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Barriers to NEPPS Implementation: Flexibility

A Draft Discussion Paper

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Summary

In 1999, the GAO and other evaluators completed four reviews of the National Environmental Performance Partnership System (NEPPS),¹ which EPA and States designed in part to allow States greater flexibility in managing delegated environmental programs. Each of the reviews concludes that EPA does not (and in some cases cannot) provide States with the degree of flexibility necessary for performance partnerships to reach their full potential. The reviews suggest several plausible reasons why the Agency has limited flexibility: organizational structure; agency resistance to changes in established management practices; statutory requirements; and, Agency concerns about balancing flexibility with accountability.

To draw this conclusion, the evaluators generally took the same approach to their research: they read background material on performance partnerships, and then interviewed EPA and State managers and staff over the phone and in person. The researchers did not, however, 1) define "flexibility under NEPPS" explicitly and 2) use detailed examples to explain *how and why* EPA has not provided adequate flexibility under such a definition. The researchers also did not evaluate either the reasonableness of State requests for flexibility, or EPA's justification for denying flexibility.

Nevertheless, the reviews highlight a component of NEPPS that merits serious attention from EPA senior management. As a next step, the Agency should consider developing a systematic framework to identify, verify, and eliminate non-statutory barriers to flexibility. Among the questions for the Agency senior leadership to consider, therefore, would be:

- how do the NPM and Regions define flexibility under NEPPS?
- what kinds of requests do States make? Are these requests consistent with federal statutes and regulations?
- what factors do the Regions consider when denying or granting flexibility to States? To what extent do the Regions consult the NPMs when making these decisions?
- are these decisions made consistently?

To implement a framework to verify and eliminate barriers to flexibility (where possible), the Agency could, at a minimum, take the following steps. First, it could clearly define the general conditions for granting flexibility under NEPPS. Currently, the Regions and NPMs do not have a common understanding of "acceptable" conditions for granting flexibility. To define these conditions the NPMs must work closely with the RAs and DRAs. Second, to remove barriers to flexibility, the Agency must have specific examples to evaluate. Regions should document State requests for flexibility and reasons for denying or granting flexibility, and share that information with the NPMs. Finally, it is reasonable to anticipate that there will be State

¹The other reviews were conducted by the Tellus Institute, Environmental Law Institute, and EPA Inspector General.

requests for flexibility that the general conditions do not specifically address. Therefore, the Agency should establish a process that ensures consultation between Regions and NPMs when, in considering a State's request for flexibility, a Region and State can demonstrate that the general conditions do not apply.

By taking these steps, the Agency could improve NEPPS in two important ways. First, the Agency could reduce the transaction costs of negotiating flexibility without established criteria. Second, EPA and States could systematically identify and eliminate barriers to flexibility, and define "adequate flexibility" on the basis of their shared experience. Lowering costs and increasing flexibility under the framework also might induce States and EPA to improve other aspects of performance partnerships.

Overview

EPA and States established NEPPS to encourage creative approaches to managing federal environmental programs. For the past five years, EPA Regions, by design, have implemented NEPPS without guidance from Agency headquarters, and together with States have developed several innovations in the management of federal environmental programs.² The external reviews unanimously conclude, however, that to oversee federal programs according to NEPPS principles, EPA should provide more direction to its managers and staff. But a principle of flexibility is difficult to apply consistently, in part because no existing NEPPS agreement or EPA policy Statement explicitly defines it.

The original May 1995 agreement promotes an expectation of flexibility - a working definition - that is reflected in three of the original seven NEPPS principles.³ First, flexibility is implied in the principle of "joint planning." Joint planning requires **programmatic flexibility** because limited resources prohibit EPA and States from addressing all environmental priorities equally well. Second, the principle of "allocating federal and State resources to the highest priority problems" requires **funding flexibility**, because States and EPA must be able to shift resources to address negotiated priorities.⁴ Finally, "differential oversight" connotes **oversight flexibility**, because State programs that consistently meet or exceed program goals and requirements might warrant less EPA oversight. In the absence of an explicit definition, States, Regions and Headquarters have developed different expectations of flexibility under NEPPS

² OCIR has documented several of these innovations in a compendium of "success stories." These success stories, which include examples of flexibility EPA has provided to States, are available on the EPA website.

³ National Environmental Performance Partnership System. A Framework for Partnerships between the U.S. EPA and States. May 17, 1995, p. 1.

⁴ Ibid 2.

based on one or more of these three working definitions.⁵ These conflicting expectations help explain why some States perceive that EPA does not provide adequate flexibility under NEPPS.

