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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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MEMORANDUM

SUBJECT: Supplemental Environmental Projects in EPA Settlements Involving Early Reductions under the Clean Air Act

FROM: Edward E. Reich
Acting Assistant Administrator

TO: Addressees

This memorandum supplements the articulation of the Agency's policy entitled "Policy on the Use of Supplemental Enforcement Projects in EPA Settlements", dated February 12, 1991. This discussion of the policy is prompted by questions that have arisen when noncomplying sources or EPA enforcement personnel have proposed a supplemental environmental project (SEP) as part of a settlement agreement in an enforcement action which, if approved, may also qualify under the Early Reductions Program (ERP) being implemented pursuant to the authority of Clean Air Act Section 112(i)(5).

The central issue here concerns the propriety of approving an otherwise valid proposed SEP which will both reduce a civil penalty in an enforcement action and qualify as a project for the ERP under Clean Air Act Section 112(i)(5). That section provides that if a source achieves an early reduction of 90% in air toxic emissions (95% in the case of particulate air toxics), the source will receive a six year extension of compliance with the otherwise applicable maximum achievable control technology (MACT) standard. The question, then, is whether a source should be allowed to use an approved SEP both to reduce a monetary penalty and to obtain a six year MACT extension under the ERP.

The fact that a project may ultimately have a value to the source beyond penalty mitigation does not necessarily render a project unacceptable as a SEP. The SEP policy thus provides that pollution prevention projects which offer significant long-term environmental and health benefits may qualify as SEPs even though the project may represent a "sound business practice" and the benefits of the project may ultimately inure to the source. Because early MACT reductions will often be in the nature of pollution prevention, we are comfortable treating these projects

as SEPs where they are offered as part of a settlement of enforcement claims. The extent of the mitigation in a given case should be determined by application of the SEP policy.

We note in this regard that, to be appropriate for penalty mitigation, the SEP should ordinarily be inspired, at least in part, by an enforcement case or the prospect of an enforcement case. Because the basic premise for mitigation is that we are getting relief beyond that which would otherwise occur, projects already underway entirely disconnected from the prospect of enforcement will not ordinarily qualify for penalty mitigation.

Nonetheless, there may be supplemental value to the government in converting a previously voluntary undertaking to an enforceable commitment under a consent agreement where the undertaking represents an important gain for the environment. Recognizing the significant environmental benefits associated with early reductions of toxic emissions, and that early reductions efforts designed to extend MACT deadlines are not guaranteed to achieve the desired reductions, the conversion of an early reduction effort to an enforceable commitment in the context of an enforcement settlement can be considered for purposes of penalty mitigation. In this setting, however, mitigation should not, in view of the independent thrust behind the project, be based on the full value of the project.

Additionally, projects which are continued (beyond the point at which they would otherwise be concluded) or expanded as a result of enforcement may qualify for mitigation.

I hope that you find this of value in devising your early reduction strategy. For further information, please contact Joanne Berman at FTS 260-6224, or Charlie Garlow at FTS 260-1088.

Addressees:

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