

US EPA ARCHIVE DOCUMENT

**A Guide
to Writing
Final Project Agreements
under Project XL**

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Office of Reinvention

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- F. December 18, 1997 Legal Principles for FPA Drafting

A Guide to Writing Final Project Agreements under Project XL

PART ONE:

QUESTIONS AND ANSWERS ABOUT FINAL PROJECT AGREEMENTS

Who is the Audience for this Guide?

This guide is intended for **people** who are **writing a Final Project Agreement** under EPA's Project XL program. The Guide assumes that you have some previous knowledge of Project XL or have access to documents explaining the program, such as through the XL website: www.epa.gov/ProjectXL.

What does this Guide Contain?

The Guide provides a general explanation of what Final Project Agreements are all about, an outline of a Final Project Agreement, and suggested text for some of the sections.

What is a Final Project Agreement?

A Final Project Agreement (in this guide simply called "the Agreement") is a statement of the **plans, intentions, and commitments of XL Project participants** regarding implementation of the XL Project. The Agreement defines what a Project is all about, who will do what, when they will do it, and what happens if things don't work out as originally planned. The agreement is developed by Direct Participant Stakeholders, the people who participate in the day-to-day negotiations of the Project. EPA makes the final draft of the agreement available for public comment by publishing a notice of availability in the U.S. Government's Federal Register and also placing it on EPA's Project XL web page. The direct-participant stakeholders will consider all comments before signing the final Agreement.

Is the Agreement a Legally Binding Document?

While the Agreement contains the necessary specifics for Project implementation, **it is not** a legally binding document or contract, and does not create legal rights or obligations for the signatories. Most Agreements are accompanied by legally enforceable and binding documents, called "implementing mechanisms." These mechanisms can be, for example, a rule or a permit.

Where the intent of the Project is to provide regulatory relief, such as flexibility from an existing permit or an alternative regulatory requirement, the Agreement must make it clear that the other mechanism (e.g., rule, permit modification, State variance) makes the regulatory relief or alternative requirement effective. Final Project Agreements are not subject to court review, but enforceable implementing mechanisms, if challenged, may be reviewable.

Please keep this distinction between the Agreement and the implementing mechanism in mind as you read this Guide.

What Does a Final Project Agreement Cover?

The Agreement provides the following information:

- A a **description** of the Project
- A how it meets the XL **acceptance criteria** (including superior environmental performance)
- A the **regulatory flexibility** needed to make the Project possible
- A the ways Project **stakeholders** have been and will continue to be involved
- A the **intentions and commitments** of the parties to the Agreement
- A how Project **implementation** will be monitored and evaluated, and
- A the **legal basis** for the Agreement.

In addition, it describes a number of procedures and requirements in case, for example, the Project needs to be changed or terminated. For a more detailed overview of an Agreement, please see the Table of Contents of a Final Project Agreement on Page 8.

Who are the Project Stakeholders?

In addition to the Project **Sponsor, EPA, the State** and/or appropriate **local regulatory agencies**, other stakeholders play an important role in the development of XL Projects as well. Stakeholders in XL Projects typically include **communities** near the Project, **businesses, environmental** and other **local or national public interest groups, industry groups, local colleges, or individual citizens**. Stakeholders may be in close proximity to the Project facility or farther away. All share an interest in the concepts and potential outcomes of the Project.

The Project XL program has defined stakeholders into three categories, based on the degree of the stakeholders' level of interest in the development of the Project:

- 1.) **Direct Participant Stakeholders**, the people who will be at the negotiation table to work out the details of the Project, including the specifics of the Agreement. They include the Project Sponsor, EPA, the State and/or other local regulatory agencies and relevant and interested stakeholders, such as environmental groups, citizen activists, and company workers, who want to participate intensively and in an ongoing manner. The views of Direct Participant Stakeholders will strongly influence the details of the Project as well as EPA's ultimate decision to approve or not to approve it;
- 2.) **Commentors**, a group of stakeholders or individuals who want to comment on the Project, but, for whatever reason, are not intensively involved in the details of developing the Project;
- 3.) **The General Public**, who should have access to information about the Project and its anticipated environmental results.

For more detail on stakeholder involvement under Project XL, please refer to EPA's Federal Register Notice dated April 23, 1997 in the Appendix to this Guide, and to EPA's document "Project XL Stakeholder Involvement: A Guide for Project Sponsors and Stakeholders," which is available in hard copy by calling the XL information line 202-260-5754. Both documents are also available on the XL web site - www.epa.gov/ProjectXL .

What is the Stakeholders' Role?

Project Sponsors are responsible for the stakeholder process. Stakeholders are **advisors to the Project Sponsor**, not to EPA. Direct Participant Stakeholder groups, including the Project Sponsor, establish ground rules for the decision-making process, including whether the group will make decisions by consensus or majority vote. As the guarantor of an adequate stakeholder process, EPA will look to see if decisions were made according to the established process.

