

# Facilitating Monitoring, Subverting Self-Interest and Limiting Discretion: Learning from “New” Forms of Accountability in Practice

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## INTRODUCTION

A transformation in environmental governance is taking place around the globe.<sup>1</sup> Centralized decision-making by environmental regulators is increasingly beleaguered by declining legitimacy<sup>2</sup> and growing criticism of the command style legal regulatory model. These critics argue that the command style legal regulatory model is too costly, too adversarial, too cumbersome, and too insensitive to local contexts to achieve its goals.<sup>3</sup> This has led to the search for alternatives.<sup>4</sup> Arguably the most credible alternative to hierarchy involves a collaborative, multi-party, multi-level, and adaptive approach to environmental and natural resource governance.<sup>5</sup>

1. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 343 (2004) (discussing the shift from the traditional New Deal regulatory era to a “Renew Deal” governance paradigm).

2. *Id.* at 372; Marshall J. Breger, *The Quest For Legitimacy In American Administrative Law*, 40(1) ISR. L. REV. 72, 78 (2007).

3. NEIL GUNNINGHAM, PETER GRABOSKY & DARREN SINCLAIR, SMART REGULATION 5–7, 343–448 (1998) (discussing the “command and control” approach); *see, e.g.*, Robert N. Stavins & Bradley W. Whitehead, *Market Based Environmental Policy*, in THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY 105 (Marian R. Chertow & Daniel C. Esty eds., 1997) (describing the use of market forces, instead of bureaucracy, as a tool for creating environmental policy); Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 61 (2001); Robert H. Cutting & Lawrence B. Cahoon, *Thinking Outside the Box: Property Rights as a Key to Environmental Protection*, 22 PACE ENVTL. L. REV. 55, 55–56, 83 (2005) (raising general criticisms of regulation, including its cost, its information starved nature, a lack of enforcement, and minimal abatement); Bradley C. Karkkainen, *Information-Forcing Regulation and Environmental Governance*, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 293 (Gráinne de Búrca & Joanne Scott eds., 2006) [hereinafter LAW AND NEW GOVERNANCE]; Annecoos Wiersema, *A Train Without Tracks: Rethinking the Place of Law and Goals in Environmental and Natural Resources Law*, 38 ENVTL. L. 1239, 1241 (2008).

4. For example, some have placed their faith in the market and market based instruments. *See generally* Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 814–19 (2005) (characterizing the debate over the preferred tools of environmental regulation as one that pits traditional “command and control” regulation against market mechanisms, which are thought to be more efficient); Neil Gunningham, Darren Sinclair & Peter Grabosky, *Instruments for Environmental Protection*, in SMART REGULATION, *supra* note 3, at 69–83 (discussing examples of market based approaches and their strengths and weaknesses). For other reforms in regulation, *see generally* NEIL GUNNINGHAM & DARREN SINCLAIR, LEADERS AND LAGGARDS: NEXT-GENERATION ENVIRONMENTAL REGULATION (2002) (providing an analysis of a range of regulatory reforms implemented by agencies and policy makers).

5. Bradley C. Karkkainen, Reply, “New Governance” in *Legal Thought and in the World: Some Splittings as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 473 (2004).

This new approach has generated a diversity of new theoretical perspectives,<sup>6</sup> including “democratic experimentalism,”<sup>7</sup> “collaborative ecosystem governance,”<sup>8</sup> “collaborative governance,”<sup>9</sup> “modular regulation,”<sup>10</sup> “grassroots ecosystem management,”<sup>11</sup> “civic

6. There are of course many other theories not mentioned here, including contract-derived theories. See, e.g., David A. Dana, *The New “Contractarian” Paradigm in Environmental Regulation*, 2000 U. ILL. L. REV. 35, 36 (2000); David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?*, 19 HARV. ENVTL. L. REV. 303, 379–80 (1995). See also Daniel J. Fiorino, *Rethinking Environmental Regulation: Perspectives on Law and Governance*, 23 HARV. ENVTL. L. REV. 441, 443 (1999) (discussing, *inter alia*, social-political governance and policy-learning). There have also been prominent empirically focused lines of work on collaborative watershed and natural resource management. See, e.g., SWIMMING UPSTREAM: COLLABORATIVE APPROACHES TO WATERSHED MANAGEMENT (Paul A. Sabatier et al. eds., 2005) [hereinafter SWIMMING UPSTREAM]; Tanya Heikkila & Andrea K. Gerlak, *The Formation of Large-Scale Collaborative Resource Management Institutions: Clarifying the Roles of Stakeholders, Science, and Institutions*, 33(4) POL’Y. STUD. J. 583, 583 (2005); TOMAS M. KOONTZ ET AL., COLLABORATIVE ENVIRONMENTAL MANAGEMENT: WHAT ROLES FOR GOVERNMENT? 6–9 (2004); JULIA M. WONDOLLECK & STEVEN L. YAFFE, MAKING COLLABORATION WORK: LESSONS FROM INNOVATION IN NATURAL RESOURCE MANAGEMENT 11 (2000).

7. See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (describing democratic experimentalism, a new form of government in which power is decentralized to enable citizens and other actors to utilize their local knowledge to fit solutions to their individual circumstances, but in which regional and national coordinating bodies require actors to share their knowledge with others facing similar problems); Charles Sabel, Archon Fung & Bradley Karkkainen, *Beyond Backyard Environmentalism*, 24(5) BOSTON REV. 1, 6 (1999) (describing how communities are refashioning environmental regulation); Bradley Karkkainen, Archon Fung & Charles F. Sabel, *After Backyard Environmentalism Toward a Performance-Based Regime of Environmental Protection*, 44 AM. BEHAV. SCIENTIST 690 (2000) (developing a model of environmental regulation that is flexible, democratic, and more effective than the familiar methods of central command or market-based control).

8. See, e.g., Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189, 200–04, 224 (2002) (discussing Habitat Conservation Plans, Florida’s Everglades, Chesapeake Bay, and Great Lakes, watershed approaches western United States, Baltic Sea, and other international collaborative efforts).

9. See generally Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997) [hereinafter Freeman, *Collaborative*] (proposing a model of collaborative governance as an alternative to the model of interest representation); see also Jody Freeman, Remarks to the Japanese American Law Society (Sept. 12, 2004), in 83 WASH. U. L.R. 1859 (2005) [hereinafter Freeman, *Remarks*] (discussing collaborative governance and the way in which public agencies and private parties participate jointly and cooperatively in the regulatory and administrative process).

10. Freeman & Farber, *supra* note 4, at 800–05 (discussing a theory of modular regulation that extends the features of Freeman’s collaborative governance model); see also Freeman, *Collaborative*, *supra* note 9. The theory also builds on Dan Farber’s pragmatism inspired theories. See DAN FARBER, ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISION IN AN UNCERTAIN WORLD (1999).

11. See generally Edward P. Weber, *A New Vanguard for the Environment: Grass-Roots Ecosystem Management as a New Environmental Movement*, 13(3) SOC’Y & NAT. RESOURCES 237 (2000)

environmentalism,”<sup>12</sup> “the new regional paradigm,”<sup>13</sup> and “reflexive environmental law.”<sup>14</sup> These perspectives vary in their emphases, encompassing different schools of thought,<sup>15</sup> and applying varying

(discussing grass-roots ecosystem management as a new environmental movement).

12. Coined in the early 1990s by DeWitt John, the concept of civic environmentalism has since been developed by a range of authors. See, e.g., DeWitt John, *Civic Environmentalism*, in ENVIRONMENTAL GOVERNANCE RECONSIDERED 219 (Robert F. Durant, Daniel J. Fiorino & Rosemary O’Leary eds., 2004) [hereinafter ENVIRONMENTAL GOVERNANCE]; DEWITT JOHN, CIVIC ENVIRONMENTALISM: ALTERNATIVES TO REGULATION IN STATES AND COMMUNITIES (1994) (discussing the changing focus of environmental policy and politics); WILLIAM A. SHUTKIN, THE LAND THAT COULD BE: ENVIRONMENTALISM AND DEMOCRACY IN THE TWENTY FIRST CENTURY 237–44 (2000); MARC LANDY & CHARLES T. RUBIN, GEORGE C. MARSHALL INSTITUTE, CIVIC ENVIRONMENTALISM: A NEW APPROACH TO POLICY 1–15 (2001).

13. See Brian Head, *Participation or Co-governance? Challenges for Regional Natural Resource Management*, in PARTICIPATION AND GOVERNANCE IN REGIONAL DEVELOPMENT: GLOBAL TRENDS IN AN AUSTRALIAN CONTEXT 137–54 (Robyn Eversole & John Martin eds., 2005); see generally Jo-Anne Everingham, Lynda Cheshire & Geoffrey Lawrence, *Regional Renaissance? New Forms of Governance in Non-Metropolitan Australia*, 24(1) ENV’T & PLAN. C: GOV’T & POL’Y 139 (2006) (discussing the new regionalist paradigm of Northern America and Europe and concluding that there is a broader concept of sustainable regional development than the new regionalist paradigm in Australia); Lisa Robins, *Major Paradigm Shifts in NRM in Australia*, 7(4) INT’L J. GLOBAL ENV’T L. ISSUES 300 (2007).

14. See generally Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227 (1995) (introducing the theory of reflexive environmental law which focuses on influencing the self-referential capacities of social institutions that are subject to regulation); Sanford E. Gaines, *Reflexive Law as a Legal Paradigm for Sustainable Development*, 10 BUFF. ENVTL. L.J. 1 (2003) (discussing whether using the reflexive law paradigm might help sustainable development resolve its conceptual dilemmas). Influential here is the work by German theorist Teubner and his concept of autopoietic systems. See, e.g., Gunther Teubner, *Introduction to Autopoietic Law*, in AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 3 (Gunther Teubner ed., 1988). This work builds on Luhmann’s system theory. See Niklas Luhmann, *The Self-Replication of Law and its Limits*, in DILEMMAS OF LAW IN THE WELFARE STATE 111 (Gunther Teubner ed., 1985). See also Wiersema, *supra* note 3, at 1242–43.

15. Space precludes a detailed discussion of the entire range of intellectual roots to NEG, however, some of the key underpinnings beyond the abovementioned autopoietic systems thinking include: pragmatism, see generally JOHN DEWEY, ESSAYS IN EXPERIMENTAL LOGIC 303–29 (1916); participation scholarship, see JANE MANSBRIDGE, BEYOND ADVERSARY DEMOCRACY 290–92 (1983); radical and deliberative democratic thought, see Joshua Cohen, *Deliberation and Democratic Legitimacy*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 67 (James Bohman & William Rehg eds., 1997) (discussing the value of an association that engages in public deliberation); see generally THE FEDERALIST NO. 10 (James Madison) (discussing the separation of powers and senatorial deliberation); civic engagement literature, see ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (Henry Reeve trans., 3d ed. 1863); Thomas Jefferson’s philosophy on limited government and the egalitarian culture of agricultural communities, see Peter S. Onuf, *The Scholars’ Jefferson*, 50 WM. & MARY Q. 671, 675–84 (1993); third way politics, see generally ANTHONY GIDDENS, THE THIRD WAY AND ITS CRITICS (2000) (discussing the notion of finding a third way in politics); and in areas such as Australian scholarship, governmentality literature, see generally Nikolas Rose & Peter Miller, *Political Power Beyond the State: Problematics of Government*, 43(2) BRIT. J. SOC. 173 (1992) (analyzing political power in terms of the problems of government).

institutional and political approaches to a range of environmental and public policy problems.<sup>16</sup> Some of this scholarship is more idealized or normative,<sup>17</sup> while other scholarship is more explanatory<sup>18</sup> or empirical.<sup>19</sup> However, much of the scholarship has a number of broad principles in common.<sup>20</sup> These include<sup>21</sup> a focus on the virtues of flexibility, contextual and “bottom-up”

16. Some scholars focus exclusively on U.S. experiments. See WONDOLLECK & YAFFEE, *supra* note 6. Others engage in international comparisons. See Karkkainen, *supra* note 8, at 192. Some limit their investigations to developments in environmental or natural resource management policy areas. See, e.g., Freeman, *Collaborative*, *supra* note 9 (examining environmental standard setting and pollution focused programs); SWIMMING UPSTREAM, *supra* note 6 (examining watershed management initiatives across the United States). Others, such as democratic experimentalist writing, have conceptualized common trends across a range of environmental, natural resource, and/or other public policy issues. See, e.g., Dorf & Sabel, *supra* note 7, at 357, 371–88; Sabel, Fung & Karkkainen, *supra* note 7, at 6.

17. Such as “democratic experimentalism” or “collaborative governance” respectively. See, e.g., Dorf & Sabel, *supra* note 7; Freeman, *Collaborative*, *supra* note 9.

18. Such as the “new regional paradigm” or “collaborative ecosystem governance.” See, e.g., Head, *supra* note 13, at 137; Karkkainen, *supra* note 8, at 200–04, 224.

19. For example, scholarship on collaborative watershed management. See SWIMMING UPSTREAM, *supra* note 6.

20. This commonality arises from their engagement with forms of environmental and public policy (such as the “NEG experiments” mentioned below) that generally favor less rigid, less uniform, less prescriptive, and less hierarchical approaches to governing and which promise a new, arguably more effective, and legitimate means of addressing environmental challenges. See, e.g., Lobel, *supra* note 1, at 371–404; Karkkainen, *supra* note 5, at 472, 496; Gráinne de Búrca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, in LAW AND NEW GOVERNANCE, *supra* note 3, at 2–3; Richard D. Margerum, *Overcoming Locally Based Collaboration Constraints*, 20 SOC’Y & NAT. RES. 135 (2007).

21. There is no firm agreement on a definitive “model” of NEG per se. Thus, in deciding to group such diverse theories together under the rubric of NEG scholarship, there is of course a risk of over generalization and of obscuring important differences. See Karkkainen, *supra* note 5, at 481–96 (offering examples of such risks relating to divergent theoretical roots, as well as the application of terminologies such as “soft law” and “civic environmentalism”). However, the approach taken by this Article is that, conscious of the risks of generalization, there are nevertheless significant benefits to be gained from broadly grouping different theories and scholarship under an NEG framework. Indeed, consistent with emerging understandings within the NEG literature itself, by adopting a generalized rubric of NEG (with apposite attention to differences) and linking and comparing theories in this broad way, it may be possible to test, build on, and reformulate theory to help achieve collectively and separately a better understanding of what is occurring, and/or a better approach for normatively influencing the direction of this new approach to environmental governance. See, e.g., Neil Walker, *EU Constitutionalism and New Governance*, in LAW AND NEW GOVERNANCE, *supra* note 3, at 21–24; David Trubek & Louise Trubek, *The Birth of a Notion: Some Reflections on New Governance and Regulation at the Berlin Conference on Law and Society in the 21st Century*, EU CENTRE OF EXCELLENCE UW-MADISON, 1–2 (2007) (noting that new governance is considered “a major field within socio-legal studies world-wide”); Orly Lobel, *Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498, 502, 506–08 (2004); De Búrca & Scott, *supra* note 20, at 3; Wiersema, *supra* note 3, at 1242–43.

governance, collaboration, learning and adaptation,<sup>22</sup> and “new” forms of accountability.<sup>23</sup> Following the work of a burgeoning group of scholars both within and beyond the environmental and natural resources law fields, this Article uses the term “new environmental governance” (“NEG”) to refer to governance experiments that contain some or all of these characteristics.<sup>24</sup>

22. For some commonly cited characteristics of NEG, *see, e.g.*, Karkkainen, *supra* note 5, at 473–74 (noting NEG characteristics that include “collaborative, multi-party, multi-level, adaptive, problem-solving” unpinned by aspirations to be more “open-textured, participatory, bottom-up, consensus-oriented, contextual, flexible, integrative, and pragmatic . . . and adaptive”); Lobel, *supra* note 1, at 371–404 (pointing to eight clusters of shared approaches, namely “Participation and Partnership, Collaboration, Diversity and Competition, Decentralization and Subsidiarity, Integration of Policy Domains, Flexibility and Non-coerciveness (or Softness-in-Law), Fallibility, Adaptability, and Dynamic Learning, Law as Competence and Orchestration”); Walker, *supra* note 21, at 22 (noting new governance shares general properties such as “participation and power sharing, multilevel integration, diversity and decentralisation, deliberation, flexibility and revisability of norms, and experimentation and knowledge creation”); Neil Gunningham, Professor, Australia National University, Address at the International Meeting of Law and Society in the 21st Century, Humboldt University, Berlin: The New Collaborative Environmental Governance (July 25, 2007) (defining new governance as “participatory dialogue and deliberation, devolved decision-making, flexibility rather than uniformity, inclusiveness, transparency, institutionalised consensus-building practices, and a shift from hierarchy to heterarchy”).

23. Unlike the other characteristics of NEG, the feature of “new” forms of accountability has not specifically been raised in any meta-analysis of new governance thus far. Nevertheless, for the purposes of this Article, this feature arguably warrants inclusion as a common characteristic of NEG, both because it is an explicit feature of some individual NEG theories and, as discussed below, what this Article has termed “new” forms of accountability is widely recognized as central to NEG’s unique approach to governing. *See, e.g.*, Freeman, *Collaborative*, *supra* note 9, at 30; Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 664–66 (2000); Brian W. Head, *Assessing Network-Based Collaborations*, 10 PUB. MGMT. REV. 733, 737–39 (discussing and classifying collaborative networks around a set of dimensions, including accountability frameworks); Marcus B. Lane, Critical Issues in Regional Natural Resource Management, prepared for the Australian State of the Environment Committee 4–5 (2006), available at <http://www.environment.gov.au/soe/2006/publications/integrative/nrm-issues/pubs/nrm-issues.pdf>.

24. Note that the term “new” in “new environmental governance” is not intended to signify governance efforts that are recent in time (although many new governance experiments are in fact quite “young”—being less than a decade old), but rather something that is *distinct* from what has gone before. De Búrca & Scott, *supra* note 20, at 2–3. *See generally* Karkkainen, *supra* note 5, at 472–73, n.2 (providing a useful background and history on the term); Walker, *supra* note 21, at 21–24 (discussing the concept of new governance and, *inter alia*, making a distinction between concrete and abstract specifications of what is “new” in new governance). For further discussion and development of the term, *see, e.g.*, THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE (Lester M. Salamon ed., 2001) (compiling a discussion of the new governance framework which emphasizes collaboration and enablement rather than hierarchy and control); Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503 (2008); Wiersema, *supra* note 3, at 1241.

This new approach to environmental and natural resources law is supported by explicit or implicit normative claims that NEG’s characteristics will deliver effectiveness, legitimacy, and democratic benefits beyond those provided by traditional approaches to environmental protection.<sup>25</sup> For example, compared to command and control’s (“CAC”) exclusive reliance on the knowledge and resources of centralized agencies, techniques of collaboration, participation, and deliberation are said to enhance democracy, capitalize on the unique capacities of multiple public and private actors, and lead to problem-solving that is inclusive of local circumstances.<sup>26</sup> Combining these benefits with adaption and learning approaches, NEG may also go beyond the “ossified” nature of CAC to cope better with many of today’s “second-generation” environmental problems that involve diffuse pollution sources and occur within dynamic and complex ecological systems.<sup>27</sup>

Despite these purported benefits of NEG, it has also faced a litany of criticisms.<sup>28</sup> Many of the most trenchant criticisms relate to issues of accountability.<sup>29</sup> Accountability is a key concept for

25. Lobel, *supra* note 21, at 502.

26. *See, e.g.*, Karkkainen, *supra* note 8, at 223; Mark Lubell et al., *Conclusions and Recommendations*, in *SWIMMING UPSTREAM*, *supra* note 6, at 286–87; Freeman & Farber, *supra* note 4, at 877; Bradley C. Karkkainen, *Managing Transboundary Aquatic Ecosystems: Lessons From The Great Lakes*, 19 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 209, 228–29 (2006).

27. *See, e.g.*, Freeman & Farber, *supra* note 4, at 806–14, 877; Orts, *supra* note 14, at 1238; Robert F. Durant, Daniel J. Fiorino & Rosemary O’Leary, *Introduction*, in *ENVIRONMENTAL GOVERNANCE*, *supra* note 12, at 4.

28. For example, a range of authors have claimed that NEG leads to lowest common denominator solutions, rent-seeking, dominance by self-interested economic actors, and disenfranchised environmental interests. For an overview of these debates, *see, e.g.*, Eric W. Orts & Cary Coglianese, *Collaborative Environmental Law: Pro and Con*, Debate, 156 U. PA. L. REV. PENNUMBRA 289 (2007), available at <http://www.pennumbra.com/debates/pdfs/collabenvlaw.pdf>; Tomas M. Koontz & Craig W. Thomas, *What Do We Know and Need to Know About the Environmental Outcomes of Collaborative Management*, 66(1) PUB. ADMIN. REV. 111, 113 (2006); Donald T. Hornstein, *Complexity Theory, Adaptation and Administrative Law*, 54 DUKE L.J. 913, 949–51 (2005).

29. Archon Fung & Erik Olin Wright, *Thinking About Empowered Participatory Governance*, in *DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE* 21–22, 36–37 (Archon Fung & Erik Olin Wright eds., 2003) [hereinafter *DEEPENING DEMOCRACY*]; Rena I. Steinzor, *Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control*, 22 HARV. ENVTL. L. REV. 103, 142–43 (1998); Daniel A. Farber, *Triangulating the Future of Reinvention: Three Emerging Models of Environmental Protection*, 2000 U. ILL. L. REV. 61, 74–75 (2000); Dana, *supra* note 6, at 52–57; David L. Markell, “Slack” in the Administrative State and its Implications For Governance: *The Issue of Accountability*, 84 OR. L. REV. 1, 56–57 (2005); Holly Doremus, *Adaptive Management, the Endangered Species Act, and the Institutional Challenges of “New Age” Environmental Protection*, 41

democratic governance broadly concerned with preventing the abuse of public authority, ensuring that public resources are used appropriately, and securing performance expectations of governance endeavors.<sup>30</sup> Traditionally, accountability issues in public law and regulatory scholarship have been narrowly drawn.<sup>31</sup> The focus was on formal, largely hierarchical, principal-agent accountability relationships where a legislature (the principal) confers on an administrative agency (the agent) responsibility for the performance of particular tasks, with a duty to explain, justify, and be held accountable for its actions via legal or administrative mechanisms (e.g., judicial review).<sup>32</sup>

In both NEG and regulatory reform scholarship,<sup>33</sup> these traditional concepts have been supplemented by “new” understandings,<sup>34</sup> formations, and mechanisms of accountability.<sup>35</sup> One of the primary reasons for these developments has been the need for an approach to governance that addresses accountability concerns where non-government actors assume important roles in the legal process.<sup>36</sup> Indeed, hierarchical, principal-agent accountability relationships cannot capture the dynamic of multiple principals and preferences present in a multi-agency,

WASHBURN L.J. 50, 52, 88 (2001); Freeman, *Collaborative*, *supra* note 9, at 2, 96; Paul L. Posner, *Accountability Challenges of Third-Party Government*, in *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE*, *supra* note 24, at 523; Bradley C. Karkkainen, *Adaptive Ecosystem Management and Regulatory Penalty Defaults: Toward a Bounded Pragmatism*, 87 MINN. L. REV. 943, 961–63 (2003); Peter J. May, *Regulatory Regimes and Accountability*, 1(1) REG. & GOVERNANCE 8, 9–11 (2007).

30. May, *supra* note 29, at 11.

31. Charles F. Sabel & William H. Simon, *Epilogue: Accountability Without Sovereignty*, in *LAW AND NEW GOVERNANCE*, *supra* note 3, at 398–99.

32. JENNY STEWART & GRANT JONES, *RENEGOTIATING THE ENVIRONMENT* 12, 123 (2003); Colin Scott, *Accountability in the Regulatory State*, 27(1) J.L. & SOC'Y 38, 39–40 (2000); Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 EUR. L.J. 447, 450 (2007).

33. Posner, *supra* note 29, at 524–28; Scott, *supra* note 32, at 40; John Braithwaite, *Accountability and Governance Under the New Regulatory State*, 58(1) AUS. J. PUB. ADMIN. 90, 91 (1999).

34. This has included discussions of alternative “separation of power” doctrines that seek to account for the role of private actors in governance. See generally Karkkainen, Fung & Sabel, *supra* note 7.

35. Freeman, *Collaborative*, *supra* note 9, at 96; Posner, *supra* note 29, at 524; May, *supra* note 29, at 11; STEWART & JONES, *supra* note 32, at 123.

36. Private actors have long played a role in governance. See Freeman, *supra* note 23, at 547; May, *supra* note 29; Elizabeth Fisher, *The European Union in the Age of Accountability*, 24 OXFORD J. LEGAL STUD. 495, 497 (2004).

multi-stakeholder NEG collaboration.<sup>37</sup> Instead, accountability in NEG may take on various horizontal forms (such as mutual accountability between collaborators) as well as downward relationships (such as stakeholders being accountable to their respective sectors or groups).<sup>38</sup>

Because traditional mechanisms of accountability (e.g., rigid authorizing legislation coupled with judicial review) tend to constrain discretion, some NEG scholars argue those mechanisms may be incapable of capitalizing upon, and even detrimental to, the contributions of non-governmental actors and multi-agency collaborations to environmental governance.<sup>39</sup>

Various authors have proposed extensive reforms to traditional political, administrative, and legal forms of accountability.<sup>40</sup> This Article is focused on how aspects of these reforms and additions play out within two broad levels of accountability common to legal regulation and governance.<sup>41</sup> The first relates to the accountability of those who make regulations and rules with respect to the content of these provisions, while the second relates to the answerability and compliance of those being regulated.<sup>42</sup>

At these two levels, a variety of “new” mechanisms and approaches to accountability have been proposed in NEG literature, typically under a rationale of providing *greater* deference to decision-making by agencies and stakeholders.<sup>43</sup> For instance,

37. Freeman & Farber, *supra* note 4, at 904.

38. *Id.*

39. *Id.*; Freeman, *supra* note 23, at 575; Posner, *supra* note 29, at 524–28; Scott, *supra* note 32, at 39.

