



ALTERNATIVE ENVIRONMENTAL COMPLIANCE STRATEGIES

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New approaches to controlling pollution are needed to produce continuing environmental gains at less cost, a diverse group of participants in an Environmental and Energy Study Institute workshop generally agreed, but they split on whether allowing industry to come up with alternative ways to comply with current requirements is the way to go. The participants included environmental policy experts, business executives, environmental leaders, Clinton administration and state officials and Members of Congress.

A prominent "alternative compliance" approach is to give polluting facilities flexibility in meeting regulatory requirements in exchange for environmental performance superior to that achieved through cookie-cutter regulations. Facilities may be

allowed to exceed some pollution limits and come in under the wire on others, or may be granted a streamlined permitting process, as long as net pollution levels are lower. Businesses take part on the promise of cost savings and regulatory breaks that can be turned into greater efficiency and profit. The U.S. Environmental Protection Agency's "Project XL" embodies this approach. Project XL is testing out alternative compliance at a small number of pilot facilities.

As an environmental analyst pointed out at the May 20, 1997, session, several trends have converged to bring the flexibility idea to the fore. First, strong national environmental laws and state and local programs have greatly reduced pollution. Second, the rigidity and costs of these efforts

have caused growing frustration among regulated entities and others. Third, environmentalists and others are unsatisfied with the pace of new protection efforts.

To advance environmental protection and leave behind the frustration and dissatisfaction, several elements "must move together" to forge a more effective regime, the analyst said. Policy changes must be made to make the system more goal-based and flexible; to induce regulated entities to higher levels of environmental stewardship; and to push economic levers such as taxes and subsidies that can reinforce desired outcomes.

The early returns on Project XL and similar initiatives point up four issues that must be addressed if flexibility is to work, most workshop participants agreed.

IS ALTERNATIVE COMPLIANCE RELEVANT?

For alternative compliance to yield greater environmental protection and cost savings, its relevance to a given pollution-

control effort must be decided in the first place, a policy analyst said. For example, does a factory emit a broad enough array of pollutants

such that the most dangerous can be cut and the least dangerous boosted to achieve a net environmental gain? Can economic incentives and regulatory waivers be mixed and matched to increase company profits and boost environmental protection?

A corporate official said his firm is working toward greater stewardship but "sometimes gets frustrated at having the easy things made harder." Alternative compliance may be relevant if it

Workshop Supporters:

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can right such inefficiency, he suggested.

Another industry executive said a state agency spends a disproportionate amount of time processing his company's permit changes even though the firm is always in compliance with pollution standards. Flexibility here could free up resources of both the company and agency, he said.

Another business leader stopped well short of endorsing alternative compliance as the new salvation but indicated it has potential to redress a long-standing industry grievance. "Our best plants in the world are not in the U.S. because we're not allowed to install the latest technology," he said.

But one environmentalist at the workshop raised questions about whether pursuing alternative compliance is wise to begin with. He maintained that the approach by its very nature will disrupt the current regulatory scheme, which has been mostly successful, he said. Alternative compliance begins with the handicap of being based on individual companies or facilities while environmental laws for the most part are aimed at geographic areas, such as the Chesapeake Bay. Also, large companies have the resources to examine their alternatives and make changes whereas smaller ones do not, he said.

Another environmentalist noted that some of the current pollution

control system, such as the acid rain control program, is based on a market system, where companies with high control costs buy credits from companies with low control costs which reduce their pollution more than required. Alternative compliance's basis on individual deals will disrupt this market and possibly make it obsolete, he said.

A White House official extended this logic to warn of the "nightmare" aspect of alternative compliance as being a "race to the bottom" of environmental performance.

Environmentalists were adamant that alternative compliance should be seen as an add-on to other regulatory methods and not a replacement.

