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Submission to External Advisory Committee on Smart Regulation[1]

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The Canadian Environmental Law Association (CELA) is a non-profit, public interest organization established in 1970 to use existing laws to protect the environment and to advocate environmental law reforms. It is also a free legal advisory clinic for the public, and will act at hearings and in courts on behalf of citizens or citizens' groups who are otherwise unable to afford legal assistance. Funded by Legal Aid Ontario, CELA is one of 72 community legal clinics located across Ontario, fifteen of which offer services in specialized areas of the law.

CELA's objectives are:

- To provide equitable access to justice to those otherwise unable to afford representation for their environmental problems;
- To advocate for comprehensive laws, standards and policies that will protect and enhance environmental quality in Ontario and throughout Canada;
- To increase public participation in environmental decision-making;
- To provide the public with information, research, advice and educational materials to assist them in addressing environmental problems;
- To work with communities, neighbourhoods, individuals and public interest groups to foster long-term sustainable solutions to environmental concerns and resource use;
- To protect ecosystem and public health by preventing degradation from pollution, destruction of natural areas and resource extraction and misuse;
- To work, increasingly with other constituencies, in defending democratic rights and essential services significant to social health and well-being;
- To mitigate the recent erosions of the environmental protection framework from deregulation, budget cuts, harmonization of standards and corporate self-regulation; and
- To use all of these tools to address the increasing impacts of economic globalization on environmental integrity.

A. Introduction

This paper is a submission to the External Advisory Committee on Smart Regulation (EACSR), intended to consider what "smart regulation" means for environmental protection and human health protection regulation.

Background

The government's intention to strike an External Advisory Committee on Smart Regulation was announced in the Speech from the Throne on September 30, 2002. The appointment of the

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EACSR's first chair, Hugh MacDiarmid, was announced on February 11, 2003. Mr. MacDiarmid resigned during the summer of 2003. In the meantime, other members' appointments were announced on May 1, 2003.[2] Prime Minister Chrétien named Mr. Gaétan Lussier chair of the EACSR on July 23, 2003.

There has been little public indication by the new government under Prime Minister Martin about its expectations for the EACSR exercise, which perhaps is appropriate given its nominally "external and advisory" role.[3] The only allusion to the EACSR in the February 2 Speech from the Throne appeared (under the heading "Building a 21st Century Economy") as follows:

> [The government foresees] A Canada built on innovation with world-class research universities, smart regulation and innovative financing, all combining to make Canada a global leader in the commercialization of bright ideas.[4]

There is little indication of what is meant by "smart regulation;" it is ambiguous to the extent that the EACSR, and powerful economic interests, will have wide rein in defining it. The "terms of reference" appended to the announcement of the committee's membership dated May 1 say only that

> over the next 12 to 15 months, the EACSR will develop recommendations on a modern regulatory strategy to support Canada's objectives as a trading nation that is committed to offering a high quality of life for its citizens.
>
> Concurrently, it will review and provide an external perspective on current regulatory issues. In addition to advancing these issues, this work will be helpful in supporting the development of the regulatory strategy.
>
> The EACSR will also identify priority sectors and areas requiring regulatory reform in order for Canada to have a strategic advantage.

The language of "strategic advantage" immediately raises the question about the government's main focus in reviewing its regulatory framework. It seems more likely that Canadians view public good regulation in terms of the responsibility of their governments to provide protections that cannot or likely will not be provided by the market, than in terms of "advantage."

In any case, the terms of reference[5] gives the EACSR a very difficult challenge because of the breadth of the subject-matter inherent in regulation. Clearly, the parameters the EACSR sets for itself will be important in defining the direction of its activities and its report. The role of the EACSR and others to date in giving shape to the meaning of "smart regulation" is discussed later in this submission.

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[2] The list of members and brief biographical information is at http://www.smartregulation.gc.ca/en/01/mb-01.asp (accessed 22 March 2004).
[3] The impression of the EACSR as "external" to government is not helped by the fact that the committee is physically housed in the same facility as the Privy Council Office.
[4] Speech from the Throne to open the Third Session of the Thirty-Seventh Parliament of Canada (February 2, 2004).
[5] See "Mandate and Terms of Reference" at http://www.smartregulation.gc.ca/en/01/mn-01.asp.

About this submission

This submission focuses on environmental protection and public / human health regulation. It maintains this focus in order to highlight the particular needs and necessary attributes of such regulation, although such attributes are common to other types of what we will call "public good" regulation.

The reason for taking this approach is that there are many different contexts and applications for regulation. No single formula can address all regulatory contexts. In proposing policies and processes for all areas of federal regulation, care must be taken to ensure that powers to protect human health and the environment are not compromised by imposing shortcuts and by weakening regulatory (including scientific) capacity in government.

The time is ripe for the present submission, emphasizing public good regulation as it does. Not only is the EACSR seeking input; more importantly, Canadians have suffered several regulatory failures that have focussed attention on the safety of blood, food and water supplies. In spite of such clear signals that government regulatory capacity needs beefing up, not further erosion, some governments continue to propose experimentation with privatization not only of services and emerging industries, but of their oversight. A proposed new *Canada Health Protection Act* is a case in point.[6]

Continuing down the road towards market solutions to public hazards seems ill-advised, however. As will be shown, traditional regulation in the context of environmental and health protection has a good track record, when it is actually implemented. Moreover, the public supports and expects enforcement of environmental regulation. For example, a 1996 survey is reported to have found that 78% of respondents wanted environmental regulations to be strictly enforced, even in times of recession. "When asked the best way to reduce industrial pollution, 48% cited government regulation, 25% said tax incentives, and 19% public reporting. Nobody chose the other option, voluntary compliance."[7] Similarly, a survey cited by Bennett[8] had the following results:

> Government should let businesses decide for themselves how to protect the environment, even if it means they don't always do the right things: **4.9%** of responses
> Government should pass laws to make businesses protect the environment, even if it interferes with businesses' rights to make their own decisions: **88%**
> Can't choose: **6.0%**
> Not applicable or refused: **1.0%**

[6] For example, the CHPA (combining the current *Hazardous Products Act*, *Food and Drugs Act*, *Quarantine Act* and *Radiation Emitting Devices Act*) as proposed will entrench a risk assessment approach that insists on restricting decision-making to "sound science", denying application of the internationally-recognized precautionary principle. It will inappropriately apply cost-benefit analysis to public health protection. As Mary Wiktorowicz has reported, such a "strategic risk management" approach rather than a more comprehensive approach to public health protection is already well underway in at least one of the areas proposed to be amalgamated into the CHPA: "Shifting priorities at the Health Protection Branch: challenges to the regulatory process", in (2000) 43 Canadian Public Administration 1, pp. 1-22.

[7] Michelle Swenarchuk, quoted in "Regulatory Reform Roundtable: Is any consensus possible". In Michael D. Mehta, ed., Regulatory Efficiency and the Role of Risk Assessment (Queen's University: 1996), at p. 100.

[8] Scott Bennett, "Canadian Opinions on Environmental Policy: Patterns and Determinants", Chapter 2 in Alan Frizzell and Jon H. Pammett, eds., Shades of Green: Environmental Attitudes in Canada and Around the World (Ottawa: Carleton University Press, 1997), Table 2 at p. 21.

In "A Public Opinion Perspective on Regulation," Matthew Mendelsohn's findings echo these preferences, *particularly where respondents are asked specifically about governments' role in protecting public goods*.[9]

The Auditor General has also noted increased public awareness and scrutiny of, and sensitivity to, regulatory decisions involving health and safety,[10] suggesting that in spite of any difficulties in participation in regulatory decision-making, members of the public care about the outcomes.

The next stage of federal regulatory reform should respond to both conventional and emerging threats to human health and the environment, recognizing both the unique role of the federal government in protecting these public goods, and the public expectation that the government will fulfil this role. The Government of Canada should do this by re-building government science, regulatory and enforcement capacity, not by dismantling it through entrenchment of risk-based strategies and reliance on the free hand of the market.

In Part B, the stage for a discussion of public good regulation is set by considering the role of regulation in the Canadian democratic system. The basic requirements for government to regulate effectively, and common arguments for and against regulation are also canvassed.

Part C considers the particular context of federal environmental protection regulation and the role of Environment Canada. It discusses the relative importance of regulatory and non-regulatory instruments to environmental protection, and concludes that traditional forms of regulation must form the foundation for Environment Canada's efforts because these approaches have a proven record in achieving results.

In Part D, we look at the current federal regulatory process and suggest that it reflects serious biases against traditional regulatory processes.

Throughout the submission, ➔ **the main messages, conclusions and recommendations are emphasized in this format. These will continue to be the central messages in public interest campaigns in favour of strong regulatory capacity and approaches.**

B. What is regulation, and why does the state regulate?

Prior to addressing the possible meaning of "smart regulation," it is necessary to arrive at a common understanding of "regulation." This part considers various meanings of regulation, and suggests an appropriate context for talking about regulation of public goods such as health and the environment. While it is not assumed that all the following considerations will necessarily fit every context for regulation, the considerations should be helpful in designing a regulatory

[9] (2003). Posted at http://www.smartregulation.gc.ca/en/06/01/su-08.asp and http://www.smartregulation.gc.ca/en/06/01/su-08a.asp (last accessed January 16, 2004).
[10] Auditor General of Canada, "Federal Health and Safety Regulatory Programs", Chapter 24 of the 2000 Report, at paragraphs 24.67 – 24.70.

policy that, in responding to the needs of citizens, reflects social values such as transparency and fairness.

Regulation is an elusive concept because of the breadth of contexts to which it applies and the different senses in which it is used. The goal here is to provide meaning to the term, while acknowledging the wide scope of regulatory endeavours.

