UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

MENASHA CORPORATION, and
NEENAH-MENASHA SEWERAGE
COMMISSION,

Plaintiffs, Case No. 11-C-682

v.

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant United States Department of Justice ("DOJ"), by its undersigned counsel, submits herewith this brief in support of its motion for summary judgment.

I. Introduction

On July 15, 2011, plaintiffs Menasha Corporation and Neenah-Menasha Sewerage Commission filed this action under the Freedom of Information Act, 5 U.S.C. § 522 ("FOIA"), alleging that DOJ failed to provide records responsive to an administrative FOIA request submitted to DOJ on December 17, 2010. The undisputed facts show, however, that DOJ has fully complied with the FOIA request at issue here. It produced thousands of documents related to an ongoing environmental enforcement action, but withheld communications among DOJ attorneys, and between DOJ attorneys and federal agencies, regarding the government's legal views and litigation strategy -- quintessential attorney work product and attorney-client communications. Plaintiffs are not entitled to receive the government's privileged material.

Plaintiffs appear to be arguing that communications between attorneys in different sections within DOJ's Environment and Natural Resources Division (ENRD), or between their "client" agencies, are not protected by these privileges. There is no basis for this novel position. All DOJ attorneys represent a single client – the United States. Because they represent the same client, DOJ attorneys may communicate with each other and with the federal agencies whose interests they represent without waiving any privileges, just as lawyers for a private client may speak with each other and with their client without waiving any privileges. There is no waiver of any privilege under these circumstances, and any contrary rule would cause immense disruption to the operations of ENRD, and indeed, the entire Department of Justice and federal government.

In addition, some of the withheld documents plaintiffs seek are also protected by FOIA Exemption 7(A), which permits the withholding of documents compiled for law enforcement proceedings where the release of these documents would interfere with the ongoing enforcement action. The vast majority of the enforcement-sensitive documents have not been shared outside the federal government (and in most cases, not outside the Department of Justice); thus, the law enforcement exemption fully applies. [1]

II. Factual Background

A. The Environment and Natural Resources Division

ENRD is a component of the Department of Justice, and is assigned responsibility for handling, among other things, civil suits "involving air, water, noise, and other types of pollution…", 28 C.F.R. 0.65(d), as well as other cases by or against the United States

[1] A number of the challenged documents were exchanged with consulting experts working for DOJ and a few others were exchanged with representatives of the State of Wisconsin, the Oneida Tribe of Indians of Wisconsin, and the Menominee Indian Tribe of Wisconsin. A previously-filed declaration documents the joint enforcement interest the United States shares with those co-sovereigns for enforcement matters concerning the Fox River Site. *See* Declaration of Randall M. Stone at ¶ 21 & n.7. *See also* Memorandum of Agreement Regarding Restoration of the Lower Fox River, Green Bay and Lake Michigan Environment, posted at http://epa.gov/region5/cleanup/foxriver/moa.htm.

involving natural resources such as land, water, and air. 28 C.F.R. § 0.65(a). All litigation matters under ENRD's purview, both affirmative and defensive, are supervised by a single Assistant Attorney General. *See* 28 U.S.C. § 506; 28 C.F.R. § 0.65; *see also* 28 U.S.C. §§ 516, 519.

ENRD is currently organized into nine litigating sections. Of relevance here, the Environmental Enforcement Section (EES) 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, including the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-75. The Environmental Defense Section (EDS) represents the United States in civil litigation arising under the environmental laws. For example, EDS defends rules issued by EPA and other agencies under the pollution control laws, defends the United States against claims under CERCLA, and defends federal agencies accused of being in violation of pollution control statutes. EDS also brings enforcement actions against those who fill wetlands in violation of the Clean Water Act.

ENRD's Assistant Attorney General is delegated the authority to approve settlements under CERCLA, with certain exceptions. 28 C.F.R. § 0.160(c). However, the Associate Attorney General must approve a CERCLA settlement if: (1) the difference between the amount of the United States' claim and the amount of the settlement exceeds $2,000,000; or (2) the settlement amount being paid on behalf of the United States exceeds $2,000,000. *See* 28 C.F.R. §§ 0.160(a)(2), 0.161. EES and EDS are directly supervised by a Deputy Assistant Attorney General; currently, and for at least the last five years, the same Deputy Assistant Attorney General has been assigned to supervise both EES and EDS.

