

# Removing the Thorn From New Governance's Side: Examining the Emergence of Collaboration in Practice and the Roles for Law, Nested Institutions, and Trust

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## Editors' Summary

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New environmental governance (NEG) is emerging around the globe and aims to overcome the limitations of the interventionist state and its market alternative. A significant, yet divisive, aspect of NEG that remains largely overlooked by researchers is collaboration and the conditions that support its successful formation. This Article examines select case studies offering a range of controversial and underresearched mechanisms that may be used to foster successful collaboration and recommends four “groups” of conditions that are found to increase the likelihood of successful collaboration.

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One doesn't need to have read Al Gore's “Our Choice”<sup>1</sup> or absorbed James Cameron's “metaphor for earth” in “Avatar”<sup>2</sup> to know that rapid environmental change is prevalent across the globe. The climate crisis, loss of biodiversity, degraded land, diffuse air pollution, serious degradation to coast and oceans, and deteriorating water and soil quality are among the most serious threats to nature, human health, and economic well-being.<sup>3</sup>

At both a domestic and international level there has been an important shift in the way citizens and governments are trying to cope with these environmental and natural resource problems.<sup>4</sup> The traditional command-style legal regulatory model, despite achieving significant gains in halting and slowing environmental degradation caused by large industries,<sup>5</sup> has failed to provide completely adequate answers to many of these issues.<sup>6</sup> Indeed, its uniform rules, heavy reliance on scientific/technocratic knowledge, and hierarchical, centralized, and interventionist nature have been extensively

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1. AL GORE, OUR CHOICE: A PLAN TO SOLVE THE CLIMATE CRISIS (2009).
2. See Geoffrey Lawrence, *Promoting Sustainable Development: The Question of Governance*, in RESEARCH IN RURAL SOCIOLOGY AND DEVELOPMENT: NEW DIRECTIONS IN THE SOCIOLOGY OF GLOBAL DEVELOPMENT 145-74 (Frederick H. Buttel & Philip David McMichael eds., 2005); *Cameron Sees Metaphor for Earth in Avatar*, ABC NEWS (Aust.), Dec. 11, 2009, <http://www.abc.net.au/news/stories/2009/12/11/2768981.htm>.
3. See DAVID HELD ET AL., GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS, AND CULTURE 376-413 (1999); Ban Ki-Moon, *Foreword*, in UNITED NATIONS ENVIRONMENT PROGRAMME, GLOBAL ENVIRONMENT OUTLOOK: ENVIRONMENT FOR DEVELOPMENT xvi (2007); UNITED NATIONS ENVIRONMENT PROGRAMME, *supra*, at 4.
4. See, e.g., MULTILEVEL GOVERNANCE OF GLOBAL ENVIRONMENTAL CHANGE: PERSPECTIVES FROM SCIENCE, SOCIOLOGY, AND THE LAW (Gerd Winter ed., 2006) (examining, inter alia, horizontal transfer of national policies, regional integration, and improved coordination between international environmental organizations); REFORMING INTERNATIONAL ENVIRONMENTAL GOVERNANCE: FROM INSTITUTIONAL LIMITS TO INNOVATIVE REFORMS (W. Bradnee Chambers & Jessica F. Green eds., 2005) (discussing examples of institutions that have evolved to meet the changing realities of the world in the 21st century and envisioning what changes are needed for a more effective international environmental governance system); Bradley C. Karkkainen, Reply, “New Governance” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 473 (2004); 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).
5. See Daniel H. Cole & Peter Z. Grossman, *When Is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection*, 5 WIS. L. REV. 887, 888, 893 (1991); Robert F. Durant et al., *Toward a New Governance Paradigm for Environmental and Natural Resource Management in the 21st Century?*, 35 ADMIN. & SOC'Y 643, 644-45 (2004).
6. See generally NEIL GUNNINGHAM ET AL., SMART REGULATION: DESIGNING ENVIRONMENTAL POLICY 5-7, 343-348 (1998) [hereinafter SMART REGULATION] (discussing the “command-and-control” approach).

criticized as excessively adversarial, expensive, unwieldy, and insensitive to local contexts.<sup>7</sup> Responding to these limits, policymakers and regulatory agencies have pursued a range of alternatives to hierarchy.<sup>8</sup> One of the most plausible and increasingly prevalent alternatives to emerge embraces a more collaborative, multiparty and multilevel approach to environmental and natural resource governance.<sup>9</sup>

In the United States, such trends are clearly evident in the collaborative endeavors of multiple agencies and stakeholders addressing the demands on water resources in the Chesapeake Bay<sup>10</sup> and the San Francisco Bay Delta,<sup>11</sup> and in habitat conservation planning by landowners, various tiers and agencies of government, conservationists, independent scientists, and other interested citizens.<sup>12</sup> Broadly similar endeavors can also be found internationally,<sup>13</sup> including in the European Union where there has been increasing multiparty collaboration and participation via environmental assessment and framework directives, the Open Method of Coordination, and forms of voluntary agreements with industries.<sup>14</sup>

7. See, e.g., 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 U.S. 293 (Grainne de Búrca & Joanne Scott eds., 2006) [hereinafter LAW AND NEW GOVERNANCE]; Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 61 (2001); 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).
8. Some placed their faith in the market and market-based instruments. See generally Neil Gunningham et al., *Instruments for Environmental Protection*, in SMART REGULATION, *supra* note 6, at 37, 69-83 (discussing examples of market-based approaches and their strengths and weaknesses); Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 814-19 (2005) (discussing the debate over the preferred tools of environmental regulation as involving traditional “command-and-control” regulation versus market mechanisms); 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). For other reforms in regulation, see 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 policymakers).
9. Karkkainen, *supra* note 4, at 473.
10. See Wiersema, *supra* note 7.
11. See Freeman & Farber, *supra* note 8.
12. See, e.g., Bradley C. Karkkainen, *Toward Ecologically Sustainable Democracy?*, in DEEPENING DEMOCRACY: INSTITUTIONAL INNOVATIONS IN EMPOWERED PARTICIPATORY GOVERNANCE 208, 211-12 (Archon Fung & Erik Olin Wright eds., 2003) [hereinafter DEEPENING DEMOCRACY]; Alejandro E. Camacho, *Can Regulation Evolve? Lessons From a Study in Maladaptive Management*, 55 UCLA L. REV. 293 (2007).
13. See, e.g., Wayne McCallum et al., *Community Environmental Management in New Zealand: Exploring the Realities in the Metaphor*, 20 SOC’Y & NAT. RESOURCES 323 (2007); Pekka Virtanen, *Local Management of Global Values: Community-Based Wildlife Management in Zimbabwe and Zambia*, 16 SOC’Y & NAT. RESOURCES 179 (2003).
14. See, e.g., Katharina Holzinger et al., *Rhetoric or Reality? The “New Governance” in EU Environmental Policy*, 12 EUR. L.J. 403, 408-09, 413 (2006) (examining

These are just some of the novel and exciting experiments that constitute the “new governance” in the context of environmental protection, and that evidence a major rethink by policymakers and scholars on how we can and should cope with the pressing environmental problems of our time.<sup>15</sup>

Scholarship on “new governance” is recognized as being broad in scope, but is now considered “a major field within socio-legal studies world-wide<sup>16</sup> and “an increasingly popular form of jurisprudence.”<sup>17</sup> This scholarship encompasses many different schools of thought,<sup>18</sup> and often

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ing transition in governance ideas in the EU, as well as the effects of these reform ideas on actual patterns of governance, including fostering voluntary agreements with industry and forms of private self-regulation); Joanne Scott & Jane Holder, *Law and New Environmental Governance in the European Union*, in LAW AND NEW GOVERNANCE, *supra* note 7, at 211 (examining environmental assessment and the Water Framework directive suggesting that in the EU there is a unique approach to federalism emerging that can be called experimentalist); Joanne Scott & David Trubek, *Mind the Gap*, 8 EUR. L.J. 1 (2002) (discussing the emergence of a series of new approaches to governance in the EU and, inter alia, identifying some of the conceptual issues these phenomena present for legal and political theory); David M. Trubek & Louise G. Trubek, *New Governance & Legal Regulation: Complementarity, Rivalry, and Transformation*, 13 COLUM. J. EUR. L. 539, 550-57 (2006) [hereinafter Trubek & Trubek, *Complementarity*] (discussing the EU’s Water Framework directive as an example of a mixed system of new governance and traditional legal approaches that creates a new type of law); David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination*, 11 EUR. L.J. 343, 344 (2005) (examining the Open Method of Coordination and the debates surrounding it regarding the relative value of hard and soft law in EU social policy).

15. For further on the term new governance, see generally Grainne de Búrca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism*, in LAW AND NEW GOVERNANCE, *supra* note 7, at 1, 2-3; Neil Walker, *EU Constitutionalism and New Governance*, in LAW AND NEW GOVERNANCE, *supra* note 7, at 15, 21-24 (discussing different specifications of what is “new” in new governance); Karkkainen, *supra* note 4, at 471 n.2, 472-73 (providing a useful background and history on the term). For other discussions of the term, see Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, in THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE 1 (Lester M. Salamon ed., 2001). For an overview of broadly similar reforms based around networks and collaborations, see JENNY STEWART & GRANT JONES, *RENEGOTIATING THE ENVIRONMENT: THE POWER OF POLITICS* 11-12 (2003) (discussing the term governance and environmental governance); Scott Burris et al., *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 AKRON L. REV. 1, 2 (2008) (exploring “for a broader legal audience what researchers and theorists in a wide range of fields have made of the ferment in governance”); Brian W. Head, *Assessing Network-Based Collaborations*, 10 PUB. MGMT. REV. 733 (2008) (suggesting that network collaborations can vary in important ways).
16. 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* 1 (EU Centre of Excellence, Univ. of Wis.-Madison, 2007).
17. Lisa T. Alexander, *Stakeholder Participation in New Governance: Lessons From Chicago’s Public Housing Reform Experiment*, 16 GEO. J. ON POVERTY L. & POL’Y 117, 118-19, 124-29 (2009) (characterizing new governance theory as a “paradigm shift in contemporary legal scholarship about the appropriate role of traditional administrative regulation, adjudication, and public impact-litigation in public problem-solving”). For some recent discussions of new governance scholarship, see generally Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503 (2008); Douglas NeJaime, *When New Governance Fails*, 70 OHIO ST. L.J. 323, 330-37 (2009); Wiersema, *supra* note 7, at 1241.
18. Some of the key underpinnings of new governance include: pragmatism (see generally JOHN DEWEY, *ESSAYS IN EXPERIMENTAL LOGIC* 303-29 (1916)); participation scholarship (see JANE MANSBRIDGE, *BEYOND ADVERSARY*

utilizes different terminologies to explain this new way of regulating and governing public problems.<sup>19</sup> These terminologies have included “multilevel governance,”<sup>20</sup> “collaborative governance,”<sup>21</sup> “experimentalism,”<sup>22</sup> “collaborative ecosystem

governance,”<sup>23</sup> “the new regional paradigm,”<sup>24</sup> “modular regulation,”<sup>25</sup> “empowered participatory governance,”<sup>26</sup> “civic environmentalism,”<sup>27</sup> and “reflexive environmental law.”<sup>28</sup> Even though meaningful distinctions exist among these various ideas,<sup>29</sup> significant unifying themes have emerged,

- 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); *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., Gryphon Editions, 1988) (1862)); 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 BRIT. J. SOC. 173 (1992) (analyzing political power in terms of the problems of government)).
19. David Hess, *The Three Pillars of Corporate Social Reporting as New Governance Regulation: Disclosure, Dialogue, and Development*, 18 (4) BUS. ETHICS Q. 447, 450 (2008). 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); Edward P. Weber, *A New Vanguard for the Environment: Grass-Roots Ecosystem Management as a New Environmental Movement*, 13 SOC'Y & NAT. RESOURCES 237 (2000) (discussing grassroots ecosystem management as a new environmental movement); Lawrence Susskind et al., *Collaborative Planning and Adaptive Management in Glen Canyon: A Cautionary Tale*, 35 COLUM. J. ENVTL. L. 1, 2-3 (2010) (discussing collaborative adaptive management as an approach to managing the Glen Canyon Dam). There have also been prominent empirically focused lines of work on collaborative watershed and natural resource management. See, e.g., TOMAS M. KOONTZ ET AL., *COLLABORATIVE ENVIRONMENTAL MANAGEMENT: WHAT ROLES FOR GOVERNMENT?* 6-9 (2004); *SWIMMING UPSTREAM: COLLABORATIVE APPROACHES TO WATERSHED MANAGEMENT* (Paul A. Sabatier et al. eds., 2005) [hereinafter *SWIMMING UPSTREAM*]; JULIA M. WONDOLLECK & STEVEN L. YAFFE, *MAKING COLLABORATION WORK: LESSONS FROM INNOVATION IN NATURAL RESOURCE MANAGEMENT* 11 (2000); Tanya Heikkilä & Andrea K. Gerlak, *The Formation of Large-Scale Collaborative Resource Management Institutions: Clarifying the Roles of Stakeholders, Science, and Institutions*, 33 POL'Y STUD. J. 583, 583 (2005).
  20. See, e.g., Arthur Benz, *Accountable Multilevel Governance by the Open Method of Coordination?*, 13 EUR. L.J. 505 (2007); Jens Newig & Oliver Fritsch, *Environmental Governance: Participatory, Multi-Level—and Effective?*, 19 ENVTL. POL'Y & GOVERNANCE 197, 200 (2009).
  21. 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); Kerry E. Rodgers, *The Limits of Collaborative Governance: Homeland Security and Environmental Protection at U.S. Ports*, 25 VA. ENVTL. L.J. 157 (2007) (discussing various models for improving environmental governance that increase reliance on public-private collaboration and exploring their limitations); see also Jody Freeman, Remarks to the Japanese American Law Society (Sept. 12, 2004), in 83 WASH. U. L.Q. 1859 (2005) (discussing collaborative governance and the way in which public agencies and private parties participate jointly and cooperatively in the regulatory and administrative process).
  22. Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, Paper 9187, COLUMBIA PUBLIC LAW & LEGAL THEORY WORKING PAPERS 26-41 (2010), available at [http://lsr.nellco.org/columbia\\_plt/9187](http://lsr.nellco.org/columbia_plt/9187). See also Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (discussing “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 et al.,

- Beyond Backyard Environmentalism*, BOSTON REV., Oct./Nov. 1999, at 1, 6 (describing how communities are refashioning environmental regulation); Bradley Karkkainen et al., *After Backyard Environmentalism: Toward a Performance-Based Regime of Environmental Protection*, 44 AM. BEHAV. SCIENTIST 692 (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).
23. 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 in the western United States, Baltic Sea, and other international collaborative efforts).
  24. 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 (Robyn Eversole & John Martin eds., 2005); see generally Jo-Anne Everingham et al., *Regional Renaissance? New Forms of Governance in Non-Metropolitan Australia*, 24 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 INT'L J. GLOBAL ENVTL. ISSUES 300 (2007).
  25. Freeman & Farber, *supra* note 8, 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 21. The theory also builds on Dan Farber's pragmatism-inspired theories. See DANIEL A. FARBER, *ECO-PRAGMATISM: MAKING SENSIBLE ENVIRONMENTAL DECISIONS IN AN UNCERTAIN WORLD* (1999).
  26. See generally Archon Fung & Erik Olin Wright, *Thinking About Empowered Participatory Governance*, in *DEEPENING DEMOCRACY*, *supra* note 12, at 3, 5 (classifying a set of reforms under the concept of empowered participatory governance, an idea which “presses the values of participation, deliberation, and empowerment”).
  27. The concept of civic environmentalism was developed in the early 1990s by DeWitt John, and has since been expanded upon by a range of authors. See, e.g., DEWITT JOHN, *CIVIC ENVIRONMENTALISM: ALTERNATIVES TO REGULATION IN STATES AND COMMUNITIES* (1994) (discussing the changing focus of environmental policy and politics); MARC LANDY & CHARLES T. RUBIN, *GEORGE C. MARSHALL INST., CIVIC ENVIRONMENTALISM: A NEW APPROACH TO POLICY* 1-15 (2001); WILLIAM A. SHUTKIN, *THE LAND THAT COULD BE: ENVIRONMENTALISM AND DEMOCRACY IN THE TWENTY FIRST CENTURY* 237-44 (2000); DeWitt John, *Civic Environmentalism*, in *ENVIRONMENTAL GOVERNANCE RECONSIDERED: CHALLENGES, CHOICES, AND OPPORTUNITIES* 219 (Robert F. Durant et al. eds., 2004).
  28. See generally 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); 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). Influential here is the work by German theorist Gunther 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* 1, 3 (Gunther Teubner ed., 1988). This work builds on Niklas Luhmann's system theory. See Niklas Luhmann, *The Self-Reproduction of Law and Its Limits*, in *DILEMMAS OF LAW IN THE WELFARE STATE* 111 (Gunther Teubner ed., 1985). See also Wiersema, *supra* note 7, at 1242-43.
  29. Note that there is no firm agreement on a definitive “model” of the 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 overgeneralization and of obscuring important differences. See Karkkainen, *supra* note 4, 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 the broader research project of which this Article forms a part 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

including a focus on the virtues of collaboration, participation, contextual and “bottom-up” governance, learning and adaptation, flexibility<sup>30</sup> and “new” forms of accountability.<sup>31</sup>

At a normative level, these characteristics of new environmental governance (NEG) are explicitly or implicitly believed to deliver effectiveness, legitimacy, and democratic benefits that surpass those provided by conventional approaches to environmental and natural resources protection.<sup>32</sup> For example, conventional command-and-control approaches arguably place an unattainable demand on centralized knowledge to set suitable standards, and tend to allow complex problems to fall through the cracks between different tiers of government and/or government agencies.<sup>33</sup> In contrast, NEG’s characteristics are said to: (1) contribute to a rich understanding of and capacity to solve complex problems by harnessing the unique information, resources, and capacities of diverse public and private actors; (2) foster more integrative and adaptive approaches to planning and implementation by bringing together agencies and stakeholders who are close to the problem; (3) reduce existing conflict, enhance ownership, and thus increase cooperation in implementation by contributing to the formation of some form of consensus among parties; and/or (4) **enhance democracy** by allowing citizens and other nongovernment actors

to interact, deliberate and work together cooperatively, build social capital, and promote civic behavior.<sup>34</sup>

Yet, despite these professed advantages, NEG’s approach and institutions have raised a host of concerns and debates,<sup>35</sup> many relating to one of its most fundamental characteristics: collaboration.<sup>36</sup>

Collaboration in NEG has antecedents in many earlier legal and public policy process.<sup>37</sup> Closely related notions of partnerships<sup>38</sup> and cooperation<sup>39</sup> have also sometimes been used to describe such an approach, and the precise details of collaboration can vary between NEG institutions.<sup>40</sup> However, at a general level, it is common in the NEG literature to associate collaboration with consensus processes, which seek to move toward an agreement among parties (although strict unanimous agreement may not necessarily be a requirement).<sup>41</sup> Such collaborative relationships may be “once-off” events,<sup>42</sup> however many others are ongoing processes, where stakeholders plan, implement, monitor,

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., Cameron Holley, *Facilitating Monitoring, Subverting Self-Interest, and Limiting Discretion: Learning From “New” Forms of Accountability in Practice*, 35 COLUM. J. ENVTL. L. 127, 131, n.21 (2010); de Búrca & Scott, *supra* note 15, at 3; Orly Lobel, *Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498, 502, 506-08 (2004); Walker, *supra* note 15, at 21-24; Wiersema, *supra* note 7, at 1242-43.

30. For some commonly cited characteristics of the NEG, see Neil Gunningham, *The New Collaborative Environmental Governance: The Localization of Regulation*, 36 J. L. & SOC’Y 145, 146 (2009) (defining new governance in the context of environmental protection as involving “participatory dialogue and deliberation, devolved decision-making, flexibility rather than uniformity, inclusiveness, transparency, institutionalized consensus-building practices, and a shift from hierarchy to heterarchy”); Karkkainen, *supra* note 4, 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 4, 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”); Nejaime, *supra* note 17, at 325, 332 (noting that “New Governance scholarship places primacy on (1) collaborative process, (2) stakeholder participation, (3) local experimentation, (4) public/private partnership, and (5) flexible policy formation, implementation, and monitoring”); Walker, *supra* note 15, at 22 (noting new governance shares general properties, such as “participation and power sharing, multilevel integration, diversity and decentralization, deliberation, flexibility and revisability of norms, and experimentation and knowledge creation”).
31. See Holley, *supra* note 29, at 131-32.
32. Alexander, *supra* note 17, at 124-28; Lobel, *supra* note 29, at 502.
33. David Farrier, *Fragmented Law in Fragmented Landscapes: The Slow Evolution of Integrated Natural Resource Management Legislation in NSW*, 19 ENVTL. & PLAN. L.J. 89, 90 (2002); Freeman & Farber, *supra* note 8, at 806-14.

34. See, e.g., WONDOLLECK & YAFFE, *supra* note 19, at 23-46; Cary Coglianese, *Is Consensus an Appropriate Basis for Regulatory Policy*, in ENVIRONMENTAL CONTRACTS: COMPARATIVE APPROACHES TO REGULATORY INNOVATION IN THE UNITED STATES AND EUROPE 93, 98-105 (Eric W. Orts & Kurt Deketelaere eds., 2001); Fung & Wright, *supra* note 26, at 15; Bradley C. Karkkainen, *Managing Transboundary Aquatic Ecosystems: Lessons From the Great Lakes*, 19 PAC. McGEORGE GLOBAL BUS. & DEV. L.J. 209, 228-29 (2006); Karkkainen, *supra* note 23, at 199-205; Mark Lubell et al., *Conclusions and Recommendations*, in SWIMMING UPSTREAM, *supra* note 19, at 261, 286-87; T.H. Morrison et al., *Integrating Natural Resource Management for Better Environmental Outcomes*, 35 AUSTRALIAN GEOGRAPHER 243, 248 (2004).
35. For an overview of some of these various debates, see Tomas M. Koontz & Craig W. Thomas, *What Do We Know and Need to Know About the Environmental Outcomes of Collaborative Management*, 66 PUB. ADMIN. REV. 111, 113 (2006); Eric W. Orts & Cary Coglianese, *Debate, Collaborative Environmental Law: Pro and Con*, 156 U. PA. L. REV. PENNUMBRA 289 (2007), available at <http://www.pennumbra.com/debates/pdfs/collabenvlaw.pdf>.
36. See, e.g., Gaines, *supra* note 28, at 14-19; Head, *supra* note 15, at 734-35; Heikkilä & Gerlak, *supra* note 19, at 583-85; Donald T. Hornstein, *Complexity Theory, Adaptation, and Administrative Law*, 54 DUKE L.J. 913, 949-51 (2005); Karkkainen, *supra* note 34, at 212; Karkkainen, *supra* note 23, at 226; Koontz & Thomas, *supra* note 35, at 113; Richard D. Margerum, *Overcoming Locally Based Collaboration Constraints*, 20 SOC’Y & NAT. RESOURCES 135, 136 (2007); Carole Menkel-Meadow, *Getting to “Let’s Talk”: Comments on Collaborative Environmental Dispute Resolution Processes*, 8 NEV. L.J. 835, 850 (2008); Orts & Coglianese, *supra* note 35, at 303.
37. Head, *supra* note 24, at 137; McCallum et al., *supra* note 13, at 324.
38. Terms such as partnership and cooperation are sometimes used interchangeably with, but other times distinguished from, the term collaboration. See, e.g., James M. Whelan & Peter Oliver, *Regional Community-Based Planning: The Challenge of Participatory Environmental Governance*, 12 AUSTRALASIAN J. ENVTL. MGMT. 126, 129 (2005). For a review of literature on partnerships, see Jennifer M. Brinkerhoff, *Government-Nonprofit Partnership: A Defining Framework*, 22 PUB. ADMIN. & DEV. 19 (2002).
39. See, e.g., JOHN CHILD & DAVID FAULKNER, *STRATEGIES OF COOPERATION: MANAGING ALLIANCES, NETWORKS, AND JOINT VENTURES* (1998); Head, *supra* note 15, at 735 (noting distinctions between cooperative, coordinated, and collaborative arrangements).
40. See, e.g., Head, *supra* note 15; Richard D. Margerum, *A Typology of Collaboration Efforts in Environmental Management*, 41 ENVTL. MGMT. 487 (2008); Elizabeth A. Moore & Tomas M. Koontz, *A Typology of Collaborative Watershed Groups: Citizen-Based, Agency-Based, and Mixed Partnerships*, 16 SOC’Y & NAT. RESOURCES 451 (2003).
41. Fung & Wright, *supra* note 26, at 26; Karkkainen, *supra* note 23, at 240; Orts & Coglianese, *supra* note 35, at 302; Robin O’Malley & Anthony Janetos, *Consensus on Consensus?*, 46 ENV’T SCI. & POL’Y SUSTAINABLE DEV. 11, 11-12 (2004).
42. Such as where agencies formally negotiate with public interest groups over terms of a proposed regulation or rules. See Freeman, *Collaborative*, *supra* note 21, at 33-55; Karkkainen, *supra* note 23, at 240 n.116.

and adapt their actions over time.<sup>43</sup> For the purposes of this Article, a relatively broad definition of collaboration is adopted, viewing it as a process where a group of diverse stakeholders, including government and nongovernment actors, pool their knowledge and/or tangible resources to solve shared environmental or natural resource dilemmas.<sup>44</sup>

The conventional wisdom on such collaborative action has long been that self-interest and transaction costs, i.e., the personal time, resources, and travel expenses associated with participating in the interactive process, will effectively stymie most, if not all, NEG efforts<sup>45</sup> to voluntarily cooperate to capture mutual gains.<sup>46</sup> As Mancur Olson argued long ago in his defining work, “The Logic of Collective Action,” self-interested individuals are unlikely to cooperate voluntarily to capture joint benefits unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest.<sup>47</sup>

Largely arguing from first principles, some NEG authors explicitly or implicitly adopt such concerns to claim that NEG’s purported benefits are therefore unlikely to be achieved in many real-world situations.<sup>48</sup> In contrast, others claim that such cooperative dilemmas are best viewed as obstacles that may largely be overcome or avoided through clever legal and institutional designs and/or targeting efforts in a host of situations more favorable to collaboration.<sup>49</sup>

43. WONDOLLECK & YAFFE, *supra* note 19, at 71-73, 117; Karkkainen, *supra* note 23, at 222-25; Margerum, *supra* note 36, at 135.

