



DEPARTMENT OF THE ARMY

U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CECC-ZA

11 January 2001

MEMORANDUM FOR ALL USACE HEADQUARTERS, DIVISION, DISTRICT,
CENTER, LABORATORY AND FIELD OPERATING ACTIVITY COUNSEL

SUBJECT: Role of the USACE Division Counsel

1. Unlike the District Counsel and Chief Counsel functions, which are well defined, the role of the Division Counsel in the US Army Corps of Engineers has evolved and changed in recent years. The evolution of an "integrated Corps legal services system" as described in the Chief Counsel's Task Force Report (1994), the emergence of the "Regional Business Center" (1998), and the USACE Major Subordinate Command (MSC) Restructuring (2000) have all affected the role of the Division Counsel with regard to management and accountability.
2. To clarify the role of the Division Counsel in today's Corps, I tasked my USACE Legal Services Managing Partners Group to research all prevailing regulations, guidance, and policy affecting the Division Counsel's function and draft a paper defining what the role of the Division Counsel should be with regard to these directives. The attached document is the result of that effort and has been approved by all USACE division counsels.
3. Although this document seeks to define the role of the USACE Division Counsel, it also provides a comprehensive look at our USACE Legal Services system and how it is integrated, both horizontally and vertically. I ask that you use this document as a guide towards understanding not only the function of the Office of Division Counsel, but our legal services organization as a whole.

A handwritten signature in cursive script that reads "Robert M. Andersen".

ROBERT M. ANDERSEN
Chief Counsel

Enclosure

The Role of the Office of the Division Counsel in Providing Legal Services

1. Purpose: To define the role of the Division Counsel in the U.S. Army Corps of Engineers Legal Services System.
2. Reference:
 - a. USACE Memorandum, 9 March 1998, subject: Divisions as Regional Business Centers
 - b. May 2000 MSC 2000 Option II Approved
 - c. AR 690-200, Chapter 213, "Employment of Attorneys"
 - d. USACE Supplement 1 to AR 690-300, supplementing the predecessor to the above regulation
 - e. AR 27-26, Rules of Professional Conduct for Lawyers
 - f. ER 27-2-2, Rules of Professional Conduct
 - g. USACE Memorandum, 1 June 2000, subject: Interim Guidance on Quality Management
 - h. Chief Counsel's Task Force Report on the Delivery of Legal Services, 30 September 1994
 - i. CECC-ZB Memorandum, 30 August 1999, subject: Reorganization of the HQUSACE Office of the Chief Counsel (CECC)
 - j. Charter, USACE Legal Services Managing Partners Group, 30 August 1999
3. Background.
 - a. The role of the District Counsel in advising and assisting the District Engineer in executing the Corps mission is well understood. Moreover, the role of the Office of the Chief Counsel in providing policy and legal advice to the Chief of Engineers, direction and management of the USACE legal services system, and liaison with Army General Counsel, Department of Justice and other agencies is also well-established. This has not been the case with the role of the Division Counsel, or for that matter, the Division, whose purpose and mission have evolved and changed.
 - b. In 1998, the USACE Commander approved the adoption of the Regional Business Center (RBC) concept throughout the Corps, as outlined in reference 2a. This directive mandated that each Major Subordinate Command (MSC, Division HQ) manage the division and all subordinate districts as a single business center balancing the types

and quantities of workload against resources throughout the division's respective areas of responsibility. Discussions regarding this concept were held at the August and November 1998 Board of Directors meetings, among HQUSACE staff during the summer of 1998, and at a September 1998 HQUSACE meeting of division commanders and the Deputy Commanding General. The results of those deliberations have been implemented in various forms throughout the eight division offices. Most recently, as reflected in reference 2b, a standard structure and organizational relationship has been established to guide the divisions in establishing common organizational relationships to implement the business center concept. The goal is to establish common organizational principles and structure across division lines.

c. As part of this organizational mandate, USACE established a direct reporting relationship between the Office of Division Counsel and the Division Commander set out in reference 2b. Structurally, this establishes a direct attorney/client relationship between the Division Commander and the Division Counsel. By this single action, the Chief of Engineers clarified any remaining ambiguity about the single most-important duty of the Division Counsel.

