



U.S. Department of Justice

Environment and Natural Resources Division

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ENVIRONMENT AND NATURAL RESOURCES DIVISION

DIRECTIVE No. 2016-16

**Title:** Procedures for Handling a Request to File a Brief as Amicus Curiae or to Intervene Pursuant to 28 U.S.C. § 2403(a)

**Authority:** This Directive is issued pursuant to the authority vested in me as Assistant Attorney General (AAG) of the Environment and Natural Resources Division (ENRD) by 28 C.F.R. § 0.65.

**Purpose:** The purpose of this Directive is to (1) formalize the procedures of the Environment and Natural Resources Division (“ENRD” or “the Division”) for responding to requests for *amicus* participation, (2) ensure that the Division takes advantage of opportunities to file briefs as *amicus curiae* in appropriate cases, and (3) to formalize ENRD procedures for responding to requests to intervene pursuant to 28 U.S.C. § 2403(a). This directive amends and supersedes ENRD Directive No. 96-42 dated October 19, 1996.

**Effective Date:** This Directive shall become effective upon approval by the AAG.

**Action:** The Division, where appropriate to further the mission of the Division and its client agencies, and subject to available resources, will file *amicus* briefs in courts throughout the country. A district court *amicus* brief may be captioned as a “statement of interest” where it is appropriate to do so, or where that mechanism is established by local rule. The procedures for identifying cases that may warrant *amicus* participation, and for determining whether to file briefs, are set forth here:

I. *AMICUS* COMMITTEE

A. An ENRD *amicus* committee (the “*amicus* committee”) will be established on a case-by-case basis to consider each significant request for the United States to participate as *amicus curiae*. The membership of this committee will vary depending on the issue that would be addressed through a proposed *amicus* brief. The *amicus* committee shall always include a designated representative of the Law and Policy Section (LPS) and a designated representative of the Appellate Section (Appellate). Section points of contact or other section representatives shall be included, as appropriate, based on the issues that may be addressed in a proposed *amicus* brief. For cases relating to statutes administered by EPA, the Environmental Enforcement Section and Environmental Defense Section, and as pertinent the Environmental Crimes Section, shall be included in the review process. For cases relating to Tribal issues, the Indian Resources

Section and the Natural Resources Section shall be included in the review process. As to other matters, the individual sections will be included as appropriate.

All requests submitted in a formal written document by a client agency, an outside party, or requested by a court shall be considered "significant" for purposes of this guidance. Informal or oral requests shall be considered "significant" based on the circumstances of the request, or if the informal or oral request appears likely to generate a subsequent formal request by the agency. Early coordination with members of the *amicus* committee is encouraged. As appropriate, *amicus* representatives and the *amicus* committee may also monitor and review cases in which participation may be appropriate but no request has been received.

B. Similarly, an appropriate *amicus* committee will consider all requests for intervention pursuant to 28 U.S.C. § 2403(a). For proposed district court filings, the committee shall make a recommendation as to whether a brief should be filed. For proposed court of appeals or Supreme Court filings, which require authorization from the Solicitor General (SG), interested sections shall make a recommendation to the Appellate Section, after discussion by the committee, in accordance with the Division's SG authorization process.

## II. RESPONSIBILITIES OF LPS AND APPELLATE

A. LPS and Appellate will jointly be responsible for administration of these procedures, and the two sections will coordinate on requests received and processing of requests.

B. Receipt of requests for *amicus* participation. LPS will maintain a log and inventory of all *amicus* requests received within the Division. In order to do this, all requests for consideration of *amicus* participation from courts, the other sections of the Division, the Division's client agencies, United States Attorney's offices, state, tribal, and local governments, parties to litigation, and the public should be sent to LPS. Whenever a written request for *amicus* participation is received by any section of the Division that Section is responsible for forwarding a copy of it to LPS to be logged into the computer tracking system and distributed, as described below. If an oral request is received, the recipient of the oral request should document the request in an email that shall be forwarded to LPS. When considering a district court *amicus* request, LPS shall determine what sections will participate in the *amicus* committee to consider each request, and shall put the committee on notice when appropriate. Appellate shall serve that same function when considering an appellate *amicus* request.

C. Receipt of requests to intervene pursuant to 28 U.S.C. § 2403(a). Where the constitutionality of any Act of Congress affecting the public interest is drawn into question, the court shall permit the United States to intervene in certain circumstances. 28 U.S.C. § 2403(a). See also Fed. R. Civ. P. 5.1 (relating to notices of constitutional challenges). Whenever a written request to intervene pursuant to 28 U.S.C. § 2403(a) is received by any section of the Division, that Section is responsible for forwarding a copy of it to LPS to be logged into the computer tracking system and distributed, as described below. If an oral request is received, the recipient of the oral request should document the request in an email that shall be forwarded to LPS. When considering intervention in district court, LPS shall determine what sections will participate in the *amicus* committee to consider each request, and shall put the committee on notice when appropriate. Appellate shall serve that same function when considering an appellate intervention request.

