



U.S. Geological Survey Manual

431.11 – Litigation

Date:

OPR: Office of Enterprise Information

Instructions: Supersedes Survey Manual (SM) Chapter 431.11, dated June 3, 2009.

1. **Purpose.** This SM chapter provides policy for complying with U.S. Geological Survey (USGS) information preservation and production requirements related to litigation in which the Federal Government is involved. This SM chapter does not amend or change either SM 205.9, Authority to Approve Request to Testify, and Release of Official Personnel Folders, or SM 450.2, Court Testimony and Release of Official Records.
2. **Scope.** This chapter applies to all USGS employees including intermittent, temporary, and seasonal employees, contractor personnel, volunteers and affiliates.
3. **Authorities.**
 - A. 18 U.S.C. 1503, 1510, 1512 and 1519
 - B. 28 U.S.C. Sections 26, 34, 37, Federal Rules of Civil Procedures
 - C. 44 U.S.C. Chapters 21, 29, 31, and 33, Records Management
 - D. SM 431.1 – Records Management Program
 - E. SM 431.3 – Electronic Mail
4. **Policy.** The USGS will coordinate compliance with litigation requirements including litigation holds and certification, preservation, and data calls and subpoenas with the Department of the Interior (DOI) Office of the Solicitor (SOL). USGS will take appropriate steps to prevent unlawful or accidental removal, defacing, alteration, or destruction of the potentially relevant information for reasonably anticipated or pending litigation.
5. **Definitions.**
 - A. *Discovery* is the pre-trial stage in a lawsuit by which each party can request documents and other evidence from other parties. Discovery is obtained either by the service of an adverse party with a notice to examine prepared by the applicant’s attorney or by a court order.
 - B. *Electronically Stored Information (ESI)* is information that may be created, manipulated,

communicated, stored, or utilized in electronic form. ESI includes e-mail, voice mail, instant messages, electronic business documents (e.g., word processing, spreadsheets, and calendars, and computer databases).

- C. *Hold Certification* is when employees with relevant records acknowledge receipt of the preservation requirement, identify records, and sign a certification indicating their understanding of the litigation hold.
- D. *Litigation Hold* is a directive to preserve information, regardless of form, that is relevant to the pending or foreseeable litigation.
- E. *Metadata* is data about the data created by a system automatically that must be preserved for ESI under a litigation hold. It provides contextual information such as creation date and modified date.
- F. *Nonrecords* are government-owned informational materials excluded from the legal definition of records or not meeting the requirements of that definition. Included are extra copies of documents kept only for convenience or reference, stocks of publications and of processed documents, and library or museum materials intended solely for reference or exhibition.
- G. *Production* refers to information defined and determined to be produced by SOL regardless of media or if it is nonrecord or records. ESI must be preserved in its original electronic form to ensure the preservation of metadata documenting contextual information. All information contained within it, whether visible or not (i.e., metadata), must remain available for inspection.
- H. *Records* include all books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of the records (44 U.S.C. 3301).
- I. *Records Owners or Custodians* are individuals who have control or possession of relevant records for pending or actual litigation regardless of who created the original records.
- J. *Relevant Records* is a term used to collectively describe information, records or nonrecords that relates to an incident, both pre-incident state and post-event state activities and information relevant to litigation.
- K. *Spoliation* is a legal term used when a document or information under a litigation hold that should be preserved and produced in discovery is negligently or intentionally destroyed or altered significantly in violation of the litigation requirements.

6. Responsibilities.

- A. *Associate Director, Regional Director, Science Center Directors* are responsible for ensuring their staff comply with the litigation hold identification of personnel and records, respond timely to data calls, preserve relevant information until notified, and coordinate on responding to discovery production requirements.
- B. *Litigation Coordinator* is responsible for coordinating litigation and its related activities with USGS personnel and the Office of the Solicitor, Department of Justice attorneys,

