Exhibit A

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

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

April 26, 2021

MEMORANDUM

SUBJECT: Using All Appropriate Injunctive Relief Tools in Civil Enforcement Settlements

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TO: Regional Counsels and Deputies
Enforcement and Compliance Assurance Division Directors and Deputies
OECA Office Directors and Deputies

Enforcement is essential to ensuring that everyone is protected by our nation's environmental laws and regulations. Through enforcement of these laws and regulations, we strive not only to return facilities to compliance but also to tailor the relief to address the underlying causes of the violations to prevent reoccurrence and, in appropriate cases, mitigate the harm to the communities impacted by noncompliance. This memorandum charges enforcement staff and case teams to appropriately use the full array of policy and legal tools available to ensure that our country's environmental laws – and the policies to implement them – deliver benefits to all individuals and communities.[1]

A 2018 memorandum on this topic (*The Appropriate Use of Compliance Tools in Civil Enforcement Settlements*, Apr. 3, 2018) largely restricted the scope of injunctive relief to compliance with applicable statutes or regulations, and rescinded a prior policy statement on this topic (*Use of Next Generation Compliance Tools in Civil Enforcement Settlements*, Jan. 27, 2015). The 2018 memorandum is hereby withdrawn. Today's memorandum supersedes and replaces both the 2018 and 2015 documents but draws on many of the underlying principles from the 2015 memorandum.

In determining the most appropriate resolution for a particular matter, case teams should first consider which compliance tools will be most effective in ensuring a facility promptly returns to, and remains in, compliance. The extent to which these tools are appropriate and how they are included in a settlement will depend on the particular facts and circumstances of each case.

[1] This memorandum applies to civil regulatory enforcement cases and should be read and implemented in conjunction with other OECA civil settlements guidance. (Guidance documents that are publicly available can be accessed at https://www.epa.gov/enforcement/enforcement-policy-guidance-publications.) Separate guidance on injunctive relief tools related to cleanup settlements under CERCLA or RCRA is being developed by OECA's Office of Site Remediation Enforcement.

These tools include:

- **Advanced Monitoring**: Advanced monitoring includes a broad range of sampling and analytic equipment, systems, techniques, practices, and technologies for better detecting and measuring pollution. This may include both point source emission/discharge monitoring and ambient monitoring (e.g., fence-line monitoring of air pollution at the border of a facility).

- **Audits and Independent third-party verification**: Facility-wide or corporate-wide compliance audits can be included in a settlement to achieve compliance beyond the focus of a specific enforcement action. Independent third-party verification can be included in a settlement as a resource-efficient way for the government, the settling party, and the public to obtain information about a facility's compliance with settlement obligations. To ensure integrity, OECA should periodically assess the methods and practices of the third parties.

- **Electronic reporting**: Electronic reporting can be included in a settlement to require the settling party to submit required data and reports electronically in a searchable format. This kind of reporting can result in more accurate and timely information and save time and resources compared to traditional paper-based submissions.

- **Increased Transparency of Compliance Data**: Greater public access to compliance data can promote a community's ability to better understand and manage risks and to monitor compliance at local facilities. Settlement provisions can include requirements to provide the public with monitoring data (e.g., through facility websites or other means) or information on progress toward achieving settlement milestones.

More detailed discussion of these compliance tools is provided in an attachment to this memorandum. Note that some of these tools are particularly effective when used in tandem (e.g., fence-line monitoring and transparency). Use of these tools can help EPA conserve oversight resources by having settlement compliance information provided in a more readily available format and available to outside parties (such as the public) who can assist in monitoring compliance. Some tools can also benefit the settling party; for example, a more transparent demonstration of compliance with settlement obligations may help the settling party's relationship with its neighboring community.

In addition, case teams should consider settlement provisions that address past harm to communities caused by the noncompliance or otherwise benefit communities impacted by noncompliance. These provisions may include:

- **Mitigation**: Mitigation is 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. Mitigation is not focused on preventing future violations and does not require proof that a defendant is currently violating the law. Rather, mitigation is intended to redress harm from ongoing and past violations.[2]

- **Supplemental Environmental Projects**: Although not injunctive relief, a Supplemental Environmental Project can be included in a settlement if a settling party voluntarily agrees to undertake it as part of the settlement of an enforcement action. SEPs are environmentally

[2] *See Securing Mitigation as Injunctive Relief in Certain Civil Enforcement Settlements* (Nov. 14, 2012).

beneficial projects or activities that go beyond what could legally be required in order for the settling party to return to compliance and secure environmental and/or public health benefits in addition to those achieved by compliance with applicable laws.[3]

- **Stipulated Remedies**: A stipulated remedy is a settlement term that requires the implementation of a specified project in the event of any future violation of the settlement agreement and may be a useful tool to advance environmental protection in circumstances where settlement agreements have been violated.[4]

In conclusion, case teams take into account a host of case-specific facts and factors in arriving at settlements that achieve environmental compliance and should include, as appropriate, settlement terms that can address past harm and assist impacted communities.

