



U.S. Department of Justice  
Environment and Natural Resources Division

236380-4-1-22-05839

Law and Policy Section  
P.O. Box 7415  
Ben Franklin Station  
Washington, DC 20044-7415

Telephone (202) 514-1442

December 8, 2022

**VIA EMAIL**

Mehreen Rasheed  
American Oversight  
1030 15th Street NW  
Suite B255  
Washington, DC 20005  
foia@americanoversight.org

FOIA No.: 2022-05839

Dear Ms. Rasheed:

This is a third interim response relating to your Freedom of Information Act (FOIA) request seeking email communications sent by Jeffrey Bossert Clark that include any one of 39 search terms, and all types of communications between Jeffrey Clark and the White House or Scott Perry. By letter to you from the Civil Division at the Department of Justice dated May 9, 2022, the Civil Division noted:

[Y]ou agreed to narrow the scope of the request to exclude all documents located in a search for records containing the key words Georgia, Pennsylvania, Michigan and Wisconsin, or Perry, provided that we review all documents returned by the search terms and process any documents related to the 2020 election. You were seeking records from November 4, 2020, through January 20, 2021.

The Environment and Natural Resources Division (ENRD) received your FOIA request on May 9, 2022. Your request originally was directed to the Civil Division. The Civil Division forwarded your request to this Office for processing and direct response to you.

Please find attached three pages we are releasing to you in part. Portions of one page are redacted pursuant to FOIA Exemption 5, which relates to “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.” The redacted content of these records is protected by the attorney-client privilege, the attorney work-product doctrine, and/or the deliberative process privilege. 5 U.S.C. § 552(b)(5). Please be advised that we have considered the foreseeable harm standard when reviewing records and applying FOIA exemptions.

ENRD continues to process your FOIA request, and estimates that you will receive an additional, if not final, response no later than January 31, 2023.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. 552(c) (2006 & Supp. IV 2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you need any further assistance, please contact Madeline Van Nostrand at (202) 514-3473 or our FOIA Public Liaison Charles Smioldo at (202) 514-0424. Additionally, you may contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA mediation services it offers. The contact information for OGIS is as follows: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, Maryland 20740-6001, e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); telephone at (202) 741-5770; toll free at 1 (877) 684-6448; or facsimile at (202) 741-5769.

Sincerely,

*/s/ Judy Harvey*

Judy Harvey  
Assistant Chief, Law & Policy Section

**To:** Brightbill, Jonathan (ENRD)[JBrightbil@ENRD.USDOJ.GOV]; Buschbacher, Michael (ENRD)[MBuschbach@ENRD.USDOJ.GOV]  
**From:** Clark, Jeffrey (ENRD)[/O=EXCHANGELABS/OU=EXCHANGE ADMINISTRATIVE GROUP (FYDIBOHF23SPDLT)/CN=RECIPIENTS/CN=5875129421F04DDDA825F5A484527B3-JCLARK\_F6CB]  
**Sent:** Wed 1/13/2021 9:57:54 PM (UTC)  
**Subject:** Fwd: Exclusive:

Cruden comments added now to article.  
He's quite frisky with them.

I can't resist commenting that we are not ruled by elementary school aphorisms but by statutory text and legal doctrine. Nothing would stop Congress from writing statutes with broader mitigation mandates. (b) (5)

Jeff

Sent from my iPhone

Begin forwarded message:

**From:** Bloomberg Law <bloomberg@bna.com>  
**Date:** January 13, 2021 at 12:48:28 PM EST  
**To:** "Clark, Jeffrey (ENRD)" <JClark@enrd.usdoj.gov>  
**Subject:** Exclusive:

# Environment & Energy Report

Wednesday, January 13, 2021

## Justice Department Memo Targets Mitigation in Environment Cases

The Trump administration is limiting the inclusion of certain mitigation requirements in environmental enforcement cases, building on other Justice Department moves to set constraints on settlements.

Assistant Attorney General Jeffrey Bossert Clark issued a [memo](#) Tuesday, requiring lawyers in the Environment and Natural Resources Division to include "equitable mitigation" relief in settlements only

after considering a set of precautions “to ensure that our civil enforcement actions do not overstep the bounds set by Congress.”

Equitable mitigation refers to Justice Department lawyers’ practice of asking courts to force companies to remedy alleged violations by offsetting related environmental harms. It’s a form of relief often included in environmental settlements.

Clark’s policy is cause for “significant concern,” said Lois Schiffer, who led ENRD during the Clinton administration. “But this is all going to be revisited when he leaves, which is imminent.”

The incoming Biden administration is expected to review this and other Clark policies as soon as new political officials are installed. The president-elect hasn’t yet announced a nominee to lead ENRD.

### ‘Not a Blank Check’

Clark’s memo acknowledges courts’ power to order equitable relief, but says it’s “not a blank check.”

He cautioned attorneys in the environment division to weigh certain factors when considering such relief: that there’s a strong legal basis for mitigation; that there’s a geographic connection between a mitigation project and harm caused by a violation; that a project’s costs don’t outweigh its benefits; and that monetary penalties are still the first and primary form of relief sought.

The directive builds upon Clark’s 2018 memo barring the use of “supplemental environmental projects” in settlements. SEPs, unlike mitigation, are voluntary efforts alleged violators can take to benefit the environment—sometimes in exchange for lower fines. But the projects often don’t have as close a connection to the alleged violations as equitable mitigation relief.

“The exact line between permissible mitigation relief and illegal SEPs can be difficult to trace,” Clark wrote.

Sidley Austin LLP lawyer David Buente said this week’s memo “is kind of like the other shoe falling.”

“The memo, if it’s implemented, will undoubtedly lead to it being used in fewer cases,” he said of equitable mitigation. “It will lead to a narrowing of it, but it’s not prohibiting it altogether.”

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