



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

APR 18 2008

OFFICE OF
GENERAL COUNSEL

The Honorable Henry A. Waxman
Chairman
Committee on Oversight and Government Reform
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing in response to your April 4, 2008 letter to Administrator Stephen L. Johnson regarding the Environmental Protection Agency's efforts defending the EPA in court. As you can see by the chart attached hereto, we provide specific answers to your questions. But your letter also touches on broader issues. Accordingly, as the Agency's chief legal advisor, I have asked Administrator Johnson for the opportunity to respond also to the broader issues and concerns raised by your letter.

In response to Questions 1 through 4 of your April 4 letter, we assembled the attached chart on Clean Air Act (CAA) actions and litigation. The chart reveals that the handful of court decisions cited in your letter are not representative of our overall litigation results under that Act. Rather, the chart shows a wide range of results, including many victories and partial victories in significant cases. Regarding Question 5 of the Committee's letter, EPA does not keep records of Full Time Equivalents (FTE) equivalents devoted to developing and defending rules or major decisions. Accordingly, such information is not available to EPA. Further, each EPA rule or major decision involves contributions of varying amounts of time from numerous employees spread through many offices in the EPA who juggle many other responsibilities. Consequently, it would be extremely difficult to provide even an estimate of the FTE devoted to making and defending EPA rules and major decisions, and any estimate that could be developed would be so rough as to have minimal relationship to actual resources expended.

As I noted, your letter also touches upon broader issues regarding the defense of various EPA decisions in the courts. Similarly, in recent weeks, several members of the U.S. Congress and other observers have criticized the Agency's "track record" in court and legal counseling. I appreciate and take seriously your inquiry and other views that have been expressed, which in my opinion are grounds for a reasoned discussion. Like you, I believe any loss in court is one loss too many and am disappointed by several significant court decisions in recent years. I therefore value this opportunity to offer my perspective on these comments.

To begin, criticism that merely cites to a small handful of cases among the hundreds, if not thousands, of matters handled with unparalleled professionalism by the Office of General Counsel (“OGC”) does not reflect a full and accurate accounting of the counseling provided by the nation’s most talented environmental law office. Undoubtedly, EPA has suffered some significant adverse decisions as you point out, and we must gain from those experiences in order to enhance our counseling in the future. Yet, we also must be mindful of the extraordinary service OGC’s attorneys and staff perform every day in implementing the world’s strongest environmental legal framework.

Consider at the outset EPA’s litigation before the United States Supreme Court in the last two years. Of the five cases involving EPA, the Agency prevailed in three¹ – including two unanimous decisions – while losing two decisions in closely split 5-4 and 4-1-4 opinions.² This reflects the strongest possible legal advocacy.

In cases where EPA does not prevail, EPA lawyers immediately turn to the task of counseling on the best options for realizing the strongest environmental results within the framework of the decision. For example, although EPA sided with environmental organizations in defending the scope of the Clean Water Act in front of the Supreme Court in *Rapanos*, the Court ruled against EPA in a 4-1-4 decision. Subsequent to the decision, EPA asserted the most environmentally protective interpretation of the fractured Supreme Court decision by arguing that the reach of federal waters under the Clean Water Act extended to waters that met either of the standards for jurisdiction articulated in the plurality and concurrence opinions. Following *Rapanos*, the government has prevailed in defending its jurisdictional determinations in seven of eight cases, with the eighth decision having been remanded for a new trial.

Contrary to the suggestion in your letter that EPA takes positions mostly aligned with industry, our record reveals that our decisions on what positions to take do not turn on the characterization of the party. In addition to the *Rapanos* example mentioned above, in the *S.D. Warren* litigation before the Supreme Court, EPA joined the State of Maine and American Rivers to successfully establish the requirement under Section 401 of the Clean Water Act for state certification of discharges through dams to protect water quality and to establish any other necessary limitations, including protecting aquatic

¹ *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. 370 (2006) (holding that because dam raised potential for discharge, § 401 of Clean Water Act (CWA) was triggered and state certification was required, as argued by EPA in an *amicus curiae* brief); *National Ass'n of Home Builders v. Defenders of Wildlife*, ___ U.S. ___, 127 S.Ct. 2518 (2007) (affirming State of Arizona’s ability to implement CWA program); *Environmental Defense v. Duke Energy Corp.*, ___ U.S. ___, 127 S.Ct. 1423 (2007) (agreeing with EPA that the Agency was not required to interpret the term “modification” congruently in its regulations governing the Prevention of Significant Deterioration (PSD) section of the CAA and its regulations governing the New Source Performance Standards (NSPS)).