NOTE: This memorandum is intended for use by EPA personnel and does not create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. This memorandum is not intended to supersede any statutory or regulatory requirements or agency policy. Any inconsistencies between this memorandum and any statute, regulation, or policy should be resolved in favor of the statutory or regulatory requirement, or policy document, at issue.

Attachment

[3] *See* https://www.epa.gov/enforcement/supplemental-environmental-projects-seps for more information on Supplemental Environmental Projects. The inclusion of SEPs in judicial settlements is currently severely limited by a regulation promulgated by the Department of Justice (28 C.F.R. § 50.28(c)(1)), as well as other DOJ policies. Those are now under review at DOJ, and until further guidance is provided, inclusion of SEPs and stipulated remedies in civil judicial settlements should be limited to those that involve diesel emission reductions. EPA is coordinating closely with DOJ on the subject of SEPs.

[4] Stipulated remedies may also be limited by current DOJ policies. EPA is coordinating closely with DOJ to address any such limitations. *See* n. 3.

Attachment – Discussion of Potential Compliance Tools

The following text is excerpted from a memorandum issued by then OECA Assistant Administrator Cynthia Giles, *Use of Next Generation Compliance Tools in Civil Enforcement Settlements*, (Jan. 27, 2015).

A. *Advanced monitoring.*

Advanced monitoring refers to a broad range of sampling and analytic equipment, systems, techniques, practices and technologies for better detecting and measuring pollution. Advanced monitoring technology is generally defined by one or more of these factors:

1. Not yet in widespread use in a particular sector or particular regulatory program.
2. Monitors pollutants on a real-time or near real-time basis, often without lengthy lag times for laboratory analysis.
3. Less expensive, easier to use, or more mobile compared to technologies currently in widespread use.
4. Provides acceptable data quality that is more complete or easier to interpret and can meet a specific need.
5. Is an existing technology but used in a new way to provide better information on pollutants, pollution sources, or environmental conditions.

Advanced monitoring includes 1) monitors that can measure emissions or discharges from a particular source and 2) those that monitor pollutants in the ambient environment (such as air, water, soil, products, or building). Advanced monitoring often provides more complete and timely data without lengthy laboratory analysis compared to traditional monitoring. It can also be used to provide communities and individuals with real-time information about pollution that impacts them. Enforcement settlements that include advanced monitoring, and in particular those that require collection of real-time data, may enable a settling party and the EPA to more efficiently and effectively prevent and/or remedy violations or even better identify and remedy pollution problems before they become violations. A facility collecting real-time environmental data may be able to quickly remedy emissions or discharges over an allowed limit or identify problematic spikes in pollution that might not be as apparent with averaged samples. Advanced monitoring is likely to be most effective when the information is immediately available to the facility operators so they can quickly investigate and respond to elevated pollution levels. Further, advanced monitoring becomes a more powerful compliance driver when the information is also provided to the EPA, states, and/or the public. Facilities are more likely to take extra caution to self-police and ensure their operations are addressing pollution problems when the information is transparent.

Including advanced monitoring in settlements provides an opportunity to test new monitoring technologies and may help identify more-effective or less-expensive methods that may later become standard industry practices and included in subsequent regulations. Some of these monitoring tools are already in existence,[1] while others are newly emerging. The agency is keeping abreast of these new technologies and actively identifying ways to incorporate them into our enforcement settlements. Many

[1] Examples of existing advanced monitoring technologies include infrared video cameras to "see" emissions, mobile monitors such as geospatial measurements of air pollution (GMAP), fence-line monitors such as the ultraviolet differential absorption spectroscopy measurement (UVDOAS), continuous emissions monitoring (CEM), solar occultation flux, and differential absorption light detection and ranging methodology (DIAL), among others.

advanced monitoring technologies have been developed to measure air emissions, and similar advances are being made to measure water pollution. These and newly emerging technologies can be more powerful when they are connected to communications technologies such as email, smart phones, or the internet that notify a facility official, a regulatory agency, and/or the community of pertinent pollutant information. Several recent agency settlements require the use of advanced monitoring with such information being made available to the public.

