

March 15, 2000

Mr. Gary D. Vest
Principal Assistant Deputy Under Secretary of Defense
Office of the Under Secretary of Defense
3000 Defense Pentagon
Washington, DC 20301-3000

Dear Mr. Vest:

Thank you for your letter of September 28, 1999 regarding the report to Congress on EPA-DOD cooperation in meeting the Chemical Weapons Convention (CWC) requirements. In your letter, you asked for my concurrence on the report by early October, 1999.

As we informed your staff last fall, EPA finds the report acceptable for submission to Congress, except for the response to Question No. 5, addressing the legality of DOD funding EPA travel to certain chemical demilitarization meetings and activities.

We are concerned that the language in this response will have significant program implications for EPA, and undoubtedly for other federal agencies. More to the point, EPA's financial attorneys believe that the language is overly restrictive and incorrect in its legal interpretation.

For your information, I have enclosed an opinion on the issue by the EPA's Office of General Counsel. I understand that you have put the draft report into internal DOD review and will be submitting it to OMB for clearance before submission to Congress. I trust that we will be able to agree on mutually acceptable language in response to Question No. 5 before the draft is sent to OMB.

We have set up a meeting with your staff for today to resolve the issue. In the meantime, if your staff have particular questions, they should contact Matt Hale, of my staff, at (703) 308-8895.

Sincerely yours,

Timothy Fields, Jr.
Assistant Administrator

Enclosure

March 7, 2000

MEMORANDUM

SUBJECT: Report to Congress: Cooperation between the Department of the Army and the Environmental Protection Agency to meet the Chemical Weapons Convention Deadline

FROM: Pat Hirsch
Attorney-Advisor
Office of General Counsel

TO: Matt Hale
Deputy Director
Office of Solid Waste

This office has reviewed the above-referenced Report, and previously transmitted red-lined comments on the text. You have also asked for our analysis of the discussion in Question 5 of the Report, concerning payment by Department of the Army (DOA) for EPA travel to DOA meetings.

FACTUAL BACKGROUND

Your office has informed us of the following facts. EPA has been assisting DOA with its chemical demilitarization efforts and corresponding RCRA permitting issues. While the EPA Budget does not request funds for this activity and no funds have been specifically appropriated for it, EPA FTE time has been provided without reimbursement or payment by DOA. The DOA has been issuing travel orders for EPA personnel to attend meetings when such attendance has been requested by DOA. EPA is providing technical assistance services to the Army beyond the normal scope of our RCRA regulatory or oversight activities at DOA's request, in order to facilitate DOA's

compliance with legal requirements. The meetings would not include EPA personnel but for DOA's request.

DOA's POSITION

The Army's draft Report to Congress concluded that payment of the travel in this situation would be an impermissible augmentation of EPA's appropriation. It states that EPA's travel funds must be legally "unavailable" and the EPA employee must not be acting on behalf of the EPA, the Army concluded, in order to allow Army to pay for EPA travel. Army found the situation controlled by In re: Matter of Reconsideration of Merit Systems Protection Board's Authority To Accept Reimbursement for Hearing Officers Travel Expenses, May 26, 1982 (61 Comptroller General 419, 1982); and In re: Matter of: Merit Systems Protection Board Travel Expenses of Hearing Officers, April 24, 1980 (59 Comptroller General 415, 1980).

In the situation that gave rise to both of these opinions, the Merit Systems Protection Board (MSPB) ran short of funds to conduct employee appeal hearings and began conducting hearings at its field offices rather than funding the travel of their hearing officers to locations where the cases arose. In order to conserve their own travel appropriations, other federal agencies and labor unions then sought to pay for the travel of the MSPB hearing officers under the Economy Act, but the Comptroller General ruled that such a transaction would be an unlawful augmentation of the MSPB's appropriations.

The Army concluded that under the MSPB cases, one agency cannot lawfully pay for the travel of a second agency's employees simply because the travel benefits the first agency and the second agency lacks sufficient appropriations of its own. The Army concluded that as long as the second agency has travel funds appropriated that could legally be used for the travel at issue, its appropriations must be used for whatever travel occurs, and the Army is precluded from funding such travel itself. Thus, the Army's position is that additional statutory authority is needed for it to fund the requested actions by EPA to facilitate achievement of the stockpile elimination deadline.

