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LAW IN THE PUBLIC INTEREST

Shrinking Government and the Protection of Ontario's Environment

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SUMMARY

Governments across Canada, in the United States, Great Britain and in many OECD countries have decreased government expenditures and reduced government regulatory involvement. In Ontario the Progressive Conservative election in June of 1995 brought to power a government committed to deficit reduction and tax cuts.

The government's stated objective is "doing more with less" and its has taken a number of measures aimed at the environmental sector. It has:

- cut government expenditures and jobs for the Ministry of Environment and Energy by more than 30%;
- undertaken or proposed a series of changes to Ontario's environmental regulatory framework and made a number of other decisions directly impinging on the environment;
- eliminated or curtailed public involvement in environmental decisions across a wide front of environmental decision making.

The government has stated that it will improve the regulatory structure by doing away with waste, duplication and unnecessary barriers to economic growth, making environmental standards clearer and easier to understand and reducing the inflexibility of regulations which do not permit business to find the most appropriate way to meet environmental standards. The government has said that it will maintain and fortify a solid regulatory base, while turning increasingly to voluntary efforts and the provision of incentives to effect its objectives and encourage continuous environmental improvement.

The government has repeatedly said that the quality of the environment will not be harmed and that Ontario's environmental protection will not be diminished. Ministers of the Environment and Energy and the Premier of the province have reiterated that Ontario's environment will not suffer as a result of the government's actions.

Do the government's environmental actions perform as promised? Do they in fact ensure environmental protection? These are the issues to which the present paper is addressed.

Standards with the force of law have directly and indirectly played a central part in Ontario's improved environmental performance over the past three decades. Other motivations for environmental performance by business play a part, especially in some sectors: markets for environmental products and for shares in environmentally appropriate companies, the emergence of an environmentalist ethic in some corporations reaching as far as the boardroom and the perceived value of positive environmental performance to be recognized as good for corporate citizenship. However, the fundamental factor that prompted this government action in the first place -- perceived short term economic interests favour polluting and resource depleting activities -- persists as the dominant economic reality, especially in an era of increased global competitiveness.

A brief examination of the government's action to date leads to the following conclusions:

(1) Decreased standards. The government has initiated and proposed a significant number of changes to Ontario's environmental standards. A few of these changes have resulted in increased stringency of regulation but by far the largest number and those with the greatest significance have been to decrease environmental standards.

Some of these decreases have been a direct weakening of environmental performance standards. For example, the government has lowered standards of environmental protection in the Planning Act, weakened Mining Act provisions for closure and cleanup, repealed the ban on municipal waste incinerators, exempted the Ministry of Finance from the provisions of the Environmental Bill of Rights, eliminated energy conservation performance requirement from the Building Code, proposed removal reference to the goal of zero levels of AOX discharges for the year 2002 in the MISA Pulp and Paper Regulations and proposed the elimination of the hearings requirement for selected hazardous and municipal waste projects.

Others decreases have removed the certainty of environmental expectations by opening up previously unequivocal standards to the possibility of weakening by bureaucratic, ministerial or governmental discretion. For example, the key provision of the Environmental Assessment Act requiring all undertakings under the Act to consider a full range of reasonable alternatives will be subject to the discretion of the Minister. Similarly the Cabinet will be able to make a regulation exempting anyone from any provision of the Environmental Protection Act and the Ontario Water Resources Act.

In addition there is the ominous prospect of further decreases in existing standards. On more than one occasion the government has relaxed environmental standards in direct response to business requests, despite existing precedent or advice to the contrary. For example, Brenda Elliott as Minister made a decision not to hold an Environmental Assessment hearing in the Taro landfill case, directly counter to the purpose of the Environmental Assessment Act and contrary to established precedent pursuant to the Act. The government made proposals in Responsive Environmental Protection which ran counter to recommendations of MOEE staff concerns about environmental protection. Norman Sterling, current Minister, recently exempted, by regulation, established aggregate concerns from the necessity to obtain a permit for aggregate operations expansions (not involving building alternations or additional water requirements); this responded to a court decision which found that permits were required for these firms. The message business may take from this is that requests for the weakening of standards or exemptions to them will be looked upon favourably.

