Privileged & Confidential

Division of Environmental Quality and Protection
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To: Tim Moore

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From: Keith Tyler

Phone 202 452 7723

Date: 7/14/2008

Number of Pages: 73

Subject: Attorney Client Communication

Given the breadth of this discovery obligation and the logistical complexity of production, the Department of Justice requests that BLM designate a point of contact to coordinate the process with the DOJ trial team. For reference, Nancy Dean of the Division of Environmental Quality and Protection and Theresa Hanley, Deputy State Director, Division of Resources both certified the production of materials in this case in January of 2006.

Please send the name, phone number and e-mail address of the point of contact for this production as soon as possible to EPA CID Special Agent Kimberly Burch at Burch.Kimberly@epa.gov. Ms. Burch will be serving as the trial team's liaison with BLM for the purposes of this production.

As in the last production, once responsive documents are collected and the affidavit signed (see **Attachment C**)[1/], please submit both the documents and affidavit with a cover letter via Federal Express overnight delivery directly to:

Kimberly Burch
U.S. EPA-OCEFT-LCRMD
Box 25227, DFC Bldg. 25
Entrance E3
Denver, CO 80225
(303) 462-9252

I. Requested Manner of Production

We are requesting that BLM search its hard copy and electronic files (including handwritten notes and e-mails) for any documents relevant to the categories of information described or referenced in this letter. If possible, **please submit documents in electronic form organized in folders on an external hard drive.** For example, please do NOT print e-mails for production, they should be produced electronically. If it is necessary to produce hard copy documents, please segregate by topic in labeled folders, and make certain that privileged documents are also segregated and clearly identified as set forth below. To ensure timely processing and disclosure of responsive documents, it is imperative to coordinate in advance with Special Agent Kimberly Burch (above) regarding any technical or logistical issues related to collection and transfer of the material.

II. Privileged and Protected Documents

Please segregate any privileged or protected documents and group them by their respective applicable privileges. **Withholding based on privilege assertions is limited in this criminal case.** The Court has determined that documents that might otherwise be withheld under

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[1/] The District Court mandated that each federal agency ordered to produce *Brady* materials designate a representative to sign an affidavit describing the process of *Brady* compliance with respect to that agency. (See Dec. 5, 2005 Order at 5). We have prepared an affidavit for signature by your agency representative once your review and production of relevant material is complete (see **Attachment C**).

Deliberative Process, The Privacy Act and The Trade Secrets Act (Confidential Business Information or CBI) must be disclosed in this case (see **Attachment D**). To limit distribution, the Court has issued a protective orders for documents in these categories. If BLM wishes DOJ to seek a protective order for any documents that should be covered by the Deliberative Process, The Privacy Act or CBI, the documents must be clearly identified and segregated in the production. They need NOT be entered on a privilege log since they will be disclosed to the defendants. Documents that are not segregated as privileged will be disclosed.

All attorney-client privileged and attorney work-product protected material must be produced to DOJ with a completed privilege log (see **Attachment E**). In the log, the descriptions of documents for which a privilege is asserted must sufficiently describe the document's contents to make clear the reasonableness of the privilege claim. Assertions of privilege must be justified in the log.

If BLM believes any other categories of privileged documents exist, please notify the DOJ trial team in advance of the production.

III. Required Affidavit from Each Federal Agency Subject to Order Describing the Process of *Brady* Compliance

The Court's December 5, 2005 order requires the government to file a separate affidavit for each federal agency ordered to produce Brady material.[2/] The affidavit must describe the process of Brady compliance at that agency. See December 5, 2005 Order at 5. The affidavit description "shall include the type of search used, the places searched, the number of individuals involved in the search, and the name of the person with primary responsibility for conducting the search within the particular agency named." This affidavit is due no more than 10 days after th July 31st deadline.

Please advise us as soon as possible regarding who will sign the affidavit on behalf of BLM. Following completion of BLM's response, we will assist the designated affiant in preparing the affidavit required by the Court.

[2/] *Brady* material generally refers to materials that may be exculpatory or favorable to the accused. Defendants have a constitutional right to these materials pursuant to the Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963). Convictions have been reversed when it is found after trial that material exculpatory information was not provided to the defendants. See id. Because it is difficult for prosecutors to know exactly what materials may be helpful to the defendants, the Court determined that the government may fulfill its *Brady* obligations by providing defendants with all relevant documents in the possession of the government. See November 23, 2005 Order at 18-21.

We sincerely appreciate the efforts to date by BLM employees in responding to DOJ's requests for information that must be gathered and disclosed for this important criminal case.

Thank you for your continued attention to this matter.

Very truly yours,

/s/ W. W. Mercer for

William W. Mercer
United States Attorney
District of Montana

/s/ S. H. Mitchell for

Stacey H. Mitchell
Chief
Environmental Crimes Section

Attachment A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. W. R. GRACE, ALAN R. STRINGER, HENRY A. ESCHENBACH, JACK W. WOLTER, WILLIAM J. McCAIG, ROBERT J. BETTACCHI, O. MARIO FAVORITO, ROBERT C. WALSH, Defendants.	)	CR 05-07-M-DWM ORDER

I. Introduction and Factual Background[1]

Defendants W.R. Grace and Co., a Connecticut corporation ("Grace"), and former Grace employees Alan R. Stringer, Henry A. Eschenbach, Jack W. Wolter, William J. McCaig, Robert J.

[1]The facts of this case are well known to the parties and will be discussed herein only to the extent necessary to address the issues raised by the present motions.

Bettacchi, O. Mario Favorito and Robert C. Walsh, are charged by a ten-count Indictment with crimes arising from Grace's operation of a vermiculite mine near Libby, Montana (the "Libby Mine"). The defendants are charged with conspiracy to violate the Clean Air Act and to defraud the United States in violation of 18 U.S.C. § 371 (Count I); violation of the Clean Air Act, 42 U.S.C. § 7413(c)(5)(A) (Counts II, III and IV); wire fraud in violation of 18 U.S.C. §§ 1343, 2 (Counts V and VI); and Obstruction of Justice in violation of 18 U.S.C. §§ 1505, 2 (Counts VII, VIII, IX and X). The charges relate to the defendants' alleged role in the release and distribution throughout the Libby area of asbestos contaminated vermiculite.

This Order concerns two separate discovery motions filed by the Defendants. The first, filed by Defendant Grace on behalf of all Defendants, seeks an order compelling production of certain information as well as exculpatory information in the possession of government agencies. The second is a motion by the individual Defendants seeking an order compelling production of evidence favorable to the accused under Brady v. Maryland, 373 U.S. 83 (1963).[2] Although Grace seeks some specific information, the essence of its motion is addressed to whether the government is

[2]The individual Defendants' opening brief in support of their motion fails to comply with Local Rule 10.1(b) in that it is not in true double-spacing. Cf. Defendants' reply brief, is double-spaced in accordance with L.R. 10.1(b). The parties are reminded to adhere to the Local Rules lest they be subject to sanctions.

obligated under the rules of discovery or Brady to produce files held by federal agencies[3] other than the prosecution. The individual Defendants' motion, on the other hand, seeks specific information or categories of information to which Defendants believe they are entitled but which they contend have not been produced. Both motions additionally object to the government's disclosure of its entire evidentiary database without differentiating evidence favorable to the accused. The United States opposes the motions. For the reasons set forth below, the motions are granted in part, and denied in part.

II. Analysis

A. The Government's Discovery Obligations

In a criminal case, the United States' discovery obligation is rooted in two separate sources. The Federal Rules of Criminal Procedure, Rule 16(a)(1)(E), require the government to, upon the defendant's request, provide or allow the defendant access to documents and objects in the government's possession. The due process clauses of the Fifth and Fourteenth Amendments to the Constitution, as interpreted by the United States Supreme Court

[3]Grace claims that along with its motion to compel it filed a "memorandum that provides the Court with a list of specific documents and types of documents that the Defendants have reason to believe exist in agency files." No such memorandum appears on the docket for this case. Grace's motion is twenty pages in length, thereby exhausting the maximum number of pages allowed for an opening brief. Any effort to incorporate other documents into the motion is an effort to exceed the page limit and will be rejected by the Court. See Local Rule CR 12.1(b); Order denying Defendants' motion for suspension of L.R. 12.1(b), dated July 29, 2005.

in Brady v. Maryland, 373 U.S. 83 (1963), and its progeny require the prosecution to learn of and disclose to the defense any exculpatory or impeachment evidence favorable to the accused that is in the prosecution's possession. The government's discovery obligations under Rule 16 and its constitutional obligations under Brady are separate and distinct, although they appear to be conflated in the parties' briefs. Before resolving the pending motions, it is first necessary to clarify as to each both the scope of the obligation and the proper enforcement mechanism.

1. Rule 16(a)(1)(E), Fed. R. Crim. P.[4]

Rule 16(a)(1)(E) provides:

> Upon a defendant's request, the government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:
>
> (i) the item is material to preparing the defense;
>
> (ii) the government intends to use the item in its case-in-chief at trial, or
>
> (iii) the item was obtained from or belongs to the defendant.

