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Ending the EPA's Billion-Dollar Green Energy Rip-Off

How Agency Regulators Leverage the Courts to Create their own "Power of the Purse"

By William Yeatman[*]

The U.S. Environmental Protection Agency (EPA) in recent years has established a pattern of making industrial policy through legal settlements. In effect, the agency has abused its regulatory enforcement authority to create its own *de facto* power of the purse by leveraging enforcement actions to drive spending in support of policies that have not been enacted by Congress. Guidelines to safeguard against obvious separation of powers concerns raised by the EPA's extra-statutory "mitigation" projects have been ineffective. Hopefully, Attorney General Jeff Sessions's recently announced policy against federal abuse of legal settlements will end what to date has been a $1.55 billion EPA program to fund bureaucratic priorities never approved by Congress.[1]

Congress has subsidized renewable energy and electric vehicles to some extent.[2] However, since 2005, the EPA—assisted by the Justice Department—has used settlements in 18 Clean Air Act enforcement actions to move $1.55 billion in private-sector funds to renewable energy, energy efficiency, and electric vehicle infrastructure projects without congressional authorization.[3] The EPA calls these green energy projects "mitigation," which are defined as "injunctive relief sought by the government to remedy, reduce or offset past—and in some cases ongoing—harm caused by the alleged violations in a particular case."[4]

The EPA's promotion of green energy projects through "mitigation" is inappropriate policy making by an administrative agency. A data set of green energy mitigation projects shows that the agency has diverted $1.55 billion toward its own priorities, funds that would otherwise have remained in private hands or gone to the Treasury as penalties subject to congressional appropriation. A new Justice Department policy barring settlement payments to third parties may prevent the EPA from pursuing such settlements. However, lawmakers should ensure that freelance policymaking through "mitigation" has ended once and for all.

EPA's Negotiation of Green Energy Projects into Settlements. The EPA Office of Enforcement and Compliance Assurance (OECA) enforces the nation's environmental laws.[5] Over the last decade, OECA's enforcement activities have sought to implement industrial policy through the inclusion of so-called "mitigation" actions in settlements negotiated with alleged violators of environmental statutes. In a 2012 guidance document, OECA described the agency's pursuit of mitigation actions as being a function of injunctive relief:

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> In settlement of certain civil environmental enforcement cases, consent decrees negotiated by EPA and Department of Justice typically include injunctive relief obligations to ensure that defendants' future operations are in compliance with the law. … However, at least one other form of injunctive relief is available to the government under appropriate circumstances: relief requiring a defendant to remedy, reduce, or offset harm caused by past or ongoing violations. This relief is often referred to as "mitigation" or "mitigation actions."[6]

Mitigation actions can take the form of physical improvements or operational changes at the facility liable for pollution.[7] However, the EPA also negotiates mitigation actions that go "beyond the fence-line" of the defendant's manufacturing facility. Since 2005, the EPA and the Justice Department have reached 18 judicial settlements pursuant to Clean Air Act enforcement actions, including:

- $74.4 million spent on renewable energy projects;
- $257 million spent on energy efficiency projects; and,
- $1.2 billion spent on electric vehicle infrastructure.

All but two settlements allocating a combined total of $7 million were negotiated during the Obama administration.

Congress has never delegated authority or appropriated money for the EPA to fund and oversee projects for renewable electricity generation, energy efficiency, and electric vehicles. Instead of congressional intent, OECA roots the legal foundation for mitigation in the power of the judiciary:

> Mitigation derives from courts' authority to employ all equitable remedies necessary to achieve complete justice. This fundamental principle derives from the English common law tradition and is a long-standing element of American legal doctrine. Where the public interest is involved, a court's equitable authority is curtailed only by a clear signal from Congress.[8]

As a statutory basis for mitigation actions, OECA cites provisions of environmental laws that recognize the courts' equitable powers as a means of providing remedy for violations.[9] On the basis of these theories, OECA reasons that "EPA's ability to obtain mitigation in settlement is based on the likelihood that, in litigation, the United States could establish mitigation was needed to redress past or ongoing harm to the environment and public health."[10]

