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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 11 1994

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases

FROM: Steven A. Herman
Assistant Administrator

TO: Assistant Administrators
Regional Administrators
Deputy Assistant Administrators
Regional Counsels
OECA Office Directors and Division Directors

On May 31, 1994, the Administrator commissioned an effort to follow up on the issues raised by the Regional Impacts Task Force (RITF) regarding the division of roles and responsibility between the Regions and Headquarters in the enforcement and compliance assurance program. The principal area which needed further discussion regarded the management of civil judicial and administrative cases. The specific question to be addressed concerned the nature and extent of Headquarters involvement in case development and litigation.

A small work group, which included personnel from OECA, the Regions, and OGC, was formed to undertake this follow-up effort. The work group approached its assignment in two phases. Phase 1 has focussed on the roles issue in the regulatory enforcement context; Phase 2 will examine the issue in the Superfund context. Phase 1, on which the work group has completed its work, is the subject of this memorandum; Phase 2 will be brought to closure in the near term.

The RITF provided a basic framework for the Headquarters/Regional relationship in the case management arena, concluding that Headquarters involvement was appropriate in a number of contexts: a) cases or issues that rise to a level of national attention; b) multi-regional cases against the same company; c) national initiative cases. The RITF Report encouraged redelegation of authority for matters that are not of national import. The relevant portions of the RITF Report are attached to this memorandum as Attachment A. Also attached to

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this memorandum are supplemental guidance developed by the follow-up work group (Attachment B), giving further definition to the concept of "national significance," and a new redelegation of authority to the Regions that builds on the work of the RITF and reflects the views of the work group (Attachment C).

This memorandum and its attachments, taken together, establish the general framework and guidance that the Agency will hereafter follow in the processing and management of civil regulatory enforcement cases. The effective date for implementation of this new approach will be October 1, 1994. In the meantime, we will be developing further the auditing concept outlined below and visiting the Regions to discuss expectations regarding implementation.

A NEW APPROACH TO OVERSIGHT

As articulated by the RITF, the fundamental role of OECA is to provide overall leadership in the enforcement and compliance assurance arena. This leadership role has a number of different facets, including devising the national strategy for the program, addressing matters of national policy and concern, ensuring national consistency, ensuring the development of regulations and laws that are clear and enforceable, representing the Agency before the Congress and with other agencies, and ensuring effective implementation of the Agency's enforcement and compliance assurance program.

Although, as discussed further below, there are significant benefits associated with Headquarters involvement in cases, case involvement has been historically used by Headquarters at least in part as a means of overseeing Regional implementation of EPA's enforcement program. The principal vehicle for effecting this oversight has been the requirement that Headquarters formally concur on all Regional settlements of civil judicial matters, whether or not those matters raise issues of national concern. This concurrence process has been criticized for increasing transaction costs, causing processing delays, and diverting Headquarters and Regional staff attention from other, more compelling work.

With this memorandum, and in keeping with the principles of empowerment, reinvention, and accountability, we are fundamentally reorienting our approach to Regional oversight. The new approach has the following features:

- **Value-added approach to case involvement** -- Headquarters involvement in cases will operate according to the "value added" principle. Under this principle, Headquarters staff will be involved in cases when the case or the program at large will benefit from such involvement (see below for

further discussion).

o **Focus on "nationally significant" matters and issues** -- The concurrence process will no longer be used for purposes of routine oversight. Instead, it will be reserved for cases or issues which call for Headquarters sign-off because of their national significance -- i.e., because they are national in terms of their impact or attention, are sensitive in nature, raise unresolved policy issues, establish an important precedent, arise in an area where national consistency is of paramount importance (e.g., Shell Oil, where an adverse legal decision raised major programmatic concerns under RCRA), or otherwise affect the overall program. The new approach eliminates the distinctions between administrative and judicial cases, as cases in either forum can be nationally significant and can raise issues of national consequence. Attachment B provides specific examples of nationally significant matters. Because of its unique national perspective and its role as policy-maker and national "voice" for the enforcement and compliance assurance program, Headquarters staff involvement during the pendency of the litigation and ultimately the AA/OECA's review and sign-off in these circumstances adds value to program implementation and is essential to effective program implementation and public accountability.