44. BARBARA GRAY, COLLABORATING: FINDING COMMON GROUND FOR MULTIPARTY PROBLEMS 10 (1989); Barbara Gray, *Conditions Facilitating Interorganizational Collaboration*, 38 HUM. REL. 911, 912 (1985); Heikkilä & Gerlak, *supra* note 19, at 583; Margerum, *supra* note 36, at 135.

45. See, e.g., Freeman & Farber, *supra* note 8, at 833; Gaines, *supra* note 28, at 15; Stephen M. Nickelsburg, *Mere Volunteers? The Promise and Limits of Community-Based Environmental Protection*, 84 VA. L. REV. 1371, 1373, 1406-09 (1998); William E. Scheuerman, *Democratic Experimentalism or Capitalist Synchronization? Critical Reflections of Directly-Deliberative Polyarchy*, 17 CAN. J.L. & JURIS. 101, 121 (2004); Rena I. Steinzor, *The Corruption of Civic Environmentalism*, 30 ELR 10909 (Oct. 2000).

46. The problem of collective action and related theory is discussed in detail below in Part II. See also Heikkilä & Gerlak, *supra* note 19, at 584; Hornstein, *supra* note 36, at 951; Karkkainen *supra* note 23, at 243; Margerum, *supra* note 36, at 136-37; Leigh Raymond, *Cooperation Without Trust: Overcoming Collective Action Barriers to Endangered Species Protection*, 34 POL’Y STUD. J. 37, 37-39 (2006).

47. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965); Raymond, *supra* note 46, at 37.

48. Note that some authors do cite empirical examples for their arguments; however, as discussed below, the state of empirical research in NEG literature is generally recognized as being underdeveloped and limited in a number of ways. See Joe Cannon, *Choices and Institutions in Watershed Management*, 25 WM. & MARY ENVTL. L. & POL’Y REV. 379, 428 (2000); Coglianesi, *supra* note 34, at 113; Gaines, *supra* note 28, at 15-17; Freeman & Farber, *supra* note 8, at 833 (arguing that one of the major strands of the NEG—democratic experimentalism—“lacks an explanation of how those [local] units will overcome collective action problems that impede cooperation”); Nickelsburg, *supra* note 45, at 1373, 1406-09; Orts & Coglianesi, *supra* note 35, at 298-99; Scheuerman, *supra* note 45, at 121; Steinzor, *supra* note 45 n.2, 10909, 10920-21; Marcus B. Lane, *Critical Issues in Regional Natural Resource Management 4-5* (Australian State of the Env’t Comm., Issue Paper, 2006), available at <http://www.environment.gov.au/soe/2006/publications/integrative/nrm-issues/pubs/nrm-issues.pdf>; see also Karkkainen, *supra* note 4, at 476-77; Karkkainen, *supra* note 23, at 225; Karkkainen, *supra* note 34, at 212; Bradley C. Karkkainen, *Post-Sovereign Environmental Governance*, GLOBAL ENVTL. POL., Feb. 2004, at 72, 91.

49. See, e.g., Hornstein *supra* note 36, at 949-52; John, *supra* note 27, at 231-33; Karkkainen, *supra* note 23, at 226-33; Bradley C. Karkkainen, *Adaptive*

Accordingly, in their view, NEG can have widespread value in managing environmental problems.

These debates go to the heart of whether NEG is a viable and convincing approach to public problem-solving and are far from being resolved. Indeed, as a range of scholars have pointed out, what is lacking in these debates (and accordingly what is greatly needed), is rigorous, empirical scrutiny of emerging NEG institutions *in practice* to better discern the conditions that support the formation of these institutions and their relative effectiveness.<sup>50</sup> Although some authors have begun this endeavor, this research has, so far, been limited in a number of important ways.<sup>51</sup>

First, much of the empirical research, thus far, has focused on single cases and/or lacked grounding in wider theory.<sup>52</sup> More recently, a handful of empirical research has focused on multiple NEG institutions, as well as drawing on a range of broader collaboration theories.<sup>53</sup> Not least, this research has looked to Elinor Ostrom’s work on the co-management of common-pool resources (CPR), which has identified a range of conditions associated with an increased likelihood of collaboration in CPR contexts.<sup>54</sup>

*Ecosystem Management and Regulatory Penalty Defaults: Toward a Bounded Pragmatism*, 87 MINN. L. REV. 943, 966 n.75 (2003); Mark Lubell, *Do Watershed Partnerships Enhance Beliefs Conducive to Collective Action?*, in SWIMMING UPSTREAM, *supra* note 19, at 201; Lubell et al., *supra* note 34 at 262-65, 271-77, 289-93; Margerum, *supra* note 36, at 136-37; Paul A. Sabatier et al., *Theoretical Frameworks Explaining Partnership Success*, in SWIMMING UPSTREAM, *supra* note 19, at 173; Ann Marie Thomson & James L. Perry, *Collaboration Processes: Inside the Black Box*, 66 PUB. ADMIN. REV. 20, 21 (2006).

50. See, e.g., Karkkainen, *supra* note 23, at 226, 240 (pointing to the need for critical scrutiny of “success and failures” relating to issues that include collaboration); Karkkainen, *supra* note 34, at 212 (discussing debates in the literature and suggesting that “what is needed now is a careful ‘hard-look’ at what is working, what is not, and why”); Menkel-Meadow, *supra* note 36, at 850; Nejaime, *supra* note 17, at 347 (pointing to the need for contextual case studies of New Governance successes and failures); Orts & Coglianesi, *supra* note 35, at 302-04 (pointing to the need for the scholarly debate to “move on to a more useful examination of when collaborative approaches have worked and when they have not, which would then help to inform effective legal responses to future environmental problems”); Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819, 833 (2008) (noting that “the new governance scholarship would do well to focus more on the conditions for success” including “whether the threat of either litigation or more top down regulation is necessary to induce the regulated entities to engage in collaborative efforts”); Susan Sturm, *Gender Equity Regimes and the Architecture of Learning*, in LAW AND NEW GOVERNANCE, *supra* note 7, at 323, 323-24 (explaining that new governance has “provoked questions about its feasibility,” including issues regarding “institutions which resist cooperating in (or investing the resources required to enable) effective problem solving”).

51. See, e.g., Heikkilä & Gerlak, *supra* note 19; Lubell, *supra* note 49; Lubell et al., *supra* note 34; Sabatier et al., *supra* note 49.

52. For discussion of these weaknesses, see Heikkilä & Gerlak, *supra* note 19, at 589; Paul A. Sabatier et al., *Collaborative Approaches to Watershed Management*, in SWIMMING UPSTREAM, *supra* note 19, at 3, 11, 13.

53. See, e.g., KOONTZ ET AL., *supra* note 19; SWIMMING UPSTREAM, *supra* note 19; Cary Coglianesi, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997); Scott D. Hardy & Tomas M. Koontz, *Reducing Nonpoint Source Pollution Through Collaboration: Policies and Programs Across the U.S. States*. 41 ENVTL. MGMT. 301(2008); Heikkilä & Gerlak, *supra* note 19.

54. CPRs are natural or man-made resource systems that are sufficiently large as to make it costly (but not impossible) to exclude potential beneficiaries from obtaining benefits from their use. Typical examples are forests or irrigation and fishery systems. The conditions associated with an increased likelihood of collaboration in CPR contexts are discussed further in Part II below. See ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 30-31 (1990); Edella Schlager, *Common-Pool*

However, the generalizability of the findings from this NEG research has been limited by its tendency to focus on watershed management partnerships,<sup>55</sup> and to a lesser degree on large-scale regional natural resource management (NRM) approaches,<sup>56</sup> as opposed to the many other types of NEG institutions, such as pollution control or diffuse urban issues.<sup>57</sup> Although the above research has begun to provisionally identify a number of factors as important causes of successful collective action, coherent theory has yet to emerge, and a number of important issues remain to be resolved. These include the following: What is the role and importance of building trust in fostering successful collaboration?<sup>58</sup> What legal and institutional design conditions, e.g., “nested” models of collaboration, penalty default rules and more “positive” government incentives, best overcome transaction costs and drive collaborative processes toward successful resolutions? And what forms should these conditions take?<sup>59</sup>

Going beyond previous empirical research, this Article reflects on the above issues and others through a comparative examination of three different NEG programs in Australia. Although Australian examples of NEG have been less widely discussed in the literature, as we will see, they are equally, if not more, novel and interesting than their counterparts in the United States and Europe. The first NEG program from Australia—the Environment Improvement Plan (EIP)—involves the participation of local communities in coop-

erative and innovative regulatory processes addressing the point source pollution challenges of large industrial enterprises. The second program—Neighborhood Environment Improvement Plans (NEIP)—aspires to involve multiple nongovernment and government stakeholders in the collaborative management of diffuse and complex environmental problems in urban and rural neighborhoods. Finally, the third program—Regional Natural Resource Management—has involved the investment of billions of dollars of public funds into wide-reaching “partnerships” between federal, state, and local governments, regional communities, farmers, and industry bodies to try to address natural resource problems, such as biodiversity and salinity.<sup>60</sup>

Drawing on data from 80 interviews, the Article examines each program and asks what conditions foster the emergence of successful collaboration. In answering this question, the Article touches on available evidence regarding the long-term success of the cases’ collaborative processes and their likelihood of achieving environmental outcomes. However, the primary focus of empirical analysis is the conditions that impact on the emergence of successful collaboration, i.e., how each case brings parties together to draft a management plan and begin implementation, as opposed to the long-term survival of collaborative organizations.<sup>61</sup> Furthermore, the Article does not set out to examine all physical, community, and institutional attributes that might impact on the likelihood of collaboration.<sup>62</sup> Instead, responding to questions and criticisms raised in the literature, this Article focuses its attention largely on legal and institutional design issues specific to each of the case studies, and a limited number of contextual matters, e.g., attributes of environmental problems.

Based on its analysis, the Article finds that all three cases were able to foster collaboration, but with varying degrees of success. Drawing lessons from their comparative achievements, the findings reveal the difficulties nested collaborative arrangements can face in achieving power-sharing and overcoming transaction costs at higher government levels.

In addition, the findings provide insights into the role of penalty default rules and reveal a rarely discussed point, namely, that law can be a *direct* tool to enhance the likelihood of successful collaboration. These and other findings lead the Article to develop a number of recommendations for improving the likelihood of successful collaboration in practice. The recommendations fall under four “groups” of conditions.<sup>63</sup> That is, the severity of environmental problems,

*Resource Theory*, in ENVIRONMENTAL GOVERNANCE RECONSIDERED, *supra* note 27, at 145, 147; see also Sabatier et al., *supra* note 49.

55. See, e.g., SWIMMING UPSTREAM, *supra* note 19; Hardy & Koontz, *supra* note 53; Lubell, *supra* note 49; Moore & Koontz, *supra* note 40.

56. Studies have tended to focus on Habitat Conversation Plans, the Chesapeake Bay Program, and the CALFED Bay-Delta Program. See, e.g., Heikkilä & Gerlak, *supra* note 19, at 584; Raymond, *supra* note 46. However, there have been more extensive studies into forestry and natural resource management approaches in the United States, WONDOLLECK & YAFFEE, *supra* note 19, as well as research on collaboration internationally, Whelan & Oliver, *supra* note 38.

57. William Leach, *Collaborative Public Management and Democracy: Evidence From Western Watershed Partnerships*, 66 PUB. ADMIN. REV. 100, 108 (2006). Also see discussions in Karkkainen, *supra* note 23, at 240 n.116 (discussing the limitations of conclusions drawn from Coglianese’s study of negotiated rulemaking) and Coglianese, *supra* note 53.

58. See Gaines, *supra* note 28, at 17; Raymond, *supra* note 46, at 37.

59. See, e.g., KOONTZ ET AL., *supra* note 19, at 182 (noting that “additional research to gain further insight into the breadth of roles played by governments would be beneficial”); Kristin Floress et al., *Constraints to Watershed Planning: Group Structure and Process*, 45 J. AM. WATER RESOURCES ASS’N 1352, 1352-53 (2009) (noting that what roles government should play in fostering group development or organizational gestation has been the topic of only a handful of studies); Cathy Robinson et al., *The Changing and Contested Governance of Australia’s Environmental Heritage*, in CONTESTED COUNTRY: LOCAL AND REGIONAL NATURAL RESOURCES MANAGEMENT IN AUSTRALIA 245 (Marcus Lane et al. eds., 2009) [hereinafter CONTESTED COUNTRY] (arguing there is a need for “testing successful strategies in order to promote integrated and appropriately nested NRM policy development and implementation arrangements”); Hardy & Koontz, *supra* note 53, at 309-10 (“Further study . . . might examine the impact of local, state, and federal funds on the ability of collaborative watershed groups to reduce NPS pollution, as well as trends in where resources are coming from, and which types of resources are the most effective”); Margerum, *supra* note 36, at 137, 140, 149-50 (discussing transaction cost barriers to collaboration, and arguing that a nested set of collaborative arrangements can overcome such constraints, but questioning whether the institutionalization of such a model will be able to overcome a number of significant hurdles of its own, including resourcing and power-sharing); see also Karkkainen, *supra* note 23, at 240-41; Karkkainen, *supra* note 48, at 91; Orts & Coglianese, *supra* note 35, at 302-03; Matt Wilson & Eric Weltman, *Government’s Job*, BOSTON REV., Oct./Nov. 1999, at 13, 14.

60. See Head, *supra* note 24.

61. Accordingly, the Article does not focus on subsequent stages of the collaboration process such as: (1) long-term implementation; (2) monitoring and/or enforcement; and (3) adapting, reviewing, and recommencing collaboration after the completion of the original agreement. See Sabatier et al., *supra* note 49, at 182-84.

62. Such a study would be large in size and well beyond this single Article. For a list of some of the potential variables, see Mark Lubell et al., *Watershed Partnerships and the Emergence of Collective Action Institutions*, 46 AM. J. POL. SCI. 148, 151 (2002); George Varughese & Elinor Ostrom, *The Contested Role of Heterogeneity in Collective Action: Some Evidence From Community Forestry in Nepal*, 29 WORLD DEV. 747, 752-53 (2001).

63. Richard D. Margerum, *Integrated Environmental Management: The Foundations for Successful Practice*, 24 ENVTL. MGMT. 151, 152 (1999).

structures for supporting and funding collaborations, cooperation inducing incentives (both negative and positive), and in most, but not all, cases, trust.

Following this introduction, the Article's analysis proceeds in five parts. Part I briefly fleshes out some key theories on collaboration and collective action, paying particular attention to how these bodies of work have been applied in the NEG literature.<sup>64</sup> Part II outlines the methods, before Part III provides an overview of the three case studies and their legal design features. Part IV examines whether and to what extent the case studies overcame collective action problems to form a successful collaboration.<sup>65</sup> The discussion and conclusion in Part V takes stock of the findings and lays out what the cases' experiences suggest for designing NEG institutions to improve the likelihood of successful collaboration in practice.

In addition to these recommendations, the conclusion also provides some insights for broader theory. This includes focusing on an issue that has been the subject of dynamic debate by legal scholars, namely the nature and role of conventional law in new governance.<sup>66</sup> As discussed further below, this Article examines one particular hypothesized relationship between law and new governance, namely "default hybridity." Drawing on its findings, the Article argues that although this hybridity thesis does not descriptively reflect the relationship between law and new governance across all the case studies, the comparative evidence suggests that default hybridity will often be normatively desirable. The conclusion also provides insights into the normative debates regarding whether NEG is a viable and convincing approach to solving environmental and natural resources problems. Here, it is argued, that although some aspects of the findings may be seen to confirm skeptics' claims that NEG is best limited to narrowly constrained or unique circumstances, e.g., small communities, under the right conditions, a more sanguine view of NEG is justified.

## I. Theory and Research: Collaboration in NEG

There are many different bodies of work on collaboration, the most relevant here being collective action theory, CPR literature, and social capital theory.<sup>67</sup>

64. Heikkilä & Gerlak, *supra* note 19, at 588.

65. Raymond, *supra* note 46, at 38.

66. See, e.g., de Búrca & Scott, *supra* note 15, at 4; Alexander, *supra* note 17, at 178-84; Trubek & Trubek, *Complementarity*, *supra* note 14, at 541; Wiersema, *supra* note 7, 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).

67. For other literature and issues discussed by some NEG scholars, see, for example: game theory (ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984)); advocacy coalition framework (PAUL A. SABATIER & HANK JENKINS-SMITH, *POLICY CHANGE AND LEARNING: AN ADVOCACY COALITION APPROACH* (1993)); leadership (Carole M. Rose, *Property as Storytelling: Perspectives From Game Theory, Narrative Theory, Feminist Theory*, 2 *YALE J.L. & HUMAN.* 37, 48-56 (1990)); alternative dispute resolution (ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (Bruce Patton ed., 1981); LAWRENCE E. SUSSKIND ET AL., *NEGOTIATING ENVIRONMENTAL AGREEMENTS: HOW TO AVOID ESCALATING CONFRONTATION, NEEDLESS*

The collective action literature suggests that there are few guarantees that people will voluntarily come together to cooperate, let alone be successful, since (so it is assumed) people are self-interested beings whose interests make it more rational to behave in a competitive rather than a cooperative manner.<sup>68</sup> This rational, self-interested actor rears its head in at least three well-worn "cooperation dilemma" constructs: the tragedy of the commons;<sup>69</sup> the prisoner's dilemma<sup>70</sup>; and Olson's<sup>71</sup> collective action problem. As the logic underlying these three constructs is similar, exploring the tragedy of the commons will suffice for illustrative purposes.

The tragedy of the commons, as expounded by Garrett Hardin and others,<sup>72</sup> was one of the first works to theorize the problems potential collaborators are likely to face in coming together to voluntarily cooperate. Hardin explains the tragedy using the example of cattle herders and their use of common land, which is open to all, i.e., which no one owns.<sup>73</sup> As Hardin sees it:

the rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. And another; and another . . . But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited.<sup>74</sup>

Common to this tragedy and the other two cooperation dilemma constructs is the issue of free riders. That is, whenever one person cannot be excluded from the benefits

COSTS, AND UNNECESSARY LITIGATION (2000)). See generally Cohen, *supra* note 17; Karkkainen, *supra* note 23, at 232-33; Heikkilä & Gerlak, *supra* note 19, at 587-88; Menkel-Meadow, *supra* note 36; Sabatier et al., *supra* note 49, at 189-98.

68. See WONDOLLECK & YAFFE, *supra* note 19, at 48-49; Gaines, *supra* note 28, at 15; Heikkilä & Gerlak, *supra* note 19, at 583-84; Steinzor, *supra* note 45, at 10920-21.

69. See, e.g., Garrett Hardin, *The Tragedy of the Commons*, 162 *SCI.* 1243 (1968).

70. The prisoner's dilemma game has been described by a number of authors using various social examples that build on the original form described by Albert Tucker. The dilemma is as follows: two men are held separately by the police but charged with jointly violating the law. If both confess, each will be fined one penalty unit, e.g., \$1,000, if only one confesses and the other does not, the former will be rewarded \$1,000, and the latter will be fined \$2,000 while if neither confess, there is good reason to believe both prisoners will be let go or receive only a minor penalty. According to this model, even though the "optimal" choice is for neither to confess, both prisoners will confess, because as rational beings who are unable to communicate, neither will want to take the risk of not confessing in case the other prisoner comes clean. The game itself is credited to the work of Melvin Dresher and formalized by Tucker in 1950. See MELVIN DRESHER, *THE MATHEMATICS OF GAMES OF STRATEGY: THEORY AND APPLICATIONS* (1961); OSTROM, *supra* note 54, at 3-5; Karkkainen, *supra* note 23, at 226-27; Albert W. Tucker, *The Mathematics of Tucker: A Sampler*, 14 *TWO-YEAR C. MATHEMATICS J.* 228 (1983).

71. According to Olson, "unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, rational self-interest individuals will not act to achieve their common or group interests." OLSON, *supra* note 47, at 2. See Nickelsburg, *supra* note 45, at 1378.

