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**GUIDANCE ON INCORPORATING
ENVIRONMENTAL MANagements SYSTEMS
INTO ENFORCEMENT NEGOTIATIONS AND SETTLEMENTS**

I. INTRODUCTION

A. DEFINITION OF AN ENVIRONMENTAL MANAGEMENT SYSTEM

An **environmental management system** (EMS) is a set of ongoing management processes and procedures that allows an organization systematically to analyze, control and reduce the environmental impact of its activities, products and services.

B. PURPOSE AND INTENT

Implementation of an effective environmental management system (EMS) can improve an organization's environmental performance. An EMS is appropriate for many types of organizations of varying sizes in public and private sectors.

The Department of Environmental Protection (DEP) supports and encourages any organization seeking to improve its environmental performance through the implementation of an EMS. One method through which DEP intends to promote EMSs is the incorporation of EMSs in the settlement of enforcement cases where appropriate.

This guidance is intended to assist DEP staff to promote EMSs in their negotiation and settlement of enforcement cases. To that end, this guidance sets forth:

- The *role of DEP* in promoting EMSs through the settlement of enforcement cases;
- The *appropriate use of EMSs* in resolving enforcement cases;
- The types of higher level enforcement cases most suitable for incorporating an EMS requirement;
- An explanation about how this guidance *relates to, and clarifies existing enforcement policy and guidance*;
- *Key elements of a compliance-focused EMS*; and
- *DEP expectations* about the development and implementation of EMSs.

This information is available in alternate format by calling our ADA Coordinator at (617) 574-6872.

DEP on the World Wide Web: <http://www.state.ma.us/dep>

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C. APPLICABILITY AND LEGAL EFFECT

This guidance applies to all administrative enforcement actions commenced after the effective date of this guidance, and to all pending cases in which DEP has not reached agreement in principle with the regulated entity on the terms and conditions of settlement as of the effective date of this guidance.

This guidance supplements the DEP 1997 Enforcement Response Guidance, and should be read in conjunction with it, unless otherwise specified below.

This guidance does not apply to settlements of claims for stipulated or suspended penalties for violations of consent orders or other consent order requirements. Thus, in resolving a claim for a suspended or stipulated penalty, an agreement to develop and implement an EMS cannot be used to reduce the amount of the suspended or stipulated penalty.

This guidance:

- Does not constitute final agency action;
- Is intended solely as guidance for DEP managers and staff in the exercise of enforcement authority under the Civil Administrative Penalties Act, M.G.L. Chapter 21A, Section 16 and 310 CMR 5.00, and various other program authorities;
- May not be relied upon to create rights, duties, obligations, or defenses, implied or otherwise, enforceable at law or in equity, by any person in litigation with DEP; and
- Is not intended to, nor does it, constitute “regulations” as that term is used in M.G.L. Chapter 30A.

DEP reserves the right to act at variance with this guidance in exercising sound enforcement discretion and good judgment. DEP also reserves the right to amend it at any time without public notice.

II. PROMOTION OF EMSs THROUGH ENFORCEMENT

DEP adopts the following principles in promoting EMSs through negotiation and settlement of enforcement cases:

A. APPLICABILITY

1. LIMITED TO HIGHER LEVEL ENFORCEMENT CASES

DEP will include provisions concerning implementation of an EMS *only in cases involving higher level enforcement* (i.e., cases in which an enforcement response is greater than a Notice of Noncompliance).

2. NECESSARY COMPLIANCE ASSURANCE ACTIVITY

DEP considers the adoption and implementation of an EMS to be *part of the activity necessary* for a regulated entity that routinely engages in activity regulated by DEP to return to, achieve, maintain and/or improve overall environmental compliance. Accordingly, in higher level enforcement cases involving such regulated entities, DEP may accept, at its sole discretion, and then require establishment of an EMS as a condition of settlement.

DEP managers and staff should discuss at the Regional Enforcement Review Committee (RERC) whether an EMS is an appropriate settlement condition, considering the nature of the regulated entity, the nature of the violations and the degree of noncompliance. *Examples* of higher level enforcement cases that *may be appropriate* for incorporating an EMS include:

- Cases involving regulated entities in violation of multiple DEP program requirements;
- Cases involving regulated entities with multiple facilities within Massachusetts;
- Cases involving municipalities;
- Cases involving state agencies and authorities;
- Cases involving sectors specifically targeted by DEP for promotion of EMSs; and
- Other cases in which facts compel the promotion of an EMS.

There may also be higher level enforcement cases for which requiring establishment of an EMS is *not* a desirable or effective condition of settlement. *Examples* of cases that may be *inappropriate* for incorporating EMSs include:

- Cases involving one-time wetlands violations;
- Cases involving violations applicable to residential properties and committed by the homeowner;
- Cases involving criminal violations; and/or
- Cases involving regulated entities that do not have the ability, reliability and/or willingness to adopt and implement an EMS.