B. The Pending Enforcement Action

The FOIA request at issue seeks ENRD documents related to a proposed Consent Decree lodged with the Court on December 1, 2010, in *United States v. NCR Corp., et al*., Case No. 10-C-910 (E.D. Wis.)(Doc. 31-1). That case is the most recent in a series of enforcement actions taken by the United States pursuant to CERCLA, seeking cleanup of the Fox River. On October 14, 2010, the United States and the State of Wisconsin brought suit under CERCLA against ten companies and two municipalities to require continued environmental cleanup work at the Fox River Site and payment of associated government response costs and natural resource damages. The United States and the State filed an Amended Complaint on December 1, 2010, adding claims against Brown County and the City of Green Bay.

Menasha Corporation ("Menasha") and the Neenah-Menasha Sewerage Commission ("NMSC") are defendants in that CERCLA enforcement action. Menasha and NMSC have asserted counterclaims against the United States in that case, alleging that they are entitled to recover response costs and damages from the United States based on the Army Corps of Engineers' activities related to the Site and paper recycling activities by federal agencies.[2] The United States also was named as a defendant in a set of consolidated lawsuits filed by Appleton Papers Inc. and NCR Corporation in 2008 related to the Site. Menasha filed a third-party claim against the United States in that action.[3]

In the Consent Decree, which is currently pending before the Court, the United States is proposing to resolve two categories of potential liability for the Lower Fox River and Green Bay

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[2] *See United States and the State of Wisconsin v. NCR Corp., et al*., Case No. 10-C-910 (E.D. Wis.), Docket Nos. 1 (Complaint), 30 (First Amended Complaint), 48 (Menasha Answer and Counterclaims), 58 (NMSC Answer and Counterclaim).

[3] *See Appleton Papers Inc. v. George A. Whiting Paper Co.*, Case No. 08-C-00016 (E.D. Wis.); *NCR Corp. v. Kimberly-Clark Corp.*, Case No. 08-C-00895 (E.D. Wis.).

Superfund Site: (1) the alleged liability of Brown County, the City of Green Bay, and the United States (on behalf of the Army Corps of Engineers) for navigational dredging and other activities undertaken to improve navigation on the Lower Fox River and Green Bay; and (2) the alleged liability of the United States for activities related to the recycling of PCB-containing paper by mills in the Fox River Valley. *See* Case No. 10-C-910 (E.D. Wis.)(Doc. 175)(Plaintiffs' Joint Brief in Support of Motion to Enter Consent Decree).

C. The FOIA Request

On December 17, 2010, Attorney David Rabbino submitted a FOIA request to ENRD seeking the disclosure of documents and communications "received by ENRD from any party, including but not limited to the Settling Defendants, the Settling Federal Agencies or their respective consultants, regarding discharges of material from the Consolidated Disposal Facilities [and] all other information considered [by ENRD] in arriving at the proposed terms of the settlement." Doc. 1-1 (Attachment to the Complaint) at p. 2. Because of the breadth of the FOIA request – and its focus on privileged communications among ENRD attorneys, ENRD's expert consultants, and represented components of the United States government – ENRD first attempted to work with Mr. Rabbino to narrow the request. When this was unsuccessful, ENRD produced 3648 documents, consisting of almost 40,000 pages, within six weeks of the FOIA request's submission. *See* Doc. 11 (Declaration of Randall Stone), at ¶ 14. ENRD also withheld approximately 1300 documents from a universe of almost 5000 potentially responsive documents. Stone Dec. ¶ 14. On November 1, 2011, DOJ released 144 additional documents, sixty-four in redacted form and eighty in full.

Plaintiffs filed this action on July15, 2011. On October 28, 2011, ENRD filed an index of the withheld documents pursuant to *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), along

with two explanatory declarations (Documents 11-13). The government's *Vaughn* Index contains a description of all withheld documents, including the source, recipient, subject matter and category of document, and the basis for withholding (Document 13).[4] In addition, the United States submitted a fourteen-page letter outlining the factual and legal basis for each of the privileges asserted in the *Vaughn* Index (Document 10).

Subsequently, in a letter to the Court dated November 4, 2011, and as represented during the telephonic status conference held on November 7, 2011, plaintiffs agreed to narrow the focus of this suit to approximately 440 withheld documents (Document 14). These documents are listed on a supplemental *Vaughn* Index, filed with this motion.[5] In so narrowing their focus, plaintiffs are now challenging only those documents and communications exchanged between lawyers in EES and lawyers in EDS regarding the proposed Consent Decree. Many of these documents also are communications with other federal agencies, including the Environmental Protection Agency, the Army Corps of Engineers, the General Services Administration, and the Government Printing Office.