72. See, e.g., Anthony Scott, *The Fishery: The Objectives of Sole Ownership*, 63 *J. POL. ECON.* 116 (1955).

73. Hardin, *supra* note 69, at 1244. See OSTROM, *supra* note 54, at 3.

74. Hardin, *supra* note 69, at 1244. He continues: "Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all." *Id.*

that others provide, each person is motivated not to contribute to the collaboration but to “free ride” on the labor of others.<sup>75</sup> Accordingly, if some or all participants choose to free ride, the decisionmaking process will result in either a less-than-optimal level of provision or no collective benefit being created at all.<sup>76</sup>

Certainly, aspects of the collective action literature recognize that the above problems may be avoided in what are arguably rare cases.<sup>77</sup> For example, Olson<sup>78</sup> points out that where a group is very small, the costs of agreeing on collective behavior and of monitoring and enforcing that agreement may be low enough that the group is able to overcome those costs and organize itself.<sup>79</sup> Ultimately, however, what these cooperation dilemma models all suggest is that individually rational strategies may bring about collectively irrational outcomes.<sup>80</sup>

It is unsurprising, then, that the cooperation dilemma is seen as a “theoretical thorn in the side” of NEG proposals.<sup>81</sup> However, as suggested above, a growing number of NEG scholars have sought to counter such claims by drawing on a range of literature that suggests more optimistic possibilities for cooperation under certain conditions.<sup>82</sup>

Primary here is the literature on CPR, e.g., forestry, grazing, irrigation, and fishery systems. Spearheaded by Ostrom and other co-management scholars,<sup>83</sup> numerous field studies have been conducted to show that, under apposite conditions, user-based groups *can* voluntarily provide collective goods.<sup>84</sup> Such successful cooperation is thought more likely to occur where the benefits of collaborating outweigh the costs of doing so. Whether this is the case has been shown to depend largely<sup>85</sup> on a number of key variables that are positively related to the emergence of collective action.<sup>86</sup>

These variables include the following: environmental problems being sufficiently severe (or perceived to be severe)

that there is benefit to be gained from cooperating<sup>87</sup>; the environmental resource is sufficiently small, relative to existing communication and transport technology, that resource users can develop accurate knowledge of external boundaries; parties trust one another to keep promises and relate to one another with reciprocity; and external authorities give resource users governing autonomy.<sup>88</sup>

Some NEG commentators have applied Ostrom’s work to argue that the conditions for successful collaboration are more likely to be found in limited circumstances: small, isolated, and homogeneous communities with simple economic structures tied closely to environmental conditions.<sup>89</sup> Accordingly, they argue, the wider application and success of NEG is unlikely in all but the most narrowly constrained circumstances.<sup>90</sup>

In contrast to these claims, a handful of NEG scholars have applied Ostrom’s work in their own empirical research to demonstrate the emergence of collaboration in an array of diverse settings.<sup>91</sup> For example, in one of the few studies into the formation of collaboration in large regional NRM collaborations in the United States, Tanya Heikkila and Andrea Gerlak evaluate and integrate CPR theory with social capital and policy change literature to point to a number of factors that supported the emergence of those particular collaborative institutions. These factors included widely acknowledged problems, leadership among federal and state actors, practice and experience working together, and external institutional triggers.<sup>92</sup> Given the limited NEG research thus far, whether these conditions are capable of wider application remains an issue of contention.<sup>93</sup>

A second body of theory in the NEG literature is work on social capital. Pioneers of this literature include Alexis de Tocqueville,<sup>94</sup> and its more recent contributors include James Coleman’s research on Chicago schools and Robert Putnam and his co-writers’ work on regional political institutions

75. OSTROM, *supra* note 54, at 6.

76. *Id.*

77. Another potential exception in larger regions may involve a member, or a small subset of the population, benefiting enough from cooperation that it is willing to incur alone the costs of organization. For further background on some exceptions, see OLSON, *supra* note 47, at 2, 44; Nickelsburg, *supra* note 45, at 1378; Raymond, *supra* note 46, at 42.

78. OLSON, *supra* note 47, at 2, 43-45.

79. See, e.g., Margerum, *supra* note 36; Nickelsburg, *supra* note 45, at 1378.

80. See OSTROM, *supra* note 54, at 5.

81. Hornstein, *supra* note 36, at 952.

82. See, e.g., *id.* at 951-52; Karkkainen, *supra* note 23, at 226-33; Karkkainen, *supra* note 49, at 966 n.75; Sabatier et al., *supra* note 49; Thomson & Perry, *supra* note 49, at 21.

83. See, e.g., GARY LIBECAP, *CONTRACTING FOR PROPERTY RIGHTS* (1989); Ryan Plummer & John Fitzgibbon, *Co-Management of Natural Resources: A Proposed Framework*, 33 ENVTL. MGMT. 876, 879 (2004).

84. See, e.g., OSTROM, *supra* note 54; Elinor Ostrom, *The Danger of Self-Evident Truths*, 33 PS: POL. SCI. & POL. 33, 39-40 (2000); Schlager, *supra* note 54, at 151-53, 162.

85. Note that these variables are interdependent and affected by the type of larger regime in which the resource and group are situated. For example, even if there is a high degree of existing trust and reciprocity between participants (thus lowering the costs of organizing), attempts to collaborate may be rare if the resource is so abundant or, conversely, so deteriorated that there is little benefit to be gained from cooperating. See Ostrom, *supra* note 84, at 40; Schlager, *supra* note 54, at 153.

86. See Schlager, *supra* note 54, at 153; Varughese & Ostrom, *supra* note 62, at 748.

87. Severe environmental problems tend to arise where existing institutions are not actively addressing the problem. See Mark Lubell, *Collaborative Institutions, Belief-Systems, and Perceived Policy Effectiveness*, 56 POL. RES. Q. 309, 311 (2003); Lubell et al., *supra* note 62, at 150; Schlager, *supra* note 54, at 151; Thomson & Perry, *supra* note 49, at 21. See Bradley Karkkainen, *Getting to “Let’s Talk”: Legal and Natural Destabilizations and the Future of Regional Collaboration*, 8 NEV. L.J. 811, 819-22 (2008) (discussing a similar notion of “natural” and “anthropo-natural disasters” as a means to clear the way for the emergence of new forms of community collaboration and problem-solving).

88. Heikkila & Gerlak, *supra* note 19, at 585; Per Olsson et al., *Adaptive Co-Management for Building Resilience in Social-Ecological Systems*, 34 ENVTL. MGMT. 75, 84 (2004); Elinor Ostrom et al., *Revisiting the Commons: Local Lessons, Global Challenges*, 284 SCI. 278, 281 (1999); Sabatier et al., *supra* note 49, at 182; Schlager, *supra* note 54, at 152.

89. Note that research in CPR has not found a significant relationship between the likelihood of collaborative action and group numbers or area size. See Schlager, *supra* note 54, at 162-63.

90. See Gaines, *supra* note 28, at 17; see also Cannon, *supra* note 48, at 428; John, *supra* note 27, at 231 (arguing that successful collaboration is more likely to emerge when the extent of the environmental issue is small enough (100 sq miles) for key leaders to drive to evening meetings); Karkkainen, *supra* note 4, at 476-77.

91. See, e.g., Heikkila & Gerlak, *supra* note 19; William D. Leach & Paul A. Sabatier, *Are Trust and Social Capital the Keys to Success? Watershed Partnerships in California and Washington*, in SWIMMING UPSTREAM, *supra* note 19, at 233.

92. Heikkila & Gerlak, *supra* note 19, at 606.

93. *Id.*

94. See DE TOCQUEVILLE, *supra* note 18.



in Italy and social and community relations in America.<sup>95</sup> In broad terms, this body of work suggests that networks,<sup>96</sup> reciprocity,<sup>97</sup> and trust<sup>98</sup> can foster and make collective action easier, not least because it can reduce transactions costs and increase the likelihood of parties reaching and implementing agreements.<sup>99</sup>

A central idea here, adopted by many in the NEG literature, is that institutional arrangements encourage cooperation and solve the collective action problem by building more trust among actors,<sup>100</sup> which then leads to greater cooperation.<sup>101</sup> This view is mirrored in other literature and particularly in the alternative dispute resolution and CPR literature, which see trust as an optimal variable for successful collaboration.<sup>102</sup>

However, a handful of emerging empirical research in NEG and other areas has challenged the view that trust is essential or even favorable to successful cooperation.<sup>103</sup> For example, one study of habitat conservation planning (HCP)

in the United States has made what one scholar has termed the provocative and “somewhat controversial” claim that trust is largely irrelevant to successful collective action in many settings.<sup>104</sup> Other research into watershed partnerships suggest that while trust is important to mature collaborations, agreements in “must do something soon” situations (such as a flooding crisis) have been made in the face of significant *distrust*.<sup>105</sup> Further insight is accordingly needed into this debate on the importance of trust as a condition for the emergence of successful collaboration.

Beyond the social capital and CPR literature, emerging NEG scholarship has revealed its own insights into effective institutional designs to aid in reducing transaction costs. For example, some NEG authors suggest nested collaborative structures, i.e., developing institutions at different scales/levels, may be used to overcome transaction costs.<sup>106</sup> Examples of such approaches can be found in a variety of NEG experiments, such as the Chesapeake Bay program, and may involve basinwide or ecosystemwide institutions, e.g., a multiagency collaborative body, that address systemwide problems and coordinate efforts across the basin as a whole, while other levels of more localized institutional arrangements manage locally varying conditions, e.g., government and nongovernment partnership managing specific tributaries.<sup>107</sup>

Such nested arrangements are claimed to be effective, both where geographic scale is larger (by allowing collaborative groups to divide a region into smaller areas and thus reduce the costs and time associated with collaborating across the whole region),<sup>108</sup> and at more local levels (allowing local groups to operate at regional scales to share information and interact with higher level agencies in a more structured single forum, rather than in an ad-hoc, once-off manner).<sup>109</sup>

While this nested approach is thought to have the potential to reduce transaction costs greatly, on the other hand, a nested model, with its many levels, necessarily involves greater total costs in cooperating than collaboration at a single local level.<sup>110</sup> Indeed, various parts of this structure may impose additional challenges, such as achieving power-sharing between agencies/governments at higher regional or state scales.<sup>111</sup> Different governments and agencies are notoriously unwilling to share authority and funds, and if their cooperation is not forthcoming, the consequences may

95. See, e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); ROBERT D. PUTNAM ET AL., *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993); James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. 595 (1988).

96. The term “networks” generally refers to social arrangements that provide opportunities for both informal and formal interpersonal communication and exchange, such as membership in voluntary associations like a sports club. See PUTNAM ET AL., *supra* note 95; Sabatier et al., *supra* note 49, at 187.

97. The norm of reciprocity is generally understood as a willingness to initiate and return favors—an “I will if you will” mentality—based on a perceived degree of obligation, for example, where one partner is willing to bear initial disproportional costs because they expect another will equalize the cost and benefit distribution over time out of a sense of duty. See Sabatier et al., *supra* note 49, at 187; Thomson & Perry, *supra* note 49, at 27.

98. Trust can generally be understood as referring to confidence that people will keep their promises, treat others fairly, and show some concern for others’ welfare. See Sabatier et al., *supra* note 49, at 187; Thomson & Perry, *supra* note 49, at 28.

99. See STEWART & JONES, *supra* note 15, at 128-29; Freeman & Farber, *supra* note 8, at 801; Sabatier et al., *supra* note 49, at 186-89.

100. Although trust and social capital are related concepts, the literature also treats trust as an independent variable that is itself an important precursor to successful collaboration. See, e.g., Leach & Sabatier, *supra* note 91, at 233-34; Raymond, *supra* note 46, at 37, 40. For further background on the issue, see William B. Stevenson & Robert F. Radin, *Social Capital and Social Influence on the Board of Directors*, 46 J. MGMT. STUD. 16, 20 (2009) (discussing social capital as the social ties of the individual, and distinguishing the creation of ties from trust).

101. In a manner reminiscent of Robert Axelrod’s famous use of game theory, see AXELROD, *supra* note 67, “repeat” as opposed to static interaction and communication mechanisms, such as ongoing face-to-face negotiation and/or deliberation, is seen by many NEG scholars to be particularly important to building necessary trust and reciprocity to ensure successful collaboration. In general terms, such processes can resolve conflict, while also allowing participants to show respect for each other and be assured that others are willing to contribute their fair share to dealing with the problem. See, e.g., Joshua Cohen & Charles F. Sabel, *Directly-Deliberative Polyarchy*, 3 EUR. L.J. 313, 323 (1997); Freeman, *Collaborative*, *supra* note 21, at 23 & n.59, 24; Fung & Wright, *supra* note 26, at 15-18; John, *supra* note 27, at 235; Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 MICH. L. REV. 71, 71, 88-89 (2003).

102. See, e.g., Rosemary O’Leary et al., *Environmental Conflict Resolution, in ENVIRONMENTAL GOVERNANCE RECONSIDERED*, *supra* note 27, at 323, 338; Raymond, *supra* note 46, at 40; Sabatier et al., *supra* note 49, at 197; Schlager, *supra* note 54, at 152.

103. See generally KAREN S. COOK ET AL., *COOPERATION WITHOUT TRUST? (2005)* (arguing that although trust is a useful element in many kinds of relationships, mutually beneficial cooperative relationships can take place without it); TRUST AND DISTRUST IN ORGANIZATIONS: DILEMMAS AND APPROACHES (Roderick Moreland Kramer & Karen S. Cook eds., 2004) (highlighting the complexities and problematics of trust and distrust in organizational settings).

104. See, e.g., Raymond, *supra* note 46, at 37.

105. See Leach & Sabatier, *supra* note 91, at 253; Lubell et al., *supra* note 34, at 275.

106. John, *supra* note 27, at 236-37; Karkkainen, *supra* note 23, at 209; Karkkainen, *supra* note 34, at 221, 235-36 (identifying that nested scales of management are evident in some of the most successful ecosystem governance arrangements); Margerum, *supra* note 36, at 144-46. Note also that Ostrom’s research suggests nested arrangements are also characteristic of long-term successful collaboration. See OSTROM, *supra* note 54, at 52.

107. Karkkainen, *supra* note 34, at 235.

108. See Joseph E. Bonnell & Tomas M. Koontz, *Stumbling Forward: The Organizational Challenges of Building and Sustaining Collaborative Watershed Management*, 20 SOC’Y & NAT. RESOURCES 153, 161, 163 (2007); Graham R. Marshall, *Can Community-Based NRM Work at the Scale of Larger Regions? Exploring the Roles of Nesting and Subsidiarity*, in *CONTESTED COUNTRY*, *supra* note 59, at 50-54.

109. Margerum, *supra* note 36, at 144-46.

110. *Id.*

111. See *id.*; Bonnell & Koontz, *supra* note 108, at 161, 163; Lane, *supra* note 48, at 5-6.

be devastating for lower levels that depend on government for guidance and support.<sup>112</sup> How much conflict and cooperation is actually evident between different agencies and levels of government in NEG accordingly remains an important focus for research.<sup>113</sup>

In addition to nested arrangements, a range of other conditions have been identified or suggested by NEG authors as necessary or desirable to the formation of successful collaboration, including:

- government funding and/or agency assistance, e.g., providing capacity-building and information, to reduce organization costs<sup>114</sup>;
- strategic use of government funding as an incentive to spur cooperation<sup>115</sup>; and
- the existence of harsh penalty default style rules,<sup>116</sup> or indeed other forms of social or economic pressure from third parties,<sup>117</sup> that can alter the incentives of actors to make transaction costs of collaboration potentially more attractive than bearing the costs imposed by the default rule.<sup>118</sup>

Although the broader regulatory literature has examined the impacts of such mechanisms as a means to encourage cooperation and affirmative self-regulatory behavior,<sup>119</sup> the application of these conditions in recent NEG developments has received much less empirical scrutiny.<sup>120</sup>

In particular, whether and to what extent traditional legal rules represent a form of penalty default regime for new

governance experiments remains an issue that continues to pose significant practical and conceptual challenges for law and for lawyers.<sup>121</sup> This issue forms a part of wider theoretical debates focused on the relationship between new governance and traditional law, i.e., top-down control using fixed statutes, detailed rules, and coercion.<sup>122</sup> Here, a number of NEG authors argue that new governance has and/or should form “hybrids” with traditional law.<sup>123</sup> One particular variety of these hybrids is sometimes referred to as “default hybridity.” This thesis suggests that standard regulatory frameworks may act as a default regime (applicable only in the case of failure to conform to new governance demands), and should be set precisely for the purposes of inducing people to contract out of it and into new governance regimes.<sup>124</sup> Certainly, as new governance forums continue to emerge in arenas regulated by conventional legal processes, others have identified a wider range of configurations<sup>125</sup> between law and new governance systems.<sup>126</sup> However, there is a recognized need for further empirical inquiry into such default hybrids, including identifying examples in practice, as well as exploring both the feasibility and desirability of greater use of these hybrid forms.<sup>127</sup>

This Article accordingly returns below to explore what the findings suggest about default hybridity between law and new governance, as well as to examine the impacts in practice of nested institutional designs, trust-building, and the other variables raised above.

## II. Methods

The research employed a *collective* case study approach to analyze collaboration in NEG.<sup>128</sup> To select the cases, two steps were required: selecting a set of NEG programs as the “case studies”; and selecting from within each of those programs a set of “on-ground” collaborations to study (“sub-cases”). To select the programs, two main criteria

112. Sarah Ewing, *Catchment Management Arrangements*, in MANAGING AUSTRALIA'S ENVIRONMENT 405, 406 (Stephen Dovers & Su Wild River eds., 2003) [hereinafter AUSTRALIA'S ENVIRONMENT]; Megan Farrelly, *Regionalisation of Environmental Management: A Case Study of the Natural Heritage Trust, South Australia*, 43 GEOGRAPHICAL RES. 393, 400 (2005); Freeman & Farber, *supra* note 8, at 900-01; Margerum, *supra* note 36, at 144-46, 149; Sandy Paton et al., *Regional Natural Resource Management: Is It Sustainable?*, 11 AUSTRALASIAN J. ENVTL. MGMT. 259, 263 (2004).

113. Head, *supra* note 24, at 145.

114. See DOUGLAS S. KENNEY ET AL., THE NEW WATERSHED SOURCE BOOK (2000); Cohen & Sabel, *supra* note 101, at 334; Freeman, *Collaborative*, *supra* note 21, at 31; Freeman & Farber, *supra* note 8, at 890; John, *supra* note 27, at 230-42; DeWitt John & Marian Mlay, *Community-Based Environmental Protection: Encouraging Civic Environmentalism*, in BETTER ENVIRONMENTAL DECISIONS: STRATEGIES FOR GOVERNMENTS, BUSINESSES, AND COMMUNITIES 353, 362-63 (Ken Sexton et al. eds., 1999); Nickelsburg, *supra* note 45, at 1380-81.

115. See Farrier, *supra* note 19; Karkkainen, *supra* note 23, at 229 n.89.

116. See Karkkainen, *supra* note 7, at 296, 298, 321; Karkkainen, *supra* note 23, at 241; Karkkainen, *supra* note 49, at 944. Note, however, that some authors have questioned the role of default rules in NEG. See, e.g., 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 (2006).

117. See generally NEIL GUNNINGHAM ET AL., SHADES OF GREEN: BUSINESS, REGULATION, AND ENVIRONMENT (2003); GUNNINGHAM & SINCLAIR, *supra* note 8, at 149.

118. See KOONTZ ET AL., *supra* note 19, at 166-67; WONDOLLECK & YAFFE, *supra* note 19, at 240-41; Farrier, *supra* note 19, at 350, 390-91; Freeman & Farber, *supra* note 8, at 903; Karkkainen, *supra* note 23, at 241.

119. See, e.g., IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE (1992); SMART REGULATION, *supra* note 6.

120. The main focus on such conditions has come in the form of regulatory penalty defaults in the U.S. context. See sources cited *supra* notes 116, 118. However, as discussed below, research on the application of such penalty default-style rules is also recognized as a priority for new governance research. See Karkkainen, *supra* note 23, at 241; Solomon, *supra* note 50, at 833-34.

121. See de Búrca & Scott, *supra* note 15, at 4; Charles F. Sabel & William H. Simon, *Epilogue: Accountability Without Sovereignty*, in LAW AND NEW GOVERNANCE, *supra* note 7, at 395; Trubek & Trubek, *Complementarity*, *supra* note 14, at 543.

122. Trubek & Trubek, *Complementarity*, *supra* note 14, at 543.

123. See, e.g., de Búrca & Scott, *supra* note 15, at 6-9.

124. *Id.* at 9. Note that there are other forms of so-called hybrid relationship that may be formed between law and new governance. See generally *id.* at 6-7; Trubek & Trubek, *Complementarity*, *supra* note 14.

125. Trubek & Trubek, *Complementarity*, *supra* note 14, at 544 (discussing three types of coexistence between law and new governance, namely complementarity, rivalry, or transformation hybridity).

126. For example, some authors have hypothesized that conventional forms of law and regulation remain impervious to, form different forms of hybrids with, and/or are being “reshaped” by these new ways of governing. See de Búrca & Scott, *supra* note 15, at 4-9; Sabel & Simon, *supra* note 121, at 395-96.

127. See Solomon, *supra* note 50, at 833-34; Trubek & Trubek, *Complementarity*, *supra* note 14, at 539, 558, 564 (discussing a variety of hybrid forms of law and new governance, including those akin to default hybridity); see also de Búrca & Scott, *supra* note 15, at 4-9.

128. 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 K. YIN, CASE STUDY RESEARCH: DESIGN, AND METHODS 53-54 (3d ed. 2003); Robert E. Stake, *Qualitative Case Studies*, in STRATEGIES OF QUALITATIVE INQUIRY 119, 136-38 (Norman K. Denzin & Yvonna S. Lincoln eds., 3d ed. 2008). Note that elements of the following research methods discussion were developed and built upon in Holley, *supra* note 29, at 148-51.

were used.<sup>129</sup> First, a number of recent governance programs were appraised to **verify whether at least some of their components embraced common NEG characteristics**, not least an aspiration to collaboration. **Second, given the significant diversity in NEG institutions**, a subsequent criteria for selecting the cases was to capture a diversity of conditions, including cases that operated at different scales, focused on different environmental problems and **included different numbers and types of stakeholders**. As discussed further below, the EIP<sup>130</sup> and the NEIP in Victoria were selected as meeting these criteria, along with the Regional Natural Resource Management (RNRM) program in Queensland.<sup>131</sup>

Following case selection, “on-ground” collaborations in each of the three programs were selected. After a desktop analysis to identify “information rich” cases,<sup>132</sup> eight EIP collaborations were selected from the approximately 70 EIPs in operation to ensure as close as practicably possible that at least one sub-case was selected from each of the seven different jurisdictional units of the Environment Protection Authority, Victoria.<sup>133</sup> Three of the seven active NEIP collaborations were selected to include all of the NEIPs that at the time had reached the implementation stage.<sup>134</sup> Finally, one RNRM region was selected on the basis that it was a very information-rich case, being one of the largest of the 14 regions in Queensland, facing some of the most pressing natural resource problems within the state, and receiving sig-

nificantly higher levels of governmental funding than many other regions.<sup>135</sup>

The study relied primarily on qualitative interviewing. Selection of interviewees involved a purposive sampling approach that chose interviewees to represent key stakeholder groups involved in the collaborations.<sup>136</sup> The majority of the interviews were in-depth conversations and followed a semi-structured interviewing technique.<sup>137</sup> A total of 80 interviews were conducted: 24 in the EIP; 26 in the NEIP; and 30 in the RNRM.<sup>138</sup> The interview data was also backed up with an analysis of key documents and reports selected to ensure they related to or impacted on the operation of the cases.<sup>139</sup> The analysis of the data followed the approach of adaptive theory to code data and capture patterns and themes, as well as discrepancies.<sup>140</sup> The validity of the study’s conclusions was heightened through both triangulating multiple sources of data (interviews and documents), and a process of respondent evaluation conducted near the end of the fieldwork.<sup>141</sup>

### III. Case Studies—Overview and Legal Design

#### A. Overview of Cases

##### I. The RNRM

The Australian federal government pioneered the first case study, the RNRM in 2000-2001. A key intention of this program was to modify and replace earlier Australian NRM

129. The approach to selecting these cases and sub-cases was similar to purposeful sampling, utilizing the criterion or Theory-Based/Operational Construction strategy. See MICHAEL QUINN PATTON, *QUALITATIVE EVALUATION AND RESEARCH METHODS*, 182-83 (2d ed. 1990); Alexander Conley & Margaret A. Moote, *Evaluating Collaborative Natural Resource Management*, 16 SOC’Y & NAT. RESOURCES 371, 378 (2003). Note that the programs were also selected partly based on practical considerations. For example, the location of the program was an important consideration (for example, to reduce costs of travel, only cases in eastern states of Australia were considered).

130. 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., GUNNINGHAM & SINCLAIR, *supra* note 8, at 158-59, 179-87; Ian Wills & Sigmund Fritschy, *Industry-Community-Regulator: Consultation in Improving Environmental Performance in Victoria*, 8 AUSTRAL. J. ENVTL. MGMT. 158, 165-66 (2001).

131. While the RNRM is a national program, the practical need for the federal government to engage and reach agreement with unique state and territory governments to support these programs resulted in differences between state jurisdictions. The choice to study the RNRM program accordingly carried with it a choice of a particular state and its own unique features and considerations. This study chose to examine the RNRM in Queensland on the basis that this state offered a different policy context to the other two NEG experiments in the state of Victoria, as well as the fact that the RNRM in Queensland is a relatively unique “community” and a nonstatutory-based approach to the RNRM. See Head, *supra* note 24, at 144.

