COMMON GROUND ALLIANCE (CGA) CONFIDENTIALITY
POLICY FOR THE DAMAGE INFORMATION REPORTING TOOL

The following restates existing CGA policy and is based on legal advice:[1]

The Damage Information Reporting Tool ("DIRT") is a CGA electronic communications tool by which any person or entity, regardless of whether they are members of CGA ("participants"), may report damage to underground utilities to CGA. CGA has adopted the following policy with respect to information reported by individual participants to CGA using DIRT that identifies such individual participants ("individual participant data"):

CGA pledges that any individual participant data submitted to DIRT will be used only for CGA purposes, will be kept confidential to and by CGA, and will not be released to third parties by CGA (unless the third parties are working on CGA's behalf), without the individual submitting participant's written consent, except as authorized by law. CGA may release aggregate DIRT information that does not disclose individual participant data.

CGA has adopted the following measures to protect confidentiality of individual participant data:

1. If CGA receives a request for individual participant data, CGA will notify the applicable individual participant in writing and seek written consent to disclose such data. If the individual participant denies consent, CGA will notify the requestor in writing that the information is confidential and not available.

2. If CGA receives a subpoena for individual participant data, CGA will review the subpoena with CGA counsel for advice. CGA will also notify the individual participant in writing of receipt of the subpoena, unless such notice is prohibited by law. If the subpoena is valid based upon CGA counsel review, CGA will assert legal defenses to production of such data and/or seek an order protecting confidentiality of such data, if such defenses or order are available after consultation with CGA counsel.

3. If CGA receives a court order requiring production of individual participant data, CGA will review the order with CGA counsel for advice. CGA will also notify the individual participant in writing of receipt of the order, unless such notice is prohibited by law. If the order is valid based upon CGA counsel review, and CGA counsel advises against appeal of the order, CGA will comply with such order based upon advice of CGA counsel, and produce individual participant data based upon advice of CGA counsel. If the order is not valid or CGA counsel advises there are valid grounds for appeal, CGA may appeal the order based upon advice of CGA counsel.

[1] Memorandum by Hinshaw & Culbertson LLP (Sept. 10, 2004).

HINSHAW & CULBERTSON LLP

MEMORANDUM

PRIVILEGED AND CONFIDENTIAL

TO: Common Ground Alliance's Stakeholders

FROM: Hinshaw & Culbertson LLP

DATE: September 10, 2004

RE: **Common Ground Alliance's Pledge of Confidentiality to Stakeholders**

INTRODUCTION

Common Ground Alliance (CGA) is a member-driven non-profit organization that has created a secure, web browser-based application and database known as the Damage Information Reporting Tool (DIRT). DIRT is a tool for reporting, recording and analyzing underground damage information in order to gain a better understanding of how and why damage occurs while gauging the effectiveness of various damage prevention efforts. The goal of DIRT, as well as CGA as a whole, is to reduce underground facility damage, which can cost billions of dollars and potentially cause loss of life each year.

In order for CGA to perform this function, CGA depends on stakeholders to submit accurate and comprehensive damage data. Some of this data, however, is of a sensitive nature which stakeholders customarily keep confidential and away from public disclosure. In recognizing the confidential nature of the damage data:

> **CGA pledges that individual stakeholder damage data will only be used for CGA purposes and will be kept confidential from release to third parties (unless the third parties are working on CGA's behalf) without the stakeholder's consent, except as authorized by law.**

To ensure CGA's pledge of confidentiality, CGA engaged outside counsel from Hinshaw & Culbertson LLP (H&C) to review its current policies and procedures regarding safeguarding the confidentiality of stakeholders' data submissions. CGA also requested that H&C, upon completion of their review, issue a report to CGA detailing any deficiencies and providing suggestions in order to enhance CGA's current safeguards.

