To: Wehling, Carrie[Wehling.Carrie@epa.gov]; Askew, Wendel[Askew.Wendel@epa.gov]
Cc: Pakula, Kenneth[Pakula.Kenneth@epa.gov]; Redden, Kenneth[Redden.Kenneth@epa.gov]; Cooper, Geoff[Cooper.Geoff@epa.gov]; Scalise, Laura[Scalise.Laura@epa.gov]
From: Packard, Elise
Sent: Wed 7/12/2017 10:51:34 PM
Subject: RE: Update - Water system disinfection project

Hi Carrie,

I think the question is if one were to exercise 1431 because of imminent and substantial endangerment, would that allow us to pay for machines in people's houses?

Thanks,

Elise

Elise B. Packard

Acting Principal Deputy General Counsel

U.S. EPA Office of General Counsel, Rm. 4020

(202) 564-7729

From: Wehling, Carrie
Sent: Wednesday, July 12, 2017 6:19 PM
To: Askew, Wendel <Askew.Wendel@epa.gov>
Cc: Packard, Elise <Packard.Elise@epa.gov>; Pakula, Kenneth <Pakula.Kenneth@epa.gov>; Redden, Kenneth <Redden.Kenneth@epa.gov>; Cooper, Geoff <Cooper.Geoff@epa.gov>; Scalise, Laura <Scalise.Laura@epa.gov>
Subject: Re: Update - Water system disinfection project

I am available to discuss 1431 but I don't see how it would be of use here. Is there an imminent and substantial endangerment to drinking water for which this procurement s necessary?

Sent from my iPhone

On Jul 12, 2017, at 5:56 PM, Askew, Wendel <Askew.Wendel@epa.gov> wrote:

Elise – I think we've missed Carrie for the day as her voicemail indicates she leaves at 4:30. I have provided additional language in red below addressing the FGCAA issue regarding the need for grant authority, which I don't think we have, and a source of funding available for the authority.

According to the WLO, Section 1431 of the SDWA, is an authority that EPA uses use to take action if there is an imminent and substantial endangerment to public health as a result of potential or actual contamination of the drinking water supply where the State and local authorities have not taken action to address the endangerment. Section 1431 does not specifically address procurement. Moreover, this is a fact-specific inquiry and requires a record to make the necessary findings. We have considered taking action in East Chicago under 1431 but have not done so due to the actions already underway thru the state and local authorities.

Within the procurement scenario, there are a few potential options to quickly procure an AWG, although option Number 4 may be the only option that would take less than thirty days.

1. EPA could do a justification for other than full and open competition (JOFOC) citing urgent and compelling circumstances (assuming the facts support such an argument). The justification must be publicly posted within 30 days *after* award. EPA could then procure the AWG. I believe it would take the Office of Acquisition Management at least thirty days to accomplish such a task.

2. If the item is only available from one source, the Agency could do a JOFOC based upon Federal Acquisition Regulation 6.302-1 but the justification must be made publicly available for 30 days. My understanding is that there are actually 70 companies worldwide that produce AWG devices so it is doubtful that this exception to competition could be used.

3. The small purchase threshold is $150,000 and allows for simpler expedited procurement procedures. Not knowing the dollar amount of the AWG being considered, I can't opine on whether it would fit under the small purchase threshold but it is worth noting that even under small purchase procedures, a contracting officer must still ensure that there is adequate competition. This process could easily exceed thirty days.

4. Depending on where the AWG is to be used, i.e., if it is to be used on an existing site where an EPA contractor is performing under a cost-reimbursable contract, EPA may be able to simply task the incumbent contractor with buying the AWG to assist in performance – the Agency would then simply reimburse the contractor for its costs. Normally, however, we do not dictate the specific manufacturer of equipment to be used by our contractors.

Assuming we get past the procurement hurdles, there is still the issue of finding authority under the SDWA to provide the machines for people's homes. Under the Federal Grant and Cooperative Agreement Act, a contract is used to procure goods and services for the Agency's benefit or use. A grant is the vehicle for providing something of value to a recipient. And, we need a specific statutory authority from Congress to award a grant. See GAO Redbook chapt. 10, pg 10-17. While SDWA 1431 clearly provides authority for the Administrator to direct others to take action it doesn't mention authority for the Administrator to award grant funding. By contrast, SDWA 1442(b) contains emergency authority that authorizes grants to States or public water systems to assist in responding to and alleviating any emergency situation affecting public water systems which the Administrator determines to present substantial danger to the public health. However, the grant authority in 1442(b) doesn't extend to individuals and one condition for awarding these grants is the action would not be taken without such assistance. So, we'd need to determine that the activities undertaken by the local authorities would not address the emergency situation.

One additional limitation here is that we'd need to determine that a source of funding is available for the purpose of purchasing these devices. For example, SRF funds are only available for the statutorily authorized purposes delineated in SDWA 1452. Those funds would not be available for grants under SDWA 1442 or any action taken under SDWA 1431.

Wendel Askew

Assistant General Counsel for Assistance Law

Office of General Counsel

Mail Code 2399A

202-564-3987

7454H WJCN

From: Packard, Elise
Sent: Wednesday, July 12, 2017 4:55 PM
To: Pakula, Kenneth <Pakula.Kenneth@epa.gov>; Redden, Kenneth <Redden.Kenneth@epa.gov>; Cooper, Geoff <Cooper.Geoff@epa.gov>; Scalise, Laura <Scalise.Laura@epa.gov>; Wehling, Carrie <Wehling.Carrie@epa.gov>
Cc: Askew, Wendel <Askew.Wendel@epa.gov>
Subject: RE: Update - Water system disinfection project

Thanks, Ken, helpful on the contracting issue, but adding Carrie to this because I don't see how we get to the contracting issue unless we have authority to buy water machines to put in people's homes. Carrie, assuming that we wanted to do 1431 instead of the current plan, would it give us authority to buy water generating machines to put in folks homes? How would we justify giving it to them? Wendel is there assistance authority that would get us there?

