Beyond Experiments

EPA is starting a new “parallel track” reinvention effort, and at least 21 states have or are developing similar policies. Unfortunately, most state programs are marginal in scope and focus on activities rather than outcomes. To achieve their promise of improving environmental performance, many may need to be substantially revamped

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Last July, the Environmental Protection Agency publicly recommitted itself to its reinvention efforts in a report titled Aiming for Excellence: Actions to Encourage Stewardship and Accelerate Environmental Progress. One of the “actions” continues the agency’s search for workable and effective programs that use incentives to inspire and reward those businesses achieving environmental performance beyond what is required by law or regulation. This proposal would create a “dual track” regulatory system. The new Performance Track would invite facilities to meet certain voluntary requirements, in return for which they would receive a mix of regulatory, financial, and other benefits. The remaining facilities would stay on the other track — the existing compliance-oriented system.

EPA plans on having two tiers within the Performance Track. The agency recently invited stakeholders to participate in the development of the lower tier, which EPA intends to roll out this summer using administrative prerogatives under existing laws and regulations. While precise details of this tier are still uncertain, the agency appears likely to offer pre-defined incentives such as public recognition, enhanced access to regulators, assistance, and — potentially — regulatory flexibility. Participating facilities will be required to demonstrate good compliance and a commitment to continuous environmental improvement, implement an environmental management system, and commit to public outreach and performance reporting. Later, the agency will develop the upper tier, to which higher performers would graduate and which is expected to offer more significant and possibly more tailored incentives.

EPA sees the states as vital partners in its Performance Track initiative. In fact, the agency has been increasingly receptive to incentive-based experiments in the states, which have grown at a rapid pace since the mid-1990s. More than 40 percent of the states have implemented or are developing Performance Track initiatives — or what we term “environmental leadership programs.” For the sake of this article, ELPs are defined as voluntary programs in which a regulatory agency offers financial and/or regulatory incentives for firms to engage in certain activities — such as implementing environmental management systems or pollution prevention — or even better to actually achieve beyond compliance environmental results.

Why has there been such an explosion in ELPs in recent years? Specific motivations in states actually vary widely — and are not always especially clear. Taken together, however, these programs respond to several currents of thinking regarding the governance of environmental affairs. Many policymakers believe that ELPs can motivate beyond compliance environmental performance that otherwise would not occur — especially in the absence of bold federal legislative action or significant green market pressures. ELPs may also enable regulators to create detours around existing regulatory obstacles to beyond compliance performance and to direct greater oversight resources to laggards. Furthermore, ELPs respond to a long-standing industry position that the current system unnecessarily burdens business and that equal or superior environmental outcomes can be achieved less expensively. Increased efficiency among leaders may even create a market pull, drawing more firms into better performance.

The trend toward ELPs seems likely to continue, owing to the renewed EPA commitment plus the apparent widespread political support for such policies. For example, a number of state legislatures have passed enabling statutes, and both leading presidential candi-
dates appear to support voluntary, beyond compliance approaches. Yet, while many of the current ELP initiatives exhibit elements of a paradigm shift, most appear to be having a very limited impact, operating around the edges of the regulatory system. Participation in state ELPs has been disappointingly low, with few programs attracting more than 10 participants. More than half the state programs tie ELP incentives only to commitments or activities, rather than the actual accomplishment of environmental outcomes. Some ELPs do not even require a pollution prevention program, or even pollution prevention goals, despite the continued need for the regulatory system to promote prevention-based strategies.

These facts reflect a tentative approach to ELPs that many observers worry does not sufficiently exploit this opportunity to achieve significantly better environmental protection. Although most programs are too recent to allow firm conclusions concerning their efficacy, it is clear that many may need to be redefined or revamped to achieve their goals. In trying to do so, ELP designers face four key challenges. First, “leadership” requires careful definition — particularly emphasizing prevention-based approaches and proven results. Second, incentive packages must be revised to attract both existing and new leaders, particularly by including a variety of incentives that can directly impact participants’ bottom lines. Third, sound accountability mechanisms are necessary to assure all stakeholders that public and private resources applied to the program will lead to better results — and that those results will be proportional to the incentives given. Last, the structure of ELPs must reinforce, facilitate, and streamline the solutions to these challenges by moving beyond past experiments to capitalize on lessons learned from them.