The EPA proposes mitigation projects under threat of civil penalties for the regulated entity.[11] OECA guidance states: "A defendant's willingness, especially if demonstrated early in negotiations, to perform certain mitigation actions as part of a settlement might provide a rational for some reduction in the gravity-based penalty."[12]

While the agency stresses that civil penalty reductions are not guaranteed when a defendant agrees to undertake a mitigation project,[13] an industry counsel who has been on the other side of the negotiating table confirms that regulated entities are motivated by the prospect that every dollar spent on a mitigation project results in more than a dollar's decrease in civil penalties.[14]

EPA Safeguards Do Not Protect Against Constitutional Aggrandizement by the Executive Branch. OECA's use of judicial settlements to advance green energy projects raises the troubling prospect that the EPA is performing an end-run around congressional appropriations. While the EPA has established a number of safeguards to ensure against impermissible usurpation of Congress' appropriations power, these safeguards have failed to effectively limit OECA's discretion. It has created a "power of the purse" independent of Congress.

Purported Safeguard 1: Sufficient Nexus. The first safeguard is a requirement that all mitigation projects have a "nexus" with the underlying statutory violation that led to the settlement.[15] Without such a nexus, the agency would have no basis to ask the courts for injunctive relief in the form of mitigation.[16]

However, the EPA defines this nexus requirement too broadly to provide an effective check on its own enforcement authority. According to the EPA, a nexus is established when a proposed project "is designed to reduce ... [t]he overall risk to public health and/or the environment potentially affected by the violation at issue."[17] As a practical matter, that means that nexus exists in any project that might mitigate *some* type of pollution.

Consider, for example, the supposed nexus in a settlement reached by the federal government to resolve a Clean Air Act enforcement action brought against the Tennessee Valley Authority (TVA) in 2011.[18] The TVA allegedly failed to install pollution control upgrades for sulfur dioxide, nitrogen oxides, and fine particulate matter. Under the terms of the settlement, the utility was required to invest $1 million to $3 million in electric vehicle infrastructure in order to reduce greenhouse gases.[19] Other than the categorical similarity of dealing with air quality, there is no obvious nexus between a violation at a power plant for conventional pollutants and automotive technologies whose primary purpose is to reduce greenhouse gases.

Purported Safeguard 2: Agency Cannot "Control" the Project. The second safeguard is the OECA's self-imposed prohibition on "managing" or "controlling" mitigation projects.[20] However, the agency affords itself considerable latitude to "oversee" these projects.[21] The extensiveness of EPA oversight suggests that this effort at agency self-policing is a dead letter.

Consider the electric vehicle mitigation project included in the EPA's partial settlement with Volkswagen (VW) over the company's installation of defeat devices to cheat air quality testing in more than 500,000 vehicles sold in the U.S.[22] The EPA's oversight of the mitigation project was pervasive.

The settlement required VW to spend $1.2 billion on promoting the use of electric vehicles.[23] The company had 30 days to submit for EPA approval guidance for "creditable costs," which itself had to be formulated with EPA input prior to proposal.[24] Within 120 days of the settlement, VW had to submit a draft investment plan.[25] The settlement also required the company to meet with the EPA "as soon as practicable" after submission of the draft plan to discuss the agency's input. Within 30 days of that meeting, VW had to submit to the EPA a final investment plan for its approval.[26]

VW is also required to submit annual investment proposals to the EPA, subject to the agency's approval.[27] Moreover, the EPA is empowered to fine the company up to $10,000 a day for noncompliance with an agency-approved plan. [28]

Even were the EPA to have no role in overseeing mitigation actions that involve spending on green energy projects, such a safeguard does not squarely address the underlying problem—that the agency can use regulatory enforcement to fund its preferred energy policies, independent of a congressional delegation or appropriation.