Who Signs a Final Project Agreement?

Signatories should include: the Project **Sponsor**, the **State** (and possibly local regulatory agencies, such as a local Health Department, or Air Pollution Control District with legal responsibilities for activities covered by the Agreement), and **EPA**. Signatories might also include members of the Direct Participant Stakeholder Group, depending on the ground rules developed at the outset of the Project.

What Commitments are in an Agreement?

There are three different types of commitments which may be described or contained in an Agreement, enforceable commitments, voluntary commitments, and corporate aspirations.

Enforceable commitments are those actions or levels of performance which can be compelled by government. Enforceable commitments can be described in an Agreement, but are made binding and enforceable only in a separate legal implementing mechanism such as a site-specific rule or permit. Failure to achieve enforceable commitments may constitute grounds for government or citizen enforcement action, with all of the remedies generally available absent Project XL.

Voluntary Commitments are those for which a facility may be held accountable through means other than injunctive relief, penalty or other conventional legal enforcement action. Failure to achieve these commitments is an appropriate basis for termination or modification of the XL Project. Voluntary commitments will be contained in the Agreement, which is not itself legally binding on the parties. Accordingly, both the Agreement and associated legal implementing mechanisms should reserve EPA's discretion to terminate a Project and to return the facility to compliance with otherwise applicable requirements where voluntary commitments have not been met.

Finally, enforceable and voluntary commitments should not be confused with corporate aspirations. Corporate aspirations are not commitments for which a facility should expect to be

held accountable through government action or citizen enforcement. However, ambitious **corporate aspirations** (e.g., zero content of a priority pollutant in a facility's effluent, 100% reclamation of a raw material, or elimination of a potential toxic from use in production) can be important drivers for superior environmental performance and will be assessed accordingly by EPA. Corporate aspirations will be contained in the Agreement as part of the Project description and as elements that help to make up the Project's superior environmental performance, but should be clearly distinguished from accountable commitments.

What is the Incentive for Making Commitments?

There are a number of incentives for making commitments under Project XL. They include:

- ▲ **Flexibility** from existing requirements (e.g., regulations, permit requirements, reporting or monitoring requirements, policies, compliance deadlines, etc., which may be barriers to innovative environmental solutions).
- ▲ **Better environmental and public health protection** for the community and for workers in the facility;
- ▲ **Cost savings** from more efficient and effective ways of complying with regulatory requirements;
- ▲ **Production benefits** (such as the ability to adapt products more quickly to market demands) and increased operating efficiency;
- ▲ **Leadership**; EPA will help the project sponsor get recognition for being an environmental leader;
- ▲ **Better relations** with the community and other stakeholders.

What if the Project Fails to Deliver the Anticipated Results?

Project XL is an experiment to try new ways to achieve superior environmental protection. EPA recognizes that some of the experiments may not work out as planned. If an XL Project does not achieve the intended goals (or if it reaches the end of its agreed-upon term and the Project is not extended), the **sponsor must come back into compliance** with the regulations or other requirements or policies that applied before it was given flexibility. The details of when and how the sponsor would come back into compliance with the regulations or other requirements or policies are negotiated during the development of the Agreement.

Are Agreements Written in Plain or Very Technical Language?

Although an Agreement may include some technical components, particularly in the appendices, they should be written as much as possible in **plain language**. Because they are not legally binding contracts, they do not generally need terminology found in legally binding contracts or enforceable regulatory documents. For example, rather than statements, such as a party “shall” or “must” perform certain actions, you should use terms like the Sponsor “will” or “intends” to perform certain actions. Other terms like “compliance” with the Agreement or “violations” of the Agreement should also be avoided.

PART TWO:

DETAILED OUTLINE OF A FINAL PROJECT AGREEMENT

All Agreements will be different and this outline is provided merely as guidance. It is not intended to be a required format, but it does include some suggested language and length for certain sections. However, to the extent you use the suggested language, it may help people reading and reviewing the document. Please note, that you should write the Final Project Agreement in plain language, keeping the following three principles in mind:

- ▲ Write for ALL the Project stakeholders, not solely for technical or professional staff.**
- ▲ Use natural expression.** Write as much as possible as you would speak. Write with commonly used words in the way that they are commonly used.
- ▲ Make your document *easy to read and visually appealing*.** Consider using graphical depictions of data, text boxes, and tables to organize and compare information. Present your text in a way that highlights the main points you want to communicate.