CGA recently received H&C's report which found no deficiencies in its review of CGA's safeguards over DIRT or its data gathering techniques. Despite a finding of no deficiencies, CGA continues to strive to alleviate any remaining stakeholder concerns regarding the disclosure of damage information. In furtherance of this effort, CGA has requested H&C to prepare this Memorandum to address how CGA will make every reasonable effort to maintain the confidentiality of a stakeholder's data submission when faced with a third party's request for such data.

This Memorandum consists of three parts. **Part One** details how CGA will generally respond to a third party request for a stakeholder's confidential data. **Part Two** explains the practical considerations regarding any release of confidential damage data by CGA to a third party.

Furthermore, in an effort to alleviate all possible stakeholder concerns regarding its data submission, **Part Three** of this Memorandum addresses the practical considerations regarding a third party's use of the CGA data report in a litigation matter involving a stakeholder.

PART ONE: MAINTAINING CONFIDENTIALITY IN LIGHT OF A THIRD PARTY'S REQUEST FOR A STAKEHOLDER'S CONFIDENTIAL DATA

CGA places the highest priority on maintaining the confidentiality of its stakeholder's data submissions. In general, a confidentiality issue may arise when there is a request by a third party to obtain the stakeholder's data submission. Unfortunately, the legal system acknowledges that there are times when certain third parties can seek release of information such as damage data information.

A third party request for a stakeholder's data submission may occur in one of three forms and each form requires a different response. These various types of requests and examples of CGA's response to each type of request are provided below.

Type I: A third party request for a stakeholder's damage data from CGA without an authorization signed by the stakeholder to whom the data belongs

A request for a stakeholder's data submission may come in the form of an informal written or oral request from a third party asking that CGA release the data. It is CGA's policy to not release confidential stakeholder data to third parties (except third parties working on CGA's behalf) without the stakeholder's express authorization allowing release of the data.

Accordingly, when CGA receives such a communication from a third party, CGA will respond that CGA is unable to release confidential records, if any, without a stakeholder's express authorization in the form of a signed authorization. Because this form of third party request is not based on any legal authority such as a court order, CGA cannot be compelled to disclose the stakeholder's confidential information in this situation. If, however, a release is executed by the stakeholder thereby demonstrating that the stakeholder consents to the release and the release meets with CGA's satisfaction, then CGA will release the information to the third party.

Type II: Subpoena

Although unlikely, another form of request for a stakeholder's data submission is by service of a subpoena. While CGA has never been the recipient of a third party subpoena requesting stakeholder data, CGA is prepared to defend its stakeholder's confidentiality to the fullest extent allowable under the law.

When parties are involved in litigation, the parties will typically seek to discover as much relevant information about the opposing party within reason by using various legally acceptable methods to do so. This process is typically referred to as "discovery" or the "discovery process." A subpoena is one of many legally acceptable methods that can be used to attempt to discover

relevant information. Many times a subpoena is used to compel a person or entity not involved in the litigation to provide certain information.

In general, there are two types of subpoenas. A subpoena is a legal document compelling a party to appear at a certain time and place to give testimony about a certain matter. Another type of subpoena, a subpoena duces tecum, is a court process initiated by a party involved in litigation compelling production of specific documents from another party which are material and relevant to the facts in issue in the legal proceeding.

a. CGA will challenge the validity of the subpoena

In the event CGA is properly served with a subpoena, CGA will not simply comply with the subpoena, turn over the requested information, or appear to present testimony. Instead, CGA will immediately attempt to contact the stakeholder (if one is identified) and inform the stakeholder that CGA has been served with a subpoena. If the stakeholder authorizes the release of the information requested in the subpoena, then CGA will work to comply with the request. If, on the other hand, the stakeholder states that they do not want the information requested by the third party released, CGA will work with the stakeholder's counsel to challenge the validity of the subpoena and investigate the factual and legal support for the subpoena.