4. In order for the Office of Division Counsel to function within the business center, and at the same time fulfill its direct responsibilities to the Division Commander, the Chief Counsel and his senior leadership throughout the Corps legal services system have established an integrated legal services strategy. This strategy seeks to maximize quality, efficiency and cost effectiveness, timeliness and responsiveness, accountability, and career development. The strategy starts with the recognition that an effective, integrated legal services system is only possible if the unique and discrete roles of the District, Division, Laboratory, Center, and Headquarters legal offices are clearly defined and respected during delivery of legal services. Such a system envisions, identifies, and assigns appropriate, value-adding roles and responsibilities to each Corps legal office. This includes developing and disseminating legal services policy, assigning legal services missions and functions at each level, and establishing and maintaining legal services management, automation, and career development systems. The system is meant to assure that each legal office has the necessary resources and tools to carry out its assigned roles and responsibilities. The system designates appropriate and necessary centers of expertise. Finally, it is meant to eliminate duplicative effort and multiple levels of review, and assure accountability to command structure, the client groups responsible for program and project management, and ultimately to uniform legal interpretations and directives established by the Office of the Chief Counsel of the Corps of Engineers and the General Counsel of the Army.

5. Recently, the USACE Legal Services Managing Partners Group, operating under the authority set out in reference 2h, identified six specific initiatives to improve this integration.

a. Corporately identify and build our legal leadership while also recruiting, hiring and developing highly capable attorneys at every level through succession planning.

b. Maintain counsel functions as a recognized value-added function, providing high quality, effective, timely and responsive legal services which foster the Corps mission.

- c. Improve corporate management and presentation of Corps position in litigation and other forums.
- d. Enhance professional responsibility within the Corps Counsel community (including RE Staff) and beyond the Counsel community.
- e. Improve and institutionalize communication and knowledge management both horizontally and vertically to create trust, a collaborative work environment and take advantage of diversity of thought in support of integration.
- f. Identify business process and practices essential for us to operate as an effective and integrated system. These processes are aimed at developing strong interdependent District, Division, Laboratory, Center, and Headquarters legal services organizations.

6. Understanding the role of the Division Office of Counsel is crucial to the success of the MSC organization and implementing the Chief Counsel's initiatives. The Division Office of Counsel provides direct support to the Business Center where it has been designated a center of expertise for a particular legal subject matter or specialty. The Division Office of Counsel also directly supports development and execution of regional policy matters, often representing the division before private entities. The Division Office of Counsel assists the Commander in his/her command and control function, and focuses on managing the legal services provided by its District Offices of Counsel. Finally, the Division Office of Counsel provides "operational" legal services to the Division Commander and the division staff on "operational" matters creating the need for original legal work at the division and properly arising from the division role or where it is the action office or the decision maker.

7. In particular, the Division Office of Counsel provides comprehensive legal advice and assistance to the Division Commander and his/her staff. Recently, this role has been highlighted in the MSC 2000 standard office organization. The attorneys and other members of the office provide support to the Division Counsel who acts as or directs the functions of Ethics Counselor; Procurement Fraud Advisor; advisor and legal manager for the division's Freedom of Information Act Program; decision authority for agency bid protests filed within the division, and consultation with and preparation for the Division Commander in approving decisions involving alleged mistakes in bid.

8. In addition, the Division Office of Counsel provides oversight for the legal activities performed by its District Offices of Counsel over the broad range of their program activities, including contract formation, claims and appeals; general litigation; environmental regulation and compliance; public lands and related resource issues; civil works authorities; and military programs issues, in particular procurement and fiscal law matters.

9. By maintaining this focus on these key functional responsibilities, the Division Office of Counsel manages downward to districts, and integrates upward to HQ, thus facilitating integration of legal services. Downward-management occurs by insuring that districts are aware of and are effectively implementing and adhering to (1) settled legal principles, and (2) HQ-CECC legal interpretations, established policies and procedures. Upward integration occurs by insuring that HQ is made aware of cases and matters of national significance and/or precedential value so that HQ is prepared to take necessary

action as appropriate. It also includes informing HQ of other non-legal or management matters that could be nationally significant.