Table of Contents for the Final Project Agreement

- I. Introduction to the Agreement
 - A. Very Brief Description of the Project and Its Purpose (*two or more paragraphs*)
 - B. Description of Your Facility/Community/Geographic Area (*one or more pages*)
 - C. Purpose of the Agreement (*one page*)
 - D. List of the Parties that Will Sign the Agreement
 - E. List of the Project Contacts
- II. Detailed Description of the Project (*two or more pages*)
 - A. Summary of the Project
 - B. Description of the Specific Project Elements
 - 1. Project Element # 1
 - 2. Project Element # 2
 - 3. etc.
- III. How the Project Will Meet the Project XL Acceptance Criteria (*three or more pages*)
 - A. Anticipated Superior Environmental Performance
 - B. Anticipated Benefits (such as cost savings, paperwork reduction and operational flexibility)
 - C. Stakeholder Involvement and Support

- D. Innovative Approach and Multi-media Pollution Prevention
 - E. Transferability of the Approach to Other Entities or Sectors
 - F. Feasibility of the Project
 - G. Monitoring, Reporting, Accountability, and Evaluation Methods to be Used
 - H. Avoidance of Shifting the Risk Burden to Other Areas or Media
- Three additional criteria apply to XL Projects sponsored by communities:
- I. Capacity for Community Participation
 - J. Economic Opportunity
 - K. Community Planning
- IV. Description of the Requested Flexibility and the Implementing Mechanisms (*one or more pages*)
- A. Requested Flexibility
 - B. Legally Implementing Mechanisms
- V. Discussion of Intentions and Commitments for Implementing the Project (*one or more pages*)
- A. [*Project Sponsor's name*] Intentions and Commitments
 - B. EPA, State, and Local Agency's Intentions and Commitments
 - C. Project XL Performance Targets
 - D. Proposed Schedule and Milestones
 - E. Project Tracking, Reporting, and Evaluation
 - F. Periodic Review by the Parties to the Agreement
 - G. Duration of the Project
- VI. Legal Basis for the Project (*one to two pages*)
- A. Authority to Enter Into an Agreement
 - B. Legal Effect of the Agreement
 - C. Other Laws or Regulations That May Apply
 - D. Retention of Rights to Other Legal Remedies
- VII. Unavoidable Delay During Project Implementation
- VIII. Amendments or Modifications to the Agreement
- IX. Transfer of the Project Benefits and Responsibilities to a New Owner
- X. Process for Resolving Disputes
- XI. Withdrawal From or Termination of the Agreement
- A. Expectations
 - B. Procedures
- XII. Compliance After the Project is Over

- A. Orderly Return to Compliance if the Project Term is Completed and Not Extended
- B. Orderly Return to Compliance in the Event of Early Withdrawal or Termination

XIII. Signatories and Effective Date

XIV. Glossary of Terms (Optional)

I. Introduction to the Agreement

The Introduction is a short summary of the Project, about three to five paragraphs in length. When the draft Agreement is ready for public comment, its Introduction will be used as the basis for a notice in the U.S. government's Federal Register, announcing the availability of the document.

A. Very Brief Description of the Project and Its Purpose *(two or more paragraphs)*

Aside from the very brief description, we suggest also including the following general language about Project XL: “The U.S. Environmental Protection Agency (EPA), with the cooperation of State and local authorities, has initiated Project XL to work with interested companies or other potential Project Sponsors to develop innovative approaches to environmental protection. Project XL encourages potential sponsors to come forward with new approaches that can advance our nation’s environmental goals more effectively and efficiently than current regulatory and policy tools or procedures.”

B. Description of Your Facility and Facility Operations/Community/Geographic Area *(one or more pages)*

C. Purpose of the Agreement *(one page)*

This section describes the purpose of the Agreement in general terms.

Suggested language:

“This Final Project Agreement (“ the Agreement”) is a joint statement of the plans, intentions and commitments of the U.S. Environmental Protection Agency (“EPA”), [name of State], and [Project Sponsor’s name, and others as appropriate] to carry out this pilot Project approved for implementation at [Project Sponsor’s name of facility(s)]. This Project will be part of EPA’s Project XL program to develop innovative approaches to environmental protection.”

“The Agreement does not create legal rights or obligations and is not an enforceable contract or a regulatory action such as a permit or a rule. This applies to both the substantive and the procedural provisions of this Agreement. While the parties to the Agreement fully intend to follow these procedures, they are not legally obligated to do so. For more detail, please refer to Section __ (Legal Basis for the Agreement).”

“Federal and State flexibility and enforceable commitments described in this Agreement will be implemented and become effective through a legal implementing mechanism such as a rule or permit.”

“All parties to this Agreement will strive for a high level of cooperation, communication, and coordination to assure successful, effective, and efficient implementation of the Agreement and the Project.”

