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Project XL: Good for the Environment, Good for Business, Good for Communities

by Lisa C. Lund

In March of 1995, President Clinton and Vice President Gore announced 25 actions that the U.S. Environmental Protection Agency (EPA) would take to reinvent environmental regulation.[1] These actions recognized 25 years of success achieved by our current system of environmental protection, yet acknowledged that EPA needed to better align that system with the changing world we regulate. Reinvention serves four timely and important purposes at EPA:

> 1. The need to better address environmental problems that continue to persist despite our vigorous laws and regulations. These tend to be problems that cross statutory, media, state, regional, and international boundaries.
> 2. To take advantage of technological advances and to make sure our regulations are not hindering their use or effectiveness.
> 3. To recognize the growing sophistication and expertise among EPA's stakeholders and to leverage their information, experience, perspectives, and resources. This is especially true concerning our co-regulators, the states.
> 4. To underscore and cultivate a philosophical shift from pollution control to pollution prevention, and to highlight new awareness of environmental justice concerns.[2]

The White House announcement said that EPA would create a Project XL program to inspire greater "eXcellence and Leadership" in environmental management. As envisioned, Project XL would be a series of 50 experiments to test innovative approaches to environmental management. If successful, these experiments would be integrated into our system of environmental regulation and lead to systemic change in how EPA protects the environment. XL projects are designed to achieve better environmental outcomes, create operational flexibility and other benefits, and generate greater involvement and support among affected stakeholders. Project XL provides targeted change in environmental protection by using site-specific experiments to test potentially better solutions while building upon and enhancing protections of the past.

This Dialogue reviews the history of Project XL, charting its course from innovative concept to the successful staging of pilot projects. In so doing, it recounts the many lessons learned so that others interested in running or participating in innovative environmental programs can benefit from EPA's experience. Second, it shows how XL has evolved during its four-year life span, demonstrating how the program has grown and changed with time and experience. Third, it initiates a dialogue on the value of XL. While it is too early to pass final judgment, EPA has begun to evaluate both the individual XL projects and the overall program. We find many of the results are encouraging. And finally, this Dialogue begins looking at the future of Project XL. Once EPA has 50 projects, what then? Will EPA continue to experiment with new approaches? What has Project XL taught us about crafting new relationships and building a system of environmental protection that will be sustainable into the 21st century? The time is nearing for this debate. This Dialogue can set the stage for that discussion.

History

On March 15, 1995, the President and Vice President announced a new agenda for reinventing environmental regulation.[3] The President expressed a desire to "build upon the strengths of our current system while overcoming its limitations." Reinvention was designed to "reform, not undermine," our nation's environmental protection system. He emphasized that economic growth and environmental quality need not be at odds with each other. If environmental stewardship could be expanded so that governments, businesses, organizations, and citizens all accepted responsibility, we could achieve sustainability in both our economy and environmental protection. The President talked of new tools, such as the "power of information and new environmental management systems" to help us achieve our goals. The Vice President described more specifically what reinvention was about: fixing problems within today's regulatory programs and developing innovative alternatives to the current system. He was the first to outline a vision for Project XL and how it fit into the reinvention agenda. He said, "knowledge gained from . . . bold experimentation will allow us to leapfrog past . . . limitations . . . to a new environ-

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1. President William J. Clinton, Remarks on Project XL and the Reinventing Environmental Regulation Program (Mar. 15, 1995) (available from the ELR Document Service, ELR Order No. AD-979) [hereinafter President's Remarks].
2. Office of the Administrator, U.S. EPA, Reinventing Environmental Protection: 1998 Annual Report (1999) (available from the ELR Document Service, ELR Order No. AD-4112) (also available at <http://www.epa.gov/reinvent>).
3. President's Remarks, *supra* note 1.

mental protection system for the 21st century." Project XL was to provide an environment for bold experimentation through 50 demonstration projects that would reach for environmental performance beyond what current law required. Project XL could offer regulatory flexibility in exchange for accountability and collaborative decisionmaking. Gore announced four avenues for entrance into the XL program:

> *Alternative Strategies for Specific Facilities*. The Vice President mentioned five criteria for pilot projects: superior environmental performance, transparency, no adverse effects to worker safety or environmental justice communities, community support, and enforceability.
>
> *Alternative Strategies for Sectors*. This avenue, Gore said, might include enforceable agreements with industry sectors, thus suggesting XL projects might grow out of an existing sector-based effort such as the Common Sense Initiative.
>
> *Alternative Strategies for Communities*. This path aimed to increase efficiencies and effectiveness for local governments, as well as grapple with their often limited financial and technical capabilities.
>
> *Alternative Strategies for Agencies*. Gore announced a similar U.S. Department of Defense program which would focus on pollution prevention, compliance and technology research projects.

Thus, Project XL was launched with significant fanfare, but few details and little stakeholder involvement prior to the announcement. One way to track the progress and evolution of XL is to follow a time line of events (Fig. 1) and to examine the changes in program structure, policy and procedures through *Federal Register* notices, which notified the public on changes in the operating guidance for the program.

It took two months—until May 23, 1995—for EPA to publish the first notice on Project XL.[4] The notice did three things. First, it solicited project proposals from facilities, sectors, and federal facilities, setting a goal of 50 pilot projects done in full partnership with states. EPA planned to select six initial projects and to build the program on the lessons learned from them. Second, the notice outlined a process that included solicitation, proposals, selection, invitation to develop a project plan, and, finally, a signed agreement. This process was designed to last six months. After an agreement was signed, the project would enter an implementation, monitoring, and evaluation phase. EPA expected competition among proposals. The notice also mentioned legal mechanisms to implement projects, including enforcement discretion, regulatory changes, and potential changes to underlying statutes. Third, it listed the eight project criteria: environmental results; cost savings and paperwork reduction; stakeholder support; innovation and multimedia pollution prevention; transferability; feasibility; monitoring, reporting and evaluation; and no shifting of risk burden.

Later that fall, President Clinton announced the first eight companies that would participate in the program. They included 3M, Intel, Hadco, the South Coast Air Quality Management District, Lucent, the Minnesota Pollution Control Agency, Merck, and Anheuser-Busch.[5]

On November 11, 1995, EPA published a solicitation for community-based XL projects.[6] This solicitation included the same criteria for projects, but added strategic community planning. The term "community," the notice said, meant that projects needed to be within a geographic area. The notice also postulated that for communities, economic opportunity might provide the incentive to participate, becoming the equivalent of flexibility in facility-based projects.

After publishing these two notices, the XL program struggled to work through the first proposals and reach negotiated agreements. Many factors combined to make these negotiations difficult, and stakeholders from various constituencies were frustrated with the lack of clarity or agreement on program issues. These issues are described more fully in the next section of this Dialogue.

EPA published a third solicitation on September 11, 1996.[7] This one sought innovative environmental technology projects, following up on a series of meetings hosted by the Office of Science and Technology Policy at the White House. The solicitation asked for projects that would remove barriers for developing, testing, or deploying technology; create a regulatory climate that provided incentives for innovation; test new monitoring requirements; or create cost savings through increased efficiencies. EPA was looking for technologies that lowered compliance costs, minimized the risk of environmental liability, or enhanced operational flexibility. This solicitation also signaled for the first time EPA's willingness to do mid-course corrections to the XL program to improve clarity and agreement on policies.[8] This notice provided additional guidance to improve the quality of XL proposals and defined principles for superior environmental performance (SEP) and stakeholder involvement. Through the notice, EPA sought to improve management of the XL program and project development process, promote cultural change within the Agency, and find ways to provide greater access to information for stakeholders.

After that notice, EPA embarked on an eight-month effort to improve Project XL by listening to perspectives and input from the various constituencies, including states, industry, environmentalists, and environmental justice groups. The culmination of this effort was an April 23, 1997, *Federal Register* notice that announced new operating policy guidance.[9] The notice again solicited new project proposals, listing specific projects in which EPA was interested. It clarified that XL was an opportunity for both environmental leaders and average performers. It invited stakeholders to be co-sponsors of proposals, an idea put forth by environmental groups. This notice also described changes made to streamline and improve the negotiation process, highlighting for the first time preproposal discussions as important to

4. Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. 27282 (May 23, 1995) (transcript and press release on file with author).

