

**Pilot Project Approach on Use of Non-Governmental Entities
to Implement Section 503 of Executive Order 12873 on
Federal Acquisition, Recycling and Waste Prevention**

Background:

Section 503(a) of Executive Order 12873 directs EPA to "issue guidance that recommends principles that Executive agencies should use in making determinations for the preference and purchase of environmentally preferable products." Section 503 (b) states that Executive agencies shall use EPA's guidance to "identify and purchase environmentally preferable products" and to "modify their procurement programs by reviewing and revising specifications, solicitation procedures, and policies as appropriate."

On September 28, 1995, EPA issued a proposed *Guidance on the Acquisition of Environmentally Preferable Products and Services* which includes a series of principles that are intended to guide Federal purchasers as they consider environmental preferability in their acquisition decisions. This proposed *Guidance* was the culmination of numerous discussions EPA had with staff from key purchasing agencies and departments as well as representatives from industry and environmental and other interested organizations.

In EPA's proposed *Guidance* (Supplementary Information - Section III (E)), EPA acknowledged the existence of non-governmental entities -- including, but not limited to, environmental standard setting organizations, third party certification programs, environmental labeling or environmental "report card" programs and other environmental consulting organizations -- to which Executive agencies, in appropriate circumstances, may refer for technical assistance¹ in meeting the Executive Order goals.

In this paper, EPA suggests a pilot project approach to test the utility of various means of using non-governmental entities to achieve environmentally preferable purchasing goals. This pilot project approach will be publicized through a *Notice of Availability* in the *Federal*

¹ For example, Executive agencies might seek technical assistance from non-governmental entities to help Executive agencies:

- (a) analyze life cycle and multiple environmental attributes;
- (b) analyze basic environmental performance characteristics for specific categories of products/services;
- (c) identify environmentally preferable product/service criteria for a given product category based on agencies' core environmental values; and
- (d) identify products/services in a given category which meet agencies' predetermined set of environmental performance criteria.

Executive agencies are reminded that they must critically examine all information from non-governmental entities. The Executive agencies involved, and not the non-governmental entities, must make all final determinations regarding environmental preferability.

Register. Ultimately the findings from the pilot project approach will provide practical information to EPA in the development of its final *Guidance*.

Spectrum of Approaches

First, it must be emphasized that Executive agencies may choose to implement EPA's proposed *Guidance* without technical assistance from non-governmental entities. A number of on-going environmentally preferable purchasing (EPP) pilot projects are relying successfully on the in-house environmental and procurement expertise of EPA and the partnering Executive agency (e.g., General Services Administration and the Department of Defense). Therefore, **this paper should in no way be interpreted as an EPA endorsement of a specific non-governmental entity, organization or program, nor should agencies feel obligated in any way to utilize the technical assistance of such entities.**

However, to the extent that the Agencies are interested in tapping the expertise that resides outside the Government, EPA concludes that Agencies, in carrying out existing mandates for environmentally preferable purchasing may use non-governmental entities in accordance with appropriate operating guidelines. Executive agencies should note that they must avoid favoring, without reasonable justification, one non-governmental entity over another. Executive agencies should also inform their personnel about the Federal Trade Commission's *Guides for the Use of Environmental Marketing Claims* which govern environmental claims made by anyone, including manufacturers or environmental labeling or "report card" programs.

Thus far, EPA has identified a number of different potential approaches for how Executive agencies could use the technical expertise of non-governmental entities in furthering their environmentally preferable purchasing goals. All of the potential approaches described below require that the Executive agencies involved critically examine all information from non-governmental entities. The Executive agencies involved, and not the non-governmental entities, must make all final determinations regarding environmental preferability.

This list of approaches is not comprehensive. Agencies are encouraged to bring to EPA's attention other potential approaches for using non-governmental entities. In utilizing an approach, agencies have considerable discretion in incorporating environmental preferability into procurement decisions. For example, environmental considerations that result in limiting competition or in the payment of a price premium for goods or services may be reasonably related to an agency's definition of its "minimum needs" and therefore permissible.