When a defendant seeks discovery under Rule 16(a)(1)(E)(i) on the ground that the information sought is material to the

[4]Prior to the stylistic changes contained in the 2002 Amendments to the Federal Rules of Criminal Procedure, the substantive provisions set forth in current Rule 16(a)(1)(E) were located in Rule 16(a)(1)(C). See Advisory Committee's Note to 2002 Amendments, Rule 16, Fed. R. Crim. P.

preparing the defense, the defendant must make a threshold showing of materiality. United States v. Santiago, 46 F.3d 885, 894 (9th Cir. 1995). That "requires a presentation of 'facts which would tend to show that the Government is in possession of information helpful to the defense.'" Id. (quoting United States v. Mandel, 914 F.2d 1215, 1219 (9th Cir. 1990)). "Neither a general description of the information sought nor conclusory allegations of materiality suffice." Id. "Requests under Rule 16 must be sufficiently clear to inform the prosecution about what is sought." United States v. McVeigh, 954 F.Supp. 1441, 1450 (D.Colo. 1997).

While the text of Rule 16(a)(1)(E) makes the government disclose all items in its "possession, custody, or control," the Ninth Circuit has held that the scope of Rule 16 extends beyond that which is in the physical possession of the prosecutor. Information in the hands of other federal agencies must also be turned over if the prosecutor has knowledge of and access to the documents sought. United States v. Bryan, 868 F.2d 1032, 1036 (9th Cir. 1989). "[A] prosecutor need not comb the files of every federal agency which might have documents regarding the defendant in order to fulfill his or her obligations under [Rule 16(a)(1)(E)]." Id. See, also, United States v. Liquid Sugars, Inc., 158 F.R.D. 466, 474 (E.D.Cal. 1994) ("for obvious practical reasons, not every governmental agency can be considered as part

of the 'government' for discovery purposes"). At the same time, however, a prosecutor may not employ "a mechanical definition of 'government' that would deny to the defendant documents accessible to the prosecution." Bryan, 868 F.2d at 1036.

The knowledge and access test is met when there exists any information in the possession, custody or control of a federal agency participating in the same investigation of the defendant. Id. Agency involvement in the investigation is a "sufficient, but not necessary factor to show that the prosecution was in 'possession' of the agency's information." Santiago, 46 F.3d at 893-94. Information held by federal agencies not directly involved with the investigation is nonetheless discoverable under Rule 16(a)(1)(E) if the prosecutor has knowledge of and access to the information and the requirements of the rule are otherwise met. Id.

Rule 16 sets a framework for a court to regulate discovery before trial. Rule 16(d) authorizes the court to issue a protective or modifying order or to compel disclosure in accordance with the discovery rules. Rule 12(b)(3)(E), Fed. R. Crim. P., means that motions pursuant to Rule 16(d) to enforce the discovery rules must be made before trial.

2. The Constitutional Mandate of Brady

The due process clauses of the Fifth and Fourteenth Amendments require that the prosecution in a criminal case

disclose to the defense any evidence in the government's possession that is favorable to the accused and that is material to either guilt or punishment. Brady, 373 U.S. at 87. Suppression of such evidence by the government works a constitutional violation, regardless of the good faith or bad faith or the prosecutor. Id. "[A]n inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment." Strickler v. Greene, 527 U.S. 263, 288 (1999). The constitutional obligations under Brady are self-executing, and they do not require a motion by the defense or an order of the court to take effect. Kyles v. Whitley, 514 U.S. 419, 433 (1995) (citing United States v. Agurs, 427 U.S. 97, 108 (1976)). Brady material must be disclosed sufficiently in advance of trial as to be of value to the accused. United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991).

Before there is a constitutional violation under Brady, the following three elements must be satisfied:

(1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;

(2) that evidence must have been suppressed by the prosecution, either willingly or inadvertently; and

(3) prejudice must have ensued.

Strickler, 527 U.S. at 281-82. The Supreme Court has cast the prejudice prong as requiring that the evidence suppressed be

material. See, e.g., Kyles, 514 U.S. 419; United States v. Bagley, 473 U.S. 667 (1985). Evidence is material under Brady "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682. Despite the use of the term "reasonable probability," the Supreme Court has emphasized that materiality does not require a demonstration by a preponderance. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles, 514 U.S. at 434. In deciding whether this reasonable probability exists, courts should consider the suppressed evidence collectively, rather than on an item-by-item basis. Id. at 436.

Brady places an affirmative duty on the prosecutor to seek out information in the government's possession that is favorable to the defendant. "[T]he individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case." Kyles, 514 U.S. at 437. The prosecutor's obligation to seek out exculpatory evidence in the government's possession is not tempered by considerations of reasonableness or undue burden. "The failure to comply with a constitutional command to present evidence fairly at trial is not

excused by any inconvenience, expense, annoyance or delay." McVeigh, 954 F.Supp. at 1450. The prosecution must inform itself as to all information in the government's possession, and disclose that which is favorable to the accused.

Whether exculpatory information is in the government's possession for Brady purposes is measured by the same "knowledge and access" test used under Rule 16(a)(1)(E) for discovery.

> As with [Rule 16(a)(1)(E)]'s definition of government, we see no reason why the prosecutor's obligation under Brady should stop at the border of the district. If a federal prosecutor has knowledge of and access to the exculpatory information as defined in Brady and its progeny that is outside the district, then the prosecutor must disclose it to the defense.

Bryan, 868 F.2d at 1037 (rejecting government's argument that Rule 16 and Brady material need not be disclosed if located outside of the district in which the prosecution was pending). As in the formal discovery context, a prosecutor is deemed to have knowledge of and access to Brady material if the information is in the custody or control of any federal agency participating in the same investigation of the defendant. United States v. Zuno-Arce, 44 F.3d 1420, 1427 (9th Cir. 1995) (prosecution deemed in possession of FBI files where FBI investigated the case); United States v. Blanco, 392 F.3d 382, 393-94 (9th Cir. 2004) (prosecution in drug case deemed in possession of DEA files). Moreover, in the Ninth Circuit, the prosecution is deemed to be in possession of agency files where the agency involved is

charged with administration of the statute allegedly violated and the agency consulted with the prosecutor in the steps leading to prosecution. United States v. Wood, 57 F.3d 733, 737 (9th Cir. 1995) (Food and Drug Administration files found to be in government's possession for purposes of prosecution under the Federal Food, Drug and Cosmetic Act). As is the case with Rule 16 discovery, the touchstone remains whether the prosecution has knowledge of and access to the information. Bryan, 868 F.2d at 1037. The conditions described are sufficient but not necessary conditions to finding possession within the rule.

3. Distinction Between Rule 16 and Brady

There is an important distinction between the government's discovery obligations under Rule 16 and its constitutional obligations under Brady. Rule 16(a)(1)(E) requires disclosure upon request of all material information in the government's possession, and provides a mechanism by which a defendant may seek enforcement of the rule before trial. Brady imposes a self-executing constitutional obligation, and generally is not the proper subject of court rulings prior to trial. This is because any information requested by a defendant that is "favorable to the accused" under Brady is also material under Rule 16(a)(1)(E)(I) and therefore must be disclosed under that rule.[1]

[1]The Advisory Committee Notes to the 1974 Amendments to Rule 16 demonstrate that evidence that is favorable to the accused under Brady is subsumed within Rule 16's definition of materiality. "Although the

Thus, if the defense knows of the existence of information favorable to the accused, it should request that information by invoking Rule 16(a)(1)(E). For the prosecution the constitutional command of Brady goes beyond Rule 16 to require the disclosure of information of which the defense *is* not aware. In such cases, the government's nondisclosure could not be the subject of a pre-trial motion because the defense is not aware the undisclosed information exists. Rather, Brady violations are generally raised and adjudicated post-trial, upon the revelation by the government or discovery by the defense of information favorable to the accused that should have been disclosed before trial. Only after trial has concluded and a complete trial record exists may a court analyze whether information the government has not produced constitutes a Brady violation. "Indeed, it is not possible to apply the materiality standard in Kyles before the outcome of the trial is known." McVeigh, 954 F.Supp. at 1450.

For purposes of the pending motions, then, the Defendants' requests for specific information are properly characterized as motions to compel under Rule 16(d)(2), and they will be analyzed in accordance with the disclosure requirements of Rule

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Advisory Committee decided not to codify the Brady Rule, the requirement that the government disclose documents and tangible objects 'material to the preparation of his defense' underscores the importance of disclosure of evidence favorable to the defendant." Advisory Committee's Note to 1974 Amendments, Rule 16, Fed. R. Crim. P.

16(a)(1)(E). The requirements of Brady play no role in deciding whether information identified and requested by Defendants must be produced. Those disputes are properly decided under Rule 16(a)(1)(E). At this stage of the proceedings, the Court will only weigh in on Brady for purposes of correcting any misconception about the proper scope of the government's Brady obligations. The discussion of Brady below is limited to whether a given federal agency's files are "in the government's possession" for Brady purposes and therefore must be reviewed by the prosecution for evidence favorable to the accused.

B. The Scope of the Government's Obligation Under Brady: Information in the Possession of Federal Agencies

The briefs reveal a substantial disagreement between the parties as to what constitutes information "in the government's possession" for purposes of Brady. Because the United States has evinced an understanding of the scope of its Brady obligations that is not in keeping with the law of this circuit, it is necessary to clarify the government's obligations.