B. PENALTY CALCULATION

M.G.L. Chapter 21A, Section 16 and 310 CMR 5.25 require DEP to consider a number of criteria concerning the regulated entity's conduct relative to the violations in determining the appropriate amount of an administrative penalty. The DEP Guidelines for Calculating Administrative Penalties (the "DEP Calculation Guidance") describe these considerations as evidence of the *existence of good faith* which may be used to reduce the amount of the base penalty after gravity based adjustments up to fifty percent.

NOTE: Please refer to Section III of this guidance, *Relationship of This Guidance to Existing Enforcement Policy and Guidance*, for discussion of penalty calculation and mitigation in cases concerning small businesses, municipalities, environmental audits and/or supplemental environmental projects.

1. WHERE EMS DOES NOT EXIST AT TIME OF INSPECTION

Where a regulated entity does *not* have an EMS in place at the time of the initial inspection, and agrees to develop and establish an EMS as a condition of settlement, DEP will consider the regulated entity's agreement as *evidence of good faith* in returning to compliance and assuring future compliance. DEP will then calculate a "good faith" reduction of 0% to 50% of the base penalty after gravity based adjustments in consideration of the EMS agreement.

DEP will reduce the penalty by the amount of the "good faith" adjustment, and suspend that amount *contingent upon the regulated entity complying fully with the consent order requirements concerning development and establishment of an EMS*. The consent order will specifically require the regulated entity to pay the full amount of the suspended "good faith" reduction in the event that the regulated entity fails to comply with the requirements concerning the EMS.

As an alternative to reinstating the suspended "good faith" reduction, DEP may use stipulated penalties to assure compliance with consent order requirements concerning development and performance of an EMS.

2. WHERE EMS EXISTS AT TIME OF INSPECTION (EMS NOT PREVIOUSLY REQUIRED BY DEP)

Where a regulated entity has an EMS in place at the time of the initial inspection, and agrees to review and modify the existing EMS to improve its effectiveness, DEP will consider the regulated entity's agreement as evidence of good faith in assuring future noncompliance. DEP will then calculate a "good faith" reduction of 0% to 50% of the base penalty after gravity based adjustments in consideration of the EMS agreement.

DEP will reduce the penalty by the amount of the "good faith" adjustment, and suspend that amount *contingent upon the regulated entity complying fully with the consent order requirements concerning modification of its EMS*. The consent order will specifically require the regulated entity to pay the full amount of the suspended "good faith" reduction in the event that the regulated entity fails to comply with the requirements concerning the EMS modification.

As an alternative to reinstating the suspended "good faith" reduction, DEP may use stipulated penalties to assure compliance with consent order requirements concerning modification of the existing EMS.

3. WHERE EMS EXISTS AT TIME OF INSPECTION (EMS PREVIOUSLY REQUIRED BY DEP)

Where a regulated entity has an EMS in place at the time of the initial inspection that was previously required in a consent order with DEP, DEP will consider the noncompliance as evidence of "lack of good faith." DEP will then calculate a "lack of good faith" increase of 0% to 50% of the base penalty after gravity based adjustments.

If DEP requires review and modification to improve the effectiveness of the existing EMS, DEP may suspend the amount of the increase contingent upon the regulated entity complying fully with the consent order requirements concerning improvement of the existing EMS. The consent order will require the regulated entity to pay the full amount of the suspended “lack of good faith” increase in the event that the regulated entity fails to comply with requirements concerning improvement of the EMS.

As an alternative to suspending the “lack of good faith” increase, DEP may use stipulated penalties to assure compliance with consent order requirements concerning improvement of the EMS.

In the event of subsequent noncompliance with environmental requirements, DEP will not reduce, or in any way mitigate a penalty in consideration of the existence of an EMS or any agreement to improve the effectiveness of an existing EMS.

C. KEY ELEMENTS REQUIRED IN LIEU OF MANDATING A TYPE OF EMS

DEP will not mandate any particular type of EMS although DEP may require that certain key elements, outlined below, be contained in each EMS required in the resolution of an enforcement matter.

D. EMS TEMPLATES ENCOURAGED

DEP may encourage the development of EMS templates for use by specific public and private sectors through a variety of means.

III. RELATIONSHIP OF THIS GUIDANCE TO EXISTING ENFORCEMENT POLICY AND GUIDANCE

A. 1997 ENFORCEMENT RESPONSE GUIDANCE

This guidance serves to amend the 1997 DEP Enforcement Response Guidance (ERG), Section I, A (page 2) to include the following in the list of DEP goals and objectives advanced by the ERG:

- 5) implementation of an effective environmental management system (EMS) to improve a regulated entity’s environmental performance.