40. It is important not to overstate the novelty of these “new” forms of accountability identified in the NEG. Forms of accountability in performance-based approaches have had a relatively long history. Nevertheless, NEG’s approach is widely seen as a distinct trend. *See, e.g.,* Peter J. May, *Performance-Based Regulation and Regulatory Regimes: The Saga of Leaky Buildings*, 25(4) LAW & POL’Y 381, 384 (2003) (discussing the challenge of “identifying relevant measures of performance and standards for desired levels of performance” against which accountability and compliance is gauged. May proceeds to note a specific example of the difficulties of translating vague performance objectives for regulations into meaningful standards “which perhaps is the first quantitative performance standard in United States . . . the creation in 1914 of a voluntary federal drinking water quality standard that specified maximum coliform bacteria levels for municipal water supplies”); Leighton McDonald, *The Rule of Law in the ‘New Regulatory State’*, 33 COMMON L. WORLD REV. 197, 221 (2004). *See generally* De Búrca & Scott, *supra* note 20, at 1–2; Lobel, *supra* note 1; Freeman, *Collaborative*, *supra* note 9.

41. May, *supra* note 29, at 11–12.

42. *Id.*

43. Freeman, *Collaborative*, *supra* note 9, at 2, 96; Posner, *supra* note 29, at 524; May, *supra* note 29, at 11.

statutes that announce general goals without dictating the means of achieving them afford agencies and stakeholders the discretion to devise locally tailored and innovative solutions.<sup>44</sup> Some would even relax judicial review, suggesting courts grant a *presumptive deference* to agency and stakeholders' decisions.<sup>45</sup> Others argue that traditional accountability approaches should be enhanced by "new" mechanisms in which private actors and institutions play active roles.<sup>46</sup> Examples include mutual accountability between multiple public and private collaborators who cooperatively negotiate rules and/or fulfill self-monitoring and reporting tasks,<sup>47</sup> "professional" accountability of firms,<sup>48</sup> third-party certification,<sup>49</sup> and contractual agreements.<sup>50</sup>

These and other proposals in the NEG literature have raised a number of important empirical questions. However, empirical investigations of the practical operation of "new" accountability mechanisms applied to NEG are rare. This Article draws on eighty interviews across three NEG programs in Australia to examine the practical application of a range of new accountability mechanisms. The first program—the Environmental Improvement Plan—involves local residents, regulators, and "big" industries trying to reduce point source pollution impacts.<sup>51</sup> The second program—Neighbourhood Environment Improvement Plans—aims to foster partnerships between communities, small and medium sized enterprises, state agencies, local governments, and environmental groups to address diffuse and complex environmental problems in the neighborhoods of Victoria.<sup>52</sup> Finally, the third program—

44. Freeman, *Collaborative*, *supra* note 9, at 92–94; WONDOLLECK & YAFFEE, *supra* note 6, at 241; Karkkainen, *supra* note 29, at 963.

45. Freeman, *Collaborative*, *supra* note 9, at 92.

46. WONDOLLECK & YAFFEE, *supra* note 6, at 235–37.

47. Edward P. Weber, *The Question of Accountability in Historical Perspective: From Jackson to Contemporary Grassroots Ecosystem Management*, 31(4) ADMIN. & SOC'Y 451, 453 (1999); WONDOLLECK & YAFFEE, *supra* note 6, at 238; Lobel, *supra* note 1, at 378, 432; Freeman & Farber, *supra* note 4, at 905–06, 908.

48. May, *supra* note 29, at 12.

49. Freeman, *supra* note 23, at 665; Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 198–201, 207 (2000); Weber, *supra* note 47, at 455; Freeman, *Collaborative*, *supra* note 9, at 22, 96.

50. Freeman, *supra* note 49, at 198–201.

51. Cameron Holley & Neil Gunningham, *Environment Improvement Plans: Facilitative Regulation in Practice*, 23 ENVTL. & PLAN. L.J. 448 (2006); Ian Wills & Sigmund Fritschy, *Industry-Community-Regulator: Consultation in Improving Environmental Performance in Victoria*, 8 AUSTL. J. ENVTL. MGMT. 158 (2001); GUNNINGHAM & SINCLAIR, *supra* note 4.

52. Neil Gunningham, Cameron Holley & Clifford Shearing, *Neighbourhood Environment*

Regional Natural Resource Management—is a broad-based, natural resource management initiative that focuses across Australia, involving the establishment of fifty-six regional natural resource management bodies and the investment of around AUD\$5 billion in public funds.<sup>53</sup>

This Article does not set out to determine whether the programs evidence a suitable degree of “accountability” per se. Accountability is a broad concept, well beyond the scope of this Article to explore empirically.<sup>54</sup> Instead, the analysis is limited to evaluating the effectiveness of some specific mechanisms and approaches to accountability, most prominently: professional accountability, mutual accountability, and agency and stakeholder decision-making within performance orientated regimes.<sup>55</sup> These mechanisms and approaches are analyzed in relation to how NEG collaborative groups are held accountable both for developing fair and appropriate targets and procedures, and for complying with these provisions.<sup>56</sup> Responding to criticisms in the literature regarding NEG’s flexible, adaptive, and collaborative approach, this evaluation specifically considers whether these mechanisms were successful in ensuring the studied examples of NEG avoided risks of unprincipled deal-making (i.e., agencies and their bargaining partners striking any deal they want regarding environmental performance) and stymied chances of capture and

*Improvement Plans: Community Empowerment, Voluntary Collaboration and Legislative Design*, 24(2) ENVTL. & PLAN. L.J. 125 (2007).

53. Head, *supra* note 13.

54. For example, this Article does not investigate accountability structures that relate to political, administrative, financial, and legal accountability in government agencies. Thus, while it examines accountability structures regarding the development of rules and their enforcement, it does not examine the role of judicial review in ensuring agencies are held accountable for their decisions in designing regulations, nor does it consider other bureaucratic controls designed to ensure agencies and their inspectors do not abuse their authority by enforcing regulations in a capricious way. The Article also does not examine transparency issues relating to collaborative groups, or accountability between collaborators representing a non-governmental group and the wider group members. For further information on the concept of accountability, see, e.g., Bovens, *supra* note 32, at 454–60; Scott, *supra* note 32, at 40–43; May, *supra* note 29, at 11–12; Fisher, *supra* note 36, at 501–03; Posner, *supra* note 29, at 524.

55. See, e.g., Weber, *supra* note 47, at 454; Karkkainen, *supra* note 8, at 237; Susan Sturm, *Gender Equity Regimes and the Architecture of Learning*, in LAW AND NEW GOVERNANCE, *supra* note 3, at 331–34.

56. In judging their effectiveness, the Article draws on respondent opinions and documentary data to determine whether these mechanisms had or were likely to ensure appropriate use of public resources, secure reasonable environmental performance expectations, and prevent the abuse of authority. May, *supra* note 29, at 11–12.

rent-seeking (i.e., economic or other interests benefiting from the NEG program at the expense of the broader public interest).<sup>57</sup>

Beyond examining the effectiveness of new accountability mechanisms, the Article also provides insight on the nature and role of conventional law in “new governance”—an issue that has posed significant practical and conceptual challenges for law and for lawyers.<sup>58</sup> NEG’s defining features—particularly flexibility, contextual and “bottom-up” governance, and learning and adaptation—have prompted scholars to question whether and to what extent law can be made an instrument of this variable form of governance, while still operating traditionally in the sense of holding officials accountable for their acts.<sup>59</sup> One recent study formulates these doubts as three competing theses on the nature and role of traditional law in new governance: conventional forms of law and governing either remain impervious to, form hybrids with, or are being “reshaped” by these new ways of governing.<sup>60</sup> While these are broad and complex issues, containing both descriptive and normative elements, the Article’s empirical findings lead the author to argue that “hybridity” descriptively captures the relationship between law and new governance.<sup>61</sup>

This Article’s examination proceeds in five Parts. Part I outlines relevant theory on accountability in NEG and fleshes out some key questions that remain unanswered. Part II explains the methodology of the Article’s empirical analysis before Parts III, IV, and V explore the three case studies. For each case, this Article

57. Fung & Wright, *supra* note 29, at 37; Karkkainen, *supra* note 29, at 963; Doremus, *supra* note 29.

58. See, e.g., Wiersema, *supra* note 3, at 1294–99 (examining collaborative ecosystem management and new governance and asking whether there is a way that law might play a role in ensuring that the goal of environmental protection over the long-term is not lost to competing short-term interests); De Búrca & Scott, *supra* note 20, at 4; Sabel & Simon, *supra* note 31.

59. Sabel & Simon, *supra* note 31, at 395; Freeman, *Collaborative*, *supra* note 9, at 8.

60. De Búrca & Scott, *supra* note 20, at 4–9; Sabel & Simon, *supra* note 31, at 395–96. See also David M. Trubek & Louise G. Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 540, 541, 543 (2006).

61. Sabel & Simon, *supra* note 31, at 395–96; De Búrca & Scott, *supra* note 20, at 4–9. This discussion depends on idealized constructs, commonly used in new governance literature. Here traditional law is seen as top-down control using fixed statutes, detailed rules, and judicial enforcement. New governance in turn is seen as involving a wide range of instruments that embrace some, and ideally all, of new governance characteristics mentioned above. As a number of authors point out, such constructs may mask complexities and empirical variation and further work needs to be done to clarify terminologies. Trubek & Trubek, *supra* note 60, at 543.

provides a brief overview of the program, examines their legislation and guidelines to reveal some of their main accountability mechanisms, and analyzes how effective these accountability mechanisms were in practice.

While the findings from each case present a range of different issues, all three NEG experiments reveal shortcomings in their different approaches to accountability, giving rise to the potential for capture, unprincipled deal-making, and rent-seeking. Drawing from the comparative findings below, this Article’s Conclusion identifies a number of recommendations for improving the effectiveness of accountability mechanisms in NEG. These insights fall into three main groupings: (i) supporting effective monitoring processes; (ii) setting overarching performance goals to “bound” or limit discretion and decision-making; and (iii) fostering effective professional and mutual accountability to subvert “self-interested behavior.” In addition to these insights, the Conclusion also includes an analysis of the interaction between conventional law and new governance.

#### I. THEORY: ACCOUNTABILITY IN NEW ENVIRONMENTAL GOVERNANCE

In western democracies like the United States and Australia, accountability is a concept that it is hard for anyone to oppose in principle.<sup>62</sup> It is intended to prevent the abuse of public authority, ensure that public resources are used appropriately, and secure performance expectations of governance endeavors.<sup>63</sup> In various ways, NEG experiments and proposals seek to secure such accountability while allowing the multiple citizens and stakeholders involved in NEG to utilize their unique knowledge and capacities to effectively collaborate and engage in flexible and provisional decision-making.<sup>64</sup>

62. Bovens, *supra* note 32, at 448.

63. May, *supra* note 29, at 11.

64. These reforms have raised numerous broader questions and debates within the new governance literature, many of which continue today. Not least, questions remain as to whether the fragmentation of responsibility and involvement of private and third parties in NEG serves to obfuscate and reduce, add to, or transform NEG accountability. *See, e.g.*, Freeman & Farber, *supra* note 4, at 893–94, 906–07; Freeman, *supra* note 23, at 665; Weber, *supra* note 47, at 463–67; Sabel & Simon, *supra* note 31; May, *supra* note 29, at 11; Bovens, *supra* note 32, at 463–64; Brian Head, *Governance, in IDEAS AND INFLUENCE SOCIAL SCIENCE AND PUBLIC POLICY IN AUSTRALIA* 48, 54–56 (Peter Saunders & James Walter eds., 2005);

Consistent with the developing new governance literature, such experiments and proposals involve a wide range of configurations and relationships between NEG and its “new” forms of accountability, on the one hand, and more conventional top-down regulation and accountability approaches, on the other.<sup>65</sup> In some of its boldest and most idealized theoretical formulations, NEG would rewrite the traditional relationship between the legislature, administrative agencies, and courts, and would thereby reform traditional political, administrative, and legal forms of accountability.<sup>66</sup> For example, rather than enact explicit rules and regulations, legislators would establish explicitly provisional and incomplete legislative frameworks to induce and facilitate problem solving by diffuse collaborations.<sup>67</sup> In such an arrangement, courts would no longer check the application and enforcement of clearly enacted law, but would instead monitor and incentivize participatory, deliberative, and transparent efforts at legislative implementation.<sup>68</sup>

Less idealized and more explanatory NEG scholarship describe governance structures in which certain functions of traditional regulatory institutions and accountability controls remain, but are variously supplemented and supported by a range of “new” accountability approaches and mechanisms.<sup>69</sup> As discussed below, such supplementary mechanisms are varied and include mutual accountability between collaborators, professional accountability within industries, and other non-traditional forms of government oversight.

These “new” mechanisms of accountability often focus on relationships between different sets of actors. For example, professional accountability relationships are derived from “internalized” mechanisms such as professional norms, while mutual accountability relationships involve checks and balances arising between individual collaborators. These relationships may

Freeman, *Collaborative*, *supra* note 9, at 31, 83–87; Hornstein, *supra* note 28, at 949 n.197; Doremus, *supra* note 29, at 52, 88; WONDOLLECK & YAFFEE, *supra* note 6, at 252; Karkkainen, *supra* note 29, at 963.

65. Trubek & Trubek, *supra* note 60, at 541.

66. Cohen, *supra* note 24, at 512. See, e.g., Karkkainen, Fung & Sabel, *supra* note 7, at 693.

67. Sabel & Simon, *supra* note 31, at 399; Cohen, *supra* note 24, at 512.

68. Sabel & Simon, *supra* note 31, at 399; Cohen, *supra* note 24, at 512; Dorf & Sabel, *supra* note 7, at 397.

69. WONDOLLECK & YAFFEE, *supra* note 6, at 229–30; Freeman, *Collaborative*, *supra* note 9, at 2, 96; Posner, *supra* note 29, at 524, 532–42; May, *supra* note 29, at 11.

also focus on different aspects of conduct.<sup>70</sup> For example, actors may be held to account for economic values, such as financial probity, or social values, such as fairness and effectiveness.<sup>71</sup>

For the purposes of this Article, it is useful to think about these various accountability relationships and foci as falling within two broad “levels” or “groupings” of accountability.<sup>72</sup> The first grouping consists of accountability relationships regarding rules.<sup>73</sup> A key issue here is the fairness of the rules developed, evaluated by factors such as whether regulatory and governance provisions developed by a given group of actors avoided capture by private interests.<sup>74</sup> The second “grouping” of accountability relationships is concerned with the implementation of the rules.<sup>75</sup> A central concern here is ensuring actors comply with implementation requirements or are held accountable for non-compliance so that governance ends are achieved.<sup>76</sup>

In order to analyze how accountability relationships are applied in NEG, it is also important to note the relative emphasis on process- and performance-based standards in different regimes. While process- and performance-based approaches are not mutually exclusive, for heuristic purposes, it is helpful to treat them separately.

In general terms, process-based approaches assume that far more will be achieved by influencing attitudes and creating a framework for better environmental organization than by imposing detailed prescriptive standards.<sup>77</sup> Like some reflexive law theories, process-based approaches focus on developing systems for managing environmental performance across an organization as a whole by

70. Bovens, *supra* note 32, at 454–55; Scott, *supra* note 32, at 41; May, *supra* note 29, at 12.

71. See Bovens, *supra* note 32, at 454–60; Scott, *supra* note 32, at 40–43; Fisher, *supra* note 36, at 501–03; Posner, *supra* note 29, at 524; May, *supra* note 29, at 11–12.

72. See Bovens, *supra* note 32, at 454–60; Scott, *supra* note 32, at 40–43; Fisher, *supra* note 36, at 501–03; Posner, *supra* note 29, at 524; May, *supra* note 29, at 11–12.

73. See Bovens, *supra* note 32, at 454–60; Scott, *supra* note 32, at 40–43; Fisher, *supra* note 36, at 501–03; Posner, *supra* note 29, at 524; May, *supra* note 29, at 11–12.

74. See Bovens, *supra* note 32, at 454–60; Scott, *supra* note 32, at 40–43; Fisher, *supra* note 36, at 501–03; Posner, *supra* note 29, at 524; May, *supra* note 29, at 11–12.

75. See Bovens, *supra* note 32, at 454–60; Scott, *supra* note 32, at 40–43; Fisher, *supra* note 36, at 501–03; Posner, *supra* note 29, at 524; May, *supra* note 29, at 11–12.

76. See Bovens, *supra* note 32, at 454–60; Scott, *supra* note 32, at 40–43; Fisher, *supra* note 36, at 501–03; Posner, *supra* note 29, at 524; May, *supra* note 29, at 11–12.

77. See generally NEIL GUNNINGHAM & RICHARD JOHNSTONE, REGULATING WORKPLACE SAFETY (1998); CHRISTINE PARKER, THE OPEN CORPORATION 276–77, 280–83 (2002); GUNNINGHAM & SINCLAIR, *supra* note 4.

requiring stakeholders (such as industry) to set objectives and targets, establish a management program, set procedures for achieving the targets, and establish measurement techniques to ensure that targets are reached.<sup>78</sup> By requiring or persuading an entity to systematically examine its environmental impact and means of reducing it, these processes will ideally stimulate a continuous search within the organization for environmental impacts that fall outside of current regulation, followed by systemic self-correction, and thus a process of continuous adjustment and improvement.<sup>79</sup>

Accountability arrangements of this nature focus on ensuring that regulated entities develop and follow prescribed processes rather than ensuring that they achieve particular performance goals.<sup>80</sup> Important “new” accountability mechanisms in this regard include industry’s “professional” accountability, third-party certification of systems, and independent audit of those systems.<sup>81</sup> The weakness of this approach is that industries may simply go through the motions, set tokenistic goals, or pay lip service to the process, and therefore ultimately fail to achieve improvements in environmental performance.<sup>82</sup> Given this risk, some scholars have suggested that regulatory or economic incentives other than the process itself are needed to drive regulated actors to improve environmental performance and to ensure their commitment to following the process.<sup>83</sup>

In part because of the perceived limitations of process-based accountability, many NEG theories seek to achieve accountability through performance-based approaches that give regulated actors discretion to determine how best to achieve prescribed “outcomes,” but nevertheless require that prescribed targets are ultimately achieved.<sup>84</sup>

78. Holley & Gunningham, *supra* note 51.

79. GUNNINGHAM & SINCLAIR, *supra* note 4, at 180; Daniel J. Fiorino, *Flexibility*, in ENVIRONMENTAL GOVERNANCE, *supra* note 12, at 415.

80. Fiorino, *supra* note 79, at 413–16; May, *supra* note 29, at 11.

81. Freeman, *Collaborative*, *supra* note 9, at 30, 96; May, *supra* note 29, at 11, 13.

82. GUNNINGHAM & SINCLAIR, *supra* note 4, at 180; Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC’Y REV. 691, 726 (2003).

83. Fiorino, *supra* note 79, at 413–16.

84. *See, e.g.*, May, *supra* note 29, at 8; Freeman, *Collaborative*, *supra* note 9, at 92–94; Doremus, *supra* note 29, at 87–88; Rena I. Steinzor, *The Corruption of Civic Environmentalism*, 30 ENVTL. L. REP. 10909, 10917 (2000).

Much of the NEG literature on performance-based approaches envisions regulated actors, stakeholders, and government entities coming together in localized collaborative forums to reveal information, monitor environmental conditions, and set locally tailored environmental performance targets (designed to deliver environmental outcomes).<sup>85</sup> The envisioned collaborative groups may also be required to identify indicators or methods of assessing performance and then monitor and report on their adherence to performance goals.<sup>86</sup>

One significant practical challenge for achieving accountability within such systems relates to the issue of monitoring, both in terms of setting targets and in terms of ensuring compliance. Indeed, a number of commentators doubt that collaborative groups will be able to meet the significant technical and financial challenges of generating data to set meaningful standards, not least because establishing baseline conditions of the ambient environment and the implications of its contamination is often extremely demanding.<sup>87</sup> If these groups cannot meet such challenges, holding them accountable for performance becomes tenuous. Some NEG authors have made concrete recommendations to try to overcome this problem. For example, Karkkainen recommends setting continually refined regulatory bottom lines in the form of “penalty” default rules, which provide a harsh regulatory incentive necessary to bring key actors to the table to reveal information, improve their environmental monitoring, and set more effective locally tailored environmental performance targets.<sup>88</sup>

Even if enough information can be generated to set meaningful performance standards, other scholars question whether and under what conditions local collaborations are capable of being effective ongoing monitors of their own actions, their impact on environmental conditions, and thus their performance against

85. See, e.g., Steinzor, *supra* note 84, at 10917; Karkkainen, *supra* note 29; Karkkainen, *supra* note 3, at 310–14.

86. See, e.g., WONDOLLECK & YAFFEE, *supra* note 6, at 241; Karkkainen, Fung & Sabel, *supra* note 7, at 691; Freeman, *Collaborative*, *supra* note 9, at 29–31.

87. See, e.g., Sturm, *supra* note 55, at 331–34; Steinzor, *supra* note 84; Rena I. Steinzor, *Reinventing Environmental Regulation: Back to the Past by Way of the Future*, 28 ENVTL. L. REP. 10361, 10369 (1998); Sarah Ewing, *Catchment Management Arrangements*, in *MANAGING AUSTRALIA’S ENVIRONMENT* 408 (Stephen Dovers & Su Wild River eds., 2003) [hereinafter *AUSTRALIA’S ENVIRONMENT*].

88. See Karkkainen, *supra* note 29.

established targets and outcomes.<sup>89</sup> Furthermore, an ongoing concern in the literature is whether externally imposed monitoring requirements on collaborators will be too prescriptive, stringent, or onerous, and would therefore stifle flexibility, learning, and effectiveness at the collaborative level.<sup>90</sup>

Assuming that collaborative groups can effectively fulfill their monitoring requirements, various forums and mechanisms may be used to hold the group accountable for the appropriateness and fairness of performance targets and for compliance with those targets.

While there are a range of questions and debates in the literature regarding different forums, mechanisms, and their collective interaction, two important areas for research relate to conditions of effective government oversight, and mutual accountability between collaborators.<sup>91</sup>

In terms of government oversight, some authors suggest that more traditional accountability relationships should remain in place to contribute to effective accountability, with government agencies acting as the final decision maker to ensure laws are respected, to limit opportunistic behavior, and to encourage responsible practices among collaborators.<sup>92</sup> Others remain skeptical of this mechanism of accountability, suggesting we cannot simply trust agencies to “do the right thing,” either because agencies can be subject to “political” pressures or because they lack the technical expertise to interpret complex data and evaluate the decisions and actions taken by collaborations.<sup>93</sup> Furthermore,

89. See, e.g., Fung & Wright, *supra* note 29, at 31–32; Gaines, *supra* note 14, at 15–16; Sturm, *supra* note 55, at 333.

90. These concerns relate to both self-monitoring and reporting on implementation as well as the use of government grants. See, e.g., Sturm, *supra* note 55; Head, *supra* note 13, at 146; Freeman, Remarks, *supra* note 9, at 1871–72, 1874; WONDOLLECK & YAFFEE, *supra* note 6, at 235–37; Brian Head, *Letting the Locals Lead*, 122 ECOS MAG. 30, 31 (2004).

91. See, e.g., Sturm, *supra* note 55, at 331–34 (describing an analytical framework for empirical investigation and theory development around the question: “how does new governance provide centralized accountability without undermining local experimentation”); Freeman & Farber, *supra* note 4, at 905–06, 908 (noting that NEG experiments such as CALFED depend on a delicate balance of agencies and stakeholders, and that poorly designed structures will likely diminish political accountability).

92. See, e.g., WONDOLLECK & YAFFEE, *supra* note 6, at 238–39; Nancy Manring, *The Politics of Accountability in National Forest Planning*, 37(1) ADMIN. & SOC'Y 57, 77 (2005).

93. See, e.g., Freeman & Farber, *supra* note 4, at 893–94; Hornstein, *supra* note 28, at 949 n.197; Doremus, *supra* note 29, at 52, 82, 87–88; Freeman, *Collaborative*, *supra* note 9, at 83–87, 91–94; Karkkainen, *supra* note 29, at 963.

scholars worry that opportunities for agency capture—which are already a concern in traditional, centralized rulemaking—will be augmented by NEG’s tendency to devolve decision-making to multiple “place-based” collaborative forums.<sup>94</sup> Here, local industries and economic interests may gain new strength and opportunities through direct access to decision makers.<sup>95</sup> Targets and their enforcement may be weakened if industry entities with resource and informational advantages are easily able to overwhelm other collaborators and capture the governance structure.<sup>96</sup>

Such problems may be mitigated by existing institutional mechanisms for cabining agency discretion. Strong legislative guidance—in the form of outcome-oriented statutes and regulatory bottom lines—and robust judicial review of agency decision-making would clearly help prevent blatant agency capture.<sup>97</sup>

As some authors suggest, however, legislating outcomes themselves may be problematic, particularly given the difficulties of balancing specificity and generality in statutory language. Indeed, significant questions of feasibility remain: is it possible to give sufficient autonomy to NEG groups for them to successfully implement their goals, while at the same time ensuring an adequate degree of consistency and control over their activities?<sup>98</sup> Too much specificity in prescribed outcomes or procedures may impede creativity, stymie flexible revision of targets, and marginalize local context.<sup>99</sup> In contrast, overgeneralization of outcomes could effectively allow them to be ignored and invite abuse.<sup>100</sup> In particular, critics warn of the dangers of unprincipled deal-making. Broad, highly discretionary standards—standards

94. See, e.g., Karkkainen, *supra* note 29, at 962; Freeman, *Collaborative*, *supra* note 9, at 83; Carol Harlow & Richard Rawlings, *Promoting Accountability in Multilevel Governance: A Network Approach*, 13 EUR. L.J. 542, 545 (2007).

95. See, e.g., Michael McCloskey, *The Skeptic: Collaboration Has Its Limit*, HIGH COUNTRY NEWS, May 13, 1996, available at <http://www.hcn.org/issues/59/1839>; Farber, *supra* note 29, at 74; Karkkainen, *supra* note 29, at 962; Freeman, *Collaborative*, *supra* note 9, at 83.

96. See Daniel A. Farber, *Models of Reinvention*, 24(5) BOSTON REV. 24 (1999); Steinzor, *supra* note 29, at 142; Steinzor, *supra* note 84.

97. See Doremus, *supra* note 29, at 87–88; Freeman, *Collaborative*, *supra* note 9, at 91–94.

98. See, e.g., WONDOLLECK & YAFFEE, *supra* note 6, at 235–37; Scott, *supra* note 32, at 39; May, *supra* note 29, at 23.

99. See, e.g., Freeman, *Collaborative*, *supra* note 9, at 192–95; May, *supra* note 29; WONDOLLECK & YAFFEE, *supra* note 6, at 241.