This article is intended to provide an even-handed consideration of these key issues and challenges, in the context of the history and motivations behind today’s ELP efforts at EPA and in the states. This assessment is based on a review of 12 active and 7 proposed ELPs in 17 states, along with other Tellus Institute experience with state- and federal-level innovation efforts. We conducted the ELP research under contract to the Florida Department of Environmental Protection as part of our State Pollution Prevention Regulatory Integration...
### TABLE 2
**Selected ELP Requirements**

<table>
<thead>
<tr>
<th>Requirement</th>
<th>Programs with Requirement</th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Requirement</strong></td>
<td><strong>Active</strong></td>
<td><strong>Proposed</strong></td>
<td><strong>Total</strong></td>
</tr>
<tr>
<td>Good compliance record</td>
<td>12</td>
<td>7</td>
<td>19</td>
</tr>
<tr>
<td>Pollution prevention program, goals, or commitments</td>
<td>9</td>
<td>5</td>
<td>14</td>
</tr>
<tr>
<td>EMS (or equivalent)</td>
<td>6</td>
<td>6</td>
<td>12</td>
</tr>
<tr>
<td>Measurement</td>
<td>8</td>
<td>4</td>
<td>12</td>
</tr>
<tr>
<td>Public involvement</td>
<td>7</td>
<td>1</td>
<td>8</td>
</tr>
<tr>
<td>Proven “beyond compliance” performance</td>
<td>6</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>Public communication</td>
<td>6</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>Mentoring</td>
<td>1</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Employee training/awards</td>
<td>2</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Self auditing</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Payment for agency effort</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
</tbody>
</table>

**NOTES**  
1. The level of agency discretion in determining whether a facility qualifies varies significantly.  
2. Some additional ELPs may require measurement through facility-specific agreements.

### TABLE 3
**Examples of ELP Incentives**

**Recognition**  
- Allowing participants to hang a special banner  
- Advertising company accomplishments  
- Recognition event with the governor

**Assistance**  
- Free pollution prevention assessments  
- Meetings for participants to share information  
- Mentoring

**Financial**  
- Rebates or credits for environmental fees  
- Tax credits  
- Loans for pollution prevention investments

**Regulatory**  
- Streamlined monitoring, reporting and recordkeeping  
- Reduced inspections  
- Expedited, multimedia, facility-wide, or extended permits  
- Pre-approved permit modifications  
- Construction permit waivers  
- Intra- and extra-agency coordination  
- Soft landings for new technologies
The Environmental Leadership Program pilot, begun by EPA in 1995, was one of the first to try to encourage beyond compliance behavior through regulatory incentives. The project offered decreased inspections and recognition in exchange for participants’ engaging in self-audits, environmental management systems, mentoring, and public communication. That same year, the agency also began Project XL, which soon became the flagship of EPA’s reinvention efforts. This program offers participants negotiated, site-specific regulatory flexibility in exchange for promised environmental achievements. It also explicitly offers opportunities for stakeholder involvement.

A similar project, the Pollution Prevention in Permitting Pilot Project — more widely known as P4 — began in 1996. However, it was expressly focused on incorporating pollution prevention conditions into Title V permits under the Clean Air Act Amendments and had fewer requirements for stakeholder involvement. Also in 1996, contemporaneous with the development of ISO 14001, EPA Region 1 initiated StarTrack. This program offers recognition and regulatory flexibility to participants in exchange for implementing EMSs, self-auditing, and reporting.

