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

Comments on

"Environmental Management Agreement"
Three Party Agreement Between Environment Canada, MOEE, and Dofasco, Inc.

EBR Registry Number: PA7E0009.P

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August 28, 1997

PART I: INTRODUCTION

The Canadian Environmental Law Association (CELA) is a legal aid clinic in the province of Ontario. For the past 25 years, it has been directly involved in the development of many of the environmental laws and policies in Ontario and Canada. CELA has also published numerous books and articles on a wide range of issues pertaining to environmental law and policy.

The purpose of this submission is to provide comments on the proposed "Environmental Management Agreement - Three Party Agreement Between Environment Canada, the Ministry of the Environment and Energy, and Dofasco, Inc." [hereinafter called the "three party agreement]. The thrust of our concern pertains to the use of non-binding agreements and Memoranda of Understanding (MOU) as a policy instrument in place of the development of laws and regulations.[1] This concern is elaborated upon below. We also have various specific concerns about the three party agreement itself.

Our overall position is that we have serious concerns about this agreement, and in particular, the use of voluntary agreements as a policy instrument. Hence, we are arguing that it be deferred until Canadians have an opportunity to expressly debate this issue.

Overall Recommendation: Our overall recommendation is that this proposed agreement be deferred until there is a more open public debate on the use of voluntary agreements and in particular, voluntary agreements between governments and a particular facility. Further, it is recommended that regulatory concessions in the draft agreement be removed from consideration and the public accountability mechanisms be enhanced.

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[1] This submission relies, in part, from the paper entitled: Michelle Swenarchuk and Paul Muldoon, Deregulation and Self-Regulation in Administrative Law: A Public Interest Perspective A paper prepared for the workshop, "Deregulation, Self-Regulation and Compliance in Administrative Law" (March 1996).

PART II: GENERAL CONCERNS WITH RESPECT TO THE THREE PARTY AGREEMENT

In the past, Environment Canada (EC) and the Ministry of the Environment and Energy (MOEE) have concluded MOUs or similar types of voluntary agreements with various industrial sectors. In response to these concerns, the environmental community has expressed serious concerns about their effectiveness and legitimacy. It is apparent that neither EC nor the MOEE have responded to these concerns.

CELA recognizes that the environmental law and policy framework for Canada needs to evolve to respond to changing times. However, one of the key constants that must be retained in the move to update the regulatory framework is respect for the rule of law. The rule of law recognizes the rights and duties of government and citizens, and that the interpretation of those rights and duties is the responsibility of the judiciary, carried out with due process. The fundamental importance of the rule of law is that it invokes a number of key principles. The voluntary approach does not have the guarantees offered by the rule of law, namely, access to environmental decision-making, the availability of public policy debates and the assurance of public accountability, among others. Finally, it must be noted that virtually all of the public opinion polls support more stringent laws, not the voluntary approaches.[2]

(i) Public Involvement in Voluntary Agreements is Too Limited

Over the past three decades, one of the key trends in environmental law and policy is the extent to which avenues have been established for public involvement in environmental decision-making. There has been significant regulatory reform to ensure that the public has a

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[2] For example, see: The Environmental Monitor, "Canadians and the Environment" Presentation to the Canadian Council of Ministers of the Environment, Whitehorse, Yukon Territories, October 23, 1995.

say in the very decisions that may impact their environment or health. The legislative trend in this regard is apparent both at the federal and provincial level. Moreover, common law has also broadened access to the courts through liberalized standing and intervention rules.[3] Similarly, most governmental agencies have developed policies recognizing the value and the need for public participation in decisions affecting the environment and natural resources.

However, one of the key characteristics of voluntary agreements is the lack of public input into the negotiation of the agreement itself. In particular, the vast majority of voluntary agreements pertaining to the environment have been negotiated behind closed doors. In fact, the agreements have typically been devoid of any consultation with the public, environmental groups, unions or health and safety organizations.

With respect to the proposed three party agreement, it is our understanding that the only notice of this agreement, and the only involvement in its negotiation, is the posting of the draft agreement on the environmental registry under the *Environmental Bill of Rights*. Hence, the public was not part of the negotiations of the agreement, did not have access to the data, information and other material that would justify targets and other provisions in the draft agreement. How can the public have the confidence that these targets are legitimate and appropriate without understanding their basis or rationale and without the opportunity to test this rationale?