100. See, e.g., McCloskey, *supra* note 95; Farber, *supra* note 29, at 74; Koontz & Thomas, *supra* note 28, at 113; Karkkainen, *supra* note 29, at 961; May, *supra* note 29; Doremus, *supra* note 29, at 82; Dana, *supra* note 6, at 53–54.

that may best accommodate provisional decision-making in an adaptive NEG regime—may also have the undesired effect of giving agencies and partners license to strike self-serving deals.<sup>101</sup>

Turning to more “horizontal” forums for ensuring accountability for performance, some authors suggest that effective forms of mutual accountability between collaborators within a group may help enhance accountability in NEG arrangements, provided that the “right mix” of environmental and economic interests in the group is achieved.<sup>102</sup> Many critics, however, remain concerned about potential asymmetries in NEG collaborations, as most non-governmental actors will be unable to match the resources and technical expertise of their industry collaborators.<sup>103</sup> Furthermore, some authors argue mutual interest may in fact compromise the ability of collaborators to act as effective accountability mechanisms.<sup>104</sup> Of particular concern here is the extent to which collaborative NEG forums enhance the risks of rent-seeking and whether effective efforts can be made to check this tendency.<sup>105</sup> Indeed, while NEG assumes that localized collaborative forums will produce public goods that benefit even those who choose not to participate directly, these forums may potentially be perverted into rent-seeking vehicles by self-interested collaborators. For example, community groups that engaged in collaboration might use public powers created by NEG to benefit themselves, such as deciding to use dedicated public funds to support their membership at the expense of other external groups.<sup>106</sup>

Aware of these and other potential weaknesses, some of the more extensive NEG reform proposals seek to create what is characterized as a Neo-Madisonian form of checks and balances.<sup>107</sup> In broad terms, this involves a “peer review” process, which devolves significant discretion to collaborative groups within a broad framework of standards and processes. These groups must

101. See, e.g., McCloskey, *supra* note 95; Koontz & Thomas, *supra* note 28, at 113; Karkkainen, *supra* note 29, at 961–63.

102. See, e.g., WONDOLLECK & YAFFEE, *supra* note 6, at 238; Freeman & Farber, *supra* note 4, at 905–06, 908; Archon Fung & Erik Olin Wright, *Countervailing Power in Empowered Participatory Governance*, in DEEPENING DEMOCRACY, *supra* note 29, at 271; Karkkainen, *supra* note 29, at 961–62.

103. Steinzor, *supra* note 87.

104. See Harlow & Rawlings, *supra* note 94, at 545.

105. Fung & Wright, *supra* note 29, at 36–37.

106. *Id.*

107. See Karkkainen, Fung & Sabel, *supra* note 7.

in turn justify the exercise of their discretion in light of the benchmarked experience of other groups.<sup>108</sup> Additionally, a central government monitor of all groups has a key disciplining and vertical accountability role in this model.<sup>109</sup> This central body pools performance monitoring and reporting information, and is empowered with an administrative “destabilization right”—a right to intervene, destabilize, and disentrench efforts that evidenced chronic underperformance relevant to expectation, problems of capture, or other procedural defects (e.g., political blockage).<sup>110</sup>

Consistent with the ideal of experimentalism, “destabilization” would involve an agency offering a normative critique of the NEG group (rather than specifically prescribing new arrangements) that would fashion a fresh start.<sup>111</sup> While still an under-explored suggestion for fostering accountability in NEG, some authors question whether interventions justified by a group’s failure would nonetheless disrupt the necessary openness and engagement for collaborative problem solving to work.<sup>112</sup>

To summarize the above discussion, many NEG authors suggest accountability can be secured through reforming, replacing, or supplementing traditional accountability controls with a range of professional, mutual, and other unique accountability arrangements in both performance- and process-based regimes.<sup>113</sup> However, as we have seen, the efficacy of many of these accountability designs remains in question or has been under-explored in practice.<sup>114</sup> Indeed, a number of authors suggest that NEG remains exposed to risks of rent-seeking behavior,

108. See, e.g., Sabel & Simon, *supra* note 31, at 400; Freeman, *Collaborative*, *supra* note 9, at 2, 96; Dorf & Sabel, *supra* note 7, at 288, 389–90.

109. See, e.g., Karkkainen, *supra* note 3, at 295–96; Karkkainen, Fung & Sabel, *supra* note 7.

110. See, e.g., Karkkainen, *supra* note 29, at 980–81; Karkkainen, *supra* note 3, at 310–20 (noting that there are a variety of destabilization rights discussed in both environmental and other public policy contexts). See generally Bradley Karkkainen, *Getting To ‘Let’s Talk’: Legal and Natural Destabilizations and the Future Of Regional Collaboration*, 8 NEV. L.J. 811 (2008) (discussing destabilization rights and providing examples of, *inter alia*, natural and anthropogenic destabilization rights).

111. See, e.g., Karkkainen, *supra* note 3, at 317 (monetary compensation or a requirement to offset adverse impacts may also be imposed); Karkkainen, *supra* note 29, at 980–81.

112. See Sturm, *supra* note 55, at 333.

113. See, e.g., Freeman, *supra* note 23, at 665; Freeman, *supra* note 49, at 198–201; Weber, *supra* note 47, at 455; Freeman, *Collaborative*, *supra* note 9, at 22, 96.

114. Fung & Wright, *supra* note 29, at 37.

unprincipled deal-making, and capture.<sup>115</sup> The findings below respond to and provide some insights into many of the above questions and debates.

## II. METHODS

The Article's research followed a collective case study approach to examine "new" forms of accountability in NEG.<sup>116</sup> Selecting the cases required two steps: first, selecting a set of NEG programs ("case studies"), and second, selecting from within each of those programs a set of "on ground" examples to study ("sub cases").<sup>117</sup> In terms of selecting programs, a number of recent governance programs were reviewed to determine whether at least some of their components embraced widely recognized characteristics of NEG and, in particular, "new" forms of accountability.<sup>118</sup> Mindful of the significant diversity of NEG institutions, a second consideration for selecting the cases was to capture a diversity of conditions, including cases that focused on different environmental problems and different legal designs. As outlined further below, the Environment Protection Authority, Victoria's Environment Improvement Plan ("EIP"),<sup>119</sup> and Neighbourhood

115. See generally Steinzor, *supra* note 29, at 141–43; Farber, *supra* note 29, at 74; Dana, *supra* note 6, at 52–57; Fung & Wright, *supra* note 29, at 21–22, 36–37; Markell, *supra* note 29, at 56–57; Doremus, *supra* note 29, at 52, 88; Karkkainen, *supra* note 29, at 963.

116. Collective case studies involve jointly studying a number of cases in order to gain a better understanding about a still larger collection of cases such as a phenomenon, population, or general condition. See, e.g., Robert E. Stake, *Qualitative Case Studies, in STRATEGIES OF QUALITATIVE INQUIRY* 119, 136–38 (Norman K. Denzin & Yvonna S. Lincoln eds., 3d ed. 2008); ROBERT K. YIN, *CASE STUDY RESEARCH, DESIGN, AND METHODS* 53–54 (3d ed. 2003).

117. The approach to selecting these cases and sub cases was similar to purposeful sampling, the common qualitative research approach to case and interview selection. There are many strategies that can be used for generating purposive samples. See MICHAEL Q. PATTON, *QUALITATIVE EVALUATION AND RESEARCH METHODS* 182–83 (2d ed. 1990).

118. This is roughly similar to the criterion or Theory-Based/Operational Construction strategies of purposive sampling. See, e.g., *id.*; Alexander Conley & Margaret Moote, *Evaluating Collaborative Natural Resource Management*, 16 *SOC'Y & NAT. RESOURCES* 371, 378 (2003).

119. In choosing to study the EIP program, the author was aware that the EIP had attracted previous academic attention in the form of policy focused empirical studies. However, the EIP was considered an apposite case for research in this Article because most of the early research was policy-based, lacked a comparative aspect, and had not located the EIP initiative within the then embryonic NEG literature. See, e.g., Wills & Fritschy, *supra* note 51, at 165–66; GUNNINGHAM & SINCLAIR, *supra* note 4, at 158–59, 179–87. More recently, in the light of comparatively more mature NEG scholarship, the EIP has drawn comparisons with contractarian-based governance theories. See Karkkainen, *supra* note 3, at 293–94.

Environment Improvement Plan (“NEIP”) programs were selected as meeting these criteria, along with the Australian Federal Government’s and Queensland State Government’s Regional Natural Resource Management program (“RNRM”).<sup>120</sup>

The next step was to select “on ground” examples to study from approximately seventy EIP collaborations and seven NEIP collaborations in Victoria, and fourteen RNRM collaborations in Queensland. After a desktop analysis to identify “information rich” cases,<sup>121</sup> eight EIPs were selected to ensure as close as practicably possible that at least one sub case was selected from each of the seven different jurisdictional units of Environment Protection Authority, Victoria (“VEPA”).<sup>122</sup> Three NEIPs were selected to include all of the NEIPs that had reached the implementation stage at the time of this research.<sup>123</sup> Finally, one RNRM region was selected on the basis that it was a particularly information rich case, being one of the largest regions, facing some of the most pressing natural resource problems within the state, and receiving significantly higher levels of funding from governmental programs than many other regions.<sup>124</sup>

When choosing this RNRM sub-case, a further decision was also necessary. As discussed in more detail below, RNRM has involved a number of different funding programs, including “Caring for our Country,” which commenced in 2008, and the jointly delivered “Natural Heritage Trust 2” and “National Action Plan for Salinity

120. Program selection was also based in part on practical considerations (e.g., cases in eastern Australian states were selected to reduce travel costs). As RNRM is a national program implemented in partnership with the states, the choice of where to study RNRM carries with it a choice of a particular state’s unique RNRM design features. The choice to examine RNRM in Queensland was made on the basis that its program offered a different policy context to the other two cases in Victoria, as well as a relatively unique “community” based approach to the RNRM program. *See* Head, *supra* note 13, at 144.

121. This is close to the idea of purposeful sampling for intensity. *See* PATTON, *supra* note 117, at 182–83.

122. The VEPA assisted the author in the selection of the sub cases. As noted below, EIP process can adopt a bipartite approach involving just an industry enterprise and the VEPA; however, this is very uncommon in practice. Such a bipartite form would obviously struggle to satisfy participation and arguably many forms of collaboration characteristic of NEG. Accordingly, the empirical component of the research focused principally on multi-stakeholder EIPs.

123. The VEPA assisted the author in the selection of the sub cases.

124. With unlimited time and funding, it would have been beneficial to also contrast multiple RNRM sub cases. However, this study explored only one case study because, as detailed below, RNRM is a far more complex program than the others; it involves a plethora of public and private stakeholders operating at a regional, state, and national level.

and Water Quality,” which ran from 2001–2008. While the two older programs shared the same legal and accountability arrangements, the more recent Caring for our Country program introduced slightly different arrangements.<sup>125</sup> Accordingly, for the purposes of this Article, it was necessary to select which set of programs to study. In order to ensure sufficient data, this study focuses on the two older programs that had accountability mechanisms, implementation, and monitoring that had been in practice over a significant period.<sup>126</sup>

The research relied primarily on qualitative interviewing.<sup>127</sup> The interview selection process was based on purposive sampling, selecting interviewees to represent key stakeholder groups involved in the collaborations.<sup>128</sup> Eighty interviews were conducted: twenty-four in the EIP, twenty-six in the NEIP, and thirty in the RNRM. The majority of the interviews were in-depth conversations that followed a semi-structured interviewing technique.<sup>129</sup> Data analysis followed the stipulations of Adaptive Theory to code data to capture patterns, themes, and discrepancies, and to draw conclusions.<sup>130</sup> The validity of the conclusions reached below was heightened by triangulating multiple sources of data (interviews and documents) and using a process of respondent evaluation

125. *See infra* Part V.

126. For the sake of completeness, this Article briefly discusses the Caring for our Program below. However, the analysis throughout the remainder of the Article focuses solely on the accountability arrangements under the Natural Heritage Trust 2 and National Action Plan for Salinity and Water Quality.

127. The interview data was also backed up with an analysis of key documents, plans, and reports selected to ensure they related to or impacted the operation of the cases.

128. *See, e.g.*, W. LAWRENCE NEUMAN, *SOCIAL RESEARCH METHODS: QUALITATIVE AND QUANTITATIVE APPROACHES*, 211, 214 (5th ed. 2003); PATTON, *supra* note 117, at 182–83. Interviewees included residents/non-governmental groups, EPA, local government, and industries in EIP; residents/non-governmental groups, EPA, local/state government, NRM groups, and industries/businesses in NEIP; and regional/subregional NRM group members and staff, farmers, federal/state/local governments, science, peak industry, and conservation bodies in RNRM.

129. *See* Andrea Fontana & James H. Frey, *The Interview: From Structured Questions to Negotiated Texts*, in *COLLECTING AND INTERPRETING QUALITATIVE MATERIALS* 61, 62 (Norman K. Denzin & Yvonna S. Lincoln eds., 2d ed. 2003). Some interviews were more informal and shorter due to practical constraints, and in accordance with the ethical and confidentiality responsibilities of this research, interviewee identity was protected by a system of number identifiers and general stakeholder classification.

130. *See* DEREK LAYDER, *SOCIOLOGICAL PRACTICE: LINKING THEORY AND SOCIAL RESEARCH* (1998); JOHN W. CRESWELL, *QUALITATIVE INQUIRY AND RESEARCH DESIGN: CHOOSING AMONG FIVE TRADITIONS* 153–54 (1998).

conducted near the end of the fieldwork.<sup>131</sup> In conducting its analysis, this Article acknowledges that wider accountability mechanisms, such as judicial review, may operate to support the various mechanisms and other elements of accountability discussed and examined in each case study.<sup>132</sup>

The following Parts consider each case study in turn and provide a broad overview of each program, followed by an analysis of its accountability architecture and the findings in relation to its effectiveness in practice. This overview and comparison of the programs shows that there are both similarities and variations across the cases regarding their approach to and mechanisms of accountability.

### III. ENVIRONMENT IMPROVEMENT PLANS—OVERVIEW, LEGAL DESIGN, AND FINDINGS

#### A. Overview of EIP

The first case study is of one of the oldest NEG programs in Australia.<sup>133</sup> Introduced in the late 1980s pursuant to the Environment Protection Act, the Environmental Improvement Plan (“EIP”) was pioneered by the VEPA and aimed to address point source pollution from an industry, usually at a single site.<sup>134</sup> As described by the VEPA, an EIP:

is a public commitment by a company to improve its environmental performance. An EIP outlines areas for improvement including actions and time lines. An EIP is usually . . . developed in consultation with the local community in the area surrounding the company’s premises . . . . Once a plan has been completed it requires

131. Respondent validation involved holding a dialogue/re-interviewing five key government and/or non-governmental participants that had significant carriage and/or involvement in the programs (one in EIP, two NEIP, and two RNRM). See DAVID SILVERMAN, *DOING QUALITATIVE RESEARCH: A PRACTICAL HANDBOOK* 99, 176 (2000); YIN, *supra* note 116, at 35; NEUMAN, *supra* note 128, at 138.

132. In view of the underdeveloped knowledge and the recognized need for empirical research on specific new forms and mechanisms of accountability in practice, there is arguably value in examining when, how, and under what conditions such mechanisms are likely to be effective either in isolation or as a part of a wider system.

133. See Environment Protection Act, 1970, § 31C (Vict.). As with the other two case studies, this Article does not aim to provide a comprehensive outline of the EIP, its history, or its various legislative and policy design. Such an examination of the EIP is provided in other articles. See, e.g., Holley & Gunningham, *supra* note 51; Wills & Fritschy, *supra* note 51.

134. See VEPA Environment Improvement Plans, pub. 938, 1 (2004).

ongoing monitoring by the local community and regulatory agencies.<sup>135</sup>

Similar goals for improving the environmental performance of industry have been pursued by international NEG experiments, including Project XL in the United States, and environmental agreements and covenants in Europe.<sup>136</sup> Like the EIP, these NEG experiments have focused on encouraging leading or “good” performers to voluntarily aspire to go beyond compliance. In contrast, however, two factors set the EIP apart from those NEG experiments. First, the EIP is one of few NEG approaches to focus on improving the environmental performance of both the best and the worst industries.<sup>137</sup> Second, the EIP initiative was introduced a number of years before “regulatory flexibility initiatives” such as Project XL, making the EIP a considerably more mature example of NEG.

While there have been a number of permutations of the EIP program,<sup>138</sup> the majority of plans fall into two main categories.<sup>139</sup> The first form of EIP is voluntarily entered into by industry pursuant to section 26B of the Environment Protection Act.<sup>140</sup> This type of EIP forms a part of an Accredited Licensee (“AL”) scheme, which is targeted at “leading” environmental performers and provides industry with an option to gain less prescriptive alternatives to the standard works approval and license, in addition to a discount of the license fee. To obtain an accredited license, a firm must not only demonstrate that it is a strong environmental performer, but also agree to develop and audit an environmental

135. *Id.*

136. *See* Karkkainen, *supra* note 3, at 293–94 (classifying the EIP as an example of environmental contracting). For examples of European environmental performance agreements, see, for example, Adrienne Héritier, *New Modes of Governance in Europe: Policy Making Without Legislating?*, 81 POL. SCI. SERIES 1, 13–14 (2002); Eric Orts & Kurt Deketelaere, *Introduction: Environmental Contracts and Regulatory Innovation*, in ENVIRONMENTAL CONTRACTS: COMPARATIVE APPROACHES TO REGULATORY INNOVATION IN THE UNITED STATES AND EUROPE 1, 5 (2001). Elements of the EIP process also mirror a range of environmental management systems. *See, e.g.*, Orts, *supra* note 14; Holley & Gunningham, *supra* note 51. The EIP also shares similarities with the Wisconsin Green Tier Initiative, <http://dnr.wi.gov/org/caer/cea/environmental/> (last visited Jan. 23, 2010).

137. GUNNINGHAM & SINCLAIR, *supra* note 4, at 158.

138. For an overview of the various types of EIPs, *see* Holley & Gunningham, *supra* note 51.

139. *See id.*

140. *See, e.g.*, Environment Protection Act, 1970, §§ 26A–26E (Vict.); VEPA Accredited Licensee System—Guidelines for Applicants, pub. 424.4 (2009).

management system and to put an EIP in place.<sup>141</sup>

A second and more common type of EIP is also voluntarily entered into by an industry.<sup>142</sup> Unlike EIPs under AL, these voluntary EIPs are not specifically authorized under legislation. Rather, legislative approval for EIPs falls broadly under the VEPA’s enforcement powers and its discretion “to promote compliance with the Act and regulations and/or to encourage environmental performance beyond minimum requirements . . . .”<sup>143</sup> Using this authority, the VEPA encourages good environmental performers to take up EIPs voluntarily. However, the VEPA has also found it expedient to persuade a number of poor performing firms to participate “voluntarily” in this form of EIP through direct or implicit threats to impose more stringent license conditions or to pursue prosecutions if the targeted enterprise declines to enter into an EIP.<sup>144</sup> Community pressure, whether in the form of bad press, protests, or lawsuits opposing development applications, may also serve as a similar threat for more reputation-conscious industries.<sup>145</sup> Whether truly voluntary or instigated in “the shadow of the law,” the EIP shifts away from a traditional bipartite relationship between regulators and the regulated to focus on a tripartite collaboration between industry, local community stakeholders, and government bodies to improve the environmental performance of the firm. This collaborative approach is underpinned by requirements and recommendations that EIPs “make provision for the participation of the

141. See Environment Protection Act, 1970, § 26B(2)(c) (Vict.).

142. See generally VEPA Guidelines for the Preparation of Environment Improvement Plans, pub. 739 (2002).

143. See, e.g., Environment Protection Act, 1970, § 1K (Vict.); VEPA Enforcement Policy, pub. 384.3, 1, 8–9 (2006) (“EPA is of the view that non-regulatory measures, to promote compliance with the Act and regulations and/or to encourage environmental performance beyond minimum requirements, are often effective and reduce the need for enforcement. These measures include education and the provision of information, technical advice on license compliance and waste minimization, best practice guidelines, promotion of environmental audits, encouragement of environment improvement plans and voluntary agreements.”).

144. These threats may also include threats of audits or the imposition of a “compulsory EIP” either through the VEPA imposing conditions in enterprise licenses or pursuant to a “section 31C EIP.” In rare cases, the VEPA may make participation in an EIP compulsory for an industry by using its powers to impose an EIP as a license condition for an industry. See Environment Protection Act §§ 20(6)(b), 31C. See also GUNNINGHAM & SINCLAIR, *supra* note 4, at 163; Holley & Gunningham, *supra* note 51.

145. See GUNNINGHAM & SINCLAIR, *supra* note 4, at 163; Holley & Gunningham, *supra* note 51.

community”<sup>146</sup> and include “substantial community involvement.”<sup>147</sup> While the nature and extent of this community involvement can vary between individual EIPs,<sup>148</sup> in practice most involve the industry, VEPA, local government, local non-government stakeholders, and interested local citizens forming a “collaborative group.”<sup>149</sup> This group then collectively develops, monitors, and periodically reviews an “EIP plan” that governs improvements to the industry’s environmental performance, and must meet or go beyond all existing license or other legal requirements on both local issues (e.g., amenity, noise) and broader environmental impacts (e.g., water usage, green house gas).<sup>150</sup>

In conjunction with this collaborative, performance-oriented approach, the EIP has also been designed to operate as a form of process-based regulation. As discussed further below, this involves the VEPA requiring or recommending a range of processes to be included and followed by enterprises under the EIP plan (e.g.,

146. Pursuant to the Environment Protection Act, EIPs under AL must include “provision for the participation of the community in the evaluation of the performance in meeting objectives under the EIP.” Environment Protection Act, 1970, §§ 26B(2)(c), 31C (Vict.).

147. In the case of voluntary EIPs other than those entered into under AL, VEPA guidelines recommend EIP processes include “substantial community involvement.” VEPA, *supra* note 142, at 10. *See also* VEPA, *supra* note 134, at 2.

148. The statutory requirements and EIP guidelines recognize (implicitly and/or explicitly) that involving community stakeholders in the EIP process may be impractical where there are no community members or non-government groups interested in or impacted upon by the environmental performance of a participating industry. In these circumstances, the guidelines allow an EIP to be negotiated between VEPA and the enterprise without direct collaboration with other stakeholders. Nevertheless, such bipartite EIPs are unusual, with most EIPs involving some form of direct community involvement through collaborative groups. *See, e.g.*, Wills & Fritschy, *supra* note 51, at 159 (noting that “most voluntary EIPs, involve the formation of Community Liaison Committees (CLCs), including industry site managers, community members and EPA staff, to undertake the reporting, monitoring and review processes”); Holley & Gunningham, *supra* note 51, at 454.

149. VEPA, *supra* note 134, at 2 (“Above all, the [EIP] process should allow for a truly combined effort in identifying issues and developing plans for improvement. The combined effort comes from the group of people formed to develop and monitor the EIP. This group, frequently referred to as a community liaison committee, usually comprises company representatives, residents, local government, EPA and other government regulators as appropriate.”). According to VEPA guidelines, the collaborative group will ideally be made up of about ten to twelve members including: two to three industry enterprise representatives, ideally senior staff and those involved in the firm’s operation; government representatives (local and VEPA); two to three representatives of interested groups such as NGOs; and five to six local community representatives. VEPA, GUIDELINES FOR RUNNING COMMUNITY LIAISON COMMITTEES, pub. 740, 2–3 (Nov. 2001) [hereinafter VEPA GUIDELINES].

150. VEPA, *supra* note 142, at 7.

monitoring of compliance, audits and assessments; improvement project details including what needs to be done; and how it will be done and by when).<sup>151</sup>

## B. EIP Legal Design

Having provided a brief overview of the EIP case, this section takes a closer look at its accountability design features. The EIP supplements the more traditional accountability relationships (e.g., industry to VEPA) with “new” horizontal ones (e.g., industry to local residents). It also seeks to capitalize on the direct involvement of private actors such as industry, auditors, and local residents in governance processes, and the roles they can play in ensuring accountability for effective process and performance.<sup>152</sup> By doing so, it is designed to make the program responsive not only upward to government agencies (and thus ideally legislatures),<sup>153</sup> but also to more immediate stakeholders such as local residents.<sup>154</sup>

As mentioned above, it is useful to think about the EIP and the following cases’ mechanisms of accountability as separable into two broad “groupings”:<sup>155</sup> 1) accountability for rulemaking<sup>156</sup> and 2) accountability for implementing rules.<sup>157</sup> In the EIP case, the additional distinction between process- and performance-based rules is also analytically significant. As explained below, although all three of the NEG cases studied in this Article involve performance-based rules, the EIP case is the only one to include an overlapping “process-based” regime.

### 1. Accountability and a Process-Based Approach

Like many reflexive law approaches,<sup>158</sup> accountability in the EIP’s process-based approach is centered on whether industry has an acceptable process or plan, rather than on the basis of its

151. *Id.* at 5–10.

152. *See, e.g.*, Freeman, *Collaborative*, *supra* note 9, at 96; May, *supra* note 29, at 11.

153. This discussion does not address precisely how links between agencies, parliament, and the courts are designed, as these considerations are beyond the scope of this Article and the specific design of the EIP.

154. *See, e.g.*, Freeman, *Collaborative*, *supra* note 9, at 96.

155. May, *supra* note 29, at 11–12.

156. *Id.*

157. *Id.*

158. *See supra* note 14 (citing several theories and discussions of reflexive law); May, *supra* note 29, at 13.

environmental outcomes.<sup>159</sup> Here the EIP has been designed to be “an effective tool to guide a company’s environmental management” by prescribing minimum processes that are intended to expose industry to new information about its operations and environmental impacts.<sup>160</sup> For EIPs under AL, these processes are prescribed in legislation;<sup>161</sup> however, for other voluntary EIPs the content is established according to VEPA guidelines. These processes, while sometimes overlapping with the EIP’s performance-based approach (discussed below), will generally include: undertakings to comply or go beyond compliance with licenses and regulations; monitoring of compliance; audits and assessments; improvement project details, including what needs to be done, how it will be done, and by when; assessment of new and emerging technology; and assessment and monitoring.<sup>162</sup>

Industry is to exercise its “professional expertise” when developing the management system. Industry also remains accountable to the VEPA, which ensures that the plan’s content is fair and appropriate.<sup>163</sup> Industry is also required to adhere to the management system and periodically evaluate and report on its implementation to the VEPA, which is ultimately responsible for ensuring effective implementation.<sup>164</sup> Accountability relationships between industry and independent environmental auditors are also used to evaluate the effectiveness of the management system.<sup>165</sup>

## 2. Accountability and a Performance-Based Approach

Even with the above accountability mechanisms in place, the architects of the EIP recognized that a complementary performance-based approach was also needed to help stymie any risks of tokenism arising from its process-based approach.

