1-1-1998

The Environmental Protection Agency's Project XL and Other Regulatory Reform Initiatives: The Need for Legislative Authorization

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INTRODUCTION

Expanding upon the regulatory reform initiatives that began during the Bush Administration,[1] the Clinton Administration proceeded with an ambitious plan comprised of twenty-five initiatives to reinvent environmental regulation.[2] Most of these initiatives promote multimedia approaches to regulation, reflecting a consensus among environmentalists, industry, and scholars that multimedia regulation offers the greatest potential for improving the existing system of environmental regulation, which largely regulates a single medium at a time. While many of these multimedia initiatives are innovative and controversial, this Article will focus on Project XL—for excellence and leadership—because it incorporates all of the alternative compliance methods that are used to some extent in other reform initiatives, including multimedia emission caps and performance-based standards.[3] The multimedia approach in Project XL is simply the most dramatic of several other initiatives; accordingly, a discussion of Project XL will illustrate the promise and potential pitfalls in other regulatory reform initiatives.

Enthusiasm for Project XL is great. Gordon Moore, Chairman of the Board of Intel Corporation, a participant in Project XL,[4] sees "a real paradigm shift." According to Moore, "the new system envisioned by Project XL is to work cooperatively and focus on the results: a cleaner environment; a faster, less costly system; with more input from the local community."[5] As some EPA pilot projects have

1. *See generally* Part I.B.2.c.

2. *See generally* BILL CLINTON & AL GORE, REINVENTING ENVIRONMENTAL REGULATION 2 *passim* (1995) [hereinafter CLINTON & GORE]; *Reinvention at EPA, Testimony Before Senate Appropriation Comm.*, 104th Cong. (1996) (testimony of Fred Hansen, Deputy Administrator, EPA), available at http://www.epa.gov/partners/reinvent/hansen.htm (visited Feb. 26, 1998) [hereinafter Hansen Testimony]. *See also infra* Part I.B.2.c.

3. *See generally* Part I.B.2.c.

4. *See generally id.*

5. *See* U.S. ENVTL. PROTECTION AGENCY, COMMON-SENSE STRATEGIES TO PROTECT PUBLIC HEALTH: A PROGRESS REPORT ON REINVENTING ENVIRONMENTAL REGULATION 9 [hereinafter EPA, A PROGRESS REPORT ON REINVENTING ENVIRONMENTAL REGULATION].

already demonstrated, Project XL has the potential to reduce both regulatory costs *and* pollution by allowing companies to try innovative pollution control strategies that are customized for individual facilities rather than relying on the current one-size-fits-all approach to environmental regulation. Furthermore, Project XL will allow companies to take a multimedia approach to pollution rather than treat air, land, and water pollution as unrelated issues, as in the present system.

But despite the enthusiasm, it is unclear whether EPA has the legal authority to adopt its reform initiatives. In many cases, firms seek to waive existing statutory or regulatory requirements that mandate the use of best available technology, a specified percentage reduction in the amount of pollution, pollution monitoring, or reporting requirements.[6] A high-level EPA official has suggested that many regulatory reinvention proposals can be made without further amendments to existing environmental statutes.[7] Anonymous EPA employees, however, have suggested that "'if it isn't illegal, it isn't XL.'"[8] EPA acknowledged the possibility that statutes may limit the scope of its flexibility and promised to reexamine the issue in late 1997.[9]

Furthermore, regulatory reform is not without its critics. Environmentalists frequently argue that weakening technology-based pollution reduction monitoring or reporting requirements will cause serious harm to the environment and public health.[10] In addition, many environmentalists are worried that the shift from national, uniform regulatory standards to a more individualized, site-specific ap-

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6. *See generally* Part I.B.2.b.

7. *See* MAJORITY STAFF OF THE HOUSE COMM. ON TRANSPORTATION AND INFRASTRUCTURE, 104TH CONG., AN ASSESSMENT OF EPA'S REINVENTION 7 n.52 (Comm. Print Sept. 1996) (citing *Subcomm. on Tech. and Subcomm. on Energy and the Env. of the Comm. on Science, U.S. House of Representatives*, June 20, 1996 (testimony of David Gardiner, Assistant Administrator, EPA Office of Policy, Planning, and Evaluation)) (visited Oct. 31, 1996)<http://www.house.gov/transportation/hotissue/invent.htm> [hereinafter AN ASSESSMENT OF EPA'S REINVENTION].

8. *See* Rena I. Steinzor, *Regulatory Reinvention and Project XL: Does the Emperor Have Any Clothes*, 26 Envtl. L. Rep. (Envtl. L. Inst.) (News & Analysis) 10,527 (Oct. 1996) (citing What's Up With Project XL—Week of 3/11/96, Project XL Update).

9. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, GAO/RCED-97-155, ENVIRONMENTAL PROTECTION: CHALLENGES FACING EPA'S EFFORTS TO REINVENT ENVIRONMENTAL REGULATION 10 (1997) [hereinafter GAO REPORT]. In 1996, the Senate considered a bill that would have authorized Project XL, but the bill appears to have died. See Innovative Compliance Act, S. 2160, 104th Cong. (1996) (proposing to authorize waivers from regulatory requirements if (1) facility complies with all other environmental or public health standards; (2) the alternative compliance strategy will achieve "better overall environmental results" than under existing rules; (3) there are no adverse cross-media impacts; and (4) the alternative compliance strategy is enforceable and open to public scrutiny to the same extent as the waived requirement); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 90-91 n.282 (1997). This Article provides a far more detailed proposal to achieve many of that bill's goals.

10. *See infra* Part II.B.2.

proach will weaken the ability of the public to challenge industry claims.[11] In particular, they are worried that local environmental groups lack the resources to evaluate the cross-media and cross-pollutant trading schemes incorporated in many industry regulatory reform proposals.[12]

The focus of this Article is twofold. First, the Article will show that EPA's reform initiatives are severely hampered by a lack of legal authority, and proposes that Congress give EPA sufficient authority to enact needed reforms. Second, this Article will address concerns that reform will lead to inferior environmental protection and public participation. This Article proposes a number of statutory provisions to ensure that, once EPA has sufficient authority to pursue its reform agenda the agency will do so in a way that avoids a diminution of public health safeguards.

Part I of this Article analyzes the various impediments to EPA's reform agenda and ways of overcoming these impediments. Part I.A shows that most existing statutes address only a single medium and generally ignore impacts on other media. Part I.B demonstrates that a multimedia approach to environmental regulation is generally more desirable and examines several EPA multimedia regulatory reform initiatives. Part I.C illustrates how current single-medium statutes, Congress' fragmented committee structure, and EPA's single-medium administrative scheme all work together to create serious obstacles to multimedia reform initiatives. Part I.D discusses different strategies for achieving regulatory flexibility. Most importantly, Part I proposes that, instead of muddling through on an ad hoc basis to address statutory restrictions, Congress should enact a statute that would authorize EPA to proceed with its regulatory reform agenda.

Part II proposes that this reform should only be undertaken if it addresses concerns about delegating authority to EPA, guarantees public participation, and meets statutory performance-based goals. An authorizing statute is suggested that would require EPA to assemble diverse stakeholder groups to participate in preliminary negotiations, provide funding to these stakeholders so they can meaningfully challenge industry data, and hold a public hearing before granting a permit. Each participating firm would have to issue an annual report examining the risks and benefits of their alternative compliance methods.

Part II.A addresses concerns about Congress delegating too much authority to EPA, and explains how delegation can work without giving the agency excessive discretion. Part II.B explores the case against

11. *See id.*
12. *See infra* Part II.C.b.iii.

an integrated multimedia approach to regulation and EPA's inadequate efforts to respond to those concerns. Part II.C makes proposals that would guarantee meaningful public participation, preserve Congress' role in supervising the agency's performance, and ensure that regulatory flexibility does not turn into regulatory laxity.

I
THE NEED FOR LEGISLATIVE AUTHORIZATION OF THE ENVIROMENTAL PROTECTION AGENCY'S (EPA) REFORM INITIATIVES

A. The Single Medium Approach

For the most part, environmental statutes address only one medium such as air, water, or land. Chief among these statutes are the Clean Water Act and the Clean Air Act, each of which deals exclusively with its namesake medium.[13] Two other major statutes, the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) ought to apply to releases in all media,[14] but in practice primarily address only land disposal issues.[15]

The two other major environmental statutes, the National Environmental Policy Act (NEPA) and the Toxic Substances Control Act (TSCA), are supposed to have brought an integrated approach to environmental management, but in fact have had little impact on EPA's media policies.[16] A textualist reading of NEPA would require EPA to consider multimedia impacts when the agency issues rules that would significantly impact the environment. However, Congress and the courts have largely exempted EPA rulemaking under the major single-medium statutes from NEPA's requirement of issuing an environmen-

13. *See* Adam Babich, *RCRA Imminent Hazard Authority: A Powerful Tool for Businesses, Governments, and Citizen Enforcers*, 24 Envtl. L. Rep. (Envtl. L. Inst.) 10,122, 10,130-31 (March 1994); Clean Air Act: Enforcement Authority Guidance, 56 Fed. Reg. 24,393, 24,398 (1991) [hereinafter Enforcement Authority Guidance].

14. *See* Connecticut Coastal Fishermen's Ass'n v. Remington Arms Co., 989 F.2d 1305 (2d Cir. 1993) (holding RCRA § 7002(a)(1)(B) addresses lead shot polluting water); Comite Pro Rescate de la Salud v. Puerto Rico Aqueduct & Sewer Auth., 888 F.2d 180, 182 (1st Cir. 1989), *cert. denied*, 494 U.S. 1029 (1990) (holding RCRA § 7002(a)(1)(B) addresses fumes from sewer lines); Orchard Lane Rd. Ass'n v. Peter Lien & Sons, 34 Env't Rep. Cas. (BNA) 1749 (D. Colo. 1992) (holding RCRA § 7002(a)(1)(B) addresses release of silica dust to air); 40 C.F.R. pt. 264, subpts. AA & BB (1996) (containing RCRA regulations for "Air Emission Standards for Process Vents" and "Air Emission Standards for Equipment Leaks"); Enforcement Authority Guidance, *supra* note 13.

15. *See generally* ROGER W. FINDLEY & DANIEL A. FARBER, CASES AND MATERIALS ON ENVIRONMENTAL LAW 468-70 (4th ed. 1995) (pointing out that Congress enacted RCRA and CERCLA largely to address land disposal issues).

16. *See* Bradford C. Mank, *What Comes After Technology: Using an "Exception Process" to Improve Residual Risk Regulation of Hazardous Air Pollutants*, 13 STAN. ENVTL. L.J. 263, 293 (1994) [hereinafter Mank, *Exception Process*].

tal impact statement for all significant environmental actions. Their basic premise has been that the agency's rulemaking is the "functional equivalent" of such a statement.[17] It appears that the TSCA would give EPA authority to move towards the administrative implementation of an integrated approach.[18] However, the agency has not used this statute often for that purpose, perhaps because the TSCA requires the agency to justify any total or partial ban of substances upon "substantial evidence" in the rulemaking record taken as a whole[19] and because of the "least burdensome requirements."[20] Accordingly, despite the TSCA and NEPA, it is fair to say that the United States lacks an effective organic statute that addresses environmental problems comprehensively.[21]

B. The Need for Integrated Pollution Control

1. Problems with the Single Medium Approach

Many commentators have argued that, rather than treat each medium as unrelated to the others,[22] EPA should adopt an integrated approach to pollution control that would address pollution problems on a multimedia basis. They argue that controls on air pollutants, for instance, often result in the discharge of the same chemicals into the land or water without reducing the total number of harmful substances released into the environment.[23] For example, the Clean Air

17. *See* Lakshman Guruswamy, *Integrating Thoughtways: Re-opening of the Environmental Mind*, 1989 WIS. L. REV. 463, 477-79, 484-87, 490-92; Mank, *Exception Process*, *supra* note 16, at 293 n.134.

18. *See* Guruswamy, *supra* note 17, at 522-30; Mank, *Exception Process*, *supra* note 16, at 293 n.134.

19. *See* 15 U.S.C. § 2618(c)(1)(B)(i).

20. *See* Robert V. Percival, *Presentation at American Association of Law Schools Annual Meeting, Joint Program of Sections on Environmental Law and Torts and Compensation Systems, Three Perspectives on Risk: Common Law, Environmental Regulation and Law and Economics*, Jan. 6, 1997, 14 PACE ENVTL. L. REV. 513, 520 (1997); *see generally* 15 U.S.C. § 2605(a); Corrosion Proof Fittings v. EPA, 947 F.2d 1201 (5th Cir. 1991); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 548 (1997) ("In the six years that have passed since the *Corrosion Proof Fittings* opinion, EPA has not initiated a single action under section 6 of TSCA, and it is not likely to use section 6 to impose requirements that regulatees oppose until it is amended to overrule the court's opinion.").

21. *See* Daniel J. Fiorino, Essay, *Toward a New System of Environmental Regulation: The Case for an Industry Sector Approach*, 26 ENVTL. L. 457, 461 (1996).

22. *See* Frances H. Irwin, *An Integrated Framework for Preventing Pollution and Protecting the Environment*, 22 ENVTL. L. 1, 10-11 (1992); Mank, *Exception Process*, *supra* note 16, at 293; *see* Guruswamy, *supra* note 17, at 467-69, 476-79, 488-92, 516; *see generally* James E. Krier & Mark Brownstein, *On Integrated Pollution Control*, 22 ENVTL. L. 119 (1992).

23. *See* CLINTON & GORE, *supra* note 2, at 40, Appendix A, No. 24 ("multiple permits may result in undesirable cross-media transfer of pollutants"); Guruswamy, *supra* note 17, at 467-69, 488-92; Irwin, *supra* note 22, at 12-14 (listing seven reasons for integrated pollution control); Mank, *Exception Process*, *supra* note 16, at 294.

Act requires most utilities burning high-sulfur coal to use scrubbers to remove sulfur dioxide from flue gases, but this type of air pollution control produces three to six tons of scrubber sludge for every ton of sulfur dioxide removed from the air.[24] Industry deposits most of this sludge in landfills.[25] Some types of air pollutants, such as cadmium, are more dangerous if they reach the ground and contaminate food than if they are simply inhaled. Accordingly, air pollution regulation can actually increase the risk to public health.[26]

In addition, pollution from one medium often affects other media. For example, a significant amount of water pollution is caused by air pollutants that fall directly into waterways or that fall on the land and then are carried into the nation's waters.[27] In fact, the single largest source of lead, zinc, and copper pollution in the Great Lakes is not direct discharge into the water, but atmospheric deposition.[28]

Moreover, there are serious problems with existing single-medium programs that EPA can solve only by switching to a multimedia approach to environmental regulation. The current regime of multiple medium-specific permits often results in EPA or state agencies imposing "overlapping, poorly-coordinated and contradictory requirements" and may also allow some types of pollution to "fall through the cracks."[29] As will be discussed below, this regulatory problem occurred at the Amoco Oil Company's refinery in Yorktown, Virginia. Because EPA was focusing on one problem at a time rather than the big picture existing regulations focused on benzene emissions from wastewater plants, while ignoring a larger problem with benzene emissions from loading docks.[30]

Also, some believe that medium-specific strategies foster "end-of-the-pipe" pollution control techniques to treat, store, or dispose of waste, rather than encouraging pollution prevention or alternative compliance methodologies.[31] For instance, the Clean Water Act requires municipalities to operate sewage plants, but on average these facilities remove only fifty percent of toxic chemicals and allow twenty percent of the remainder to leach into the air, fifteen percent into the

24. *See* Guruswamy, *supra* note 17, at n.22.

25. *See id.*

26. *See id.*

27. *See* ENVTL. PROTECTION AGENCY, CHESAPEAKE BAY PROGRAM, THE STATE OF CHESAPEAKE BAY 1995 14 (1995) (reporting that 11% of the nitrogen falling into Chesapeake Bay falls directly into the water and that atmospheric nitrogen falling onto the land and reaching the water accounts for an additional 16%).

28. *See* Guruswamy, *supra* note 17, at 468 n.21.

29. *See* CLINTON & GORE, *supra* note 2, at 40, Appendix A, No. 24.

30. *See infra* Part I.B.2.b.

31. *See* GENERAL ACCOUNTING OFFICE, ENVIRONMENTAL MANAGEMENT: AN INTEGRATED APPROACH COULD REDUCE POLLUTION AND INCREASE REGULATORY EFFICIENCY (1996) (GAO/RCED-96-41) [hereinafter GAO, Integrated Approach].

land as sewage sludge, and another fifteen percent into the water.[32] The traditional approach to pollution control would concentrate on developing more effective (and usually more expensive) removal technologies. A better approach would be to prevent these toxics either from entering the sewage plant at all or from being created in the first place.[33]

Furthermore, some representatives of industry contend that using a different set of requirements for each medium increases the cost and complexity of compliance with environmental regulations.[34] Each single-medium statute typically creates a separate set of complex regulations, requires industry to apply for separate permits, often mandates different types of pollution control equipment, and usually imposes separate reporting and monitoring obligations, hence increasing the overall cost of regulation.

2. *The Promise of Reform*

In response to a congressional request,[35] the National Academy of Public Administration reviewed EPA's performance and concluded that the agency should attempt to integrate its responsibilities under various statutes into a more comprehensive and flexible approach.[36] The report was another indication that EPA needs to experiment with and adopt multimedia regulatory reforms and suggested that multimedia approaches to regulation possess great promise.[37]

Simple emissions averaging that involves the same pollutant and the same medium is relatively well accepted today even by many environmentalists.[38] But EPA clearly needs to extend single-medium pollution averaging and trading to a multimedia basis to achieve both cost and pollution reductions. Cross-pollutant trading or averaging would allow participants to trade decreased emissions of one aggregate type of pollutant—e.g., volatile organic compounds—for increased emissions of another class of pollutants—e.g., sulfur dioxide and nitrogen oxide.[39] Cross-media trading or averaging would allow a

32. *See* Guruswamy, *supra* note 17, at 468-69 n.23.

33. *See id.*

34. *See* CLINTON & GORE, *supra* note 2, at 40, Appendix A, No. 24.

35. *See* NATIONAL ACADEMY OF PUBLIC ADMINISTRATION, SETTING PRIORITIES, GETTING RESULTS: A NEW DIRECTION FOR EPA 102 (1995) (Table 5.1) [hereinafter NAPA]; Fiorino, *supra* note 21, at 468.

36. *See* NAPA, *supra* note 35, at 4, 30, 103, 132.

37. *See id.*

38. *See generally* Bruce A. Ackerman & Richard B. Stewart, Comment, *Reforming Environmental Law*, 37 STAN. L. REV. 1333 (1985) (advocating EPA use of emissions "bubble" and "tradeoff" policies); Robert W. Hahn & Robert N. Stavins, *Incentive Based Environmental Regulation*, 18 ECOLOGY L.Q. 1 (1991).

39. Steinzor, *supra* note 8, at 10,530-31 (citing Merck & Co., Inc., Project XL for Facilities Final Project Agreement Application, Stonewall Plant, Elkton, Va. (July 28, 1995));

participant to shift the allocation of the same pollutant among different media, resulting in, for example, lower releases into surface water in exchange for higher releases into the air or land.[40]

Industry generally supports the use of cross-pollutant or cross-media trading or averaging because it may be cheaper to control one pollutant than another, or to reduce water pollution than air pollution.[41] Furthermore, emissions caps that allow these types of trades can give industries the flexibility to make process changes without amending their permits.[42] In fact, Intel Corporation pursued a Project XL agreement with EPA primarily because it wanted flexibility to make rapid process changes at its facility in Chandler, Arizona without having to go through time-consuming permit changes.[43]

Even some environmentalists would agree that the issue is not whether to adopt multimedia emissions caps, but how to do so in a way that protects public health and the environment.[44] The real issues are the extent to which society should allow reductions in one medium to offset small increases in another, and the identification of the situations in which different types of pollutants may be averaged as long as the total risk to the public remains the same or is lessened by the averaging scheme. Existing statutory requirements, however, disallow many types of multimedia pollution averaging or trading, and demonstrate the need for legislation to allow multimedia reforms that are essential in achieving cheaper and more effective regulation.

a. Bubbles and Emissions Caps

In single-medium, same-pollutant regulation, EPA has already successfully used emissions bubbles and caps to reduce the expense of

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but see Mank, *Exception Process*, *supra* note 16, at 281-88 (questioning EPA proposal during Bush administration to allow emissions averaging of different carcinogens and even noncarcinogens because of serious uncertainties about the risks of each carcinogen and broader policy concerns about the ability of society to compare the risks of different chemicals).

40. Steinzor, *supra* note 8, at 10,530-31 (citing Merck & Co., Inc., Project XL for Facilities Final Project Agreement Application, Stonewall Plant, Elkton, Va. (July 28, 1995)); *but see* Mank, *Exception Process*, *supra* note 16, at 336-37 (discussing limitations in EPA exposure assessments and potentially troubling implications for minority groups whose consumption patterns may differ from the agency's assumptions about how most people eat, work or live).

41. *See* Timothy J. Mohin, *The Alternative Compliance Model: A Bridge to the Future of Environmental Management*, [July 1997 News & Analysis] 27 Envtl L. Rep. (Envtl L. Inst.) (News & Analysis) 10,345, 10,350-53 (Mohin is Government Affairs Manager for Environmental Health and Safety Issues at Intel Corporation).

42. *See id.*

43. *See id.*

44. As discussed in Part II, however, there is considerable controversy about the use of either cross-pollutant or cross-media trading because such trading may allow trade-offs between pollutants and media when there may be substantial scientific uncertainty as to whether overall risk is diminished in the trade. *See infra* Part II.B.1.

regulation while at the same time achieving greater pollution reductions. For a number of years, EPA has allowed some firms to place an imaginary "bubble" over a facility which allows the firm to average certain emission requirements that otherwise apply to smaller units.[45] For instance, EPA might require air pollution equipment on a boiler to achieve ninety percent efficiency. A "bubble" or averaging program allows a firm to average Boiler A's eighty-five percent efficiency with Boiler B's ninety-five percent efficiency to achieve an overall average of ninety percent, assuming that the two boilers emit the same amount of pollutants. Economists generally favor "bubbles" because it may be cheaper to increase the efficiency of Boiler B than Boiler A, and averaging therefore allows a facility to achieve ninety percent efficiency at less cost.[46] This type of averaging must be extended on a multimedia basis to reap the full benefits of reform.

b. The Yorktown Experiment

The Yorktown study discussed below illustrates not only the potential benefits of multimedia regulatory reform but also the need for legislative reform discussed more fully in Part I.C. This study showed that focusing on a facility's total emissions, rather than on the amount of pollution going to each individual medium or coming from particular smokestacks, can result in cheaper and more effective regulation. Despite the clear benefits of reform, the company indicated that it would do nothing because under the existing statutory and regulatory framework EPA lacks the authority to relax existing mandates in exchange for innovative approaches that achieve greater net reductions in pollution.

In 1990, EPA and Amoco Oil Company announced a cooperative pilot study at Amoco's Yorktown, Virginia refinery to examine pollution prevention and alternative permitting strategies.[47] In 1992 and 1993, Amoco and EPA reported that it indeed was possible to reduce

45. *See generally* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 859-66 (1984) (holding that EPA had authority under Clean Air Act to authorize use of "bubbles" in areas not in attainment with National Ambient Air Quality Standards); Ackerman & Stewart, *supra* note 38, at 1341-49, 1364-65 (discussing use of "bubbles" and other economic incentives to improve the incentive structures and efficiency of environmental statutes and regulations).

46. For illustrations of these regulatory strategies, see Ackerman & Stewart, *supra* note 38, at 1341-49. Some environmentalists have opposed emissions averaging because they want Boiler A to achieve 90% efficiency on its own and still require Boiler B to meet 95% efficiency.

47. *See* Ronald E. Schmitt, *The Amoco/EPA Yorktown Experience and Regulating the Right Thing*, 9 NAT. RESOURCES & ENV'T 11 (Schmitt is director of Environmental Performance Management for Amoco); *Pollution Prevention: Pilot Project Cut Pollution at Less Cost Than Mandated Rules, Amoco Official Says*, 24 Env't. Rep. (BNA) 903, 903 (Sept. 24, 1993) [hereinafter *Amoco Official Says*]; *EPA, Amoco Launch Pollution Prevention Project*, 14 Chem. Reg. Rep. (BNA) 70 (April 20, 1990).

pollution at less cost than is allowed under current regulatory requirements.[48] The refinery was spending $31 million to rebuild its wastewater treatment system to reduce benzene emissions, which are carcinogenic. However, EPA regulations did not then require any controls at the refinery's marine loading docks, which emitted far more benzene pollution and could be controlled for only $6 million.[49] In addition, the study found that while Amoco reduced airborne hydrocarbon and listed waste emissions by about 7,300 tons per year at a cost of $2,400 per ton, if EPA had the authority to allow more flexible compliance strategies, Amoco could have reduced its hydrocarbon emissions by approximately the same amount at a cost of only $500 per ton.[50] Under existing statutes or agency regulations, there were no provisions allowing EPA to exempt the refinery from rebuilding the wastewater treatment facility in exchange for controlling a greater amount of benzene emissions from the loading docks or to adopt alternative compliance strategies for controlling hydrocarbons.[51]

The joint Amoco-EPA study concluded that current administrative procedures discouraged an integrated approach to multimedia pollution.[52] It recommended that Congress or EPA provide incentives for firms to conduct facility-wide assessments that would enable them to develop pollution prevention and multimedia reduction strategies.[53] However, because the major issue at the Yorktown refinery was controlling different sources of benzene or hydrocarbon emissions, the study did not fully address the difficult problem of whether it is appropriate to ease regulation of one class of pollutant in exchange for more stringent regulation of another type of pollutant, including carcinogens.[54] Nevertheless, the Yorktown experiment was so promising that it encouraged EPA to begin several pilot or experimental multimedia alternative compliance programs.[55]

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48. *See* Mank, *Exception Process*, *supra* note 16, at 324-25; Schmitt, *supra* note 47, at 13, 51; *see generally* AMOCO/U.S. ENVIRONMENTAL PROTECTION AGENCY, YORKTOWN POLLUTION PREVENTION PROJECT: PROJECT SUMMARY (1992) [hereinafter AMOCO].

49. *See* AMOCO, *supra* note 48, at viii, 1-7, 1-11, 1-12; Mank, *Exception Process*, *supra* note 16, at 324-25.

50. *See* Fiorino, *supra* note 21, at 462; Schmitt, *supra* note 47, at 13.

51. *See* AMOCO, *supra* note 48, at ix, 1-12, 1-15, 1-16; Mank, *Exception Process*, *supra* note 16, at 325.

52. *See* AMOCO, *supra* note 48, at ix, 1-18; Mank, *Exception Process*, *supra* note 16, at 325.

53. *See* AMOCO, *supra* note 48, at 1-17, 1-18; Mank, *Exception Process*, *supra* note 16, at 325.