The investigation leading to the Indictment in this case is a joint undertaking of the Department of Justice ("DOJ") and the Environmental Protection Agency's Criminal Investigation Division ("EPA-CID"). The investigation revealed several state and federal agencies that had dealt with Defendant Grace and the Libby Mine in the course of routine administrative duties during the period charged in the Indictment. For example, the Mine

Safety Health Administration ("MSHA") and the Occupational Safety and Health Administration ("OSHA") periodically inspected Grace's Libby facilities for compliance with safety regulations. The National Institute for Occupational Safety and Health ("NIOSH") and the Consumer Product Safety Commission ("CPSC") asked for information from Grace about the nature and level of asbestos fiber releases from Libby vermiculite and vermiculite products. During the course of the investigation, DOJ and EPA-CID interviewed employees and obtained files from MSHA, OSHA, NIOSH and CPSC. The prosecution also obtained files from the Bureau of Land Management ("BLM"), the United States Geological Survey ("USGS"), the Montana Department of Environmental Quality ("MDEQ"), and the Agency for Toxic Substances Disease Registry ("ATSDR").

The government takes the position that it has provided the defense with all documents it has obtained from the agencies listed above pursuant to Rule 16 and argues that it has no further obligations under Rule 16 or Brady. According to the prosecution, "[n]either Rule 16 nor Brady require the government to retrieve and produce documents from governmental agencies not participating in the investigation and prosecution of the defendants." The government maintains that it is only required to conduct a Brady search of materials in the possession of the "prosecution team," which is characterized by the government as

consisting of investigative and prosecutorial personnel. The "prosecution team" concept upon which the government relies is a product of case law from other circuits;[6] it has not been embraced by the Ninth Circuit. In my view, the law of the Ninth Circuit prohibits adoption of the flawed "prosecution team" idea. The prosecution is in possession of information held by any government agency provided the prosecution has knowledge of and access to the information. This is so regardless of whether the agency holding the information participated in the investigation. Santiago, 46 F.3d at 894 ("We therefore reject the district court's finding that the government has 'possession and control' over the files of only those agencies that participated in the investigation").[7]

The Ninth Circuit provides some guidance as to the application of the "knowledge and access" test for purposes of Brady and Rule 16.[8] Although knowledge and access are factual

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[6]See, e.g., United States v. Meros, 866 F.2d 1304, 1309 (11th Cir. 1989) (quoting United States v. Antone, 603 F.2d 566, 569 (5th Cir. 1979); United States v. Morris, 80 F.3d 1151, 1169 (7th Cir. 1996); and United States v. Pelullo, 399 F.3d 197, 217-18 (3rd Cir. 2005).

[7]Although the court in Santiago was addressing "possession and control" in the Rule 16 context, Bryan makes clear that the "possession and control" elements of Rule 16 and Brady are interchangeable. Bryan, 868 F.2d at 1037.

[8]Most Ninth Circuit cases dealing with the question of "possession and control" present factual scenarios in which the prosecution is deemed to have knowledge and access because the agency in question is investigating the crime, see, e.g., Bianco, 392 F.3d at 393-94, or is responsible for administering the statute allegedly

determinations that must necessarily be made on a case-by-case and agency-by-agency basis, the Santiago opinion provides insight about the rule. In that case, a federal prisoner convicted of murdering a fellow inmate appealed the district court's denial of his motion to compel production of Bureau of Prisons ("BOP") files on the government's inmate witnesses. The prosecution took the position that the files were not in its possession, custody or control because BOP was "a separate governmental division with no responsibility for the investigation or prosecution of the crime." 46 F.3d at 893. Applying the "knowledge and access" test, the Circuit rejected the district court's finding and concluded that the prosecution was in "possession and control" of BOP files. Id. at 894. With regard to knowledge, the court found that the prosecution "certainly knew" that its inmate witnesses would have BOP files. Id. As for access, the court noted that the government was able to obtain the defendant's prison file from BOP and concluded on that basis that other BOP files were accessible to the prosecution as well. Id.[9]

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violated and has consulted with the prosecution in the steps leading up to indictment. See, e.g., Wood, 57 F.3d at 737. In such cases, a factual determination as to knowledge and access is unnecessary because the prosecution is deemed to have possession and control regardless of actual knowledge and access.

[9]The Santiago court additionally noted that BOP and the United States Attorney's Office are both branches of the DOJ, which would facilitate access, and that case law has established that BOP files are within the possession and control of the United States Attorney. 46 F.3d at 894.

Appreciation of the knowledge and access test in this case shows that the United States takes an impermissibly narrow view of its obligations under Brady. It is insufficient for Brady purposes for the prosecution to produce only that information from other agencies that has found its way into the physical possession of the prosecutor. The prosecution may not simply ask for information it wants while leaving behind other, potentially exculpatory information within agency files. "The government in the form of the prosecutor cannot tell the court there is nothing more to disclose while the agency interested in the prosecution holds in its files information favorable to the defendant." Wood, 57 F.3d at 737. "Rather, the prosecution has a duty to learn of any exculpatory evidence known to others acting on the government's behalf." Carriger v. Stewart, 132 F.3d 463, 479-80 (9th Cir. 1997) (citing Kyles, 514 U.S. at 437). "Because the prosecution is in a unique position to obtain information known to other agents of the government, it may not be excused from disclosing what it does not know but could have learned." Stewart, 132 F.3d at 480 (citing Kyles, 514 U.S. at 438-40).

The prosecution in this case has asked for and received documents and information from a number of federal agencies, including EPA, NIOSH, MSHA, CPSC, BLM, USGS, and ATSDR.[10] The

[10]Although the prosecution consulted with and received files from at least one agency of the State of Montana, federal prosecutors are generally not deemed to have access to material held by state

prosecution sought information from these agencies which shows knowledge on the part of the government that the agencies hold information relevant to this case. The agencies supplied the requested information to the prosecution and that shows that the prosecution has access to the agencies' files. Accordingly, exculpatory information in the files of the agencies listed above is within the prosecution's "possession and control" for Brady purposes and must be reviewed for evidence favorable to the Defendants."

This analysis clarifies the government's obligations under Brady. It should not be construed to limit those obligations to a review of the files of the agencies discussed above. The prosecution's constitutional duty under Brady is self-executing, and cannot be enlarged or curtailed by court order. In that

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agencies. See Santiago, 46 F.3d at 894 (citing United States v. Aichele, 941 F.2d 761, 764 (9th Cir. 1991)). Contrary to Grace's contention that this Court's March 12, 2005 Scheduling Order has "all but mooted" the distinction between the United States and the State of Montana, nothing in that Order (which required production of MDEQ documents "obtained by" the prosecution) diminishes the force of this longstanding Ninth Circuit precedent.

"Moreover, as it relates to the EPA, that agency's files are deemed to be within in the possession and control of the prosecution both because EPA is an investigating agency, see, e.g., Blanco, 392 F.3d at 393-94, and it is responsible for administering several of the statutes allegedly violated (e.g., Clean Air Act, CERCLA) and has consulted with the prosecution in the steps leading up to indictment. See, e.g., Wood, 57 F.3d at 737. The Defendants have maintained a right to discovery of EPA files since the outset of this case. See, e.g., Mr. Frongillo's comments at the March 9, 2005 Scheduling Conference regarding the EPA's position on asbestos danger in the wake of the World Trade Center catastrophe, discussed at pp. 31-34, infra.

regard, it remains the case that "a federal prosecutor need not comb the files of every federal agency which might have documents" regarding the defendant. Zuno-Arce, 44 F.3d at 1427. The government's obligations under Brady cover a broad range of federal agencies and fulfilling its constitutional obligations may prove burdensome to the prosecution. But this is a case in which the government has levied a broad and complex Indictment, and has consulted with a number of federal agencies in gathering evidence against the accused. The Constitution does not go too far in defense of due process when it requires that the prosecution's search for evidence favorable to the accused be as far-reaching as the search for evidence against him."[12]

C. The Manner of the Government's Disclosure of Brady Material

The government has provided the defendants with its entire evidentiary database consisting of 3,389,109 pages of discovery. The documents are in a searchable format and the Defendants report that they have conducted exhaustive searches of the database. Nonetheless, the Defendants argue that Brady requires the prosecution to search for and identify for the defense each document in the database that is favorable to the defense. The Defendants cite cases from other circuits in which courts have

[12]In order to ensure that the prosecution will discharge its obligations under Brady in a timely manner given the complexity of this case, the Court shall require disclosure of all Brady material no later than January 13, 2006 (subject, of course, to the ongoing duty to disclose newly discovered Brady material).

held that Brady obligations are not fulfilled when the prosecution discloses an undifferentiated mass of documents. See, e.g., United States v. Hsia, 24 F.Supp.2d 14, 29-30 (D.D.C. 1998) ("the government cannot meet its Brady obligations by providing [the defendant] with access to 600,000 documents and then claiming that she should have been able to find the exculpatory information in the haystack").