D. Amicus log. Each significant request for *amicus* participation or intervention received will be entered by LPS support staff into a computer tracking system established and maintained by LPS (the “*Amicus Log*”). The initial *Amicus Log* entry will include the nature, source, and date of the request. The *Amicus Log* will be updated periodically to reflect the processing and ultimate disposition of the request, specifically noting whether the request was ultimately accepted, declined, or withdrawn.

E. Coordination. LPS (for district court cases) or Appellate (for appellate court cases) will assign a staff attorney who will be responsible for soliciting views from affected agencies, from other sections within the Division, and from other Department components, including any interested United States Attorney’s office. The staff attorney shall also be responsible for conducting an initial analysis of the *amicus* request and providing this analysis to the *amicus* committee in either oral or written form. The assigned attorney shall keep the *amicus* committee and section managers apprised of any significant developments with respect to the *amicus* matter.

F. DJ Numbers. The Division’s case management system has designated a classification code for all *amicus* matters, which is “90-12-XXXX.” LPS opens records in the system for cases in the district courts; Appellate opens records for cases in courts of appeals or supreme courts.

### III. CRITERIA TO BE CONSIDERED

Criteria for evaluating cases for *amicus* participation include:

A. Court. In what court is the case pending, and what are the implications for the government’s interests?

B. Affected interest. Is the case one of particular interest to a client agency or the federal government generally? Does the case fit within the Division’s mission and priorities? Is the case likely to affect the development of law in an area under the jurisdiction of the Division? Are there potential adverse consequences to participation? Do the issues raised in the *amicus* request support or advance a priority area for the Division, Department or Administration?

C. Resources required. Is there sufficient time to prepare a brief, coordinate with affected components and agencies, and obtain approvals? Is it possible to participate in the time available consistent with other Division responsibilities and without unreasonably burdening Division resources?

D. Any other appropriate considerations, including consideration of whether the case is an appropriate vehicle to advance the interests of the United States and consideration of whether the United States’ role in the case would be unique.

### IV. PREPARATION AND APPROVAL OF *AMICUS* BRIEFS

A. Assignment. LPS, in consultation with relevant sections, will be responsible for assigning district court *amicus* briefs, and Appellate will be responsible for assigning appellate court *amicus* briefs. Assignment should be made promptly upon receipt of the request and in sufficient time for preparation of materials for consideration of the request by the *amicus*

committee and drafting and filing of a brief in as timely a manner as possible in court. Assignment may be made to an LPS or APP attorney or to an attorney from another section.

B. Review. All draft briefs will be circulated to the *amicus* committee, to the Chiefs of APP and LPS, to interested sections within the Division as appropriate, and to relevant client agencies prior to filing.

C. Approval. Appellate amicus briefs will be approved through the process used by the Appellate Section for approval of appellate briefs, which includes obtaining prior authorization for the filing of such briefs from the Solicitor General. District court *amicus* briefs and decisions with respect to district court amicus participation will be approved by the Chief of the Law and Policy Section and the Deputy Assistant Attorney General responsible for supervising the Law and Policy Section. Interested sections will notify LPS if they would like their supervising DAAG copied on the approval package. If the LPS Deputy Assistant Attorney General determines that a district court amicus filing warrants the attention of the Assistant Attorney General, it shall be forwarded to the Assistant Attorney General for approval.

## V. ESTABLISHING *AMICUS* POINTS OF CONTACT

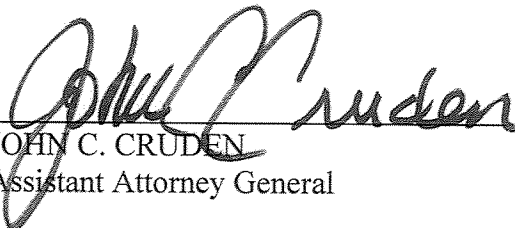
Each section shall establish one or more points of contact for *amicus* matters. If an *amicus* request is made to any ENRD attorney, that attorney shall coordinate with his or her section *amicus* contact to ensure that the requirements of this directive are satisfied.

## VI. ENFORCEABILITY OF PROCEDURES

This Directive provides only internal guidelines for the Division. The guidelines do not create any rights, substantive or procedural, that are enforceable at law by any party. No limitations hereby are placed on otherwise lawful prerogatives of the Department.

## VII. CONSULTATION

This Directive was developed in consultation with all sections of ENRD. I hereby direct that this Directive be distributed by LPS to managers of each section of ENRD; that managers inform attorneys and other employees, as appropriate, of the new Directive; and that LPS make a copy of the original of this Directive available to all Division attorneys and other employees via user-friendly software technology such that it is indexed, searchable and accessible (*e.g.*, PDF format).

  
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JOHN C. CRUDEN  
Assistant Attorney General

1/3/2017  
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DATE