Project XL: Should It Be Used to Wage War on Urban Sprawl?

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PROJECT XL: SHOULD IT BE USED TO WAGE WAR ON URBAN SPRAWL?

INTRODUCTION

Atlanta, Georgia soon will become the proving ground for some radical environmental management strategies because the United States Environmental Protection Agency (EPA) actually is helping real estate developers build a large commercial/residential development in the heart of the city. The EPA accepted the development as a project under its Project XL program, a national pilot program for testing innovative environmental management strategies for the future.

Project XL, which stands for “eXcellence” and “Leadership,” allows regulated entities to find environmental solutions that work better than those currently mandated in the hope that these solutions can better protect the environment. The Atlanta project is a radical change in the program because it marks the first time the EPA has used the program to steer land use rather than to regulate industry.

Although the project’s real estate developers (who typically remain outside the EPA’s purview) must submit to EPA scrutiny, they get much in the bargain; as initially proposed, the


4. See id.

5. See id.

6. See Goldberg, supra note 1.
development cannot come to fruition without the EPA's help. The developers plan to convert an old steel mill near downtown Atlanta into approximately twelve million square feet of residential and commercial property. Because of the development's size, access to the site requires a new bridge across a major interstate. Atlanta's air pollution problem prohibits construction of the bridge, however, because the city may not construct transportation projects that require federal approval. To resolve this problem, the developers asked the EPA to use the XL process to recognize the proposed development as a "transportation control measure," this would allow federal approval and possible funding of the bridge.

A transportation control measure (TCM) is any measure that curbs emissions by reducing vehicle use or by changing traffic flow or congested conditions. Although TCM designation traditionally has been limited to transportation programs, such as public transit and high occupancy vehicle lanes, the EPA considered designating the entire residential/commercial development in question as a TCM—albeit a very nontraditional one.

Because TCMs are regulatory devices completely separate from the XL process, TCM status does not require participation in Project XL. The Atlanta developers initiated the XL process to gain access to EPA expertise and funding, which they in turn hope will help them prove that the project can meet the TCM

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7. See id.
10. See Atlantic Steel Project Description, supra note 8, at 1.
11. See Public Meeting Addresses Atlantic Steel Redevelopment Project in Atlanta,
15. See Public Meeting Addresses Atlantic Steel, supra note 11, at 4.
criteria. In addition, by having the entire development designated an XL pilot project, the agency has opened the door to potential additional regulatory flexibility. Thus, the developers are simply using XL as a means to an end.

The EPA considered this unprecedented use of the XL program because the project exemplifies "smart growth." However, by using Project XL instead of developing other methods to create an "environmentally friendly" project, the EPA and the developers risk having the project challenged in court. First, significant debate exists as to whether the program itself is legal. Second, the EPA's actions are subject to judicial review.

This Note examines whether developments such as the one proposed are proper XL projects. Section I discusses the background and underlying policies of Project XL. Section II describes the proposed development and discusses how Atlanta's clean air requirements prevent its construction. Finally, Section III analyzes the proposed development under the EPA's Project XL criteria and describes how these criteria might be applied to similar projects. This Note concludes that the proposed development is not a proper XL pilot. Although environmentalists, landowners, developers, and the city all have expressed support for the project, it does not meet XL pilot requirements. Although the development is arguably environmentally friendly, Project XL was not meant to encompass this kind of development project and should not be led so far afield of its established policy. Further, granting pilot status to an inappropriate project could jeopardize the entire XL program.

19. See Public Meeting Addresses Atlantic Steel, supra note 11, at 4.
20. See infra Part I.D.
I. PROJECT XL

Recent major environmental laws contain an unprecedented amount of detailed requirements. Although rigorous requirements may appear more environmentally protective, critics argue that strict adherence to the complicated regulations sacrifices overall environmental protection. Additionally, industry leaders contend that methods other than standard command and control requirements more efficiently and effectively accomplish the EPA’s broad goals. Attempting to satisfy industry leaders and generally improve government efficiency, President Clinton introduced several “reinvention” initiatives. Project XL, the EPA’s most ambitious initiative thus far, promises the greatest degree of change towards a more flexible system of environmental regulation.

A. Regulatory Flexibility

Introduced on May 23, 1995, Project XL offers regulatory flexibility to entities that can produce greater environmental benefits using strategies other than current regulatory requirements. “Project XL has the potential to reduce both

25. See infra notes 83-85 and accompanying text.
26. See Steinzor, supra note 23, at 115-18. “[T]he extreme rigidity of the current system, coupled with the burdensome process necessary to change existing regulations, discourages the development of creative compliance schemes.” Caballero, supra note 24, at 402. These technology-based standards are economically inefficient in principle because they impose standard pollution control requirements on all sources across the board without regard to the costs imposed or the benefits derived. See Steinzor, supra note 23, at 115.
29. Id. at 20.
regulatory costs and pollution by allowing companies to try innovative pollution control strategies . . . ."31 It allows the EPA to address environmental pollution as a whole, rather than treating air, land, and water pollution as unrelated issues, as does the present system.32

The EPA committed to allow a total of fifty XL pilot projects.33 In exchange for the flexibility to replace or modify specific regulatory requirements, the pilots must meet higher accountability standards in demonstrating that the project will produce greater environmental benefits.34 The EPA determines the amount of flexibility it will grant a project on a case-by-case basis.35

The EPA's flexible approach may involve waivers of or variances from current regulations and site-specific rules, permit modifications, or the issuance of new permits,36 provided such allowances do not violate statutory requirements.37 In most cases, the EPA can only provide regulatory flexibility; in other words, the EPA can be flexible only with its own rules, not federal statutes.38

B. Selecting Pilot Projects

The EPA has set forth eight criteria for evaluating XL Program proposals: (1) superior environmental performance; (2) regulatory flexibility/economic benefit; (3) stakeholder support; (4) innovation/multi-media pollution prevention; (5) transferability; (6) feasibility; (7) monitoring, reporting, and

32. See id.
34. See id. Often, the EPA does not actually grant flexibility; it simply chooses not to enforce regulatory violations. See Caballero, supra note 24, at 413.
36. See id.
38. See id.; Dennis D. Hirsch, Bill and Al's XL-ent Adventure: An Analysis of the EPA's Legal Authority to Implement the Clinton Administration's Project XL, 98 U. ILL. L. REV. 129, 150-52 (1998). Narrow exceptions to this rule exist. See id. at 153-54. The EPA has the authority to grant waivers from specific statutes. See id. at 153. Also, the EPA can create site-specific rules that authorize an alternative mode of compliance with a statute available only to a specific facility. See id. at 154.
evaluation; and (8) shifting of risk burden. Section III of this Article discusses these factors and evaluates the Atlanta development under each criteria. Once the EPA agrees to accept the project as a pilot, project proponents must develop a Final Project Agreement (FPA); the pilot becomes a full-fledged XL project only upon signing of the FPA.  

C. The Final Project Agreement

The FPA must address project-specific issues, such as the legal authority for implementation, regulatory flexibility, public involvement, expected environmental results, specific environmental commitments, and enforceability. Further, the FPA “should clearly distinguish among the different ways in which [pilots] may be held accountable for commitments to superior environmental performance” by distinguishing between enforceable commitments and voluntary commitments.  

*Enforceable commitments* are those levels of performance which can be compelled by government. Failure to achieve these commitments constitutes grounds for government or citizen enforcement action, with all of the remedies generally available absent Project XL . . . . *Voluntary commitments* are those for which a [project sponsor] may be held accountable through means other than injunctive relief, penalty or other conventional legal enforcement action. Failure to achieve these commitments is an appropriate basis for termination or modification of the XL project.

The FPA should clearly specify that any enforcement relief is conditioned on the pilot’s compliance with the agreed requirements. Further, such a stipulation should be signed by

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41. See id. Although the FPA should identify the commitments made by all parties involved, the EPA does not view FPAs as legally enforceable documents. See Steinzor, supra note 23, at 123-24 n.74.