54. *See generally* Mank, *Exception Process*, *supra* note 16, at 281-88 (questioning EPA proposal during Bush administration to allow emissions averaging of different carcinogens and even noncarcinogens because of serious uncertainties about the risks of each carcinogen and broader policy concerns about the ability of society to compare the risks of different chemicals).

55. *See infra* Part I.B.2.c.i.

c. Reform Initiatives

The EPA is convinced that regulatory reform, especially multimedia regulation, can fulfill the promise of the Yorktown study and achieve better results at less cost. However, each of its reform initiatives, to a greater or lesser extent, suffers from the general problem that no legal authority exists for EPA to relax certain requirements in exchange for greater environmental benefits. Accordingly, as Part I.C explains, legislative authorization giving EPA greater authority to substitute individualized, multimedia regulation at specific facilities in lieu of generic requirements would benefit all of these programs.

Beginning during the Bush Administration and continuing during the Clinton Administration, EPA has begun a number of regulatory reform initiatives to create more flexible permits and emphasize performance-based standards rather than compliance with mandatory regulatory techniques.[56] These initiatives have set the stage for the agency's most ambitious initiative, Project XL, which Part I.B.2.d and Parts II.B and C examine.

The EPA has recognized many of the advantages of a multimedia approach to regulation, but changing its focus has been difficult because many agency staff and congressional leaders have a vested interest in single-medium programs.[57] The agency began studying integrated environmental management in 1980,[58] but its efforts to adopt a more integrated approach were slowed during the middle 1980s by congressional adherence to single-medium approaches.[59] As this section discusses, EPA has slowly started to shift from a single-medium to a multimedia approach, but more needs to be done.

i. Cluster Rules, the Common Sense Initiative, and the GAO Report

In late 1993, EPA Administrator Carol Browner announced that the agency would adopt a multimedia approach to rulemaking on a comprehensive industry-by-industry basis to replace the existing approach of issuing a separate or even multiple rules for each medium.[60] The EPA quickly proposed a regulation that would have integrated Clean Air Act and Clean Water Act requirements for the pulp and paper industry.[61] This so-called "clustered"[62] or multimedia rule pro-

56. *See infra* Part I.B.2.d (describing Project XL).

57. *See infra* Part I.C.3.

58. *See* Krier & Brownstein, *supra* note 22, at 130-31 (discussing EPA's Integrated Environmental Management Project, created in 1980, and continuing agency interest in integrated pollution control during the 1980s).

59. *See infra* Parts I.C.2 and I.C.3.

60. *See* Carol M. Browner, Address to the Chamber of Commerce Washington, D.C. (Nov. 19, 1993); AN ASSESSMENT OF EPA'S REINVENTION, *supra* note 7, at 6.

61. *See* 58 Fed. Reg. 66,078 (Dec. 17, 1993).

posed to take an "ecosystem-wide" approach to reduce and prevent discharges of dioxin and other toxic pollutants.[63] Industry, however, argued that the proposed rule was too costly while environmentalists criticized the proposal because it did not totally eliminate the use of chlorine, which is converted into dioxin when paper is bleached.[64] The difficulty of assessing the costs and the amount of dioxin that is produced by various bleaching processes delayed EPA from issuing a final cluster rule.[65]

Even if existing statutes give EPA the authority to issue cluster rules (which some disappointed party will likely challenge if the agency ever issues such a rule), specific legislative authorization for "cluster" rules would likely have encouraged the agency to move forward more quickly and given it the backbone to withstand both industry and environmentalist criticisms. While it is true that legislative authorization would not eliminate difficult technical issues involving the amount of dioxin produced by the industry and its possible health impacts, legislation would likely have set a deadline for issuing a cluster rule and provided the agency with reassurance that a clustered or multimedia approach is in fact legal.

In a major speech in 1994, EPA Administrator Carol Browner announced a "Common Sense Initiative" designed to achieve "cleaner, cheaper, smarter" environmental regulation that, rather than taking the traditional approach of specifying the type of pollution control technology industry must utilize,[66] promised to give industry more flexibility in achieving pollution reduction as long as it achieved particular goals. A major focus of the Common Sense Initiative was to develop multimedia regulation of industry sectors[67] (initially through pilot projects in six industry sectors[68]) and to replace so-

62. *See U.S. Envtl. Protection Agency: New Rule-Making Process, "Clustered" Rules to Come From EPA in Next Year, Official Says*, 17 CHEM. REG. REP. (BNA) 1592 (Dec. 3, 1993) (reporting EPA official's explanation of concept of "clustered" or multimedia rulemaking).

63. *See* Timothy Noah, *EPA Seeks Strict Paper-Industry Rules Aimed at Cutting Dioxin, Air Pollution*, WALL ST. J., Nov. 2, 1993, at A24; *see also* Mank, *Exception Process*, *supra* note 16, at 295.

64. *See* Noah, *supra* note 63, at A24.

65. *See* AN ASSESSMENT OF EPA's REINVENTION, *supra* note 7, at 6. On November 14, 1997, the EPA finally issued a combined water and air "cluster" rule for the pulp and paper industry, which is the first multimedia rule to cover an entire industry. *See* Susan Bruninga, *Pulp-Paper Cluster Rule Seeks Cuts in Dioxin, Hazardous Air Pollutants*, 28 Env't Rep. 1406, 1406-08 (BNA) (Nov. 21, 1997).

66. *See* Browner, *supra* note 60; Common Sense Initiative Council Federal Advisory Committee: Establishment, 59 Fed. Reg. 55,117 (1994); Fiorino, *supra* note 21, at 470-71.

67. *See* Fiorino, *supra* note 21, at 471.

68. The six sectors include: 1) metal finishing and plating; 2) electronics and computers; 3) iron and steel; 4) auto assembly; 5) petroleum refining; and 6) printing. *See* Fiorino, *supra* note 21, at 470; *see also Multimedia: Ten Single-Permit Projects Allowed Under Baucus Clean Water Act Amendment*, 1994 Daily Env't Rep. (BNA) 35 d4 (Feb. 23,

called prescriptive "command-and-control" regulation.[69] Some industry sectors have achieved more success than others,[70] but the program arguably has failed to achieve the consensus required by the Federal Advisory Committee Act process.[71] This program would also benefit from specific legislative authorization that defines its goals, explicates the extent to which multimedia regulation may replace existing requirements, and specifies when the agency may act if consensus is not achieved within industry or among other stakeholders representing environmental interests.

In 1994, Senator Max Baucus, then-Chair of the Senate Environment and Public Works Committee, proposed an amendment to a Senate Clean Water Act bill that would have authorized EPA to issue five-year "integrated permits" for air, water, and solid waste regulations at up to ten demonstration sites.[72] Unfortunately, Congress failed to enact any significant changes to the Clean Water Act that year. Senator Baucus, however, subsequently requested that the General Accounting Office (GAO) review experimental multimedia regulatory approaches in Massachusetts, New Jersey, and New York. In a 1996 report, the GAO concluded that because these state efforts show promise in both reducing industry costs and reducing the total amount of pollution released to all media, the agency should consider allocating greater funds to state multimedia programs.[73] The GAO report demonstrates that Congress ought to enact legislation that at a minimum would give EPA authority to issue experimental multimedia permits to test the validity of this approach on a national scale.

1994) [hereinafter, Multimedia Projects] (reporting February 16, 1994 speech to United States Chamber of Commerce by EPA Administrator Carol Browner on Feb. 16, 1994).

69. *See* Fiorino, *supra* note 21, at 471.

70. In June 1996, the State of Michigan withdrew from the Common Sense Initiative's automobile manufacturing subcommittee, even though about half the country's automobile manufacturing facilities are located in that state, because the Director of the Michigan Department of Environmental Quality was dissatisfied with the ability of participants to achieve consensus about how to find better environmental solutions. *See* AN ASSESSMENT OF EPA'S REINVENTION, *supra* note 7, at 7 n.47 (citing Letter to Carol Browner from Russell J. Harding, Director of the Michigan Department of Environmental Quality (June 21, 1996)). *Cf.* Susan Bruninga, *Regulatory Reform: EPA Reinvention Effort Falls Short Report Says; Agency Decries Findings*, 181 DAILY ENV'T REP. (BNA) A-13 (Sept. 18, 1996) [hereinafter *Agency Decries Findings*] (finding that the metal finishing sector committee announced in September 1996 that consensus had been achieved among environmentalists, industry, and other interested parties on a procedure for setting goals).

71. *See* AN ASSESSMENT OF EPA'S REINVENTION, *supra* note 7, at 6-7; *see also* Federal Advisory Committee Act (FACA), 5 U.S.C. App. §§ 1-15.

72. *See Multimedia Projects*, *supra* note 68, at 68; *General Policy: Baucus Soon to Introduce Bill to Set Up Pilot MultiMedia Programs*, 17 Chem. Reg. Rep. (BNA) 1709 (Jan. 7, 1994).

73. *See* GAO, INTEGRATED APPROACH, *supra* note 31, at 16; *Regulatory Reform: State Integrated Regulatory Approaches Have Promise, Funding Problems, GAO Says*, 1996 Daily Env't Rep. (BNA) 25 d17 (Feb. 7, 1996).

ii. The Environmental Leadership Program

In January 1993, EPA published in the Federal Register a notice of its intention to establish an experimental Environmental Leadership Program (ELP). The ELP would reward firms that achieved various pollution reduction goals and criteria by reducing monitoring or reporting requirements. It would also provide some leniency in enforcement by encouraging multimedia permitting, use of regulatory credits to compensate for voluntary efforts that exceed mandatory pollution goals, and establishment of a special opportunity to consult with an agency ombudsman who might be able to reduce unnecessary administrative burdens.[74] However, competitors that do *not* receive this special treatment are likely to complain about favoritism or even file suit alleging that EPA has violated existing statutes by exempting a leadership firm from certain requirements. Therefore, this program would be more successful if Congress provided specific legislative authorization and defined the parameters for the requirements EPA may waive if a firm proves to be an "environmental leader." While such legislation would not eliminate the possibility that some firms that are not selected by the agency will charge that EPA is playing favorites with their competitors, such legislation would provide a benchmark for the GAO, Congress, and the public to determine whether EPA is properly selecting environmental leaders for the program and to what extent the agency may provide exemptions from existing requirements.

iii. Permits Improvement Team (PIT)

In 1994, EPA created a Permits Improvement Team (PIT), composed of agency, state, local, and tribal permitting officials, to evaluate the agency's permitting programs, including both those the agency had delegated to those government entities and those the agency directly administered.[75] In 1996, the PIT issued a Concept Paper and Task Force recommendations in the Federal Register that announced that the Team was considering the establishment of "public performance-based permitting" as a way of easing industry's permit obligations, and

74. *See* Request for Environmental Leadership Program Pilot Project Proposals, 58 Fed. Reg. 4802, 4811-12 (1993). Since 1982, the Occupational Health and Safety Administration (OSHA) has selected companies with low injury and accident rates that meet other requirements to participate in a "Star" program that rewards these firms by allowing them to largely self-monitor and to be subject to triennial inspections rather than annual compliance inspections. *See* Notice of Changes to the Voluntary Protection Programs, 50 Fed. Reg. 43,804, 43,812-13, 43,816 (1985); Notice of Implementation of Revised Voluntary Protection Programs, 47 Fed. Reg. 29,025, 29,027-28 (1982).

75. *See* Notice of Availability of Permits Improvement Team Concept Paper on Environmental Permitting and Task Force Recommendations, 61 Fed. Reg. 21,856 (1996) [hereinafter PIT Concept Paper].

was inviting informal public discussion of the recommendations.[76] After making any changes based upon additional public comments, the PIT will submit a final report to EPA Administrator Carol Browner for her consideration. She, in turn, has the authority to adopt the recommendations as official agency policy.[77]

The PIT's recommendations bolster the emerging consensus about the potential advantages of regulatory reform and multimedia permits, but also raise serious questions about whether EPA can implement all of the recommendations without specific legislative authorization. Because the goal of permits should be to achieve ambient environmental goals rather than simply meeting technology- or management-specific standards,[78] the paper recommends that EPA: 1) allow firms to make a wide range of physical and operational changes without triggering the need for a new or modified permit if a firm can achieve less overall pollution than under existing mandates;[79] 2) allow itself, as well as state, local, or tribal agencies, to focus monitoring and reporting requirements on the most serious issues; and 3) reduce the paperwork burden on less important activities.[80] To safeguard the public from any harm from its recommendations for operational flexibility and more selective agency monitoring, the paper also recommended that EPA seek to incorporate more meaningful public

76. *See id. "Public Performance-Based Permitting" Considered by EPA to Ease Industry's Burden*, 27 ENV'T REP. (BNA) 270, 270 (May 17, 1996) [hereinafter *"Public Performance-Based Permitting"*].

77. *See* PIT Concept Paper, *supra* note 75, 61 Fed. Reg. at 21,856; *"Public Performance-Based Permitting" supra* note 76, at 270. In recent years, the EPA and other agencies have often adopted official agency policies in "guidance documents" or other informal policy announcements rather than through public notice-and-comment rulemaking under section 553 of the Administrative Procedure Act. There has been considerable controversy about how binding guidance documents are compared to duly promulgated rules, but that issue is beyond the scope of this Article. *See generally* Robert A. Anthony & David A. Codevilla, *Pro-Ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667 (1996) (proposing courts review agency policy statements under demanding standards used to review interpretive rules); Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311 (1992) (discussing agency policy statements and arguing that they should not be treated the same as duly promulgated rules).

78. *See* PIT Concept Paper, *supra* note 75, 61 Fed. Reg. at 21,860-61 (EPA will, as a matter of first preference, attempt to set performance standards based upon ambient environmental goals; as a second choice, the agency will use performance standards based upon technological achievability as the primary criterion; and, finally, the agency will, as a last resort, use technology- or management-specific standards if it is infeasible to use performance-based measures).

79. *See* PIT Concept Paper, *supra* note 75, 61 Fed. Reg. at 21,863-64; *"Public Performance-Based Permitting", supra* note 76, at 270.

80. *See* PIT Concept Paper, *supra* note 75, 61 Fed. Reg. at 21,863-64; *"Public Performance-Based Permitting", supra* note 76, at 270. The fourth task force recommendation was to "establish computer systems" and the fifth was to provide assistance to regional permit processes. *See* PIT Concept Paper, *supra* note 75, 61 Fed. Reg. at 21,864-65.

participation in the permit process, including such incorporation into the development and implementation of alternative and multimedia permit approaches.[81] Because the PIT included a diverse group of federal, state, local, and tribal permitting officials, it is significant that they came to the same conclusions about operational flexibility and a more performance- and goal-based system of monitoring that many in industry, academe, and even environmental groups had been recommending.

While EPA can seek to improve public participation in permit decisions without additional legislative approval, many of the PIT's recommendations about multimedia permits, the modification of permits, and the relaxation of at least some reporting requirements raise questions about EPA's legal authority to implement them. The fact that the PIT task force called for significant changes in the permitting system demonstrates that Congress needs to reexamine existing statutory permit requirements and consider modifying them in light of the paper's recommendations. In short, a fundamental change in something so basic as the permit system demands legislative attention and action.

iv. States and Performance Partnerships

The EPA needs to redefine its relationship with the states and tribes (which implement a significant proportion of federal environmental mandates) because existing statutes and regulations give state and tribal permitting agencies little flexibility to modify programs to fit local conditions.[82] The challenge is to go beyond the existing federal-state/tribal relationship, which has emphasized simplistic measurements such as "bean counting" the total number of state or tribal inspections or permits.[83] If EPA is to redefine its relationship with states and tribes, however, Congress needs to provide legislative guidance about the degree to which local entities may depart from national norms.

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81. *See* PIT Concept Paper, *supra* note 75, 61 Fed. Reg. at 21,871-73; *"Public Performance-Based Permitting"*, *supra* note 76, at 270.

82. *See EPA: Ruckelshaus to Head Effort on New Agency Statutory Mission*, Daily Env't Rep. (BNA) 41 d9 (Mar. 1, 1996) [hereinafter *New Agency Statutory Mission*]; *but see* Victor Byers Flatt, *A Dirty River Runs Through It (The Failure of Enforcement in the Clean Water Act*, 25 B.C. ENVTL. AFF. L. REV. 1 (1997) (arguing that state enforcement of Clean Water Act NPDES permits varies significantly from state to state). There is not necessarily an inconsistency between those that argue that federal environmental laws provide states with little flexibility and those who point out that states vary greatly in how they implement those laws. A better environmental regime would give states more flexibility in what regulatory approaches they may use, while requiring that states meet strict performance goals.

83. *See New Agency Statutory Mission*, *supra* note 82, at 41 d9.

On May 17, 1995, EPA signed an agreement with states to develop a new federal oversight system of state and tribal programs, the National Environmental Performance Partnership System (NEPPS).[84] Under this System, EPA is supposed to grant far greater flexibility and autonomy to state and tribal permitting authorities than ever before.[85] On August 19, 1996, EPA issued a revised interim guidance on when the agency should issue performance partnership grants to state or tribal authorities.[86] A performance partnership grant is a multi-program grant made to a state or a tribal agency from funds otherwise available for categorical grant programs. It allows a state or tribe to combine two or more of sixteen eligible grant programs into one or more performance partnership grants.[87] In theory, according to EPA, these combined grants "will provide States and Tribes with flexibility to address their most pressing environmental priorities across all media and establish resource allocations based on those priorities while continuing to address core program commitments."[88] "As of April 1997, EPA had signed performance partnership agreements with 27 states and environmental performance partnership grants with 21 states."[89] Broader regulatory reform legislation is needed, however, to define "core commitments" (minimum requirements that all states and tribes must meet), the extent to which states may combine grant programs, and the authority of local permitting agencies to authorize firms to implement alternative compliance approaches. On October 29, 1997, EPA issued a notice in the Federal Register requesting public comment on a draft agreement prepared jointly with the Environmental Council of States establishing a framework for how the agency and the states will promote and implement future regulatory innovation efforts.[90]

84. *See id.*

85. *See id.*

86. *See* Performance Partnership Grants for State and Tribal Environmental Programs: Revised Interim Guidance, 61 Fed. Reg. 42,887 (1996) [hereinafter Performance Partnership Grants].

87. *See id.*

88. *Id.* at 42,889.

89. GAO REPORT, *supra* note 9, at 26. On June 3, 1997, EPA announced it had reached performance partnership agreements with 23 states. *See* EPA, Administration Environmental Protection Reinvention Programs Heightened, Environmental News, EPA 97-R-88, *available at* 1997 WL 290320, *2 (June 3, 1997). The inconsistency between the EPA and GAO figures may be due to different definitions of an agreement.

90. *See* U.S. Envtl. Protection Agency, Joint EPA/State Agreement on Pursuing Regulatory Innovation, 62 Fed. Reg. 56,182 (1997).

d. Project XL: Its Promise and Problems (EPA's Plans for Project XL)

i. Project XL's Promise

In 1995, EPA developed, and President Clinton endorsed, a widely publicized initiative called Project XL to promote regulatory flexibility. EPA promised to implement fifty pilot projects within two years.[91] Of all EPA's reform initiatives, Project XL is the most ambitious and promises the greatest degree of change towards a more flexible system of environmental regulation.[92]

Project XL seeks to use innovative permitting methods, particularly those emphasizing pollution prevention or multimedia emissions averaging, to reduce compliance costs and to realize superior environmental performance compared to that achieved under existing laws.[93] Although Project XL involves four distinct initiatives,[94] most attention has focused upon the Project's "facilities" initiative's, which would give large manufacturing facilities the flexibility to use site-specific alternative compliance plans and integrated multimedia permits as long as they meet or exceed pollution goals negotiated with the agency and interested stakeholders.[95] In particular, Project XL would likely replace limits on emissions to a specific medium with facility-wide "caps" or "bubbles" that authorize a firm to trade emissions among pollutants or media.[96] The Clinton Administration provided the following example:

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91. *See* President William Clinton, Remarks on Project XL, at the Old Executive Office Building (Nov. 3, 1995) (visited Oct. 13, 1997) <http://www.npr.gov/library/speeches/2662.html>; Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. 27,282 (1995) [hereinafter XL Pilot Projects]. *See generally* Susan Bruninga & Allison Meyer, *"Reinvention" Top EPA Priority*, 26 Env't Rep. (BNA) 1889, 1889-90 (Feb. 2, 1996) (discussing Project XL); William H. Freedman & Karen A. Caffee, *EPA's Project XL: Regulatory Flexibility*, 10 NAT. RESOURCES & ENV'T 59, 59 (1996); Beth S. Ginsberg & Cynthia Cummis, *EPA's Project XL: A Paradigm for Promising Regulatory Reform*, 26 Envtl. L. Rep. (Envtl. L. Inst.) 10,059, 10,061 (Feb. 1996); Marianne Lavelle, *Bending the Rules*, NAT'L L.J., June 10, 1996, at A1, A17; Steinzor, *supra* note 8, at 10,527-29 & n.13.

92. *See* Fiorino, *supra* note 21, at 477.

93. *See* CLINTON & GORE, *supra* note 2, at 35; Ginsberg & Cummis, *supra* note 91, at 10,061.

94. The four Project XL program areas are: 1) individual facilities; 2) industry-wide or sector-based; 3) government agencies regulated by the EPA; and 4) community-based programs. *See* XL Pilot Projects, *supra* note 91 at 27,282-90. The community-based programs are significantly different from the other three types. *See* Regulatory Reinvention (XL) Pilot Projects: XL Community Pilot Program, 60 Fed. Reg. 55,569 (1995); Regulatory Reinvention (XL) Pilot Projects: Notice of Modifications to Project XL, 62 Fed. Reg. 19,872 (1997) [hereinafter XL Modification].

95. *See* Ginsberg & Cummis, *supra* note 91, at 10,061; Steinzor, *supra* note 8, at 10,527-28.

96. *See* Ginsberg & Cummis, *supra* note 91, at 10,061-62; Steinzor, *supra* note 8, at 10,528, 10,530-31 (discussing several Project XL proposals and raising questions about the

> [A] company may find that upgrading its wastewater treatment system to meet Clean Water Act technology-based requirements would have a negligible impact on water quality, and that it could achieve greater overall environmental protection by redirecting its pollution control efforts toward programs to minimize hazardous emissions from unregulated sources, to recycle hazardous wastes and to reduce the use of toxic chemicals in the manufacturing process.[97]

In 1995, EPA established eight criteria for selecting companies for Project XL.[98] First and probably most importantly, a company must be able to "achieve environmental performance that is superior to what would be achieved through compliance with current and reasonably anticipated future regulation."[99] All Project XL agreements also should include "[e]xplicit definitions and measures of 'cleaner results'" but establishing that baseline is likely to raise serious legal and technical questions about when overall reductions in multimedia pollution justify waiving single-medium requirements.[100] In addition, the criteria require projects to achieve cost savings or reduce a company's paperwork burden, and especially favor innovative, multimedia, or pollution prevention projects.[101] Furthermore, these projects must achieve significant support from stakeholders such as state agencies, local communities, businesses, and environmental and other public interest groups.[102] Finally, a project must be consistent with Executive Order 12,898, requiring federal agencies to consider whether environmental regulations or actions disproportionately affect poor people or racial minority groups, and may not shift a facility's risk burden to endanger worker safety or subject anyone to "unjust or disproportionate environmental impacts."[103] While EPA indicated that it would at-

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appropriateness of "cross-pollutant trades within a facility-wide—or even broader—emissions 'cap.'").

97. *See* CLINTON & GORE, *supra* note 2, at 35.

98. *See* XL Pilot Projects, *supra* note 91, at 27,287; Ginsberg & Cummis, *supra* note 91, at 10,061.

99. XL Pilot Projects, *supra* note 91, at 27,287; *see* Ginsberg & Cummis, *supra* note 91, at 10,061.

100. XL Pilot Projects, *supra* note 91, at 27,287; *see* Ginsberg & Cummis, *supra* note 91, at 10,061-63.

101. *See* XL Pilot Projects, *supra* note 91, at 27,287; Ginsberg & Cummis, *supra* note 91, at 10,061; Steinzor, *supra* note 8, at 10,528.

102. *See* XL Pilot Projects, *supra* note 91, at 27,287; Ginsberg & Cummis, *supra* note 91, at 10,061; Steinzor, *supra* note 8, at 10,528.

103. *See* XL Pilot Projects, *supra* note 91, at 27,287; Ginsberg & Cummis, *supra* note 91, at 10,061; *see generally* Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994) (requiring federal agencies to consider whether environmental regulations or actions disproportionately affect poor people or racial minority groups); Bradford C. Mank, *Environmental Justice and Discriminatory Siting: Risk-Based Representation and Equitable Compensation*, 56 OHIO ST. L.J. 329, 334-44 (1995) (reviewing empirical evidence regarding whether environmental inequities exist concerning various racial minority groups and the poor) [hereinafter Mank, *Risk-Based Representation*].

tempt to provide some guidance to sponsors about "acceptable approaches" to meeting these eight criteria, the agency warned that it "must retain the ultimate authority to select projects based on a qualitative consideration of these criteria."[104]

On April 23, 1997, EPA stated that, while it was retaining the eight criteria, in the future the agency would emphasize three factors as of paramount importance in deciding whether to approve an XL proposal: first, whether the proposal would achieve superior environmental performance compared to existing requirements; second, whether the type of regulatory flexibility methods proposed were appropriate and might serve as a model for other projects; and, third, whether the proposal contained adequate opportunities for involvement by various stakeholders to "ensure that the projects garner broad community support."[105]

Recognizing that there are a number of complex issues involving the measurement of environmental results and the appropriate environmental baseline, EPA is conducting the Project on a trial basis.[106] In its April 23, 1997 Notice of Modification, EPA tried to provide greater clarity about what constitutes superior environmental performance and which types of projects that increase regulatory flexibility would likely win approval. The agency has established a two-tiered approach to assessing superior environmental performance that examines both quantitative and qualitative factors, which Part II.B.3.a examines in more detail.[107] The agency invited proposals that provide incentives for pollution prevention, especially approaches that minimize the generation of persistent, bio-accumulative, or toxic chemicals; source reduction, recycling, or on-site reuse of wastes; greater or continuous collection of emissions data; facility-wide emissions limits under the Clean Air Act that also include continuous emission reduction; enhanced systems for data collection on employee health and exposure to environmental pollutants; regulatory mechanisms to encourage consideration of the environment through the entire life cycle of a product; the incorporation of environmental stewardship into customer and supplier relationships; or a multi-media closed-loop process for technology development.[108] Although each of the proposals reflects the individual circumstances of a particular facility, the proposals generally include at least one of the following elements: emissions trading, facility emission caps, multimedia permitting, pollution pre-

104. *See* XL Pilot Projects, *supra* note 91, at 27,287.
105. *See* XL Modification, supra note 94.
106. *See* CLINTON & GORE, *supra* note 2, at 35.
107. *See* XL Modification, *supra* note 94, at 19,873-75.
108. *See id. supra* note 94, at 19,873.

vention, or the elimination of obsolete reporting and other paperwork-intensive requirements.[109]

Because Project XL is based on allowing facilities to employ alternative compliance strategies that may violate existing laws, EPA has promised to provide enforcement relief as long as the affected firm complies with the alternative methods it negotiates with EPA.[110] The main mechanism for accomplishing Project XL agreements will be "no action assurances" from EPA, which will stipulate that the agency will not pursue an enforcement action against a participant if it meets all terms of its Final Project Agreement with the agency.[111]

As of October 17, 1997, EPA had approved four XL projects for implementation, had essentially approved a fifth, had announced a sixth agreement, and was developing several additional projects with state and local governments, project sponsors, and stakeholders.[112] On July 12, 1996, EPA announced that it had approved a Project XL pilot project with Jack M. Berry Inc., a citrus juice processor in La-Belle, Florida, which is expected to result in a single multimedia operating permit.[113] In November 1995, EPA reached a Project XL agreement with Intel Corporation regarding its new facility in Chandler, Arizona.[114] In January 1997, EPA signed an agreement with a Weyerhaeuser Corporation facility in Oglethorpe, Georgia that exempts the facility from required hazardous air pollutant controls, as well as reduces reporting and testing requirements, in exchange for an alternative compliance plan that incorporates pollution prevention techniques and seeks significant reductions in total emissions to air,

109. *See* Ginsberg & Cummis, *supra* note 91, at 10,061-62; Steinzor, *supra* note 8, at 10,530-31.

