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# “Improving” Project XL: Helping Adaptive Management to Work within EPA

*Lawrence E. Susskind and Joshua Secunda\**

## ABSTRACT

Since 1995, the U.S. Environmental Protection Agency has struggled to implement an experiment in regulatory reinvention it calls Project XL (“Excellence in Leadership”). In doing so, EPA is experimenting with regulatory reform based on the theory of “adaptive management”, a theory that can conflict with EPA’s “command and control” enforcement philosophy.<sup>1</sup> Project XL attempts to implement an adaptive management approach by planning “experiments” and monitoring their results for lessons that can be used to guide reform of regulatory systems. Proponents hope to encourage the private sector to collaborate with EPA to plan, run and monitor experiments in

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1. Fundamentally, command and control is an approach to regulation in which the regulator tries to control some aspect of the regulated community’s conduct by specifying behavioral or technological requirements, i.e., “inputs” For example, command and control regulations tell firms what pollution control technologies to use and how much pollution they can emit. “Inputs” can include raw materials, labor or capital that a company applies to the production of a good or a service. In the case of air pollution, inputs might include provisions requiring or encouraging coal-fired power plants to use low sulfur coal, a particular type of scrubber or taller smokestacks.

environmental compliance, rethink regulation and apply new technologies. To date, this has not occurred to the extent that XL's designers had hoped.

In *The Risks and Advantages of Agency Discretion: Evidence from EPA's Project XL*, we concluded that EPA's history and structure make it a challenging locale in which to attempt adaptive management. Indeed, the advent of XL caused a clash of philosophies (between adaptive management and "command and control" adherents) that generated significant tensions within EPA, and spilled over to project stakeholders outside the Agency.

We believe that Project XL can be improved. To that end, this paper offers strategies designed to succeed without statutory reform or other "sea changes" to the existing Project's framework. We propose strategies that: can be implemented quickly and without congressional intervention; focus all stakeholders on jointly defining and achieving XL's mission; encourage EPA to use the discretion it already has to facilitate a flow of more innovative XL proposals; and promote greater efficiency in the review and approval of new XL projects.

## I.

### INTRODUCTION

Since 1995, the U.S. Environmental Protection Agency has struggled to implement an experiment in regulatory reinvention it calls Project XL ("Excellence in Leadership").<sup>2</sup>

EPA envisions Project XL as a national program designed to test innovative ways of achieving better and more cost-effective ways of ensuring public health and environmental protection. Under Project XL, sponsors (private facilities, industry sectors, federal facilities and communities) are encouraged to implement innovative strategies to produce superior environmental performance by replacing specific regulatory requirements, and promoting greater accountability to stakeholders. EPA seeks to attract project sponsors by proposing to grant regulatory flexibility in exchange for commitments to achieve better environmental results - results superior to those that would otherwise have been attained through full compliance with regulations. Through site-

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2. See Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. 27,282 (1995). See also *U.S. Environmental Protection Agency Project XL* (visited Nov. 8, 1998) <[http://yosemite.epa.gov/xl/xl\\_home.nsf/all/homepage](http://yosemite.epa.gov/xl/xl_home.nsf/all/homepage)>.

specific agreements with project sponsors, EPA tries to gather data and project experience to help the Agency redesign its current approaches to ensuring public health and environmental protection. Thus, XL projects are meant to be "real world" tests of innovative strategies to achieve cleaner and less expensive results than conventional regulatory techniques.

In implementing Project XL, EPA is experimenting with regulatory reform based on the theory of "adaptive management" - a theory that can conflict with EPA's "command and control" enforcement philosophy. Adaptive management theory treats almost all governmental interactions as experiments, from which we can continuously learn what works and what does not.<sup>3</sup> Adaptive management envisions a continuous process of institutional transformation, as entities "evolve" their philosophies and strategies through continuous assessment and improvement. Change is driven by a constant flow of information gathered via purposeful experimentation. Thus, adaptive management experiments should be thought of as continuous research projects through which the "thought processes" of dynamic institutions evolve towards increasing efficiency in meeting the goals of environmental policy. Project XL attempts to implement an adaptive management approach by planning "experiments" and monitoring their results for lessons that can be used to guide reform of regulatory systems. Proponents hope to encourage the private sector to collaborate with EPA to plan, run and monitor experiments in environmental compliance, rethink regulation and apply new technologies.<sup>4</sup> To date, this has not occurred to the extent that XL's designers had hoped.