The prosecution relies on contrary case law in support of its position, also from other circuits. See, e.g., United States v. Mmahat, 106 F.3d 89, 94 (5th Cir. 1997) (overruled on other grounds by United States v. Estate of Parsons, 367 F.3d 409 (5th Cir. 2004) ("there is no authority for the proposition that the government's Brady obligations require it to point the defense to specific documents within a larger mass of material that it has already turned over").

As it relates to the manner of production, Brady simply requires that information be produced in such a way that it will be of value to the accused. The government's production in this case complies with that requirement for at least two reasons. First, the documents have been presented in a searchable format. More importantly, over half of the documents presented – 2,613,658 pages – are actually Grace documents provided to the government during the Libby Superfund Clean-up litigation. There is no reason to assume that the government is better equipped

through resources or knowledge to locate exculpatory documents than are the Defendants.[13]

The individual Defendants contend that while Grace may be imputed knowledge of its own documents, it is unreasonable to expect the individual Defendants to have a working knowledge of so many pages of material. However, as a practical matter there is every reason to expect that the individual Defendants will have access to and benefit from Grace's institutional understanding of its own documents. Counsel for the Defendants expressed an intention to work together in preparing the defense during the March 9, 2005 scheduling conference. Grace has filed several motions on behalf of all Defendants, including the instant motion to compel. Moreover, the parties expressed a willingness to file joint briefs in Grace's Motion For Leave of Court to File Joint Briefs in Excess of 20 Pages, filed July 22, 2005 and joined by Defendants Favorito, Bettacchi and Wolter.

There is no reason to believe that the Defendants are less able to locate exculpatory materials within the evidentiary database than is the government. For the reasons stated, the Defendants' request for an order requiring the prosecution to identify Brady materials within the discovery already produced is

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[13]The Court notes that the events surrounding the Libby Mine have spawned a great deal of civil litigation in which Defendant Grace was a party. It is assumed that this participation has led to a heightened familiarity on Grace's part with the documents at issue generally and specifically with the location and nature of exculpatory documents.

denied.

D. Requests for Specific Information Under Rule 16(a)(1)(E)(I)

The Defendants' requests for specific information are properly cast not as motions for Brady material but instead as motions to compel discovery in accordance with Rule 16(a)(1)(E) and Rule 16(d)(2). As is discussed in greater detail above, documents and objects are discoverable under Rule 16(a)(1)(E)(I) if they are:

> (1) requested by the defendant in a manner sufficiently clear to inform the prosecution about what is sought;
>
> (2) material to preparing the defense in that they are helpful to the defense; and
>
> (3) in the possession, custody, and control of the government as determined by the "knowledge and access" test.

The Defendants make several requests for certain documents and categories of documents. For purposes of this analysis, overlapping requests by Grace and the individual Defendants will be considered together.[14]

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[14]The individual Defendants attempt to incorporate into their motion to compel 51 pages of discovery requests set forth in a dozen letters sent to the government over the course of this case. This constitutes an improper effort to exceed the page limitations of Local Rule CR12.1(b). Consequently, this Order addresses only those categories of information specifically identified in the briefs.

The parties are reminded that the Court has neither the resources nor the inclination to referee every dispute over every document during the discovery phase of this case. The Court's role is to clarify each side's obligations where necessary, and to settle disputes over specific items when the parties have been unable, after *undertaking a good faith effort*, to resolve the dispute independently. The requirement that the parties attempt in good faith to resolve disputes bears emphasis as it relates to the prosecution,

1. Evidence that the Federal Government was Aware of Asbestos Dangers

The Defendants ask that the government be made to produce evidence Defendants believe exists showing that the government was aware that exposure to Libby vermiculite posed health risks during the time period in which the Defendants were allegedly concealing information about the health risks. In support of their contention that such evidence exists, the Defendants rely entirely on media accounts about how the facts giving rise to the indictment played out. For example, in their book An Air That Kills, authors Andrew Schneider and David McCumber write of "boxes of documents" and "reams of paper" gathered by EPA officials from other federal agencies during the Superfund cleanup process in Libby. Id. at 188 (G.P. Putnam's Sons 2004). The book quotes an EPA employee as stating that the documents retrieved from other agencies reveal that the agencies were aware of the dangers of asbestos and "not a damn thing was done about it." Id. at 190. The Defendants claim that they have not received "boxes of documents" regarding federal agencies'

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which responded to four months of written discovery requests with a one-paragraph letter, concluding as follows:

> In essence, the prosecution team has disclosed all materials presently in its possession and has committed to providing additional materials as they are discoverable by the prosecution team. If you do not view these disclosures as sufficient, you should file a motion for discovery with the district court by the August 1, 2005 deadline.

Letter from Kris McLean to defense counsel, dated July 12, 2005.

knowledge of the dangers of Libby vermiculite and demand that the information be produced. The government represents that it has produced the materials requested by the Defendants "[t]o the extent such information is in possession of the prosecution team." The government is not bound by journalistic descriptions or quantification of "evidence."

On the other hand, the prosecution may not rely on the "prosecution team" construct to limit its discovery obligations. The prosecution is required under Rule 16 to produce requested information that is within its possession or control under the "knowledge and access" standard. See Bryan, 868 F.2d at 1036. Information held by the EPA is deemed to be within the prosecution's possession and control because EPA participated in the investigation of this case. Id. The Defendants have made a focused request for documents they believe to be in EPA's possession and have sufficiently alleged the materiality of those documents. If it has not already done so, the prosecution must, in accordance with Rule 16(a)(1)(E)(i), produce all documents retrieved from other agencies and reviewed by EPA employees which tend to show that other agencies were aware of the dangers of Libby vermiculite. If the prosecution has already disclosed all documents responsive to the specific requests, it should say

so.[15,16]

2. Evidence That Government Entities Told the Defendants the Mine Site Was Safe

The Defendants want evidence that governmental entities told them that the Libby Mine was safe. What they seek are documents in the possession of Montana state agencies. The government says that it has produced documents responsive to the Defendants' request to the extent they are in the prosecution's possession. The government's production is sufficient under Rule 16(a)(1)(E) because information in the files of state agencies is not within the possession and control of federal prosecutors. See Aichele, 941 F.2d at 764. The prosecution is not required to disclose materials that are exclusively within the possession of state agencies, although it is required, in accordance with Rule 16 and the Scheduling Order, to produce relevant documents obtained from state agencies and now in the possession of the prosecution.

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[15]This should not be construed as holding that the prosecution's obligation under Rule 16 is not fully discharged until it has produced "reams of paper" or "boxes of documents" responsive to the request. The prosecution's duty is to produce all documents responsive to the request, and the completeness of that response will not be judged against subjective media accounts.

[16]Grace additionally requests documents relating to two tests conducted by EPA employees in 1980 and 1982, respectively. Grace maintains that the existence of the materials sought is established by two newspaper articles attached to its opening brief (dkt #177) as Exhibits J and K. Neither the materials delivered to chambers nor the hard copies on file in the clerk's office contain Exhibits J and K to Grace's opening brief. In both cases, the exhibits stop at the letter E. In the absence of any proof that the documents sought in fact exist, the Court cannot make a determination as to materiality and will not order the prosecution to produce the documents.

3. Evidence Showing Community Knowledge of the Presence of Tremolite and Its Potential Dangers

The Defendants seek documents showing that W.R. Grace communicated potential dangers of Libby vermiculite or the presence of tremolite to prospective buyers, lessees, or users of Grace's Libby properties, or that the Libby community knew of those dangers. The discovery provided to date contains a letter from Grace to prospective buyer 3M in which Grace refers 3M to asbestos exposure studies provided to 3M by Grace. Defendants argue that the government must produce more evidence of Grace's notice to potential buyers of asbestos risks because "[a]lthough the 1991 letter to 3M was included in the government's production, other examples that one would expect to find were not." (Def's Op. Br. at 9.)

The Defendants' speculation as to the existence of other documents showing notice to prospective buyers is insufficient to warrant an order directing the prosecution to hunt for other examples "one would expect to find." To merit discovery under Rule 16, the defense must present "facts which would tend to show that the Government is in possession of information helpful to the defense." Santiago, 46 F.3d at 894 (quoting Mandel, 914 F.2d at 1219). "Neither a general description of the information sought nor conclusory allegations of materiality suffice." Id. The government is subject to self-executing obligations under Brady and discovery obligations triggered by valid requests under

Rule 16. The Court will not impose an additional burden by compelling production of documents that may or may not exist based on the speculative inferences of the defense.

Defendants also seek information relating to Grace's communications to school officials and community members regarding vermiculite running tracks in Libby. In support of their contention that such information exists, the Defendants cite the following passage from January 31, 2001 letter from K.W. Maki, Superintendent of the Libby Public Schools, to the EPA:

> In 1982, the Superintendent of Schools received a call from the W.R. Grace Business Manager informing him that the vermiculite on the tracks posed potential problems as it had tremolite asbestos fibers in it, which could be medically harmful (see attached letters). He made it clear that we couldn't keep the vermiculite track in its present state. He gave two options. Number One, W.R. Grace would come and remove the vermiculite fill or Number Two they would pay to have the vermiculite encapsulated. After consulting with the school officials and coaches the second option, encapsulating the vermiculite, was recommended.

