S. at 7-9 (discussing "documents" and "communications"); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *see FTC v. Grolier Inc.*, 462 U.S. 19, 26 (1983); *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1184 (D.C. Cir. 1987).

[38] *See Klamath*, 532 U.S. at 7-14 (exemption 5 did not apply to communications between Indian tribes and DOI, even those containing attorney work-product and subject to a confidentiality agreement, because they represented the tribes' self-interest; tribes' relationship to DOI in this

- ☐ Exemption 7 protects information compiled for law enforcement purposes, if access to this information could reasonably interfere with the enforcement proceeding.[39] Courts apply exemption 7 not only to information compiled for criminal enforcement purposes, but also to information compiled for civil enforcement purposes. *See Jordan v. DOJ*, 668 F.3d 1188, 1196 (10th Cir. 2011) ("[E]xemption [7] is aimed at . . . agencies having administrative as well as civil enforcement duties."). "[T]he government must show that (1) a law enforcement proceeding is pending or prospective and (2) release of the information could reasonably be expected to cause some articulable harm." *Manna v. DOJ*, 51 F.3d 1158, 1164 (3d Cir. 1995).

- ☐ Asserting the common interest doctrine of non-waiver may protect documents from discovery in litigation.[40] While this protection generally extends to privileged information requested under FOIA, [41] it may not extend to such information requested under state public record statutes.

5. State Public Records Laws

- ☐ Attorneys should review state public access laws before exchanging documents.[42]

- ☐ Each state has a public record statute that requires the disclosure of information on request, and many have open meeting laws that may require disclosure of information. These statutes vary between states and may provide less protection than FOIA to documents attorneys exchange.[43]

---

context distinct from that of government consultants, who are uninterested parties that operate like government employees) (internal citation omitted); *Hunton & Williams v. DOJ*, 590 F.3d 272, 280 (4th Cir. 2010) ("[S]ome courts of appeals have held that [exemption 5] extends to communications between Government agencies and outside consultants hired by them.") (internal quotation marks omitted); *Hoover v. DOI*, 611 F.2d 1132 (5th Cir. 1980).

[39] *See Prudential Locations LLC v. HUD*, 739 F.3d 424, 434 (9th Cir. 2013) ("Exemption 7 applies to 'records or information compiled for law enforcement purposes.' 5 U.S.C. §552(b)(7). Such records are exempt from a FOIA request, but only if they satisfy the criteria of at least one of six subcategories of Exemption 7—Exemptions 7(A) through 7(F).").

[40] *See* Section D.2., *supra*.

[41] *Hunton & Williams*, 590 F.3d at 278.

[42] Appendix F contains a list of state public record statutes.

[43] *See, e.g., Cmty. Youth Athletic Ctr. v. City of Nat'l City*, 164 Cal. Rptr. 3d 644, 652 (Cal Ct. App. 2013) ("California case law has relied on FOIA legal standards as persuasive[.]"); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 884 P.2d 592, 605 (Wash. 1994) ("[T]he

- ☐ 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 the state public record statute to the extent possible.

- ☐ If the state public records law provides broad access, or does not otherwise protect materials received from the federal government, then state and federal attorneys should discuss the risks of disclosure and how to minimize them. State and federal attorneys may work jointly through a confidentiality agreement, though such an agreement may not overcome state law absent a court order. Also, under some state laws, federal attorneys may disclose documents to assistant attorneys general, but not to agency personnel.[44] Another option may be to exchange redacted documents.

6. Sharing Information with Defendants

- ☐ It is often critical to share information with opposing counsel. Attorneys should consider the possible implications of FOIA and state public records laws before exchanging documents. Similar issues also can arise if a third party intervenes in the action.

- ☐ FOIA does not provide a specific exemption for information exchanged between adversaries in settlement negotiations. Thus, such information most likely would be subject to disclosure under FOIA and, potentially, a state's public records law. In filed cases, however, it may be possible for the parties to obtain a protective order, depending on the particular facts of the case and the law in the jurisdiction.

- ☐ Where the focus of the parties from the outset is on settlement, plaintiffs may wish to include defendants in a three-way confidentiality agreement. Such an agreement can protect the signatories from claiming that the exchange of documents waived privileges if settlement efforts do not succeed. It would not protect, however, against disclosure to a third-party under federal or state freedom of information laws. Again, in a filed case, the parties may wish to seek a protective order.

- ☐ Attorneys also may consider using court alternative dispute resolution (ADR) programs, including potential involvement of a neutral party, to gain confidentiality protections under the local court rules and the ADR Act. *See* 28

Public Records Act closely parallels the Federal Freedom of Information Act, nevertheless the state act is more severe than the federal act in many areas.") (internal quotation marks omitted).

[44] *See, e.g., Brown & Brown v. Blumenthal*, No. CV064025215S, 2007 Conn. Super. LEXIS 1057, at *21-22 (Conn. Super. Ct. May 1, 2007) (noting the attorney general's office had different document production obligations than state agencies).

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 H).[45]

7. Confidential Business Information (CBI)

☐ Federal regulations prevent government agencies from disclosing documents claimed as CBI. EPA regulations mandate how that federal agency handles CBI. *See* 40 C.F.R. Part 2, subpart B.[46]

☐ As a general matter, the United States cannot disclose CBI to states engaged in a joint enforcement action. However, the regulations describe certain contexts in which the United States may divulge CBI to states. *See* 40 C.F.R. §2.209; *see also United States v. Chromatex, Inc.*, No. 91-1501, 2010 U.S. Dist. LEXIS 67101, at *9 n.3 (M.D. Pa. July 6, 2010) (discussing the court order exemption).

☐ EPA regulations also allow a business to consent to the release of its CBI. *See id.* §2.209(f). Therefore, attorneys should consider including the defendant company in a confidentiality agreement to facilitate sharing of CBI. The confidentiality agreement can state that the company waives the confidentiality of its CBI with regard to the parties to the agreement and allows the United States to exchange CBI with a signatory state.

☐ EPA's CBI regulations further permit the agency to disclose information requested under some environmental statutes to a state agency if the state has duties or responsibilities under the pertinent statute or the regulations implementing it. *See, e.g.*, 40 C.F.R. §§2.301(h)(3)(CAA), 2.302(h)(3)(CWA), 2.305(h)(3)(RCRA).

[45] The impact of local court rules or ADR confidentiality protections on a federal agency's FOIA obligations is an open legal question at this time. Check the law in your jurisdiction before assuming such protections exist.

[46] Exemption 4 also protects trade secrets or confidential commercial information. 5 U.S.C. §552(b)(4).

APPENDIX A

Environment and Natural Resources Division

HISTORY

On November 16, 1909, Attorney General George Wickersham signed a two-page order creating "The Public Lands Division" of the Department of Justice to step into the breach and address the critical litigation that ensued. 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" (ENRD) to better reflect those responsibilities. Today, the Division, which is organized into ten sections, has offices in Washington, D.C., Anchorage, Boston, Denver, Sacramento, San Francisco and Seattle, and a staff of over 600 people. It currently has over 7,000 active cases and matters, and has represented virtually every federal agency in courts in all fifty states, territories and possessions.

