



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

JUL 18 2008

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Supplemental Environmental Projects to Reduce Diesel Emissions

FROM: Walker B. Smith, Director *WBS*
Office of Civil Enforcement

TO: Regional Counsel
Regional Enforcement Coordinators
Regional Enforcement Division Directors
OECA Office Directors

The purpose of this memorandum is to provide guidelines in connection with the recently enacted legislation which authorizes EPA to accept diesel emissions reduction Supplemental Environmental Projects (SEPs) in enforcement settlements, notwithstanding any congressional appropriations to EPA or other federal agency for diesel projects.

Senate Bill 2146 was signed into law on June 30, 2008. It authorizes EPA to accept any type of diesel SEP, even if EPA or other federal agency has received Congressional appropriations for diesel projects.¹ The legislation provides that EPA may accept a diesel SEP provided that the project: (1) protects human health or the environment; (2) is related to the underlying alleged violations; (3) does not constitute activities that the defendant would otherwise be legally required to perform; and (4) does not provide funds for the staff of the Agency or for contractors to carry out the Agency's internal operations.

The legislation also provides that EPA must require defendants in settlement agreements that include diesel SEPs certify that they would have performed a comparably valued SEP had the Agency been precluded by law from accepting a diesel emissions reduction SEP. Accordingly, all administrative and civil judicial settlements not concluded as of the date of this memorandum that include diesel SEPs should include the following language:

“Defendant/Respondent certifies under penalty of law that it would have agreed to perform a comparably valued, alternative project other than a diesel emissions

¹ See Public Law 110-255, June 30, 2008, available from *Thomas* (Library of Congress), <http://thomas.loc.gov>. A copy of the enrolled bill is attached to this memorandum.

reduction Supplemental Environmental Project, if the Agency were precluded by law from accepting a diesel emissions reduction Supplemental Environmental Project.”

We have determined as a policy matter that, in addition to complying with the requirements in this legislation, diesel SEPs should comply with all requirements in EPA’s 1998 SEP Policy, except for the provision regarding congressional appropriations (Legal Guideline C.5.b.)²

If you have any questions regarding this memorandum, please contact Beth Cavalier (202-564-3271) or Melissa Raack (202-564-7039), the Office of Civil Enforcement’s National SEP Coordinators. We appreciate your efforts to ensure compliance with the diesel SEP legislation.

Attachment

cc: Regional and HQ SEP Coordinators
OCE Division Directors
B. Gelber, DOJ
K. Dworkin, DOJ

² Legal Guideline C.5.b. provides the following:

A project may not provide EPA or any federal agency with additional resources to perform a particular activity for which Congress has specifically appropriated funds. A project may not provide EPA with additional resources to perform a particular activity for which Congress has earmarked funds in an appropriations committee report. Further, a project cannot be used to satisfy EPA’s statutory or earmark obligation, or another federal agency’s statutory obligation, to spend funds on a particular activity. A project, however, may be related to a particular activity for which Congress has specifically appropriated or earmarked funds.

SEP Policy at p. 6 (footnote omitted).

One Hundred Tenth Congress
of the
United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on Thursday,
the third day of January, two thousand and eight*

An Act

To authorize the Administrator of the Environmental Protection Agency to accept, as part of a settlement, diesel emission reduction Supplemental Environmental Projects, and for other purposes.

*Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,*

**SECTION 1. EPA AUTHORITY TO ACCEPT DIESEL EMISSIONS REDUC-
TION SUPPLEMENTAL ENVIRONMENTAL PROJECTS.**

The Administrator of the Environmental Protection Agency (hereinafter, the "Agency") may accept (notwithstanding sections 3302 and 1301 of title 31, United States Code) diesel emissions reduction Supplemental Environmental Projects if the projects, as part of a settlement of any alleged violations of environmental law—

- (1) protect human health or the environment;
- (2) are related to the underlying alleged violations;
- (3) do not constitute activities that the defendant would otherwise be legally required to perform; and
- (4) do not provide funds for the staff of the Agency or for contractors to carry out the Agency's internal operations.

SEC. 2. SETTLEMENT AGREEMENT PROVISIONS.

In any settlement agreement regarding alleged violations of environmental law in which a defendant agrees to perform a diesel emissions reduction Supplemental Environmental Project, the Administrator of the Environmental Protection Agency shall require the defendant to include in the settlement documents a certification under penalty of law that the defendant would have agreed to perform a comparably valued, alternative project other than a diesel emissions reduction Supplemental Environmental Project if the Administrator were precluded by law from accepting a diesel emission reduction Supplemental Environmental Project. A failure by the Administrator to include this language in such a settlement agreement shall not create a cause of action against the United States under the Clean Air Act or any other law or create a basis for overturning a settlement agreement entered into by the United States.

**SEC. 3. INCLUSION OF THE DISTRICT OF COLUMBIA IN CERTAIN STATE
AND LOCAL GRANT PROGRAMS FOR DIESEL EMISSION
REDUCTIONS.**

(a) IN GENERAL.—Section 791 of the Energy Policy Act of 2005 (42 U.S.C. 16131) is amended by adding at the end thereof the following:

S. 2146—2

“(9) DEFINITION OF STATE.—The term ‘State’ includes the District of Columbia.”

(b) CONFORMING AMENDMENTS.—(1) Section 793(d)(2) of such Act (42 U.S.C. 16133(d)(2)) is amended by striking “Governor” and inserting “chief executive”.

(2) Subparagraphs (A) and (B) of section 793(c)(2) of such Act are each amended by striking “50” and inserting “51” and by striking “2 percent” and inserting “1.96 percent” in each place such terms appear.

Speaker of the House of Representatives.

*Vice President of the United States and
President of the Senate.*