In *The Risks and Advantages of Agency Discretion: Evidence from EPA's Project XL*<sup>5</sup>, we recounted the historical factors that account for EPA's initial institutional design. Our review suggests that EPA's history and structure make it a challenging locale in which to attempt adaptive management. Indeed, the

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3. See KAI N. LEE, *COMPASS AND GYROSCOPE: INTEGRATING SCIENCE AND POLITICS FOR THE ENVIRONMENT* (1993); MALCOLM K. SPARROW, *IMPOSING DUTIES: GOVERNMENT'S CHANGING APPROACH TO COMPLIANCE* (1994).

4. See Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. 27,282 (1995). Project XL is one of several initiatives undertaken by EPA pursuant to the Clinton Administration's Regulatory Reinvention agenda. Project XL also solicited project proposals from entire industry sectors and from various government agencies including states, cities and towns.

5. LAWRENCE E. SUSSKIND, ET AL., *THE RISKS AND ADVANTAGES OF AGENCY DISCRETION: EVIDENCE FROM EPA'S PROJECT XL ETP97-02* (1997).

advent of XL caused a clash of philosophies (between adaptive management and 'command and control' adherents) that generated significant tensions within EPA, and spilled over to project stakeholders outside the Agency. Through interviews with project participants and observers, we chronicled how the Agency's attempts to advance XL were obstructed by the political tensions inevitably generated when a public agency attempts a series of experiments requiring cooperation among the regulated community, non-governmental environmental groups (NGOs), the public, and its own philosophically divided staff. We then charted the political tensions generated when the XL experiment was tested "in the field," analyzing the stresses generated within EPA over disagreements regarding the proper use of discretion in authorizing specific XL projects. We also examined various parties' reactions as stakeholders in XL moved to protect their respective interests. We concluded by noting that despite the institutional toll taken by these conflicts, Project XL went on to achieve potentially significant successes.

We believe that Project XL can be improved. To that end, this paper offers strategies designed to succeed without statutory reform or other "sea changes" to the existing Project's framework. We propose strategies that: can be implemented quickly and without congressional intervention; focus all stakeholders on jointly defining and achieving XL's mission; encourage EPA to use the discretion it already has to facilitate a flow of more innovative XL proposals; and promote greater efficiency in the review and approval of new XL projects.

Our proposed approach may initially generate fewer XL projects than contemplated by EPA officials in their public statements. However, XL's value lies in its role as an avatar of environmental innovation - a value that does not rest on the number of projects generated. Rather, its utility rests on the significance, quality and transferability of project results, achieved within the context of a collaborative regulatory structure. Finally, we believe that our proposal will, over time, generate significantly more XL proposals than EPA has received to date.

## II.

### A PRO-ACTIVE AGENCY LEADING A CONSENSUS BUILDING PROCESS

Most critically, EPA must, in our view, come to internal agreement on a definition of the goals of the Project. EPA must ac-

knowledge that Reinvention and Project XL have caused significant philosophical conflict among its own personnel. Only when these disagreements are confronted directly will EPA come to internal agreement on a definition of XL's goal and mission.

The Agency could best accomplish this by leading its own stakeholders (including its various regional offices) through a collaborative, problem-solving process aimed at defining the goals of Project XL. Individual project proposals would not be discussed. Instead, the focus would be on the criteria by which individual proposals would be assessed.

This will not be easy. EPA is composed of a myriad of offices and divisions, each with its own perceptions of EPA policy and mission. Most of the time, these offices operate on quasi-independent tracks and avoid overt conflict. However, the creation of a crosscutting Office of Reinvention, and an agency-wide initiative like XL, forces these conflicts and competing parochial interests to the surface.<sup>6</sup> Like almost all institutions (both public and private sector), EPA is conflict-averse; to date, intra-EPA conflicts have not been fully addressed. As a result, rather than coming to agreement on a set of acceptable guidelines for the initiative as a whole, the Agency's various offices battle over Project XL one proposal at a time. This "divide and conquer" practice undermines the Project, sabotages relationships within the Agency, erodes EPA's credibility with the regulated community, and discourages corporations and NGOs from participating.