o **Redelegation of authority** -- Regional civil judicial and administrative cases which seek a bottom line penalty[1] of less than $500,000 will be presumed to not be nationally significant. Accordingly, consistent with the attached delegation, I am redelegating to the Regional Counsel the AA's authority to concur on settlements undertaken by the Regional Administrator (or Regional Division Director, where the RA's authority has been redelegated), provided such settlements adhere to national policy and guidance and do not raise issues of national significance. The Regional Counsel will, in the first instance and in keeping with this guidance, make and document the determination whether such a matter raises an issue of national significance. Judicial and administrative cases involving a bottom line penalty of $500,000 or more assume a sufficient national profile so as to be presumptively nationally significant and will be

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[1]Under the Agency's penalty policies, this generally means recovery of the economic benefit of noncompliance plus a gravity component. Where the Region has not prepared a bottom line penalty before filing an administrative case, cases will be presumed to be nationally significant if the proposed penalty sought in the complaint to be filed is greater than or equal to $500,000.

reserved for the AA/OECA's concurrence.[2]

o **Flexible involvement** -- Flexibility is built into the redelegation. If a nationally significant issue arises in a case with a bottom line penalty under the $500,000 threshold, the delegation will require the Region to consult with the appropriate division in the Office of Regulatory Enforcement (ORE) in OECA; OECA would, at the Division Director level, then have the authority to opt in for purposes of concurrence if appropriate.[3] For the $500,000 and over cases, the redelegation would give OECA, at the Office Director level, the authority to opt out for purposes of concurrence if, for example, there are no issues of national significance and the case is not likely to assume a national profile.

o **Differential oversight** -- The case-by-case approach to oversight will be replaced with a systematic approach to accountability which will include, at a minimum, periodic auditing of regional compliance with the requirements of the redelegation, regular docket reviews, and after-the-fact review of regional decision documents. Regional Counsel

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[2]The delegations that are currently in place for administrative penalty actions under, e.g., the Clean Water Act (2-52-A), the Clean Air Act (7-6-A), RCRA Subtitle J (8-3), and TSCA (12-2-A), reserve the OECA Assistant Administrator's authority in "multi-Regional cases, cases of national significance or nationally managed programs." Consequently, the approach outlined in this memorandum for administrative cases is consistent with delegations relating to these authorities. Because the delegations that are currently in place for RCRA Subtitle C and the Safe Drinking Water Act do not include this explicit reservation, we will need to make conforming amendments to the Administrator's delegation under these authorities. This will be done as part of the third phase of delegations adjustments associated with the reorganization. In the meantime, as a function of their reporting relationship with the OECA AA, the Regional Counsels will be expected to consult with OECA, consistent with this memorandum, on nationally significant administrative matters arising under these authorities.

[3]Where OECA opts in, the concurrence requirement will be fashioned to reflect the character of the matter at hand. In some circumstances, OECA's concurrence will be required only for resolution of the nationally significant issue (as opposed to requiring concurrence on the settlement); in others, such as where the nationally significant issue is so fundamental to the case that the resolution of the case inevitably speaks to the issue in an important way, the Assistant Administrator's concurrence will be required for the settlement.

forth below:

o **"National Program" cases** -- These are cases that arise in programs that are not implemented at the Regional level, such as the Mobile Source program and enforcement of the adverse effects reporting requirements under FIFRA, and cases which are Headquarters-driven because the data systems necessary to identify noncompliance are maintained at Headquarters (e.g., CFC import and export cases, certain acid rain cases, etc.). In these cases, Headquarters has the lead role, with little or no regional involvement.[4]

o **"National Violator" cases** -- These are cases against a single entity involving violations at facilities in more than one Region (e.g., the Louisiana Pacific multi-facility case). In these cases, Headquarters will have the EPA lead for overall case direction and coordination. Generally, Regional personnel will be responsible for developing and supporting those components of the case that arise in their Region. In national violator cases in which a disproportionate number of violating facilities are located in a single region, OECA may determine that it is more appropriate for personnel from that Region to play the lead role, essentially reporting to OECA in this capacity.