The meaning and implications of such a broad concept as "regulation" need to be agreed upon, because of the term's tendency to slip into highly rhetorical debate that escapes useful context. [11] A closer examination of the nature of regulation is useful in order to escape the limitations of rhetorical claims made without context.

Constitutional-legal context

Above all, regulation is a fundamental element of the "rule of law" (or the "supremacy of law"[12]), meaning our system of democratic governance. The rule of law is itself an elusive concept, but depends on the role of and authority residing in the state, in return for the understanding that actions of the state are authorized by the elected representatives of the public. Implicit in this is representative and responsible government; that is to say, a government that is responsible to citizens. For regulation to have meaning in this context, it must be distinguished from non-binding instruments and approaches that lack regulatory reinforcement.

In the past, CELA[13] has discussed regulation in terms of its democratic characteristics, namely fair and consistent decision-making (including equality before the law); public accountability; and due process.

These elements suggest the need, where relevant, for regulation that meets the requirements of natural justice and procedural fairness. While by no means every regulatory regime needs a quasi-judicial tribunal to make decisions, regulatory regimes that allow decision-making without

[11] An example of the rhetorical challenge is the largely pejorative use of the term "command and control regulation" (CAC). For a thorough analysis of command and control, see Gunningham and Grabosky, *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998), pp. 39-50. In short, CAC is characterized by setting targets, determining penalties for not meeting the targets and critically, ensuring and making it known that the capacity (a "credible threat") for enforcement exists. Pejorative views of CAC derive partly from the fact that many US regulations are technology-based (industry is most strongly opposed to this approach), although performance- or outcome-based standards have already replaced technology-based standards in many cases. The merits and disadvantages of CAC (or traditionally, "direct") regulation are, not surprisingly, diametrically opposite. For example, government must be fairly heavily involved and informed on the nature of science and technology implicated by a particular problem or industrial activity; the corresponding argument against regulation is "excessive government intervention" or intrusion. Often, the argument against regulation is that "the market" is adequate to address the problem. As Gunningham and Grabosky point out, however, a local or national economy often benefits from the impetus for innovation that is driven by regulatory requirements.

[12] For example: "The rule of law, sometimes called "the supremacy of law", provides that decisions should be made by the application of known principles or laws without the intervention of discretion in their application." *Black's Law Dictionary*, Sixth Edition, at p. 1332. Decisions made in accordance with the rule of law may thus be distinguished from, for example, purely political decisions.

[13] Michelle Swenarchuk and Paul Muldoon, "Deregulation and Self-Regulation in Administrative Law: A Public Interest Perspective" (CELA Brief No. 285, March 1996).

public scrutiny, and those whose mandates imply a service and promotion relationship concurrently with an oversight relationship, need to be revisited.[14]

Examples of problematic regulatory structures include decision-making power within government with unjustifiably wide discretion, "arms-length" agencies responsible to Ministers but with dual or conflicting mandates, and alternative service delivery structures that provide little or no public accountability. [15]

It is no coincidence that the notion of "public good regulation" incorporates ideas of "democracy" and "accountability." While much of the regulatory chatter includes reference to non-regulatory solutions to public interest protection problems, some level of state involvement will be necessary to ensure that specific public policy goals, particularly those made by Parliament, are achieved.

➔ Public good regulation means activity involving government acting as representative and guardian of the public interest in, for example, human and public health and environmental protection.

Describing regulation

Regulation can be thought of in both substantive and procedural terms. Substantively, it must be effective in achieving desired outcomes, and without compromising distributive justice (for example, it should recognize principles such as cost internalization and polluter pays, and should not disadvantage already vulnerable communities). Procedurally, regulation should be defensible both constitutionally and in terms of its enabling legislation, and both its development and its implementation should be transparent.

A helpful but by no means definitive or complete way of thinking about regulation is in terms of its elements or components. These components may be seen as intrinsic parts of a regulatory framework. For example, Baldwin has identified information gathering, standard setting and behaviour modification components of regulation.[16]

[14] The remarks of the Expert Panel Report on the Future of Food Biotechnology (Royal Society of Canada, 2001) that regulatory departments "should seek to separate institutionally as much as possible the role of promoter from the role of regulator" (p. 212) should apply equally to all areas of public good regulation as to the regulation of food biotechnology.

[15] It is no coincidence, for example, that plunging public confidence in governments has coincided with crises during which the public has become more aware of governments' vacating fields where they previously had a presence. Municipalities have been moved to regulate the use of pesticides in part because of the Pesticide Management Regulatory Agency's "partnership" relationship with the pesticide industry. Food inspection crises and reports of auditors-general have revealed massive holes in federal and provincial inspection systems, and the federal government's emphasis on the need for biotechnology industries to "compete" globally interferes with its regulatory oversight responsibilities.

[16] Robert Baldwin, "Is Regulation Right?" (Centre for Analysis of Risk and Regulation, London School of Economics and Political Science, 2000). Baldwin identifies these components for the purpose of considering the "pressures and challenges" facing regulators, and their varying performance, at different stages of the regulatory process.

A number of stages or components of a sound regulatory process can be identified, each of which needs to be supported by adequate resources if it is to be performed adequately (observation of a range of regulatory schemes would allow a more nuanced description of components):

- Problem identification
- Identification of desired behaviour changes and/or outcomes
- Choice and design of policy instruments used to achieve outcomes
- Implementation of policy instruments
- Compliance monitoring
- Enforcement
- Monitoring and review of effectiveness

These components are not necessarily stages in a linear process. Because of larger social and political contexts, and depending on the type of regulation that is sought, the elements are likely to occur simultaneously and on an ongoing basis.

Each of these components is part of regulation. Removing one component can amount to deregulation. For example, public information and public reporting of production and consumption patterns, as is done in pollutant release and transfer registries like the National Pollutant Release Inventory (NPRI) are not only necessary elements of public involvement in our own governance; they are essential prerequisites to the more interventionist elements of regulation (the elements that we more commonly tend to think of as "regulation") because they provide critical baseline information not only to government, but to citizens and communities, serving the important role of facilitating the right to know about health hazards. Reporting to the NPRI is mandatory, with sanctions for non-compliance, and is an example of a very effective regulatory program. [17]

While the state need not be at the centre of all of the components of a regulatory system, neither can it be absent from certain key roles. A variety of other parties interested in outcomes will participate and play a variety of roles, but the state's role is central in regulation as the term must be understood.[18] For example, important data collection and analysis functions will sometimes be performed by those interested in importing, manufacturing or using a substance or product. Meanwhile, government needs to retain sufficient capacity to determine whether the data are accurate. An example is the screening and assessment for toxicity, persistence, bioaccumulation

[17] NPRI is required by ss. 46-53, *Canadian Environmental Protection Act, 1999*. For a description of NPRI and its successes, see Environment Canada, "Improving Environmental Regulation: An Environment Canada Perspectives Paper," and its Compendium, at p. 9.

[18] Governments can and will rationalize those roles that they perform themselves and others that they will merely facilitate and oversee. Decisions to delegate certain functions will continue to be contentious. Winfield's work developing analytical frameworks for assessing the performance, governance and accountability features of alternative service delivery mechanisms is illustrative. See Mark S. Winfield, Shelly Kaufman and David Whorley, *The 'New Public Management' Comes to Ontario: A Study of Ontario's Technical Standards and Safety Authority and the impacts of putting public safety in private hands* (Canadian Institute for Environmental Law and Policy, 2000), Mark S. Winfield and Hugh Benevides, "Drinking Water Protection in Ontario: A Comparison of Direct and Alternative Delivery Models" (paper commissioned by the Walkerton Inquiry, 2001) and Mark S. Winfield and Hugh Benevides, "Industry Self-Inspection and Compliance in the Ontario Forest Sector" (Pembina Institute for Appropriate Development, 2003).

and other properties conducted under the *Canadian Environmental Protection Act, 1999* (CEPA 1999) by both Health Canada and Environment Canada.

Some roles that are part of a regulatory framework can be performed by those outside government, but government must have the ultimate power to compel performance. In addition to the key role of enforcement, the market's inability to provide information about a hazardous substance to the public may be viewed as a "market imperfection." In such cases, there is a "compelling role for public agencies to provide information on job hazards" (to give one example from the Ontario Royal Commission on Asbestos that still resonates today in terms of threats to public, workers' or environmental health).[19] As with the NPRI, information is compelled by the state but is compiled from data supplied by private actors.

Both the rule of law and regulation can sometimes be well-*described* in terms of their attributes, rather than by *definition*. A simple excerpt drawn from the Report of the Walkerton Inquiry illustrates a common and proper understanding of both the meaning of regulation, and the state's role in it:

> The [Guidelines for Canadian Drinking Water Quality, published by Health Canada] are not regulations ... and thus do not have the force of law: there are no penalties for a failure to comply with them. [20]

That the Guidelines do not have the force of law and lack penalties for a failure to comply with them, with the result that they are not regulatory in nature, appears to be a trite and uncontroversial characterization. While laws and regulations are usually understood to be binding, guidelines and policies are generally not. As has often been demonstrated, the capacity to *enforce* a standard (in addition to the capacity to *justify* it, *monitor and report* on performance, and *adapt* to changing circumstances) will determine whether regulatees comply with standards, and whether citizens are protected from hazards.

Standards, in order to be enforceable, need to be incorporated by regulation. A smart regulation strategy would include a federal commitment to adopting and enforcing minimum standards, allowing provinces to adopt more rigorous standards if they chose. Currently-favoured "cooperative" approaches (for example, reliance on unaccountable bodies like the Canadian Council of Ministers of the Environment), supposedly in recognition of concurrent federal and provincial powers to protect the environment, do not guarantee protection in the absence of binding, enforceable standards.[21]

➔ Smart regulation means retained government capacity to perform public protection functions. In particular, the federal government needs to be more assertive in ensuring protection of the public health and environment, by enforcing minimum standards.

