

## Sometimes It's Not a Unitary Government

January 27, 2012 by [Robert S. Sanoff](#)

For several decades now, the United States has taken the position that communications and documents exchanged in Superfund matters between government lawyers representing the US EPA and government lawyers representing federal PRPs are privileged. Specifically, the government has argued that both of these sets of government lawyers represent the same party -- the United States, which is a unitary government -- and thus their communications are protected as attorney-client communications. That unitary government position was squarely rejected earlier this week in [Menasha Corporation v. United States Department of Justice](#) -- yet another litigation arising from the Lower Fox River Superfund Site in Wisconsin.

In that case, a private PRP pursued a Freedom of Information Act claim seeking documents relating to the terms of an earlier settlement. Relying upon its unitary government theory, the United States asserted a claim of privilege with respect to documents and communications exchanged between DOJ lawyers representing EPA and other DOJ lawyers representing federal PRPs. The court disagreed: "Because the United States has competing interests in this case, it (appropriately) has separate counsel from [two different sections at the Department of Justice] independently representing the interests of their respective client agencies in the same manner as other adverse parties. Communications between those adverse parties therefore waive the privilege as would communications between Plaintiffs Menasha and NMSC and any other PRP."

Central to the court's holding is the rationale that in Superfund cases lawyers representing EPA and lawyers representing federal PRPs have adverse interests. Lawyers for EPA seek to maximize joint and several liability, whereas lawyers for federal PRPs, like lawyers representing private PRPs, seek to minimize liability. This rationale would seem to apply broadly in all Superfund matters to defeat most privilege claims involving communications and documents exchanged between DOJ lawyers representing EPA and federal PRPs. It will be interesting to see if this decision changes the way DOJ attorneys interact in cases involving a federal PRP.

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