For these reasons, all EPA participants in the process we propose must accept that each office has its own set of perceptions and reservations about Project XL and that their respective concerns and interests need to be confronted. To that end, it is critical that EPA's individual offices engage in a facilitated agency-wide dialogue to accomplish this goal.

The process would start with the preparation of a conflict assessment, conducted well before facilitated discussions begin. Conflict assessments are an information-gathering tool essential to determining whether and how a consensus building process should move forward. Independent "neutrals" would start by interviewing all obvious stakeholders within the Agency on a confi-

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6. For instance, some personnel in the Office of Enforcement perceive the XL rationale (partnering with industry) as undermining the Agency's enforcement mission. The Office of General Counsel seems alarmed by the potential emergence of proposals based on innovative interpretation of existing regulations - interpretations that may conflict with that Office's prior pronouncements.

dential basis. (Stakeholders would be initially identified by EPA's Office of Reinvention. Then, each of those interviewees would be asked to name other key participants within the Agency.) The information gleaned from these interviews would be used to analyze the scope of the conflict, and weigh the prospects (and best strategies) for reaching agreement.

The neutral facilitators would summarize their findings and recommendations in a conflict assessment report. This document would enable the neutrals to identify all necessary EPA stakeholders, map their substantive interests and concerns, and scope the areas of agreement and disagreement among them. Compiling the report would also allow the neutrals to explore each party's willingness to negotiate. Such information helps a neutral determine whether a consensus building process ought to go forward, and, if so, how it should be structured. Equally important, the assessment should provide the stakeholders with an independent, impartial view of the best way to frame and analyze the dialogue. In this fashion, each stakeholder can realistically assess the benefits and liabilities of moving forward.

### III.

#### A "MEMORANDUM OF AGREEMENT"

The ultimate product of the facilitated discussion we are proposing would be a "Memorandum of Agreement" ("MOA") defining a mutually acceptable scope for Project XL, and setting out criteria and a method for evaluating all proposed projects. The MOA would delineate policy priorities, and set out lines of authority to resolve intra-office disagreements.

Such a MOA might obviate the need for various EPA offices to engage in "trench warfare" over proposals they do not like. Serious impasses between headquarters and regional offices might be subject to mediation (by prior agreement.)<sup>7</sup> Final project approvals in contested cases could be delegated to an XL Assistant Administrator for Reinvention;<sup>8</sup> such a position could be vested with sufficient jurisdiction to cut through bureaucratic "turf," resolving differences that otherwise paralyze the review process. In cases where no statutory conflict is presented by a proposal, the XL Administrator would make the final "call" on implemen-

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7. See LAWRENCE E. SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* (1987).

8. The Administrator of the EPA could accomplish this by explicitly delegating certain decision making powers to this position.

tation, stressing that XL, by definition, is experimental and not precedent setting; i.e., approval of XL experiments has no legal effect on existing enforcement regimes. The national XL administrator position could be mirrored by appointment of a XL ombudsperson for each region. The ombudsperson could attempt to collaboratively resolve XL project disputes within the Region, before they "bubble up" to the national level. Expedited dispute resolution procedures will be available to resolve these differences if a time-limited consensus building process fails to do so. If regional attempts fail, the headquarters processes described above would come into play.

This reformed XL process would take place in parallel with (not in lieu of) the existing enforcement regime. XL refinements generated by the process would be integrated into the Project as a stakeholder advisory committee reaches consensus on their efficacy. Thus, the XL program would not periodically "stop for repairs". Instead, XL's procedural course would adjust as it "learns" how to improve through analysis of information gleaned from ongoing projects. Only after that process is complete would an XL innovation be considered for inclusion in the existing regulatory system.

