



Performance Systems Task Force Survey Review



DEVELOPED BY THE ASTSWMO PERFORMANCE SYSTEMS TASK FORCE

ASTSWMO PERFORMANCE SYSTEMS TASK FORCE PERFORMANCE SYSTEMS SURVEY

The Performance Systems Task Force of the Hazardous Waste Subcommittee of the Association of State and Territorial Solid Waste Management Officials (ASTSWMO) has engaged in activities to coordinate States' efforts in identifying opportunities for facility specific flexibility under the RCRA program to be implemented by States that is designed to result in more protective, yet enforceable, environmental management and outcomes. As such, the Task Force has concluded that there exists to "one size fits all" performance system that would satisfy the goal of needed flexibility among the different State programs.

The history of flexibility needs has been a conundrum for the States and EPA RCRA programs since the early days of RCRA, venturing through the era of the early days of environmental management systems. Although the concept of an Environmental Management System (EMS) has been in place for many years, the drawbacks to early EMS' were that these systems may have only been cursory systems designed for single media, not well thought out, and unable to keep pace with the constant regulatory changes in the 1970's, 1980's, and well into the 1990's. The traditional approach by the regulatory agencies of developing rules, implementing them, inspecting regulated entities, and enforcing the rules where applicable, did achieve excellent results in compliance, although these early enforcement actions may have stifled any innovative flexibility designed to achieve the same environmental results. In the late 1980's and early 1990's, the inception of ISO14001 brought a more disciplined and engineered approach to EMS. There was perceive to be a rather cynical view by some States and federal agencies that looked at ISO14001 as more of a business/economic decision which allowed various facilities to gain a more competitive edge with overseas business interests, rather than a tool for aggressive environmental stewardship. However, the benefits of ISO14001 gave rise to opportunities in development of more robust EMS' in the days and years to come.

The benefits of EMS were to promote greater environmental compliance, efficiency and performance. EPA, in recognizing these benefits in promoting EMS', launched their National Environmental Performance Track program in June, 2000. Although the Performance Track program offered incentives to enrolled industry, such as certain reduced requirements and reporting, it was still touted as a "voluntary program" which recognized and rewarded facilities that exceeded minimum regulatory requirements and would take extra steps to reduce and prevent pollution. The Performance Track program had mixed results and came under criticism from a variety of sources. Because Performance Track was a voluntary program administered by EPA, and apparently not well coordinated with individual States' "media" programs, the lack of a more disciplined approach seemed to yield some negative consequences.

In December, 2004, EPA sponsored an Environmental Management Systems Summit to discuss the emerging use of EMS'. ASTSWMO was represented at this summit and, in March, 2005, developed a White Paper on EMS based on the discussions from this Summit. In the White Paper, ASTSWMO discussed issues critical to successful implementation of EMS in the states, including:

- State support of EMS initiatives

- EPA grant of regulatory flexibility
- State and Federal agreement on recognition and incentives
- Enforcement of EMS provisions
- EMS performance evaluation
- EMS training for State regulatory staff

EPA terminated the Performance Track on March 16, 2009. In her letter, Administrator Jackson reiterated how much she values EPA's partnerships with environmental leaders, and stated that she looked forward to working with the States to "set new objectives for environmental stewardship and sustainability."

Last year, the Performance Systems Task Force conducted a survey of ASTSWMO members, requesting specific input from the States in identifying areas where regulatory flexibility could or should be implemented, impediments to implementation, how benefits may be quantified and ensuring that any flexibility resulted in no reduction in environmental protection. The Task Force particularly requested input on public outreach, how facilities' compliance history should factor into any grant of flexibility and enforceability. (The results of the survey are attached.) The responses received were as varied as the States responding, but several consistent themes were echoed in the majority of responses.

REGULATORY FLEXIBILITY MUST BE EARNED RATHER THAN GRANTED

The States are strong proponents of a program where any flexibility must be earned, rather than granted. Many stated that facilities in the Performance Track viewed their commitment as "should do", rather than "must do". They supported requirements for continuous improvement with revocation of eligibility if safety, health or environmental protection was compromised. All States agreed that compliance history should be a major factor in eligibility and flexibility determinations, with recent violations weighted more heavily than historic violations. The States also supported eligibility determinations taking into account compliance with other program (TSCA, FIFRA, OSHA, etc.) standards, and one State opined that the Performance Track criterion of two major violations in the preceding three years was too weak. Some disappointing results from Performance Track cited by the States included facilities being slow to memorialize their commitments, then violating basic legal and regulatory requirements, as well as alternate requirements under other programs (Project XL). The States also strongly supported the need for compliance oversight in conjunction with any grant of regulatory flexibility.