132. Following the idea of purposeful sampling for intensity. See PATTON, *supra* note 129, at 182-83.

133. As noted below, the 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 multistakeholder EIPs.

134. The VEPA assisted the author in the selection of both the EIP and the NEIP sub-cases.

135. In an ideal world, with unlimited time and funding, it would have been beneficial to also contrast multiple RNRM sub-cases. However, as explained below, the RNRM is a far more complex case than either the EIP or the NEIP, involving a plethora of additional key stakeholders at a national, state, regional, and local level.

136. See, e.g., W. LAWRENCE NEUMAN, *SOCIAL RESEARCH METHODS: QUALITATIVE AND QUANTITATIVE APPROACHES* 211, 214 (5th ed. 2003); PATTON, *supra* note 129, at 182-83.

137. 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. 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).

138. Interviewees included residents/nongovernmental groups, EPA, local government, and industries in the EIP; residents/nongovernmental groups, EPA, local/state government, NRM groups, and industries/businesses in the NEIP; and regional/subregional NRM group members and staff, farmers, federal/state/local governments, science, peak industry, and conservation bodies in the RNRM.

139. These documents included available agendas, announcements and minutes of meetings; plans, legislation, parliamentary speeches and guidelines; public administrative reports (proposals, progress or annual reports, budgets); other studies or evaluations of the case; newspaper articles or community newsletters.

140. See JOHN W. CRESWELL, *QUALITATIVE INQUIRY AND RESEARCH DESIGN: CHOOSING AMONG FIVE TRADITIONS* 153-54 (1998); DEREK LAYDER, *SOCIOLOGICAL PRACTICE: LINKING THEORY AND SOCIAL RESEARCH* 53-55, 101 (1998).

141. Respondent validation involved holding a dialogue/reinterviewing with five key government and/or nongovernmental participants that had significant carriage and/or involvement in the programs (one in the EIP, two in the NEIP, and two in the RNRM). See NEUMAN, *supra* note 136, at 138; DAVID SILVERMAN, *DOING QUALITATIVE RESEARCH: A PRACTICAL HANDBOOK* 99, 176 (2000); YIN, *supra* note 128, at 35.

initiatives<sup>142</sup> that had been judged as unsuccessful in resolving Australia's increasingly urgent natural resource problems.<sup>143</sup>

Over its life thus far,<sup>144</sup> the RNRM has been underpinned by approximately AUD\$5 billion of federal and state government funds.<sup>145</sup> This funding has been delivered pursuant to the Natural Heritage Trust Act,<sup>146</sup> and various initiatives, known as Caring for Our Country (2008-2013),<sup>147</sup> the Natural Heritage Trust 2 (NHT2), and National Action Plan (NAP) for Salinity and Water Quality (2001-2008).<sup>148</sup> While the earlier NHT2 and the NAP were jointly delivered, and share similar legal designs, the more recent Caring for Our Country introduced slightly different arrangements.<sup>149</sup> For the purposes of this Article and its focus on the emergence of successful collaboration, it is the NHT2 and the NAP programs that are of primary interest, not least

because they governed the RNRM's initial introduction and implementation of collaboration.<sup>150</sup>

Pursuant to the NHT2 and the NAP, natural resource management was decentralized to 56 regions across Australia to contribute to national goals that included improving biodiversity and addressing "critical salinity and water quality problems that need urgent action."<sup>151</sup> Central to the RNRM's arrangements was the pursuit of "cooperative partnerships" that, inter alia, engaged regional communities and existing community-based regional groups and regional networks already concerned about natural resource issues across Australia.<sup>152</sup> As one policy document elaborated:

The active involvement and participation of rural and regional communities is the cornerstone of this Plan . . . 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>153</sup>

In contrast to the other two case studies discussed below, the RNRM involves a "nested" collaborative structure at three key levels. At the national level, collaboration occurred between departments, ministers, and the federal and state governments.<sup>154</sup> This involved the production and oversight of a variety of RNRM guidelines and policies that set performance expectations, overarching national outcomes, objectives,<sup>155</sup> and other accountability controls to guide

142. These programs included integrated catchment management approaches, Landcare, and Natural Heritage Trust 1. For a discussion of these programs, see Kate Crowley, *Effective Environmental Federalism? Australia's Natural Heritage Trust*, 3 J. ENVTL. POL'Y & PLAN. 255 (2001) (outlining and evaluating the NHT's administration, accountability measures, and ecological outcomes against the goals of effective federalism); Allan Curtis, *The Landcare Experience, in AUSTRALIA'S ENVIRONMENT*, *supra* note 112, at 454 (discussing the origins, strengths, and weaknesses of Landcare); Ewing, *supra* note 112 (comparing Catchment Management approaches across Australian states).

143. As one Commonwealth government report noted:

One of the greatest challenges facing Australia is how to manage natural resources for a healthy future, when much of the landscape has critical salinity and water quality problems that need urgent action . . . Good progress on addressing water quality, salinity and natural resource management issues has been made with landcare and the Natural Heritage Trust. However, the lack of agreed, specific on-the-ground outcomes and targets for water quality, salinity and other natural resource management attributes has been a major barrier to guaranteeing a return on the Commonwealth's investment.

COUNCIL OF AUSTRALIAN GOV'TS, A NATIONAL ACTION PLAN FOR SALINITY AND WATER QUALITY 3, 6 (2000) [hereinafter COAG], available at [http://www.mpii.org.au/nswgovdocs\\_files/pdf/nta\\_salinity.pdf](http://www.mpii.org.au/nswgovdocs_files/pdf/nta_salinity.pdf).

144. This Article's primary focus is on collaboration in the RNRM, and it does not seek to provide a detailed overview of the RNRM or the respective funding initiatives. For a more comprehensive discussion of the RNRM and its Natural Heritage Trust 2 and National Action Plan for Salinity and Water Quality programs, see CONTESTED COUNTRY, *supra* note 59; Farrelly, *supra* note 112; Head, *supra* note 24; 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); Paton et al., *supra* note 112; Robins, *supra* note 24. For an overview of the more recent Caring for Our Country program, see Caring for Our Country home page, <http://www.nrm.gov.au> (last visited May 17, 2010); Caring for Our Country, What Is Natural Resource Management?, <http://www.nrm.gov.au/nrm/index.html> (last visited Mar. 10, 2010).

145. See Caring for Our Country, Funded Projects, <http://www.nrm.gov.au/funding/index.html> (last visited Jan. 7, 2010).

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

147. 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." COMMONWEALTH OF AUSTRALIA, CARING FOR OUR COUNTRY: BUSINESS PLAN 2009-2010, at 3 (2008), available at <http://nrm.gov.au/publications/books/business-plan.html>. 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. *Id.*

148. See generally CONTESTED COUNTRY, *supra* note 59; Lisa Robins & Stephen Dovers, *Community-Based NRM Boards of Management: Are They Up to the Task?*, 14 AUSTRALIAN J. ENVTL. MGMT. 111 (2007).

149. See Australian Government, Caring for Our Country (2008) (leaflet), available at <http://nrm.gov.au/publications/factsheets/pubs/cfoc-general.pdf>.

150. The analysis throughout the remainder of the Article accordingly focuses solely on the RNRM's arrangements under the Natural Heritage Trust 2 and National Action Plan for Salinity and Water Quality.

151. COAG, *supra* note 143, at 3. For further information on national goals, see Natural Heritage Trust of Australia Act, 1997; NATURAL RES. MGMT. MINISTERIAL COUNCIL, FRAMEWORK FOR THE EXTENSION OF THE NATURAL HERITAGE TRUST (2002) [hereinafter NRMCMC], available at <http://www.nht.gov.au/publications/frameworks/extension-framework.html>; Intergovernmental Agreement on a National Action Plan for Salinity and Water Quality (2001), available at <http://www.napswq.gov.au/publications/books/iga.html> [hereinafter Implementation Agreement NAP].

152. See Bilateral Agreement Between the Commonwealth of Australia and the State of Queensland to Deliver the Natural Heritage Trust, Attachment D, §4 (2004) [hereinafter Bilateral Agreement NHT]; NAT'L NATURAL RES. MGMT. TASKFORCE, MANAGING NATURAL RESOURCES IN AUSTRALIA FOR A SUSTAINABLE FUTURE 27 (1999). See also COAG, *supra* note 143, at 3 (noting "Partnerships are essential to the success of this important initiative"); Head, *supra* note 24, at 141-45; Whelan & Oliver, *supra* note 38, at 126-28.

153. Implementation Agreement NAP, *supra* note 151, at 2.

154. At the national level, the overarching body of the program was the NRMCMC. This body was comprised of Commonwealth and State Ministers and oversaw the development and implementation of national natural resource management programs, including the NAP and NHT 2. See Australian Government, About NRMCMC, [http://www.mincos.gov.au/about\\_nrmcmc](http://www.mincos.gov.au/about_nrmcmc) (last visited May 20, 2010). Also at the national level was the Natural Heritage Ministerial Board, comprising at the time of the Commonwealth Minister for the Environment and Heritage and the Commonwealth Minister for Agriculture, Fisheries, and Forestry, who were responsible for administering the NHT funding account. See Natural Heritage Trust of Australia Act, 1997, §40.

155. The national outcomes included the following: (1) the impact of salinity on land and water resources is minimized, avoided, or reduced; (2) biodiversity and the extent, diversity, and condition of native ecosystems are maintained or rehabilitated; (3) populations of significant species and ecological communities are maintained or rehabilitated; (4) ecosystem services and functions are maintained or rehabilitated; (5) surface and groundwater quality is maintained or enhanced; (6) the impact of threatening processes on locations and systems that are critical for conservation of biodiversity, agricultural production, towns, infrastructure, and cultural and social values is avoided or minimized;

actions at lower collaborative levels.<sup>156</sup> A central part of this collaboration involved federal and state/territory governments negotiating separate NAP and NHT2 bilateral agreements to govern RNRM arrangements in each state or territory.<sup>157</sup>

Below these national arrangements was a second level of collaboration at the state scale. In the state of Queensland, various federal and state agency representatives formed collaborative groups to assist in directing government spending and oversee state/regional-level policy issues. A primary body here was the Joint Steering Committee (JSC) responsible for authorizing payments and other accountability controls.<sup>158</sup>

Nested within these state and national collaborative levels were 14 regions across Queensland. The size of the regions varied, although most were large and involved one or more bioregions.<sup>159</sup> Each region was required to establish a multi-stakeholder collaborative group, comprising volunteer community membership, including production and conservation interests and relevant stakeholders (at minimum, indigenous interests and local government).<sup>160</sup> The group was required to be incorporated and consult with the regional community to achieve effective involvement of all key stakeholders in the development of a regional plan and a regional investment strategy.<sup>161</sup> These documents set priorities and actions for natural resource management in the region, and once approved by the JSC, the regional body was to implement the plans in collaboration with local farmers and other regional stakeholders using money invested and controlled by the government.<sup>162</sup>

(7) 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 (8) 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. NRMMC, NATIONAL FRAMEWORK FOR NATURAL RESOURCE MANAGEMENT (NRM) STANDARDS AND TARGETS 10 tbl.1 (2002).

156. See, e.g., *id.*; NRMMC, NATIONAL NATURAL RESOURCE MANAGEMENT MONITORING AND EVALUATION FRAMEWORK (2002); NRMMC, *supra* note 151.

157. See Implementation Agreement NAP, *supra* note 151; Bilateral Agreement NHT, *supra* note 152.

158. Bilateral Agreement NHT, *supra* note 152, §§37-43; Implementation Agreement NAP, *supra* note 151, §22.

159. Caring for Our Country, What Is a Natural Resource Management Region?, <http://www.nrm.gov.au/nrm/region.html> (last visited Jan. 7, 2010) (noting that the Australian government, in association with state and territory governments, identified 56 regions covering all of Australia).

160. Bilateral Agreement NHT, *supra* note 152, §§67, 68(b) & Attachment D, at 56; Implementation Agreement NAP, *supra* note 151, cl. 7.1(b), (f).

161. 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 NHT, *supra* note 152, §§67, 68, 87 & Attachment D, at 56, Attachment E, at 59-60; Implementation Agreement NAP, *supra* note 151, §7.1; see also Head, *supra* note 24.

162. See Head, *supra* note 24.

The RNRM program has recently drawn comparisons with NEG approaches in the United States,<sup>163</sup> including collaborative regional ecosystem efforts in the Chesapeake Bay,<sup>164</sup> San Francisco Bay Delta,<sup>165</sup> and the multiparty, regional landscape-scale HCPs.<sup>166</sup> All these programs share a broadly similar collaborative and regional ecosystem-focused approach. Yet, there are also some differences. For example, both the Bay Delta and Chesapeake Bay experiments arose in response to: (1) the limits of traditional approaches; (2) citizen movements; and (3) long-standing conflicts between stakeholders. They have each since undergone a lengthy evolution, involving various periods of institutional innovation to address the problems plaguing their regional ecosystems. In contrast, the RNRM is a far more ambitious attempt to self-consciously roll out a regional ecosystem program across an entire nation.<sup>167</sup>

The RNRM is also distinct from multiparty, regional landscape-scale HCPs. As discussed further below, the RNRM principally relies on government investment to strengthen the chances of successful collaborative processes. In contrast, the HCP's overall approach to regional collaborative ecosystem governance relies less on government investment and more on legal incentives, such as the operation of a "penalty default"-style rule that encourages and compels landowners and others to collaborate in landscape-scale ecosystem planning.<sup>168</sup>

## 2. The NEIPs

In contrast to the nested collaboration of the RNRM, the second case study focuses on urban and rural second-generation environmental problems, and pursuant to the Environment Protection Act, aims to foster collaboration in "neighborhoods" (usually the size of a township or catchment).<sup>169</sup>

Known as the NEIP,<sup>170</sup> this NEG program was developed in 2001 by the Environment Protection Authority, Victoria (VEPA). The relevant second reading of the Environment Protection (Liveable Neighborhoods) Bill notes that the NEIP is:

163. See Holley, *supra* note 29, at 187-88.

164. See, e.g., Wiersema, *supra* note 7.

165. See, e.g., Freeman & Farber, *supra* note 8.

166. Karkkainen, *supra* note 12, at 211-12.

167. Freeman & Farber, *supra* note 8, at 837-39, 854-57; Holley, *supra* note 29, at 187-88; Karkkainen, *supra* note 48, at 81-82.

168. This default rule arises under a set of provisions of the Endangered Species Act (ESA) that lists endangered species and imposes strong sanctions on those who harm/harass them or their habitat, unless an HCP is developed and approved. See Endangered Species Act of 1973, 16 U.S.C. §§1531-1544 (2007), ELR STAT. ESA §§2-18. For further discussion of the relevant provisions and their operation, see Holley, *supra* note 29, at 187-88; Ruhl, *supra* note 116, 906-08; Craig W. Thomas, *Habitat Conservation Planning*, in DEEPENING DEMOCRACY, *supra* note 12, at 144, 145-50.

169. See Environment Protection Act, 1970, §§19AD-19AK (Vict.); Neil Gunningham, Cameron Holley, & Clifford Shearing, *Neighborhood Environment Improvement Plans: Community Empowerment, Voluntary Collaboration, and Legislative Design*, 24 ENVTL. & PLAN. L.J. 125 (2007).

170. This Article does not seek to provide a detailed overview of the NEIP and its legislative design. A detailed analysis of the NEIP and its legislative design can be found in Gunningham et al., *supra* note 169.

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>171</sup>

The concept of collaboration and partnerships is central to the NEIP approach.<sup>172</sup> Indeed, the program aspires to address severe and complex environmental problems that “require concerted shared action.”<sup>173</sup> These include situations such as “when there are multiple sources of pollution and where a joint effort is required to develop and implement solutions” and/or existing “plans or programs are not being effectively implemented” and there is “community concern” about the problem.<sup>174</sup>

Any person or government body interested in resolving such environmental issues can voluntarily commence an NEIP. These persons must first identify a government sponsor, such as a local government.<sup>175</sup> The sponsor then assists, e.g., funding or in-kind support, the interested actors to form a collaborative group that comprises volunteers from “those groups, businesses or people contributing to the environmental problems” in the neighborhood, as well as “those concerned about it and with the responsibility to act on it.”<sup>176</sup>

The group must then consult with the neighborhood community to develop a proposal for an NEIP before submitting it to the VEPA. According to the relevant guidelines “by the time a Neighborhood EIP proposal is submitted to EPA, the key partners must be identified, and a process for ensuring full community consultation and engagement established.”<sup>177</sup> If the proposal is approved by the VEPA, the group is then to develop a plan of action, again in consultation with the neighborhood community. This plan should contain performance targets and milestones

for improving the local environmental issues.<sup>178</sup> Parties, including the sponsor and the VEPA, also commit to perform certain actions and activities to achieve the agreed objectives. If the VEPA approves the plan, the group is then responsible for implementing the plan, which includes either identifying and obtaining external funding or utilizing their own resources for implementation.<sup>179</sup>

While the NEIP’s approach has been hailed as a “bold and imaginative experiment” in Australia,<sup>180</sup> it also shares similarities with international NEG experiments.<sup>181</sup> Not least, the NEIP’s have been likened to the now-defunct NEG experiment of Community-Based Environmental Protection (CBEP)<sup>182</sup> that was developed by the U.S. Environmental Protection Agency (U.S. EPA).<sup>183</sup> Both programs were place-based approaches that encouraged collaboration between local community stakeholders to address complex and cross-media environmental problems. Furthermore, like the CBEP, the NEIP program aims to achieve a form of “top down support for bottom up community initiatives.”<sup>184</sup> However, in contrast to the NEIP program, the CBEP was not formally enshrined in legislation, nor was it a specific U.S. EPA program. Rather, the CBEP formed a part of U.S. EPA’s strategic plan and aimed to incorporate the CBEP into all U.S. EPA programs to “change . . . how the Agency does business.”<sup>185</sup>

171. Hon. Sherry Garbutt, *Environment Protection (Liveable Neighbourhoods) Bill 2000: Second Reading*, 2000 VICT. LEGIS. ASSEMBLY HANSARD EXTRACT 1457, 1459 (Nov. 11, 2000).

172. VICT. ENVTL. PROT. AUTH., PUBL’N NO. 846, NEIGHBORHOOD ENVIRONMENT IMPROVEMENT PLANS—DEVELOPING A VOLUNTARY PROPOSAL 8 (2002) (pointing out, “Each Neighbourhood EIP will be comprised of different partners.” Suggested partners include individuals and households, social groups and services, local businesses, industry and business organizations, local green groups, state and local government agencies, green peak bodies, professional associations, and financial institutions).

173. VICT. ENVTL. PROT. AUTH., PUBL’N NO. 913, CORPORATE PLAN 2003-2005, at 7 (2003).

174. VICT. ENVTL. PROT. AUTH., *supra* note 172, at 2-4.

175. 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.); VICT. ENVTL. PROT. AUTH., *supra* note 172, at 7-8.

176. VICT. ENVTL. PROT. AUTH., *supra* note 172, at 8.

177. *Id.* at 8-9.

178. The proposal and a plan document must meet a number of requirements including: the community and a government “sponsor” drawing a “neighbourhood 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 and community groups, and government agencies; establishing a steering committee made-up of key partners; and determining a “vision” for it; determining how the vision may be achieved through the efforts of the whole community; 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. *Id.* at 1-6; Environment Protection Act, 1970, §§19AD, 19AE, 19AH, 19AI(3) (Vict.).

179. VICT. ENVTL. PROT. AUTH., *supra* note 172, at 9; Environment Protection Act, 1970, §19AI (Vict.); Holley, *supra* note 29, at 173-74.

180. Gunningham, Holley, & Shearing, *supra* note 169, at 125.

181. The NEIP also shares similarities with “civic environmentalism” identified by John and others in the United States. For example, both the NEIP and John emphasize ideas of “sponsors,” and both civic environmentalism and the NEIP emphasize more bottom-up efforts that embraced community capacity to govern local second-generation environmental problems. See John & Mlay, *supra* note 114, at 361.

182. This has since been replaced by Community Action for a Renewed Environment (CARE). See U.S. EPA, Community Action for a Renewed Environment (CARE), <http://www.epa.gov/care/> (last visited May 20, 2010).

183. See Holley, *supra* note 29, at 174.

184. *Id.*; John & Mlay, *supra* note 114, at 361.

185. U.S. EPA, EPA’S FRAMEWORK FOR COMMUNITY-BASED ENVIRONMENTAL PROTECTION 9 (1999); see generally U.S. EPA, EPA STRATEGIC PLAN 83-85 (1997) (noting that the CBEP was a “key cross-agency program”); U.S. EPA, THE NEW GENERATION OF ENVIRONMENTAL PROTECTION: A SUMMARY OF EPA’S FIVE-YEAR STRATEGIC PLAN (1994); Holley, *supra* note 29, at 174; John & Mlay, *supra* note 114, at 361-62; Nickelsburg, *supra* note 45, at 1372-73, 1375-77; Paul S. Weiland & Robert O. Vos, *Reforming EPA’s Organizational Structure: Establishing an Adaptable Agency Through Eco-Regions*, 42 NAT. RESOURCES J. 91, 123-24 (2002).

### 3. The EIPs

The third and final case study examined in this Article—the EIP—involves far fewer potential stakeholders than the NEIP or the RNRM and is the only case to focus on point source pollution problems from a single industry site.<sup>186</sup> The EIP was introduced into the Environment Protection Act in the late 1980s and, like the NEIP, was also pioneered by the VEPA.<sup>187</sup> One VEPA guideline describes an EIP as:

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 . . . developing an EIP is a dynamic process and putting the plan together requires effective collaboration with all those involved. Once a plan has been completed it requires ongoing monitoring by the local community and regulatory agencies.<sup>188</sup>

Central to the EIP's goal of improving the environmental performance of industrial enterprises (including getting them to extend beyond compliance with legal requirements) is effective collaboration.<sup>189</sup> The EIP aspires to utilize collaboration in a variety of situations, such as where there is community concern about an industry's environmental impacts, and traditional regulatory tools have proven inadequate at resolving the problem. As the guidelines illustrate, this often occurs at a local scale near the industry site, where "industries or housing have been allowed to develop too close together, causing amenity problems for nearby residents."<sup>190</sup>

To achieve the above goals, a number of different EIPs have been developed over the program's life-span.<sup>191</sup> The oldest, often referred to as a "Section 31C" EIP, falls under the Environment Protection Act, and effectively empowers the VEPA to compel industries to develop and implement an EIP.<sup>192</sup>

A second and far more common form of EIP is voluntary in nature. The large majority of these voluntary EIPs are not specifically authorized under statute.<sup>193</sup> Rather,

legislative approval for these 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>194</sup> Pursuant to this authority, the VEPA encourages "good" environmental performers to volunteer as participants in an EIP, in part on the basis that the EIPs can assist these industries to maintain or improve their relationship with local stakeholders potentially affected by industries' operations or future site expansions.<sup>195</sup> Notably, the VEPA has also found it beneficial to "persuade" a number of poorer performing laggards to participate in this form of EIP using various "regulatory incentives."<sup>196</sup> These incentives are discussed in more detail below.

In practice, when an EIP is commenced by an industry, the VEPA recommends that the process should be designed to include "substantial community involvement."<sup>197</sup> Although the form and extent of this community involvement can vary between individual EIPs,<sup>198</sup> most EIPs involve the formation of a collaborative group consisting of approximately two to three industry representatives, local and state government representatives, two to three representatives of interested groups, such as NGOs, and five to six volunteer residents.<sup>199</sup>

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 management system and to put an EIP in place. *See* Environment Protection Act, 1970, §§26A-26E (Vict.); VICT. ENVTL. PROT. AUTH., PUBL'N No. 424.4, ACCREDITED LICENSEE SYSTEM—GUIDELINES FOR APPLICANTS (2009).

