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

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ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Restrictions on Communicating with Outside Parties Regarding Enforcement Actions

FROM: Granta Y. Nakayama Granta Y. Nakayama

TO: Assistant Administrators
Deputy Assistant Administrators
Associate Administrators
Regional Administrators
Deputy Regional Administrators
General Counsel

This memorandum reiterates earlier guidance and memoranda outlining restrictions on communicating with parties external to the Environmental Protection Agency (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. When sensitive enforcement information is released by EPA 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, including EPA Ethics Advisory 90-2, and, most recently, an October 28, 2003, memorandum from Assistant Administrator J.P. Suarez, entitled, "Restrictions on Communicating with Outside Parties Regarding Enforcement Actions", which is substantially the same as this memorandum. Copies are attached for your reference.

I am hereby endorsing those past directives through this memorandum, and am providing further guidance to ensure that such information is maintained as privileged and confidential to the fullest extent allowed by law. 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 Principles

Central to our enforcement work is the need to keep information that is not already in the public domain confidential while EPA is engaged in an enforcement matter. Although oftentimes the existence of an enforcement action is widely known, specific and sensitive enforcement information should be closely guarded. Therefore, communication with outside parties about enforcement-sensitive information should not occur.

Outside parties include, but are not limited to:

- Members of Congress or Congressional staff;
- Representatives of state or local governments that do not enter into a joint prosecution or confidentiality agreement with EPA or the federal government;
- Representatives of the media;
- Industry, trade associations, environmental groups, public interest groups; and
- Members of the general public, except when they are involved, as necessary, in a settlement involving a Supplemental Environmental Project (SEP).

Information that should not be shared with outside parties includes, but is not limited to:

- Information on the status of an investigation, negotiation, or settlement discussion, including strategy and tactics;
- Non-public information concerning pending litigation;
- 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 by EPA or other parties;
- Information that is required to be treated as Confidential Business Information (CBI) pursuant to 40 C.F.R. Part 2; and
- Draft press and communications documents, such as press releases.

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 may 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; and
- Court decisions.

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

Protecting Settlement Communications

It is common practice that once settlement negotiations begin in any given enforcement matter, that the parties agree, in writing, that such communications will be held confidential between the parties to the fullest extent allowed by law. 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 counteroffers 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. Enforcement staff should not discuss settlement negotiations with outside 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 may not be confidential, but should not be disclosed with respect to a case that has been referred to the Department of Justice (DOJ) without prior consultation with DOJ. The details of exchange of offers, counteroffers, and other settlement dynamics are confidential and must not be disclosed to outside 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 outside parties relating to the remedy necessary to settle a given case are inappropriate and should not occur.

Communications with Congress

As to Congressional inquiries on pending enforcement matters, Members of Congress and Congressional staff should be handled in the same way as any other outside 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 may 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 settlement exchanges on the appropriate remedy required to settle an enforcement matter, penalty demands, and other case-specific matters. The details of exchange of offers, counteroffers, and other settlement dynamics are confidential and must not be disclosed to outside parties.

If you receive a request from a Member of Congress or Congressional staff, please refer that person to EPA's Office of Congressional and Intergovernmental Relations or the regional Congressional Liaisons. DOJ should be notified and consulted with respect to any communications with Congress regarding an ongoing judicial action or a referred case, and may be present at any meetings with Congressional representatives concerning any such case. Please keep in mind that it is never appropriate to have a Member of Congress or Congressional 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. Failure to adhere to the restrictions outlined in this memorandum may result in disciplinary action. 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 is uncertain about what information should or should not be disclosed in a specific situation, please contact my office or your Deputy Ethics Official (DEO) 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: Stephen L. Johnson, Administrator
Marcus C. Peacock, Deputy Administrator
Charles Ingebretson, Chief of Staff
Roger R. Martella, Jr., Designated Agency Ethics Official
Regional Counsels
Regional Enforcement Managers
Regional Enforcement Coordinators
OECA Office Directors and Deputy Office Directors

Attachments:
EPA Ethics Advisory 90-2, "Outside Communications Regarding Matters Under Investigation, in Pre-Litigation Stages, or in Litigation"
Memorandum from Assistant Administrator J.P. Suarez, dated October 28, 2003, "Restrictions on Communicating with Outside Parties Regarding Enforcement Actions"