5. President William J. Clinton, Remarks on Project XL, at the Old Executive Office Building (Nov. 3, 1995).

6. Regulatory Reinvention (XL) Pilot Projects: XL Community Pilot Program, 60 Fed. Reg. 55569 (Nov. 1, 1995).

7. Regulatory Reinvention (XL) Pilot Projects, Solicitation of Proposals and Request for Comment on Project XL, 61 Fed. Reg. 47929 (Sept. 11, 1996).

8. *See id*. at 47929-30.

9. Regulatory Reinvention (XL) Pilot Projects, Notice of Modifications to Project XL, 62 Fed. Reg. 19872-82 (Apr. 23, 1997) [hereinafter Notice of Modifications to Project XL or April Notice].

the building of good ideas, proposals, and relationships. And most importantly, it clarified three project selection criteria: SEP, regulatory flexibility, and stakeholder involvement. To support the needs of project stakeholders, this notice announced the availability of technical assistance for individuals or groups who choose to work intensively with project sponsors as part of an organized stakeholder group. The notice expanded the tool kit of available legal mechanisms beyond enforcement discretion to include permits, waivers, variances, interpretive statements, site-specific rules, and deviation from existing practices and policies as allowed by statute. This was an extremely important milestone in the program. Whether or not constituencies agreed with EPA positions on these issues, the discussions that led to the notice represented a welcome change to participants and observers alike. These discussions helped to clarify EPA expectations and to explain how the Agency's stated policies had developed.

Many specific suggestions about potential project ideas arose from the outreach meetings that led to the April 1997 notice. Now that expectations were clear, EPA decided to host other meetings to get more good proposal ideas. On June 23, 1998, EPA published a new solicitation for projects with very specific ideas that had come out of round table discussions and internal EPA nominations.[10] This notice also clarified the types of flexibility EPA was willing to offer. In addition to regulatory flexibility, it offered flexibility in policies, guidance, procedures, and processes. It identified key elements of good proposals, and it set the stage for EPA's next task: reducing transaction costs.

To get input and help to re-engineer the XL process, EPA convened a group of stakeholders who had participated in XL projects. On April 5, 1999, the Agency published the improved process and several tools that addressed particular process problems.[11] These tools, which are now in use, include a guide to stakeholder involvement for sponsors and stakeholders,[12] a best practices guide for proposal development,[13] and a manual for EPA teams working on Project XL.[14] After several projects have used these tools, EPA will evaluate Project XL for further opportunities to improve.

The above chronology traces important milestones in the development of Project XL. The next section delves into the issues that arose as EPA tried to negotiate and implement XL projects. What problems occurred and why were they important? What has EPA done to address these issues? What issues still exist, and why has EPA not been able to resolve them to date?

Issues

Soon after the March 1995 announcement, it became clear that implementing Project XL was not going to be easy. Many of the reasons are discussed in this section, providing examples of issues that environmental regulators should consider when developing innovative programs.

The early problems stemmed from several sources: political ties created in the program's initial announcement; EPA's decision to provide no predetermined program structure or policy in the initial stages, and the minimal stakeholder involvement in the original program design. Other issues evolved as negotiations delved into the details of each proposal. After a year of struggling, EPA developed an approach to resolving issues based on consultation with the various stakeholder constituencies: states and other co-regulators, environmentalists, environmental justice groups, and industry. EPA's goal was to design a balanced response to each issue, keeping the Agency's underlying mission to protect the environment always in mind. Stakeholders have generally reacted with understanding of EPA's stated policy. At the very least, people understood why EPA took a certain position and what our expectations were, regardless of whether they liked the position or not.

The problems that arose during XL's early stages included:

- widely differing expectations within EPA and among stakeholders;
- lack of early public input;
- lack of clear legal authority and protection of project sponsors;
- lack of clarity on what constitutes SEP;
- difficulty in achieving meaningful stakeholder involvement;
- lack of understanding of EPA's ability to offer flexibility; and
- high transaction costs.

We will look at each of these issues in turn.

Widely Differing Expectations

When Project XL was announced, the program's offer of regulatory flexibility was often referred to as a desire to "throw the rule book away." Unfortunately, it wasn't clear what "rule book"was being tossed, leaving many companies with the impression that EPA would be able to change its statutory authorities. As EPA lawyers were quick to point out, the Agency had no ability to circumvent statutes, though we clearly could change regulations written by the Agency. There were many who were suspicious of just what this meant, as Project XL was developed during the 104th Congress, when EPA and environmental regulation were under open attack by the newly elected House of Representatives and their "Contract With America." In this atmosphere, it is easy to understand why various constituencies reacted the way they did:

- EPA staff were defensive and suspicious that regulatory flexibility meant that environmental protections would be "rolled back." Initial reaction

10. Solicitation of Additional Projects Under Project XL, 63 Fed. Reg. 34161-76 (June 12, 1998).
11. Notice of Process Improvements Under Project XL, 64 Fed. Reg. 16450-52 (Apr. 5, 1999) [hereinafter Notice of Process Improvements].
12. Office of Reinvention, U.S. EPA, Project XL Stakeholder Involvement: A Guide for Project Sponsors and Stakeholders (1999) (available from the ELR Document Service, ELR Order No. AD- 4146) (also available at <http://www.epa.gov/projectxl/032599.pdf>) [hereinafter Project XL Stakeholder Involvement].
13. Office of Reinvention, U.S. EPA, Project XL: Best Practices for Proposal Development (1999) (available at <http://www.epa.gov/projectxl/eval9.htm>) [hereinafter Project XL: Best Practices for Proposal Development].
14. Office of Reinvention, U.S. EPA, Manual for EPA Project XL Teams (1999) (available from the ELR Document Service, ELR Order No. AD-4145) (also available at <http://www.epa.gov/projectxl/033199.pdf>) [hereinafter Project XL Team Manual].

by EPA staff to XL proposals from industry was extremely conservative.[15]

- States felt that Project XL should be "delegated" to them to run. The program raised federalism issues that went far beyond XL's intentions.[16]
- Environmentalists also were very suspicious of regulatory flexibility. Their expectations for industry's environmental performance were very high. In many ways, environmentalists helped create the system we have today, both in the development of processes and environmental policy. They were not ready to put that system aside as the 104th Congress talked of dismantling EPA's enforcement capabilities. Working in creative partnerships did not mesh well with the "watchdog" role of many environmental groups.[17]
- Industry reaction ranged from those who saw XL as a "free for all," to those who viewed it as a legitimate way of designing alternative regulatory schemes that worked better for them. In the latter case, those companies didn't object to the notion of SEP in theory, but as negotiations proceeded many found that SEP was a difficult concept to define and implement. Many companies that had instituted voluntary pollution controls saw XL as an opportunity to "get credit" for those voluntary actions.[18]

These differing reactions led to a wide disparity in goals and expectations when the first set of project negotiations began. Expectations and perceptions were further confused as conceptual discussions about the "environmental protection system of the 21st century" were held by various groups across the country. The Aspen Institute's "Alternative Path,"[19] the National Academy of Public Administration,[20] and William Ruckelshaus' "Enterprise for the Environment"[21] all attempted to plot a path for radical change and ended with conclusions that looked very much like Project XL. Although contrary to the "Alternative Path" discussions, EPA saw XL as a means of carrying out experiments that, if successful, would lead to systemic change. EPA did not view XL as a means to provide a separate regulatory path that good actors could choose while others stayed in the traditional system. These different perspectives on the purpose and objectives of XL compounded the issues of varying expectations of the program.

Lack of Initial Public Input

Though public involvement was described as a cornerstone of Project XL, very little input was sought from EPA stakeholders before the announcement. In fact, it took more than six months before EPA was ready to talk with stakeholders about how it intended to run the program. By that time, the first projects were already in trouble and EPA's credibility had already been damaged.[22] Though EPA has increased discussions with stakeholders over time, it has been difficult to overcome this initial lapse. One reason for this initial lack of input, definition, and structure was EPA's intent to stimulate industry's creativity in designing proposals. As a result, EPA was forced to make policy on an "as needed" (crisis) basis. Often, especially in the first year, this method did not allow adequate vetting of ideas before EPA stated its position. This, in turn, prevented EPA from creating trusting relationships with affected constituencies. Some in industry praised EPA for its courage in proposing such a flexible program, while others criticized the Agency for lack of clarity and detail.[23]

Legal Issues

There were no new, separate, or explicit authorities authorizing EPA to create Project XL. That meant EPA needed to authorize and carry out XL projects using its existing statutory authorities: the Clean Air Act (CAA),[24] the Clean Water Act,[25] the Safe Drinking Water Act,[26] the Resource Conservation and Recovery Act (RCRA),[27] Superfund,[28] and the Toxic Substances Control Act.[29] While many saw the lack of an XL statute as providing a long-term ability to integrate the results of XL experiments into the current system, others saw this as a roadblock to creativity. EPA's early position, largely because of the atmosphere in Congress in 1995 and 1996, was that explicit authority was not necessary to carry out Project XL.[30] EPA believed that our inability to alter statutes helped provide a critical "firewall" necessary in building public support for regulatory flexibility. Industry, on the other hand, was adamant that it needed legislative protections to carry out XL projects without incurring the additional threat of citizen suits. Industry also felt that EPA

15. *See* Alfred Marcus et al., University of Minnesota, "Impasse in the Movement Toward a New Competence in Environmental Management: Lessons From Project XL" (1999) (submitted to and funded wholly or in part by the EPA Office of Research, National Center for Environmental Research and Quality Assurance, through Grant Number R824754) (copy on file with author).
16. *See* James Seif & Donald Welsh, *U.S. EPA Role Reversal Needed to Complete Paradigm Shift in Environmental Protection*, ENVTL. PROTECTION UPDATE, Oct. 24, 1997, at 18-21.
17. *See* Letter from David Hawkins & Chris Van Loben, Natural Resources Defense Council, to Fred Hanson, EPA Deputy Administrator (July 1, 1996) (on file with author); Rena I. Steinzor, *Regulatory Reinvention and Project XL: Does the Emperor Have Any Clothes?,* 26 ELR 10527-37 (Oct. 1996).
18. *See* Marcus et al., *supra* note 15, at 17-18; Timothy J. Mohin, *The Alternative Compliance Model: A Bridge to the Future of Environmental Management*, 27 ELR 10345, 10351-56 (July 1997).
19. ASPEN INST., THE ALTERNATIVE PATH: A CLEANER, CHEAPER WAY TO PROTECT AND ENHANCE THE ENVIRONMENT (1996).
20. NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, SETTING PRIORITIES AND GETTING RESULTS (1995); and NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, RESOLVING THE PARADOX OF ENVIRONMENTAL PROTECTION: AN AGENDA FOR CONGRESS, EPA AND THE STATES (1997).
21. CENTER FOR STRATEGIC & INT'L STUDIES, ENTERPRISE FOR THE ENVIRONMENT: THE ENVIRONMENTAL PROTECTION SYSTEM IN TRANSITION TOWARD A MORE DESIRABLE FUTURE (1998).
22. *See* Steinzor, *supra* note 17, at 10527-28.
23. *Compare* Mohin, *supra* note 18, at 10347, which complements EPA for not cluttering XL with "unnecessary bureaucracy," *with* Steinzor, *supra* note 17, at 10529, which criticizes XL for having vague goals and no firm guidelines, creating what the author argues is a "regulatory free-for-all."
24. 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.
25. 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.
26. 42 U.S.C. §§300f to 300j-26, ELR STAT. SDWA §§1401-1465.
27. *Id.* §§6901-6992k, ELR STAT. RCRA §§1001-11011.
28. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405.
29. 15 U.S.C. §§2601-2692, ELR STAT. TSCA §§2-412.
30. *See* Notice of Modifications to Project XL, *supra* note 9, at 19876.

and states needed a clear mandate to provide flexibility. While there have been some efforts to draft legislation that could enjoy broad support, none have been seriously considered in Congress to date.[31] There was a new effort in 1999 to build a bipartisan consensus of moderates in both the House and Senate to legislate an "XL-like" program.[32] The outcome of this effort is still uncertain.

Because EPA had no explicit authority for XL, we had no authority to delegate the program to states. Early on, Minnesota and Florida[33] were interested in delegation, and discussions along those lines proved frustrating to both federal and state negotiators. This led to several outcomes.

First, the states asked the EPA Administrator to negotiate a separate agreement on state innovations programs. This agreement, the "State/EPA Innovations Agreement," recognizes that not all innovations projects fit the XL criteria and that EPA and states needed a process for implementing other good ideas.[34] The Agreement outlines principles of innovation and creates three categories for projects:

- Efficiency-only projects where clear value is evident in improving the efficiency of government or in meeting compliance obligations, but where there is no added benefit to the environment.
- Experiments where the outcome is uncertain and regulators and the community need some added benefit in environmental performance in exchange for allowing the experiment to be conducted. These, if successful, can be incorporated into the current regulatory system so the benefits become more broadly available. XL projects fall in this category.
- Broad policy debates where issues need open vetting and national dialogues or where statutory changes might be contemplated. These need to be addressed on a case-by-case basis.[35]

Second, several states have passed legislation to run XL-like programs at the state level. In some cases these laws have been helpful to the implementation of the federal XL program. For example, the state of Louisiana did not have authority to write site-specific rules, which, in many cases, is the appropriate legal mechanism to implement an XL project. When a state runs a delegated program and EPA writes a site-specific rule, the state often must write a similar rule. It was helpful to have Louisiana seek and receive this authority in their innovations legislation.[36] In other cases, state laws have caused real concern at the federal level about their impact on delegated programs in air, water, and waste. If states grant flexibilities that make their programs less stringent than the federal counterpart, EPA might have to withdraw the program. It is critical for states to work with EPA where flexibility in federal regulations is being considered.[37]

Industry has been very concerned that projects that change the definition of compliance might leave participants vulnerable to citizen lawsuits based on traditional requirements. Although EPA initially considered using enforcement discretion to carry out projects,[38] it became clear that this did not protect potential sponsors from citizen suits. EPA then decided to use Final Project Agreements (FPAs) to state the intentions of the signators, while utilizing legal vehicles such as modified or innovative permits, site-specific rules, waivers, variances, or administrative orders on consent to codify and make enforceable the new definition of compliance under XL.[39] This means that while projects and EPA can be challenged, the company is protected. EPA did not want to circumvent or alter existing authorities for citizen suits under the various environmental statutes. From EPA's perspective, citizen suits are an important and necessary democratic right that the Agency strongly supports.

EPA attorneys raised questions about a potential sponsor's compliance record, both historically and for violations uncovered during negotiations. EPA felt enforcement screening of applicants was important to prevent the awkward and difficult situation of simultaneously enforcing against and bargaining with a facility.[40] EPA had to develop criteria for disqualifying a particular sponsor: criminal investigations or charges at the facility and/or corporate level, or an ongoing enforcement action at the facility in the same area of interest as the proposed XL project. If EPA and a sponsor are negotiating an XL agreement and violations are found, the company may use the Agency's audit policy, which allows self disclosure within certain time frames in exchange for penalty mitigation.[41] In this way, violations can be resolved quickly and negotiations may resume.

Superior Environmental Performance

The original White House and EPA announcements of Project XL emphasized that environmental results had to be better than what was achieved under current and reasonably anticipated future regulations.[42] In the April 1997 *Federal Register* notice, EPA identified three steps for determining whether a project produces a better environmental result:

31. Leiberman Bill, S. 1348, 105th Cong. (1997).
32. Second Generation of Environmental Improvement Act of 1999, H.R. 3448, 106th Cong. (1999).
33. *See* U.S. EPA & Minnesota Pollution Control Agency, Minnesota Proposed Environmental Regulatory Flexibility Final Project Agreement, May 8, 1996 (available at <http://www.epa.gov/projectxl/mpca/page1.htm>); State of Florida and the Florida Department of Environmental Protection (FDEP), FDEP Proposal to Conduct a State of Florida Project Under Project XL Initiative (Feb. 7, 1996) (available at <http://www.epa.gov/projectxl/fdep/020796.pdf>).
34. Joint EPA/State Agreement to Pursue Regulatory Innovation: Notice of Availability of Joint EPA/State Innovation Agreement, 63 Fed. Reg. 24784 (May 5, 1998).
35. *Id.* at 24790.
36. La. Rev. Stat. Ann. I 22 §2561-2566 (West 1997).
37. For example, in March 1999, EPA Region V and Wisconsin signed a Memorandum of Agreement on how the agencies would work together in implementing the Wisconsin Environmental Cooperation Pilot Program.
38. *See* Office of Enforcement & Compliance Assurance, U.S. EPA, EPA's Operating Principles for Project XL Participants (Oct. 2, 1995, memorandum) (available from the ELR Document Service, ELR Order No. AD-3608).
39. *See* Notice of Modifications to Project XL, *supra* note 9.
40. *See* Office of Enforcement & Compliance Assurance, U.S. EPA, Guidance for Compliance Screening for Project XL (Sept. 1998) (available from the ELR Document Service, ELR Order No. AD-4160) (also available at <http://www.epa.gov/projectxl/compxl.htm>).
41. Incentives for Self-Policing: Discovery, Disclosure, Correction, and Prevention of Violations, Final Policy Statement, 60 Fed. Reg. 66706-12 (Dec. 22, 1995), Admin. Mat. 35233 (also available from the ELR Document Service, ELR Order No. AD-3125).
42. *See* Regulatory Reinvention (XL) Pilot Projects, *supra* note 4, at 27287.

- determining a baseline for current performance;
- comparing that baseline to projected performance under the Project XL scenario; and
- factoring in the many subjective considerations that can make a project superior.[43]

While this may sound simple, it rarely is, as we will see in the discussion below by examining the XL proposal from 3M Corporation[44] In addition to the three-step process, EPA also felt SEP should be proportional to the flexibility being sought. In other words, projects proposing narrow, low-risk fixes to the current regulatory system could demonstrate a lesser level of improved performance than a project proposing radical change with higher risks. Quantitative determinations are not the only way to show SEP, though they tend to be easier to understand and negotiate. EPA did acknowledge that strict quantitative determinations may be more incremental in nature, and expressed its openness to other approaches. In fact, some projects have used alternatives, such as Exxon's Superfund project, which offers a faster cleanup time at a national priority list site,[45] or Hadco's commitment to invest cost savings in environmental projects.[46]

□ *Determining a Baseline*. In the simplest cases, a baseline can be defined by simply looking at actual performance in one particular process and quantifying past performance using some agreed-upon time period. It becomes more complicated when looking at multiple sources and processes, trying to consolidate controls or permits, or looking at multimedia performance. For example, if the facility wants to eliminate lines, bring in new products, or modify lines, determining an appropriate baseline can be complex. If a facility doesn't know (or isn't willing to share) what future products they may be producing, it requires regulatory agencies to compare different scenarios with inadequate information. Needless to say, this makes regulators very uncomfortable. Regulators have trouble granting blanket approvals for unknown conditions. At a minimum, they will seek safeguards to ensure adequate protection of public health and the environment in the event of contingencies.

In the 3M Corporation case, the company wanted a cap permit that allowed flexibility among various sources and gave credit for past voluntary controls. EPA was able to define 3M's past performance, taking into account discontinued lines. But 3M didn't know what future products their Hutchinson, Minnesota, plant might produce. Given this uncertainty, national environmentalists were very skeptical of allowing the distinct possibility that actual emissions at the plant would increase—a backsliding of performance contrary to what XL promised. Their argument makes logical sense: *superior* performance should be better, not worse than current actual performance. EPA learned from the 3M project that the more information that facilities can provide, the fewer contingencies regulators will be forced to provide for and the simpler and clearer the baseline determination will be.

The 3M case pointed out two other issues that must be resolved early in order to determine a baseline. The first is the issue of *actual* versus *allowable* emissions. In the CAA, facilities are granted a permitted "potential to emit." This potential is called the allowable level of emissions. 3M and other companies routinely operate below allowable limits to avoid inadvertent exceedances. Project XL requires that a facility reduce *actual* emission levels in order to demonstrate superior performance. The 3M proposal raised the possibility that actual emissions might rise, although they would remain below the allowable levels.

The second issue 3M raised was how to factor in voluntary controls that a company may have installed prior to applying for XL. In the April 1997 notice, EPA stated that voluntary controls should be included in baseline calculations. While some have called this a disincentive for environmental leaders to participate in XL, EPA believes that those companies are not participating in XL in order to demonstrate end-of-pipe controls. These companies are more likely to desire alternative regulatory approaches that reflect a different world, create competitive advantage, and reflect the attitude that environmental management can be an asset to a company rather than a liability. While it will be easier for companies that haven't instituted voluntary controls to demonstrate significant end-of-pipe emission reductions, there are many creative XL opportunities for companies that have invested in voluntary controls. In 3M's case, the company had performed a number of voluntary actions that showed its environmental conscience. Overall, EPA agreed that XL should not penalize 3M for those good deeds, but the agreement stopped short of granting 3M a "bank account" of credits upon which to draw. EPA was able to review the facility, process by process, and give 3M much of the credit it sought, but in a way that made the company clearly accountable, though agreement was ultimately not finalized. EPA also stated in its April 1997 notice, that it was willing to consider voluntary controls on a case-by-case basis and, where appropriate, would try to credit past performance in assessing the qualitative factors of SEP. In the case of Weyerhaeuser,[47] for example, EPA was flexible about the time frame used to calculate the baseline, which allowed Weyerhaeuser to take credit for some voluntary measures. EPA has learned there is no substitute for early and open discussions of these issues with regulators and stakeholders. Working through these issues requires motivated project sponsors and time, patience, and a willingness to understand different perspectives.

A final issue in determining the baseline and comparing it to projected performance under XL is that of trading between regulated and unregulated sources in designing new emission control or prevention scenarios. Several provisions of the CAA contain constraints against trading or aver-

43. *See* Notice of Modifications to Project XL, *supra* note 9, at 19873-75.

44. 3M Corp. Proposal, Focusing on the Implementation of Beyond Compliance Permits at Three 3M Manufacturing Sites (1995) (available at <http://www.epa.gov/projectxl/3mhut/071095.pdf>). Although this proposal did not culminate in a signed agreement, it may represent the greatest learning experience we have had in Project XL to date.

45. Exxon Corp., Final Project XL Agreement, Exxon Fairmont Coke Works Superfund Site Cleanup, May 24, 1999 (available at <http://www.epa.gov/projectxl/fairmont/052499.htm>).

46. HADCO Corp., HADCO Corporation Final Project XL Agreement, Oct. 2, 1997 (<available at http://www.epa.gov/projectxl/hadco/100297.htm>).

47. Weyerhaeuser Co., Weyerhaeuser Flint River Operations Final Project XL Agreement, Jan. 17, 1997 (available at <http://www.epa.gov/projectxl/weyer/011797.htm>) [hereinafter Weyerhaeuser FPA].

aging between regulated and unregulated sources, or between sources in different source categories. EPA and states are willing to work through these constraints where legally possible, but project sponsors that desire to include either trading or averaging in their proposals must be able to demonstrate in a clear way why the proposed scenario is better for the environment.

□ *Comparing That Baseline to Projected Performance Under XL*. Many of the same issues come into play when trying to predict future emissions. Discontinued lines, modified lines, new products, and unknown future strategies all can contribute to uncertainty. EPA must take into account anticipated new regulations if they could require reductions that, under today's regulatory scheme, would be considered superior performance. Expansion is difficult for many companies to project, but it can be factored in by developing pollution per unit production measures.[48] Also, pollution prevention projects can develop new measures for inputs into the production process, thus allowing raw material and resource efficiency to be monitored and improved while allowing for production growth. EPA is very supportive of the development of these types of metrics.

Complicating negotiations is the general desire by EPA and the states to convert a facility's environmental performance commitments into legally enforceable mechanisms. Many companies may not understand why regulators need to make these commitments enforceable. While we can craft enforcement scenarios that provide adequate time to correct averages or exceedances, EPA and the states cannot give up their mandate to protect public health and the environment. As we create new definitions of compliance, we must craft equitable enforcement options to go along with them. However, it is important to not confuse enforceable commitments with other voluntary commitments project sponsors may choose to make (to their stakeholders, shareholders, or employees, for example) or aspirational goals that may be included in an FPA but for which a company is not held accountable beyond a good-faith effort.[49] While EPA supports both voluntary commitments and aspirational goals, the Agency would not have the authority to enforce if these were not achieved.

Again, with 3M EPA encountered each of these issues. EPA and 3M were able to work out a "comparative actions test" or (CAT) that met the needs of both parties. It demonstrated a baseline composed of calculations for all the production lines 3M wanted to include under the permit cap, allowed for some undefined expansion, gave some credit for past voluntary controls, and developed a test for performance under XL. The problem was that the CAT was extremely complex and would have been difficult to explain to the public. 3M also balked at making the test enforceable.[50] EPA worked very hard to design an enforcement response scenario that gave 3M considerable time to deal with fluctuations and exceedances. In the end, because of the long struggle on other issues and the approaching permit deadline 3M faced, no one had the energy to streamline and simplify the CAT and deal with the enforcement question, and the proposal was withdrawn.

□ *Factoring in the Many Subjective Factors That Can Make a Project Superior*. EPA has identified many qualitative factors that should be considered in determining how superior an XL project's performance will be. First, projected performance must be at least equivalent to the baseline, or else the subjective factors have no hope of achieving superiority. Therefore, the degree to which the XL project exceeds the baseline is the first factor to look at. Other factors include requests from stakeholders, including shareholders or employees, which might include facility set-backs, reduced water or energy use, worker health issues, or community education programs. The past performance, including voluntary controls, of the sponsor also can be considered here.[51]

A final issue to consider under superior performance is the possibility of allowing cross-media trades in determining SEP and in granting flexibilities. This is difficult as there is no universally accepted scientific model or tool that can compare the value and risks in a like way between media. EPA has stated in its policies[52] that cross-media trades are potentially permissible if the sponsor can:

- find a way of comparing the risks and benefits that satisfies both regulators and stakeholders;
- has the support of stakeholders; and
- can demonstrate a clear benefit.

EPA is leaving this issue open by not explicitly naming an accepted methodology by which trades will be judged. This requires the potential sponsor to decide whether the concept is worth the investment. While this may be a difficult judgment, science has not yet come to any good conclusion about comparative risk and benefit models. Therefore, it isn't fair to expect XL to resolve the science in a hurry. EPA hoped that by allowing the potential for cross-media trades, XL would inspire holistic, risk-based analysis of facilities. Project XL can be a vehicle to deal more quickly and rationally with the highest priority problems while allowing flexibility in areas posing smaller risks. Again, it must present a clear benefit and demonstrate good common sense. The Weyerhaeuser project[53] is a good example. They proposed cutting their bleach plant effluent—the largest concern at pulp and paper mills—in exchange for flexibility in how they achieve emission reductions comparable to those that would have been achieved under their maximum achievable control technology requirements.

48. *See* INTEL CORP., FINAL PROJECT XL AGREEMENT FOR THE INTEL CORPORATION OCOTILLO SITE PROJECT XL, Nov. 19, 1996 (available at <http://www.epa.gov/projectxl/intel/111996.htm>) [hereinafter INTEL FPA]; ANDERSEN CORP., FINAL PROJECT AGREEMENT FOR THE XL PILOT AT ANDERSEN CORPORATION, June 30, 1999 (available at <http://www.epa.gov/projectxl/andersen/063099.htm>) [hereinafter ANDERSON FPA].

49. *See* Notice of Modifications to Project XL, *supra* note 9, at 19875, which clarifies the difference between enforceable commitments and voluntary, aspirational goals.

50. *See* Letter from David Wefring, 3M Corp., to Andrew Ronchak, Minnesota Pollution Control Agency, on requiring 3M, in effect, to participate in dual regulatory processes (Aug. 7, 1996) (available at <http://www.epa.gov/projectxl/3mhut/080796.htm>).

51. *See* Notice of Modifications to Project XL, *supra* note 9, at 19874. Other factors can be found in the description of SEP in the April 1997 notice.

52. *Id.* at 19874-75.

53. WEYERHAEUSER FPA, *supra* note 47, at 11,13,19-20.

Stakeholder Processes

Since its inception, XL has required projects to include meaningful and organized participation on the part of community and national nongovernmental organizations (NGOs).[54] To improve participation, the Agency has requested formal stakeholder evaluations of individual projects, hosted stakeholder round table meetings, and formed a "process re-engineering" workgroup that worked to improve stakeholder access to information, input into decisionmaking, and influence in project design, implementation, and evaluation. These forums revealed the difficulties experienced by public stakeholders involved with XL and proved that public participation is one of the most challenging components of the program. Below is a summary of these issues.

EPA decided very early on that the "one-size-fits-all" approach to stakeholder involvement would not be suitable to the innovative nature of XL. Therefore, EPA focused on defining the principles and process by which stakeholder involvement in XL projects should be governed rather than defining a single model. By focusing on principles, the sponsors—as the "managers" of the process—can tailor stakeholder involvement to reflect the scope and complexity of the project. EPA expects proportionality between the complexity and uncertainty of the project and the investment in the stakeholder process. This also allows the stakeholders themselves to have a say in how the process is structured and conducted. This early input has proven to be more important to success than any model.[55]

Early in XL, process confusion and time-consuming negotiations created problems for stakeholders. The most important indicators of success and credibility seemed to be a clear structure and objectives for the process.[56] EPA's steps to clarify, improve, and streamline the XL process, both through the April 1997 *Federal Register* notice and through a recent re-engineering exercise,[57] have resulted in better understanding from all participants and a related reduction in transaction costs. The re-engineering process led to changes in the actual negotiation process itself, and a set of tools including *Project XL Stakeholder Involvement: Guide for Sponsors and Stakeholders*.[58]

Some critics perceive that a project sponsor could "orchestrate" stakeholder support and that EPA, therefore, actually needed to run project stakeholder involvement.[59] It is important to note that the project sponsors, not EPA, are responsible for initiating and maintaining the stakeholder involvement process related to particular projects. If EPA were to run project-related stakeholder processes, they would need to comply with the Federal Advisory Committee Act because these groups would be advising EPA on project-related issues. In lieu of that, EPA developed the stakeholder involvement guide to help sponsors identify and work with stakeholders on project ideas. Experience shows that in the most successful processes, the sponsor and the stakeholders co-create the process. EPA will participate as a member of the overall stakeholder group, ensuring that these processes are transparent. EPA's secondary role in running the stakeholder process should not be confused with the Agency's ultimate role of judging whether the process meets Project XL's criterion for public participation. EPA retains authority to approve or disapprove an XL project based on how well the criteria are met. States share the ability to veto projects that do not meet the criteria in their eyes. While this authority is not delegated to stakeholder groups, the views and recommendations of direct participants strongly influence the decisions of the regulators.[60]

As EPA learned from 3M and other projects, both local and national stakeholders should be involved early in the process. When they have come late to the negotiations, national NGOs have sometimes ruffled the feathers of other stakeholders. In some projects,[61] the participation of the national NGOs was consistent, timely, and helped to move the project development process forward. In these cases, local stakeholders have given the national environmental groups high praise for being very helpful to local citizens and bringing substantive expertise to the table that local citizens themselves may lack. In other projects, however, the participation of the national NGOs was perceived as inconsistent, late, and difficult to predict.[62] The national NGOs' approach was perceived as "intervention" and viewed to be disconnected from local citizen involvement.

In the April 1997 notice,[63] EPA tried to get beyond the local versus national issue by defining different tiers of public participation in Project XL:

> • "Direct participants" are involved in the day-to-day aspects of project negotiations. They influence the design and development of projects, and their views strongly influence both the details of the agreement and EPA's ultimate decision to approve or reject the project. They can be local or national stakeholders.
>
> • "Commentors" are stakeholders who have an interest in the project but do not participate in day-to-day negotiations and project development. EPA requires sponsors to provide information to potential commentors and create periodic forums in which they can express their comments.

54. *See* Regulatory Reinvention (XL) Pilot Projects, *supra* note 4, at 27287.

55. *See* Office of the Administrator, U.S. EPA, Evaluation of Project XL Stakeholder Processes, at 46-47 (1998) [hereinafter Evaluation of Project XL Stakeholder Processes].

56. *Id.* at 47.

57. Notice of Process Improvements, *supra* note 11, at 16450.

58. Project XL Stakeholder Involvement, *supra* note 12, at 1. The stakeholder guide provides information on how to determine (1) what type of process is appropriate, (2) stakeholder needs regarding time commitment and technical assistance, and (3) the scope and complexity of the involvement process.

59. *See* Steinzor, *supra* note 17, at 10534.

60. To build stakeholder trust, EPA also provides facilitation assistance to project sponsors for initiating project-specific stakeholder processes and determining the best overall process. Facilitation by a third party, face-to-face meetings, and site visits stand out as demonstrated mechanisms for building trust. The April 1997 Notice, *supra* note 9, and Project XL Stakeholder Involvement, *supra* note 12, both cover the importance of well-defined and transparent ground rules. Key questions include the participants' role (advisory, consultative, or decisional) and how stakeholder input should be expressed (i.e., by consensus or "majority vote"). These topics, as well as other ground rules, must be discussed and consented to by the direct participants.

61. Evaluation of Project XL Stakeholder Processes, *supra* note 55, at 23-24.

62. *See id.* at 44-46.

63. Notice of Modifications to Project XL, *supra* note 9, at 19877.

- The "general public" is involved by having clear access to information on the development and environmental results of the project. EPA expects the project sponsor to arrange public meetings and make information available, allowing opportunities for the public to influence decisionmaking.

EPA also encourages viable links between local groups and national organizations that are interested in individual XL projects but are unable to be a "direct participant." To facilitate more timely comments by national NGOs, EPA is compiling an "XL commentors list" that will assist the Agency in notifying NGOs when a proposed project overlaps with their areas of interest.

In both the April 1997 notice and the stakeholder guide, EPA strongly suggests that newly formed stakeholder groups perform a "needs assessment" to determine whether they require training or technical assistance to ensure the active participation of all stakeholders. There can be a number of means for local stakeholders to receive technical assistance. For example, the project sponsor, the state or federal government, a national environmental organization, or an academic institution might provide technical information or assistance to local stakeholders. However, when these means are not available or appropriate, EPA has set up a mechanism to provide task-specific technical assistance to XL stakeholders. The Institute for Conservation Leadership manages this service under a cooperative agreement with EPA. This assistance is available (up to $25,000 per project) when requested by a direct participant stakeholder group.

Flexibility: What Can EPA Offer?

Project XL cannot offer flexibility from statutes when those statutes and their interpretations are clear and explicit. However, XL can consider flexibility when the Agency has authority to interpret statutes or when EPA has generated regulations, policies, guidance, processes, or procedures that create barriers to better environmental performance.

Project XL's flexibilities, therefore, are not just regulatory. Project XL is about testing new approaches, some of which need regulatory flexibility to make them happen. Other proposals suggest approaches that our authorities currently allow but which EPA doesn't utilize in the way proposed. Sometimes a project merely suggests doing things differently or focusing resources on issues that weren't priorities.[64] Project XL should not shy away from testing new approaches as long as they are innovative and different from how we currently carry out our regulatory duties and achieve a better environmental outcome.[65]

Project XL should be seen as a problem-solving tool. If certain regulations are hindering good business practices, then XL can be used to design a new approach. The Global Environmental Management Initiative (GEMI) report, *Industry Incentives for Environmental Improvement*,[66] lists several types of flexibility that interest industry. Project XL has been able to offer many of these incentives. Examples include allowing process changes without prior review or permit modifications by operating under an emissions cap,[67] using pollution prevention to achieve emission reductions instead of costly control equipment,[68] using high quality environmental management systems (EMS) as the basis for consolidated permits (such as the Berry and Lucent permits), designating a multi-use development with mass transit capacity as a transportation control measure to promote smart growth,[69] paperwork reductions and administrative cost savings due to consolidated reporting and/or alternative monitoring schemes,[70] and more effective cheaper controls on alternative units in lieu of costly controls on regulated units.[71] This is not an exhaustive listing by any means. Projects cover the span from Superfund cleanups; RCRA hazardous waste management, recycling, and reuse; how states regulate small business sectors; consolidating permits; and utilizing EMS as a basis for permits. Many more project ideas are in the works, and EPA's solicitations have offered other specific ideas on where flexibility could be sought. The only real limitations are the statutory authorities and the imagination of potential sponsors.

Transaction Costs and Process Improvements

While many think tanks and other groups have advocated regulatory flexibility in exchange for better performance, XL has been the first to actually do it. One should not underestimate how hard it has been for all participants to move these projects forward. The devil really is in the details, both in developing policies and projects and in managing our own internal processes.

In its May 1995 notice, EPA outlined a basic process for getting proposals from concept to reality.[72] This process has been refined twice[73] and today is much more robust, clear, and streamlined than when first articulated.

EPA is grateful both to those early project sponsors who struggled with the Agency to figure it out and to those stakeholders who worked with EPA to re-engineer and refine

64. *See* Project XL Site-Specific Rulemaking for University Laboratories at the University of Massachusetts Boston, Boston, Mass., the Boston College, Chestnut Hill, Mass., and the University of Vermont, Burlington, Vt.; Hazardous Waste Management System; Final Rule, 64 Fed. Reg. 52380-52396 (Sept. 28, 1999). New England Labs is an example where a project focuses resources on issues that though long touted as problems, have not been considered high priorities by the program office.

65. *See* Solicitation of Additional Projects Under Project XL, *supra* note 10, at 34163-64.

66. 1 Environmental Management Initiative, Environmental Improvement Through Business Incentives—The GEMI IDEA 21 Project (1999).

67. *See* Intel FPA, *supra* note 48; Merck & Co., Final Project Agreement for Merck Stonewall Plant, Jan. 16, 1997 (available at <http://www.epa.gov/projectxl/merck/011697.htm>) [hereinafter Merck FPA].

68. *See* Weyerhaeuser FPA, *supra* note 47; Andersen FPA, *supra* note 48.

69. *See* Atlantic Steel/Jacoby Dev. Corp., Atlantic Steel Final Version: Phase 1 Project Agreement, Apr. 13, 1999 (available at <http://www.epa.gov/projectxl/atlantic/041399.htm.>) [hereinafter Atlantic FPA].

70. *See* Publication of Proposed Project XL Final Project Agreement (FPA) for Vandenberg Air Force Base and Related Documents, 62 Fed. Reg. 47335, 47335-41 (Sept. 8, 1997).

71. *See* OSi Specialties Incorporated Final Project Agreement, Oct. 17, 1997 (available at <http://www.epa.gov/projectxl/witco/101797.htm>).

72. *See* Regulatory Reinvention (XL) Pilot Projects, *supra* note 4, at 27285.

73. *See* Notice of Modifications to Project XL, *supra* note 9, at 19878-81, which clarified the concrete steps in the process; Notice of Process Improvements, *supra* note 11, at 16450-51. The recent re-engineering sought to reduce negotiation transaction costs, which had become substantial for all participants.

EPA's processes. Project XL now offers a five-step process with clear time frames, roles, and responsibilities.[74] These steps include:[75]

- *Preproposal*: Potential sponsors informally discuss their concept with state and federal regulators to see if the idea is worth their investment.
- *Proposal Development*: EPA and the state coach the sponsor in developing a complete proposal package.
- *Review and Selection*: EPA and the state review the technical and legal merits of the proposal and decide whether to go forward or not. A decision to begin formal negotiations not only means that regulators are interested in conducting the experiment, but also are willing, if the experiment is successful, to find ways to incorporate the new approach more broadly.
- *Negotiation of an FPA*: The intentions of the signators[76] are spelled out in detail and legal mechanisms are prepared to make the commitments binding and to protect the sponsor.
- *Implementation*: The experiment begins. Reporting and evaluation cycles also begin and will continue for the duration of the project.

One potentially difficult issue is the role of state agencies versus that of EPA. The states are pivotal players in whether or not projects move forward. They have veto power over projects, a power shared with project sponsors and EPA. Other reasons states are important include:

- In many cases, the states will be the first point of contact for companies with good ideas. As front-line regulators, they are often best suited to help find solutions to problems that the regulated community is experiencing. They have a tremendous ability to funnel good ideas into XL.
- The states provide important ties to local regulators who are involved in many projects.
- When projects fall within delegated programs, the state will be the implementing agency and will receive monitoring data and reports on commitments.
- State legal expertise is needed to ensure that legal mechanisms fall within the correct jurisdiction and create appropriate accountability.
- Since many states have different or more stringent statutory authorities than EPA, state regulators must ensure that XL projects are not inadvertently violating state laws.

The process changes have looked to integrate the states as co-regulators into the XL process in a seamless way. Since instituting these process changes, EPA has significantly reduced the time it takes to get projects from preproposal to signature. The Atlantic Steel project[77] took eight months from preproposal discussions to a signed phase 1 agreement. Not all the tools were available for use on this project, but it provides clear evidence that the improvements are moving EPA in the right direction.

Current Status and Challenges

As this paper is being written, XL has approximately 50 projects in the formal pipeline. Since refining the process, EPA has been aggressively marketing Project XL to the private sector. There are signs of increasing credibility, such as renewed interest of potential sponsors, new project ideas being floated to EPA, invitations to speak at business lunches and conferences, increased visits to the Project XL web page,[78] and requests for materials. The best spokesmen EPA has are the current project sponsors. Intel, Merck, Weyerhaeuser, and OSi (now Witco) all have been willing to present their projects to other industry groups and talk about XL's value.

EPA has just finished its second round of evaluations on the seven projects that have been in implementation for over a year. These progress reports—46 in all—were compiled in the fall of 1998 and the winter of 1999, and show that project sponsors in all ongoing projects are meeting or exceeding their commitments, that they are enjoying substantial benefits that also exceed projections, and that communities feel they are benefitting from these ongoing projects. In Appendix A are the seven progress reports for Berry, Intel, Weyerhaeuser, Hadco, OSi, Vandenberg AFB, and Merck.

Incentives and Benefits

Project XL has begun to demonstrate that it is good for the environment, good for business, and good for communities. Project sponsors are in most cases exceeding the commitments they have made in XL projects.

Environmental Benefits

XL projects have reduced air emissions, wastewater discharges, and waste generation. In an assessment of the three XL projects underway in 1997 and 1998, we found the following cumulative environmental benefits:

- eliminated[79] 20,853 tons of criteria air pollutants (nitrogen oxide, sulfur dioxide, particulate matter, carbon monoxide);
- eliminated 2,636 tons of volatile organic compounds;
- recycled 2,089 tons of solid waste;
- recycled 690 tons of nonhazardous chemical waste;
- recycled 613 tons of hazardous waste;

74. As noted earlier, the re-engineering work also created three tools to improve the process for sponsors, stakeholders, and EPA. These are: (1) a PROJECT XL: BEST PRACTICES FOR PROPOSAL DEVELOPMENT guide (*supra* note 13) that explains how to put a proposal together, including what specific information we need and why; (2) PROJECT XL STAKEHOLDER INVOLVEMENT (*supra* note 12) a booklet to assist project sponsors in managing stakeholder processes and help stakeholders understand what it means to participate; and (3) PROJECT XL TEAM MANUAL (*supra* note 14) that structures EPA teams so the Agency can respond quickly, speak with one voice, and resolve issues at the appropriate level in a timely way. The manual defines the decisionmaking process and identifies the decisionmaking body for Project XL: EPA's senior-level career managers who participate on the Reinvention Action Council.

75. PROJECT XL STAKEHOLDER INVOLVEMENT, *supra* note 12, at 4.

76. Signators include, at a minimum, EPA, the state, and the sponsor, but also could include stakeholders and local governments.

77. OFFICE OF THE ADMINISTRATOR, PROJECT XL: FROM PILOT TO PRACTICE—A JOURNEY TO SYSTEM CHANGE, at 3 (1999) (available at <http://www.epa.gov/projectxl/pilot.pdf>).

78. The Project XL website is located at <http://www.epa.gov/ProjectXL>.

79. Emission reductions are calculated by subtracting actual emissions from the established project baselines.

- reused 1,069 million gallons of water; and
- reused 311 tons of methanol.

Beyond those quantified above, XL projects have many environmental benefits that are not listed or that will increase in magnitude as more projects are implemented. Therefore, these results are only an early indication of the benefits XL should be expected to provide.

Benefits to Sponsors

In exchange for SEP, EPA's XL program has provided many incentives that increased operational flexibility. This flexibility provides other benefits that make XL worthwhile for participants. Examples include:

- financial gains, such as cost savings, market advantage, and cost effective environmental management;
- efficiency benefits, such as consolidated and/or electronic reporting;
- industry leadership, including improved standing within an industry sector, better reputation among consumers, and a hand in shaping future regulation;
- better community and stakeholder relations; and
- improved relationships with regulators at all levels.

Our evaluations to date[80] have shown financial benefits already gained by project sponsors. For example, Weyerhaeuser expects to avoid $10 million in future capital spending, is now saving $200,000 a year by recovering and reusing lime muds, and will continue to save $176,000 in administrative costs annually by consolidating reporting requirements. By eliminating 30 to 50 permit reviews a year, Intel won a competitive advantage in the quick-to-market semiconductor industry and avoided millions of dollars worth of production delays. Witco expects to save $800,000 over five years through its negotiated hazardous waste deferral. Merck expects to avoid millions of dollars in production delays by eliminating repetitive permit reviews and getting their products to market quicker.

In addition to saving money, company sponsors have used XL to test methods for improving environmental management and workforce participation. Project XL sponsors have stated that once environmental management is viewed as an asset within the corporation, they discover new opportunities for innovative technology, pollution prevention and reduction strategies, and employee-driven problem solving. For example, Intel hopes to transfer its plant site emissions limits to two other company facilities in Texas and Massachusetts.[81] Merck's project provided information that may influence future corporate equipment purchases.[82] Weyerhaeuser reported that by engaging employees in implementing their EMS, they have increased staff awareness of the environmental aspects of their jobs and improved performance.[83] Berry reported that developing standard operating procedures helped reduce the cost of training and improved day-to-day compliance.[84] OSi used a cross-section of the plant's technical and operating staff to brainstorm and then implement pollution prevention options that would be technically and economically feasible.[85]

Sponsors also report improved relationships with the local community and other stakeholders. In at least two private surveys, XL project sponsors said stakeholder involvement had helped increase mutual understanding and networking. Some project sponsors who had little or no experience in working with stakeholder groups were able to build new relationships. Others such as Intel, Weyerhaeuser, and Merck used XL to develop more meaningful community involvement in the development and issuance of permits and in redesigning reporting mechanisms to suit community needs.

Finally, companies should not underestimate the value of working closely with regulators and educating them to the realities of the business world. When regulators learn how environmental regulations affect business decisions, they can take business needs into account as they develop future regulations or policies. Conversely, industries that understand the needs of regulatory agencies will be in a better position to respond to new actions. This kind of positioning can make the difference in a tightly competitive marketplace.

Benefits for Communities and Stakeholders

While XL has been time-consuming, stakeholders in successful projects tell EPA they have seen real value at a local level. They say they have information, input, and access they didn't have before. In many cases these projects have led to other community improvements not anticipated in the initial proposal. Community benefits have included:

- a cleaner local environment;
- forging a real, informed trust with the project sponsor;
- offering input into a company's environmental decisions;
- improving access to information through the Internet, direct reports from the facility or local library holdings;
- receiving reports in easy-to-understand formats;
- understanding a local facility's operations better, and sometimes those of an industry as a whole; and
- receiving help with community projects, such as computer donations and property set-backs.

Project XL is demonstrating value at facilities and communities where its experiments are located. It is showing that regulatory flexibility can provide both economic value

80. *See* OFFICE OF THE ADMINISTRATOR, U.S. EPA, PROJECT XL PRELIMINARY STATUS REPORT: AN EVALUATION OF PROJECTS IN IMPLEMENTATION, at 3-4 (1998) (available at <http://www.epa.gov/projectxl/eval15.pdf>) [hereinafter PROJECT XL PRELIMINARY STATUS REPORT]; OFFICE OF REINVENTION, U.S. EPA, XL PROJECT PROGRESS REPORTS: OSi SPECIALTIES, WEYERHAEUSER FLINT RIVER, VANDENBERG AFB, JACK M. BERRY, INC., HADCO CORPORATION, MERCK STONEWALL PLANT, INTEL CORP. (1999) (available at <http://www.epa.gov/projectxl/file1.htm>).

81. *See* INTEL FPA, *supra* note 48, at 12, Enforceability of the FPA and Public Accountability.

82. *See* MERCK FPA, *supra* note 67, at 6-7.

83. OFFICE OF THE ADMINISTRATOR, U.S. EPA, PROJECT XL 1999 COMPREHENSIVE REPORT, at 16-17 (1999) [hereinafter PROJECT XL 1999 COMPREHENSIVE REPORT].

84. *See* PROJECT XL PRELIMINARY STATUS REPORT, *supra* note 80, at 3.

85. *See* PROJECT XL 1999 COMPREHENSIVE REPORT, *supra* note 83, at 62.

and lessons important to national policy. We can now say with some assurance:

- environmental achievements are starting to look impressive, considering the early age of the program and projects;
- financial benefits have far exceeded the costs of negotiating and implementing the agreements; and
- community participants continue to receive benefits beyond their initial investment in the project.