Fundamental to this approach is the process of collaborative groups agreeing to performance targets that industry must subsequently adhere to. EIP collaborations are accountable to

159. May, *supra* note 29, at 10.

160. VEPA, *supra* note 142, at 1; Fiorino, *supra* note 79, at 402.

161. Environment Protection Act, 1970, § 26B(2)(c) (Vict.).

162. VEPA, *supra* note 134, at 2; VEPA, *supra* note 142, at 9.

163. VEPA, *supra* note 142, at 9–10; Manring, *supra* note 92, at 61; May, *supra* note 29, at 10, 13; Scott, *supra* note 32, at 42–43 (describing upward accountability of industry to regulator).

164. VEPA, *supra* note 142, at 9–10.

165. *Id.*

VEPA, which is given ultimate responsibility for ensuring that performance standards set by a collaborative group are fair and appropriate.<sup>166</sup> Individual collaborators are also accountable to each other for setting appropriate standards (e.g., local community or environmental group members may bring pressure to bear on industry).<sup>167</sup>

Beyond this, and in an attempt to protect the public interest and ensure that fair and credible standards are set by collaborative groups and approved by the VEPA, the Victorian legislature has, to varying degrees, “limited” the decision space of the groups and VEPA. That is, the targets that groups set are required to be consistent with relevant environmental quality standards, planning schemes, and laws, and in some cases must contribute to an overarching outcome.<sup>168</sup>

As suggested above, legislatures face difficulty in striking the right balance between specificity and generality.<sup>169</sup> For the present case, it is the risks associated with overgeneralization that are of greater significance. Indeed, the EIP’s legislated outcomes are extremely broad. EIPs under AL must “maintain and improve environmental performance” and must set targets that comply or go beyond-compliance with licenses and regulations.<sup>170</sup> In the case of purely voluntary EIPs, there is no formal legislated goal for EIPs per se. Instead the agency is free to experiment within the bounds of its enforcement discretion, which requires that it conduct enforcement of environmental requirements for the goal of “better protecting the environment and its economic and social uses.”<sup>171</sup> This broad discretion has allowed VEPA to develop its own guidelines that set out a similar desired outcome to that stated in legislation, namely setting targets that “improve[] environmental

166. Indeed, the VEPA has power to approve and/or amend all targets. Further, the ongoing participation of agency officials in groups may provide ongoing checks on groups to ensure they adhere to performance goals. VEPA, *supra* note 142, at 11; Environment Protection Act, 1970, § 26B (Vict.).

167. Residents and other non-governmental members may also play a democratic-accountability role in scrutinizing government actions and relationships with industry/development interests in pursuing environmental performance. Weber, *supra* note 47, at 453; VEPA, *supra* note 134, at 1–2.

168. The EIP involves minimal baselines in so far as targets must meet or go beyond all existing license or other legal requirements. See VEPA, *supra* note 142, at 7; VEPA, *supra* note 143, at 1, 8–9.

169. Dana, *supra* note 6, at 53–54.

170. Environment Protection Act, 1970, § 26B (Vict.); see also VEPA, *supra* note 142, at 9.

171. Environment Protection Act, 1970, § 1K (Vict.).

performance” of industry and that comply with or go beyond legislative requirements.<sup>172</sup>

No additional details are provided on these broad outcomes or on the specific matters for which targets should be set. Furthermore, neither the legislation nor the regulatory guidelines provide guidance on what indicators should be used in measuring specific outputs. For example, there is no requirement for industries to set targets to reduce specific emissions, such as greenhouse gases, by a certain level. Whether and to what extent this high degree of generality in the EIPs overarching goals is successful in “limiting” and guiding decision-making by agencies and collaborative groups to avoid “abuse” and risks of capture is an issue that is revisited below.<sup>173</sup>

A second issue raised in the literature that NEG experiments like EIPs may face relates to the technical and financial challenges of environmental monitoring to collect sufficient data to set performance targets.<sup>174</sup> No direct government support for data collection is provided in EIP (as opposed to the other cases discussed below).<sup>175</sup> This is understandable given that industries’ regulatory license conditions will normally require monitoring and annual reporting to VEPA on any relevant waste they discharge, emit, or deposit into the environment.<sup>176</sup> There will of course be environmental issues for which data may not exist.<sup>177</sup> In these situations, however, the EIP program has the capacity to harness community pressure or VEPA regulatory powers to effectively arm-twist industry into undertaking the costs and burdens of baseline data collection in an effort to analyze and improve its

172. VEPA, *supra* note 142, at 2, 7.

173. *See, e.g.*, Karkkainen, *supra* note 29, at 979; Dana, *supra* note 6; Markell, *supra* note 29, at 56–57.

174. *See, e.g.*, Steinzor, *supra* note 87; Gaines, *supra* note 14, at 15–16; Ewing, *supra* note 87, at 408.

175. VEPA, *supra* note 142, at 7.

176. Of course, in most cases, industry is only measuring its point source pollution releases. It would be far more complicated if, for example, industry was expected to measure the changes in environmental conditions brought about by its pollution releases. *Id.* at 9. *See generally* VEPA, Licences, <http://www.epa.vic.gov.au/bus/licences/licences.asp> (last visited Jan. 23, 2010).

177. This may be the case where the collaborative group actually does seek to negotiate targets around impacts on environmental conditions brought about by industry’s pollution releases, such as pollution impact on biodiversity levels in wetlands or the impact of an ocean outfall on the aquatic ocean environment.

environmental performance.<sup>178</sup>

Beyond setting targets, achieving effective accountability for performance also depends on collaborative groups conducting ongoing monitoring, evaluation, and reporting on their progress against targets and their implementation of projects and outputs. Here, the EIP program imposes very few monitoring and reporting prescriptions on industry and collaborations. Rather, industry is expected to develop and fund its own processes for monitoring, evaluation, and reporting, subject to the approval of the VEPA.<sup>179</sup>

Assuming sufficient data on implementation and performance is generated, the EIP case has been designed to impose a number of different mechanisms to hold groups accountable should compliance not be forthcoming.<sup>180</sup> For example, underperformance can lead to VEPA threatening to amend an industry’s license or to pursue regulatory sanctions, while non-governmental actors are also expected to play “a valuable role in monitoring and reviewing the performance of existing facilities.”<sup>181</sup> Such an approach not only checks industry behavior but also increases transparency.<sup>182</sup> The aim is for stakeholders to “blow the whistle” or otherwise bring pressure to bear (e.g., using local media to threaten an industry’s reputation and social license) if decisions and actions are failing to achieve the set targets and/or reduce impacts on the local area.<sup>183</sup>

### C. Findings—Achievements and Limitations in Process- and

178. This type of approach has been spelled out aptly by Karkkainen. *See, e.g.*, Karkkainen, *supra* note 29, at 993–97; Karkkainen, *supra* note 3, at 310–14. Others emphasize similar, although less developed, concepts. *See, e.g.*, WONDOLLECK & YAFFEE, *supra* note 6, at 240; Freeman, *supra* note 23, at 666; Lobel, *supra* note 1, at 452.

179. This will involve developing their own indicators for ongoing evaluation, as well as developing a process for “review” of its plans. It is suggested that reports include a summary of complaints and follow-up actions; data on the performance in meeting the objectives and targets; an account of the causes and effects of any failings, and actions taken to remedy them; an overall assessment of the environmental performance; an assessment of opportunities to improve the environmental performance; and changes to the EIP suggested as a result of the review. Environment Protection Act, 1970, § 26B (Vict.); VEPA, *supra* note 142, at 9–10.

180. May, *supra* note 29, at 10–11.

181. *See, e.g.*, VEPA GUIDELINES, *supra* note 149, at 1–3; GUNNINGHAM & SINCLAIR, *supra* note 4, at 180; Fung & Wright, *supra* note 29, at 16–17.

182. Fung & Wright, *supra* note 29, at 16–17.

183. Local residents may also play a democratic accountability role in scrutinizing VEPA actions and relationships with industry in pursuing compliance. Weber, *supra* note 47, at 453.

### Performance-Based Regimes

As discussed above, the EIP program has been designed to rely on a complementary interaction of “new” forms of accountability in both its process and performance-based approaches to governance. The findings discussed below indicate that agency oversight, in conjunction with the mutual and professional accountability mechanisms employed in these regimes, was effective in addressing some, but not all, risks of capture and tokenism.<sup>184</sup> The following discussion focuses first on accountability for process, then performance. Each sub-section commences with an analysis of the first “grouping” of accountability relationships regarding appropriateness and fairness of rules,<sup>185</sup> followed by an analysis of the second “grouping” concerning the implementation of the rules.<sup>186</sup>

#### 1. Process-Based Approach

Accountability arrangements in EIP’s process-based approach were reported to have been effective for many industries.<sup>187</sup> While questions are raised below about the adequacy of systems designed by poor performers, industries with a history of good environmental performance adequately discharged their professional accountability responsibilities to develop reportedly adequate management systems.<sup>188</sup> As one VEPA officer explained, the substantial majority of these leading and good performers developed their EIPs by drawing on existing accredited management systems (e.g., ISO 14001),<sup>189</sup> which gave the VEPA

184. Farber, *supra* note 96, at 24; May, *supra* note 29, at 10–11.

185. May, *supra* note 29, at 10–11.

186. *Id.* at 11–12.

187. *Id.*

188. “Leading” and “good” performing industries generally maintained better performance records under their VEPA license (e.g., infrequent license violations). However, they often had pollution impacts that were problematic for local residents. Poor performing industries often had persistent regulatory breaches, had been fined (or even prosecuted), and were under close scrutiny by VEPA for their environmental impacts on either/both the local and wider environment. Indeed, respondents suggested poor performers often required close VEPA scrutiny to try to ensure adequate systems were developed. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 181 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Aug. 10, 2005) (explaining that: “we have quite a strong role helping them develop it.”). *See also* GUNNINGHAM & SINCLAIR, *supra* note 4, at 163.

189. Interview with Interviewee 132 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 22, 2005) (noting “the EIP is generally

added “satisfaction . . . [and] some comfort that the EIP [was] adequate.”<sup>190</sup>

Auditors also monitored subsequent EIP implementation,<sup>191</sup> ensuring either that all industries followed adequate processes or that recommendations were made when they did not. As one industry explained, “[We get] reviewed by an EPA approved auditor and then take on board his comments, modify the program, and once he is happy with it, we then forward it onto the EPA and put that into our system.”<sup>192</sup>

For all industries, such “checks” on management systems (combined with the overlapping performance approach discussed below) had ensured subsequent improvement in local impacts. To illustrate, a large majority of interviewees echoed the following statement:<sup>193</sup> “All the big problems for the community basically have been fixed. The smells, noises, things like that have basically been fixed . . . there hasn’t been much that hasn’t worked . . . you wouldn’t know [industry] were here half the time now.”<sup>194</sup>

Further, for leading firms under AL and good firms under voluntary EIPs, following the process-based approach had enabled industry to achieve improvements in environmental performance with regard to its broader impacts such as carbon emissions and natural gas usage. As one respondent generalized, “internally within the industry [EIPs] just make you think so laterally and so broad[ly] about the way your business needs to be performing in

borne [sic] out of the Environmental Management System . . . . The EMS is certified.”); Interview with Interviewee 151 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 23, 2005) (stating “We had ISO [and] I think that gave us our framework so the EIP really slotted in there.”).

190. Interview with Interviewee 132 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 22, 2005) (further describing the VEPA’s role as follows: “Well the EPA actually signs off on the EIP so we have to approve the EIP, so to that end we’ll review the EIP . . . we’ve got our guidelines there and we’ll tick off the various items of the EIP to see that it satisfies that.”).

191. Interview with Interviewee 132 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 22, 2005) (stating that “The EIP obviously needs an audit program in there and the audit program is generally signed off by an EPA approved auditor. So that’s another area that provides us with some certainty.”).

192. Interview with Interviewee 131 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 22, 2005).

193. The exception to this sentiment was where the plan was still being implemented; however, even here respondents reported that improvements were beginning to be achieved. For further information, see Holley & Gunningham, *supra* note 51.

194. Interview with Interviewee 162 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 23, 2005).

the future.”<sup>195</sup>

When it came to poorer environmental performers, however, VEPA officers were skeptical about whether this group seriously exercised their professional judgment when designing processes to deliver broader environmental achievements. As one industry respondent explained when questioned about this issue, “environment was not such an important aspect of the business . . . I don’t think there was the commitment to improve the situation.”<sup>196</sup>

Indeed, problems such as industry incompetence or deliberate subterfuge reportedly made it difficult for both the VEPA and auditors to address management system shortcomings.<sup>197</sup> As one community respondent described, “industry w[as] trying very hard to have enough items on the EIP plan to make it look like a really good plan . . . they did some very minor things and . . . sort of passed it off as a plan . . . sometimes the form overcomes the substance.”<sup>198</sup>

While such “shams” may be a common complaint leveled at process-based systems,<sup>199</sup> it is somewhat surprising that it was able to occur in EIP given that this instrument had expressly been designed to address this weakness through a complementary performance-based accountability regime. The reasons why some aspects of poorer environmental performance at times slipped through both the process and performance accountability nets, and whether the accountability regime able to sufficiently address other defects in performance are addressed in the following paragraphs.

## 2. Accountability for Performance

At the core of successful accountability in EIP’s performance-based approach is the setting of credible targets against which performance is judged. The costs and technical skills associated with collecting baseline data to set targets posed few problems in EIPs. Ample data was either available under existing license

195. Interview with Interviewee 141 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 22, 2005).

196. Interview with Interviewee 174 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 24, 2005).

197. May, *supra* note 29, at 21–22.

198. Interview with Interviewee 152 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 23, 2005).

199. See Fiorino, *supra* note 79, at 413–16.

monitoring requirements, or had been collected by hired consultants or newly installed monitoring devices<sup>200</sup> as a result of pressure<sup>201</sup> on industry from VEPA and local residents.<sup>202</sup> As one respondent explained, “there had been a definite build up of emotion from local residents regarding noise levels . . . so we have worked very hard at reducing noise. A noise consultant does surveys . . . and out of that comes priorities.”<sup>203</sup>

Mutual accountability arrangements between community and industry also prevented industry from dominating local performance targets.<sup>204</sup> Indeed, with very few exceptions,<sup>205</sup> local stakeholders reportedly maintained their independence from industry even after long periods of collaboration.<sup>206</sup> As one industry

200. One industry installed ambient monitoring and load control devices for problematic emissions in their local area. Interview with Interviewee 141 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 22, 2005).

201. The exception here was the “leading environmental performers” who had often sought to monitor local environmental problems without pressure from the community.

202. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 182 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Aug. 10, 2005) (explaining that “it was a combination of EPA taking a bit more action . . . . The community being quite noisy and vociferous about it . . . and the . . . company board rep on these meetings . . . he could see that the company needed some outside help to understand how to solve the problem, he got a couple of different consultants . . . these people really had free run of the plant and worked with their engineering people.”).

203. Interview by Cameron Holley and Neil Gunningham with Interviewee 111 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (May 9, 2005).

204. In fulfilling this role, local residents received vital assistance from mediators and VEPA officers.

205. Certainly some of the respondents warned that local non-governmental interests were vulnerable to capture by industry. Interview with Interviewee 132 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 22, 2005) (noting that “your local mum and dads, they are probably more interested about industry being maintained in the area . . . you’ll have people . . . that are actually pro-industry.”). However, respondents across all sub cases reported that it was more common for local collaborators and local government to want to improve industry performance rather than protect local “jobs” or economic welfare. *See, e.g.*, Interview by Cameron Holley and Neil Gunningham with Interviewee 111 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (May 9, 2005); Interview with Interviewee 141 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 22, 2005); Interview with Interviewee 152 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 23, 2005); Interview with Interviewee 174 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 24, 2005).

206. Interview with Interviewee 133 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 22, 2005) (local resident providing an example of such independence, namely an original participant in a long standing EIP who had reportedly “been fighting them for years . . . and he was a welcome member of the [EIP

respondent put it, “we work with them [community] so there’s a friendly enough relationship, but they’ll turn hostile like that [snaps fingers] if they’ve got good reason.”<sup>207</sup> The above-mentioned improvements in local environmental conditions such as noise and odor across all EIPs testify to this success.<sup>208</sup> One local resident summarized residents’ “mutual accountability” role in this success stating, “We go to meetings and whin[e] and complain . . . and we got what we wanted as the complaints about noise got ironed out.”<sup>209</sup> But when it came to setting environmental performance targets relating to industry’s impacts on the wider environment,<sup>210</sup> the findings indicated far more mixed results.

On the one hand, it appeared atypical for “leading” firms under AL or good performers under voluntary EIPs to try to “capture” and distort environmental targets.<sup>211</sup> VEPA, community, and industry respondents all reported that performance targets had typically gone significantly beyond compliance for these industries. For example, they reduced benzene and butadiene emissions by ten percent and twenty-five percent respectively over three years, achieved fifty percent reduction of landfill use by 2003 compared to 1997, and achieved twenty percent water recycling of its total

group].”).

207. Interview with Interviewee 161 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 23, 2005).

208. In sub cases where implementation had been conducted for a number of years over multiple plans, nearly all respondents reported positive improvements regarding previous local environmental problems. *See, e.g.*, Interview with Interviewee 162 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 23, 2005) (stating “All the big problems for the community basically have been fixed . . . there hasn’t been much that hasn’t worked . . . you wouldn’t know [industry] were here half the time now.”); Interview with Interviewee 152 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 23, 2005) (stating “industry is conscious of noise, they’ve built mounds and, you know, things have improved.”). Even in sub cases less than two years or so into implementing their first plan, respondents were cautiously optimistic of improved performance on local issues. *See* Interview with Interviewee 173 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 24, 2005) (stating “I think there’s less noise. I think there are less blowouts. I think there’s less fibre about then [sic] they’re used to be . . . and we’ve asked them to remove the lights and they have begun to do that. They have taken some steps . . . [but] the jury is absolutely out on whether it’s [sic] been effective or not.”).

209. Interview by Cameron Holley and Neil Gunningham with Interviewee 112 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (May 9, 2005).

210. These were typically given more focus in later iterations of plans as local issues were progressively resolved.

211. Only one or two respondents suggested performance targets had sometimes erred on the side of industry’s economic interest, with few positive externalities for environment.

effluent production.<sup>212</sup> Based on the findings, this success was due most directly to industries’ existing professional judgment and norms, including their commitment to environmental performance,<sup>213</sup> recognition of cost-saving and reputation benefits, and drive for continuous improvement fostered by the EIP’s process-based approach.<sup>214</sup>

Unlike better environmental performers, poor performers typically lacked commitment to environmental management and, as noted above, had not readily embraced opportunities to improve overall environmental performance under the process-based approach.<sup>215</sup> The result was manifest inadequacies in broader environmental performance targets—setting tokenistic objectives that rarely went much beyond compliance. As one VEPA respondent explained, “the company gives a long list of EIP items . . . but it is very weak in terms of environmental improvements, most are just house keeping items.”<sup>216</sup>

Although the VEPA and collaborators had sometimes identified these weaknesses, the findings suggested that their interest and capacity to actually take action to resolve such defects was severely

212. Although there was no available independent data available on which to judge the “appropriateness” of the targets set, the interviews with VEPA, local resident and industry stakeholders suggested many of these targets had gone considerably beyond license requirements. For similar findings, see GUNNINGHAM & SINCLAIR, *supra* note 4, at 168.

213. For leading performers, most of these targets had been rolled into EIP from their pre-existing environmental management systems or corporate plans. Interview with Interviewee 151 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 23, 2005) (stating “we had a lot of projects . . . we already knew what we were doing”). In terms of good performers, most of these industries were reputation conscious and environmental management had long been an important part of their business. Interview by Cameron Holley and Neil Gunningham with Interviewee 113 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (May 9, 2005) (describing a “good” performers EIP as “just an outlet for communicating what they have done anyway”).

214. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 181 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Aug. 10, 2005) (pointing out that the process-based approach “[is] good for companies . . . it helps them think about how they can improve by focusing on process rather than outcomes . . . and once companies start on the path of improvement they realise there are business benefits.”). See generally Holley & Gunningham, *supra* note 51.

215. Interview with Interviewee 174 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 24, 2005) (stating “environment was not such an important aspect of the business . . . I don’t think there was the commitment to improve the situation”).

216. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 181 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Aug. 10, 2005).

limited.<sup>217</sup> Many local residents and local environmental groups tended to focus on environmental issues that were the most tangible and had sparked their involvement in EIP, essentially pursuing personal environmental agendas, with little reference to wider environmental concerns.<sup>218</sup> As one VEPA officer put it, “sometimes these [collaborative] people can be fairly single-issue focused and, as long as their part of the environment is doing all right, bugger the rest, if you know what I mean.”<sup>219</sup>

Even those who had wider interests often lacked the technical knowledge to play an effective mutual accountability role to push industry to set higher targets on these issues, suggesting information was “too technical for us to say what to do.”<sup>220</sup> As one respondent summed up these limitations, “there’s no one really who’s got the strategic big picture . . . from that point of view I didn’t think anybody in the [EIP collaboration] has really made much of an impact. . . . [I]ndustry stayed very much in control over the process.”<sup>221</sup>

Respondents confirmed industry was able to dominate the target-setting process because it either consciously or unconsciously exploited its knowledge advantage regarding its own operations and its impacts on the environment. Consistent with concerns

217. May, *supra* note 29, at 17.

218. *See, e.g.*, Interview with Interviewee 173 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 24, 2005) (stating that “It’s just the dirty ones . . . . If they’re not noisy, they don’t stink and they don’t cause a nuisance and don’t have any effect on our lifestyle, they’re not a problem.”); Interview with Interviewee 123 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 21, 2005) (discussing two local environmental groups and noting that they “only seem to get excited when you talk about biodiversity and waterbirds . . . I think that’s a problem with most [EIP groups] in that they don’t tend to attract those sort of people who might have a big picture view of sustainability who can sort of see how all the parts sort of fit together.”). *See generally* Holley & Gunningham, *supra* note 51.

219. Interview with Interviewee 123 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 21, 2005).

220. *See, e.g.*, Interview with Interviewee 162 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 23, 2005); Interview with Interviewee 173 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 24, 2005).

221. Interview with Interviewee 123 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 21, 2005); *see also* Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 181 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Aug. 10, 2005) (pointing out that “with technical details and the actual actions and improvements, the community has a very minor input”).

expressed in NEG literature,<sup>222</sup> one industry respondent suggested they could dazzle and placate local residents easily enough by using technical information and setting targets that were largely in the industry’s interest. According to the industry respondent, “if you get out ahead of them, then they’ll just sit there and listen.”<sup>223</sup> Such direct intent to manipulate appeared rare; yet, most industry respondents did admit that they made the majority of decisions in the EIP on more technical, wider-scale environmental issues, with either cursory or no input from local stakeholders. As one industry respondent put it “to be candid I would say most of the time about 85–90% is generally prepared by us.”<sup>224</sup>

Of course, it is not entirely surprising that industry would make a greater contribution to decisions about its own performance and operations than residents or other non-governmental actors who know nothing about industry itself. Most respondents, however, felt that industry tended to assert its targets and actions on these broader environmental issues without much genuine discussion or negotiation. As one VEPA officer described the decision-making process regarding such technical issues, “when [industry officials] would come in and they’d give a presentation on each part of it, like biosolids or effluent needs, there wasn’t a great deal of discussion—so then it would go into the EIP.”<sup>225</sup>

Compounding this problem was the fact that the VEPA reportedly had “underplayed [its] accountability hand” across all EIPs, leading it to fail at addressing tokenism by poor performers.<sup>226</sup> Respondents reported this was less an issue of pre-existing entrenched agency capture, and more a difficulty that arose from the overly general performance requirements stated in legislation and guidelines that had afforded very broad discretion to VEPA officers with regards to beyond-compliance target setting.<sup>227</sup> That

222. Farber, *supra* note 29, at 24.

223. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 184 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Aug. 10, 2005).

224. Interview with Interviewee 131 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 22, 2005).

225. Interview with Interviewee 123 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 21, 2005). *See also* ARCHON FUNG, EMPOWERED PARTICIPATION REINVENTING URBAN DEMOCRACY 25 (2004).

226. May, *supra* note 29, at 17; Doremus, *supra* note 29, at 61.

227. A very small minority of respondents suggested this was attributable to long term dealings between VEPA and industry. *See* Interview with Interviewee 173 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 24, 2005)

is, the VEPA appeared to lack the capacity to exercise this discretion effectively. Certainly VEPA officers had tried to ensure that where there were obvious opportunities for improvement, industry implemented them.<sup>228</sup>

Nevertheless, officers appeared to lack detailed knowledge of the many technical issues associated with each individual industry operation.<sup>229</sup> This made it difficult to direct meaningfully each industry toward relevant target setting.<sup>230</sup> As one representative from a poor performer noted, “Unfortunately you don’t get VEPA people who try to impose, what you tend to get is people who don’t know a lot and are not helpful because they can’t help you because they don’t have a knowledge base and all they do is just refer to the book.”<sup>231</sup> This tendency to refer to “the book” saw officers stick to their “traditional role” of enforcing minimum legislative standards and focus less on the issues and magnitude of “beyond” compliance targets. As one respondent lamented, “it would be great if the EPA was saying we want it too [sic] look like this or have you considered this . . . but I think that the EPA trusts that the license process

(stating “For the EPA, their client is the offending industry and they’re the ones that are being looked after. Not the environment, not the people that live in the environment”). However, such agency “capture” appeared rare. As the majority of respondents pointed out, VEPA officers undertook their role with sincere intention to protect environment and there was almost always a “regulator-industry tension” in the EIP process. *See, e.g.*, Interview with Interviewee 142 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 23, 2005); Interview with Interviewee 121 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 21, 2005) (noting that “[T]he regulator wouldn’t be doing its job if it didn’t say those things or require those things . . . . It’s [sic] advocated for the environment here.”); Interview with Interviewee 123 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 21, 2005) (stating “Our role is to make sure what the company is committed to accords with what the VEPA expects of them.”); Doremus, *supra* note 29, at 61.

228. Interview with Interviewee 142 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 23, 2005).

229. One VEPA officer was responsible for approximately ten different industries, ranging from a car manufacture, to a rendering plant, to a plastics manufacturer. Doremus, *supra* note 29, at 82.