In order to challenge the subpoena, CGA will bring a motion to quash and seek a protective order. Quash means to "squash", and is the legal means by which to avoid honoring a subpoena. There must be grounds to quash a subpoena and seek a protective order, *e.g.*, like confidentiality or relevancy. Such defenses may include objections such as overly broad, unduly burdensome, irrelevant, not reasonably related to the discovery of admissible evidence, vague or that the information sought is protected by a privilege. A few of these objections are discussed below.

b. Possible objections to a subpoena

For purposes of determining the appropriate scope of discovery, the relevant inquiry is generally whether the request is "reasonably calculated to lead to the discovery of admissible evidence." *See* Fed.R.Civ.P.26(b)(1). Depending on the scope of the request, interposing objections that the request is overly broad and "not reasonably calculated to lead to the discovery of admissible evidence" can be valid. The determination of whether the request exceeds the appropriate scope of discovery typically hinges on the specific facts of the case and the specific request. Significantly, the courts typically favor broad discovery.

Although many courts are largely unsympathetic to denying a discovery request entirely based on the objection that it is unduly costly to produce electronic information, this is another valid objection especially in light of the fact that CGA is a non-profit organization rather than a large international corporation. In practice, however, the court will likely simply shift the cost of the discovery if the objection is deemed to be valid to the responding party. An instructive case on cost allocation involving electronic discovery is *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 2002 U.S. Dist. Lexis 488 (S.D.N.Y. Jan.16 2002), in which the court summarized the following factors to be taken into account in making cost determinations:

> (1) the specificity of the discovery requests; (2) the likelihood of discovery of critical information; (3) the availability of such information from other sources; (4) the purposes

for which the responding party maintains the requested data; (5) the relative benefit to the parties for obtaining the information; (6) the total cost associated with production; (7) the relative ability of each party to control cost and its incentive to do so; (8) the resources available to each. Each of these factors is relevant in determining whether discovery costs should be shifted in this case.

Another objection that may be raised is that the request would prove to be "unduly burdensome." Case authority on this point suggests that the threshold for "undue burden" when a requesting party has shown that the information requested is relevant is typically high and any facts offered in opposing the request must be specific. *See*, *e.g.*, *Dunn v. Midwestern Indemnity*, 88 F.R.D.191 (D.C. Ohio 1980)(not only must the type of burden claimed be extraordinary to justify denying relevant computer related discovery but the claim must also be properly supported by competent evidence).

Appropriate defenses employed by CGA to challenge the subpoena will vary depending on the nature of the litigation and on a case-by-case basis. However, by raising valid defenses and by being prepared to challenge a subpoena, CGA has increased the likelihood that the court may either limit the request or even deny the request in total.

Type III: Court Orders

A further type of request for stakeholder information may come in the form of a court order. A court order is a document that is signed by a judge. Generally, the recipient of a court order responds to the request of the judge in the manner indicated in the court order. Unlike a subpoena, CGA does not have the option of attempting to quash a court order. To get the court order reversed, CGA would need to appeal the judge's decision to the next higher court. Generally, CGA must have good legal grounds to do so because higher courts do not like going over a lower court's head so to speak while a case is still pending. Also, appealing the order may strategically be unwise as, for example, it could anger the lower court's judge. Accordingly, CGA will work with the stakeholder's counsel to determine whether CGA should appeal any court order demanding that a stakeholder's data submission be produced by CGA.

Type IV: FOIA Requests

CGA will not, however, be compelled to disclose confidential data pursuant to a FOIA request as these requests can only apply to a governmental entity, which CGA is not.

PART TWO: PRACTICAL CONSIDERATIONS REGARDING THE RELEASE OF A STAKEHOLDER'S DATA SUBMISSION TO A THIRD PARTY

While CGA is prepared to defend stakeholders' confidentiality to the fullest extent available under law as detailed above, the consequence of the release of such damage data is nominal at best.