Approach 1: Use of Existing Information Developed by Non-governmental Entities

Executive agencies' personnel could use existing information developed by non-governmental entities regarding environmental preferability of products and services, along with other available information (such as product performance and price) in defining the

requirements for procurements and making more informed procurement and acquisition decisions. For example, Agencies might consider undertaking pilot projects to test the utility of non-governmental entities in the following instances:

a) Executive agencies could examine and evaluate already existing environmental criteria or standards developed by non-governmental entities for products or product categories (as well as for services or service categories), along with other available information, to identify a range of environmental attributes which can inform the agencies' own determinations of environmental preferability. Those determinations of environmental preferability could then translate into agency requirements, or at the very least, important criteria in the evaluation and selection of competing vendors or manufacturers.

b) In buying commercial items off-the-shelf, Executive agencies could inform their personnel to take into consideration environmental information (e.g., environmental claims, product profiles, "report cards", or environmental seals along with accompanying explanation, etc.) either displayed on the products or provided through product literature or other materials (e.g., newsletters) in making purchasing decisions. This environmental information could be provided by vendors or manufacturers or by non-governmental entities. Executive agency personnel should be cautioned to avoid making their purchasing decisions on broad claims of environmental superiority.²

c) At the request of vendors or manufacturers, an Executive agency could include in its catalogs or schedules symbols from non-governmental entities denoting certain environmental characteristics, provided that (1) these symbols are accompanied by additional information that specify the reasons why a product has been "tagged" with a symbol; (2) the catalogs or schedules clearly emphasize that Executive agency personnel are not required to purchase products or services that are tagged; and (3) procurement officials should not rely on the symbols to make purchasing decisions, but instead, are required to take into account the environmental information underlying the

²The following excerpt from FTC's *Guides for the Use of Environmental Marketing Claims* illustrates this point:

*A product is advertised as "environmentally preferable." This claim is likely to convey to consumers that this product is environmentally superior to other products. If the manufacturer cannot substantiate this broad claim, the claim would be deceptive. The claim would not be deceptive if it were accompanied by clear and prominent qualifying language limiting the environmental superiority representation to the particular product attribute or attributes for which it could be substantiated, provided that no other deceptive implications were created by the context. (From FTC's *Guides*, (a) General Environmental Benefit Claims, Example 6)*

symbol for relevance to the procurement.³ Agencies including such symbols in their schedules or catalogs should ensure that their employees receive appropriate guidance in utilizing this approach. Vendors or manufacturers who choose not to obtain a seal or other symbols denoting certain environmental characteristics from non-governmental entities may nevertheless also request that environmental information about their products be included in the agency's catalogs or schedules.

This option will be piloted on a limited basis so that it can be closely monitored to determine its effectiveness.

d) On its own initiative, an Executive agency could tag products or services in its catalogs or schedules with its own symbol which denotes environmental characteristics that the Executive agency, through its own determination, deems preferable. This symbol could be based on existing information (e.g., environmental claims, product profiles, "report cards", or environmental seals along with accompanying explanation, etc.) available from non-governmental entities or from vendors or manufacturers themselves. This symbol should be accompanied by specific information explaining the basis for "tagging" a product as well as the source of the information. Catalogs or schedules should emphasize that Executive agency personnel would not be required to purchase products or services which are tagged, but are requested to take into account the environmental information underlying the symbol for relevance to the procurement.

Approach 2: Use of Non-governmental Entities as Certifiers of Specific Claims

Executive agencies could require vendors or manufacturers to have specific, measurable and verifiable claims certified by qualified non-governmental entities. A product's percentage content of volatile organic compounds (VOCs), for example, would be considered measurable and verifiable. The rationale behind this approach is that credible certification by non-governmental entities (or actual evidence from vendors or manufacturers themselves) could increase the credibility of claims that may be displayed on products. Such certification, or a vendor's or a manufacturer's ability otherwise to prove particular claims of environmental preferability, could be a prerequisite for competitive consideration.

³The following excerpt from FTC's *Guides for the Use of Environmental Marketing Claims* provides an example of this point:

*A product label contains an environmental seal, either in the form of a globe icon, or a globe icon with only the text "Earth Smart" around it. Either label is likely to convey to consumers that the product is environmentally superior to other products. If the manufacturer cannot substantiate this broad claim, the claim would be deceptive. The claims would not be deceptive if they were accompanied by clear and prominent qualifying language limiting the environmental superiority representation to the particular product attribute or attributes for which they could be substantiated, provided that no other deceptive implications were created by the context. (From FTC's *Guides*, (a) General Environmental Benefit Claims, Example 5).*

This approach assumes that (1) no particular non-governmental entity is favored (without reasonable justification) over any other non-governmental entity; and (2) vendors or manufacturers who choose not to be certified by non-governmental entities are provided the opportunity to present credible evidence that their products or services conform to established standards.