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[19] See M. Gunderson and K. Swinton, "Collective Bargaining and Asbestos Dangers at the Workplace" (Ontario Royal Commission on Asbestos, Study no. 1, 1981), Part IV: Market Imperfections and Failures.
[20] Justice Dennis O'Connor, Report of the Walkerton Inquiry, Part Two, at p. 155.
[21] As Harrison notes, national pollution standards have the added advantage of discouraging the establishment of pollution havens in a jurisdiction. A joint committee of the Senate and House of Commons recommended such an approach, for example, in 1972. See Kathryn Harrison, "Passing the Buck: Federalism and Canadian Environmental Policy" (UBC Press, 1996), at 179.

Social vs. market regulation

A classic distinction is between so-called "social regulation" (understood to encompass health, safety and environmental regulation as well as other types) and "direct" or "economic regulation." Economic regulation attempts to control one or more of price, rate of return, output of a product, etc., while "social regulation affects the conditions under which goods and services are produced and sold, and the physical characteristics of products that are manufactured." [22]

Even the term "social regulation" is somewhat limited insofar as it is interpreted in narrow terms as affecting "economic behaviour." In any case, the public good regulation to which this submission relates generally falls in the social regulation category.

The point of raising this additional (economic or market regulation vs. social regulation) classification is to point out that much rhetorical protest about regulation deals with economic regulation. Because of the nature of market regulation, it must be assessed on a different basis than what this submission calls public good regulation.

Regulation is sometimes also viewed in a broader context as one of a suite of policy instruments that governments use to modify behaviour, in order to achieve public policy goals. By this approach, "small "r" regulation" is sometimes intended to describe all policy instruments with a coercive or compulsive aspect. Some economic instruments, information and reporting requirements could be fit in this category. A narrower category, "capital "R" regulation", is sometimes used to describe laws and regulations requiring or prohibiting certain behaviour, backed by sanction or penalty for non-compliance. As is shown in Part C of this paper, capital "R" regulation (including a credible threat of enforcement) is not only the type of instrument most likely to motivate compliance; it is the type of instrument with the best track record of doing so.

Regulation may be best considered in terms of *outcomes*. We use regulation when we need to be sure of achieving specific outcomes, particularly in terms of environmental quality, public health, and safety. We return to the importance of outcomes in Part C.

Regulations in federal law

The meanings of regulation discussed here are all reflected, not surprisingly, in federal law. The *Statutory Instruments Act* defines regulation as

> a statutory instrument
>
> (a) made in the exercise of a legislative power conferred by or under an Act of Parliament, or
> (b) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,
>
> and includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament.[23]

[22] Economic Council of Canada, *Responsible Regulation (Interim Report)* (1979), at p. 45 (quoting William Lilley III and James C. Miller III, in "The New 'Social Regulation'," *The Public Interest*, No. 47, Spring 1977, pp. 53-54).
[23] R.S.C. 1985, c S-22, s. 2 ("regulation"). .

The central role of Parliament, including its accountability to citizens for the making and implementation of regulations, is clear in this statutory definition. The Act also includes a lengthy definition of "statutory instrument" that similarly emphasizes the role of Parliament. Within the broader constellation of "statutory instruments", a "regulation" obtains sanctions for non-compliance, consistent with how the term is traditionally understood.

The *Interpretation Act* includes a similar definition:

> "regulation" includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established
>
> (*a*) in the execution of a power conferred by or under the authority of an Act, or
> (*b*) by or under the authority of the Governor in Council.[24]

The CEPA Registry, made under authority of CEPA 1999, paraphrases the *Statutory Instruments Act* definition. In addition to statutory instruments that are formally called "regulations", it should be remembered that instruments such as the notices requiring emitters to report to the NPRI meet all of the defining criteria of "regulation" identified here.

Why regulate?

The appearance of legal and formal articulations of regulation thus signals the central and essential place of regulation in our legal, economic and social systems. In describing the nature of regulation, we find that we also have a reason for regulation: "smart regulation" means government acting in a manner that effectively protects the environment and public health. Necessarily, it also means the retention of government capacity to perform the functions. That this articulation of the reason for regulation resembles a reason for having government – namely performing public protection functions – is not a coincidence and demonstrates the centrality of regulation to government.

In our view, "smart regulation" must be regulation to begin with. Thus, it must have the following characteristics:

➔ Effective regulation for protection of the public good must be made by authority of government, and backed by the force of law.
➔ In order to ensure protection of the public and other public goods, government must have the necessary involvement, capacity and ability to exercise its powers.
➔ Effective regulation for protection of the public good does not include non-enforceable voluntary agreements or guidelines (to give just two examples). Such instruments can be aspects of regulation but the fundamental components (enforceability, capacity) must be present.

This is not to deny the existence and the role of many other policy instruments, some of which may have neither the sanction, control, or even the participation of the state. We have experience with many examples of non-government entities performing a range of functions, some of which

[24] R.S.C. 1985, c. I-23, subs. 2 (1) ("regulation").

were traditionally state-centred or state-performed. Many of these have a place and can form an important part of regulatory schemes.

Why not regulate?

Having discussed the public policy rationale for regulation as it is properly understood, it is important to acknowledge private sector motivations for resisting regulation, and their strategies for doing so.

Douglas Macdonald characterizes private sector actors' efforts in promoting voluntary measures over regulation in two ways. One is a form of "adaptation" often called going ""beyond compliance": the greening of business which is presented as the justification for use of voluntarism to supplement regulation." He cites as examples the emergence of the Canadian Chemical Producers Association's Responsible Care program in the 1980s and more generally, the "greening of business in the early 1990s."

Macdonald calls the second approach "weak intervention," the goal of which is to "delay and weaken" the imposition of standards. Here he cites the example of the efforts of the Canadian pulp and paper and smelting sectors in delaying and weakening the imposition of new regulatory standards in the 1970s and early 1980s.[25]

Whatever the motivation, it is important for government regulators in particular to recognize the preferences and behaviour of potential regulatees. The corollary to the rule that industry's primary motivation for compliance is the threat of enforcement of regulation is that industry will go to great lengths in discouraging the imposition of binding and enforceable rules, and to weaken the rules their imposition becomes inevitable. At the same time the opposite tendency of industry, to seek regulation in order to protect competitive positions, must also be recognized.

➔ **Significant regulatory capacity and demonstrated willingness to enforce regulations are the primary motivators for regulatory compliance, and must be maintained by the Government of Canada in areas of public good regulation.**

In the next part of this paper, we consider what environmental protection regulation will have to look like in order to be "smart regulation." Regulation, as the term has traditionally been understood and as we understand it, works; voluntarism, without the reinforcement or backstop of regulation, does not.

[25] Douglas Macdonald, "The business campaign to prevent Kyoto ratification" (unpublished paper presented at annual meeting of Canadian Political Science Association, Dalhousie University, May 31, 2003), at p. 11. Macdonald also cites the examples of the soft-drink industry's role in the advent of household recyling programs, and policy intervention by relevant industries in climate change and acid rain issues.

C. Environmental and health protection regulation

In its perspectives paper submitted to the EACSR, [26] Environment Canada describes aspects of its legislative mandate, and some efforts it is making in fulfilling it.

The department continues to face a number of pressures from within government, and imperatives arising from the increasingly global character of environmental problems and their connection to an increasingly globalized economy.

An ongoing reality for Environment Canada is the need to maintain science capacity in order to fulfil its legislative mandate. Doern [27] identifies three main "features" of environmental science that describe how it is practised in the department. These are the tension between the end-of-pipe approach favoured in the 1970s and what Doern calls a more "preventive," sustainable development approach[28] (briefly, the "remediation vs. prevention" tension); the asymmetry of political power between Canada and the United States that requires Environment Canada to ensure it has exceptional science capacity as a "counterweight to US political might"; and the fact that the department's various programs (i.e. internal) and business and ENGO constituencies (external) have diverse views about the practise of risk management. In its perspectives paper, Environment Canada identifies many of the same pressures [29] as Doern.

Combined with these pressures are a dramatically expanding mandate, public awareness of and support for solutions to environmental problems, budget and capacity cuts of 30% since the mid-1990s, and constantly changing political leadership (twenty ministers in twenty-two years). These factors result in Doern's conclusion that science, the lifeblood of the department, is stretched thin and "science on demand" is growing and displacing "patient science." [30] Where the two can be distinguished, the latter type of science is equally if not more important to ongoing regulatory performance.

These realities are particularly important in the context of the Environmental Protection Service, because "science in the Environmental Protection Service tends to serve a more direct regulatory role." [31] Doern and Reed contend that Program Review cuts, in addition to their implications for government's ability to respond to hazards to human health and the environment, also increased "risks for the legitimacy of the state." [32]

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[26] "Improving Environmental Regulation: An Environment Canada Perspectives Paper". Environment Canada Working Paper, May 23, 2003 ("perspectives paper").

[27] G. Bruce Doern, "Patient Science versus Science on Demand: The Stretching of Green Science at Environment Canada," pp. 286-306 at 294-5. In Doern and Ted Reed, eds., Risky Business: Canada's Changing Science-Based Policy and Regulatory Regime (2000, University of Toronto Press).

[28] For reasons described below, we prefer not to equate prevention and sustainable development as easily as does Doern.

