



# **EPA's Mitigation Policy in Civil Enforcement: A Sleeping Giant?**

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# Traditional Civil Enforcement Tools

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## ➤ Penalties

- Economic benefit component
  - “Level the playing field.”
- Gravity component

## ➤ Injunctive Relief

- Correct violations
- May require capital projects

# Supplemental Environmental Projects (SEPs)

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- Characteristics of SEPs
  - Environmentally beneficial project
  - Settlement of an enforcement action
  - Not otherwise legally required
  
- Advantage of SEP – Penalty Reduction Based on Cost of SEP

# New Concept – Mitigation

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- EPA Mitigation Policy – Current Version Issued November 14, 2012
  
- What is Mitigation
  - Injunctive relief to remedy, reduce or offset past harm
  
- How is Mitigation Different from SEP
  - Could be ordered as injunctive relief by a court
  - Closer nexus to the violation
  - No penalty reduction

# What is Legal Basis

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- Inherent equitable power of courts
  
- Broad statutory language, court may “award any other appropriate relief”
  
- Cases – Clean Air Act
  - United States v. Cinergy Corp  
582 F. Supp 2d 1055 (S.D. Ind. 2008)

# Issues with Mitigation

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- Double Counting
  - Economic benefit and mitigation
  
- Proportionality
  - Mitigation cost compared to alleged environmental harm

# Mitigation Cases

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## List of EPA Settlement that Include Mitigation

### Regional Cases

1	Interprint	01/31/2011
1	Polar	06/06/2011
1	Polyfoam	09/15/2011
1	G&K	07/06/2011
3	Jeld-Wen	04/12/2011
3	Honeywell	03/28/2013
4	KU Ghent	01/02/2013
5	White Pine Electric Power, LLC	08/19/2014
5	City of Akron	
5	SABIC Innovative Plastics	05/31/2012
8	Samson	05/01/2014
8	Elm Ridge	10/01/2012
10	Icicle Seafood	09/20/2007
10	American Seafoods	06/14/2012
10	GVEA	10/02/2012

# Mitigation Cases

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## List of EPA Settlement that Include Mitigation

### National Cases

Consumers 9/16/2014

Flint Hill Resources 3/20/2014

Cabot Corporation 11/19/2013

AK Steel 8/21/2013

Shell Deer Park 7/10/2013

Ash Grove 6/19/2013

Dominion 4/1/2013

Kentucky Utilities 1/2/2013

Louisiana Generating 11/21/2012

BP Whiting 5/23/2012

Essroc 12/29/2011

Minnesota Power 7/16/2014

El Dorado Chemical 3/19/2014

Citgo 9/19/2013

Holcim 7/11/2013

Deseret 7/2/2013

Wisconsin Power and Light 4/22/2013

Wisconsin Public Service 1/4/2013

Owens Brockway 12/3/2012

Dairyland 6/29/2012

Marathon 4/5/2012

Tennessee Valley Authority 4/14/2011



# Mitigation Cases

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## List of EPA Settlement that Include Mitigation

### National Cases-Continued

Northern Indiana Power Company	1/13/2011	Hossier Energy	7/23/2010
American Municipal Power	5/18/2010	Westar	1/25/2010
Duke	12/22/2009	Mosaic Fertilizer	10/5/2009
Kentucky Utilities	2/3/2009	Salt River Project	8/12/2008
American Electric Power	10/9/2007	East Kentucky Power	7/27/2007
Nevada Power	6/13/2007	PSEG	11/30/2006
Mirant	5/8/2006	Minnkota Power Cooperative	4/24/2006
Illinois Power	3/7/2005	Mirant	9/27/2004
Santee Cooper	3/16/2004	Southern Indiana Gas and Electric	6/6/2003
Wisconsin Electric Power	4/27/2003	Virginia Electric Power	4/17/2003
Alcoa	4/9/2003	Tampa Electric Company	2/29/2000

# Mitigation Cases

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## List of EPA Settlement that Include Mitigation

### Mobile Source Cases

Savoia	01/06/2014
Hyundai-Kia	11/03/2014
Wildfire	05/23/2014
American Honda	03/25/2013
Citgo Lake Charles	09/19/2013

# Recent Mitigation Settlements

## United States of America, et al v. Tesoro Refining & Marketing Company LLC, et al (7/18/2016)

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Tesoro to implement three mitigation projects estimated \$12.2 million

- School Bus Replacement Project
  - Contribute \$1 million to a California school district for four new compressed natural gas school buses
  
- Infrared Gas – Imaging Camera Project
  - Purchase and employ infrared gas-imaging cameras at Anacortes, Kenai, Mandan, and Salt Lake City refineries.
  - Cost estimate \$400,000 (\$100,000 per camera)
  
- Salt Lake City Ultraformer Furnace Project
  - Install ultra-low NOx burners at Salt Lake City refinery and establish new NOx limit.
  - Cost estimate \$10.8 million

# Recent Mitigation Settlements-cont. United States v. HollyFrontier Refining & Marketing (11/19/2015)

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## ➤ Consent Decree

- Self-disclosed violations of sampling, sample management, testing, recordkeeping, reporting, and product transfer documentation requirements, and Clean Air Act fuels law and regulations – primarily RVP requirements
- \$1.2 million civil penalty
- Mitigation project – slotted guide post controls on two refinery tanks
  - Third party compliance certification by independent PE (Next Generation Compliance)

# Other Mitigation Settlements

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- Flint Hills Resources, Port Arthur Clean Air Act Settlement - 2014
  - Environmental mitigation projects
    - 1) \$2 million to implement and complete retrofitting, repowering, replacing, and/or retiring diesel vehicles;
    - 2) \$350,00 to purchase and install environmentally beneficial technologies in low income homes.
  
- CITGO Petroleum Corporation Clean Air Act Settlement - 2013
  - Mitigation
    - 1) Install and Maintain geodesic dome;
    - 2) Install and maintain carbon adsorption systems.

# Other Mitigation Settlements -cont.

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- Shell Deer Park Settlement - 2013
  - Environmental mitigation projects
    - 1) Modify wastewater plant to reduce VOC emissions;
    - 2) Replace and repair tanks and engage in bi-weekly infrared-camera imaging program;
    - 3) Control hazardous air pollutants (“HAPs”) and VOCs through enhanced monitoring and repair practices.
  - Valued between \$15 and \$60 million

# Other Mitigation Settlements -cont.

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- Marathon Petroleum Company – LP and Catlettsburg Refining – LLC Settlement (Flaring) - 2012
  - Environmental mitigation project
    - 1) Control sludge handling system to reduce at least 15 tons per year of VOCs and at least one ton per year of benzene;
    - 2) Replace open-air units with units closed to the environment;
    - 3) Install controls on several tanks.
  - Valued at \$2.2 million

# Negotiating Mitigation in Environmental Actions

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- Legal Basis
- Other Litigation Risk
- Possible Increased Flexibility



# Mitigation and Next Generation Compliance

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## ➤ Third Party Compliance Verification

- Expect to see in Consent Decrees for all projects; injunctive relief, SEP, mitigation
  - See United States v. HollyFrontier Refining & Marketing
- Environmental Justice Concerns-Mitigation projects listed as consideration in environmental justice policy document

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