Purported Safeguard 3: Anti-Augmentation. The third safeguard prohibits mitigation projects from "involv[ing] actions that are already the responsibility of a federal agency to perform," in order to "avoid any augmentation of government resources."[29] Specifically, EPA guidance prohibit projects that:

1. Satisfy statutory obligations of EPA or other federal agencies;
2. Provide additional resources to support specific activities performed by EPA or another federal agency;
3. Provide additional support for a project performed by another federal agency;
4. Further any activity for which the EPA receives a specific appropriation; or
5. Provide a recipient in a "particular federal financial assistance transaction" with additional funding for the same project.[30]

The first three limitations preclude agencies from using settlements to fund themselves directly. The fourth limitation applies narrowly to the EPA's present grant-making activity. Any project not directly benefitting from an EPA grant is unbound by this prohibition. The fifth safeguard bars OECA from negotiating a settlement that would provide a recipient in a particular federal financial assistance transaction with another federal agency with additional resources for the same activity described in the terms of the transaction. This safeguard is attenuated by the agency's narrow definition of "federal financial assistance transaction," which includes "grants, cooperative agreements, federal loans, and federally guaranteed loans," but excludes the primary mechanism used by the federal government to encourage green energy—tax subsidies.[31]

How effective are the EPA's constitutional safeguards? Taken as a whole, OECA safeguards permit any mitigation project that is not within the scope of a current EPA grant program and does not provide the direct transactional beneficiary with federal "grants, cooperative agreements, federal loans, and federally guaranteed loans."[32] Within these broad boundaries, OECA is free to negotiate any privately funded project that 1) might reduce

pollution in the future and that 2) has a nexus with the underlying violation. After the project is negotiated and approved by the EPA, the agency may exercise constant and authoritative oversight of the mitigation project, despite a prohibition on direct agency control.

Presidential politics seems to have played an undue role in the mitigation actions identified in this report. President Barack Obama campaigned on a promise to create "green jobs" in environmentally friendly industries.[33] Apparently to that end, OECA used the government's prosecutorial authority pursuant to the Clean Air Act to allocate more than $1.5 billion in extra-congressional expenditures on green energy during the Obama administration.

It is fair to ask: Did the EPA's safeguards still allow a president's administration to unilaterally fund a campaign promise? The EPA's mitigation actions give the executive branch a means and incentive to create its own *de facto* power of the purse. There is no end to the potential constitutional mischief if a presidential administration, Republican or Democrat, can pour resources into regulatory enforcement and then pursue settlements that spend money in accordance with the president's policy priorities.

Does the New Justice Department Policy Foreclose "Mitigation" Spending or Just Narrow the Window? In early June 2017, Attorney General Jeff Sessions issued a memorandum prohibiting settlement payments to third parties, which may foreclose the freelance policy making EPA has recently conducted via mitigation settlements. The EPA's creative lawyering, however, may allow the agency to continue using settlements to achieve goals that the agency holds unguided by the priorities Congress has put into law.

Sessions's memo terminates the practice of "includ[ing] payments to various non-governmental, third-party organizations as a condition of settlement with the United States."[34] Effective immediately, it states:

> Department attorneys may not enter into any agreement on behalf of the United States in settlement of federal claims or charges ... that directs or provides for a payment or loan to any non-governmental person or entity that is not a party to the dispute.[35]

This would seem to end settlements with creative "mitigations" that direct funds to projects achieve aims outside of the law. However, the policy has an exception that the EPA could exploit to continue the practice of diverting funds from the Treasury to favored projects. The memo specifically states that the policy does not apply to payments "that provide[] restitution to a victim or that otherwise directly remedies the harm that is sought to be redressed," and it specifically cites harm to the environment. This exception could be a loophole through which the EPA allows funding for *any* environmental project to act as mitigation for an alleged violation of environmental laws, as it did in its pollutant/greenhouse gas settlement with the TVA.

Rather than leave this potential loophole open, the EPA administrator and the attorney general should make clear, if mitigation settlements are allowed at all, that the agency may not use settlements to pursue aims that are beyond the scope of the law allegedly violated.

The courts should scrutinize such settlements more carefully. Given the EPA's theory that its power to seek wide-ranging mitigations arises from courts' injunctive powers, courts should assess mitigation settlements as quasi-injunctions, not voluntary settlements.

Finally, settlements should meet a high bar. The Supreme Court has declared that injunctive relief "is a drastic and extraordinary remedy, which should not be granted as a matter of course."[36] Federal judges should give greater thought to what is being asked of them when the government seeks a settlement that includes a mitigation action that goes "beyond the fence-line" of the defendant and into the realm of industrial policymaking.