D. List of the Parties that Will Sign the Agreement

Suggested language: “The Parties to this Final Project XL Agreement are the United States Environmental Protection Agency (EPA), [*the Project Sponsor’s name*], and the State of [*name*],... [*and others, as appropriate*]”

E. List of the Project Contacts

Company [*or other Project Sponsor*]:

EPA Headquarters:

EPA Regional Office:

State Agency:

Local Agency:

Other signatory or Stakeholder Groups

II. Detailed Description of the Project (*two or more pages*)

For more detailed guidance on the content of this section, please refer to EPA’s guide called “Project XL: Best Practices for Proposal Development.” The Federal Register Notices of April 23, 1997 and May 23, 1995 in the Appendix of this Guide also provide important program information. For this particular section, you may also want to refer to text examples from the Final Project Agreements for Exxon (Section 4.0), Merck (Section II.) and Witco Corporation (Section II. B) to see what substantive points were addressed and how. Please keep in mind, however, that none of these older documents was written based on the format and content suggestions of this Guide, which reflect several years of experience on what works best in putting a Final Project Agreement together. All of these documents are available on the XL web site at www.epa.gov/ProjectXL or in hard copy from EPA’s Project XL information line 202-260-5754.

A. Summary of the Project

B. Description of the Specific Project Elements

Project elements are the individual components that make up a Project. Each component should be explained separately and clearly. Some Projects may include different elements that are carried out simultaneously and others may include elements that are dependent on the results of initial steps of a Project. For example,

a Project may include a testing component and then an implementation component. It will help reviewers understand a Project if each component is described separately and if it is explained how each component fits into the Project.

1. Project Element # 1
2. Project Element # 2
3. etc.

III. How the Project Will Meet the XL Acceptance Criteria

(three or more pages)

For more detailed guidance on the content of this section, please refer to the Federal Register Notice dated April 23, 1997 in the Appendix to this Guide and to EPA's document entitled "Project XL: Best Practices for Proposal Development". For this particular section, you may also want to refer to text examples from the Final Project Agreements for Merck (Section II. B) and Atlantic Steel (Section VI.) to see what substantive points were addressed and how. Please keep in mind, however, that none of these older documents was written based on the format and content suggestions of this Guide, which reflect several years of experience on what works best in putting a final Agreement together. All of these documents are available on the XL web site at www.epa.gov/ProjectXL or in hard copy from the XL information line at 202-260-5754.

A. Superior Environmental Performance

This is a plain language description of how the Project will achieve levels of environmental performance superior to what would be achieved under applicable statutes, regulations and policies. This discussion should include "baseline" levels of performance and how the Project commitments will be superior to that baseline. The discussion should also address how enforceable commitments are equivalent to or better than the baseline levels of protection, described as "Tier I" in the Federal Register Notice, dated April 23, 1997. Where a Project relies on a mix of enforceable and voluntary commitments, you should clearly distinguish and identify which implementation mechanisms (e.g., rule, permit, etc.) are used. Briefly identify the mechanism associated with each commitment. Section IV will describe the implementing mechanisms in greater detail.

B. Anticipated Benefits, such as Cost Savings, Paperwork Reduction, and Operational Flexibility

C. Stakeholder Involvement and Support

D. Innovative Approach and Multi-Media Pollution Prevention in the Project

E. Transferability of the Approach to Other Entities or Sectors

F. Feasibility of the Project

G. Monitoring, Reporting, Accountability, and Evaluation Methods to be Used

H. Avoidance of Shifting the Risk Burden to Other Areas or Media

Three additional Acceptance Criteria apply only to XL Projects sponsored by communities (see Federal Register Notice, dated November 1, 1995):

I. Capacity for Community Participation

J. Economic Opportunity

K. Community Planning

IV. Description of the Requested Flexibility and Implementing Mechanisms

As a reminder: Since Final Project Agreements themselves have no legal effect, EPA and/or the State or local authority will provide any regulatory flexibility through legal implementing mechanisms, such as a rule or permit.

A. Requested Flexibility

This section describes the Federal, State, and/or local flexibility needed to implement the Project and will describe current requirements, relevant statutes, regulations, policies, or guidance, and will outline what needs to be changed to implement the Project. For this particular section, you may also want to refer to text examples from the Final Project Agreements for the Witco Corporation (Section II. C) and Andersen (Section II. E) to see what substantive points were addressed and how. Please keep in mind, however, that none of these older documents was written based on the format and content suggestions of this Guide, which reflect several years of experience on what works best in putting a Final Project Agreement together.

Suggested language to be added to the above description: “The parties to the Agreement do not anticipate any need to provide flexibility from any additional [Federal and/or State and/or local] requirements. If the parties agree that additional flexibility is necessary and appropriate, the flexibility may be added to this Project and will be subject to public notice and comment, as appropriate.”

B. Legal Implementing Mechanisms

The primary goal of this section is to describe key aspects of the legal implementing mechanism. This will help avoid significant unresolved issues from arising during development of the implementing mechanism by clearly stating the common understanding of the parties. The expectation is that the legal mechanism is being developed and drafted at the same time as the Agreement, so that confusion between documents and parties may be avoided in an efficient and cost-effective manner.

