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

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

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SUBJECT: Guidance on the Use of Environmental Management Systems in Enforcement Settlements as Injunctive Relief and Supplemental Environmental Projects

FROM: John Peter Suarez, Assistant Administrator

TO: Regional Administrators (I-X)
Regional Counsel (I-X)

Through this Guidance, the Office of Enforcement and Compliance Assurance (OECA) is reiterating our support for the use of Environmental Management Systems (EMSs) by all sizes and types of organizations, whether they are in compliance or determined to be in violation. We will promote EMSs as a potentially valuable tool for maintaining compliance, achieving beyond-compliance results, and minimizing environmental impacts in non-regulated areas.

OECA will continue to encourage incorporating compliance-focused EMSs as injunctive relief in enforcement settlements when necessary to address the root causes of the violations. When EMS settlement terms are necessary as injunctive relief, enforcement staff should consult the OECA-National Enforcement Investigations Center's (NEIC) *Compliance-Focused Environmental Management System (CFEMS) - Enforcement Agreement Guidance* (revised August 2002).

Currently, the Supplemental Environmental Project (SEP) Policy provides that "Other Types of Projects" may be accepted with advance OECA approval. This Guidance provides that EMSs by State and local governments and small businesses that meet the criteria in the SEP Policy are now eligible for SEP penalty mitigation credit as "Other Types of Projects" without advance Headquarters approval. Each Region must consult with the Office of Planning, Policy Analysis and Communications (OPPAC) and the Office of Regulatory Enforcement (ORE)-Multimedia Enforcement Division (MED) prior to extending SEP credit to the first EMS for either a State or local government or small business under this Guidance. Regions are encouraged to consult with OPPAC and ORE-MED on subsequent State and local government and small business EMS SEPs.

EMSs by medium-size or large companies may be proposed for SEP credit as "Other Types of Projects." These SEPs will continue to require approval from the ORE-MED Director.

Finally, we are clarifying that EMSs that are not formally incorporated into settlement agreements as injunctive relief or SEPs may be considered for penalty adjustments in the context of settlement penalty calculations. This discretion may be exercised to the extent permitted under EPA's Audit Policy and media-specific penalty policies.

This Guidance is intended to apply to settlement negotiations, only. It is effective immediately. The attachment includes a list of OECA contacts for questions concerning EMSs and SEPs. OECA will continue to also support compliance audits as SEPs, as described in my January 10, 2003 memorandum, "Clarification and Expansion of Environmental Compliance Audits Under the SEP Policy."

Attachment

cc: Phyllis P. Harris, Principal Deputy Assistant Administrator
Steven J. Shimberg, Associate Assistant Administrator
John Cruden, Deputy Assistant Attorney General, DOJ-ENRD-EES
Media Enforcement Division Directors (I-X)
Regional Enforcement Coordinators, Regions I-X
OECA Office Directors
ORE Division Directors
OECA & Regional EMS and SEP Contacts
Steve Sisk, OCEFT-NEIC

- ATTACHMENT -

Guidance on the Use of Environmental Management Systems in Enforcement Settlements as Injunctive Relief and Supplemental Environmental Projects

EPA has determined that properly designed and implemented Environmental Management Systems (EMSs) can help promote positive environmental outcomes. OECA supports the Agency's EMS policy as expressed in the *USEPA EMS Position Statement*. Together with Regional compliance and enforcement programs, we have and will continue to play a leading role within the Agency in actively promoting EMSs.[1] OECA supports and will promote EMSs for industry, state and local governments, and federal facilities of all types and sizes, whether in compliance or determined to be in violation.

EMSs as Injunctive Relief in Enforcement Settlements

EPA's approach in *all* enforcement actions is to seek appropriate injunctive relief to return violators to compliance and minimize or eliminate the potential for repeat violations by addressing the root causes of noncompliance. Where EPA determines, taking into account a violator's size, characteristics, and overall compliance obligations, that the root cause of a defendant's or respondent's violations is the absence of a systematic approach to identifying, understanding, and managing the regulated entity's compliance with applicable environmental requirements, the appropriate injunctive relief should include an EMS with a compliance focus. In addition, where specific elements or requirements common to EMSs are independently required by law or regulation, such elements/requirements should be sought as injunctive relief whether or not a compliance-focused EMS, per se, is sought. Since 1993, OECA and the Regions have concluded cases requiring the defendants to develop and implement compliance-focused EMSs at 258 facilities nationwide.[2]

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[1] The *USEPA Position Statement on EMSs* at <http://www.epa.gov/ems/policy/position.htm> (EMS Position Statement; May 15, '02) articulates the Agency's policy that EMSs can help improve environmental performance when they are implemented diligently, supported with adequate resources, and continually improved. The *EMS Position Statement* encourages the widespread use of EMSs across a range of organizations and settings, with particular emphasis on adoption of EMSs to achieve improved environmental performance and compliance, pollution prevention through source reduction, and continual improvement.

