UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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MEMORANDUM

OFFICE OF
GENERAL COUNSEL

SUBJECT: Legal principles for FPA drafting

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TO: Lisa Lund
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We believe that at this stage in the development of Project XL, it would be useful to provide some guidance on the basic legal principles to be considered in drafting final project agreements (FPAs). The attached principles are based on the legal framework under which Project XL operates, and our drafting experience to date. We hope this guidance will be helpful both to EPA staff, and to outside parties, and will help to expedite the process of developing FPAs.

Attachment

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FPA Drafting Principles

Legal and practical significance of the FPA

1. A final project agreement is intended to be a statement of the parties' plans and intentions with regard to an XL project. It memorializes the seriousness of the parties' intentions, and each party signing the FPA is putting its credibility and good faith on the line. The FPA also has important practical consequences (see paragraph 8).

2. An FPA does not, however, create legal rights or obligations and is not a contract, or a regulatory action such as a permit or rule, and is not legally enforceable or legally binding on any party. This principle reflects in part the limits on EPA's authority to enter into contractual arrangements that alter otherwise applicable law,[1] or tie EPA's hands in its future actions. Because they are not legally enforceable, and do not create rights or obligations, FPAs are not "final agency actions" that could be reviewable.

3. Some parts of a project may be implemented through a separate regulatory mechanism (e.g., a rule or permit). In contrast to the FPA itself, such mechanisms can be legally enforceable. Where the intent is to create a legally enforceable term, the language of the FPA should make clear that it is the other mechanism, not the FPA itself, that will make the requirement enforceable. For example, the FPA would not state that "X Corp. shall limit emissions of VOCs to X tons per year", since this implies that the FPA is creating an enforceable requirement; rather, it would state that a requirement to limit emissions to X tons will be imposed through a separate legal mechanism (and specify what that mechanism will be). One option may be to make a draft permit or rule an attachment to the FPA, and limit discussion within the FPA to a more general summary of the requirements and a statement that EPA "intends to propose" a rule or permit in the attached form.[2]

4. An FPA may also include other commitments that are not intended to be made legally enforceable. (See the discussion of "voluntary commitments" in the April 23, 1997 Federal Register notice on Project XL (62 FR 19875). Even though such commitments are legally not enforceable, the sponsor remains accountable in other ways. For example, if such a commitment is essential to the willingness of other parties to participate in the project, those parties may make clear in the FPA that they would expect to withdraw if those commitments are not carried out. Statements identifying

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[1] Proposed FPAs are sometimes submitted to EPA that purport to substitute for or supplant some or all of the permits or rules that would otherwise apply to the facility, and to create an "alternative form of regulation". EPA does not have authority to create new regulatory vehicles by agreement, or to allow such agreements to supersede permits that would otherwise be required.

[2] In many cases, the FPA will be executed at approximately the same time that the rule or permit is finalized. At that stage, the FPA may state that EPA will issue a final rule or permit as specified. Earlier, however, it would be premature to make such a statement, and the draft FPA issued for public comment should refer only to proposing a rule or permit.

which terms would be expected to trigger withdrawal will generally be desirable, both to establish the parties' plans and intentions about the XL project, and to help avoid claims of bad faith in the event that a project is terminated.

5. It will also be generally desirable to distinguish between commitments to achieve certain results (e.g., quantifiable emissions levels), and commitments to take certain steps without guaranteeing what the results will be (e.g., making pollution prevention efforts with aspirational goals that may or may not be achieved). Commitments can be framed in either way; the key is to state clearly the parties' understanding on the nature of the commitments and the implications should the sponsor not carry them out.

6. This guidance does not address implementation of project terms through enforcement discretion. In general, the use of enforcement discretion is not the preferred approach, and should be considered only where there are no other legally viable alternatives. Before considering enforcement discretion as a mechanism, regional and headquarters counsel should be consulted (at headquarters, the Office of General Counsel and the Office of Enforcement and Compliance Assurance). For further guidance on the use of enforcement discretion, see two memoranda from Assistant Administrator Steven Herman, "OECA's Operating Principles for Project XL Participants" (October 2, 1995), and "Clarification of Enforcement Policy Principles for Project XL" (May 24, 1996).

