

October 28, 2003

MEMORANDUM

SUBJECT: Restrictions on Communicating With Outside Parties Regarding Enforcement Actions

FROM: John Peter Suarez /s/

TO: Assistant Administrators
Deputy Assistant Administrators
Associate Assistant Administrators
Regional Administrators
Deputy Regional Administrators
Regional Counsels
OECA Office and Deputy Directors
Headquarters and Regional Enforcement Managers
Regional Enforcement Coordinators

This memorandum reiterates earlier guidance and memoranda outlining restrictions on communicating with parties external to EPA about enforcement actions. Continuing to implement these procedures will ensure an open and fair process and will allow enforcement staff to negotiate and conclude cases successfully. However, when sensitive enforcement information is released through either discussions or written communications, it may result in less protection of public health and the environment and jeopardize settlement negotiations. I request that you relay the information in this memorandum to all of your managers and staff and continue to reiterate the importance of this policy.

Historical EPA Directives on External Communications

EPA has traditionally directed employees not to disclose information that will interfere with an investigation, settlement negotiation, or litigation. Since 1990, various policy statements and ethics advisories have addressed this issue, and are attached for your reference. I am hereby endorsing those past directives through this memorandum, and am providing further clarification to ensure that such information is maintained as privileged and confidential. We must also continue to work openly, fairly, and in accordance with all legal requirements while simultaneously protecting enforcement sensitive and privileged information.

Outline of General Principals

Central to our enforcement work is the need to keep information that is not already in the public domain confidential while engaged in an enforcement matter. Although often times the existence of an enforcement action is widely known, specific and sensitive enforcement information should be closely guarded. Therefore, communication with external parties about enforcement sensitive information should not occur. External third parties include:

- Members of Congress or Congressional Staff;
- Representatives of State or local governments that do not enter into a joint prosecution agreement with the Federal government;
- Representatives of the media;
- Industry, trade associations, environmental groups, public interest groups; and
- Members of the general public.

Information that should not be shared with external parties includes:

- Information on the status of an investigation, negotiation, litigation, or settlement discussion, including strategy and tactics;
- Sensitive information that may affect how a case proceeds, even though the information may not be privileged;
- Non-public information that was inadvertently or otherwise disclosed; and
- Draft press and communications documents, such as press releases or advisories.

While there are many details within enforcement matters that are confidential and may not be shared with outside parties, public documents that can be shared with outside parties include:

- Information requests to initiate investigations,
- Judicial complaints;
- Notices of violations;
- Administrative orders;
- Final Settlement agreements;

- Motions and other documents filed with courts or filed in administrative proceedings;
- Court decisions.

These types of public information can be shared with external parties, although when communicating with external parties about information that is already in the public domain, staff must be mindful of avoiding the release of non-public sensitive information.

Protecting Settlement Communications

It is common practice that once settlement negotiations begin in any given enforcement matter, that the parties agree, either verbally or in writing, that such communications will be held confidential between the parties. These agreements are not only for the protection of the party subject to the enforcement proceeding, but also to protect EPA if the matter is not settled and proceeds to adjudication. In addition to upsetting the unique balance of offers and counter-offers presented in negotiations, a violation of a confidentiality agreement may constitute a violation of ethical standards. Certain legal privileges, such as attorney-work-product and attorney-client communications, may also be waived inadvertently if privileged information is made public. Indeed, Federal Rules of Evidence Rule 408 protects settlement discussions from disclosure, and enforcement staff should not discuss settlement negotiations with external parties whether or not a confidentiality agreement exists.

During the negotiation process with a specific party or within the EPA-internal case development phase, it is not uncommon that legal claims are discussed and litigation risks analyzed, as they are present in any case. Such communications are highly sensitive and must be protected from disclosure. The fact that EPA and a party are in settlement negotiations need not be confidential, but the detail exchange of offers, counter-offers, and other settlement dynamics are confidential and must not be disclosed to third-parties. In particular, discussions on the remedy being sought in settlement should be confined to the settlement room where only EPA and other government personnel involved in the enforcement matter and the opposing party are present. Discussions with third-parties relating to remedy required to settle a given case are inappropriate.

Communications with Congress

As to Congressional inquiries on pending enforcement matters, Members of Congress and their staffs should be handled the same as any other external party when enforcement information is requested. This has consistently been EPA's policy for many years, and I reiterate it again today. While outside parties are encouraged to contact Congress on legislative, policy, and statutory implementation issues, it is inappropriate for Congress to mediate, participate, or in any way influence the enforcement process against a specific individual or company. Congress is not a party in enforcement actions and should not be privy to or attempt to influence settlement

exchanges on what an appropriate remedy is required to settle an enforcement matter, penalty demands, and other case specific matters. If you receive a request from a Congressional Member or their staff, please refer that person to the Office of Congressional and Intergovernmental Relations or the regional Congressional affairs office. The Department of Justice should participate in communications with Congress if a judicial action is ongoing or is likely to be initiated in the near future. Please keep in mind that it is never appropriate to have a Member of Congress or their staff present during settlement negotiations, and any such request must be denied.

Conclusion

Enforcement of the Nation's environmental laws is an important component of EPA's mission to protect public health and the environment. Development and the progression of an enforcement case is highly sensitive, and all EPA employees involved in or with knowledge of an enforcement matter are responsible for ensuring that the process is protected and professionally maintained. If you have any questions relating to communicating enforcement matters to outside parties, including Congress, please contact my office. If you or anyone on your staff are uncertain about what information should or should not be disclosed in a specific situation, please contact my office so that we can evaluate the situation.

Thank you for your attention to this important policy. I look forward to continuing to work together to make sure we are doing all we can to protect our land, air and water.

cc: Marianne Horinko, Acting Administrator
Steve Johnson, Acting Deputy Administrator

Attachments