194. *See, e.g.*, Environment Protection Act, 1970, §1K (Vict.); VICT. ENVTL. PROT. AUTH., PUBL'N No. 384.3, ENFORCEMENT POLICY 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"); Holley, *supra* note 29, at 153.

195. VICT. ENVTL. PROT. AUTH., *supra* note 188, at 1, noting: EIPs are a reflection of community right to know. The process of consultation in developing an EIP, if done well, provides for an openness between the various parties that might otherwise be very difficult to achieve. It can also lead to greater mutual understanding and resolution of concerns . . . [F]ormerly hostile communities have become much more supportive of local industry. This has led to little if any delays with plant upgrades or further developments.

196. *See also* GUNNINGHAM & SINCLAIR, *supra* note 8, at 163; Holley & Gunningham, *supra* note 186, at 453.

197. VICT. ENVTL. PROT. AUTH., *supra* note 189, at 10; *see* VICT. ENVTL. PROT. AUTH., *supra* note 188, at 2.

198. The statutory requirements and EIP guidelines recognize (implicitly and explicitly) that involving community stakeholders in the EIP process may be impractical where there are no community members or nongovernment 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 the 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.*, Holley & Gunningham, *supra* note 186, at 454; Wills & Fritschy, *supra* note 130, 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").

199. VICT. ENVTL. PROT. AUTH., PUBL'N No. 740, GUIDELINES FOR RUNNING COMMUNITY LIAISON COMMITTEES 2-3 (2001).

186. 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. For such an examination of the EIP, see Cameron Holley & Neil Gunningham, *Environment Improvement Plans: Facilitative Regulation in Practice*, 23 ENVTL. & PLAN. L.J. 448 (2006).

187. *See* Environment Protection Act, 1970, §31C (Vict.).

188. VICT. ENVTL. PROT. AUTH., PUBL'N No. 938, ENVIRONMENT IMPROVEMENT PLANS—AN OVERVIEW 1 (2004).

189. *Id.* at 1, 7; VICT. ENVTL. PROT. AUTH., PUBL'N No. 739, GUIDELINES FOR THE PREPARATION OF ENVIRONMENT IMPROVEMENT PLANS 2, 10 (2002).

190. VICT. ENVTL. PROT. AUTH., *supra* note 188, at 1.

191. *See* Holley & Gunningham, *supra* note 186, at 453 (discussing the different types of EIPs).

192. This is achieved through a convoluted mechanism that involves "declaring" a particular highly polluting industry sector to be subject to section 31C and then offering individual enterprises within it the "option" of entering an EIP as a more palatable alternative to a mandatory environmental audit. *See id.* Environment Protection Act, 1970, §31C (Vict.).

193. Although not discussed in detail in this Article, a less common form of voluntary EIP is entered into by industry pursuant to §26B of the Environment Protection Act. This type of EIP forms a part of an Accredited Licensee scheme, which is targeted at "leading" environmental performers

These members develop a plan that sets out objectives and actions to manage industry's overall environmental performance.<sup>200</sup> While in the RNRM and the NEIP all collaborators, including government, have a role in implementing or funding activities, it is only industry that implements the EIP plan, while the other stakeholders monitor and police the industry's performance.<sup>201</sup>

NEG scholars reviewing the EIP's collaborative approach have compared it to a number of international NEG experiments, including Project XL in the United States, and environmental agreements and covenants in Europe.<sup>202</sup> In an approach that is similar to the EIP, these NEG examples have focused on encouraging leading or "good" performers to voluntarily aspire to go beyond compliance. However, it is worthy of note that the EIP is one of few NEG approaches to focus on improving the environmental performance of both the best and the worst industries (discussed further below).<sup>203</sup>

### B. Examining the Cases' Legal Design—Features That Support the Formation of Collaboration

As we have seen, all three cases aspire to foster collaboration as a means to resolve particular environmental and natural resource problems. Inherently, they share an assumption that there are attractions and benefits to be gained by actors coming together to cooperate.<sup>204</sup> However, for many actors, such benefits may not outweigh their short-term economic interests. Furthermore, the transaction costs of organizing and negotiating the various plans and associated documents are likely to be high. In all three cases, it is expected that actors with divergent interests will voluntarily form a group and engage in time-consuming negotiation, consultation, and information exchange to agree on objectives and actions in a plan that improves environmental issues.<sup>205</sup> The guidelines across all three cases suggest these respective planning processes will likely take between one and three years, a lengthy and costly period for paid government or

industry stakeholders, let alone nongovernment volunteers.<sup>206</sup> In the absence of any external support or other institutional mechanisms, such costs might be expected to block many, if not all, EIPs, NEIPs, and RNRMs from even getting off the ground.<sup>207</sup>

However, as we saw in Part I above, a host of theories reveal that such barriers to cooperation are neither inevitable nor necessarily fatal. The astute policy designers of the three programs appear to have been mindful of some of these conditions thought likely to increase the chances of successful collaboration, at least in broad terms. For example, akin to insights provided by Ostrom's work, the cases' designers aim to provide relative autonomy for local stakeholders by creating a space for people and associated organizations to initiate and/or participate in collaborative decisionmaking.<sup>208</sup> As we saw above, the cases were also broadly designed with an intention to address severe (or perceived to be severe) environmental and natural resource issues that traditional regulatory and NRM approaches have been unable to resolve, and for which many stakeholders have an established concern.

The architects of the three programs also appear to have been sympathetic to widespread claims on the benefits of trust to achieving successful collaboration. Indeed, each case implicitly or explicitly accepts that mistrust between stakeholders will be rife and, accordingly, all have been designed to involve a range of negotiation, mediation, and facilitation processes in collaborative meetings and consultations.<sup>209</sup> The broad intention appears to be that these processes, and the opportunities they afford for assisting parties to show respect, contribute their fair share and iteratively demonstrate reciprocity,<sup>210</sup> will ultimately "build trust"<sup>211</sup> and assist in "resolving conflict"<sup>212</sup> among stakeholders in the development of their plans, or other outputs.<sup>213</sup>

The cases have also been designed mindful of other conditions, including creating incentives and designing

200. Plans will generally include: undertakings to comply (or even go beyond compliance) with licenses and regulations; emission and waste production standards; monitoring of compliance; audits and assessments; improvement project details including what needs to be done, how it will be done, and by when; provision for upgrading of plant; assessment of new and emerging technology; emergency and contingency plans; enhanced response to community complaints; community relations, health and safety issues; and community reporting requirements on progress. VICT. ENVTL. PROT. AUTH., *supra* note 188, at 2.

201. VICT. ENVTL. PROT. AUTH., *supra* note 189, at 1.

202. See Holley, *supra* note 29, at 152; Karkkainen, *supra* note 7, at 293-94 (classifying the EIP as an example of environmental contracting). For examples of European environmental performance agreements, see Adrienne Héritier, *New Modes of Governance in Europe: Policy Making Without Legislating?*, 81 IHS POL. SCI. SERIES 1, 13-14 (2002); Eric Orts & Kurt Deketelaere, *Introduction: Environmental Contracts and Regulatory Innovation*, in ENVIRONMENTAL CONTRACTS, *supra* note 34, at 1, 5. Elements of the EIP process also mirror a range of environmental management systems. See, e.g., Holley & Gunningham, *supra* note 186. The EIP also shares similarities with the Wisconsin Green Tier Initiative. See Wisconsin Department of Natural Resources, Green Tier, <http://dnr.wi.gov/org/caer/cea/environmental/> (last visited Apr. 7, 2010).

203. GUNNINGHAM & SINCLAIR, *supra* note 8, at 158; Holley, *supra* note 29, at 152.

204. Raymond, *supra* note 46, at 39.

205. Similar expectations can be found in a range of NEG initiatives. See, e.g., Margerum, *supra* note 36, at 137.

206. See Bilateral Agreement NHT, *supra* note 152, Attachment E, at 65 (pointing out that most plans are expected to be substantially completed within one to three years of signing bilateral agreements); VICT. ENVTL. PROT. AUTH., *supra* note 188, at 2 (pointing out: "Most EIPs generally take about 12 months to complete."); VICT. ENVTL. PROT. AUTH., *supra* note 172, at 9 (noting an expectation that plan development will take "two years").

207. Raymond, *supra* note 46, at 39.

208. Olsson et al., *supra* note 88, at 84; Schlager, *supra* note 54, at 152.

209. See Bilateral Agreement NHT, *supra* note 152, §121 & Attachment E, at 62-63; COAG, *supra* note 143, at 10; COMMONWEALTH GOV'T & QUEENSL. GOV'T, GUIDELINES FOR COMMUNITY ENGAGEMENT BY RNRM BODIES 4-5 (2004), available at [http://www.regionalnrm.qld.gov.au/policies\\_plans\\_legislation/planning\\_guidance\\_docs/community\\_engagement.pdf](http://www.regionalnrm.qld.gov.au/policies_plans_legislation/planning_guidance_docs/community_engagement.pdf); VICT. ENVTL. PROT. AUTH., *supra* note 199, at 4; VICT. ENVTL. PROT. AUTH., *supra* note 172, at 3, 4.

210. See, e.g., Kahan, *supra* note 101, at 71, 88-89.

211. As the EIP guidelines point out, the intent is for the first meeting(s) to be used to "build up trust" involving "skillfully chaired" negotiations assisted by VEPA officers as brokers between the sides. See VICT. ENVTL. PROT. AUTH., *supra* note 188, at 1, 2, 3-6; VICT. ENVTL. PROT. AUTH., *supra* note 189, at 1, 2, 7; VICT. ENVTL. PROT. AUTH., *supra* note 199, at 1, 2, 4, 5. Similarly, the NEIP process is intended to achieve "better relationships . . . friendships, and social networks." VICT. ENVTL. PROT. AUTH., *supra* note 172, at 5-6.

212. Bilateral Agreement NHT, *supra* note 152, Attachment E, at 57.

213. Raymond, *supra* note 46, at 42.



support structures to reduce transaction costs.<sup>214</sup> As discussed below, the cases give different weight to these conditions, and each program applies them in different ways.

Central to the institutional design of both the EIP and the RNRM, for example, is the provision of incentives to overcome transaction costs.<sup>215</sup> In the RNRM, dedicated funding that is given to regional bodies to support their organization, pay rent, hire staff, and take action on natural resource issues may act as an important incentive for interested actors to volunteer to collaborate on regional bodies. In the EIPs, **negative incentives are utilized to encourage industry collaboration.** For example, the EIP can draw on local community pressure, e.g., local protests or media to threaten an industry's "social license," as a spur to bring industry to the table to engage in affirmative collaboration. This pressure could also include local citizens and groups bringing more formal forms of legal pressure on enterprises, such as lodging formal complaints or using citizen's rights at general law to object to developments.<sup>216</sup>

Broadly akin to a penalty default rule,<sup>217</sup> the VEPA's conventional regulatory powers to license and regulate industry<sup>218</sup> may also be used to directly or tacitly persuade industry to participate in an EIP. This includes threats of more stringent and costly license conditions, potential prosecution, and even the application of a Section 31C EIP.<sup>219</sup> As may be apparent, both Section 31C of the Environment Protection Act and the VEPA's licensing powers allow them to impose an EIP directly on an industry. However, as we will see below in the findings, the "arm-twisting" strategy appears to be the more favored approach of the VEPA.<sup>220</sup>

In contrast to the EIP and the RNRM cases, the NEIP has not been designed to expressly invoke any incentives. Indeed, the NEIP lacks any underpinning of regulatory rules that could be used as a credible threat to induce cooperation from reluctant parties.<sup>221</sup> Rather, the twofold assumption appears to be that: (1) potential partners who are interested, concerned, or who have responsibility for environmental issues will voluntarily participate in the proposal and sign on to perform works under the plan; and/or (2) community, sponsor, and partners have sufficient skills and leverage themselves to encourage participation from potential partners (such as identifying external sources of funding to

provide necessary incentives to bring parties to the table).<sup>222</sup> Whether these assumptions are sufficiently sound to successfully achieve the objective of voluntary collaboration is called into question by the findings detailed below.<sup>223</sup>

Regardless of whether the cases utilize incentives or not, all three programs have been designed to reduce transaction costs by providing government support, such as officer assistance from program organizers, e.g., information about regulatory standards or assisting in negotiations.<sup>224</sup>

While the EIP does not provide any specific funding to reduce transaction costs (unlike the NEIP and the RNRM discussed below), it has been designed to ensure the "better-resourced" industry partner provides in-kind support to the collaborative group. Indeed, most financial costs associated with meeting rooms, negotiators, minute-taking, and drafting the EIP plan are to be covered by industry, either voluntarily or as a result of "incentives," such as VEPA "arm-twisting."<sup>225</sup>

Unlike the EIP, both the NEIP<sup>226</sup> and the RNRM programs<sup>227</sup> provide additional government grants and funding for collaborators to assist with administration and organization tasks. This additional funding is understandable, given that they both focus on relatively large neighborhood catchment and regional ecosystem scales, and seek to include a wider range of heterogeneous actors.

Notably, the RNRM's unique nested collaborative design may also act to reduce transaction costs. For example, the structured collaborative forums of the multiagency, state-level JSC would ideally reduce the time that would otherwise have been spent by individual agencies consulting each other and individual regions about issues and actions.<sup>228</sup> In addition, if collaborative regional bodies are able to engage representatives from multiple local groups already operating at subregional levels, a regional body may be able to simultaneously harness these groups' resources at multiple local levels to reduce the overall costs and time of the body collaborating across the region as a whole.<sup>229</sup>

214. There are, of course, a number of other factors that may play an important role here; however, for present purposes, these strategies are the most pertinent and significant in each case as they relate to points of interest in the NEG literature. Further, responses by respondents interviewed for this research discussed below confirmed that these factors were some of the most relevant matters for fostering the emergence of successful collaboration across the cases.

215. See Karkkainen, *supra* note 49, at 966; Karkkainen, *supra* note 34, at 229.

216. VICT. ENVTL. PROT. AUTH., *supra* note 188, at 1. See GUNNINGHAM & SINCLAIR, *supra* note 8, at 163; Karkkainen, *supra* note 7, at 296; Karkkainen, *supra* note 49, at 989-90.

217. See Karkkainen, *supra* note 7, at 296, 298, 321; Karkkainen, *supra* note 34, at 241; Karkkainen, *supra* note 49, at 944.

218. See, e.g., Environment Protection Act, 1970, §20 (Vict.).

219. GUNNINGHAM & SINCLAIR, *supra* note 8, at 162.

220. As discussed elsewhere, this is largely because, where practicable, persuasion (albeit in "the shadow of the law") can be a less costly and inconvenient path to achieving the same ends. See Holley & Gunningham, *supra* note 186.

221. As one VEPA respondent plainly put it: "Actually there's no penalties in the Act for not participating in it." Interview 237, EPA.

222. VICT. ENVTL. PROT. AUTH., *supra* note 172, at 8-9.

223. Gunningham et al., *supra* note 169, at 133-34.

224. See Bilateral Agreement NHT, *supra* note 152, §§40-42, 83, 101; VICT. ENVTL. PROT. AUTH., *supra* note 188, at 1, 3, 5; VICT. ENVTL. PROT. AUTH., *supra* note 189, at 10. The NEIP in particular has also been designed to harness local government (or some other appropriate government agency) as a "sponsor" who may reduce costs by providing or obtaining resources to support group operation. VICT. ENVTL. PROT. AUTH., *supra* note 172, at 1-5, 7-10.

225. VICT. ENVTL. PROT. AUTH., *supra* note 188, at 2; see VICT. ENVTL. PROT. AUTH., *supra* note 199, at 5.

226. The precise amount of funding is unspecified, but in practice, it appears to fall somewhere between \$10,000 and \$30,000.

227. The support provided in the RNRM program included a small rebate for regional body collaborators (for example, covering the costs of time and travel); in practice, this appears generally to range from \$1,000 to \$5,000 dollars per annum. The regional body could also apply for so-called foundational project funding to support the process of establishing regional bodies, consultation, and drafting the plan. Further, the body would receive around \$400,000 in core funding to support its ongoing collaborative operations and organization. See Bilateral Agreement NHT, *supra* note 152, §95; Implementation Agreement NAP, *supra* note 151, §§9, 24; Interim Financial Agreement Between the Commonwealth of Australia and the State of Queensland to Deliver the Natural Heritage Trust Extension in Queensland §51 (2003); Farrelly, *supra* note 112, at 396.

228. See Margerum, *supra* note 36, at 144.

229. See Bonnell & Koontz, *supra* note 108, at 161, 163.

Local-level groups may also gain from such a “nested” arrangement, because the regional body would potentially allow them to interact with each other and with agencies in a more structured single forum, rather than each acting alone or seeking agency advice in ad-hoc manner.<sup>230</sup>

### C. Summary

To conclude this overview of the case studies, we have seen that the three cases each pursue collaborative processes where different interests voluntarily form a group and engage in negotiation and consultation to develop, and then subsequently implement, a plan to improve environmental and natural resources issues. The precise form of this collaboration across the cases does, however, vary, ranging from the EIP’s small group of localized nongovernment actors, the VEPA, and industry; to the NEIP’s medium-size multiagency and multistakeholder neighborhood group; all the way to the much more complex, nested model of the RNRM.

Further, while all three cases appear to anticipate a number of recognized barriers to collaboration, they often deal with these problems in slightly different ways. The EIP and the RNRM, for example, harness negative regulatory and positive economic incentives, respectively, to compel reluctant actors to collaborate. In contrast, the NEIP has been designed without either incentive. All three cases also provide government officer assistance and seek to build trust among parties to make cooperation easier, but each pursues different ways of reducing transaction costs, including the EIP’s harnessing of industry’s resources, the NEIP’s government grants, and the RNRM’s government funding and nested institutional design. As outlined in Part I above, some of these arrangements remain contentious, and the findings section below examines how these issues played out in practice.

## IV. Findings—The Emergence of Collaboration in Practice

This section examines in detail whether and to what extent the cases were able to foster the emergence of successful collaboration in practice. Success here is gauged using respondents’ opinions and an analysis of data regarding whether the collaboration included relevant stakeholders, and whether these stakeholders were able to combine their capacity, resources, and knowledge to develop a plan that contained significant objectives and commitments toward improving the environmental problem(s).<sup>231</sup>

### A. EIP—Successful Collaboration Without Trust

The VEPA is responsible for over 1,000 licenses in the state of Victoria, relatively few of which have embraced the

collaborative approach embodied in the EIP.<sup>232</sup> Over the 20-odd years the EIP program has been in operation, the total number of EIPs has grown, but there are today only about 70 that were operational or being negotiated at the time of writing, some 7% of total licenses.<sup>233</sup> Even though these are a relatively small proportion of the total licensed population, these collaborations demonstrate that some stakeholders and industries have been able to overcome barriers to cooperation and to address environmental challenges in a collaborative manner.<sup>234</sup>

Based on the analysis of the sub-cases, the main route to collaboration was blazed by good and poor industry performers.<sup>235</sup> These sub-cases were successful in overcoming collective action barriers; yet contrary to conventional wisdom (and much of the literature) this was achieved *without* building trust.

The initial catalyst to these collaborations was the occurrence of severe environmental problems (or at least problems perceived to be severe by residents whose amenity and/or health was affected). The story for both good and poor performers was a familiar one: most industries had quite severe noise, odor, amenity, or other pollution impacts on local residents. Residents’ attempts to approach industry were often stonewalled, while their complaints to the VEPA and/or local government typically engendered cumbersome, slow and/or ineffective responses.<sup>236</sup> The primary challenge here was getting industry to come to the table to collaborate and agree to change their behavior.

“Good” performing industries generally maintained better performance records under their VEPA license, e.g., infrequent license violations. However, they often had immediately local pollution impacts, such as noise, odor, or other amenity issue impacting on properties typically adjacent to the industry site or within the surrounding

232. Estimate of total licenses based on most recent published figures of VEPA license numbers. See VICT. ENVTL. PROT. AUTH., PUBL’N NO. 919, ANNUAL REPORT 2002-2003: COMPLIANCE REPORT 2 (2003); Raymond, *supra* note 46, at 45.

233. The only available statistics on the growth of EIPs was between the period of 1997/1998 to 2001/2002, which annually grew as follows: 31 (1997/1998), 35 (1998/1999), 36 (1999/2000), 50 (2000/2001), 54 (2001/2002). Since this time, they have risen to approximately 70 (based on statistics obtained from VEPA interviews). VICT. ENVTL. PROT. AUTH., *supra* note 232, at 2.

234. For similar discussions regarding HCPs, see Raymond, *supra* note 46, at 45.

235. A second route was followed by a minority of sub-cases that involved “leading” industries who had pursued an EIP to gain an Accredited License (AL). For further on these types of EIPs, see *supra* note 193. Based on the findings, these sub-cases were less successful in engaging stakeholders. This was because the AL program was aimed at leading industries—the best of the best. Understandably, these industries had only a minimal impact on local environment and had thus somewhat incongruously pursued collaboration in situations where local environmental problems lacked any real severity to generate stakeholder benefits from collaborating. While they had achieved agreement among a few local parties that had collaborated regarding some very minor local problems, the overall utility of this collaboration in terms of contributing to the production of an effective plan appeared to be minimal. Indeed, the plan that was produced largely reiterated existing industry targets, projects, and priorities for both local and broader issues that industry was already committed to under preexisting environmental management systems. For a further discussion on these issues, see GUNNINGHAM & SINCLAIR, *supra* note 8, at 171-74; Holley & Gunningham, *supra* note 186.

236. Interview 182, Local Resident (noting “the EPA are tied down with the bureaucracy and the time it takes to take odor samples and get them tested and come back months had gone past”).

230. Margerum, *supra* note 36, at 144-46.

231. These criteria were based on criteria raised in the literature. See GRAY, *supra* note 44, at 10; Head, *supra* note 24, at 148; Karkkainen, *supra* note 34, at 240; Varughese & Ostrom, *supra* note 62, at 752.

suburb. These impacts were problematic for local resident and/nongovernmental groups but were often within license requirements, or were so infrequent that the VEPA did not see it as a worthwhile use of resources to take serious action to address the problem. Notably, these “good” industries tended to be particularly sensitive to their public image and brand name. Unsurprisingly, when frustrated local stakeholders began drumming up bad publicity in the local media,<sup>237</sup> or using their rights at law to oppose industry expansion,<sup>238</sup> the enterprise saw this assault on their social, economic, and/or regulatory viability as an unacceptable cost and accordingly came to the table.<sup>239</sup> As one VEPA respondent succinctly put it: “Bad publicity is the turning point for a lot of these industry changes.”<sup>240</sup>

“Poor” performing industries often had persistent impacts on local residents that were serious or outright breaches of their license. While community pressure emerged, this was typically not enough to tip the cost-benefit equation of these less reputation-conscious industries. Amid the community furor, and after repeated VEPA investigations and notices, the VEPA ratcheted up regulatory threats, warning industry that harsher license conditions, Section 31C EIPs, audits, and prosecutions could be imposed.<sup>241</sup> The costs and consequences of these threats were sufficient to motivate most poor performers to engage in the collaborative process. As one VEPA officer generalized: “There is still that arm-twisting in the background. The classic one would be: ‘right, if you don’t agree with this we’ll just put it in your licence.’ So there’s the easy way or the hard way.”<sup>242</sup>

However, it is worthy of note that such arm-twisting was insufficient for a few industries where management and owners were largely antagonistic to good environmental practice.<sup>243</sup> Instead, the VEPA had to break out the handcuffs and force industry to collaborate. This direct compulsion at law has included the only use of the VEPA’s Section 31C

power,<sup>244</sup> as well as a court order,<sup>245</sup> and inserting an EIP as a condition of industry’s regulatory license. As one VEPA officer explained:

when it was just voluntary nothing happened . . . since the inclusion of the [license] condition the industry is now getting somewhere. Before it was just “coming, going, crying, fighting”—nothing was getting done! Now it’s getting documented, the company attitude is better now.<sup>246</sup>

Having successfully brought industry to the table using the above incentives and/or direct force, there was unsurprisingly little trouble generating interest from already incensed local stakeholders. While there were no firm demographics on who or how many people were affected by a specific industry’s pollution, respondents’ estimates on the affected group size ranged from no more than 10 households, to much higher numbers (in the hundreds) from sub-cases in more populated suburbs: “people would turn up and were very irate, you know like you’d get 70 people at a meeting.”<sup>247</sup> These stakeholders coalesced into groups of around 20 people or less. While these stakeholders were not representative and inclusive of all interests in a democratic sense,<sup>248</sup> they nevertheless achieved considerable success in engaging the desired mix of the main affected interests, including: six to 12 residents (and local environmental groups where they were present in the local area), one to five industry representatives, one to three local governments, and one to four government agencies.<sup>249</sup>

After overcoming the initial difficulties of bringing stakeholders together, the next stage of the journey was rising to the challenge of developing a plan. As we will see, this process involved a number of steps including arranging support processes and trying to build trust.