Grace contends that government has failed to produce the "attached letters" referred to in the Maki letter, and that those letters would "conclusively prove that Grace disclosed exactly what the indictment alleges it concealed." (Def's Op. Br. at 9.)

The government responds by referring the Defendants to the Report of Interview of K.W. Maki already provided in discovery. According to the government, Maki explained in that interview that the "attached letters" were memos he had received from Libby resident Gayla Benefield. The government states that it has

already disclosed the those memos. In light of that statement, an order compelling production of the requested materials is not warranted.

The Defendants also want the government to produce statements and Reports of Interview for witnesses concerning the school running tracks, including Bill Cooper, Bill Anderson, Stan Evans and Dick Baeth. The government responds that it is in the process of preparing Reports of Interview for Stan Evans and Dick Baeth, and that it has not interviewed Bill Cooper or Bill Anderson. In light of that statement, an order compelling production of the requested materials is not warranted.

4. Evidence of Government Approval of the Kootenai Development Corporation Transaction

The Defendants seek any documents tending to show that the EPA approved the allegedly fraudulent Kootenai Development Corporation ("KDC") transaction referred to in Counts I and VI of the Indictment. Defendants contend that such documents are material because they tend to show that Grace's sale of Libby properties to KDC and subsequent purchase of those properties received EPA approval, which would undermine the government's allegation that the transactions were fraudulent. The Defendants' belief that such documents exist is based entirely on passages from *An Air That Kills*. See Schneider and McCumber at 177. The book depicts meetings in 1999 and 2000 between EPA employees and KDC majority shareholder Lum Owens in which Owens

was urged to sell the KDC properties back to Grace, which Owens did on July 14, 2000. Defendants want any evidence that KDC cooperated with EPA efforts in 1999-2000, or that the EPA was involved in or approved of the transaction in any way.

The government states that it has provided materials responsive to this request "to the extent such materials are in possession of the prosecution team." Again, reliance on the prosecution team concept results in an improperly narrow view of the government's obligations under Rule 16. The government must provide all responsive documents within its possession and control, meaning all documents of which it has knowledge and to which it has access, and it must provide those materials immediately. If the government has already provided all responsive materials, it should say so.

5. Evidence of Grace's Cooperation With NIOSH

The Defendants note that a series of meetings occurred between Grace employees and NIOSH officials in 1980-81. Defendants contend that those meetings included Grace's cooperation with a NIOSH survey of Grace employees. Any evidence of that cooperation is material, Defendants argue, because NIOSH is one of the agencies allegedly frustrated by the conspiracy charged in Count I. Defendants complain that among the documents produced by the government, "there is scant, if any, record by that agency of what transpired at its meetings with Grace in 1980

and 1981." The government maintains that it has provided all responsive documents held by the "prosecution team."

Both the Defendants' request and the government's response are lacking when measured by the standards of Rule 16. Defendants admit that responsive documents have been produced, but argue that because there are so few, there must be more. That sort of speculation is normally insufficient to meet the materiality standard of Rule 16. See Santiago, 46 F.3d at 894 (quoting Mandel, 914 F.2d at 1219). However, in this case, the government's response lends some credence to the Defendants' suspicion that more responsive documents exist because the government makes clear that it has provided only those responsive documents held by the "prosecution team." Under Bryan's knowledge and access standard, the prosecution must produce all responsive documents — whether they be held by the prosecution or by NIOSH — and to do so immediately. If it has already produced all responsive documents, it should say so.[27]

6. Evidence of Individual Defendants' Limited Involvement in Company Decisions About Vermiculite

The Defendants make a general request for any witness statements not yet produced that tend to show that they had limited involvement in Grace's decision making process regarding

[27]The Defendants also request a Report of Interview for NIOSH employee Dr. Harlan Amandus. The prosecution states that it is in the process of interviewing Dr. Amandus and will provide a report of interview as soon as possible.

tremolite. While acknowledging that some such statements have already been provided, Defendants seek any others that may not yet have been produced. This speculation falls short of showing "facts which would tend to show that the Government is in possession of information helpful to the defense," as is required by Rule 16. See Santiago, 46 F.3d at 894 (quoting Mandel, 914 F.2d at 1219). Similarly, the Defendants' conclusory assertion that "at least one government witness" stated that Defendant Wolter was excluded from certain meetings is insufficient to establish materiality. The Defendants' request in this regard is overbroad and speculative and will be denied.[12]

7. Evidence That Grace's Filings Complied With the Toxic Substances Control Act

Five of the overt acts alleged in Count I of the Indictment pertain to Grace's alleged failure to disclose studies as required under the Toxic Substances Control Act ("TSCA"). The Defendants seek an order compelling production of any EPA documents generated in response to Grace's disclosure of studies in 1986 (the McDonald and NIOSH studies) and 1992 (the Hampster Study). The Defendants argue that there is reason to assume any such documents are favorable to the defense because the allegedly untimely submissions did not lead to any prior regulatory or

[12]In conjunction with this request, the Defendants have asked for a Report of Interview for witness Jim Regh. The government states that it has disclosed that report.

legal proceedings. The government claims to have produced all responsive documents held by the prosecution team.

This is another instance in which the government's reliance on the "prosecution team" concept is improper. The Defendants have made a specific request for internal EPA documents generated in response to Grace's submission of three studies. Given the span of time between the allegedly untimely submissions and the Indictment in this case, it is reasonable to infer that any such documents are material to preparing the defense as they may show that the EPA did not regard the alleged lapses as warranting criminal prosecution at the time. Rule 16 requires that the prosecution disclose all responsive documents, including those held solely by the EPA, and that it do so immediately. If it has already produced all responsive documents, it should say so.

8. Materials Showing Scientific Disagreement About the Dangers of Tremolite and the Libby Operations

The Defendants make several requests for information which they argue tends to show disagreements within EPA as to the dangers of tremolite asbestos. In particular, the Defendants seek any information that could undermine the Indictment's declaration at Paragraph 47 that "[m]odern science has not established a safe level for asbestos exposure for which there is no increased risk of disease." Of particular interest to Defendants are documents relating to the EPA's investigation of airborne asbestos dangers in New York City immediately following

the World Trade Center attacks in September 2001. They seek all files pertaining to the EPA's response to the collapse of the towers, including "documents reflecting EPA's characterization of particulates from the destruction of the World Trade Center, the toxicological effect of the particulates, the potential exposures to airborne and settled particulates, statements about air quality, air monitoring results and medical monitoring results."

The government has refused to produce any responsive documents, arguing that the prosecution team is not in possession of any such documents and that they are irrelevant to the allegations of the Indictment. Both arguments fail. The EPA's Criminal Investigation Division has been involved with the investigation of this case from the beginning. Undoubtedly, EPA-CID has access to documents held by the civil regulatory divisions of the EPA. The prosecution has hinted at a distinction between EPA-CID and the agency's civil side, but there is no support in the rules of discovery or the relevant case law for such a distinction. Moreover, the EPA is the agency charged with administering the statutes allegedly violated and consulted with the prosecution in the steps leading up to Indictment, which means the prosecution is deemed to have knowledge of and access to all EPA files, not just those held by EPA-CID. See Mood, 57 F.3d at 737. There is some suggestion that EPA officials working in Libby may have been involved in

assessing asbestos and clean-up risks in New York City after September 11, 2001. Accordingly, the requested documents are within the prosecution's possession, custody and control for purposes of Rule 16.

The government cannot justify non-disclosure by arguing that such documents are irrelevant. Materiality requires that the Defendants show that the information sought would be helpful to the defense. While the government professes to see no connection, the defense may be aided by documents tending to show that the agency, or witnesses, actively involved in this prosecution made determinations elsewhere that conflict with critical allegations here. This case relies on allegations about the danger of airborne asbestos. Defendants are entitled to know if elsewhere it was determined that similar airborne asbestos levels were not harmful. The government appears to take the position that information is only material if it directly references W.R. Grace or Libby. That position is too narrow. The Defendants are entitled to defend against all of the government's allegations, including those dealing with the dangers of asbestos generally. To that end, the Defendants have advanced a legitimate request for information discoverable under Rule 16(a)(1)(E)(i), and the government is obliged to comply. The prosecution is required to produce all EPA documents responsive to the Defendants' request, including documents

reflecting EPA's characterization of particulates from the destruction of the World Trade Center, the toxicological effect of the particulates, the potential exposures to airborne and settled particulates, statements about air quality, air monitoring results and medical monitoring results.[19,20]

9. General Exculpatory Material

The Defendants have asked the government to produce statements allegedly made by Libby residents and reported by the prosecution to the defense that Defendant Wolter is a "stand-up guy" and a "straight shooter." In response, the government has referred the Defendants to the Report of Interview of Gaylon "Lum" Owens. In light of this response, there is no basis for an order compelling production of responsive documents.

IV. Order

Based on the foregoing, Grace's Motion to Compel (Dkt #177) is GRANTED in part and DENIED in part as set forth above, and the

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[19]This material must be produced no later than January 13, 2006.