110. *See* XL Pilot Projects, *supra* note 91, at 27,284, 27,287.

111. *See* Clarification of Project XL's Operating Principles, Office of Enforcement and Compliance Assistance, U.S. EPA, to Tim Mohin, Intel Corporation 3 (Feb. 23, 1996) (Letter from John Fogarty) (visited Oct. 13, 1997) <http://199.223.29.233/xl_home/xl_foges.html> [hereinafter Clarification of Project XL's Operating Principles]; Memorandum from Steven Herman, EPA Assistant Administrator for Office of Enforcement and Compliance Assurance 4-5 (Oct. 2, 1995)(titled "Operating Principles for Project XL Participants")(visited Oct. 13, 1997) <http://199.223.29.233/xl_home/xl_oeca.html> [hereinafter Operating Principles for Project XL Participants]. However, there are serious questions whether EPA can preclude a citizen suit if the agency plans to do nothing about a statutory or regulatory violation. *See infra* notes 143-144 and accompanying text. In addition, even assuming full compliance by a Project XL participant, EPA has indicated that it retains the ability to bring an enforcement action to force a participant to address unanticipated environmental problems that pose imminent hazards or unacceptable health threats. *See* Clarification of Project XL's Operating Principles *supra*; Operating Principles for Project XL Participants *supra*; *see also* Ginsberg & Cummis, *supra* note 91, at 10,063.

112. *See* XL Modification, *supra* note 94, at 19,873.

113. *Florida Juice Maker First to Participate in EPA's Project XL*, July 16, 1996, *available in* 1996 WL 393059, West's Legal News.

114. *See* Mohin, *supra* note 41, at 10,347-51; *Project XL: Intel to Sign Agreement for "One-Stop" Permit*, GREENWIRE, Nov. 19, 1996.

water, and land.[115] In October 1997, EPA announced a Final Project Agreement with HADCO corporation.[116] Also in that month, EPA announced a site-specific rule for Merck and Company's pharmaceutical facility in Stonewall, Virginia, which is tantamount to a final XL agreement.[117] Finally, again in October, EPA announced a final XL agreement with OSi Specialties, Inc., a chemical company in Sisterville, West Virginia.[118] The EPA's goal is to set in motion roughly fifty projects.[119]

ii. Project XL's Problems

Project XL has great promise but it shares the same basic problem as other multimedia reform initiatives discussed in Part I.B.2.c—lack of clear EPA authority. As a result, uncertainty has hindered the development of the program. Uncertainty exists because existing statutory requirements and agency institutional arrangements are primarily based on a single-medium approach that at best ignores and at worst forbids multimedia regulatory approaches. This uncertainty is reflected in the widely circulated comment supposedly made by an anonymous EPA employee that "if it isn't illegal, it isn't XL."[120]

Although EPA contends that current statutes allow reform in many but not all circumstances, even the agency implicitly concedes there is considerable ambiguity as to which statutes allow reform and under what circumstances.[121] Because substantial uncertainty exists about the authority of EPA to replace existing requirements with various regulatory flexibility projects, the probability of prolonged litigation will discourage many firms from participating in such initiatives.[122] Only if EPA can offer greater certainty and minimize

115. *See* EPA, Regulatory Reinvention Pilot Projects: Notice of Availability of Weyerhaeuser Project XL Final Project Agreement, 62 Fed. Reg. 4760 (Jan. 31, 1997); *Weyerhaeuser, EPA Set Project XL Pact to Reduce Water Pollution, Air Emissions*, 27 Env't. Rep. (BNA) 1932, 1932-33 (Jan. 24, 1997).

116. *See* EPA, Project XL Final Project Agreement for HADCO Corporation, 62 Fed. Reg. 52,334 (1997); *see also* EPA, Project XL Draft Final Project Agreement for HADCO Corporation, 62 Fed. Reg. 3508 (1997).

117. *See generally* EPA, Project XL Site-Specific Rulemaking for Merck & Co., Inc. Stonewall Plant, 62 Fed. Reg. 52,622 (Oct. 8, 1997) (final rule); EPA, Site-Specific Rulemaking for Merck & Co., Inc. Stonewall Plant, 62 Fed. Reg. 15,304 (to be codified at 40 C.F.R. Parts 52, 60, 264 & 265) (proposed Mar. 1997) [hereinafter Site-Specific Rulemaking].

118. *See* EPA Regulatory Reinvention Pilot Projects: Notice of Signing of OSi Project XL Final Project Agreement, 62 Fed. Reg. 55,637 (Oct. 27, 1997).

119. *See* XL Modification, *supra* note 94, at 19,873.

120. *See* Steinzor, *supra* note 8, at 10,527 (citing *What's Up With Project XL—Week of 3/11/96, Project XL Update*).

121. *See supra* Part I.B.2.c.

122. *See* Camilla Day Buczek, *EPA Moves to Cooperative Approach*, NAT'L L.J., Oct. 14, 1996, at C15 (observing that EPA's written XL agreements with industry will not necessarily shield them from citizen suits); Ginsberg & Cummis, *supra* note 91, at 10,063 (same);

the prospects for litigation are such programs likely to have a major impact on reshaping the framework of environmental regulation.

The EPA has generally claimed that existing statutes are sufficiently flexible to accommodate its regulatory reform initiatives. In its 1995 Notice announcing the Project XL Pilot Projects, EPA acknowledged that "[i]n particular circumstances, [the agency] may consider changes in underlying regulations or may seek changes in underlying statutes."[123] In 1996, the PIT Concept Paper, however, claimed that some EPA programs, such as the Clean Water Act's National Pollution Discharge Elimination System permitting process, are already applying many of these public performance-based permitting principles, and therefore may have fewer changes to make.[124] Similarly, in 1996, David Gardiner, Assistant Administrator, EPA Office of Policy, Planning, and Evaluation, suggested that performance-based approaches such as those used in Project XL could often be made without further amendments to existing environmental statutes.[125] What Gardiner and the concept paper ignore is the fact that many existing statutes do not appear to allow performance-based standards or multimedia approaches to be substituted for existing technology-based standards or single-medium requirements.[126] In fact, many environmentalists and EPA staff have opposed the agency's regulatory reform initiatives precisely because they believe such proposals violate regulations and statutory requirements that EPA does not have the authority to waive.[127] In particular, firms may seek to waive existing statutory or regulatory requirements that mandate the use of best available technology, a specified percentage reduction in the amount of pollution, pollution monitoring, or reporting requirements.

In its April 23, 1997 Notice of Modification, EPA acknowledges that "[s]pecific statutory provisions may limit the scope of flexibility available to certain XL projects."[128] However, the agency contends that "[t]o date . . . this concern generally has not been a real barrier to implementation of projects that meet the XL decision criteria."[129] Nevertheless, EPA strongly encourages applicants to examine "the full range of discretion available under the combination of existing

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Lavelle, *supra* note 91 at A17 (noting EPA's argument that firms complying with Project XL requirements are no longer liable for certain other former mandates).

123. *See* XL Pilot Projects, *supra* note 91, at 27,287.

124. *See* PIT Concept Paper, *supra* note 75, 61 Fed. Reg. at 21,856.

125. *See* AN ASSESSMENT OF EPA'S REINVENTION, *supra* note 7, at 8 n.52.

126. *See* AN ASSESSMENT OF EPA'S REINVENTION, *supra* note 7, at 10-12.

127. *See, e.g.*, Steinzor, *supra* note 8, at 10,527-37; *see also* GAO REPORT, *supra* note 9, at 32 ("EPA has had difficulty achieving 'buy-in' among the agency's rank and file, which have grown accustomed to prescriptive, medium-by-medium regulation during the agency's 27-year history.").

128. XL Modification, *supra* note 94, at 19,876.

129. *Id.*

federal and state regulatory and statutory mechanisms," including various variance and waiver procedures, the possibility of flexible interpretations of current requirements, the modification of existing permits or the issuance of new permits to allow greater flexibility.[130] If existing procedures are inadequate, EPA will consider the possibility of site-specific notice-and-comment rulemaking to modify requirements that prevent the implementation of an applicant's proposal as long as specific statutory provisions do not limit the authority of the agency or states to promulgate such site-specific rules.[131]

Whether the agency has the flexibility under a particular statute to adopt a Project XL agreement incorporating alternative compliance strategies can only be decided on a case by case basis.[132] If a statute is ambiguous, courts will generally give the agency the benefit of the doubt. In *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, the Supreme Court established the principle that courts should defer to an agency's "permissible" construction of an ambiguous statute.[133] Accordingly, courts may defer to EPA if the agency contends that a statute allows, or at least does not prohibit, an alternative compliance strategy adopted as part of a regulatory flexibility program.

On the other hand, even under *Chevron*, a court must reject a policy that is more efficient or otherwise praiseworthy if a judge determines that the applicable statute clearly precludes the agency's interpretation.[134] Where a statute requires the use of a particular technology or the use of the best available pollution control technology for an industry, EPA may have a difficult task in convincing a court that it is legal for the agency to waive such requirements where a firm achieves greater than mandated reductions in another medium.[135] If an alternative compliance strategy, however, achieves equivalent results in the same medium as the best available technology, then the agency would have a stronger case for arguing that deference is appropriate.

EPA may also have discretion to decide whether to enforce certain statutory requirements where the agency believes a company is meeting substantially equivalent alternative compliance requirements

130. *Id.*

131. *See id.* at 19,876-77; *see generally,* site-specific Rulemaking, *supra* note 117.

132. *See* XL Modification, *supra* note 94, at 19,876.

133. 467 U.S. 837, 842-44, 865-66; *see* Bradford C. Mank, *Is a Textualist Approach to Statutory Interpretation Pro-Environmentalist?: Why Pragmatic Agency Decisionmaking is Better Than Judicial Literalism*, 53 WASH. & LEE L. REV. 1231, 1242 (1996) [hereinafter Mank, *Textualist Interpretation*].

134. *See* 467 U.S. at 842-43, 865-66; *see also* Mank, *Textualist Interpretation*, *supra* note 133, at 1244, 1250.

135. *See supra* notes 134-135.

under a Project XL agreement. In *Heckler v. Chaney*, the Supreme Court indicated that agency applications of prosecutorial discretion are generally unsuitable for judicial review in part because the agency often must consider issues uniquely within its expertise.[136] The Court declared that a presumption of unreviewability exists if a plaintiff challenges an agency's failure to bring a prosecution. This presumption may be rebutted either by the existence of a mandatory statutory duty to act in circumstances that a reviewing court is capable of defining or where the agency has imposed such a duty on itself in a legislative rule.[137] *Heckler's* generally broad protection of prosecutorial discretion and deferential attitude toward agency expertise may provide authority for EPA to take no enforcement action against a firm that enters into an agreement to use alternative compliance methods.

But despite *Heckler*, some commentators believe that EPA's exercise of prosecutorial discretion may be reviewable where there is no explicit statutory language authorizing EPA to use alternative compliance methods, such as those in Project XL, because the agency can only exercise that authority granted to it pursuant to specific statutory directives.[138] Assuming *Heckler* applies, there is a presumption that EPA's no-action agreements are nonreviewable, but there is the possibility that a court in a particular case may overcome that presumption by concluding that a statutory or regulatory duty compels EPA to take enforcement action.

Furthermore, even if EPA has the enforcement discretion not to prosecute firms involved in regulatory flexibility initiatives, environmentalists, other interested nongovernmental groups, and competitors who are not part of these initiatives, may use the citizen suit provisions found in most environmental statutes to challenge any attempt by EPA to bend or waive rules for participating firms.[139] Although the Supreme Court has implied that a person filing such a suit must meet standing requirements, such as personal injury-in-fact,[140] it is

136. *See* 470 U.S. 821, 831-32; RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 323 (2d ed. 1992) [hereinafter PIERCE]; *see also* Arnow v. United States Nuclear Regulatory Comm'n, 868 F.2d 223, 235-36 (7th Cir. 1989) (applying *Heckler v. Chaney* to an NRC enforcement decision). *But see* Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653 (1985) (criticizing *Heckler v. Chaney*).

137. *See* PIERCE, *supra* note 136, at 323.

138. *See* Steinzor, *supra* note 8, at 10,535-36.

139. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7604 (1994); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1994); Solid Waste Disposal Act, 42 U.S.C. § 6972 (1994); *see* Fiorino, *supra* note 21, at 480-81; Ginsberg & Cummis, *supra* note 91, at 10,063-64; Steinzor, *supra* note 8, at 10,535-36.

140. *See generally* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 571-78 (1992) (requiring citizen to demonstrate some type of concrete and particularized "injury in fact" to obtain standing and rejecting view that citizen suit provisions in environmental statutes can confer standing upon persons without such injury); *see also id.* at 579-81 (Kennedy, J.,

generally easy for a citizen who is affected by a firm's pollution to meet threshold standing requirements—even aesthetic injuries may be enough.[141] Recently, in *Bennett v. Spear*, the Supreme Court held that the "zone of interests" test for restricting standing to those with a legitimate interest in a statute's goals does not apply to citizen suit statutes authorizing "any person" to challenge an act or omission by an agency.[142] Even if some persons or firms lack standing, there are likely to be a significant number who possess standing to bring a citizen suit challenging a Project XL or other regulatory flexibility agreement.

It is possible, but unlikely, that "no enforcement" agreements bar a citizen suit. Environmental statutes usually preclude citizen suits when the appropriate state or federal agency is diligently prosecuting an action to enforce the standards, although any person may intervene as a matter of right.[143] If an agency simply issues an administrative order, however, the courts have generally held that such an order without more, such as a requirement that the violator pay civil penalties comparable to the applicable federal penalty provision, is not the equivalent of "a civil or criminal action in a court of the United States." Accordingly, such orders do not bar citizen suits.[144]

However, a consent decree, if approved by a court, will bar a citizen suit on issues controlled by its terms.[145] It is unlikely that EPA

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concurring in part and concurring in the judgment) (arguing some type of concrete injury is needed for standing, but maintaining that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before. . . .").

141. *See Lujan*, 504 U.S. at 562-63; Sierra Club v. Morton, 405 U.S. 727, 734 (1972).

142. 117 S. Ct. 1154, 1161-63 (1997) (*rev'g* Bennett v. Plenert, 63 F.3d 915 (9th Cir. 1995)).

143. *See, e.g.*, 42 U.S.C. § 7604(b)(1)(B); Citizens for a Better Env't v. Union Oil Co., 83 F.3d 1111, 1115-18 (9th Cir. 1996) (discussing when diligent state or federal enforcement action bars a citizen suit under the Clean Water Act); Steven Russo, *States, Citizens, and the Clean Water Act: State Administrative Enforcement and the Diligent Prosecution Defense*, 4 N.Y.U. ENVTL. L.J. 211, 231 (1995).

144. *See Citizens*, 83 F.3d at 1116-18 (holding state penalty assessment was not comparable to federal penalty provision under Clean Water Act and therefore did not bar citizen suit); Washington Public Interest Research Group (WASHPIRG) v. Pendleton Woolen Mills, 11 F.3d 883, 885-86 (9th Cir. 1993) (holding that EPA administrative compliance order requiring the defendant to prepare a report identifying ways for it to achieve compliance did not bar citizen suit under Clean Water Act because order did not seek monetary penalties); Proffitt v. Commissioners of Bristol, 754 F.2d 504, 507 (3d Cir. 1985); Student Public Interest Research Group of New Jersey, Inc. v. Fritsche, Dodge & Olcott, Inc., 759 F.2d 1131, 1136-39 (3d Cir. 1985). An administrative consent order that requires monetary penalties may in some circumstances bar a citizen suit. *See, e.g.*, Arkansas Wildlife Fed'n v. ICI Americas, Inc., 29 F.3d 376, 383 (8th Cir. 1994); JOHN E. BONINE & THOMAS O. MCGARITY, THE LAW OF ENVIRONMENTAL PROTECTION 880 (2d ed. 1992).

145. *See* EPA v. City of Green Forest, 921 F.2d 1394, 1403-05 (8th Cir. 1990); Student Public Interest Research Group of New Jersey, Inc. v. Georgia-Pacific Corp., 615 F. Supp. 1419, 1431-32 (D. N.J. 1985); BONINE & MCGARITY, *supra* note 144, at 880.

would want to pursue the lengthy consent decree process for every regulatory flexibility agreement it enters with industry. Therefore, it is likely that "no enforcement action" agreements between firms and the agency will be vulnerable to citizen suits.[146] The EPA might reduce, but not totally eliminate, the possibility of such lawsuits by securing the approval and support of all stakeholders,[147] but EPA's Common Sense Initiative demonstrates the difficulty of achieving such consensus.[148]

Even assuming a participant fully complies with a Project XL agreement, the existence of such an agreement is unlikely to shield a participant from liability altogether. Although the presence of a Project XL agreement might lead a court to reduce substantially a fine or to waive certain injunctive requirements,[149] prospective applicants nonetheless may decide not to pursue the lengthy Project XL process if they are uncertain about the extent to which an agreement with EPA will shield them from liability.

An example of such litigation is a suit challenging the use of emissions trading to allow companies to avoid existing regulatory requirements—which is exactly the type of program Project XL seeks to encourage. In late July 1997, local environmental justice groups and the NAACP Legal Defense Fund filed a civil rights suit—the first of its kind—against the regional South Coast Air Quality Management District and California Air Resources Board. The suit challenged an air pollution trading scheme in which oil companies, including Chevron Corp., Unocal Corp., Tosco Corp., Ultramar Corp., and GATX Corp. were relieved from cleaning up emissions of 590 tons of hydrocarbons, which are volatile organic compounds (VOCs), from certain terminals in Los Angeles, California. In exchange, the companies agreed to buy and remove more than 7,400 older, high-pollution cars, at a cost of approximately $600 a piece, from area highways.[150]

While declining to formally comment on the suit, the oil companies argue that the program produces great benefits for all fourteen million people living in Southern California, and only minor, insignificant risks for residents living near the refineries.[151] The plaintiffs al-

146. *See* Steinzor, *supra* note 8, at 10,536.

147. *See Liability Concerns, Regulatory Uncertainty Impede Innovation, White House Official Says*, 27 Env't Rep. (BNA) 1246 (Oct. 4, 1996) [hereinafter White House Official Says] (reporting remarks at Sept. 25, 1996 forum by David Rejeski, spokesman for the White House Office of Science and Technology); Ginsberg & Cummis, *supra* note 91, at 10,063; Steinzor, *supra* note 8, at 10,536.

148. *See supra* Part I.B.2.c.i.

149. *See* Ginsberg & Cummis, *supra* note 91, at 10,063.

150. *See* Marla Cone, *Civil Rights Suit Attacks Trade in Pollution Credits*, L.A. TIMES, July 23, 1997, at A1; Robert Stevens, *Civil Rights Laws Are Cited in Challenge to California Pollution-Control Tactics*, WALL ST. J., July 24, 1997, at B10.

151. *See* Cone, *supra* note 150, at A1.

lege that the emissions-trading initiatives approved by regional and state air pollution control officials violate Title VI of the 1964 Civil Rights Act, which prohibits recipients of federal financial assistance from engaging in discrimination.[152] The complaint alleges that certain minority communities are selectively subjected to disproportionately high amounts, so-called "hot spots," of harmful chemicals.[153] While the regional district has a separate rule limiting "hot spots" to a maximum risk of 100 cases of cancer per million people exposed, many feel that standard may be inadequate for health concerns.[154] The suit asks EPA to rescind the program and to withdraw all federal funding from the Air Quality Management District.[155] The EPA stated that it took the suit seriously, but did not announce what action or position it would take.[156]

This suit raises serious questions about many Project XL proposals, which often involve innovative trading or emissions caps schemes. The suit also raises serious questions about hundreds of other trading programs in Southern California, a similar strategy in Michigan, and many proposed programs in other states.[157]

C. The Need for Legislation: Impediments to Reform

Project XL and similar multimedia reform initiatives possess great promise, but EPA finds itself constrained by an unclear allocation of authority. In terms of Project XL, the unclear allocation of authority is due mostly to statutory limitations on the regulatory methods that EPA may employ. As the next section illustrates, the inherent nature of the statutory scheme not only impedes reform of Project XL but of environmental regulation generally. Even where a statute arguably allows for some of the proposed reforms, litigation by disgruntled parties will bog the entire process down. Further, two other important factors impede reform as well—Congress' fragmented committee structure and EPA's single-medium oriented administrative structure. Existing institutional arrangements and statutory requirements empower those who prefer the present single-medium system of pollution control and raise serious legal questions about multimedia reform efforts. Elimination of these impediments would require comprehensive regulatory reform authorizing a holistic, multi-media approach.

152. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601-605, 78 Stat. 241, 252-53, 42 U.S.C. § 2000d (1994); Mank, *Risk-Based Representation*, *supra* note 103, at 383-86 (discussing application of Title VI to environmental justice suits).

153. *See* Cone, *supra* note 150, at A1; Stevens, *supra* note 150, at B10.

154. *See* Cone, *supra* note 150, at A1; Stevens, *supra* note 150, at B10.

155. *See* Cone, *supra* note 150, at A1.

156. *See id.*; Stevens, *supra* note 150, at B10.

157. *See* Cone, *supra* note 150, at A1.

1. *Statutory Limitations on Regulatory Methods*

Congress has often limited the ability of EPA to readjust either priorities or remedies by imposing narrow statutory commands and, accordingly, has excluded methods that might be more efficient.[158] During the 1970s, when national pollution control regulation was new, the legislature tended to set highly rigid and often unrealistic goals for EPA and frequently specified the use of technology-based pollution control methods.[159] For instance, section 101(a) of the 1972 Clean Water Act required *zero* water pollution by 1985—this anachronistic provision is still part of the statute.[160] Multimedia reform efforts require that Congress, as well as EPA officials still committed to traditional single-medium regulation, recognize that some minimum level of water pollution may be necessary to avoid greater harm to the land or air.

In addition, section 112 of the 1970 Clean Air Act required EPA to establish air quality standards for hazardous air pollutants that provided an "ample margin of safety."[161] Because of scientific uncertainties about the risks of carcinogens, the statute provided EPA with no realistic guidance about how to achieve the statutory goal short of an unrealistic ban on numerous chemicals that would have shut down major sections of American industry—a result that was politically infeasible for EPA to command.[162] Such an unrealistic goal impedes reform by, for instance, preventing EPA from tolerating a minor increase in hazardous air emissions if there is a corresponding or greater decrease in other environmental risks. Unrealistic statutory commands also helped to create a culture within EPA that focuses on meeting bureaucratic requirements rather than experimenting with regulatory alternatives that might be more effective, yet more contro-

158. For example, EPA has only limited power to regulate indoor air pollution even though the agency believes that such pollution poses a higher health risk than many other hazards it regulates. Richard N.L. Andrews, *Long-Range Planning in Environmental and Health Regulatory Agencies*, 20 ECOLOGY L.Q. 515, 532-33 (1993).

159. *See generally* Ackerman & Stewart, *supra* note 38, at 1335-39 (observing that Congress during the 1970s often specified technology-based pollution controls in environmental legislation and arguing that subsequent experience has shown these "Best Available Technology" based controls to be inefficient and disproportionately detrimental).

160. *See* 33 U.S.C. § 1251(a)(1). The statute, however, undermined the whole zero discharge premise by establishing a system in which a polluter may discharge as long as it holds a permit. *See* 33 U.S.C. § 1342; 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, 523 n.272 (1995).

161. 42 U.S.C. § 7412(f)(2).

162. *See* 42 U.S.C. § 7412(b)(1)(B); John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 ECOLOGY L.Q. 233, 237-41, 255 & (1990); Mank, *Exception Process*, *supra* note 16, at 267-70.

versial for individual agency employees who have to think about their careers.[163]

Prescriptive "command-and-control" statutes also hinder reform efforts by imposing mandatory conditions that a firm must meet even if the firm could present an alternative strategy that would achieve the same or lower pollution at less cost but does not meet the specified requirements. During the 1980s and early 1990s, Congresses controlled by the Democratic Party arguably made statutes more prescriptive, perhaps as a way to block the deregulatory efforts of the Republican Reagan and Bush Administrations. Such statutes include the Hazardous Waste and Disposal Act of 1984,[164] the Safe Drinking Water Act of 1986,[165] and the Clean Air Act Amendments of 1990.[166] Some commentators refer to these types of regulation as "command-and-control" regulation[167] because of their detailed requirements about which chemicals an agency must regulate, how the agency must regulate them, and when the agency must promulgate regulations.[168] As a result, these statutes strongly inhibit or clearly preclude the agency from adopting different regulatory strategies and obstruct agency employees who favor multimedia reform.[169]

Other environmental statutes constrain agency behavior by precluding the use of alternative regulatory methods. For example, the Clean Water Act requires EPA to issue permits to all point sources discharging into the nation's navigable waters.[170] Instead of mandating permits, however, Congress could have provided EPA with freedom to choose alternative pollution control strategies such as pollution taxes, limitations on the use of specified waste-creating feed-

163. *See infra* note 166.

164. Pub. L. No. 98-616, 96 Stat. 3221.

165. The Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1994).

166. *See* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399; STEPHEN J. BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1992) (criticizing Congress for setting unrealistic goals and mandating overly specific requirements in environmental statutes); Fiorino, *supra* note 21, at 480 ("Environmental laws—especially those reauthorized by the largely pro-regulatory Congresses of the 1980s—contain many specific regulatory requirements."); Michael Herz, *Judicial Textualism Meets Congressional Micromanagement: A Potential Collision in Clean Air Act Interpretation*, 16 HARV. ENVTL. L. REV. 175, 175-82 (1992) (arguing that Congress has enacted overly specific environmental statutes, especially the 1990 Clean Air Act Amendments).

167. *See, e.g.*, Fiorino, *supra* note 21, at 463-64 (citing sources).