[29] The pressures identified by EC include scientific and technological change; globalization and economic trends; governance and jurisdictional co-operation; evolving public attitudes and demands; and the increasing complexity of problems – interaction and interplay amongst trends, both international and domestic – to which the department must respond. Perspectives paper, pp. 2-7.

[30] See Doern, above, at p. 288.

[31] Doern, p. 297.

[32] G. Bruce Doern and Ted Reed, "Introduction: Issues and Framework" in Doern and Reed, cited above, at p. 9.

While all these factors must be acknowledged, existing legislative mandates and regulatory responsibilities should not be forgotten in the rush to identify "areas of opportunity." [33] Parliament, on behalf of the public, has imposed legal responsibilities and requirements on the basis of identified need. Areas of opportunity should be pursued only to the extent that they do not work counter to the achievement of legal mandates, and should be vetted by Parliament. This is particularly true in times of fiscal restraint.

Unless and until the *Department of the Environment Act* is changed, EC's legal mandate revolves around the "preservation of the natural environment."[34] How this is to be achieved programmatically in the area of environmental protection is set out in CEPA 1999. (Contrary to the Canadian Chemical Producers' Association's (CCPA's) discussion paper produced in anticipation of the EACSR's work, [35] "taking a sustainable development approach to regulatory issues" is outside of Environment Canada's (and Health Canada's[36]) legislative mandates.)

Similarly, while the first part of the preamble to CEPA 1999 declares that "the primary purpose of this Act is to contribute to sustainable development through pollution prevention," it is the operative and mandatory parts of the Act that must be looked to for guidance respecting the government's responsibilities. For example, the "administrative duties" of the Government of Canada, described in section 2, begin with and are based on an obligation to "protect the environment and human health." Sustainable development is not mentioned among the government's administrative duties.

While sustainable development is expressed in myriad government policy and political statements, the government's *legal mandate* in administering CEPA 1999 is clear. Thus, while Environment Canada identifies sustainable development as "the basic model underlying [its] vision of good decision-making" and "a guide for [its] own activities," [37] it must not allow such internal policies to trump the law.

Similarly, EC identifies a daily pressure: "a demand on regulators from many stakeholders to create certainty for the marketplace." Here again, the law requires that environmental and health protection take precedence over elusive "market certainty." *CEPA regulators* in particular have enough of a challenge in handling ever-present scientific uncertainty; they *should not be expected to ensure market certainty* as well. *Steps must be taken to protect the department's ability to perform its mandate, rather than responding to contrary pressures.* In particular, regulatory policies and central agency power should not be allowed to trump environmental and health protection measures.

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[33] The perspectives paper identifies economic instruments, administrative efficiencies, and international convergence as "areas of opportunity" in improving environmental policies and regulations.
[34] R.S.C. 1985, c. E-10. See especially ss. 4 and 5.
[35] CCPA, "Smart Regulation to Help Improve Canadian Global Competitiveness: A Discussion Paper on Regulatory Reform by the CCPA" (March 2003), at p. 2. While the CCPA paper describes complaints about customs policies and inter- and intra-governmental matters, a major focus is CEPA and regulatory process.
[36] The *Department of Health Act* (S.C. 1996, c. 8) identifies "the promotion and preservation of the health of the people of Canada" as the overarching theme of the Minister of Health's powers, duties and functions (see s. 4). Sustainable development is not mentioned.
[37] Perspectives paper, at p. 6.

The EC paper also identifies an overriding criterion for assessing regulations and regulatory systems as "the promotion of the public good". However, the submission goes on to require that the criterion be met by a cost-benefit analysis. The arguments against the primacy of cost-benefit analysis are reviewed briefly below in relation to the Government of Canada Regulatory Policy.

➔ Existing legal duties and responsibilities required by health, safety and environmental protection legislation should take precedence over non-legislated priorities, and any exceptions should be reviewed by Parliament, and not only by Cabinet.

Smart regulation defined by outcomes, effectiveness

The regulatory reform literature emphasizes the importance of evaluating policy instruments on the basis of outcomes or good results, rather than process-related measures. For example, while recognizing that the number of enforcement actions taken remains relevant, Sparrow places "effects, impacts and outcomes" such as "environmental results and health effects" on a higher tier of desirability.[38]

Even entirely voluntary initiatives must be considered in these terms. For example, the chemical industry's Responsible Care initiative may be able to claim a certain level of emissions reductions, but it may fail to report on an emission or spill if there is no mechanism for reporting it, let alone any accountability to or scrutiny by the public.

The voluntary initiative alone cannot comprise "smart" regulation. This has been demonstrated repeatedly. Examples of the failed effectiveness of wholly voluntary initiatives include:

- The Voluntary Challenge and Registry Programme (VCR) "is significantly flawed and … is currently doing little to encourage greenhouse gas emissions reduction in Canada." [39]

- The effectiveness of the Accelerated Reduction/Elimination of Toxics initiative is in serious question, and "environmentalists and some industry representatives now argue that a regulatory backbone for the ARET programme appears necessary." [40] Most of the progress reported by the initiative can be attributed to regulatory control of acid rain and pulp and paper discharge regulations. The largest reductions in reported releases came from the two

[38] Malcolm K. Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (2000, The Brookings Institution), at p. 119. Environment Canada cites Sparrow favourably in its perspectives paper.

[39] See Robert Hornung, "The VCR Doesn't Work" in Robert B. Gibson, ed., *Voluntary Initiatives: the new politics of corporate greening* (1999, Broadview Press), at pp. 134-140. More recent but similar conclusions may be found in Matthew Bramley, "The Case for Kyoto: The Failure of Voluntary Corporate Action" (Pembina Institute for Appropriate Development, October 2002), and Rose Murphy and Mark Jaccard, "The Voluntary Approach to GHG Reduction: A Case Study of BC Hydro" in Energy Studies Review, Vol. 11, No. 2 (2003), pp. 131-151: "Our hindsight decision analysis suggests that BC Hydro's participation in Canada's voluntary program to reduce industrial GHG emissions had little impact on its willingness to incur small financial costs in order to reduce these emissions. … Overall, this analysis suggests that the voluntary program had little effect on those very decisions of the firm that it was presumably intended to influence, decisions that would result in substantial progress toward the environmental objective at minimal cost" (149).

[40] See Debora L. VanNijnatten, "The ARET Challenge," and "The Day the NGOs Walked Out" in *Voluntary Initiatives* (cited above), pp. 93-100 and 101-110, at 108.

sectors that were subject to major regulatory initiatives in the 1980s and 1990s, namely metal smelting and pulp and paper.

- Voluntary measures are also frequently plagued by low participation rates and free rider problems. Regulation and the rule of law require fair and consistent application, helping to create a level playing-field among competitors.

As Jennifer Lynes and Robert Gibson put it so succinctly, "Pure volunteerism is rare. And many of the most effective voluntary initiatives are driven by motivations that rest on the law – on the indirect effects of existing legal obligations, or on the desire to avoid additional mandatory requirements." [41]

In contrast to the documented failures of voluntary instruments, the instruments identified in the Environment Canada perspectives paper and listed below have the potential to be considered "smart regulation" (page references are to the perspectives paper "PP" and its accompanying compendium "C", respectively):

- The perspectives paper mentions the use of statutory prohibitions and the creation of protected areas as methods in protecting wildlife. Both are legislative/regulatory in nature. (The compendium indicates how lack of determination or "political will" to exercise legislative powers can compromise the effectiveness of these tools.) (PP 12; C 17-18, 21-22, etc.)

- The power to "ratchet down" the overall cap for methyl bromide tradable permits similarly exemplifies the need for continuing political will in exercising state control, in order to achieve incrementally the ultimate goal of eliminating the substance (13; 4).

- Similarly, an "imminent federal ban" underlying (providing a backstop to) the use of economic instruments is mentioned as a key factor in the phasing out of lead in gasoline in the 1980s (13; 3).

- The use of both tax incentives and disincentives, cited in the energy and fuels area, are examples of smart use of the tax (regulatory) system having negative pollution impacts, in contrast to continuing "perverse subsidies" that send market signals in the opposite direction (13-14; 5, 23-24).

- The National Pollutant Release Inventory (NPRI) is legislated and includes sanctions for non- or false reporting (14; 9).

- Although the use of pollution prevention plans in Part 4 of CEPA 1999 has not been as proactive as one might have hoped, and triggering the process is discretionary, P2 planning is mandatory once initiated and could make great strides toward achieving the objectives of the Act (15, 10-11).

[41] "The Alternatives Pocket Guide to Voluntary Corporate Initiatives For Environmental Improvement". Appendix in *Voluntary Initiatives* (cited above), at 258.

- Environment Canada notes that emissions trading among large industrial emitters, meant to assist in achieving Canada's Kyoto objectives, will occur "within a regulatory framework" (PP 23).

- The paper notes the recent sulphur in gas and diesel regulations, and forthcoming sulphur in fuel oils regulations (14, 23; 23).

Conventional regulation as in the above examples has, in fact, worked for Environment Canada, as the department demonstrates in its perspectives paper. Most of the experiences are marked by blends of instruments that, in almost all cases, have at least a coercive or compulsive aspect, if not compulsion at their centre, and have *succeeded in achieving the desired outcomes*.

After considerable experimentation with voluntarism in Canada and other jurisdictions, it is clear that approaches including enforced regulations have worked best in protecting Canadians. Other examples in the environmental protection context include:

- Success in reducing discharges from pulp and paper plants resulting in part from a strong federal regulatory presence.[42]
- The elimination of lead from gasoline.
- The effectiveness of regulations in phasing out ozone-depleting substances.
- Efforts to reduce acid rain.
- Recent efforts to reduce sulphur in gasoline and oil.