o **"National Initiatives"** -- These are clusters of cases involving more than one Region centered around a sector of the regulated community (e.g., the pulp and paper initiative), a geographic area (e.g., the Mexican border), a pollutant (e.g., the lead initiative), or a particular kind of regulatory requirement (e.g., the RCRA non-notifier initiative). In these circumstances, OECA personnel will have a lead role in coordinating the overall project, including developing initiative guidance, screening cases for inclusion in the initiative, and giving direction in terms of timing of activities, communication strategy, etc. Generally, Regional personnel will serve as the Agency lead for the individual cases that are included in the initiative.

o **Single Region cases** -- This category includes cases which arise in the ordinary course of events within a Region as well as self-contained regional initiatives. Regional personnel will serve as the Agency lead for cases in this category. Headquarters involvement will be determined largely by the redelegation of authority. Thus, in redelegated cases, Headquarters personnel will ordinarily

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[4]In the near term, I will be doing an additional delegation of authority within OECA for settlements in cases falling into this category.

not be involved; in non-redelegated cases, Headquarters personnel will be involved for the purpose of providing national perspective and expertise, keeping the AA/OECA and other critical Headquarters decision-makers advised, and informing AA/OECA concurrence. Whether or not Headquarters is involved, the Regional Counsels will, by providing copies to ORE of referrals to the Department of Justice and through regular reports and periodic consultation, be responsible for keeping the AA/OECA and ORE informed regarding program activities.

This guidance regarding Headquarters involvement should not be viewed rigidly. Rather, it should be viewed flexibly, with an eye towards using the overall resources available to the program to get the job done. Thus, where, for example, a national initiative calls for work that is beyond a Region's resources, OECA personnel may be deployed to the Region to work with Regional management in leading case developing efforts.

Similarly, apart from the redelegation, the need to provide training opportunities that will leave Headquarters personnel better able to perform their policy and regulatory role may suggest involvement in circumstances not expressly contemplated above. Additionally, OECA retains the authority to take action, after consultation with the Regional Administrator, in the place of a Region in the rare situation where the Region is unprepared to respond to a problem of national concern or to assume the lead in a case which is of such paramount national interest as to require daily involvement by the AA/OECA (e.g., Love Canal).

CONCLUSION

In sum, this guidance and redelegation should help the Agency turn a corner in the Headquarters/Regional relationship in the enforcement and compliance assurance arena. Our new approach not only will preserve, but reinforce OECA's leadership role for the enforcement and compliance assurance program, particularly as it relates to nationally significant cases and issues. At the same time, it will empower managers in the Regions to implement the Regional enforcement program in a more efficient manner. Moreover, the accountability mechanism contemplated here -- systematic audits, after-the-fact review of pertinent decision documents, and differential oversight -- should leave OECA better able to identify problems and respond to them holistically than is possible under the current system. Frequent and regular contacts between Headquarters and Regional managers will be essential to the success of the new system. At the one-year anniversary of the effective date of this memorandum we will review this guidance and redelegation to determine whether any adjustments are needed.

Attachments

ATTACHMENT A

REPORT OF THE EPA

REGIONAL ENFORCEMENT IMPACTS

TASK FORCE

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MAY 1994

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should have the lead, with participation from the other, depending on the nature of the matter.

6. Case Development and Management

a. General Background

The area of case development and management presents the largest challenge for setting out appropriate roles and responsibilities because there are so many functions, so much work, and legitimate disagreements over dividing responsibilities between the Regions and Headquarters. The Task Force spent a great deal of its time and effort dealing with roles and responsibilities in this area.