In this section, you should list and describe the mechanisms that will be put into

place, when that will occur, and under what conditions, (such as a need for data collection before a waiver is granted).

Depending on the flexibility you are getting, you may need a legal implementing mechanism, such as a waiver or exemption from the existing regulations, a site-specific rule, a new permit, or a combination of these.

If the legal implementing mechanism is proposed and finalized simultaneously with the Agreement, then details may be contained in the legal implementing mechanism itself and need not be repeated in the Agreement in their entirety. While this is not recommended, if the Agreement is finalized before the legal implementing mechanism, then more details may be necessary in the Agreement.

V. Discussion of Intentions and Commitments for Implementing the Project

For this particular section, you may also want to refer to text examples from the Final Project Agreements for the Witco Corporation (Section VI.) and Atlantic Steel (Section VII.) to see what substantive points were addressed and how. Please keep in mind, however, that none of these older documents was written based on the format and content suggestions of this Guide, which reflect several years of experience on what works best in putting a Final Agreement together. All of these documents are available on the XL web page www.epa.gov/ProjectXL. Please also keep in mind that the Agreement itself does not have any legal effect.

A. [The Project Sponsor's name] Intentions and Commitments

B. EPA's, [State]'s, and [local agency]'s Intentions and Commitments

Suggested language, depending on the nature of the flexibility:

- “1. EPA intends to propose and issue (subject to applicable procedures and review of public comments) a site-specific rule, amending 40 CFR Part ___ [*relevant citation*], and/or to propose and issue (also subject to applicable procedures and review of public comments) a permit or a permit modification under 40 CFR [*new citation*] that applies specifically to the [*Project Sponsor's*] facility. The [*site-specific rule or permit*] will also provide for withdrawal or termination and a post-Project compliance period consistent with Section ___ of this Agreement, and will address the transfer procedures included in Section __. The standards and reporting requirements set forth in Section __ [and Attachments of this Agreement] will be implemented in the [*site-specific rule and/or associated permit and/or other local rule, permit, etc.*]

- “2. The State of [*name*] intends to propose and issue (subject to applicable procedures and review of public comments) a [*rule, permit, order, etc.*] under [*cite relevant state authority*].” [*Describe the specifics of what goes into the state legal mechanism*].

3. [*Describe local authority actions, if needed.*]

C. Project XL Performance Targets

Please refer to the April 27, 1997 Federal Register Notice in the Appendix for a discussion of the two levels of superior environmental performance (Tier I and Tier II). Quantifiable measures are preferable over qualitative measures in documenting performance.

D. Proposed Schedule and Milestones

The schedule and milestones should address:

- *Proposed Project duration*
- *Milestones associated with Project implementation*
- *Relevant permit renewal dates or other upcoming compliance deadlines*
- *[If applicable, add:] Effect of your industry business cycle on the Project schedule*
- *State regulations that need to be amended*

E. Project Tracking, Reporting and Evaluation

For guidance on this section, please refer to Appendix A and B of this Guide

F. Periodic Review by the Parties to the Agreement

Suggested language: “ The Parties will hold periodic performance review conferences to assess their progress in implementing this Project. Unless they agree otherwise, the date for those conferences will be concurrent with annual Stakeholder Meetings. No later than thirty (30) days following a periodic performance review conference, [*the Project Sponsor*] will provide a summary of the minutes of that conference to all Direct Stakeholders. Any additional comments of participating Stakeholders will be reported to EPA.”

G. Duration

Suggested language:

“This Agreement will remain in effect for [X] years, unless the Project ends at an earlier date, as provided under Section __ (Amendments or Modifications), Section __ (Withdrawal or Termination), or Section __ (Transfer of Project Benefits and Responsibilities). The implementing mechanism(s) will contain “sunset” provisions ending authorization for this Project [X] years after the effective date of the [*implementing mechanism(s)*]. They will also address withdrawal or termination conditions and procedures (as described in Section __). This Project will not extend past the agreed upon date, and [*the Project Sponsor*] will comply with all applicable requirements following this date (as described in Section __), unless all parties agree to an amendment to the Project term (as provided in Section __).”

For guidance on this section, please refer to Appendix A and B of this Guide.

VI. Legal Basis for the Project

(one to two pages)

A. Authority to Enter Into the Agreement

Suggested language: “By signing this Agreement, EPA, the State of ...[*name*], [local government], and ... [*the Project Sponsor’s name*] acknowledge and agree that they have the respective authorities, discretion, and resources to enter into this Agreement and to implement all applicable provisions of this Project, as described in this Agreement.”

B. Legal Effect of the Agreement

Suggested Language: “This Agreement states the intentions of the Parties with respect to [*the Project Sponsor’s name*]’s XL Project. The Parties have stated their intentions seriously and in good faith, and expect to carry out their stated intentions.”