[20]The Defendants also note the statement by John Melone, then the director of the National Priority Chemicals Division in EPA's Office of Pollution, Prevention and Toxic Substances, that "to characterize this vermiculite material as dangerous was contrary to science." The Defendants request any EPA documents supporting or agreeing with the statement, which is not a direct quote and was apparently made during a teleconference with EPA's on-site coordinator in Libby. See Schneider and McCumber, *An Air That Kills*, 197. This request is highly speculative and does not warrant the issuance of an order compelling production of responsive documents. This finding does nothing, however, to diminish the prosecution's obligation under Brady to disclose any EPA documents showing that the agency or one of its employees ever took the position attributed to Melone in *An Air That Kills*.

individual Defendants' Motion for Production of Brady Materials (dkt #176) is GRANTED in part and DENIED in part as set forth above.

DATED this 23rd day of November, 2005.

Donald W. Molloy, Chief Judge
United States District Court

Attachment B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. W. R. GRACE, ALAN R. STRINGER, HENRY A. ESCHENBACH, JACK W. WOLTER, WILLIAM J. McCAIG, ROBERT J. BETTACCHI, O. MARIO FAVORITO, ROBERT C. WALSH, Defendants.	)	CR 05-07-M-DWM ORDER

I. Introduction[1]

A status conference was held in this matter on December 2, 2005. Among the issues discussed at the conference were the sufficiency of the prosecution's expert disclosures, the prosecution's compliance with the Court's recent discovery orders, the Defendants' collective request for an extension of the deadline for reciprocal discovery under Rule 16(b)(1), Fed.

[1]The facts of this case, set forth in the Court's prior orders, are well known to the parties and will not be repeated here.

R. Crim. P., and the Defendants' concerns over the size of the government's witness list. Pursuant to Rule 17.1, Fed. R. Crim. P., and in order to promote the orderly progression of this matter to trial, the Court hereby enters this memorandum and order.

II. Matters Discussed at the Status Conference

A. The United States' Finalized Witness List

The Scheduling Order in this case, dated March 15, 2005, requires that the prosecution disclose a "finalized list of witnesses and trial exhibits" on September 30, 2005. That disclosure deadline was selected in part because of the government's representation in its Notice to the Court dated March 8, 2005 that it was prepared to try the case in September 2005. In the same document, the government estimated that it would call 60 to 80 witnesses in its case in chief.

The witness list disclosed by the government on September 30, 2005 names 233 witnesses. The government explains that the reason for the increase is that the investigation of this case is ongoing and will continue through the close of all evidence at trial. That contention is at odds with the prosecution's claim in March that it was prepared to try its case in September of 2005. The government placed its case before the grand jury many months ago. Presumably, the witnesses deemed necessary by the government to prove the charges had been identified by the time

of the filing of the Indictment. By the government's own admission, its case was prepared to go to trial three months ago. It cannot now credibly claim that it is necessary to continue adding witnesses to an already unwieldy list.

Nor is it fair to the Defendants for the government to contend that its case is still a work in progress more than six months after the discovery deadline. While it is never advisable to take a "charge first, investigate later" approach to criminal prosecution, such an approach is doubly undesirable in a case of this complexity. Nonetheless, the Court attempted to allow for additional investigation by the government by establishing two deadlines for disclosure of witnesses, the preliminary deadline of May 27 and the final deadline of September 30. Those deadlines having passed, the government's presentation at trial will be limited to those witnesses that have been disclosed as of the filing of this Order.

As a means of reducing the number of prosecution witnesses needed at trial, the government proposed at the status conference that the Defendants review the government's exhibit list and identify those exhibits for which they will not contest foundation and authenticity, thereby eliminating the necessity of a foundation witness. I agree that such a procedure would be worthwhile. Accordingly, the Defendants shall review the prosecution's exhibits and identify those which all Defendants

are willing to stipulate are authentic and do not require a foundation witness.[2] The Defendants must inform the government of their stipulations no later than January 13, 2006. Upon receiving the stipulations, the government shall have two weeks in which to inform the Defendants and the Court of the corresponding foundation witnesses to be removed from the government's list.[3]

B. The Government's Compliance with the Court's Discovery Orders

The Scheduling Order set a deadline of April 29, 2005 for fulfillment of the government's discovery obligations under Rule 16, Fed. R. Crim. P. As discussed in the Court's orders dated November 23, 2005, the government failed to fully comply with that deadline, resulting in a delay of several months in the completion of discovery. It is my impression that the delay is due largely to the government's practice of adopting aggressive legal positions in defense of non-disclosure and waiting for an order of this Court to sort out the dispute. If this case is to proceed to trial as currently scheduled, that practice by the

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[2]Such stipulations will not constitute a waiver of any evidentiary objections beyond foundation and authenticity. In the event some Defendants are willing to stipulate as to a document and others are not, the Defendants shall notify the Court and identify with respect to each such document those Defendants who are willing to stipulate and those who are not.

[3]To the extent the parties can agree to stipulations of foundation and authenticity with respect to the Defendants' exhibits, they should attempt to do so by April 30, 2006.

government must cease.

To that end, I will grant in part the Defendants' request that the government's compliance with the recent discovery orders be monitored. No more than ten days after the January 13, 2006 deadline for compliance with its Brady obligations, the government shall file a separate affidavit for each federal agency listed in the Court's November 23, 2005 Order, describing the process of Brady compliance with regard to that agency. The description shall include the type of search used, the places searched, the number of individuals involved in the search, and the name of the person with primary responsibility for conducting the search within the particular agency named. It is unnecessary to monitor the process of compliance with the Court's rulings with regard to Rule 16 because unlike Brady, the government's compliance with Rule 16 can best be assessed by evaluating the materials produced.[4]

C. The Government's Expert Disclosures

The Scheduling Order sets an expert disclosure deadline of September 30, 2005 for the government. The Defendants contend that the disclosures provided by the government are inadequate and have filed a written motion for an order compelling more detailed disclosures and allowing depositions of the government's

[4]The government has agreed to identify any evidence it intends to offer under Rule 404(b), Fed. R. Evid., by March 11, 2006.

experts.

The government has not yet had an opportunity to respond in writing to the Defendants' motion. However, I find based on my review of the controlling authority and the disclosures attached to the Defendants' motion that certain matters may be resolved without further delay.

Rule 16(a)(1)(G), Fed. R. Crim. P., requires the government to provide, at the defendant's request, a written summary of any expert testimony to be used at trial. "The summary provided ... must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." This Court has previously held that

> Rule 16 requires that the expert summary shall contain a complete statement signed by the expert of all opinions to be expressed and the bases and reasons for the opinions; any data or information considered by the expert in forming the opinions; the qualifications of the expert, including a list of all publications by the expert within the last ten years, and a list of all cases for which the expert has testified as an expert in trial or by deposition in the past four years.

United States v. Michel-Diaz, 205 F.Supp.2d 1155, 1156 (D.Mont. 2002).

Based on the foregoing, the following must be included in all expert disclosures in this case:

> 1. **Specific identification of all documents or other information the expert reviewed in preparing his report, segregated by expert.** Where possible, documents should be identified by exhibit number or Bates number of items already produced. At trial, the government's expert witnesses will not be permitted to rely upon documents

unless the documents are contained in the discovery produced to date or are currently subject to an order of this Court requiring production.[5] See Rule 16 (d)(2)(C) and (D), Fed. R. Crim. P.

2. **Identification of samples reviewed, where applicable.** Samples reviewed should be identified by exhibit number or Bates number if possible.

3. **Any studies, examinations or tests done with respect to the subject matter of the testimony, segregated by expert.** Where possible, studies should be identified by exhibit number or Bates number of items already produced. At trial, the government's expert witnesses will not be permitted to rely upon studies unless the studies are contained in the discovery produced to date or are currently subject to an order of this Court requiring production. See Rule 16 (d)(2)(C) and (D), Fed. R. Crim. P.

4. **A list of the expert's prior deposition and trial testimony.**

5. **The letter of agreement or contract for services relating to the expert's involvement in this case.** It is not necessary to disclose any other communication between the expert and parties or counsel.

To the extent the government's existing expert disclosures do not comply with the foregoing, they should be revised by January 13, 2006. Upon completion of any necessary revisions, the government shall file with the Court all expert disclosures it has provided in this case. The disclosures should include the substantive report, the *curriculum vitae*, and the list of prior testimony. It is not necessary to include other attachments. The government shall timely respond in writing to any remaining

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[5]See Orders dated November 23, 2005 and Order dated November 10, 2005.

issues raised by the Defendants' motion to compel more complete expert disclosures.

The Defendants' request for depositions of government experts is denied. The Federal Rules of Criminal Procedure offer specific guidance with respect to depositions in Rule 15(a). It is clear from that rule that a court may order depositions are only for the purpose of preserving the testimony of an unavailable witness whose expected testimony would be favorable to the movant. See United States v. Zuno-Arce, 44 F.3d 1420, 1425 (9th Cir. 1995)(citations omitted). Otherwise, the parties may stipulate to the use of depositions with the court's consent. See Rule 15(h), Fed. R. Crim. P. The Defendants are not entitled to depositions under either subparagraph. Because there is a specific rule addressing depositions in criminal cases, I do not believe either Rule 57(b) or Rule 16(d), Fed. R. Crim. P., provides a means to circumvent the meaning of Rule 15(a).