The Task Force believes that a number of principles should guide the Headquarters/Regions relationship in case development and management including: Use resources efficiently and effectively; avoid duplication of effort and second guessing; maximize delegations; use a team approach to problem solving based on trust, cooperation, and respect; determine roles based on need for unique perspectives and knowledge; provide clear and timely Headquarters guidance that allows Regions a specified degree of flexibility and sets out a process for greater flexibility based on the facts of a specific case.

The Task Force's recommended roles and responsibilities between Regions and Headquarters reflect the general and normal delineation of roles and responsibilities that would take place for case development and management and should not be viewed as an absolute. Overall, there needs to be a balance between empowerment and consistency. Specific case facts relating to precedential concerns, the need to deviate from established policies, or other matters may warrant the need for greater Headquarters involvement. However, with the exception of nationally run enforcement programs, the presumption is that Regions manage their cases.

Currently, responsibility for administrative cases is largely delegated to the Regions with minimal Headquarters involvement. Headquarters involvement is usually limited to administrative cases resulting from national programs that are managed entirely out of Headquarters (e.g., mobile sources) and administrative actions brought under new statutory or regulatory authority, for which the Regions typically have submitted their first three such actions for Headquarters approval. However, there are also occasional circumstances when, because of the

precedential nature of issues involved in administrative cases, Headquarters becomes involved.

Under the reorganized enforcement program, the Task Force generally believes that development, management, and settlement of the significant majority of administrative cases should continue to be handled by the Regions. However, for regional cases that (a) rise to a level of national attention, (b) are multi-regional cases against a company, economic sector, or ecosystem, or (c) are part of national enforcement initiatives, the Task Force generally believes that some degree of Headquarters involvement (which can range from consultation to concurrence) would be advisable and that in some cases a Headquarters lead would be appropriate. The Task Force believes these three types of cases are likely to be a relatively small percentage of all regional administrative cases. Whether a Region or Headquarters should have the "lead" and the extent of the other office's participation and/or concurrence in these cases would depend on the nature and facts of the case. There should be criteria and guidance to help guide these decisions. The most important consideration, however, is that the decision on the lead responsibility for such administrative cases must be made as early in the process as possible.

Currently, Regions have been delegated less authority for initiating, conducting, and settling judicial cases than for administrative cases. Headquarters involvement is significant. Under the reorganized enforcement program, the Task Force generally believes that development, management, and settlement of the majority of judicial cases should be delegated to Regions. However, the Task Force believes that cases that (a) rise to a level of national attention, (b) are multi-regional cases against the same company, or (c) are part of national enforcement initiatives, could be either Regional lead with Headquarters concurrence/participation or Headquarters lead with Regional concurrence/participation, depending on the nature and facts of each case. As with administrative cases, there should be criteria and guidance to help guide these decisions. The most important consideration, however, is that the decision on the lead responsibility for such judicial cases must be made as early in the process as possible.

b. Delegations Proposal

In light of these considerations, the Task Force recommends that the Assistant Administrator for OECA consider a number of delegations in the context of overall environmental enforcement case management. These delegations are

appropriate in light of the Administrator's commitment to streamlining, ensuring national consistency, and implementing the recommendations of the National Performance Review. These delegation principles are not intended to substitute for the principle that good communication between Headquarters and the Regions is essential for consistent and efficient Agency enforcement.

The Task Force suggests consideration of the following principles:

(i) It is appropriate to further delegate civil judicial case initiation, management, and settlement authorities to Regional Administrators/Regional Counsels. The Task Force expects that authority for initiation, management, and settlement of the majority of cases will be delegated to the Regions, and Regions will be held accountable for appropriate exercise of that authority. These include all cases not falling within the exceptions to be set forth in guidelines, as noted in (ii) below.

Administrative enforcement authorities have largely been delegated to regional offices. The Task Force expects that the authorities for initiation, management, and settlement of these cases will be maintained in the Regions, with exceptions limited to those set forth in guidelines, as noted in (ii) below.