#### IV.

##### A PROJECT XL ADVISORY COMMITTEE

Once this critical internal dialogue is underway, EPA should convene a group of XL stakeholders representing the regulated community, NGOs and the public. This group should become a Project XL Advisory Committee.<sup>9</sup> Facilitators could lead this group through the parallel development of an equivalent MOA, clarifying the respective interests of various categories of stakeholders and spelling out how disagreements of various kinds will be handled. Creating this consensus-building process is sure to be difficult, time consuming and expensive. However, it offers an opportunity to actually achieve the kind of policy gains envi-

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9. This group could comprise a permanent Stakeholder's XL Steering Committee. This, and other, steps a more proactive Agency might take could trigger the Federal Advisory Committee Act (FACA). *See* 5 U.S.C.A. §§1-15. FACA imposes structural requirements on private sector "consultation" with the government. It requires that a balance of views be represented in negotiated rulemaking that all meetings are open to the public and that all attending a meeting be heard and recorded. The EPA would prefer to avoid its application to XL, due solely to the adverse funding implications of compliance and accompanying delays in project approvals.



sioned by the proponents of XL. Through consensus building, conflicting interests and goals can be charted and reconciled, institutional and policy barriers identified and surmounted, and a mutually acceptable agenda agreed upon. Nor will this process seem novel to the parties; it has been successfully used to bring business, government and NGOs together to negotiate environmental regulations and a range of federal policy reforms.<sup>10</sup> Further, the process is remarkably well suited to the implementation of individual XL projects.<sup>11</sup>

Together the parties explore their shared interests as well as differences of opinion, collaborate in gathering and analyzing technical information, generate options, and bargain and trade across these options according to their differing priorities. If a consensus is reached, it is published in the *Federal Register* . . . . Because most of the parties likely to comment have already agreed on the notice . . . the review period should be uneventful.<sup>12</sup>

Agencies using this process typically provide resources to support it in the form of neutral parties who coordinate the negotiations and provide facilitation and/or mediation services. We believe that it will be necessary for EPA to do so in this case as well.

## V.

### FUNDING AND STAKEHOLDER PARTICIPATION

The participation of all stakeholders in XL projects must be ongoing and meaningful. EPA cannot allow access to resources to be perceived as the basis for dictating the outcome of the Pro-

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10. In an effort to reduce procedural and litigation burdens imposed by the existing system, some federal agencies have experimented with negotiated rulemaking (often referred to as "reg-neg") in which the agency and affected parties participate in mediated negotiations designed to produce consensus (as opposed to the customary, APA-dictated process): notice of rulemaking by EPA; negative comment from NGOs and industry; agency response and rule promulgation; lawsuits filed by industry and/or NGOs to overturn the regulation; reply briefs filed by EPA; negotiation; repromulgation or verdict, etc. See WILLIAM ÜRY, ET AL., GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT 42-45 (1993). See also Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1 (1982); Philip J. Harter, *Fear of Commitment: An Affliction of Adolescents*, 46 DUKE L.J. 1389 (1997). For a contrary view, see Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997).

11. See Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, YALE J. ON REG. 133 (1985).

12. *Id.* at 137.

ject XL debate. Therefore, EPA should create a funding mechanism to help stakeholders lacking sufficient resources attend advisory committee meetings, or to participate in the review and implementation of individual XL projects.

Indeed, EPA could use this opportunity to build trust by brokering the creation of an escrowed, independent funding mechanism. To do so, EPA can provide for or negotiate the provision of grants to cover the cost of legal, health and/or scientific advisors.<sup>13</sup> Both the government (for advisory committee meetings) and corporations proposing XL projects (to support individual project participation) could deposit funds into it. Requiring groups with analogous concerns to designate a single representative can hold down costs.

EPA should also consider taking a stronger stance towards stakeholder participation in individual projects. In its effort to generate a first round of XL proposals, EPA sometimes accepted whatever degree of stakeholder involvement the participating corporation happened to prefer; the Agency did not consistently cultivate community or NGO participation. Instead, EPA representatives should work directly with participating corporations to identify all relevant stakeholders, and bring them into discussions about project design.

## VI.

### EXERCISING AGENCY DISCRETION IN A COLLABORATIVE CONTEXT

Once EPA succeeds in generating internal agreement on the appropriate ambit for Project XL, it should use the discretion it already has to shape XL proposals. For instance, we believe that it is within EPA's discretion to identify problematic elements of the regulatory system and encourage experimentation. To this end, a sub-group of the XL advisory committee might engage in a kind of retrospective regulatory negotiation. The sub-group could review sets of regulations, identify problems associated with their use and generate possible alternatives - alternatives arguably more in line with the intent of the original regulation.<sup>14</sup> EPA's Office of Technology Assessment might identify the most

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13. There is precedent for EPA to provide access to such funding. For instance, CERCLA provides technical assistance grants (TAGs) of up to \$50,000 to communities engaged in hazardous waste remediation. See 42 U.S.C. § 9617(e) (1995).