230. Interview by Cameron Holley and Neil Gunningham with Interviewee 113 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (May 9, 2005) (explaining that they tended to act as a check on the *process* and play less of a role in holding the groups accountable for substantive targets: “[I] sit there and watch and let the parties sort it out between them, and throw in a comment from our perspective now and then, but its more, ‘[L]et them go to it.’”).

231. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 184 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Aug. 10, 2005).

supports what the regional priorities are.”<sup>232</sup>

As a range of respondents confirmed, VEPA representatives typically took a “backseat,”<sup>233</sup> “caretaker,”<sup>234</sup> or “passive”<sup>235</sup> role when it came to setting targets that were beyond compliance on broader environmental issues.<sup>236</sup> The unfortunate result appeared to be a subtle form of “capture” where poor performers were essentially free to manipulate “beyond compliance” targets.<sup>237</sup>

Notwithstanding these difficulties in setting performance targets, the findings indicated that the program’s “new” forms and mechanisms of accountability were effective in ensuring industries achieved targets (albeit often imperfect ones) and were held accountable for non-compliance.<sup>238</sup> Vital to this success was the fact that all industries had reportedly carried out “very open”<sup>239</sup> and effective monitoring and reporting on their performance against targets.<sup>240</sup> While these responsibilities added costs to industry,<sup>241</sup>

232. Interview with Interviewee 141 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 22, 2005).

233. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 181 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Aug. 10, 2005).

234. Interview by Cameron Holley and Neil Gunningham with Interviewee 113 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (May 9, 2005).

235. Interview with Interviewee 131 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 22, 2005).

236. Interview with Interviewee 142 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 23, 2005) (stating “when it’s come to approval they’ve had a couple of minor suggestions about the looks of graphs and a few words here and there but they’re not really there driving it”).

237. One could argue that this “hands off” approach was in fact a conscious effort to ensure there was sufficient flexibility, innovation, and learning for process-based approach to be implemented effectively. However, local residents and industry respondents reportedly strongly believe that the VEPA should and could have done more. *See* Interview with Interviewee 162 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 23, 2005) (stating “with the EPA, they could be proactive in formulating EIP’s. What it’s left to mainly up to date, it has been is the company and the residents.”).

238. *May, supra* note 29, at 12.

239. Interview with Interviewee 133 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 22, 2005).

240. *See, e.g.*, Interview with Interviewee 151 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 23, 2005) (describing their monitoring and reporting process: “We have a [EIP meeting] every two months which focuses on the EIP, in the meantime we update the progress to each of those items that was in the EIP, each of the projects listed in the EIP to update where we are at and present those to the meeting, usually it would take 15 minutes out of the meeting, to track progress a couple of questions, we only look at the changes that have moved between, we highlight those in red, this is what has changed from one to the other”); Interview with Interviewee 132 of the Local Capacity

they had been able to reduce these burdens by drawing on pre-existing monitoring and reporting processes.<sup>242</sup>

According to respondents, industry discharged its responsibilities because the validity of its data was subject to scrutiny by the VEPA, through potential inspections and annual license reporting.<sup>243</sup> If industry could not show whether and for what reasons targets were or were not being achieved, subsequent pressure would be forthcoming, particularly from non-governmental collaborators:<sup>244</sup>

[T]he consequences of not achieving that target, puts a lot of pressure from an external point of view and external pressure brings more external pressure, and then the next thing you know you are audited very very heavily by the community, and usually its [sic] about negative perceptions which are created about your inability to get things done . . . I think their point of view is why did you say you could do that if you had no intention of doing it . . . so there is an accountability.<sup>245</sup>

The fact that “community” representatives would bring pressure to bear on industry may seem surprising given the aforementioned findings of their limited technical knowledge and minimal interest

Regulation, Facilitating Participatory Environmental Policy Project (June 22, 2005); Interview with Interviewee 133 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 22, 2005); WONDOLLECK & YAFFEE, *supra* note 6, at 241.

241. Interview with Interviewee 132 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 22, 2005) (stating “They put a fair bit of resources into holding these meetings, into having the staff to collate all the information, to look at the EMS and pull out the relevant bits that need to be investigated or viewed further in terms of trying to get the action items up and I think it’s a pretty amazing process actually”).

242. This was evident in different planning periods (e.g., one, two, or three year length plans) and monitoring and evaluation cycles across sub cases. These were reportedly adapted to suit individual environmental monitoring and management systems, business reporting cycles, and corporate monitoring and reporting. For example, one industry commented how their earlier EIPs had been based on three year plans, but with change in business profitability they had come back to focus on one year EIP plans. Interview with Interviewee 161 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 23, 2005) (stating “we actually brought them back to only going to put what we can do the next year as part of the business planning cycle. I guess that’s come around from the business underlying factor that we’ve had for a few years of financial survival, where we’ve got to get the business refinanced”).

243. Interview with Interviewee 132 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 22, 2005) (stating “the company’s open, from my point of view it’s transparent because we get on the ground there a bit and have a look around and see what’s going on and see that it does translate down onto the ground what’s [reported] on paper”).

244. *See, e.g.*, Bovens, *supra* note 32, at 450; Karkkainen, *supra* note 3, at 317.

245. Interview with Interviewee 141 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 22, 2005).

in non-local environmental issues. However, the reason they were effective in exerting influence here was that rather than engaging in technical discussions to determine an appropriate target, the information reported by industry regarding compliance was much more straightforward.<sup>246</sup> Reporting on compliance with targets typically involved a simple type of report card, such as using color-coding, “green ticks or red crosses” to indicate progress against targets.<sup>247</sup> This in turn allowed the residents and groups to identify easily when outcomes were not being achieved, and accordingly bring pressure to bear as appropriate.

VEPA supervision was also vital to ensuring overall compliance with targets, particularly in cases involving poor performers who were less conscious about their reputation being damaged by the public. Indeed, ensuring even basic compliance with minimal targets required the VEPA to “keep a close eye” on these industries,<sup>248</sup> and threaten to or carry out license changes.<sup>249</sup> As one VEPA respondent illustrated: “[T]hey were in denial . . . [t]hey’ve committed AUD\$5 million plus [over two EIPs] . . . and it hasn’t worked . . . so we’ve actually changed the license, amended the license and had severe discussions with them.”<sup>250</sup>

246. The target setting process typically involved “technical” presentations and discussions about industry’s operations and their environmental impacts. *See, e.g.*, note 217 & note 221. In contrast, reporting on target compliance involved a much more general account as to whether targets/actions were being met or not. *See, e.g.*, Interview with Interviewee 123 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 21, 2005) (discussing their reporting to the collaborative group as involving “traffic light reports . . . . So green is on target. Yellow is what we . . . and red is—not looking good”). Interview with Interviewee 131 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 22, 2005) (characterizing their processes of reporting to the EIP collaborative group as including “general information, if you like, on some of the key things we are doing and some actually measurement against the EIP . . . we report progress on each month and we will explain where there is a bit of slippage or whatever and why that happens and it is up to them to question it, and they do, its up to us to keep them confident that we are delivering the outcomes.”).

247. Interview with Interviewee 142 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 23, 2005).

248. Interview by Cameron Holley, Neil Gunningham and Clifford Shearing with Interviewee 181 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Aug. 10, 2005).

249. In situations where a failure to meet EIP targets constitutes a breach of law, this could also involve the threat or use of other VEPA enforcement actions through the court system. Interview by Cameron Holley, Neil Gunningham and Clifford Shearing with Interviewee 181 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Aug. 10, 2005) (noting generally that “there’s always that threat of ‘look we are receiving these reports, it is in our policy that we can issue you with fines.’”).

250. Interview with Interviewee 121 of the Local Capacity Regulation, Facilitating

To sum up the discussion of accountability, the EIP's new forms and mechanisms of accountability achieved some successes but also evidenced some weaknesses. In terms of professional accountability, many industries appeared largely adequate at successfully designing management systems and performance goals. Poor performers who had little commitment to environmental improvement appeared to purposefully deceive others and flout their responsibilities.<sup>251</sup>

To some extent this shortfall was overcome by mutual accountability regarding local issues. Indeed, mutual accountability between industry and community stakeholders was effective in ensuring that industry set adequate targets on local issues and was held accountable for overall performance. Nonetheless, it was apparent that this relationship was ineffective when it came to broader and more technical environmental issues, where community lacked the interest or sufficient knowledge to meaningfully engage in target setting. This left these more technical and broader targets open to industry domination.

In terms of VEPA oversight, the agency was clearly effective in carrying out its traditional accountability roles and had used its conventional regulatory powers to great effect in ensuring that industries met the costs of gathering baseline data and monitoring and remained accountable for overall compliance with the EIP. It was also clear that the VEPA was more comfortable in this traditional role of enforcing detailed legislative standards than it was in exercising its extensive discretion to assess and approve beyond-compliance targets. This contributed to a subtle form of capture by poor performers who essentially manipulated "beyond compliance" targets on broader environmental issues to ensure they achieved only tokenistic improvements.

#### IV. NEIGHBOURHOOD ENVIRONMENT IMPROVEMENT PLANS— OVERVIEW, LEGAL DESIGN, AND FINDINGS

##### A. Overview of NEIP

The second case study—the NEIP—commenced in 2001.<sup>252</sup> In

Participatory Environmental Policy Project (June 21, 2005).

251. May, *supra* note 29, at 24.

252. This Article does not seek to provide a detailed overview of NEIP and its legislative

contrast to the EIP’s focus on point source pollution from a single industry site, this initiative aimed to encourage the voluntary creation of collaborative groups on a “neighborhood” scale<sup>253</sup> to manage more complex environmental problems (e.g., the diffuse pollution of an urban stream and its catchment). The relevant second reading of the Environment Protection (Liveable Neighbourhoods) Bill notes that NEIP is:

[A] statutory mechanism to enable those contributing to and those affected by local environmental problems to come together in a constructive forum. In this forum, the members of the local community, including residents, industry and local government, can agree on the environmental priority issues for the neighbourhood. They can then devise a plan to address their agreed environmental issues in a practical manner.<sup>254</sup>

In practical terms, when an interested group of non-governmental or governmental stakeholders decides to engage in the NEIP process, it must first identify a specific government “sponsor”, typically a local government.<sup>255</sup> With the sponsor’s help the group is to engage and consult with the neighborhood community, then develop and submit a proposal for a NEIP to the VEPA. If approved, the group is then to develop a plan of action. The plan is expected to cover a stated period and contain relevant environmental performance targets and milestones.<sup>256</sup> Parties, including the sponsor and VEPA, also commit to perform certain actions and activities to achieve the agreed upon objectives.<sup>257</sup> If

design. A detailed analysis of NEIP and its legislative design can be found in Gunningham, Holley & Shearing, *supra* note 52. See generally EPA Victoria, <http://www.epa.vic.gov.au> (last visited Jan. 23, 2010).

253. Such as the size of a township, or small catchment. See Gunningham, Holley & Shearing, *supra* note 52.

254. Environment Protection (Liveable Neighbourhoods) Bill 2000: Second Reading of the Bill Before the Legislative Assembly of the Parliament of Victoria (Nov. 2, 2000) (Statement of The Hon. Sherry Garbutt) (Austl.).

255. The government sponsor is required to be a “protection agency,” which is a person or body having powers or duties under Acts, other than Environment Protection Act 1970 (Vict.), with respect to the environment or any segment of the environment in any part or parts of Victoria. Examples of protection agencies include local councils, catchment management authorities, water authorities, or government departments such as the Department of Natural Resources and Environment or the Department of Infrastructure. Environment Protection Act, 1970, § 19AE (Vict.); VEPA, *Neighbourhood Improvement Plans—Developing a Voluntary Proposal*, INFO. BULL., Pub. 846, 7–8 May 2002 (Austl.).

256. VEPA, *supra* note 255, at 3, 6; VEPA, *Neighbourhood Environment Improvement Plans—Developing a Voluntary Proposal*, INFO. BULL., Pub. 847, 5–6 May 2002 (Austl.); Environment Protection Act, 1970, § 19AI(3) (Vict.).

257. The proposal and a plan document must meet a number of requirements including:

the VEPA approves the plan, the group is then responsible for its implementation, which includes either obtaining external funding or utilizing their own resources. The implementation is subsequently monitored, and the plan is continually reviewed and redrafted over time.<sup>258</sup>

The unique approach of the NEIP shares some similarities with NEG experiments in other countries, including elements of “civic environmentalism” identified by John and others in the United States.<sup>259</sup> However, it is more closely related to the now defunct NEG experiment of Community Based Environmental Protection (“CBEP”) that was developed by the United States Environmental Protection Agency (“U.S. EPA”).<sup>260</sup> Like CBEP, the NEIP program aims to achieve a form of “top down support for bottom up community initiatives.”<sup>261</sup> Similarly, both are “place-based” approaches that encourage collaboration between local stakeholders in a community to address complex and cross-media environmental problems. In contrast to the NEIP program, CBEP was not a statutory mechanism that was formally enshrined in legislation, nor was it a specific U.S. EPA program. Rather, CBEP was a general initiative that formed a part of the EPA’s strategic plan and aimed to build on the U.S. EPA’s existing media-specific

drawing a “neighborhood boundary” around an issue; identifying where the problems are and what the possible solutions may be; engaging and obtaining formal sign-on of so called NEIP “partners” such as business groups, community groups, and government agencies; establishing a steering committee made-up of key partners; determining a “vision” for the NEIP; determining how the vision may be achieved through community efforts; identifying the financial or other resources needed to fund the development of the NEIP plan; identifying the likely nature of involvement and resource commitments to be made by the partners; detailing the proposed process for developing the plan; and ensuring that the process is open to all parts of the community. VEPA, *supra* note 255; Environment Protection Act, 1970, §§ 19AD, 19AE, 19AH, 19AI(3) (Vict.).

258. VEPA, *supra* note 255, at 10; Environment Protection Act, 1970, § 19AI (Vict.).

259. For example, both NEIP and John emphasize ideas of “sponsors,” and both civic environmentalism and NEIP emphasize more bottom-up efforts that embraced community capacity to govern local second generation environmental problems. DeWitt John & Marian Mlay, *Community-Based Environmental Protection: Encouraging Civic Environmentalism*, in BETTER ENVIRONMENTAL DECISIONS STRATEGIES FOR GOVERNMENTS, BUSINESSES AND COMMUNITIES 353, 361 (Ken Sexton et al. eds., 1999).

260. See Community Based Environmental Protection (CBEP) Subcommittee, [http://www.epa.gov/ocem/nacept/cbep97/cbep\\_charge.htm](http://www.epa.gov/ocem/nacept/cbep97/cbep_charge.htm) (last visited Jan. 23, 2010). This has since been replaced by Community Action for a Renewed Environment (CARE). See CARE, <http://www.epa.gov/care/> (last visited Jan. 23, 2010). See generally Stephen. M. Nickelsburg, *Mere Volunteers? The Promise and Limits of Community-Based Environmental Protection*, 84 VA. L. REV. 1371, 1372–73 (1998).

261. John & Mlay, *supra* note 259, at 361.

statutory program by incorporating CBEP into all U.S. EPA programs to “change . . . how the Agency does business.”<sup>262</sup>

### B. Legal Design—NEIP and Performance-Based Approaches

The NEIP employs a range of “new” mechanisms of accountability that, akin to other NEG approaches, seek to capitalize on the roles that its multiple public and private collaborators can play in holding each other to account.<sup>263</sup> As discussed further below, this approach relies on mutual accountability, contractual controls, and VEPA oversight to establish accountability in the program. These accountability features ideally check environmental performance and make the program responsive to VEPA (and thus ideally parliament) as well as the more immediate neighborhood community.<sup>264</sup>

The NEIP’s accountability mechanisms are deployed within a performance accountability regime, which involves both accountability relationships regarding rules and targets as well as accountability relationships regarding the implementation of the rules.<sup>265</sup>

In terms of the development of rules, collaborative groups are required to set performance targets, with individual collaborators accountable to each other for setting and agreeing to appropriate targets.<sup>266</sup> The collaborative group is also accountable to the VEPA, which is given ultimate responsibility to ensure that performance standards set by the collaborative group are fair and appropriate.<sup>267</sup>

262. U.S. ENVTL. PROT. AGENCY, EPA’S FRAMEWORK FOR COMMUNITY-BASED ENVIRONMENTAL PROTECTION 9 (1999); *see generally* Paul S. Weiland & Robert O. Vos, *Reforming EPA’s Organizational Structure: Establishing an Adaptable Agency Through Eco-Regions*, 42 NAT. RESOURCES J. 123–24 (2002); U.S. ENVTL. PROT. AGENCY, THE NEW GENERATION OF ENVIRONMENTAL PROTECTION: A SUMMARY OF EPA’S FIVE-YEAR STRATEGIC PLAN (1994); U.S. ENVTL. PROT. AGENCY, EPA STRATEGIC PLAN 83–85 (1997) (noting that CBEP was a “key cross-agency program”); Nickelsburg, *supra* note 260, at 1372–73, 1375–77; John & Mlay, *supra* note 259, at 361–62.

263. *See, e.g.*, Freeman & Farber, *supra* note 4, at 904.

264. *See* Freeman, *Collaborative*, *supra* note 9, at 96.

265. May, *supra* note 29, at 11–12; WONDOLLECK & YAFFEE, *supra* note 6, at 240; Karkkainen, *supra* note 29, at 993–97.

266. Residents and other non-governmental members may also play a democratic accountability role in scrutinizing government actions and relationships with industry/development interests in pursuing environmental performance. VEPA, *supra* note 255, at 1–4; *see also* Weber, *supra* note 47, at 453.

267. VEPA have power to approve and/or amend all targets. Further, the ongoing participation of agency officials in groups may provide ongoing checks on groups to ensure they adhere to performance goals. Environment Protection Act, 1970, §§ 19AH(2), 19AI(2)

In addition, the Victorian legislature attempts to protect the public interest and ensure that fair and credible standards are set by collaborative groups and approved by VEPA by “limiting” the decision space of the groups and agency. Like other NEG processes, the legislature faces the challenge of striking the right balance between specificity and generality<sup>268</sup> and, broadly akin to the EIP case, the risks of overgeneralization. While NEIPs are required to be consistent with relevant environmental quality standards, planning schemes, and laws,<sup>269</sup> the legislation leaves much of the details about a NEIP’s goals, form, and manner to the VEPA.<sup>270</sup> Indeed, collaborative groups are only required to set measurable performance targets that contribute to broad outcomes of protecting a beneficial use of the environment and improving the quality of the local neighborhood environment.<sup>271</sup> Like the EIP case, there is no further detail on outcomes or matters for targets, nor do they recommend any indicators to be used in measuring specific issues. For example, there is no requirement for NEIP groups to address certain issues such as salinity or nitrogen in creeks, nor does the case recommend exactly what kind of indicators for such issues should be used when seeking to measure environmental conditions (e.g., using electrical conductivity to measure salinity in a creek). Whether this degree of statutory generality results in difficulties similar to those observed in EIP is revisited below.<sup>272</sup>

In developing the NEIP plan and setting their performance targets, the collaborative groups are encouraged to utilize their own resources or identify external sources for data collection, analysis, technical support, and advice.<sup>273</sup> Because the NEIP focuses on complex and diffuse environmental and natural resource issues, data collection and monitoring of environmental conditions to set

(Vict.).

268. See Dana, *supra* note 6, at 53–54.

269. Environment Protection Act, 1970, §§ 19AI(3) (b), (h), (i) (Vict.).

270. Environment Protection Act, 1970, §§ 19AH, 19AI (Vict.).

271. Beneficial use is a use of the environment which “is conducive to public benefit, welfare, safety, health or aesthetic enjoyment and which requires protection from the effects of waste discharges, emissions or deposits or of the emission of noise.” Environment Protection Act, 1970, §§ 4(1), 19AE, 19AF, 19AG, 19AH(2), 19AI(2) (Vict.); VEPA, *supra* note 256, at 5; VEPA, *supra* note 255, at 1.

272. See Karkkainen, *supra* note 29, at 979; Dana, *supra* note 6; Markell, *supra* note 29, at 56–57.

273. Environment Protection Act, 1970, §§ 19AI, 19AJ (Vict.).

targets is likely to be costly and require significant technical expertise. Aware of such challenges, the designers have provided collaborations with some limited support, including the provision of available government data on environmental conditions,<sup>274</sup> as well as a small degree of funding.<sup>275</sup> The findings below examine the extent to which the support mechanisms are sufficient for the case to set credible performance standards.

Once targets are established, the collaborative group is expected to conduct self-monitoring, evaluation, and reporting on their progress against targets and their implementation of projects and outputs.<sup>276</sup> Broadly akin to the EIP program, the NEIP design largely leaves it to the discretion of the collaborators as to the form and funding of these processes, subject to the approval of the VEPA.<sup>277</sup>

If compliance is not forthcoming, the NEIP uses a form of contractual arrangement as a means to foster accountability.<sup>278</sup> This involves the publication of the NEIP plan in the Government Gazette (“gazetted”)<sup>279</sup> by the VEPA, making all actions voluntarily agreed to by stakeholders legally binding.<sup>280</sup> The consequence of subsequent withdrawal or failure to fulfill the contractual terms is

274. This may involve the provision of VEPA data to the collaborative group. See VEPA, *supra* note 255, at 9 (noting that “EPA may be able to offer expertise in areas such as scientific monitoring and assessment, [and] environmental auditing”).

275. *Id.* In practice, such support has included government “seed” funding, usually from the VEPA or sponsor. The precise amount of funding is unspecified, but in practice it appears to fall somewhere between AUD\$10,000 and \$30,000. This funding is to be used to support the organization of the group, planning as well as monitoring.

276. Environment Protection Act, 1970, §§ 19AI, 19AJ (Vict.).

277. This will involve developing their own indicators for ongoing evaluation, as well as developing a process for “review” of their plans. VEPA, *supra* note 255, at 1, 10; Environment Protection Act, 1970, §§ 19AI, 19AJ (Vict.).

278. For further information on contractual mechanisms, see, for example, Freeman, *supra* note 49, at 198–201; Dana, *supra* note 6, at 36; May, *supra* note 29, at 10–11.

279. The Government Gazette provides official notification of decisions or actions taken by, or information from, the Governor of Victoria, Government authorities, Government Departments, local councils, companies, and individuals. This can include proclamations by the Governor such as Acts of Parliament, or government agencies publishing notices as required under particular Acts. See About us, [http://www.gazette.vic.gov.au/gazette\\_bin/about\\_us.cfm?bct=home|aboutus&k=2A279B51-925D-05D9-69DE58795E8B7F71](http://www.gazette.vic.gov.au/gazette_bin/about_us.cfm?bct=home|aboutus&k=2A279B51-925D-05D9-69DE58795E8B7F71) (last visited Jan. 23, 2010).

280. While this mechanism remains untested, the intention appears to be that a failure to fulfill the terms of the plan will constitute a breach of law, ideally giving VEPA something of a “whip hand” to discipline actors and ensure accountability for implementation and performance. Environment Protection Act, 1970, § 19AI(4) (Vict.); see also Karkkainen, *supra* note 3, at 316–17; VEPA, *supra* note 255, at 3.

intended to involve a breach of law, effectively giving VEPA enforcement options (e.g., issuing a penalty infringement notice which imposes monetary penalties).<sup>281</sup> The guidelines sum up the intended benefits of this contractual approach: “[a] Neighbourhood EIP can . . . encourage greater commitment and accountability through a public and statutory document.”<sup>282</sup>

### C. Findings—Imprecise Targets and Inept Monitoring: The Failing of “New” Forms of Accountability in a Performance-Based Regime

The experience of the NEIP and its focus on complex, second generation problems revealed significant and costly monitoring demands that were insufficiently met by the NEIP partners or program. As discussed below, the result was widespread imprecise target setting and delays in implementation that appeared likely to undermine accountability for performance.<sup>283</sup> The analysis considers accountability relationships regarding performance targets<sup>284</sup> and examines the implementation of and compliance with targets.<sup>285</sup>

The primary task in any performance-based regime is setting performance targets. Like the EIP program, the NEIP faces risks that powerful economic or other interests will capture and shape agendas. This was less of a problem in NEIP because most collaborations did not have specific “industry” interests actively engaged in decision-making processes.<sup>286</sup> Furthermore,

281. Interview with Interviewee 214 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 13, 2005) (stating “because it’s a EPA statutory document the EPA could essentially put an equivalent of a PIN on them and say this is the improvement notice, you have signed onto these things, you said you were going to do these things, in this time frame, you haven’t achieved, now we’re asking you to demonstrate that you will do it by this timeline”). Note that this legal backing may also improve the capacity of collaborators to hold each other to account through “shaming” potentially “unlawful” underperformers. See VEPA, *supra* note 255, at 3; Gunningham, Holley & Shearing, *supra* note 52; Freeman, *supra* note 49, at 207.

282. VEPA, *supra* note 255, at 3.

283. Note that much of the analysis draws on the findings regarding NEIP sub cases 1 and 2, as at the time the research was conducted they had progressed substantially further into implementation than NEIP sub case 3.

284. May, *supra* note 29, at 11–12.

285. *Id.*

286. Perhaps the greatest risk was in NEIP sub case 3 where a number of farmers were represented on the committee. However, as one respondent illustrated, risks of capture had been averted by mutual accountability between the other partners (urban residents and a water trust) and the farmers. Interview with Interviewee 231 of the Local Capacity

respondents suggested that the participation of multiple environmental agencies had ensured that targets set by the group respected the “broader regional wide context” and accounted for existing laws and planning schemes.<sup>287</sup>

Despite avoiding any evident distortion by industry, the relevant performance targets were extremely vague.<sup>288</sup> Many targets aimed to achieve an “improvement” in a stated environmental quality variable, but few provided any direct quantifiable measures regarding the *level of improvement* to be realized. For example, targets were stated as aspirations to “[r]educe” a town’s “ecological footprint” (NEIP 2),<sup>289</sup> achieve an “improvement” in baseline water quality of a stream (NEIP 1),<sup>290</sup> or “improve water quality within 3 years by reducing sediment load from 2004 levels” (NEIP 3).<sup>291</sup>

Regulation, Facilitating Participatory Environmental Policy Project (Dec. 7, 2006) (reporting, “some things that started becoming very apparent as far as E. coli levels were concerned. People started pointing fingers and it perhaps created a little angst amongst one or two rural landholders . . . and blow me down . . . they asked [V]EPA ‘How can we do things better?’”). For further information on industry involvement in NEIP, *see* Gunningham, Holley & Shearing, *supra* note 52.