Significantly, the stakeholder damage data CGA possesses is in no way different than the information the stakeholder provided to CGA in the first instance. CGA only obtains stakeholder damage data from the stakeholders themselves. CGA does not utilize any outside

sources to compile stakeholder information. Rather, CGA simply relies on the accuracy of the information provided by the stakeholder(s).

In addition, CGA does not utilize the stakeholder's data submission to determine damage liability. Similarly, CGA does not use the damage data for enforcement purposes. Rather, CGA merely assembles and analyzes the data so that it can be combined with the data submitted by other stakeholders to create a database of information and a statistical compilation of the data.

Further, it is important to understand that if the stakeholder is a named party to a litigation matter (which means that the stakeholder either is suing or being sued), the third party has the right to request the same information from the stakeholder. Therefore, if the stakeholder releases this information in the litigation matter, CGA's information about the specific stakeholder certainly would just be duplicative information.

PART THREE: PRACTICAL CONSIDERATIONS REGARDING A THIRD PARTY'S USE OF CGA'S DAMAGE DATA REPORTS IN A LITIGATION MATTER

CGA understands that a few stakeholders have voiced concerns over whether a third party can use CGA's reports in a litigation matter involving a stakeholder. CGA seeks to address these concerns below.

In order for a third party to offer a CGA damage data report into evidence at trial, the third party would have to demonstrate that, among other things, the report is relevant and probative. The scope of available defenses as well as the strength of the defenses will depend on the purpose for which the third party was seeking to admit the report. As such, appropriate defenses would be determined on a case-by-case basis.

There will be several chances during the litigation process for the stakeholder's counsel to challenge the admissibility of the reports. For example, the stakeholder's counsel most likely will have an opportunity before trial to seek to preclude admission of the reports pursuant to a motion *in limine*. A motion *in limine* is a pretrial motion asking the court to prohibit opposing counsel from offering certain evidence. In the event the stakeholder's counsel is unsuccessful, the counsel would also most likely have an opportunity to explain to the fact finder (the jury in a trial or judge if neither party requests a jury) why the reports are irrelevant and/or should not be given much weight in the decision process. Accordingly, it is unclear as to how must weight a finder of fact would interpret the reports. It is certainly possible the jury would give no weight whatsoever to the reports.

Nevertheless, regardless of the purpose for which the third party seeks to admit CGA's reports, several defenses are available and a few of the defenses are described briefly below.

First, the relevance of the CGA-issued facility damage reports *vis á vis* the specific stakeholder involved in the litigation will be extremely tenuous. CGA's reports will present damage data on an aggregate basis based on millions of damage submissions from hundreds of different types of stakeholders from all across the country. Because the reports are based on such a broad ground of stakeholders, the damage reports would be misleading and irrelevant to the specific stakeholder involved in the litigation.

Second, it is well-established that the third party (the plaintiff) in negligence matter has the burden of proving that the stakeholder was negligent in order for the stakeholder to be found liable for the party's alleged damages. Therefore, it could be argued that whether the industry as a whole has a low or high incidence of damage has absolutely nothing to do with the determination of whether a particular stakeholder was negligent with respect to a particular incident on a particular day. Therefore, as the argument would go, the reports should not be allowed a trial as they are not probative nor relevant to any fact in dispute.

Finally, it is important to note that regardless if a stakeholder elects to submit damage information to CGA, CGA's data report will still be prepared. In addition, other trade association data currently exists, such as the State of Colorado's facility damage data. Therefore, a third party will still be able to attempt to use a facility damage report in a litigation matter against the non-participating stakeholder. In other words, nonparticipation in the damage submission will most likely not prevent a third party from attempting to use the reports in a litigation matter. Rather, whether a third party attempts to admit the report will simply be a matter of choice.

CONCLUSION

CGA takes its relationship with stakeholders very seriously. As a result, CGA is firmly committed to collecting the damage data in a way which ensures each stakeholder's confidentiality. By this Memorandum, CGA hopes that it has resolved any remaining confidentiality concerns. As always, CGA invites stakeholders' questions and comments.