B. SMALL BUSINESS POLICY

The Small Business Policy provides for suspension or waiver of a penalty if a small business satisfies certain conditions, including a *demonstration of a good faith intention to maintain future compliance*. DEP considers the development and establishment of an EMS to satisfy the demonstration of such good faith intention.

The Small Business Policy provides that if a small business, as that term is defined in the Small Business Policy, agrees to develop and establish an EMS, *and* satisfies all other conditions specified in the policy, DEP may suspend or waive the *entire* penalty in accordance with the policy. If a small business agrees to develop and establish an EMS, but does *not* satisfy *all* other specified conditions, DEP may reduce the penalty consistent with the DEP Calculation Guidance, but may not suspend or waive the *entire* penalty.

C. MUNICIPAL POLICY

The Municipal Policy provides for suspension or waiver of a penalty if a municipality satisfies certain conditions, including *demonstration of a good faith intention to maintain future compliance*. DEP considers the development and establishment of an EMS to satisfy the demonstration of good faith intention.

The Municipal Policy provides that if a municipality agrees to develop and establish an EMS, *and* satisfies all other conditions specified in the policy, DEP may suspend or waive the *entire* penalty in accordance with the policy. If a municipality agrees to develop and establish an EMS, but does *not* satisfy all other specified conditions, DEP may reduce the penalty consistent with the DEP Calculation Guidance, but may *not* suspend or waive the *entire* penalty.

In addition, the Municipal Policy provides that compliance problems discovered through a “municipal environmental audit” or through “due diligence,” as those terms are defined in the Municipal Policy, and disclosed pursuant to the Municipal Policy will be subject to penalty relief under the terms of Section IV of the Municipal Policy (e.g., all penalty except for economic benefit is waived).

If a municipality implements an EMS that requires the municipality to review and evaluate its environmental compliance systematically and periodically, DEP may consider the EMS to be consistent with “municipal environmental audit” and “due diligence,” as those terms are defined in the Municipal Policy. Thus, if a municipality discovers compliance problems through its implementation of an EMS, and discloses the problems to DEP consistent with the terms of the Municipal Policy, DEP may waive the punitive portion of the penalty.

D. ENVIRONMENTAL AUDIT POLICY

The Environmental Audit Policy (or “Audit Policy”) provides that compliance problems discovered through an “environmental audit” or through “due diligence,” as those terms are defined in the Audit Policy, and disclosed pursuant to the Audit Policy, will be subject to penalty relief under the terms of the Audit Policy (i.e., all penalty except for economic benefit is waived).

If a regulated entity implements an EMS that requires the regulated entity to review and evaluate its environmental compliance systematically and periodically, DEP may consider the EMS to be consistent with “environmental audit” and “due diligence,” as those terms are defined in the Audit Policy. Thus, if a regulated entity discovers compliance problems through its implementation of an EMS, and discloses the problems to DEP consistent with the terms of the Audit Policy, DEP may waive the punitive portion of the penalty.

E. SUPPLEMENTAL ENVIRONMENTAL PROJECT POLICY

The DEP Supplemental Environmental Project (“SEP”) Policy defines a SEP as an “environmentally beneficial” project which a regulated entity agrees to undertake “in settlement of an enforcement action,” but which the regulated entity is “not otherwise legally required to perform.”

The concept of an EMS as a condition of settlement in an enforcement action is similar in certain respects to the concept of a SEP in that:

- Each may be considered “environmentally beneficial,”
- Each is being undertaken by a regulated entity “in settlement of an enforcement action,” and
- A regulated entity is “not otherwise legally required to perform” either one.

However, DEP considers the development and implementation of an EMS **principally** to be part of the *activity necessary* for a regulated entity to return to, achieve, maintain and/or improve overall environmental compliance. DEP considers the performance of a SEP **principally** to be *beyond what is necessary* to return to compliance and continually assure future compliance with environmental requirements. Thus, DEP does not consider an EMS to be a category of SEP. Accordingly, DEP is not limited by the legal constraints inherent in the SEP Policy or by the terms and degree of penalty mitigation set forth in the SEP Policy in requiring an EMS as a condition of settlement.

NOTE: A case settlement may contain both an agreement to develop and establish an EMS and an agreement to perform a SEP of some nature. In that situation, the EMS agreement is considered evidence of good faith, as described above, and the penalty is calculated accordingly. Once the penalty is calculated, the amount of the penalty may be reduced up to 75% in consideration of the SEP performance.

F. EPA PERFORMANCE TRACK PROGRAM

The U.S. Environmental Protection Agency administers a Performance Track Program in which facilities voluntarily adopt and self-certify to an EMS with key elements similar to those outlined in this guidance. Participants conduct compliance and environmental management system audits in accordance with EPA’s Performance Track guidelines. EPA will accept facilities into the program if they check and correct violations, document past environmental improvement, commit to continuous improvement, have a record of sustained compliance and do public outreach and reporting. Once accepted, EPA awards facilities incentives, including: low priority for inspection; penalty mitigation for good faith participation; use of a logo; listing on an EPA web site and other benefits.