REGULATORY FLEXIBILITY FOR REDUNDANT PERMITTING AND RECORDKEEPING

The States strongly supported flexibility where the interface between programs required redundant permitting and recordkeeping, with occasional conflicts in specific compliance requirements. Specifically cited were the interface between RCRA and the CAA programs, as in the interface with BB requirements and streamlining MACT standards for hazardous waste combustors. One State specifically requested that air issues be deferred to Clean Air Act (CAA) jurisdiction whenever possible. Another state requested flexibility where general facility standards were duplicative of Homeland Security requirements. There was also a request to

“rationalize” groundwater monitoring requirements across the various cleanup programs; subject to RCRA permitting, subject to facility-wide corrective action, and subject to CERCLA.

HISTORIC EPA FLEXIBILITY

Some specific requests for flexibility have been implemented in a targeted fashion by EPA. EPA has increased the storage limit and storage time for F006 metal-containing waste that is to be sent off for reclamation; several states requested flexibility in storage time and accumulation limits for generators. Several States supported increased use of electronic reporting data transfer and recordkeeping, to include a web-based database accessible to regulators. EPA is currently working on the E-manifest and electronic tracking of notifiers under the Definition of Solid Waste rule, as well as the financial assurance module in RCRAInfo.

STATES STRONGLY SUPPORT PUBLIC PARTICIPATION IN REGULATORY FLEXIBILITY

The States support public participation in the regulatory flexibility process. They support public access to the application for flexibility, records of on-site reviews and inspections, compliance history and the basis for any final flexibility decisions. Various States also supported public participation in granting variances, facility-implemented community involvement plans, and notices of proposed flexibility determinations being sent out to the facility mailing list for public comment prior to finalizing the determination.

The Task Force agrees with Administrator Jackson that the Performance Track, while it has had its successes, would benefit from a review and refinement of its core concepts leading to “a stronger system of environmental protection as we go forward.” Our Performance Systems Taskforce is eager to partner with EPA and other stakeholders to ensure that the experiences and capabilities of the States, as represented by ASTSWMO, will provide for the best, most transparent and implementable program providing for earned flexibility in environmental management for those facilities that merit it.

SURVEY SUMMARY

The survey posed ten direct questions in identifying opportunities for facility-specific flexibility in RCRA programs, and the following is a summary of the response from the States.

1. Please provide examples where you think that RCRA can provide an opportunity for State flexibility in implementing RCRA Subtitle C generator or TSD requirements (e.g., to reduce duplicative requirements, regulatory burden).

- General management standards
 - Eliminate duplication with homeland security requirements
 - Provide for alternatives to prescriptive contingency plan requirements
 - Reduce submission of supporting documentation by labs with stringent QA programs
 - Record keeping and reporting – electronic submittals; web-based recordkeeping remotely accessible to regulators
- Generator standards
 - Allow use of state-approved facility environmental management plans as alternative to complying with generator standards
 - Satellite accumulation – increase volume limits; allow remote, secure locations
 - Allow additional accumulation time without a permit
- TSD requirements
 - Relax storage permit requirements for universal waste destination facilities
 - Increase use of performance-based standards
 - Write permit conditions to allow changes to be made without triggering permit modification process
 - Rationalize groundwater monitoring requirements across programs (RCRA 264/265; RCRA corrective action; superfund; etc.)
 - Defer to Clean Air Act jurisdiction whenever possible
 - Provide alternatives to immediate sampling of all wells following observation of a statistically significant increase in one well
- Programmatic issues
 - Streamline the authorization process – grant “presumptive authorization” that is revocable if EPA demonstrates state program is deficient
 - Provide training on existing areas of flexibility (CAMUs, recycling criteria, Remedial Action Plans, contained-in policy, etc.)

- Develop a compendium of examples of flexibility

2. Please provide suggestions for requirements that may be placed on the regulatory flexibility activity as a condition, like a conditional exemption. Can these requirements be met by generic language or would you suggest specific requirements for each activity? Please explain.