Advanced-ambient monitoring, such as fence-line monitoring, has the potential to provide valuable information to impacted communities that are located near a facility. These technologies can allow for the collection of ambient air or water data, upstream and downstream of a facility. To be most useful, ambient monitoring should be coupled with tools that make the information transparent, as described below. For example, if elevated air emissions from a refinery or smelter are of concern to a nearby community, a settlement may include monitors at the facility fence line or in the surrounding community. Similarly, a settlement may require water quality monitoring to be conducted upstream and downstream of a discharger, allowing information to be shared with the public about the condition of a particular water body on a near real-time basis.

Enforcement settlements may also require point source advanced water monitoring that is coupled with informational tools where the data can be shared with the potentially impacted community. Such water pollution information may be communicated to the public, e.g., by automated signal lights on the water body to warn users when a combined sewer overflow is happening or by email, text or other electronic notices to the public of such events. Data derived from both advanced-ambient and point-source monitoring can be used to inform future permitting decisions and other regulatory actions. The availability of reliable advanced-ambient and point-source environmental data can also result in more constructive conversations between a facility and its neighbors.

B. *Independent third-party verification of a settling party's compliance with a settlement.*

Independent third-party verification can be included in a settlement as a resource-efficient way for the government, the settling party, and the public to obtain information about a facility's compliance with settlement obligations. For example, settlement agreements have used independent third-party verification for the following functions:

- To certify as to the proper installation of pollution control equipment;
- To ensure the appropriate design of a landfill cap;
- To oversee the closure of a concentrated animal feeding operations lagoon; and
- To oversee compliance with various settlement requirements.

This type of tool is particularly valuable where settlements are complex and require long-term injunctive relief, especially in light of limited agency resources. The key requirement for establishing third party verification is ensuring that the verifier is independent and qualified. There is a growing literature on how to establish effective independent third party verification programs.[2] Third party verifiers should be required to provide their findings and reports to the EPA at the same time as they provide them to the settling party, and the agency will then exercise its discretion to determine whether the defendant is in compliance with the settlement obligations. In general, if the third party is allowed to provide the

[2] Lesley K. McAllister, Regulation by Third-Party Verification, 53 B.C. L. REV. 1, 22-23 (2012). See also Esther Duflo, Michael Greenstone, Rohini Pande & Nicholas Ryan, Truth-Telling By Third-Party Auditors And The Response of Polluting Firms: Experimental Evidence From India, 128 Q. J. OF ECON. 4 at 1499-1545 (2013).

settling party or its counsel with drafts of the reports prior to submission to the EPA, these third parties should be characterized as consultants to the settling party and not as independent third party verifiers.

C. *Electronic reporting.*

Electronic reporting does not refer simply to emailing files to the government; rather, at a minimum it describes a system whereby a settling party electronically submits required reports and data in a searchable format. Electronic reporting generally requires that the EPA have systems in place to facilitate data submission from the settling party and tools for the agency to receive and analyze this information.[3] For example, a settling party can electronically submit progress reports to the EPA with data showing how the settlement requirements are being implemented in a way that can be sorted or searched by the agency. When electronic reporting is combined with transparency, the submitted information can also be easily uploaded to an EPA database or website or provided directly on the settling party's website. Electronic reporting can ultimately: 1) provide more accurate, complete and timely information on pollution sources, pollution, and compliance; 2) save time and resources in overseeing compliance with settlement requirements; and 3) reduce paper transaction costs for the settling party associated with creating, mailing, and entering compliance information, as well as error correction.

D. *Public accountability through increased transparency of compliance data.*

Public accountability drives better compliance. Transparency as a settlement tool refers to providing meaningful information to the EPA and the public about a facility's compliance with specific settlement obligations and other environmental requirements. Settlement information coupled with information about a facility's compliance (or noncompliance) with specific settlement compliance milestones, including monitoring data, can provide valuable information to support the agency's compliance monitoring responsibilities. It also allows the public, impacted community members, neighboring facilities, and other agencies to play a role in assessing compliance. Ways to increase transparency include providing readily accessible, relevant, and understandable information on the settling party's website, via a mailer, or through the Enforcement and Compliance History Online database or other publicly available EPA websites. As noted above, combining transparency tools with other tools, such as advanced monitoring, can tie data to geographic information which can provide insights to ambient environmental conditions and significant pollutant loadings.

[3] Electronic reporting usually begins with a smart form or web tool that guides regulated entities through the reporting process.