Ultimately, Congress must more carefully circumscribe the EPA's enforcement authority. In addition, lawmakers should review the environmental statutes—which have not changed in decades—to determine whether they meet the needs of our modern economy and society. Congress must ensure that agencies like the EPA can only act to carry out the terms of legislation. No agency should have the leeway to set policy. Doing so is the sole prerogative of the legislative branch acting in concert with the president.

Conclusion. In recent years, the EPA has sought to implement policy, claiming that courts' equity powers somehow allow the executive branch to fund its political priorities unilaterally. It has done so by negotiating broad settlements with alleged violators of environmental statutes that require them to pay for the EPA's—not Congress'—priorities. Since 2005, the agency has reached eighteen judicial settlements pursuant to Clean Air Act enforcement actions, resulting in $1.55 billion of private sector spending on renewable energy, energy efficiency, and electric vehicles. The EPA and the attorney general should make clear that these settlements are no longer permitted. If they persist, courts should give greater scrutiny to these mitigation actions. In addition, Congress should revise the nation's environmental laws so the EPA can only carry out clear instructions assigned to it by the legislative branch.

Notes

[1] Office of the Attorney General, "Memorandum for all Component Heads and United States Attorneys," June 7, 2017, https://www.justice.gov/opa/press-release/file/971826/download.
[2] Lynn J. Cunningham and Beth Cook, Congressional Research Service, "Renewable Energy and Energy Efficiency Programs: A Summary of Federal Programs," 7-5700, R40913, July 29, 2015, http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R40913.pdf.
[3] See Appendix for a list of the projects.
[4] U.S. Environmental Protection Agency, "Securing Mitigation as Injunctive Relief in Certain Civil Enforcement Settlements (2nd edition)," Memorandum, November 14, 2012, p. 2, https://www.epa.gov/enforcement/securing-mitigation-injunctive-relief-certain-civil-enforcement-settlements-2nd-editionat.
[5] EPA, About the Office of Enforcement and Compliance Assurance, accessed March 7, 2017, https://www.epa.gov/aboutepa/about-office-enforcement-and-compliance-assurance-oeca. Memorandum of Understanding between Department of Justice and Environmental Protection Agency, 42 Fed. Reg. 48942-04 (September 26, 1977) (establishing the respective duties of Justice and the EPA in environmental enforcement).
[6] EPA, "Securing Mitigation," p. 2.