[4] The purposes of the *Vaughn* Index, and its supporting declarations, are to allow the Court "to make a rational decision [about] whether the withheld material must be produced without actually reviewing the documents themselves . . . [and to] produce a record that will render [its] decision capable of meaningful review on appeal." *King v. United States Department of Justice*, 830 F.2d 210, 219 (D.C. Cir. 1987).

[5] On November 11, 2011, as directed by the Court, plaintiffs submitted an index listing the approximately 440 documents that allegedly fall within this limited category. Many of these documents do represent communications between EES and EDS attorneys, but some do not. For example, the first document listed on plaintiffs' index is DOJ221424. The *Vaughn* Index indicates that this document is a fax communication between an Army Corps of Engineers client representative and Stephen Crowley, an ENRD lawyer with EDS. Yet there is no indication that this communication was shared with other EES lawyers. Regardless of the court's ultimate ruling concerning the protected status of communications between EES and EDS attorneys, there is no basis to question the confidentiality of documents shared exclusively between EDS and other federal agencies regarding the defensive-related interests of the United States, on one hand, and EES and other federal agencies regarding the enforcement-related interests of the United States, on the other.

II. Legal Standards

A. FOIA Standard of Review

FOIA "seeks to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 136 (quoting S. Rep. No. 89-813, at 3 (1965)). In accordance with FOIA's "goal of broad disclosure, [the FOIA] exemptions have been consistently given a narrow compass." *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (citation and internal quotation marks omitted). However, while narrowly construed, the exemptions "are intended to have meaningful reach and application." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Indeed, Congress recognized that public disclosure is not always in the public interest. Rather, "FOIA represents a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." *Center for National Security Studies v. Department of Justice*, 331 F.3d 918, 925 (D.C. Cir. 2003)(citing *John Doe Agency*, 493 U.S. at 152). Moreover, FOIA was not intended as a supplement to, or substitute for, civil discovery. *See United States v. Weber Aircraft Corp.*, 465 U.S. 792, 801-802 (1984)(collecting cases).

After exhausting his or her administrative remedies, a FOIA requester can receive relief from a court when an agency has improperly withheld agency records. *See* 5 U.S.C. § 552(a)(4)(B). The district court reviews these agency determinations *de novo*. 5 U.S.C. § 552(a)(4)(B); *Patterson v. IRS*, 56 F.3d 832, 836 (7th Cir. 1995); *Summers v. Department of Justice*, 140 F.3d 1077, 1080 (7th Cir. 1998). If the agency locates responsive records, they must be produced unless the records, or portions of them, are protected from disclosure by one or more of the exemptions set forth in the FOIA statute, 5 U.S.C. § 552(b).

B. Summary Judgment Standard

Summary judgment is appropriate "if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The burden rests on the moving party to show the absence of any such issue. *Adickes v. S.H. Kress & Company*, 398 U.S. 144, 157 (1970). Most FOIA actions are resolved on a motion for summary judgment. *See, e.g., Becker v. IRS,* 34 F.3d 398, 402 n.11 (7th Cir. 1994)("[P]rocedurally the issue of whether documents are exempt under FOIA is often brought before a district court by motion for summary judgment . . ."); *Miscavige v. IRS*, 2 F.3d 366, 369 (11th Cir. 1993)("Generally, FOIA cases should be handled on motions for summary judgment, once the documents in issue are properly identified."); *Struth v. FBI*, 673 F. Supp. 949, 953 (E.D. Wis. 1987)("Summary judgment is commonly used to adjudicate FOIA cases.").

III. Argument

In this case, there are no material issues of fact with respect to whether the United States properly withheld litigation-related documents prepared by or at the request of attorneys, nearly all of which were exchanged solely within the federal government. The withheld documents reflect the work product of attorneys representing the United States as they developed the litigation strategy for the case of *United States and the State of Wisconsin v. NCR Corp., et al.* Some documents reflect recommendations to decisionmakers within DOJ, who are entrusted by statute and regulation with making decisions about the United States' positions in litigation. Other documents include communications with federal agencies whose interests are directly implicated by the Fox River litigation. Accordingly, summary judgment in defendant's favor is appropriate.

A. The Withheld Materials Are Protected by Attorney Work Product Doctrine, the Attorney-Client Privilege, and/or the Deliberative Process Privilege.

Exemption Five of the FOIA protects "inter-agency or intra-agency memorandums or letters which would not be available by law to party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). Courts have construed this exemption to apply to documents that are normally privileged in the civil discovery context. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1185 (D.C. Cir. 1987). As recognized by the Supreme Court, this includes attorney work product. "The Senate Report [on the FOIA] states that Exemption 5 'would include the working papers of the agency attorney and documents which would come within the attorney-client privilege if applied to private parties.'" *Sears, Roebuck*, 421 U.S. at 154. The Court noted that the work product rule "clearly applies to memoranda prepared by an attorney in contemplation of litigation which set forth the attorney's theory of the case and his litigation strategy." *Id.* The attorney work product exemption includes factual information prepared by an attorney in anticipation of litigation. *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1187 (D.C. Cir. 1987).