The government has decreased environmental standards in a number of respects, opened the prospect for further decreases and created clear precedents for even further decreases.

(2) Decreased capability to ensure compliance. MOEE (and MNR) staffing cuts have been severe. The Ministry's capability to inspect, monitor and enforce is hampered by lack of personnel.

Certificates of approval play an important role in enabling the Ministry to enforce Ontario's environmental standards. The proposed elimination of certificate of approval requirements for a whole range of activities (eg., ventilation) and the proposed permit by rule approach may reduce the Ministry's ability to monitor and enforce environmental violations.

Major cuts to the Ministry's science and technology budgets, including laboratory analysis, mean that essential support functions for monitoring and enforcement have been severely weakened. Decreases in the Ministry's scientific and analytical capacity makes it more difficult to identify violations and successfully prosecute them.

Discretionary decisions are made every day by Ministry personnel concerning the level and focus of inspection and monitoring and prosecution. The current government's emphasis on eliminating barriers to economic activity may have a spill-over effect on MOEE personnel, especially in the context of decreased personnel resources, making the discretionary decisions more favourable to business than they have been in the past.

Additionally, business (and government ministries subject to Environmental Assessment Act) willingness to comply voluntarily with existing standards may decrease, increasing violations of existing standards and decreasing compliance. The government has made it clear that it favours business interests. The government has also opened up a whole range of Environmental Protection Act and Environmental Assessment Act decisions to discretionary intervention. It is reasonable to assume that business and government ministries subject to Environmental Assessment Act will focus more on obtaining exemptions than they have in the past to the potential detriment of complying with standards.

(3) Decreased ability to make future standards and make further improvements in Ontario's environmental health: the Problems with Voluntarism

The government's regulatory philosophy has made making additional regulations much more difficult: the "Less Paper/More Jobs" test, with its focus on cost-benefit analysis, the priority given to voluntarism and the need for all new regulations to go through the Red Tape Commission makes it much more difficult for the Ministry to bring in further environmental regulation.

The government's ability to make future regulations is hampered in a number of other respects as well. The decline in scientific and monitoring activity erodes the knowledge base from which new regulations must be made. It is highly unlikely that the government will be able to entice voluntary private sector activity to replace what it has foregone in this area: how likely is it that private will interests undertake research purely in the public interest? It will also be difficult for the government to convince universities, who themselves are under constraints and seeking private money, to undertake scientific and monitoring activity in the public interest.

The Ministry has emphasized the role of voluntary measures in achieving further environmental improvements. Voluntary agreements will inevitably result in lower standards than would result from a regulated standard set by the government in the public interest. It is not in industry's interest to agree voluntarily to what would be otherwise be brought in by regulation and that

means that Ontario will get a set of standards which are closer to what business considers in its own interest. Fundamental reliance on the voluntary likely means that there will be little further standard setting which is truly in the public interest.

(4) Decreases in Public Participation and Environmental Stewardship

On balance the government's changes to date have significantly decreased the public's access to information and its ability to participate in environmental decision making. Decreasing public participation reduces the effectiveness of environmental protection, diminishes the rights of those affected by environmental decisions to know about and influence the decisions that touch them, and discourages environmental stewardship.

A. INTRODUCTION

Governments across Canada, in the United States, Great Britain and in many OECD countries have moved to decrease government expenditures and reduce government involvement in regulation

The rationale for this move has been a combination of an asserted necessity for deficit reduction, alleged inefficiency in government spending, the professed desire for lower taxes on the part of their constituents and the claimed need to compete successfully on the international stage with countries having lower regulatory requirements and lower taxes.

The dual theme of budget cuts and decreased regulatory requirements has been felt by the Canadian environment. The federal government has made repeated cuts in environmental expenditures since the 1980's, reduced transfer payments and devolved environmental responsibilities. Following the 1994 reelection of the Conservative party in 1994, Alberta decreased its expenditure on the environment and made changes to its environmental protection regime.

