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EPA ETHICS ADVISORY 87-2

SUBJECT: Employees on IPA Assignments

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TO: Deputy Ethics Officials

Under 18 U.S.C. §§203 and 205, federal employees generally may not act as "agent or attorney" before any federal agency regarding at "particular matter." To act as "agent or attorney" means to communicate with intent to influence on behalf of another person or organization. This prohibition applies to rulemaking as well as to matters which involve specific parties, such as contracts and assistance agreements.

The prohibition does not apply when an employee is acting "in the proper discharge of * * * official duties." A Department of Justice opinion dated March 17, 1980, [See endnote 1] indicates that EPA employees who are assigned to state and local agencies under the Intergovernmental Personnel Act (IPA) to carry out programs for which EPA and the states have a joint responsibility under the environmental statutes are acting "in the proper discharge of * * * official duties." Accordingly, they may act as "agent or attorney" before EPA or other federal departments and agencies in connection with potentially controversial issues which are "integral to a substantive federal program" for which EPA and the states have joint responsibility.

Some examples of such issues include:

- whether EPA should veto a state permit or revoke state permit authority under the Clean Water Act (33 U.S.C. §1342(d) and 33 U.S.C. §1342(c)(3));
- EPA review of state water quality standards under the Clean Water Act (33 U.S.C. §1313);
- delegations of construction grant authority (33 U.S.C. §§1281-

1293(a));

- EPA review of State Implementation Plans under the Clean Air Act (42 U.S.C. §1857c-5);
- determinations about the adequacy of state hazardous waste disposal programs under the Resource Conservation and Recover Act (42 U.S.C. §6926(d));
- determinations about the adequacy of state programs under the Safe Drinking Water Act (42 U.S.C. §§300g-2 and 300g-3); and
- state program grants and other agreements with states, including CERCLA agreements (33 U.S.C. §1299 and 42 U.S.C. §9604).

These provisions contemplate relationships between EPA and state agencies which may become adversarial. It is nonetheless proper for an EPA employee on an IPA detail to act as "agent or attorney" for a state agency regarding such matters. It is also proper for an EPA employee to participate in negotiations regarding permits, standards and compliance at state and federal facilities.

However, as noted on page 4 of the Department of Justice opinion, the IPA contains broad authority to assign employees to carry out "work of mutual concern" to EPA and state and local governments. Such work is not necessarily "integral to a substantive federal program." Where the work is not "integral" to a program for which EPA and the states have a joint responsibility, employees may not act as "agent or attorney" before EPA or any other federal agency. For example, the Department of Justice opinion does not authorize represent states before:

- the Department of Justice regarding a land acquisition matter not related to an environmental program;
- The Department of Health and Human Services regarding grant matters, Medicare/Medicaid matters, federal aid to education, or other matters not related to environmental programs; or
- The Equal Employment Opportunity Commission regarding employment discrimination issues.

Finally, since the cooperative relationship has ceased to exist where EPA and a state or local government are adversaries in litigation, EPA employees on IPA assignments may not "act as agent or attorney" for a state or local government in such cases.

Please make sure that employees in your organizations who are on IPA assignments to state or local governments, or who are contemplating such assignments, are aware of this Ethics Advisory.

cc: Office of Government Ethics