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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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MAR 29 1974

The Honorable Victor V. Veysey
House of Representatives

Dear Mr. Veysey:

On August 2, 1973, you requested that we look into the development of a Federal air pollution episode program for the Los Angeles area of California; its implementation on July 25, 1973, which resulted in administrative leave for thousands of Federal employees; and the provision of the Clean Air Act (42 U.S.C. 1857) under which the program was developed and implemented. You indicated that a newspaper had reported that the Federal employees had headed for beaches and other recreational facilities and thereby had negated the purpose of the program, which was to reduce vehicle travel and thus reduce air pollution.

We made our examination at the Environmental Protection Agency (EPA) headquarters in Washington, D.C., and at the EPA region IX office in San Francisco. We interviewed cognizant EPA officials and contacted air pollution episode coordinators at the Los Angeles offices of the Internal Revenue Service, Social Security Administration, and National Labor Relations Board. An official of the Civil Service Commission gave us information on the Federal leave policy for air pollution episodes. We examined pertinent legislation, regulations, records, and files relating to the development and implementation of the program.

The program consists of various procedures, established by Federal agencies in southern California, for reducing air pollution emissions when there is a likelihood that pollution will reach levels that present imminent and substantial endangerment to the health of persons. One of the procedures was to reduce vehicle traffic by granting Federal employees administrative leave.

The Regional Administrator of EPA region IX initiated the development of the program for the Los Angeles area, and he has the authority to implement the program with the advance concurrence of the Assistant Administrator for Enforcement and General Counsel.

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According to EPA's Associate General Counsel, Air Quality, Noise and Radiation Division, EPA's request to implement the program in July 1973 was a call for voluntary action by the agencies and was not based on any statutory authority. We have concluded that EPA has the legal authority to request Federal agencies to cease operations voluntarily during an air pollution emergency.

DEVELOPMENT OF THE FEDERAL AIR POLLUTION EPISODE PROGRAM

The Clean Air Act provides that each State adopt, and submit to EPA for approval, a plan for implementing, maintaining, and enforcing primary ambient air quality standards. In addition, it provides that EPA prepare and publish proposed regulations setting forth a plan, or any part thereof, if EPA determines that the State-submitted plan is not in accordance with the act.

California submitted its plan for pollution abatement to EPA in February 1972. On May 31, 1972, EPA approved only part of the plan because, among other reasons, the plan, contrary to EPA requirements, did not have procedures to be implemented during air pollution episodes.

In May 1973 EPA met with the Los Angeles Federal Executive Board and presented a preliminary version of a Federal program for reducing emissions during air pollution episodes. This program was to be designed so that it could be incorporated in the State's plan. EPA's intention was to set up a model program among the Federal agencies that would set a leadership example for private organizations.

On June 1, 1973, EPA's region IX Administrator sent 63 letters explaining the program to Federal agencies in the Los Angeles area and on June 17, 1973, sent 26 additional letters. These letters requested that each agency submit to EPA by June 25, 1973, an interim program outlining a plan of action for reducing pollutant emissions on days of air pollution alerts. In those letters the Regional Administrator cited EPA's authority for establishing the program as follows:

> "Our authority for establishing such a Federal program for air pollution episodes rests on Section 303 of the Clean Air Act Amendments of 1970. We are there empowered to take action in the event of an air pollution episode which presents an 'imminent and substantial endangerment to the health of persons.'"

Section 303 of the act provides that:

> "Notwithstanding any other provision of this Act, the Administrator upon receipt of evidence that a pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to the health of persons, and that appropriate State or local authorities have not acted to abate such sources, may bring suit on behalf of the United States in the appropriate United States district court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other action as may be necessary."

Although the Regional Administrator cited section 303 as EPA's authority for establishing the program and thereby indicated to the agencies that EPA had authority to compel them, through the courts, to assist in abating any emergency, EPA headquarters officials said that EPA's request to the agencies was for voluntary commitments on their part and was not based on any specific legal authority.

On July 25, 1973, when EPA requested the agencies to reduce, to the maximum extent possible, vehicle-miles traveled by their employees, because of an impending air pollution emergency, about 50 percent of the agencies had submitted their programs to EPA. Some programs called for granting administrative leave, some for reducing official vehicle operations, and others for encouraging the formation of carpools.