In Ontario, the Progressive Conservative Party was elected in June 1995 on a platform which featured budgetary deficit reduction and tax cuts. The Party's platform, "The Common Sense Revolution" made no specific reference to the environment, but since taking power the Ontario Conservative government has applied its budget cutting and regulatory "reform" to the environment in a number of areas: significant cuts to the Ministry of Environment and Energy (MOEE) and Ministry of Natural Resources (MNR) budgets, and a series of changes and proposed changes to environmental programs and environmental legislation and regulations: in Bill 26 (the "Omnibus" Bill), revisions to the Environmental Protection Act and Ontario Water Resources Act (in Bill 57), the Environmental Assessment Act (in Bill 76) and changes to a number of regulations proposed in Responsive Environmental Protection.[1] It has also explicitly committed, in Responsive Environmental Protection, to a regulatory approach which places a heavy emphasis on "voluntary" measures and "self-regulation", echoing a theme favoured by the federal government and a number of governments in other jurisdictions.

The government has repeatedly asserted that environmental protection will not be diminished by these changes, saying that it is "doing more with less". It has said that it has a strong commitment to environmental protection, that the changes target bureaucratic waste and duplication and environmentally unnecessary constraints to Ontario business competitiveness. The government implies that voluntary efforts and self-regulation will fill whatever environmentally significant gaps are left by cuts and changes to the regulatory regime.

This paper takes the government at its word and examines the changes and proposed changes in light of its commitment not to harm Ontario's environmental protection regime. The paper begins with a review of the government's commitments on the environment in Section B.

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[1] Ontario Ministry of Environment and Energy, Responsive Environmental Protection: A Consultation Paper, ISBN 0-7778-5401-5, July 1996.

Section C provides background for an examination of the government's performance by briefly reviewing the establishment of the environmental protection regime in Ontario. Section D gives a summary comment on the government's importance in providing environmental protection. Section E develops a framework for assessing the impact of the changes on MOEE's provision of this protection. The rest of the paper examines the changes in light of this framework.

Section F sets out, in summary form, changes to MOEE's budget. Section G briefly discusses what appear to be changes in the Ministry's conception of its role. Section H reviews changes to standards, Section I discusses changes to compliance activities and Section J addresses changes to MOEE's ability to make new standards. Section K examines the government's commitment to "voluntarism" and Section L reviews changes to public participation. Section M provides a brief summary.

The analysis is preliminary and incomplete. The government has initiated a large number of changes; only a portion of which are examined in what follows. Moreover, much of the information necessary to undertake a detailed examination of the likely impacts of the changes has not been generated by the Ontario government. The assessment has focused on changes which will affect the government's ability to protect the environment, not on changes which will have little or no environmental protection impact.

The paper concludes that the government program of change weakens Ontario's environmental protection regime. It has cut environmental services, lowered standards, decreased its capability to ensure compliance with existing standards and reduced its ability and willingness to make new standards in the public interest. It has dramatically reduced public participation in Ontario's environmental protection system.

B. THE ONTARIO GOVERNMENT'S COMMITMENTS ON THE ENVIRONMENT

The Ontario Progressive Conservatives ran on a platform of eliminating waste, reducing government expenditures and providing a tax cut. Environment was not mentioned in the "Common Sense Revolution", the Party's platform in the 1995 election. Since coming to power the government has stated that it will make changes to improve the efficiency of the delivery of environmental services without affecting protection for the Ontario environment.

The government's position on the environment has been articulated in its Business Plan, in Responsive Environmental Protection through press releases and public statements by the Minister and the Premier.

The Business Plan for MOEE was issued in June 1996. The "Ministers Message" from the then Minister of MOEE Brenda Elliott, made a commitment of environmental protection to the "clients" of the Ministry, the people of Ontario:

> "It is my pleasure to present the ministry's plan to our clients -- the people of Ontario. The Ministry wants to achieve the results that its clients expect and deserve. In our case,

> this includes clean air, clean water, and the protection, conservation and wise use of energy and other precious resources. The ministry will meet these expectations by focusing on its core businesses: pollution prevention, remediation, energy planning and conservation and environmental stewardship. The ministry is committed to maintaining a high quality of environmental protection, so that Ontarians receive full value for every Environment and Energy dollar." [2]