OUR WORK

The Environment and Natural Resources Division of the Department of Justice handles environmental and natural resources litigation on behalf of the United States. The work of the Division arises under approximately 150 federal civil and criminal statutes, including the CAA, CWA, CERCLA, Safe Drinking Water Act, Endangered Species Act, Marine Mammal Protection Act, National Environmental Policy Act (NEPA), Surface Mining Control and Reclamation Act, and Tucker Act.

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.

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 CAA to reduce air pollution
- the CWA to reduce water pollution and protect wetlands
- RCRA to ensure that hazardous wastes are properly stored, transported, and disposed

- CERCLA (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 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 CAA and the CWA, or activities at federal facilities that are claimed to violate such statutes. The Natural Resources 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 National Forest), 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 Natural Resources Section is primarily responsible for these cases.

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 Natural Resources 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 Natural Resources 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 affect 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 Law and Policy Section.

SECTIONS

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, the Federal Bureau of Investigation, and the Fish and Wildlife Service in dealing with violations of such statutes as the CAA, the CWA, RCRA, CERCLA, the Lacey Act, and the Endangered Species Act, among other statutes.

Environmental Defense Section: The Environmental Defense Section represents the United States in complex civil litigation arising under a broad range of environmental statutes. EDS is the only section in the Division that routinely handles cases in both federal circuit and district courts. EDS defends rules issued by EPA and other agencies under the pollution control laws, brings enforcement actions against those who destroy wetlands in violation of the CWA, 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 regulations governing permitting of discharges from factory farms, its ambitious "Clean Air Interstate Rule" aimed at attaining air quality standards for ozone and fine particulate matter in the eastern half of the country, the Agency's efforts to revamp the CAA new source review program, and its safety standards for the Yucca Mountain nuclear waste repository in Nevada; defending challenges to the United States' implementation of international treaties involving the elimination of chemical weapons; and prosecuting civil enforcement actions under the CWA that have protected hundreds of thousands of wetland acres and recovered millions of dollars in penalties.

Environmental Enforcement Section: The Environmental Enforcement Section is one of the largest litigating sections in the Department and includes nearly one-third 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 CAA, CWA, Safe Drinking Water Act, Oil Pollution Act, RCRA and 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 a basis of the Section's actions to recover damages for injury to natural resources that are under the trusteeship of federal agencies.

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.

Natural Resources Section (formerly "General Litigation Section"): The Natural Resources Section is responsible for a diverse and extensive docket of primarily defensive litigation involving more than eighty statutes, treaties and the U.S. Constitution. The Section's responsibilities include 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 matter involves federal land, resource and ecosystem management decisions challenged under a wide variety of federal environmental statutes and affecting more than a half-billion acres of lands managed by the Departments of the Interior and Agriculture (totaling nearly one-quarter of the entire land mass of the United States) and an additional 300 million acres of subsurface mineral interests; vital national security programs involving military preparedness and border protection, nuclear materials management, and weapons system research; billions of dollars in constitutional claims of Fifth Amendment takings covering a broad spectrum of Federal activities affecting private property; challenges brought by individual Native Americans and Indian tribes relating to the United States' trust responsibility; a panoply of cultural resource matters including cases related to historic buildings, repatriation of ancient human remains and salvage of shipwrecks; preserving federal water rights and prosecuting water rights adjudications; ensuring proper mineral royalty payments to the Treasury; and litigation involving offshore boundary disputes, interstate water compacts and other issues in Supreme Court original actions in coordination with the Office of the Solicitor General. The Section's clients include virtually every major Federal executive branch agency.

Wildlife and Marine Resources Section: The Wildlife and Marine Resources Section litigates civil cases under federal wildlife laws and laws concerning the protection of marine fish and mammals. 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.

Law and Policy Section (formerly "Policy, Legislation and Special Litigation Section"): The Law and Policy 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. Other duties include responding to congressional and citizen

correspondence and FOIA requests, as well as serving as the Division's ethics officer and counselor, alternative dispute resolution counselor, and liaison with state and local governments. Attorneys in the Section coordinate the Division's amicus practice, handling many of these cases directly or together with Appellate, undertake other special litigation projects, and coordinate the Division's involvement in international legal matters.

Appellate: 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 the Department'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.

ENVIRONMENT AND NATURAL RESOURCES
DIVISION POINTS OF CONTACT[47]

OFFICE OF THE ASSISTANT ATTORNEY GENERAL
John C. Cruden
Assistant Attorney General

Sam Hirsch
Principal Deputy Assistant Attorney General

Lisa E. Jones
Deputy Assistant Attorney General

Jean E. Williams
Deputy Assistant Attorney General

Bruce S. Gelber
Deputy Assistant Attorney General

Main Phone Number: 202-514-2701

OTHER ENRD CONTACTS
Andrea L. Berlowe
Counselor for State and Local Matters
202-305-0478

Wyn Hornbuckle
ENRD Press Liaison
202-514-2008

APPELLATE SECTION
James C. Kilbourne
Chief
202-514-2748

Andrew C. Mergen
Deputy Chief
202-514-2813

ENVIRONMENTAL CRIMES SECTION
Deborah L. Harris
Chief
202-305-0347

Joseph A. Poux
Deputy Chief
202-305-0357

[47] Please consult the Division's website at http://www.justice.gov/enrd/contact-division for staffing updates.

ENVIRONMENTAL DEFENSE SECTION

Letitia Grishaw
Chief
202-514-2219

Christopher Vaden
Deputy Chief
202-514-4438

Jack Lipshultz
Assistant Chief
Supervising: Petitions for Review
202-514-2191

Kenneth Amaditz
Assistant Chief
Supervising: Regions 3 and 10
202-514-3698

Angeline Purdy
Assistant Chief
Supervising: Regions 2, 6
and cases filed in DC (including Claims Court)
202-514-0996

Martha Mann (as of February 1, 2017)
Assistant Chief
Supervising: Regions 4 and 9
202-514-2664

Scott Schachter
Assistant Chief
Supervising: Regions 1, 5, 7 and 8
202-514-4632

Cherie Rogers
Assistant Chief
Supervising: Administrative Matters
and Training
202-514-3701

ENVIRONMENTAL ENFORCEMENT SECTION

Tom Mariani
Chief
202-514-4620

Nat Douglas
Deputy Chief
Supervising: EPA Regions 3/8 and 6
202-514-4628

Ellen Mahan
Deputy Chief
Supervising: Regions 1/2 and 4/9
202-514-3646

[Vacant]
Deputy Chief
Supervising: Regions 5 and 7/10
202-[###-####]

Karen Dworkin
Assistant Chief
Supervising: Special Litigation & Projects Group
202-514-4084

Jeffrey Sands
Assistant Chief
Supervising: Management
202-514-3908

ENVIRONMENTAL ENFORCEMENT SECTION (continued)