Many of the documents, as indicated on ENRD's *Vaughn* index, are also privileged attorney-client communications. The Supreme Court has long recognized that the attorney-client privilege merits special protection "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). Thus, "if a party demonstrates that attorney-client privilege applies, the privilege affords all communications between attorney and client absolute and complete protection from disclosure." *In re Allen,* 106 F.3d 582, 600 (4th Cir.1997). This privilege protects "not only the giving of

professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Upjohn,* 449 U.S. at 390.

Additionally, many of the documents withheld are protected by the deliberative process privilege, which protects predecisional materials that are a part of the deliberative process. *See, e..g., Mapother v. DOJ*, 3 F.3d 1533, 1537 (D.C. Cir. 1993); *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). The privileges incorporated into Exemption 5 are designed to promote the open communication necessary to render legal advice based on a full and accurate understanding of the relevant facts and properly inform the government's internal decision-making process. *See, e.g., Upjohn*, 449 U.S. at 389.

Here, the documents withheld pursuant to Exemption 5 fall squarely within the attorney work product protection and, in the case of many documents, within the attorney-client privilege or deliberative process privilege. Many are communications between ENRD attorneys (or their litigation consultants) regarding legal theories, application of the law to the facts, litigation and settlement strategy, or drafts of internal memoranda and pleadings. *See, e.g.,* DOJ224084; DOJ223246; DOJ224620; DOJ320760; DOJ314629. Other documents are communications regarding litigation and settlement strategy with federal agency attorneys and staff assigned to handle this litigation. *See, e.g.,* DOJ314679; DOJ314684; DOJ314865; DOJ314870. Many documents also reflect recommendations or legal analysis that is being prepared to aid agency decisionmakers. *See, e.g.*, DOJ316035; DOJ335591; DOJ336574; DOJ336623.

B. Discussions Between DOJ Attorneys Cannot Waive the Privilege Because All DOJ Attorneys Represent a Single Client, the United States.

Plaintiffs' position in this case – that certain internal communications among DOJ lawyers are not privileged – appears premised on the general rule that the disclosure of a privileged communication to a third party ordinarily waives the attorney-client privilege, and in

some cases, the attorney work product protections.[6] *See United States v. Windfelder*, 790 F.2d 576, 579 (7th Cir. 1987); *In the Matter of Continental Illinois Securities Litigation*, 732 F.2d 1302, 1314 (7th Cir. 1984). Thus, in the analogy posited by counsel for NMSC during the November 7, 2011 status hearing, the attorney-client privilege might be waived if a private attorney representing a client in litigation communicates privileged information to counsel for another party with opposing interests.

That is not what has occurred here. DOJ attorneys represent the interests of a single client: the United States of America. As a result, government lawyers may (and often do) communicate freely with one another to represent the government's often competing interests. Indeed, these communications are essential to ensuring that the United States takes positions in litigation that best serve the interests of the United States. Because the United States, not a particular agency or agency interest, is DOJ's client, it necessarily follows that these internal communications do not waive the United States' legal privileges.[7]

The United States Constitution vests "the executive Power . . . in the President of the United States of America," who must "take Care that the Laws be faithfully executed." U.S. Const. Art. II, §§ 1, 3. Consistent with this principle, a number of federal statutes work together to give DOJ plenary authority over the legal affairs of the Executive Branch, including the authority to conduct and supervise all litigation, affirmative and defensive, for the Executive. *See* 5 U.S.C. § 3106; 28 U.S.C. §§ 503, 506, 509, 510, 516, 519. *See also Attorney General's*

[6] In accordance with the Court's direction, this motion focuses on the legal issue raised by plaintiffs during the status conference. DOJ does not waive its right to assert other defenses, or the applicability of other exemptions at any time during the litigation of this case.

[7] In addition to the privileges asserted pursuant to Exemption 5 of the FOIA, many of the communications and documents withheld by DOJ also constitute "records or information compiled for law enforcement purposes," the release of which "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A). As such, they are properly withheld under Exemption 7(A). Plaintiffs have failed to show that the narrow dissemination of these communications and documents in any way affected their enforcement-sensitive nature or waived the Exemption 7(A) privilege.

