

GUIDANCE FOR SEEKING AND APPROVING CREDIT UNDER ELEMENT 13 OF THE STATE REVIEW FRAMEWORK

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1. Purpose

EPA is providing this guidance to encourage willing states to use Element 13 of EPA's State Review Framework (SRF) to achieve results by seeking recognition and resource flexibility credit for alternative approaches for achieving compliance. The guidance also provides information to EPA regions on the review and approval of state requests for credit.¹

This guidance applies specifically to credit proposals for Environmental Results Programs (ERPs), although it may be used as a starting point for credit proposals for other types of alternative programs. This will be a dynamic document that will need to be expanded and revised as new types of alternative approaches are approved for credit. EPA envisions using a similar process and set of criteria for approving credit requests for different types of alternative approaches.²

2. Background

The goal of the SRF is to establish consistency in the level of core compliance and enforcement activities across states, as well as consistency in regional oversight. Elements 1-12 of the SRF address inspection, enforcement and data aspects of traditional core CWA, CAA and RCRA compliance programs. A voluntary Element 13 provides a state the opportunity to describe additional activities that improve overall compliance. Many states have expressed their desire to utilize Element 13 to request credit for these activities. Element 13 offers states three ways to show the role alternative programs play in their overall compliance and enforcement programs.

1. *Educational descriptions of other tools used to gain compliance in conjunction with the SRF review:* The state may present alternative activities or programs to EPA during its SRF review. The state in this case is not seeking credit, but is demonstrating to EPA a more complete picture of the breadth and scope of its activities to promote compliance.
2. *Recognition Credit:* The state may request formal acknowledgement of results from alternative compliance and enforcement programs.
3. *Resource Flexibility Credit:* The state may request EPA approval of the shift of resources from the traditional program outlined by existing national enforcement program guidance to alternative activities to promote compliance.

¹ On June 23, 2005, EPA issued Element 13: Additional Compliance Programs and Activities, describing how states should submit materials under Element 13. This document supersedes the June 23, 2005 guidance.

² On January 18, 2006, EPA issued a revised draft State Review Framework Element 13 Concept Paper. The Concept Paper is still relevant and contains content not included in this current document. These two documents should be utilized together for a full understanding of the credit available under Element 13 of the SRF.

3. Educational Description of Other Tools

The original purpose of Element 13 was to provide a way for states to demonstrate to EPA the breadth and scope of their compliance and enforcement activities, beyond the core activities covered in Elements 1 - 12. States are free to provide EPA whatever information they wish on these other tools (such as compliance assistance, incentive (audit) programs, pollution prevention activities, outreach, etc.) to promote compliance or beyond compliance activities at any time during the review process. EPA welcomes any outcome information that states might wish to share from assistance, monitoring, audit programs or enforcement.

4. Credit Proposals

As a benefit for good performance, states may formally request credit for alternative programs or activities related to achieving compliance after the state has completed a successful SRF review. A state may seek recognition and/or resource flexibility credit using this guidance.

Credit will be considered and granted on a continuum based on the level of performance demonstrated in a state's SRF review, the strength of the design of the alternative program and the demonstration of meaningful results. The more robust these factors are, the more credit may be granted. EPA recognizes that a state may have minor areas of improvement identified in the review and still be determined to warrant credit. States may also seek credit in a media program where performance is high, while being deficient in another program.

Completion of the SRF review is important in order to benchmark that a state has and will perform in a manner that is at least consistent with the minimum goals of national guidance and in general alignment with the performance of other states across the country. Reductions in traditional core program activities could signal a decrease in enforcement efforts in a state, or could indicate other problems in state enforcement programs. It is important, then, for EPA to carefully assess that these are not issues before granting flexibility from core program requirements. Traditional outputs are closely scrutinized by OMB, Congress and external parties. When credit results in reductions in core activities, it is critical that EPA and states explain those reductions by demonstrating effective outputs and results of the programs that are approved under Element 13.