287. Interview with Interviewee 214 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 13, 2005).

288. While there are many different social and environmental targets, for the purposes of this Article the focus is placed on arguably the most significant and ultimate measure of performance—targets relating to environmental performance.

289. The vision of the NEIP was “[a] proud and connected community creating a prosperous and sustainable future in a healthy and beautiful environment” and the objectives/targets included “[p]rotect[ing] . . . natural ecological values” and “[r]educing . . . ecological footprint.” SURF COAST SHIRE COUNCIL, ANGLESEA, ANGLESEA NEIGHBOURHOOD ENVIRONMENT IMPROVEMENT PLAN 13 (2004).

290. The vision of the NEIP was “[a] clean Stony Creek corridor that is the pride of all our community” and the objectives/targets included “[i]mprove water quality . . . [which] will be measured by: a) a reduction of the number of pollution incidents and b) an improvement in baseline water quality” defined by an index of Stream Condition tool. MARIBYRNONG CITY COUNCIL, NEIGHBOURHOOD ENVIRONMENT IMPROVEMENT PLAN FOR STONY CREEK 1, 23–24 (2004).

291. The vision of the NEIP was “[a] healthy Little Snowy Creek that supports a range of uses and is managed in a cooperative and considerate manner for the benefit of all” and the objectives/targets included: “[t]o improve the stream health of Little Snowy Creek and consequently improve water quality” . . . “[r]educe in the level of nutrients entering the Little Snowy Creek from farming practices to less than the 2004 monitoring levels within 5 years” . . . “[i]mprove water quality within 3 years by reducing sediment load from 2004 levels using turbidity as the measure” . . . “[t]o provide clean, drinkable water . . .” The only target to come close to specific quantifiable measure within a specific time period was as follows: “Reduce the amount of grey-water entering the storm-water system without treatment to 10% of properties or less within 5 years from 1 July 2006.” TOWONG SHIRE COUNCIL, LITTLE SNOWY CREEK NEIGHBOURHOOD ENVIRONMENT IMPROVEMENT PLAN 23–24 (2006).

A sympathetic reading of these targets would suggest that the collaborations were striving to achieve as much “improvement” or “reduction” in the given environmental conditions as possible. A more critical stance, however, may raise questions about the possibility of “unprincipled deal making [sic]” among collaborators to try to avoid any significant improvements.<sup>292</sup> Groups certainly could achieve minimal improvements to environmental quality and still formally claim to have met their respective targets.<sup>293</sup>

As NEIP is still in the early years of implementation, only time will tell which of these readings is vindicated.<sup>294</sup> At the very least, respondents have suggested two fundamental flaws in the NEIP approach that provide considerable scope for tokenism and negligible environmental improvements: a lack of relevant data to inform measurable targets (discussed further below) and a break down in VEPA’s accountability responsibilities.

Akin to the findings in the EIP program, the sweeping legislative statements regarding expected outcomes in the NEIP program left significant discretion to VEPA officers on the nature and magnitude of performance targets. While this is not inherently a problem, the findings suggested that the VEPA lacked internal direction or technical capacity to exercise its discretion effectively and identify what the targets should contain, and the extent of improvement that should be expected.<sup>295</sup> As one VEPA officer reported, “there weren’t really detailed guidelines of what you needed to include . . . [so] you want to improve water quality, but how are we going to measure that? That in itself posed certain problems.”<sup>296</sup>

An additional cause of imprecision in performance targets was manifest gaps in baseline data. Certainly, the VEPA and other well-resourced agency collaborators had tried to assist collaborative groups in monitoring tasks. This included small grants (e.g.,

292. Karkkainen, *supra* note 29, at 963; Doremus, *supra* note 29.

293. Steinzor, *supra* note 84; Doremus, *supra* note 29; Karkkainen, *supra* note 29, at 963.

294. NEIP 1 and 2 were between two to three years into implementation. NEIP 3 was less than one year into implementation at the time of the research.

295. In part, this was a reflection that NEIP 1 and 2 were the “pilot” cases for the VEPA’s NEIP instrument, and the agency was still learning about the NEIP. However, similar problems have persisted in later NEIPs, such as NEIP 3 where most targets (although showing slightly greater specificity) still evidenced a high level of generality, without directly quantifiable improvements.

296. Interview with Interviewee 211 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 13, 2005).

AUD\$40,000), the provision of monitoring systems, and training to complete baseline water quality/“eco-footprint” monitoring.<sup>297</sup> Respondents reported that this support was severely deficient, contained underdeveloped “metrics”, and was unsuited to volunteers who lacked technical skills.<sup>298</sup> This led to scientifically questionable measurements and significant gaps in data collected. As one government respondent put it: “we were doing some base line monitoring, [but] there was a bit of a stuff-up on that . . . we need[ed] some more sophisticated systems . . . the issue was the cost of collecting that data and how we’re going to do that.”<sup>299</sup>

Unsurprisingly, even some years after having their NEIPs approved this lack of funding and technical capacity meant that collaborations had neither taken steps to try and improve baseline data, nor implemented any monitoring of environmental indicators to try and judge whether progress was being made against the limited baseline data that had been generated. Unfortunately, this makes it virtually impossible to judge realistically whether progress toward the NEIPs’ vague targets is being made.<sup>300</sup> As one respondent explained, “I don’t think that we’ve come up yet with a system that we think is sustainable in terms of the cost of getting

297. This includes water quality monitoring (NEIP 3), funding, and in kind support for “VEPA ecofootprint calculators” to measure towns’ ecofootprint with an aim to improve sustainability of the town (NEIP 2). Notably no attempt was made to measure “natural ecological values” in NEIP 2. SURF COAST SHIRE COUNCIL, *supra* note 289, at 14.

298. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 224 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Aug. 9, 2005) (stating “[w]e were using the EPA’s eco foot print calculator. And again it was another example of one of X’s awesome ideas that just weren’t resourced properly, so the foot print calculator that we were waiting for just took forever to arrive. So we kept saying to people we’ve got this rough model that we can calculate the foot print and what we’d like to do is we’d like to look at your behavior and see how that influences your footprint and then we’ll say if you change your behavior it’ll reduce your footprint. And we were waiting for this model from the EPA to arrive [but it didn’t]”); Interview with Interviewee 234 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Dec. 14, 2006) (“I never wanted to put too much emphasis on the use of that data to say too much . . . so there’s a hell of a lot of variables and we’re only doing it as a [volunteer] level”).

299. Interview with Interviewee 215 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Mar. 1, 2007).

300. Doremus, *supra* note 29, at 62. Even in NEIP 3 where community monitoring of water quality had continued, there were ominous signs of volunteer burnout with monitors dropping from ten people to two people during the research period. This led one respondent to speculate that the monitoring group “may well fold.” Interview with Interviewee 234 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Dec. 14, 2006).

that data with the access and measurability and us being able to interpret and use it . . . I would accept that as a bit of a criticism.”<sup>301</sup>

Without such monitoring mechanisms, outputs remained the primary “indicator” of performance in NEIP.<sup>302</sup> But, even monitoring outputs and implementation appeared to present significant difficulties in NEIP.

While key collaborators such as NEIP “sponsors” provided in-kind administrative support and had obtained a few short-term government grants,<sup>303</sup> in general the collaborations relied on their own resources (volunteering their time and capacities) to monitor and report on implementation.<sup>304</sup> On all accounts, respondents suggested these resources were insufficient to implement formal processes. Instead, monitoring and reporting was generally verbal and informal<sup>305</sup> or conducted “behind the scenes.”<sup>306</sup> As one respondent pointed out: “there’s a kind of a policing/monitoring role that is important, that’s part of the nature of the NEIP, but that slipped without funding.”<sup>307</sup>

Unsurprisingly, with little formal monitoring, it was difficult to hold collaborators accountable for implementation and outputs.<sup>308</sup>

301. Interview with Interviewee 215 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Mar. 1, 2007).

302. Interview with Interviewee 237 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Dec. 14, 2006); Markell, *supra* note 29, at 62.

303. When grants had been obtained by a specific collaborative partner (usually an agency), the partner themselves took on formal monitoring and reporting duties to the funding body and on all accounts had discharged these responsibilities adequately. However, such monitoring and evaluation did not appear to flow back to the group. Interview with Interviewee 218 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Feb. 28, 2007).

304. “Seed” funding that had originally supported NEIP operations “dried up” upon approval of the plan.

305. Interview with Interviewee 214 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 13, 2005) (“there’s a requirement for a review process in there and we are meeting on a two monthly basis but the level of reporting back by the various partners whether they be agencies or community groups is very much verbal at the meeting and I think it needs to be more robust”).

306. As one respondent pointed out in NEIP 2, “evaluating doesn’t really occur.” Interview with Interviewee 227 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Feb. 27, 2007). The unfunded coordinator reportedly was continuing to collate information on group participation rates and activities, however the coordinator rarely attended meetings. Interview with Interviewee 228 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Feb. 26, 2007).

307. Interview with Interviewee 215 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Mar. 1, 2007).

308. See, e.g., Bovens, *supra* note 32, at 450; Karkkainen, *supra* note 3, at 317. Reporting to VEPA naturally also suffered. In NEIP 1, for example, the group missed an entire year of

Many collaborators failed to deliver outputs “on time” or at all,<sup>309</sup> or deviated from the formal actions and objectives of the plan:<sup>310</sup> “they’re supposed to be implementing their plan now but it’s like they haven’t even looked at the plan.”<sup>311</sup>

Despite these deficiencies, there were no reports of deliberate collusion by collaborators to hide this underperformance.<sup>312</sup> Thus, these defects appeared attributable to the lenient monitoring that was insufficient to reveal underperformance and “catch out” indolent collaborators.<sup>313</sup>

reporting “because [they] didn’t have the resources.” Interview with Interviewee 215 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Mar. 1, 2007). In NEIP 2, respondents suggested reporting had also “peeled off.” Interview with Interviewee 228 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Feb. 26, 2007).

309. Some partners may have had valid reasons for non-compliance, but respondents suggested that mostly, partners simply let timelines slip. Interview with Interviewee 218 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Feb. 28, 2007) (“The initial plan had a lot of outcomes, a lot of date lines of targets to be met. That fell by the wayside a bit. Some of the targets were pretty far in the future, but a lot were supposed to be done in the first couple of years after NEIP and they weren’t really actually done.”).

310. Indeed, in NEIP 2, accountabilities for implementation of the plan reportedly “got a bit lost.” If such changes occurred in accordance with an “adaptive management” approach, they may have been entirely justifiable. With the ineffective baseline and ongoing monitoring, however, adaptive management processes appeared to be rare. Rather, the group appeared to simply head in its own direction to try and undertake new “sustainability” projects with little direct regard to the specific plan objectives. Interview with Interviewee 228 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Feb. 26, 2007).

311. Interview with Interviewee 241 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (June 29, 2006).

312. Many, in fact, expressed a desire for a better monitoring and reporting system. Further, many partners, particularly government agencies, actually continued to implement actions. Interview with Interviewee 214 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 13, 2005).

313. Notably, recent short-term grants to some NEIPs appeared likely to turn around their abysmal monitoring of implementation and reduce the likelihood that such enforcement would be needed. For example, one NEIP hired a coordinator, who had in turn implemented a new monitoring protocol, developed and distributed a formal register of actions, and produced a report for the VEPA. This appeared to provide partners with the information they needed to shame and exert pressure on under performers. *See, e.g.*, Interview with Interviewee 218 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Feb. 28, 2007) (describing that “[t]hings are starting to happen . . . . [The coordinator] has spent the last six months now just chasing up what previously hadn’t been done and what each partner was supposed to do . . . . [T]hey have re-initiate[d] that process”); Interview with Interviewee 215 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Mar. 1, 2007) (stating, “[s]o that was one of the first things [the coordinator] did. Was just to update that and report back to EPA.”). However, despite this improvement, most agreed that the short-term nature of the

Why had the VEPA not tried to take a more active role in encouraging partners to remain accountable to their commitments? In part, VEPA officers appeared to want to avoid too much control over the group in the first few years of implementation. It is also plausible that the VEPA did not push too hard because they (and the collaborators themselves) were aware that the NEIP's contractual mechanism had been designed to hold specific parties ultimately accountable for performing their actions at the end of the plan.<sup>314</sup> How effective such strategies are likely to be, however, seems very doubtful.

In summary, while the NEIP program is still in its early stages, the findings suggest that the mechanisms that have been put in place for holding collaborations accountable for future performance are unlikely to be stable or effective. Overly broad performance requirements, coupled with the fact that the VEPA lacks the knowledge or direction to ensure that appropriate targets were set, raise serious questions about unprincipled deal-making and suggest significant flaws in current accountability mechanisms. The findings also reveal that in contrast to EIP, the complex second-generation problems in NEIP pose significant and costly monitoring demands that are insufficiently met by the NEIP partners or program. Without relevant data, it will be difficult for collaborators to fulfill mutual accountability roles or for agencies to ensure even basic accountability for implementation, let alone hold groups accountable for environmental results.

## V. REGIONAL NATURAL RESOURCE MANAGEMENT—OVERVIEW, LEGAL DESIGN, AND FINDINGS

### A. Overview of RNRM

The final case study, the RNRM program, is far more complex

grant, like other similar funding sources obtained earlier, was capable of providing only a short-term fix for the underfunded collaboration. *See also* Cameron Holley, *Aging Gracefully? Examining the Conditions for Sustaining Successful Collaboration in Environmental Law and Governance*, 26 ENVTL. & PLAN. L.J. 457 (2009).

314. At least some collaborators were aware that they would suffer consequences if they failed to meet their commitments when the plan ceased. Interview with Interviewee 214 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 13, 2005) (stating, "I guess the power that the NEIP does have is it's a statutory EPA document so I guess we need to be seen to be keeping our end of the bargain . . . [T]here's a degree of statutory obligation to ensure that we do it.").

than the other two, involving wide-reaching “partnerships” between federal, state, and local governments, and regional communities, farmers, and industry bodies to address natural resource problems.<sup>315</sup> RNRM was pioneered in 2000/2001 by the Australian Federal Government in collaboration with the Australian States and Territories. Since its inception, the program has been underpinned by approximately AUD\$5 billion of Federal and State government funding.<sup>316</sup> This funding is provided pursuant to the Natural Heritage Trust Act 1997 (Cth)<sup>317</sup> and various programs, including Caring for our Country (2008–2013),<sup>318</sup> the jointly delivered Natural Heritage Trust 2 (“NHT 2”), and the National Action Plan for Salinity and Water Quality (“NAP”) (2001–2008).<sup>319</sup> NHT 2 and NAP together decentralized natural resource management (“NRM”) to fifty-six regions across Australia<sup>320</sup> to

315. Head, *supra* note 13, at 141–42.

316. See Caring for our Country Funded Projects, <http://www.nrm.gov.au/funding/index.html> (last visited Jan. 23, 2010).

317. Natural Heritage Trust of Australia Act, 1997, § 19 (Austl.). See also Natural Resources Management (Financial Assistance) Act, 1992, § 5 (Austl.).

318. The overarching goal of Caring for our Country is to achieve “an environment that is healthy, better protected, well managed and resilient, and provides essential ecosystem services in a changing climate.” This goal is underpinned by six national priorities: coastal environments and critical aquatic habitats, community skills, knowledge and engagement, the National Reserve System, biodiversity and natural icons, sustainable farm practices, and natural resource management in northern and remote Australia. COMMONWEALTH OF AUSTRALIA, CARING FOR OUR COUNTRY BUSINESS PLAN (2009–2010), available at <http://nrm.gov.au/publications/books/business-plan.html>.

319. This Article’s primary focus is on accountability in RNRM and it does not seek to provide a detailed overview of RNRM or the respective funding programs. For a more comprehensive discussion of RNRM and the NHT2 and NAP programs, see, for example, Head, *supra* note 13; Susan A. Moore & Susan F. Rockloff, *Organizing Regionally for Natural Resource Management in Australia: Reflections on Agency and Government*, 8 J. ENVTL. POL’Y & PLAN. 259 (2006); Lisa Robins, *Major Paradigm Shifts in NRM in Australia*, 7 INT’L J. GLOBAL ENVTL. ISSUES 300 (2007); Megan Farrelly, *Regionalisation of Environmental Management: A Case Study of the Natural Heritage Trust, South Australia*, 43 GEOGRAPHICAL RES. 393 (2005); Sandy Paton et al., *Regional Natural Resource Management: Is It Sustainable*, 11 AUSTL. J. ENVTL. MGMT. 259 (2004). For an overview of the more recent Caring for our Country program, see, for example, Caring for our Country, <http://www.nrm.gov.au> (last visited Jan. 23, 2010); What is Natural Resource Management?, <http://www.nrm.gov.au/nrm/index.html> (last visited Jan. 23, 2010).

320. This is consistent with the broader trend towards democratic decentralization of NRM. See JESSE C. RIBOT, DEMOCRATIC DECENTRALIZATION OF NATURAL RESOURCES: INSTITUTIONALIZING POPULAR PARTICIPATION 3–4, 13 (World Resources Institute 2002). However, in contrast to Ribot’s emphasis on building on elected local representative systems, RNRM fulfills this decentralization via a regional collaborative group, most often formed through the process of stakeholder self nomination, and government appointment in consultation with the regional community. Head, *supra* note 13.

contribute to national goals and priorities that, *inter alia*, have related to (1) salinity and water quality, (2) biodiversity conservation, (3) sustainable use of natural resources, and (4) community capacity building.<sup>321</sup> As one policy document describes, “we seek to enable communities to take responsibility for planning and implementing natural resource management strategies, in partnership with all levels of government, that meet their priorities for sustainable development and ongoing viability.”<sup>322</sup>

While the specific arrangements of this program vary between States and Territories, fourteen regions were established in Queensland, the area of study in this Article.<sup>323</sup> Each region was defined around one or more bioregions.<sup>324</sup> A multistakeholder regional body was formed in each region, each body comprising a number of community stakeholders that ideally balanced economic and environmental interests. These bodies were to be incorporated and subsequently funded to engage in a consultative process to develop regional planning documents.<sup>325</sup> These

321. For further information, see, for example, Natural Heritage Trust of Australia Act, 1997 (Austl.); NATURAL RESOURCE MANAGEMENT MINISTERIAL COUNCIL, FRAMEWORK FOR THE EXTENSION OF THE NATURAL HERITAGE TRUST (2002), *available at* <http://www.nht.gov.au/publications/frameworks/extension-framework.html>; An Agreement Between the Commonwealth of Australia and the State of Queensland for the Implementation of the Intergovernmental Agreement on a National Action Plan for Salinity and Water Quality (2001), *available at* <http://www.napsqw.gov.au/publications/books/iga.html>.

322. Intergovernmental Agreement on a National Action Plan for Salinity and Water Quality, *supra* note 321, at 2.

323. For arrangements in different regions, see What is a Natural Resource Management Region?, <http://www.nrm.gov.au./nrm/region.html> (last visited Jan. 23, 2010).

324. *Id.* (noting that the Australian Government, in association with state and territory governments, identified fifty-six regions covering all of Australia).

325. The RNRM case imposes requirements for the regional body to develop and implement a plan and a “regional investment strategy.” These documents must cover, *inter alia*, the full range of NRM issues, be underpinned by scientific analysis of natural resource conditions, problems, and priorities, have effective involvement of all key stakeholders in plan development and implementation, focus on addressing the underlying causes rather than symptoms of problems, include strategies to implement agreed NRM policies to protect the natural resource, demonstrate consistency with other planning processes and legislative requirements applicable to the region, set targets at the regional scale, and identify strategic, prioritized, and achievable actions to address the range of NRM issues and achieve the regional targets. This includes an evaluation of the wider social, economic, and environmental impacts of such actions and any actions needed to address such impacts, and requires providing for the continuous development, monitoring, review, and improvement of the plan. Bilateral Agreement Between the Commonwealth of Australia and the State of Queensland to Deliver the Natural Heritage Trust §§ 67, 68(b), 87, Attachment D at 56, Attachment E at 59–60 (2004); An Agreement Between the Commonwealth of Australia and

documents set priorities and actions for NRM, consistent with national goals.<sup>326</sup> A government committee known as the Joint Steering Committee (“JSC”) approved each regional plan,<sup>327</sup> and the regional bodies implemented their plans in an adaptive manner using dedicated government investment. This involved implementing projects themselves or by working in collaboration with regional stakeholders (e.g., paying local and regional “service providers” such as farmers or catchment management groups to implement actions).

Although RNRM is an Australian program, these arrangements have a number of close NEG relatives internationally; particularly United States initiatives such as collaborative regional ecosystem efforts in Chesapeake Bay,<sup>328</sup> San Francisco Bay Delta,<sup>329</sup> and the multiparty, regional landscape scale Habitat Conservation Plans (what Karkkainen classifies as “Type II HCPs”).<sup>330</sup> While all share a broadly similar collaborative and regional ecosystem-focused approach, there are also some differences. For example, RNRM relies primarily on dedicated government investment to provide incentives and support to underpin the formation of collaborative groups, planning, and implementation. In contrast, HCP’s overall approach to regional collaborative ecosystem governance depends less directly on government investment and more on legal incentives and mechanisms, particularly the operation of a “penalty

the State of Queensland for the Implementation of the Intergovernmental Agreement on a National Action Plan for Salinity and Water Quality, *supra* note 321, § 7.1; *see also* Head, *supra* note 13.

326. Note that the relatively recent Caring for our Country program utilizes these regional documents, as well as overarching national outcome and business plans, to determine which activities to invest in. In addition to regional bodies, other public and private stakeholders can also apply for government investment under the Caring for our Country RNRM program. For an overview, *see* Caring for our Country, <http://www.nrm.gov.au> (last visited Jan. 23, 2010).

327. While there are multiple government agencies and ministerial bodies that have a role in overseeing aspects of the RNRM program, the JSC has the most direct accountability relationship to the regional body. This relationship exists pursuant to a “partnership agreement” between the regional body and the government. *See, e.g.*, Bilateral Agreement Between the Commonwealth of Australia and the State of Queensland To Deliver the Natural Heritage Trust, *supra* note 325, §§ 69, 71, 94, Attachment J, 8.5; An Agreement Between the Commonwealth of Australia and the State of Queensland for the Implementation of the Intergovernmental Agreement on a National Action Plan for Salinity and Water Quality, *supra* note 321, §§ 8.1, 14.1; *see also* Head, *supra* note 13, at 139.

328. *See* Wiersema, *supra* note 3.

329. *See* Freeman & Farber, *supra* note 4.

330. Bradley C. Karkkainen, *Toward Ecologically Sustainable Democracy?*, in DEEPENING DEMOCRACY, *supra* note 29, 208, 211–12.

default”-style rule that encourages and compels landowners, local governments, and others to collaborate and engage in landscape-scale ecosystem planning.<sup>331</sup>

RNRM is also distinct from the Bay Delta and Chesapeake Bay experiments. Both of these experiments emerged in response to the limitations of traditional approaches, citizen movements that demanded improvements in the Bays, and longstanding conflicts between key stakeholders. They have since developed their own unique and lengthy history, and have involved a greater deal of institutional innovation and evolution to address the problems plaguing their regional ecosystems.<sup>332</sup> In contrast, RNRM stands as a far more structured and ambitious attempt to roll out a government-designed regional ecosystem program across an entire country.

#### B. RNRM’s Legal Design: “New” Forms of Accountability

Given that RNRM involves billions of dollars of public funding, pursuing proper accountability was of particular concern to its architects. As the guidelines point out, “the Parliament and the public need to be confident that program funds are being spent on actions that will make positive changes to Australia’s environment.”<sup>333</sup> Thus, there are multiple accountability responsibilities and relationships, including accountability controls on how government investment and accounts are to be managed,<sup>334</sup> as well as multiple reporting requirements between the different state and national bodies, leading back to government ministers.<sup>335</sup>

331. This default rule arises under a set of provisions of the Endangered Species Act that lists endangered species and imposes strong sanctions on those who harm or harass them or their habitat, unless a HCP is developed and approved. See Endangered Species Act of 1973, 16 U.S.C. §§ 1531–44 (2000). For further discussion of the relevant provisions and their operation, see, for example, J.B. Ruhl, *Default Rule Opt-Outs and Interest Group Shut-Outs: Citizen Participation and Contractarian Innovation in Environmental Law*, 33 FLA. ST. U. L. REV. 903, 906–08 (2006); Craig W. Thomas, *Habitat Conservation Planning*, in DEEPENING DEMOCRACY, *supra* note 29, at 145–50; Karkkainen, *supra* note 330, at 213–14.

332. See Freeman & Farber, *supra* note 4, at 837–39, 854–57; Bradley C. Karkkainen, *Post-Sovereign Environmental Governance*, 4 GLOBAL ENVTL. POL. 72, 81–82 (2004).

333. Bilateral Agreement Between the Commonwealth of Australia and the State of Queensland to Deliver the Natural Heritage Trust, *supra* note 325, at 117.

334. Natural Heritage Trust of Australia Act, 1997, § 19 (Austl.); Bilateral Agreement Between the Commonwealth of Australia and the State of Queensland To Deliver the Natural Heritage Trust, *supra* note 325, § 6, Attachment J.

335. Bilateral Agreement Between the Commonwealth of Australia and the State of Queensland To Deliver the Natural Heritage Trust, *supra* note 325, §§ 153, 154, Attachment

Formal political and democratic accountability ideally exists at the top levels, with ministers being held accountable through the electoral system.

As discussed further below, RNRM also utilizes various “new” mechanisms and forms of accountability within a performance-based approach to governance, and includes an embryonic form of “destabilization right,” as well as giving collaborators the capacity to check each others’ behavior to fulfill self-monitoring and reporting tasks. Compared to the other two cases, however, RNRM places a far heavier reliance on delivering accountability through hierarchical and bureaucratic monitoring requirements and on fixed parameters of the program through government frameworks and monitoring and reporting strategies.

Fundamental to RNRM’s performance approach is the process of collaborative groups agreeing to regional performance targets to which they must subsequently adhere. Regional collaborations are accountable to the JSC, which ensures that performance standards set by a collaborative group are fair and appropriate.<sup>336</sup> Individual collaborators are also accountable to one another for setting appropriate standards.<sup>337</sup>

In contrast to the other cases, the legislatures in RNRM were far more willing to constrain the decisional space and discretion of these groups and agencies regarding target setting. Indeed, the RNRM program offers a far greater level of specificity than either NEIP or EIP regarding outcomes and targets. For example, rather than setting an overarching goal to “improve the quality of the

J, § 8.1; Natural Heritage Trust of Australia Act, 1997, §§ 41, 43 (Austl.).