[2] The enforcement cases with EMS injunctive components concluded to date address a range of facilities sharing the common characteristic of compliance issues requiring EMS-type solutions to address the violations' root causes. Examples of multi-facility settlements with EMSs as injunctive relief include the December 19, 2000 settlement in U.S. v. Nucor Corporation, Inc. (Nucor) and the January 16, 2003 settlement in U.S. v. Koppers Industries, Inc. (Koppers) addressing thousands of Clean Water Act (CWA) violations, in addition to some Clean Air Act (CAA), and Resource Conservation and Recovery Act (RCRA) violations. EMSs have also been obtained as injunctive relief in actions involving universities, e.g., U.S. v. Massachusetts Institute of Technology (April 18, 2001), single media cases with root cause management issues, e.g., U.S. v. National Railroad Passenger Corp. [AMTRAK] (September 19, 2001), and an action addressing a federal facility, Department of Energy, Brookhaven National

OECA practice is to seek, as injunctive relief in settlements, EMSs that are developed pursuant to the OECA-National Enforcement Investigations Center's (NEIC) *Compliance-Focused Environmental Management System (CFEMS) - Enforcement Agreement Guidance* (revised August 2002). *CFEMS* describes an EMS with policies and procedures addressing twelve key elements designed by NEIC, based on extensive, practical field experience, to assist in preventing and addressing noncompliance caused by management problems. The *CFEMS Guidance* includes model consent decree language to assist in settlement negotiation, and may be consulted on a case-by-case basis in litigated matters where the Agency is seeking a CFEMS or features of a CFEMS as injunctive relief.

The *CFEMS Guidance* is intended to supplement, not replace, EMS standards such as ISO 14001 developed by voluntary consensus standards bodies. The *CFEMS* 12 elements support the broad, multimedia, beyond-compliance approaches that are the hallmarks of an effective, functioning EMS. They supplement existing EMS voluntary consensus standards by filling potential compliance-related gaps and actively promoting compliance-focused approaches and results.[3] An EMS that has been enhanced by the *CFEMS* elements is thus tailored to address the specific, additional compliance-focused needs of violators with systematic management issues.[4]

It is possible to use the *CFEMS* 12 elements as a starting point for development of a new EMS based on the "plan-do-check-act" management cycle. In practice, violators subject to enforcement actions may have EMSs – or a variety of discrete management elements such as policies, training programs, corrective action procedures, etc., that are common precursor elements to formal EMSs – already in place prior to the discovery of the violations by EPA. From a performance-based perspective, when violations whose root causes are management-based occur despite the prior existence of EMSs or precursor management elements, those EMSs or management elements have not achieved their goals. EPA can add significant value, when negotiating injunctive relief in appropriate settlement agreements, by requiring the violators to enhance their existing EMSs to achieve and maintain actual compliance (as opposed to merely

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Laboratory Memorandum of Agreement (March 23, 1998). An EMS was required in a criminal action against a municipality, U.S. v. City of Roanoke, Virginia (January 10, 2000), as a condition of probation.

[3] For example, while ISO 14001 requires organizations to express a "commitment to comply" and to identify and periodically evaluate compliance with legal obligations, the standard does not expressly require actual compliance, operational controls for assuring compliance, or that an organization establish compliance objectives and targets.

[4] CFEMSs include: an environmental policy with an *express statement of management's intent to provide adequate EMS personnel and resources*; processes and monitoring to *ensure sustained compliance*; written targets, objectives, and action plans, for each organizational subunit, *to achieve and maintain compliance with all environmental requirements*; a *mandatory pollution prevention program*; a *program for ongoing community education and involvement* in the environmental aspects of the defendants' operations; procedures for *investigating and promptly correcting violations* and their root causes; and ongoing evaluation of facility compliance, including *periodic compliance audits by independent 3rd party auditors*.

committing to compliance as an internal policy goal).[5]

While OECA strongly encourages all organizations interested in focusing their EMSs on compliance to reference the CFEMS model as a potentially useful tool for supplementing existing EMS standards, it is not OECA's position that EMSs associated with voluntary EPA programs, e.g., National Environmental Performance Track (NEPT) and the Public Entity Environmental Management System Resource (PEER) Center/Local Government Program [6], need to incorporate the *CFEMS* 12 elements. NEIC developed the *CFEMS* model for application in enforcement actions as injunctive relief for defendants with violations caused by management failures. In our view, such organizations warrant the compliance focus embodied in the *CFEMS* approach. Different considerations may exist in addressing top performers who are pre-screened for compliance (e.g., "green track" programs) or other facilities not demonstrated to be currently in noncompliance (e.g., compliance assistance programs).