D. The Defendants' Reciprocal Discovery Deadline

The deadline for the Defendants' disclosure of reciprocal discovery under Rule 16(b)(1) is currently set for January 16, 2006. Defendants' have requested that the deadline be continued in recognition of the government's failure to timely comply with its own disclosure requirements. I agree that an extension is warranted. Accordingly, the Defendants shall have until April 30, 2006 to make their reciprocal disclosures under Rule

16(b)(1).

E. Date for the Next Status Conference

The parties have advised the Court that they have agreed on February 14, 2006 as the date for the next status conference. The Defendants have also requested oral argument on their motions challenging the facial sufficiency of the charges. Accordingly, it is hereby ordered that oral argument and a status conference will be held on February 14, 2006. The Court will specify those motions to be argued by a later order.

DATED this 5th day of December, 2005.

Donald W. Molloy, Chief Judge
United States District Court

Attachment C

RE: UNITED STATES v. W.R. Grace et al.
Criminal Action No. CR-05-07-M-DWM (District of Montana)

AFFIDAVIT CONCERNING *BRADY* COMPLIANCE
BUREAU OF LAND MANAGEMENT

This affidavit describes the process of this agency's compliance with the November 23, 2005 and December 5, 2005 Federal District Court orders in the above referenced case.

As required by the court, the undersigned affiant hereby affirms the following with respect to this agency's search for Brady material as described in the Court's orders:

I. Type of Searched Used:

II. Places Searched:

III. Number of Individuals Involved in Search:

IV. Name of Person with Primary Responsibility for Conducting the Search:

Signature & Title of Affiant:

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Attachment D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. W. R. GRACE, ALAN R. STRINGER, HENRY A. ESCHENBACH, JACK W. WOLTER, WILLIAM J. McCAIG, ROBERT J. BETTACCHI, O. MARIO FAVORITO, ROBERT C. WALSH, Defendants.	)	CR 05-07-M-DWM ORDER

I. Introduction[1]

Before the Court is a joint motion by Defendants to compel discovery of documents which the United States is asserting do not have to be disclosed based on various evidentiary privileges.

[1]The facts of this case are well known to the Court and the parties and will not be recited here except where necessary.

Defendants object to the Government's use of the deliberative process privilege to withhold documents from criminal discovery. They also claim that documents are being improperly withheld by the Government on the basis of 5 U.S.C. § 552a, 18 U.S.C. § 1905, and 16 U.S.C. § 470hh. Finally, Defendants object to specific assertions of the attorney-client privilege. The United States opposes the motion, maintaining that its assertions of evidentiary privileges are proper, and that non-disclosure of the other disputed documents is statutorily required. For the reasons that follow, the United States must produce those documents withheld under the deliberative process privilege or any claimed statutory bases. It must also produce certain attorney-client documents specified below. Others are protected by the attorney-client privilege and do not have to be produced.

II. Analysis

A. Deliberative Process Privilege

Defendants claim that the assertion of the deliberative process privilege is inapposite in the present context as its use is more properly confined to civil litigation and litigation arising under the Freedom of Information Act (FOIA). They claim that the assertion of the privilege as a means to shield documents otherwise discoverable under Federal Rule of Criminal Procedure 16 is both novel and inappropriate.

The development of the deliberative process privilege can

be traced to two relatively recent decisions. See United States v. Morgan, 313 U.S. 409, 61 S.Ct. 999 (1941); Kaiser Aluminum & Chemical Corp. v. United States, 157 F.Supp. 939 (Ct. Cl. 1958). While leaving the particulars of the privilege, and its bases, largely unexamined, in each case the court recognized a right of government decision makers to have their mental processes, and documents reflecting those processes, protected from public scrutiny. At this early stage of the privilege's development it was treated as entirely as a species of the executive privilege. Subsequent developments, particularly after the passage of the Freedom of Information Act with its Exemption 5,[2] show courts treating the privilege distinctly and developing a body of law concerning its assertion. Courts have treated the privilege as being based in the common law, but decisions discussing the privilege have freely relied on case law deriving from disputes concerning FOIA Exemption 5. See Wright & Graham, Federal Practice and Procedure: Evidence, § 5680 (1992); Weaver & Jones, 54 Mo. L. Rev. 279, 289 (1989).

Under the common law deliberative process privilege, government agencies or departments may refuse to disclose information related to intra governmental opinions,

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[2] Freedom of Information Act Exemption 5 provides that "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" are not subject to the Act. 5 U.S.C. § 552(b)(5).

recommendations, proposals, etc., which are related to their decisional or policymaking functions. In recognizing the privilege, courts have relied on the commonly proffered rationale that unfettered access to agency decision making processes would chill debate or discussion by agency employees, and therefore degrade the ability of agencies to function effectively. See, e.g., Assembly of the State of California v. United States Department of Commerce, 968 F.2d 916, 920 (9th Cir. 1996) ("Its [the privilege's] purpose is to allow agencies freely to explore possibilities, engage in internal debates, or play devil's advocate without fear of public scrutiny."). Following from this rationale, courts have required that in order for an agency to prevent disclosure of information through an assertion of the privilege the information withheld must be both "predecisional" and "deliberative" in nature. See, e.g., F.T.C. v. Warner Communications Inc., 742 F.2d 1156, 1161 (9th Cir. 1984) (a document must be "predecisional- it must have been generated before the adoption of an agency's policy or decision" as well as being "deliberative in nature, containing opinions, recommendations, or advice about agency policies" in order to qualify for the privilege.). The privilege has never been viewed as absolute, and may be overcome by a "sufficient showing of need." Cobell v. Norton, 213 F.R.D. 1, 4 (D.D.C. 2003). Thus, the analysis involves a case-by-case examination of the competing

claims whenever the privilege is asserted.

There is judicial discussion on the types of considerations which might go into such an examination. The court in Warner identified those factors as: "1) the relevance of the evidence; 2) the availability of other evidence; 3) the government's role in the litigation; and 4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." 742 F.2d at 1161. Other possible factors have been identified as: 5) the seriousness of the litigation; 6) allegations of government misconduct; 7) the interest of the litigants in accurate judicial fact finding; and 8) the federal interest in enforcing federal law. Newport Pacific Inc. v. County of San Diego, 200 F.R.D. 628, 638-40 (S.D. Cal. 2001); North Pacifica, LLC v. City of Pacifica, 274 F.Supp.2d 1118, 1122 (N.D. Cal. 2003).

It is necessary to engage in a two-step process when evaluating an assertion of privilege based on deliberative process. First, the court must verify that the privilege applies, i.e., that the agency communications being withheld are in fact predecisional and deliberative in nature. Once the court has satisfied itself that the assertion of privilege is proper it must still make a determination that the agency's interest in withholding the documents outweighs the moving party's interest in securing them. Redlands Soccer Club, Inc. v. Department of

the Army, 55 F.3d 827, 854 (3d. Cir. 1995).

As Defendants contend, the assertion of the deliberative process privilege is relatively common in litigation arising under FOIA and in civil suits. There are few instances reflected in the case law when the government has asserted the privilege in criminal litigation. The Government points to the cases of United States v. Fernandez, 231 F.3d 1240 (9th Cir. 2000), and United States v. Furrow, 100 F.Supp.2d 1170 (C.D. Cal. 2000) to support its contention that the privilege assertion is proper in the present instance. In each case the court decided that the deliberative process privilege properly allowed the non-production of death penalty evaluation forms and other prosecution memoranda related to the exercise of prosecutorial discretion in deciding to seek the death penalty. This authority is in apposite to a situation in which the government is attempting to shield agency documents from criminal discovery. Nevertheless, Defendants' broad claim that the privilege is completely inappropriate in the criminal context is not supported by the case law. The deliberative process privilege exists in the common law, and its use has not been confined to civil litigation or disputes arising under FOIA. There is nothing which supports anything other than applying the balancing test developed for use in analyzing assertions of the privilege.

In applying that test, attention must be paid to the fact

that the liberty of the Defendants is at issue and, accordingly, any governmental interest in nondisclosure must be substantial for a claim of privilege to prevail. Documents subject to discovery in this case are produced pursuant to the Court's protective order allowing the Government to designate certain documents as "sensitive," and this protective order effectively provides the Government with a means to shield its interests without invoking the privilege. The protective order guarantees that designated documents will not be broadly disseminated, which should serve to allay agency fears that the public will gain access to their decision making processes (the primary "evil" the privilege is designed to prevent), and militates against non-disclosure.

For the reasons stated above, the Defendants' interest in obtaining documents withheld from discovery on the basis of the deliberative process outweighs whatever limited harm the Government might suffer by producing these documents under the terms of the Court's protective order. As such, the Government is hereby ordered to produce all documents withheld on the basis of the deliberative process privilege, subject to the January 18, 2006 Protective Order (Doc. No. 294).

B. Attorney-client Privilege

Defendants acknowledge that the "attorney-client privilege has, of course, long been respected as an evidentiary privilege."