States too began to develop ELPs in the mid-1990s. They were driven in part by executive and legislative leadership at the state level that aimed to bring reinvention and innovation to state regulatory agencies. Perhaps the first such program was Minnesota’s Project XL, modeled on and designed to work with EPA’s Project XL. Minnesota’s Pollution Control Agency sowed the seeds for this program in 1995, through initial talks with a 3M facility and the PCA’s proposal that EPA delegate Project XL authority to the state. The PCA was also bolstered by the state’s 1996 Environmental Regulatory Innovations Act. (Minnesota ultimately withdrew its request for XL authority.) By the end of 1997, several other states had successfully followed suit. The pace continued in the following years, bolstered by the 1998 Joint EPA-State Agreement to Pursue Regulatory Innovations. Now nearly half of the states have active or proposed ELPs.

Table 1, on pages 20-21, lists each of the 19 programs we assessed, along with its key attributes. For example, the table notes whether the program is individualized — similar to Project XL — or has a more standardized menu of incentives and requirements. A quick look reveals that standardized, or menu-based, programs are becoming more common and that many ELPs have elements of both approaches. (While individualized programs offer greater flexibility and perhaps better fit to a particular facility, they are resource-intensive for all parties involved. Menu-based programs can offer significant benefits at much less cost.) Many different categories of requirements and incentives are offered. Overall, the broad array of structures, incentives, and requirements reflects a mix of motivations and goals associated with ELPs.

On the whole, improved performance is expected to come from three groups of economic actors, which are both directly and indirectly targeted by ELPs: high-performing firms, firms in compliance (or possibly unregulated), and firms below compliance.

Many ELPs have been oriented, either implicitly or explicitly, toward sophisticated facilities that are already performing beyond compliance. Such programs may potentially benefit agencies and participants in two symbiotic ways. First, they can allow regulators and companies to develop solutions when the regulatory structure impedes more effective and/or efficient environmental protection — solutions that regulators can ideally then apply to a more general audience. Second, through such programs, agencies can recognize and reward the companies that have long been at the forefront of implementing more sustainable practices, while ideally reducing participants’ regulatory burden. This improves the resource efficiency of businesses, by allowing them to focus more directly upon environmental outcomes. It also ideally improves the efficiency of agencies. Within the limits of statutes, which may require yearly inspections or specific timelines for permit renewals, agencies can divert already limited resources away from proven higher performers and toward laggards with compliance problems.

Many ELPs also attempt to serve as models to encourage better performance among mid-performing companies with a commitment to, but little history of, beyond compliance performance. The premise is that incentives increase the number of companies taking initial steps toward more sustainable practices — such as implementing pollution pre-
Environmental Leadership Programs — ELPs — can motivate beyond compliance environmental performance that otherwise would not occur — especially in the absence of bold federal legislative action or significant green market pressures.

What demonstrates leadership, and what kind of leadership merits government recognition and reward? Is it compliance, EMS implementation, pollution prevention goals, stakeholder involvement, mentoring, or proven performance? Not surprisingly, different states have different views, as expressed in or implied by the requirements of their ELPs. Some requirements are fairly common across all programs. For example, all demand some form of good compliance history. Approximately two-thirds require EMSs. Many programs require either public involvement or communications. However, overall portraits of leadership vary widely, mirroring the variation in state politics and culture. Table 2, on page 21, presents a detailed list of requirements, and the numbers of active and proposed programs that have those requirements.

Despite this necessary variance, however, the definition of leadership must be chosen carefully and be well delineated, because it determines other key aspects in the design of an effective ELP: appropriate participation and performance requirements and incentives, and the basis for the agency's measures of success and program evaluation. Careful definition may also provide a foundation for improved coordination between state and federal ELPs — a challenge discussed more fully later. As such, two items in particular seem to be worth considering as important minimum elements of a leadership definition: stakeholder involvement (discussed later under accountability) and proven superior environmental performance (including demonstrated use of prevention-based approaches), particularly in return for the best incentives.

When the overarching motivation behind ELPs is better environmental outcomes, a crucial issue is whether leadership is based on proven results or only on commitments. Most ELPs do require participants to create pollution prevention plans or goals. Ideally, however, all ELPs would emphasize actually achieving pollution prevention, considering EPA's policy commitment placing prevention at the top of the waste reduction hierarchy. To do otherwise would appear inconsistent with...
agency policy and would miss an opportunity to advance pollution prevention in ways that traditional regulatory tools are unable to, in part because the success of pollution prevention frequently relies upon industry knowledge and willingness.

But less than half of ELPs require any proven pollution decrease (or other environmental outcome) either for entry or for staying in the program. Most only require commitments or goals for continual improvement — apparently without penalty for failing to achieve them. This lack of performance requirements may be explained by a key premise common to many programs: that sound EMSs will really ensure continued compliance and, eventually, beyond compliance performance. Yet, data do not yet exist to either refute or support the premise that EMSs are associated with superior environmental performance. (Fortunately, this important question is part of the mission of the Multi-State Working Group on Environmental Management Systems. The MSWG is developing an evaluation of the change in performance of facilities participating in state-sponsored programs to encourage EMSs; many of these programs are ELPs. This project, the National Database on Environmental Management Systems, is being run by the Environmental Law Institute and the University of North Carolina, in collaboration with the MSWG and EPA.)

Given the current lack of data, we were surprised to find that only 3 of 12 ELPs with an EMS component tie incentives to accomplishment of actual environmental outcomes. Two primary reasons suggest the need to do so: because many voluntary programs divert scarce resources from other agency activities, and because some regulatory incentives (such as reduced inspections) may present risks relative to the traditional, protective regulatory framework. Additionally, in trying to set a precedent for the future credibility of performance track initiatives, agencies may wish to be cautious of potentially creating the appearance that incentives are conferred with few strings attached.

Participation in state ELPs has been disappointingly limited to date. No active program we reviewed had more than 30 participants, and most had fewer than 10 — a minuscule portion of potential facilities. Furthermore, most participants are among the small number of facilities that already are engaging in beyond compliance activities. In other words, programs have struggled as yet to broaden participation beyond existing leaders, failing to find the right recipe to entice hundreds — not mere dozens — of participants. To expand the appeal of their programs, agencies must consider providing well-defined packages of incentives that offer participants a range of promising, tangible rewards without high costs to participate. Only by doing so can ELPs address certain of the motivations discussed above, such as attracting new leaders, greatly reducing unnecessary agency oversight, and creating green market pressures.

Most current ELP incentive packages seem to be falling short. We observed over 30 different incentives among the state programs we surveyed. They can be broken down into four categories: recognition, assistance, regulatory, and financial. (See Table 3, page 21.) A large portion of the incentive structure of many of the programs consists of recognition and technical assistance, which frequently represents a re-packaging of standing strategies. Often available elsewhere, these incentives have failed to enthuse large numbers of candidate facilities. In addition, because they have been available for so long, it seems unlikely that assistance and recognition can play a significant role in changing the fundamental, day-to-day ways in which regulators relate to industry, and industry in turn relates to the environment. Sector-specific, size-specific, and even facility-specific variations indicate the need to develop a varied mix of incentives — particularly those that more directly impact profitability — in order to motivate broad participation.

Most companies focus on bottom line gains and seem unimpressed by “soft” incentives, such as recognition and assistance — especially compared to the resources required to apply and participate in a program. Financial incentives, such as permit fee reductions and tax credits, may be particularly enticing for their direct and measurable impact on a firm’s bottom line, particularly for small- and medium-sized enterprises. For larger companies, greater regulatory flexibility is often more attractive. However, new participants of any kind are unlikely to be drawn to ELPs in significant numbers unless agencies enlarge the effective availability of regulatory incentives through increased standardization. Facility-specific flexibility agreements, such as under EPA’s Project XL, can offer companies targeted and economically appealing inducements. However, such negotiation-based agreements historically have been associated with high
While many of the current ELP initiatives exhibit elements of a paradigm shift, most appear to be having a very limited impact, operating around the edges of the regulatory system. And participation has been low.

Proponents of ELPs argue that such incentive-based approaches represent a strong, positive overlay on the traditional system of regulation. ELPs do hold the promise of better performance, but, at the same time, must ensure that the current system of protections is not undermined. Such protections might
be weakened either when incentives alter traditional protections (such as pre-approving permit modifications), or when these programs divert limited resources away from traditional regulatory enforcement.

Thus, participants and agencies must be accountable — in large part, to the public — for the success or failure of ELPs. This concept of co-responsibility is similar in spirit to the contract system proposed under Wisconsin’s Green Tier program, but need not necessitate the kind of fundamental legal changes the Green Tier envisions — as long as the parties meet their responsibilities. Meeting such responsibilities will confer an important benefit upon the ELP — that of greater credibility and less likelihood of facility or agency missteps. Such comfort may encourage more industry representatives and regulators to cooperate, with less fear of bad publicity, third-party lawsuits, or legislative revocation of such programs. In this sense, greater accountability complements the goals that all ELP stakeholders share.

Key participant accountability mechanisms can be divided into three categories: requirements for actual performance improvements; requirements to monitor, record, and report progress; and making incentives proportional to performance.

As to the first category, this article earlier suggested that program developers may wish to consider performance requirements as a minimum element of an ELP. Particularly in this era of the Government Performance Results Act and the National Environmental Performance Partnership System’s state Core Performance Measures, it will be increasingly difficult for agencies to justify the resources spent on programs that do not demonstrate superior environmental outcomes. Yet, how much improvement is sufficient? It is difficult to say. Business has raised at least two legitimate concerns. First, requiring a specific percentage reduction may penalize superior companies that picked low-hanging fruit without the benefit of incentives. Such advanced companies may be the best performers but at the same time not be capable of as high reductions as late starters. Second, it is often difficult to predict the amount of pollution reduction in any particular measurement/reporting period. The current Performance Track proposal (released in first draft in March) may offer a partial solution to this dilemma. It proposes to require yearly progress in terms of reductions, but does not specify how much. It also would invite exceptional companies to excel in different categories than they have focused on before, or to engage in tailored agreements that would both accommodate and take advantage of their special circumstances.

On the second category, “monitoring, record-keeping, and reporting” requirements will be needed to assure agencies and the public of continued improvement against an established baseline of performance. More than half the state programs we examined have some sort of MRR requirements. Effective requirements ensure in particular that reports are timely, meaningful, and easily comprehensible, but how can ELP reporting requirements be reconciled with a common business anthem of reducing unnecessary reporting requirements? By focusing on those that are truly necessary, and by harmonizing ELP reporting with emerging industry standards, such as the Global Reporting Initiative. The Oregon Green Permits Program is attempting to reconcile these two themes. Its director noted that a participating company with an already well-developed EMS found that it was publicly reporting more than it did before, but that the reporting is both more meaningful and requires few resources in addition to its standard EMS efforts. In addition, a Tellus prototype of an integrated reporting and tracking system in New Jersey demonstrated that companies and environmental groups can both be satisfied with integrated, multimedia reporting, because it is both more efficient and more usable to all stakeholders.

Finally, although approaches to ensuring accountability vary, requirements must be proportional to the attractiveness and potential risk of incentives in order to create a more credible ELP in the eyes of many stakeholders. Certain types of regulatory flexibility, such as pre-approval for permits or modifications, can result in negative environmental outcomes. Accountability measures help ensure both that participants have incentives to avoid such outcomes and that agencies and external stakeholders have recourse in that event.

Like participants, implementing agencies also bear a responsibility: to program participants, concerned community and environmental groups, and the broader public. First, agencies owe an efficient response to applicants and participants. Such efficiency is not just in return for a commitment to superior environmental performance.
When the overarching motivation behind ELPs is better environmental outcomes, a crucial issue is whether leadership is based on proven results or only on commitments.

It helps bestow greater credibility on agencies from the viewpoint of the business manager — thereby encouraging increased participation. To accomplish this, agencies may have to dedicate additional budgetary resources, and be flexible enough to add more if the program grows. Alternatively, the program could have a participation cap until the next budget cycle, so that participants in the system receive efficient treatment until such time that the budget can accommodate greater participation. Additionally, customer service may be enhanced by agencies’ setting explicit, public goals upon which their performance will be judged. One example could be setting a deadline by which an agency will respond to applicants. Another could be an expedited permitting process.