“This Agreement in itself does not create or modify legal rights or obligations, is not a contract or a regulatory action, such as a permit or a rule, and is not legally binding or enforceable against any Party. Rather, it expresses the plans and intentions of the Parties without making those plans and intentions binding requirements. This applies to the provisions of this Agreement that concern procedural as well as substantive matters. Thus, for example, the Agreement establishes procedures that the parties intend to follow with respect to dispute resolution and termination (see Sections__ and __). However, while the parties fully intend to adhere to these procedures, they are not legally obligated to do so.”

“EPA intends to propose for public comment the [*insert name of legal mechanism, e.g. rule, permit modification, etc.*] needed to implement this Project. Any rules, permit modifications or legal mechanisms that implement this Project will be effective and enforceable as provided under applicable law.”

“This Agreement is not a "final agency action" by EPA, because it does not create or modify legal rights or obligations and is not legally enforceable. This Agreement itself is not subject to judicial review or enforcement. Nothing any Party does or does not do that deviates from a provision of this Agreement, or that is alleged to deviate from a provision of this Agreement, can serve as the sole basis for any claim for damages, compensation or other relief against any Party.”

C. Other Laws or Regulations That May Apply

Suggested Language: “Except as provided in the legal implementing mechanisms for this Project, the parties do not intend that this Final Project Agreement will modify any other existing or future laws or regulations.”

D. Retention of Rights to Other Legal Remedies

Suggested language: “Except as expressly provided in the legal implementing mechanisms described in Section ____, nothing in this Agreement affects or limits [*the Project Sponsor’s*], EPA’s, the State’s, or any other signatory’s legal rights. These rights include legal, equitable, civil, criminal or administrative claims or other relief regarding the enforcement of present or future applicable federal and state laws, rules,

regulations or permits with respect to the facility.”

Although [*the Project Sponsor*] does not intend to challenge agency actions implementing the Project (including any rule amendments or adoptions, permit actions, or other action) that are consistent with this Agreement, [*the Project Sponsor*] reserves any right it may have to appeal or otherwise challenge any EPA, [*State*] [*or local authority*] action to implement the Project. With regard to the legal implementing mechanisms, nothing in this Agreement is intended to limit [*the Project Sponsor's*] right of to administrative or judicial appeal or review of those legal mechanisms, in accordance with the applicable procedures for such review.”

VII. Unavoidable Delay During Project Implementation

It is a good idea to anticipate that things may not always go as planned and write an agreement that can adapt to these situations.

Suggested language: “Unavoidable delay” (for purposes of this Agreement) means any event beyond the control of any Party that causes delays or prevents the implementation of the Project described in this Agreement, despite the Parties’ best efforts to put their intentions into effect. An unavoidable delay can be caused by, for example, a fire or acts of war.”

“When any event occurs that may delay or prevent the implementation of this Project, whether or not it is avoidable, the Party to this Agreement who knows about it will immediately provide notice to the remaining Parties. Within ten (10) days after that initial notice, the Party should confirm the event in writing. The confirming notice should include: 1) the reason for the delay; 2) the anticipated duration; 3) all actions taken to prevent or minimize the delay; and 4) why the delay was considered unavoidable, accompanied by appropriate documentation.”

“If the Parties, agree that the delay is unavoidable, relevant parts of the Project schedule (see Section ___) will be extended to cover the time period lost due to the delay. If they agree, they will also document their agreement in a written amendment to this Agreement. If the Parties don’t agree, then they will follow the provisions for Dispute Resolution outlined below.”

“This section applies only to provisions of this Agreement that are not implemented by legal implementing mechanisms. Legal mechanisms, such as permit provisions or rules, will be subject to modification or enforcement as provided under applicable law.”

VIII. Amendments or Modifications to the Agreement

Suggested language: “This Project is an experiment designed to test new approaches to environmental protection and there is a degree of uncertainty regarding the environmental benefits and costs associated with activities to be undertaken in this Project. Therefore, it may be appropriate to amend this Agreement at some point during its duration.”

“This Final Project Agreement may be amended by mutual agreement of all parties at any time during the duration of the Project. The parties recognize that amendments to this Agreement may also necessitate modification of legal implementation mechanisms (*such as a rule or*

permit) or may require development of new implementation mechanisms. If the Agreement is amended, EPA and *[the Project Sponsor]* expect to work together with other regulatory bodies and stakeholders to identify and pursue any necessary modifications or additions to the implementation mechanisms in accordance with applicable procedures. If the parties agree to make a substantial amendment to this Agreement, the general public will receive notice of the amendment and be given an opportunity to participate in the process, as appropriate.”

“In determining whether to amend the Agreement, the parties will evaluate whether the proposed amendment meets Project XL acceptance criteria and any other relevant considerations agreed on by the parties. All parties to the Agreement will meet within ninety (90) days following submission of any amendment proposal (or within a shorter or longer period if all parties agree) to discuss evaluation of the proposed amendment. If all parties support the proposed amendment, the parties will (after appropriate stakeholder involvement) amend the Agreement.”

