



ARTICLES

PROJECT XL AND THE SOUTH COAST AIR QUALITY MANAGEMENT PROPOSAL

By
Rachael Salcido *

INTRODUCTION	4
I. BACKGROUND	5
A. <i>Current Pollution Control Strategy</i>	5
B. <i>Regulatory Reinvention: Exploring Possibilities</i>	7
II. PROJECT OVERVIEW	8
A. <i>The Three Phases of XL Projects</i>	8
B. <i>Selection Criteria</i>	9
1. <i>Superior Environmental Performance</i>	9
2. <i>Cost Savings and Paperwork Reduction</i>	10
3. <i>Innovation/Multi-media Pollution Prevention</i>	10
4. <i>Transferability</i>	10
5. <i>Feasibility</i>	11
6. <i>Monitoring, Reporting, and Evaluation</i>	11
7. <i>Stakeholder Support</i>	11
8. <i>No Risk Burden Shifting</i>	12
C. <i>The “Good Actors” Requirement</i>	12
D. <i>Enforcement</i>	12
III. SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT PROPOSAL	13
A. <i>The Proposal</i>	13
B. <i>Meeting XL Criteria</i>	14
1. <i>Superior Environmental Results</i>	14
2. <i>Cost Savings and Paperwork Reduction</i>	15
3. <i>Innovation/Multi-media Pollution Prevention</i>	15

* Rachael Salcido is a third-year student at King Hall School of Law, University of California, Davis. Ms. Salcido holds a bachelor of arts degree in English and Political Science from UC Davis.

4. *Transferability* 15
5. *Feasibility* 16
6. *Monitoring, Reporting, and Evaluation.* 16
7. *Stakeholder Support* 16
8. *No Risk Burden Shifting*..... 16
IV. EVALUATION AND CRITICISMS 17
CONCLUSION 18

INTRODUCTION

The Environmental Protection Agency (EPA) is the primary federal agency responsible for health and environmental protection.¹ Congress charged this agency with the task of implementing several laws.² However, by most accounts the EPA has been ineffective in fulfilling its regulatory goals, drawing extensive criticisms from the public as well as the regulated community. In March 1995, President Clinton announced that the EPA would be developing strategies to improve the current environmental regulatory system.³

Project XL, which stands for “Excellence in Leadership” is one project the EPA has undertaken to systematically consider innovative alternatives, in hopes of achieving better, more cost-effective health and environmental protection.⁴ Through this project the EPA plans to select and test fifty alternative pollution control solutions submitted by industry, regulated facilities, and government agencies.⁵ An applicant may receive regulatory flexibility in exchange for its promise to achieve superior pollution controls.⁶

¹ JOEL A. MINTZ, ENFORCEMENT AT THE EPA 20 (1995) (describing creation of EPA in 1970).

² *See id.* at 1 (characterizing EPA as critical actor with responsibility for over fourteen health and environmental statutes).

³ *See* Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. 27,282, 27,283 (1995) (referencing Clinton’s March 16, 1995 document Reinventing Environmental Regulation). President Bill Clinton and vice-president Al Gore, Reinventing Environmental Regulation (March 16, 1995) *reprinted in* Daily Env’t Rep. (BNA) March 17, 1995.

⁴ *See* Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. at 27,282-83 (announcing three reinvention programs); *See also* EPA Web site, *New Direction Index Page* (last modified Feb. 1997) <<http://www.epa.gov/reinvent/new2/index.htm>> (providing updates on different EPA reinvention programs).

⁵ *See* Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. at 27, 283. The EPA proposed to test 50 projects in four different XL program areas- XL programs for facilities, industry-wide/sector-based, government agencies regulated by EPA, and community-based. *Id.*

⁶ *See id.*

One pilot project proposed to the EPA for Project XL is a voluntary air quality investment program, initially submitted by the South Coast Air Quality Management District on January 22, 1998.⁷ This Article begins by exploring traditional environmental regulation and what led to the current “regulatory reinvention” occurring in the EPA. Part II outlines the contours of Project XL. Part III looks specifically at the South Coast Air Quality Management District’s Project XL proposal. Finally, Part IV presents an analysis of the possible flaws and important criticisms of Project XL. Ultimately, the conclusion section suggests that Project XL may provide critically necessary innovation, tested under real world circumstances.