14. Some commentators note that certain systemic flaws in environmental regulatory schemes may be due to a failure to anticipate the unforeseen negative outcomes

promising experimental technologies to be tested through Project XL. Interested, technically compatible corporations could then step forward and collaborate with the Advisory Committee to formulate more specific tests that meet corporate, as well as regulatory, interests.

## VII.

### IDENTIFYING STAKEHOLDER INTERESTS; PROVIDING INCENTIVES TO GENERATE PROPOSALS

Once proposals have emerged, EPA headquarters and regional offices should also create task forces (through their Assistance and Pollution Prevention offices) to identify and ensure the participation of all necessary stakeholders. Needy NGOs and community participants can be encouraged to participate as discussed above. EPA might also encourage the private sector to participate more fully. EPA could specify environmental performance prerequisites as a condition for participation in Project XL. Such a "membership requirement" could both provide formal public recognition of participating corporations' and make it easier to win acceptance inside EPA of innovative regulatory strategies.

ISO international management standards might provide a well-developed benchmark for calibrating such requirements. ISO is a set of environmental management guidelines established by the Geneva-based International Standards Organization.<sup>15</sup> Combining ISO standards with other similar measures of corporate excellence could create a set of performance prerequisites for participation in XL.<sup>16</sup> Achievement and maintenance of these standards might result in EPA granting these companies certain exemptions from selected aspects of the current regulatory system, such as monitoring and reporting requirements.<sup>17</sup> Going further, achievement of these standards might create an Agency

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generated by their implementation. Thus, this group should be charged with the identification of possible negative outcomes of proposed alternative schemes as well.

15. ISO was designed as a set of voluntary environmental management standards; we believe that it would be inappropriate to convert it into a regulatory requirement. However, as an adjunct to existing environmental regulations, ISO could serve as a basis to qualify corporations for "beyond compliance" incentives, such as Project XL.

16. Such standards might include: the degree of voluntary public disclosure of environmental compliance; emissions benchmarking; stakeholder outreach; voluntary reporting; self-auditing; and a consistent record of virtually complete compliance with all regulatory standards.

17. However, we suggest that these corporations would be required to disclose compliance data to the public. See Lawrence J. Speer, *From Command and Control*

presumption in favor of enforcement discretion, should regulatory violations be conscientiously self-reported and corrected within a specified time period.

When XL projects yield useful innovations, their application should be expanded to other "member" corporations. Such corporations should be the most likely candidates to test their transferability. EPA can encourage transferability efforts by designating them as XL projects as well. Environmental credits of some kind might also be offered to companies willing to apply or re-test XL-generated innovations.

### VIII.

#### MORE EFFICIENT TARGETING OF SCARCE EPA RESOURCES

Our proposed framework should have a synergistic effect; an "environmental excellence" prerequisite to XL participation might also strengthen EPA's enforcement and compliance efforts. The implementation of such a prerequisite would divide the regulated community into tiers or categories. EPA could formulate compliance strategies for each tier, using its enforcement discretion to target violators requiring legal correction; dispatching its "compliance assistance" teams to non-violating under-achievers best served by technical assistance; and using designated corporate environmental leaders as laboratories for future XL experimentation.

The tiers might be composed of corporations that habitually exceed compliance standards and constantly strive to improve performance: those that merely (and largely) comply, and those habitually in violation. Needless to say, these categories are not mutually exclusive. Most corporations will move in and out of these tiers based on EPA's assessment of their compliance histories. EPA's range of enforcement options in responding to any corporation's violations of environmental law would be independent of what tier that corporation might currently occupy.

### IX.

#### FUTURE SYSTEMIC CHANGES

The reforms we suggest are meant to provide corrective strategies to further encourage effective experimentation within the

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*to Self-Regulation: The Role of Environmental Management Systems*, BNA INT'L ENV'T REP., Mar. 5, 1997, at 227.

existing boundaries of Project XL. However, it is likely that more systemic changes will also be needed if EPA is to meaningfully subsume adaptive management principles into its daily operations.