7. Because they are non-binding, FPAs should avoid using terminology normally associated with legally binding contracts or enforceable regulatory documents such as permits. Examples of language that could suggest that an FPA was meant to be enforceable include:

-- statements that a party "shall" or "must" perform certain actions (using the term "will" may be enough to make clear that this is simply intended to be a statement of current intent or expectation, but "intends to" is best);

-- referring to "compliance" with the FPA, or "violations" of the FPA;

-- referring to "terms and conditions" of the FPA (especially in conjunction with terms like "compliance" or "violation");

-- referring to one or more parties "enforcing" the FPA;

-- purporting to limit the ability of parties to withdraw from the FPA (e.g., by requiring termination to be "for cause", or stating that the agreement may be terminated only by mutual consent of all the parties).

8. Although an FPA cannot legally tie any party's hands, it may have practical consequences (e.g., future actions by a party inconsistent with the agreement could be viewed as bad faith or damage its credibility). Drafters should keep these practical consequences of the agreement in mind since they may have significant policy implications.

Withdrawal and Termination

9. Because the FPA is not legally binding, special attention needs to be given to provisions relating to termination or to withdrawal of parties. On one hand, the parties will want to have a high degree of confidence that the project will not be abandoned lightly. This is important both for the regulated parties, who will in many cases make significant investments as part of the project, and the regulators, who are providing relief from otherwise applicable requirements. On the other hand, the FPA cannot create a right enforceable in court to compel another party to continue implementing a project (or a right to damages for "breach"). Therefore, termination and withdrawal provisions perform a somewhat different function than in typical contracts. They cannot, and should not purport to, set limits on the legal ability of parties to withdraw (e.g., they cannot require that withdrawal be "for cause"); however, they can, and generally should, establish clear expectations about circumstances that the parties all agree would justify another party in withdrawing or calling for the termination of the project. Setting up expectations in advance about what would be legitimate grounds for canceling the project will help to reduce claims of bad faith later on.

10. Termination and withdrawal provisions should also address the process that the parties would expect to be followed (again, this is not legally binding). Generally, the process will include advance notice to the other parties, and an opportunity to discuss the request for withdrawal or termination. A dispute resolution process may be specified as well (although both participation in such a process, and adherence to any resolution reached, would have to be described as non-binding).

11. Termination provisions are sometimes difficult to reach agreement on (e.g., some parties may wish to avoid the appearance created by an affirmative statement to the effect that any party may withdraw at any time). An acceptable option is to be silent on termination, and include only a provision on "orderly transition" (see paragraph 12). Such a provision assumes that termination may occur, but does not address it directly. If this approach is used, however, all parties should clearly understand that because it is non-binding the FPA does not compel anyone to continue their participation in the project.

12. Both the FPA, and any implementing mechanisms, should also address what will happen if the project is terminated. Regulated parties will generally want to include provisions allowing an orderly transition back to traditional regulation, and it will generally be in EPA's interest to have an orderly transition as well.

13. It is important to recognize that legal mechanisms such as permits or rules remain subject to legal constraints on termination or modification, and such constraints (which may be either procedural or substantive) cannot be superseded or limited simply by including an alternative termination provision in the FPA. For example, a permit could not be revoked, or a rule rescinded, without following the normal procedures for doing so.[3] Conversely, existing rights to modify or

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[3] As part of the XL project, the rules governing modification or termination of permits might be modified (just as other substantive rules may be modified). However, this would require

revoke a rule or permit cannot be limited by terms in an FPA. For clarity, whenever the FPA addresses issues potentially applying to both the FPA and the implementing rule or permit (e.g., termination, modification or dispute resolution) it should clearly distinguish between the provisions governing the FPA itself, and those applicable to the rule or permit.

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a separate legal mechanism (e.g., a site-specific rule); the FPA alone cannot make such changes. Procedures for amending rules, of course, are specified by statute and such statutory requirements cannot be changed in an XL project.