CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

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October 22, 2004

The Right Honourable Paul Martin
Prime Minister of Canada
c/o Office of the Prime Minister
80 Wellington Street
Ottawa, ON K1A 0A2

Facsimile: 613-941-6900

Dear Prime Minister,

Re: Report of the External Advisory Committee on Smart Regulation

We are writing, on behalf of the Canadian Environmental Law Association (CELA) regarding your government's smart regulation initiative.

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 at all levels. Funded by Legal Aid Ontario, it is also a free legal advisory clinic for the public, acting at hearings and in courts on behalf of citizens or citizens' groups who are otherwise unable to afford legal assistance. CELA also undertakes additional educational and law reform projects funded by government and private foundations. At the federal level, CELA chairs the toxics caucus of the Canadian Environmental Network, and participates in all aspects of implementation of the *Canadian Environmental Protection Act, 1999*, and is in involved in preparations for the legislative review of that Act. We made extensive submissions to Privy Council Office's (PCO's) consultations on the implementation of the precautionary principle in federal law and policy, and made detailed submissions on changes that were proposed to the *Canadian Environmental Assessment Act* in Bill C-9. CELA is engaged in the consultations on the proposed *Canadian Health Protection Act*, made submissions during the development of the *Species at Risk Act*, and has expertise with hazardous products and food and drug regulation as well as pesticides legislation.

CELA also recognizes the consequences of globalization on environmental protection. The expansion of international trade regimes has made it more difficult for countries to develop new and more progressive laws and policies. CELA remains a leader in recognizing and documenting the influence of trade agreements on governments' and citizens' ability to protect the environment.

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CELA participated in the consultations of the External Advisory Committee on Smart Regulation (EACSR), making a lengthy submission and meeting with staff of the EACSR and of the Regulatory Affairs and Orders in Council Secretariat, PCO in April 2004, and following up with a letter to the EACSR members in May. We attended a July consultation meeting of the EACSR, where we made further submissions in response to the Committee's consultation document. Based on what was learned at the consultation meetings, we followed up with a letter, signed by forty-five other organizations and individuals, in August. All of these documents are available at http://www.cela.ca/coreprograms/detail.shtml?x=2017.

In the August letter (enclosed), the signatories urged the EACSR to **identify the protection of the public's health, safety and environment as the primary objective of federal regulation**. The EACSR's final report instead proceeds with the *status quo* approach, whereby economic competitiveness effectively takes precedence over the protection of public goods.

The purpose of this letter is to provide you with CELA's response to the EACSR's final report to you of September 23, along with some recommendations for the direction of further regulatory reform.

Common ground

In its submissions, CELA's focus was on social regulation, traditionally defined as including environment, health and safety (distinct from direct or economic regulation aimed at markets and competitiveness). The EACSR's explicit focus was on the same matters.

Another area of common ground with the EACSR has to do with the complexity of regulatory requirements. The nature of global commerce, the speed with which goods are expected to cross borders in order to reach customers, and the rate of development of new technologies, all create greater need for the federal government to improve regulatory capacity and interact with other governments, both within Canada and internationally. The complexity of emerging hazards will require ever more sophisticated regulatory responses, often in consultation with other governments.

However, the EACSR's recommendation is to limit rather than strengthen Canadian regulatory activity and capacity, based on vague tests ("Canada should develop its own regulatory requirements only when its national goals or values are significantly different from those of key trading partners", and "when the federal government is pursuing important national priorities": p. 19, and "Canada should identify and target the areas where it wants to be an international leader": p. 25).

In its August submission to the EACSR, West Coast Environmental Law explains that pressure to align with international standards tends to exert a downward force on environmental, health and safety regulations, and that alignment with international standards tends to conflict with the transparency, accountability, timeliness and effectiveness objectives identified by the EACSR (*West Coast Environmental Law's Comments on 'Smart Regulation for Canada'*, August 2004, at pp. 3-4). **Canada therefore cannot afford to take the ambivalent approach to international standard-setting that is proposed by the EACSR.**

The EACSR also proposes "an ongoing program of evaluation and modernization of existing regulation" (part 3.6.6 of the EACSR report). In our April 2004 submission to the EACSR, CELA acknowledged the potential for some existing regulations to become outdated. We cited, as a cautionary note, a report prepared for the Environmental Commissioner of Ontario as follows:

> 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. (from "The Ontario Regulation and Policy-Making Process in a Comparative Context: Exploring the Possibilities for Reform", 1996, at p. 49)

A further word of caution is necessary: the evaluation function would require greater resources for regulatory departments, particularly Environment Canada. The allocation of resources for regulatory review must be carefully reconciled with the need for regulatory capacity more generally. **Your government's Expenditure Review exercise must not be allowed to dismantle existing regulations and regulatory capacity**.

Apart from some areas of qualified agreement with the EACSR, the public interest community takes a fundamentally different approach to public good regulation.