Susan Akers
Assistant Chief
Supervising: Regions 7 and 10
202-514-4831

William Brighton
Assistant Chief
Supervising: Region 5
202-514-2244

Robert Brook
Assistant Chief
Supervising: Regions 3 and 8
202-514-2738

Tom Carroll
Assistant Chief
Supervising: Region 6
202-514-4051

Bob Maher
Assistant Chief
Supervising: Regions 1 and 2
202-514-4241

Henry Friedman
Assistant Chief
Supervising: Regions 4 and 9
202-514-5268

INDIAN RESOURCES SECTION

Craig Alexander
Chief
202-514-9080

John Turner
Deputy Chief
202-514-9257

LAND ACQUISITION SECTION

Andrew M. Goldfrank
Chief
202-305-0288

Barry A. Weiner
Deputy Chief
202-305-0469

LAW AND POLICY SECTION (formerly "Policy, Legislation and Special Litigation Section")

Karen M. Wardzinski
Chief
202-514-0474

NATURAL RESOURCES SECTION (formerly "General Litigation Section")

Lisa L. Russell
Chief
202-305-0438

James Gette
Principal Deputy Chief
202-305-1461

Ed Passarelli
Deputy Chief
202-305-0468

WILDLIFE AND MARINE RESOURCES SECTION
Seth M. Barsky
Chief
202-305-0223

APPENDIX B

Contact Information and State Attorneys General Offices

Jeanette Manning is the NAGTRI program counsel and liaison to NAAG's Energy and Environment Committee. Should you have an interest in contacting a particular person within an attorney general office on any environmental matters, such a request should be made directly to Jeanette Manning. She may be reached electronically at jmanning@naag.org. The information provided in the table includes publicly available information for each state and territorial attorney general office.

State	Address & Telephone Number
Alabama	Office of the Attorney General of Alabama P.O. Box 300152 Montgomery, AL 36130-0152 Tel: (334)-242-7300
Alaska	Office of the Attorney General of Alaska P.O. Box 110300 Juneau, AK 99811-0300 Tel: (907)-465-2133
American Samoa	Office of the Attorney General of American Samoa American Samoa Gov't, Exec. Office. Bldg., Utulei, Territory of American Samoa Pago Pago, AS 96799 Tel: (684)-633-4163
Arizona	Office of the Attorney General of Arizona Financial Services Section 1275 W Washington Street Phoenix, AZ 85007 Tel: (602)-542-5025

Arkansas	Office of the Attorney General of Arkansas Catlett-Prien Building 323 Center Street, Suite 200 Little Rock, AR 72201 Tel: (501)-682-2007
California	Office of the Attorney General of California P.O. Box 944255 Sacramento, CA 94244-2550 Tel: (916) 445-9555
California	Office of the Attorney General of California 300 South Spring Street Los Angeles, CA 90013-1230 Tel: (213)-897-2000
California	Office of the Attorney General of California 1515 Clay Street, 20th Floor Oakland, CA 94612-1499 Tel: (510)-622-2100
California	Office of the Attorney General of California 1300 I Street Sacramento, CA 95814-2919 Tel: (916)-445-9555
Colorado	Office of the Attorney General of Colorado Ralph L. Carr Judicial Building 1300 Broadway, 10th Floor Tel: (720)-508-6000
Connecticut	Office of the Attorney General of Connecticut 55 Elm Street PO Box 120 Hartford, CT 06106 Tel: (860)-808-5318

Delaware	Office of the Attorney General of Delaware Carvel Office Building 820 N. French Street Wilmington, DE 19801 Tel: (302)-577-8338
District Of Columbia	Office of the Attorney General of the District of Columbia 441 4th Street, NW, Suite 1100 Washington, DC 20001 Tel: (202)-727-3400
Florida	Office of the Attorney General of Florida The Capitol, PL 01 Tallahassee, FL 32399-1050 Tel: (850)-414-3300
Georgia	Office of the Attorney General of Georgia 40 Capitol Square, SW Atlanta, GA 30334-1300 Tel: (404)-656-3300
Guam	Office of the Attorney General of Guam ITC Building, 590 S. Marine Corps Dr, Ste. 706, Tamuning, Guam 96913 Tel: (671)-475-3324
Hawaii	Office of the Attorney General of Hawaii 425 Queen St. Honolulu, HI 96813 Tel: (808)-586-1500
Idaho	Office of the Attorney General of Idaho 700 W. Jefferson P.O. Box 83720 Boise, ID 83720-0010 Tel: (208)-334-2400

Illinois	Office of the Attorney General of Illinois 100 West Randolph Street, 20th Floor Chicago, IL 60601 Tel: (312)-814-3000
Indiana	Office of the Attorney General of Indiana Indiana Government Center South 302 W Washington Street, 5th Floor Indianapolis, IN 46204 Tel: (317)-232-6201
Iowa	Office of the Attorney General of Iowa 1305 East Walnut St Des Moines, lA 50319 Tel: (515)-281-5164
Kansas	Office of the Attorney General of Kansas 120 S.W. 10th Ave., 2nd Floor Topeka, KS 66612-1597 Tel: (785) 296-2215
Kentucky	Office of the Attorney General of Kentucky Capitol Building 700 Capitol Avenue, Capitol Building Suite 118 Frankfort, KY 40601-3449 Tel: (502)-696-5300
Louisiana	Office of the Attorney General of Louisiana Post Office Box 94095 Baton Rouge, LA 70804-4095 Tel: (225)-342-6000
Maine	Office of the Attorney General of Maine State House Station 6 Augusta, ME 04333 Tel: (207)-626-8800

Maryland	Office of the Attorney General of Maryland 200 St. Paul Place Baltimore, MD 21202-2202 Tel: (410)-576-6300
Massachusetts	Office of the Attorney General of Massachusetts 1 Ashburton Place Boston, MA 02108-1698 Tel: (617)-727-2200
Michigan	Office of the Attorney General of Michigan 525 W. Ottawa St. P.O. Box 30212 Lansing, Ml 48909-0212 Tel: (517)-373-1110
Minnesota	Office of the Attorney General of Minnesota 1400 Bremer Tower, 445 Minnesota St. Saint Paul, MN 55101-2131 Tel: (651)-296-3353
Mississippi	Office of the Attorney General of Mississippi Department of Justice, P.O. Box 220 550 High Street Jackson, MS 39201-0220 Tel: (601)-359-3680
Missouri	Office of the Attorney General of Missouri Supreme Ct. Bldg., 207 W. High St. P.O. Box 899 Jefferson City, MO 65102 Tel: (573)-751-3321
Montana	Office of the Attorney General of Montana Justice Building 215 N Sanders Street Helena, MT 59620-1401 Tel: (406)-444-2026

Nebraska	Office of the Attorney General of Nebraska 2115 State Capitol State Capitol Building Lincoln, NE 68509-8920 Tel: (402)-471-2682
Nevada	Office of the Attorney General of Nevada Old Supreme Ct. Building 100 N Carson Street Carson City, NV 89701 Tel: (775)-684-1100
New Hampshire	Office of the Attorney General of New Hampshire State House Annex 33 Capitol Street Concord, NH 03301-6397 Tel: (603)-271-3658
New Jersey	Office of the Attorney General of New Jersey RJ Hughes Justice Complex 25 Market Street, Box 080 Trenton, NJ 08625-0080 Tel: (609)-292-5508
New Mexico	Office of the Attorney General of New Mexico Post Office Drawer 1508 Santa Fe, NM 87504-1508 Tel: (505)-827-6000
New York	Office of the Attorney General of New York New York State Department of Law The Capitol, 2nd Fl., Albany, NY 12224-0341 Tel: (518)-474-7330

