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EPA Enforcement: A Heightened Emphasis on Mitigation Relief

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This article reviews key features of a November 2012 U.S. Environmental Protection Agency (EPA) Memorandum entitled Securing Mitigation as Injunctive Relief in Certain Civil Enforcement Settlements (2d ed. Nov. 2012) (hereinafter Mitigation Memorandum or Memorandum) (the agency issued its 1st edition of the Memorandum in September 2012). The agency issued the Memorandum for the purpose of "strongly encourag[ing] [EPA enforcement personnel] to seek mitigation, where appropriate, as a component of the injunctive relief they seek in civil judicial enforcement cases." Implementation of the Mitigation Memorandum coincides with an agency effort to more fundamentally reconsider its approach to compliance promotion, which EPA calls its Next Generation (Next Gen) Compliance Initiative and characterizes as a "new paradigm" for promoting compliance. See e.g., U.S. EPA, Office of Enforcement and Compliance Assurance National Program Manager Guidance FY 2014 at 10–12 (June 12, 2013). As EPA revisits its approach to improving compliance more generally, the Mitigation Memorandum offers insights into EPA's strategies for pursuing formal enforcement, including civil judicial cases.

EPA's new Mitigation Memorandum

In its Mitigation Memorandum, EPA reinforces the importance of a significant feature of formal enforcement: EPA's pursuit of what it styles "mitigation" injunctive relief in civil enforcement cases. EPA views "mitigation" relief as a form of "redress in connection with the consequences of a set of violations." The agency's pursuit of mitigation has considerable practical significance given both the high cost of mitigation in some cases and the not insubstantial transaction costs to negotiate and implement a mitigation project.

EPA's Memorandum includes at least three key features. It defines what the agency means by "mitigation," and in doing so explains how mitigation differs from injunctive relief that requires a party to return to compliance; it explains how mitigation differs from "Supplemental Environmental Projects" (SEPs), another form of relief that EPA sometimes negotiates in enforcement cases; and it provides guidance for agency personnel to determine when, and how, to pursue mitigation in an enforcement case. Beyond these three practical purposes, the Memorandum discusses EPA's legal authority to pursue mitigation.

Defining mitigation

EPA defines "mitigation" as "injunctive relief . . . to remedy, reduce or offset . . . harm caused by the alleged violations in a particular case." The agency identifies four types of mitigation projects, each of which is to provide "identifiable benefits":

- Cleaning up illegally emitted or discharged pollutants from the environmental media affected by the violation;
- Limiting [more stringently than required by law] the amount of future pollutants emitted or discharged . . . to address past excesses;
- Addressing the impacts on human health, wildlife or the environment from the . . . noncompliant discharges [such as restocking fish if a Clean Water Act violation resulted in a loss of fish];
- Monitoring . . . the pollution emitted or discharged from a facility.

Memorandum at 2–3.

EPA notes that, while the agency often requires violators to undertake actions to prevent future noncompliance, in contrast to that form of injunctive relief, mitigation "is not focused on preventing future violations"; instead, mitigation is intended to "redress harm."

Contrasting mitigation with SEPs

EPA identifies three "significant differences" between mitigation and SEPs (for more on SEPs, see EPA Final SEP Policy (May 1, 1998)). First, EPA asserts that a court could order an alleged violator to implement a mitigation project if the project were needed to redress harm caused by the violation. A SEP, in contrast, is a "voluntary project" that EPA lacks the authority to require a defendant to undertake. Second, mitigation projects must be "closely connect[ed]" to the harm resulting from the violations because their purpose is to redress that harm; in contrast, the "nexus" required for a SEP is much looser. EPA indicates that a project that would reduce the likelihood that similar violations will occur might be approvable as a SEP but would not be appropriate as a mitigation project. Third, a defen-

dant's agreement to a mitigation project is not supposed to result in a reduction of the payable penalty. In contrast, EPA may agree to reduce a payable penalty in exchange for a defendant's commitment to undertake a SEP.