- Inspector General and other law enforcement and Federal agencies.
- C. *Ethics Officer* must be consulted on the appropriateness of requests for testimony and provide written approval.
 - D. *Information Technology Specialists* are responsible for coordinating with center or program staff to ensure that ESI is preserved in place in native file format and monitors custodians to ensure that information is preserved unless material is going to be lost.
 - E. *Office of the Solicitor (SOL)* is responsible for providing legal advice on litigation and subpoenas, all of the Department of the Interior, and they distribute written litigation hold notices documenting the hold scope, instructions on how to comply and defining preservation media. The Solicitor's office also issues the litigation hold removal notices.
 - F. *Records Liaisons* are responsible for ensuring that records are not under an anticipated or current litigation hold notification before implementing disposition.
 - G. *Employees* are responsible for the following:
 - (1) Upon receipt of litigation hold notification, certifying that they have received read and understand the instructions in the litigation hold by signing and returning the acknowledgement provided with/or after the hold notification;
 - (2) Preserving all relevant information including any medium, organizational duplicates, documents or electronically stored information that relates in any way to the litigation scope;
 - (3) In addition to USGS offices, keeping a file copy of information relevant to a litigation hold to include those received prior to and post litigation until the subject records are released from the litigation hold;
 - (4) Preserving relevant information in its original format. If there is a concern about the medium degrading, employees are responsible for raising this issue with the USGS Litigation Coordinator for notifying SOL and potentially the courts; and
 - (5) If an employee possesses potentially relevant information subject to a litigation hold directive and separates from USGS during the course of the litigation hold directive, their supervisor or other designated person is responsible for taking possession of all hard copy information and ESI under the control of the former employee as discussed in the records management clearing procedures that is part of the Employee Clearance process (Webform 9-090).

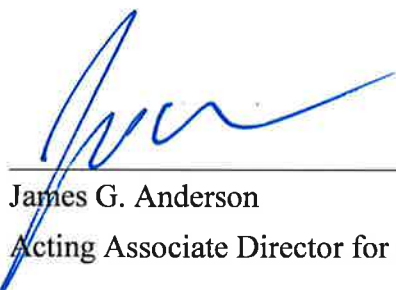
7. **General Procedures.**

- A. *Hold Notification.* Typically, a litigation hold is issued for an anticipated or actual litigation for which personnel may have responsive records. Employees are required to take immediate measures to secure all paper, microfilm, and ESI subject to the litigation hold and to suspend normal procedures affecting the preservation of potentially relevant information. Employees are also required to notify the Litigation Coordinator who will track and coordinate with personnel and SOL. Information to be identified and preserved may be located in but not limited to:
 - (1) Off-site facilities, such as Federal Records Centers and commercial storage;
 - (2) Paper, electronic or other media files in employee offices and warehouse spaces;
 - (3) Information technology sources where ESI may be stored, includes, but is not limited to, government issued or personal property computers and laptops used to conduct government work, network or hard drives of office desktop computers, office and field laptop computers, and Government computers at employee residences (or

privately-owned personal computers if government-related information is processed by the computer), portable storage media (e.g., flash drives, compact discs, memory sticks, and any handheld cell phones, smartphones, or computers – may also be referred to as personal digital assistants).

- B. *Acknowledge Receipt and Identify Custodians.* With the litigation hold notification, SOL will require identifying personnel with related records and their acknowledgement of the receipt of the litigation hold and its preservation requirements. This involves coordination across the bureau. Records custodians or records holders may be responsible for information that provides contextual information for assessing damage or impact.
- C. *Production.* Based on the litigation, USGS personnel may be required to produce records through discovery for the case. This production, referred to as discovery, may be for information in any medium, and electronic information requires specialized software to preserve the metadata.
- D. *Continued Preservation.* Continued preservation is required by all employees that may require taking appropriate steps for continued compliance with the litigation hold until that hold is lifted by SOL. Violating the hold is spoliation, by failing to take steps to preserve potentially relevant information, may expose an employee to disciplinary actions up to and including dismissal as well as personal liability for civil and/or criminal sanctions by the courts or law enforcement agencies.
- E. *Release from a Litigation Hold.* A release from a litigation hold directive is issued by the SOL. Upon issuance of a litigation hold release, the released records and information will once again be subject to the disposition requirements specified in the applicable records disposition schedules and the litigation authorities (See SM 431.1).

8. Expiration Date. This policy must be reviewed biennially, or more frequently as needed to maintain current information.



James G. Anderson
Acting Associate Director for Administration

12/21/18
Date