IX. Transfer of Project Benefits and Responsibilities to a New Owner

If applicable, this section describes what would happen if the facility were sold or new owners or operators took over.

Suggested language: “The parties expect that the implementing mechanisms will allow for a transfer of *[the Project Sponsor’s]* benefits and responsibilities under the Project to any future owner or operator upon request of *[the Project Sponsor]* and the new owner or operator, provided that the following conditions are met:

- A. *[The Project Sponsor]* will provide written notice of any such proposed transfer to the EPA, *[State,]* *[and local authority]* at least ninety (90) days before the effective date of the transfer. The notice is expected to include identification of the proposed new owner or operator, a description of its financial and technical capability to assume the obligations associated with the Project, and a statement of the new owner or operator’s intention to take over the responsibilities in the XL Project of the existing owner or operator.
- B. Within forty-five (45) days of receipt of the written notice, the parties expect that EPA, *[State,]* *[and local authority]*, in consultation with *[stakeholder(s)]*, will determine whether: 1) the new owner or operator has demonstrated adequate capability to meet EPA’s requirements for carrying out the XL Project; 2) is willing to take over the responsibilities in the XL Project of the existing owner or operator; and 3) is otherwise an appropriate Project XL partner. Other relevant factors, including the new owner or operator’s record of compliance with Federal, State and local environmental requirements, may be considered as well.

It will be necessary to modify the Agreement to reflect the new owner and it may also be necessary for EPA, *[the State]* *[, and the local authority]* to amend appropriate rules, permits, or other implementing mechanisms (subject to applicable public notice and comment) to transfer the legal rights and obligations of *[the Project Sponsor]* under this

Project to the proposed new owner or operator.”

X. Process for Resolving Disputes

Suggested language: “Any dispute which arises under or with respect to this Agreement will be subject to informal negotiations between the parties to the Agreement. The period of informal negotiations will not exceed twenty (20) calendar days from the time the dispute is first documented, unless that period is extended by a written agreement of the parties to the dispute. The dispute will be considered documented when one party sends a written Notice of Dispute to the other parties.

If the parties cannot resolve a dispute through informal negotiations, the parties may invoke non-binding mediation by describing the dispute with a proposal for resolution in a letter to the Regional Administrator for EPA Region [#]. The Regional Administrator will serve as the non-binding mediator and may request an informal mediation meeting to attempt to resolve the dispute. He or she will then issue a written opinion that will be non-binding and does not constitute a final EPA action. If this effort is not successful, the parties still have the option to terminate or withdraw from the Agreement, as set forth in Section ___ below.”

XI. Withdrawal From or Termination of the Agreement

Most Project XL Agreements use this section to describe steps which would be taken if the Project failed to achieve the anticipated environmental performance despite good faith efforts. In most cases, failure to achieve anticipated environmental performance would result in an orderly return to compliance with regulatory requirements that would have been in effect without the flexibility provided through Project XL.

A. Expectations

Suggested language: “Although this Agreement is not legally binding and any party may withdraw from the Agreement at any time, it is the desire of the parties that it should remain in effect through the expected duration of [X# of] years, and be implemented as fully as possible unless one of the conditions below occurs:

1. Failure by any party to (a) comply with the provisions of the enforceable implementing mechanisms for this Project, or (b) act in accordance with the provisions of this Agreement. The assessment of the failure will take its nature and duration into account.
2. Failure of any party to disclose material facts during development of the Agreement.
3. Failure of the Project to provide superior environmental performance consistent with the provisions of this Agreement.
4. Enactment or promulgation of any environmental, health or safety law or regulation after execution of the Agreement, which renders the Project legally, technically or economically impracticable.

5. Decision by an agency to reject the transfer of the Project to a new owner or operator of the facility.

In addition, EPA, [*the State*], [*and the local authority*] do not intend to withdraw from the Agreement if [*the Project Sponsor's name*] does not act in accordance with this Agreement or its implementation mechanisms, unless the actions constitute a substantial failure to act consistently with intentions expressed in this Agreement and its implementing mechanisms. The decision to withdraw will, of course, take the failure's nature and duration into account.

[*The Project Sponsor*] will be given notice and a reasonable opportunity to remedy any "substantial failure" before EPA's withdrawal. If there is a disagreement between the parties over whether a "substantial failure" exists, the parties will use the dispute resolution mechanism identified in section ____ of this Agreement. EPA, the State of ...[*name*], and ...[*any other signatory?*] retain their discretion to use existing enforcement authorities, including withdrawal or termination of this Project, as appropriate. [*The Project Sponsor*] retains any existing rights or abilities to defend itself against any enforcement actions, in accordance with applicable procedures."