➔ "Smart regulation" may imply a combination of instruments that includes so-called "voluntary" measures, but if both public accountability and performance are to be achieved, will almost invariably include some element of conventional "regulation" as defined in this submission.

Relative "efficiency" of instruments

Another argument in favour of strong, clear regulatory powers and processes concerns notions of "efficiency". Gross Stein analyses problems with current usages of such terms as "efficiency" and "cost-effectiveness", in particular the tendency to mistake them as ends rather than means. [43]

For example, Environment Canada maintains that "in some clearly-defined cases, it may be in the public interest and more efficient to let real risk and uncertainty be handled by the market".[44] While this may be true in particular contexts and in combination with appropriate regulatory backstops (as already noted, a number of successful economic instruments have included such backstops), a cautionary note about the desired "efficiencies" is useful:

[42] Kathryn Harrison, "Regulation of Pulp Mill Effluents in the Canadian Federal State" (1996) 29 *Canadian Journal of Political Science* 2, pp. 469-496. While Harrison makes it clear that a range of motivations in federal-provincial politics and competition for jobs complicate the picture, federal enforcement or standard-setting action can have the effect of pushing provinces to higher standards.
[43] See Janice Gross Stein, *The Cult of Efficiency* (Anansi Press, 2001), especially pp. 6 and 69.
[44] Perspectives paper at page 9.

> One thing that is clear is that regulation will continue. Some commentators, such as Majone, talk of our moving into a "regulatory state" in Europe in which statutory regulation tends to replace older forms of state intervention. Even traditional command regulation can look to a long life. *Many of the "less restrictive" alternatives to command systems (such as taxes and franchises) have been found to reproduce some fairly familiar difficulties: complex rules have to be written; enforcement has to be carried out; capture looms as a danger. There have been no easy "incentive-based" answers to the old regulatory questions.* [45]

Similarly, Robert Howse adds: "Some incentive-based schemes involve compliance and administrative costs and complications that equal, or even exceed, those of command and control regulation." [46] Devices designed for coping with the fact that non-state actors are delivering some of the new non-command and control instruments (for example, agency and accountability problems) "may entail costs as high as the monitoring and enforcement costs that were considered to be among the major drawbacks to CAC regulation."[47]

The supposed "efficiencies" of alternatives to regulation may, therefore, be more apparent than real.

Regulation and competitiveness

There is also a debate about the effect on competitiveness of regulatory mechanisms. The conventional assumption is that regulation stifles competition. This assumption is, however, questionable. For example, a report by the Public Policy Forum and the International Institute for Sustainable Development 2001 revealed that, contrary to common claims, environmental regulations did not appear to negatively affect firms' or industries' competitiveness. The report also found that, although there was little or no empirical evidence that environmental policies stimulate innovation and propel competitiveness, there was a strong correlation between "tough environmental standards" and "high national income and growth potential" (without a firm causative link being established). [48]

Porter and van der Linde, in a frequently-cited 1995 study, [49] suggested that strict, upstream, preventive regulation tends to promote real innovation and reduce costs.

These conclusions complement Harrison's and Antweiler's findings [50] that actual regulation, and not merely the threat of regulation is a greater incentive for emission reductions.

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[45] Robert Baldwin, "Is Regulation Right?" (cited above), at p.3 (emphasis added).
[46] Robert Howse, "Retrenchment, Reform or Revolution? The Shift to Incentives and the Future of the Regulatory State" in (1993), Alberta Law Review Vol. XXXI, No. 3, 455-492, at 460.
[47] Ibid., at 475.
[48] Barg et al., "Environmental Protection and Business Competitiveness (Summary Paper)" (International Institute for Sustainable Development, for Public Policy Forum, 2001).
[49] Michael E. Porter and Class van der Linde, "Green and Competitive: Ending the Stalemate" in *Harvard Business Review* (September-October 1995), pp. 120-134; Porter and van der Linde, "Toward a New Conception of the Environment-Competitiveness Relationship" in *Journal of Economic Perspectives* 9, no. 4 (fall 1995).
[50] Kathryn Harrison and Werner Antweiler, "Incentives for Pollution Abatement: Regulation, Regulatory Threats, and Non-Governmental Pressures" (2003), *Journal of Policy Analysis and Management*, Vol. 22, No. 3, pp. 361-382. The distinctions lie between actually-regulated toxic substances, and those merely listed on the CEPA List of Toxic Substances, and also depend on the pollution-intensity of firms and facilities. The authors also note that the

Summary: environmental protection regulation

➔ Environment Canada's strengths and public expectations converge in the department's existing legislative/regulatory mandates and responsibilities.
➔ Environment Canada needs adequate science, regulatory and enforcement capacity in order for these responsibilities to be met.
➔ Environment Canada's and Health Canada's mandates relate to protection, not to "sustainable development".
➔ Regulation (as defined to include public accountability features) in the environmental protection field has proven effective. Empirical evidence suggests actual regulation is more effective than mere threat of regulation, which in turn is more effective than mere ability to regulate.
➔ Where so-called voluntarism is employed, real regulation is needed as a backstop.
➔ The supposed efficiencies of alternatives to regulation may be illusory.
➔ Regulation has a positive correlation with competitiveness.

D. Broader Context for Smart Regulation: regulatory reform and process

Assuming that regulations are the most effective policy instrument for protecting human health and the environment, how do we get there? Laws that establish public policy objectives are just a starting-point. This part demonstrates that the values and obstacles embedded in regulatory policies are at least equally important in determining government action and inaction.

Whether viewed on the international level (for example, periodic reports by the Organization for Economic Cooperation and Development on member countries' progress in reviewing and constantly improving its regulatory systems, with an emphasis on "competitiveness"[51]) or domestically, pressure toward regulatory change is constant. These ongoing pressures reinforce the need for "improved" regulatory approaches.

For example, almost sixteen years ago the federal government heralded the arrival of a "new" transparency in regulatory process. At the same time, they claimed a solution to problems ("confusion and uncertainty") about which industry perennially complains:

> "The new regulatory process, implemented in September 1986, has been operational for two years. … [As a result,] draft regulations are prepublished in Part I of the Canada Gazette for at least 30 days before they become final, allowing those who have been consulted, and anyone else who is interested, to see exactly what the regulation is going to say. Regulation is no longer a 'hidden' layer of government. Canadians now see and influence government regulation." "The confusion and uncertainty created by long delays have been eliminated."[52]

NPRI is a very important information tool for government regulators, in addition to its obvious benefit as a public information tool. See also Kathryn Harrison, "Voluntarism and Environmental Governance".

[51] For examples, see www.oecd.org and select "Regulatory reform" from the list of topics.

[52] From *Regulatory Reform: Making it Work* (Office of Privatization and Regulatory Affairs, September 1988), at pp. 1 and 2.

These examples suggest that the regulatory "reform" debate over the past two decades has reflected gradual rather than rapid change. Publication of proposals and consultation are not new, and they represent just two snapshots in the lengthy and complex regulatory process.

Consultation of parties anticipated to be affected by regulations, touted as a new development over a decade ago,[53] is now commonplace and touted as good practice by partisans of all stripes. Meanwhile, a new push for regulatory reform ("smart regulation" is just one of the phrases used) seems to appear every several years. The "smart regulation" initiative is just another stage in this ongoing "reform" debate.

Problems with the Regulatory Policy

Central to discussions about regulatory reform is the machinery guiding the executive part of government (the bureaucracy) that produces regulations, and central to that machinery is the Government of Canada Regulatory Policy. [54]

The Regulatory Policy is identified in a Treasury Board manual as the "key policy governing regulation in Canada."[55] Although it is difficult to know to what extent the Policy is complied with, one must assume by its central importance that some attention is paid to it. The fact that it is issued by the Privy Council Office (PCO), which is also responsible for its implementation,[56] suggests that it is taken very seriously at the highest levels of the executive.

Our legal system imposes a hierarchy of laws and instruments. For example, the constitution is the "supreme law" of Canada, establishing standards and norms to which laws must adhere. Regulations must, in turn, be generally consistent with their enabling laws and with the

[53] See Message from the President of the Treasury Board, *1992 Federal Regulatory Plan* (Treasury Board, Government of Canada), in which Hon. Gilles Loiselle suggests he initiated "this openness of process," even though in a December 1990 news release, his predecessor touted the importance of the 1991 Plan in giving "people an opportunity to get involved in the regulation-making process and [making] their views known." In December 1986 a news release by an earlier Minister Responsible for Regulatory Affairs similarly claimed that "Publication of the [1987] Plan marks the first time a federal government has prepared a comprehensive plan of its regulatory intentions for the up-coming year and presented it to the public for consultation." Publication of the Plan has since quietly been dropped; presumably, publication of individual regulatory proposals in the *Canada Gazette* allows greater timeliness than an omnibus annual plan.

[54] (Privy Council Office, 1999).

[55] A Guide to the Regulatory Process for TBS Program Analysts (Treasury Board Secretariat, no date), online at http://www.tbs-sct.gc.ca/ri-qr/processguideprocessus_e.asp (accessed 1 December 2003, "Modified: 2002-12-09"). Some of the documents related to the Regulatory Policy and forming part of the "internal law" of the regulatory process include (in approximate, assumed descending order of authority): the Cabinet Directive on Law-Making, the Guide to Making Federal Acts and Regulations, and the Guide to the Regulatory Process. Also related are the Integrated Risk Management Framework, A Framework for Science and Technology Advice, and A Framework for the Application of Precaution in Science-based Decision-Making About Risk.