Naturally we need the answer with all possible speed.

Thanks!

Elise

Elise B. Packard

Acting Principal Deputy General Counsel

U.S. EPA Office of General Counsel, Rm. 4020

(202) 564-7729

From: Pakula, Kenneth
Sent: Wednesday, July 12, 2017 3:19 PM
To: Packard, Elise <Packard.Elise@epa.gov>; Redden, Kenneth <Redden.Kenneth@epa.gov>; Cooper, Geoff <Cooper.Geoff@epa.gov>; Scalise, Laura <Scalise.Laura@epa.gov>
Cc: Askew, Wendel <Askew.Wendel@epa.gov>
Subject: RE: Update - Water system disinfection project

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One additional limitation here is that we'd need to determine that a source of funding is available for this purpose. For example, SRF funds are only available for

Ken Pakula

Assistant General Counsel

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U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
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From: Packard, Elise
Sent: Wednesday, July 12, 2017 12:22 PM
To: Pakula, Kenneth <Pakula.Kenneth@epa.gov>; Redden, Kenneth <Redden.Kenneth@epa.gov>; Cooper, Geoff <Cooper.Geoff@epa.gov>; Scalise, Laura <Scalise.Laura@epa.gov>
Subject: FW: Update - Water system disinfection project

Any exceptions that would let us execute this is the next 30 days?

Elise B. Packard

Acting Principal Deputy General Counsel

U.S. EPA Office of General Counsel, Rm. 4020

(202) 564-7729

From: Fotouhi, David
Sent: Wednesday, July 12, 2017 10:24 AM
To: Packard, Elise <Packard.Elise@epa.gov>
Cc: Kelly, Albert <kelly.albert@epa.gov>
Subject: RE: Update - Water system disinfection project

Elise:

The Administrator has asked that we explore, on an expedited time frame, whether we have authority under SDWA 1431 or any other authority to procure atmospheric water generation machines in short order (30 days) without the typical contracting requirements and without waiting to launch the CRDA. Is this something you could help me track down? If we can find a viable path for this by the end of the week, the Administrator would like Kell to announce the plan on Saturday while in East Chicago, Indiana. Let me know if you would like to discuss further. Thank you!

Best,

David

David Fotouhi

Deputy General Counsel

Office of General Counsel

U.S. Environmental Protection Agency

Tel: +1 202.564.1976

fotouhi.david@epa.gov

From: Packard, Elise
Sent: Wednesday, July 5, 2017 10:25 AM
To: Kelly, Albert <kelly.albert@epa.gov>
Cc: Fotouhi, David <fotouhi.david@epa.gov>
Subject: FW: Update - Water system disinfection project

Hi Kel,

I thought it might be helpful for you to have an update on where the working group got last week prior to our meeting tomorrow so that you could weigh in if anything needs to be adjusted.

Thanks!

Elise

Elise B. Packard

Acting Principal Deputy General Counsel

U.S. EPA Office of General Counsel, Rm. 4020

(202) 564-7729

From: Scalise, Laura
Sent: Friday, June 30, 2017 5:07 PM
To: Packard, Elise <Packard.Elise@epa.gov>
Cc: Cooper, Geoff <Cooper.Geoff@epa.gov>
Subject: Update - Water system disinfection project

Hi Elise. We had a great call this afternoon to discuss the water system disinfectant project.

ORD had some great information. Seems that the Army Corp has been working on this water system disinfectant issue for some time – in support of its facilities, including its field facilities.

The Corp is going to start a project in 6 months and are looking forward to having EPA's technical input.

Army Corp has prepared a preliminary report and EPA is trying to get that report. One of the findings discussed with ORD is that the system needs humidity and isn't working well in hot dry Texas.

BTW, the Corp looked at the WaterGen system. Don't know what they thought of it. Should be in the report ORD is trying to get.

Concurrently, ORD wants to look at the types of pathogens that are growing in treatment systems already in use. From several manufacturers. That's because a system needs to run for several months before anything bad has a chance to grow in the system. Sally Gutierrez knows of several of these water systems to test.

Finally, the Army Corp project will run for at least two years. EPA will participate, but Army Corp will lead. ORD may want to run a research project too, but they don't want to duplicate the Corp's efforts. So they will likely coordinate.

So this is our starting point. ORD is taking the technical lead on this end of the project. Tom Speth and Jay Garland and Sally G. will compile a research game plan. Once they do that, Sarah Bauer can engage as the FTTA coordinator and she and I will determine the best vehicle (agreement-wise) to proceed with – be it a CRADA, MOU, or IAG or a combination of agreements.

Makes sense to me to join forces with the Corp and not start from scratch.

We should have the plan of action from ORD by the next phone call. I'm confident this project is in good hands.

As an aside, I worked for Region 2 in the Superfund program for 14 years before becoming an attorney. QA, lab and field auditing, supporting the Site managers and assuring good

data. I'm certainly not one of the Research Rock Stars that abound in our incredibly talented ORD, but I'm still technically competent. I love a good science project.

My day is ending. I'll be teleworking on Monday if you want to discuss any of this. Have a nice weekend. - Laura

"Everything should be made as simple as possible,
but not simpler." - Albert Einstein

Laura Scalise

Patent Attorney

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