168. *See id.* at 480.

169. *See* 42 U.S.C. § 7470 (Prevention of Significant Deterioration Program set forth in Title I, Part C of the Clean Air Act); A. STANLEY MEIBURG, PROTECT AND ENHANCE: "JURIDICAL DEMOCRACY" AND THE PREVENTION OF SIGNIFICANT DETERIORATION OF AIR QUALITY (1991).

170. *See* 33 U.S.C. § 1342; Wilkins & Hunt, *supra* note 160, at 521.

stock materials, or mandatory recycling or pretreatment of waste products.[171]

Even a statute that appears to give an agency considerable discretion may foreclose the use of innovative alternatives. For instance, CERCLA establishes a general framework in which EPA must promulgate a national contingency plan for cleaning up abandoned hazardous waste sites. EPA must establish a hazard ranking system and use that criteria to rank various facilities, respond to those sites, and seek reimbursement for its cleanup from the responsible polluters.[172] Although CERCLA leaves most of the details to EPA, an examination of recent proposed legislation designed to reform the statute implicitly suggests that it would be inappropriate for the agency to unilaterally adopt changes—such as taxing those who benefit from waste-producing activities or changing remediation guidelines to make remedial activities more sensitive to economic or technical feasibility, or to location—because the authors of the bills assumed that the agency could not simply adopt these reforms.[173] Indeed, in *Kelley v. U.S. Environmental Protection Agency*,[174] the D.C. Circuit struck down an EPA rule regarding the CERCLA liability of banks as beyond the agency's statutory authority and concluded that section 107 of the statute did not give the agency rulemaking authority over the scope of the statute's liability provisions, but instead left the courts with authority to define CERCLA's breadth.[175]

Furthermore, inclusion of prescriptive regulatory requirements in a single-medium statute often implicitly or explicitly discourages the use of a multimedia approach. For instance, a statutory or regulatory requirement that a plant upgrade its wastewater treatment to meet the Clean Water Act's technology-based requirements may only marginally improve the quality of the receiving water, but the expense of doing so may prevent the firm from voluntarily spending the same amount of money to correct a more serious land disposal or air pollution problem.[176] Some environmentalists appear to believe that the way to solve multimedia problems is to make regulation of all media

171. *See* Carol A. Browner, *The Common Sense Initiative: A New Generation of Environmental Protection* (last modified June 21, 1996) <http://www.epa.gov/commonsense/speech2.txt> (criticizing laws that tell "industry not only what standard to meet but also the specific technology they ha[ve] to use to meet it"); Wilkins & Hunt, *supra* note 160, at 521.

172. *See* 42 U.S.C. §§ 9604, 9605, 9606, 9607 (1997); Wilkins & Hunt, *supra* note 160, at 513.

173. *See* Wilkins & Hunt, *supra* note 160, at 514.

174. 15 F.3d 1100 (D.C. Cir. 1994).

175. *See id.* at 1105-08; William W. Buzbee, *CERCLA's New Safe Harbors for Banks, Lenders, and Fiduciaries*, 26 ENVTL. L. REP. (Envtl. L. Inst.) 10,656, 10,658, 10,661-62 (Dec. 1996).

176. *See supra* Part I.B.1.

more stringent.[177] However, in a world of limited resources, a rigid and expensive prescriptive requirement in one medium may mean that the company has less money to spend on more serious problems in other media.[178] Most environmental statutes and regulations do not recognize the value of alternative regulatory methods that might allow greater reductions of pollution at less cost in the same or different media.[179]

Other unnecessarily rigid controls are the Best Available Technology (BAT) mandates that require EPA to set uniform technology-based pollution controls for an entire industry throughout the nation.[180] There is substantial evidence that uniform technology-based statutory requirements are often inefficient for many individual firms, are expensive for agencies to promulgate, discourage innovation, and promote litigation about the details of the requirements. Despite this, Congress has only slowly moved to allow some use of alternative incentive-based pollution control strategies.[181] Title IV of the 1990 Clean Air Act Amendments began to allow and even encourage market-based regulation with the sulfur dioxide allowance trading scheme to control the creation of acid rain.[182] Nevertheless, the 1990 Clean Air Act Amendments are premised on a medium-specific approach and contain many highly prescriptive requirements, including traditional technology-based mandates.[183]

2. *Congress' Fragmented Environmental Committees*

Congress' fragmented committee structure has often contributed to a focus on a single medium[184] at the expense of looking at the impact on other media. There is some dispute about the exact number of House and Senate committees and subcommittees with extensive jurisdiction over EPA, but all commentators agree that the number is high.[185] Less fragmentation exists in the Senate because its Commit-

177. *See generally infra* Part II.B.

178. *See generally supra* Part I.B.1.

179. *See id.*

180. *See* Ackerman & Stewart *supra* note 38, at 1335.

181. *See id. supra* note 38, at 1335-39, 1364-65.

182. *See* 42 U.S.C. § 7651-7651o (1997) (providing for sulfur dioxide allowance program); *see also* Fiorino, *supra* note 21, at 480.

183. *See* Fiorino, *supra* note 21, at 480; Herz, *supra* note 166, at 175-82.

184. *See* Fiorino, *supra* note 21, at 460-61.

185. *Compare* Steven J. Groseclose, *Reinventing the Regulatory Agenda: Conclusions From an Empirical Study of EPA's Clean Air Act Rulemaking Progress Projections*, 53 MD. L. REV. 521, 536 (1994) (currently, at least 11 standing House and 9 standing Senate committees and as many as 100 of their subcommittees share jurisdiction over EPA); Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves)?*, 54-AUT LAW & CONTEMP. PROBS. 205, 211 (1991) [hereinafter *Congressional Oversight*]; *see also* NAPA, *supra* note 35, at 124-25 (13 House and Senate committees and 31 subcommittees had actual oversight juris-

tee on the Environment and Public Works has responsibility over all major environmental programs except for pesticides issues.[186] In the House, there is much more fragmentation among environmental committees.[187] There are five House Committees that oversee most EPA and other environmental programs,[188] with the Commerce Committee covering the widest range of environmental programs.[189] In addition, there is often overlapping jurisdiction among different House committees.[190] For instance, three committees share authority over groundwater issues. A fourth, Agriculture, has jurisdiction if groundwater contamination by pesticides is implicated.[191] In both chambers, the agriculture committees oversee pesticides policy and tend to favor farmer and grower interests rather than the protection of the public health.[192]

In addition to the major environmental oversight committees, several other committees have jurisdiction over broad issues that include the environment.[193] Most notably, the Senate and House appropriations committees control EPA's budget and, therefore, have an enormous impact on what the agency can actually accomplish.

Because there are so many congressional committees with authority over at least some EPA programs, Congress frequently provides only divided and conflicting directions to the agency. In general, both congressional policymaking and oversight of agency implementa-

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diction during the 104th Congress) (Table 5.1); *see also* DANIEL J. FIORINO, MAKING ENVIRONMENTAL POLICY 64-66 (1995) (listing several House and Senate environmental committees).

186. The Committee's jurisdiction is divided among four major subcommittees. FIORINO, *supra* note 185, at 64-66. In addition, the Water and Power Subcommittee of the Senate Committee on Energy and Natural Resources oversees groundwater policies, and the Subcommittee on Oceans and Fisheries of the Senate Commerce, Science, and Transportation Committee has jurisdiction over oceanic environmental issues. *Id.* at 65; NAPA, *supra* note 35, at 124, 126.

187. FIORINO, *supra* note 185, at 65.

188. The five main House Committees include the: 1) Commerce; 2) Resources, which in 1995 absorbed the environmental jurisdiction of the former Merchant Marine and Fisheries committee; 3) Transportation and Infrastructure; 4) Agriculture; and 5) Science committees. *See generally* David Hosansky, *House Commerce Profile*, 53 CONG. Q. WKLY. REP., Jan. 7, 1995, at 37 (reporting jurisdiction of House Commerce Committee in 1995); *1995 Special Committees Report: House Resources*, 53 CONG. Q. WKLY. REP., March 25, 1995, at 82-83 (reporting jurisdiction of House Resources Committee in 1995).

189. The House Energy and Commerce Committee has jurisdiction over air, toxic chemicals, land waste disposal, drinking water, and groundwater. *See* FIORINO, *supra* note 185, at 65-66.

190. *See id.* at 65.

191. *See id.*

192. *See id.*

193. For instance, the Senate Government Affairs and House Government Operations committees would address specific issues within their jurisdiction that would include the management of various EPA programs. *See id.*

tion of policies are "fitful," unsystematic, and uneven.[194] The legislative process frequently involves compromise agreements to "split the difference," leading to statutory gaps or inconsistencies, and statutes often fail to anticipate many implementation issues.[195] Because congressional environmental committees are especially fragmented (for example, enacting one environmental statute at a time) and write statutes in different subcommittees with overlapping jurisdiction, Congress as an institution cannot easily coordinate potentially overlapping provisions in different environmental statutes.[196] Furthermore, the excessive division of environmental committees' oversight jurisdiction often results in poorly drafted laws. That division has also prevented needed amendments of existing laws because each committee involved in the drafting process is frequently only interested in its piece of the package rather than the good of the whole.[197] Even worse, committee influence over agency policy may not reflect the desires of the entire Congress, especially because members of Congress are often assigned to particular committees if their district has a special interest in the committee's subject matter.[198] Ironically, the House and Senate appropriations committees, which have often been hostile to increased EPA funding,[199] are the only committees in Congress with comprehensive jurisdiction over EPA. All of the authorizing environmental committees have only fragmented jurisdiction over the agency and may not examine the performance of the agency as a whole.[200]

While in 1995 House Speaker Newt Gingrich was able to adopt some rules changes in the House of Representatives that enhance centralized control by House leaders over many substantive areas,[201] he and his conservative Republican colleagues failed to achieve passage of major environmental deregulation bills that proposed to make both

194. *See* CHRISTOPHER H. FOREMAN, JR., SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION 171 (1988) ("Oversight is at heart, then, a process of fitful policy adjustment."); Sidney A. Shapiro, *Occupational Safety and Health: Policy Options and Political Reality*, 31 HOUS. L. REV. 13, 14-15 (1994).

195. *See* Andrews, *supra* note 158, at 530.

196. *See* BREYER, *supra* note 166, at 42.

197. *See* Lazarus, *Congressional Oversight*, *supra* note 185, at 231; Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 AUT-LAW & CONTEMP. PROBS. 311, 357 (1991).

198. *See* Lazarus, *Tragedy of Distrust*, *supra* note 197, at 357; Shapiro, *supra* note 193 at 15.

199. *See* Adam M. Finkel & Dominic Golding, *Working Group Discussions*, *in* WORST THINGS FIRST 197 (Adam M. Finkel & Dominic Golding eds., 1994) [hereinafter WORST THINGS FIRST]; Lazarus, *Congressional Oversight*, *supra* note 185, at 217-18, 230; Lazarus, *Tragedy of Distrust*, *supra* note 197, at 323-30.

200. *See* NAPA, *supra* note 35, at 126.

201. *See* David S. Cloud, *GOP, to Its Great Delight, Enacts House Rules Changes*, 53 CONG. Q. WKLY. REP., Jan. 7, 1995, at 13-15.

significant procedural and substantive changes to the environmental policy area. Gingrich's efforts failed because in 1996 President Clinton won the battle for public support over these issues by attacking Republicans for seeking to weaken most environmental programs and Senate moderates often deserted conservatives in the House.[202]

Furthermore, congressional oversight of EPA has often discouraged innovative reforms within the agency, such as agency efforts to promote cross-media regulation during the mid-1980s.[203] Congress is not well-suited to formulate environmental policies or readjust environmental priorities to reflect new scientific information or evolving policy goals.[204] Congressional oversight has tended to skew agency priorities by forcing the agency to adjust its resources in response to requests by various committees or subcommittees rather than through systematic prioritization.[205] On the whole, Congress often uses the oversight process to achieve short-term political goals or respond to perceived crises by focusing on the "chemical of the month" rather than to encourage broad or long-term review of statutes or programs.[206] In general, Congress may tend to have a short time horizon because legislators are not only concerned with writing statutes, but also with a whole host of political issues.

Hence, EPA's budget primarily reflects political factors and entrenched congressional interests rather than a careful assessment of how money should be spent to achieve the greatest reduction in pollution.[207] In fiscal year 1990, more than seventy percent of EPA's $6 billion budget was spent on two programs: construction of wastewater treatment plants—which are politically valuable sources of jobs as well as environmentally useful—and cleanup of abandoned hazardous waste sites under Superfund—a politically popular environmental issue that many experts believe is not as important a problem as other environmental questions.[208] As a result, only five percent of EPA's budget was available for discretionary spending, and the rest was com-

202. *See* Josh Connelly, *GOP Mostly Thwarted on Environmental Issues*, SEATTLE POST-INTELLIGENCER, Jan. 26, 1996, at A1.

203. Andrews, *supra* note 158, at 545; Lazarus, *Congressional Oversight*, *supra* note 185, at 229; Lazarus, *Tragedy of Distrust*, *supra* note 197, at 359.

204. *See* Andrews, *supra* note 158, at 530-31.

205. Andrews, *supra* note 158, at 545; Lazarus, *Congressional Oversight*, *supra* note 185, at 230.

206. *See* WORST THINGS FIRST, *supra* note 198, at 197; FIORINO, *supra* note 185, at 68-69; Andrews, *supra* note 158, at 545; Shapiro, *supra* note 193, at 25-26.

207. *See generally* F. Henry Habicht II, *EPA's Vision for Setting National Environmental Priorities*, *in* WORST THINGS FIRST, *supra* note 199, at 42-44.

208. *See* Habicht, *supra* note 207, at 42; Charles W. Kent & Frederick W. Allen, *An Overview of Risk-Based Priority Setting at EPA*, *in* WORST THINGS FIRST, *supra* note 199, at 58-60.

mitted to specific programs or media issues.[209] Furthermore, whenever the agency wishes to shift money from one program to another, EPA must obtain Congress' approval. This is a lengthy and difficult process that discourages the agency from promptly responding to changing circumstances and priorities. In addition, the short-term focus of the budget cycle hinders the ability of agencies to engage in long-range planning.[210]

In theory, Congress as a whole should coordinate the efforts of different committees. However, as suggested above, Congress tends to evaluate each committee's work on an ad hoc basis without examining its impact on other committees or legislation. Because it will be difficult to remedy Congress's deeply fragmented institutional structure, the next best approach would be for Congress to authorize EPA to make multimedia tradeoffs within certain legislatively defined limits that protect public health and the environment, and allow for greater public participation in the permitting and regulatory process.[211]

3. *EPA's Single-Medium Organizational Structure*

In addition to fragmentation of congressional committees, EPA's own staff has often inhibited coherent and integrated agency decisionmaking.[212] The EPA's organizational structure encourages the media offices to focus on the medium-specific statutes that created their programs and fosters tunnel vision about environmental issues, retarding efforts at comparative risk assessment and priority-setting.[213]

In 1970, President Nixon created EPA by pulling together several different, largely medium-specific programs.[214] The transition team assigned to create EPA's organizational structure wanted to create an agency integrated across media lines in the long run. However, the team recognized that because EPA had inherited a host of separate single-medium statutes, the agency had to be organized, at least initially, on a mostly medium-specific basis.[215] William Ruckelshaus, EPA's first administrator, believed that it was more important for the

209. *See* Adam M. Finkel, *Should We—and Can We—Reduce the Worst Risks First?*, *in* WORST THINGS FIRST, *supra* note 199, at 11; Habicht, *supra* note 207, at 42.

210. *See* Andrews, *supra* note 158, at 541-43; Bradford C. Mank, *Protecting the Environment for Future Generations: A Proposal for a "Republican" Superagency*, 5 N.Y.U. ENVTL. L.J. 444, 474-75 (1996).

211. *See infra* Part II.C.2.b.

212. *See* NAPA, *supra* note 35, at 126-27.

213. *See id.* at 127; GAO REPORT, *supra* note 9, at 16-17.

214. *See* NAPA, *supra* note 35, at 15; Krier & Brownstein, *supra* note 22; Alfred A. Marcus, *EPA's Organizational Structure*, 54 LAW & CONTEMP. PROBS., Autumn 1991, at 5, 9-21.

215. *See* Krier & Brownstein, *supra* note 22, at 121; Marcus, *supra* note 214, at 22-30, 32.

agency to take action against pollution than to become mired in political battles about the agency's organization.[216] In the end, Ruckelshaus and the other high-level administrators in the early EPA created an agency that was partly integrated across functional lines and partly driven by medium-specific issues.[217]

By 1971, EPA had established functional offices for planning, research and enforcement, but also had created separate Assistant Administrators for Media Programs, such as Air and Water, and for Categorical Programs such as Pesticides, Radiation, and Solid Waste.[218] EPA's attempt to create only two program offices failed as a result of the medium-specific nature of environmental statutes.[219] For instance, EPA first placed both its large water and air programs under a single assistant administrator, but eventually divided these media programs into two offices with separate assistant administrators because their statutory mandates were sufficiently different.[220] While five of EPA's nine Assistant Administrators have functional responsibilities cutting across programmatic lines,[221] the agency's four Assistant Administrators with programmatic responsibilities still largely focus on a single-medium, and their program offices disproportionately influence the agency's culture toward single-medium thinking.[222]

The four major program offices are responsible for developing rules, which most frequently are issued in response to a specific statutory command.[223] Normally, one of the four program offices acts as the lead office in developing a particular rule, and traditionally EPA's separate single-medium offices have thought little about the impacts of their regulations on other media programs.[224] Over the years, EPA has sought, with varying degrees of success, to increase the participation of other program and functional offices in the lead office's deci-

216. *See* Krier & Brownstein, *supra* note 22, at 121; Marcus, *supra* note 214, at 22-30.

217. *See* NAPA, *supra* note 35, at 15; Krier & Brownstein, *supra* note 22, at 121; Marcus, *supra* note 214, at 22-23, 29.

218. *See* NAPA, *supra* note 35, at 15; Marcus, *supra* note 214, at 29.

219. *See* NAPA, *supra* note 35, at 15-17; Marcus, *supra* note 214, at 32-33.

220. Marcus, *supra* note 214, at 32.

221. The Assistant Administrators with cross program responsibilities are: Administration and Resource Management; Enforcement and Compliance Monitoring; International Activities; Policy, Planning, and Evaluation; and Research and Development. *See* NAPA, *supra* note 35, at 16-17; Thomas O. McGarity, *Assessing the Environmental Protection Agency After Twenty Years: Law, Politics, and Economics: The Internal Structure of EPA Rulemaking*, 54 LAW & CONTEMP. PROBS., Autumn 1991, at 57, 65-67 [hereinafter McGarity, *Internal Structure*].

222. The Assistant Administrators for Air and Radiation, for Solid Waste and Emergency Response, and for Water largely focus on a single medium; the Assistant Administrator for Pesticides and Toxic Substances has a somewhat broader scope of authority. *See* NAPA, *supra* note 35, at 16-17; McGarity, *Internal Structure*, *supra* note 221, at 65-66.

223. *See* McGarity, *Internal Structure*, *supra* note 221, at 70.

224. *See id.* at 70, 85-86.

sionmaking and rulemaking processes.[225] Since the late 1980s, EPA has made a concerted attempt to increase consideration of the cross-media aspects of pollution and pollution control technologies, but the agency is far from creating a truly multimedia approach to regulation.[226]

The single-medium focus in EPA is difficult to change because this emphasis runs from the congressional authorizing committees to the assistant administrators who direct media offices and then to media office staff members.[227] Many EPA career managers have a close relationship with congressional committee and subcommittee staff, and both EPA and congressional staff are often more concerned with the specific medium statute within their jurisdiction than with improving the agency's overall priorities.[228] Too often agency staff and managers are preoccupied with short-term problems, consider only a narrow class of options, are too concerned with protecting their program's turf against other departments or agencies, or are too constrained by their own professional training as engineers or lawyers to see the big picture.[229] The EPA's leadership needs to overcome these tendencies toward fragmentation if the agency is to achieve a true multimedia focus.[230]

Reflecting the agency's own implicit acknowledgement of the inability of its single-medium focussed program offices to innovate, EPA in 1995 placed responsibility for Project XL in the agency's Office of Policy, Planning, and Evaluation (the "Policy Office"), rather than in a medium-specific program office.[231] The Policy Office's staff includes

225. *See generally id.* at 70-90 (discussing various aspects of EPA's internal rulemaking structures).

226. *See* GAO REPORT, *supra* note 9, at 18-19.

227. *See* NAPA, *supra* note 35, at 127.

228. *See id.* at 126-27; *see also* GAO REPORT, *supra* note 9, at 32 ("EPA has had difficulty achieving 'buy-in' among the agency's rank and file, which have grown accustomed to prescriptive, medium-by-medium regulation during the agency's 27-year history.").

229. There are six defining characteristics of agencies following the techno-bureaucratic model: 1) people working for a techno-bureaucratic agency often have a *mission orientation* in which they elevate the agency's statutory or general regulatory goals; 2) program office staff often have an *action orientation* in favor of issuing rules rather than waiting for more studies because they are evaluated in part based upon the number of rules issued; 3) staff often have *restricted planning horizons*, or are focused upon short-range problems and do not have enough time for long-range planning; 4) techno-bureaucratic rationality is inclined to narrow options early in the decisionmaking process and tends to be unreceptive to new options that are developed later, resulting in *bounded options*; 5) a regulatory bureaucracy is often intensely *turf conscious* about which regulatory issues fall within its domain; and 6) the thinking of many professional staff is constrained by their *professional perspective* as lawyers, scientists, economists and especially engineers. *See* McGarity, *Internal Structure, supra* note 220, at 8-10.

230. *See* NAPA, *supra* note 35, at 126-27; *see generally* GAO REPORT, *supra* note 9, at 16-17.

231. *See* Steinzor, *supra* note 8, at 10,529.

many regulatory analysts who tend to favor innovative approaches to make regulations more cost-efficient.[232] In early 1997, EPA Administrator Carol Browner reassigned Project XL and the Common Sense Initiative to the newly created Office of Reinvention, which is designed to carry out the agency's new multimedia reforms.[233] In light of the serious budget constraints that federal agencies are likely to face for the foreseeable future, the Clinton Administration is likely to be successful in transforming EPA from a single-medium to a truly multimedia organization only if the agency has the authority to reassign significant personnel and functions from the single-medium program offices to the Office of Reinvention and other multimedia offices.

D. Possible Strategies for Regulatory Flexibility

While in recent years EPA has made some efforts to coordinate its medium-specific programs into a more multimedia approach, both existing statutes and the fragmented congressional committee structure impede the agency's efforts at integration. Further, the threat of prolonged litigation about the legality of regulatory reform initiatives is another obstacle to reform. To solve these problems, it is essential for Congress to enact multimedia reform legislation enabling EPA to take a decisive step toward being a unified agency with the authority to adopt a comprehensive multimedia approach. Part I.D.1 describes the general advantages of such delegation. Part I.D.2 describes the specific forms this delegation ought to take.

1. The Case for Delegation of Greater Authority to EPA

Congress needs to delegate greater authority to EPA to undertake regulatory reform initiatives and issue multimedia permits because the current statutory scheme, oriented toward individual media, is too inflexible. Increasing regulatory flexibility and providing the agency with clear authority for multimedia regulation would encourage the agency to reorganize itself and overcome its current single-medium orientation. Finally, increasing the agency's authority is the only way for the agency to overcome obstacles to regulatory reform and multimedia regulation created by Congress' fragmented committee structure.

The proposed statute and the increased authority it would give to the agency would also encourage EPA to undertake more comprehen-

232. *See* THOMAS O. MCGARITY, REINVENTING RATIONALITY 239-40, 256-60 (1991); Steinzor, *supra* note 8, at 10,529.

233. *See* Lori Tripoli, *Reinventing EPA*, 12 NO. 10 ENVTL. COMPLIANCE & LITIG. STRATEGY 6 (1997); GAO REPORT, *supra* note 9, at 27-28 (discussing EPA's plans for new Office of Reinvention).

sive planning. Because Congress has provided limited or nonexistent statutory authority for conducting comprehensive planning, EPA has tended to take a relatively narrow view of planning and the overall role of the regulatory processes.[234] Congress needs to give EPA greater flexibility to tackle emerging environmental issues, especially the problem of multimedia pollution.

As a functional rather than a constitutional matter, Congress wisely leaves much decisionmaking to agencies because legislative bodies are too busy with political issues, too unwieldy in size and often too fragmented to provide effective direction to administrative agencies.[235] The existing approach to administrative delegations, however, could be more efficient if Congress provided agencies with greater regulatory flexibility in choosing whether, for example, to impose technology-based controls or to use economic incentives.[236]

In addition, EPA can usually promulgate new regulations through notice-and-comment rulemaking much faster than the typical six-to-eight year lead time it takes for Congress to amend major environmental legislation.[237] For instance, in 1986 Congress amended CERCLA legislation with the Superfund Amendments and Reauthorization Act ("SARA"),[238] but has been unable in the last ten years to enact major changes despite the introduction of several bills in Congress and enormous public debate.[239] The ability to rapidly

234. *See* Andrews, *supra* note 158, at 522-23.

235. *See* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORGAN. 81, 95-99 (1985). Although Congressional creation of a general committee for overseeing the regulatory process, development of a regulatory budget that limits the cost of regulation, or establishment of a permanent staff assigned the task of evaluating regulatory programs could overcome problems associated with eliminating administrative delegation, those possibilities are unlikely to materialize because of congressional fragmentation; individual committees or members are unlikely to want to cede such authority to a centralized body. *See* Lazarus, *Congressional Oversight*, *supra* note 185, at 232-37 (proposing reforms to reduce congressional fragmentation and excessive oversight but acknowledging the difficulty of achieving such reforms); Lazarus, *Tragedy of Distrust*, *supra* note 197, at 367-68 (arguing that Congress is unlikely to reduce the amount of oversight over EPA or fix the legislature's fragmented committee structure).

236. *See* Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 328-43 (1987) (arguing that delegation is appropriate, but that the political branches could greatly improve efficiency by directing agencies to use economic incentives rather than centralized prescriptive regulation).

237. *See* Wilkins & Hunt, *supra* note 160, at 514.

238. *See* Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections of 10, 26, 29, 33, and 42 U.S.C.).

239. *See, e.g.*, Allan Freedman, *EPA's Call for Superfund Bill Has Not Dispelled Doubts*, 55 CONG. Q. 173 (1997) (observing that chances for Superfund legislation during 1997 were questionable); James E. Satterfield, *A Funny Thing Happened on the Way to the Revolution: The Environmental Record of the 104th Congress*, 27 ENVTL. L. REP. (Envtl. L. Inst.) 10,019, 10,028-30 (Jan. 1997) (discussing failed efforts to amend CERCLA during 104th Congress). In 1996, Congress did enact new amendments to CERCLA, "The Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996," by attach-

change regulatory methods is essential to keep up with the constantly evolving scientific knowledge of environmental risks and solutions.