Regulations are the most effective instruments for achieving policy objectives

CELA continues to take the position that **regulation forms the necessary backbone of regulatory strategies**. This is consistent with current regulatory literature that emphasizes a policy instrument mix with regulation at the core.

Part 3.5 of the EACSR's final report, "Instruments for Government Action", fails to account for the fact that well-designed, **adequately-resourced and enforced regulations have proven to be the best instrument for protecting public goods**. The reason for the effectiveness of regulation is simple: individual or corporate actors wish not to suffer the public disrepute, cost and other disadvantages of prosecution or penalty. Surveys of corporate leaders show that the existence and enforcement of regulations give the strongest motivation for compliance.

In submissions to the EACSR, CELA reviewed documented experiences with voluntary arrangements – specifically, those that have been implemented in the absence of enforceable regulations – and found that all such voluntary experiments have failed. CELA's April submission (see especially pp. 14-17) lists some recent failures of voluntarism, and the successes of federal regulatory initiatives.

Rather than acknowledging such failures, the EACSR suggests in its final report (but provides no evidence) that voluntary approaches in the absence of regulations are worthwhile and effective. The Committee effectively dismissed the evidence presented by CELA, saying:

> a number of [NGOs], along with some government officials, consider that traditional prescriptive command-and-control regulatory measures are the most effective and reliable means to achieve these objectives, despite a growing body of evidence that other forms of regulation can, if well designed, produce better results. Some parliamentarians also share this view at times [sic]. During the consultations, the NGOs repeatedly expressed a lack of faith in the ability of industry voluntary codes alone to deliver consumer protection or safety objectives, for instance. The Committee recognizes that, as is the case for all measures, there are limitations to alternative instruments, including voluntary codes. This, however, should not preclude their careful consideration and appropriate use. (EACSR report, p. 44)

The EACSR seems to have begun from the assumption that your government will not provide regulators with adequate resources for implementing existing regulations:

> *Because government does not have the resources to inspect or enforce all regulations*, a relationship of trust should be built whereby government compliance strategies could include incentives for businesses and citizens to voluntarily demonstrate compliance. Sanctions should also be sufficient to deter non-compliance by removing the ability to make a profit from non-compliance, for example. (EACSR report, p. 54; italics added)

This approach fails to consider that regulatory requirements have been imposed by Parliament for the purpose of implementing the laws of Canada. **Ensuring administrative, science and enforcement capacity to implement regulations should therefore be the highest priority of your government**. Instead, the EACSR presupposes a lack of government capacity. Its report also implies that sanctions for violation of federal laws should not include a punitive element for purposes of deterrence.

By contrast with the EACSR approach, CELA's remarks on regulatory reform are founded on the empirical record of well-executed and properly-resourced regulatory frameworks, compared to the failures of purely voluntary initiatives (that is, initiatives that exist in the absence of supporting regulations).

In addition to motivating compliance, regulation tends to spur rather than block or delay innovation. In our remarks to the EACSR in July 2004, CELA cited the compelling conclusions of a recent report of the Northeast (US) States for Coordinated Air Use Management, including the following: "… innovation in control technologies has consistently occurred only after regulatory drivers with well-defined targets and deadlines were adopted. …" (see CELA's "Remarks to the EACSR, July 21, 2004" at p. 3).

In submissions to the EACSR, we therefore concluded that **regulation has proven the most effective means of achieving public policy ends. Empirical evidence suggests that actual regulation is more effective than mere threat of regulation, which in turn is more effective than mere ability to regulate.**

No dual mandates for public good regulation

Citizens' groups, including CELA, asserted throughout the EACSR process that the protection of Canadians' health, safety and environment are the priority, and that dual mandates are contrary to

public good regulation. Regulatory mandates are different from the promotional roles of government, and the temptation to merge them must be resisted.

Laws and regulations provide the strongest and most direct linkage from citizens to their government, traceable to the rules that are produced through the parliamentary process. Industry-promotion roles of some ministries (as distinguished from their regulatory responsibilities) do not have the same linkage to accountability and the rule of law.

Regulatory mandates should be undiluted by an approach that attempts to "balance" protection against competitiveness, innovation and "enabling". The EACSR report nevertheless insists that "Smart regulation is both [simultaneously] protecting and enabling" (at p. 12).

The conflicted, "balancing" approach needs to be removed from the *Government of Canada Regulatory Policy*. We note especially the third and fourth "Policy requirements" of the current *Regulatory Policy*, obliging regulatory authorities to ensure that (3.) the benefits of regulatory proposals outweigh the costs to Canadians, their governments and businesses, and (4.) that "adverse impacts on the capacity of the economy to generate wealth and employment are minimized and no unnecessary regulatory burden is imposed" by regulatory proposals.

Analysis of costs and benefits is notoriously prone to manipulation and unquantifiable values. The vagueness of "no unnecessary regulatory burden" tells Canadians little about the standards that will be applied. (Moreover, the *Policy* defines "sustainable development" in a way that is completely out of step with both Canadian and international articulations of the concept.)