Defs' Br. at p. 7. They object, however, that the Government's assertion of the privilege, particularly in regard to email communications identified in the EPA log, is overbroad, and that the Government is claiming privilege in instances in which the communication does not contain legal advice, or in which the access of third-parties to the communication constitutes waiver. The Government claims that its assertions of the privilege are proper in that: 1) the disputed communications are largely those between Libby team members and Matt Cohn, an EPA attorney assigned to the Libby matter; 2) "when a Libby team member addresses a communication to Mr. Cohn and other members of the Libby team, EPA reasonably assumes that the communication is directed to Mr. Cohn to request his legal advice"; and 3) the "fact that many of the topics of these e-mails were day-to-day operational matters is irrelevant" in determining their privilege status because the Libby team was frequently seeking legal advice about operational matters in anticipation of expected litigation concerning the site. Govt's Resp. at p. 8. I have reviewed each of the documents at issue.

The substantive elements of the attorney-client privilege are well established. To invoke the privilege a party must demonstrate that there was: (1) a communication between client and counsel, which (2) was intended to be and was in fact kept confidential, and (3) made for the purpose of obtaining or

providing legal advice. Fisher v. United States, 425 U.S. 391, 403 (1976); United States v. Abrahams, 905 F.2d 1276, 1283 (9th Cir. 1990). The party asserting the privilege must establish the essential elements of the privilege. von Bulow by Auerspurg v. von Bulow, 811 F.2d 136, 144 (2d Cir. 1987).

Given the above, the Government is mistaken in its contention that the substance of the communication is irrelevant in determining its privilege status if it can be shown that the communication took place in anticipation of litigation. The requirement that the communication have the purpose of providing or obtaining legal advice is the heart of the privilege. What matters is the specific nature of the communication and not the broader context within which the communication occurs. Similarly, it is not enough for the EPA to say that it "assumes" communications directed from its employees to agency attorneys are for the purpose of requesting legal advice. "That a person is a lawyer does not ipso facto, make all communications with that person privileged. The privilege applies only when legal advice is sought from a professional legal advisor in his capacity as such." United States v. Chen, 99 F.3d 1495, 1501 (9th Cir. 1996).

Defendants also maintain that certain emails withheld by the EPA on the basis of attorney-client privilege should be produced because they may "contain facts or evidence relating to matters

that the Government has put 'at issue' by charging obstruction of justice stemming from Grace's presentations of information to EPA from January to April 2002." Defs' Br. at p. 16. Defendants contend that by bringing Counts 1 and 10 of the original Indictment, the Government has impliedly waived attorney-client privilege with respect to communications which "may pertain to the matters regarding which the Defendants are alleged to have conspired to defraud the Government or obstructed justice." Defs' Br. at p. 7. Citing the test for implied waiver outlined by the court in United States v. Amlani, 169 F.3d 1189, 1195 (9th Cir. 1999),[3] Defendants contend that certain documents should be produced if review shows that they contain information vital to the defense.

The Government argues that in bringing the indictment it did not impliedly waive its attorney-client privilege. It also maintains that because it is not relying on the privileged information to litigate the case, Defendants are mistaken in their contention that it has put the contents of the disputed

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[3]The Amlani court described the implied waiver test as follows:

> First the court considers whether the party is asserting the privilege as the result of some affirmative act, such as filing suit. Second, the court examines whether through this affirmative act, the asserting party puts the privileged information at issue. Finally, the court evaluates whether allowing the privilege would deny the opposing party access to information vital to its defense.

169 F.3d at 1195.

communications "at issue."

The Government is correct that attorney-client communications "do not become discoverable simply because they are related to issues in the litigation." Govt's Resp. at p. 11 (citing Amlani, 169 F.3d at 1195). Defendants contend that statements memorialized in the disputed documents might show that the Government was not defrauded or obstructed by Grace. Even if this were so, the mere fact that these communications may concern the indicted acts is not enough to trigger the implicit waiver doctrine articulated in Amlani. In that case, the court found that Amlani had waived his attorney-client privilege with respect to communications with his lawyers upon asserting that disparaging remarks by the prosecutor had caused him to substitute counsel in violation of his Sixth Amendment rights. The court reasoned that Amlani could not assert attorney disparagement and simultaneously assert attorney-client privilege as to those conversations related to his decision to substitute counsel, as access to these conversation was the only means by which the government could defend itself against the claim. Here, the Defendants' ability to defend against the acts alleged in the indictment will not be made impossible without access to the Government's attorney-client communications concerning those acts. In any event, I have reviewed the documents in question, and find that they do not contain information vital to the

defense. On the basis of this examination, I have determined that the following documents are not protected by the attorney-client privilege and must be produced subject to the Court's protective order of January 16:

(1) EPA Region 8 Email documents 0255, 0259, 0261, 0263, 0268, 0304, 0306, 0337, 0338, 0360, 0377, 0385, 0449, and their corresponding attachments.

(2) EPA Region 8 Site documents 2021581 and 2023609.

(3) EPA Headquarters documents P-001890 and P-009091.

C. Statutory Privileges

The Government is withholding numerous documents based upon what it describes as statutory obligations that compel non-disclosure. Defendants argue that these statutes are inapplicable in the context of criminal discovery. The Government's understanding of its obligations is inaccurate.

The Government is withholding a small number of documents on the basis of what is described in the privilege logs as "personal information." In its brief, the Government asserts that its nondisclosure is compelled by the Privacy Act.[4] It claims that

[4] The relevant portion of the Act (5 U.S.C. § 552a(b)) reads: "No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior consent of, the individual to whom the record pertains..." For the purposes of the section, a "record" is "any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to his education, financial transactions, medical history and criminal or employment history and

the withheld documents contain social security numbers of employees and "personal exposure information." Govt's Resp. at 15. Defendants' maintain that a "personal information" privilege is "not contemplated by Rule 16," and that the Government should be required to produce the documents so designated. Defs' Br. at 6.

The Privacy Act specifically exempts government employees from penalty for the release of materials pursuant to the order of a court of competent jurisdiction. 5 U.S.C. §552a(b)(11). This Court's discovery orders exempt any disclosure from sanctions established by the Act. It does not appear that the documents in question are covered by the Act in any event, as they are not being maintained by the agencies in a "system of records," which the act defines as being a collection of documents organized in such a way that they are retrievable by name or some other identifier assigned to the individual. 5 U.S.C. §552a (a)(5).

As these documents have been determined to be responsive to the Court's discovery order, and the Privacy Act does not obligate the Government to withhold them, the Government must produce, subject to the January 18, 2006 Protective Order, all documents withheld on the basis of the Privacy Act, i.e., those

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that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual..." 5 U.S.C. § 552(a)(4).

identified as "personal information" in the privilege logs.

The Government is refusing to produce a small number of documents on the basis of the Trade Secrets Act,[5] which are identified in the privilege logs as being withheld on the basis of "confidential business information." Defendants contend that a "confidential business information" (CBI) privilege is not one of the evidentiary privileges contemplated by Rule 16, and thus, the documents so designated should be produced.

The Trade Secrets Act provides penalties for government employees who disclose, in a manner not authorized by law, any

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[5] The Trade Secrets Act provides in part:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the Office of Federal Housing Enterprise Oversight, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), or being an employee of a private sector organization who is or was assigned to an agency under chapter 37 of title 5, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.

18 U.S.C. § 1905.

trade information that is revealed to the employee in performance of official duties. The Act is designed to prevent discretionary release by government employees of certain types of business information in their possession. The production of the documents in question is compelled by this Court's discovery orders. The disclosure of the documents is authorized by law. Therefore, the Government must produce all documents identified it is withholding on the basis of 18 U.S.C. § 1905, subject to the January 18, 2006 Protective Order.

16 U.S.C. § 470hh is the section of the Archeological Resources Protection prohibiting the disclosure of information "concerning the nature and location" of certain archeological resources "to the public under subchapter II of chapter 5 of Title 5 or under any other provision of law" absent certain determinations by the Federal land manager.[6] The documents in question are subject to this Court's discovery order. They are not being made available to the public on the basis of 5 U.S.C. § 552. Therefore, the United States must produce all documents withheld on the basis of 16 U.S.C. § 470hh, subject to the January 18, 2006 Protective Order.

[6] 16 U.S.C. § 470hh (a).

III. Order

Based on the foregoing, it is hereby ordered that the Government must immediately produce:

(1) all documents withheld on the basis of the deliberative process privilege;

(2) all documents withheld on the basis of 18 U.S.C. § 1905, 5 U.S.C. § 522a, and 16 U.S.C. § 470hh;

(3) EPA Region 8 Site documents 2021581 and 2023609;

(4) EPA Headquarters documents P-001890 and P-009091; and

(5) EPA Region 8 Email documents 0255, 0259, 0261, 0263, 0268, 0304, 0306, 0337, 0338, 0360, 0377, 0385, and 0449.

The Government's production must be complete no later than August 15, 2006.

DATED this 9th day of August, 2006.

Donald W. Molloy, Chief Judge
United States District Court

Attachment E

This is a model privilege log indicating the minimum information required. If you create your own log, please follow this model as closely as possible
If you would like an electronic copy of this model, please contact Kimberly Burch at Burch.Kimberly@epa.gov

Bates Range	Date	Author	Addressee	Description	Privilege Claimed (Attorney Client)	Privilege Claimed (Attorney Work Product)	Litigation Anticipated (AWP only)