With few exceptions, it was reported across all sub-cases that the EIP design provided adequate support to reduce the costs of those involved in collaboration. The small size of the affected area (typically a few square kilometers)<sup>250</sup>

237. Interview 121, EPA (explaining that it was not until an environmental group “turned up the heat” through a negative publicity campaign that the industry deemed the costs (and thus associated benefits) as sufficiently high to begin to collaborate).

238. Interview 15/62, Local Resident (stating: “We opposed absolutely every application they made . . . we basically said, ‘look you’re wasting your money, you know, you’re moving, we don’t want you here.’”).

239. In some sub-cases, industries—alerted to the unrest in the local area—initially undertook to consult with the local community before ultimately turning to an EIP.

240. Interview 121, EPA.

241. Interview 181, EPA (pointing out “[o]f course in other times we have to really, by force or threaten to add license conditions to ask them to improve their performance”); Interview 161, Industry (the “EPA really on your case . . . saying we’re not sure that you should have a license to operate”).

242. Interview 121, EPA.

243. See GUNNINGHAM & SINCLAIR, *supra* note 8, at 162-63 (drawing similar conclusions).

244. Interview 121, EPA (stating that the VEPA had sent “the fax off to [industry]. It was faxes in those days: ‘We are gazetting you [under section 31C]’. We just imagined the guy turning pink and purple and every other colour, because he wasn’t—they were just in denial and quite awful denial . . . in the end we got to a point where you know, they were ‘you give me the shits but I can see what you’re saying’ . . . we then all wrote the EIP [local resident, the VEP, and industry] and that was the nature of that particular situation. It worked.”). See GUNNINGHAM & SINCLAIR, *supra* note 8, at 162-63.

245. In sub-case 8, after continuing odor pollution by the industry, the VEPA reportedly “saw red.” They prosecuted industry for a breach of license and pollution offenses. The court order ultimately placed the company on a good behavior bond, a condition of which was to develop an Environment Improvement Plan in consultation with the local community. Interview 184, Industry.

246. Interview 171, EPA.

247. Interview 184, Industry.

248. Interview 161, Industry (pointing out “they [community members on the CLC] are not representing anybody . . . they’re a cross section and they give us six different viewpoints as opposed to representing some community group. They keep pointing that out—we’re not community representatives, we’re representatives from the community.”).

249. Other interests that participated in a minority of cases included community groups and other collaborative government bodies, such as catchment management authorities.

250. There was no firm or detailed statistics on the size of the affected area; however, it was usual for those affected to be adjacent to or living in the blocks surrounding the industry site. In one sub-case, there were reports of odor infrequently travelling across multiple suburbs.

usually kept travel costs down for residents. VEPA officer support also provided useful assistance with communication between stakeholders.<sup>251</sup> Perhaps most importantly, the looming “shadow of the law” (and indeed the threat of social pressure from local residents or “the legal handcuffs”) was reportedly effective at not only bringing industry to the table, but forcing them to take action and cover the principal collaborative costs:

the EPA would say to [Industry], “you need to get an independent person and you need to pay for it, you need to have an independent location for the meetings and you need to pay for it, and by the way if the meeting is on at 6 o'clock at night and people are coming straight from work maybe you should put a bit of supper on”...and they did.<sup>252</sup>

The abovementioned support was vital during lengthy negotiations, which usually occurred over one, or even sometimes two years. The historically adversarial behavior of parties meant there was typically a high degree of mistrust and animosity between most collaborators. Indeed, despite repeated meetings and negotiations, such high degrees of mistrust were rarely broken down: “shouting and screaming,”<sup>253</sup> “a lot of anger,” and accusations of “lying” remained common.<sup>254</sup> Local residents evidenced minimal trust in the VEPA or local government, not least because of their ineffectualness at resolving the initial environmental problems.<sup>255</sup> Industries also naturally remained wary of the regulator.<sup>256</sup> Furthermore, industries tended to reveal only the bare minimum of information, ensuring they were “tight-lipped”<sup>257</sup> in response to a mistrusting community. As one respondent explained:

the residents argued over every step of the way . . . because the relationship was so poor that nobody trusted each other. They argued over every single word. They spent hundreds and hundreds of hours drafting this document.<sup>258</sup>

As this quote suggests, the failure to significantly improve trust and reciprocity augmented the transaction costs of negotiating, and lengthened the time it took to draft a plan.<sup>259</sup> However, such lack of trust was not fatal to the process, as the high benefits to be gained by local stakeholders and the

background pressure on industry were sufficient incentives to keep these key parties at the table.<sup>260</sup> It was indeed extremely rare for people to disengage during plan development due to excessive transactions costs.<sup>261</sup>

After these lengthy negotiations, the parties ultimately agreed to a plan. Here, pressure from community, VEPA, and/or industry's own internal management programs ensured they had agreed to address a full gamut of relevant and challenging issues. For both “poor” and “good” performers, these included often large-scale commitments to address the highly controversial impacts of industry on local suburbs (such as \$80 million plant upgrades to reduce dust or noise). Further, some EIPs (primarily those involving “good” performers) also addressed more complex issues that were sometimes less important to local stakeholders but important to industry and the VEPA. These included targets and actions to reduce water consumption by 29%, solid waste to landfills by 30%, prescribed waste by 15%, and GHG emissions by 35%.

Ultimately, respondents suggested the collaboration had “really added value”<sup>262</sup> and the plan for action had allowed them to “take some steps”<sup>263</sup> likely to contribute to improving the environmental performance of industry. As one industry respondent summed up: “I think it's pretty good—it's not efficient and it's not conflict free, but it's a good working group that has actually achieved a lot.”<sup>264</sup>

Evidence elsewhere suggests the initial success of these collaborative processes has been largely maintained over time.<sup>265</sup> Indeed, the EIP collaborations reportedly achieved substantial success during the implementation and monitoring of their initial plans, including a range of environmental improvements in the local area, e.g., odor, noise, and dust reductions, and in some cases, achievements on broader environmental issues, e.g., reducing GHG emissions.<sup>266</sup> While the success of the EIP in dealing with environmental laggards has been more qualified than in dealing with good performers (with research suggesting that outcomes on broader environmental issues were less likely),

251. Interview 111, Industry (stating “EPA helped in the earlier period regarding the [formation of the EIP group].”); Interview 181, EPA (“So we certainly work with the company, but it's generally as a first point of contact.”).

252. Interview 182, Community.

253. Interview 112, Community.

254. Interview 162, Community (stating “I didn't believe them for years and years and years; every night, they were telling lies and some of them have admitted that they have told lies . . . they were long and tiring, difficult meetings that we all absolutely hated going to, for years really.”).

255. Interview 174, Industry (pointing out that residents believed these bodies had not “represented them to the degree that they expected”).

256. Interview 161, Industry (describing the VEPA as “police with a speed camera . . . they talk about the carrot and the stick. EPA prefers to use the carrot, but the stick is always there if they need it.”).

257. Interview 111, Industry.

258. Interview 184, Industry.

259. Interview 173, Local Resident (stating that the EIP was “a long drawn out process”); Interview 121, Industry (noting “it took a long time . . . these meetings were very acrimonious, very acrimonious”); Interview 161, Industry (reporting that “the meetings went past midnight and there was lots of screaming matches because it was borne out of dissatisfaction . . . it's been a long process”).

260. Interview 184, Industry (explaining that they felt compelled to continue to try and resolve the problem because “the EPA were just about to put our lights out . . . we really hadn't taken a lot of action until then . . . [but] that just jacked the whole thing up and obviously the community anger”).

261. Only two sub-cases reported someone leaving the group. In one case, this was due to the person's personal circumstances, rather than due to the EIP process itself. In the other, it involved an environmental group who dropped out to pursue a more adversarial approach to the environmental problem.

262. Interview 141, Industry (stating “It was a collaborative effort between [Industry] and the community . . . we are engaging with some of our harshest critics, and we are meeting with them and they come in with a big bag of rocks and they will throw them at us and sometime it's fair and sometimes it's not fair, but you know it really adds value.”).

263. Interview 173, Local Resident.

264. Interview 161, Industry.

265. Cameron Holley, *Aging Gracefully? Examining the Conditions for Sustaining Successful Collaboration in Environmental Law and Governance*, 26 ENVTL. & PLAN. L.J. 457, 470-74 (2009) (pointing to progressive success by the EIP collaborations in the medium term, including resolving local environmental issues, but noting that this very success led to a significant decline in stakeholder interest and participation over time, which posed a challenge to sustaining an effective collaboration in the long term).

266. *Id.*; Holley & Gunningham, *supra* note 186, at 457.

even here, the evidence indicates a substantial improvement on the status quo in local-level achievements.<sup>267</sup>

To conclude this discussion of the EIP case, the above analysis evidenced “cooperation without trust” that was, somewhat counter intuitively, largely successful in overcoming collective-action barriers.<sup>268</sup> The key to this achievement was the presence of a severe problem to engender stakeholders to cooperate; “negative” incentives (and even direct force of law) to compel industry to collaborate and make meaningful commitments, and, finally, adequate in-kind support from VEPA officers and industry to reduce transaction costs.

## B. The NEIP—Flawed Design?

In contrast to the EIP program, the NEIP addresses much more complex second-generation problems across a larger neighborhood area, and involving a greater number of stakeholders. Broadly consistent with collective-action theory, there have been comparatively fewer attempts at NEIPs than EIPs: only seven operational NEIP collaborations arose over the first seven years of its life, compared to 35 EIPs that were commenced over its first seven years of operation. Nevertheless, the very existence of these seven NEIP collaborative endeavors shows that at least some stakeholders have begun to overcome the barriers to collective action to address neighborhood environmental challenges in a collaborative manner.<sup>269</sup>

Based on the analysis of three of the most advanced NEIP collaborations, the path to collaboration in this program followed two distinct routes.<sup>270</sup> The first and most common route was followed by NEIP sub-cases 1 and 2 (NEIP 1 and 2) and was the least successful, largely because of a lack of regulatory or other incentives in the NEIP design. The second route to collaboration was followed by NEIP sub-case 3, which was surprisingly able to achieve far more successful collaboration, because of three conditions external to the NEIP institution: a small population size; high and direct stakes in a severe environmental problem; and external funding.

## I. NEIP Sub-Cases 1 and 2

With the introduction of the NEIP instrument in 2001, the VEPA sought to learn about its new and untested instrument by selecting NEIPs 1 and 2 as pilot cases. Not coincidentally, both these initial test cases were selected because they were believed to involve conditions favorable to collaboration, namely environmental problems perceived to be severe by local government and a number of local community groups and residents. NEIP 1 focused on the catchment of a highly degraded urban creek, which had long been used

as a drain and was polluted by diffuse sources, including pollution from multiple industries and small and medium-size enterprises (SMEs). NEIP 2 focused on the even more complex problem of developing a sustainable township in a diverse coastal environment threatened by a range of diffuse problems, including air pollution and habitat impacts from a local coal mine and power station, development pressure, and household and business resource use.

Commencing the collaborative process, the local governments that had nominated their neighborhoods as pilot cases took on the formal role of a sponsor, and committed a small amount of resources to the NEIP endeavor.<sup>271</sup> The sponsor also received short-term seed funding from the VEPA, and/or other partners.<sup>272</sup> This collective funding was primarily used by the sponsor to employ a coordinator for the two to three years that it took to develop a proposal and plan.<sup>273</sup> These coordinators were reportedly an essential means of overcoming the transaction costs associated with bringing parties together, bargaining, and keeping stakeholders connected in the average sized neighborhoods (20 square kilometers or less).<sup>274</sup>

With this coordinator support, local government and VEPA officers began engaging partners and consulting with the neighborhood by holding initial meetings, multiple public workshops and conducting surveys.<sup>275</sup> Although a degree of preexisting community concern about the environmental problems ensured relatively high participation at these meetings (between 100 and 200 people in sub-cases 1 and 2) these numbers were still relatively low compared to the populations of 11,000 and 10,000 people in the neighborhoods.<sup>276</sup> Respondents suggested this lack

271. Interview 213, Local Government (describing their decision: “We thought, yes it’s going to be difficult, it’s going to mean that we’re going to have to put in more resources . . . [but] we see NEIP is a way forward with the potential for partnerships and working together.”).

272. Approximately \$30,000 and \$20,000 was received from contributions in NEIP 1 and 2, respectively. NEIP 1 received funding from the VEPA as a result of an “alternate penalty provision” prosecution of an industry, while NEIP 2 received a once-off grant from the VEPA. A small amount of additional funding was also received from two industry partners in NEIP 1 and a Catchment Management Authority Partner in NEIP 2. MARIBYRNONG CITY COUNCIL, NEIGHBOURHOOD ENVIRONMENT IMPROVEMENT PLAN FOR STONY CREEK 17 (2004); SURF COAST SHIRE COUNCIL, ANGLESEA NEIGHBOURHOOD ENVIRONMENT IMPROVEMENT PLAN 28 (2004).

273. This was obviously a protracted process that created some frustration among stakeholders, but appeared largely attributable to the design of the NEIP requiring the development of a proposal and then a plan. Interview 211, EPA (“you look at it—12 months or so to develop a proposal—then 12 months before you’ve got a plan. It’s two years and a lot of people are— ‘oh God, you’re still banging on about this, what have you actually done?’”). See Gunningham et al., *supra* note 169.

274. Interview 221-1, Coordinator (stating “I think initially to get a project up and going and build momentum, you definitely need someone in a paid position . . . to build that initial enthusiasm, involvement, and commitment, get runs on the board.”).

275. To illustrate, in NEIP 1, the coordinator, VEPA officer, and local government officer conducted processes such as public forums and workshops (over 60 people attending these in total, including 15 industries), as well as sending out questionnaires to develop a shared community vision and objectives regarding the creek. NEIP 2 also ran a significant number of meetings and workshops; some 60 people turned up to one workshop alone. MARIBYRNONG CITY COUNCIL, *supra* note 272, at 16; Interview 222, Local Government.

276. Note that in NEIP 2, the official population of the town was 2,000; however, this number routinely swelled much higher (often due to people travelling daily to work in the town), including up to 10,000 people during the tourist

267. Holley, *supra* note 29, at 159-71; see also GUNNINGHAM & SINCLAIR, *supra* note 8, at 166-67.

268. See Raymond, *supra* note 46, at 40-41, 54.

269. Note that this comparison is based on collaborative groups as the unit of comparison and not “industry” involvement in collaboration. While the EIP involve a single industry working with others, the NEIPs can involve multiple industries in any one collaboration.

270. See Raymond, *supra* note 46, at 52.

of engagement was, in part, attributable to the fact that the environmental issues (a creek that largely served as a stormwater drain for urban and industrialized suburbs, and the broad issue of trying to develop a sustainable coastal township) were of little direct importance to most ordinary people in the neighborhood.<sup>277</sup> As one respondent pointed out: “We have people with an underlying concern about sustainability, but they’re not outraged about it . . . relatively speaking it’s a fantastic environment here so it’s like what’s the problem?”<sup>278</sup>

Ultimately, some, but as discussed below not all, significant stakeholders engaged, including one to four industry collaborators, five to seven government collaborators, five to six nongovernment groups, and two to 11 residents.

Having engaged at least some diverse stakeholders, the next stage was building trust among them. This involved the local government, coordinator, and VEPA leading negotiations and consultation processes. After years of these processes during proposal and then plan development, respondents reported there was a marked improvement in trust, with “none of this us and them thing” anymore.<sup>279</sup> This trust in turn enabled them to work together strategically in a more coordinated and effective way to move beyond their previously fragmented responsibility and interests: “it’s making it a bit more effective and that’s been a really good outcome, even identifying, well, hey, we’re doing this. Let’s join up together.”<sup>280</sup>

Respondents also emphasized that the collaborative process had allowed parties to improve their understanding and agreement on the nature of environmental problems, allowing them to create a new, shared agenda. As one respondent put it: “we’re clearer on our own areas of direct responsibility and shared responsibility and we have an improved understanding of the broader issues and the greater challenges.”<sup>281</sup>

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season. The 10,000 figure is accordingly referred to in the NEIP plan, not least because tourism pressure was one of the significant environmental issues facing the NEIP and the fact that the NEIP program itself expressly seeks to foster collaboration among those who “live, work, and play” in the neighborhood. SURF COAST SHIRE COUNCIL, *supra* note 272, at 9, 12.

277. As pointed out above, in both these cases there was a degree of community concern about these issues. For example, community complaints in NEIP 1 about spills in the creek were common, and residents in NEIP 2 were found to be particularly “environmentally aware.” However, concerns about the appearance of a local creek, or that people in the town acted “unsustainably,” are comparatively less important to most “ordinary people” than exposure to poor air quality and amenity on a daily basis, or, as discussed below, the chance of getting sick from drinking water from their household tap. See SURF COAST SHIRE COUNCIL, *supra* note 272, at 6.

278. Interview 224, Government Agency; Interview 211, EPA (stating “I don’t think you necessarily have that group of concerned residents. Yeah, I mean, a little concerned, but not that concerned.”).

279. Interview 221, Community (stating that community and government stakeholders “all get together and there’s none of this us and them thing . . . it’s just that we have managed to build those relationships . . . I think without that, you’re always going to have that bit of cynicism and a bit of lack of trust”); Interview, 213 Local Government (pointing to improvements in trust that occurred between businesses and local stakeholders: “So those conversations are open rather than the [local business], for example, just being totally hostile to the [community group] and seeing them as just a bunch of greenies. That conversation is more open so they are, I think, successes.”).

280. Interview 211, EPA.

281. Interview 213, Local Government.

While these are all positive achievements, the findings suggested that self-interest of certain players had significantly limited the success of the collaborations in terms of achieving improved environmental outcomes. Indeed, respondents from both NEIP 1 and 2 pointed to a lack of buy-in from key industry stakeholders who were some of the primary causes of the local environmental problems.

This lack of buy-in from these problem stakeholders is best and most dramatically illustrated through a brief discussion of NEIP 1, where over 200 industries and SMEs lined the polluted creek and were a major source of its degradation.<sup>282</sup> The sponsor and the VEPA tried to engage these industries through workshops and sending out 400 letters to industry managers. However, only 15 industry members attended the workshops, and not one response was received from the letters.<sup>283</sup> The VEPA accordingly tried to use tacit external pressure, such as shaming big industries. However, a lack of officer resources and limited regulatory leverage over SMEs restricted such pressure to only a few large, licensed industries.<sup>284</sup> The result was a dismal number of industry interests signing on to the plan: one business representative group and three companies. Respondents were clear on the reason for this minimal engagement: “I don’t think the NEIP has the capacity to engage with industry . . . the only way they will become engaged is through regulation.”<sup>285</sup>

The absence of sufficient regulatory incentives not only stifled industry engagement, but also meant that those who had engaged had no motivation to share information or make anything other than tokenistic commitments.<sup>286</sup> Indeed, none of the four industry interests made any commitment to improve environmental performance, and were essentially free riders<sup>287</sup>: “they did attend some meetings but nothing’s

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282. The lack of incentives in the NEIP design also produced similar difficulties in NEIP 2. Although the sustainability agenda of this NEIP was wide in scope, the threats to the local air shed and habitat from the only major industry in town was still one of the primary identifiable impediments to the town’s “sustainability.” With only the one industry to contend with, the local government sponsor was able to successfully focus its efforts on persuading this industry to come to the table. However, like NEIP 1, respondents reported the NEIP had not provided them with the necessary tools to encourage industry to take positive action, and only tokenistic commitments ensued. The collaboration and its likely success in improving sustainability of the town were accordingly seen to be weaker as a result. As one respondent explained: “I smile, I suppose, when you look at [Town] and you sort of say, okay, yeah, we want to be a sustainable, ecologically friendly town, and then you look out the back and you see this dirty rotten big mine . . . I don’t think we’ll have much of a chance getting them to change their output. I think that’s a bit beyond the NEIP.” Interview 221, Local Resident.

283. MARIBYRNONG CITY COUNCIL, *supra* note 272, at 17.

284. This involved encouraging industry to provide \$3,000 to the NEIP.

285. Interview 216, Industry.

286. Interview 212, Local Community (“I think that one of the issues with the NEIPs system is that . . . there’s nothing to force them to participate in that creek.”). See Karkkainen, *supra* note 7, at 296. Note that the use of government spending powers could also act as a useful incentive for industry.

287. In broad terms, industry displayed a form of free-rider behavior. That is, potentially gaining reputation benefits from collaborating to improve the creek, without making any significant contribution themselves. Indeed, industry made only the minimalist of commitments to help other partners develop a best practice stormwater management plan for goods and transport handling. For further on free-riding, see GUNNINGHAM & SINCLAIR, *supra* note 8, at 150.

actually happened with them. They haven't formally committed to anything."<sup>288</sup>

These limitations appeared to extend beyond the issue of industry partners. Indeed, some respondents raised concerns that even in the case of government collaborators, the NEIP had insufficient incentives, particularly dedicated funding to encourage and enable agencies to make commitments that went significantly beyond business as usual<sup>289</sup>: "there's no central source of funding . . . that meant that they committed to a lot less than they would've committed to."<sup>290</sup>

Overall, without increased participation and commitments by key partners, there appeared to be substantial limits on what the two NEIPs could achieve in the future in terms of improving neighborhood environmental quality. Indeed, as has been reported elsewhere, the early stages of implementation in both NEIP 1 and 2 collaborations have produced very few improvements in the neighborhood environmental issues.<sup>291</sup>

## 2. NEIP Sub-Case 3

NEIP 3, which commenced shortly after NEIPs 1 and 2, was not a VEPA "pilot" case. Like NEIP 1, it also focused on a degraded creek under threat from diffuse sources of pollution, but NEIP 3 was located in a township in a rural area. To some extent, the findings on the emergence of collaboration in this context corresponded closely with those in NEIPs 1 and 2, including the local government sponsor's positive support role, effective seed funding,<sup>292</sup> and the cooperation-enhancing effects of processes that built trust.<sup>293</sup> However, in contrast to NEIP 1 and 2, NEIP 3 was far more successful in engaging and obtaining meaningful commitments from its problem stakeholders, as well as other parties in collaboration. The findings indicated this was primarily due to three conditions.

288. Interview 212, Local Community.

289. Interview 213, Local Government ("In some sense, aspects of the NEIP, the approved plan, were written in a way that people just said what they were already doing or slightly improved, so they weren't over committing.").

290. Interview 212, Local Community.

291. Holley, *supra* note 265, at 474-77.

292. Short-term "seed" funding (a \$20,000 grant from the Victorian Catchment Management Council) was used by the local government sponsor to employ a coordinator. Combined with VEPA officer support, the coordinator had engaged a large number of parties and conducted extensive consultation within the neighborhood. This involved public meetings, information days, giving out flyers, and surveys. TOWONG SHIRE COUNCIL & PARTNERS OF LITTLE SNOWY CREEK NEIP, LITTLE SNOWY CREEK NEIGHBOURHOOD ENVIRONMENT IMPROVEMENT PLAN 37-38 (2006).