EMSs as Supplemental Environmental Projects (SEPs) for Small Businesses and State and Local Governments:

OECA is clarifying the eligibility of EMSs, under the SEP Policy (May 1, 1998)[7] for penalty mitigation credit and encouraging their inclusion in settlements as SEPs when they meet the SEP Policy's terms and are not appropriate to require as injunctive relief. In the past, under the SEP Policy, OECA has allowed enforcement personnel to propose penalty mitigation credit for EMSs as "Other Types of Projects," but has required prior approval by the Director of the Multimedia Enforcement Division (MED) within the Office of Regulatory Enforcement (ORE).[8]

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[5] To ensure the most effective process possible for both parties, EPA staff should endeavor to the maximum extent possible to merge the CFEMS elements into the violators' preexisting EMSs or management elements. This includes utilizing a company's preexisting nomenclature, if it differs from the language employed in the CFEMS Guidance, as long as the requisite substantive enhancements are achieved.

[6] The PEER Center is supported by a cooperative agreement between EPA's Office of Water and the Global Environment and Technology Foundation. OECA has supported and provided funding for this program. The PEER Center has developed a national clearinghouse of EMS information with a focus on municipalities. In July 2002, EPA also designated eight Local Resource Centers around the country to provide assistance to local governments interested in adopting EMSs. The PEER Center website may be accessed at <http://www.peercenter.net/>.

[7] EPA Supplemental Environmental Projects Policy (May 1, 1998). The SEP Policy is posted at <http://www.epa.gov/compliance/resources/policies/civil/seps/sepfinal2.pdf>.

[8] For example, Region 3 recently proposed, and OECA approved, SEP credit for an EMS in settlement of In the Matter of: State of Maryland, Department of Public Safety and Correctional Services,

OECA is now waiving the prior ORE-MED approval requirement for EMSs by state and local governments and small businesses[9] that otherwise meet the criteria in the SEP Policy and this Guidance, i.e., EMSs by State and local governments and small businesses that meet the SEP Policy criteria are eligible for penalty mitigation credit as "Other Types of Projects" without advance ORE-MED approval. Each Region must consult with the Office of Planning, Policy Analysis and Communications (OPPAC) and ORE-MED prior to extending SEP credit to the first EMS for either a State or local government or small business under this Guidance. Regions are encouraged to consult OPPAC and ORE-MED on subsequent State and local government and small business EMS SEPs. EMSs by medium-size or large companies may be proposed for SEP credit where not appropriate as injunctive relief but will continue to require prior ORE-MED approval.

OECA recognizes that defendants and respondents often come to the settlement table with multiple SEP proposals. In such cases, the most environmentally beneficial candidate project(s) for SEP credit may be an EMS alone, an EMS in conjunction with one or more other projects, or the alternative projects. Consistent with smart enforcement principles, in choosing between multiple SEP candidates when violator funds and/or penalty mitigation opportunities are limited, EPA case teams should include in the settlements those projects which promise the greatest overall environmental benefits.

The decision as to whether to accept a proposed EMS for SEP credit under the SEP Policy remains within the discretion of EPA and the case team. The Settlement Justification Memoranda in all cases should explain how the EMS meets the SEP Policy's conditions, including a nexus to the violations[10] and documentation of key underlying facts and expenditures. The remainder of this section provides additional guidance on when and under what circumstances EMSs are appropriate for consideration as SEPs.

Guidance on When EMSs Are "Supplemental" Projects: The SEP Policy, and federal law,

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Division of Correction, EPA Docket No. RCRA-3-2001-0404/CWA-3-2001-0403 (Consent Agreement and Final Order; May 6, 2003).

[9] Under the SEP Policy, a small business is one that is owned by a person or another entity that employs 100 or fewer individuals. Small businesses can be individuals, privately held corporations, farmers, landowners, partnerships and others. Experience suggests that some small businesses are unlikely to implement EMSs as a normal course of business due to resource constraints. State and local governments face similar limitations that often lead to EMS design and implementation activities not receiving support during budget development. Providing penalty mitigation under the SEP Policy to these organizations is thus likely to produce positive environmental outcomes of benefit to the public which would not otherwise be realized.