[56] "The Privy Council Office is responsible for assessing the effectiveness of this Policy, its implementation and its elaboration. … The Privy Council Office provides advice to regulatory authorities on the Policy requirements, develops guides and supports capacity building to help regulatory authorities comply with the Policy:" from the Regulatory Policy.

constitution. Most critically, courts and the judiciary guard against abuses in implementation. In the absence of a respected justice system, enforcement of regulations could be subject to abuse.

The regulatory process is not subject to all of the same protections. In particular, there is little or no opportunity to know the assumptions that are made from the moment the regulatory process is triggered, and how the various actors conduct themselves.

The assumptions within the regulatory process, as best characterized by the Regulatory Policy, need to be considered carefully. The reason is that rather than setting out *how* to make a regulation, the Regulatory Policy sets out a series of tests to determine *whether* to make a regulation. It guides officials not only in how to make "regulations", but how to choose among different policy instruments.

Where Environment Canada and Health Canada have determined, for example, that action on a toxic substance is needed, they are required to demonstrate (somehow) that "regulatory effort is being expended where it will do the most good." This rather ambiguous requirement (it's not clear how "the most good" is to be determined, and compared to what alternatives) applies where regulations addressing health, social, economic or environmental "risks" are being considered.

The Policy also requires that "the Business Impact Test[57], or equivalent analysis, must be undertaken to assess the effect that major regulatory proposals will have on Canadian businesses." There is no equivalent test in place that is intended to test the "public interest impact" of regulatory proposals, for example where the intention is to protect public health.

Regulators are also to "ensure that … federal government intervention is justified", that "regulation is the best alternative", that "Canadians are consulted", and that "the benefits outweigh the costs to Canadians, their governments and businesses. In particular, when managing risks on behalf of Canadians, limited resources available to government are [to be] used where they do the most good."

These requirements appear, at first, to be based on unassailable and reasonable principles. However, because they pose completely open-ended questions it is difficult to predict how they might be answered in a given situation.

Other criteria are somewhat more direct: "Adverse impacts on the economy to generate wealth and employment" must be "minimized", and "no unnecessary burden is [to be] imposed." In fact, central to the assumptions of the Regulatory Policy are notions of "competitiveness" and "efficiency".

[57] The BIT was "jointly developed with the Canadian Manufacturers Association:" Hon. Arthur Eggleton, President of the Treasury Board and Minister Responsible for Infrastructure, in *House of Commons Debates*, 10 February 1994, at 1050 hrs. The Minister continued: "I had the pleasure of unveiling it with that association just a week ago. This new software package is designed to help governments understand and evaluate the potential impact of proposed regulations on the private sector." The adoption in official government policy of a process standard developed and promoted by industry raises questions of institutional accountability and bias.

Consistent with the wealth generation priority, the Policy explains "sustainable development" in a way that severely downplays its environmental and social equity dimensions: "[sustainable development] concerns the long run capacity of both the economy and the environment to generate well-being, wealth and employment for Canadians." Inexplicably, the Policy assigns sustainable development a new meaning that emphasizes wealth (consistent with the fourth "policy requirement" in the Regulatory Policy), while providing neither authority nor a rationale for the departure from the widely accepted Brundtland approach. [58]

The Regulatory Policy provides that "parties proposing equivalent means to conform with regulatory requirements are [to be] given positive consideration." The policy does not make clear how "positive consideration" will be given. The "equivalent means" approach raises particularly serious questions about transparency, accountability and the rule of law.[59] An apparently open-ended allowance for a potential regulatee to have special considerations apply to it offends not only the competitiveness values typically embraced by the private sector; it also allows for the application of different rules to each person.

Past attempts to legislate "equivalent means" have failed. For example, a scheme allowing any person to submit a proposed compliance plan as an alternative to meeting the obligations set out in a regulation, was proposed in the first session of the 35th Parliament in the form of Bill C-62, the *Regulatory Efficiency Act*. The long title of the proposed legislation suggested its main thrust: "An Act to provide for the achievement of regulatory goals through alternatives to designated regulations and through administrative agreements".

Just as the *Regulatory Efficiency Act* would have allowed parties to be exempt from regulations already in place, giving "positive consideration" to "equivalent means" gives a systemic advantage to consideration of non-regulatory alternatives to regulations that have not yet been made, arguably short-circuiting the rule of law (and making passage of a *Regulatory Efficiency Act* unnecessary).

For a regulation that is ultimately enacted, "positive consideration" to "equivalent means" suggests privileges will be extended to those having the necessary access to decision-makers and resources to propose "equivalent means to conform".

In either case, "positive consideration" thus gives an advantage to those favouring non-regulatory alternatives.

As Lorne Sossin writes, "Democratic administration … cannot be founded on public institutions that contain and reproduce socioeconomic inequalities. *All those who engage in dialogue with*

[58] Our Common Future: [Report of] The World Commission on Environment and Development (Oxford University Press, 1987), often referred to as the Brundtland commission report after its chair, Gro Harlem Brundtland of Norway. Brundtland defined sustainable development "as development that meets the needs of the present without compromising the ability of future generations to meet their own needs" (at page 43).

[59] Although the meaning of the rule of law is elusive, and varies according to context, the formulation of the Supreme Court of Canada in Re Manitoba Language Rights, [1985] 1 SCR 721 (per Coram) at 748, is apt here:

> The rule of law, a fundamental principle of our Constitution, must mean …. [f]irst, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power.

officials must be equally empowered to be persuasive, and have equal access to the resources needed to convey argument." [60] By this measure, the Regulatory Policy violates basic rule of law principles.

Bill C-62 was not passed, but the equivalent means test and other value assumptions favouring wealth generation over the protection of public health are embedded in the Regulatory Policy. Many of the ideas and values that were proposed and rejected by Parliament are nonetheless powerfully implemented in the Regulatory Policy, with neither Parliamentary nor public approval.

➔ **The expression of assumed values and preferences in the current Regulatory Policy such as competitiveness, wealth maximization, cost-benefit analysis, business impacts and equivalent means work against the likelihood of environmental and health protection regulations coming into force. Other, more ambiguous tests in the Policy are silent about public health and environmental protection or any other values. Such ambiguity and ill-defined objectives violate basic fairness and rule of law principles.**

➔ **A regulatory proposal intended to protect human health and the environment from the most harmful toxic substance should not have to jump the procedural hurdles currently found in the Regulatory Policy. Regulatory hurdles should be removed, not increased, and a "fast track" process provided for where public health, safety and the environment are at immediate risk.**

As the excerpt from the Walkerton Inquiry in the next section demonstrates, schemes designed to discourage regulation lead to sub-optimal decision-making in favour of less effective instruments or even inaction, with sometimes fatal consequences.

Other procedural barriers to public good regulation

The raising of institutional and procedural barriers to regulation (for example, so-called red-tape reduction efforts by governments) is one aspect of regulatory reform over the past several years. Often, a measure that is rhetorically labelled as bureaucratic red tape also happens to be public good regulation: that is, having a valid public health, safety or environmental protection purpose. Such regulation, "interfering" as it does with otherwise unhindered commercial activities, is characterized as "red tape."

Domestic regulatory process has been negatively affected by imposing barriers to regulation. Such procedural barriers in the path of new 'regulatory' requirements can become so onerous that agencies find that they lack the resources necessary to overcome the procedural barriers. As a result they decline to try, even when there is strong evidence that new rules are needed to protect public health and safety.

A striking example of this characterization and its severe limitations given the nature of public good regulation appears in the following excerpt of the Report of the Walkerton Inquiry:

[60] Lorne Sossin, "The politics of discretion: toward a critical theory of public administration" in (1993) 36 Canadian Public Administration 3, 364-391, at 380 (italics added).

I am satisfied that at the time laboratory testing of municipal water samples was privatized in 1996, the government should have enacted a regulation requiring laboratories to notify public authorities promptly and directly of adverse results. As mentioned earlier, such a requirement was in place for private clinical laboratories. (In Chapter 5 of this report, I concluded that Stan Koebel should have disclosed the adverse results received on May 17 to the health unit. Had he done so, the scope of the outbreak would have been reduced. However, in my view, that does not affect the conclusion that the government should have enacted a regulation mandating notification or the conclusion that if it had done so, the scope of the outbreak would have been reduced, as I describe below.)

... [D]irect notification by a testing laboratory to public authorities when adverse test results are found is an important element in protecting public health. ... The government was aware of the advantages of direct notification both before and after the decision to privatize.

Because it was the private sector that would be asked to directly notify public authorities, it was essential that the requirement be embodied in a legally enforceable regulation, rather than a guideline. After the Walkerton tragedy, the government moved quickly to enact a notification regulation. It should have done so in 1996, or at least on the numerous occasions afterward when serious concerns about the lack of notification came to its attention.

I am satisfied that the failure to enact a notification regulation resulted, at least in part, from the regulatory culture of the government elected in June 1995. The regulatory culture of the MOE, and of the government generally, discouraged the enactment of a new regulation to make the notification protocol for adverse drinking water results legally binding on municipal water operators and on private laboratories.

At the relevant time, the MOE was conducting a review of existing regulations to ensure that they were all justified in view of the directions being taken by the government. Any new regulation would have had to overcome the cost- benefit analysis imposed by the Red Tape Commission, which discouraged regulations that imposed reporting requirements because such requirements are “complicated and create unnecessary paperwork.” To impose such a legal requirement upon private laboratories might have been considered a barrier to jobs and economic growth. Moreover, because a new regulation would have to be administered and enforced, it would also increase the cost of government – another effect that would have been unpopular in the prevailing political climate.