I. BACKGROUND

A. Current Pollution Control Strategy

Environmental law is dominated by command and control regulation.⁸ This system favors prescriptive rules developed by Congress and the EPA, which are then enforced in the regulated community.⁹ This type of regulation has several shortcomings, particularly in the environmental law context.¹⁰ Three shortcomings of command and control regulations in the environmental arena are that enforcement can be costly, may not lead to optimum results, and can be too hard to carry out effectively.¹¹

Many people familiar with the implementation of command and control regulation assert that it is unreasonably costly in the environmental context.¹²

⁷ See Project XL Web site, *SCAQMD Proposal: Rules 2501/2503* (visited Apr. 3, 1999) <http://yosemite.epa.gov/xl_home.nsf/all/SCAQMD2-proposal-1-98.html>.

⁸ See Robert H. Nelson, *How Much is Enough? An Overview of the Benefits and Costs of Environmental Protection*, in *TAKING THE ENVIRONMENT SERIOUSLY* 1, 10 (Roger E. Meiners and Bruce Yandle, 1993) (generalizing that U.S. controls pollution in rigid command and control manner); Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey From Command to Self-control*, 22 *HARV. ENVTL. L. REV.* 103, 103 (1998).

⁹ See *id.* at 104.

¹⁰ See ROBERT V. PERCIVAL ET AL., *ENVIRONMENTAL REGULATION, LAW, SCIENCE, AND POLICY*, at 159 (2d ed. 1996).

¹¹ See *id.* at 159. The authors suggest that supporters of traditional command-and-control regulation might value “simplicity, enforceability, and equity” more so that “efficiency” in terms of costs. *Id.* However, in the context of environmental law, the regulations are vast and complex, which would diminish the simplicity and enforceability value of command-and-control regulations. See, e.g., Steinzor, *supra* note 8, at 104-05 (stating that environmental law is used frequently as example of command-and-control failings).

¹² See Nelson, *supra* note 8, at 1-4 (noting lack of cost-benefit analysis in environmental regulations).

This criticism stems from the fact that regulators develop across the board regulations without sufficient regard to the benefits that will be gained in individual instances.¹³ Interrelated to this complaint, regulators also do not take into account the costs of compliance.¹⁴ Additionally, the regulated community points to the inefficiencies inherent in redundant paperwork, monitoring, and reporting costs.¹⁵ The EPA is convinced that facilities and other entities can achieve "cheaper, more efficient results" by following non-traditional pollution control strategies focused on the specific facility or entity.¹⁶

Neither the regulated community nor advocates for environmental protection believes that we have achieved optimum results under command and control regulation.¹⁷ Critics suggest that reduction in levels of pollution could better be met by compensating those sources which can achieve reductions at the lowest cost.¹⁸ These critics argue for inserting economic incentive into pollution reduction at the individual facility level.¹⁹ The EPA also believes environmental protection beyond the levels anticipated under current regulation can be achieved. The EPA contends that by allowing greater flexibility, and exploring non-traditional pollution control solutions on site, facilities may achieve improved pollution reduction.²⁰

The EPA cannot practically monitor the vast number of regulated pollution emitters that fall under the purview of the laws and regulations.²¹ Enforce-

¹³ See Steinzor, *supra* note 8, at 115.

¹⁴ See Nelson, *supra* note 8, at 10 (stating that command-and-control forces same standards of companies irrespective of compliance costs); Steinzor, *supra* note 8, at 115.

¹⁵ See Kevin A. Fletcher, *EPA's Project XL Voluntary Initiative: The Struggle For Enhanced Environmental Protection at a Lower Cost*, 3 ALB. L. ENVTL. OUTLOOK 51, 51 (Spring/Summer 1997) (discussing industry criticism of command-and-control regulation).

¹⁶ See Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. at 27,283 (discussing results that might be achieved with regulatory flexibility); See also Nelson, *supra* note 8, at 10-11 (arguing that costs of regulation could be greatly reduced with market system).

¹⁷ See Nelson, *supra* note 8, at 10-11; Steinzor, *supra* note 8, at 106 (stating that criticisms from academic and popular press compelled agencies to reinvent regulation).

¹⁸ See Nelson, *supra* note 8, at 10-11; Steinzor, *supra* note 8, at 115-16.

¹⁹ See Nelson, *supra* note 8, at 10-11; Steinzor, *supra* note 8, at 115-16; See also Fletcher, *supra* note 15, at 51 (citing economic motives of industry to participate in reinvention projects).

²⁰ See Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. at 27,283.

²¹ See MINTZ, *supra* note 1, at 122 (stating that only fraction of regulated sites are personally inspected); Jodi Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 16-17 (1997) (pointing to enormous difficulty in monitoring compliance with hundreds of thousands of permits).

ment often consists of monitoring and self-reporting of violations by industry and facilities.²² Practical and financial restraints therefore constrain the effectiveness of command and control regulation in the environmental context.²³ With these constraints in mind, the EPA's goal is to maintain industry and facility accountability for pollution control, while improving the implementation of environmental regulations.²⁴

B. Regulatory Reinvention: Exploring Possibilities

Recognizing the shortcomings of command and control, the EPA sought to exchange regulatory flexibility for improved results.²⁵ The EPA officially announced Project XL, and solicited proposals from the regulated community in May 1995.²⁶ Two years later, a second notice integrated what had already been learned from the XL process, clarified certain terms from the first solicitation, and renewed the invitation to the regulated community to submit project proposals.²⁷

These announcements explicitly introduced the purpose of Project XL. The agency hopes to achieve results through a collaborative process with regulators and industry working together.²⁸ Throughout this negotiation process, the EPA and project sponsors will create pilot XL projects, testing new and innovative pollution control solutions. The EPA is pursuing better decisions and decision-making processes for cheaper, smarter, and more effective pollution control.²⁹

²² See MINTZ, *supra* note 1, at 122 (calling compliance rates "guesstimates" based on possible unreliable self-monitoring by industry).

²³ See *id.* at 122 (citing shortage of enforcement personnel and resources); at 135 (discussing budget cuts of EPA in fiscal year 1994).

²⁴ See Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. at 27,283.

²⁵ See *id.* at 27,287 (stating XL projects include flexibility from existing regulations).

²⁶ See Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. at 27,291. Almost two years later the EPA announced some modifications in the original Project XL notice; See also Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. 19,871 (1997) (introducing clarifications and additions to Project XL).

²⁷ See Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. at 19,872 (defining XL as evolving program) at 19872-73 (expanding invitation to parties outside regulated community as well).

²⁸ See Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. at 27,283 (stating that better decisions can be reached through collaborative process).

²⁹ See *id.*

II. PROJECT OVERVIEW

A. *The Three Phases of XL Projects*

The Project XL process begins with the proposal.³⁰ The project “sponsor” should first gain support for their proposal from applicable regulatory agencies, and contact stakeholders and potential commentators on the proposal to obtain their participation early in the process.³¹ The EPA, with the state environmental agency, reviews the proposal.³² If selected, the proposal then moves to the project development phase.³³

In this next phase participation by stakeholders is crucial. In fact, the first step in this stage is to notify the public and invite participation from stakeholders and commentators.³⁴ The sponsor, the EPA, and stakeholders negotiate a Final Project Agreement (FPA).³⁵ The FPA contains the requirements and agreements between the EPA and the proposal sponsor.³⁶ The FPA identifies the flexibility or deviation from traditional regulation. However, the EPA usually issues an alternative permit or waiver to grant the flexibility needed to achieve superior environmental performance.³⁷

The final phase is implementation and evaluation of the project.³⁸ The proposal is carried out by the sponsor. The sponsor and EPA monitor progress, ensuring that the sponsor complies with the FPA and other associated permits.³⁹ The EPA will then take any lessons gleaned from the project to improve the XL program, and, if applicable, apply the information obtained to improve health and environmental regulation.⁴⁰

³⁰ See *Regulatory Reinvention (XL) Pilot Projects*, 62 Fed. Reg. at 19,878.

³¹ See *id.*

³² See *id.*

³³ See *id.*

³⁴ See *id.*

³⁵ See *id.* at 19,875.

³⁶ See *id.*

³⁷ See *id.* at 19,876 (discussing authority for providing flexibility from requirements).

³⁸ See *id.* at 19,880.

³⁹ See *id.*

⁴⁰ See *id.*

B. Selection Criteria

The goal of Project XL is to discover and utilize better methods for the regulation of health and environmental protection.⁴¹ “Broader implementation of cleaner, cheaper, and smarter ideas is the ultimate objective of Project XL.”⁴² With these goals in mind, and a target of fifty projects, the EPA wants to select a variety of pilot projects that might produce the most innovative, successful results with sweeping application.⁴³ The EPA applies eight factors during the proposal stage to determine whether the proposal should advance as an XL project.⁴⁴

1. Superior Environmental Performance

The driving force behind Project XL is the search for better ways to control pollution. Therefore, in selecting XL projects, the first and most important factor is whether the project will produce “superior environmental performance.”⁴⁵ The EPA takes a two-tiered approach in evaluating whether the proposed project meets this standard.⁴⁶

The first tier assesses whether the project is equivalent to the existing regulation.⁴⁷ The inquiry assumes a qualitative benchmark, then evaluates the proposed project against the environmental performance that *would have been achieved* without the proposal.⁴⁸ The proposal must meet this standard to move to the second tier of evaluation. The EPA will not accept projects that fail to achieve at least this minimum level of environmental protection.

The second tier is multi-factored. The inquiry is geared at determining the likelihood of whether the project will achieve “superior environmental performance.”⁴⁹ This assessment includes examination and subjective valuation of

⁴¹ See *id.* at 19,872 (describing goals of Project XL). According to this second notice, the EPA will work with state environmental agencies in ultimately transferring the lessons from XL projects into the regulatory system. *Id.*

⁴² See *id.*

⁴³ See *id.*

⁴⁴ See *id.* at 19,878 (discussing proposal development stage).

⁴⁵ See *id.* at 19,874 (explaining superior environmental performance).

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See *id.* at 19,875.

quantitative and qualitative factors.⁵⁰ These include: the size of the proposed pollution reductions over current levels, the applicant's past history of leadership in environmental performance, and the specific goals of the project.⁵¹ For instance, the EPA values zero emissions goals, upstream reduction of pollution — such as elimination of pollutants in production processes — and attention to environmental conditions beyond EPA rules — such as habitat preservation, odor or noise reduction, etc.⁵² If this first criterion is met, the EPA will continue to look at the other selection criteria.

2. *Cost Savings and Paperwork Reduction*

It is important to the EPA that the project propose cost savings or economic opportunity.⁵³ EPA is also interested in projects which reduce the paperwork involved with compliance, monitoring, and reporting.⁵⁴

3. *Innovation/ Multi-media Pollution Prevention*

The EPA is looking for those projects that illustrate “thinking out of the box.”⁵⁵ The innovation can reside in, “processes, technologies, or management practices.”⁵⁶ The EPA has also cited cross-media and multi-media pollution prevention as areas in which they would like to obtain research.⁵⁷ Moreover, the EPA hopes sponsors will propose innovative solutions reducing the generation of pollution rather than merely controlling generated pollution.⁵⁸

4. *Transferability*

Due to the limited number of projects, the EPA specifically wants to test ideas that can be transferred to other facilities and industries.⁵⁹ Unlike “alterna-

⁵⁰ See *id.*

⁵¹ See *id.*

⁵² See *id.*

⁵³ See Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. at 27,287.

⁵⁴ See *id.*

⁵⁵ See *supra* note 7, Project (XL) Web Site.

⁵⁶ See *id.*

⁵⁷ See *id.* (seeking alternative approaches to more than one regulatory requirements, or more than one environmental medium).

⁵⁸ See *id.* (discussing their preference for former rather than latter type of proposals).

⁵⁹ See *id.*

tive path" regulation, or other pilot programs, Project XL seeks broadly applicable solutions to change the face of current regulation.⁶⁰

5. Feasibility

The EPA will only select projects which they believe are technically and economically feasible.⁶¹ This factor is important because the EPA will only obtain experiment results from fifty projects. Therefore, the EPA wants to assure that each pilot project might be a worthwhile learning experience.

6. Monitoring, Reporting, and Evaluation

The proposal should include a suggestion of how progress, as well as success or failure, can be monitored and evaluated by the EPA and the public.⁶² The proposal should contain clear objectives, achievement of which are identifiable and feasible to accomplish in a specified time period.⁶³ The EPA wants the sponsor to identify a method for disseminating this information to the public in a manner that will be easy to understand and evaluate.⁶⁴

7. Stakeholder Support

The evaluation of the project also takes into account stakeholders. The EPA recognizes that ideas, comments, criticisms, and concerns of interested and affected persons should be present in the development of pilot projects.⁶⁵ In general, stakeholders include communities near the project, local or state governments, businesses, and environmental and other public interest groups.⁶⁶ The EPA will not approve a project that is not approved by the state environmental agency regulating the applicant.⁶⁷

⁶⁰ See *id.*; Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. at 19,872 (distinguishing Project XL from other regulatory reinvention approaches).

⁶¹ See Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. at 27,287.

⁶² See *id.*

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See *id.* at 27,282.

⁶⁶ See *id.* at 27,287.

⁶⁷ See Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. at 19,880.

8. No Risk Burden Shifting

The project must abide by the environmental justice requirements of Executive Order 12898, assuring no unjust or disproportionate environmental impacts fall on any certain persons, area or community.⁶⁸

C. The "Good Actors" Requirement

This "requirement" is factored into the selection process similar to the previous criteria. It is the intent of the EPA that pilot projects be submitted by leaders in the field of environmental controls and management.⁶⁹ Applicants should be currently meeting compliance guidelines.⁷⁰ In general the EPA will not approve projects for facilities that are subject to an ongoing enforcement action.⁷¹ Proposals from applicants that have a history of violations will be highly scrutinized during EPA's selection process.⁷²

D. Enforcement

One of the most controversial aspects of the Project XL program is how the EPA handles enforcement issues during the pilot projects.⁷³ The EPA contemplated two methods of exacting compliance from Project XL participants.⁷⁴ First, the EPA can compel compliance with levels of performance called for under current law.⁷⁵ Second, participants must abide by voluntary commitments made during negotiations and contained in the FPA.⁷⁶

⁶⁸ See Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. at 27,287.

⁶⁹ See Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. at 19,875.

⁷⁰ See *id.*

⁷¹ See *id.* (explaining that violations must be resolved before approval of XL proposal will be considered).

⁷² See *id.*

⁷³ See Andrew S. Hogeland, *EPA's Innovative Programs: How Enforcement Risk Impedes Their Success*, 3 ALB. L. ENVTL. OUTLOOK 33, 37-39 (Spring/Summer 1997) (arguing that enforcement issues detract from Project XL success because participants are not given adequate legal assurance from EPA); Steinzor *supra* note 8, at 149-50 (discussing legal uncertainty as deterring industry participation). Steinzor suggests the only remedy to remove industry hesitation is to have Congress codify Project XL. See Steinzor, *supra* note 8, at 149-50.

⁷⁴ See Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. at 27,287 (discussing enforcement mechanisms). This first notice did not cover these methods for enforcement thoroughly. The second Project XL notice discussed enforcement issues in more depth. See Regulatory Reinvention (XL) Pilot Project, 62 Fed. Reg. at 19,875 (discussing voluntary and enforceable commitments).

⁷⁵ See Regulatory Reinvention (XL) Pilot Project, 62 Fed. Reg. at 19,875.

⁷⁶ See *id.*

The EPA anticipates that facilities engaged in alternate strategies of pollution control might not comply with all applicable environmental requirements.⁷⁷ The agency intends to be flexible, and to accept superior environmental performance in exchange for non-compliance with one or more applicable regulations.⁷⁸ The voluntary commitments contained in the FPA are not legally enforceable.⁷⁹ However, violations of voluntary commitments create good cause for the EPA to cancel the pilot project under XL, and to require compliance with previously applicable regulations.⁸⁰

The EPA anticipates that an enforceable rule-making, alternative permit, or administrative order will be issued with the FPA, creating enforceable commitments for the project.⁸¹ The controversial aspects of this system are two-fold. Some critics argue that the EPA lacks authority to provide flexibility-granting variances and exemptions.⁸² Other critics argue that the EPA is not providing assurance that the "flexibility" granted will protect the facility from enforcement actions.⁸³ These criticisms are explored in Part IV.

III. SOUTH COAST AIR QUALITY MANAGEMENT DISTRICT PROPOSAL

A. The Proposal

The South Coast Air Quality Management District (SCAQMD) submitted a proposal to the EPA for consideration under the XL program.⁸⁴ The proposal uses two rules, 2501 and 2503, to create and enforce an Air Quality Investment Program (AQIP).⁸⁵ The plan is, in general, a "SCAQMD-operated open market trading program."⁸⁶

⁷⁷ See Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. at 27,287 (discussing regulatory flexibility).

⁷⁸ See *id.* (discussing non-compliance of pilot projects).

⁷⁹ See Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. at 19,875.

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² See *id.* The EPA counters that XL projects are on firm legal ground. See Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. at 19,876 (discussing tools for providing regulatory flexibility). According to the EPA, the EPA and state regulators have existing authority to grant waivers, site-specific rules, and "generally applicable interpretive statements" in order to provide the flexibility needed to promote the pilot project. See *id.*

⁸³ See Hogeland, *supra* note 73, at 37-39.

⁸⁴ See *supra* note 7.

⁸⁵ See *id.*

⁸⁶ See *id.*

Rule 2501 presents the AQIP.⁸⁷ Under this rule SCAQMD creates a pool of credits produced by the emission reductions of certain regulated sources.⁸⁸ Sources are compensated for their reductions.⁸⁹ After these reductions have been made, investors may pay a premium and fee to SCAQMD to obtain the credits in lieu of achieving compliance with emission requirements.⁹⁰ In addition, SCAQMD proposes to retire at least ten percent of emissions reductions beyond what is requested by investors, and use part of the premiums for pollution control research.⁹¹

Rule 2503 compliments rule 2501.⁹² It contains enforcement and monitoring procedures that will be used to carry out rule 2501.⁹³ Rule 2503 also contains the "emissions quantification methodology," the process used to determine the amount of AQIP emission reduction required to create the "credit" an investor may purchase in lieu of compliance.⁹⁴

B. Meeting XL Criteria.

The EPA is reluctant to approve SCAQMD's proposal as it stands.⁹⁵ In order for the EPA to approve the proposal, SCAQMD would have to make some modifications and additions.⁹⁶ The EPA has not rejected the proposal. Though the proposal meets several criteria, the EPA notes that it falls short in a number of important areas.⁹⁷

1. Superior Environmental Results

SCAQMD proposes that superior environmental results will be achieved under this proposal, for under command and control regulation sources regu-

⁸⁷ See SCAQMD Rule 2501 (visited Apr. 3, 1999) <http://yosemite.epa.gov/xl_home.nsf/all/2501.html>.

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *id.*

⁹² See SCAQMD Rule 2503: Enforceable Procedures (visited Apr. 3, 1999) <http://yosemite.epa.gov/xl_home.nsf/all/2503.html>.

⁹³ See *id.*

⁹⁴ See *id.*

⁹⁵ August 3, 1998: Letter Regarding potential XL project in the SCAQMD-AQIP (visited Oct. 18, 1998) <http://yosemite.epa.gov/xl/xl_home.nsf/all/sc-8-3-98.html>.

⁹⁶ See *id.*

⁹⁷ See *id.*

larly received variances or rule exemptions when faced with financial or technical difficulties in achieving emissions limitations.⁹⁸ The premium obtained from investors will be used to fund projects to advance technology.⁹⁹ SCAQMD will also retire at least ten percent of additional emissions reductions.¹⁰⁰

The EPA is not yet convinced that the proposal will achieve superior environmental performance.¹⁰¹ SCAQMD and the EPA continue to debate the "emission quantification protocols." The EPA is uncertain that the amount of credit purchased by investors will be for equivalent or more emissions reductions under the protocol.¹⁰²

2. Cost Savings and Paperwork Reduction

SCAQMD points out that regulated sources will participate only if cost savings will be achieved.¹⁰³ These sources might otherwise avoid variance applications in order to avoid paperwork and the costs associated with such applications.¹⁰⁴

3. Innovation/Multi-media Pollution Prevention

The EPA is supportive of economic incentive programs.¹⁰⁵ The trading market provides compliance flexibility and cost reductions to the regulated community.¹⁰⁶ The innovative investment aspect gathers money to fund research and retire credits.¹⁰⁷

4. Transferability

The proposal is basically an open-market trading program run by SCAQMD. Lessons from the project have a high potential for applicability in other contexts.

⁹⁸ See *supra* note 7.

⁹⁹ See *id.*

¹⁰⁰ See *id.*

¹⁰¹ August 3, 1998: Letter Regarding potential XL project in the SCAQMD-AQIP (visited Oct. 18, 1998) <http://yosemite.epa.gov/xl/xl_home.nsf/all/sc-8-3-98.html>.

¹⁰² See *id.*

¹⁰³ See *supra* note 7.

¹⁰⁴ See *id.*

¹⁰⁵ August 3, 1998: Letter Regarding potential XL project in the SCAQMD-AQIP (visited Oct. 18, 1998) <http://yosemite.epa.gov/xl/xl_home.nsf/all/sc-8-3-98.html>.

¹⁰⁶ See *supra* note 7.

¹⁰⁷ See *id.*

5. Feasibility

The program is voluntary; therefore, sources will only participate if feasible.¹⁰⁸

6. Monitoring, Reporting, and Evaluation.

Rule 2501 contains criteria for monitoring, reporting, and record-keeping, and rule 2503 contains enforceable procedures and monitoring requirements.

7. Stakeholder Support

SCAQMD asserts that the project is supported by stakeholders because SCAQMD solicited extensive input from a large focus group. The group included representatives from public agencies in the state, the EPA, sources under their purview, and environmental groups. However, the EPA asserts that SCAQMD must create a stakeholder involvement plan, obtain more public participation, and gain explicit support for the proposal from environmental groups.¹⁰⁹

8. No Risk Burden Shifting

SCAQMD asserts that there is no risk burden shifting in the project.¹¹⁰ They point to specific requirements to prevent localized impacts that SCAQMD will still have in place.¹¹¹ The project will protect attainment of the NO₂ ambient air quality standard.¹¹² The project also does not allow use of AQIP reductions in lieu of National Emissions Standards for Hazardous Air Pollutants (NESHAP) requirements.¹¹³ However, the EPA is not convinced that the project will meet environmental justice requirements.¹¹⁴ The EPA is clarifying national policy in conjunction with the National Environmental Justice Advisory Council on the issue of environmental justice and emissions trading in general.¹¹⁵

¹⁰⁸ See *id.*

¹⁰⁹ August 3, 1998: Letter Regarding potential XL project in the SCAQMD-AQIP (visited Oct. 18, 1998) <http://yosemite.epa.gov/xl/xl_home.nsf/all/sc-8-3-98.html>.

¹¹⁰ See *supra* note 7.

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ August 3, 1998: Letter Regarding potential XL project in the SCAQMD-AQIP (visited Oct. 18, 1998) <http://yosemite.epa.gov/xl/xl_home.nsf/all/sc-8-3-98.html>.

¹¹⁵ See *id.*

Until this issue and the unresolved debate over emissions quantification are resolved, the project remains in the proposal stage. SCAQMD is viewed as a "good actor," a leader in the area of economic incentive programs. The EPA asserted that it was willing to negotiate a proposal with SCAQMD, which appears to be requesting flexibility from federal regulations which would require "investors" to apply for variances under the Clean Air Act's State Implementation Plan (SIP) requirements.¹¹⁶ However, the EPA asserted that it may be easier for SCAQMD to gain approval of the AQIP program as a revision to the SIP rather than pursue XL status.¹¹⁷

IV. EVALUATION AND CRITICISMS

Project XL was not enacted by Congress. Some question its legitimacy in granting "regulatory flexibility" on this basis alone.¹¹⁸ Many argue that XL "flexibility" contravenes existing law.¹¹⁹ Though the EPA stated that it is more likely to approve proposals that contain requests for variances and exemptions *factually related* to the proposals, this is not required.¹²⁰ Therefore, variances and exemptions are rightfully scrutinized by critics who question whether such variances and exemptions will actually promote "superior" results. The EPA contends its existing authority legitimizes these variances.¹²¹ However, the EPA cannot even muster confidence from their sponsors that adequate protection from enforcement actions is provided during XL projects.¹²²

Another critique of Project XL is that sponsors often propose cross-media or cross-pollutant exchanges. The logical question is whether we are truly getting a "reduction" in overall pollution from projects which reduce one type of pollution, but increase pollution elsewhere. Moreover, emissions trading markets and similar projects are currently criticized for contravening environmental justice issues.¹²³

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See Steinzor, *supra* note 8, at 149-50 (contemplating whether industry's objections to XL are strategically made to obtain Congressional approval for XL).

¹¹⁹ See *id.* at 147-48 (discussing possibilities of legal challenge to XL projects).

¹²⁰ See Regulatory Reinvention (XL) Pilot Project, 62 Fed. Reg. at 19,876 (discussing favorable outlook on projects with strong legal or factual link between flexibility requested and environmental benefits sought).

¹²¹ See *supra* note 82.

¹²² See Hogeland, *supra* note 73, at 37-39.

¹²³ See *supra* note 114 and accompanying text.

Two criticisms of the collaborative model are that it lacks adequate accountability and that it contains too much agency discretion.¹²⁴ Critics have attacked Project XL on both of these points. The EPA obtains only a voluntary commitment from the sponsor, and, in return, the sponsor may not get complete assurance from the EPA that its actions will not be penalized.¹²⁵ Yet, the positive aspects are that the public views regulation as more legitimate.¹²⁶ The broad base of information and participation also, theoretically, leads to better decisions.¹²⁷ For the EPA, the optimum solution is for Project XL sponsors to extensively involve stakeholders, thereby avoiding citizen suits and adverse agency action as much as possible.

The SCAQMD proposal is only in its infancy. Yet, as an illustration of the XL process, it indicates that not all projects request exorbitant deviations from regulations. In fact, the EPA suggested the proposal might be approved under existing federal SIP guidelines.¹²⁸ SCAQMD sources have had difficulty achieving Clean Air Act compliance.¹²⁹ The proposal is a proactive way for SCAQMD to attempt to solve this problem.

CONCLUSION

Project XL could be an important learning tool, specifically in terms of innovative pollution control technologies, processes, and management. It may also suggest improvements for the regulatory process in general. Through the XL process, the antagonism between the EPA and the regulated community is reduced and replaced by a collaborative negotiation process.¹³⁰ The XL negotiation process itself will provide the EPA with insight into collaborative governance, as well as the possibility of extracting the benefits of that regulatory model.¹³¹

The most important aspect of Project XL is the promotion of creativity. Project XL paves the way for innovation and invites sponsors to look beyond

¹²⁴ See Freeman, *supra* note 21, at 82-83 (discussing lack of traditional accountability in collaborative model).

¹²⁵ See Hogeland, *supra* note 73, at 37-39; *supra* notes 78-80 and accompanying text.

¹²⁶ See Hogeland, *supra* note 73, at 23-24 (discussing democratic view of rules developed in collaborative model).

¹²⁷ See *id.* at 27 (noting how participation may enhance quality of decisions).

¹²⁸ See *supra* text accompanying note 117.

¹²⁹ See *supra* accompanying text note 98.

¹³⁰ See Freeman, *supra* note 21, at 54.

¹³¹ See *id.* at 8-32 (discussing collaborative model of governance).

current programs to develop working solutions. Those that criticize the EPA for allowing variances to existing regulations in order to provide flexibility to pursue superior environmental performance must also consider the current discourse on the rising costs of environmental regulation. It is unclear how much longer traditional command and control environmental regulations will prevail against vocal critics.¹³² It is a critical time to focus on innovative strategies that provide both cost-efficiency *and* superior reductions in health and environmental hazards.

It is important to look at the substantive criticisms of Project XL in conjunction with the EPA's objectives. The EPA is performing numerous reinvention activities. The agency never intended for Project XL to replace regulation, nor become a regulatory process. From the outset the EPA set a limit of fifty pilot projects. It also set out qualitative and quantitative criteria for project selection, factually linked to the stated objectives. The EPA aspires to draw all information, data, and experiences it can from these experiments. In this context, the only pertinent criticism is that health or environmental degradation, abuse, or harm may be perpetrated by these pilot projects. However, EPA scrutiny of proposals, stakeholder involvement, and public notices should go far in alleviating this concerns.

¹³² See, e.g., Nelson, *supra* note 8, at 4-5, 17-18 (discussing need for cost-benefit analysis).