43. Id.

44. See Regulatory Reinvention (XL) Pilot Projects, 60 Fed. Reg. at 27,284.
the EPA, project proponents, state or tribal environmental agencies, and other co-regulators.\footnote{45}

In certain circumstances, the FPA also “may include statements of the [EPA’s] intent to refrain from instituting an enforcement action” for specific regulatory violations by the project if the purpose and objective of the regulation is satisfied “(i.e., that there is no ‘substantive’ violation, even though there may be a technical violation).”\footnote{46} However, language regarding the EPA’s exercise of enforcement discretion must be limited to situations in which the participant is in full compliance with the project agreement, “the decision not to enforce is clearly in the public interest, human health and the environment is protected, and no other mechanism exists to address the situation at hand.”\footnote{47}

Further, any statements of intent to refrain from enforcement “must be in an area in which [the] EPA has discretion not to act under applicable law.”\footnote{48} The agreement should acknowledge, however, that circumstances may arise in which, even if the pilot is in full compliance with the FPA, the EPA must retain its discretion to respond to circumstances that present an imminent and substantial threat to human health or the environment.\footnote{49}

\textit{D. Legal Barriers to Project XL}

Although the Clinton Administration continues to tout Project XL as the “crown jewel” of its “cleaner, cheaper, smarter” approach to environmental regulation,\footnote{50} from the beginning industry representatives, environmentalists, and even EPA staff have questioned the program’s legality.\footnote{51} Environmentalists

\footnote{45}{See id.}
}\footnote{47}{Id.}
\footnote{48}{Id.}
\footnote{49}{See id.}
\footnote{50}{See Hirsch, \textit{supra note 38}, at 131.}
\footnote{51}{See id; Mank, \textit{supra note 38}, at 4; Cindy Skrzynki, \textit{Critics See a Playground for Polluters in EPA’s XL Plan}, \textit{WASH. POST}, Jan. 24, 1997, at D1.}
have called the XL process a "regulatory free-for-all" and see the program as an opportunity to craft sweetheart deals for polluters. In fact, some allege that EPA staffers coined the phrase "if it isn't illegal, it isn't XL."

The chief criticism is that the EPA lacks the legal authority to grant the regulatory flexibility Project XL offers. Without direct statutory authority, Project XL gives companies approval to violate current regulatory requirements, exposing the EPA and XL participants to legal attack for those violations.

In perhaps Project XL's biggest legal problem, challengers of a particular XL project can bring citizen suits. All of the major environmental statutes authorize citizen suits, not only for violations of the statutory provisions, but also for violations of EPA regulations. A challenger could bring suit against a project's sponsors, alleging that the facility violates statutory or regulatory requirements that, under XL "flexibility," would not apply to the project. A challenger could also bring suit against the EPA, alleging that the agency lacks discretionary authority to allow noncompliance because a statute or regulation requires that the EPA apply a specific standard. Finally, the Administrative Procedure Act makes judicial review of agency actions generally available.

Although the EPA claims the statutes are sufficiently flexible to accommodate XL projects, even the agency concedes an ambiguity over which statutes allow flexibility and under what circumstances. Most environmental laws are of the "command-and-control" variety. That means that the law contains a "legislated command ([for example], reduce sulfur dioxide

52. Skrzycki, supra note 51.
54. Id. at 147.
55. See Hirsch, supra note 38, at 131-32.
56. See Caballero, supra note 24, at 412.
57. See id. at 422.
58. See Steinzor, supra note 23, at 141 n.139.
60. See id.
61. See Administrative Procedure Act, 5 U.S.C. § 706 (1994). A court may set aside an action if it is arbitrary or capricious, an abuse of discretion, unsupported by substantial evidence, or unwarranted by the facts. See id.
62. See Mank, supra note 28, at 24-25.
emissions) [that is] implemented by very specific regulatory controls designed to achieve" the goal.64 Command-and-control statutes dictate that goals be achieved only through the specified means, even though alternative means may reduce pollution at a lower cost.65 Even statutes that appear to give the EPA considerable discretion may prevent the use of innovative alternatives.66

The EPA views some of its XL agreements "as non-reviewable exercises of its enforcement discretion."67 According to this approach, instead of "granting flexibility" the agency may simply choose not to enforce a regulation in a specific case.68 The Supreme Court has held that agency non-enforcement decisions are presumptively non-reviewable by courts.69 This presumption can be rebutted if a statute or regulation provides "guidelines for the agency to follow in exercising its enforcement powers."70 However, the non-reviewability presumption has no impact on and therefore cannot protect project sponsors from citizen suits.71

Claimants also may attack the EPA under the Administrative Procedure Act.72 Although the Clean Air Act gives the agency some discretion over which transportation projects it exempts from the highway sanctions provision,73 the Administrative Procedure Act allows an agency action to be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."74 Because no citizens have challenged Project XL in court, the EPA's authority to implement the project has not been tested.75

64. Id.
65. See Mank, supra note 28, at 32.
66. See id. at 33.
67. Caballero, supra note 24, at 413.
68. See id.
70. Caballero, supra note 24, at 415-16 (quoting Heckler, 470 U.S. at 832-33 (1985)).
71. See Bethlehem Steel Corp. v. Train, 544 F.2d 657, 660 (3d Cir. 1976); see also Caballero, supra note 24, at 422.
73. See Clean Air Act of 1990 § 179, 42 U.S.C. § 7509(b)(1)(B) (1994). In addition to specific types of transportation programs, the Act allows approval of "such other transportation-related programs [that] . . . would improve air quality and would not encourage single occupancy vehicle capacity." Id. at (viii).
75. This may be, in part, because standing requirements make citizen suits difficult
E. Current XL Projects

As of October 1999, the EPA was in the process of implementing fifteen XL projects, while developing another fifteen. For example, another project in Georgia strives to minimize the environmental impact of its pulp manufacturing processes on an adjoining river by reducing solid waste, air emissions, and effluent discharges into the river. Similarly, Vandenberg Air Force Base, one of the few non-manufacturing facilities among the XL pilots, is testing the "emissions reduction potential from a variety of sources, including internal combustion engines, space heaters, water heaters, chillers, and solvent applications." Current projects have commitments ranging in duration from three to fifteen years. Further, the regulatory flexibility granted in the current XL projects falls into five categories: (1) consolidated reporting methods; (2) alternative means of achieving the required control technology; (3) no government review prior to permit modifications, provided the output does not exceed stipulated levels; (4) flexible waste recycling; and (5) deferred regulations.

The Atlanta project departs significantly from these norms because it involves a flexible interpretation of a statutory definition rather than a flexible means of achieving statutory or regulatory requirements. Most XL pilots still must achieve the end results required by statute; XL simply allows program


78. Id. at 4.

79. See id. The EPA has indicated that because the XL projects are experimental, at some point, every XL project must end and the FPA must provide for the project’s termination. See Letter from John Fogarty, EPA Office of Enforcement and Compliance Assistance (Feb. 23, 1996); Clarification of Project XL’s Operating Principles (visited Sept. 7, 1998) <http://yosemite.epa.gov/xl/xl_home.nsf/all/xl_foges.html>.

80. See EPA 100-F-98-016, supra note 77.

participants to meet the ends by alternative means. To develop the Atlanta project, however, the EPA must redefine the ends. By designating not just the road improvements, but the entire Atlanta project as a TCM, the EPA is expanding the list of automobile emissions reducing “transportation projects” to include land-use planning.