Flexibility in Practice

In its June 1999 report on NEPPS, the GAO cites four factors that influence how much flexibility EPA provides: 1) statutory and/or regulatory requirements; 2) demand for measurable assurances from States in exchange for flexibility; 3) organizational culture; and 4) communications within EPA. To support its conclusion, GAO provides the following examples:⁶

1. After officials with the Minnesota Pollution Control Agency (MPCA) completed PPA negotiations with Region 5, OECA requested separate performance measures and a separate section apart from the other programs in the PPA. Georgia officials also noted that OECA requested additional information after their PPA had been negotiated with Region 4 and was ready to be signed.
2. Maine and Connecticut had proposed to consolidate funds for their wetlands programs under a PPG, and Region 1 agreed to grant this request. OW objected, however, to allowing all funds to be shifted from a categorical grant to a PPG. OW argued that a portion of the funds were supposed to be used in a competitive bid process for nonprofit organizations (and other eligible parties) to propose special projects. Region 1 had to negotiate with OW to allow for some funding from each State in Region 1 to be set aside for special regional wetlands pilots.
3. Minnesota officials said that EPA regional waste officials were asking for predictive or target numbers (such as the number of inspections the State intends to pursue during the coming year) - information, they said, that was not required nor included in their PPA with Region 5.

In contrast to the GAO's findings, OCIR has identified examples of Regions providing States with programmatic and funding flexibility.

1. In June 1999, EPA Region III's Superfund program entered into a pilot agreement with Delaware's environmental agency. The agreement allows Delaware to decide which Superfund site assessments they will conduct without prior approval from Region III. To do this, Delaware needed to obtain a grant deviation. In addition, Delaware does not have to submit draft site assessment reports to Region III, and may assume that Region III would concur with the reports' findings. The pilot agreement has saved Delaware time

⁵ The term flexibility used throughout this discussion paper comprises all three kinds of flexibility.

⁶ General Accounting Office. Environmental Protection: Collaborative EPA-State Effort Needed to Improve New Performance Partnership System. GAO/RCED-99-171. June 1999.

and helped the State assess the worst sites first. Given this success, Region III extended the agreement through September 2000.

2. For the past three years, Texas has used the authority under PPGs to use excess federal funds to complete activities that address top State environmental priorities. Texas did not use the funds until it had completed all negotiated PPA commitments.
3. Region 8 has authorized the use of PPG carryover funds to support several multi-media projects in South Dakota. These projects include: 1) a GIS digital mapping to integrate geographic data with regulatory data on permitted facilities. This mapping scheme can indicate whether proposed new or expanded facilities, such as CAFOs, should be permitted given the geography of the site; 2) an inspection program for hog CAFOs and development of a general permit for livestock CAFOs; 3) a Statewide testing program to determine levels of radon in community drinking water systems.
4. New Jersey is in the process of installing a new computer system called NJEMS. NJEMS is intended to integrate all of the State's computer systems. At the same time, EPA is modernizing PCS, the compliance system for water. New Jersey currently transmits data from its existing data system into PCS, but has made a number of requests for flexibility due to its planned changes to its computer systems. The State asked that Region II provide funding to write a computer program that converts data from NJEMS into a format compatible with PCS. New Jersey believed that because its system would be available before modifications to PCS were completed, it would have to write two data conversion programs; one for the current PCS, and one for the new PCS. In response, EPA headquarters has provided both funding for, and leadership of, a workgroup to create an Interim Data Exchange Format for PCS. This is a format that will serve as a bridge between the versions of PCS. New Jersey can develop software that accesses its NJEMS system's database and converts selected data into IDEF format. There are multiple mechanisms that New Jersey might use to submit the IDEF transaction files to EPA. It will most likely be via the Internet.

(Additional examples are included in Appendix A).

Three Steps the Agency Could Take to Improve Flexibility under NEPPS

The above examples demonstrate that, in practice, the Regional Offices have *both* denied *and* accepted State requests for flexibility. Without knowing what it means to provide States with "adequate" flexibility under NEPPS, however, it is difficult to determine how EPA falls short of State expectations. Another consideration is that more flexibility is not always desirable - a position reflected in the varying degrees to which States participate in performance partnerships, and also in discussions with State agency officials. Some States, such as Pennsylvania, limit their NEPPS activities because the effort to engage more heavily seems to outweigh the benefits. But a more common reason may be differences in States' capacity for

running federally delegated programs. For example, at the Region 8 State Director's meeting, Wyoming's director noted that a State like New Jersey had a far greater capacity (resources) than Wyoming DEQ for assuming additional delegated responsibilities. States like Wyoming may be less inclined to request certain kinds of flexibility given their relatively smaller capacity. The Director of South Carolina's environmental agency also has noted that, until recently, it did not engage more heavily in NEPPS discussions with Region 4 because it was not prepared to take full advantage of performance partnerships. These comments suggest that what is adequate flexibility for one State might be inadequate for another. A more useful concept of adequate flexibility, therefore, could be "flexibility commensurate with negotiated capacity."