While it is extremely early to be making any value judgment about Project XL, it appears that projects are living up to their commitments and expectations. But what about transferability? Have we started moving from pilot projects to institutional change?

The first XL annual report entitled *Project XL 1999 Comprehensive Report* is attempting to answer those questions by looking at EPA's core functions and seeing what influence the projects have had on how the Agency performs its day-to-day responsibilities. We looked at rules and regulations; permitting; environmental information reporting and management; stakeholder involvement; environmental stewardship, enforcement, and compliance assurance; and Agency culture change.

Rules

The Weyerhaeuser project allowed EPA to design and test two new compliance options that are now part of the Agency's new pulp and paper cluster rule.[86] We expect this new rule to eliminate 59 percent of toxic air emissions from U.S. pulp, paper, and paperboard mills. Chloroform discharges to water will fall 99 percent; dioxin and furan discharges will be reduced by 96 percent. The Molex and HADCO experiments are testing several waste reduction, metal recycling, and recovery options that are now restrained by RCRA regulations.[87] Although 3M's XL proposal did not reach final agreement, one of its alternative compliance ideas was incorporated into federal rules for magnetic tape manufacturers.

Permits

Four XL projects contain innovative permitting concepts, including three that are testing facilitywide permit emission caps. After developing Merck's facilitywide air permit, which allows operational changes without individual permit reviews, EPA incorporated limited preapproval for some types of production changes in 1998 air regulations governing pharmaceutical plants.[88] Other XL projects are testing innovations in the RCRA permitting program to encourage recycling.[89] Although the Berry project closed due to change of ownership, EPA is documenting the Berry concept of a comprehensive operating permit so that other interested project sponsors or regulators can consider this approach.

Information Management

Intel is improving public access to information by redesigning environmental performance reports based on stakeholder suggestions and by posting these reports on the Internet.[90] Intel and Weyerhaeuser are consolidating routine reporting requirements. And Merck's requirements for recordkeeping and reporting grow more stringent as its actual emissions approach the facilitywide cap. Project XL will transfer these experiences to EPA's new Information Office, where they can be used to design the Agency's future information reporting and management strategies.

Stakeholder Involvement

Through XL, EPA has learned valuable lessons about opening up its decisionmaking process and inviting stakeholders to participate. We have learned the importance of establishing clear ground rules and roles and identifying stakeholder needs early in the project's development.[91] Project XL's experiences have been incorporated into an Agency plan for improving stakeholder involvement.

Enforcement and Compliance Assurance

Project XL has helped to broaden the Agency's experience with self-certification as a means of improving enforcement and compliance. For example, the Massachusetts Environmental Results Program is testing self-certification as a way to improve compliance among small businesses.[92] The results of this experiment may lend credence to self-certification as an important tool of the future.

Environmental Stewardship

Project XL is also experimenting with EMS, pollution prevention, and recycling as ways to add to the Agency's knowledge and experience with environmental stewardship as a means of helping organizations improve environmental performance and potentially go beyond compliance. These experiments will guide EPA as it develops national policy on the role of EMSs in environmental regulation.

Agency Culture Change

Project XL has begun to change the Agency's culture in a number of ways. First, XL is building the capacity to run cross-Agency, cross-media teams that can resolve important policy issues in a timely way.[93] Second, EPA has created

86. *See* National Emissions Standards for Hazardous Air Pollutants for Source Categories: Pulp and Paper Production; Effluent Limitation Guidelines, Pretreatment Standards, and New Source Performance Standards: Pulp, Paper, and Paperboard Category, 63 Fed. Reg. 18504, 18509, 18523 (Apr. 15, 1998).

87. Project XL Final Project Agreement for Molex Inc., 60 Fed. Reg. 43588, 43589 (Aug. 13, 1998).

88. National Emissions Standards for Hazardous Air Pollutants for Source Categories: Pharmaceuticals Production, 63 Fed. Reg. 50282 (Sept. 21, 1998).

89. *See* PROJECT XL 1999 COMPREHENSIVE REPORT, *supra* note 83, at 41, 48-49.

90. *See* EVALUATION OF PROJECT XL STAKEHOLDER PROCESSES, *supra* note 55, at 13.

91. *See id.* at 2-4.

92. MASSACHUSETTS ENVTL. DEP'T, PROJECT XL FINAL PROJECT AGREEMENT FOR MASSACHUSETTS ENVIRONMENTAL RESULTS PROGRAM, July 29, 1998 (available at <http://www.epa.gov/projectxl/massdep.100698.pdf>).

a Reinvention Action Council of senior career managers to resolve tough reinvention issues.[94] Third, the Office of Enforcement and Compliance Assistance developed a streamlined process for compliance screening, which led to a similar document for other partnership programs across the Agency. Fourth, the Environmental Council of the States Innovations Agreement grew out of state dissatisfaction with the XL criteria, but has given EPA and the states a new way to work together.

Again, it is far too early to be drawing conclusions about the value of XL or the long-term effect it will have on the Agency and how it operates. But the early results indicate that Project XL may meet expectations in leading to systemic change.

The Future: Life After 50

Though the Agency has not yet planned Project XL's future, there are some observations that are worth making. First, EPA will retain the capacity built by XL to do cross-Agency, cross-media experimentation that will be codified in a new organization under the Office of Policy, Economics, and Innovation. Second, one of XL's major contributions will be providing EPA the ability to make Agencywide decisions that are both consultative and timely and that allow the Agency to speak with one voice. This decisionmaking process will be critical as the Agency does business in the future. Third, EPA will continue to need a gateway through which the regulated community and others can bring good ideas and new approaches to our attention. Fourth, the culture change that is just beginning within the Agency needs to be cultivated and encouraged for it to continue. All these factors indicate that the XL concept in some form will continue.

Project XL is important to EPA because it encourages public involvement and input into discussions between EPA, our co-regulators, and industry. It helps to form more collaborative relationships. EPA can serve as a buffer between constituencies while they build trust and confidence. In this way, XL can help develop stakeholder buy-in for change. Project XL is a way of introducing the "flexibility with safeguards" approach to EPA and state staff in a comfortable way that can help to promote cultural change. And again, XL has been instrumental in building capacity for cross-Agency and cross-media experimentation.

Project XL also can test promising alternative approaches in a way that doesn't over-commit to the approach without supporting data. It allows industry to approach the Agency with alternative ways of achieving desirable environmental outcomes that are more supportive of their marketplace and business needs. It creates a context within which constructive relationships can be formed and in which information can be shared and better regulations can be developed.

In looking to the future, there is considerable interest in establishing a performance-based system of dealing with the regulated community, whether it is called a "green track," "performance track,"[95] or "alternative path."[96] Project XL could serve as the foundation for the performance-based system of the future. Already, projects with Merck and Andersen Windows have explored innovative incentives that encourage and reward good performance. It could be possible to develop a list of generic flexibilities from our XL experience that could serve as recognition and incentives for good environmental performance. Another possibility is legislation to create a permanent XL-like program, as advocated by a coalition of bipartisan congressional moderates and the Progressive Policy Institute may succeed.[97] Regardless, EPA will continue to build on the foundation of Project XL and increase its capacity for cross-Agency experimentation. The concepts of beyond compliance performance, operational flexibility with accountability, and the involvement of affected stakeholders are here to stay. In some fashion, they will be an integral part of environmental protection well into the 21st century.

93. PROJECT XL TEAM MANUAL, *supra* note 14.

94. OFFICE OF REINVENTION, U.S. EPA, REINVENTING ENVIRONMENTAL PROTECTION—EPA'S APPROACH, at 1-4 (1999).

95. OFFICE OF THE ADMINISTRATOR, U.S. EPA, AIMING FOR EXCELLENCE: ACTIONS TO ENCOURAGE STEWARDSHIP AND ACCELERATE ENVIRONMENTAL PROGRESS—REPORT OF THE EPA INNOVATIONS TASK FORCE, at 13 (1999) (available at <http://www.epa.gov/reinvent/taskforce/report99/>).

96. *See* ASPEN INST., *supra* note 19.

97. DEBRA KNOPMAN & EMILY FLESCHNER, PROGRESSIVE POLICY INST., SECOND GENERATION OF ENVIRONMENTAL STEWARDSHIP: IMPROVE ENVIRONMENTAL RESULTS AND BROADEN CIVIC ENGAGEMENT (1999).