II. THE ATLANTIC STEEL PROJECT

A. The Atlantic Steel Mill: A Hazardous Waste Dump

Atlantic Steel Industries, Inc. operated a steel plant in midtown Atlanta for most of the twentieth century. The mill struggled in the 1980s because of foreign and domestic competition, however, and Atlantic Steel had to shut down some of its operations. Until its recent purchase, the mill had been for sale for twenty years; although it stood in a coveted location, the property could not overcome the stigma of being a hazardous waste disposal site. On May 12, 1997, Jacoby Development, Inc. announced that it had agreed to buy the 138-acre site for approximately $76 million and the deal closed in December 1999. The steel mill continued to operate on the

82. See EPA 100-F-98-016, supra note 77; see also Jacoby Proposal, supra note 81, at 22-25.
84. See Bond, supra note 1. Founded in 1801, the mill originally made steel ties for cotton bales and hoops for barrels. See Walker, supra note 1.
85. See Walker, supra note 1 (noting that employment dropped from 1400 in 1979 to 400 in 1997).
86. See Bond, supra note 1; see also Sallye Salter, Relaxed EPA Rules Open Door to Redevelopment, ATLANTA J. & CONST., June 29, 1997, at R4. The property was previously considered and rejected in initial plans for several projects, including the Olympic stadium for the 1996 Summer Olympics and the Atlanta Hawks basketball arena. See id.
87. See Walker, supra note 1. Real estate developers have longed to get their hands on this property for decades due to its “central location and high visibility from downtown expressways.” Id. (quoting Dale Henson, veteran real estate consultant). It is “absolutely perfect for good in-town housing.” Id.
88. See id.; Salter, June 29, 1997, supra note 86.
89. See Walker, supra note 1.
property until the end of 1998, when the company moved to a smaller, rod-producing plant outside of Atlanta.91

Along with thousands of similar sites across the country, the Atlantic Steel property is a “brownfield”—previously developed land that is now vacant or underutilized relative to its economic potential.92 A large percentage of these sites are located in inner cities and are often contaminated by toxic waste.93 Most experts agree that the best way to clean up brownfields is to bring them back into productive, but non-polluting, use.94 However, current federal environmental laws hold past, current, and prospective owners of property liable for the hazardous waste clean-up costs required to rehabilitate brownfields.95 Therefore, absent some financial reward, owners lack incentive to clean up the idle property.96 Further, developers often find brownfields unattractive because, in addition to the environmental liability, the sites often contain outmoded buildings and deteriorating infrastructure; moreover they are often subject to strict zoning and other regulatory constraints.97

The EPA’s Brownfield Economic Redevelopment Initiative made brownfield redevelopment more attractive by easing the standards for hazardous waste cleanup.98 Under the new standards, developers need not remove all hazardous waste; they must merely clean up the site “enough ‘so that no one would be harmed and the ground water would be protected.”99 Further, for some uses, developers may merely seal off contaminated materials, rather than remove them from the site.100

The sellers of the property will pay an estimated $10 million in environmental cleanup costs out of the proceeds from the

91. See id.
93. See id. at i-ii.
94. See id. at ii.
95. See id. at i.
96. See id. at ii.
97. See id. at iii.
98. See Salter, supra note 86.
99. See id. (quoting Jennifer Kodur, head of the hazardous waste division of the Georgia Environmental Protection Division).
100. See id.
The company conducted environmental testing throughout 1998 and site remediation is scheduled to begin in July 2000. If the EPA grants approval, groundbreaking is set for July 2001, with the first phase of the project opening in October 2002 and development continuing over the next fifteen to twenty years.

B. Zoning Requirements

Although some say it is "one of the best locations for a mixed-use site in the country," the Atlantic Steel site required rezoning to add commercial and residential uses to the existing industrial use. Jacoby first applied for approval from the Atlanta Regional Commission (ARC); the law requires ARC to "give local governments its nonbinding review of large projects deemed to have regional impact." The ARC voted eighteen to eight against the project because "it would far exceed the ARC's air pollution limits." The ARC's limit on nitrogen oxide emissions (such as automobile fumes) is fifty tons-per-year per project; during its former industrial operations, Atlantic Steel

103. See John McCosh, Down to the Wire Midtown Project: the Atlantic Steel Plan Will Clean the Soil, But Air Quality is Still Subject to Review, ATLANTA J. & CONST., Mar. 13, 2000, at E1.
104. See id.
106. Bond, supra note 1.
108. Lucy Soto, Revamped Pollution Formula May Be Too Late for Two Projects, ATLANTA J. & CONST., Feb. 25, 1998, at C1; see also Sallye Salter, ARC Staff Against Atlantic Steel Project: Concerns About Air Quality Cited, ATLANTA J. & CONST., Feb. 6, 1998, at F2. The ARC is the federally designated planning agency responsible for making transportation plans for ten metropolitan Atlanta counties. See David Goldberg, Regional Council in Turmoil: Somebody Must Plan and Control Growth, but People with That Job Feel Frustrated, Pressured, ATLANTA J. & CONST., Sept. 13, 1998, at A1. However, the ARC has no authority to implement the plans; only state or local governments can implement transportation plans. See id.
110. See Salter, supra note 86.
emitted sixty tons-per-year, while the proposed development would emit an estimated 180 tons-per-year.\textsuperscript{111}

The mixed-use development would pollute far more than did the steel company.\textsuperscript{112} Since the ARC established its current air quality standard in 1996, it has not approved any project exceeding the standard by such a large amount.\textsuperscript{113} Developers and politicians question the standard's fairness because the tonnage limit is "one size fits all"—that is, it does not consider a project's size.\textsuperscript{114} Although the ARC has agreed to re-evaluate the standard,\textsuperscript{115} any change would come too late for Jacoby because the property purchase agreement required rezoning by the end of April 1998.\textsuperscript{116}

The Atlanta City Council voted unanimously on April 6, 1998 to rezone the property to allow for construction of eighteen million square feet of residential and commercial space.\textsuperscript{117} The Council imposed extensive conditions for managing and reducing traffic because of the project's potential impact on adjacent neighborhoods.\textsuperscript{118} The key requirement is the construction of a bridge across the expressway at Seventeenth Street.\textsuperscript{119} The Council stipulated that no building permits would be issued until it approved a contract for construction of the bridge.\textsuperscript{120}

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\begin{footnotesize}
\textsuperscript{111} See id.
\textsuperscript{112} See id. ARC Planning Director Joel Stone estimated the project would eventually draw 80,000 cars per day. See Salter, Feb. 26, 1998, \textit{supra} note 22.
\textsuperscript{113} See Salter, \textit{supra} note 108.
\textsuperscript{115} See Soto, \textit{supra} note 108.
\textsuperscript{116} See Salter, Mar. 12, 1998, \textit{supra} note 22; Salter, Mar. 1, 1998, \textit{supra} note 9. Neighborhood activists criticized the project due to a threat of increased traffic and "carte blanche-type zoning" for a time-pressed developer; the activists urged the city not to be pressured into hastily rezoning the property. See Salter, Mar. 1, 1998, \textit{supra} note 9. Atlanta Mayor Bill Campbell, however, made a strong pitch for the project; he promised that "the project would comply with any new pollution formulas the ARC comes up with later." Salter, Feb. 26, 1998, \textit{supra} note 22. The Mayor further stated that it "must be built . . . to replace that environmental nightmare [Atlantic Steel] with . . . the kind of mixed-use development a city craves." \textit{Id}.
\textsuperscript{120} See id.
\end{footnotesize}
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C. The Atlanta Air Problem

Air quality is the most pressing quality-of-life issue now facing the Atlanta region. On November 15, 1990, the EPA classified the Atlanta area as a serious nonattainment area under the ozone National Ambient Air Quality Standards; this means that the area failed to meet the national air quality standards under the Clean Air Act. This law required the area to meet the national standards by November 15, 1999 and to show at least a three percent reduction in emissions per year beginning November 15, 1996. The Atlanta area failed to meet the 1999 deadline and, as of the date of this publication, it remained out of compliance.

Not only may EPA impose federal highway sanctions on nonattainment areas, but federal officials cannot permit, approve, support, or provide financial assistance for any project concerning a federal highway that does not conform to an approved state implementation plan. Because city officials also require access ramps from Interstate 75/85 to the proposed

126. See Clean Air Act of 1990 § 176, 42 U.S.C. § 7506 (1994). The proposed bridge would not conform to the present state implementation plan because it will create additional emissions in the immediate area. See Salter, Feb. 6, 1998, supra note 107. The developers had hoped to get an exemption included in the federal transportation bill that Congress passed in May 1998, but despite the support of United States Representative John Linder, R-11th Dist. (Ga.), the special exemption failed to make the final bill. See David Goldberg, Inability to Build New Bridge Imperils Midtown Proposal: Developers Insist the Live/Work/Play Complex Would be Environment-Friendly, but Clear-Air Laws Prevent Plans for a 17th Street Overpass, ATLANTA J. & CONST., May 28, 1998, at C2. United States Representative John Lewis, D-5th Dist. (Ga.) supports the redevelopment of Atlantic Steel, but opposes the developers' efforts to get a special exemption, fearing "other developers will plead for piecemeal exemptions .... Ignoring the law is how we got into trouble in the first place," Lewis said. "We literally have paved ourselves into a corner." Id.
Seventeenth Street bridge, the regulations appear to prohibit the project.  