2. *Forms of Delegation*

A number of options are available to effect the needed reform. Among these are: enacting a single statute incorporating or taking the place of all other environmental statutes; enacting a general waiver statute permitting EPA to waive statutory requirements when waiver is in the public interest; enacting a statute permitting EPA to use comparative risk assessment to set priorities and allocate resources; and creating outcome-based legislation that would permit EPA to measure its performance by the outcome of its programs. The following section suggests that enacting outcome-based legislation is the most feasible and effective option.

a. Single Statute Reform

Some commentators and environmental groups have recommended transforming EPA into a cabinet level Department of the Environment and adopting a single, comprehensive environmental protection statute within which priorities could be set with greater discretion or upon a broader basis.[240] Some also argue that other agencies with environmental responsibilities such as the National Oceanic and Atmospheric Agency should be merged into a new cabinet level EPA.[241]

As a practical matter, however, these proposals would be difficult to implement. For one, these proposals have stalled in Congress both because some environmentalists believe that comparative risk assessment tends to understate broader public concerns about the risks of many substances,[242] and because industry has often been more concerned with reducing the total burden of regulation than with making existing regulation more efficient.[243] In addition, Congress may adopt

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ing them to the Omnibus Consolidated Appropriations Act. *See* Pub. L. No. 104-208 (Sept. 30, 1996); Buzbee, *supra* note 175, at 10,656-63. While these amendments are significant for banks, lenders, and fiduciaries, they do not represent a major change in CERCLA's overall liability scheme or cleanup procedures.

240. *See* NATIONAL COMM'N ON THE ENV'T, CHOOSING A SUSTAINABLE FUTURE 47-51 (1993) (endorsing proposal for Department of Environment with organic statute); John S. Applegate, *Worst Things First: Risk, Information, and Regulatory Structure in Toxic Substances Control*, 9 YALE J. ON REG. 277, 280, 349-52 [hereinafter Applegate] (discussing Conservation Foundation proposal for cabinet-level Department of Environment and single, comprehensive environmental protection statute, and arguing proposal would provide suitable framework within which to set priorities).

241. *See* Lazarus, *Tragedy of Distrust*, *supra* note 197, at 369-70.

242. *See infra* Part II.B.

243. Before 1995, Congress considered bills that would have created a Cabinet-level Department of the Environment, but House Democratic leaders in 1994 withdrew such a

symbolic legislation that elevates EPA to cabinet level status but does not give the agency greater authority to reallocate resources or enough resources to carry out comparative risk assessment.[244]

As a matter of pragmatic politics, it may be better to delay the consideration of a comprehensive environmental protection statute until Congress first creates a workable program for integrated permits and flexibility for alternative compliance methods. Some critics favor the creation of one-stop permitting that would allow a facility to obtain a single permit for all its land, water, and air pollution activities, but such critics vehemently oppose efforts to create an enlarged EPA that would address all environmental problems by implementing a unified statute that incorporates a single, uniform standard of "unreasonable risk" to health and the environment.[245] These critics may be won over to an integrated pollution control strategy that focuses on integrating risks or controls at a single facility or geographic area and that provides for ample opportunities for public involvement. Part D.2 makes proposals to achieve integrated pollution control at individual sites. If that program goes well, perhaps Congress would seriously consider enacting a broader comparative risk assessment scheme.

A final question is whether it is appropriate to use a single statute to reform the whole environmental law field. A primary goal of environmental law reform ought to be to replace the single-medium approach of several statutes with a single integrated approach to pollution control.[246] Furthermore, enacting a single statute authorizing regulatory experiments and alternative compliance agreements may be the best way to encourage or force Congress to reevaluate the several major environmental statutes. In light of the several years it usually takes Congress to amend a single environmental statute,[247] it is tempting to try to use one statute to reform the entire area rather than to try to amend several different statutes. It is probably easier

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bill when it became clear that it could not be passed without support from conservatives who demanded to add amendments requiring the proposed Department to conduct risk assessments and cost-benefit analysis before issuing regulations. *See, e.g.*, H.R. 3425, 103rd Cong., 2d Sess. (1994); Applegate, *supra* note 240, at 280, 351-52 & n.424 (citing proposed legislation to create cabinet-level Department of Environment); *General Policy: Future of EPA Cabinet Bill Uncertain Following House Vote on Amendment Rule*, 24 Env't Rep. (BNA) 1719 (Feb. 04, 1994); *EPA Cabinet Status*, 24 Env't Rep. (BNA) 1660, 1660-61 (Jan. 24, 1994).

244. *See* Andrews, *supra* note 158, at 579-80.

245. *See* Krier & Brownstein, *supra* note 22, at 127.

246. *See* FIORINO, *supra* note 185, at 68-69; Andrews, *supra* note 158, at 545; Finkel & Golding, *supra* note 198, at 197; Lazarus, *Congressional Oversight*, *supra* note 185, at 230; Shapiro, *supra* note 206, at 25-26.

247. *See* FIORINO, *supra* note 185, at 68-69; Andrews, *supra* note 158, at 545; Finkel & Golding, *supra* note 198, at 197; Lazarus, *Congressional Oversight*, *supra* note 185, at 230.

and faster to give EPA the authority to deviate from existing statutes if a firm submits a compelling alternative compliance plan than to re-examine each individual statute.

Nevertheless, there are valid objections to adopting a single statute as a means to achieve regulatory reform. Any reform effort is likely to cause some confusion by upsetting predictable patterns of regulation and a single statute affecting several different existing statutes is especially likely to create unintended consequences.[248] During the 104th Congress, legislators introduced several single-statute regulatory reform bills that mandated cost-benefit and risk analysis, that might have impacted existing environmental laws, and that could have substantially interfered with EPA's ability to promulgate new regulations or enforce existing ones.[249] While it should be easier for the public to understand a single reform statute than several different ones, a more site-specific, individualized approach to regulation may increase the cost of acquiring information and thereby favor industry at the expense of the general public.[250] After President Clinton successfully blocked comprehensive conservative deregulation efforts, he and Republican leaders were able to compromise on more modest bipartisan reforms of individual statutes, including the Safe Drinking Water Act Amendments of 1996.[251] Accordingly, sometimes it is better to take one successful small step at reform than to fail to achieve one large leap.

In addition, a single-statute reform act is likely to be more general and hence more vague than a series of more specific statutes. In other words, a single statute may be less effective than several more specific ones simply because it tries to cover too many diverse areas of environmental protection. Both NEPA and TSCA are broader than most single-medium statutes, but neither has been terribly effective—perhaps because courts, recognizing that the statutes are so broad as to impose potentially immense and burdensome requirements on

248. *See* William W. Buzbee, *Regulatory Reform or Statutory Muddle: The "Legislative Mirage" of Single Statute Regulatory Reform*, 5 N.Y.U. ENVTL. L.J. 298, 300-02 (1996).

249. *See* Buzbee, *supra* note 248, at 381 & *passim*.

250. *See* Barton H. Thompson, Jr., *The Search for Regulatory Alternatives*, 15 STAN. ENVTL. L.J. vii, xvi (1996); *see also* Buzbee, *supra* note 248, at 370-71 (arguing single-statute reform bills can reduce ability of public to scrutinize agency process and outcome if statute is less transparent than existing statutes); Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1213-15 (1977) (arguing that national environmental groups are usually more effective than local groups because the former have lower transaction costs in representing environmental interests and in raising money); *see also* Mank, *Exception Process*, *supra* note 16, at 306, 319-21 (discussing the different implications of national rulemaking and individualized variances for public involvement).

251. Pub. L. 104-182.

agencies,[252] have tended to read them narrowly. Indeed, the proposed single-statute regulatory reform bills in the 104th Congress were so potentially broad in scope that courts would have faced a difficult task in deciding how to construe them.[253]

b. A General Waiver Statute

By enacting a general waiver statute authorizing EPA to waive any requirement whenever the agency believes it is in the public interest to do so, Congress could empower the agency to modify existing rules without amending the underlying substantive statute that authorizes the specific regulation at issue.[254] Congress could adopt a similar waiver statute that would delegate to EPA the discretion to waive statutory requirements for regulatory flexibility projects that achieved greater or at least equal compliance with existing laws.[255]

For instance, section 101(c) of the Mine Safety and Health Act of 1977[256] authorizes the Secretary of Labor to modify any mine safety standard if she "determines that an alternative method of achieving the result of such standard exists which will . . . guarantee no less than the same measure of protection afforded . . . by such standard, or that the application of such standard . . . will not result in a diminution of safety to the miners in such mine."[257] Mine safety is undoubtedly an important and complex issue. However, the myriad questions raised by the several major environmental statutes—and especially the problem of taking an integrated, multimedia approach that transcends the often narrow, single-medium focus of most existing environmental statutes—raise far more difficult concerns about measuring whether an alternative compliance method provides equivalent protection to the public as well as miners. Furthermore, a general waiver provision that applies to all environmental statutes would clearly affect a far broader range of the national economy than a waiver that only impacts mine safety. Accordingly, it would likely be much more difficult to convince Congress to delegate such a broad range of waiver discretion to EPA. Furthermore, a general waiver statute would not provide sufficient congressional guidance to EPA. A general waiver would not specify which types of alternative compliance methods would be ac-

252. *See* Corrosion Proof Fittings, 947 F.2d 1230-31 (placing burden on EPA to justify TSCA regulation banning use of asbestos); Buzbee, *supra* note 248, at 318-19, 373-75 (arguing that courts have narrowly construed NEPA in part because its language is so broad and vague).

253. *See* Buzbee, *supra* note 248, at 344-48, 367-69, 381.

254. *See* Fiorino, *supra* note 21, at 481 n.159.

255. *See Id.*

256. *See generally* 30 U.S.C. §§ 801-962 (1994).

257. 30 U.S.C. § 811(c) (1994).

ceptable or the minimum level of public safety and participation that would be permittable.

c. *Comparative Risk Assessment*

A third approach would be for Congress to adopt a comprehensive statute that allows EPA to use some type of comparative risk assessment analysis to set priorities and to reallocate agency resources. This would allow the agency to undertake both risk-based priority setting and integrated pollution control measures across environmental media.[258] Since 1987, EPA has undertaken a number of studies that examine the possibilities of using relative risk as a primary criterion for setting priorities among its diverse responsibilities and has found that existing congressional and agency priorities correlate much more strongly with perceived risk than with calculated risk.[259] For example, the environmental and health risks posed by hazardous waste sites tend to be considerably smaller than for pesticide residues, but Congress and various Presidents have provided far greater funding for the former problem.[260] The EPA hopes to use these studies to determine which problems deserve the earliest attention and the greatest alloca-

258. *See* Applegate, *supra* note 240, at 279; Paul S. Wilson & Ted K. Harris, *Integrated Pollution Control: A Prologue*, 22 ENVTL. L. i, iii, viii-x (1992). In 1988, EPA's Science Advisory Board appointed a Research Strategies Committee, chaired by former Deputy Administrator Alvin Alm. Andrews, *supra* note 158, at 554. The Committee issued a report, FUTURE RISK: RISK REDUCTION STRATEGIES FOR THE 1990s, recommending that EPA shift its research priorities from meeting preconceived regulatory imperatives to preventing or reducing environmental risks and anticipating new problems. *See* SCIENCE ADVISORY BD., U.S. ENVTL. PROTECTION AGENCY, FUTURE RISK: RESEARCH STRATEGIES FOR THE 1990s 4, 12 (1988).

259. *See* EPA, SCI. ADVISORY BD., RELATIVE RISK REDUCTION STRATEGIES COMM. REDUCING RISK: SETTING PRIORITIES AND STRATEGIES FOR ENVIRONMENTAL PROTECTION 2, 16 (1990) [hereinafter SAB, REDUCING RISK]; ENVIRONMENTAL PROTECTION AGENCY, COMPARING RISKS AND SETTING ENVIRONMENTAL PRIORITIES: OVERVIEW OF THREE REGIONAL PROJECTS (1989) [hereinafter EPA, COMPARING RISKS]; EPA, UNFINISHED BUSINESS: A COMPARATIVE ASSESSMENT OF ENVIRONMENTAL PROBLEMS (1987) [hereinafter EPA, UNFINISHED BUSINESS]. These developments are described and critically reviewed in Andrews, *supra* note 158, at 553; Applegate, *supra* note 240, at 279 & *passim*; Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 COLUM. L. REV. 562, 563-69 (1992) [hereinafter Hornstein, *Normative Critique*]; Symposium, *Risk Analysis and the United States Environmental Protection Agency*, 21 ENVTL. L. 1321 (1991); Symposium, *Risk Assessment in the Federal Government*, 3 N.Y.U. ENVTL. L.J. 251 (1995); *Setting Environmental Priorities: The Debate About Risk*, EPA J., March/April 1991.

260. *See* Applegate, *supra* note 240, at 279; *but see* Lisa Heinzerling, *Political Science*, U. CHI. L. REV. 449, 466-67 (1995) (reviewing STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993)) (questioning reliability of comparative risk assessment studies); Hornstein, *Normative Critique*, *supra* note 259 (because Superfund sites present concentrated risks that could wipe out an entire family, society can legitimately expend more money on such cleanups than upon higher, but more diffuse risks).

tion of EPA's limited resources and, to the extent that statutes permit, to reorder its priorities accordingly.[261]

During the Bush administration, EPA Administrator William Reilly made comparative risk assessment and its implementation a personal priority.[262] During the Clinton Administration, a National Performance Review Office headed by Vice President Gore issued a report that endorsed risk prioritization, and called for greater emphasis on identifying future risks and avoiding them.[263] Furthermore, EPA sought to shift its resources to high-risk problems[264] and asked its independent Science Advisory Board to revise and update the Reducing Risk[265] study on priority setting issued during the Bush Administration.[266] However, as Part II.B.1 will discuss, environmentalists' potential challenges to science's ability to compare different types of risks may make experimentation with multimedia permits and alternative compliance strategies at individual sites good policy. If those experiments are successful, EPA can then tackle comprehensive comparative risk regulation.

d. Outcome-Based Legislation

To the extent that it is possible for an agency, especially EPA, to measure its performance or the outcome of its programs, Congress should strongly consider giving it considerable autonomy in selecting which regulatory methods to use, as long as the agency achieves the results specified in a statute.[267] In some ways, it is easier for Congress to set performance standards for EPA because the agency regulates pollution that can be measured in quantitative amounts. On the other hand, environmental quality or risk issues often cannot be captured in purely quantitative terms and, accordingly, it is difficult to measure the agency's performance in achieving more subjective goals. There are a number of possible performance measures that Congress could

261. Applegate, *supra* note 240, at 279.

262. *See, e.g.*, William K. Reilly, *Taking Aim Toward 2000: Rethinking the Nation's Environmental Agenda*, 21 ENVTL. L. 1359 (1991); William K. Reilly, *The Turning Point: An Environmental Vision for the 1990s*, 20 ENV'T REP. (BNA) 1386 (Dec. 8, 1989); Applegate, *supra* note 240, at 279.

263. *See* OFFICE OF THE VICE PRESIDENT, IMPROVING REGULATORY SYSTEMS: ACCOMPANYING REPORT OF THE NATIONAL PERFORMANCE REVIEW 53-57 (1993) (recommendation REG07); Jeffrey S. Lubbers, *Better Regulations: The National Performance Review's Regulatory Recommendations*, 43 DUKE L.J. 1165, 1174-76 (1994) (discussing National Performance Review's recommendations for ranking risks and engaging in anticipatory planning).

264. *See* EPA, A PROGRESS REPORT ON REINVENTING ENVIRONMENTAL REGULATION, *supra* note 5, at 10-11.

265. *See* SAB, REDUCING RISK, *supra* note 259, at 5.

266. *See* EPA, A PROGRESS REPORT ON REINVENTING ENVIRONMENTAL REGULATION, *supra* note 5, at 10-11.

267. *See* Wilkins & Hunt, *supra* note 160, at 525-30.

use, including cost-effectiveness, risk reduction, the total amount of pollution released, or the percentage of waste recycled.[268] The PIT Concept Paper appropriately recognized that EPA should first attempt to set performance standards based upon ambient environmental goals, then, as a second-best approach, to establish performance standards using technological achievability as the primary criterion and, finally, to use technology or management-specific standards as only a last resort.[269]

Although the use of outcome-based performance measures may impose additional reporting burdens on the agency, EPA currently has to issue at least thirty-seven annual reports to Congress each year. New legislation discussed below already requires the agency to develop performance measures, so the additional reporting burden may be relatively small.[270] There are strong reasons for Congress to authorize EPA to create pilot programs to test the concept of performance-based standards, or at least to issue a limited number of experimental integrated permits.

The Clinton Administration's regulatory reform initiatives emphasize the use of performance-based standards as a means to increase the cost-effectiveness of regulation and to promote innovative alternative compliance strategies.[271] In particular, the Clinton plan proposes that EPA conduct demonstrations of one-stop multimedia permits using performance-based criteria,[272] and give states and tribes the flexibility to use performance-based programs as part of the NEPPS program.[273] To understand how performance-based standards might work and what they are, it will be useful to examine two recently enacted statutes: the Government Performance and Results Act of 1993 [Performance Act],[274] and the Safe Drinking Water Act Amendments of 1996 [1996 Amendments].[275]

The Performance Act requires agencies to begin developing performance measures by September 30, 1997[276] and then to issue a report on their performance by the year 2000.[277] Because the Performance Act authorizes pilot performance measurement projects for the 1994-96 fiscal years,[278] EPA in its 1994 Five-Year Strategic Plan

268. *See* Wilkins & Hunt, *supra* note 160, at 529.
269. *See supra* Part I.B.2.c.iii.
270. *See* NAPA, *supra* note 35, at 126.
271. *See* CLINTON & GORE, *supra* note 2, at 5-7, 13-14.
272. *See id.* at 26, 40, Appendix A, Nos. 10, 24.
273. *See id.* at 22, Appendix A, No.6.
274. Pub. L. No. 103-62, § 2, 107 Stat. 285, 285.
275. Pub. L. 104-182.
276. *See* 5 U.S.C. § 306 (1994).
277. *See* 31 U.S.C. § 1116.
278. *See* 31 U.S.C. § 1118.

committed itself to "[m]easure performance to assess whether EPA programs and activities are achieving their intended results, and to comply with" the 1993 Performance Act.[279]

Once agencies establish performance-based measurements, Congress would need to reevaluate many existing environmental and other statutes that rigidly define the choice of agency regulatory method. But so far Congress has made only a limited effort to amend existing environmental statutes and expand EPA's ability to use performance-based measures or controls.[280] Recently, however, Congress has been willing to enact some environmental legislation that provides EPA with greater regulatory flexibility and focuses more on results than on prescribing regulatory methods. For instance, in August 1996, the Republican led Congress compromised with Democrats to enact the 1996 Safe Drinking Water Act and repealed a requirement in the Act's 1986 Amendments requiring EPA to set standards for twenty-five different drinking water contaminants every three years, which the agency had failed to achieve in any case.[281] By contrast, the 1996 amendments provide significant regulatory flexibility by allowing EPA to target those contaminants that pose the greatest risk, based on risk assessment and cost-benefit analysis.[282] Furthermore, if EPA concludes that the benefits of any standard promulgated under the new law would not justify the costs to water systems, the agency may issue a less stringent standard, provided that the regulation maximizes health risk reduction at a cost that is justified.[283] Thus, the 1996 Amendments give EPA much more flexibility to select the

279. U.S. ENVTL. PROTECTION AGENCY, THE NEW GENERATION OF ENVIRONMENTAL PROTECTION: EPA's FIVE-YEAR STRATEGIC PLAN 38 (1994) (EPA 200-B-94-002); Wilkins & Hunt, *supra* note 160, at 517.

280. *See* Wilkins & Hunt, *supra* note 160, at 517-18.

281. Under the Safe Drinking Water Act's 1996 Amendments, EPA was supposed to regulate 83 contaminants by 1989, and then regulate another 25 every three years. *Regulatory Changes Under SDWA Consistent With EPA "Program Redirection," Official Says*, 27 ENV'T REP. (BNA) 1039, 1039 (Sept. 13, 1996) [hereinafter *Regulatory Changes Under SDWA*]. By the time of the August 1996 amendments to the Act, EPA had published standards for most of the original 83, but none of the first round of 25. *See id.*

282. *See, e.g.*, Allan Freedman, *Safe Drinking Water Act Amendments*, 54 CONG. Q. 2622 (1996); *New Law Focuses on Worst Contaminants, Provides Financial Assistance to Communities*, 27 ENV'T REP. (BNA) 820, 820 (Aug. 9, 1996) [hereinafter *New Law*]. In choosing which contaminants to place on the master list, EPA must select the substances that pose the greatest public health concern, and must be especially concerned with whether these substances pose special health risks to the most vulnerable groups, such as infants, children, pregnant women, the elderly and seriously ill. *See* Freedman, Safe Drinking Water Act Amendments, 54 Cong. Q. at 2622, 2627. Within five years of enactment and every five years thereafter, EPA must consider whether to regulate at least five chemicals from the master list or even those not on the list, but the agency has the discretion not to regulate any of those contaminants as long as it provides public comment on the issue and is able to justify a decision not to regulate on appeal. The EPA's determination whether to regulate or not regulate is final agency action subject to legal challenge. *See id.* at 2622.

283. *See* Freedman, *supra* note 282, at 2623; *New Law*, *supra* note 281, at 820.

chemicals to regulate and to make tradeoffs between the risks of disinfection byproducts and microbes. It remains to be seen, however, whether Congress will amend other major environmental statutes to give EPA greater regulatory flexibility.

II
ACHIEVING RESPONSIBLE REFORM

Part I of this Article has demonstrated the necessity and desirability of reform and illustrated a number of ways this reform may come to be. But in pursuing this reform agenda, there must be certain safeguards. Part II addresses a number of problems that would arise in implementing reform and proposes solutions. First among these problems is the political issue of delegating significant authority and autonomy to EPA. As Part II.A illustrates, the potential for abuse of such authority is not as great as imagined, and the benefits of giving EPA greater authority to allow alternative compliance strategies far outweigh any disadvantages. Part II.B discusses a number of legitimate concerns regarding the establishment of multimedia regulation. Chief among these concerns are problems with risk assessment, especially of multimedia trading or emissions averaging and public participation, particularly by disadvantaged groups or those at high risk. This section demonstrates how these problems present themselves in Project XL and how EPA has attempted to deal with them. Part II.C demonstrates why EPA's attempts to correct these problems have been inadequate and suggests a number of statutory provisions Congress should enact to ensure that regulatory reform is undertaken in the most responsible manner possible.

A. Concerns About Giving EPA Greater Authority; Solutions to These Problems

1. The Case Against Delegation

a. Nondelegation Issues

Strong political theory arguments exist for significantly restricting the delegation of authority to administrative agencies. Opponents of delegation often argue that vague delegations delegitimize representative governance or suggest that statutory vagueness leads to an overall reduction in public welfare.[284] According to democratic theory, Congress, instead of bureaucrats, ought to make significant policy deci-

284. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST 131-34 (1980); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U. L. REV. 295, 297-312, 314-18, 321-22 (1987); *but see infra* Part II.A.2.

sions and explicitly state those choices in the statutory text.[285] In addition, congressional policymaking ought to strengthen public participation because public officials are supposed to be more accessible to the public than technical experts in a bureaucracy.[286] Moreover, legislative priority setting should eliminate lengthy administrative delays.[287] All of these political theory arguments, however, must face the reality that Congress' large size, its highly partisan deliberations, its fragmented committee structure, and the sheer amount of detail and complexity in the modern world make it nearly impossible for Congress to address issues without delegating substantial responsibilities to administrative agencies.[288]

Despite an effort during the 1970s and 1980s by Justice Rehnquist and some commentators to revive the nondelegation doctrine,[289] the Supreme Court is unlikely to revitalize that doctrine because a strict application of that principle would invalidate numerous statutes.[290] Some scholars have proposed to reformulate the delegation doctrine to make judicial review of delegations more acceptable,[291] but even a modified application of the delegation doctrine would invalidate many popular regulatory programs and, accordingly, would be unacceptable to most members of Congress and the Supreme Court.[292]

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285. Andrews, *supra* note 158, at 520; Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1703 (1995).

286. *See* Wagner, *supra* note 285, at 1703.

287. *See id.* at 1703-04.

288. *See supra* Part I.C.2.

289. *See* American Textiles Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 543-48 (1981) (Rehnquist, J., dissenting) (explicitly relying upon the nondelegation doctrine as a basis for rejecting the statutory delegation at issue); Industrial Union Dept., AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 671-75 (1980) (Rehnquist, J., concurring) (same); 1 Wilkins & Hunt, *supra* note 160, at 541 (discussing revival of nondelegation doctrine during 1970s and 1980s, but arguing that such efforts have proven unsuccessful).

290. Since 1937, courts have usually refused to invoke the delegation doctrine to invalidate broad congressional delegations of power to agencies, concluding such questions ought to be resolved through political mechanisms of representative government. *See* Stewart, *Beyond Delegation Doctrine*, *supra* note 236, at 326.

291. *See* Ernest Gellhorn, *Returning to First Principles*, 36 AM. U. L. REV. 345, 351-53 (1987) (reformulating nondelegation doctrine in terms of public/private goods distinction); David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 365-66 (1987); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1249-60 (1985) (developing test for judicial review of delegated authority).

292. *See* Richard J. Pierce, Jr., *Political Accountability and Delegated Power: A Response to Professor Lowi*, 36 AM. U. L. REV. 391, 400-01 (1987) ("Professor Schoenbrod's proposal would invalidate ninety-nine percent of all present delegations to agencies. . . ."); Stewart, *Beyond Delegation Doctrine*, *supra* note 236, at 327 ("As [Pierce] shows, the Schoenbrod test would invalidate most of the federal regulatory statutes now on the books.").

b. *Agency Bias*

The regulatory flexibility presented by Project XL and this Article could provide opportunities to an agency to make only token efforts to comply with the statute's performance measures. Under section 110 of the Clean Air Act, states are given considerable regulatory flexibility to create an individualized state implementation plan (SIP) to meet or exceed national ambient air quality standards set by EPA.[293] Some commentators have charged that certain states deliberately took advantage of section 110's flexibility to produce "cheater SIPs," and that EPA, often for political reasons, approved SIPs that the agency knew would fail to achieve statutorily mandated attainment requirements.[294] Similarly, it is possible that EPA could deliberately manipulate any statute that grants it greater flexibility, but even under current statutory requirements some agency leaders may either shirk or over-zealously enforce agency mandates.

Although fears that industry will "capture" an agency are often exaggerated,[295] especially in the case of an agency that regulates numerous industries,[296] a greater possibility exists that an agency might either shirk or over-zealously enforce its responsibilities for ideological or political reasons.[297] For instance, during the Reagan Administration, many environmentalists believed that Anne Gorsuch Burford, Administrator of EPA, and James Watt, Secretary of Interior, used their discretionary authority in an effort to circumvent statutory mandates that imposed high costs on industry.[298] On the other hand, during the Carter Administration, the television industry believed that Michael Pertscuk, Chair of the Federal Trade Commission, exceeded the Commission's authority in a moral crusade to improve children's television advertising.[299]

2. *Making Delegation Work*

Ultimately, any system in which Congress delegates significant authority to an agency requires vigilance on the part of Congress. Since President Nixon created EPA in 1970, Congress has vigorously

293. *See* 42 U.S.C. § 7410; Wilkins & Hunt, *supra* note 160, at 529.