336. The JSC has the power to approve and/or amend the targets. Note, however, that Ministers (via a recommendation from the JSC) have the ultimate approval rights over the regional plan, its targets, and the processes of monitoring, evaluation, and reporting. Bilateral Agreement Between the Commonwealth of Australia and the State of Queensland to Deliver the Natural Heritage Trust, *supra* note 325; An Agreement Between the Commonwealth of Australia and the State of Queensland for the Implementation of the Intergovernmental Agreement on a National Action Plan for Salinity and Water Quality, *supra* note 321, §§ 7, 14.

337. Non-governmental members may also play a democratic accountability role in scrutinizing government actions and relationships with industry/development interests in pursuing environmental performance. See, e.g., Weber, *supra* note 47, at 453; COMMONWEALTH AND QUEENSLAND GOVERNMENTS, MONITORING AND EVALUATION IMPLEMENTATION PLAN FOR THE NATIONAL (AUSTRALIAN AND STATE) PROGRAMS §§ 5.2.1–5.2.3, 7.1 (2004), available at [http://www.regionalnrm.qld.gov.au/policies\\_plans\\_legislation/planning\\_guidance\\_docs/m\\_e\\_framework\\_body.pdf](http://www.regionalnrm.qld.gov.au/policies_plans_legislation/planning_guidance_docs/m_e_framework_body.pdf).

environment,” like the NEIP, the RNRM program specifies: (i) eight national outcomes to be achieved (e.g., maintaining or rehabilitating ecosystem services and functions; minimizing, avoiding, or reducing the impact of salinity on land and water resources);<sup>338</sup> (ii) natural resource and management action “matters” for which targets are to be set (e.g., adopting improved land and water management practices);<sup>339</sup> and (iii) indicators to guide the setting of measurable targets.<sup>340</sup> All targets are also required to be consistent with relevant environmental quality standards, planning schemes, and laws.<sup>341</sup> As will be shown below, the specificity of the RNRM case appears to ensure that JSC agencies are more effective than the VEPA in EIP or NEIP in exercising discretion to set fair and appropriate targets.<sup>342</sup>

338. The full list of national goals under NHT 2 and NAP includes: (i) the impact of salinity on land and water resources is minimized, avoided, or reduced; (ii) biodiversity and the extent, diversity, and condition of native ecosystems are maintained or rehabilitated; (iii) populations of significant species and ecological communities are maintained or rehabilitated; (iv) ecosystem services and functions are maintained or rehabilitated; (v) surface and groundwater quality is maintained or enhanced; (vi) the impact of threatening processes on locations and systems which are critical for conservation of biodiversity, agricultural production, towns, infrastructure, and cultural and social values, is avoided or minimized; (vii) surface water and groundwater is securely allocated for sustainable production purposes and to support human uses and the environment, within the sustainable capacity of the water resource; and (viii) sustainable production systems are developed and management practices are in place, which maintain or rehabilitate biodiversity and ecosystem services, maintain or enhance resource quality, maintain productive capacity, and prevent and manage degradation. NATURAL RESOURCE MANAGEMENT MINISTERIAL COUNCIL, NATIONAL FRAMEWORK FOR NATURAL RESOURCE MANAGEMENT STANDARDS AND TARGETS §§ 4–11 tbl.1 (2003), available at <http://www.nrm.gov.au/publications/frameworks/pubs/standards-targets-framework.pdf>.

339. Resource Condition Matters for target include land salinity, soil condition, native vegetation communities’ integrity, inland aquatic ecosystems integrity (rivers and other wetlands), estuarine, coastal and marine habitat integrity, nutrients in aquatic environments, turbidity/suspended particulate matter in aquatic environments, surface water salinity in freshwater aquatic environments, significant native species and ecological communities, and ecologically significant invasive species. Management Action Matters for target include identifying and protecting critical assets, developing and implementing water allocation plans, and adopting improved land and water management practices. *Id.*

340. For example, the recommended indicator for the “land salinity” matter for target includes the “area of land threatened by shallow or rising water tables.” For each indicator, there were also a number of recommended dimensions and how each should be measured. For example, for lands threatened by shallow or rising water tables, the dimensions include “depth to groundwater, groundwater salinity/baseflow salinity, and location, size and intensity of salt-affected areas.” MONITORING AND EVALUATION IMPLEMENTATION PLAN FOR THE NATIONAL (AUSTRALIAN AND STATE) PROGRAMS, *supra* note 337, at 13.

341. See Bilateral Agreement Between the Commonwealth of Australia and the State of Queensland to Deliver the Natural Heritage Trust, *supra* note 325, at 64.

342. See, e.g., Karkkainen, *supra* note 29, at 979; Dana, *supra* note 6; Markell, *supra* note

Beyond identifying expected outcomes and targets, the RNRM program also provides significant government support to collaborative groups in order to assist them with required monitoring tasks. This includes the provision of available government data on environmental conditions,<sup>343</sup> as well as significant degrees of funding<sup>344</sup> for additional monitoring and data collection.<sup>345</sup> Such support is intended to enable groups to conduct highly technical and costly environmental monitoring vital to actually setting performance targets.<sup>346</sup>

In the area of implementation, the RNRM architects impose much stricter monitoring responsibilities on collaborations regarding both “financial” and “environmental” issues than either NEIP or EIP.<sup>347</sup> These responsibilities include monitoring,

29, at 56–57.

343. This may involve data from national sources. *See, e.g.*, National Land and Water Resources Audit, <http://www.nlwra.gov.au/> (last visited Jan. 23, 2010); State of Environment Reporting, <http://www.environment.gov.au/soe/index.html> (last visited Jan. 23, 2010). Queensland State agencies also have ongoing statutory responsibilities or partnerships with other stakeholders for monitoring. *See, e.g.*, MONITORING AND EVALUATION IMPLEMENTATION PLAN FOR THE NATIONAL (AUSTRALIAN AND STATE) PROGRAMS, *supra* note 337; Bilateral Agreement Between the Commonwealth of Australia and the State of Queensland to Deliver the Natural Heritage Trust, *supra* note 325, at 113.

344. The NHT 2 and NAP program provided “core funding” and “foundational funding.” Although the amounts varied, core funding in the case study was approximately AUD\$400,000, which was to be used for, *inter alia*, planning and data collection. Interim Financial Agreement to Deliver the Natural Heritage Trust Extension in Qld 2003 (Cth/Qld), § 51.

345. Notably, the RNRM case has also been designed to approve regional plans without all baseline data and targets set, provided there are commitments to rigorous monitoring over the first few years of RNRM to collect missing data. *See* Bilateral Agreement Between the Commonwealth of Australia and the State of Queensland to Deliver the Natural Heritage Trust, 2004, *supra* note 325, at 65 (pointing out that many regions will not be in a position to set natural resource condition targets at the time their regional plans are put forward for accreditation, and that to address this situation, a regional plan will need to contain, *inter alia*, a commitment to the early establishment of monitoring systems to collect/analyze baseline and trend information to enable setting of resource condition targets).

346. *See, e.g.*, Steinzor, *supra* note 87; Gaines, *supra* note 14, at 16; Ewing, *supra* note 87, at 408.

347. These responsibilities are established pursuant to Natural Heritage Trust of Australia Act, 1997, § 19 (Austl.), Natural Resources Management (Financial Assistance) Act, 1992, § 5 (Austl.), and under: (i) national frameworks, *see, e.g.*, NATURAL RESOURCE MANAGEMENT MINISTERIAL COUNCIL, *supra* note 338; (ii) state based monitoring and reporting strategies, *see* MONITORING AND EVALUATION IMPLEMENTATION PLAN FOR THE NATIONAL (AUSTRALIAN AND STATE) PROGRAMS, *supra* note 337; and (iii) contractual “partnership agreements” between government and the regional body, *see* Bilateral Agreement between the Commonwealth of Australia and the State of Queensland to Deliver the Natural Heritage Trust, *supra* note 325, §§ 71, 94. There may also be additional accountability mechanisms and legal responsibilities for incorporated regional bodies, including discharging reporting

evaluation, and reporting to the JSC on progress against “management action” targets, outputs,<sup>348</sup> finances,<sup>349</sup> and changes in resource conditions.<sup>350</sup> The regional bodies must report to the JSC on a quarterly, biannual, and annual basis regarding these matters.<sup>351</sup> The bodies receive funding and in-kind government support for these tasks, including ongoing assistance by state government agencies that take responsibility under the RNRM program for ongoing monitoring of resource conditions and trends in many areas.<sup>352</sup> Some NEG scholars, however, have queried whether these palpably onerous requirements may in fact hamper the intended flexible, community-oriented nature of regional bodies.<sup>353</sup> Whether this is the case in practice is explored below.

Assuming that collaborative groups generate sufficient data on implementation and performance, the regional collaborators would ideally hold each other accountable if compliance is not

and financial accountability requirements under relevant corporate law. *See, e.g.*, Corporations Act, 2001 (Austl.); Bilateral Agreement Between the Commonwealth of Australia and the State of Queensland to Deliver the Natural Heritage Trust, *supra* note 325, §§ 68, 69, 71, 94, 134, 135; An Agreement Between the Commonwealth of Australia and the State of Queensland for the Implementation of the Intergovernmental Agreement on a National Action Plan for Salinity and Water Quality, *supra* note 321, §§ 7.1, 8.1, 14.1, 30.

348. Bilateral Agreement Between the Commonwealth of Australia and the State of Queensland to Deliver the Natural Heritage Trust, *supra* note 325, § 94; An Agreement Between the Commonwealth of Australia and the State of Queensland for the Implementation of the Intergovernmental Agreement on a National Action Plan for Salinity and Water Quality, *supra* note 321, §§ 14, 30.3.

349. MONITORING AND EVALUATION IMPLEMENTATION PLAN FOR THE NATIONAL (AUSTRALIAN AND STATE) PROGRAMS, *supra* note 337, §§ 6.2.1–6.2.3.

350. The last responsibility is borne in conjunction with state government agencies that contributed to monitoring data (as discussed below). *See* An Agreement Between the Commonwealth of Australia and the State of Queensland for the Implementation of the Intergovernmental Agreement on a National Action Plan for Salinity and Water Quality, *supra* note 321, § 24.

351. This monitoring is generally required to accord with indicators and data collection and storage protocols. Note also that quarterly reporting is only required for financial reporting. *See, e.g.*, MONITORING AND EVALUATION IMPLEMENTATION PLAN FOR THE NATIONAL (AUSTRALIAN AND STATE) PROGRAMS, *supra* note 337, §§ 5.1.2–5.1.3, 6.1.1–6.2.3; An Agreement Between the Commonwealth of Australia and the State of Queensland for the Implementation of the Intergovernmental Agreement on a National Action Plan for Salinity and Water Quality, *supra* note 321, §§ 14, 17.6, 30.3; Bilateral Agreement Between the Commonwealth of Australia and the State of Queensland to Deliver the Natural Heritage Trust, *supra* note 325, §§ 94, 146.

352. Indeed, state agencies take responsibility for ongoing measuring and monitoring resource condition and trend in many areas. *See* MONITORING AND EVALUATION IMPLEMENTATION PLAN FOR THE NATIONAL (AUSTRALIAN AND STATE) PROGRAMS, *supra* note 337, §§ 6.6.1, 8.2.7.

353. Head, *supra* note 13, at 146; Head, *supra* note 90, at 31.

forthcoming.<sup>354</sup> In addition, the JSC is given an embryonic form of administrative “destabilization right,” a mechanism that gives the JSC the power to intervene upon evidence of underperformance or financial impropriety and to stop funding the regional body.<sup>355</sup> It may conduct an evaluation<sup>356</sup> and critique the accountability procedures, the capacity of representatives,<sup>357</sup> or the arrangements of regional body membership and leave the details of the response to the regional body stakeholders, under ongoing monitoring from the JSC.<sup>358</sup>

### C. RNRM—Success and Limitations of “New” Forms of Accountability in a Performance-Based Approach

The findings on RNRM indicate that most aspects of its accountability mechanisms were effective, at least compared to the experience of EIP or NEIP. Performance targets appeared to avoid distortions from “industry” stakeholders. Furthermore, although the collection of baseline data and ongoing monitoring of

354. Mutual accountability between stakeholders on the regional body (whose membership was required to balance agricultural production and conservation interests) may be an important ongoing check against performance and the application of government investment, although the guidelines and legislation do not explicitly raise this role. *See* Bilateral Agreement between the Commonwealth of Australia and the State of Queensland to Deliver the Natural Heritage Trust, *supra* note 325, § 68.

355. This “destabilization right,” however, is within what would likely be considered a more prescriptive and government dominated regime than envisioned by democratic experimentalists. *See* Karkkainen, *supra* note 3, at 317.

356. MONITORING AND EVALUATION IMPLEMENTATION PLAN FOR THE NATIONAL (AUSTRALIAN AND STATE) PROGRAMS, *supra* note 337, § 7; An Agreement between the Commonwealth of Australia and the State of Queensland for the Implementation of the Intergovernmental Agreement on a National Action Plan for Salinity and Water Quality, *supra* note 321, § 30; Bilateral Agreement Between the Commonwealth of Australia and the State of Queensland to Deliver the Natural Heritage Trust, *supra* note 325, § 137.

357. The state government and JSC have a positive duty to ensure a regional body “maintains and provides proper financial accounts and detailed records for funds received in order to provide reports” and “has the necessary skills and capacity to manage the implementation of agreed components” and “fulfill the accountability responsibilities” of RNRM in its region. *See* An Agreement between the Commonwealth of Australia and the State of Queensland for the Implementation of the Intergovernmental Agreement on a National Action Plan for Salinity and Water Quality, *supra* note 321, § 7.1(b); *see also* Bilateral Agreement between the Commonwealth of Australia and the State of Queensland to Deliver the Natural Heritage Trust, *supra* note 325, §§ 67, 68, 71.

358. *See, e.g.*, An Agreement between the Commonwealth of Australia and the State of Queensland for the Implementation of the Intergovernmental Agreement on a National Action Plan for Salinity and Water Quality, *supra* note 321, §§ 14, 17.6, 30.3; Bilateral Agreement between the Commonwealth of Australia and the State of Queensland to Deliver the Natural Heritage Trust, *supra* note 325, §§ 67, 68, 71; Karkkainen, *supra* note 3, at 317.

environmental indicators evidenced some shortcomings, the program had taken far more significant steps towards establishing effective monitoring than the NEIP program, and had resolved evident “rent-seeking” issues at the regional body level. Despite this general success, respondents suggested that monitoring and reporting obligations were too onerous, and would likely turn the supposedly flexible, community-based regional bodies into bureaucracies. The discussion below examines in turn the accountability relationships regarding target setting and the achievement of these targets.

The setting of performance targets in the RNRM sub-case was guided by a regional body comprised predominantly of agricultural, farming, and pastoral interests.<sup>359</sup> While this created significant risk of biased and self-interested decision-making, respondents reported that government oversight had largely addressed such defects.<sup>360</sup> As one respondent explained, they had frequently used their veto over targets set by the group to ensure the targets were consistent with existing laws<sup>361</sup> and maintained credible environmental standards. As another respondent explained, “[the process] gets down to the point that these targets are written . . . it goes to the JSC and [it] . . . say[s] ‘that’s not good enough,’ crosses it out, rewrites it . . . and sends it back.”<sup>362</sup>

Such checks by JSC led to reportedly appropriate, measurable, and quantifiable targets such as: “[b]y 2012, the health and diversity of 75% of the mapped key groundwater dependent ecosystems is stable”; “[b]y 2010, 75% of landholders in cropping areas are implementing farm management systems”; “[b]y 2015, ensure 90% of all threatened flora and fauna species in the region

359. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 341 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 26, 2005) (noting “If you look at the make up of the board I see such a strong lobby from [the] agriculture and pastoral industry, they were the industries.”).

360. One respondent also suggested that effective targets arose from having two scientific interests on the regional body, and because of wider community consultation processes that were conducted as a part of planning. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 323 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 21, 2005).

361. *Id.* (noting that “The plan would say . . . ‘change the Vegetation Management Act’, and we’d say ‘why did you waste the ink—that is not a decision that is appropriate to this group.’”).

362. Interview by Cameron Holley and Clifford Shearing with Interviewee 311 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 20, 2005).

will be represented in conservation reserves or under voluntary conservation agreements.”<sup>363</sup>

This success was partly attributable to the specificity in the RNRM framework regarding expected outcomes and matters for target, which appeared to ensure that the JSC had a relatively clear picture of the issues to be measured and the magnitude of targets expected. As one JSC respondent explained: “[t]he regional bodies planning is largely operational . . . all the decision-making will be taken in the government framework, veg management, water planning, for example: there’s no discretion.”<sup>364</sup>

Successful target setting was also attributable to significant baseline monitoring. Vital here was the provision of existing environmental monitoring data from state government agencies,<sup>365</sup> as well as funding to regional bodies to seek scientific advice and conduct multiple studies on regional resource conditions and social and economic issues.<sup>366</sup>

This is not to suggest that this support had been sufficient to overcome all the technical constraints<sup>367</sup> and scientific uncertainties characteristic of such a complex ecosystem management system.<sup>368</sup> Like many NEG experiments, RNRM operated on the basis of

363. See generally BURDEKIN DRY TROPICS BOARD, BURDEKIN DRY TROPICS NATURAL RESOURCE MANAGEMENT PLAN 2005–2010 71–153 (2005) [hereinafter BDTNRM] (discussing the various targets and action plans for managing the regions natural resources).

364. Interview with Interviewee 321 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 20, 2005).

365. Interview with Interviewee 3211 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Oct. 27, 2005) (confirming that state government agencies “all assist by providing actual information or data . . . science support . . . [and] undertake science projects on their behalf.”).

366. The funding had been used in part to form a “technical advisory panel,” comprised of biophysical and socio-economic scientists, who provided useful scientific advice on targets. See BDTNRM, *supra* note 363, at 32.

367. State agencies reportedly prevented access to some of its data due to intellectual property concerns. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 315 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 21, 2005) (stating that “the agencies had done a lot of work . . . but you know they were keeping it, they had decided they had the intellectual property on it so it wasn’t going out to bodies”).

368. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 323 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 21, 2005) (stating “the reality is that in NRM there are huge information gaps and we have done lots of really good science work”); see also KIM KEOGH, DOUG CHANT & BOB FRAZER, REVIEW OF ARRANGEMENTS FOR REGIONAL DELIVERY OF NATURAL RESOURCE MANAGEMENT PROGRAMMES 78 (2006), available at <http://www.nrm.gov.au/publications/books/pubs/regional-delivery-review.pdf>.

incomplete, yet “best available” science,<sup>369</sup> a fact that led some to question the scientific appropriateness of some targets.<sup>370</sup> There were also a number of gaps in the baseline data, preventing targets from being set for issues such as dry land salinity and terrestrial weeds.<sup>371</sup> Importantly, the RNRM program was aware of these gaps in data. At the time of writing, however, there had been few efforts to fill them (either by way of additional government monitoring or additional funding for regional bodies). Much may accordingly hang on the future application of funding under Caring for our Country and its new “monitoring, evaluation, reporting and improvement strategy” to fill in these gaps over the next few years.<sup>372</sup>

In addition to filling baseline gaps, an equally important task is ongoing environmental monitoring of indicators to enable progress to be judged against resource condition targets. The findings suggest that the regional body and state agencies had made some significant progress in developing long term data

369. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 341 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 26, 2005).

370. For example, some respondents raised concerns about causal links between management action targets and resource conditions outcomes. *See* Interview by Cameron Holley and Clifford Shearing with Interviewee 311 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 20, 2005). Others raised questions regarding the monitoring and “hydrological models” associated with load based end of river targets. *See, e.g.*, Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 341 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 26, 2005); COREY WATTS, AUSTRALIA’S PROGRESS TOWARDS THE ECOLOGICALLY SUSTAINABLE MANAGEMENT OF OUR RURAL LANDSCAPE: A DISCUSSION PAPER WITH RECOMMENDATIONS 36–37 (2004), *available at* [http://www.acfonline.org.au/uploads/res/res\\_getting\\_on\\_track.pdf](http://www.acfonline.org.au/uploads/res/res_getting_on_track.pdf) (raising general concerns regarding the scientific underpinnings of RNRM targets).

371. Gaps were also reported in data relating to acidity, flora and fauna biodiversity, wetlands and hydraulic links, ground water and water bodies, coastal condition, and water quality. BDTNRM, *supra* note 363, at 81–82. Similar findings have been made in a range of national evaluations of RNRM. *See, e.g.*, RM CONSULTING ET AL., EVALUATION OF SUSTAINABLE AGRICULTURE OUTCOMES FROM REGIONAL INVESTMENT (NAP AND NHT) 15–17 (2006); JENNIFER BELLAMY ET AL., EVALUATION OF INVASIVE SPECIES (WEEDS) OUTCOMES OF REGIONAL INVESTMENT, FINAL REPORT TO THE DEPARTMENT OF ENVIRONMENT AND HERITAGE AND DEPARTMENT OF AGRICULTURE, FISHERIES AND FORESTRY VII, VIII (2005); KEOGH, CHANT & FRAZER, *supra* note 368, at 7; *see also* AUSTRALIAN GOVERNMENT NRM TEAM, BOOKS AND REPORTS, NATIONAL EVALUATIONS OF THE NHT AND THE NAP (2009), *available at* <http://www.nrm.gov.au/publications/books/index.html>.

372. *See* AUSTRALIAN GOVERNMENT NRM TEAM, MONITORING, EVALUATION, REPORTING AND IMPROVEMENT FOR CARING FOR OUR COUNTRY (2009), *available at* <http://www.nrm.gov.au/me/index.html>.

capture processes, including obtaining satellite imagery of the region, implementing drilling programs, and building in monitoring components to projects.<sup>373</sup> Nevertheless, the findings indicated that such ongoing monitoring was likely to face two key difficulties. First, respondents suggested that despite specific commitments and efforts to foster cooperative government monitoring for the purposes of the RNRM program, there was still a significant lack of coordination in ongoing monitoring by agencies. As one respondent explained regarding water monitoring, “one of the problems I suppose is there are so many different agencies doing so many different things. There is no commonality, or no communication you know bringing them together.”<sup>374</sup>

The second challenge is related to funding. Available funding was viewed by many as simply too small and too short-term for regional bodies to sustain long-term monitoring and implementation responsibilities necessary to achieve their targets. As one respondent explained, “it’s really quite a tiny investment . . . it is really ‘vegemite’ [spread too thinly].”<sup>375</sup> Without further funding or improved coordination, these barriers to monitoring may reduce the capacity of the government and the public to be able to judge whether they are receiving good value for expenditure and whether progress is being made toward national outcomes.<sup>376</sup>

Compared to the challenges of setting and measuring progress against performance targets, the RNRM program appeared to face fewer problems in monitoring financial activity, outputs, and adherence to target milestones. This is best illustrated by exploring how these monitoring processes successfully allowed the JSC to step

373. Interview by Cameron Holley and Clifford Shearing with Interviewee 334 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 27, 2010); Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 341 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 26, 2005).

374. Interview by Cameron Holley and Clifford Shearing with Interviewee 342 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 26, 2007).

375. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 3210 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 26, 2005).

376. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 3215 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Nov. 1, 2005).

in and rectify emerging rent-seeking behavior at the regional body level.

Two unique issues appeared to give rise to the problem of rent-seeking in the case study. The first was the membership structure of the regional body. This structure gave majority membership to five “sub-regional” catchment management groups, each representing one of five sub-regions that comprised the larger regional area. This arrangement gave rise to potential conflicts of interest when the regional body managing the rollout of government investment implemented the plan because the sub-regional bodies were potential recipients of the funding “controlled” by their representatives on the regional body:

[W]hen it came to actually roll out and receiving the money and making the decision you all of a sudden had a structure that was full of conflict of interest . . . [because] the board of directors consists of 99% of potential providers of services to the organization.<sup>377</sup>

Compounding this problem was a second issue, namely that the group members often lacked the knowledge or training for managing funds or incorporated regional bodies.<sup>378</sup> This appeared to stymie any mutual accountability between partners who appeared largely interested in obtaining money for their groups<sup>379</sup> and reportedly created “incompetence at a board level.”<sup>380</sup>

This generated governance and management problems regarding the use of public funds and sparked concerns of “rent-seeking” behavior. As one respondent explained:

377. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 341 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 26, 2005). This problem appears to resonate with concerns raised in Paton et al., *supra* note 319, at 265.

378. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 341 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 26, 2005) (explaining that “the 5 subregional bodies and other organizations [had] nominate[d] people onto the board regardless of qualifications, their background, their ability to govern . . . there was a plan and they had written a regional investment strategy, but nobody had thought how they actually were going to roll the money out or the structures or the system they needed to actually do that”).

379. *Id.* (“A lot of them were in there to lobby to make sure that those organizations got money.”).

380. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 3210 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 26, 2005) (explaining “drawing from the community is a really good thing but you need people who know how to sit on a board. And once you start getting out of cities and large regional areas. The capacity for someone to not carry their individual hats onto a board, so you have incompetence at a board level.”).

[O]ut of the funding available they decided to fund a [capacity building project] for each of their organizations . . . but that was the funding that was supposed to be used for setting up the roll out of the plan.<sup>381</sup>

Fortunately, the regional body had received sufficient funding to complete administrative tasks and hire staff to meet monitoring and reporting expectations on finances and implementation.<sup>382</sup> This monitoring in turn alerted the JSC to the above problems, and it accordingly exercised its “destabilization right” to initiate a review of governance and operational arrangements.<sup>383</sup> This involved government officers working with regional body directors and staff to identify a range of potential improvements, setting out twenty-three general recommendations and a number of actions to be addressed by the participants.<sup>384</sup> As one respondent explained, “that review actually pointed out the need to change the focus, structure and the composition of the board . . . and put in place some policies.”<sup>385</sup> The precise details of the new structure, composition, and policies were largely left to the regional body. The JSC, however, retained the ongoing right to review the changes as they were made over time.<sup>386</sup>

At the time of writing, the regional body had successfully responded to many of these recommendations.<sup>387</sup> Although there

381. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 341 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 26, 2005).

382. This was supported by government based Regional Coordinating Group and Regional Body Advisors who reported that they kept the JSC informed on whether “projects were being implemented, conducted successfully/not successful and whether there were problems.” Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 3211 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Oct. 27, 2005).