The rule does contain an exception, however: if the EPA approves the project as a TCM, the Federal Highway Administration can grant highway access. The Clean Air Act lists examples of TCMs, including programs for improved public transit, vehicle restrictions in concentrated emission areas, and areas limited to pedestrians and non-motorized vehicles. Designating the Atlantic Steel site as a TCM would be a non-traditional use of such measures. Therefore, the developers hope to use the Project XL designation to provide support for the EPA to approve the entire project as a TCM.

The EPA endorses the Atlantic Steel project because, as one of the largest urban redevelopment proposals in the country, it has the potential to showcase Project XL; also, because the developers will build on previously developed land, the project could prevent further urban sprawl. The EPA has estimated that the project will bring approximately 21,000 new jobs and 7500 new residents to the project area, thus creating new automobile trips that will increase emissions. The EPA believes, however, that as Atlanta continues to grow, this project has the potential to produce fewer emissions than a comparable

127. See David Goldberg, supra note 126.
128. See 42 U.S.C. § 7408; Goldberg, supra note 121. Three exceptions to the general rule exist: (1) transportation control measures, (2) safety projects, and (3) grandfathered projects. See 42 U.S.C. § 7408; 40 C.F.R. §§ 93.126, 93.127 (1997); Public Meeting Addresses Atlantic Steel, supra note 11, at 4.
130. See Public Meeting Addresses Atlantic Steel, supra note 11, at 4.
131. See Kutzman, supra note 17.
132. See Bond, supra note 1.
133. See id.
amount of development scattered throughout the nonattainment region.\textsuperscript{138} Thus, the EPA is attempting to compare the potential emissions from this development to the speculative real estate development that it perceives is inevitable if this project does not proceed.\textsuperscript{137} In contrast, the ARC is unable to use such an analysis; it must look at the emissions resulting from a single project, regardless of its size.\textsuperscript{138}

\textbf{D. Regulatory Flexibility}

The EPA is considering two types of regulatory flexibility for the Atlantic Steel site. First, the EPA would be flexible in conferring TCM status.\textsuperscript{139} In other words, it must expand the definition of a “transportation control measure” to include a commercial/residential real estate development that includes environmentally-friendly transportation elements (for example, mass transit connections and bicycle lanes).\textsuperscript{140} Second, the EPA would flexibly measure the air quality benefit.\textsuperscript{141} Because the development will actually increase the amount of automobile emissions to the area,\textsuperscript{142} the development by itself could never be considered a TCM.\textsuperscript{143} Instead, the EPA wants to use a projected estimate of reduced emission effects on the entire thirteen county non-attainment area as the TCM-qualifying measure.\textsuperscript{144}

\textbf{III. THE XL CRITERIA}

The EPA created eight different criteria for evaluating project proposals: (1) superior environmental performance; (2) regulatory flexibility/economic benefit; (3) stakeholder support; (4) innovation/multi-media pollution control measures; (5) transferability; (6) feasibility; (7) monitoring, reporting, and
evaluation; and (8) shifting of risk burden. A review team consisting of representatives from state and tribal environmental agencies and EPA staff evaluates all proposals and selects those that most advance the purposes of the Project XL program. After an extensive review process, the EPA accepted the Atlantic Steel Project as an XL pilot project and signed a Final Project Agreement with Jacoby on September 7, 1999. The following sections analyze the proposed project using the XL criteria.

A. Superior Environmental Performance

After numerous questions arose about how the EPA should judge superior environmental performance, the agency issued a modification to the original criteria, establishing a two-tiered assessment of superior environmental performance. Once Tier 1 establishes a baseline of equivalence, then Tier 2 measures the project’s performance against the baseline. The amount by which the project exceeds the baseline is a factor used to determine whether the project qualifies as environmentally superior.

1. Tier 1: Is the Project Equivalent?

Tier 1 establishes a quantitative benchmark of environmental performance against which reviewers can measure the project’s anticipated environmental performance. The benchmark is “a reasonable estimate of what would have happened to the environment” absent the proposed project. This tier

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146. See id. at 27,283.
150. See id. at 19,875.
151. See id. at 19,874.
152. Id.
establishes a baseline of performance—if the proposed project is not at least equivalent, it cannot be superior overall.\textsuperscript{153}

The benchmark is expressed in terms of “loadings” to the environment, incorporating a “broad set of stressors to the environment, such as emissions of specific pollutants”\textsuperscript{154} or waste disposal generation.\textsuperscript{155} The loadings may be defined as a per-unit of production or “other comparable measure (for example, volume of liquid hazardous waste generated per unit of product).”\textsuperscript{156} The project sponsor should set the benchmark from “a pollution prevention perspective” and may express the benchmark “in terms of inputs to production (for example, use of toxic chemicals, freshwater, or other natural resources).”\textsuperscript{157} Further, when the project calls for new or expanded facilities, the sponsor should set the benchmark at a level generally representative of industry practice or the future allowable environmental loadings for such a facility, whichever is more protective.\textsuperscript{158}

The sponsor creates a baseline for “each environmental medium (for example, air, water, land)”\textsuperscript{159} and measures the project against each baseline.\textsuperscript{160} The EPA will consider projects involving tradeoffs among mediums and among loadings.\textsuperscript{161} Tradeoffs allow a project to “exceed the appropriate benchmark for one loading but fall short of it for another.”\textsuperscript{162} “[P]rojects of this type should demonstrate, with an adequate margin of safety, overall superior environmental performance over what

\textsuperscript{153} See id.
\textsuperscript{154} Id.
\textsuperscript{155} See id.
\textsuperscript{156} Id.
\textsuperscript{157} Id. Although pollution prevention is encouraged, it is not required, and “applicants are free to ignore this aspect of their operations.” Steinzor, supra note 23, at 133.
\textsuperscript{159} Id.
\textsuperscript{160} See id.
\textsuperscript{161} See id.
\textsuperscript{162} Id. "Tradeoffs may be allowed among different loadings that contribute to a single environmental outcome" or “among different loadings that produce different environmental outcomes.” Id. For example, a project may increase production of nitrogen oxide if it decreases volatile organic compounds (both of the compounds contribute to smog), or a project may actually increase air pollution if it significantly decreases water pollution. See id.; USEPA, EPA 451-K-97-002, OZONE (1997).
would be achieved absent XL."  Further, the "[b]enefits should be measurable through an analytic methodology acceptable" to all parties involved. However, the EPA will not approve projects that threaten "ecological health or risk-based environmental standards" (for example, air quality standards).

Jacoby proposed using a comparable "greenfield" development as the Tier 1 benchmark. Greenfields are undeveloped land areas. Jacoby chose this definition for Tier 1 based on current economic and growth projections, which predict that most new development in Atlanta would occur at the outer edges of the presently developed area. Jacoby therefore assumed that without this project, the present fringe development most likely would continue.

Although the effects of greenfield development have not been measured, Jacoby has hired consultants to produce quantitative measurements for its theory. The consultants chose three undeveloped sites on the outer edges of Atlanta that could accommodate development comparable to the Atlantic Steel proposal. They selected sites based on current zoning and proposed development and determined the anticipated effect on the environment if the sites were developed. This projection established the baseline against which the EPA measured the Atlantic Steel project. Researchers used computer modeling to predict whether the Atlantic Steel development would produce fewer emissions than a typical suburban development.

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185. Id.
186. See Jacoby Proposal, supra note 81, at 25.
187. See THE URBAN INST. ET AL., supra note 92, at i.
188. See Jacoby Proposal, supra note 81, at 25.
189. See id.
191. See id.
192. See id.
193. See id.
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Atlantic Steel’s Tier 1 analysis is quite different from that used in other XL projects because, in most cases, the Tier 1 benchmark is the measure of current performance. In other projects, for example where a factory already has been built or processes already are in use, regulators can easily measure the current environmental performance. For the Atlantic Steel project, however, the “current” measure of performance is the estimated future performance of the city of Atlanta over the next twenty years.