PROGRAM IMPLEMENTATION

The Regional Administrator of EPA region IX, with the advance concurrence of the Acting Assistant Administrator for Enforcement and General Counsel, implemented the program on July 25, 1973, on the basis of information received from the National Weather Service's Los Angeles office and from several air-monitoring stations indicating that a high pollution concentration was expected for the southern California area. At approximately 3 p.m. on that date, EPA officials requested Federal agencies to reduce, to the maximum extent possible, vehicle-miles to be traveled on July 26, 1973. In contacting the agencies, EPA found that:

--Some episode coordinators could not be reached, and some were unfamiliar with their agency's episode plan.

--The U.S. Navy would not implement its plan without authority from its headquarters in Washington, D.C.

--The U.S. Army Recruiting Office had a plan but would not implement it (no reason was given).

--The episode coordinator for the Internal Revenue Service would implement the plan only after he obtained authorization from his supervisor.

--Several agencies wanted official confirmation from EPA before they would implement their plans.

Subsequently, EPA contracted with TRW, a private firm which had been developing an episode plan for the Los Angeles area, to evaluate EPA's actions during the July episode. In a December 1973 report, TRW said that it had surveyed, by telephone, 14 of 45 agencies which had submitted emergency pollution abatement plans. The 14 agencies had 39,345 employees, or 93 percent of the total employees of the 45 agencies. TRW's survey disclosed that, of 13,650 employees targeted for leave under full implementation of the plans, only 3,379 were absent from work on July 26, 1973. On the basis of vehicle data for July 26, TRW also estimated that, if a reduction in vehicle-miles had occurred, it had been negligible.

We contacted an official of the Civil Service Commission to determine whether there were any overall Government policies which concerned leave for Federal employees during an air pollution episode. The Commission's Chief of Leave and Special Pay Policy told us that there were no specific regulations concerning leave during air pollution episodes. He further said that the Commission was aware of air pollution problems, such as the one in southern California, and that a draft document entitled "Guidelines for Dismissal and Leave Treatment of Federal Employees During Emergency Situation" had recently been distributed to Federal agencies for comment. The guidelines provide for granting administrative leave during emergency situations, which include air pollution episodes. He said that guidelines such as these would encourage more coordinated Federal action in emergency situations.

EPA'S AUTHORITY FOR IMPLEMENTING THE PROGRAM

We requested EPA's Office of General Counsel to provide us with an opinion on EPA's authority under the Clean Air Act to request Federal agencies to cease operations in the Los Angeles area during an air pollution emergency.

EPA said that the action taken had not arisen under any specific statutory authority, because formulating and implementing contingency

plans were voluntary actions by both EPA and the Federal agencies involved. EPA said also that Executive Order 11514 directed the Federal Government to provide leadership in developing measures to protect the Nation's environment and expressed the view that the actions taken had demonstrated that leadership.

As previously stated, the EPA Regional Administrator's letters to Federal agencies, by citing section 303 of the Clean Air Act as EPA's authority for establishing the Federal air pollution episode program, implied that EPA had authority to compel the agencies to take action to assist in abating any emergency situation. We contacted episode coordinators of three Federal agencies, one of which had not submitted a plan, to determine how they had interpreted EPA's written and oral communications on the program. Episode coordinators of the Internal Revenue Service and the National Labor Relations Board stated that they had interpreted EPA's region IX communications to be requests for cooperative action, but the episode coordinator of the Social Security Administration said that he had interpreted the communications to be mandatory requirements to act.

We have concluded that EPA's communications were requests for voluntary action and that, for the reasons discussed below, EPA has the legal authority to request such action.

The policy of the United States, as set forth in the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 et seq.), is to use, in cooperation with State and local governments and other concerned organizations, all practicable means and measures, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature may exist in productive harmony. It is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may enjoy a healthful environment and that all Americans can be assured safe, healthful, and productive surroundings. The provisions of NEPA further state that the Congress authorizes and directs that, to the fullest extent possible, the policies, regulations, and public laws of the United States be interpreted and administered in accordance with the foregoing policies.

Relying on the policies set forth in title I of NEPA, the President, on March 5, 1970, issued Executive Order 11514. Section 2(a) provides that heads of the Federal agencies: