ARTICLES

PROJECT XL AND THE SOUTH COAST AIR QUALITY
MANAGEMENT PROPOSAL

BY
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INTRODUCTION

The Environmental Protection Agency (EPA) is the primary federal agency responsible for health and environmental protection. Congress charged this agency with the task of implementing several laws. 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.

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. Through this project the EPA plans to select and test fifty alternative pollution control solutions submitted by industry, regulated facilities, and government agencies. An applicant may receive regulatory flexibility in exchange for its promise to achieve superior pollution controls.

2 See id. at 1 (characterizing EPA as critical actor with responsibility for over fourteen health and environmental statutes).
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. 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. This system favors prescriptive rules developed by Congress and the EPA, which are then enforced in the regulated community. This type of regulation has several shortcomings, particularly in the environmental law context. 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.

Many people familiar with the implementation of command and control regulation assert that it is unreasonably costly in the environmental context.
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. Interrelated to this complaint, regulators also do not take into account the costs of compliance. Additionally, the regulated community points to the inefficiencies inherent in redundant paperwork, monitoring, and reporting costs. 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.

Neither the regulated community nor advocates for environmental protection believes that we have achieved optimum results under command and control regulation. Critics suggest that reduction in levels of pollution could better be met by compensating those sources which can achieve reductions at the lowest cost. These critics argue for inserting economic incentive into pollution reduction at the individual facility level. 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.

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

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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).
21 See Mintz, supra note 1, at 122 (stating that only fraction of regulated cites 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.\textsuperscript{22} Practical and financial restraints therefore constrain the effectiveness of command and control regulation in the environmental context.\textsuperscript{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.\textsuperscript{24}

B. Regulatory Reinvention: Exploring Possibilities

Recognizing the shortcomings of command and control, the EPA sought to exchange regulatory flexibility for improved results.\textsuperscript{25} The EPA officially announced Project XL, and solicited proposals from the regulated community in May 1995.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{29}

\textsuperscript{22} See Mirz, supra note 1, at 122 (calling compliance rates “guessimates” based on possible unreliable self-monitoring by industry).
\textsuperscript{23} See id. at 122 (citing shortage of enforcement personnel and resources); at 135 (discussing budget cuts of EPA in fiscal year 1994).
\textsuperscript{24} See Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. at 27,283.
\textsuperscript{25} See id. at 27,287 (stating XL projects include flexibility from existing regulations).
\textsuperscript{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).
\textsuperscript{28} See Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. at 27,283 (stating that better decisions can be reached through collaborative process).
\textsuperscript{29} See id.
II. PROJECT OVERVIEW

A. The Three Phases of XL Projects

The Project XL process begins with the proposal. 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. The EPA, with the state environmental agency, reviews the proposal. If selected, the proposal then moves to the project development phase. 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. The sponsor, the EPA, and stakeholders negotiate a Final Project Agreement (FPA). The FPA contains the requirements and agreements between the EPA and the proposal sponsor. 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.

The final phase is implementation and evaluation of the project. 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. 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.

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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

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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. 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. 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. 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. EPA is also interested in projects which reduce the paperwork involved with compliance, monitoring, and reporting.

3. Innovation/ Multi-media Pollution Prevention

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

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. Unlike "alterna-

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30 See id.
31 See id.
32 See id.
34 See id.
35 See supra note 7, Project (XL) Web Site.
36 See id.
37 See id. (seeking alternative approaches to more than one regulatory requirements, or more than one environmental medium).
38 See id. (discussing their preference for former rather than latter type of proposals).
39 See id.
tive path" regulation, or other pilot programs, Project XL seeks broadly appli-
cable solutions to change the face of current regulation.⁶⁰

5. Feasibility

The EPA will only select projects which they believe are technically and eco-
nomically 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 suc-
cess 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 spon-
sor 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 gov-
ernments, businesses, and environmental and other public interest groups.⁶⁶ The EPA will not approve a project that is not approved by the state environ-
mental 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).
⁶² See id.
⁶³ See id.
⁶⁴ See id.
⁶⁵ See id. at 27,282.
⁶⁶ See id. at 27,287.
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

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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. ENVT. 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).
76 See id.
The EPA anticipates that facilities engaged in alternate strategies of pollution control might not comply with all applicable environmental requirements.\textsuperscript{77} The agency intends to be flexible, and to accept superior environmental performance in exchange for non-compliance with one or more applicable regulations.\textsuperscript{78} The voluntary commitments contained in the FPA are not legally enforceable.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{82} Other critics argue that the EPA is not providing assurance that the “flexibility” granted will protect the facility from enforcement actions.\textsuperscript{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.\textsuperscript{84} The proposal uses two rules, 2501 and 2503, to create and enforce an Air Quality Investment Program (AQIP).\textsuperscript{85} The plan is, in general, a “SCAQMD-operated open market trading program.”\textsuperscript{86}

\textsuperscript{77} See Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. at 27,287 (discussing regulatory flexibility).
\textsuperscript{78} See id. (discussing non-compliance of pilot projects).
\textsuperscript{80} See id.
\textsuperscript{81} See id.
\textsuperscript{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.
\textsuperscript{83} See Hogeland, supra note 73, at 37-39.
\textsuperscript{84} See supra note 7.
\textsuperscript{85} See id.
\textsuperscript{86} See id.
Rule 2501 presents the AQIP. Under this rule SCAQMD creates a pool of credits produced by the emission reductions of certain regulated sources. Sources are compensated for their reductions. 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. 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.

Rule 2503 compliments rule 2501. It contains enforcement and monitoring procedures that will be used to carry out rule 2501. 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.

B. Meeting XL Criteria.

The EPA is reluctant to approve SCAQMD’s proposal as it stands. In order for the EPA to approve the proposal, SCAQMD would have to make some modifications and additions. 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.

1. Superior Environmental Results

SCAQMD proposes that superior environmental results will be achieved under this proposal, for under command and control regulation sources regu-
larly received variances or rule exemptions when faced with financial or technical difficulties in achieving emissions limitations. The premium obtained from investors will be used to fund projects to advance technology. SCAQMD will also retire at least ten percent of additional emissions reductions.

The EPA is not yet convinced that the proposal will achieve superior environmental performance. 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.

2. Cost Savings and Paperwork Reduction

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

3. Innovation/Multi-media Pollution Prevention

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

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.

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98 See supra note 7.
99 See id.
100 See id.
102 See id.
103 See supra note 7.
104 See id.
106 See supra note 7.
107 See id.
5. Feasibility

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


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.

8. No Risk Burden Shifting

SCAQMD asserts that there is no risk burden shifting in the project. They point to specific requirements to prevent localized impacts that SCAQMD will still have in place. The project will protect attainment of the NO₂ ambient air quality standard. The project also does not allow use of AQIP reductions in lieu of National Emissions Standards for Hazardous Air Pollutants (NESHAP) requirements. However, the EPA is not convinced that the project will meet environmental justice requirements. 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.

108 See id.
110 See supra note 7.
111 See id.
112 See id.
113 See id.
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. 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.

IV. EVALUATION AND CRITICISMS

Project XL was not enacted by Congress. Some question its legitimacy in granting "regulatory flexibility" on this basis alone. Many argue that XL "flexibility" contravenes existing law. 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. 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. However, the EPA cannot even muster confidence from their sponsors that adequate protection from enforcement actions is provided during XL projects.

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.

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.\textsuperscript{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.\textsuperscript{125} Yet, the positive aspects are that the public views regulation as more legitimate.\textsuperscript{126} The broad base of information and participation also, theoretically, leads to better decisions.\textsuperscript{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.\textsuperscript{128} SCAQMD sources have had difficulty achieving Clean Air Act compliance.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{124} See Freeman, \textit{supra} note 21, at 82-83 (discussing lack of traditional accountability in collaborative model).
\textsuperscript{125} See Hogeland, \textit{supra} note 73, at 37-39; \textit{supra} notes 78-80 and accompanying text.
\textsuperscript{126} See Hogeland, \textit{supra} note 73, at 23-24 (discussing democratic view of rules developed in collaborative model).
\textsuperscript{127} See id. at 27 (noting how participation may enhance quality of decisions).
\textsuperscript{128} See \textit{supra} text accompanying note 117.
\textsuperscript{129} See \textit{supra} accompanying text note 98.
\textsuperscript{130} See Freeman, \textit{supra} note 21, at 54.
\textsuperscript{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. 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).