Recognition Credit

Recognition credit means that EPA provides "official recognition" and acknowledgement that the alternative program is an important part of a state's overall approach to achieving compliance. EPA can provide recognition credit by including a description of the alternative program:

- in PPAs or other kinds of grant agreements;
- in reports on EPA reviews of state programs;

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- in reports to EPA senior management, Congress, or the public that summarize state programs and activities; and/or
- by providing information to EPA senior managers, the public and other stakeholders through EPA web sites on both the Internet and Intranet.

For recognition credit, a State Commissioner (or their representative) should submit a formal request to the Regional Administrator (or their representative) during or after its state review, describing the programs it would like recognized, the results achieved and how the state would like the recognition to occur. As long as a state has demonstrated performance that warrants credit, and the alternative approach relates to improving compliance within the CWA, CAA and RCRA programs covered in the SRF review, recognition credit will be granted. Recognition credit is **not** an endorsement of reductions in core work in favor of the alternative program. Such reductions are addressed in the “Resource Flexibility Credit” section below.

Resource Flexibility Credit

Resource flexibility credit can allow a state to reduce traditional core program activities in one or more media programs in order to invest in alternative compliance activities in the media area(s) covered by the review. These activities should further the overall compliance of the state’s regulated universe and may help to support state-specific priority areas.

EPA is using an “incubator” approach to resource flexibility credit proposals. This means:

- When requests for resource flexibility credit for alternative programs are put forward for the first time, EPA will review them to determine whether the results of the alternative program warrant credit.
- Once EPA has approved a proposal for credit for a type of alternative program, guidance (e.g., this document) will be developed for states on how to request similar credit and for regions on how to review and approve those requests. The Environmental Results Program (ERP) is the first alternative approach to have been approved for credit. The essential elements and components that EPA expects to see in an ERP that is submitted for credit are contained in Appendix 1 of this guidance.
- This approach will promote consistency across regions in dealing with similar proposals and help to develop consistency in the format and information included in state submittals.

Step 1: A state must have completed an SRF review cycle prior to submitting a formal proposal for resource flexibility credit.

Step 2: A state considering a resource flexibility credit proposal should discuss its needs with its region early in their deliberation process and prior to submitting a formal proposal. This can happen while a state is going through its SRF review. The state and its EPA region should review the existing national enforcement program guidance for applicable media

programs to see if existing flexibility can meet the state's needs.³ The state and region should discuss how existing flexibility may be applied through Performance Partnership Agreements (PPAs), Performance Partnership Grants (PPGs) or through categorical grant work plans.

Step 3: If the state needs flexibility beyond that offered in existing guidance, it should consider an Element 13 proposal for resource flexibility credit. It should notify its region about its interest and the region should, in turn, notify OECA. The region and OECA can help a state ensure that its formal proposal contains the necessary information for review. These discussions can be taking place during or after the performance of the state's review under the SRF.

Step 4: After the region has determined that the state's performance warrants the granting of credit, the State Commissioner (or their representative) should send a formal proposal to the Regional Administrator (or their representative) that contains the following information:

- A brief overall description of the environmental issues facing the state in the relevant SRF program areas covered by the proposal, and how the traditional universes and the alternative approaches fit into this picture.
- The current status of efforts to address these problems, including the compliance status of both the traditional universes and those addressed by the alternative approach, how this was determined, and the statutory or regulatory basis for dealing with these problems.
- A summary of inspection and enforcement activities directed at the traditional universe.
- A description of the alternative approach including information on the regulated universe addressed, inspection, compliance and enforcement activities aimed at these facilities and the likelihood that the environmental problems have been or can be addressed through the proposed approach.
- A detailed statement of the credit the state is seeking, including the full range of activities the state plans to carry out in the media areas affected (e.g., if flexibility for inspection coverage from traditional major facilities is sought, what are the state's inspection commitments, including commitments to implement the alternative approach).
- Explain how performance has been or will be measured, in terms of the state's commitments, compliance status of the traditional universes and in addressing the environmental problem. Specific pollutant information and population exposure information, if available, is desirable. The state's description should include a means

³ An addendum to this guidance document will be provided later in FY2007 that will reference the flexibility in existing national enforcement program guidance in the three media programs covered by the SRF reviews.

of determining that areas where resources are removed are not expected to experience undue environmental problems.

- A statement as to how the core program commitments and the alternative approach fit together into an overall compliance and enforcement strategy for the state that yields equal or greater environmental and public health protection.
- A senior manager point of contact.

EPA encourages states to consider requesting prospective credit for types of alternative programs that have already received EPA approval under Element 13 in another state. Under this scenario, a state could propose to use resource flexibility to start up and implement the alternative program. While the state will not have demonstrated results to provide initially, the state's proposal should include an implementation timeline and expected results, along with as much information on the factors listed above as possible.

Requesting Both Recognition and Resource Flexibility Credit

A state may request both recognition and resource flexibility credit at the same time and in the same proposal. The proposal should address the information identified above; clearly state the specific recognition desired, and define the resource flexibility being requested.

5. Evaluating Credit Proposals

States requesting any type of credit must have successfully completed an SRF review of Elements 1-12. As long as the state is within a review cycle, the region does not need to repeat a review of the core elements of the SRF. Regions must verify two factors in the beginning of the approval process:

- that the state has completed a review under the SRF and the region has determined that the state's performance warrants the granting of credit; and
- whether the alternative approach that the state is implementing or planning has previously been approved by EPA for credit (e.g. ERP).

Recognition Credit

The standard for a state to receive recognition credit is the determination by the region that the state has demonstrated performance that warrants the granting of credit and that the state is willing to share alternative program information and results with EPA. The only data requirements are a description of the activities to receive recognition and the environmental benefits, outcomes or other results of those activities.

Regions should decide whether to approve requests for recognition credit within 14 days of receipt of a complete formal proposal or at the completion of the state's SRF review.

Resource Flexibility Credit

The standard for a state to receive resource flexibility credit is the determination by the region that the state has demonstrated performance that warrants the granting of credit and that the alternative program, as a part of a strategic approach by the state, will likely produce results that are equivalent to or greater than the results obtained in the traditional core program area.

The region will work with the state on a program-by-program basis to ensure their formal proposal for credit reflects a distribution of resources across traditional and alternative programs that will produce maximum compliance and environmental results. The commitments and credit should be captured in a form consistent with the existing State/EPA agreement (PPA/PPG or categorical grant work plan).

In reviewing the proposal and making a decision about approval, EPA will consider:

- whether the traditional universe of major facilities (or the universe where flexibility is being sought) is generally in compliance with CAA, CWA and RCRA requirements (as appropriate in light of the proposal);
- the strategic nature of the state's compliance and enforcement program, highlighting how the use of all tools and approaches utilized by the state leads to a balanced program that produces equal or greater environmental protection than the traditional approach;
- information provided to describe results and performance in both the traditional universe and the alternative program sector; and
- the additional environmental gain (if any) from the alternative approach.

Initial proposals for resource flexibility credit for a type of alternative approach not previously approved by EPA will take longer than those that have already been through the approval process. Regions are required to notify OECA when a formal request for credit is submitted, and provide OECA with the information provided by the state as it is received. Determinations will need to be made as to what the critical components of the alternative approach are and how this approach might fit into a state's strategy. Approvals for initial proposals should not take more than 90 days of OECA's receipt of a complete, formal proposal. The OECA AA retains the ultimate decisional authority to approve all initial credit proposals, based on recommendations from OECA offices and the involved regional office.

Regions should decide whether to approve requests for resource flexibility credit for **alternative approaches that have already been through the approval process** within 60 days of receipt of a complete, formal proposal. Where an approach has been approved and guidance developed, regions are required to notify OECA when credit is requested and provide OECA with the information provided by the state as it is received. In those cases, the regions have the decisional authority to grant or deny credit. Regions should inform OECA of their determination before communicating the decision to the state.

EPA has not developed a predetermined formula as a means of approving resource flexibility credit, but rather has taken a holistic approach to achieving results as its primary decisional criterion. EPA has agreed to work with states to explore the concept of an “environmental currency” approach to credit. Until such an approach is agreed upon and announced, EPA will utilize the strategic approach outlined in this guidance.