293. As discussed below, NEIP 3 involved a smaller community that provided a much greater "base level" of trust and networks on which to build cooperation. As one respondent put it: "every single person knows every single person," and in "these small towns . . . they have so many bloody committees." Interview 234, Local Government. Even so, developing trust and overcoming transaction costs was as vital to NEIP 3 as the other sub-cases. Indeed, mistrust between the township and surrounding farmers in NEIP 3 was high: "It's a sort of a 'them and us' because blame was laid on both as to the causes of declining water quality." *Id.* However, after negotiating, trust had noticeably improved, and so had cooperation. As one respondent commented: "It's not as bad as it was, it is getting better, the communication and the cooperation [between farmers and town], I suppose you could say, is getting better." Interview 232, Local Resident.

First, stakeholders had a much greater interest in what was perceived to be an extremely severe environmental problem in NEIP 3, at least compared to the other two sub-cases. The polluted creek not only provided irrigation for local dairy and other farming industries, but it was also the sole water supply for the township of 100 people that had no wastewater system. **The water supply was not treated and was below Australian standards for drinking water.** While some residents suggested they had "built up a bit of an immunity," personal health concerns were evident, particularly for visitors to the town, with noted cases of tourists becoming sick from drinking the water.<sup>294</sup> These events raised not only health concerns, but also economic issues by threatening tourism, stymieing future development,<sup>295</sup> and raising public liability issues both for the town and agencies with responsibility for public health.<sup>296</sup>

Such direct health and economic stakes for local actors meant there was a much greater range of stakeholders that saw high benefits in engaging and committing to the collaboration than for either NEIP 2's more diffuse threats to sustainability or the polluted creek in NEIP 1, which provided largely only amenity uses.<sup>297</sup>

The second reason why NEIP 3 was able to achieve more successful collaboration than NEIP 1 and 2 was the difference in population size. With only around 100 people within the small catchment area, transaction costs were much lower than in the other sub-cases, and engagement rates proportionally higher.<sup>298</sup> This enabled sponsors to focus their resources to engage a larger proportion and mix of significant stakeholders (18 local residents/farmer representatives, 13 government and three nongovernment groups, and one collaborative NRM body).<sup>299</sup> Notably, these stakeholders included two-thirds of the key problem stakeholders, namely the nearby dairy farming industry.<sup>300</sup>

294. Interview 236, Community Group (explaining "sometimes people have come here and stayed at camping grounds, they've been a bit sick from the water . . . but I just think 'oh well, that's their constitution . . . we've been drinking the water the whole time.'").

295. Interview 135, EPA (reporting that "the town was really driven by the fact that tourist potential would suffer as a result of grey water and stinky water in their drains and boil water notices . . . their ability to not subdivide and the value of their properties because waste water hadn't been managed was really important to them.").

296. Because the town provided their own water supply by pumping water from the creek, the town was effectively liable for those who drank the water. Interview 237, EPA (noting "the issue that needed to be solved was in fact that they were carrying a legal liability for it").

297. *Id.* (pointing out that "this NEIP is very different to the others . . . because the core issue is the water supply which affects everybody"). **Indeed, these conditions made the potential benefits of collaboration high enough that a nascent form of cooperation between local and state government officers had commenced a year before the NEIP formally began.**

298. One or two public meetings reportedly included almost the entire neighborhood population: "I might add that most of the town was represented at that meeting." Interview 231, Government Agency. As one VEPA respondent reflected on the difference between NEIP 1 and NEIP 3: "the last couple of meetings we were having 15 to 20 people. So it's actually bloody high numbers if you talked about it, if you looked at it in terms of what does that mean for [NEIP 1], you'd have over 1,000 people at a meeting." Interview 237, EPA.

299. Although lacking an environmental interest group, this was beyond the control of the collaboration itself, as there was no environmental group in the local area.

300. Much like NEIP 2, there were only a small number of these "problem" stakeholders (six dairy farmers), which made it easier for sponsors and partner

The ability of this NEIP to engage these problem stakeholders arose largely from a third and final condition: monetary resources/incentives. Specifically, water supplies and the management of rural resources were both issues that fortuitously were the subject of significant external government funding.<sup>301</sup> Unlike NEIP 1 and 2, where stakeholders had to rely on their own limited resources or small grant programs to fund their commitments,<sup>302</sup> the external funding sources in NEIP 3 brought with them more than \$700,000 in investment over four years. This funding enabled partners to make significant commitments and to progress the plan toward development of wastewater and water supply systems, as well as to undertake waterway restoration projects. Perhaps most importantly, this funding was used to provide incentives that encouraged local farmers to engage and contribute to on-farm improvements.

they wanted all of their waterways fenced out, they wanted all the willows removed, they wanted it all reveged, and they saw that as being a real bonus, a real benefit, and they were very committed to that.<sup>303</sup>

While some commitments in the NEIP 3 plan still depended on future cooperative decisions and resourcing,<sup>304</sup> the above three conditions appeared to have ensured that this sub-case achieved far greater engagement and commitments to “on ground” environmental improvements than NEIP 1 or 2.<sup>305</sup>

### 3. Summary

To conclude this discussion on NEIPs, at a general level, the NEIP appears to have been far less successful than the EIP in fostering the emergence of successful collaboration. This is primarily because the NEIP lacked the capacity to engage and/or obtain commitment from key problem stakeholders, which severely constrained their potential to achieve significant environmental improvements. Yet, despite these weaknesses, the NEIP design clearly can work under the right

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agencies to persuade them to engage. As one respondent put it, the NEIP had achieved “pretty bloody good involvement . . . two thirds of the dairy farmers, so what more can you ask sort of thing.” Interview 237, EPA.

301. That is, the Rural Water Supplies grants and Regional Natural Resource Management programs in Victoria that were accessible through one of the key NEIP partners—a regional catchment management body. Interview 241, EPA.

302. Both NEIP 1 and NEIP 2 had obtained some small, short-term grants to resource their projects. For example, the NEIP 1 sponsor secured funding from a Victorian State Government initiative for addressing stormwater issues. Similarly, NEIP 2 gained external funding from the Australian Greenhouse Office Cool Communities Program, as well as government monies for a “plastic bag-free campaign.” MARIBYRNONG CITY COUNCIL, *supra* note 272, at 25; SURF COAST SHIRE COUNCIL, *supra* note 272, at 23.

303. Interview 231, Government Agency.

304. While funding had been obtained for feasibility studies on wastewater and water supply systems, the group still had to find resources for actually building these systems. However, stakeholders were generally confident that resources were available. As one respondent explained: “we have commitment from [Water Authority] that they actually will do the water supplies within a year or so, and the wastewater will probably get done within three or four years. So we have certainly gone toward achieving both of those initial aims.” *Id.*

305. Interview 241, EPA (“I think [NEIP 3] has worked quite well . . . we can say where potential environmental outcomes are going to come from . . . it’s had resources coming to it . . . we had a really good roll up of people . . . we know who is going to doing what. That was all developed well.”).

conditions, not least where there is a small population with high stakes in a severe environmental issue and funding is (fortuitously) available to effectively fill the incentive gap left in the NEIP design.

### C. The RNRM—The Challenges of Nested Arrangements

Collaboration in the RNRM is slightly different from the other cases, since it is a nested model that requires cooperation at the three institutional levels.<sup>306</sup> Although the data suggest that stakeholders achieved substantial cooperation at all of these levels, problems were reported, both at each level and between them. These included drawn-out conflicts between federal and state governments, agency turf wars at the state level, vague government guidance, and insufficient support for regional bodies.

Some of these problems were interrelated, and none were immediately fatal to the collaborative arrangements. However, they all diminished the overall success of the collaboration that emerged. The discussion below outlines in broad terms the steps taken to achieve these collaborative RNRM arrangements and highlights at each stage the achievements and shortcomings.

The primary issue for the RNRM’s nested approach was state and federal governments negotiating bilateral agreements to provide the strategic framework for Queensland’s RNRM. Consistent with suspicions of some RNRM commentators and NEG authors,<sup>307</sup> conflict rather than cooperation was evident in some of the very first steps in the RNRM nested model. Here, the transactions costs of negotiating bilateral agreements were extremely high, with problematic, lengthy, and repeatedly stalled negotiations.<sup>308</sup> A number of factors appeared to contribute to these difficulties. First, respondents pointed to a lack of trust historically entrenched in a federal system: “you know what the states are like, they are always paranoid about the feds.”<sup>309</sup>

Second, some respondents suggested the federal government had wrongly assumed that the state would see resource benefits arising from the collaboration with the federal government. However, the magnitude of federal resources was reportedly too small to motivate meaningful state cooperation. As one respondent put it:

[the federal government] think they’ve so much money to run this [RNRM] that the state will click and dance. Well it started to click and dance and then it decided well no, get

306. Head, *supra* note 24, at 144.

307. See Margerum, *supra* note 36, at 149; Paton et al., *supra* note 112.

308. This was particularly the case regarding the more expansive NHT 2 bilateral (NAP being limited to only 4 “priority” regions in Queensland). As one respondent noted: “they couldn’t even get [an] NHT contract signed between the fed and state gov.” Interview 3210, Science. Indeed, following announcements that the NHT and the NAP would be implemented together, the NAP agreement was reached relatively quickly in 2002, but negotiations continued on the NHT agreement until 2004. This was in part because the NAP was developed through the Council of Australian Governments, which involves both state and federal governments. In contrast, the NHT was predominantly a federal program.

309. Interview 334, Regional Body.



nicked . . . there's not enough money . . . so you had a failed system to start off with.<sup>310</sup>

Simultaneously, there was an ongoing conflict at the state government level. Akin to turf warfare among administrative departments that has been a noted problem in earlier NRM experiments,<sup>311</sup> state agencies reportedly struggled to share power and find agreement regarding their collective approach to the RNRM.<sup>312</sup> As one respondent put it, this uncertainty and conflict: “was a tragedy because . . . the whole of government solidarity sort of fell apart.”<sup>313</sup>

While these conflicts were going on, the governments pressed ahead and rolled out the RNRM at the regional level, operating under interim arrangements for many aspects of the program.<sup>314</sup> In some respects, the fragile higher institutional structures appeared quite successful at assisting regional stakeholders to cooperate.

Building on preexisting groups and following numerous meetings with members of the regional population (approximately 190,000 people), government officers facilitated a number of key interested stakeholders to form a collaborative regional body. These included individuals from five subregional community-based collaborative groups, e.g., catchment management groups, two science interests, two indigenous interests, two local government members, and four non-voting government advisors.

Why did these stakeholders want to collaborate? At the broadest level, stakeholders were interested in participating in the collaborative group because they were concerned about the region's severe natural resource problems.<sup>315</sup> Indeed, since the 1990s, there had been community-based catchment groups seeking to manage diverse natural resources that were reportedly threatened and degraded by competing and interconnected resource uses, such as grazing, cane farming, and urban development.<sup>316</sup> Unsurprisingly, the five existing subregional collaborative groups were thus some of the most motivated stakeholders to seek membership on the regional body. Furthermore, for some of these groups, obtaining and/or controlling government funding also acted as an important incentive for seeking membership on the collaborative regional body. As one respondent put it: “they nominated these people to make sure that they got some money for their organizations.”<sup>317</sup>

310. Interview 3210, Science.

311. Ewing, *supra* note 112, at 406.

312. While some agencies with direct responsibility for the RNRM reportedly wished to pursue a collaborative and “whole of government” approach, others were resistant to sharing their power, leading to a “disintegrated government system” and a number of independent reviews of the system. Interview 334, Regional Body; see CHARLIE ZAMMIT ET AL., A REVIEW OF THE NRM ARRANGEMENTS IN QUEENSLAND (2004).

313. Interview 334, Regional Body.

314. While agreement had been reached on an NAP bilateral, NHT negotiations continued and interim agreements were used to “plug the gap.” Interview 342-1, Subregional Body.

315. Indeed, natural resources were the primary source of livelihood in the region—96% of the regional land use was cattle grazing, and tourism was the major employer. BURDEKIN DRY TROPICS BOARD, BURDEKIN DRY TROPICS NATURAL RESOURCE MANAGEMENT PLAN 2005-2010, at 29-33 (2005) [hereinafter BDTB].

316. *Id.* at 1, 8, 29, 30.

317. Interview 341, Regional Body.

Although valid questions exist about the inclusiveness and balance of interests on the regional body, securing the engagement of the collaborative subregional groups (who themselves had a relatively diverse membership) had gone some way toward bringing a good mix of key stakeholders into the regional collaboration.<sup>318</sup> Furthermore, one particularly beneficial feature of the subregional groups' involvement was that the regional body had essentially developed its own nested approach that took account of the geographical spread of catchments in the large region.<sup>319</sup>

Indeed, because the regional body contained government advisors and interacted with agency staff, it was able to provide a structured forum that reduced the costs of feeding government guidance down to individual subregional groups to assist with their consultation process.<sup>320</sup> Simultaneously, dividing the workload among these groups reduced the time and resources spent by the regional body in consulting with the wider region.

For example, government funding obtained by the regional body was partly devolved to the subregional bodies to hire coordinators, who were vital to assisting subregional groups to consult<sup>321</sup> and bargain on critical NRM assets, targets, and

318. For example, the networking of a typical subregional group in the case study included, *inter alia*, three local citizens, four environmental/water groups, three Indigenous groups, four local farming members, one tourism industry body, and 27 farming/fishing/agricultural industry representatives. See BDTB, *supra* note 315, at 8.

319. That is, the region was divided into five subregions that corresponded to each subregional group on the regional body. This structure ensured that at least some existing subregional groups and the local subregional community was not forgotten or overlooked in the shift to regional arrangements. Other regions in Queensland adopted different approaches and structures, and, as some researchers have noted, many faced significant degrees of conflict between existing subregional and other community groups in the regional establishment process. See Whelan & Oliver, *supra* note 38. However, it appeared in the studied sub-case that as the regional body had embraced a number of existing subregional groups, such conflict had been reduced. Indeed, subregional bodies generally suggested it was a successful “bottoms-up” process. Interview 342, Subregional Body. See also PETER GILBEY, RIGHTS AND DUTY OF CARE: A QUEENSLAND PERSPECTIVE (2002), available at <http://www.clw.csiro.au/lbi/publications/ANCID2002paper-Gilbey.pdf>.

320. For example, the regional body's staff and government advisors were able to develop a standardized template to assist subregional groups with their processes of consulting to set measurable and time-bound targets. This template ensured that the correct information was supplied and that targets could be compared across subregions. BDTB, *supra* note 315, at 187.

321. Eight coordinators were hired in total, three of which had technical skills in biodiversity, water quality, and coastal and marine issues and were outsourced to provide broad technical support across the regional area. BURDEKIN DRY TROPICS BOARD, BURDEKIN DRY TROPICS NATURAL RESOURCE MANAGEMENT: ANNUAL REPORT 2004-2005, at 15 (2005); GILBEY, *supra* note 319. While the specific form of subregional consultation and negotiation varied, the coordinator typically assisted the group to complete targeted consultation, workshops, and public-notice-and comment procedures with the catchment's community, industry groups, and local governments. To illustrate, one subregional body followed this process:

the coordinator and the technical support officer . . . complete[d] targeted consultation with community, industry groups and local government throughout the [subregion]. Community consultation was held over three days in [eight towns]. Interviews were held at the [Shire Council]. Correspondence was sent to key stakeholders . . . River Trust, two Water Boards, Shire Council, Landcare Association, Environmental Protection Agency, Department of Natural Resources and Mines, Department of Primary Industries, Queensland Parks and Wildlife Service, Canegrowers, Pest and Productivity Boards, Mango Growers Association, Pacific Reef Fisheries, Irrigators Committee, Catchment Committee, CSIRO, Tourism Association, and two Chambers of Commerce . . . Prioritization workshops were held by

actions in each subregion.<sup>322</sup> This consultation fed up to the coordinating regional body, where the remaining funding was reportedly essential to enabling the body to conduct broader regional consultation,<sup>323</sup> rent an office, and employ planning staff, including a consultant to complete some of the regional planning documents.<sup>324</sup>

These were all positive achievements that assisted in the development of the region's NRM plan. However, the overall success of collaboration at the regional level was limited by a number of issues. First, because of the ongoing bickering regarding the overarching Bilateral Agreements, government guidance intended to support the regional body was often vague and constantly changing.<sup>325</sup> As one government advisor to the regional body explained:

the regional bodies have been evolving at the same time as the infrastructure has been . . . we haven't necessarily provided them with the framework or the support to be able to achieve what we want them to achieve.<sup>326</sup>

This did little to reduce transaction costs, and may have even augmented them, as regional bodies continually had to adapt and readapt to changing requirements.<sup>327</sup> Furthermore, the findings indicated this lack of firm guidance may have been detrimental to the overall success of the process, with regional bodies often failing to connect effectively with key stakeholders.<sup>328</sup> As one respondent reflected: "we have got some major coal and gold mines in the area. Not one of the mining industries has even been talked to."<sup>329</sup>

A related weakness was the reported delay in government funding to mitigate transaction costs. This, again, was caused by ongoing disagreement between federal and state governments. As one respondent explained, this had made it more difficult for the regional body to complete their plan on time: "I see the [Queensland]-[Federal] crunch as incredibly negative. It's stopped us getting funding when

we needed our funding . . . and then that flows through to the community."<sup>330</sup>

A second issue that augmented the above difficulties was the reported insufficiency in the funding. As one respondent frankly stated: "the biggest deficiency is that it is hopelessly under resourced."<sup>331</sup> Even with volunteers putting in "thousands of hours,"<sup>332</sup> the funding had not sufficiently equipped the subregional and regional bodies to overcome transaction costs and cooperative barriers that arose in the extremely large geographic region (almost 130,000 square kilometers). Most problematic were reports that the body had failed to "tap into all of the farming structures"<sup>333</sup> in the region, particularly "average" farmers, as opposed to those who were already involved in existing subregional NRM bodies.<sup>334</sup> As one respondent put it:

we have had a group of most probably 30 land holders, commercial beef property people that have been involved fairly heavily in doing all this consultation process for the planning, but the majority haven't engaged.<sup>335</sup>

These crucial stakeholders had not engaged in the regional collaborative process, for a number of reasons. These included "cynicism" about government programs,<sup>336</sup> a lack of immediate "stake" in the typically longer term NRM issues,<sup>337</sup> anger that on-ground funding had largely ceased while RNRM plans were being developed,<sup>338</sup> and, most

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the sub-committees in [two towns] . . . The steering committee, the coordinator and the technical support officer then grouped the similar issues and reworked issues to reduce the total number of issues . . . Initially over 200 issues were submitted through these community, stakeholder and natural resource management plan steering committee consultations . . . steering sub-committees, along with the Coordinator and relevant Board staff involved in the community consultations reviewed the entire list of issues . . . The issues list was placed on the [Region's] InfoBase and disseminated to general [subregional body] members and then prioritized by the natural resource management plan steering sub-committees.

BDTB, *supra* note 315, at 185-87.

322. Interview 342, Subregional Body ("Our coordinator makes sure information is disseminated properly . . . coordinators are needed because farmers or landholders—they don't know how to connect.")

323. The body also conducted its own regionally focused consultation process, conducting a two-day regional forum attended by 60 people that integrated the issues and targets identified across the five subregions into a regionally-based structure. BDTB, *supra* note 315, at 65, 185-96.

324. *Id.* at 197.

325. See Farrelly, *supra* note 112, at 399.

326. Interview 327, Government Agency.

327. For example, requirements for regional body organizational structures reportedly changed from a focus of establishing public good organizations to forming companies. Interview 327, Government Agency.

328. *Id.*

329. Interview 341, Regional Body.

330. Interview 342, Subregional Group.

331. Interview 337, Local Government.

332. Interview 342, Subregional Group.

333. Interview 314, Industry Body.

334. For example, coordinators and subregional groups were working with farmers on projects; however, the general view was that these farmers were "leaders" as opposed to "average punters." In addition, respondents reported that they lacked the time and resources to engage with a range of peak industry bodies who were reportedly wary of new regional bodies and saw them as "a threat" to their influence over rural issues. As one respondent explained, "they did see them as a threat, we're talking in code here, but the idea was that when these regional bodies emerged they'd be, kind of have some persuasive influence over the assignment of resources at the regional level. That's not the case, so there was a fear in the mind of these industry groups that may be perceived to be stacked in a particular way, whether a green persuasion or not, and they'd be calling the shots at a regional level." Interview 323, State Agency.

335. Interview 344, Subregional Body.

336. Interview 311, Industry Body (noting that "part of the problem with these arrangements . . . is they're so . . . governments both state and federal, [Program A] in Queensland was one example: it becomes something that they do and deliver in a budget cycle and then the funding dries up and then they don't do it again. Then it goes away and it comes back rebadged with the same people, who three months ago were delivering [Program A] to you, are all now standing on your farm saying 'I have got [Program B], it's the new best thing,' so growers get a little bit tired of two year, three year funding cycles. The money dries up and goes away, its rebadged as something else, so it's actually been quite difficult to get some of the growers past the cynicism, and us as well, in some respects, and say the regional arrangements are around, how long are they actually around for? And how much effort in some respects do you actually put in to try and work and get these long term?")

337. A number of respondents pointed out that many farmers care about their land and longer term resource management issues. However, as discussed below, even these actors found the time and skills demands of the RNRM too overwhelming to participate.

338. Interview 345, Subregional Group (pointing out "I don't think the task the regional bodies have had to do, particularly in Queensland, for the last two years hasn't really given them much of a leg up in the community's view. For two years they have just been planning, planning, planning and there is no money being channelled down except through different . . . we have had one regionally competitive bid, a Landcare program, but the NHT, they (the farmers) had just got used to had ceased").

prominently, the fact that numerous farmers lacked the time and resources to drive “many hours” to attend meetings.<sup>339</sup>

This lack of engagement from key stakeholders appears likely to have reduced the overall success of the collaborative process and the effectiveness of the plan that was produced.

However, those that did engage were at least able to agree to planning documents.<sup>340</sup> According to respondents, the repeat interactions and negotiations to develop these documents (while far from conflict-free)<sup>341</sup> had helped build stronger relationships and reduce mistrust, which made reaching agreement much easier. As one science respondent reflected on the experience after a number of negotiated meetings with farmers, local government, and peak industry bodies: “you know when you have some sort of break in the log jam . . . there was just a level of honesty about presentations by all sides that got it away from the hostility.”<sup>342</sup>

After government review, recommendations, and ultimate approval, the plan contained a number of ambitious targets on reportedly important priorities for the region and nation. These ranged from soil issues, e.g., by 2024, achieve a 10% improvement in soil health in extensive and intensive agricultural areas, to biodiversity issues, e.g., by 2015, ensure 90% of all threatened flora and fauna species in the region will be represented in conservation reserves or under voluntary conservation agreements, to coastal and marine issues, e.g., by 2025, connectivity between and within freshwater and marine ecosystems will be restored.<sup>343</sup>

At the time of writing, it is virtually impossible to be definitive on whether the RNRM’s collaborative approach will deliver on these specific environmental outcomes, not least because the recent transition to Caring for Our County has impacted on funding arrangements and natural resource management priorities. However, even with such changes, some authors have expressed significant doubts about whether the RNRM can deliver on the desired long-term environmental outcomes, in part because the challenges faced in these initial stages of collaborative formation continue to hamper its longer term success, including continuing conflict among governments and agencies, and insufficient funding.<sup>344</sup>

To sum up the above discussion, the RNRM has been successful in facilitating federal, state, and a range of regional nongovernment stakeholders to come together to produce a new nested set of collaborative arrangements. However, akin to most of the NEIP sub-cases, the success

of the RNRM is qualified to the extent that it faced a host of difficulties in engaging key stakeholders to input into the plan. These difficulties arose because of problems at different institutional levels. While nested arrangements appeared to have some benefits in reducing transaction costs across such a large region, consistent with fears of some authors, conflict and uncertainty at higher levels not only created an unstable foundation to the RNRM program, but also delayed financial support and reduced effective guidance from government to regional bodies. These problems, along with insufficiencies in funding, hindered regional collaborators’ attempts to engage key stakeholders. Notably, many of these problems are consistent with those documented within the RNRM arrangements in other Australian states.<sup>345</sup>

## V. Discussion and Conclusions

This Article has examined the conditions that fostered the emergence of successful collaboration. Going beyond much previous empirical research, the cases provided valuable examples of collaboration in natural resource, point source, and diffuse pollution problem settings, and reveal a range of insights into underresearched questions and debates in the literature.<sup>346</sup>

At a broad level, the findings contribute to the literature by providing empirical insights into ongoing normative debates about whether NEG is a viable and convincing approach to public problem-solving. Indeed, although collective-action barriers ostensibly remain a “theoretical thorn in the side” of NEG, the above analysis suggests that under the right conditions a more sanguine view of NEG is justified.<sup>347</sup> Consistent with growing empirical evidence,<sup>348</sup> the very existence of collaboration across the cases suggests that all three NEG examples effectively removed much of the metaphorical thorn by designing institutions to target favorable conditions and utilize mechanisms to reduce these barriers.<sup>349</sup>

This basic finding suggests that it is oversimplification to rely on the tragedy of the commons and cooperation dilemmas to write off all or even most NEG cooperative solutions as theoretically implausible.<sup>350</sup> Having said that, most of the collaboration processes examined here were far from easy, and the findings revealed varying degrees of success between the collaborative processes.<sup>351</sup>

339. Interview 345, Subregional Group (adding that “they were asking [farmers] to come along to all these volunteer meetings to give their opinion on what was going on on the land, but they didn’t really.”).