Role as Chief Litigator for the United States, 6 Op. Off. Legal Counsel 47, 1982 WL 170670 (1982)(explaining that the Attorney General represents the "interests of the United States as a whole, as articulated by the Executive"). In particular, "the conduct of litigation in which the United States, an agency, or officer thereof is a party . . . is reserved to officers of the Department of Justice, under the direction of the Attorney General," 28 U.S.C. § 516. Further, "the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party. . . ." 28 U.S.C. § 519.

In 1982, the Attorney General asked that DOJ's Office of Legal Counsel address the following question:

> You have asked this Office to outline the role and responsibilities of the Attorney General in representing the United States in litigation in which the United States, or a federal agency or department, is a party. In particular, you asked that we consider the Attorney General's authority and responsibility to make decisions with respect to litigation, *even if those decisions may conflict with the views, desires, or legal analyses of other departments or agencies of the United States*, including those which may be 'clients' in the particular litigation.

6 Op. Off. Legal Counsel 47, at 1 (emphasis added). Based on a detailed analysis of historical case and statutory law, the Opinion concluded that, "absent clear legislative directives to the contrary, the Attorney General has full plenary authority over all litigation, civil and criminal, to which the United States, its agencies, or departments, are parties." *Id*. at 1.

In support of this conclusion, the 1982 Opinion makes a number of observations that illustrate that the Attorney General and the Department lawyers who work under his or her supervision represent the United States as a whole, even where multiple government interests are implicated by that representation. First, the Opinion notes that the authority conferred upon the Attorney General under substantive law "embraces all aspects of litigation." 6 Op. Off. Legal

Counsel at 61. Implicit in that broad grant of authority is "the recognition that the Attorney General must serve both the interests of the 'client' agencies and the broader interests of the United States as a whole." *Id.* at 61. Moreover, where an agency may wish to take a position in litigation that, in the view of the Attorney General, is contrary to the "broader interests" of the United States, the Attorney General's obligation to advocate for the agency's position "must yield to a higher obligation to take care that the laws be executed faithfully." *Id.* at 62. This is because, "[i]n every case, the Attorney General must satisfy himself that this constitutional duty . . . has not been compromised in any way, and that the legal positions advocated by him do not adversely affect the interests of the United States." *Id.* at 62. This broad grant of authority necessarily extends to the settlement of any litigation over which the Attorney General exercises supervisory authority. *Id.* at 59, *citing* Exec. Order No. 6166 (June 10, 1933), *reprinted in* 5 U.S.C. § 901 note (1976). Hence, in exercising settlement authority, the Attorney General "may make a decision in his discretion, on the basis of national policies espoused by the Executive, limited only by limitations that pertain to the Attorney General's litigating authority generally." *Id*. at 60. In sum, substantive law vests in the Attorney General broad, comprehensive, and nearly exclusive authority and discretion to conduct, direct, and supervise litigation in which the United States is involved, in accordance with the best interests of the United States as a whole.

The Model Rules of Professional Responsibility provide further support for the principle that the United States, not a particular agency or agency interest, is the "organizational client" of DOJ lawyers. Model Rule 1.13 specifies that an organizational client acts through its duly authorized constituents. Moreover, in the case of a governmental client, the Rule recognizes that substantive law may confer on the chief legal officer of a government entity the authority both to represent the government entity and to exercise authority reserved to the governmental client.

See Model Rule 1.13 (Comment 9, and Scope 18). In the case of litigation handled by DOJ lawyers under the supervision of the Attorney General, substantive law requires that all such litigation be conducted in the best interests of the United States as a whole as determined by the Attorney General. It follows that the United States as a whole is the organizational "client" of DOJ lawyers within the meaning of the Rules, and that the officials authorized to speak and act for that client are the Attorney General and his or her designees.

Thus, in the pending Fox River cleanup litigation, all ENRD attorneys represent the overall interests of the United States. That litigation, like other cases handled by ENRD, involves both an enforcement action brought on behalf of the United States as plaintiff and counterclaim in that enforcement action and third-party contribution claims against the United States. ENRD lawyers are entrusted by statute (*e.g.,* 28 U.S.C. § 516) and regulation (*e.g.,* 28 C.F.R. § 0.65) with representing the interests of the United States in this litigation, and thus were assigned to represent all the interests of the United States in both affirmative and defensive aspects of the cases related to that cleanup. For the purposes of internal management and ensuring that all of the potential interests of the United States in a matter are thoroughly considered, ENRD is divided into sections with principal responsibility for handling different areas of litigation. Thus, EES lawyers were assigned principally to represent the enforcement-related interests of the United States, while lawyers with EDS were assigned principally to represent the defensive interests of the United States resulting from the contribution claims.