STAKEHOLDER INVOLVEMENT

Assuming alternative compliance is relevant to a given case, the next issue critical to its success is the involvement of various "stakeholders" in developing an alternative compliance plan for a facility, workshop-goers agreed. Project XL, for example, views broad stakeholder participation as essential to developing a successful alternative compliance plan. Stakeholders include not only the plant or factory, but local political leaders, community groups and others.

But one analyst said that broad participation "is no savior." It is very expensive in terms of time, energy and political will and inevitably reveals deep differences of opinion, such as between local and national perspectives. Indeed, an environmental leader pointed out many national groups are concerned about what some local interests might agree to in an alternative compliance project. The local groups may lack the expertise and resources of larger-scale organizations and may enter into an agreement that sets a precedent for weakening safeguards, he said.

The analyst noted that the broader stakeholder involvement is, the more contentious the issues get since there is more room for disagreement. Partly for this reason, alternative compliance should be adopted incrementally, he said. This will ensure proper participation, as a broad start on local projects and wholesale adoption of Project XL by EPA would otherwise exhaust the stakeholder pool. National environmental groups — with great expertise but small budgets — cannot be at every local table, one environmentalist added.

JUDGMENT

The next key issue is that alternative compliance plans by their nature require much more judgment and many more decisions by many more people than cookie-

cutter requirements. This means that it can be tough, if not impossible, to get agreement on such plans and that if agreement can be reached, the process can be

slow and cumbersome. The greater judgment, number of decisions and lengthy process also mean that such plans may stray from their original goal and not produce their intended results.

LEGISLATIVE AUTHORITY

Problematic to begin with, the judgment process is further hampered by uncertainty over whether, in the case of Project XL, EPA has the authority to grant flexibility and resulting fears of citizen lawsuits, an analyst said. The lack of clear lines of decision-making authority leaves virtually any participant open to a lawsuit, which can quash much of the initiative, creativity and innovation that is alternative compliance's goal. The uncertainty ultimately will require Congress to act to

clarify what's permitted and what's not, the analyst said.

Another workshop-goer noted EPA should seek clarification soon since its current promotion of alternative compliance on its own hook may alienate and prejudice Congress against the approach.

However, another participant cautioned that congressional action may not be the remedy some expect. Lawmaking must be based on an agreement of what the fundamental issues are, which seems to be

elusive at this point, he said. He added that laws and regulations tend to be written in terms of what regulated organizations cannot do and what enforcers can do, which seems to be at odds with the spirit of alternative compliance.

A Member of Congress reinforced these views, asking "an idea may be sent up to the Hill but what does it come back as?" He warned of Congress' "genetic drive" to change legislation from its stated goal.

A CASE IN POINT

Just as alternative compliance is most clearly embodied in EPA's Project XL, its promise and pitfalls are well revealed in an agency-fostered Minnesota project that ultimately collapsed. According to briefing papers provided at the workshop, the project, which involved the 3M Company and the Minnesota Pollution Control Agency, foundered over the definition of "superior environmental performance," which EPA mandates for an alternative compliance plan to go forward. EPA listed vague criteria for superior performance, community stakeholder support and

six other factors when it issued XL guidelines.

3M wanted performance-based permitting, elimination of preconstruction reviews, reduction of air pollution permits from 20 to 1 and less recordkeeping, according to the documents. 3M in exchange pledged to cap air emissions below currently allowed levels, publicly report all emissions and establish a tight pollution-prevention plan. Negotiations among the state, 3M and EPA broke down over whether the company had to guarantee superior environmental performance. The state maintained prescriptive permit rules would

defeat the purpose and experimental nature of the project. EPA held that the emissions cap below the legal limit was nevertheless above 3M's current actual level, which would have let it increase pollution and undercut XL's basic premise. A related issue was whether the deal would have been subject to a citizen suit claiming it violated the law.

The dispute proved so intractable that MPCA withdrew from the program and 3M soon followed suit. Workshop talk of congressional action was presaged by some of the parties to the failed Minnesota project, who already are calling for Project XL legal clarification.