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February 23, 2012

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PROTECTING YOUR COMMON INTEREST COMMUNICATIONS IN MULTI-PARTY ENVIRONMENTAL PROCEEDINGS

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The recent decision in Menasha Corp. v. United States Department of Justice, No. 11-C-682 (E.D. Wis. 2012), serves as an important reminder that communications between a company and its counsel, if shared with an affiliated company or the affiliate's counsel, may not be protected by the attorney-client or work product privilege if there is any potential adverse relationship between the affiliated companies. The Menasha decision arose out of a Freedom of Information Act ("FOIA") action filed by Menasha Corporation and Neenah-Menasha Sewerage Commission (collectively the "Menasha PRPs"), two of several potentially responsible parties ("PRPs") named as defendants in a Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") enforcement action brought by the United States on behalf of the Environmental Protection Agency (the "EPA") relating to the Lower Fox River Superfund Site ("Site") in Wisconsin. In the underlying action, the Menasha PRPs filed counterclaims against the United States, seeking to recover response costs and damages on account of the Army Corps of Engineers' ("Corps") alleged activities at the Site and paper recycling activities of other federal agencies, which agencies were identified as PRPs at the Site, but settled with the EPA.

In defending the underlying claims brought against them, the Menasha PRPs submitted a FOIA request to the Department of Justice's ("DOJ") Environment and Natural Resources Division ("ENRD") seeking the disclosure of documents and communications "received by ENRD from any party including but not limited to the Settling Defendants, the Settling Federal Agencies or their respective consultants, regarding discharges from material . . . . [and] all other information considered [by ENRD] in arriving at the proposed terms of the settlement." In responding to the FOIA request, DOJ produced responsive documents, but withheld those documents reflecting communications exchanged between lawyers in DOJ's Environmental Enforcement Section ("EES") and lawyers in DOJ's Environmental Defense Section ("EDS"), which also included communications with other federal agencies including the EPA, Corps, and the U.S General Services Administration ("GSA"), regarding the proposed consent decree. After attempts to resolve the dispute over the production of the withheld documents failed, the Menasha PRPs initiated the referenced FOIA action.

The DOJ moved for summary judgment arguing that the documents withheld were privileged under the work product doctrine, attorney-client privilege and deliberative process exemption under FOIA because the DOJ lawyers represented a single entity, the United States. The Court denied the DOJ's motion, finding that the communications at issue were not protected because the various DOJ lawyers represented

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separate client agencies with adverse interests. That is, because the DOJ lawyers from EES represented EPA in its enforcement capacity, whereas the DOJ lawyers from EDS were responsible for representing the Corps and other federal agency PRPs in defense of such claims, their interests were necessarily adverse such that any privilege that may ordinarily apply to interagency communications was waived.

That the Menasha decision will have an impact on governmental privilege claims in future environmental enforcement actions involving government PRPs is unquestionable. The decision, however, also raises important considerations for companies with multiple operating entities separately named in a multi-party environmental proceeding. Indeed, while it has become fairly commonplace, and sometimes even mandated by the courts, for unrelated defendants to enter into joint-defense agreements to promote judicial efficiency and protect shared common-interest communications, such may not be a common practice among affiliated companies. As the Menasha decision highlights, however, affiliation alone may not be sufficient to protect your communications from discovery by third-parties if an argument can be made that the affiliated entities have an adverse interest in the litigation. For this reason, in-house counsel should consider the use of joint-defense agreements among their affiliated entities, in addition to any multi-defendant agreement they may already be a party to, in order to specifically identify the common interests and the scope of the communications or documents that the affiliated entities intend to be covered by their agreement. Indeed, having an agreement in place which identifies the affiliates' common interest and purpose in communications shared among the affiliates and their counsel, is especially important when there is any potential for third-parties to claim the affiliates' interests in the litigation are or have become adverse.