It was also clear that the Red Tape Commission was focusing on the nature and extent of regulations under the purview of the MOE. The MOE was subject to twice as many recommendations from the commission as any other ministry. In a consultation paper, the MOE stated that environmental protection agencies in many countries were reducing their emphasis on traditional “command and control ” regulatory approaches. In its view, there was a trend toward using environmental management approaches that were broader than simply mandatory requirements. This paper was published in July 1996, the same month in which the routine laboratory testing was privatized. In reviewing the MOE ’s regulatory reform package in September 1997,the Red Tape Commission recommended that certain regulations be replaced with voluntary guidelines. In making this recommendation, the commission relied on its position that “as a matter of principle, when we ask businesses to be good corporate citizens and in effect to police themselves, those matters should be agreed upon through voluntary agreements, MOUs [Memorandums of Understanding] and other instruments outside of Regulations.”

In view of this regulatory climate, it is not surprising that the MOE did not move to turn a voluntary guideline into a binding legal requirement. This is unfortunate given the information that the MOE had – both at that time and afterward – that private laboratories were not notifying the local MOE offices and Medical Officers of Health about adverse test results for municipal drinking water. ...

... [T]hat the concept of a notification regulation was not likely “a starter ” with the government, given its interest in minimizing regulation, was a reasonable assessment of the situation. I am sure that those within the MOE who might have initiated the steps necessary to develop such a regulation would have been disinclined to do so in view of the prevailing culture.

> My conclusion that there was a reluctance to enact a new regulation in conjunction with the privatization of laboratory testing is also consistent with the way in which the government addressed the issue of the accreditation and certification of private laboratories. The government was disinclined to enact a regulation to require mandatory accreditation of private laboratories that were entering the area of routine drinking water testing as a result of the government 's decision to discontinue conducting such tests. ... [61]

As demonstrated by the events at Walkerton, the Red Tape exercise and the failure to make the appropriate rules regulating water testing can be considered an example of anything but "smart regulation."

Also, Winfield and Whorley identify the institutionalization of certain beliefs and assumptions in the Walkerton story, with the result of limiting policy choices. One example they give, echoing the findings of Justice O'Connor, is the institutionalization of the war on red tape. They also identify restricted consultation with interested parties; speed as an overarching priority in policy formulation; heavy de-emphasis on the role of government in protecting public goods; priority for political risk over health and environmental risk; the failure to recognize the potential negative impact of alternative service delivery mechanisms on information flow to government; a growing "culture of voluntary abatement"; and as a result of all these factors, a declining belief at both the provincial and local levels in Walkerton in the importance of water testing. [62]

➔ The Government of Canada's current Regulatory policy does not support sound instrument choice; instead, it incorporates and favours biases against regulation in favour of other, less effective instruments such as voluntary initiatives.

➔ The Government of Canada's institutional bias against regulations, as exemplified by the Regulatory Policy, may result in unnecessary obstacles to regulation-making. The message of the Regulatory Policy is that a system of rules and values, similar to those put in place during Ontario's "Common Sense Revolution", also applies to the federal regulatory process.

The very weight of the regulatory process is also worthy of consideration as a barrier to effective public good regulation: "The U.S. and … Canadian federal experiences suggest that extensive review and evaluation requirements may actually reinforce the ossification of the regulatory process. This is a result of the additional costs and delays associated with meeting central agency review and evaluation requirements. These have had the perverse effect of discouraging agencies from amending or withdrawing existing regulations even when such steps are appropriate in light of changed circumstances and new information." [63]

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[61] The Honourable Dennis R. O'Connor, *Report of the Walkerton Inquiry*, Part One (Ontario, 2002). "10.8: Reasons for the Failure to Enact a Notification Regulation," at pp. 392-395 (emphasis added).

[62] David Whorley and Mark Winfield, "Competing Narratives and the Walkerton Inquiry: Locating Institutional Factors in Tragic Choices". Unpublished paper presented at the Annual meeting of the Canadian Political Science Assocation, May 2002.

[63] "The Ontario Regulation and Policy-Making Process In A Comparative Context: Exploring the Possibilities for Reform" (Report Prepared for the Environmental Commissioner of Ontario, 1996), at p. 49.

In CEPA 1999, for example, a regulatory proposal may have to be vetted by Cabinet (a process that, like the Regulatory Policy, favours economic ministers and their interests out of all proportion to their social and environmental counterparts) not just once, but several times. During the CEPA renewal process, the first bill tabled in Parliament did not require listing a substance on the Toxic Substances List to undergo, *twice*, scrutiny by the Special Committee of Council, a Cabinet sub-committee.[64] The later bill, which eventually became CEPA 1999, included this new requirement. Since listing a substance does not necessarily lead to a regulation, this seems an unnecessary step that adds complexity and delay.

Another problem with regulatory process is the requirement of cost-benefit analysis. Like the other assumptions built into the Policy, cost-benefit tends to favour conventional measures of well-being, and tends to weight short-term costs disproportionately over longer-term benefits. In one recent case, cost-benefit analysis, and estimates of the "cost of compliance," revealed the advantages of regulatory approaches:

> The most comprehensive cost/benefit study conducted on government regulations was recently released by the Bush administration's Office of Management and Budget (OMB). The OMB has concluded that many of those regulations have a major positive impact on the environment and public health. This report surprised many because it came from an administration that has been preaching the opposite of the report's results as it undermines environmental standards.
>
> The OMB report issued in September reviewed 107 of the most significant government regulations issued during the past decade, and found that the environmental, health, and other benefits the public received far exceed the costs of complying with the regulations. In other words, these major regulations served the public well. …
>
> EPA regulations limiting emissions from engines used for recreational, non-road purposes cost $192 million per year to comply with, but save the operators more than twice that -- $410 million/year -- in lower operating costs. On top of that, there are even bigger savings in health and environmental protection, estimated between $900 million and $7.88 billion in air quality benefits this year! And this does not even include some benefits that the OMB recognized but was unable to quantify, such as reductions in infant mortality from the cleaner air.
>
> The Washington Post summarized the OMB report saying that "the health and social benefits of enforcing tough new clean-air regulations during the past decade were *five to seven times greater* in economic terms than were the costs of complying with the rules. The value of reductions in hospitalization and emergency room visits, premature deaths and lost workdays resulting from improved air quality were estimated between $120 billion and $193 billion from October 1992 to September 2002. By comparison, industry, states and municipalities spent an estimated $23 billion to $26 billion to retrofit plants and facilities and make other changes to comply with new clean-air standards."

[64] See diagram of "Major Steps and Responsibilities in the Making of Federal Regulations" in "Government Regulatory Process Management Standards: Compliance Guide (Privy Council Office) (reproduced as Exhibit 24.2 in 2000 Report of the Auditor General of Canada, Chapter 24, December 2000). This extra hurdle in the TSL process also means greater involvement of the Privy Council Office, who lack the expertise of scientists and policy analysts at Health Canada and Environment Canada who have determined that the substance meets requirements for listing.

> This report did not receive widespread public attention. One suspects this is due to the Bush administration's dissatisfaction with the results of its own research and desire to downplay the report. [65]

In light of this U.S. example, perhaps it is little wonder that any progress in broader assessments of regulatory benefits is not very prominent in Canada. It seems likely that better measurements of environmental benefits of regulations, for example, would contradict the view, promoted by powerful economic interests, that regulation is harmful to the economy, quite apart from the protective and ancillary benefits (e.g less need for reactive "health care" and environmental clean-up) that regulation is proven to offer.

E. Conclusions: What should smart regulation look like?

The ENGO community has a demonstrated commitment to improving legislation and regulation that reflects environmental and human health priorities. These priorities are often defeated by other priorities that are less clearly in the public interest.

Smart regulation must recognize ongoing legislative responsibilities. While competitiveness and innovation are government *policies or priorities*, Environment Canada and Health Canada's environmental protection role is the *law*, set by Parliament, and should not be pitted against an economic growth agenda. Government functions and responsibilities are too complex and onerous to justify pitting – or "balancing" – innovation and competitiveness against the need to protect environment and human health. Parliament and the public should have the opportunity to debate the proper place of laws as opposed to unaccountable policies.

The necessary characteristics we have identified for human health and environmental protection are also applicable to such sectors as biotechnology, aquaculture, new and conventional threats to public health and safety such as viruses and epidemics, etc.

In these and other areas, innovation is not accepted by "the market" if consumers don't see the regulatory framework as strong and credible. Treating regulated entities as customers/clients/partners, and public perception of the same, also undermines that credibility. A proven symbiosis exists among regulation, industry and the public, further justifying regulatory systems and structures.

In both conventional and emerging policy areas, there exist similar reasons for retaining, strengthening and in some cases creating regulatory capacity and powers. Each of these policy areas is justification for a regulation-making system and process that accommodates their complexity.