The plan sets out the Ministry's strategy saying:

> The common theme of this strategy is: "no compromise on environmental quality". The ministry will be tough on polluters, while ensuring a successful marriage of environmental protection and economic development."[3]

This position has been reiterated by both the Minister and the Premier. For example, Bill 76 which proposes amendments to the Environmental Assessment Act is entitled "The Environmental Assessment and Consultation Improvement Act". In the News Release which accompanied Bill 76, Minister Elliott is quoted as stating "We are committed to modernizing and strengthening environmental assessment. These reforms will better protect Ontario's environment, while making the EA Act less costly, more timely and more effective....These amendments will strengthen the province's environmental assessment and help us deliver better environmental protection through an official process that is more effective and certain and more accessible to everyone."[4]

Responsive Environmental Protection states: "The fundamental objective of MOEE's regulatory reform is to ensure continued human health and safety and environmental protection while eliminating red tape, obsolete regulations and simplifying the system in order to promote economic growth and job creation."[5]

After replacing Brenda Elliott as Minister of the Environment on August 17, 1996, the Premier stated "We want to send an important message to Ontarians that protecting the environment for the future generations ranks equally with us as the fiscal situation for future generations."[6]

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2 Ontario Ministry of Environment and Energy, Business Plan, May 1996, p. 1.

3 Business Plan, p. 6.

4 "Ontario Strengthens Environmental Assessment" MOEE News Release 04096.NR June 13, 1996.

5 Responsive Environmental Protection, p. 16.

6 "Cabinet Shuffle a Tune-Up, Harris Says" Globe and Mail, August 17, 1996.

C. BACKGROUND: THE DEVELOPMENT OF ONTARIO'S SYSTEM OF ENVIRONMENTAL PROTECTION

Economic growth and industrialization, population growth and large increases in the industrialized world's per capita consumption have placed increasing strains on the world's biological, land, water and air resources since the end of the Second World War. With the growing recognition of environmental problems beginning in the 1960's, there has been a major increase in efforts to protect the environment in Canada and internationally.

In the absence of legal strictures or entitlements it frequently made economic sense to pollute and deplete. There are short term economic gains to be made by many in engaging activities which deplete natural resources or which pollute the land, air or water. This is not transitory phenomenon. It is endemic to a modern system based upon commercial interests unfettered by the legal necessity to adapt behaviour to short and long run impacts on the environment.

Growing awareness of environmental problems was coupled with the acknowledgement of the weakness of the common law in protecting the environment. The common law actions of negligence, nuisance, trespass were extremely limited in their ability to protect the environment. The standards of behaviour enforced by the courts were generally too low, time frames too limited, awards paltry and the legal system too expensive to be accessible.

Existing legislation and regulations were not enough; government rule-making was required to step in to fill the gap. Pressed by growing scientific evidence of environmental decline and aroused by public concern, governments in a number of industrialized countries took initiatives to protect the environment. They:

- Brought in environmental standards including legislation, regulations, policies, etc. prohibiting inappropriate environmental behaviour.[7]

- Strengthened governmental capacity to monitor activity and encourage compliance with standards and prosecute violators. Environmental standards mean little without compliance with them (see, for example, Mexico or the former USSR).

In Ontario the legislation included the Environmental Protection Act, revisions to Ontario Water Resources Act, Pesticides Act, the Environmental Assessment Act. The Ministry of the Environment was established and developed a growing capacity and commitment to Ontario's environmental improvement.

During the 1980's two sets of concerns emerged about the adequacy of the regulations. First the regulations were not comprehensive and were not tough enough. For example, acid rain was not

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[7] "Standards" are broadly defined in this paper to include legal requirements, but also guidelines and policies, etc., which while not technically law have the virtual force of law.

addressed by the regulations which had developed in the 1970's and early 1980's and toxic chemicals were seriously under-regulated. Secondly, there was a pattern of insufficient enforcement. Central regulations were on the books but not enforced. Voluntary agreements had been struck with companies such as Inco, who did not meet the regulations and who showed little progress in doing so. Few prosecutions were initiated and there was intense concern that the relationship between the government and those regulated was too close.