[7] *United States v. Continental Carbon Co.,* Consent Decree, No. 5:15-cv-00290-F (W.D. Okla. Mar. 23, 2015) (Clean Air Act civil settlement requiring defendant to spend $550,000 to significantly reduce air pollution from three carbon black manufacturing plants in Oklahoma, Alabama, and Texas that were the subject of the violations).
[8] EPA, Securing Mitigation, p. 5.
[9] Ibid. ("The language in various statutes that EPA enforces supports the argument that Congress did not intend to strip the courts of this equitable power …")
[10] EPA, "Securing Mitigation, p. 3.
[11] Ibid.
[12] Ibid.
[13] Ibid.
[14] Conversation with anonymous industry counsel, November 15, 2016.
[15] OECA guidance for mitigation projects defines the "nexus" concept in reference to EPA guidance for Supplemental Environmental Projects (SEPs). SEPs are voluntary projects that are negotiated into judicial settlements. Mitigation projects, by contrast, are considered compulsory by the EPA because the agency "likely" would have won mitigation projects as injunctive relief had the case gone to trial. There are three distinctions between SEPs and mitigation projects: 1) SEPs are based on the party's consent, while mitigation projects are based on the court's power to order injunctive relief; 2) SEPs entitle the defendant to civil penalty reductions, while mitigation projects do not do so in theory, even if they do so in practice; and 3) the nexus for mitigation projects must be more direct than that for SEPs. EPA, "Securing Mitigation," p. 4. EPA, "2015 Update to the 1998 U.S. Environmental Protection Agency Supplemental Environmental Projects Policy," Memorandum, March 1, 2015, pp. 6-7 (explaining the difference between mitigation action and supplemental environmental projects), https://www.epa.gov/enforcement/2015-update-1998-us-epa-supplemental-environmental-projects-policy.
[16] EPA, "2015 Update," p. 7, footnote 8 ("prosecutorial discretion to settlement enforcement actions does not extend to the inclusion of [projects] that do not have a nexus to the violations being resolved").
[17] Ibid, p. 8.
[18] *In the Matter of: Tennessee Valley Authority 400 W. Summit Hill Drive Knoxville, Tennessee 37092 Allen, Bull Run, Colbert, Cumberland, John Sevier, Kingston, Paradise, & Shawnee Fossil Plants, Respondent*, CAA-04-2010-1528(B), 2011 WL 2583045 (EPA June 15, 2011).
[19] EPA, Tennessee Valley Authority Settlement, press kit, April 14, 2011, (noting "$40 million to reduce greenhouse gases and other pollutants through the Clean/Renewable Energy Projects," which included, *inter alia*, the $1 million to $3 million investment in electric vehicle charging stations), https://www.epa.gov/enforcement/tennessee-valley-authority-clean-air-act-settlement#mitigation.
[20] EPA, "Securing Mitigation."
[21] EPA, "2015 Update," pp. 8-9 ("The EPA may not play any role in managing or controlling funds …The EPA may, of course, perform oversight to ensure that the project is implemented pursuant to the provisions of the settlement and have legal recourse if the SEP is not adequately performed.").
[22] *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Product Liability Litigation*, No. 2672 CRB (JSC), 2016 WL 6442227 (N.D. Cal. October 25, 2016).
[23] Ibid., Appendix C.
[24] Ibid., p. 80 ¶ 2.2.
[25] Ibid. ¶ 2.4.
[26] Ibid., p. 81 ¶ 2.5.
[27] Ibid., p. 84 ¶ 2.9.
[28] Ibid., p. at ¶ 2.12.1.
[29] EPA, "Securing Mitigation." It is unclear what the EPA means by the phrase "actions that are already the responsibility of a federal agency to perform." The agency did not provide a citation to elaborate on this prohibition. As with the "nexus" concept, it is instructive to look for clarification to the EPA's guidance for voluntary supplemental environmental projects, which elaborate on whether other agency might "augment" their budgets by negotiating voluntary projects into enforcement settlements.
[30] EPA, "2015 Update."
[31] Ibid., pp. 9-10.
[32] Ibid.

[33] Ira Boudway, "The Five Million Green Jobs that Weren't," Bloomberg, October 12, 2012, http://www.bloomberg.com/news/articles/2012-10-11/the-5-million-green-jobs-that-werent.
[34] Office of the Attorney General, "Memorandum for all Component Heads and United States Attorneys."
[35] Ibid.

Appendix
EPA Green Energy Policymaking Settlements during the Presidential Administrations of George W. Bush and Barack Obama

- **Defendant**: Minnkota Power; **Project**: $5 million on a wind energy project; **Date settlement reached**: April 24, 2006, https://www.epa.gov/enforcement/consent-decree-minnkota-power-cooperative-inc-and-square-butte-electric-cooperative

- **Defendant**: Salt River Project; **Project**: $2 million to install solar photovoltaic technology on public building; **Date settlement reached**: August 12, 2008, https://www.epa.gov/enforcement/consent-decree-salt-river-project-agricultural-improvement-and-power-district-civil

- **Defendant**: Westar; **Project**: $1 million to 6 million on "third party wind generation:" **Date settlement reached**: January 25, 2010, https://www.epa.gov/enforcement/westar-energy-inc-settlement

- **Defendant**: American Municipal Power; **Project**: $15 million on a "large scale energy efficiency project;" **Date settlement reached**: May 18, 2010, https://www.epa.gov/enforcement/american-municipal-power-clean-air-act-settlement

- **Defendant**: Hoosier Energy Rural Electric Cooperative; **Project**: Up to $2.6 million on photovoltaic solar panel project; **Date settlement reached**: July 23, 2010, https://www.epa.gov/enforcement/hoosier-energy-rural-electric-cooperative-inc-settlement

- **Defendant**: Northern Indiana Public Service Company; **Project**: up to $2 million on an "Electric Infrastructure Project" to "fund creation of one or more charging stations for electric vehicles;" **Date settlement reached**: January 13, 2011, https://www.epa.gov/enforcement/northern-indiana-public-service-company-clean-air-act-settlement