Further, the future effects on this site absent Project XL ordinarily should be a key factor in any XL analysis because the EPA should not grant regulatory flexibility unless it is absolutely necessary. For example, the Atlantic Steel project requires regulatory flexibility to build the Seventeenth Street Bridge. However, if the property could be developed on a smaller scale, so that the bridge is not required, flexibility would not be necessary. Although a downscaled development may not be economically feasible for these developers, all options must be explored in the XL analysis.

2. Tier 2: The Proposed Project

Tier 2 is a subjective assessment of whether the proposed project can achieve superior environmental performance. This assessment may include weighing factors such as the “increment by which the project exceeds the appropriate Tier 1 benchmarks,” the “extent to which the project produces clear

175. See generally EPA 100-F-98-016, supra note 77.
176. See id.
177. See Jacoby Proposal, supra note 81, at 25.
178. Cf EPA 100-R-97-002, supra note 3, at 3.
179. See Atlantic Steel Project Description, supra note 8.
180. See Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. 19,872, 19,875 (1997). One critic charged that the EPA’s carefully crafted language actually allows Tier 2 factors to override Tier 1 determinations because a project may produce pollution in greater amounts than the Tier 1 benchmark if the project has “superior” environmental performance overall under Tier 2. See Steinzor, supra note 23, at 131.
181. Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. at 19,875. The term “exceed” is somewhat ambiguous because it could be read to mean producing pollution in greater amounts than Tier 1 or environmental performance that is better than Tier 1. See Steinzor, supra note 23, at 134. The EPA uses the term to mean that projects may depart from Tier 1 benchmark levels in either direction given that it allows tradeoffs among loadings. See id. "While [the] EPA is unlikely to use this escape clause to justify projects that violate existing standards across-the-board, the Agency could easily
reduction of risk," and a "historic demonstration of leadership in environmental performance" by the project proponents. The assessment should express the factors used in quantitative terms whenever possible. The proposed benefits of the Atlantic Steel project fall primarily into two categories: (1) brownfield development over greenfield development, and (2) long term air quality benefits.

a. Brownfield Development

Regulators prefer brownfield redevelopment for two reasons: first, redevelopment cleans up the contaminated site, and second, it prevents further "urban sprawl," now a significant problem in the Atlanta area. Urban sprawl is the "unplanned, uncontrolled spreading of an urban development into areas adjoining the edge of a city." In 1998, the Sierra Club ranked Atlanta number one among "large cities whose quality of life and environment are most threatened by sprawl" because Atlantans drive more miles per day and consume more land per person than average Americans.

overuse it to justify complicated trades of emissions across media and among pollutants, the real effects of which are impossible to characterize." Id.

183. Id.
184. See id.
185. See id.
188. THE AMERICAN HERITAGE COLLEGE DICTIONARY (1984). A Sierra Club report describes "sprawl" as strip commercial developments along highways and large-lot residential subdivisions spreading out over what was once farmland or forests." Dart, supra note 187. "Neither government nor business leaders believe there is an overall vision guiding the region's growth," and Atlanta's future is being charted by builders, not planners, who are not accountable to the public. Goldberg, May 28, 1998, supra note 126.
189. Dart, supra note 187.
190. See Goldberg, Sept. 10, 1998, supra note 187. The Sierra Club reports that Atlantans drive an average of 36.5 miles per person per day, while another study shows 33 miles per day. See id.; Netherton, supra note 187.
area currently covers one million acres, with the area growing at the rate of 25,000 additional acres per year.\footnote{See Netherton, \textit{supra} note 187. Some environmentalists call Atlanta “the blob.”}

\textbf{b. Long Term Air Quality Benefits}

Jacoby asserts that the project promises relative air quality benefits\footnote{See Jacoby Proposal, \textit{supra} note 81, at 26-27.} because of the collective advantage of a mixed-use development, public transit access, and the central location of the site.\footnote{See \textit{id.} at 26.} The project is a mixed-use development because it has a combination of residential and commercial uses.\footnote{See \textit{id.}} The master development plan proposes a residential village surrounding a man-made lake, flanked by two high-rise residential towers.\footnote{See \textit{id.}; Sallye Salter, \textit{Atlantic Steel Site Just Got Bigger}, \textit{ATLANTA J. \& CONST.}, Nov. 11, 1998, at F2.} The residential area will consist of 5000 one to three-bedroom units for sale or lease.\footnote{See \textit{id.;} Sallye Salter, \textit{Atlantic Steel Site Just Got Bigger}, \textit{ATLANTA J. \& CONST.}, Nov. 11, 1998, at F2.} The plan also includes five million square feet of office space and 1000 hotel rooms, all within reasonable walking distance of 1.5 million square feet of retail and entertainment space.\footnote{See Jacoby Proposal, \textit{supra} note 81, at 28. Jacoby is forming a consortium of developers to build the various components of the development. See Walker, \textit{supra} note 1. Post Properties Inc., one of the nation’s largest luxury apartment developers, plans to build at least one thousand apartments, and the Mills Corporation signed on to build the open-air retail and entertainment area. See Sallye Salter \& Patti Bond, \textit{Forging Ahead Downtown: Post Properties, Hines Sign on to Develop Atlantic Steel Site}, \textit{ATLANTA J. \& CONST.}, Nov. 17, 1998, at E1. “Food and entertainment will represent about 60% of the [retail] tenants.” Bond, \textit{supra} note 1.} “The theory is that such live-work-play complexes create the need for less driving than a similar amount of housing, retail space, and offices developed in isolation from each other.”\footnote{Goldberg, Aug. 9, 1998, \textit{supra} note 187.}

Jacoby cites studies showing that mixed-use developments and increased population density create fewer automobile trips and decrease the total number of vehicle hours traveled.\footnote{See Jacoby Proposal, \textit{supra} note 81, at 41. A study of the greater Denver area found that mixed land use could reduce automobile trips by as much as twenty-five percent. Further, the Institute of Transportation Engineers Trip Generation Manual states that if a 100,000 square foot office development were split into 25,000 square feet of general office space, 25,000 square feet of research and development space, 40,000}
"Workers in mixed use developments find that they use their automobiles less when mid-day errands or lunch can be obtained where services are readily accessible." These studies assert that such developments can reduce total vehicle operation hours by twenty-seven percent and can increase the use of nearby mass transit by as much as nine percent in suburban areas and thirty percent in central cities. Further, studies show that developments oriented toward mass transit and pedestrian traffic tend to generate more mass-transit use, bicycle and walking trips, and fewer automobile trips. Jacoby's proposed Seventeenth Street bridge also is designed to decrease automobile traffic.

The proposed 124-foot-wide bridge includes a broad pedestrian sidewalk on either side, two bicycle lanes, two lanes for general automobile traffic in each direction, and a trolley lane in the middle of the bridge. This incorporation of transit, bicycle, and pedestrian access provides the "connectivity" necessary to create significant emissions reductions. Conversely, increasing the population density and creating a mixed-use development, without significant connection to nonvehicular transportation, would offer little promise as a means of reducing automobile traffic and concomitant emissions.

square feet of multifamily apartments, and 10,000 square feet of specialty retail, an 18.7% reduction in daily traffic volume would result. See id. at 41-42.
200. Id. at 42.
201. See id. at 44. One study compared automobile use in "traditional" neighborhoods, which emphasize mixed land use and alternative modes of transportation, with conventional suburban developments, which emphasize single uses of land. The study found that in traditional neighborhoods, automobile use was 32% less, 10.5% fewer miles of peak morning travel were generated, and automobile trips were 15.5% shorter. These findings show the potential for mixed-use developments with access to mass transit to reduce vehicle travel and emissions. Id. at 43-44.
202. See id. at 42.
203. See id. at 44.
204. See id. at 27. The developers further add that the bridge could be used as a "gateway" to visually frame the Atlanta skyline by making a "visual or aesthetic impact." Id. at 20.
205. See David Goldberg, Changes Urged for Midtown Project, ATLANTA J. & CONST., Dec. 14, 1998, at E1. The trolley will originate at the current MARTA Arts Center Station, cross the new bridge, and continue on into the development. See Jacoby Proposal, supra note 81, at 20.
206. See Jacoby Proposal, supra note 81, at 27.
207. See id.
Jacoby hopes to create further connectivity with the construction of a new “transit loop.” At present, the Atlanta rail system only runs east of Interstate 75/85; Atlantic Steel lies to the west of the interstate. Extending the rail line across the interstate would provide mass transit access to west midtown Atlanta. The City of Atlanta and the Metropolitan Atlanta Rapid Transit Authority (MARTA) have shown an interest in creating a transit loop by extending the rail line from the Atlantic Steel site to a Southern rail station. This loop would benefit employers by increasing mass transit access to the project and west midtown Atlanta. Project proponents argue that transit ridership pattern studies demonstrate that such a loop would reduce automobile traffic.