Here, ENRD lawyers from both EES and EDS exercised their responsibility as the lawyers for the United States by jointly analyzing the affirmative and defensive interests involved, consulting with each other and with the agencies involved, and making informed litigating decisions that have resulted in the Consent Decree, all of which has permitted DOJ to

speak with one voice in court about the fairness and reasonableness of the proposed Decree. In addition, both the enforcement and defensive aspects of the proposed settlement were reviewed and approved by a single set of high-level Justice Department officials – the Associate Attorney General and the Assistant Attorney General for the Environment and Natural Resources Division – under the Justice Department's settlement authority regulations. *See* 28 C.F.R. §§ 0.65, 0.65a, 0.160, 0.161.[8]

In any event, regardless of the division of litigating responsibility within DOJ or the various interests implicated by any particular case, the essential legal principle remains that all DOJ lawyers represent a single client, the Executive Branch of the United States Government. Accordingly, otherwise privileged communications are not waived when DOJ lawyers communicate with one another in their capacity as lawyers for the United States, regardless of whether those DOJ lawyers have been assigned primarily to advocate for distinct or even conflicting government interests.

C. Proper Government Functioning Requires DOJ Attorneys to Consider Multiple Federal Interests in Representing the United States, Without Waiving Any Privileges.

One result of the "single client" principle is that Executive Branch agencies, whose heads serve at the pleasure of the President – such as EPA and the Army Corps – ordinarily do not sue one another in Article III courts.[9] Nevertheless, the interests of multiple agencies may need to be

[8] The Associate Attorney General is the third-ranking official in the Department of Justice and oversees many components of the Department, as shown on the organizational chart posted on this Justice Department website: http://www.justice.gov/agencies/index-org.html.

[9] Disputes among federal agencies fail to present an actual "case or controversy," because the United States and its agencies are one party. However, recognizing that disputes may arise between agencies with differing missions, the President has directed agencies to resolve their disputes within the Executive Branch. *See* Executive Order No. 12,146, 44 Fed. Reg. 42,657 (July 20, 1979). In keeping with his plenary authority over most Executive Branch litigation, the Attorney General is authorized to resolve any such disputes that may arise among the federal departments and agencies represented by DOJ, or between them and their Justice Department counsel. Id. This ensures that the public interest is fully considered,

resolved in a single case. The Fox River litigation presents an example of this, where one agency has enforcement interests at a Superfund site, other agencies have defensive interests at the same site, and the respective interests must be resolved in the same case because of counterclaims or third-party claims.[10] This scenario does not mean that the United States has a legal or ethical conflict of interest, or that communications among DOJ lawyers assigned to different components within DOJ waive or preclude the assertion of otherwise applicable legal privileges.

Indeed, the Supreme Court has observed that Justice Department representation of multiple departments and agencies with varying executive missions and interests is the inevitable consequence of "a democratic government that is charged with more than one responsibility." *Nevada v. United States*, 463 U.S. 110, 135 n.15 (1983). As the Court explained:

> [T]he Government stands in a different position than a private fiduciary where Congress has decreed that the Government must represent more than one interest. When the Government performs such duties it does not by that reason alone compromise its obligation to any of the interests involved.

Id.

Just this term, the Supreme Court considered the role of the government attorney in representing multiple – and sometimes competing interests – and rejected the application of an exception to the attorney-client privilege in these circumstances. In *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313 (June 13, 2011), an Indian tribe sought to compel production of privileged communications between the Interior Department and government lawyers. The tribe

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and enables the Executive Branch to speak with one voice in court. It also explains why there are no Supreme Court cases and very few lower court cases addressing such disputes.

[10] Indeed, it should be noted that the agencies involved cannot be categorized as strictly aligned with either the enforcement or defensive interests of the United States. For instance, EPA initiated the enforcement action but was also named in the third-party contribution claims based on its alleged involvement in paper recycling in the Fox River Valley.

argued that a "fiduciary exception" to the attorney-client privilege should apply because of the trust relationship between the United States and the tribe. *Id*. at 2319-20. The Supreme Court was not persuaded, finding that the United States did not have a common law fiduciary relationship with Indian tribes; rather, the United States "establishes an attorney-client relationship related to its sovereign interest in the execution of federal law." *Id.* at 2327-28.

In rejecting the tribe's attempt to invoke an exception to the government's privileges, the Court observed, as it did in *Nevada*, that the federal government is nearly always balancing multiple interests in its decisionmaking:

> [t]he Government may be obliged 'to balance competing interests' when it administers a tribal trust. . . . The Government may need to comply with other statutory duties, such as [] environmental and conservation obligations. . . . The Government may also face conflicting obligations to different tribes or individual Indians.