- Performance criteria – require achievement of performance at least as good as what is required under existing specific, prescriptive regulations
- Specify general management standards in regulation, with details to be determined by the regulators for each particular case
- Emphasize requirements for continuous improvement, and self-audits with reporting
- Revoke eligibility if safety, health, or environmental protection are compromised
- Authorize use of “letters of agreement” in lieu of cleanup orders

3. Please provide examples where compliance with a facility management system or chemical management policy would achieve the same results as the current RCRA requirements.

- Positives

- Innovative, integrated remedial design more effective than RCRA C cap

- Negatives

- no examples ever seen – facilities mainly want reduced frequency for required actions and avoidance of NOVs for minor infractions
- not aware of any – spotty results dependent on management commitment; changes in management and profitability issues tend to limit effectiveness
- a facility management system can improve facility compliance, but is no substitute for RCRA cradle-to-grave oversight
- it is too difficult to measure and demonstrate performance of alternate practices compared to current requirements
- Regulators should not rely on a “management system” alone to demonstrate equivalency. Compliance oversight and enforcement will always be necessary.
- Regulators lack training in environmental management systems

4. Can you suggest other opportunities for RCRA facility-specific flexibility? (Note: It does not have to be limited to RCRA Subtitle C.)

- Region VI corrective action strategy (streamlining the corrective action process)

- Revise the permit modification process to simplify and make less administratively burdensome
- Increase the use of electronic reporting, data transfer and record keeping
- Provide alternative enforcement mechanisms (e.g., a “ticket system” that operates like traffic tickets)
- Revisit past “burden reduction” reviews to determine if there are any additional actions worth implementing
- Extend the accumulation time limit

5. Have you ever granted regulatory flexibility in exchange for a commitment to enhanced environmental performance and been disappointed in the results? ___Yes ___No In what ways did the facility fail to live up to its commitments?

- Facilities slow to submit information to memorialize facility commitments, coupled with violations of basic legal/regulatory requirements after agreement put into effect
- Facilities view commitments as “should do” rather than “must do”
- Drafting and review of performance plans was time intensive for facility – self-audits and corrective measures might have been more productive uses of facility’s time
- Facility cited for noncompliance with alternative requirements under Project XL

6. Can you think of examples where regulatory requirements kept better environmental performance measures, or improved environmental compliance, from being implemented? What were they? Please describe.

- Administratively burdensome provisions hindering remedial actions (delistings, LDR variances, for example.)
- Required 50-foot setback for ignitable wastes conflicting with Fire Marshal recommendations
- Commingled releases from regulated land disposal units, historic solid waste management units, and areas of concern: the post-closure requirements for regulated units are often not well suited to this situation

7. What comments or suggestions have you received from regulated entities on flexibility that would allow them to improve their environmental performance? Did you accept or reject “flexibility” suggestions for environmental improvements or better environmental performance? ___Yes ___No Why or why not?

- 10-day timeframe for railcar unloading

- Relax 3rd-party liability requirement for facility no longer managing hazardous waste but not yet certified closed
- Request from hazardous waste combustors to streamline implementation of MACT regulations

8. What impediments or rejections to environmental flexibility have you faced from the Federal Agency? What reasons were given? Why?

- Implementing Subpart BB requirements at facilities with air permits covering emissions from wastes as well as other sources
- Reluctance to accept state's "One Cleanup Program" concept at RCRA corrective action facilities and unwillingness to provide "enforcement comfort" if state "One Cleanup Program" followed.
- EPA insistence on MCLs as cleanup standard where risk-based approach would provide protective alternative
- Perceived EPA preference for treatment-based remedial alternatives even when risk-based approach is equally protective

9. What type of public process should be involved in the granting of flexibility?

- Facility-implemented community involvement plan
- Public involvement at rulemaking stage only, but flexibility decisions part of public record, with notice of proposed flexibility decisions sent out to facility mailing list
- Give public easy access to information: application, review process, composition of review panel, records of on-site reviews, facility compliance history, flexibility decisions
- Include public participation in any granting of variances
- Case-by-case for flexibility based on interpretation of guidance

10. How should compliance history be factored into the flexibility determination?

- Should be a major factor
- Follow Performance Track standard
- Performance Track criterion allowing 2 major violations in preceding 3 years may be too weak, depending on the violations.
- Past violations should factor strongly into decision of whether to grant flexibility

- Grant of flexibility should be revocable based on current non-compliance
- Weight recent violations more heavily, and take into account the nature of the violations
- Consider compliance with other program standards (TSCA, FIFRA, OSHA, etc.)