294. *See* Howard Latin, *Regulatory Failure, Administrative Incentives, and the New Clean Air Act*, 21 ENVTL. L. 1647, 1689-90 (1991).

295. *See* Mank, *Textualist Interpretation*, *supra* note 133, at 1278-1284.

296. *See id.*

297. *See* Wilkins & Hunt, *supra* note 160, at 546-47 (discussing problem of agency shirking or overzealousness).

298. *See* MINTZ, ENFORCEMENT AT THE EPA at 40-59 (1995) (discussing EPA enforcement and congressional oversight during Gorsuch era); Lazarus, *Congressional Oversight*, *supra* note 185, at 216-17, 226 (discussing congressional oversight during Gorsuch era); Wilkins & Hunt, *supra* note 160, at 532, 547 (discussing Burford and Watt's performance).

299. *See* Wilkins & Hunt, *supra* note 160, at 547.

used oversight hearings to monitor and control the agency.[300] In addition, if an agency fails to meet certain performance targets, Congress could mandate that the agency must implement specific regulatory approaches and establish judicial review procedures to ensure their implementation.[301] On the other hand, Congress should also consider providing explicit severability clauses in case, for instance, an agency cannot meet a statutory deadline, as long as the agency is working to achieve that goal as expeditiously as possible.[302] Even if politically motivated agency officials could misuse a statute, such as Project XL, that authorizes regulatory flexibility, agencies already fail to comply with current statutes that require certain rigid types of regulatory methods.[303] Accordingly, agencies are not necessarily more likely to manipulate a statute that allows regulatory flexibility than current statutes that mandate regulatory requirements. Nevertheless, a regulatory flexibility statute that gives EPA greater discretion to waive statutory requirements and to substitute alternative compliance methods will require both congressional oversight and public involvement to prevent any abuses in favor of politically influential firms.

Furthermore, although it is usually assumed that the electoral process imbues Congress with greater democratic legitimacy than administrative agencies, some commentators argue that delegation of political authority to administrative agencies can actually improve the responsiveness of government to the desires of the electorate; agencies can allow interested parties broader participation than can Congress. For instance, senior administrators, including the head of EPA, may be more accountable to the public on specific issues than most individual members of Congress, despite the fact that senior administrators can potentially serve longer terms than the two-year term of representatives to the House. Senior administrators may be more accountable because they are continuously subject to removal by the President.[304]

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300. *See generally Congressional Oversight, supra* note 184, at 205-39.

301. In the past, Congress has often enacted overly stringent judicial review provisions and must strike a balance between judicial supervision and the need for considerable agency discretion. *See generally* Peter L. Strauss, *Revisiting Overton Park: Political and Judicial Controls Over Administrative Actions Affecting the Community*, 39 UCLA L. REV. 1251.

302. *See* Mank, *Textualist Interpretation, supra* note 133, at 1288.

303. *See supra* Part I.B.1.

304. *See generally* Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and "Fine-Tuning" Regulatory Reforms*, 37 STAN. L. REV. 1267, 1300 & n.65 (1985) (agencies can be more accountable to the public than individual members of Congress or committees); *but see* Mank, *Exception Process, supra* note 16, at 308-09 (arguing that society is better off when Congress as whole enacts legislation providing clear direction for an agency's exercise of discretion).

B. Concerns About Implementing a Multimedia Approach (The Case Against Integration)

1. General Problems with the Multimedia Approach

Although an examination of pollution from an integrated perspective has advantages, some commentators question whether integrated pollution control will really work and are especially worried that it will lead to an unfortunate reliance on the controversial methodologies of comparative risk assessment. Many proponents of comparative risk assessment seek to use primarily quantitative methods to rank all environmental risks and then to reallocate environmental priorities and resources according to this ranking.[305] Critics of comparative risk assessment often argue that a quantitative risk assessment creates a misleading sense of certainty. Critics also suggest that comparative risk assessment focuses too narrowly on expected loss of life and ignores other issues such as the voluntariness of risk, or the relative concentration or dispersion of damage.[306] Furthermore, these critics often contend that such centralized, formal systems of expert decisionmaking have serious flaws because of data limitations, their own use of heuristics, the threat that regulated industries will capture an agency, and the failure to address our inability to compare different types of health risks, such as cancer and neurological damage, or to make value free decisions about choosing pesticides that pose, for instance, greater or lesser harms to consumers or migrant workers.[307] In addition, critics argue that comparative risk assessment and integrated pollution control rely on the false premises of "comprehensive rationality" or "synopticism," and seek to accomplish the impossible task of addressing all the problems and variables in our complex environment.[308]

Furthermore, integrated pollution control schemes raise serious questions about insuring adequate public participation. Proponents of a public approach to environmental decisionmaking frequently maintain that it is appropriate for members of the general public to consider qualitative factors in environmental decisionmaking.[309] For instance, because the risks from Superfund facilities are more geographically concentrated than the risks from radon, which is widely

305. *See* Krier & Brownstein, *supra* note 22, at 120, 137-38.

306. *See generally* Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1073-85 (1990); Hornstein, *Normative Critique*, *supra* note 259, at 610-11; Mank, *Exception Process*, *supra* note 16, at 280-84 (reviewing critiques of risk assessment).

307. *See* Hornstein, *Normative Critique*, *supra* note 259, at 610-17.

308. *See* Krier & Brownstein, *supra* note 22, at 122-26.

309. *See generally* Gillette & Krier, *supra* note 306, at 1073-85; Hornstein, *Normative Critique*, *supra* note 259, at 610-11; Mank, *Exception Process*, *supra* note 16, at 280-84 (discussing "public" approach to risk assessment).

scattered throughout the United States, it may be appropriate for Congress to place a higher priority on Superfund sites even if a cost-benefit or risk analysis would suggest that EPA should allocate more resources to indoor air pollution.[310] Furthermore, critics of comparative risk assessment often argue that proponents are too dismissive of the ability of the general public to make risk judgments without assistance from experts. Those critics point to some evidence that the public is in fact able to distinguish among small, medium, and large risks when responding to surveys that specifically ask respondents to specify how many people are likely to die from a particular cause such as smoking.[311]

Critics of comparative risk assessment sometimes argue that the same problems of measuring the riskiness of various chemicals apply to integrated pollution strategies, which may use comparative risk assessment methodologies at an individual facility level. A controversial issue arises with both cross-media or cross-pollutant averaging or trading because there is a lack of scientific information about the long-term health implications of either type of exchange.[312] Both comparative risk assessment and integrated pollution control may be inappropriate because society does not have enough information about the chemicals involved and the long-term implications of shifting priorities among different agency programs or different media. In particular, very little scientific information exists about the long-term implications of cross-media and cross-pollutant trading.[313] Hence, even if integration is a good policy in the abstract, the crucial question is how far integration should go when substantial uncertainties remain about the risks of many disparate chemicals, or the mechanisms by which chemicals travel through different media to reach the human body.[314]

Substantial uncertainties exist about the risks of most carcinogens. Therefore, many environmentalists would prefer that Congress or EPA ban the trading of different carcinogens and the trading of carcinogens with noncarcinogens, because it is philosophically and scientifically impossible to compare the tradeoffs among different kinds

310. *See* Hornstein *Normative Critique*, supra note 259, at 441.

311. *See Facing Our Fears*, 61 CONSUMER REPORTS, Dec. 1996, at 50-53 (arguing that surveys asking specifically about the numbers of victims show that the public "can distinguish big risks from moderate and little ones.").

312. *See infra* Part II.C.2.a.

313. *See id.*

314. *See generally* Mank, *Exception Process*, *supra* note 16, at 281-89 (discussing problems associated with measuring the risks of different carcinogens and noncarcinogens), 336-37 (discussing limitations in EPA exposure assessments and suggesting potentially troubling implications for minority groups whose consumption patterns may differ from the agency's assumptions about how most people eat, work or live).

of diseases.[315] At the end of the Bush Administration, in 1992, EPA proposed to allow averaging—i.e., trading-off different carcinogens and even noncarcinogens with carcinogens according to a complex weighting system that purported to measure the relative toxicity of various widely used carcinogens.[316] Because of opposition to the Bush proposal by environmentalists, including environmental justice groups, in 1993 and 1994, the Clinton Administration largely abandoned the proposal for averaging of different carcinogens, and also noncarcinogens, by giving states the discretion not to allow such averaging (which most states opposed) and by increasing the scientific burden of proof on industry to justify such averaging. In 1993 and 1994 the Clinton Administration responded to environmentalists' (including environmental justice groups[317]) opposition to the Bush proposal by abandoning the Bush proposal for the averaging of different carcinogens and noncarcinogens. The administration gave states the discretion not to allow such averaging (which most states opposed[318]) and increased the scientific burden of proof on industry to justify such averaging.[319] The Clinton EPA, however, has not definitely prohib-

315. *See* Steinzor, *supra* note 8, at 10,530-32 (discussing concerns about cross-media and cross-pollution trading); *see generally* Mank, *Exception Process*, *supra* note 16, at 281-88 (questioning EPA proposal during Bush administration to allow emissions averaging of different carcinogen and even noncarcinogens because of serious uncertainties about the risks of each carcinogen and broader policy concerns about the ability of society to compare the risks of different chemicals).

316. *See* Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry and Seven Other Processes, 57 Fed. Reg. 62,608, 62,631 (1992) (proposing averaging of different hazardous air pollutants by one industry); Compliance Extensions for Early Reductions, 57 Fed. Reg. 61,970, 61,980-85 (1992) (proposing risk index that assigns weighting factors to 47 different chemicals and allows different carcinogens and noncarcinogens to be averaged based on risk index); Mank, *Exception Process*, *supra* note 16, at 284-85, and especially n.98.

317. *See Witnesses Oppose Averaging, Trading Provisions in HON Proposal at Public Hearing in Louisiana*, 23 Env't Rep. (BNA) 3045 (Mar. 26, 1993) (national environmental groups and local environmental justice groups opposed Bush EPA proposal to allow emissions averaging of different carcinogens at public hearing in Louisiana); Mank, *Exception Process*, *supra* note 16, at 283-88.

318. *See* NESHAP: Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry and Seven Other Processes, 58 Fed. Reg. 53,478 (1993) (proposing to give states greater discretion to disapprove emissions averaging by industry); *States Expected to Avoid Averaging on Air Toxics, Agency's Air Chief Says*, 24 ENV'T REP. (BNA) 1474, 1474 (Dec. 3, 1993); *Plan to Give States Discretion on Averaging of Toxic Emissions Meets Industry Opposition*, 24 ENV'T REP. (BNA) 1464, 1464-65 (Dec. 3, 1993); *see also* Mank, *Exception Process*, *supra* note 16, at 286-88; *but see Final HON Rule Could Cut Toxic Emissions from Chemical Manufacturing By 90%*, 24 ENV'T REP. (BNA) 1883, 1883-84 (Mar. 4, 1994) (some environmentalists fear industry will pressure states to allow averaging of hazardous air pollutants).

319. *See* National Emission Standards for Hazardous Air Pollutants for Source Categories: Organic Hazardous Air Pollutants from the Synthetic Organic Chemical Manufacturing Industry and Other Processes Subject to the Negotiated Regulation for Equipment Leaks, 59 Fed. Reg. 19,402, 19,408 (1994) (limiting emissions averaging of hazardous air pollutants and requiring industry to conduct risk assessment justifying such averaging);

ited the possibility of carcinogenic trading.[320] Indeed, in its Project XL agreement with Intel Corporation's Chandler, Arizona facility, the Clinton Administration effectively approved a limited degree of averaging of different carcinogens by approving the use of a facility-wide aggregate emissions cap for hazardous air pollutants.[321]

2. *Problems as Manifested in Project XL*

While the most pressing problem threatening the success of Project XL is the need for explicit legislative authorization to define EPA's authority to implement the program, there are other problems with XL that either Congress or an EPA with clear delegated congressional authority needs to address. To ensure responsible reform, Congress and EPA need to integrate both meaningful public participation and public safety protections into the program. Part II.B.2 examines the obstacles to this integration and Part II.C presents proposals to achieve the integration of public participation and public health issues into Project XL and similar multimedia regulatory reform initiatives.

Legitimate questions about proposals for cross-media and cross-pollutant trading, and about the need for more effective public participation, have created both internal and external problems in the implementation of Project XL. The EPA's April 23, 1997 Notice of Modification represents the agency's attempt to respond to many of these criticisms.[322]

The failure of EPA to establish a "baseline" for what constitutes superior environmental performance or an acceptable trade among different classes of pollutants or media troubles some commentators. These commentators worry that EPA may allow companies to perform their own risk assessments in lieu of the agency conducting its own, more comprehensive, assessments of the damage emissions cause to ecosystems, their propensity to bioaccumulate, or their harm to broader geographic areas. Hence, these commentators are wary of the "fence-line" assessments for which some industry proposals have called.[323] In addition, some environmentalists worry that proposed trades could cause increases in more toxic chemicals or that increased

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Hazardous Air Pollutants: Proposed Regulations Governing Constructed, Reconstructed, or Modified Major Sources, 59 Fed. Reg. 15,504, 15,563 (1994) (implicitly criticizing earlier proposal from EPA (during Bush administration) to assign weights to many different carcinogens and noncarcinogens); Mank, *Exception Process*, *supra* note 16, at 285-88.

320. *See* Mank, *Exception Process*, *supra* note 16, at 286-88.

321. *See* Mohin, *supra* note 41, at 10,352 n.60 (According to Intel Manager Timothy J. Mohin, "Because the cap limited the aggregate of all HAP [hazardous air pollutant] emissions, critics complained that the mix of chemicals in the total emission stream may change. This condition could potentially result in higher emissions of more toxic chemicals, without violating the aggregate emissions cap.").

322. *See generally* XL Modification, *supra* note 94.

323. *See* Steinzor, *supra* note 8, at 10,531.

emissions of the same pollutant into one medium may cause different health impacts that are not redressed by decreases into another medium. This is especially dangerous for racial or cultural minorities whose eating, working or lifestyle behavior may differ significantly from the hypothetical "average" person EPA uses when it estimates how much a person is likely to be exposed to a chemical or facility.[324] Further, although it would seem difficult for an environmentalist to oppose a regulatory reform initiative that straightforwardly reduces a single pollutant in one medium, such apparent decreases may be deceptive if EPA is likely to impose more stringent controls in the near future.[325]

In addition, critics are concerned about Project XL proposals that allow participants to trade decreased emissions of one aggregate type of pollutant, like volatile organic compounds, for increased emissions of another class of pollutants, like sulfur dioxide and nitrogen oxide, or that trade the same pollutant among different media, resulting in, for example, lower releases into surface water in exchange for higher releases into the air or land. Their concern arises because there is a lack of scientific information about the long-term health implications of both cross-media and cross-pollutant exchanges.[326]

Some environmentalists believe that EPA should only allow emissions caps or averaging that involve carcinogens similar to the Intel agreement if the project proponent conducts a scientific analysis of these chemicals' potential for synergistic impacts, to bioaccumulate, or to cause damage to human life or ecosystems.[327] On the other hand, industry believes that the Project XL process already requires the project proponent to demonstrate that the project will produce an overall benefit to the environment, will not significantly increase the risk to

324. *See id.* (discussing concerns about cross-media and cross-pollution trading); *see generally* Mank, *Exception Process*, *supra* note 16, at 281-88, 336-37.

325. *See* Steinzor, *supra* note 8, at 10,531; *Weyerhaeuser Proposal*, *supra* note, at 1840 (reporting David Hawkins', attorney with Natural Resources Defense Council, criticism that Project XL agreement between EPA and Weyerhaeuser did not achieve significant reductions beyond what law would soon require).

326. *See* William F. Pederson, Jr., *Can Site-Specific Pollution Control Plans Furnish an Alternative to the Current Regulatory Regime and a Bridge to a New One?*, 25 ENVTL. L. REP. (Envtl. L. Inst.) 10,486, 10,490 (Sept. 1995) (arguing that multimedia pollution trading is problematic because society does not know how to set the trading ratio between, for example, releases to air, and releases to water); Steinzor, *supra* note 8, at 10,530-31 (same and citing Merck & Co., Inc. Project XL for Facilities Final Project Agreement Application, Stonewall Plant, Elkton, Va. (July 28, 1995)); *see generally* Mank, *Exception Process*, *supra* note 16, at 281-88.

327. *See* Mohin, *supra* note 41, at 10,353; Steinzor, *supra* note 8, at 10,531. Intel has agreed not to exceed Arizona's air quality guidelines, which are based on protection at one-in-a-million excess lifetime cancer risk, and to use dispersion modeling to predict the impact of introducing new chemicals. Accordingly, it has indirectly limited the health risks of emissions trading. *See* Freeman, *supra* note 125, at 65 n.195.

individuals or populations, or significantly shift risk.[328] Furthermore, industry believes that some environmentalist proposals for greater scientific testing will, as a practical matter, prevent the use of these alternative compliance approaches that produce overall benefits to the environment. Industry also believes that proposals by environmentalists to require comprehensive risk assessments impose an unnecessary burden of proof that exceeds that used in any other environmental area.[329]

Furthermore, critics of Project XL and other reform initiatives often argue that, despite explicit provisions for involving the public,[330] these initiatives do not give the public sufficient opportunities to challenge the use of alternative compliance methods. Most members of the general public and even most environmental advocacy groups are not equipped to address the complex problems of determining the synergistic cumulative risk of multimedia pollution and the implications of cross-media or cross-pollutant exchanges.[331] Before April 23, 1997, Project XL did not authorize EPA to provide technical assistance to the general public, local communities, or public interest groups to enable them to conduct an independent analysis of a project. As Part II.C.2.b.iii shows, Project XL does not require the agency to provide adequate grants.[332] In addition, critics argue that the current XL process does not require that participants or EPA make extensive efforts to achieve consensus among various stakeholders before the agency approves a project.[333]

In the longer run, if Project XL or similar initiatives develop into a regulatory framework in which all major industrial sources of pollution negotiate individual discharge agreements with the government, some environmentalists fear a loss of public control even if community representatives participate in the negotiation. Local groups, on average, cannot represent the national interest in environmental protection as well as national environmental advocacy groups.[334] Environmentalists generally believe that the participation of national environmental advocacy groups in public notice-and-comment rulemaking in the Federal Register is a superior means of incorporat-

328. *See* Mohin, *supra* note 41, at 10,352.

329. *See id.* at 10,353.

330. *See* Steinzor, *supra* note 8, at 10,532-34.

331. *See generally* Mank, *Exception Process*, *supra* note 16, at 340-43 (arguing that Congress should require either EPA or industry to provide technical assistance grants to citizens who wish to challenge requests by industry for site-specific exceptions to national regulations); Steinzor, *supra* note 8, at 10,532-34.

332. *See* Steinzor, *supra* note 8, at 10,534 (discussing disadvantages environmentalists face in evaluating environmental proposals); *see also* Mank, *Exception Process*, *supra* note 16, at 340-43.

333. *See* Steinzor, *supra* note 8, at 10,534.

334. *See* Thompson, *supra* note 250, at xvi.

ing public involvement than individualized or local proceedings in which local advocacy groups usually bear higher transaction costs in terms of organizing, raising money, and educating decisionmakers.[335] Local community groups may not have the time or resources to participate effectively in complex negotiations to develop alternative compliance strategies. For instance, David Matusow, who was the sole community representative on the stakeholder panel during the development of Intel Corporation's new Chandler, Arizona facility, attended seventy of the one hundred four-to-six-hour meetings the company scheduled in the space of ten months. Environmentalists cite this as an example of how site-specific regulatory decisionmaking can place unreasonable burdens on local activists.[336] Furthermore, if Project XL or NEPPS allows state and tribal permitting authorities greater discretion to authorize multimedia permits, some commentators believe that state or tribal agencies are more likely to be captured by industry or weaken environmental protection provisions in an effort to attract industry from other areas with more stringent environmental laws.[337] Other commentators, however, have questioned this "race-to-the-bottom" hypothesis.[338]

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335. *See also* Chemical Mfrs. Ass'n v. Natural Resources Defense Council, 470 U.S. 116, 159-65 (1985) (Marshall, J., dissenting) (arguing that under subsection 301(l) of the Clean Water Act EPA must create separate subcategories through rulemaking for sources of toxic pollutants that claim to possess "fundamentally different factors" than sources in the primary category rather than granting individualized variances that are less subject to public scrutiny); Stewart, *Pyramids*, *supra* note 250, at 1213-15 (arguing that national environmental groups are usually more effective than local groups because the former have lower transaction costs in representing environmental interests and in raising money); Mank, *Exception Process*, *supra* note 16, at 306 (citing Stewart, *supra*), 319-21 (discussing the different implications of national rulemaking and individualized variances for public involvement).

336. *See Regulatory Reform: Participants in Project XL to Meet, Discuss Problems With Stakeholder Process*, 8 DAILY ENV'T REP. (BNA) A-10 (Jan. 13, 1997); *but see* Mohin, *supra* note 41, at 10,348-51 (Intel manager defends Intel's efforts to involve public). Another commentator, however, states that the community advisory panel included not just David Matusow, but also Barbara Knox, a farmer, and Jim Lemmon, an environmental consultant. *See* Freeman, *supra* note 125, n.183.

337. *See* Mank, *Exception Process*, *supra* note 16, at 306 discussing "race-to-the-bottom" thesis that state environmental regulation may be less stringent than national environmental regulation); Rena I. Steinzor, *Unfunded Environmental Mandates and the "New (New) Federalism": Devolution, Revolution, or Reform?*, 81 MINN. L. REV. 97, 177-79 (1996); *see generally* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1210-11 n.1 (citing sources).

338. Revesz and other critics of the "race-to-the-bottom" thesis maintain that interjurisdictional competition produces efficient regulatory results, and that even if such competition results in lower environmental standards, that is because such lowering will enhance social welfare. *See* Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 608-09 (1996) (summarizing "second generation" arguments in favor of decentralized environmental regulation); Revesz, *supra* note 337, at 1229-47 (arguing that competition among states for industry promotes an efficient allocation of industrial activity

Although it is sometimes easier for a local environmental group to stir up public interest in a site-specific issue, such as the siting of an incinerator, than for a national group to develop public concern about a general rule affecting all new incinerators across the nation, the problem with local environmental movements is that their strength is likely to vary considerably from area to area. Accordingly, there will probably be problems of inconsistency if local environmental groups are relied upon to provide public participation.

Sometimes, however, local environmental movements are closer to the interests of the average citizen than national environmental groups, whose leaders are often far more liberal than the average voter.[339] For instance, the Quincy Library Group, a coalition of local environmental organizations and timber companies, was able to reach an innovative agreement that allowed selective logging in national forests in California's Sierra Nevada as a means to create firebreaks despite opposition from many national environmental groups, which argued that the agreement allowed too much logging and that the firebreaks were too large.[340] By a 429 to 1 vote in the House of Representatives, Congress ratified and President Clinton signed legislation approving the agreement. Arguably, this demonstrates that the national environmental groups, which generally favored litigation rather than compromise over the logging issue, were out-of-touch with most voters.[341] Furthermore, the environmental justice movement primarily grew as a series of local movements rather than as the result of planning by national groups, which had often neglected the interests of the poor and minorities.[342] Thus, a focus on site-specific issues

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among states, and that if states may not compete on environmental grounds, they may compete in other undesirable ways); *see also* Steinzor, *Unfunded Environmental Mandates*, *supra* note 337, at 178-79 (questioning the quantum and weight of empirical data in support of the "race-to-the-bottom" thesis that state environmental regulation tends to be less stringent than national environmental regulation).

339. *See* Mark E. Rushefsky, *Elites and Environmental Policy*, *in* ENVIRONMENTAL POLITICS AND POLICY 287-96 (James P. Lester ed., 2d ed. 1995) (discussing whether leaders of national environmental interest groups constitute an "elite" that is overwhelmingly liberal compared to general population and rise of environmental justice movement); *see generally* Helen Ingram et al., *Interest Groups and Environmental Policy*, *in* ENVIRONMENTAL POLITICS AND POLICY, *supra* at 115-45 (discussing membership and views of members of national environmental interest groups).

340. *See* Daniel Sneider, *Blueprint for a Green Compromise*, CHRISTIAN SCIENCE MONITOR, July 18, 1997, at 1 (reporting success of Quincy Library Group in winning support of Congress and President Clinton for selective logging as method to create firebreaks and unsuccessful opposition of national environmental groups); *but see* Alexander Cockburn, *Scarring Forests in the Name of Conservation*, ARIZONA REPUBLIC, July 24, 1997, at B7 (criticizing Quincy Library Group bill for creating ecological disaster by allowing unnecessarily wide firebreaks).

341. *See* Sneider, 339 at 1; *but see* Cockburn, *supra*, note 340 at B7.

342. *See* Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 634-41, 652-70, 683 (1992)

might foster the growth of a grassroots environmentalism that is stronger than the current movement, which is dominated by national environmental organizations.

3. *EPA's Efforts to Fix Project XL*

The EPA has been meeting with representatives of industry, public interest groups, and state regulators to discuss how the agency could improve Project XL. In late September 1996, a number of state environmental commissioners met with EPA Administrator Carol Browner to express concerns about implementation problems with Project XL.[343] In November 1996, EPA sought to respond to these mounting concerns by issuing a series of draft guidance documents addressing the development of Project XL projects, including: 1) stakeholder involvement;[344] 2) the definition of superior environmental performance; 3) principles for regulatory flexibility;[345] and 4) the XL proposal and project development process.[346] In December 1996, participants in a Washington D.C. Bar forum discussed various problems with Project XL and an EPA official from the Policy Office acknowledged that the program had experienced initial difficulties and needed to improve.[347] On January 13, 1997, EPA held a public meeting to address criteria for determining the role of the public and various stakeholders in Project XL and in defining the concept of superior performance.[348] On April 23, 1997, EPA published a Notice of Modification to Project XL that clarifies the agency's resolution of three crucial project issues: 1) the meaning of "superior" environmental performance; 2) the meaning of "regulatory flexibility"; and 3) the role of the stakeholder in the Project.[349]

(contrasting "mainstream" environmentalism, which focuses on legal and scientific specialists, with grassroots environmentalism, which empowers clients); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 785-89 (1993).

343. *See Regulatory Reform: State Environmental Heads to Meet with Browner on Project XL Concerns*, 178 Daily Env't Rep. (BNA) A-10 (Sept. 13, 1996).

344. *See* EPA, *Guidelines for Stakeholder Involvement* (visited Oct. 3, 1997) <http://199.223.29.233/xl_home/Stakeholder_Involvement.html>.

345. *See* EPA, *Principles for Regulatory Flexibility in Project XL* (visited Oct. 3, 1997) <http://199.223.29.233/xl_home/Regulatory_Flexibility.html>.