(ii) Consistent with the Administrator's desire that EPA speak with one enforcement voice, the Assistant Administrator for OECA should be included in the decision-making process at any time that it becomes apparent that a civil judicial or administrative case will raise issues of national precedence or national significance. Depending upon the level of national precedence or significance, inclusion and participation of the Assistant Administrator for OECA will vary from consultation to concurrence in regionally-managed cases to actual Headquarters lead in case development and management.

The Task Force believes that a number of factors should be considered in ascertaining whether a case is of national significance or nationally-precedential, and what level of delegation is therefore appropriate. These factors include the dollar value of assessed penalties, the precedential character of the case or specific issues involved, the degree of national importance and public interest in the case, whether a case covers facilities or environmental contamination problems in multiple Regions, whether a proposed settlement is within national norms, whether a case is initiated within the context of a national initiative, and whether a case is consistent with legislative proposals under consideration.

(iii) Assuring that the Administrator's goals of national consistency and streamlining are met will require that the Assistant Administrator for OECA introduce and implement a system of accountability. In accordance with the delegations outlined in (b) above, the system must include some contemporaneous review of the case initiation, management, and settlement in nationally significant cases, as well as in cases in which national settlement criteria have not been met (e.g., recovery of economic benefit of non-compliance). In addition, the Task Force recommends institution of systematic post hoc reviews of regional enforcement program performance, and consistency with national enforcement policies. The Task Force recommends that this review yield sanctions for non conformance with national policy, a recognition of superior performance, and consideration of differential delegations if appropriate.

c. Recommended Roles and Responsibilities

Based on the above discussion, a number of functions should fall into the category of Headquarters in the lead with Regional participation. These include national priority setting and targeting, technical and legal support on national issues, clearinghouse/coordination, development of information systems, Headquarters providing technical and legal support on Regional cases, providing technical experts on key cases, DOJ interface, policy and guidance on case management, coordination with OGC, communication and coordination among Regions, criminal case development, and citizen suit matters.

Regions should have the lead on regional targeting and screening, and communicating and coordinating with Headquarters and States.

The Regions and Headquarters should share the responsibility for ensuring consistency with national policy guidance, but the Task Force recognizes that Headquarters should have an audit function with respect to the Regions. On administrative appeals, the Regions should have the lead with Headquarters concurrence on both the decision to appeal and the conduct of the case. For judicial appeals, Headquarters should have the lead with Regional concurrence. The same is true for contractor listing. In defensive litigation, in both pre-enforcement review and counterclaims, Headquarters or the Regions should have the lead, with the other participating, depending on the case.

On most administrative cases, the Regions should have the lead in developing, managing, litigating, and resolving the matters. In several categories of administrative cases, Headquarters should be involved, and on rare occasions

Guidelines for Identification of Nationally Significant Cases or Issues

The following guidelines and examples set forth indicators of national significance for purposes of determining the involvement of the Office of Enforcement and Compliance Assurance in Regional enforcement cases, and the exercise of any case settlement authorities delegated to Regional Counsels. These guidelines should not, however, be the sole basis for any determination regarding the presence of nationally significant issues in an enforcement action; indeed, what is "nationally significant" will necessarily reflect the current climate in which the Agency carries out its mission. For example, matters which would not ordinarily be nationally significant may become such when they relate to statutory reauthorization or other legislative developments. Regional Counsels are expected to consult with the appropriate Office of Regulatory Enforcement Division Director on any issues of national significance which have been identified, yet do not otherwise fall within any of the guidelines set forth below. These guidelines may be periodically supplemented or revised to reflect additional indicia of national significance, or to remove any indicia listed below for which Headquarters attention is no longer required.