CELA recommends that where a government agency or department proposes to take action that would amount to industry promotion, **a revised *Regulatory Policy* should first require that agency or department to determine whether the action would be consistent with an existing regulatory requirement or regulatory function of that or any other department or agency**. Such an approach would, in effect, appropriately favour the regulatory over the promotional function.

That regulators should regulate, not promote, is not a merely principled position. This was the clear message of the Auditor General of Canada in 2000: **the government should "clarify the priorities of the regulatory policy for health and safety regulatory programs"** (see Chapter 24, 2000 Report of the Auditor General, "Federal Health and Safety Regulatory Programs", excerpted in CELA's April 2004 submission to the EACSR, at pp. 27-28).

The EACSR, by contrast, continues to promote a dual mandate approach (most prominently, "Smart Regulation is both protecting and enabling": p. 12, EACSR report).

The public sees protection as the priority of social regulation

That regulators should regulate, not promote, is not a merely principled position. It **is solidly grounded in public-opinion polling over at least the last two decades**.

The EACSR's own commissioned research is no exception:

> All dialogues reached the same unequivocal conclusion: *when it comes to protecting the environment and public health, government must be in the driver's seat*. From citizens' perspective, *it is unrealistic to expect industry to self-regulate its behaviour* so as to ensure a safe environment, and protect the country's natural resources. And *the same argument was applied to the companies that produce pharmaceuticals and other health products and services*. (Leslie Pal and Judith Maxwell, "Assessing the Public Interest in the 21st Century: A Framework", also cited in CELA's July 2004 Remarks to the EACSR) (italics added).

CELA's April 2004 submission (at pp. 3-4) presented other public opinion research that consistently reflects Canadians' preference for government regulation over alternatives, in order to ensure environmental protection.

Existing policies favour economic values over protection of public goods

The recommendations in the EACSR report are not new. Many would amplify existing government policies that favour market competitiveness, investment and innovation over health, safety and environmental protection, and would further integrate risk-based approaches in federal management of hazards, to the near-exclusion of any meaningful application of the precautionary approach.

As examples, we cite the existing *Regulatory Policy* and various other Treasury Board policies, and the *Framework for the Application of Precaution in Science-Based Decision Making About Risk* (PCO, July 2003). Our critique of federal regulatory process generally and the *Regulatory Policy* in particular (beginning at page 19 of the CELA submission to the EACSR, April 2004) was entirely overlooked by the EACSR, which instead proposes further integration of business values and processes into the *Policy*, and even into law.

Reformed regulatory process and policy must consider strategies for ensuring better capacity and access of public interest community representatives to regulatory decision-making.

In conclusion

Since the EACSR reported, we have had a preliminary discussion with officials in the Privy Council Office about plans for smart regulation implementation. It is our understanding that various aspects of implementation will be carried out by departments having responsibility for a given policy area. We remain concerned about the pace at which this process is advancing, particularly as the default presumption is that smart regulation as envisioned in the EACSR report is the appropriate starting-point.

It is also our understanding that PCO's responsibility at this stage is to reconsider the direction of the *Regulatory Policy*. We look forward to the dialogue and will continue to press for an overarching protection mandate for the policy, which is at the core of federal regulatory culture and process. Such a dialogue is badly needed, because the EACSR report clearly reflects only the viewpoint of one set of interests, namely proponents of industry, technologies and development projects.

We therefore urge you to send a message throughout government to halt smart regulation implementation until a national consensus is achieved on the appropriate direction for the policy, taking into account the views of those in science organizations, non-governmental organizations, regulatory departments, parliamentarians and ordinary Canadians. Meanwhile, CELA will continue to inform Canadians that the current dual-mandate approach compromises the regulatory responsibilities of the federal government.

Regulatory functions best define and represent the nature of government's responsibility as steward of the public interest. Accordingly, Canadians deserve a clear, unequivocal articulation of the government's proposed approach to its regulatory (as opposed to its promotional) functions, as the Auditor General proposed in 2000.

We welcome further opportunities to discuss regulatory reform with you or your delegates.

Sincerely,

Paul Muldoon
Executive Director and Counsel

Hugh Benevides
Research Associate

Enclosure: August 2004 letter to EACSR

cc. 45 Supporters of August 2004 letter
Hon. Lucienne Robillard, President of the Queen's Privy Council for Canada and Minister of Intergovernmental Affairs
Hon. Stéphane Dion, Minister of the Environment
Hon. Reginald Alcock, President of Treasury Board
Hon. Irwin Cotler, Minister of Justice and Attorney General of Canada
Hon. Ujjal Dosanjh, Minister of Health
Hon. John McCallum, Minister of National Revenue and Chair, Expenditure Review Sub-Committee, Treasury Board
Alex Himelfarb, Clerk of the Privy Council and Secretary to the Cabinet
Sheila Fraser, FCA, Auditor General of Canada
Johanne Gélinas, Commissioner of the Environment and Sustainable Development
Jack Layton, Leader, New Democratic Party of Canada
Steve Hindle, President, Professional Institute of the Public Service of Canada