To meet the challenges to flexibility under NEPPS, as discussed in the evaluations, EPA's senior management could, at a minimum, take the following kinds of actions: 1) define the general conditions under which a Region may grant flexibility; 2) document State requests and regional decision making processes in response; and, 3) establish guidelines to ensure consultation between Regions and NPMs if there are data that demonstrate that the general conditions do not apply. These three steps represent a systematic framework for identifying and eliminating barriers to flexibility under NEPPS.

Step 1: Define the general conditions for flexibility

Clearly defined general conditions for flexibility may improve EPA's implementation of NEPPS by establishing a consistent initial negotiating position for Regions. Regions may then choose to move away from this initial position given such factors as State program capacity, new environmental data, etc. It is important to note that these conditions would not act as a "floor" below which EPA could not approve a State's request. Rather, the conditions would encourage Regions to consider State requests for flexibility more consistently and systematically. It also would encourage Regions to clarify their reasoning. Further, Step 1 would allow EPA and States to define flexibility jointly, based on their shared experiences rather than on allegations and misunderstandings.

One approach that could be useful for defining the general conditions of flexibility comprises three sources of EPA oversight: 1) statutory requirements; 2) regulatory requirements and 3) standard operating procedures. Under this approach, statutory requirements would be non-negotiable (i.e., "off the table"), although the NPM might grant a State flexibility in *how* it meets statutory requirements. Regulatory requirements could be considered negotiable but would be presumed to apply to every authorized State program. These requirements could be tailored to State environmental conditions and the capabilities of individual, delegated programs, but would require NPM involvement. The third category, standard operating procedures, is a broad category that includes those aspects of oversight not governed by statutes or regulations. These procedures, which include scheduled or unscheduled information requests, file reviews, or frequency of reporting, likely developed on an ad hoc basis and over time became established Agency oversight activities. EPA has more opportunity to provide flexibility to States under this third category.

If Regions negotiated flexibility using an established set of conditions, rather than inconsistent criteria, EPA and States could minimize lost opportunities and lower transaction costs associated with granting flexibility. These conditions could be defined in the NPM guidance, or possibly in the MOAs with the Regions. In developing this framework the Agency should be careful not to preempt the judgment of Regional managers that is crucial to thinking outside traditional statutory lines. Regional managers' "on-the-ground" knowledge of the particulars of each State helps make flexibility possible. Rather, the framework would allow EPA and States to test, against their shared experience, the assumption that flexibility is currently inadequate.

Step 2: Document State requests for flexibility and reasons for denying or granting flexibility.

Although the external reviewers persuasively argue that flexibility merits greater attention from EPA senior management, they do not provide detailed examples of how and why has EPA has not met State expectations of flexibility. The Regional NEPPS leaders could ensure that each Region documents the nature of State requests for flexibility and reasons for accepting or rejecting them. Assuming that Step 1 is completed, the documentation should provide answers to the following types of questions, in addition to those listed above:

- what justifications for flexibility do the States provide? Do the States use environmental data to support their request?
- what reasons does EPA provide for denying or approving States' requests?
- are EPA's actions consistent with the general conditions for flexibility?
- has the framework for flexibility simplified, complicated, or simply failed to improve negotiations?

Step 3: Establish guidelines to ensure that Regions consult NPMs if the Region and State can demonstrate that the general conditions do not apply.

Some NPMs may be concerned that flexibility as defined by some Regions is tantamount to "negotiating everything" in a federally delegated program. Defining the general conditions for flexibility (Step 1) can alleviate this concern, but might not be useful in the face of new information, requirements of court decisions, or changes in federal and State agency leadership. An additional step, therefore, would be to establish a process whereby Regions and NPMs consult each other if the general conditions do not apply. Case-by-case decisions increase transaction costs because they are more process-intensive. Steps 1 and 3 could lower the overall costs of negotiating flexibility by making case-by-case decisions the exception, not the rule. In addition, these steps might prevent last-minute or post-negotiation changes to PPAs (see GAO example 1 above).

A New Framework is Necessary but Insufficient to Improve NEPPS

The proposed framework offers two potential improvements over the current situation. First, the framework might reduce the transaction costs of negotiating flexibility without established criteria. Second, the framework might help EPA and States systematically identify and eliminate barriers to flexibility, and define "adequate flexibility" on the basis of their shared experience. Lowering costs and increasing flexibility under the framework also might induce States and EPA to improve other aspects of performance partnerships. The NPM for NEPPS should consider working with ECOS on a process to develop a shared understanding of barriers. Once EPA and States have had time to negotiate flexibility under the new framework and document problems and successes, ECOS and EPA can revisit the issue of flexibility and make necessary adjustments to the process.