² *Rapanos v. United States*, 547 U.S. 715 (2006) (a 4-1-4 decision, where EPA had joined with environmental groups); *Massachusetts v. EPA*, ___ U.S. ___, 127 S.Ct. 1438 (2007) (a 5-4 decision reversing the D.C. Circuit, which had affirmed EPA’s position below).

species. In the *Teck Cominco* litigation before the Supreme Court last year,³ we supported the State of Washington and the Confederated Colville Tribes in successfully persuading the Court not to review a transboundary pollution decision adverse to a mining company.

Beyond the Supreme Court docket, EPA attorneys work passionately every day advocating for a better environment on scores of issues too numerous to discuss here in detail. As an example, OGC's Solid Waste and Emergency Response Law Office has won *all* of its RCRA and CERCLA cases decided during my tenure. Such cases include a very favorable decision in *Mayes v. EPA*, No. 3:05-CV-478 (E.D. Tenn. Jan. 4, 2008), where the court affirmed EPA's decision that the owner/operator of an underground storage tank had not complied with the applicable notification, leak detection and closure requirements. Other examples of OGC successes include OGC's Pesticide and Toxic Substances Law Office favorably settling seven cases during my tenure, and winning three others.

It is also my observation that while EPA's losses garner significant public attention, its victories less often do. By way of recent example, a federal court in California used strong language to rebuke the plaintiffs when dismissing a request for a writ of mandamus regarding EPA's response to the *Massachusetts v. EPA* decision.⁴ Specifically, the court there held that the requested writ of mandamus "is so far afield from notions of comity and propriety that it need not be seriously considered."⁵ This decision, which *granted* EPA's motion to dismiss, appears to have received virtually no coverage or commentary. Yet the mere filing of a petition for a writ of mandamus by the petitioners in *Massachusetts v. EPA* in the D. C. Circuit days later attracted national media attention.

Outside the courtroom, OGC attorneys have provided extraordinary counseling on numerous issues. One representative example is the Office's counseling on tribal Treatment-as-State ("TAS") applications. In my tenure at EPA, OGC attorneys have worked to approve twelve TAS applications. In large part due to OGC's strong counseling, not a single one of these important decisions has been challenged by any party despite the frequently controversial nature of such decisions. OGC also is increasingly promoting environmental conflict resolution (ECR) as a way to realize stronger, faster and more effective environmental results in a manner that more flexibly reflects the interests of various stakeholders. For example, in the last year alone, OGC's Alternative Dispute Resolution Law Office, through its Conflict Prevention and Resolution Center, has supported ECR in more than 70 cases.

³ *Teck Cominco Metals, Ltd. v. Pakootas*, 452 F.3d 1066 (9th Cir. 2006), *cert. denied*. No. 06-1188, ___ U.S. ___, 128 S.Ct. 858 (Jan. 7, 2008).

⁴ *S.F. Chapter of A. Philip Randolph Inst. v. EPA*, No. C 07-04936 CRB, 2008 WL 859985 (N.D. Cal. Mar. 28, 2008).

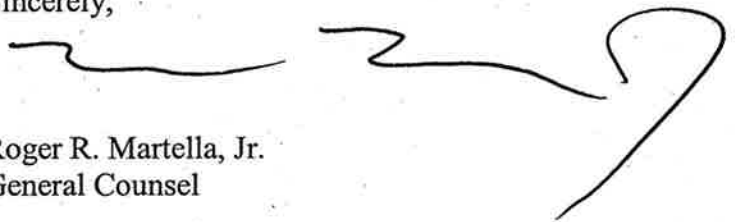
⁵ *Id.*, 2008 WL 859985, at *4.

When viewed in full context, I am proud of EPA's legal counseling and the representation its lawyers provide every day. At the same time, we should strive for nothing less than full success. To that end, one year ago I asked OGC's managers to join me in establishing an office-wide initiative focused on enhancing the defensibility of the Agency's decisions and strengthening the Agency's record in the courtroom. Seizing this as a priority for the Office and the Agency, as a team we have focused on enhancing our client counseling while emphasizing a strategic and deliberate approach to pursuing appeals and *certiorari* petitions in adverse decisions.

Finally, as the head of OGC, I have defined our success as much by the strength of the team advocating for our nation's environmental future as by the number of decisions won or lost. In that regard, OGC's management team in the last two years has placed emphasis on recruiting and training the nation's best and brightest environmental advocates. Today, OGC's legal team is stronger and working more effectively than ever before for better environmental results for our children and grandchildren.

Thank you for the opportunity to address these issues. If you have further questions, please contact Christopher Bliley, Associate Administrator, Office of Congressional and Intergovernmental Relations, or your staff may contact Jim Blizzard in that office, at (202) 564-1695.

Sincerely,



Roger R. Martella, Jr.
General Counsel

cc: The Honorable Tom Davis
Ranking Minority Member

Enclosure