While it distinguishes between mitigation and SEPs, EPA acknowledges that the same project may qualify as one or the other depending on the circumstances. For example, EPA suggests that diesel school bus retrofits may be suitable as a mitigation action if the retrofits will reduce excess emissions, while such retrofits might be more appropriate as a SEP if violations consist solely of a failure to do required emissions testing but do not involve evidence of excess emissions (i.e., there is no "redress" involved).

When EPA is likely to pursue mitigation and how it will do so

EPA's Memorandum indicates that the decision regarding whether to pursue mitigation in enforcement situations is "fact-dependent" and should be made on a case-by-case basis. The Memorandum identifies two "threshold considerations" to guide agency staff in conducting this ad hoc analysis. First, agency staff should assess whether the violations "resulted in a harm that can be effectively redressed." Second is whether mitigation actions are available that would effectively redress the harm. The Memorandum identifies a series of additional important factors in evaluating whether to pursue mitigation, including:

> [T]he extent of harm the violations caused; the characteristics of the impacted area and community; the potential for increased resource burdens in preparing the case, as well as those associated with monitoring compliance with the settlement; and an overall assessment of any litigation risk associated with pursuing the violations or the contemplated mitigation actions.

The agency also acknowledges that mitigation projects may involve significant transaction costs, as has long been the case for SEPs:

> Case teams should also recognize that pursuing mitigation has the potential to create significant additional agency resource burdens, such as the need for expert opinions and more detailed analyses of environmental harm and/or public health effects, and can substantially increase the length and complexity of settlement discussions. It also has the potential to create post-settlement burdens associated with monitoring compliance during implementation. Each of these factors should be taken into account.

Another key feature of EPA's strategy for pursuing mitigation involves whether EPA should consider a defendant's willingness to conduct mitigation in its penalty calculations. On the one hand, EPA's Memorandum provides explicitly that "in general, a defendant's willingness to undertake mitigation does not justify a reduction in the civil penalty the government would otherwise demand in settlement." The agency's logic is straightforward: EPA has the authority to require a defendant to do mitigation; as a result, a defendant's willingness to do "what could be legally required" does not warrant a penalty reduction. On the other hand, the Memorandum also indicates that mitigation actions might support a reduction in the gravity-based portion of a penalty if the commitment to conduct mitigation

evinces a high degree of cooperation by the defendant. In addition, the Memorandum suggests that litigation risks may be a basis for reducing a payable penalty in order to finalize a settlement that avoids those risks and includes mitigation as part of the settlement package.

EPA indicates that the new Memorandum "is not meant . . . to alter" EPA's traditional practice of "routinely seeki[ng]" restorative measures under the Clean Water Act § 404 program or the agency's practices under various remedial authorities, such as those in the Comprehensive Environmental Response, Compensation, and Liability Act and the Resource Conservation and Recovery Act (RCRA).

Issues that EPA's Mitigation Memorandum potentially raises

At least three issues are worth highlighting at this early stage of implementation of EPA's Mitigation Memorandum. One involves EPA's claim that it possesses the legal authority to pursue and obtain "mitigation" relief based on "courts' authority to employ all equitable remedies necessary to achieve complete justice." The agency cites a series of court decisions approving mitigation relief under provisions of several major environmental statutes (e.g., the Clean Air Act, Clean Water Act, and RCRA), including United States v. Cinergy Corp., 582 F. Supp. 2d 1055 (S.D. Ind. 2008), a Clean Air Act case that EPA cites as the most recent decision to uphold the United States' authority to obtain mitigation relief. Because, as EPA acknowledges, Congress has the capacity to strip courts of their equitable powers, a court's decision about mitigation-styled relief may raise separation of powers issues in some circumstances. For a decision in which the Supreme Court concluded Congress had limited judicial discretion, see TVA v. Hill, 98 S. Ct. 2279 (1978).