Research also indicates that infill development, rather than greenfield development, creates long-term air quality benefits. A study of three United States infill developments found that the infill sites consistently reduced emissions. Further, a study conducted in Washington’s Central Puget Sound region found that “the less central the location in which a household is located, the more vehicular travel and emissions that it will generate.”

208. See id. at 22.
209. See id.
210. See id.
211. See id. The proposed rail line would connect to MARTA’s Omni Station which lies to the south of the development. See id.
212. See id.
213. See id. at 22-23. This reduction of vehicle travel is based upon the “assumption that a large concentration of development that is currently underserved by transit would be given direct and proximate rail access.” Id. at 23 n.5. The reduction in vehicle travel attributable to increased rail access is limited to the MARTA service area of Fulton and DeKalb counties (the two most urban counties in the area). See id. “Referendums to expand MARTA into the surrounding [nonattainment] counties have failed for over 20 years.” Id.
214. Infill development is the utilization of undeveloped or underdeveloped land located within an urban area. See Timothy J. Choppin, Note, Breaking the Exclusionary Land Use Regulation Barrier: Policies to Promote Affordable Housing in the Suburbs, 82 GEO. L.J. 2039, 2065 n.142 (1994).
215. See id. at 27.
216. See id. The study identified both an infill location and a greenfield location in a given region with the same amount and type of development. The study found that less nitric oxide was generated by the infill location than by its greenfield counterpart, with the following results: infill in (1) San Diego, California-42% less, (2) Montgomery County, Maryland-31% less, and (3) West Palm Beach, Florida-28% less. See id.
217. Id. at 27-28.
Clearly, to be considered a TCM, the Atlantic Steel project must reduce vehicle emissions.\textsuperscript{218} Although the EPA believes that the project will reduce automobile travel by more than fifty million miles per year,\textsuperscript{219} carpools and mass transit sometimes offer little emissions reduction.\textsuperscript{220} "Auto emissions are not proportionate to trip length."\textsuperscript{221} For example, in a typical ten-mile trip, more than half of an auto's emissions can occur upon ignition.\textsuperscript{222} Low-density development in the suburbs has increased dependence on automobile travel.\textsuperscript{223} Therefore, commuters who must drive to carpools or rail stations may remain significant sources of pollution.\textsuperscript{224}

In the past thirty years, Americans have grown increasingly dependent on their automobiles.\textsuperscript{225} Public transportation accounts for only about five percent of work commutes, and carpools account for about thirteen percent.\textsuperscript{226} Therefore, for the Atlantic Steel project to significantly reduce emissions, a majority of the employees commuting to the site will have to use mass transit or nonvehicular travel.\textsuperscript{227}

In addition, once at a mixed-use site, employees who drove to work likely will not use automobiles for lunch or midday errands.\textsuperscript{228} Figures substantiating reductions from such travel patterns are readily available,\textsuperscript{229} but it is still not clear whether such patterns alone lead to superior environmental performance.\textsuperscript{230}

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\textsuperscript{219} See USEPA, Atlantic Steel Redevelopment, supra note 135.
\textsuperscript{221} Id. at 211.
\textsuperscript{222} See id.
\textsuperscript{223} See id. at 160.
\textsuperscript{224} See id. at 210.
\textsuperscript{225} See id. at 100-63.
\textsuperscript{226} See id. at 104.
\textsuperscript{227} As of early 2000, the development plan only called for about 15 percent of the trips in the area to be via mass transit. MARTA officials have criticized the plan, stating that 40 percent of people traveling to and from the development should use mass transit. See McCosh, supra note 103.
\textsuperscript{228} See Oren, supra note 220 at 170; Jacoby Proposal, supra note 81, at 42.
\textsuperscript{229} See Oren, supra note 220, at 172; Jacoby Proposal, supra note 81, at 42.
\textsuperscript{230} See generally Oren, supra note 220, at 164.
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3. Accountability for Environmental Performance

Accountability for environmental performance essentially is an additional requirement for superior environmental performance. Not only must proponents show that a pilot can produce superior environmental performance, they must ensure that it will produce such performance. Every XL project should encompass commitments to superior environmental performance for which the EPA can hold the project sponsor accountable. Failure to achieve superior environmental performance constitutes, at the minimum, grounds for termination or modification of the XL project.

One of the Atlantic Steel proposal's fatal flaws is the sponsors' lack of enforceable commitments to produce a superior environmental performance. Although the Final Project Agreement lists several enforceable commitments, such commitments merely relate to building and design measures. If the project does not meet certain performance standards, the developer is required to implement a transportation management association to encourage trip reductions and travel modes other than single occupancy vehicles. Further, the City of Atlanta must ensure that such alternative transportation programs are developed. Short of these measures, however, nothing else protects the public if the project fails to produce superior environmental performance. Developments like Atlantic Steel use Project XL to build permanent fixtures such as the Seventeenth Street Bridge, which cannot be modified or terminated. This use of Project XL goes against XL's core principles because if the theories the project was designed to test are wrong, the EPA can do very little to bring the project back into compliance with environmental standards.

232. See id.
233. See id.
234. See id.
235. See generally Jacoby Proposal, supra note 81.
236. See Final Project Agreement, supra note 14, at 21-23.
237. See id. at 22.
238. See id.
240. Cf. Fogarty, supra note 79.
XL projects are experimental because they test different approaches for achieving superior environmental performance. The EPA did not intend XL Pilots to be open-ended endeavors that continue indefinitely. Consequently, every FPA must specify the project's end point. Further, "because XL is intended to achieve superior environmental results, it would serve no useful purpose to leave uncorrected a situation in which a project is providing inferior environmental results."

The EPA cannot abrogate its public obligation and instead ensure only minimal environmental protection. Under its own criteria, the EPA cannot approve the Atlantic Steel project because it lacks enforceable commitments to environmental performance. Project XL exists to test new ideas, but when a pilot does not produce its intended results, the experiment should end. If projects such as Atlantic Steel fail to produce fewer emissions or, worse, actually produce more pollution, the public has little recourse. Project XL's supporters never intended such results. The Atlantic Steel development is not like a factory that can be shut down easily; in fact, if the project does not reduce emissions, the state will have to establish other emissions-reducing programs.