## X.

### STATUTORY AUTHORIZATION OF PROJECT XL

EPA's uneasiness regarding the use of its administrative discretion undermined Project XL from its inception. For this reason alone, Project XL would be well served by passage of legislation specifically defining and authorizing its implementation. In this way, Congress could authorize XL experiments which conflict with promulgated rules, or certain rigorously specified statutory provisions. As a safeguard against potential abuse, the proposed statute could require EPA to certify that all proposed projects meet the following standards: 1) there must be a demonstrable likelihood of superior environmental performance; 2) the proposed experiment poses no discernible potential threat to human health or the environment; 3) impartial third party monitoring of the experiment is provided; 4) any affected party can petition to have the project stopped immediately in federal court on the ground that the proposed experiment poses a potential threat to human health or the environment; and 5) EPA and/or a state environmental authority can unilaterally order the experiment to cease.<sup>18</sup>

Such legislation could clearly distinguish XL experiments from the existing enforcement regime. It would minimize the need for agency staff to squeeze XL experiments under the umbrella of tortured regulatory reinterpretation. It would remove any temptation to stretch the concept of discretion beyond a reasonable limit and buttress public perceptions of agency accountability. Further, such a statute might insulate Project XL from regressive tinkering by those who feel threatened by its evolutionary effect on EPA's existing enforcement regimes.

## XI.

### METHODOLOGICAL DISCRETION

As discussed in *The Risks and Advantages of Agency Discretion: Evidence from EPA's Project XL*, Congress carefully speci-

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18. See Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 89-90 (1997).

fies the methodological framework for each bit of regulatory responsibility it delegates to EPA; this is characteristic of a "command-and-control" system. Often, Congress attempts "to spell out every detail of not only what EPA must do but also what business must do."<sup>19</sup> The reasons for this are obvious; "command-and-control" instruments are extremely attractive to bureaucrats and lawmakers alike.

[They] . . . represent the shortest distance between two points: if Congress decided it wanted the price of natural gas reduced, the most direct and obvious thing to do would be to legislate a cap on its price . . . . However . . . the wisdom of policy design is almost wholly independent of directness. Command and control is frequently an inappropriate approach despite its directness, apparent administrability and enforceability because it precludes or at least hinders adapting to divergent and changing circumstances.<sup>20</sup>

Open inquiry aimed at identifying the cleanest and most efficient regulatory strategies demands experimentation with innovative methods of regulation as well as with new technologies. Therefore, Congress should consider moving its focus away from dictating methods of compliance and towards specifying desired outcomes. Performance-based standards should set the required outcomes and put monitoring mechanisms in place. The regulated community can be largely left alone to devise the best methods of achieving these outcomes. If measurable and equitable criteria for defining success can be agreed upon (no easy task, to be sure), agencies could then use performance measures to encourage both the achievement of emissions benchmarks and continuous improvement in environmental performance.<sup>21</sup> This

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19. Carol M. Browner, *The Common Sense Initiative: A New Generation of Environmental Protection*, Address Before the Center for National Policy 5-6 (July 20, 1994) (transcript available from the Environmental Protection Agency).

20. Timothy A. Wilkins & Terrell E. Hunt, *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship*, 63 GEO. WASH. L. REV. 479, 483 (1995). The Clean Water Act (CWA) offers an example of this concept at work. Its goal was to eliminate all discharges of pollutants into navigable waters by 1985. Releases from point sources are banned unless they are authorized by permit. However, alternate strategies are readily imaginable: pollution taxes; limitation on the use of waste-creating source materials "upstream" of a sewage treatment plant; or recycling requirements. Congress, however, specified the permit system as the sole means to control water pollution, preventing EPA from experimenting with alternatives. *See id.* at 521.

21. Such performance criteria could include the cost-effectiveness of proposed regulations; their actual performance; percentages of waste recycled by the private

would allow EPA to use its discretion to experiment and institute more efficient and flexible compliance frameworks without compromising progress toward legislative goals.

## XII.

### A NEW PERFORMANCE-BASED RELATIONSHIP BETWEEN CONGRESS AND EPA

Wilkins and Terrell offer an example of how such a system might work in *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship*. They suggest that Congress and EPA form the same performance-based relationship as has been advocated between EPA and the regulated community: a relationship that would unleash EPA's ability to serve as a laboratory for collaborative, incentive-driven environmental improvement.