As the NEPPS evaluations noted, the issue of flexibility is one of many challenges facing EPA and States. Improving environmental protection through NEPPS will require EPA-State collaboration on many other issues, such as performance measurement and information management. EPA and States already have made progress in these areas by jointly developing more outcome performance measures and better information management strategies. By taking these steps to systematically address challenges to flexibility, the Agency would demonstrate further its continuing commitment to performance partnerships with States.

Attachment A

1. **Nebraska use of PPG authority**

In FY 1999 and FY 2000, Nebraska DEQ overmatched the required state funding for the Air and Water portions of the PPG. State funding was inadequate to cover the RCRA portion of the PPG, but the overall PPG matching funds requirement was met because of the excess matching funds in Air and Water. As a result, Nebraska DEQ was able to receive its full regional allocation of RCRA funds. This would not have been possible without PPG authority.

2. **Strategic Partnerships between Texas and Region 6**

Region 6 and the Texas Natural Resources Conservation Commission (TNRCC) continue to build upon the success that they have achieved in designing the PPA structure to match the State Strategic Plan. The State Strategic Plan is developed for the Texas Legislature as part of the State budget process. In FY 2000, the Regional Administrator and the Chairman of TNRCC have hosted two planning meetings for key State and EPA staff. The goal of these meetings has been to enhance State-EPA strategic partnerships. The State and the Region have agreed to several action items for the future.

3. **Mississippi DEQ (MDEQ) reorganization**

MDEQ undertook a reorganization in which they decided to create both a multi-media enforcement and multi-media permitting division. Rather than submit their PPG application along media lines, they requested to submit their PPG application and budget along the lines of their reorganization. This PPG format parallels the format of MDEQ's budget requests to the state legislature. Region 4 management supports MDEQ's proposal.

4. **Massachusetts Compliance Assurance Demonstration Grant to Fund Targeted and Multi-media Inspections**

The Massachusetts Compliance Assurance Demonstration Grant approved in 1995 was a forerunner of the PPA and PPG with Massachusetts. It was unique in that it tested several aspects of the State-EPA relationship. Some key activities tested under the grant were 1) multi-media inspections performed by single inspectors (rather than by cross-media teams of inspectors) and 2) flexible targeting of industrial facilities based upon joint State-EPA priorities. The grant helped pave the way for the PPA and PPG by including aspects of performance flexibility and grant consolidation.

A demonstration pilot grant authority was established to permit the combination of financial portions of three federal grants: the CAA (105), RCRA, and NPDES (106) grants. This authority removed the substantial burden on the state accounting for these

funds separately and incrementally, and allowed the State to carry-out inspections based upon an agreed upon system of prioritizing and targeting rather than on the fund source. Compliance and enforcement activities were stripped out of the three traditional grants and were renegotiated and placed into the new grant.

An even more fundamental factor to realizing the grant was the recognition on the part of both the State and the EPA Regional office of the potential to achieve a better and more strategic outcome through a multi-media, and targeted approach. Establishment of the demonstration grant was labor intensive, and required considerable EPA and State effort to overcome the pervasive single-medium focus of our grant programs.

An evaluation issued in 1997 found a number of improvements realized as a result of the demonstration grant. These include the multi-media approach allowed for elevating the level of enforcement action in consideration of multiple violations in more than one media program, and flexible targeting resulted in finding significant rates of noncompliance.

Massachusetts continues to use these and other compliance related approaches to address priorities, seeking flexibility and differential oversight whether in delegated or non-delegated programs. Specific examples include: inspection priorities at major vs. minor sources; permitting and inspections in accordance with MA 5-year watershed cycle; multi-media inspections vs. single-medium inspections; air monitoring networks; functional equivalency in water programs; documentation required to demonstrate state equivalency to RCRA.

5. New Hampshire Reprogramming of Carryover Funds

The New Hampshire Department of Environmental Services (DES) reports having successfully re-programmed funds both up-front in the budgeting process (mostly across the Water Programs included in the PPG), and particularly in PPG carryover funds across all Air, Water and Waste Programs included in the PPG. Some recent fund re-programming successes include creation of a new staff position to address sprawl, mercury reduction, restoration of shellfish beds, and protection of in-stream flow in rivers.

One of the significant advantages of the PPG is the ability to look at grant funds in total and allocate funding based on needs and priorities. DES receives a single grant award - approximately \$4.8 million in fiscal year 1999 - that provides funding for a range of air quality, waste management and water quality programs, and DES and the Region have made agreements to shift resources across programs. In addition to authority to re-program granted under the PPG, DES has made progress by gaining a better understanding of account balances in relation to work plan commitments as a result of increased communication among staff, and a quarterly financial reporting system currently under development.