There resulted an additional broadening and toughening of legislation (the acid rain regulations, the Municipal and Industrial Strategy for Abatement (MISA), etc.) and a compliance policy which emphasized enforcement. Prosecutions increased significantly. At the same time demand increased for environmental compliance measures which were transparent, allowing scrutiny by the public and permitting the participation of those directly affected by environmental decisions (the Intervenor Funding Project Act, for example).

During this period there was growing public awareness of environmental problems and the emergence of significant interest in engaging in personal activities which would be part of the environmental solution. Purchase of environmentally acceptable products and acquisition of shares in companies engaging in environmentally defensible activities became strategies for many of the environmentally concerned. With this came increasing industry interest in tapping this market, locally and internationally -- a voluntary and profitable corporate "environmentalism".

During the first part of the 1990's, Ontario increased measures to improve public accountability and increase public participation: the Environmental Bill of Rights, advisory committees committed to public consultation on environmental change, changes to the nature of the planning process to incorporate more natural resource use concerns (the Planning Act and related) all emerged during this period.

How the System Works

In Ontario, environmental activity is governed primarily through legislation adopted by the provincial legislature and regulations made by Cabinet under the authority granted by those Acts. Government guidelines and policy which do not have themselves have the explicit authority of law also play a role in guiding environmental behaviour. The primary legislative instruments are Environmental Protection Act, the Ontario Water Resources Act and the Pesticides Act.

Legislation like the Environmental Protection Act, imposes restrictions on the emission or placing of substances into the air, water or onto the land. The quantities of emissions permitted constitute the standards of allowable behaviour. For example the general Air Regulation (346) under the Environmental Protection Act specifies the concentration of a contaminant from a stationary source permitted at the "point of impingement". The acid rain regulations specify how much total annual SO_2 and NO_x are permitted from specific sources. MISA standards set out the concentrations allowed from specific industrial sectors. The regulations do not specify details of how these shall be met.

In the realm of hazardous and liquid industrial waste management, appropriate waste disposal behaviour is governed by a variety of regulations under the Environmental Protection Act requiring that generators of waste register with the Ministry the kinds of wastes they generate; specifying the manner in which wastes must be manifested, licensing of waste transportation companies, requiring the manifesting of wastes and so on.

New standards are critical for a process which truly protects the environment. The Environmental Protection Act, which contains most of the standards for environmental performance in the province, is set up so that most of the standards are contained in regulations. New regulations are normally brought in as regulations pursuant to the Act. Proposed regulations are published in the Ontario Gazette and listed on the electronic bulletin board maintained as part of the Environmental Bill of Rights for a minimum comment period of 30 days.

Other new standards will be brought in as amendments to existing legislation or as new legislation. As such, they will be subject to the same process as all legislation before the house: three readings with the possibility of committee hearings with deputations from the public. Standards which do not have the force of law, but serve to direct environmental behaviour as guidelines or policy will be issued by the Ministry as public documents.

The Standards Development Branch of the MOEE prepares recommendations for new standards. In the past MOEE has undertaken a combination of informal and formal consultation with affected parties and the interested public prior to the introduction of new standards. Up until it was disbanded by the newly elected government in the fall of 1995, the multistakeholder MISA Advisory Committee advised the Minister on the development of MISA standards (standards pertaining to the emissions of toxics into Ontario's watercourses). Prior to meeting the same fate in the fall of 1995 the Advisory Committee on Environmental Standards, served as the vehicle for formal public consultation on all other standards which were not related to MISA.

Issuing a standard does not ensure compliance. The Environmental Protection Act requires certificates of approval to operate devices that emit substances that may pollute the environment. Any new or altered facility which emits substances into the air must obtain a certificate of approval. The facility and its proposed operation must convince the approvals branch that the facility, if operated according to plan will not exceed the permitted limits set out in the standards. The certificate specifies in detail the nature of pollution devices and related matters and the operating conditions that will be permitted in order to ensure compliance with the standards. Owners may appeal the requirements set out in the certificates to the Environmental Appeals Board on the grounds that the terms and conditions are too stringent. The Environmental Bill of Rights permits appeal by others (who may think the terms and conditions are insufficiently stringent) under certain specified conditions.