Id. at 2328. Moreover, the Court reasoned that "the Government may seek the advice of counsel for guidance in balancing these competing interests. Indeed, the point of consulting counsel may be to determine whether conflicting interests are at stake." *Id.*

In *Jicarilla*, the lower court had sought to accommodate the Government's multiple obligations by suggesting that the Government may invoke, on a case-by-case basis, the attorney-client privilege if it identifies a "specific competing interest" that was considered in the particular communications it seeks to withhold. *Id*. at 2328. The Supreme Court, however, expressly disapproved of this approach, finding that "the conflicting interests the Government must consider are too pervasive for such a case-by-case approach to be workable." *Id.* Thus, the Court dispelled the notion that the government's multiple interests create any exception to the established privileges.

As *Jicarilla* recognizes, DOJ attorneys must consider potentially competing federal interests in developing the United States' litigating positions on a daily basis.[11] This is typical in civil environmental enforcement cases, where the United States (acting on behalf of EPA or other agencies) brings an enforcement action which may give rise to the liability of the United States due to the alleged actions of another governmental component. For example, in *United States v. FMC Corporation*, Case No. 05-5663 (E.D. Penn. 2005), an environmental enforcement action, EES and EDS lawyers communicated with each other to represent multiple interests of the United States, including its enforcement interests and its interests in defending contribution claims against two former federal agencies, the War Production Board and the Defense Plant Corporation; the result of those communications was a Consent Decree resolving the contribution claims against the United States.

Federal agencies are charged with different interests, and it is not uncommon for the interests of one agency to be in tension with another. This is why the responsibility for litigation on behalf of the United States is largely consolidated within the Department of Justice; it is that agency's job to consider these competing interests and represent a single position of the United States in court. It necessarily follows that communications within DOJ for purposes of representing the overall interests of the United States in litigation, even where the attorneys

[11] Since 2006, the U.S. Department of Justice has published Federal Register notices of the lodging of at least ten other CERCLA consent decrees that resolved the liability of "settling federal agencies," along with other PRPs. *See, e.g.*, 76 Fed. Reg. 385 (Jan. 4, 2011) (Moses Lake Wellfield Superfund Site); 75 Fed. Reg. 20,862 (Apr. 21, 2010) (Monitor Devices/Intercircuits, Inc. Superfund Site); 74 Fed Reg. 59,991 (Nov. 19, 2009) (West Site/Hows Corner Superfund Site); 74 Fed. Reg. 53,297 (Oct. 16, 2009) (Old Southington Landfill Superfund Site); 74 Fed. Reg. 16,233 (Apr. 9, 2009) (Saratoga Radar Superfund Site); 73 Fed. Reg. 34,040 (June 16, 2008) (Carolina Transformer Superfund Site); 72 Fed. Reg. 65,766 (Nov. 23, 2007) (Martin Aaron Superfund Site); 72 Fed. Reg. 37,053 (July 6, 2007) (San Gabriel Valley Superfund Sites); 72 Fed. Reg. 24,600 (May 3, 2007) (Beede Waste Oil Superfund Site); 72 Fed. Reg. 9,359 (Mar. 1, 2007) (East Tenth Street Superfund Site).

involved may be assigned to represent differing federal interests, do not constitute disclosures to a "third party," which might waive applicable privileges.

D. The Federal Government Could Not Effectively Function If Plaintiffs' Theory Were the Rule.

If, as plaintiffs posit, the government's privileges were waived whenever DOJ attorneys assigned to represent different interests of the federal government communicated with each other, the operations of the Department of Justice would be significantly impaired. As discussed above, DOJ attorneys routinely consider different interests as they litigate a case, and consult with other DOJ components and other federal agencies that may have differing interests in a case. If the government's privileges were waived whenever this occurred, this would significantly chill government communications and be inconsistent with the purposes of the privileges incorporated into FOIA Exemption 5. Indeed, the central goal of Exemption 5 is to promote the open communication necessary to properly inform the government's internal decision-making process. As the Seventh Circuit has explained in discussing one of the governmental privileges that applies in this case:

> The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decision by protecting open and frank discussion among those who make them with the government.

Enviro Tech International, Inc. v. U.S. Environmental Protection Agency, 371 F.3d 370, 374 (7th Cir. 2004). Likewise, the purpose of the attorney-client privilege is to encourage full and frank discussion between attorneys and their clients, especially where (as here) requiring disclosure would "hamper the attorney's ability to prepare the case" or would "interfere with enforcement

proceedings." *Wright v. Occupational Safety and Health Administration*, 822 F.2d 642, 648 (7th Cir. 1987).