North Carolina	Office of the Attorney General of North Carolina Department of Justice 9001 Mail Service Center P.O. Box 629 Raleigh, NC 27602-0629 Tel: (919)-716-6400
North Dakota	Office of the Attorney General of North Dakota State Capitol, 600 E. Boulevard Ave., Dept. 125 Bismarck, ND 58505-0040 Tel: (701)-328-2210
Northern Mariana Islands	Office of the Attorney General N. Mariana Islands Administration Building P.O. Box 10007 Saipan, MP 96950-8907 Tel: (670)-664-2341
Ohio	Office of the Attorney General of Ohio State Office Tower 30 East Broad Street, 14th Floor Columbus, OH 43215-3428 Tel: (614)-466-2766
Oklahoma	Office of the Attorney General of Oklahoma 313 NE 21st Street Oklahoma City, OK 73105 Tel: (405)-521-3921
Oregon	Office of the Attorney General of Oregon Justice Building 1162 Court Street, N.E. Salem, OR 97301-4096 Tel: (503)-378-6002
Pennsylvania	Office of the Attorney General of Pennsylvania 1600 Strawberry Square, 16th Floor Harrisburg, PA 17120 Tel: (717)-787-3391

Puerto Rico	Office of the Attorney General of Puerto Rico P.O. Box 902192 San Juan, PR, 00902-0192 Tel: (787)-721-2900
Rhode Island	Office of the Attorney General of Rhode Island 150 S. Main St. Providence, RI 02903 Tel: (401)-274-4400
South Dakota	Office of the Attorney General of South Dakota 1302 East Highway 14, Suite 1 Pierre, SD 57501-8501 Tel: (605)-773-3215
South Carolina	Office of the Attorney General of South Carolina Rembert C. Dennis Office Building P.O. Box 11549 Columbia, SC 29211-1549 Tel: (803)-734-3970
Tennessee	Office of the Attorney General of Tennessee P.O. Box 20207 Nashville, TN 37202-0207 Tel: (615)-741-3491
Texas	Office of the Attorney General of Texas Capitol Station, P.O. Box 12548 Austin, TX 78711-2548 Tel: (512) 463-2100
Utah	Office of the Attorney General of Utah Utah State Capitol Complex 350 North State Street Suite 230 Salt Lake City, UT 84114-2320 Tel: (800)-244-4636

Vermont	Office of the Attorney General of Vermont 109 State Street Montpelier, VT 05609-1001 Tel: (802)-828-3173
Virgin Islands	Office of the Attorney General of the Virgin Islands 34-38 Kronprindsens Gade, GERS Building, 2nd Floor St. Thomas, Virgin Islands 00802 Tel: (340)-774-5666
Virginia	Office of the Attorney General of Virginia 900 East Main Street, 3rd Floor Richmond, VA 23219 Tel: (804)-786-2071
Washington	Office of the Attorney General of Washington 1125 Washington St. SE PO Box 40100, Olympia, WA 98504-0100 Tel: (360)-753-6200
West Virginia	Office of the Attorney General of West Virginia State Capitol, 1900 Kanawha Blvd. E. Charleston, WV 25305 Tel: (304)-558-2021
Wisconsin	Office of the Attorney General of Wisconsin Wisconsin Department of Justice, State Capitol, Room 114 East P. O. Box 7857 Madison, WI 53707-7857 Tel: (608)-266-1221
Wyoming	Office of the Attorney General of Wyoming State Capitol Building 200 W 24th St. Cheyenne, WY 82001-2002 Tel: (307)-777-7841

APPENDIX C

[Case Name] Contacts List[48]

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 601 D Street, N.W. Room 2121 Washington, D.C. 20001	202-xxx-xxxx	xxxx.xxxx@usdoj.gov
[State] AG				
U.S. EPA Office of Regional Counsel				

[48] EES Doc. No. 2579271

APPENDIX D

Internal Case Management Plan[49]

Document No.
As of __/__/__
Attorney:

CASE MANAGEMENT PLAN
[CASE NAME]
[CASE I.D. NUMBER]

I. ADMINISTRATIVE INFORMATION

[internal tracking information]
Date Filed:
Name of Action:
District:
Client/ Region:

Type of Action (statute):
Case I.D. No:
Civil Action No.:

II. STAFF

A. DOJ
Lead attorney:
Support attorney(s):
Paralegal:

B. Agency Attorney
Regional attorney:
Regional technical staff:
HQ:

C. U.S. Attorney's Office
AUSA:
Role (lead, support, filing only):

D. Other DOJ Sections/Federal Agencies:

E. State:

[49] DOJ attorneys should refer to additional, internal information on the ENRD intranet, and contact an ENRD e-discovery coordinator with questions.

Attorney:
Technical staff:

III. PRE-FILING CASE DEVELOPMENT

A. SOL issue?
When?

What claim(s)?

B. Target Date for Filing:

C. Issues to be resolved, date, plan and assignments for resolving each:

D. Information needed for filing, date, plan and assignments for obtaining each:

E. Experts needed? See V. below. Consider whether expert opinion is necessary or advisable pre-filing

IV. POST-FILING MOTIONS

A. Motion for Summary Judgment
Issues:
Who will prepare:
Target date for filing:

B. Motion for Case Management Plan needed? If so,
Who will prepare:
Target date for filing:

C. Motion to Strike Defenses needed? If so,
Who will prepare:
Target date for filing:

D. Response to Motion to Dismiss
Who will prepare:
Expected date:

E. Other Motions anticipated/ needed:
Who will prepare:
Expected date:

V. DISCOVERY PLAN

DISCOVERY CUTOFF DATE:

A. Requests to Admit:

1. Affirmative
   Issues:
   Who will prepare:
   Target date for serving:

2. Defensive
   Who will prepare:
   Due Date:

B. Interrogatories

1. Affirmative
   Issues:
   Who will prepare:
   Target date for serving:

2. Defensive
   Who will prepare:
   Due Date:

C. Document Requests:

1. Affirmative
   Issues:
   Who will prepare:
   Target date for serving:

   Who will handle production:
   Who will handle review:
   How will review be done:
   Litigation Support needs (staff, contract, computer support, time frame, costs):

2. Defensive
   Who will prepare response:
   Who will collect documents:
   Who will handle production:

D. Depositions

1. Affirmative
   Issues:
   No. anticipated:
   Schedule for starting:
   Schedule for concluding:

   Deponent/ attorney assignments:

2. Defensive Depositions
   No. anticipated:
   Subjects:
   Deponent/ attorney assignments:

VI. DEVELOPMENT OF EXPERT EVIDENCE

DEADLINE FOR LISTING EXPERT WITNESSES:

DEADLINE FOR EXPERT WITNESS REPORTS:

TYPES OF EXPERT WITNESSES NEEDED and, for each, specify: (1) available agency in-house experts [specify availability], (2) for outside experts -- schedule, plans and assignments for search, interviews, and hiring; estimated cost (by fiscal year) and who will pay

Expert consultants needed [include same info as above]

Data or other information needed to support experts' testimony (specify who will collect, when, cost, who will pay):

VII. TRIAL PREPARATION

TRIAL DATE:

FACT WITNESS LIST DUE:

EXPERT WITNESS LIST DUE:

EXHIBIT LIST DUE:

PRE-TRIAL MOTION DEADLINE:

A. List of fact witnesses/ subject/ attorney assigned for trial

B. List of expert witnesses/ subject/ attorney assigned for trial

C. Assignments for cross-examination of opposing witnesses:

D. List of exhibits, how each will be offered into evidence

Attorney/ paralegal assignments for document handling:

E. Motions in Limine
Date due:
Subjects for affirmative motions/ attorney assigned

Subjects of anticipated defense motions, attorney assigned

F. Pre-trial order
Date due:
Attorney responsible:

G. Pre-trial brief
Date due:
Attorney responsible:

H. Jury instructions needed?
Date due:
Attorney(s) responsible:

VIII. POST-TRIAL

A. Proposed findings of fact, conclusions of law
Date due:
Attorneys responsible:

B. Date of judgment:

C. Deadline for appeal:
Who responsible for forwarding to appellate attorney:

IX. NEGOTIATIONS PLAN

A. ESSENTIAL TERMS FOR SETTLEMENT:

B. PLAN FOR PRE-FILING NEGOTIATION:

What penalty amount will be demanded?

See Case Development, penalty calculation

Who will draft:
Date for sending draft to Agency:
Target date for forwarding approval package:
How much time will defendant be given to respond (normally 2 weeks)

Negotiations plan if defendants request meeting:

How much is enough for a "good faith offer":

Target date for settlement meeting:

Plan if pre-filing settlement is reached:

Who will do first draft of decree:
Target date for first draft:
Target date for sending to defendant:
Target date for finalizing CD (should be within 30 days of reaching settlement in principle):

C. PLAN FOR POST-FILING NEGOTIATIONS

What minimum offer should be required to initiate:

Bottom line requirements for settlement:

Likely time frame for negotiations:

Assignment of responsibilities:
Lead contact with defendant:
Legal support needs:
Technical support needs:

Who will have primary responsibility for consent decree drafts:

X. SUMMARY SCHEDULE [target or anticipated dates or time ranges]

Send approval package to delegated authority:

Complete pre-filing settlement negotiations:

File complaint:

Anticipated Motion to Dismiss:

Response:

Motion for [Partial] Summary Judgment:

Reply:

Serve Interrogatories:

Serve Document Requests:

Serve Requests to Admit:

Response to Defendant’s Interrogatories:

Response to Defendant’s Requests to Admit:

Motions to Compel:

Expert Witness Reports:

Commence Depositions:

End Depositions:

Witness list:

Exhibit list:

Pre-Trial Brief:

Trial:

XI. ALLOCATION OF PERSONNEL RESOURCES

For all litigation team members, list % of time expected to be available, and approximate time frames

Agency Legal (Region and Headquarters, if involved)

Agency Technical

Attorneys

Paralegals

APPENDIX E

SAMPLE PROOF CHART[50]

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	[ ]		Engineer

[50] EES Doc. No. 593826.

	Complaints to [ ] DMRs Bypass Reports PH contracting reports on repairs made			
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 IV			
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?

APPENDIX F

State Public Record Statutes

National Association of Attorneys General

This appendix includes a listing of the applicable state public record statutes and abbreviated information, where appropriate, to discuss particular aspects of the statutes. The state laws are known by different names but, in essence, they all either resemble or attempt to provide mechanisms to obtain information using similar means as the federal Freedom of Information Act. The assembled table notes the particular name of a statute in the respective states. The ultimate objective of the laws from every state is to provide a forum that enables the public to access records and information from its government unless otherwise prohibited. In some instances, this information is not permitted to be disclosed, but each state has determined the parameters and scope applicable to inspection and/or disclosure of its materials and records.

For further information, please see the following table of information:

State	Title	Pertinent Description	Statutory Authority
Alabama	Alabama Public Records Law	Alabama's law states that unless there is a state statute that closes a public record from public view, it is open to the public for inspection. The court has created exceptions to include sensitive personnel records, pending criminal investigations and information received by a public officer in confidence. The statute also provides for two specific and general exemptions, all of which are mandatory. The specific exemptions relate to records regarding the use of public libraries and information related to security and safety to protect the public harm. Specific statutory exemptions include records related to: banking, hospital, Medicaid recipients' identities, reports concerning certain diseases, and tax returns and financial statements.	Ala. Code § 36-12-40 *et seq.* § 36-12-41 provides the right for the public to have access. § 41-13-1 provides the definition for a public record. See Respective Sections: Ala. Code § § 5-3A-11, 5-5A-43; 12-21-6; 22-6-9; 22-11A-2; 12 & 22; and 40-1-33 & 55.

State	Title	Pertinent Description	Statutory Authority
		Federal grant programs require that certain records or parts of records be maintained in confidence.	
Alaska	Alaska Public Records Act	The Alaska statute generally provides for all records of a government agency to be deemed public records that are open for inspection under reasonable and regular office hours. The law also provides for limited exceptions to the general rule related to disclosure in AS 40.25.110 *et seq*. One such exception includes not disclosing those documents that were intended to be confidential by a federal law or regulation or state law. State law includes state statutes, regulations, state common law, and the Alaska Constitution. In the context of consumer protection/antitrust matters, the AG is prohibited from releasing information concerning names or persons under investigation for violations of the state's consumer protection law. The same applies to documents produced pursuant to a civil investigatory demand involving the antitrust statute.	Alaska Stat. 09.25.110 *et seq*.
Arizona	Arizona Public Records Law	The law provides for records to be made available to the public in a prompt manner. Public records include books, papers, maps, photographs, other documentary materials, including prints or copies of items on film or electronic media. Arizona case law also discusses exceptions re: items that should be withheld, including those that are confidential by statute or those that pertain to protecting one's privacy	Ariz. Rev. Stat. 39.121*et seq*. / Ariz. Rev. Stat. 39-101 *et seq*.