346. *See* EPA, *XL Proposal and Project Development Process* (visited Oct. 3, 1997) <http://199.223.29.233/xl_home/process_index.html>.

347. *See EPA's Project XL in Need of Adjustments to Ease Participation, Forum Participants Assert*, 27 Env't. Rep. (BNA) 1839, 1839 (Jan. 3, 1997).

348. *See Industry Representatives, State Regulators Wrestle With Project XL 'Performance' Definition*, 27 ENV'T REP. (BNA) 1906, 1906 (Jan. 17, 1997) [hereinafter *Project XL 'Performance' Definition*].

349. *See* XL Modification, *supra* note 94, at 19,872.

a. "Superior" Environmental Performance

The May 23, 1995 Federal Register notice announcing the Project XL program had stated EPA's intent to approve only applicants whose projects would "achieve environmental performance that is superior to what would be achieved through compliance with current and reasonably anticipated future regulation."[350] Even Clinton administration officials, however, conceded that the agency initially failed to provide adequate guidance about what constitutes "superior" environmental performance and some other commentators were far more critical of the agency's efforts in defining environmental performance.[351] Accordingly, EPA's April 23, 1997 Notice of Modification seeks to provide an intelligible definition. The agency has established a two-tiered approach to assessing superior environmental performance that examines both quantitative and qualitative factors.[352]

Tier 1 represents a quantitative benchmark. The benchmark would represent a comparison between the load to the environment that would take place with, and without, an XL proposal.[353] These benchmarks may be based on a per-unit of production basis or on a comparable measure such as the volume of liquid hazardous waste generated by each product.[354] Except in unusual circumstances, an applicant would not receive credit for measures that the applicant had already implemented voluntarily and that would remain in place absent the Project XL process.[355] In addition, the agency seeks to incorporate pollution prevention principles by taking into account any reductions in the use of toxic chemicals or natural resources as inputs into the production process.[356]

The agency will examine the impact of a proposal on environmental loading in each of the three environmental media, but will consider projects that increase pollution in one medium in exchange for lower amounts in another medium "where there is a demonstrable net benefit to public health and the environment."[357] Because it is difficult to precisely measure the tradeoffs among environmental loadings in different media, EPA will require projects to establish, "with an

350. XL Pilot Projects, *supra* note 91, 60 Fed. Reg. at 27,287; *see* Ginsberg & Cummis, *supra* note 91, at 10,061.

351. *See White House Official Says*, *supra* note 147, at 1246 (reporting remarks at Sept. 25, 1996 forum by David Rejeski, spokesman for the White House Office of Science and Technology).

352. *See* XL Modification, *supra* note 94, at 19,874.

353. *See id.*

354. *See id.*

355. *See id.*

356. *See id.*

357. *See id.*

adequate margin of safety, overall superior environmental performance over what would be achieved absent XL."[358] The agency will not approve projects that threaten ecological health or risk-based environmental standards, such as water quality standards under the Clean Water Act.[359] However, as Part II.C.2.a will discuss, the agency will allow applicants to make tradeoffs among different pollutants that contribute to a single environmental problem or among different loadings that contribute to pollution in different media.

As part of its Tier II analysis, the EPA will make a qualitative assessment of whether a project achieves "superior" environmental performance, although the agency will seek to quantify its weighing of factors wherever possible.[360] In addition to examining issues such as environmental loadings or pollution prevention reductions, the agency will examine "the extent to which the project substantially addresses community and public health priorities of concern to stakeholders," including issues such as employee safety or community health patterns that the agency has no authority to regulate.[361] Furthermore, the agency will evaluate the extent to which the applicant will be accountable for actually achieving its goals through either enforceable or voluntary commitments and will assess the firm's past environmental record as a guide to future performance.[362] In unusual cases, EPA may give credit to an applicant for its pre-existing voluntary measures.[363]

b. Stakeholder Involvement

The EPA's May 23, 1995 Federal Register notice defining the XL program emphasized that, in deciding whether to approve a project, the agency would strongly consider "the extent to which project proponents have sought and achieved the support of parties that have a stake in the environmental impacts of the project."[364] The definition of "stakeholder" included both local community groups interested in the immediate impacts of a project, and state, regional, and national organizations concerned with the broader implications of the concepts tested in a particular project.[365] Nevertheless, many commentators criticized the agency for failing to require that community groups participate in the crucial early stages of a project or to provide adequate

358. *See id.*
359. *See id.*
360. *See id.* at 19,875.
361. *See id.*
362. *See id.* at 19,875-76.
363. *See id.* at 19,876.
364. XL Pilot Projects, *supra* note 91, 60 Fed. Reg. at 27,287.
365. *See id.*; XL Modification, *supra* note 94, at 19,877.

resources for meaningful participation by local citizen organizations.[366]

The EPA's April 23, 1997 Notice of Modification organizes stakeholders into three broad categories and provides a distinct role for each group: first, "direct participants" are involved from the early stages of developing a Project XL proposal and have the opportunity to influence the project's details and the agency's ultimate approval or disapproval; second, "informed commentors" can express their views on specific issues without participating intensely in the project's development; and third, the general public has easy access to information during the project's development and implementation.[367] While these three categories of stakeholders are important, the agency emphasizes the paramount importance of the project sponsors and "strongly encourages firms and established non-governmental organizations to partner as co-sponsors of XL projects."[368] For instance, a state citizens' group could serve as a co-sponsor of a project and thereby gain a role in the project that is quite distinct from the three categories of stakeholders.[369] Stakeholders may initiate a proposal, but EPA will consider a formal proposal only if a facility owner or operator voluntarily participates.[370] Accordingly, project sponsors normally play the key role in defining the scope of a project.[371] Furthermore, EPA places much of the responsibility for involving direct participants and commentors on the project sponsors.[372]

When project sponsors submit a proposal, EPA and state environmental agencies initially decide whether it is within the scope of the XL program. Then, if appropriate, they conduct a full review of the proposal.[373] After conducting a review and informally receiving comments from stakeholders who are aware of the initial proposal, EPA responds to the proposal with both initial findings and questions, along with any stakeholder comments, and transmits them to project sponsors and to the general public through its Project XL site on the Internet's World Wide Web.[374] The EPA expects that project sponsors will consult with various stakeholders, especially direct participants, when the sponsors develop their response to the agency's questions.[375] After reviewing the sponsors' response EPA decides

366. *See generally infra* Part II.C.2.b.
367. *See* XL Modification, *supra* note 94, at 19,877-78.
368. *See id.* at 19,878.
369. *See id.*
370. *See id.*
371. *See id.*
372. *See id.*
373. *See id.*
374. See *id.*
375. *See id.*

whether a proposal should proceed as an XL project and posts its decision on the Web site.[376]

Once EPA allows a proposal to be described as an XL project, the sponsors must develop the project into a final project agreement that the agency can approve.[377] It is the responsibility of the sponsors to achieve a final project agreement by negotiating with EPA, states, and various stakeholders, by inviting responses from commentors and by informing the general public.[378]

The April 23, 1997 Notice of Modification grants the project sponsor the primary role in recruiting potential direct participants and commentors, but strongly encourages sponsors to seek stakeholders from economically disadvantaged groups and national environmental justice organizations.[379] Project sponsors retain significant discretion in deciding the size and composition of the direct participant group, although the knowledge that EPA will take into account the adequacy of public involvement in deciding whether to approve a proposal places some constraints on project sponsors.[380] The Notice of Modification allows the project sponsor and direct participants authority to decide the ground rules for stakeholder involvement, including the level of authority vested in direct participant stakeholders, whether advisory, consultative, or decision-making.[381] In addition, the project sponsor and direct participants will determine whether a third-party facilitator/mediator is desirable. The EPA "encourages" but does not require the "use of neutral, local third-party facilitators."[382]

The EPA allows sponsors and direct participants significant discretion in setting ground rules for the role of direct participant stakeholders because the agency believes that there is no single stakeholder model that fits all the circumstances affecting a particular XL project.[383] The Notice of Modification, however, does contain some provisions promoting participation by members of the general public or local environmental groups in the direct participant negotiation process. The EPA will evaluate an XL proposal in part based upon the extent to which the project sponsor has assembled a diverse group of direct participants.[384] The agency strongly encourages, but does not require, the project sponsor to provide training to direct partici-

376. *See id.*
377. *See id.*
378. *See id.*
379. *See id.* at 19,878-79.
380. *See id.*
381. *See id.* at 19,879.
382. *See id.*
383. *See id.*
384. *See id.* at 19,878-79.

pants.[385] The EPA also promised to make its own expertise available to direct participants throughout the project development process.[386]

Furthermore, after environmentalists criticized the agency for failing to provide direct participants with the resources needed to evaluate complex projects,[387] EPA announced that it would make available up to $25,000 per project to provide technical assistance to support meaningful stakeholder involvement.[388] These grants *will not* be made directly to individuals or groups of stakeholders, but will be paid to identified experts for a specific assistance activity.[389] Individual stakeholders may not request the provision of technical assistance; only the direct participant stakeholder group acting as a whole may seek such assistance. Further, they may do so only after exploring the use of local resources.[390] The EPA emphasized the need to minimize the cost of technical assistance grants by the use of "appropriate financial management controls" and the use of innovative, cost-saving approaches such as cooperative or partnership agreements with state or local regulatory agencies, private firms, trade associations, non-profit organizations, or other interested parties who are willing to provide resources to neutral third parties who would carry out technical assistance requests.[391]

The EPA also encourages project sponsors and direct participants to develop ground rules for communicating with commentors and the general public.[392] The agency itself will facilitate such communication by disseminating information to the general public through the Internet's World Wide Web.[393] The agency will post updated drafts of project agreements and other relevant information on its Web site and also will use its Web site to notify commentors directly of the availability of reviewable material.[394] In addition, EPA will convey any comments received by the agency to the project sponsor, direct participants, and the state environmental agency and EPA will respond itself and for the record to significant comments from national environmental and environmental justice organizations.[395]

The project sponsor will submit a "Final Project Agreement" to EPA for its review after the direct participants conclude their stake-

385. *See id.* at 19,879.
386. *See id.*
387. *See infra* Part II.C.2.b.ii.
388. *See* Notice of Modification, *supra* note 94, at 19,881.
389. *See id.*
390. *See id.*
391. *See id.*
392. *See id.* at 19,879.
393. *See id.* at 19,878.
394. *See id.*
395. *See id.*

holder meetings and, if they have decisionmaking authority, vote on the proposed agreement.[396] The EPA will post a copy of the final draft on its Web site, indicate on the Web site that the agency is circulating this draft within the agency for formal concurrence, and convene, at the request of a project sponsor, direct participant stakeholder or commentor, a meeting of these groups to discuss the project and provide feedback.[397] The appropriate state environmental agency must approve the Agreement, but a state's support does not obligate EPA to agree.[398] The EPA asserts its authority to approve ultimately or to disapprove an XL project and will not be bound by the views of any stakeholder group.[399] Nonetheless, the agency emphasizes that it will carefully consider the views of stakeholders, especially those of direct participants who have acquired a thorough knowledge of a project.[400]

Once EPA has approved a proposal, the agency will post the proposed agreement on its Web site and notify commentors about the availability of reviewable material.[401] In addition, the agency will publish in the Federal Register a notice of the availability of the proposal and instructions for receiving a copy.[402] Furthermore, in appropriate cases in which an agreement appears to conflict with an existing regulation, the agency will publish a separate notice inviting public comment about any site-specific rulemaking associated with a proposal that would allow the sponsor to deviate from existing regulations.[403] After receiving comments from the public, the project sponsor, state environmental agency, and direct participant stakeholders, EPA will post its response to significant comments on the Web site and make its final decision whether to approve the proposal.[404] Once the agency approves an XL project, the sponsors implement the project and EPA monitors and evaluates its success in light of voluntary and mandatory requirements in the Agreement.[405]

C. Proposals for Alleviating Concerns About Integration

Any attempt at reforming Project XL and similar multimedia initiatives should address environmentalists' legitimate concerns about integrating meaningful public participation and public health concerns

396. *See id.* at 19,880.
397. *See id.*
398. *See id.*
399. *See id.* at 19,879.
400. *See id.*
401. *See id.* at 19,880.
402. *See id.*
403. *See id.*
404. *See id.*
405. *See id.* at 19,880-81.

into these regulatory relief programs. The previous section of this Article illustrated EPA's efforts to address these concerns; but those efforts are inadequate. Part II.C proposes a comprehensive statute that provides industry with protection from liability as long as it follows legislative parameters, addresses environmentalists' integration concerns, and ensures public participation.

1. General Requirements for Implementing Responsible Reform

The proposed statute would necessarily be somewhat general in nature because it would apply to a broad range of environmental activities and regulations; but it would have several safeguards to ensure public participation and protect the public health from the hazards inherent in comparative risk assessment. The statute would contain clear instructions as to how a permitting agency should conduct stakeholder negotiations and hold a public hearing before approving a project. Thus, there would be careful attention to protecting the role of public participation, including vulnerable minority groups. The statute would describe the instances in which cross-pollutant or cross-media trading is acceptable, and the type of information that an applicant would have to produce to protect the public health. All participants would publish an annual report discussing the impact of their alternative compliance and trading programs on the environment, including any special implications for vulnerable minority groups. Finally, the statute would require EPA to review regional, state, and tribal permitting decisions for national consistency and fairness. The proposed statute would have to be both general enough to cover a broad range of environmental issues and media and detailed enough to safeguard the public health and environment. This specificity would enable the proposed statute to function more effectively than either NEPA or TSCA.

2. Proposals for Responsible Reform

a. Cross-Media and Cross-Pollutant Trading

i. Deficiencies of EPA's Solution

In discussing the quantitative "Tier I" benchmark, the April 23, 1997 Notice of Modification allows applicants to make tradeoffs among different pollutants that contribute to a single environmental problem.[406] In addition, the agency authorizes tradeoffs among different loadings that contribute to pollution in different media.[407] The Notice of Modification provides some answers about the extent to which cross-media or cross-pollutant trading is acceptable, but it

406. *See id.* at 19,874.
407. *See id.*

leaves too many questions unanswered. Congress should provide further guidance to the agency about the extent to which a firm may average different types of pollutants or increase the risk in one medium if there is an expected reduction in multimedia risk.

The Notice of Modification does not directly or fully address all the issues related to the trading of different carcinogens, the trading of noncarcinogens for carcinogens, or the averaging of different loadings across different media. For example, EPA uses the substitution of two noncarcinogens, Volatile Organic Compounds for Nitrogen Oxides, that contribute to a single environmental outcome, the formation of smog.[408] In evaluating these tradeoffs, the applicant must examine how a reduction or increase in a related pollutant will affect unrelated health or environmental issues. For instance, VOCs may not only contribute to smog formation, but also may contain hazardous air pollutants that are carcinogens.[409] The Notice of Modification also allows tradeoffs among different loadings that contribute to pollution in different media "where there is a demonstrable net benefit to public health and the environment."[410] For example, an applicant might propose waste minimization technology that reduces hazardous waste incineration, but also increases waterborne pollutant discharges.[411]

The April 23, 1997 Notice of Modification stated that the agency would not approve projects that create a shifting of risk burden such as the diversion of hazardous air pollutant emissions from stacks affecting the surrounding community to the work area, or that raise environmental justice issues such as reducing the net level of remediation at a waste disposal site in a low-income community.[412] In its May 23, 1995 Notice, EPA had defined "shifting of risk burden" to mean that a "project must be consistent with Executive Order 12,898 on Environmental Justice. It must protect worker safety and ensure that no one is subjected to unjust or disproportionate environmental impacts."[413] Neither the original Notice nor the Notice of Modification attempt to provide a precise definition of the complex issues surrounding the meaning of "environmental justice" or "worker safety."

ii. Proposal for Reform of Cross-Trading

Congress should enact some additional requirements for cross-media or cross-pollutant averaging. A statute could establish a presumption that trades are allowed only if they reduce releases to the

408. *See id.*
409. *See id.*
410. *See id.*
411. *See id.*
412. *See id.* at 19,874-75.
413. XL Pilot Projects, *supra* note 91, 60 Fed. Reg. at 27,287.

more environmentally sensitive medium. The EPA should establish a rule that trading must reduce releases to the more environmentally sensitive medium unless the applicant can show by clear and convincing evidence that its proposal will reduce overall risks despite an increase to a more environmentally sensitive medium. For example, the trading rules might allow air decreases to be exchanged for roughly equivalent water or land waste increases, water decreases to be substituted for similar land waste increases, and prohibit land waste increases unless industry could provide a detailed risk assessment justifying the exchange.[414]

In addition, the proposed statute would require an applicant to justify any trade involving different carcinogens, or a carcinogen and a noncarcinogen, by demonstrating that the trade is more likely than not to decrease the total risk of cancer or only to increase the total risk to the surrounding population by a *de minimis* amount, which environmental agencies usually define as less than a one-in-one-million increase in the lifetime risk of cancer.[415] The applicant should pay for this assessment because it gains the benefits of trading and because Congress is unlikely to provide sufficient funds for EPA to accomplish rigorous testing. In any trading that involves highly toxic or ecologically damaging chemicals, an applicant should conduct a comprehensive assessment of the potential damage trading may cause to ecosystems, how the different mix of chemicals may affect their ability to bioaccumulate, and their harm not just to the immediate area around a facility, but also to broader geographic areas.[416] Furthermore, an applicant should investigate how trading would affect the amount of chemicals that would reach racial or cultural minorities.[417]

Congress should also provide more guidance and democratic debate about the meaning of "shifting the risk burden." Is it ever appropriate to increase the risk of one type of cancer if a tradeoff between different chemicals or releases into different media will reduce the overall risk of cancer?[418] Are tradeoffs in risks to different population groups such as consumers and workers ever appropriate if the overall risk is significantly smaller?[419] It is not surprising that EPA does not

414. *See* Pederson, *supra* note 326, at 10,490.

415. *See generally* Mank, *Exception Process*, *supra* note 16, 332 (observing that environmental agencies typically seek to achieve a lifetime cancer risk of less than one-in-a-million), *but see id.* at 281-88.

416. *See* Steinzor, *supra* note 8, at 10,531.

417. *See* Steinzor, *supra* note 8, at 10,531; *see generally* Mank, *Exception Process*, *supra* note 16, at 281-88, 336-37.

418. *See generally* Donald T. Hornstein, *Lessons from Federal Pesticide Regulation on the paradigms and Politics of Environmental Law Reform*, 10 YALE J. ON REG 369, 441 (1993). (discussing problems with comparing risks in different subpopulations).

419. *See id.*

fully address these sensitive issues. Only Congress has the democratic legitimacy to address the hard questions involved in shifting risk burdens, but in light of its fragmented structure and propensity to delegate difficult health issues to agencies, Congress is unlikely to confront such dilemmas.[420] Even if Congress does not deal with the problem of risk shifting, the proposed statute should provide better guidance to EPA and Project XL sponsors about the permissible limits of cross-media and cross-pollutant trading.

b. Protecting Public Participation

i. The Deficiency of EPA's Selection of Stakeholders

The Notice of Modification gives project sponsors too much discretion in selecting direct participants despite encouraging sponsors to select at least some direct participants from among low-income or national environmental justice groups.[421] The amount of discretion that project sponsors possess in selecting direct participants is disturbing because direct participants enjoy greater opportunities than mere commentors or the general public in shaping a proposal during its crucial early stages.[422] During the early stages of a typical Project XL, only direct participants attend meetings defining the scope of a project.[423] Furthermore, only direct participants are entitled to receive technical assistance grants from EPA.[424] There is a huge difference between commenting on a completed project and directly participating in creating it.

According to the Notice of Modification, EPA may reject a project if the agency is dissatisfied with how a sponsor has selected direct participants;[425] but, as a practical matter, the agency is likely to exercise its veto only in extreme cases in which a sponsor has deliberately excluded important community groups. In most cases, if a sponsor includes some community groups but excludes others as "redundant," the agency will be unlikely to reject a proposal that otherwise meets the agency's criteria. Accordingly, project sponsors can wield enormous power by selecting community groups that are more likely to favor the sponsor's viewpoint and by excluding those that may be less amenable to industry's positions. The Notice of Modification fails to provide adequate guarantees that sponsors will select likely project opponents as direct participants even though such groups may be bet-

420. *See supra* Part I.C.2.
421. *See* XL Modification, *supra* note 94, at 19,878-79.
422. *See supra* Part I.B.2.d.
423. *See* XL modification, *supra* note 95, at 19,878-79.
424. *See id.*
425. *See id.*

ter able to point out a project's deficiencies than the groups that sponsors would prefer.

Industry might argue that a sponsor ought to be able to exclude a group that is so clearly opposed to a project that it does not have an open mind on the subject. Any danger of obstructionism can be minimized, however, if EPA or a relevant state agency selects a diverse group of direct participants and the group operates under majority voting rules. If a group is obviously hindering progress, the majority can refuse to accede to unreasonable requests. There might even be procedures for removing a direct participant if a supermajority of the other direct participants, perhaps three-fourths, petitions the appropriate agency and justifies why the extraordinary remedy of exclusion is appropriate.

In addition, the Notice of Modification effectively allows project sponsors to determine procedural ground rules. The Notice of Modification grants the project sponsor and direct participants the authority to decide the ground rules for stakeholder involvement, including the level of authority vested in direct participant stakeholders, whether advisory, consultative, or decisionmaking.[426] As a practical matter, sponsors are unlikely to cede decisionmaking power to direct participants and will try to select direct participants who are willing to yield most authority to the sponsor. Even if a sponsor selects a few visible opponents as direct participants, a sponsor is likely to ensure that a majority of direct participants will select an advisory or consultative approach favorable to the sponsor.[427] While EPA is probably correct that direct participants do not need to possess decisionmaking authority over every XL project, allowing project sponsors to handpick direct participants with minimal oversight by the agency will likely prevent any project sponsor from giving direct participants decision-making authority. The EPA, a state agency or another neutral party ought to select direct participants.

Finally, the Notice of Modification gives the project sponsor too much discretion to decide whether mediation is appropriate. Under the Notice of Modification, the project sponsor and direct participants will determine whether a third-party facilitator/mediator is desirable; EPA "encourages" but does not require the "use of neutral, local third-party facilitators."[428] Because mediation can be expensive and time consuming,[429] most project sponsors will likely oppose its use

426. *See* XL Modification, *supra* note 94, at 19,879.

427. *See* XL Modification, *supra* note 94, at 19,879.

428. *Id.*

429. *See* Bradford C. Mank, *The Two-Headed Dragon of Siting and Cleaning Up Hazardous Waste Dumps: Can Economic Incentives or Mediation Slay the Monster?*, 19 B.C. ENVTL. AFF. L. REV. 239, 279-80 (1991).

even if the process might facilitate a dialogue with community groups. The use of mediation does not guarantee that community groups will be able to bargain equally with industry. However, if a facilitator helps weaker participants to understand better the issues at stake, mediation may create a more equal playing ground among groups with vastly different resources and technical knowledge.[430] Another factor may make mediation less likely to succeed. Sponsors are unlikely to select direct participants that would threaten the sponsors dominant role in the project. While mediation is not a panacea for solving environmental problems,[431] independent direct participants who are not hand-picked by the sponsor ought to decide whether third-party facilitation is appropriate to improve public participation in an XL project.

ii. Proposal for Ensuring Proper Stakeholder Involvement

The EPA's approach does not sufficiently protect the public's interest in having a wide range of groups participate in the development of proposals. Instead of allowing sponsors to select direct participants, Congress should require that EPA or a designated state or tribal permitting authority play a significant role in assembling a diverse group of stakeholders to serve as direct participants in the development of the proposal. There are several ways to select the members of the stakeholders group, especially direct participants. Congress could specify the types of people who should be selected, including technical experts, local politicians, or members of community or public interest groups. Alternatively, Congress could delegate this decision to EPA to fit individual circumstances. Furthermore, the statute might require that the local community elect a certain percentage of the direct participant members. In addition, Congress might give larger voting rights to those most exposed to risk from the facility or require the use of proportional voting techniques that enhance the ability of racial or ethnic minorities to win a seat on the direct participants' group.[432] As a practical matter, there probably should be some limit on the size of direct participants group, perhaps at most twenty members, to allow for meaningful discussions and negotiations.[433]

In addition, Congress should determine at least some of the ground rules for the relationship between sponsors and direct participants. Congress should not give any individual direct participant a veto over the process because that individual or group may not suffi-

430. *See id.*

431. *See id.*

432. *See* Mank, *Risk-Based Representation*, *supra* note 103, at 410-19 (proposing risk-based representation on local siting boards and discussing the use of proportional voting techniques to enhance minority representation).

433. *See* XL Modification, *supra* note 94, at 19,879.

ciently represent the public interest. It may be appropriate in some cases, however, to give high risk residents a weighted vote that is greater than those at lower risk. Congress should create a strong presumption that EPA will reject any proposal if a majority of direct participants opposes the project; the agency on its own would likely come to the same result.

The more difficult issue is ensuring thorough discussion of issues and meaningful participation by a wide range of groups without making the process unnecessarily burdensome. In theory, the presence of a neutral, third-party facilitator could help to assure that all direct participants have a meaningful opportunity to participate. On the other hand, some commentators argue that the use of facilitators does not usually address fundamental differences in power or knowledge among different parties.[434] Because some sponsors and direct participants may work well together without the need for a neutral, third-party facilitator, industry would likely argue that mandatory mediation is unnecessarily coercive and expensive. The EPA's encouragement, but not requirement, of the use of third-party facilitators is reasonable.[435]

Nevertheless, Congress could foster the use of appropriate mediation by providing EPA with money to train a pool of facilitators to be sensitive to concerns such as environmental justice and health. If EPA has a stake in training mediators it will be more likely to encourage their use. Although use of a third-party facilitator can improve each participant's understanding of other parties, a mediator cannot normally eliminate the unequal bargaining power caused by financial or informational disparities.[436] Accordingly, the presence of a mediator is not a substitute for providing one or more stakeholder groups with a technical assistance grant that would allow them or the agency to hire an independent expert to assess both the applicant's proposal and, to a limited extent, the agency's evaluation.