Second, agencies must set measurable goals for the overall performance of their programs if they are to demonstrate that public resources have been used to effect an improved environment. Appropriate, measurable goals might relate to both activities and actual environmental outcomes. For example, programs might set goals for the number of participants they will attract in each of the initial three years — preferably aiming for several hundred. Additionally, while a program such as EPA’s Performance Track might not require specific individual performance levels, it might gauge the program’s progress against, for example, an overall goal of a specified reduction in air pollutants per year. This may also serve as an indirect accountability mechanism for participants without individual performance requirements; participants would be subject to collective pressure to meet such goals or face the prospect of contributing to the program’s termination. Additionally, programs may wish to consider normalizing outcomes in terms of budgetary resources, to enable comparison with other agency activities and outcomes of other ELPs.

Third, agencies have not effectively attracted community and environmental groups. In many cases, this poor engagement is explained by constraints of time, resources, and training among NGOs — resulting in a choice among such groups to dedicate their efforts to more traditional advocacy. As a result, industry and regulators are missing out on a valuable perspective, and ELPs may face obstructionist actions by NGOs in the future. Training and orientation may improve NGO involvement. Alternately, agencies may consider creating a position for an ombudsman to review all programs, applications, and participant data to ensure that community and environmental justice concerns are sufficiently addressed. Policymakers have previously recognized the value in creating ombudsmen for underrepresented stakeholders, such as small business. This approach would also enable a confidential review of private business information for community and environmental justice concerns.

Lastly, agencies must formalize the evaluation of their performance against the above goals. A number of state ELPs have such plans, but the programs are too recent to gauge their effectiveness. There is currently a dearth of data upon which to form a full understanding of the effectiveness of state ELPs. Requiring all ELPs to include an evaluation component — and earmarking funding for it — would help address this data deficit. Also, the use of normalized metrics that address...
the types of goals listed above could enable a truer understanding of the effectiveness and tradeoffs associated with these approaches.

An effective program structure underpins a successful and vital ELP by ensuring that its mission is not lost in the voyage from drawing board to implementation. The evolution of ELPs indicates a growing recognition that a tiered, menu-driven program can represent an effective vehicle for change for several reasons: it can minimize transaction costs, capitalize on lessons learned from prior experiments, allow more meaningful stakeholder involvement, and potentially appeal to much larger numbers of participants. Several state ELPs utilize pre-defined menus of requirements and incentives as well as tiers. Tiers recognize and address the differences in participants’ commitment and capabilities by offering increasingly enticing incentives in return for more demanding requirements. EPA’s Performance Track proposal is also modeled on this arrangement.

Many negotiation-based ELPs (perhaps best exemplified by Minnesota’s or EPA’s Project XL) have tended to attract already sophisticated companies, and reward and/or learn from them. This approach offers distinct advantages over menu-based programs in certain situations. For example, negotiation-based programs may offer incentives and requirements better suited to specific facilities, result in more policy and process innovation, and build trusting relationships between regulators and the regulated community. Negotiation-based programs are also more likely to include community stakeholders. However, as discussed above, negotiation-based ELPs have been widely criticized for their high transaction costs, which greatly limit the number of capable and willing applicants. They also constrain agency and stakeholder ability to effectively participate in multiple, simultaneous agreement processes. Such costs were the most sensible investments early in the cycle of regulatory innovation and still have a role to play. But states appear ready to move beyond facility-customized approaches to reach a broader participant base. This readiness is indicated in part by our observation that negotiated flexibility has less emphasis among newer ELPs, and some existing ELPs are shifting toward greater standardization of incentives and requirements.