Provided that each participant’s EMS contains elements to identify and correct violations, DEP may recognize Performance Track participants, accepted by EPA and in good standing, by:

1. Reducing penalties and exempting certain violations from higher level enforcement as described in this guidance, provided that any harm caused was remedied immediately, and that all violations:
 - Were corrected as soon as possible;
 - Are not likely to cause imminent and substantial endangerment;
 - Did not cause serious actual harm;
 - Are not criminal;
 - Afforded no significant economic benefit; and
 - Did not violate the terms of any judicial or administrative order or any consent agreement.
2. Choosing not to conduct routine regulatory compliance inspections and instead observing audits conducted by facilities or conducting random audits. DEP may conduct inspections in response to imminent and substantial endangerment, a tip, or a complaint concerning potential civil or criminal violations at the facility.

IV. KEY ELEMENTS OF A COMPLIANCE-FOCUSED EMS

The consent order should require the regulated entity to develop an EMS manual tailored to reflect the size, complexity and environmental conditions and circumstances of its operations. The EMS manual should be organized to clearly address, at a minimum, the key elements listed below.

The key elements are closely inter-related components of an EMS for which subsystems and documented procedures should be developed and fully integrated if the entire program is to be effective. The key elements will usually be included in consent orders as a complete group; however, individual elements may need to be modified to reflect conditions and circumstances of a specific regulated entity.

Each regulated entity should implement an EMS to ensure that the regulated entity achieves and maintains compliance with the environmental requirements including, at a minimum, the development and implementation of:

1. Environmental compliance policies, procedures and guidance documents for all of the organization's operations and activities;
2. Clearly specified organizational responsibilities and accountability of organization's staff and management, on-site service providers, and contractors for regulatory compliance, required reporting to regulatory agencies, and corrective actions implemented in their area(s) of responsibility;
3. A system for tracking compliance activities;
4. Schedules and a system for conducting regular inspections of operations and facilities and annual self-audits of operations and facilities for the purposes of preventing and controlling releases, ensuring environmental protection, and maintaining compliance with statutory and regulatory requirements;
5. A system for ensuring that routine requirements for sampling, monitoring, and reporting data required by law, regulation and permit are accomplished;
6. Standard procedures and requirements for incident and noncompliance reporting to regulatory agencies, including requirements to report releases of oil and/or hazardous materials and implementation of measures to minimize risks from such releases;
7. A system for establishing return to compliance plans for noncompliance identified during inspections and audits;
8. A system for the development of continuous improvement goals and results reporting that may include: recycling and the purchase of recycled products; pollution prevention; source reduction; resource conservation; energy consumption; waste minimization, renewable energy and renewable technologies;
9. Annual compliance training for management and personnel, and initiation training for new management and personnel;

10. A process for an objective annual review and evaluation of the EMS and its components, including: implementation of modifications as necessary to ensure timely compliance and a commitment to continual improvement, and senior management review to ensure that goals are being achieved;
11. Program for ongoing community outreach in the environmental aspects of regulated entity's operations and general environmental awareness.

The EMS should describe how these key elements will be integrated into the organization's overall decision making and planning, and in particular, decisions on capital improvements, product and process design, training programs and maintenance activities.

V. ASSURING COMPLIANCE WITH EMS REQUIREMENTS IN CONSENT ORDERS

The consent order should describe the *regulated entity's role* in assuring compliance with the provisions requiring development and implementation of an EMS, or modification of an existing EMS.

The following principles apply to the roles of the regulated entity in assuring compliance with EMS requirements contained in consent orders.

The consent order should require the regulated entity, at a minimum and as scheduled in the consent order, to:

1. Provide periodic written reports to DEP on progress in developing an EMS, or modifying an existing EMS;
2. Provide a written report to DEP describing the final EMS and a plan for implementing it;
3. Provide a written report verifying that the final EMS is implemented in one of the following forms:
 - Report of an independent qualified EMS auditor; or
 - Self-certification by an officer or manager within the regulated entity with the authority to spend money and assign staff.
4. Provide periodic reports to DEP detailing the extent to which the EMS continues to be implemented and effective.

DEP acceptance of the submittals listed immediately above will constitute neither approval of the submittals nor an evaluation of EMS implementation or effectiveness. However, if DEP observes noncompliance during future inspections of the regulated entity, DEP may consider the effectiveness of an EMS previously required in a consent order when DEP develops an enforcement response to the future noncompliance.

Submission of any of the written reports may, of course, be supplemented by a meeting with DEP managers and staff to discuss contents of the reports.