State	Title	Pertinent Description	Statutory Authority
		interest that outweighs the public's right to know. The law also provides for attorneys' fees to be awarded if the custodian of the materials acts arbitrarily, capriciously, or in bad faith in refusing to disclose the records.	
Arkansas	Arkansas Freedom of Information Act	The law covers two broad areas for disclosure, including public records and public meetings. Generally, the law provides for the Act to control access to records and meetings involving state and local governmental entities. Courts also construe disclosure liberally and favor openness. Records include writings, recorded sounds, films, tapes, electronic or computer-based information, or data compilations in any medium. Software has been excluded from the definition. The additional exemptions may be found in § 25-19-105.	Ark. Code Ann. 25-19-101 *et seq*.
California	California Public Records Act	California adopted a constitutional amendment to ensure the public's access to government records. Placing this protection in the Constitution likely will impact the treatment towards exemptions and provide that they be narrowly construed and conform with standards set forth in the State's Sunshine Amendment, which can be found at Cal. Const. Art. I, § 3(b). Another pertinent law for review entails the Legislative Open Records Act at Cal. Gov't Code § 9070 *et. seq*.	Cal. Gov't. Code §6250 *et seq.*

Colorado	Colorado Open Records Act	There are various parts to the Colorado law, for which part 2 addresses inspection and copying of public records. Part 3 deals separately with criminal justice records. Provisions have been included to deny inspection and copying of public records, giving the State numerous grounds for denial, *e.g.*, compiled for a law enforcement purpose. Other exemptions related to medical, sociological, or scholastic-related achievement data, personnel files, trade secrets, records regarding public libraries, facilities, utilities, and sexual harassment claims and investigations.	Colo. Rev. Stat. §24-72-201 *et seq.*
Connecticut	Connecticut Freedom of Information Act	The law provides for disclosure of public records but also provides for various exemptions, particularly where any federal law or statute prohibits such disclosure. Information pertaining to trade secrets, commercial or financial information given in confidence, records pertaining to strategy in pending litigation, and records prepared and kept in furtherance of an attorney's rendition of legal advice are protected documents. The state uniquely has established an administrative agency, the Freedom of Information Commission, designated to be responsible for the initial adjudication over disclosure disputes.	Conn. Gen. Stat. §1-15, 1-18 *et seq*. / Conn. Gen. Stat § 1-200
Delaware	Delaware Freedom of Information Act	Seventeen statutory exemptions discuss medical and investigatory files, trade secrets, collective bargaining and pending litigation records, and other records that could jeopardize security or violate	Del. Code Ann. Tit. 29 §10001 *et seq*.

		personal privacy if disclosed. Further details re: each exemption may be found in section 10002(g).	
District of Columbia	D.C. Freedom of Information Act	The District of Columbia Freedom of Information Act, or FOIA, DC Code §§ 2-531-539, provides that any person has the right to request access to records. All public bodies of the District government are required to disclose public records, except for those records, or portions of records, that are protected from disclosure by the exemptions found at DC Code § 2-534.	2 D.C. Code 531 et seq.
Florida	Florida Public Records Law	There are numerous exemptions under this law, exceeding at least 200. Each expires after five years of enactment if not re-enacted by the legislature under the Open Government Sunset Review Act of 1995. In creating or re-enacting exemptions, the legislature must demonstrate the public necessity for nondisclosure and construct the exemption as narrowly as possible.	Fla. Stat. Ch. 119.01 *et seq.*
Georgia	Georgia Open Records Act	The Georgia law is liberal in its approach to cover almost all documents, including papers, letters, maps, books, tapes, photographs, computer-based or generated information. This also includes all of the above-referenced materials that are prepared during the course and operation of a public office or agency. A strict 3-day timeframe has been imposed for the custodian of the records to respond to a request and determine whether the requested materials are permitted to be inspected and/or copied.	Ga. Code Ann. § 50-18-70 *et seq*.

Hawaii	Uniform Information Practices Act	The law begins very openly to declare that the State's policy is to ensure that as a matter of public policy, government action that is conducted will be made readily available as possible. One particular section of the law, pursuant to § 92F-11(a), an affirmative disclosure responsibility is placed on state agencies. However, the law does provide for exceptions related to law enforcement and protection of judicial actions, in addition to any government documents—that by their very nature—are confidential and protect a legitimate government function, and those that are prohibited from disclosure due to state or federal law.	Haw. Rev. Stat. § 92F-1 *et seq*.
Idaho	Idaho Public Records Act	There are many exemptions that exist within the Idaho law, exceeding 75 in total. Most of the exemptions relate to law enforcement, investigatory, juvenile records, personnel files, financial, medical, geographical, and trade secrets protections.	Idaho Code 9-337 *et seq*.
Illinois	Illinois Freedom of Information Act	The law is drafted to ensure that public records are readily made available for public inspection and to provide copies essentially to any person who makes a written request, absent exemptions. A response from the government is required within 7 days. Some exemptions exist, including protected attorney-client privilege materials and records prepared during a criminal investigation and those protected by federal or state law information.	5 Ill. Comp. stat. 140/1 *et seq*.

Indiana	Indiana Access to Public Records Act	The law provides for how the state will treat the release of social security numbers. Administrative Rule 9 governs how to treat judicial records.	Indiana Access to Public Records Act: § 5-14-3 *et seq*.; Ind. Code § 4-1-10 *et seq*.
Iowa	Iowa Open Records Law	The Iowa law provides for access to essentially any government-created document that is prepared in any medium and belonging to any state, county, city, etc. engaging in government business. The lawful custodian with possession of the document is responsible for carrying out the function of the statute. Exceptions exist as to which documents must be turned over for inspection unless prohibited by law, and nor must access be provided to use a geographic computer database or documents that are deemed confidential in nature. Procedures have been established for requestors to access, inspect, and copy publicly available documents.	Iowa Code §22.1*et. seq.*
Kansas	Kansas Open Records Law	The Kansas law provides for inspection of public records during regular office hours for any public agency, where available. The request must be made to the custodian, at which time the custodian must respond within 3 business days with some sort of response. Any denial must state specifically the basis for the denial. As a matter of public policy, the law declares that such records should be made available. There are provisions that include specific records that shall not be disclosed, including those involving personnel records, those prohibited from disclosure by state or federal law, law enforcement purposes, and many others up to over 45 provisions laying out with	Kan. Stat. Ann. §45-215 *et. seq*.

		specificity those records that do not have to be disclosed, pursuant to § 45-221.	
Kentucky	Kentucky Open Records Act	Kentucky has declared in its law that the policy behind the legislation is to ensure that public records are free and open for examination when in the public interest. The inclusion of which documents are permitted for inspection is quite broad, but exceptions have been provided for and pursuant to KRS 61.878. This includes not permitting for inspection documents that are prohibited by law from being disclosed, and in particular, documents, such as but not limited to, those that contain personal information that would cause a personal privacy invasion, confidentially gathered documents for scientific research, supervision of a financial institution, content of real estate appraisals, examination data for licensing examination, employment, law enforcement records, etc.	Ky. Rev. Stat. Ann. §61.870 *et. seq.*
Louisiana	Louisiana Public Records Act	Records are generally deemed to be open for inspection and review, but the law has created exceptions to protect particular documents related to, for instance, law enforcement efforts, confidential sources of information, terrorist related activities, proprietary or trade secrets, commercially sensitive information and the like. The law expressly states that it is not to be misconstrued that disclosure is required in instances where law enforcement officials are conducting investigations or pursuing matters for prosecution.	La. Rev. Stat. Ann. §44:1 *et. seq.*

