Keegan

Comptroller General
of the United States

Washington, D.C. 20548

DO NOT MAKE AVAILABLE TO PUBLIC READING
FOR 30 DAYS

B-247155.2

March 1, 1993

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

Dear Mr. Chairman:

This responds to your February 1, 1993, request that we review the December 28, 1992, response of the Environmental Protection Agency (EPA) to a July 7, 1992, General Accounting Office opinion, B-247155. In that opinion, we concluded that EPA's power to "compromise, or remit, with or without conditions," administrative penalties assessed under section 205 of the Clean Air Act, as amended, does not authorize EPA to enter into settlement agreements allowing alleged violators to fund certain public awareness and other projects relating to automobile air pollution in exchange for reductions of the civil penalties assessed against them.

EPA's December 28, 1992, letter states that EPA continues to believe that it has the legal authority to include these defendant-funded projects in settlement of enforcement actions. In this connection, EPA questions whether we considered its February 12, 1991, Policy on the Use of Supplemental Environmental Projects in EPA Settlements (the SEP policy) in developing our opinion.

We did consider EPA's SEP policy in developing our opinion in B-247155, and we continue to believe that certain projects allowed under that policy are not authorized by section 205 of the Clean Air Act, as amended. Based on two earlier GAO opinions, we held in B-247155 that EPA's discretionary authority to "compromise, or remit, with or without conditions," civil penalties assessed under section 205 empowers it to adjust penalties to reflect the special circumstances of the violation or concessions exacted from the violator, but does not extend to remedies unrelated to the correction of the violation in question. See 70 Comp. Gen. 17 (1990); B-210210, Sept. 14, 1983.

EPA's SEP policy, which discusses the types of supplemental projects which will be considered acceptable for use in enforcement settlements, does require what it calls a

556593 148991

"nexus" or relationship between the violation and the environmental benefits to be derived from several types of supplemental projects it permits. SEP policy at 5. For example, under the policy, the appropriate nexus would exist between an environmental restoration project which calls for the acquisition and preservation of wetlands in the immediate vicinity of wetlands injured by unlawful discharges, in order to replace the environmental services lost by reason of such injury.

However, the SEP policy also allows what it calls "public awareness" projects, and for these projects, no nexus at all is required. SEP policy at 4, 5. Therefore, these projects, which constitute the majority of supplemental projects approved by EPA in settlement of mobile source penalties under section 205,[1] can and do go beyond correcting the violation at issue. For example, a permissible project under the policy would be a media campaign funded by the alleged violator to discourage tampering with automobile pollution control equipment. SEP policy at 4. As under the proposal we held unauthorized in our earlier case, involving the Nuclear Regulatory Commission, here, the alleged violator would make a payment to an organization--the media selected to run the campaign--that, in all likelihood, would have no relationship to the violation and would not have suffered any injury from the violation. See 70 Comp. Gen. at 19. It is our view that the EPA's authority to compromise or remit civil penalties does not extend to imposing such remedies through settlement.

EPA also asserts that settlements involving these supplemental projects do not violate the Miscellaneous Receipts Act, 31 U.S.C. § 3302, since the cash portion of the penalty assessed goes to the Treasury. This argument misses the point. As we noted in an earlier opinion, allowing alleged violators to make payments to an institution other than the federal government for purposes of engaging in supplemental projects, in lieu of penalties paid to the Treasury, circumvents 31 U.S.C. § 3302, which requires monies received for the government by government officers to be deposited into the Treasury. B-210210, Sept. 14, 1983. In addition, as we pointed out in our other earlier opinion on this topic, concerning the Nuclear Regulatory Commission, an interpretation of an agency's prosecutorial authority to allow an enforcement scheme

---

[1]See March 17, 1992, EPA Memorandum from Mary T. Smith, Director, Field Operations Support Division, to Scott C. Fulton, Deputy Assistant Administrator, Office of Enforcement, re: Office of Air and Radiation, FOSD Program Specific Alternative Payment Policy, at 2, 4.

involving supplemental projects that go beyond remedying the violation in order to carry out other statutory goals of the agency, would permit the agency to improperly augment its appropriations for those other purposes, in circumvention of the congressional appropriations process. 70 Comp. Gen. at 19.

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,

James F. Hinchman

for Comptroller General
of the United States