10. A necessary part of upward integration and downward management is effective communication among organizational echelons. Recognizing the need for division integration of district and HQ-CECC legal and policy information requires some mechanism of exchange at both the district and USACE that reflects this division role. Consistent with the concept of resolving matters at the lowest level possible and the concepts of knowledge management articulated in paragraph 11(h) below, it is recognized that direct contact between district attorneys and HQUSACE attorneys can and should occur. At the same time, the Division Counsel should prescribe an effective protocol to ensure that district attorneys inform division attorneys of such contact contemporaneously. The Division Counsel retains authority and responsibility to address regional implications arising from legal matters where the district has involved HQUSACE and to bring those matters to the attention of both the districts and HQUSACE legal personnel.

11. The Division Office of Counsel carries out these multi-faceted roles in a number of specific contexts.

a. **Command & Control:** Exercises Staff oversight of division-wide legal program; assists the Office of the Chief Counsel in Corps-wide oversight of legal services; provides professional & managerial oversight of District Offices of Counsel; renders final decisions on pre-contract disputes; reviews, investigates, recommends and acts as appropriate on all litigation involving the Corps of Engineers; serves as legal advisor for administrative and admiralty claims; and informs the Office of the Chief Counsel of issues and activities of potential national significance.

b. **Regional Interface:** Serves as liaison with external agencies, offices, and contacts, as appropriate.

c. **Program Management:** Provides programmatic legal support to Civil Works, Military, Environmental, and Support for Others programs; administers Standards of Conduct Program, Internal Management Control Program, and fiscal integrity matters for the Division Office; processes Freedom of Information & Privacy Act requests for Division office records; provides staff assistance on Alternative Dispute Resolution; advises on environmental program matters including HTRW program and potential liability issues; serves as Procurement Fraud Advisor.

d. **Resource Management:** The Division Counsel ensures the availability of operational expertise that individual districts may need, in concert with the commander and senior civilian leadership within the RBC. The Division Counsel should participate in the Regional Management Board's (RMB) activities under guidance in reference 2a that MSC Commanders add participants as required. The Division Counsel should champion the Districts' legal resource needs, and integrate these needs across Districts.

e. **Quality Assurance:** Evaluates performance of District Offices of Counsel; conducts program evaluations; serves as Ethics Counselor for Division Commander and division staff;

f. **Operational Role:** Operations may be part of the Regional Business Center role of the Division Counsel. The Division Counsel advises on full range of legal subjects (i.e., real estate, labor, criminal, constitutional and administrative law). The Division Counsel provides litigation management services and may adopt alternate strategies to ensure provision of operational legal services to the Division Commander and division staff on matters: (1) where the Division is the action office or decision-maker; or (2) where oversight, command and control and ensuring quality assurance over the operations or activities arising out of the provision of legal services by the districts in their performance of their mission and functions requires resources on a regional basis. The Division Counsel also provides legal advice on all types of contracts relating to civil and military work and on environmental and regulatory programs;

g. **Professional Conduct Role:** References 2c-2f create a standard of continuing professional qualification that requires consistent review of attorney practice in contexts of recruitment, selection, promotion, and discipline of lawyers, as well as training and professional development such as Type III Trial Attorney certification. As a senior attorney under these rules, the Division Counsel provides advice and direction on professional and ethical issues for attorneys under his/her professional jurisdiction, and advice on, and responsive implementation to, the policies and directives of the Chief Counsel as USACE Qualifying Authority.

h. **Knowledge Management Role:** The Division Counsel will ensure that the legal system within his/her respective MSC supports sharing of enterprise knowledge and establishes collaboration on work-products. They will ensure that existing knowledge sources are clearly identified and transferred within the legal services system. The Division Counsel will provide leadership and incentives for the use of technology as a knowledge transfer mechanism. Central to this responsibility is proactive oversight of the Corps of Engineers Automated Legal System (CEALS) Matter Tracking System.

12. Two tools exist that may enable the Division Office of Counsel in carrying out its functions: (1) the application of the Division Counsel's oversight authority pursuant to the several delegations from the Office of the Chief Counsel, and (2) the more comprehensive use of the Quality Assurance initiative developed over the last two years by USACE to be implemented across functional lines by the divisions as business centers.