Agency implementation of the Memorandum also will raise a series of practical implementation issues. For example, issues will arise concerning the types of mitigation EPA will approve and level of nexus to the alleged violations the agency will require; the effect the pursuit of mitigation will have on the process for negotiating and litigating cases; and the effect pursuing mitigation-style relief will have on the size of the penalty required and the types of other injunctive relief sought. The partial list of post-Mitigation Memorandum settlements that include mitigation provided below gives a starting point for assessing the agency's early track record in addressing these types of questions.

A final issue that may have longer-term effects on EPA policy-making strategies involves the impact, if any, of EPA's decision to promote pursuit of mitigation relief on the agency's effort to achieve an "optimal level" of enforcement activity. "Too much" enforcement may deter socially useful activity in ways that undermine welfare-enhancing activity. On the other hand, "too little" enforcement may encourage socially-destructive activity that causes more harm than benefit (for a recent claim that we may be moving in the latter direction, see e.g., Joel A. Mintz and Victor Flatt, EPA's enforcement retreat, The Hill (Jan. 10, 2014)). To the extent that EPA's issuance of its Mitigation Memorandum signals the agency's intention to seek more (and more costly) relief in enforcement cases, this approach has implications for the ongoing debate about the effectiveness of government compliance promotion efforts in achieving the goal of optimal deterrence (see, e.g., the Congressional Research Service's June 2013 assessment of EPA enforcement, listing as an "area[ ] of continued interest" "whether penalties

are strong enough to serve as a deterrent and maintain a level economic playing field, or too harsh and thus causing undue economic hardship." Robert Esworthy, Federal Pollution Control Laws: How Are They Enforced?, Congressional Research Service Report for Congress, RL34384 (June 18, 2013)).

Examples of Post-Mitigation Memorandum EPA Mitigation Settlements (summaries are taken from the EPA website's Enforcement pages, hyperlinks provided)

Cabot Corporation: The proposed consent decree requires Cabot to spend $450,000 on environmental mitigation projects in the communities surrounding each of its facilities, with no less than $100,000 spent in each community. The projects will consist of various energy savings projects that also have criteria pollutant reduction benefits.

Holcim (US) Inc.: Holcim will spend at least $150,000 on a mitigation project which will reduce emissions of NOx, CO, VOC, and PM through replacement of an outdated loader with a newer model that complies with Tier 4 emission standards. . . . Over approximately seven years, Holcim's new loader will emit 5 tons less NOx and hydrocarbons and 0.03 tons less PM due to operating a Tier 4 engine over a Tier 2 engine.

Shell Deer Park (SDP): SDP will implement three mitigation projects valued at between $15 and $60 million. SDP will: (1) significantly modify its wastewater treatment plant to reduce emissions of VOCs; (2) control VOC emissions from certain tanks by replacing two old tanks, repairing one tank, and engaging in an innovative bi weekly infrared camera imaging program for fifteen other tanks; and (3) control emissions of hazardous air pollutants (HAPs) and VOCs at its benzene production unit through enhanced monitoring and repair practices. When fully implemented, EPA estimates that these projects will reduce VOC emissions by at least 300 tons per year.

Dominion Energy, Inc.: Dominion Energy agreed to spend approximately $9.8 million on environmental mitigation projects to resolve Clean Air Act (CAA) violations. Dominion will pay $750,000 to the National Park Service and Forest Service for projects to mitigate the harmful effects of acid deposition caused by power plants on park and forest service lands surrounding each plant. The remaining $9,000,000 project dollars will be divided among the following environmental mitigation projects, assuring that $3,625,000 is spent on projects within Massachusetts, Rhode Island, and Connecticut, while the balance of $5,375,000 will be spent on projects in Indiana and Illinois. Project include energy efficiency, weatherization and renewable energy projects; wood stove change out and retrofit programs; land acquisition and restoration; and locomotive idle reduction and other clean diesel projects.