Under this arrangement, Congress would push the agency to achieve certain outcomes, while granting the agency discretion to choose the best methods to achieve them. In consultation with other agencies and the Office of Budget and Management (OMB), Congress would develop and publish measurable performance standards that would be used to evaluate successes relative to EPA's substantive mission, as well as the presumed level of cost-effectiveness associated with various methodologies for achieving these ends. Once Congress has codified such standards, it could minimize its statutory control over the choice of regulatory methods to allow greater policy design by the Agency itself.

Wilkins and Terrell recognize that there may be invitations to abuse inherent in such a performance-based relationship.

[The Agency] may defy Congress's will, either deliberately or as a result of simple bureaucratic inertia, and occasionally ignore direct mandates, pursue their own agendas, or both . . . . [M]oving toward an outcome focus and away from methodological controls could exacerbate this problem, particularly because failures to comply with outcome controls, unlike controls on regulatory method, might simply be blamed upon well-meaning but failed experiments.<sup>22</sup>

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and public sectors; and reductions in parts per million of a constituent released into the air, water or soil.

22. See Timothy A. Wilkins & Terrell E. Hunt, *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Commu-*

Therefore, they suggest that Congress revise much of its administrative legislation by implementing a market-oriented strategy that offers incentives to bound abuse. They would offer merit-based pay to agency personnel, based not on individual performance, but on overall agency achievement of statutory goals; the pay of all civil servants would be pegged to the same measurable standards by which Congress evaluates the agency's success. In this way, agency employees would be motivated by their stake in the success of the organization as a whole. Institutionally based incentives would be provided for high-level administrators as well. If EPA performed well over time, Congress might grant the Agency a reduction in oversight or increased freedom to explore performance-based controls. Abuses of discretion would result in a reinstatement of congressional controls and a resumption of measures to manage agency performance. Another safeguard could be added by engaging NGOs and other independent technical entities to monitor both Project XL performance and general agency achievement of other congressionally mandated goals. Such an assignment of monitoring duties could lend legitimacy to XL project data, counteracting industry's ample motivation to exaggerate promises of "superior environmental results." Monitoring entities might ultimately evolve into independent sources of data, setting out (but not interpreting) actual agency and private sector performance in implementing XL projects. Sub-delegation of monitoring and compliance duties to independent third party entities could be handled on a rotating basis (to allay "capture" concerns). Funding could be provided via the same escrowed, independent funding mechanism discussed above.

### XIII.

#### CONCLUSION

On an institutional level, the short history of Project XL confirms that conflicting incentives among stakeholders discourages innovation. However, it also seems evident that important constituencies within all these groups understand that adaptive management holds great promise for the improvement of environmental compliance regimes.

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*nity as a Model for the Congress-Agency Relationship*, 63 GEO. WASH. L. REV. 479, 531 (1995) (footnote omitted).



As outlined here, Project XL still has the potential to move all stakeholders (including EPA) towards the institutionalization of collaborative processes for formulating improved environmental compliance goals. The steps required to do so can be achieved within the confines of the existing XL initiative. They include: a focus on problem solving as opposed to win-lose negotiation; information sharing and open deliberation among all stakeholders; meaningful participation by all interested and affected parties at all stages of the process; and a new perception of rulemaking as the ongoing formulation of provisional solutions to emerging problems.

Under such a collaborative approach, all rules should come to be viewed as temporary and subject to revision. To this end, continuous monitoring and evaluation are crucial. New arrangements, networks, institutions or allocations of authority may replace or supplement the traditional regulatory regime. EPA becomes a convener/facilitator of multi-stakeholder negotiations. It provides incentives for reluctant or untrained parties to participate. It acts as a capacity builder of parties and institutions.<sup>23</sup>

The transformation of relationships among EPA, business and NGOs will take time. However, XL is a signal that the process of transformation has begun. If adaptive management is allowed to take hold, the Agency could cast off the shackles of "command and control" without jeopardizing (indeed, enhancing the chances of attaining) the environmental performance goals it was created to achieve.

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23. See Jody Freeman, *Collaborative Governance in the Administrative State*, 45 *UCLA L. REV.* 1, 22 (1997).