If plaintiffs' position was adopted, there would also be significant uncertainty about when the privilege applies and when it does not. Consideration of differing federal interests is an integral part of a DOJ attorney's job, and there is often not a bright line between when an attorney is considering one federal interest as opposed to another. In *Jicarilla Nation*, the Court emphasized that "for the attorney-client privilege to be effective, it must be predictable." The Court explained:

> If the Government were required to identify the specific interests it considered in each communication, its ability to receive confidential legal advice would be substantially compromised. . . . Forcing the Government to monitor all the considerations contained in each communication with counsel would render its attorney-client privilege little better than no privilege at all.

Jicarilla Apache, 131 S.Ct. at 2328-29 (internal quotations and citations omitted).

Plaintiffs' argument would turn the Supreme Court's admonition on its head, and imperil the Government's ability to handle litigation and receive attorney advice. If the ENRD lawyers here were required to identify the specific interest or interests they considered when making each of the 440 communications at issue in this case, the ability of the United States to receive confidential legal advice would be substantially compromised.[12] Moreover, in this case, where the goal of the entire United States is for potentially responsible parties – including the Federal Government – to pay their fair share for the Fox River cleanup, it is even more difficult to delineate the multiple interests at issue and thus correspondingly more difficult to justify a waiver of privilege.

[12] In addition, if disclosure of information to another DOJ attorney or even to their supervisor could waive the attorney-client privilege or work product protection, individual DOJ attorneys would be faced with constant dilemmas regarding their obligations under the Rules of Professional Responsibility.

Plaintiffs' argument is simply unworkable in light of DOJ's chain of authority and internal structure. As noted above, for purposes of efficiency and obtaining the best results for the United States as a whole, it is quite common for DOJ to assign separate ENRD lawyers, or even lawyers from separate components within DOJ, to pursue distinct government interests in a single case. These lawyers communicate and share confidential information regularly. This kind of coordination is essential to maintain consistent, Department-wide positions on issues relating to the interpretation and enforcement of federal environmental laws.

If plaintiffs' position were accepted, these communications between trial attorneys would likely cease, for fear of waiving the privilege. However, in the case of ENRD, both EES and EDS attorneys report to the Assistant Attorney General for ENRD. She has supervisory authority over all ENRD litigation. Furthermore, here, aspects of the proposed consent decree were subject to the approval of the Associate Attorney General. These individuals are charged with supervising this litigation, and cannot do so effectively unless they can communicate freely with all of the DOJ attorneys assigned to the case. At least twenty of the documents at issue in this case are draft or final versions of confidential, internal briefing materials for the Assistant Attorney General and Associate Attorney General, or internal ENRD communications relating to the preparation of those briefing materials. It is unclear how plaintiffs propose that the privileges would or would not apply to communications with these senior officials, but at a minimum, their theory would throw the ability of DOJ attorneys to communicate with their supervisors into uncertainty. This would be a dramatic interference in the litigation authority of the Department of Justice.

In summary, plaintiffs' position in this case – that internal communications among DOJ lawyers can waive or preclude otherwise applicable legal privileges – is manifestly inconsistent

with DOJ's well-established role as the lawyers for the United States as a whole, entirely at odds with the purposes of the privileges implicated in this case, and not feasible under current DOJ structures. Accordingly, it should be rejected.[13]

IV. Conclusion

For the reasons set forth above, and in the supporting letters, declarations and indices on file, defendant respectfully requests that the Court: (1) find that the communications among DOJ lawyers in this case did not waive, or preclude the assertion of, any asserted governmental privilege; and (2) enter summary judgment in defendant's favor.

Dated at Milwaukee, Wisconsin, this 2nd day of December, 2011.

JAMES L. SANTELLE
United States Attorney

By: /s/ Chris R. Larsen

CHRIS R. LARSEN
Assistant United States Attorney
Wisconsin State Bar Number: 1005336
Attorneys for Defendant
Office of the United States Attorney
Eastern District of Wisconsin
517 East Wisconsin Avenue, Room 530
Milwaukee, Wisconsin 53202
Telephone: (414) 297-1700
Fax: (414) 297-4394
Email: chris.larsen@usdoj.gov

[13] Because this case presents the narrow legal issue of whether the United States has waived, or is precluded from asserting, its otherwise applicable privileges when DOJ lawyers in two sections of ENRD communicated with each other, *in camera* review of the 440 documents plaintiffs continue to seek is unnecessary. *See* Document 15 (defendant's letter to the Court dated November 7, 2011).