Maine	Maine Freedom of Access Act	Maine's law essentially applies to any government related activity, including public proceedings that include any transactions or functions that affect any or all citizens of the State. The documents that are subject to inspection include a wide-range of materials forms, including written, graphic, electronic, or mechanical. Exceptions have been included in the law and a review process has also been created to address issues where denials are issued.	Me. Rev. Stat. Ann. Ttl. 1§ 400 *et seq*.
Maryland	Maryland Public Information Act	The law in Maryland sets forth three categories of exceptions to disclosures, including non-disclosure if the source of law outside the MPIA statute prevents disclosure (state or federal law prohibitions), there is an affirmative obligation on the custodian to deny inspection, or denial is based upon discretionary action. Any information pertaining to an investigation involving violations of state or federal laws that the AG is conducting may be withheld as being contrary to the public interest to disclose. Any confidential financial and commercial information, such as trade secrets, are protected from disclosure.	MD Code Ann. Com. Law I § 10-611 *et seq*.
Massachusetts	Massachusetts Public Records Act	Requests must be made to the custodian. The law's central purpose is to afford broad access to government records at a reasonable time and without any unreasonable delay. The law is fairly restrictive in terms of a custodian making a demand to receive information as to why a request was made.	Mass. Ann. Laws Ch. 66 §10(b). See also ch. 4 § 7 cl. 26

Michigan	Michigan Freedom of Information Act	The law contains numerous and very specific and discretionary exemptions regarding disclosure, including law enforcement, personal information, medical files, trade secrets, and preliminary drafts.	Mich. Comp. Laws Ann. §§ 15.231-246.
Minnesota	Minnesota Government Data Practices Act	The act allows for several categories to include exempt materials, such as educational, public health, investigatory and security-related data. The exemptions may be found in § 13.10 and 13.90.328.	Minn. Stat. § 13.01 *et seq*.
Mississippi	Mississippi Public Records Act	The Mississippi law provides for a fairly broad public records policy. In particular, it provides that public records be made available for inspection by any person. There is a list of exempted records that are deemed privileged under the law, including at least 21 areas, pursuant to § 25.61.11. Some include academic records, concealed pistols or revolvers, licenses to carry, defendants likely to flee or physically harm themselves, hospital records, jury records, and others.	Miss. Code Ann. §25-61-1 *et. seq.*
Missouri	Missouri Sunshine Law	The law is arranged to provide a mechanism where records can be inspected by any citizen of the State and that these records must be made available at a reasonable time. Refusal by an official in charge of the documents to permit inspection is prohibited, and violations constitute a criminal offense. However, exceptions have been instituted in the law, including documents prohibited by law from being disclosed or those involving ownership or a security interest in registered public obligations.	Mo. Rev. Stat. §109.180.1 *et seq.* / Mo. Rev. Stat § 610.023 *et. seq*.

Montana	Montana Public Records Act / Montana Open Records Law	The Montana law for public records has been renumbered, and §2-6-101 *et seq* has been repealed. The current law is found in Title 2 of the Montana Code but falls under Public Records – General Provisions. The law's state purpose is to still make available an efficient and effective way for public records and information to be shared with the public. The declaration in the law notes that availability and release of this information is in accordance with Article II of the Montana Constitution. The law is written such that openness is the expected goal, but exceptions for certain documents have been created within the law, such as law enforcement records, documents related to public safety and security of public facilities, and private record donors as long as the restrictions do not apply to public information.	Mont. Code Ann. §2-6-1001
Nebraska	Nebraska Public Records Law	Nebraska's law is arranged to ensure that all citizens of the state have the ability to access and examine public records. A custodian maintains the records and determines whether the records are permitted to be released or whether a denial is warranted, which must be provided to the requester in writing. Pursuant to §84-715.05, an enumerated list is provided for the types of documents that can be withheld, including but not limited to, personal information of students at educational institutions, medical records, trade secrets, attorney-work/client privilege materials, and/or law enforcement agency	Neb. Rev. Stat. §84.712.01

		materials that relate to investigations or examination of persons.	
Nevada	Nevada Open Records Act	Nevada has also declared in its legislation that access to public records help to promote the democratic process and maintain such principles. Each agency must designate a custodian over the records and to carry out the functions of the statute. Pursuant to §239.0105, confidentiality of certain records for local governmental entities are protected and do not have to be disclosed. Mechanisms have been put into place regarding responses to any denials to provide documents on the grounds that they contain confidential information.	Nev. Rev. Stat. 239 *et seq.*
New Hampshire	New Hampshire Access to Governmental Records and Meetings	New Hampshire has enshrined in its law that openness within the government is a fundamentally essential to a democratic society. As such, the law is written such that (other than confidential material) information provided during public meetings and record prepared as a result of public functions will result in these entities having to turn over government generated documents for inspection and copying.	N.H. Rev. Stat. Ann. §91-A:1 *et seq*.
New Jersey	New Jersey Open Public Records Act	The New Jersey Law heavily relies upon common law right of access. It is also based upon a policy that all public records shall be made public unless they meet a permitted exception. Government records that meet the exception include those that fall within the attorney-client privilege, proprietary information like trade secrets and financial information and certain legislative records.	N.J. Stat. Ann. 47:1A-1*et. seq*. (relies heavily on common law right to access)

New Mexico	New Mexico Inspection of Public Records Act	The law provides for a broad inclusion that all people are entitled to inspect public records of the state. Public records are defined broadly to include all records, regardless of form, that are held by or on behalf of a state or local government public body. Any documents prohibiting disclosure due to the NM Act or another law do not have to be made available as public records. Records obtained as a result of civil investigations through the Antitrust Act do not have to be disclosed. Various criteria are laid out in the law regarding how the custodian must respond to and handle requests, and procedures for enforcement and civil penalties for noncompliance.	N.M. Stat. Ann. 14-2-1 *et. seq.*
New York	New York Freedom of Information Law	New York's law expressly declares that in order to maintain a free society, actions by the government must be responsive to the public, and therefore, the people have a right to know the process of governmental decision-making and review of its documents and statistics that lead to such determinations. The law provides clear information on what documents must be included for inspection and made available to the public, while simultaneously noting the procedures to carry out the statute's purpose. Any issued denials are permitted to be appealed within 30 days of the denial.	N.Y. Pub. Off. Law §84-90

North Carolina	North Carolina Public Records Law	The law contains various exemptions to the general public records rule, including confidential information and confidential communications. However, if the governmental body makes the communications public three years from the date the communication was received by a public board, council, commission, or other governmental body, then the protection no longer applies.	N.C. Gen. Stat. §132-1 *et. seq.*
North Dakota	North Dakota Open Records Statute	The bulk of the pertinent provisions may be found in North Dakota Century Code at Sections 44-04-17 through 44-04-21.3. However, particular sections exist concerning records should be deemed open, confidential, or exempt.	N.D. Cent. Code §44-04-18 *et. seq.*
Ohio	Ohio Open Records Law	Public records in Ohio pertain to any records kept by any public office, whether it is local, state, county, city, township, etc. Any records that are prohibited by either state or federal law are exempt from disclosure and antitrust investigations and records obtained pursuant to these investigations are also protected from release.	Ohio Rev. Code Ann. §149.43
Oklahoma	Oklahoma Open Records Act	The Oklahoma law is intended to be very inclusive and permit the public to have access to records unless there is a specific state or federal statute that prohibits such disclosure due to a confidential privilege. There are several confidential privileges available under the law.	Okla. Stat. Tit. 51 §24A.1 *et. seq.*

