

Comptroller General
of the United States

Washington, D.C. 20548

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July 7, 1992

RELEASED

The Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

Your letter of December 13, 1991, requested that we examine whether the Environmental Protection Agency (EPA) has legal authority to settle mobile source air pollution enforcement actions brought pursuant to section 205 of the Clean Air Act (the Act), as amended, 42 U.S.C.A. § 7524 (West Supp. 1991), by entering into certain settlement agreements. These settlement agreements allow alleged violators to fund public awareness and other projects relating to automobile air pollution in exchange for reductions of the civil penalties assessed against them. As explained below, we conclude that EPA does not have authority to settle these enforcement actions in such a manner.

Background

Prior to its amendment in 1990, section 211 of the Clean Air Act provided for the payment of specified civil penalties by persons who violated certain provisions of the Act regulating fuels. 42 U.S.C. § 7545(d) (1988). Former section 211 further provided for the recovery of these civil penalties through judicial proceedings brought in the appropriate United States district court. Id. Under former section 211, the EPA Administrator was also authorized to "remit or mitigate" these penalties. Id.

According to documents supplied to us by EPA, the EPA developed a policy pursuant to the former section 211 whereby it would issue "Notices of Violations" to alleged violators of the fuels provisions and attempt to enter into settlements with these alleged violators in lieu of instituting judicial proceedings. Such settlements could include reductions in the penalties specified in the statute. Factors taken into account by the EPA in determining whether to reduce penalties included action taken by the alleged violator to remedy the violation.

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In addition, the EPA in 1980 developed an "alternative payment" policy with respect to the fuels provisions of the Act, whereby alleged violators could receive reductions in their cash penalties if they agreed to pay for certain public information or other projects approved by the EPA relating to mobile source air pollution issues.¹ At the same time, EPA extended this alternative payment policy to penalties for violations of former section 203 of the Clean Air Act, 42 U.S.C. § 7522 (1988), which, inter alia, prohibited tampering with emissions control devices. The section governing penalties for tampering violations-- former section 205 of the Act, 42 U.S.C. § 7524 (1988)--did not explicitly authorize EPA to remit or mitigate penalties for tampering violations, but EPA justified its extension of the alternative payment policy to penalties for these violations on the ground that former section 205 did provide for EPA discretion in determining the penalty amount.

The Clean Air Act Amendments of 1990 (1990 Amendments), Pub. L. No. 101-549, 104 Stat. 2399, amended section 205 to establish new maximum penalties for a number of the mobile source violations of the Act. Section 228(c), 104 Stat. at 2508. The 1990 Amendments further established authority for the administrative assessment of certain civil penalties (including the penalties for fuels and tampering violations) by an order made on the record after an opportunity for a hearing. Id. The Amendments set forth various factors for EPA to consider in assessing these civil penalties. Id. In addition, the 1990 Amendments gave EPA power to "compromise, or remit, with or without conditions" any administrative penalty that could be imposed under section 205. Id.

Discussion

EPA asserts that its power to "compromise, or remit, with or without conditions," civil penalties assessed under amended section 205 of the Clean Air Act provides a sufficient legal basis for its practice of funding public awareness projects with civil penalties assessed. See Attachment to Nov. 8, 1991 Letter from EPA Administrator William K. Reilly to Honorable John D. Dingell (EPA Letter). EPA also attempts to justify its alternative payment policy on the ground that

¹Examples of projects paid for by alleged violators have included an American Automobile Association training program to instruct high-school automotive instructors on the most recent emissions control technology and sponsorship by the alleged violator of public events to promote clean air, including marathons, bicycle races, fairs, airplane towing messages, and "Clean Air Days." See Attachment to Nov. 8, 1991 Letter from EPA Administrator William K. Reilly to Honorable John D. Dingell

the funded projects further the goals expressed by Congress in sections 101 through 104 of the Clean Air Act. In particular, EPA points to section 103(a) (5), which requires EPA to "conduct and promote coordination and acceleration of training relating to the causes, effects, extent, prevention, and control of air pollution," and former section 103(f) (1) (B), which required the Administrator to seek "to improve knowledge of the short- and long-term effects of air pollutants on welfare." Id. We disagree with both of these arguments.

In two earlier decisions, we held that the Nuclear Regulatory Commission (NRC) and the Commodity Futures Trading Commission (CFTC) lacked authority to adopt enforcement schemes similar to EPA's alternative payment policy. 70 Comp. Gen. 17 (1990); B-210210, Sept. 14, 1983. Our 1990 NRC decision involved statutory language virtually identical to that in the provision EPA contends authorizes its alternative settlement policy. Section 234 of the Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2282, gave the NRC power to impose civil monetary penalties, not to exceed \$100,000, and to "compromise, mitigate, or remit" such penalties. The NRC had requested our opinion whether this provision authorized it to permit a licensee who violated NRC requirements to fund nuclear safety research projects at universities or other nonprofit institutions in lieu of paying a penalty or a portion of a penalty. Like the EPA in this case, the NRC had pointed out that its enforcement proposal would further another statutory objective--in the NRC's case, its authority to award contracts to nonprofit educational institutions to conduct nuclear safety-related research.

We determined that the NRC's discretionary authority to "compromise, mitigate, or remit" civil penalties empowered it to adjust penalties to reflect the special circumstances of the violation or concessions exacted from the violator, but that its authority did not extend to remedies unrelated to the correction of the violation in question. 70 Comp. Gen. at 19. Under the NRC proposal, we noted, a violator would contribute funds to an institution that, in all likelihood, would have no relationship to the violation and would not have suffered any injury from the violation. Id.