241. See id.
242. See id.
243. See id.
244. Id. at 2.
245. See id.
249. See Fogarty, supra note 79.
250. See Final Project Agreement, supra note 14, at 30. This project will be approved as a TCM via the state's implementation plan, which lists all of the measures the state intends to use to seek the emissions reductions required under the Clean Air Act. See id. On March 29, 2000, the State of Georgia submitted a request to the EPA that the Atlantic Steel project be approved as a TCM in the state's implementation plan. See Approval and Promulgation of Implementation Plans, Georgia, 65 Fed. Reg. at 18,949. However, the state is not taking any emissions credit for the proposed TCM. See id. In addition, if the project actually increases emissions, the state must come up with a plan to offset the increase. See Final Project Agreement, supra note 14, at 30.
B. Regulatory Flexibility/Economic Benefit

Originally titled "Cost Savings and Paperwork Reduction," the second factor is the measure of benefit to the entity seeking project approval.\textsuperscript{251} "The project should produce cost savings or economic opportunity, and/or result in a decrease in paperwork burden."\textsuperscript{252} Project sponsors should articulate the link between the "[regulatory] flexibility sought, the superior environmental performance expected, and other benefits."\textsuperscript{253} "The closer the factual link between the requested flexibility and anticipated environmental benefits, the more likely EPA is to approve the project,"\textsuperscript{254} because these cases are more likely to have ideas applicable to other sites.\textsuperscript{255}

In every existing XL project, sponsors have enumerated benefits directly linked to the desired regulatory flexibility.\textsuperscript{256} In this case, however, regulatory flexibility is not directly linked to Jacoby's enumerated benefits.\textsuperscript{257} Jacoby seeks a "non-traditional" TCM.\textsuperscript{258} Because no precedent exists, Jacoby urges the EPA to "use flexibility in considering different types of TCMs and different ways to determine air quality benefits."\textsuperscript{259}

Jacoby's proposed economic benefits are both short-term and long-term, including more jobs and an enhanced tax base for the city.\textsuperscript{260} Further, site development will accelerate hazardous waste removal on the property.\textsuperscript{261} Although certainly worthwhile, none of these benefits result directly from a TCM.
C. Stakeholder Support

"The extent to which project proponents have sought and achieved the support"265 of stakeholders is the third, and one of the more important, factors in the XL analysis.266 Stakeholders are "parties that have a stake in the environmental impact of the project."267 Stakeholders can provide insight into community concerns that may have been overlooked by project proponents and regulators.268 "Stakeholders may include communities near the project, local or state governments, businesses, environmental and other public interest groups, or other similar entities."269

Stakeholders are divided into three broad categories: (1) direct participants, (2) commentators, and (3) the general public.270 Direct participants are most important during the project development period, when they "work intensively with project sponsors to build a project from the ground up."271 "The views of direct participant stakeholders will strongly influence the details of the project as well as [the] EPA's ultimate decision to approve or not to approve the project."272

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263. See Approval and Promulgation of Implementation Plans, Georgia, 65 Fed. Reg. at 18,948.
265. Regulatory Reinvention (XL) Projects, 60 Fed. Reg. 27,282, 27,287 (1995); see also
Steinzer, supra note 23, at 110.
266. See Steinzer, supra note 23 at 110; Regulatory Reinvention (XL) Pilot Projects, 62
271. Id. at 19,877.
272. Id.
On the other hand, commentators are those parties that have
a strong interest in the project but are not as active in the
development stage. Project sponsors should periodically
inform and seek input from commentators during project
development, because these informed participants may be able
to indicate the project’s potential for innovations that can be
applied elsewhere. The third group, the general public,
participates less frequently but should be able to “participate
more actively if [it] so choose[s].” The general public needs
access to environmental information both during project
development and after implementation.

Cosponsors constitute another category of stakeholders whose
support is strongly encouraged, but not required. Nongovernmental organizations can join as partners with the
original project proponents to cosponsor an XL project, thus
lending “credibility to the broader stakeholder involvement
process.” Before making a formal proposal, project sponsors
should obtain participation commitments from the EPA; state,
tribal, local, or other regulatory agencies; and potential direct
participants. Project sponsors also should identify and contact
potential commentators and develop a stakeholder-involvement
plan.

The stakeholder support factor is one of the more
controversial components of the XL process because of the
potential for abuse. The project sponsor recruits direct
participants and commentators and decides what kind of
authority to give each group (advisory, consultative, or decision-
making). Although the open involvement process should
protect the public from “sweetheart deals” between the EPA and

273. See id.
274. See id.
275. Id. at 19,878. This implies “that project proponents must accept anyone who
expresses an interest in becoming a direct participant.” Steinzor, supra note 23, at 143.
277. See id.
278. Id.
279. See id.
280. See id.
282. See Mank, supra note 28, at 67. Part of the EPA’s evaluation, however, will be
“based upon the extent to which the project sponsor has assembled a diverse group of
direct participants.” Id. at 67.
corporate applicants, because project sponsors have the ultimate responsibility for the process, those with the most at stake have the power to mediate their own disputes.\textsuperscript{283} Further, the sponsors are not required to build a consensus.\textsuperscript{284} As regulators commit to an XL project’s success, stakeholders cannot as easily affect a proposal’s substance.\textsuperscript{285}

Jacoby has developed a stakeholder involvement plan,\textsuperscript{286} in which stakeholders include nearby neighborhood associations, the state environmental protection agency, the state department of transportation, local environmental groups, and nearby businesses.\textsuperscript{287} Further, Jacoby has held several stakeholder meetings open to the general public.\textsuperscript{288}

Although the Atlantic Steel proposal states that “all of [the] issues with the city, neighbors, and political bodies were [re]solved favorably so that all votes were unanimous,”\textsuperscript{289} the ARC (a political body) originally voted eighteen to eight against the project\textsuperscript{290} because the ARC could not approve a project which exceeded its air pollution limits.\textsuperscript{291} The developers assert that the project is merely a technical violation of the ARC guidelines; if the project were divided into two or three parts, it would meet the ARC’s per-project limits.\textsuperscript{292} Moreover, the ARC plans to reconsider the controversial limits.\textsuperscript{293}

In addition, the ARC has considered a Seventeenth Street bridge in its long-term future plans.\textsuperscript{294} Nevertheless, the EPA should consider the violation of ARC limits in the XL analysis; the project, which is touted as a means to decrease air pollution,

\textsuperscript{283} See Steinzor, supra note 23, at 141-42.
\textsuperscript{284} See id. at 142-43.
\textsuperscript{285} See id. at 171.
\textsuperscript{287} See USEPA, List of Stakeholders (visited Aug. 9, 1999) <http://yosemite.epa.gov/xl/xl_home.nsf/all/stakeholders.html>.
\textsuperscript{289} Jacoby Proposal, supra note 81, at 31.
\textsuperscript{291} See id.
\textsuperscript{292} See Salter, Feb. 6, 1998, supra note 108.
\textsuperscript{294} See Salter, Feb. 6, 1998, supra note 108.
actually violates local air pollution guidelines.\textsuperscript{295} Either the ARC’s pollution limits are too low or the Atlantic Steel project’s ability to produce superior environmental performance is overstated.

\textit{D. Innovation/Multi-Media Pollution Prevention}

The proposed project should test alternatives to several regulatory requirements or test more than one environmental medium.\textsuperscript{296} The EPA prefers projects that prevent future pollution rather than those that control existing pollution.\textsuperscript{297} Among its pollution-prevention measures, Jacoby proposes to use construction materials and sustainable building technologies that minimize energy consumption, to locate buildings and landscape the property so that solar gain is maximized in the winter and minimized in the summer, to design the site to minimize storm runoff, and to use indigenous plants to minimize the need for irrigation.\textsuperscript{298}

Typically, a number of developers work together on projects of this scale;\textsuperscript{299} therefore, the FPA should address the above issues so that these commitments will be passed on to the site’s other developers. If other developers are not held to the same commitment level as the project sponsors, pollution prevention measures become mere corporate aspirations that have little value in the overall XL analysis.\textsuperscript{300}

\textit{E. Transferability}

The EPA is “most interested in pilot projects that test new approaches that could one day be applied more broadly”\textsuperscript{301} to other EPA programs, other industries, or other facilities in the same industry.\textsuperscript{302} Jacoby proposes that the EPA use the Atlantic Steel project as a national model to demonstrate the link

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\textsuperscript{297} See id.
\textsuperscript{298} See Jacoby Proposal, supra note 81, at 33.
\textsuperscript{299} See id. at 35
\textsuperscript{300} See Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. at 19,875.
\textsuperscript{301} Id.
\textsuperscript{302} See id.
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between land use, transportation, and air quality benefits. The EPA desires concrete evidence that such intown live/work/play developments can prevent urban sprawl and reduce the need to drive.

The EPA desperately needs evidence of practical solutions to environmental problems that can be applied nationwide. Unfortunately, none of the EPA’s reinvention initiatives have found new solutions that can be applied broadly. Thus far, Project XL staff have had problems seeing the big picture; they are committed to innovative solutions, but often lack the technical expertise necessary to foresee substantive problems in XL proposals. Further, the site-specific studies used often miss the “cumulative effects of pollution at the regional and national levels.”