- **Defendant**: Tennessee Valley Authority; **Project**: $240 million on "Energy Efficiency Projects that are designed to increase efficiency in transmission and demand-side supply"; $37 million to 39 million on "Clean/Renewable Energy Projects"; and $1 million to $11 million on electric vehicles and charging stations; **Date settlement reached**: April 14, 2011, https://www.epa.gov/enforcement/tennessee-valley-authority-clean-air-act-settlement

- **Defendant**: Dairyland Power Cooperative; **Project**: $2 million on "major photovoltaic development project" and up to $2.5 million on "installation of solar photovoltaic panels;" **Date settlement reached**: June 29, 2012, https://www.epa.gov/enforcement/tennessee-valley-authority-clean-air-act-

settlement

- **Defendant**: Louisiana Generating; **Project**: up to $5 million to install solar panels at local schools, government-owned facilities, or buildings owned by non-profit groups;" up to $4 million to fund electric vehicle charging stations; up to $500,000 on energy efficiency projects; **Date settlement reached**: November 21, 2012, https://www.epa.gov/enforcement/louisiana-generating-settlement

- **Defendant**: Kentucky Utilities; **Project**: $500,000 on a geothermal energy unit at a school; **Date settlement reached**: January 2, 2013, https://yosemite.epa.gov/opa/admpress.nsf/0/8E1970012B47F45085257AE7006D1B97

- **Defendant**: Wisconsin Public Service Corporation; **Project**: up to $4 million on a "Renewable Energy Resource Enhancement Project" designed to "increase power production potential of existing wind farms"; up to $2 million to install solar photovoltaic panels on publically-owned buildings; **Date settlement reached**: January 4, 2013, https://www.epa.gov/enforcement/wisconsin-public-service-corporation-settlement

- **Defendant**: Wisconsin Power and Light; **Project**: up to $5 million on a "long term major solar photovoltaic power purchase agreement with a third-party project developer"; $200,000 for an energy efficiency project; **Date settlement reached**: April 22, 2013, https://www.epa.gov/enforcement/wisconsin-power-and-light-et-al-settlement

- **Defendant**: Minnesota Power; **Project**: $2 million "to build a large-scale solar photovoltaic panel array"; up to $1.5 million "to fund installation of conventional flat panel or thin film solar photovoltaics" on public buildings; up to $500,000 on an "electric vehicle infrastructure enhancement project"; **Date settlement reached**: July 16, 2014, https://www.epa.gov/enforcement/minnesota-power-settlement

- **Defendant**: Consumers Energy; **Project**: up to $3 million funding electric vehicle charging stations; up to $4 million for a wind energy or solar photovoltaic project; up to $500,000 for an energy efficiency project; **Date settlement reached**: September 26, 2014, https://www.epa.gov/enforcement/consumers-energy-clean-air-act-settlement

- **Defendant**: Four Corners Power Plant; **Project**: up to $1.5 million on energy efficiency (weatherization) project; **Date settlement reached**: June 24, 2015, https://www.epa.gov/enforcement/four-corners-power-plant-clean-air-act-

settlement

- **Defendant**: Interstate Power and Light Company; **Project**: up to $3 million "to execute a long-term purchasing power agreement with one or more third-party developers who will then develop new solar photovoltaic installations"; **Date settlement reached**: July 15, 2015, https://www.epa.gov/enforcement/interstate-power-and-light-company-clean-air-act-settlement

- **Defendant**: Duke Energy Corporation; **Project**: up to $3.505 million on installation of electric vehicle charging infrastructure; up to $600,000 on "purchase and installation of clean air energy generation resources and/or environmentally beneficial energy efficiency measures;" **Date settlement reached**: September 10, 2015, https://www.epa.gov/enforcement/duke-energy-corporation-clean-air-act-caa-settlement

- **Defendant**: Volkswagen; **Project**: $1.2 billion on electric vehicle infrastructure; **Date settlement reached**: June 28, 2016, https://www.epa.gov/enforcement/volkswagen-clean-air-act-partial-settlement

The author reviewed all Clean Air Act settlements reached by the Justice Department, the EPA, and the alleged polluter since January 20, 2001, when President George W. Bush took office, until November 2016. The settlements are available at https://cfpub.epa.gov/enforcement/cases/index.cfm?templatePage=12&ID=1&sortby=&stat=Clean%20Air%20Act