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

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ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Consideration of Federal Agency Supplemental Environmental Projects and Executive Order Requirements

FROM: Granta Y. Nakayama

TO: Regional Senior Enforcement Managers
Regional Federal Facilities Senior Managers
Regional Counsels

In response to issues raised by Regional Federal Facility Program Managers, the Federal Facilities Enforcement Office prepared the attached document to clarify EPA's position regarding the relationship between Executive Order requirements and proposed Federal agency Supplemental Environmental Projects (SEPs). The document explains those situations where a proposal that is similar in nature to directives of an Executive Order may otherwise be acceptable under the SEP policy regarding acceptance of proposals "that may not otherwise have occurred," without the settlement. Please consult this document when Federal agency SEP discussions are occurring in your region.

If you have any questions regarding the document, please contact Melanie Garvey at 202-564-2579, or Will Garvey at 202-564-2458.

Attachment

The Effect of Executive Orders on Supplemental Environmental Projects at Federal Facilities

As part of an enforcement settlement involving a federal facility, a violator voluntarily may propose to perform a "Supplemental Environmental Project" (SEP).[1] SEPs are a settlement tool used by the Environmental Protection Agency (EPA) to encourage and obtain environmental and public health protection and improvements. These projects 1) must have a "nexus" to the underlying violation; 2) may not include activities a violator must take to return to or maintain compliance; 3) may not include projects that have been specifically funded prior to the enforcement settlement, 4) may not improperly augment EPA's appropriations, and 5) must propose an activity ***that may not otherwise have occurred*** without the settlement.

With the range of Executive Orders that contain environmental directives for federal agencies, it is necessary to review the feasibility of SEPs proposed in response to enforcement actions to ensure the proposal would not have otherwise occurred in implementing the environmental directives of Executive Orders. This document is intended to clarify the relationship between Executive Orders and EPA's SEP Policy. It also reaffirms the Agency's continued support for SEPs at federal facilities consistent with the Agency's SEP Policy.

Federal agencies and facilities are obligated to comply with Executive Orders.[2] Implementation of the terms of an Executive Order does not necessarily preclude a federal facility from performing a SEP that has related elements as a part of an enforcement action settlement agreement. The following provides a guide for consideration of SEPs proposed as part of a settlement in response to violations at Federal facilities. It should be noted that this information is provided only as a guide. Any proposed SEP must be considered and evaluated on a case-by-case basis.

Where an Executive Order outlines explicit goals to be achieved by a federal facility, a SEP proposal must exceed or enhance the scope, time frame, or degree of the goal under the Executive Order. A SEP credit mitigating penalties can only be given for that portion of the project's cost that exceeds or enhances the Executive Order's requirements. Where an Executive Order outlines broad policy goals to be achieved, such as a commitment to environmental stewardship, a specific SEP proposal which may help achieve the policy goals of the Executive Order and is not otherwise explicitly set forth in the Executive Order or other Administration implementation instructions may be appropriate, and like all potential SEPs, should be reviewed

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[1] For more information on SEPs see http://cfpub.epa.gov/compliance/resources/policies/civil/seps/ and for the Agency's Policy on SEPs, see "EPA Supplemental Environmental Projects Policy," Herman, May 1, 1998. http://www.epa.gov/compliance/resources/policies/civil/seps/fnlsup-hermn-mem.pdf

[2] Executive Orders are intended to improve the internal management of the Federal Government and generally do not create any legal rights or benefits enforceable against the Federal Government by third parties. If the Executive Order is supplemented with implementing instructions, as it was for Executive Order 13423—"Strengthening Federal Environmental, Energy, and Transportation Management," the implementing instructions, in accordance with Council on Environmental Quality (CEQ) policy, carry the full weight and force as their companion Executive Order, and Federal agencies are therefore expected to comply with their terms.

by EPA for conformance with the SEP Policy.[3] If the Executive Order outlines explicit targets or goals to be achieved at the *agency* level, the facility should be asked to provide information on its allocation of the agency goal to be achieved in order for the Region to determine if the proposed SEP would exceed or enhance the scope, time frame, or degree of the goal under the Executive Order. If that information is not available, the Region has the discretion to use the agency's goal as the goal to be exceeded or enhanced by the facility.

To exceed or enhance an explicit goal, a facility can perform a variety of projects. For example, to enhance the scope of an Executive Order goal to reduce potable water consumption by 10% per year, the facility can perform a SEP to reduce its potable *and non-potable* water consumption by 10% per year. In another example, to enhance the time frame of an Executive Order goal to reduce energy intensity by 10% by the end of fiscal year 2010, the facility can perform a SEP to reduce its energy intensity by 10% by fiscal year 2008. And finally, to enhance the degree of an Executive Order goal to reduce energy intensity by 2% annually, a facility can perform a SEP to reduce its energy intensity by 5% per year.

Where an Executive Order calls for the implementation of plans or recognized management systems, such as the Environmental Management System (EMS) implementation requirement in Executive Order (E.O.) 13423, SEPs may be proposed that exceed or enhance the scope, time frame, or degree of the goal identified under the Executive Order. E.O. 13423 directs federal agencies to develop and implement EMSs at appropriate organizational levels. Subject to consideration of the conditions listed above, federal agencies and facilities subject to that Executive Order generally remain ineligible to receive SEP credit for EMSs because they are already obligated to develop and implement EMSs pursuant to the Order. Some examples where it may be appropriate to provide SEP credit include circumstances where a facility or organization proposes to: 1) implement the EMS or associated activities at least two years prior to deadlines established in the E.O. or its accompanying instructions; 2) implement actions that are not otherwise identified by the E.O. (or its accompanying instructions) as elements of its EMS; 3) implement actions that are not otherwise contained in its existing EMS objectives and targets; or, 4) go beyond the practices and procedures established in the ISO 14001(2004) Standard. Exceptions to the SEP policy for federal facilities will require the advance approval of the Assistant Administrator for OECA.[4]

In addition, SEPs that propose to 1) provide compliance assistance to other federal entities, such as training to assist in implementation of objectives identified in an Executive Order or; 2) serve as an innovative pilot with technology transfer for a practice that is designed to achieve the goals of a given Executive Order (but where the practice is not otherwise explicitly established in the Order) may be considered as an acceptable project, subject to EPA review under the SEP Policy.

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[3] Likewise, where there are implementing instructions for an Executive Order, the SEP proposal must exceed or enhance the scope, time frame, or degree of any explicit goal to be achieved; and if the implementing instructions outline broad policy goals, a SEP may be appropriate.

[4] A copy of EPA guidance on the use of EMS in SEPs can be found at http://www.epa.gov/compliance/resources/policies/civil/seps/emssettlementguidance.pdf

Please keep in mind that enforcement actions and settlements involving federal facilities are nationally significant and the Regions should consult with the Federal Facilities Enforcement Office (FFEO) on all such cases in accordance with the Assistant Administrator Nakayama "Coordination of Federal Facility Enforcement Actions with OECA," memorandum dated November 17, 2006. FFEO will work with the Regions to ensure that proposed SEPS are appropriate and approvable. If you have any questions, contact Melanie Garvey at garvey.melanie@epa.gov.