340. Following the regional planning process, the regional investment strategy was developed. This process was conducted by a consultant hired by the Regional Body. This consultant conducted workshops with subregional groups to refine and develop costings for each management action. This was followed up by meetings with specific sectors to identify costing and potential in-kind support for the implementation of the plan. BDTB, *supra* note 315, at 66, 197.

341. Interview 341, Regional Body (reporting that “[o]ne of the biggest conflicts we have got is the targets, sediment targets, and there is some really crazy stuff they are talking about.”).

342. Interview 331, Science.

343. BDTB, *supra* note 315, at 84, 101.

344. Holley, *supra* note 265, at 477-80.

345. See generally Farrelly, *supra* note 112; Paton et al., *supra* note 112.

346. Heikkilä & Gerlak, *supra* note 19, at 584, 606; Karkkainen, *supra* note 34, at 242.

347. Hornstein, *supra* note 36, at 952.

348. See, e.g., Heikkilä & Gerlak, *supra* note 19; Raymond, *supra* note 46.

349. Karkkainen, *supra* note 34, at 229.

350. Gaines, *supra* note 28, at 15-18; Steinzor, *supra* note 45, at n.2, 10909, 10920-21; see Karkkainen, *supra* note 34, at 231, 233.

351. All were generally time- and resource-intensive and extended for many years, some expended extensive resources to try to engage reluctant participants (such as the NEIPs), while others involved taxing conflict (such as the EIPs and government levels of the RNRM). Consistent with suggestions in the broader NEG literature, collaborative experiments like the three case studies appear unlikely to speed up the policy process and may expend considerable government and nongovernment resources. See Coglianesi, *supra* note 34, at 113; Lane, *supra* note 48, at 4-5; see also Karkkainen, *supra* note 48, at 91; Karkkainen, *supra* note 34, at 225.

Generally speaking, the EIP program appeared to achieve the most successful collaboration, with the EIPs engaging a majority of key stakeholders to subsequently develop a plan that had taken substantial steps toward resolving local environmental issues. In part, such success may be attributed to the fact that, unlike the NEIP and the RNRM, it addressed comparatively simple point source pollution problems, many of which occurred on a very local scale, e.g., properties adjacent to industry sites, and involved a limited set of stakeholders making direct commitments, e.g., local residents, the VEPA, and industry.

In contrast, less successful collaboration appeared to be achieved in the NEIP and the RNRM cases where problems were not only more complex, but involved larger scales and many more stakeholders. In particular, the extremely large region and the variety of actors at the local, regional, state, and national scale in the RNRM appeared to create very high transaction costs and power-sharing difficulties that ultimately constrained collaborative success. Further, in the NEIP case, the most successful collaboration was NEIP 3, which emerged in relatively unusual circumstances involving an extremely small population, high stakes for local actors in a severe environmental problem, and fortuitous external funding.<sup>352</sup>

Based on this general comparison, the findings may appear to provide empirical support for the largely theoretical arguments of NEG skeptics, which suggest successful collaboration in NEG is at best limited to narrowly constrained or unique circumstances,<sup>353</sup> like the small community closely tied to environmental conditions evident in NEIP 3,<sup>354</sup> or less complex settings involving fewer parties, such as in the EIPs.<sup>355</sup>

However, to draw such a conclusion from this Article's research would arguably place too little weight on the quite significant achievements made by the RNRM and the other NEIP sub-cases that, at the very least, suggest a genuine potential for success, albeit only under appropriately designed institutions (discussed below).<sup>356</sup> Furthermore, such an inference would incorrectly overlook conditions other than the less complex and small-scale settings of the EIP and NEIP 3, such as the presence of regulatory incentives and government funding, which were both central to ensuring stakeholder buy-in, commitment, and action in those cases.

An arguably better conclusion to draw from the relative success of the cases is that collaboration is highly contingent and contextual, and that success or failure is ultimately dependent on the specific circumstances of the problem and

the design features of NEG institutions.<sup>357</sup> What then can literature and policy learn from the cases about the conditions that foster the emergence of successful collaboration across a wide range of settings?

Certainly, one must accept that contextuality means that any conclusion on a specific condition cannot be said to be predictive of success *per se*.<sup>358</sup> Even so, insights drawn from the findings across the diversity of contexts and institutional arrangements of the three programs do point to some key lessons regarding conditions, and their interaction, that would appear to increase the likelihood of successful collaboration emerging.<sup>359</sup>

These conditions fall under four main themes: the severity of environmental problems; incentives (both negative and positive); structures for subsidizing transaction costs; and trust. As will be apparent, all of these themes broadly resonate with existing hypotheses and claims in the NEG or wider literature about matters that can increase the likelihood and success of collaboration. However, given the uncertainty and debate surrounding these conditions, the findings provide some important empirical-based clarification for NEG theory and for policymakers.

Commencing with the issue of problem severity, most cases dealt with environmental problems perceived to be severe by key stakeholders, be it odor from an industry, a degraded urban creek, or degraded natural resources. In all cases, such severity had created concern among some stakeholders, which appeared central to their willingness to collaborate. In harmony with these findings, a "lower level" of perceived problem severity in NEIP sub-cases 1 and 2 (when compared to NEIP 3) was reported to contribute to the formation of more marginal groups and appeared likely to produce fewer gains.<sup>360</sup>

The relatively commonsense lesson here is that successful collaboration is more likely to emerge where problems are relatively severe (or perceived to be severe),<sup>361</sup> not least because it is in these circumstances that parties are most likely to see a tangible benefit in collaborating.<sup>362</sup>

The findings also provided insights as to whether, to what extent, and in what circumstances the use of incentives (both negative and positive) increase the likelihood of successful collaboration.<sup>363</sup>

As we saw from the NEIP program, at least some NEG policy designers appear to expect successful collaboration to emerge without the use of government authority or funding incentives. However, based on the analysis above, this appeared to be an overoptimistic and deeply flawed assumption, with most NEIP initiatives struggling to engage

352. Obviously the other features of the NEIP's design also had an important role to play.

353. See Cannon, *supra* note 48, at 428; Gaines, *supra* note 28, at 17.

354. See Gaines, *supra* note 28, at 17; see also Karkkainen, *supra* note 4, at 476-77.

355. Of course, this is not to suggest that situations like the EIP will always easily achieve successful collaboration.

356. Furthermore, we should be mindful here of research in more extensive CPR settings that has failed to find a significant relationship between the likelihood of collective action and the numbers of appropriators, and has also found that in relatively large and complex social settings, appropriators have devised and adopted governing arrangements. See John, *supra* note 27, at 236-37; Schlager, *supra* note 54, at 162-63.

357. It is, of course, quite possible that collaboration will be easier where it involves smaller populations and smaller scales; however, this Article stops short of drawing this as a definitive conclusion or insight, because it had only limited data on the affected populations and scales across the cases. See Schlager, *supra* note 54, at 162-64, 169.

358. Margerum, *supra* note 36, at 154.

359. *Id.*

360. Sabatier et al., *supra* note 49, at 181.

361. Cannon, *supra* note 48, at 408; Sabatier et al., *supra* note 49, at 181.

362. Heikkilä & Gerlak, *supra* note 19, at 586; Lubell et al., *supra* note 62, at 148.

363. Karkkainen, *supra* note 34, at 241.

and/or obtain meaningful commitment from a host of stakeholders. This conclusion was strongly reinforced by the findings in NEIP 3, whose surprising success depended in part on the fortuitous availability of funding incentives.<sup>364</sup> The obvious implication from these findings is that appositely designed incentives are central to the chances of achieving successful collaboration.<sup>365</sup> However, this begs the question, what should these incentives look like, and when will they be most effective at fostering successful collaboration?

First, the findings in the EIP confirmed the common claim that social and economic pressure from nongovernment stakeholders can act as an effective cooperation-inducing incentive, at least where large reputation-conscious corporations or stakeholders are involved.<sup>366</sup> However, as we also saw, in both the EIP and in the NEIP cases, there appeared to be very real limits to third parties' capacities to pressure industry or other problem stakeholders who place little credence on high profile or public image.

Much may accordingly depend on NEG institutions effectively utilizing government authority and/or funding to induce cooperation. Consistent with some suggestions in the literature, the findings in the RNRM and NEIP 3 revealed government funding can act as an incentive for some groups to collaborate and make meaningful commitments.<sup>367</sup>

However, in a time of budget deficits and government agency load-shedding, it may be unrealistic to expect even small contributions from governments to provide the necessary level of incentives for multiple, long-term NEG collaborations.<sup>368</sup> In this context, what may be needed is for NEG to rely more extensively on harsh penalty default rules.<sup>369</sup>

Indeed, as the findings in the EIP confirmed, where there is sufficient leverage over regulated parties, background regulatory pressure can be used to shift the cost-benefit calculations of reluctant stakeholders and ultimately drive them to collaborate seriously.<sup>370</sup> As a range of NEG authors aptly argue in the context of the United States, such arm-twisting need not be limited to private regulated parties, but can also seek to harness agencies or state and local governments through an appropriately designed penalty-default rule.<sup>371</sup>

Interestingly, the findings in the EIP case also suggest that in at least some legal regimes, the shadow of the law may not always be sufficiently menacing to compel the most recalcitrant actors to collaborate. Instead, **direct legal compulsion** may be needed. This finding reveals a somewhat

unique and rarely discussed point: law can be brought into the foreground as a credible and direct tool to enhance the likelihood of successful collaboration. Of course, the use of such direct compulsion on a wide scale may produce resistance and less efficient results.<sup>372</sup> Even so, at least in some instances, law appears to play an important role in achieving successful collaboration.

In addition to the use of regulatory incentives, the above analysis also shed some light on arrangements to subsidize the transaction costs of collaboration. Many writers have suggested that designing institutions to provide sufficient support to collaborators is necessary to reducing transaction costs and to increasing the chances of successful collaboration.<sup>373</sup> The findings in this Article add strong empirical support to these claims.<sup>374</sup> For example, as the NEIP and the RNRM cases revealed, funding to employ coordinators, often coupled with government officer support,<sup>375</sup> was imperative to reducing transaction costs and increasing the chances of successful collaboration emerging.<sup>376</sup> However, comparison between the NEIP and the RNRM, where insufficiencies in funding were reported, suggest that when dealing with more stakeholders and larger areas, funding and grants may need to be significantly more substantial. As noted above, obtaining sufficient funding from governments is likely to be problematic, however, the findings in the RNRM confirm that without it, the success of collaboration is likely to be limited.<sup>377</sup>

A second example of transaction cost reduction, evidenced in the EIPs, was that regulatory incentives were typically sufficient to make industries shoulder most of the organizational costs of collaboration.<sup>378</sup> The implication here is that NEG experiments may be able to design institutions that target a single well-resourced actor or actors with harsh default sanctions or significant economic incentives to successfully induce them to bear the majority of the costs associated with collaboration.<sup>379</sup>

The findings also shed some light on the capacity of nested structures to reduce transaction costs. Certainly, the regional nested structure appeared capable of mitigating transaction costs by tapping into preexisting subregional bodies to

364. Certainly, the high severity of the problem and the small population were also important to NEIP 3's success and should not be overlooked as important conditions. However, without the buckets of funding, it appears unlikely that as many farmers would have come to the table or that partners would have made as many commitments.

365. Mark Lubell, *Collaborative Environmental Institutions: All Talk and No Action?*, 23 J. POL'Y ANALYSIS & MGMT. 549, 565 (2004).

366. See generally GUNNINGHAM ET AL., *supra* note 117.

367. Karkkainen, *supra* note 34, at 229; Margerum, *supra* note 36, at 156.

368. See ADAM CRAWFORD, *THE LOCAL GOVERNANCE OF CRIME* 165-68 (1997).

369. de Búrca & Scott, *supra* note 15, at 6, 9.

370. Karkkainen, *supra* note 34, at 229.

371. Freeman & Farber, *supra* note 8, at 903; Karkkainen, *supra* note 7, at 310-11, 314.

372. Ian Ayres, *Ya-Hub: There Are and Should Be Penalty Defaults*, 33 FLA. ST. U. L. REV. 589, 589-590 (2006).

373. See, e.g., John, *supra* note 27, at 230-42; John & Mlay, *supra* note 114, at 362-63; Sabatier et al., *supra* note 49, at 181.

374. See Sabatier et al., *supra* note 49, at 181.

375. Another insight into support arrangements arose from the NEIP case and the role of their "sponsors." John's theory of civic environmentalism in the United States suggests outside "sponsors," such as agency managers or elected officials, can facilitate funding and information to support the collaborative process and ensure its success. As the findings in the NEIP revealed, this general strategy of "sponsorship" appears replicable to a wider range of bodies, such as local government, who themselves appeared quite successful in providing funding or in-kind support to significantly reduce transaction costs of emergent collaborative processes. John, *supra* note 27, at 239.

376. See Curtis, *supra* note 142, at 447, 453; Lubell et al., *supra* note 62, at 159; Margerum, *supra* note 36, at 155.

377. See Farrelly, *supra* note 112, at 402; Head, *supra* note 24, at 145.

378. Karkkainen, *supra* note 34, at 241.

379. See Karkkainen, *supra* note 34, at 228; Raymond, *supra* note 46, at 48, 53-54; Steve Selin & Deborah Chavez, *Developing a Collaborative Model for Environmental Planning and Management*, 19 ENVTL. MGMT. 189, 191 (1995).

divide and conquer collaborative tasks at lower levels.<sup>380</sup> However, the evident resistance of agencies and governments to willingly share power (resulting in delayed and uncertain support to regional bodies) adds empirical weight to claims that cooperation at these higher levels poses one of the greatest challenges to the effectiveness of nested collaborative models.<sup>381</sup> At a more practical level, the implication for policy designers is that, rather than trying to develop collaboration at multiple institutional levels all at once, the success of nested models may depend on proceeding in a more staged approach.

The final insight into fostering the emergence of successful collaboration provided by the Article relates to the role of trust. Many in the NEG and wider social capital literature claim or assume that building trust will make it easier for stakeholders to cooperate and achieve successful collaboration.<sup>382</sup> The findings in the NEIP and the RNRM appeared consistent with these claims. However, the EIP cases revealed a more nuanced take on the issue of trust. Resonating with a handful of empirical studies in other NEG experiments,<sup>383</sup> the findings in the EIP suggest trust can be largely irrelevant to successful collective action.<sup>384</sup>

Why was trust important to the success of some collaborations, but not others? One possible explanation is that most EIP sub-cases started from a very low base of trust created by adversarial relationships involving legal action, complaints to the media, and stubborn industry behavior. Starting from such a low base, stakeholders' motivation to solve the pressing problem may have simply taken precedence over the huge challenges of building trust—stakeholders essentially were willing to take a form of “calculated risk” and forge an agreement, despite distrust, to try to resolve the problem.<sup>385</sup> While mistrust and conflict was readily evident in the other cases (including community complaints to government agencies in the NEIPs), they did not evidence the kind of entrenched anger and adversarial behavior focused on a single industry “culprit” by the “victim” residents and VEPA “police.”

The implication here for the literature is that trust operates differently in different contexts, and in some situations may be largely irrelevant to successful collaboration.<sup>386</sup> At present, empirical research, including the findings in this study, have presented different explanations for this finding, including

issues such as the age of collaboration, which did not appear to explain the findings here.<sup>387</sup> Ultimately, these findings suggest a more nuanced theory of the relationship between trust and collaboration warrants attention, and further research is clearly needed to determine when trust is a relevant factor, and when and to what extent policymakers may want to focus on building trust among various parties.<sup>388</sup>

Beyond the above, the findings provide significant insights for NEG theory with regard to the fraught issue of new governance's interaction with the law.<sup>389</sup> As discussed above, a key thesis on the nature and role of traditional law in new governance is the so-called default hybridity hypothesis, where law plays an action-forcing role, and is used to induce people to contract out of standard regulatory frameworks and into new governance approaches.<sup>390</sup>

At a descriptive level, this Article's research suggests that only the EIP case broadly conforms to this default hybridity thesis.<sup>391</sup> While many EIPs relied heavily on the standard environmental regulatory framework to induce industry to engage and take action in these NEG processes, neither the NEIP nor the RNRM similarly interacted with regulatory regimes.<sup>392</sup> While aspects of their institutional designs may embrace alternative relationships with the law,<sup>393</sup> based on this study, the RNRM relied more on funding incentives than standard regulatory frameworks to induce engagement in its NEG approach, while the NEIP's purely voluntary collaborative process lacked any similar integration with the law.<sup>394</sup>

Moving from a descriptive to a normative level, comparisons between the EIP and the NEIP case appear to suggest that NEG approaches that fail to form such default hybrid relationships with the law will often be unsuccessful.<sup>395</sup> Not least, they may lack the capacity to coerce problem stakeholders who have no desire to enter into NEG, fail to curb free-riding, and thus significantly reduce the likelihood of environmental outcomes.<sup>396</sup> A final normative insight into default hybridity can also be taken from the EIP case. As we have seen, in this case, the regulatory default position was insufficiently harsh to compel some key actors to engage in this new governance experiment. Certainly, the analysis above revealed that this weakness can be sidestepped in some

380. Of course, if such subregional bodies did not already exist, this structure would likely have been less successful and instead encountered additional transaction costs. See Bonnell & Koontz, *supra* note 108, at 161, 163; Freeman & Farber, *supra* note 8, at 900-01; Head, *supra* note 24, at 145; Margerum, *supra* note 36, at 144-46.

381. As the findings suggested, it was inadequate funding that was one of the major impediments to the state's willingness to collaborate with federal governments, and consistent with Freeman and Farber's suggestions, significantly more funding may be required to generate greater cooperation at these higher levels. Freeman & Farber, *supra* note 8, at 901-03; see also Margerum, *supra* note 36, at 149-50.

382. See STEWART & JONES, *supra* note 15, at 128-29; Fung & Wright, *supra* note 26, at 15; John, *supra* note 27, at 232, 235.

383. See Leach & Sabatier, *supra* note 91; Lubell et al., *supra* note 34, at 275; Raymond, *supra* note 46.

384. Raymond, *supra* note 46, at 37, 40-41, 50, 54.

385. Leach & Sabatier, *supra* note 91, at 249.

386. Lubell et al., *supra* note 34, at 277.

387. See generally Leach & Sabatier, *supra* note 91, at 249; Raymond *supra* note 46, at 40-41, 54.

388. See Lubell et al., *supra* note 34, at 277; Raymond, *supra* note 46, at 54.

389. See de Búrca & Scott, *supra* note 15, at 3-10; Trubek & Trubek, *supra* note 16, at 1-2; Wiersema, *supra* note 7, at 1294-99.

390. de Búrca & Scott, *supra* note 15, at 9.

391. As we saw, some EIPs also involved social license pressures and/or citizen's rights at law being used to induce industry to cooperate. It is also important to note that legal rules may have also played other roles in the EIP not considered in this Article. *Id.*; Holley, *supra* note 29, at 209-10.

392. See de Búrca & Scott, *supra* note 15, at 6.

393. It is beyond the focus of this Article to examine exactly what other roles law may have played in either case and, as noted below, it is an issue that would require further examination. See Holley, *supra* note 29, at 209-10; see also Trubek & Trubek, *Complementarity*, *supra* note 14, at 544.

394. Gunningham, *supra* note 30, at 154.

395. Respondents in the NEIP commonly referred to the need for “regulation.” The provision of meaningful incentives may, of course, also be a useful strategy if public or some other source of funding is available (such as in the RNRM).

396. Gunningham, *supra* note 394, at 9.

situations by the direct use of law. However, a more general implication for both scholars and policymakers is that, where existing legal regimes are to be used as a default for NEG, they may need to be tailored to offer sufficiently harsh default positions that induce the desired participants to contract out of it, and into the new governance approach.<sup>397</sup>

While these insights are important in their own right, they also raise a number of significant issues that warrant further inquiry by legal and governance scholars, so that we can better understand the role of default hybridity in new governance.<sup>398</sup> This inquiry could include an empirical analysis to identify “superior” forms of default rules, for example, examining different forms of penalty defaults and their relative effectiveness in reducing transaction costs and altering incentives, i.e., comparing rules whose default positions vary in the severity of economic and regulatory consequences.<sup>399</sup> Studies should also be conducted into the *long-term* strengths and weaknesses of default hybridity in NEG.<sup>400</sup> Furthermore, at a more general level, scholars could examine additional institutional examples of NEG in practice to better identify and understand roles other than “default hybridity” that law may play in new governance approaches.<sup>401</sup>

To conclude, the findings in this Article have highlighted the realities of collaboration in NEG institutions.<sup>402</sup> By examining three distinct examples of NEG and its application in different settings, this Article has suggested a host of conditions under which successful collaboration in NEG appears more likely to emerge. **As noted above, adhering to the conditions does not assure success, but the analysis suggests it will improve the likelihood of effective organizations being developed.**<sup>403</sup> Of course, understanding the conditions that support the emergence of these collaborative institutions is just an initial step in the process of analyzing collaboration over the longer term in NEG.<sup>404</sup> Further, the Article’s conclusions are necessarily tentative, and further research is needed to investigate a broader range of variables and confirm the extent to which the findings described above have a wider application.<sup>405</sup> Nonetheless, at this point in our understanding of NEG, the Article has provided some much needed insights to aid scholars and policymakers contemplating, debating, and designing NEG institutions to ensure that future collaborations start down the right path.<sup>406</sup>

397. de Búrca & Scott, *supra* note 15, at 9.

398. See Trubek & Trubek, *Complementarity*, *supra* note 14, at 564; Wiersema, *supra* note 7, 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).

399. See, e.g., Karkkainen, *supra* note 23, at 241; de Búrca & Scott, *supra* note 15, at 6-9; Sabel and Simon, *supra* note 121, at 408-09; Trubek & Trubek, *Complementarity*, *supra* note 14, at 564.

400. Holley, *supra* note 29, at 159-72, n. 210, 209-10 (discussing the EIP and suggesting that while negative regulatory incentives had leveraged action by poor performing industries, it had not guaranteed action or success overtime when it came to these industries addressing broad environmental issues).

401. In particular, this could include a further inquiry into the NEIP and the RNRM themselves to develop a better understanding of how law interacts in these cases. For some emerging studies of other institutional examples, see de Búrca & Scott, *supra* note 15; Trubek & Trubek, *Complementarity*, *supra* note 14, at 564.

402. See Bonnell & Koontz, *supra* note 108, at 164.

403. See Margerum, *supra* note 36, at 164.

404. See Heikkila & Gerlak, *supra* note 19, at 606-07.

405. See Raymond, *supra* note 46, at 54.

406. See Lubell et al., *supra* note 34, at 295.