To encourage meaningful participation by low-income and national environmental justice groups, Congress should require that all XL Final Project Agreements examine both the health and *social* impacts that may reasonably be attributed to the project. For large projects having significant environmental and social impacts, the statute would require the sponsor, in conjunction with the direct participants, to write a fifteen to twenty-five page assessment similar to an Environmental Assessment under the National Environmental Policy Act, but not as extensive as a lengthy Environmental Impact State-

434. *See, e.g.*, Mank, *Mediation*, *supra* note 429, at 279-80.
435. *See* XL Modification, *supra* note 94, at 19,879.
436. *See* Mank, *Risk-Based Representation*, *supra* note 103, at 408.

ment.[437] Under NEPA, agencies usually must address social impacts that directly arise from a project's environmental impacts, but need not evaluate more indirect or diffuse social consequences.[438] A similar standard would apply to a sponsor's Project XL application as a means to require adequate discussion of socio-economic impacts without burdening sponsors with tangential issues. In light of Executive Order 12,898's requirement that federal agencies address concerns about environmental justice, however, an applicant should discuss the extent to which its project may adversely affect minorities or low-income residents even if its proposal would only marginally add to an existing disparity problem.[439]

iii. Deficiencies in EPA's Approach to Technical Assistance Grants

The EPA's proposals for training and small technical assistance grants (TAG) of up to $25,000 for XL project are positive steps, but do not go far enough to redress the limited funds most local community groups have at their disposal compared to what industry will in many cases spend on experts. Furthermore, the agency's restriction of grants to requests by the entire group of direct participants would prevent individual direct participants from requesting grants that might address important concerns and may especially harm low-income and national environmental justice groups the agency claims it wants to encourage to participate in the Project XL process. The EPA's requirement that the agency directly hire and pay neutral, third-party experts rather than allowing direct participants to select or pay their

437. *See* DANIEL R. MANDELKER, NEPA LAW AND LITIGATION §§ 7.10-7.11 (1984 & 1991 Supp.) (discussing "environmental assessments" and "environmental impact statements").

438. *See generally id.* at §§ 8.35-8.46.

439. *See generally* Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994) (requiring federal agencies to consider whether environmental regulations or actions disproportionately affect poor people or racial minority groups); Mank, *Risk-Based Representation*, *supra* note 103, at 334-44 (reviewing empirical evidence regarding whether environmental inequities exist concerning various racial minority groups and the poor). The Environmental Appeals Board has held that EPA has discretionary authority pursuant to its omnibus authority within certain statutes to go beyond the public participation requirements in 40 C.F.R. Part 124 to address environmental justice issues. *See In re: Envotech, L.P.*, 1996 WL 66307 (EPA 1996) at 14 (holding that EPA has authority under the Safe Drinking Water Act's Underground Injection Control regulations, 40 C.F.R. 4, 144.52(a)(9), to provide additional public comment to address environmental justice issues); *In re Chemical Waste Management of Indiana, Inc.*, 1995 WL 395962 (EPA 1995), at 5-6 (holding EPA has authority under 40 C.F.R pt. 124 to provide additional public participation opportunities and has authority under RCRA's omnibus clause, § 3005(c)(3), 42 U.S.C. § 6925(c)(3), to add additional permit conditions to address health concerns that threaten low income or minority communities). In addition, EPA has modified RCRA's public participation requirements to provide earlier opportunities for public involvement, even before an applicant submits a permit application, to make it easier for the public to raise environmental justice concerns. *See* 60 Fed. Reg. 63,417, 63,420-21 (1995).

own experts is somewhat questionable, but the agency does have legitimate concerns about maintaining tight control of monies and preventing potential conflicts of interest.

One must be somewhat skeptical of how EPA is likely to implement its TAG program for Project XL based on its history with similar programs. For instance, CERCLA section 117(e) provides for technical assistance grants of up to $50,000 for any group or individual affected by a release or threatened release at any abandoned hazardous waste facility that is listed on the National Priorities List under the National Contingency Plan.[440] The EPA, however, has awarded relatively few grants under this statute.[441] The General Accounting Office has criticized the program's administrative requirements for being overly burdensome[442] and by its own admission the agency has made it difficult for local citizens or environmental groups to win these grants because of unnecessary "restrictions, complexity, costs, and red tape."[443] For instance, the application must contain a three-year itemized budget and a detailed scope of work narrative.[444] In addition, community groups must ordinarily supply matching funds of twenty percent of the total grant unless they obtain a waiver.[445] Community organizations must also meet a number of administrative requirements, including being an incorporated nonprofit organization and filing quarterly progress reports and yearly financial reports.[446]

In theory, EPA's process for evaluating grant applications is fair, but the agency imposes too many complex demands on community organizations that cannot afford to file sophisticated applications. The agency evaluates grant applications based on a five-criteria, weighted 100 point scoring system that includes: 1) the site's risk (thirty points); 2) the applicant's ability to represent the public (twenty points); 3)

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440. *See* 42 U.S.C. § 9617(e) (1997); 40 C.F.R. §§ 35.4000-35.4130.

441. *See* Deeohn Ferris, *Communities of Color and Hazardous Waste Cleanup: Expanding Public Participation in the Federal Superfund Program*, 21 FORDHAM URB. L.J. 671, 679 (1994) ("a mere 119 grants have been awarded for over 1200 NPL sites.").

442. *See* GAO, EPA's Superfund TAG Program: Grants Benefit Citizens but Administrative Barriers Remain (Nov. 1992); EPA's Superfund TAG Program: Grants Benefit Citizens but Administrative Barriers Remain: Hearing Before the Subcomm. on Investigations and Oversight of the House Comm. on Pub. Works and Transp., 101st Cong., 1st Sess. (1992) (statement of Richard L. Hembra, General Accounting Office); Ferris, *supra* note 441, at 678-79.

443. 4 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: HAZARDOUS WASTES & SUBSTANCES § 8.9.C.3.b, 617-18 n.133 (1992) (quoting 1989 EPA Superfund Management Rev. at 5-16); *see also* Ellison Folk, *Public Participation in the Superfund Cleanup Process*, 18 ECOLOGY L.Q. 173, 199 n.175 (1991) (discussing restrictions on TAG grants).

444. *See* Ferris, *supra* note 441, at 679-80.

445. *See* 40 C.F.R. §§ 35.4085(a) (20% matching fund requirement), 35.4090(b) (waiver provision).

446. *See* 40 C.F.R §§ 35.4020(b) (TAG recipient must be incorporated nonprofit organization), 35.4110(a)-(b) (requiring quarterly progress and yearly financial reports).

how the group plans to use its proposed technical advisor (twenty points); 4) the ability of the applicant to inform the public (twenty points); and 5) the economic or environmental threat the site poses to group members (twenty points).[447] While these criteria are reasonable in theory, it is often difficult for community groups to address complex issues such as a site's risk or economic impacts without a technical advisor, placing them in a classic Catch 22 situation: they may not be able to get a grant for a technical advisor unless they have a technical advisor to fill out the application.[448]

If EPA provides a grant, another burdensome requirement for community groups with small budgets is that the agency does not give a lump-sum grant to successful applicants, but instead reimburses them for their actual expenses, which means the group must submit receipts before being reimbursed.[449] Alternatively, EPA should provide an up-front grant to a group and should cap any administrative costs claimed by a recipient and require a recipient to submit receipts to prevent recipients from adopting a "blank check" mentality. This procedure would lessen the administrative burden on poorly funded environmental groups and control the costs of the TAG program.

iv. Proposal for Proper Technical Assistance Grants

To allow for meaningful participation by all direct participants, Congress should either provide for significantly larger public funding than $25,000 for each project or require that industry pay for part or all of such technical assistance grants to direct participant stakeholders so EPA or a community group can hire independent experts to assess the applicant's proposal.[450] In addition, the proposed statute would allow individual direct participants to request technical assistance grants to study the impact of an XL project on particular ethnic, racial, or income groups, or local communities if there is plausible evidence to believe that there may be an impact on such a group that is different in degree or kind than on the general population, or to disseminate information to the public.[451] Furthermore, EPA needs to simplify the grant application process to make it accessible to local community groups. The statute might incorporate elements of the EPA scoring system for awarding grants, but also direct EPA to pro-

447. *See id.* at 35.4035(a)-(5) (listing five criteria).

448. *See* Ferris, *supra* note 441, at 679; *see generally* JOSEPH HELLER, CATCH 22 (1955) (regarding the absurdity of war and circular bureaucratic requirements).

449. *See* 40 C.F.R. § 35.4080; Ferris, *supra* note 441, at 682.

450. *See* Mank, *Exception Process*, *supra* note 16, at 340-41 (proposing either EPA or industry provide technical assistance grants to allow public interest groups to hire technical experts); Steinzor, *supra* note 8, at 10,535; *see supra* Part I.C.3. (discussing issue of agency capture).

451. *See* XL Modification, *supra* note 95, at 19,879, *supra* note 95, at 19,880.

vide assistance to grant applicants that lack the financial resources to even fill-out the grant application.

v. Deficiencies in EPA's Provision for Public Hearings

The April 23, 1997 Notice of Modification states that EPA will publish in the Federal Register a notice of availability regarding draft final project agreements and any proposed site-specific rulemaking associated with an agreement. It also directs EPA to provide an opportunity for public comment, but does not require the agency to hold a public hearing regarding these agreements.[452] As a matter of practice, however, EPA has given the public the opportunity to request public hearings when the agency has promulgated site-specific rules for a facility or announced draft final project agreements.

The submission of public comments in response to a notice in the Federal Register or a posting on EPA's Project XL web site can allow commentors to raise some concerns, but does not permit citizens to interact with each other in the same room, present their concerns face-to-face, or cross-examine industry or EPA experts. On the other hand, public hearings can be quite costly and time consuming for both the agency and industry. A possible compromise solution would provide for the submission of written comments by the public and then would allow agency staff to cross-examine the industry on behalf of the commentor, which is a common practice when public comments are received about an environmental impact statement (EIS) written pursuant to the National Environmental Policy Act.[453]

Currently, different environmental statutes and regulations have different requirements for public hearings and the use of formal administrative procedures. During the late 1970s, some courts interpreted the reference to a "hearing" in Section 402(a) of the Clean Water Act to require formal administrative hearings if an interested party requested such a hearing, despite the absence of an explicit mandate in the statute.[454] As a result, EPA in 1979 promulgated the current Part 124 regulations requiring the agency to provide upon re-

452. *See* Site-Specific Rulemaking, *supra* note 117, 62 Fed. Reg. 15,304; EPA, Project for HADCO Corporation, *supra* note 116, 62 Fed. Reg. at 3,508.

453. NEPA does not require that agencies provide for cross-examination of agency personnel responsible for drafting an EIS. *See* 40 C.F.R. § 1506.6 (listing public involvement requirements for NEPA). Nevertheless, agencies are generally free to impose additional procedural requirements on themselves and Congress may impose "hybrid" rulemaking procedures, including cross-examination, although courts may not impose procedures beyond those required by statute. *See* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978).

454. *See* Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 877 (1st Cir. 1978); Marathon Oil Co. v. EPA, 564 F.2d 1253, 1263-64 (9th Cir. 1977); United States Steel Corp. v. Train, 556 F.2d 822, 833 (7th Cir. 1977); Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two, 61 Fed. Reg. 65,268,

quest a formal evidentiary hearing under Section 554 of the Administrative Procedure's Act for any NPDES permit decision to grant, deny, or terminate a permit for cause.[455] These requirements apply only to permit decisions conducted by EPA officials; states and tribes are not required to conduct formal adjudicatory hearings.[456] In addition, formal adjudicatory procedures apply to a decision to terminate a permit for a hazardous waste treatment, storage, or disposal facility issued under Section 3005 of RCRA.[457] By contrast, permits issued or denied under RCRA Subtitle C, the Underground Injection Control (UIC) program of Part C of the Safe Drinking Water Act, or the Prevention of Significant Deterioration (PSD) program under Part C, Title I of the Clean Air Act, do not require formal "on the record" hearings unless such permits have been consolidated for purposes of permit issuance with an NPDES permit for which the agency has granted an evidentiary hearing.[458]

The EPA has recently proposed to eliminate formal evidentiary hearings for issuance or denial of NPDES permits under the Clean Water Act because the agency believes they are not required by the Act, and that such procedures are not needed to protect the due process rights of permittees or other interested parties.[459] The EPA contends that court decisions from the 1970s requiring formal adjudicatory hearings are no longer good law in light of more recent cases that require such procedures only if a statute explicitly mandates them.[460] In addition, the agency maintains that formal hearings are not needed to protect the due process rights of permittees or other interested parties under *Mathews v. Eldridge's*[461] three-part-test for deciding which administrative procedures are required by the due pro-

65,276 (1996) (discussing Clean Water Act's requirement for formal adjudicatory procedures) [hereinafter Amendments to Streamline].

455. *See* 40 C.F.R. part 124 §§ .71-.91 (subpart E); Amendments to Streamline, *supra* note 454, at 65,276; 44 Fed. Reg. 32,854, 32,855 (June 7, 1979); *see generally* Gilbert M. Zemansky & Richard O. Zerbe, Jr., *Adjudicatory Hearings as Part of the NPDES Permit Process*, 9 ECOLOGY L.Q. 1 (1980).

456. *See* 40 C.F.R. § 123.25 (1997); Amendments to Streamline, *supra* note 454, at 65,281; Zemansky & Zerbe, Jr., *supra* note 455, at 3.

457. *See* Amendments to Streamline, *supra* note 454, at 65,276; 40 C.F.R. §§ 124.71, 270.43 (1997).

458. *See* Amendments to Streamline, *supra* note 454, at 65,276; 40 C.F.R. § 124.71(a).

459. *See* Amendments to Streamline, *supra* note 454, at 65,276. The EPA would continue to hold formal adjudicatory hearings in those rare cases in which it terminates an NPDES or RCRA permit. *See id.* at 65,279 n.3.

460. *See* Amendments to Streamline, *supra* note 454, at 65,276-77; Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477, 1482-83 (D.C. Cir. 1989) (holding that amendments to RCRA § 3008 do not require formal adjudicatory hearings); Buttrey v. United States, 690 F.2d 1170, 1174-76 (5th Cir. 1982) (holding Clean Water Act § 404 does not require formal adjudicatory hearings).

461. 424 U.S. 319 (1976).

cess clause.[462] As a matter of policy, EPA argues that formal evidentiary hearings are too time-consuming, taking an average of eighteen to twenty-one months to resolve, including completion of the appeals process, and have led to significant delays in the issuance of permits.[463] By contrast, informal appeals for NPDES, RCRA or Safe Drinking Water Act permits average under nine months.[464] Furthermore, in only twenty percent of the cases for which the agency has data did the formal evidentiary hearing and appeals process result in a modification of the permit, and in only one case did the hearing itself result in the modification.[465] In most cases, any modification of the permit results from informal settlement negotiations between the Regional Office and the permittee.[466] Because of the lengthy formal hearing process and the greater prospects for success through informal negotiations, even when an interested party requests an evidentiary hearing, the party usually withdraws its request, settles the issues without a hearing, or the EPA regional administrator denies the request for a hearing.[467] Thus, EPA contends that eliminating formal adjudicatory hearings would save time and money[468] and would not significantly weaken the due process rights of permittees and other interested parties.[469]

A related issue is what procedures are appropriate when a project sponsor considers new activities that may be a significant departure from the final project agreement with EPA. On January 24, 1997, Maryann Froelich, Director of EPA's Office of Policy development, issued a Memorandum on New Activities and Significant Departures in XL Projects After Project Selection.[470] According to the Memorandum, "Where the new activity is not a significant departure from the original proposal, the issue need not be turned formally back to the EPA."[471] The agency warns, however, that the sponsors should document that a change is not significant. The Memorandum suggests that an activity is more likely to be regarded as insignificant "where the proposed activity was in some fashion referenced in the original

462. 424 U.S. 319, 334-35 (1976). *See also* Amendments to Streamline, *supra* note 454 at 65,277.

463. *See* Amendments to Streamline, supra note 454, at 65,278.

464. *See id.*

465. *See id.*

466. *See id.*

467. *See id.* at 65,277-78.

468. *See id.*

469. *See id.* at 65,276.

470. *See* Memorandum from Maryann Froelich, Director, Office of Policy Development, U.S. EPA 3 (last visited Jan. 24, 1997) <http://199.223.29.233/xl_home/xl_depar.html>.

471. *Id.* at 2.

proposal . . . ."[472] It is understandable that EPA does not wish to subject insignificant changes to a lengthy review process. The danger, however, is that there is no public review process to allow challenges to what the sponsor considers to be an insignificant change.

For significant departures, the Memorandum discusses three possible procedures. For less controversial changes, the EPA administrator in charge of Project XL, then the Assistant Administrator for Policy, Planning and Evaluation and currently the Associate Administrator for the Office of Reinvention, would concur with the addition.[473] Second, the sponsor could submit the new activity to the formal agency-wide selection process; this would make most sense if a sponsor wished to replicate an existing project at a totally separate facility.[474] Third, in "rare cases," the sponsor may wish to resubmit the original proposal as well as the new activity to the XL selection process.[475] For instance, if a new activity fundamentally changed the nature of a project and posed a "serious controversy" then it would remain unclear whether the project remained consistent with the original selection criteria and EPA would treat both the existing project and new activity as a new proposal.[476] Implicitly, the Memorandum gives the project sponsor, in conjunction with EPA and relevant state environmental agencies, considerable discretion in deciding which of these three procedures is appropriate in a given case.

vi. Proposal for Ensuring Adequate Public Hearings

The proposed statute would provide for a right to a public hearing in certain limited circumstances. Congress should take into consideration the stakeholder negotiation process in deciding the extent to which subsequent public hearings should involve informal or formal proceedings. If a diverse group of stakeholders has participated in a thorough negotiation process that has been reported on the World Wide Web and EPA has responded already to comments from national environmental and environmental justice organizations, then the need for formal adjudicatory procedures to rehash these issues is excessive. On the other hand, if industry brings new evidence or experts into the permit process after stakeholder negotiations have ended, the public is entitled to a chance to question the persuasiveness of that new evidence. For new evidence or experts, the statute would require the use of formal adjudicatory procedures, especially cross-

472. *Id.* at 3.
473. *See id.* at 2-3, section 2.a.1.
474. *See id.* at 3, section 2.a.2.
475. *Id.* at 3, section 2.a.3.
476. *Id.*

examination, as set forth in Sections 554, 556 and 557 of the Administrative Procedure Act.

Alternatively, under the statute either the agency or the firm may reopen stakeholder negotiations if either party introduces significant new evidence. A process that just required informal public hearings might create an incentive for firms to withhold information during the potentially intensive review of stakeholder negotiations and wait until an informal hearing without cross-examination to introduce controversial or damaging evidence. Presumably, the permitting agency or environmental groups would raise questions or objections if a firm was apparently avoiding discussion of important issues during the stakeholder negotiation process and raising them only at the public hearing stage of the process. But requiring formal adjudicatory procedures for new evidence or experts would further encourage a company to disclose promptly new information during stakeholder negotiations. Industry might object to the expense of formal proceedings, but in most cases the entire hearing probably could be informal if no new evidence exists. The fact that EPA has voluntarily offered the public the opportunity to request a hearing regarding draft final project agreements or site-specific rulemaking suggests that the proposed statute's more limited right to a public hearing is responsive to industry's concerns. There may be situations in which it is unavoidable for a firm to introduce evidence after the stakeholder negotiation process ends, but this evidence ought to be subject either to formal proceedings or reopened stakeholder negotiations so that all evidence receives approximately the same degree of scrutiny.

Accordingly, the proposed statute would establish a hybrid approach to public hearings. If the agency reasonably believes that an issue has been adequately discussed during stakeholder negotiation and a company expert was available for dialog during that process, then an informal public hearing without the right to cross-examination is adequate. On the other hand, if late in the application process an applicant seeks to introduce new evidence that was unavailable during the stakeholder negotiation process then the proposed statute would require the permitting agency to use trial-type procedures to allow cross-examination of newly introduced experts or evidence under the rules set forth in Sections 554, 556, and 557 of the Administrative Procedure Act for formal adjudicatory hearings, or, in the alternative, to reopen stakeholder negotiations.[477] This hybrid rule would create an incentive for companies to disclose evidence and experts during the early stages of the permit process.

477. *See* 5 U.S.C. §§ 554, 556, 557; Mank, *Exception Process*, *supra* note 16, at 338-40 (discussing advantages and disadvantages of public hearings).

The Froelich Memorandum addresses the circumstances under which EPA will consider the modification of an XL project to be a significant departure warranting lengthy review or an insignificant change that is not subject to public review.[478] The Memorandum fails to guarantee public involvement in cases where the new activity is deemed either insignificant or a significant departure but a noncontroversial issue within the authority of the EPA administrator in charge of the Project XL program. At least for significant departures that the agency believes are noncontroversial, EPA should provide a notice in the Federal Register and provide the public with an opportunity to request a public hearing to challenge the new activity. It may be too costly and burdensome on industry to subject allegedly "insignificant" changes to either public hearings or notice in the Federal Register, but Congress could require sponsors to post their documentation on the World Wide Web and notify former direct participants and commentors about such changes to allow them the opportunity to comment to EPA.

c. Judicial Review and Enforcement of Permits

A more immediate concern is the extent to which the public ought to be able to challenge final project agreements between EPA and a project sponsor. Under the Administrative Procedure Act or under the various environmental statutes that may be modified by Project XL, a person who is injured by a Project XL agreement likely has the right to file suit.[479]

i. The Status Quo: In Need of Change

Although EPA proposes to eliminate formal adjudicatory hearings under the Clean Water Act, the agency "believes that the ability to judicially challenge final permits is an essential element of public participation."[480] In 1996, EPA issued a final rule that requires states, but not tribes, to provide permittees and other interested parties an opportunity for state judicial review comparable to that for federally-issued permits under Section 509 of the Clean Water Act as a means "to provide for, encourage, and assist public participation in the NPDES permitting process."[481] The same reasoning applies to state or federal judicial review of integrated or alternative compliance permits, and perhaps even more strongly because such permits often in-

478. *See* Froelich, *supra* note 470.

479. *See supra* Part I.B.2.d.ii.

480. Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two, 61 Fed. Reg. 65,268, 65,279 n.3 (1996).

481. *Id.*; *see generally* 61 Fed. Reg. 20,972-75 (promulgating rule requiring states to allow broad range of interested parties the opportunity to challenge NPDES permits in state court.).

clude more unusual or nonstandard terms that require greater public scrutiny than a cookie-cutter, standard NPDES permit—although there are often significant permitting issues requiring public debate even under traditional single-medium regulatory programs. A court reviewing an alternative compliance agreement should closely examine the procedures used in developing a final agreement to ensure that the agency was reasonably fair in assembling a stakeholder group, in conducting a public hearing, and in addressing significant health issues.

ii. Proposal for Change

To clarify the extent of judicial review, Congress should give "any citizen" injured-in-fact the right to file a citizens suit, after appropriate notice to EPA and the relevant state environmental agency, to challenge the terms of an XL agreement. But it should allow an agreement that has survived all judicial challenges to serve as a shield against law suits under other environmental statutes. Under the proposed statute, any person injured-in-fact would have sixty days to challenge a final Project XL agreement in the federal District Court for the District of Columbia Circuit. The statute would centralize appeals in that circuit to provide greater uniformity for a program that otherwise may be too inconsistent.

In addition, both permitting agencies and the public could sue to enforce the terms of a final agreement, which would take precedence over otherwise applicable requirements found in other statutes, but an agreement that had survived judicial review would serve as a shield against possible challenges under other statutes. Although the proposed alternative compliance regime would be voluntary, once a firm has decided to participate in the program, EPA or any local permitting agency should be able to seek penalties if the firm violates its agreement because the firm has benefitted from waiving otherwise applicable requirements and must live up to the alternative agreement. The proposed regime would provide the sixty-day notice that environmental citizens' suit provisions generally require.[482] Following that notice, any person would be able to bring a citizens' suit under the proposed statute in the local district court against a firm for violating its agreement. The terms of a final agreement that has survived any judicial challenges, however, would supersede any requirements under other statutes. Under the Clean Air Act's Title V permit program, a permit (which normally is issued for five years) that has survived all review provides a shield against possible arguments that a firm is not comply-

482. *See, e.g.*, 42 U.S.C. § 7604(b)(1)(A).

ing with certain relevant portions of the Act that were mistakenly left out of the permit.[483]

The main argument for giving industry such a shield is that firms often make substantial investments based upon a permit's validity, and that it would be unfair to allow a citizen suit after the normal period for judicial challenges has expired. In the context of Project XL, the statute of bring their suits before a firm has invested significant resources; firms participating in a Project XL agreement should be confident that the agreement will sustain challenges brought under other environmental laws. Accordingly, a citizen meeting relevant standing requirements would have sixty days to challenge the validity of a final Project XL agreement in the District Court for the District of Columbia Circuit and could sue in the local district court to enforce the terms of the agreement against a sponsor that fails to comply. But after the sixty-day challenge period, a person could not bring a citizen suit under another environmental statute contending that the agreement was in conflict with that statute.

d. Annual Reports

The April 23, 1997 Notice of Modification does not address implementation issues.[484] The May 23, 1995 original Project XL Notice does require projects to have clear objectives and requirements that will be measurable to enable EPA and the public to evaluate the success of the project and to enforce its terms.[485] The EPA recommends that a final project agreement delineate the role of stakeholders during the evaluation and implementation of the project, and encourages sponsors to provide for re-examination or periodic evaluation of the project by direct participant stakeholders.[486]

Instead of EPA's voluntary approach to public reporting by Project XL firms, the proposed statute would require sponsors to issue an annual report. Mandating an annual report is relatively straightforward, but there are more difficult issues about what information a participant must report. For instance, a participant might explain why its internal audit program is a good substitute for more conventional monitoring or reporting requirements. In addition, the participant should annually examine the impact of any cross-media or cross-pollutant trading. The effectiveness of the report should be a significant factor in whether a permit is renewed. If a participant knowingly con-

483. *See* 42 U.S.C. 7661c(f) (1997).
484. *See* XL Modification, *supra* note 94, at 19,880-81.
485. *See id.* at 19,881; XL Pilot Projects, *supra* note 91, at 27,284, 27,287.
486. *See* XL Modification, *supra* note 94, at 19,881; XL Pilot Projects, *supra* note 91, at 27,287.

veys misleading information in its report, the standard criminal penalties for reporting fraudulent information should apply.[487]

CONCLUSION

The shift from national, uniform regulation to more individualized, site-specific agreements between firms and permitting agencies contains some risks of weakening public control, producing inconsistencies, and allowing "sweetheart" deals. The promise of more efficient and cleaner results, however, is so great that Congress ought to enact a statute authorizing regulatory flexibility agreements as long as careful attention is paid to fostering meaningful public participation, and protecting the public, especially high-risk groups, from any undue risks.

The EPA's April 23, 1997 Notice of Modification includes some protections for public participation in the development of Project XL proposals, but leaves too much discretion in the hands of project sponsors with only vague promises that EPA will take into account how well sponsors address public participation in deciding whether to approve an XL proposal. Congress should insist upon broad public participation in any alternative permitting process, and require that individual firms and EPA report regularly on the results. The proposed statute includes an inclusive stakeholder negotiation process, provisions to protect minority voting interests, a technical assistance grant program, informal or formal public hearings depending upon whether an issue was already adequately discussed by direct participants, and annual reporting provisions. If Congress adopts these measures, the public, including minority groups, should have a reasonable opportunity to express their views and to challenge industry proposals that are biased or dangerous. It is possible to achieve both more efficient regulation *and* better public participation at the same time.

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487. *See, e.g.*, 42 U.S.C. § 7413(c)(2) (criminal penalties under Clean Air Act for any person who knowingly makes false statements); 33 U.S.C. § 1319(c)(4) (same under Clean Water Act).