Approach 3: Use of Non-government Entities as "Consultants" under Advisory and Assistance Contracts

Pursuant to the competitive contracting process as set forth in the Federal Acquisition Regulation (FAR), non-governmental entities could provide consulting services to Executive agencies. Non-governmental entities may provide advice and recommendations about environmentally preferable purchasing, for example, through the identification of key environmental characteristics of product categories. Under this approach, Executive agencies would define environmental preferability with the assistance of a non-governmental entity on a procurement-by-procurement basis. As per FAR Subpart 9.5, Executive agencies must fully consider the potential for conflict of interest concerns where a non-governmental entity may be unable to render impartial advice or assistance because of private business or financial interests. Also, Executive agencies should make every effort to maximize competition in awarding these advisory and assistance contracts to avoid any exclusive or preferential relationship with any particular non-governmental entity. Finally, the environmental preferability standards developed under this approach could be used as a basis for defining the agency's "minimum needs" in particular procurements and for developing criteria for evaluating competing vendors.

EPA's Suggested Next Steps

One of the key tenets of EPA's proposed *Guidance* is to have Executive agencies undertake a series of pilot projects that can demonstrate the applicability and workability of the guiding principles as contained in EPA's proposed *Guidance*. The success of our efforts depends on learning from these pilot projects and sharing the results widely among the different Executive agencies. It is in this spirit that EPA strongly encourages Executive agencies to enter into pilot projects that test the potential approaches for using non-governmental entities as described above.

Moving forward with this non-governmental entities pilot approach is desirable for a number of reasons: 1) EPA can capture the lessons from the pilots and share them among the Executive agencies so that there is no duplication of effort; 2) we can determine where the use of expertise outside of the government is appropriate and useful and where it is not; and 3) the net effect of creating a market for such EPP services may encourage increased competition among existing and new organizations or programs that can support Federal procurement of environmentally preferable products and services. Ultimately, the results from this and other

pilot project approaches will help Executive agencies identify the most effective and practical ways to achieve the goals of environmentally preferable purchasing.

EPA recognizes that any pilot project involving a non-governmental entity will initially raise practical questions such as which non-governmental entities are legitimate and are credible and which are not; is there a need to certify a certifier? While EPA is not currently able to offer an "approved" list of non-governmental programs best suited to assist the agencies, it is prepared to provide assistance to Executive agencies on an individual procurement-by-procurement basis. As an initial step, Agencies are directed to the list of questions for evaluating non-governmental entities contained in Section III, [E] Third Party Certification Programs of EPA's proposed *Guidance on the Acquisition of Environmentally Preferable Products and Services*. The list of questions is included as Appendix 1 of this letter.

Specifically, within the context of this non-governmental entity pilot project approach, EPA's Environmentally Preferable Purchasing Program in the Office of Pollution Prevention and Toxics, is prepared to:

- 1) assist Executive agencies in structuring a pilot project involving non-governmental entities, including providing support to assess the utility of non-governmental entities on an individual procurement-by-procurement basis;
- 2) seek out and identify non-governmental entities who have expertise in the area of environmentally preferable purchasing through a variety of means, such as, but not limited to, Federal Register notices or announcements in the Commerce Business Daily (CBD). To make such a task manageable, EPA will identify, with help and guidance from the agencies, a few product or service categories upon which to focus at first. If successful, further federal register notices or CBD announcements could be issued focusing on additional product or service categories;
- 3) assemble a list of product categories for which eco-labeling criteria and standards have been established, both domestically and internationally for agencies to consider in developing their own criteria for environmental preferability. If appropriate, EPA will assist in such evaluations; and
- 4) assist Executive agencies in structuring an environmentally preferable purchasing pilot project that does not involve non-governmental entities.

In turn, Executive agencies should consult with EPA when undertaking pilots which may raise environmental issues beyond their expertise (e.g., where a pilot involves consideration of the way a product is made).

Furthermore, Executive agencies who choose to undertake pilots under option 1(c)

should consult with EPA in developing a written process or procedure for the role seals or symbols and the associated information would play in their pilots. For example, agencies should provide clear guidance which specifies the importance of considering the underlying criteria, not the seal or the symbol.

As EPA and Executive agencies embark on these activities, EPA will continue to explore a number of different ways that it can address issues which are raised within the pilot project context more definitively. Executive agencies will be kept informed of developments on these issues. Agencies should inform EPA of their efforts in environmentally preferable purchasing, whether such efforts involve non-governmental entities or not in order to share lessons learned among other agencies and to aid in the evaluation of the pilot projects. In this way, EPA can make EPP concepts more practical for use within the Federal acquisition context. To facilitate this, Agencies are requested to send the attached FAX BACK form. Pilot projects involving non-governmental entities will be evaluated over a period of the next three years. EPA will use the findings from that evaluation to inform the development of its final *Guidance*.