B. Procedures

Suggested language: "The parties agree that the following procedures will be used to withdraw from or terminate the Project before expiration of the Project term. They also agree that the implementing mechanism(s) will provide for withdrawal or termination consistent with these procedures.

1. Any party that wants to terminate or withdraw from the Project is expected to provide written notice to the other parties at least sixty (60) days before the withdrawal or termination.
2. If requested by any party during the sixty (60) day period noted above, the dispute resolution proceedings described in this Agreement may be initiated to resolve any dispute relating to the intended withdrawal or termination. If, following any dispute resolution or informal discussion, a party still desires to withdraw or terminate, that party will provide written notice of final withdrawal or termination to the other parties.

If any agency withdraws or terminates its participation in the Agreement, the remaining agencies will consult with [*the Project Sponsor*] to determine whether the Agreement should be continued in a modified form, consistent with applicable federal or State law, or whether it should be terminated.

3. The procedures described in this Section apply only to the decision to withdraw or terminate participation in this Agreement. Procedures to be used in modifying or rescinding any legal implementing mechanisms will be governed by the terms of those legal mechanisms and applicable law. It may be necessary to invoke the implementing mechanism's provisions that end authorization for the Project (called "sunset

provisions”) in the event of withdrawal or termination.”

XII. Compliance After the Project is Over

Final Project Agreements and most implementing mechanisms are negotiated for a finite period of time. After that time, the Project Sponsor needs to go back to complying with the requirements that would have been in effect without the flexibility provided through Project XL, unless the Project was successful and the Agreement and its implementing mechanisms are amended to extend the Project’s term. If the results of the experiment are clearly successful, then this can be easily assessed. If the results and transferability opportunities are not obvious, EPA will conduct an evaluation.

If the requirements for returning to traditional regulations are clear, then the process outlined below may be followed. If the requirements are not clear, you may need to include provisions for an evaluation of the Project and an implementation schedule for returning to traditional regulations, as described in the Andersen Windows Project (see www.epa.gov/ProjectXL).

Suggested language: “The parties intend that there be an orderly return to compliance upon completion, withdrawal from, or termination of the Project, as follows:

A. Orderly Return to Compliance with Otherwise Applicable Regulations, if the Project Term is Completed

EPA will conduct an evaluation of the project before a decision is made that the project has been completed.

“If, after an evaluation, the Project is terminated because the term has ended, [the Project Sponsor] will return to compliance with all applicable requirements by the end of the Project term, unless the Project is amended or modified in accordance with Section ___ of this Agreement (Amendments or Modifications). [The Project Sponsor] is expected to anticipate and plan for all activities to return to compliance sufficiently in advance of the end of the Project term. [The Project Sponsor] may request a meeting with EPA, [State], and [local authority] to discuss the timing and nature of any actions that [the Project Sponsor] will be required to take. The parties should meet within thirty days of receipt of [the Project Sponsor’s] written request for such a discussion. At and following such a meeting, the parties should discuss in reasonable, good faith, which of the requirements deferred under this Project will apply after termination of the Project.”

B. Orderly Return to Compliance with Otherwise Applicable Regulations in the Event of Early Withdrawal or Termination

“In the event of a withdrawal or termination not based on the end of the Project term and where the [Project Sponsor] has made efforts in good faith, the parties to the Agreement will determine an interim compliance period to provide sufficient time for [the Project Sponsor] to return to compliance with any regulations deferred under the Project. The interim compliance period will extend from the date on which EPA, [State], [local authority] or [the Project Sponsor] provides written notice of final withdrawal or termination of the Project, in accordance with Section ___ of this Project Agreement. By

the end of the interim compliance period, [*the Project Sponsor*] will comply with the applicable deferred standards set forth in 40 CFR Part [X] and [*State laws/regulations*]. During the interim compliance period, EPA [*State, and/or local authority*] may issue an order, permit, or other legally enforceable mechanism establishing a schedule for [*the Project Sponsor*] to return to compliance with otherwise applicable regulations as soon as practicable. This schedule cannot extend beyond [X # of] months from the date of withdrawal or termination. [*The Project Sponsor*] intends to be in compliance with all applicable Federal, State, and local requirements as soon as is practicable, as will be set forth in the new schedule.”

If good-faith efforts have not been made, EPA will enforce the Project’s legal implementing mechanisms.

XIII. Signatories and Effective Date

XIV. (Optional) Glossary of Terms

PART THREE

APPENDICES TO THE GUIDE

- A. Draft Project Tracking, Reporting and Evaluation
- A Guide for XL Project Teams
- B. EPA's XL Evaluation Activities
- C. April 23, 1997 Federal Register Notice
- D. May 23, 1995 Federal Register Notice
- E. November 1, 1995 Federal Register Notice
- F. December 18, 1997 Legal Principles for Agreement Drafting