6. Implementation

Regions will require that agreements and commitments negotiated for resource flexibility (whether prospective or not) be captured in detailed work plans including specific milestones, deliverables, and time lines as a part of the state’s PPA/PPG/categorical grant agreement. These commitments will be reviewed by the region as part of regularly scheduled reviews of grant agreements, as well as in subsequent SRF reviews to ensure the commitments are being met and the alternative approach is producing the desired results. If either of these do not occur, either a written corrective plan should be implemented or the region should withdraw the flexibility provided, and the state will be expected to implement their program in accordance with the traditional national compliance and enforcement guidance and policies.

Information regarding resource shifts should be easily accessible and reportable to OECA for tracking purposes. EPA will work with each state granted credit on a tracking and reporting format for inclusion in PPAs, PPGs, and categorical grant agreements to promote reporting ease. This will provide consistency in the information collected and reported nationwide.

7. Roles and Responsibilities

Role of the state:

- The state will notify the region of its interest in credit, discuss their ideas with EPA and develop and submit a formal proposal for credit.
- The state will organize, present and explain data to support the proposal.
- The state will propose alternative commitments for resource flexibility credit proposals.
- The state will provide reports on the outputs and outcomes of their strategic approach, including the alternative programs receiving credit.
- The state will maintain a level of performance that warrants the granting of credit, taking into consideration any flexibility provided.

Role of the region:

- When a state notifies a region of its interest, the region will engage with the state and OECA and assist the state in developing a formal proposal.
- For recognition credit, the region will consider the proposal, make a decision, notify OECA, and track and report information about the credit provided on a regular basis. Where a state wants its data included in national reporting, the

region must ensure that appropriate data is provided on an ongoing basis to the agreed-upon sites where data on the alternative program will be housed.

- When a state submits a formal request for resource flexibility credit for a new type of alternative approach, the region will notify OECA and supply OECA the information provided by the state. The region will work with OECA to review the information and make a recommendation to the OECA AA as to whether the type of alternative approach warrants credit. The OECA AA will make the final decision on whether to grant credit or not.
- When a state submits a formal proposal for resource flexibility credit for an alternative approach that has already been through the approval process, the region will notify OECA that the proposal has been submitted and provide OECA the information provided by the state. The region will consider the proposal, address OECA comments, make a decision, and notify OECA and the state.
- The region will track implementation and hold the state accountable for commitments made in the alternative program area.
- The region will provide information to OECA on a regular basis on the status of the state's strategic approach and any results achieved.

Role of OECA:

- For initial formal requests for resource flexibility credit for an alternative approach, OECA will assist in the analysis of specific credit proposals and join the region in recommending to the OECA AA whether to approve the credit proposal or not.
- The OECA AA retains final approval authority for initial resource flexibility credit determinations.
- For proposals on alternative approaches that have already been through the approval process, OECA will review the initial proposal forwarded by the region and notify the region of any major issues or questions they would like to have addressed. The region is responsible for building these issues and questions into their review.
- OECA will work with the Element 13 Workgroup to provide a forum to discuss issues associated with Element 13 and to develop guidance around new alternative approaches.
- OECA will work with states and regions on appropriate web sites and systems to include and track data provided by the regions on approved credit proposals.
- OECA will include information on state programs provided credit under Element 13 when reporting on state performance in the enforcement program. OECA will also periodically provide information to regions, states, senior managers, the public and other stakeholders on successful alternative program models.
- OECA will monitor the implementation of credit by the regions on a national basis to ensure that regions are operating in a consistent manner and to ensure that credit given does not adversely affect the program from which resources are diverted.

APPENDIX 1

ENVIRONMENTAL RESULTS PROGRAMS

In the 1990s, to supplement its traditional inspection and enforcement efforts, the Massachusetts Department of Environmental Protection (MA DEP) experimented with innovative compliance programs to use increasingly scarce resources where they could yield the greatest environmental benefit. MA DEP developed and implemented the Environmental Results Program (ERP) to efficiently pursue environmental gains at smaller sources. In 1996, MA DEP launched ERP in the printing sector and shortly thereafter added the dry cleaner and photo processor sectors. In recent years, 16 states have begun developing and implementing programs based on the ERP model.