It is unclear whether the Atlantic Steel project could serve as a national model because the project’s potential impact would be extremely difficult to measure. In theory, if the development can reduce the amount of automobile use during peak travel time, Atlanta’s air should be cleaner. However, developers cannot place a bubble over the Atlantic Steel site to measure how much pollution it produces or prevents. Therefore, whether theoretical data could persuade similar areas to invest in such redevelopment is difficult to answer.

F. Feasibility

“The project should be technically and administratively feasible and the project proponents must have the financial capability to carry it out.” In December 1999, the Atlantic Steel sponsors obtained financing from a large environmental insurance company to acquire the tract of land that will be the primary development. The “development” of the property

303. See Jacoby Proposal, supra note 81, at 35.
305. See Steinzor, supra note 23, at 151.
306. See id.
307. See id. at 127.
308. Id. at 138.
310. See generally Oren, supra note 220, at 160-72.
312. See Wilbert, supra note 90.
(i.e., the construction of buildings), however, will be privately financed primarily by other developers, with whom the sponsors have initiated negotiations. Financing has become an issue in the superior environmental performance debate as well. Some local officials and other critics charged that the development falls short of superior because the March 2000 plan includes 15,000 parking spaces. These critics say this amount of parking makes car travel so enticing that commuters are less likely to use the mass transit the project needs to achieve superior environmental performance. Project sponsors, however, said the plan was "as good as it gets" because the financing requires that the project have ample parking.

In addition, the area has been designated as a special tax allocation district to fund the necessary infrastructure improvements (water, sewer, streets, and parking). In order to encourage development in a blighted or declining area, the tax base in that area is frozen at the blighted property values. When the Atlantic Steel project is complete, it is expected to generate approximately $27.2 million annually in new tax revenue. The city approved creation of the tax allocation district (TAD) in October 1999 and agreed to issue $110 million in revenue bonds to fund necessary infrastructure upgrades. The city agreed to waive its portion of the new tax revenue; the money will instead be used to pay off the bonds. On November 3, 1999, the county approved the TAD and voted to

313. See Jacoby Proposal, supra note 81, at 35. Critics have charged, however, that the $2 billion project comes at a time when overbuilding in Atlanta has made the area suspect among national real estate investors. See Tony Wilbert, Timing Crucial for Midtown Project, ATLANTA J. & CONST., Nov. 8, 1999, at G1.
314. See McCosh, supra note 103.
315. See id.
316. See id.
317. Id.
320. See Alfred Charles, Sandy Springs Initiatives Drive for Tax Breaks, ATLANTA J. & CONST., Nov. 11, 1999, at J1. The City of Atlanta's share of that revenue is $7.2 million, Fulton County's portion is $7.8 million, and the Atlanta School Board's share is $12.2 million. See id.
322. See Fulton: City to Help Clean up Atlantic Steel Site, supra note 321.
freeze the district's property tax payments at their 1999 level of $160,000 for the next twenty-five years. In return, the developers are required to reinvest the money saved by the tax break back into the property for infrastructure and development for ten years. Finally, in December 1999, the local school board also voted to waive its portion of the increased tax revenue. Further, if the EPA approves the project as a TCM, federal and state funds potentially are available for construction of the bridge, with the remainder of the cost funded through local taxes and private funds.

G. Monitoring, Reporting, and Evaluation

The project should achieve results that are measurable and easily understood. "[T]he project sponsor should be clear about the time frame within which results will be achieved," and the sponsor should identify ways to make this information available to the public. The Atlantic Steel sponsors have not developed these criteria.

H. Shifting of Risk Burden

The proposed project "must protect worker safety and ensure that no one is subjected to unjust or disproportionate environmental impacts." The project proponents have been working with the neighboring communities to minimize the environmental risks in the immediate area.

324. See Charles, supra note 320.
326. See id. In early 2000, the estimated cost of the bridge was $50 million. See Tony Wilbert, DOT's Plan Displeases Developers: Proposed Changes to Downtown Connector Tied to Atlantic Steel Project Spark Concern, ATLANTA J. & CONST., Feb. 3, 2000, at F1.
328. Id.
329. See id.
330. See Jacoby Proposal, supra note 81, at 38.
332. See Jacoby Proposal, supra note 81, at 39.
IV. SUMMARY OF THE XL ANALYSIS

While the EPA considers all eight criteria, the first three actually define XL status; the remaining five factors provide support for the designation. The Atlantic Steel project fails the first criteria, passes the second, and may survive the third.

The first criteria is superior environmental performance. The Tier 1 baseline of performance likely is a higher level of air pollution than exists in the area today. Tier 2 then evaluates the probable effect of the project and measures this effect against the baseline. Although some reduction in automobile emissions is likely, regulators cannot determine the actual amount. Further, sponsors have made no enforceable commitments to superior environmental performance and hence offer no protection for the public. Therefore, the undeveloped Atlantic Steel project cannot show superior environmental performance overall.

The second factor requires this project to show that the requested flexibility will create an economic benefit for the project sponsors. For Jacoby, the economic benefits of developing the site are directly related to the TCM designation. The third, controversial criterion is stakeholder support. All of the currently known stakeholders support the

335. See Jacoby Proposal, supra note 81, at 25.
337. See supra Part III.A.1. The EPA estimates that the project will generate roughly 0.2 to 0.3 tons less per day of oxides of nitrogen and 1.1 to 1.2 tons less per day of volatile organic compounds (both contribute to ozone) than the Tier 1 baseline of comparable development. See Approval and Promulgation of Implementation Plans, Georgia, 65 Fed. Reg. at 18,949. Further, the EPA proposed approving the development as a TCM on April 10, 2000. See id. at 18,955.
338. See supra Part III.A.3.
341. See supra notes 260-264 and accompanying text.
342. See Mank, supra note 26, at 65-69.
project,\textsuperscript{344} except for the ARC.\textsuperscript{345} The ARC disapproval is related to the lack of superior environmental performance; because the project cannot meet local air pollution limits, the ARC will not support it.\textsuperscript{346}

The fourth factor—pollution prevention measures\textsuperscript{347}—is feasible, but sponsors must work more to ensure that such measures will be used.\textsuperscript{348} The fifth criteria—transferability\textsuperscript{349}—is also questionable at present;\textsuperscript{350} whether the project will encourage someone else to redevelop other intown property \textit{elsewhere} in an effort to reduce air pollution is not capable of determination. Finally, the project meets the sixth criterion because it is feasible.\textsuperscript{351}

\textbf{CONCLUSION}

Although the benefits of mixed-use land development seem worthwhile, projects like Atlantic Steel fail XL Project criteria. This failure stems primarily from a lack of enforceable commitments to superior environmental performance. Whether the project can produce superior environmental performance remains an open question.

Projects of this sort offer permanent answers to temporary problems, and this is not Project XL's intended use.\textsuperscript{352} Project XL was designed as a temporary test of environmental solutions.\textsuperscript{353} All of the projects implemented so far under Project XL have mechanisms in place to return the facility to regular compliance methods once the project is complete or if performance is unsatisfactory.\textsuperscript{354} Projects like Atlantic Steel may use the XL process to achieve initial regulatory flexibility that

\begin{footnotesize}
\begin{enumerate}
\item \textit{See Jacoby Proposal, supra note 81, at 31.}
\item \textit{See Salter, Feb. 26, 1998, supra note 22.}
\item \textit{See Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. at 27,287.}
\item \textit{See Regulatory Reinvention (XL) Pilot Projects, 62 Fed. Reg. at 19,875 (1997).}
\item \textit{See id.}
\item \textit{See supra Part III.E.}
\item \textit{See supra Part III.F.}
\item \textit{See generally Fogarty, supra note 79.}
\item \textit{See id.}
\item \textit{See USEPA, EPA 100-F-98-016, supra note 77; USEPA, The XL Projects, supra note 76; Fogarty, supra note 79.}
\end{enumerate}
\end{footnotesize}
cannot be revoked or modified once in place. Further, grant of XL status opens the door to other possible regulatory flexibility.

In Atlanta, once developers build the Seventeenth Street bridge and develop the Atlantic Steel site, little public recourse is available should the project fail to deliver superior environmental performance. Although Project XL is intended to test new methods of environmental protection, it should not be used for such far-reaching projects, the effects of which cannot be determined.

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