Examples of case or issues which raise indicia of national significance:

1) Cases or issues that have precedential character

- Initial use of new authorities
- New use of existing authority
- Issue of first impression
- Unresolved policy, legal or technical issue
- Change in national policy or legal interpretation
- Applications of new technology

2) Cases or issues that rise to a level of national attention or significant public interest

- Significant citizen concern (especially significant environmental justice issues)
- Significant political attention
- Major state/local government relationship issues
- Cases against municipalities
- Major environmental or public health threat
- Shut down of a facility

- International implications (e.g. trade, import violations, Basel Convention)
- Major inter-agency implications, including federal facilities
- Settlements involving cutting edge Supplemental Environmental Projects

3) Cases or issues that are potentially affected by legislative proposals under consideration, emerging regulatory proposals, or evolving policy changes

(e.g. Clean Water Act reauthorization, municipal incineration)

4) Cases that are multi-Regional

- Multi-Regional case against one company
- Multi-Regional initiative (e.g. geographic, sector, pollutant, regulation)

5) Cases or issues that deviate from the national norm

- Deviation from established policy
- Deviation from established guidance
- Deviation from previous legal positions

ATTACHMENT C

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 8 1994

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Redelegation of the Assistant Administrator for OECA's Concurrence Authority in Settlement of Certain Civil Judicial and Administrative Enforcement Actions

FROM: Steven A. Herman
Assistant Administrator

TO: Assistant Administrators
Regional Administrators
Deputy Regional Administrators
Regional Counsel
OECA Office Directors
OECA Division Directors

This memorandum constitutes the formal redelegation of certain settlement concurrence authorities currently reserved for the Assistant Administrator for Enforcement and Compliance Assurance, and serves as an attachment to the July 8, 1994 OECA memorandum entitled, "Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases." The authorities which are hereby redelegated are listed below, as well as the procedure, conditions, and limitations that apply when such redelegated authorities are exercised by either the Regional Counsels or the Director of the Office of Regulatory Enforcement of OECA. The July 8, 1994 memorandum mentioned above should be consulted for additional clarification on the procedures to be used to implement these redelegations, as well as the expectations and responsibilities that follow these settlement authorities.

Authorities

To settle or exercise the Assistant Administrator's concurrence in the settlement of civil judicial and administrative enforcement actions which involve a bottom-line penalty of less than $500,000 under the Clean Water Act, the Safe Drinking Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, the Federal Insecticide, Fungicide and Rodenticide Act, and the Toxic Substances Control Act.

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To settle or exercise the Assistant Administrator's concurrence in the settlement of civil judicial and administrative enforcement actions which involve a bottom-line penalty of $500,000 or above, in actions under the above-mentioned statutes for which the Director for the Office of Regulatory Enforcement of OECA determines that, in light of the issues presented, the concurrence of the Assistant Administrator is not necessary.

To Whom Redelegated

The Regional Counsels. This authority may not be redelegated.

Process and Limitations

The Regional Counsels must consult with the Assistant Administrator for Enforcement and Compliance Assurance or his designee prior to exercising this redelegated authority under the following circumstances: (1) a proposed settlement would not comport with applicable penalty policies or recover the full amount of economic benefit of noncompliance from a violator not in bankruptcy; or (2) the case raises issues of national significance or otherwise rises to a level of national attention.

The Regional Counsels are responsible in the first instance for identifying such cases and/or issues as they arise, and are expected to inform the Director of the Office of Regulatory Enforcement of the Office of Enforcement and Compliance Assurance as soon as they are identified. Criteria for determining whether a case or issue are nationally significant, or have risen to a level of national attention, are set forth in the July 8, 1994 OECA memorandum entitled "Redelegation of Authority and Guidance on Headquarters Involvement in Regulatory Enforcement Cases." Particular issues of national interest or concern may also be identified by the Division Directors in the Office of Regulatory Enforcement. Regional Counsels should use discretion in identifying other issues which are nationally significant, yet do not otherwise fall within the guidelines or examples contained therein.

Following the appropriate consultation between the Regional Counsel and the Director of the Office of Regulatory Enforcement of OECA, or the appropriate ORE Division Director, regarding the above-referenced issues, OECA may, at the Division Director level, determine that concurrence of the Assistant Administrator is appropriate for the matter at hand, in which case concurrence will be required.

This redelegation does not extend to Headquarters-initiated cases.