THE ESSENTIAL ELEMENTS OF AN ERP

This section describes four essential elements and lists the type of components EPA looks for in an ERP that may be submitted for resource flexibility credit under Element 13. One of the unique aspects of ERP is that it is an integrated system in which all four elements are designed to work in concert. EPA does recognize that states design ERPs to address varied compliance issues and sectors, and therefore, some variability in the components and how they are implemented is acceptable. The information provided below is from the MA ERP for dry cleaners and is an example of a comprehensive or “full” ERP. To date, EPA has only approved a proposal for credit for a full ERP.

EPA has determined that there are four essential elements of an ERP:

- 1) **A measurement system** sufficient to draw conclusions about compliance and environmental performance of the sector as a whole. A valid measurement system is one that produces representative, verifiable, credible, and reproducible results and may include:
 - a) Analysis of performance measurement data, including any results for each tool utilized by the program (e.g., assistance, monitoring, self-certification, enforcement).
 - b) Statistically-based random inspections and analysis of data.
 - c) Data collected from facility inspections and self-certifications.
 - d) Automated data collection and analysis systems.
 - e) Full/aggressive/complete identification of regulated universe.
 - f) Environmental Business Practice Indicators (EBPIs) or other metrics tracked to determine how well the sector is doing overall, assess the reliability of the self-certifications, identify trends in performance, and identify areas that still need improvement. This performance measurement approach is used to track results, determine priorities, and strategically target compliance inspections and assistance efforts.

- 2) **Self-certification by a responsible company official** using a set of questions that covers all media included in the ERP and, if necessary, a Return to Compliance (RTC) plan to document the facility's accurate current compliance status and the steps the facility commits to take to achieve compliance should problems exist. The self-certification program must include a verification component to ensure the veracity of the self-certifications (see 4. Compliance monitoring and enforcement program). The self-certification process generally includes:
 - a) Multimedia compliance questions linked to workbook sections or regulatory citations.
 - b) Self-certification statement completed by responsible company official on a regular basis. Because the ERP is system focused, it also includes a forward-looking statement asserting that systems are in place to maintain compliance over the coming year.
 - c) Return to Compliance (RTC) plans with schedules for coming back into compliance where problems have been documented.

- 3) **Compliance assistance** sufficient to enable facilities to understand their environmental responsibilities, how to fulfill those responsibilities, and how to complete their self-certifications. Typical compliance assistance tools include:
 - a) Workbooks – multi-media, plain language and covers all requirements; can include Best Management Practices (BMPs), Pollution Prevention (P2), and health-based information.
 - b) Information may be organized by process.
 - c) Regulatory performance standards may be included in workbooks.
 - d) Workshops/outreach to industry.
 - e) Ongoing relationship with trade organizations – facilitates outreach and provides feedback to industry on sector performance and non-compliance issues.
 - f) Sector manager and contact information available on a web site for ongoing technical assistance; fact sheets developed to address specific compliance, BMP, or P2 issues.
 - g) Online materials available.
 - h) Measurement of results of assistance activities.

- 4) **Compliance monitoring and enforcement program**, including a range of activities, such as calls, letters, visits and inspections at a sample of the self-certified ERP universe. The goal of these activities is to provide confirmation that a facility is in compliance – verifying the facility-submitted data. Tools and activities may include:
 - a) Return to Compliance (RTC) plans – calls, letters, visits, and inspections to follow-up on RTC plans submitted by facilities.
 - b) Reviews of certifications – automatic and manual.
 - c) Red flags in certifications – generate target list for inspectors.
 - d) Failure to certify follow-up – each year an enforcement strategy is developed including appropriate enforcement.

- e) Reporting and data analysis – e.g., percentage of certifiers, questions most frequently answered incorrectly, patterns of non-compliance among facilities under common control or ownership.
- f) Inspections – Targeted inspections each year (complaints, red flags, facility history, RTC plan issues, etc) and random inspections during years determined appropriate for sector performance measurement – results from these are used for statistical analyses.
- g) Enforcement follow-up – Notices of Non-Compliance or Notices of Violation, compliance and/or penalty actions, as appropriate.