[10] The SEP Policy defines "nexus" as the relationship between the violation and the proposed project. This relationship exists where the project is designed to reduce the likelihood that similar violations will occur in the future, reduces the adverse impact to public health or the environment to which the violation at issue contributes, or reduces the overall risk to public health or the environment potentially affected by the violation at issue. *SEP Policy* at 4.

require SEPs to be "supplemental" projects that the violators are "not otherwise legally required to perform." Under this requirement, the SEP Policy disallows projects that "the defendant/ respondent is likely to be required to perform as injunctive relief." Actions already required of violators by permit, order, or other similar enforceable mechanism are also not "supplemental." Therefore, enforcement personnel should consider first whether the nature of the violations in any given case, given their root causes, warrants seeking an EMS as injunctive relief. The decision as to whether to accept a proposed EMS for SEP credit under the SEP Policy, versus requiring an EMS as injunctive relief and/or accepting other types of SEPs, is a matter of Agency discretion to be exercised based on case-specific facts.

Federal Facilities: Executive Order (E.O.) 13148 requires appropriate federal facilities to develop and implement EMSs by December 31, 2005. Federal facilities subject to E.O. 13148 remain ineligible to receive SEP credit for EMSs because they are already required to develop and implement EMSs pursuant to the E.O. Any exception to this policy for federal facilities will require the advance approval of the Assistant Administrator for OECA.

CERCLA Remediation Actions: OECA has not, at this time, identified a sufficient nexus between EMSs and CERCLA remediation actions to satisfy the SEP Policy's nexus criterion. Therefore, EMSs should not be accepted as SEPs in these actions without prior ORE-MED approval, even for small businesses and State or local governments.

Guidance on When EMSs Are "Environmentally Beneficial Projects" Providing "Public Benefits": An EMS is a systematic process of understanding and managing a facility's environmental risks and hazards (aspects and impacts). Adopting an EMS does not ensure compliance with legal requirements. Nevertheless, as stated in the *EPA EMS Position Statement*, EMSs can help promote positive environmental outcomes and are encouraged by EPA. OECA has determined that the SEP Policy's "environmentally beneficial projects" and "public benefits" SEP criteria can generally be satisfied when the terms of settlement require the violators to implement their EMSs for at least one full EMS cycle[11], identify and report performance results on two or more EMS targets and objectives promoting beyond-compliance results with public benefits[12], ensure that issues and priorities of concern to the communities in which the facilities

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[11] A full cycle of EMS implementation means that the EMS is developed, put into practice, and a full "Plan-Do-Check-Act" cycle is completed, including auditing of conformance against the EMS standard, management review of the EMS (including the results of the audit), and any necessary adjustments to the EMS for continual improvement.

[12] The intent of this requirement is to encourage the adoption of targets and objectives that can produce real and quantifiable beyond-compliance environmental benefits. Examples of such benefits, with corresponding metrics, can be found in the Environmental Performance Table at pages 24-27 of the National Environmental Achievement Track (NEAT) Application Package (EPA240-B-00-003; December 2000). The Environmental Performance Table was developed by the Office of Policy, Economics, and Innovation (OPEI), based on the Global Reporting Initiative (GRI) and in the context of the NEPT program, to address essentially the same beyond-compliance/quantification/reporting issues of concern in the SEP context. The Table is posted at <http://www.epa.gov/performancetrack/apps/table.pdf>.

are located are identified and considered, and submit to EPA SEP Completion Reports describing what the violators have done to develop, implement, and act on their EMSs. Settlement agreements should provide for copies of the parties' EMS Manuals, with trade secrets and other confidential business information redacted, to be made available to EPA upon request.

Guidance on EMS Costs Eligible for SEP Credit: SEP credit should be extended only to EMS expenditures that produce significant benefits accruing primarily to the public. EPA compliance and enforcement personnel may choose to limit the costs that are eligible for credit to developmental, as opposed to implementation/operational costs (though costs associated with implementing targets or objectives promoting beyond compliance results may be eligible for SEP credit) and/or require an appropriate expenditures/penalty adjustment ratio, to reflect an apportionment of the EMS benefits between the violator and the public or distinguish between efforts necessary to get EMSs up and running versus maintaining them once they are in place. Providing SEP credits for EMS developmental costs may be a particularly effective way to promote facilities to implement them, thereby realizing the public and private benefits that EMSs can provide. Where SEP credit consists primarily of (or is limited to) developmental costs, as discussed above, the settlement agreement should nevertheless specify EPA's expectations concerning EMS implementation and performance measurement.