383. The review was conducted in early 2005. The government also conducted a program of Business Improvement Reviews of Regional Bodies in late 2005.

384. BURDEKIN DRY TROPICS BOARD, BURDEKIN DRY TROPICS NATURAL RESOURCE MANAGEMENT, ANNUAL REPORT 2004–2005 7, 9 (2005) [hereinafter BDTNRM ANNUAL REPORT]; BURDEKIN DRY TROPICS BOARD, BURDEKIN DRY TROPICS NATURAL RESOURCE MANAGEMENT, BUSINESS PLAN 3 (2007) [hereinafter BDTNRM BUSINESS PLAN].

385. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 341 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 26, 2005).

386. Bradley C. Karkkainen, *Panarchy and Adaptive Change: Around the Loop and Back Again*, 7 MINN. J. L. SCI. & TECH. 59, 68 (2005).

387. Among other things, a new CEO and staff were appointed, along with new membership of the board, including an independent chairperson, and the completion of corporate governance training. There were also commitments made to rewrite the body’s constitution to change the structure of the board and to develop various governance and

was a degree of disappointment from some sub-regional group members about the changes that had occurred, most remained actively engaged and continued with the process, but with greater awareness of issues such as conflicts of interest.<sup>388</sup> As the following comment from one sub-regional group illustrates: “I sat on the board the other day and I thought I can’t think for [sub-regional group] anymore . . . you can’t push our own barrow you know.”<sup>389</sup>

Despite successfully preventing rent-seeking, there was at least one downside to RNRM’s accountability arrangements.<sup>390</sup> Respondents suggested the program imposed too many ongoing monitoring and reporting requirements regarding finances, outputs, and management actions designed to deliver on performance targets. These requirements appeared to overwhelm regional groups’ resources and capacities and skewed time and effort in these directions, reducing opportunities for them to operate as effective and adaptive natural resource management organizations.<sup>391</sup> As one respondent put it: “You are constantly

business plans (e.g., corporate strategic plan). BDTNRM ANNUAL REPORT, *supra* note 384, at 3, 7, 9, 15; Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 341 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 26, 2005).

388. Notably this government intervention via the “destabilization” right did not appear to have created resistance. Nor did it appear to thwart the openness and engagement necessary for accountability and devolved collaborative problem solving. *See* Sturm, *supra* note 55, at 333.

389. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 342 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 26, 2005).

390. A small minority of respondents also pointed to a second accountability concern relating to the use of public resources. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 3210 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 26, 2005) (“I think there has been considerable devolution of responsibilities from state government to [regional groups] to pick up works . . . they have been taken advantage of in that regime I would say, there is cost shifting associated with that.”). Based on the data in this study it was difficult to determine the extent and magnitude of this cost-shifting problem; however, recent studies have raised this as an issue in RNRM. *See, e.g.*, Paton et al., *supra* note 319, at 261, 263; KEOGH, CHANT & FRAZER, *supra* note 368, at 60.

391. An illustration of this problem was the slow progress that the regional body appeared to be making in implementing procedures necessary for them to follow an adaptive approach. Despite requirements that planning processes include a monitoring and evaluation component to ensure continuous development, monitoring, review, and improvement, the regional body was years behind in developing and implementing their formal monitoring and evaluation strategy to guide their learning and adaptation. Instead, at the time of research, all regional monitoring and evaluation had been limited to quarterly performance and financial reports for governments. It was some three years after their

under review and how can you do your business if you are constantly writing your reports for the ‘feds’ . . . so that’s a shame.”<sup>392</sup>

Respondents were adamant that monitoring and accountability requirements were “smothering”<sup>393</sup> regional bodies and imposed excessive “red tape”<sup>394</sup> and onerous obligations.<sup>395</sup> As one stakeholder put it: “You’re just sticking that bureaucratic stuff into a really small organization that doesn’t have the capacity.”<sup>396</sup> The risk here was that too much government control was beginning to morph regional bodies into the very government bureaucracies that these supposedly flexible and participatory organizations were designed to replace.<sup>397</sup> As one respondent summed up: “It’s

regional plan had been approved that the regional body finalized their own formal monitoring plan and framework. BDTNRM ANNUAL REPORT, *supra* note 384, at 19; BURDEKIN DRY TROPICS BOARD, BURDEKIN DRY TROPICS NATURAL RESOURCE MANAGEMENT, ANNUAL REPORT 2007–2008 xii (2008). As others have pointed out, a significant weakness with government imposed performance monitoring and reporting in RNRM is that it has tended to focus on outputs over outcomes. That is, the information captured through monitoring has not shown what has been achieved, or provided a mechanism of linking actions to outcomes. Australian National Audit Office, *Regional Delivery Model for the Natural Heritage Trust and the National Action Plan for Salinity and Water Quality*, ANAO Audit Report No. 21 2007–08, 92–93 (2008) (noting “the information captured through monitoring . . . does not show whether: outputs actually contribute to the intended outcomes . . . [or] whether outputs are generating perverse outcomes”).

392. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 313 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 20, 2005).

393. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 349 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Oct. 28, 2005).

394. To be clear, respondents believed accountability in RNRM was important. As one respondent explained, “[E]veryone sees the value . . . it’s not your money, you have to be accountable for it.” *Id.*

395. Beyond regional bodies’ operations themselves, the accountability requirements for individual projects were also considered far too onerous for partner implementers on the ground. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 345 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 26, 2005) (pointing out that applications for funding were often extremely difficult and the reporting burdensome: “I have noticed with any of the applications that come through they seem to keep getting incredibly hard . . . . I understand why you have to go through more and more hoops . . . [but] the way the applications read its [sic] like the people are out to rip off all the grant systems which I don’t, don’t think they are.”).

396. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 349 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (Oct. 28, 2005).

397. See, e.g., Geoffrey Lawrence & Lynda Cheshire, *Managing Nature: The Promises and Problems of Regional Environmental Governance in Australia*, in PLENARY ADDRESS AT THE

getting to the stage now where the board was starting to look as if it's just another state department, and if that is going to be the case we may as well not waste all our money."<sup>398</sup>

To conclude, accountability mechanisms in RNRM appeared to avoid many of the problems that plagued the EIP and NEIP programs. Government oversight, guided by more specific prescriptions on outcomes, secured credible targets free from blatant industry dominance. Dedicated funding and state government monitoring also ensured greater success than NEIP in baseline data collection and ongoing monitoring tasks. Moreover, the RNRM program was able to intervene successfully to overcome evidently deficient mutual accountability among collaborators and to hold them accountable via a destabilization right for rent-seeking behavior.

Despite such success, RNRM also appears likely to face a number of challenges in the future, including filling gaps in baseline data and overcoming presently uncoordinated or inadequately funded long-term monitoring processes. Moreover, distinct from both NEIP and EIP programs, the RNRM program appeared to be obsessed with tight accountability controls. While aspects of these controls appeared vital to identifying risks of ongoing rent-seeking, the findings also suggested that controls may stymie the unique contribution of regional bodies and marginalize their adaptive capacities.<sup>399</sup>

## VI. DISCUSSION AND CONCLUSIONS

This Article investigated whether and to what extent "new" forms of accountability were effective in practice, and its findings have provided a number of insights.<sup>400</sup> Some were necessarily provisional while others focused on approaches and mechanisms unique to

ECOPOLITICS XV CONFERENCE ENVIRONMENTAL GOVERNANCE: TRANSFORMING REGIONS AND LOCALITIES, Macquarie University, Sydney 9 (2004); May, *supra* note 29, at 23.

398. Interview by Cameron Holley, Neil Gunningham, and Clifford Shearing with Interviewee 342 of the Local Capacity Regulation, Facilitating Participatory Environmental Policy Project (July 26, 2005).

399. As discussed in the conclusion below, this issue raises important policy questions regarding the need to design accountability mechanisms to address what appear to be very real risks of rent-seeking and with an awareness of the trade-off between the need for accountability and the need for agreements that are capable of being implemented in a flexible and adaptive manner. Lawrence & Cheshire, *supra* note 397, at 9.

400. Weber, *supra* note 47, at 454; Fung & Wright, *supra* note 29, at 37; Karkkainen, *supra* note 8, at 237; Sturm, *supra* note 55, at 331–34.

each case. For example, the findings in EIP touched on accountability in both process- and performance-based NEG approaches. Here, the findings reinforced that simply prescribing management processes does not always guarantee results. As discussed above, there was in fact a significant risk of laggards in EIPs simply “going through the motions” and pursuing tokenistic targets.<sup>401</sup> In the case of NEIP, insufficiencies in funding and support for collaborative groups were found to have undermined effective monitoring of performance. In contrast, the findings in the RNRM program evidenced far more effective monitoring and accountability mechanisms. The program, however, appeared to have imposed quite onerous controls which threatened flexibility and adaptation at the regional body level.

Notwithstanding these variations, a number of common issues and problems relating to “new” forms of accountability were raised across the cases. In particular, the findings spoke to concerns in the literature that “new” forms of accountability in NEG create significant risks of capture, unprincipled deal-making, and rent-seeking.<sup>402</sup>

Indeed, it was clear from the findings that there were shortfalls in accountability that exposed each program to such risks. While all cases appeared to conform to existing legal baselines, overly generalized performance standards, shortfalls in agency oversight, and deficiencies in mutual and professional accountability were all found to have left the door open to risks of capture (EIP), unprincipled deal-making (NEIP), or rent-seeking (RNRM). These, in turn, undermined the environmental outcomes hoped to be achieved in both EIP and NEIP. Similarly, the findings in RNRM pointed to a failure in mutual accountability that saw regional bodies pursue rent-seeking behavior. This weakness, however, was addressed through an accountability regime that provided greater specificity in expected performance outcomes and imposed stricter monitoring and reporting requirements.

At a broad level, these findings may be seen to support claims that NEG is prone to capture or unscrupulous behavior by private interests<sup>403</sup> and to suggest that more formal accountability

401. See Coglianesse & Lazer, *supra* note 82, at 413–16.

402. Doremus, *supra* note 29; Karkkainen, *supra* note 29, at 961; Posner, *supra* note 29, at 531–32; Steinzor, *supra* note 87.

403. See, e.g., McCloskey, *supra* note 95; Farber, *supra* note 29, at 74; Koontz & Thomas, *supra* note 28, at 113; Karkkainen, *supra* note 29, at 961.

safeguards are needed, including heightened scrutiny (such as in RNRM) and less deference to discretion.<sup>404</sup>

Yet as the findings in the RNRM case revealed,<sup>405</sup> stricter controls may undermine the creativity and flexibility that are arguably essential to the successful resolution of diverse, localized problems.<sup>406</sup> This suggests that it may be better, in policy terms, for governance regimes to balance sufficient accountability controls (to ensure consistency) with sufficient discretion (to promote flexibility, adaptation, and innovation).<sup>407</sup> In other words, the findings reinforce the need to design accountability mechanisms that address the risk of capture and other distortions in NEG, but to do so with an awareness of the trade-off with the need for agreements that are capable of being implemented in a flexible and adaptive manner.<sup>408</sup>

Beyond these general findings, are there more concrete, specific, and practical lessons that the case studies provide as to how best to balance accountability controls with discretion? Based on the above analysis, a number of policy proposals can be made in this regard. These fall under three main themes: (i) supporting effective monitoring processes; (ii) setting overarching performance goals to “bound” or limit discretion and decision-making; and (iii) fostering effective professional and mutual accountability to subvert “self-interested behavior.”<sup>409</sup> For each of these issues, the findings provide some important empirically-based lessons not only for policymakers but also for NEG theory more

404. Freeman, *Collaborative*, *supra* note 9, at 94.

405. In view of similar experiences in the United Kingdom and elsewhere, it is of little surprise that the program with the most funding—RNRM—also imposed the strictest upwards performance and financial monitoring and reporting requirements on collaboration. Head, *supra* note 13, at 58.

406. WONDOLLECK & YAFFEE, *supra* note 6, at 241; Freeman, *Collaborative*, *supra* note 9, at 93; Steinzor, *supra* note 84.

407. May, *supra* note 29, at 23; Freeman, Remarks, *supra* note 9, at 1871–72, 1874; Head, *supra* note 90, at 31; Freeman, *Collaborative*, *supra* note 9, at 96; WONDOLLECK & YAFFEE, *supra* note 6, at 235–37.

408. See Wiersema, *supra* note 3, at 1299 (discussing a substantive role for law in new governance for setting goals that are “both sufficiently specific to provide some form of tracks for the moving train of the institution, but also sufficiently broad that they do not overly constrain the work of all those striving to achieve a solution to the problem.”). As Wiersema goes on to note, “It is not going to be easy to know how specific the goals should be. Nevertheless, it is arguable that it is only the combination of goals with collaborative activity that will generate creativity in problem solving.” *Id.* (citation omitted); see also Freeman, Remarks, *supra* note 9, at 1871.

409. May, *supra* note 29, at 23–24.

broadly.

First, in terms of monitoring, the NEG literature has raised many questions about the conditions under which collaborative groups will best conduct the monitoring that is vital to performance-based accountability.<sup>410</sup> The findings suggest that NEG experiments which focus on point source pollution like EIP<sup>411</sup> face fewer direct monitoring challenges, not least because the environmental problems are “simpler” and because industry will often have well-established monitoring processes under traditional regulatory regimes.<sup>412</sup>

In contrast, the challenges of monitoring were understandably much greater when it came to complex and diffuse environmental issues such as those in NEIP and RNRM. While relevant data on these multifaceted and dynamic problems were scarce, both cases evidenced gaps in baseline monitoring, ineffective, or limited ongoing monitoring of environment conditions, and in the NEIP case, weak monitoring of outputs.<sup>413</sup>

From the above, a number of conditions appear likely to improve the chances of successful monitoring. At the broadest level, one of these conditions is that the extent and effectiveness of basic environmental monitoring must be substantially improved in order to better support NEG experiments.<sup>414</sup> As the difficulties in coordination and relevancy in NEIP and RNRM revealed, it is vital that there be clarity on why data is collected, who will collect it, and who must have access to it.<sup>415</sup> Another condition revealed in the EIP study, was the benefit of programs’ harnessing community and VEPA pressure on industries to encourage effective monitoring. The latter resonates with suggestions in the literature that negative

410. Fung & Wright, *supra* note 29, at 31–32; Gaines, *supra* note 14, at 16; Sturm, *supra* note 55, at 333.

411. Of course this will vary depending on what is being monitored. The EIP was focused on point source emissions—not ambient conditions, which would be far more complex to monitor.

412. Stephen Dovers, *Reflecting on Three Decades: A Synthesis, in AUSTRALIA’S ENVIRONMENT*, *supra* note 87, at 521.

413. These findings are generally consistent with other NEG research, which suggests in similar ecosystem-focused experiments that monitoring is often weak and can have negative impact on securing effective accountability. *See, e.g.*, Thomas, *supra* note 331, at 153–56; Karkkainen, *supra* note 330, at 218; Ewing, *supra* note 87, at 407–08; *see also* Steinzor, *supra* note 84; *cf.* WONDOLLECK & YAFFEE, *supra* note 6, at 136–37 (offering a positive assessment of flexible adaptive management approach to collaboration).

414. Dovers, *supra* note 412, at 522.

415. *Id.* at 521; Karkkainen, *supra* note 26, at 230–31.

incentives such as “penalty default” style rules can be used to great effect to ensure appropriate monitoring.<sup>416</sup> In the absence of specific incentives, the findings also suggest that support and funding will be needed for collaborative groups if they are to monitor environmental conditions and implementation effectively.<sup>417</sup> Without sufficient funding, NEG experiments risk abject breakdowns in monitoring processes (as evidenced in the NEIP program), or at best may be left with gaps to fill (as evidenced in RNRM).

Turning to the second set of lessons, the findings shed light on the challenges of securing accountability in performance-based experiments by setting overarching outcome expectations. In contrast to many suggestions in the literature, the findings in EIP and NEIP demonstrated that legislating overly general outcomes may *not* protect the public interest in performance regimes and can in fact create very real risks of “abuse” by collaborators, industry, and government officers.<sup>418</sup>

The data suggests that this problem might in part be overcome by legislatures avoiding sweeping statements (as in NEIP and some EIP)<sup>419</sup> and instead specifying as clearly as possible the outcomes expected. Such an approach did appear to contribute to a more successful target-setting process in RNRM.<sup>420</sup> Alternatively, legislatures could simply choose to live with such broad statements, but instead ensure that additional accountability mechanisms and checks exist on the final decision approved by an agency like the VEPA. As some authors have argued, this may involve citizen suits provisions or independent scientific review of decisions.<sup>421</sup>

A more extensive reform suggested in the literature for improving outcome specificity while retaining flexibility would be for NEG experiments to adopt a democratic experimentalist approach, involving peer review, benchmarking, and pooled

416. Karkkainen, *supra* note 29, at 996.

417. Thomas, *supra* note 331, at 167–69; Ewing, *supra* note 87, at 408.

418. Ewing, *supra* note 87, at 408; Freeman, *Collaborative*, *supra* note 9, at 94; WONDOLLECK & YAFFEE, *supra* note 6; Dana, *supra* note 6, at 53–54.

419. Or indeed offering no constraints or guidance beyond enforcement discretion as in the case of voluntary EIPs.

420. See WONDOLLECK & YAFFEE, *supra* note 6, at 241.

421. See, e.g., Dana, *supra* note 6, at 55–56; Freeman, *Collaborative*, *supra* note 9, at 90, 92, 94–95 (discussing issues around the constitutional non-delegation doctrine); see also WONDOLLECK & YAFFEE, *supra* note 6, at 241; Karkkainen, *supra* note 29; Manring, *supra* note 92, at 78.

comparable experiences of collaborative groups.<sup>422</sup> Indeed, there would arguably have been less instances of tokenism in the EIP program if collaborative groups had a capacity to benchmark a collaborating industry’s targets against those set by comparable industries.<sup>423</sup> Such a process would also have provided greater guidance and information for VEPA officers who otherwise appeared to lack the time, knowledge, or skills to know what level of environmental improvement was or was not capable of achievement by industries. This information would have enabled them to bring poorer performers into line with others. As recent research suggests, however, the primary difficulty with this approach is that such information-gathering structures may pose significant problems for agencies.<sup>424</sup>

The findings also provide some insight on the third issue of securing effective professional and mutual accountability.<sup>425</sup> Professional accountability was most prominent in industries’ design of management frameworks in the EIP program. Here, shortfalls in accountability were identified with poor performers, who appeared to purposefully deceive others and flout their responsibilities. The implication is that NEG programs need to compensate for such “bad apples” by enhancing “professional accountability.”<sup>426</sup> As some authors have suggested, this may involve either education programs or increasing the economic or regulatory consequences for failing to meet particular norms or codes of practice.<sup>427</sup> To some extent, the latter approach was evident in the EIP case where process-based and performance-based systems operated in unison. The social and regulatory consequences for failing to deliver improvements in local environmental outcomes were effective in ensuring that industry designed and implemented systems to improve their management

422. The latter is discussed *supra* Part II. See also Freeman, *Collaborative*, *supra* note 9, at 93; Karkkainen, *supra* note 29; Karkkainen, Fung & Sabel, *supra* note 7.

423. Joshua Cohen & Charles F. Sabel, *Directly-Deliberative Polyarchy*, 3 EUR. L.J. 313 (1997).

424. See Cameron Holley, *New Environmental Governance*, 305–08, 315–18 (Dec. 19, 2008) (unpublished Ph.D. thesis, Australian National University, on file with Menzies Library, Australian National University).

425. Of course, few NEG experiments are likely to rely solely on either professional or mutual accountability *per se*. Even so, given their increasingly central role in NEG, and the evident weaknesses revealed in the findings, it is useful to explore some of the conditions that may be supportive of these forms of accountability. May, *supra* note 29, at 24.

426. *Id.*

427. *Id.*

of local environmental impacts. Without effective pressure from collaborators or agencies on broader environmental issues, however, the professional accountability of poor performers slipped into tokenism.

Mutual accountability, according to many commentators, can be used to ensure that environmental considerations are not neglected in target setting and that actors achieve effective implementation.<sup>428</sup> In contradiction, the present study revealed that significant shortfalls in mutual accountability were common, with public and private actors often failing to enforce compliance or ensure apposite targets were set.<sup>429</sup> For example, as with EIP, local resident and local environmental interest groups appeared to lack interest or technical knowledge to meaningfully engage with the full range of broader environmental issues, leaving targets open to industry domination. In NEIP, inadequate technical skills and funding for monitoring and administrative assistance appeared to curtail mutual accountability and allow some partners to fall behind in implementation.<sup>430</sup> In RNRM the findings also suggested problems of mutual interest and a lack of technical skills and training on corporate governance had reduced the capacity of regional body members to prevent rent-seeking behavior.

The key implication here is that effective mutual accountability will only be achieved where self-interest can be subverted and monitored and technical capacities secured.<sup>431</sup> One way of achieving this may be to ensure collaborations obtain representation from non-local environmental interests,<sup>432</sup> which may be more likely to question the kind of self-interested behavior evident in RNRM or bring greater skills and capacities to the table to input into non-local issues in experiments like EIP.<sup>433</sup>

428. WONDOLLECK & YAFFEE, *supra* note 6, at 238; Freeman & Farber, *supra* note 4, at 908.

429. This appeared to be confirmed in the EIP program, at least to the extent that local residents appeared capable of ensuring local environmental considerations were not neglected in industry targets and ensuring that industry was accountable for their achievement.

430. See Muhittin Acar & Peter J. Robertson, *Accountability Challenges in Networks and Partnerships: Evidence from Educational Partnerships in the United States*, 70(2) INT'L REV. OF ADMIN. SCI. 331, 336–37 (2004).

431. See Freeman & Farber, *supra* note 4, at 908; Harlow & Rawlings, *supra* note 94, at 545.

432. However, as recent research has shown, this may be a difficult task in itself. See generally Holley, *supra* note 424.

433. See, e.g., Archon Fung & Erik Olin Wright, *Countervailing Power in Empowered Participatory Governance*, in DEEPENING DEMOCRACY, *supra* note 29, at 271; Karkkainen, *supra* note 29, at 961–62.

Alternatively, the provision of training and information<sup>434</sup> may help to improve the capacity of local stakeholders to deal with complex environmental and financial management issues. Core funding (most likely from government) to support effective monitoring and reporting is also needed to impart basic capacities and avoid weaknesses in mutual accountability like those experienced in NEIP.<sup>435</sup>

Beyond these specific recommendations, the findings also revealed some broader insights into the way in which new governance interacts with law and conventional forms of governing.<sup>436</sup> As noted above, one recent study suggests there are at least three competing theses on the nature and role of traditional law in new governance. These schools of thought postulate that old forms of governing either remain impervious to, form hybrids with, or are being “reshaped” by these new ways of governing.<sup>437</sup> At the level of descriptive theory, the Article’s analysis suggests that the “hybridity” thesis<sup>438</sup> best reflects the constructive co-existence of law and new governance that was evident in the case study findings.<sup>439</sup>

In all three case studies, the NEG regime relied on law to lay down outer parameters and broad governance objectives, but delegated discretion to collaborations to set specific targets and determine how they should be implemented.<sup>440</sup> In EIP, collaborations were required to comply with existing statutory and licensing standards, but they were afforded substantial discretion in achieving “beyond compliance” objectives. In developing regional

434. Even with perfect support, the findings suggest mutual accountability in some circumstances may also need to be supported by other forms of accountability if formal authority or salient pressure is lacking. As we saw in EIP, without agency support there may be little citizens can do to a truly recalcitrant industry to pressure and shame them into compliance. This finding points to the importance of designing new forms of accountability structures with such issues in mind, ensuring that such potential gaps in accountability relationships and authority are covered.

435. While funding could come from industry, this may raise further issues of capture. Accordingly, the most likely source of funding would be from government. See Acar & Robertson, *supra* note 430, at 336–41.

436. De Búrca & Scott, *supra* note 20, at 3–10; Trubek & Trubek, *supra* note 21, at 1–2; Wiersema, *supra* note 3, at 1294–99.

437. De Búrca & Scott, *supra* note 20, at 4–9.

438. *Id.* at 6–10; Trubek & Trubek, *supra* note 60, at 549.

439. Certainly the role of law was not always uniform across the cases; however, it was central to the cases in many other respects. See De Búrca & Scott, *supra* note 20, at 6.

440. *Id.* at 8; Wiersema, *supra* note 3, at 1298–99.

resource condition targets in RNRM, plans remained consistent with, and did not undermine, standards elaborated in laws such as the Vegetation Management Act 1999 (Qld). Moreover, in NEIP, the requirement that targets had to be consistent with planning schemes and existing environmental standards ensured that NEIP plans supported pervading legal norms.

Furthermore, the evident risks of tokenism and vague environmental performance goals apparent in many of these NEG cases suggest the “thin green line” provided by law across these areas appeared vital to preventing manifest back sliding in existing environmental protection standards.

Notably, law also formed a vital complementary hybrid with new governance in other ways. Indeed, as we saw in EIP, negative regulatory incentives can leverage action (e.g., monitoring) from reluctant actors.<sup>441</sup> Law also acted as a useful tool for compliance, as licensing restrictions ensured that actors ultimately fulfilled their NEG commitments.<sup>442</sup>

To the extent that this Article’s findings can be generalized and applied to NEG initiatives in other contexts, the empirical analysis raises a number of important questions that will need to be addressed by legal and governance scholars through further empirical and theoretical work. Some of these questions include: Is this “hybridity” a long-term phenomenon? Or is it an intermediate stage in the transition from a traditional, hierarchical legal order to new environmental governance? And when and to what extent is hybridity normatively desirable?<sup>443</sup>

This Article has examined the operation of a range of features of accountability, revealing the many challenges they face in practice. Given the limited scope of the analysis, some of these conclusions are necessarily tentative and further research is required. Nevertheless, the insights provided by this Article will enable practitioners and theorists to identify conditions and mechanisms best capable of fostering more effective accountability relationships. This is particularly important because the shortcomings of new accountability mechanisms as currently

441. Although this was typically only successful for local issues rather than broader environmental issues.

442. De Búrca & Scott, *supra* note 20, at 6–9.

443. *Id.* at 6–9; Wiersema, *supra* note 3, at 1294–99 (putting forward a proposal for how law can interact with new governance to ensure the goal of environmental protection over the long-term).

adopted are likely to be at least as common as their successes. NEG experiments in the future would do well to heed the lessons about how better to design and implement accountability mechanisms that empirical research is only now beginning to reveal.