In our view, a 30 day comment period is not adequate public participation for this type of agreement. The public should have a meaningful role in the negotiation and implementation of the such agreements analogous to the development of environmental laws and regulations (which includes longer notice periods, often direct consultations and

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[3] See: Marcia Valiante and Paul Muldoon, "A Foot in the Door: A Survey of Recent Trends in Access to Environmental Justice" in Steven A. Kennett (ed.) Land the Process in Environmental Management (Calgary: Canadian Institute of Resources Law, 1993), pp. 142-169.

negotiations, and at times public hearings).

Further, the three party agreement does not include any specific mechanism for on-going public involvement. Although section 7 does deal with community involvement and consultation, the three party agreement does not propose any institutionalized form of public involvement by way of the establishment of a community liaison committee or other such body. Hence, there will be no "watchdog"' or oversight mechanism that will provide detailed feedback with the resources and mandate to assess progress under the agreement. In effect, there is no third party evaluation of the activities under the agreement. As such, the public will not have confidence in any progress report by the very parties that have a vested interest in the outcome of the agreement.

(ii) Voluntary Agreements May Pre-Empt Regulatory Initiatives

Apart from the lack of public involvement in the negotiation and oversight of voluntary agreements, voluntary agreements also deprive the public of legitimate public policy debate. As a general rule, most voluntary agreements expressly recognize the ability of government to regulate, regardless of the agreement. However, in practice, a presumption by the regulated industries is that the government would be pre-empted or would hesitate to regulate industries on matters that are covered under a voluntary agreement. Industry is willing to risk a short term detriment (as defined under a voluntary agreement) to "cover the field" in order to anticipate and prevent regulatory action by governments.

In other words, while governments justify voluntary agreements as a means of moving industry forward, it can be argued that there is an understanding that governments will not regulate the industries covered under the agreement. Why would an industry rely on the agreement and take action unless there was at least some assurance they would not be required to do something else as a result of a regulation? The end result is that governments' act on what industry is willing to do rather than on the basis of what needs to be done in terms of the protection of human health and the environment.

With respect to the three party agreement, the only recognition of this issue is in the preamble. One of the clauses in the preamble's states that:

> WHEREAS Dofasco knows and understands that EC and MOEE could override this Environmental Management Agreement ("Agreement") through the application of legislation and regulation.

It is interesting to note that this clause is in a preamble rather than the body of the three party agreement. It should be noted that the thrust of this argument is not that there is no legislative authority for governments to act, but that, practically speaking, governments are fettered in the exercise of their discretion to regulate in areas covered by the agreement.

(iii) Voluntary Agreement Pre-empt Public Debate

Often, voluntary agreements are in areas of very important and frequently controversial public policy. Industry and government, then, negotiate important issues and incorporate them into the agreement without the benefit of public debate on those issues. It then becomes difficult for governments to argue for different provisions in other agreements or in the regulatory forum. In other words, they may be estopped from incorporating different or more stringent terms later than those found in a voluntary agreement.

A good example relates to the various air targets in section 2 of the three party agreement. Although the target for emissions for PAHs and benzene surpass the recommendations of the draft Steel Sector Strategic Options report, it must be recognized that those targets are still draft in nature. No doubt, public debate will remain concerning the legitimacy of those targets and whether those or more stringent targets should be incorporated into legislation. Hence, the three party agreement will make it that much more difficult for governments to deal with those debates.

Another example pertains to the fact that the government of Canada has committed to

the principle of pollution prevention.[4] The intent of the definition accepted by the federal government is that measures should be used to prevent the creation of pollutants. However, the three party agreement in section 1(1) only relates to prevention of "releases" as opposed to the prevention of the creation of pollutants in the first place. Hence, it could be argued that the agreement may be inconsistent with the thrust and the intent of the federal definition of pollution prevention.

(iv) Voluntary Agreements Results in the Loss of Accountability

One of the key concerns of voluntary agreements is that there is less accountability with respect to both the regulated community and the government. More important, the very fact that the proposed agreement is non-regulatory in nature suggests that enforcing the requirement in the agreement will not be possible. It is often put forth that although the traditional enforcement regime is not triggered, such agreements can be enforced through the "court of public opinion." In other words, the failure to abide by commitments is supposed to create an embarrassment factor that would compel industry to comply with their commitments.

However, this argument assumes that the public has the resources and information basis to reveal the progress of the agreement, that the media is willing to publicize the problem and that the interested public will be able to take action when companies do not meet the voluntary commitments.