Guidance on SEP Mitigation Credit: The exact percent of mitigation credit that can be given for any SEP is within the enforcement personnel's discretion. In general, for an EMS SEP, the Regions can offer up to 80% mitigation credit depending upon the level of performance in terms of anticipated public and environmental benefits. While the SEP Policy allows up to 100% mitigation credit for State and local entities and small businesses, the mitigation percentage for an EMS SEP should not exceed 80% unless the defendant/respondent can demonstrate that the EMS is of outstanding quality. An EMS satisfying all12 CFEMS key elements that also provides environmentally beneficial, beyond compliance public benefits as described above under *Guidance on When EMSs Are "Environmentally Beneficial Projects" Providing "Public Benefits*," may be considered to be of outstanding quality for this purpose.

Other SEP Policy Requirements: The EMS projects described in this guidance, like all SEPs, must be consistent with the SEP Policy to qualify for penalty mitigation. These include the "in settlement of" and "nexus" criteria. The SEP Policy provides a full discussion of these factors.

<u>Other Penalty Adjustments for EMSs That Are Not Incorporated Into Settlement Agreements as Injunctive Relief or SEPs</u>:

EPA's Audit Policy creates additional incentives for regulated entities to develop and implement EMSs as a means of achieving and maintaining compliance. A violator who discovers, corrects, promptly discloses, and prevents a recurrence of a violation through the implementation of an EMS will generally meet the Audit Policy's "due diligence" criterion. The Audit Policy provides for 100% of the gravity-based penalty to be waived in such circumstances

if all other conditions of the Audit Policy are met.[13] A municipality with an EMS developed pursuant to the Agency-supported PEER program (*see* f.n. 6, above), for example, that uses its EMS to discover, correct, and disclose its violations under the Audit Policy would be expected to satisfy the "due diligence" criterion.

Pursuant to the Agency's statute-specific penalty policies, EPA personnel have the discretion to calculate a settlement penalty that reflects relevant actions by violators. With respect to EMSs, the range of possible scenarios where a violator's actions may be considered in adjusting a penalty downward from the preliminary penalty amount include where a company discovers a violation through an existing EMS and corrects the violation prior to EPA's discovery or the company lacks a preexisting EMS but puts one into place before concluding settlement negotiations. For example, where EPA discovers that a company has identified and corrected violations through the implementation of an EMS, EPA may consider the implementation of that EMS, along with other case-specific facts, as an example of the defendant's/respondent's good faith efforts to comply, particularly where the violator institutes changes in its EMS to prevent recurrence of the violation. This proactive use of an EMS by a company is the type of responsible behavior we want to encourage through the penalty calculation formula.

It may also be appropriate to consider whether and to what extent a violator has implemented an EMS in assessing the degree of willfulness and/or negligence. For example, the RCRA Civil Penalty Policy provides that EPA should consider whether the violator took "reasonable precautions against the events constituting the violation," in assessing the degree of the violator's willfulness and/or negligence. Applying the RCRA Civil Penalty Policy to a particular set of facts which include a preexisting EMS, EPA may determine that it is appropriate to adjust the penalty downwards. An example might be where, as part of its EMS, a company has a good system for identifying, labeling, storing, and inspecting its on-site hazardous waste containers but committed isolated violations. On the other hand, where an EMS was in place but violations occurred nonetheless as a result of a lack of management commitment to the process, an upward penalty adjustment to reflect the willfulness or negligence of the violation may be appropriate.

Disclaimer

This Guidance is intended to apply to settlement negotiations, only. The procedures set out in this document are intended solely to guide government personnel. They are not intended to, and cannot be relied upon to create, rights, substantive or procedural, enforceable in any party in litigation with the United States. EPA reserves the right to act at variance to this Guidance or to change it at any time without public notice.

Contacts

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[13] "*Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations*," 65 FR 19,618 (April 11, 2000) (Audit Policy). The Policy is posted at <http://www.epa.gov/compliance/resources/policies/incentives/auditing/finalpolstate.pdf >.

If you have questions concerning EMSs, generally, please contact Jon Silberman of the Office of Planning and Policy Analysis (OPPAC) at (202) 564-2429. For questions on *CFEMS*, please contact Steve Sisk of the National Enforcement Investigation Center (NEIC) at (303) 236-6683. For questions concerning SEPs, generally, please contact Melissa Raack (202-564-7039) or Beth Cavalier (202-564-3271) of the Office of Regulatory Enforcement (ORE)-Multimedia Enforcement Division (MED). For questions concerning SEPs at Federal facilities, please contact Melanie Garvey of the Federal Facilities Enforcement Office (FFEO) at (202) 564-2579. For questions concerning SEPs and site remediation, please contact Mike Northridge of the Office of Site Remediation Enforcement (OSRE) at (202) 564-4263.