The Army admits that it may fund EPA's attendance at chemical demilitarization meetings with Army appropriations if the Army requires EPA's attendance and participation and EPA's appropriations are unavailable for that purpose. Under these circumstances, Army states that it could pay for EPA's attendance and participation via an Economy Act transaction. The Army acknowledges that it can use the Economy Act (31 U.S.C. Section 1535) to acquire the services of other federal agencies, such as the EPA.

DISCUSSION

There is no improper augmentation of EPA's appropriation where DOA funds EPA travel to attend meetings at the request and for the convenience of DOA, where EPA is under no statutory requirement to attend and no specific appropriation has been made to EPA for such travel. Federal agencies may use appropriated funds for travel, transportation, and subsistence expenses for employees of the United States Government who attend meetings for the purpose of carrying out official duty. 31 U.S.C. §1345(1). This authority is not limited to employees of the paying agency.

This case is very different from the MSPB cases. MSPB was receiving funds from other agencies to travel to its own hearings. MSPB set, scheduled and conducted the hearings, as it was required by law to do. When the payments by other agencies were stopped, MSPB still was required by law to conduct the hearings, and had to return to setting its hearings at its own field offices, as originally planned. This is not the situation between EPA and DOA. These are not EPA meetings. If DOA does not set and schedule the meeting, and invite and provide travel orders for EPA personnel, EPA simply does not attend, with no adverse consequences to EPA. There is no statutory requirement that EPA attend the meetings or assist DOA in DOA's chemical demilitarization efforts.

While EPA does receive appropriations for the RCRA permitting process, in general, it receives no specific appropriation for chemical demilitarization, and none for the particular purpose of technical assistance to DOA for chemical demilitarization or attending DOA meetings. EPA does not perform this type of service as part of its normal activity, and is not required to do so. This is not a case where Congress appropriated funds for a specific EPA activity that EPA has exhausted and EPA needs money from another source to continue doing its required activities.

Another Comptroller General decision is closer to these facts: In Re Matter of Reimbursement by Federal Agencies for Services of Civil Service Commission Complaints Examiners, 1980 WL 17273, B-192,875, January 15, 1980. In this case, the Comptroller General found that where there was no requirement that CSC [Civil Service Commission] provide the examiners and therefore other agencies were not prohibited from paying CSC for rendering the services. Although the Department of the Treasury had cited cases [similar to the MSPB cases] holding that one agency could not pay for services provided by another when the performing agency is required by law to render the services and when appropriations are provided to carry out these activities, the Comptroller General dismissed these as inapplicable. The CSC received no specific appropriation for this activity, and although the activity was within its authority to perform, CSC was not required by statute to do so. This is the same as EPA's situation. Another case, Matter of: Bureau of Land Management; Payment of Fees to National Archives and Records Administration for Reproduction of Documents, 64 Comp. Gen. 724, July 31, 1985, held that the Archives could charge other agencies for certain services since Archives did not request or receive appropriations specifically for

this purpose.

We have found no authority for the proposition that an agency can use the Economy Act to pay for particular services from a second agency only if the second agency's "appropriations are unavailable for that purpose." (Report, P. 18, emphasis added.) As Army notes, "such circumstances would be rare" -- yet many hundreds of Economy Act transactions occur every year. There is no prerequisite of [unavailability] for an Economy Act transfer.

As stated in Report (p. 7), EPA's role is "to provide the Army...with assistance to ensure [the Army's] compliance with environmental requirements and...treaty deadlines." Army wants to save on costs by expeditious resolution of its problems. EPA is providing a service to the Army to help it achieve its objectives. EPA is providing [additional assistance] to Army (p. 8), i.e., doing things we would not otherwise do.

While EPA's statutory authority is broad enough to cover attendance at DOA meetings using our existing appropriations, we are not required to attend and we would not, in fact, attend but for the Army's request. The Economy Act does not legally prohibit EPA from accepting funds from Army. EPA and other agencies often accept travel funds from each other to attend meetings in this situation by issuing travel orders for the other agency's employees.

For these reasons, we do not agree with the answer to Question 5 in the Army's draft Report to Congress. In our opinion, DOA payment of EPA travel in this situation is permissible. If you have any questions, please call me at 564-5462.