

OFFICE OF GENERAL COUNSEL, OFFICE OF ENFORCEMENT AND OFFICE OF
REGIONAL COUNSEL COORDINATION ON MATTERS BEFORE THE
ENVIRONMENTAL APPEALS BOARD

Under the environmental statutes administered by the Environmental Protection Agency, the Administrator has delegated authority to decide appeals of permit decisions made by the Agency's Regional Administrator's and administrative penalty decisions made by the Agency's Administrative Law Judges to an Environmental Appeals Board (EAB). The specific matters delegated to the EAB are detailed in a final rule published in the Federal Register on February 13, 1992, 57 Fed. Reg. 5320.

At the request of the EAB, the Office of General Counsel (OGC), the Office of Enforcement (OE) and the Offices of Regional Counsel (ORC) have identified ways to improve coordination on positions taken by each of these offices before the EAB. The Office of General Counsel and the Offices of Regional Counsel discussed this issue at the OGC-ORC Management Retreat held in October 1992. The Office of Enforcement has had an existing policy in this area.

Unless and until modified, this memorandum outlines the policies and procedures which will be followed to coordinate positions taken with respect to permit appeals and appeals of enforcement cases (including significant interlocutory appeals) before the EAB. Each Regional Counsel, Associate General Counsel and Enforcement Counsel responsible for matters which go before the EAB will designate at least one individual to serve as a contact person to aide in the coordination process established in this memorandum.

A. Permit Appeals

The EAB sends notice to the Regional Counsel when a notice of appeal of a permit is filed; the Region has 45 days to file a response with the EAB. We will request the EAB to send a copy of this notice to the affected Associate General Counsel and Enforcement Counsel, as well.

After the notice of appeal is received by ORC/OGC, staff in ORC will consult with OGC staff about each case. The discussions will focus on any important issues raised by the case. Each case will be handled in one of three ways: (1) OGC will sign the response as co-counsel and will have written or participated in writing the response; (2) OGC will appear as "of counsel" on the response and OGC will have reviewed the response; or (3) OGC will not be on the response and though ORC will have coordinated with OGC, OGC will not necessarily review the response.

OGC and ORC will both need to consent to the appropriate level of handling for each case. Staff in each office will consult with their supervisors, as appropriate. Any disagreements between the Regional Counsels and the Associate

General Counsels will be elevated to the appropriate Deputy General Counsel.

It is important to coordinate positions taken in one case with other Regions and with the Headquarters program office. Significant enforcement issues may also be raised in the context of certain permit appeals. In appropriate cases OGC and ORC staff need to coordinate with OE, other Regions and their respective program offices before a response is filed. Upon receipt of a notice of appeal, the Enforcement Counsel or OE Branch Chief will identify any enforcement issues that should be addressed in the appeal. In most cases it may be adequate for OE and other Regions to be informed of positions taken before the EAB through the monthly OGC/OE/ORC branch chief conference calls. This will be a standing agenda item for the monthly calls; the ORC branch chief will generally be responsible for leading this discussion.

It is important for the Regions to coordinate as early as possible with all Headquarters offices on the issues raised in permit appeals and requests for evidentiary hearings so that EPA will be advancing consistent positions. Some of this coordination needs to be initiated by the program offices and some by ORC.

B. Enforcement Appeals

There is less time for the Agency to decide its position on appeals of enforcement cases. Pursuant to 40 CFR section 22.29(a), enforcement appeals typically obtain as a matter of right, and the Agency must file its notice of appeal and an accompanying brief within 20 days after service of the initial decision or order of the Presiding Officer. See 40 CFR section 22.30(a).¹

In a May 3, 1989 memorandum from then Acting Assistant Administrator Edward Reich, a process was established to provide for review of adverse decisions of ALJs as well as favorable decisions that are appealed by the respondent. (See attached memorandum.) That process is still an appropriate method to provide an efficient way to identify and address important issues in a case that should be raised to the EAB. It should be noted that important legal and policy issues warranting an appeal may be raised in cases even though the Agency prevailed in the relief sought. This memorandum reaffirms the procedures of the earlier memorandum with the following modifications.

¹ In appropriate circumstances, agency counsel, however, may seek leave from the EAB for extensions of time in which to file such appeals or briefs, if they can satisfy the requirements of 40 CFR section 22.07(b). Depending on the circumstances, it may be advisable to seek an extension only for the filing of the brief, rather than the notice of appeal.

The ORC attorneys will consult directly with the Regional Counsel (or Deputy Regional Counsel if so directed by the Regional Counsel) to discuss their recommendation as to whether EPA should appeal each enforcement case. This view should be included in the summary of the decision forwarded to the OE Branch Chief, the OGC Branch Chief, and the ORC contacts. The Regional Counsels will report on decisions to appeal enforcement cases in their weekly report to Headquarters. Decisions in Headquarters cases will be reported in OE's Weekly Highlights. As with permit appeals, each case where a decision is made to proceed with an appeal will be handled in one of three ways: (1) OE will sign the brief as co-counsel and will have written or participated in writing the brief; (2) OE will appear as "of counsel" on the brief and OE will have reviewed the brief; or (3) OE will not be on the brief and though ORC will have coordinated with OE, OE will not necessarily review the brief.

The Regional Counsels and Enforcement Counsels will take personal responsibility to decide what kind of coordination is necessary with OGC before a decision is made to seek, or forego, an appeal of an enforcement case. OGC agrees to identify any generic areas where it needs to be consulted on a routine basis before a decision to appeal or not to appeal is made.

C. Headquarters Assistance to EAB

Subject to the prohibition on ex parte communications, nothing in this memorandum is intended to derogate the ability of OGC or OE to provide technical assistance to the EAB when the EAB deems it appropriate.

As part of their participation in the review of appeals, OGC and OE should assure that any relevant policies or new regulations are brought to the attention of the Board, since Headquarters offices will often be more aware of such matters than Regional offices.

D. Oral Arguments

The attorney best able to present the Agency's position should present oral argument to the EAB. This will be decided on a case by case basis. The Board has a strong preference in favor of having a single attorney present the Agency's argument. Nevertheless, the Board has allowed more than one attorney to divide the argument where the Agency deemed it essential for the effective presentation of its case. Accordingly, there should be an opportunity for Regional and Headquarters attorneys to argue before the Board in appropriate cases.

Any disagreements between the Regional Counsel and the Associate General Counsel or Enforcement Counsel regarding who should present the oral argument to the EAB will be elevated to the appropriate Deputy General Counsel or Director of Civil Enforcement.

The Agency attorney(s) presenting oral argument should be able to represent to the fullest extent possible that the positions taken in argument have been coordinated with, and approved by, ORC, OGC and OE, as appropriate.

E. Decisions

The EAB sends copies of all final decisions to the Regional Counsels, the Associate General Counsels and the Enforcement Counsels.

F. Follow-up

Our success in implementing these procedures and accomplishing our objectives will be evaluated in an ORC/OGC/OE conference call in approximately six months.

Attachment