Oregon	Oregon Public Records Law	The law provides for people to have the right to inspect any public record of a public body. However, the law provides for exceptions, including conducting a balancing test between the public's interest in obtaining the records and the need to withhold them from public inspection. The Attorney General Office plays a role in disputes where a requestor believes that records were withheld improperly through an applied exception. The law also provides for a case to be initiated in court should the requestor dispute the AG ruling.	Or. Rev. Stat. §192.410 *et. seq.*
Pennsylvania	Pennsylvania Right to Know Law	The law, upon its enactment in 2008, has resulted in a presumption for openness that requires state and local agencies to provide access to records unless the government agency is able to demonstrate that the requested records are not public in nature. Civil penalties exist for failing to comply. Refusal to disclose is permitted in instances involving security or defense-related records, medical and psychiatric, personal security of an individual, personnel information, trade secrets, and DNA or RNA records.	65 P.S. § 67.101 / Act 3 of 2008
Rhode Island	Rhode Island Access to Public Records Act	The law contains at least 23 exemptions to disclosure of various documents and permits a public body to charge fees associated with review, copying and receipt of the documents. There are time limits imposed as to when a response is owed to the requestor who seeks access to documents.	R.I. Gen. Laws §38-2-1 *et. seq.*

South Carolina	South Carolina Freedom of Information Act	South Carolina's law is written with the intention of ensuring that access to public records and documents that note fully the activities of the public government are readily available. Despite this broad view of readily available access, the law provides an exemption for disclosure of records that are otherwise protected against disclosure by statute or law.	S.C. Code Ann. §30-4-10 *et. seq.*
South Dakota	South Dakota Sunshine Law	The law requires that any information that is required to be maintained by law must be readily available and open for public inspection. However, the law protects government-prepared documents only to the extent that if the legislature does not require that the document be kept, then the government is not required to make it available for public inspection. Exceptions within the law have been created concerning matters related to criminal investigations that are required to be maintained, but these documents must be sealed and not open for public inspection.	S.D. Codified Laws §1-27-1&3
Tennessee	Tennessee Open Records Act	In Tennessee, documents are essentially deemed readily available for public inspection unless otherwise prohibited by law. The law has a test that dictates whether information is deemed to be a state record such that a determination must be made to ascertain if the document was made or received in connection with the transaction of official business by a government agency. Confidentiality provisions are also provided within the statute and a list of protected documents are included in the statute. Antitrust	Tenn. Code Ann. §10-7-503 *et. seq.*

		investigation documents tend to remain confidential and therefore not subject to disclosure.	
Texas	Texas Public Information Act	A legal presumption of openness is the standard in Texas according to the law unless specific procedural steps are taken to withhold information. Information created, collected, or maintained by the government are deemed to be public records. The withholding of information requires that the public government official asks the Attorney General if such is permitted. The AG is deemed to be a neutral third party when ruling on whether the information is protected under the law or any other statute.	Tex Gv. Code Ann §552.001
Utah	Utah Government Records Access and Management Act	Records are deemed public unless otherwise protected from disclosure under the law as expressly provided by statute. The statute provides for confidentially protected documents, pursuant to § 63-2-301, 63-2-303, and 63-2-304, respectively. Antitrust enforcement matters are protected as well as documents related to trade secrets, law enforcement purposes, and settlement negotiations documents.	Utah Code Ann.§ 63-2-101/ Utah Code Ann. § 63F-2-201
Vermont	Vermont Public Records Law	The law is broad to include all documents that are produced or acquired during the ordinary course of business of a state agency. However, the law provides for exceptions and include documents, such as those that are made confidential by law, those that are recognized as being privileged like medical records, criminal investigations, tax returns, trade secrets, active litigation, and financial information about individuals.	Vt. Stat. Ann. Tit. **1** §315 *et. seq.*

Virginia	Virginia Freedom of Information Act	Virginia also has a law related to public records being open to inspection and the associated procedure related to requesting and responding to such requests that can be found within the FOIA law at Va. Code Ann. § 2.2-3704.	Va. Code Ann. §2.1-340 *et. seq.*
Washington	Washington Public Records Act	The Washington law is broad in terms of the documents that are permitted to be inspected, including any writing that contains information related to government conduct, regardless of the form of the physical form. The materials must be a function of government action and owned, used, and retained by government agencies. Pursuant to § 42.56.050, the discussion of privacy is referenced in terms of laying out when privacy rights are protected, which entails one that would be highly offensive to a reasonable person or one that is not of a legitimate public concern. Exemptions are provided within the law as it pertains to various government committees, and the Attorney General Office may provide information, training, or technical assistance to carry out the provisions of the Act.	Rev. Code Wash. (ARCW) §42.56 *et seq.*
West Virginia	West Virginia Freedom of Information Act	The state has declared its law to be essential to "fundamental philosophy of the American constitutional form of representative government" that serves the people and therefore makes available documents to this effect. The law protects persons to have access to review and inspect documents that were prepared in the conduct of government business. However, pursuant to §29B-1-4, a set of exemptions have	W.Va. Code §29B-1-1 *et. seq.*

		been provided for documents that do not need to be disclosed, including but not limited to, trade secrets, personal information kept in a personal, medical or similar file, test questions on licensing examinations, law enforcement investigation and notations, and terroristic activities.	
Wisconsin	Wisconsin Open Records Law	The law maintains a presumption of openness. Instead of incorporating and relying solely upon enumerated statutory exemptions, the statute expressly provides for common law precedents to remain in effect.	Wis. Stat. §§ 19.31 – 19.39
Wyoming	Wyoming Sunshine Law	Wyoming has a custodian who is responsible for handling the control of public records for which requests are made. Such records include essentially any materials that are related to public governmental functions, including agreements and contracts, receipt, use and disposition of public property and public income, claims filed against the state, and others. Inspections and right to access for inspection must be made available unless non-disclosure is permitted, pursuant to §16-4-203, such as contrary to state statute, federal law or regulation, rules promulgated by the supreme court, records related to investigations, and others documents as enumerated.	Wyo. Stat. Ann. §16-4-201 *et. seq.*

APPENDIX G

Text of Freedom of Information Act (FOIA) Exemptions
(5 U.S.C. §552)

* * *

(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), if that statute—

(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or

(ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and

(B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

(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 that would not be available by law to a party other than an agency in litigation with the agency, provided that the deliberative process privilege shall not apply to records created 25 years or more before the date on which the records were requested;

(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, and the exemption under which the deletion is made, 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, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

* * *

5 U.S.C. §552 (2016)

APPENDIX H

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 §1(c)(1)-(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 as a 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 a 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 II, 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: 7/23/02

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 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 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 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 diem 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 the 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: _____