CELA and other public interest groups are not alone in promoting good regulatory practice in areas of public good regulation; our concerns about regulatory process and policy are shared by

[65] See Minnesota State Senator John Marty, ""Costly" Government Regulations Shown to Yield Big Returns", at http://www.apple-pie.org/ttp/default.asp?articleid=42 (December 4, 2003; last accessed 16 February 2004). See also, "Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations …" (US Office of Management and Budget, Office of Information and Regulatory Affairs, 2003).

the Auditor General of Canada. In 2000, the Auditor General issued a report on federal health and safety regulatory programs. Among the findings were the following:

> **24.86** Health Canada's 1999 National Consultations Summary Report found that Canadians believe that "health and safety must take precedence over economic and other considerations." However, the government's regulatory policy contains potentially conflicting requirements. The policy requires that costs and economic objectives be considered when developing and implementing regulatory programs. In our view, there is a need for the government to clarify the priorities of the regulatory policy for health and safety regulatory programs and clarify the balance it has reached to protect Canadians and address costs and other objectives.
>
> **24.87** Our concern for priorities of these programs stems from the emphasis on economic considerations in the regulatory policy, potential conflicts of interest arising from the cost-recovery policy, and the government's recent focus on client service.
>
> **24.88** The regulatory policy emphasizes the need for regulatory authorities to take into account economic considerations. Since 1986 the policy has focussed attention on the importance of limiting the impact of regulation on the economy. In 1996 the Treasury Board Secretariat directed departments to use a business impact test that would determine the impact of regulations on the private sector.
>
> **24.89** This economic emphasis also appears in the most recent revision of the policy in November 1999. The policy requires regulatory authorities to minimize adverse impacts on the capacity of the economy to generate wealth and employment and to impose no unnecessary regulatory burden. In addition, the authorities must ensure that information and administrative requirements are limited to what is absolutely necessary and that they impose the least possible cost; the special circumstances of small businesses are addressed; and parties proposing equivalent means to conform to regulatory requirements are given positive consideration.
>
> **24.90** The study of cost recovery by the Standing Committee on Finance raises a concern for the effect of cost recovery on the priorities of health and safety regulatory programs. The concern is that the government's policy on cost recovery to fund regulatory efforts may be creating a potential conflict between the public interest and the interest of private organizations that are paying fees to help fund regulatory programs. For example, the committee was told about concerns regarding the effect of cost recovery on the drug review process. The Auditor General told the committee that "as there is a greater dependency on fee recovery, a client-provider relationship could be established, and in some areas that may not be entirely healthy." He indicated that there is a need for direction on how to avoid potential conflict of interest.
>
> **24.91** The government has focussed on introducing the concept of client service as a public service value. A Public Trust: Keeping Canadians Safe and Healthy, the November 1999 report of the Committee of Senior Officials, reviews the consequences of this concept for the inspection and regulatory community. The report notes that adoption of the concept "has been driven by a wide range of government initiatives and directives, providing a pervasive message to all public servants." It also reviews the difficulties that the community encountered in implementing this direction. The report concludes that a key issue for the community was "the need to shift the language for this group away from the `client service' vocabulary, towards a discussion of `Protecting the Public Interest'." The clarification is also needed because government is often both a regulator and, directly or indirectly, a promoter of the industries that it regulates.
>
> **24.92** Our October 2000 Report, Chapter 12, Values and Ethics in the Federal Public Sector , and the 1996 Report of the Task Force on Values and Ethics in the Public Service (Tait Report) raise concerns about giving client service equal or more emphasis than the public interest.
>
> **24.93** By clarifying the priorities of its policies, the government may also address the continuing concerns that stakeholders have about the regulation-making process. While transparency in decision making is

required, the government needs to determine whether these concerns stem from its cost-recovery policy and its consultation process, which is encouraging expectations that cannot be met. For example, it needs to ensure that it is not raising the expectation that regulatory authorities are accountable to industry and other stakeholders.

24.94 The federal government should explain to Canadians and the government's regulatory and inspection community its priorities for health and safety regulatory programs, particularly the balance that the government has reached to protect Canadians and address budget, social, economic and trade objectives. The government should revise its regulatory policy and other policies to reflect this emphasis. [66]

➔ In keeping with the recommendations in 2000 of the Auditor General, the federal government should explain to Canadians and the government's regulatory and inspection community its priorities for health and safety regulatory programs. The government should revise its Regulatory Policy and other policies to reflect this emphasis.

The Auditor General made only passing reference to another barrier to regulation (particularly in an era of budget cuts), namely the threat of regulatory negligence.[67] In making explicit the priorities for regulatory programs, the government would need to inform Canadians fully about the chilling effects on regulation resulting from reduced scientific and enforcement capacity.

We depart slightly from the Auditor General's minimal remarks about the use of the precautionary principle. [68] The Government of Canada's Framework for the Application of Precaution in Science-based Decision-Making About Risk was released in 2002 and fails to question some of the inherent problems with and assumptions about risk management. The Framework is just one policy guidance document among several others, all of which are given secondary priority to the Regulatory Policy. The approaches recommended by the Royal Society's Expert Panel[69] (many of which can be applied to areas other than biotechnology for which the Expert Panel's recommendations were specifically intended), for example, are preferable to the conservative approach embodied in the government's "Framework."

➔ Regulatory failures affecting the blood supply, food safety, energy supply, water and air quality, food and drug and product safety and others make immediate attention to the regulatory process and the Regulatory Policy absolutely necessary. Among other recommendations, regulatory hurdles should be removed, not increased, and a "fast track" process provided for situations where public health, safety and the environment are at immediate risk.

[66] Chapter 24, *2000 Report of the Auditor General of Canada*, "Federal Health and Safety Regulatory Programs".
[67] Ibid., paragraphs 24.57 – 24.59.
[68] Ibid., 24.54 – 24.56.
[69] *Elements of Precaution: Recommendations for the Regulation of Food Biotechnology in Canada: An Expert Panel Report on the Future of Food Biotechnology* (Royal Society of Canada, 2001).

F. Summary of Main Messages, Conclusions and Recommendations

➔ The next stage of federal regulatory reform should respond to both conventional and emerging threats to human health and the environment, recognizing both the unique role of the federal government in protecting these public goods, and the public expectation that the government will fulfil this role. The Government of Canada should do this by re-building government science, regulatory and enforcement capacity, not by dismantling it through entrenchment of risk-based strategies and reliance on the free hand of the market.

➔ Public good regulation means activity involving government acting as representative and guardian of the public interest in, for example, human and public health and environmental protection.

➔ Smart regulation means retained government capacity to perform public protection functions. In particular, the federal government needs to be more assertive in ensuring protection of the public health and environment, by enforcing minimum standards.

➔ Effective regulation for protection of the public good must be made by authority of government, and backed by the force of law.

➔ In order to ensure protection of the public and other public goods, government must have the necessary involvement, capacity and ability to exercise its powers.

➔ Effective regulation for protection of the public good does not include non-enforceable voluntary agreements or guidelines (to give just two examples). Such instruments can be aspects of regulation but the fundamental components (enforceability, capacity) must be present.

➔ Significant regulatory capacity and demonstrated willingness to enforce regulations are the primary motivators for regulatory compliance, and must be maintained by the Government of Canada in areas of public good regulation.

➔ Existing legal duties and responsibilities required by health, safety and environmental protection legislation should take precedence over non-legislated priorities, and any exceptions should be reviewed by Parliament, and not only by Cabinet.

➔ "Smart regulation" may imply a combination of instruments that includes so-called "voluntary" measures, but if both public accountability and performance are to be achieved, will almost invariably include some element of conventional "regulation" as defined in this submission.

➔ Environment Canada's strengths and public expectations converge in the department's existing legislative/regulatory mandates and responsibilities.

➔ Environment Canada needs adequate science, regulatory and enforcement capacity in order for these responsibilities to be met.

➔ Environment Canada's and Health Canada's mandates relate to protection, not to "sustainable development".

➔ Regulation (as defined to include public accountability features) in the environmental protection field has proven effective. Empirical evidence suggests actual regulation is more effective than mere threat of regulation, which in turn is more effective than mere ability to regulate.

➔ **Where so-called voluntarism is employed, real regulation is needed as a backstop**.

➔ **The supposed efficiencies of alternatives to regulation may be illusory.**

➔ **Regulation has a positive correlation with competitiveness.**

➔ **The expression of assumed values and preferences in the current Regulatory Policy such as competitiveness, wealth maximization, cost-benefit analysis, business impacts and equivalent means work against the likelihood of environmental and health protection regulations coming into force. Other, more ambiguous tests in the Policy are silent about public health and environmental protection or any other values. Such ambiguity and ill-defined objectives violate basic fairness and rule of law principles.**

➔ **A regulatory proposal intended to protect human health and the environment from the most harmful toxic substance should not have to jump the procedural hurdles currently found in the Regulatory Policy. Regulatory hurdles should be removed, not increased, and a "fast track" process provided for where public health, safety and the environment are at immediate risk.**

➔ **The Government of Canada's current Regulatory policy does not support sound instrument choice; instead, it incorporates and favours biases against regulation in favour of other, less effective instruments such as voluntary initiatives.**

➔ **The Government of Canada's institutional bias against regulations, as exemplified by the Regulatory Policy, may result in unnecessary obstacles to regulation-making. The message of the Regulatory Policy is that a system of rules and values, similar to those put in place during Ontario's "Common Sense Revolution", also applies to the federal regulatory process.**

➔ **In keeping with the recommendations in 2000 of the Auditor General, the federal government should explain to Canadians and the government's regulatory and inspection community its priorities for health and safety regulatory programs. The government should revise its Regulatory Policy and other policies to reflect this emphasis.**

➔ **Regulatory failures affecting the blood supply, food safety, energy supply, water and air quality, food and drug and product safety and others make immediate attention to the regulatory process and Policy absolutely necessary. Among other recommendations, regulatory hurdles should be removed, not increased, and a "fast track" process provided for, where public health, safety and the environment are at immediate risk.**

Preparation of this submission

Hugh Benevides, the lead author of this submission, has several years' experience, in both the non-government sector and in Parliament, in environmental legislative and policy reform. He co-authored CELA's submission on the implementation of the precautionary principle by the federal government (June 2002). Mr. Benevides is a Master of Laws candidate at Osgoode Hall Law School, with a focus on regulatory theory and process. He holds an LL.B. from Dalhousie University Law School and a B.A. from Carleton University.

Paul Muldoon and Mark Winfield have provided advice and peer review throughout the preparation of the submission.

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CELA chairs the Canadian Environmental Network's Toxics Caucus, several of whose members have reviewed and offered comments on the submission. CELA will continue to liaise with caucus members on the relationship of the smart regulation exercise to environmental and human health protection issues.