The proposed three party agreement does not have a third party oversight mechanism to invoke this "court of public opinion" and it does not provide penalties or sanctions when industry fails to live up to its promises. Moreover, virtually all of the commitments in the three party agreement are qualified by the term "best efforts." Hence, even if commitments

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[4] For example, see: Government of Canada, Pollution Prevention - A Federal Strategy for Action (1995).

are not met, the parties only have to establish "best efforts," whatever that means in the minds of the parties. In our view, the three party agreement will lead to less accountability rather than a robust regulatory regime.

(v) Voluntary Agreements with Particular Facilities as Opposed to Industrial Sectors

To the best of our knowledge, the three party agreement is the first such voluntary accord between governments and an individual facility (as opposed to an agreement between government and an industrial sector). This raises the question as to why the governments did not negotiate an agreement with the iron and steel sector itself rather than one individual facility? Is this the start of a trend where governments will negotiate with specific industries? What are the policy implications of this trend? Will the governments be able to negotiate more stringent specific agreements with other facilities? If there is inconsistencies among the provisions for individual facilities, what then happens to the need of establishing a level playing field?

The notion that individual facilities will now be negotiating voluntary agreements is, in our view, problematic. The approach is similar to the one proposed under the Bill C-62, the Regulatory Efficiency Act. Although Bill C-62 did not pass, it is important to be informed from the criticisms of that bill. Under that bill, federal ministers could be empowered to negotiate compliance agreements with individual facilities in place of regulations.

A report prepared for the Standing Joint Committee for the Scrutiny of Regulations provided a scathing critique of the bill. The report noted that the proposed law:

> contemplated a system under which there may eventually be as many different rules as there were persons initially subject to a particular regulation. One person may be dispensed from the application of five sections of a regulation, a second may be dispensed form the application of the whole regulation, while a third remains subject to regulation because he was unable to persuade public officials to grant him any dispensation. To describe such as a system as one that respects the principle of

equality before the law strains credulity.[5]

Admittedly, the three party agreement is not totally analogous to a compliance agreement. However, there is a similarity. Under sections 1.1(iii), 4.4, 5.4 and 5.5, the MOEE undertakes to provide either regulatory concessions or to assist Dofasco within the regulatory context in a manner not available to other industries. In effect, then, the three party agreement is giving an advantage to Dofasco that is not available to its competitors.

The consequence of the individually negotiated voluntary agreements (as opposed to sector-wide agreements) is that there is an inherent unfairness to the system - those with the resources, expertise and access to the voluntary agreement may hold a significant advantage over other players. Rather than having a regulatory framework that makes the law applicable to all, voluntary agreements on an individual facility basis may ensure that the playing field becomes anything but level for competitors. Small businesses in particular would suffer the biggest disadvantage if this trend continues.

In our view, EC and MOEE should not be concluding specific voluntary agreements with specific facilities.

PART IV: SPECIFIC COMMENTS

For the most part, CELA's comments are limited to those general issues related above. However, we do have a number of specific issues that are worth noting. These include:

1. Nature of the Three Party Agreement: What is the nature of this agreement? Do the parties agree that it is a voluntary agreement? Are there any enforcement mechanisms?

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[5] Report on Bill C-62, Prepared for the Standing Joint Committee for the Scrutiny of Regulations, February 16, 1995, at 7.

2. Regulatory Concessions: It is unclear what this section implies, namely, that the purpose of the agreement is to "allow Dofasco to achieve greater operational flexibility while committing to achieve performance beyond compliance with such environmental laws and regulations." What does this section, along with sections 4.4, 5.4 and 5.5, mean? Does it imply there will be regulatory concessions? Similarly, it is unclear what is meant by section 3.2. We are opposed to regulatory concessions in voluntary accords and as such we are not supporting any such provisions in the draft agreement.

3. Reporting: As noted above, public verification and information requirements are not sufficient. In our view, this will provide a lower level of confidence in the public as to the progress of the agreement.

PART V: CONCLUSIONS

At this time, CELA is not in a position to support the proposed agreement. Canadians need and deserve a broader debate as to the use of these instruments. It is for this reason that we have not provided detailed comments on the proposed agreement itself. However, it is apparent from the agreement itself that there are commitments for regulatory concessions which are totally inappropriate for a voluntary agreement. Further, there is a clear lack of public accountability under the agreement. In the end, the agreement raises more concerns than it seeks to address at this point in time.