Moreover, from an appropriations law perspective, such an interpretation would have required us to infer that Congress had intended to allow the NRC to circumvent 31 U.S.C. § 3302(b) and the general rule against augmentation of appropriations. Id. Section 3302(b) requires agencies to deposit money received from any source into the Treasury; its purpose is to ensure that Congress retains control of the public purse. Id. In our view, the enforcement scheme proposed by the NRC would have resulted in an augmentation

of NRC's appropriations, allowing it to increase the amount of funds available for its nuclear safety research program. Id.

Neither the language nor the legislative history of section 234 of the Atomic Energy Act of 1954 provided any basis for an inference that Congress had intended to allow the NRC to circumvent these appropriations principles. Accordingly, we concluded that section 234 did not authorize the NRC to reduce civil penalties in exchange for a violator's agreement to fund nuclear safety research projects. Id. at 19-20.

Similarly, our 1983 CFTC decision involved the CFTC's proposal to accept a charged party's promise to make a donation to an educational institution as all or part of the settlement of a case brought under the prosecutorial power provided the CFTC by the Commodity Exchange Act, as amended, 7 U.S.C. §§ 9, 13b (1976). B-210210, Sept. 14, 1983. Like the NRC, and the EPA in this case, the CFTC had argued that such settlement terms would aid in the accomplishment of another of the Commission's statutory functions--in the CFTC's case, the establishment and maintenance of research and information programs which assisted in the development of educational and other informational materials regarding futures trading. Id. We held, as we later did in the NRC case, that the CFTC was without authority to achieve its educational and assistance function through the use of settlement agreements exacted from the exercise of its prosecutorial power. Id. We see no basis for concluding that EPA's prosecutorial authority under section 205 of the Clean Air Act is any more expansive than that of the NRC or the CFTC.

Finally, EPA argues that Congress ratified its alternative payment policy when it amended section 205 of the Clean Air Act in 1990. See EPA Letter. We disagree. In support of its ratification argument, EPA quotes a single sentence in a report on the Senate's version of the Clean Air Act Amendments of 1990. Id. The sentence is: "The Administrator may continue to issue . . . [Notices of Violation] to alleged violators of Title II provisions and to settle such matters to the extent authorized by law . . ." (quoting S. Rep. No. 228, 101st Cong., 1st Sess. 125-26 (1989)).

The context of the sentence was a discussion of the new provision eventually added to section 205 of the Clean Air Act establishing authority for the assessment of civil penalties by administrative proceeding. The Senate report quoted by the EPA was simply making clear that the new provision allowing for the assessment of civil penalties by administrative proceeding "is not intended to preclude the

Administrator from utilizing the informal notice of violation (NOV) enforcement process developed for fuels and certain other mobile source violations." See S. Rep. No. 101, 101st Cong. 1st Sess. 125 (1989).

The language quoted by the EPA indicates only that the Senate was aware that EPA had been utilizing this informal process of issuing notices of violation and settling the enforcement actions so instituted. The language does not give any indication that the Senate or the Congress as a whole was aware of the terms by which EPA was settling these enforcement actions. Accordingly, the language in the Senate report cited by EPA does not persuade us that Congress even knew about the EPA's alternative payment policy, much less ratified it. See, e.g., Inner City Broadcasting Corp. v. Sanders, 733 F.2d 154, 160 (D.C.Cir. 1984) (before court would find ratification, at threshold it must be shown that the Congress was "obviously aware" of the policy in question and consciously acted or did not act in response to that policy); Arizona Power Pooling Assoc. v. Morton, 527 F.2d 721, 726 (9th Cir. 1975), cert. denied, 429 U.S. 911 (1976) (congressional "[k]nowledge of the precise course of action alleged to have been acquiesced in is an essential prerequisite to a finding of ratification"). The EPA does not cite any purported evidence of congressional knowledge or acquiescence in the terms of its alternative settlements, and we are aware of none.²

Accordingly, we conclude that EPA's power to "compromise, or remit, with or without conditions" administrative penalties

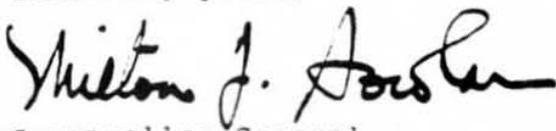
²Indeed, Congress's addition in 1990 of a new subsection to the section of the Clean Air Act governing citizen suits demonstrates that had Congress intended to authorize the EPA to fund special projects with civil penalties assessed pursuant to section 205, it could have said so in much clearer terms. See § 304(g)(1), 42 U.S.C.A. § 7604(g)(1) (West Supp. 1991). The new subsection provides that penalties assessed in citizen suits shall be deposited in a special fund in the United States Treasury for use by the EPA Administrator to finance "air compliance and enforcement activities." The new subsection further requires the Administrator annually to report to Congress about the sums deposited into the fund, the sources thereof, and the actual and proposed uses thereof. Id. The specific language authorizing the funding of EPA air compliance and enforcement activities through penalties received by way of citizen suits stands in stark contrast to the language drafted by the same Congress in section 205, which merely states that EPA may "compromise, or remit, with or without conditions" administrative penalties imposed.

19

assessed under section 205 of the Clean Air Act as amended does not authorize EPA's alternative payment policy.

We hope our comments are helpful to you. In accordance with our usual procedures, we will make this opinion available to the public 30 days from its date.

Sincerely yours,

for 
Comptroller General
of the United States