13. **Delegated Authorities.** There are eight delegated authorities that provide the option of continued Division Counsel oversight to manage quality and resources within the MSC as a business center:

a. Agency Protest Decision. EFARS 33.103(d)(3)-100(2) provides that Districts forward their agency procurement protests (with the exception of those protests arising in Honolulu District) to the Division Counsel for decision.

b. GAO Bid Protests. The Chief Counsel has delegated the authority to six Division Counsels (with the power of re-delegation to respective Districts) to prepare the final agency position in GAO cases. [See EFARS 33.104-100(a)(1)]

c. FOIA Initial Denial Authority. In CECC-ZA memorandum, dated 17 May 1995, subject: FOIA Administration Reorganization (Delegation of Initial Denial Authority), the

Chief Counsel delegated initial denial authority to all Division Counsels, with power of re-delegation to District Counsels (who will be without power to re-delegate).

d. Maritime and Tort Claims. In accordance with ER 27-1-1, and through letter dated 20 September 1995, subject: Delegation of Additional Authority for Maritime and Federal Tort Claims Act Claims, the Chief Counsel delegated the authority to Division Counsels to settle claims.

e. Civil Litigation Settlement Authority. By letter dated 12 May 1995, subject: Delegation of Settlement Authority to Field Counsel, and in accordance with the terms of ER 27-1-1, the Chief Counsel delegated the authority to settle civil litigation to the Division Counsels, District and Laboratory Counsels in situations where the case is within the authority of the US Attorney to settle; is not being handled by main Department of Justice (DOJ); and is not nationally significant or precedential.

f. Trial Attorney Practice. By letter dated 27 October 1995, subject: Changes to Procedures for Filing Trial Documents at the Boards of Contract Appeals, the Chief Trial Attorney stated that copies of pleadings, motions and briefs shall be provided to the Division. The Chief Counsel retains authority to withdraw a delegation. The trial attorney practices described in this letter have been incorporated into EFARS, Appendix A, Contract Requests, Claims and Appeals. In addition, by letter dated 9 May 1997, which established the Trial Attorney Qualification Program, the Chief Counsel set forth the Division Counsel's role in ensuring that only qualified trial attorneys represent the Corps in all contract dispute cases.

g. Employment of Attorneys. Appendix D of the USACE Supplement to AR 690-300 provides that, prior to rating the performance of the head of a legal office (*i.e.*, the District Counsel) the rating official will request information about the attorney's professional performance from the head of the legal office at the next higher level.

h. Joint Ethics Regulation DOD 5500.7-R para.1-401 and CECC Letter dtd 20 June 1994, subject: Appointment of Ethics Counselors. These documents authorize the Division Counsel to appoint Ethics Counselors for the Division.

14. The Quality Assurance (QA) Audit/Command Inspection Process. The second tool is the use of the initiative on the cross-functional quality control/quality assurance. This has been a USACE focus since 1998. All divisions are to promulgate and keep current an identified program based on the Business Center/Program Management concept. The use of a QA program for the technical aspects of integrated legal practice and the Qualifying Authority for professional management can create a more coordinated approach to the counsel organization and in particular utilize the intermediate position of the Division Counsel effectively in its identified roles.

15. These tools have generally been viewed as separate responsibilities within the legal services community. However, it is possible and advantageous to view them as distinct but integrated parts of an evaluation and management system for the provision of legal services to the client groups. What may present itself as a quality issue in a District, may also be a resource or training issue. Such issues may need a Division champion to address allocation of funds or the allocation of high grades or some other issue often addressed in the context of the RMB. Quality Assurance Audits and the Command Inspections should assess the integration of technical and management issues. They

should not only address processes for integration but also the effectiveness of those processes.

16. There are templates that address the manner in which the issues of integration, quality and management could be addressed. Among them are identification of the QA process in a condensed format, a series of questions concerning processes drawn from the traditional command inspection format, and a series of issues for review reflecting the Chief Counsel's Task Force Report as modified by the strategies during the Managing Partners Group process. These templates are available in electronic format for guidance to the Division Counsels in developing their respective QA initiatives.

17. In conclusion, the role of the Division Counsel in the seamless, integrated provision of quality legal services within USACE is vital. With the guidance articulated above, and emergence of the Regional Business Center concept, the specific roles of the Division Counsel have been clarified, making Division Counsel accountability an achievable and desirable goal.