For further information and to inform EPA of pilot project efforts, please contact:

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Pollution Prevention Division, Office of Pollution Prevention and Toxics
(202)260-3296; (202)260-0178 FAX; e-mail: goidel.eunsook@epamail.epa.gov

For legal issues associated with use of non-governmental entities in environmentally preferable purchasing, please contact:

Tali Zemel, Esq., Office of General Counsel (202)564-4708; e-mail:
Zemel.Avital@epamail.epa.gov

Appendix 1. List of Questions for Evaluating Non-governmental Entities⁴

Executive agencies should consider the following list of questions in evaluating non-governmental entities should agencies choose to use the expertise of these programs to pilot different approaches to achieve the goals of environmentally preferable purchasing such programs. Does the program have:

- an open, public process that involves key stakeholders (businesses, environmental and consumer groups, states etc.) in developing its criteria or standards?
- award criteria, assumptions, methods and data used to evaluate the product or product categories that are transparent (i.e., they are publicly available, easily accessed and understandable to the lay person)?
- a system of data verification and data quality?
- a peer review process (with representation of all stakeholders) for developing the standards or criteria?
- criteria which are developed based on a "systems" or life cycle approach (i.e., "cradle to grave")?
- an outreach program to educate the consumer, which includes clear communications to consumers that provide key information concerning environmental impacts associated with the product?
- an established goal of updating standards or criteria as technology and scientific knowledge advance?
- authority to inspect the facility whose product is certified to ensure compliance with the standards or criteria?
- testing protocols for the products that are certified which ensure testing is conducted by a credible institution?
- access to obtaining the seal by small and medium sized companies (e.g., the cost of the seal is not so high as to prevent access by companies)? and
- compliance with the Federal Trade Commission's (FTC) Guides for the Use of Environmental Marketing Claims?

⁴Excerpted from EPA's proposed *Guidance on the Acquisition of Environmentally Preferable Products and Services*.

FAX BACK FORM

PLEASE INFORM EPA ABOUT YOUR PILOT PROJECT INVOLVING THE USE OF NON-GOVERNMENTAL ENTITIES IN ENVIRONMENTALLY PREFERABLE PURCHASING!!

Name:
Department/Agency:
Address:
Address:
Phone:
FAX
e-mail:

Type of Acquisition/Procurement:
(e.g., small purchase, credit card purchase, competitive bid, etc.)

Product/Service Category:

Name of Non-Governmental Entity:

Type of Non-Governmental Entity (check all that apply):

- ☐ environmental standard setting organizations
- ☐ third party environmental certification programs
- ☐ environmental labeling organizations
- ☐ environmental report card organization
- ☐ environmental consultants
- ☐ other (please specify: _____)

Type of Information/Assistance Sought from Non-Governmental Entity:

- ☐ general environmental information about a product/service category;
- ☐ analyze life cycle and multiple environmental attributes;
- ☐ analyze basic environmental performance characteristics for specific categories of products/services;
- ☐ identify environmentally preferable product/service criteria for a given product category based on agencies' core environmental values;
- ☐ identify products/services in a given category which meet agencies' predetermined set of environmental performance criteria; and
- ☐ other (please specify: _____)

Please FAX to: Eun-Sook Goidel
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Environmentally Preferable Purchasing Program
U.S. Environmental Protection Agency
(202)260-0178 fax
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Involving Third Party Entities in Environmentally Preferable Purchasing

Test an approach for leveraging private sector expertise to meet the goals of environmentally preferable purchasing -- basically see if the private sector is willing to develop environmental standards on their own

We need organizations to develop environmental attributes and using those attributes develop environmental standards for specific product categories

Jump start environmentally preferable purchasing through a series of pilots and this is one type of pilot

We want to do a bunch of different types of pilots to see what is feasible and to determine what is the best way for EPA to work with standard setting groups

We want your feedback and your help in running some of these pilots for specific product categories

Executive Order

Can our needs be met by groups in this organization?

engage experts who have done standardization in other categories such as quality and performance and have them do the same for environmental attributes

EPA wants to try to see how standards organization and their expertise can leverage environmentally preferable purchasing -- EPA doesn't have the standard setting expertise nor the resources to push this forward