Standardized, menu-based programs allow agencies to implement, on a broader scale, lessons learned from the history of negotiation-based programs. As such, they are less resource-intensive per project, for all stakeholders. Menu-based programs also provide business more certainty in assessing, in advance, the advantages and disadvantages of ELP participation. Both factors should foster broader industry participation in the program. Further, menu-based programs offer the opportunity for more meaningful stakeholder participation in the formation of the standard requirements and incentives. However, stakeholders may exercise less power regarding the participation of individual facilities — such as during agencies’ discretionary review of facilities’ compliance histories. Including an ombudsman to evaluate applications for community and environmental justice issues would ameliorate this concern.

Tiering adds other advantages. A tiered system promises to attract a broad array of less sophisticated but environmentally conscious facilities, and to reward their continued advancement. It gives a formal structure within which to link more stringent requirements with the best (and perhaps most risky) incentives, for the strongest performers. A tiered system also can facilitate the combination of menu- and negotiation-based approaches. Under such a program, lower tiers could be menu-based and reserved for lower-level performers who advance from commitments to proven performance. In the highest tier, demonstrated high performers with the capability of developing innovative solutions to special problems would be allowed to negotiate tailored agreements with agencies. (EPA’s current Performance Track proposal reflects this design.) Agencies’ participation in such processes would need to be carefully justified, however, based upon the potential for significant regulatory and/or technological innovation to result. Otherwise, the resources may be more justly allocated to lower tiers or other agency priorities.

EPA and the states will face several additional challenges as they continue to move forward with ELPs in the future. Much of the agency’s current proposal, and several active and forthcoming state ELPs, reflect our assessment and the propositions presented above. However, EPA in particular has failed to build consensus on a negotiation- or menu-based ELP that could attract a large constituency to performing beyond compliance. The agency must attract a larger number of new
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leaders to truly invigorate this new regulatory direction.

The future path of a performance track system in the United States also rests heavily upon the ability of states and EPA to coordinate their initiatives. Companies do not have the patience, interest, or resources to participate in a burgeoning number of ELP and other voluntary initiatives at the state and federal levels. EPA has increasingly cooperated with state innovations through an agreement with the Environmental Council of the States and a limited number of state-specific memoranda of agreement and XL agreements. However, the national Performance Track will be EPA’s first attempt to create an across-the-board ELP partnership with states. In doing so, EPA and the states must prepare themselves to overcome several obstacles, including:

• A history of limited cooperation between EPA headquarters and its regions, and between the regions and states;
• Existing agreements on enforcement and programmatic issues, which run on one- and two-year cycles and may constrict certain regulatory flexibility incentives; and
• Intransigence among staff bound to a traditional regulatory culture and modus operandi.

In addressing these and other issues, states and EPA may be able to make the most progress by focusing not on the lowest common denominator, but on how the best state innovations and incentives may complement federal ones, and vice-versa. For example, as mentioned above, combining the statutorily authorized ability of many states to offer fee rebates or tax credits with well-defined federal flexibility may create a powerful synergy between the two sets of leadership programs.

In addition, state and federal program coordinators face the difficult task of developing support among rank and file regulators, who would implement many of the regulatory incentives in practice. Some such individuals are charged with upholding statutory requirements on limited resources. They can be reluctant to proceed without legislative authorization that confers a greater certainty to their actions, and greater protection from lawsuits. In the same way, greater legislative authorization and oversight improves the ability of ELPs to attract otherwise energetic participants who shy away owing to the chance of becoming a public scapegoat or of incurring program transaction costs right before the program is administratively dismantled.

Finally, while many of the current ELP initiatives tout an ongoing paradigm shift, even the most progressive appear to operate more or less at the margins of the existing regulatory system, tinkering with incremental changes. A real paradigm shift might replace permits entirely, rather than streamlining them. Such a shift would require a reconstruction of existing environmental statutes, for which there appears to be little momentum. Some stakeholders consider this a welcome limit upon ELPs. Others view ELPs as the first chapter — a proving ground — in the movement toward more fundamental structural change in how environmental agencies do business. Today, the federal and state governments are still experimenting with ELPs. As they move beyond this phase, they will have to address these concerns.