Over the past decades standards have changed, mostly getting tougher. More substances and activities are subject to regulation than previously and standards for some substances have become more stringent. Consequently, facilities which were constructed under the previous standards reflect older, less rigorous requirements and they and their certificates may not meet current

standards. Facilities operating in a manner consistent with their certificates may be exceeding current standards.

Over time the MOEE developed a capacity for monitoring environmental quality and for monitoring suspected point sources of pollution. MOEE responds to complaints and undertakes routine inspections. In some instances, the ministry's approach has been to bring those into compliance gradually; in others prosecution is employed.

Prosecutions of violations under the MOEE's legislation enforce compliance. Prosecutions can be thought of as having three functions:

- to identify and punish those responsible for violations of environmental laws;
- through the prosecution and punishment to discourage further violations, and environmental harm, by those responsible for the past violation (specific deterrence);
- to provide, through example, an incentive to others to comply with environmental law (general deterrence) -- for those operations not in compliance, to come into compliance and for those who may spill, leak, emit or deposit illegally by accident, to take due care to avoid such an outcome (due diligence).

The last point is the key one for a generalized impact on "voluntary" compliance. Environmental violations stem primarily from a perceived economic benefit, whereas compliance is perceived to cost time and money. Prosecutions help redress the balance in favour of compliance by making non-compliance costly. The higher the probability of being detected of a violation and prosecuted for it, and the higher the cost to a violator of a prosecution (a combination of the legal and other costs of going through a prosecution and the cost of the penalty), the greater will be the perceived costs of non compliance (and the more effective the general deterrent effect).

Offences under environmental legislation are typically public welfare or "regulatory" offenses. Under regulatory offences, the defendant can exculpate itself if it can show that even though it is guilty beyond a reasonable doubt of having violated the statute or the regulation it has exercised "due diligence". That is, the defendant has taken all reasonable care to avoid the violation.

Consequently, what constitutes due diligence is of primary importance in determining what behaviour is appropriate. The courts have defined due diligence to include the notion of an environmental management system. Typically the courts have used the notion of an "industry standard" to determine what is appropriate behaviour.[8]

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[8] For a discussion of environmental management systems and the court's interpretation of due diligence see John Moffet and Dianne Saxe Voluntary Compliance Measures in Canada, Draft Report prepared for North American Commission for Environmental Cooperation, January 1996.

The system is based on established principles of law. The legislature establishes the laws under which the principles of environmentally legal behaviour are defined. Standards are prescribed in the legislation or set out in regulations adopted by Cabinet. Decisions to grant or refuse certificates of approval may be appealed to the Environmental Appeals Board. Convictions may be appealed in the courts. Principles of administrative law govern judicial review of appeal and executive decisions.

A hallmark of the rule of law is that legal requirements are clearly identified and individual discretion to make decisions is defined and constrained. This is particularly important for the effectiveness, fairness and credibility of the system, given the large role that MOEE discretion plays in the system. For example:

- at the approvals stage: decisions about whether proposed systems and methods will meet the standards and what terms and conditions to apply to ensure performance including what levels of safety to require;

- at the monitoring and inspection stage: what aspects of environmental quality will be monitored, what systems will be given the go-ahead; who to monitor and inspect;

- at the enforcement stage: whether and how to permit those out of compliance to remain out of compliance, and for how long and whether to prosecute.

- at the level of whether to make new standards: MOEE decides what standards are appropriate to propose for the government's consideration and adoption by Cabinet, or if necessary, by the legislature: what substances and actors to regulate, how stringent the regulation should be. The Environmental Bill of Rights now provides openings for suggestions about reviews of government policy.

D. THE ROLE OF GOVERNMENT IN ENCOURAGING AND PRESERVING ENVIRONMENTAL HEALTH

Existing governmental standards and the prospect of the implementation of further governmental standards continues to be a fundamental inducement for environmental performance.

Standards with the force of law have directly and indirectly played a central part in improved environmental performance over the past three decades. Other motivations for environmental performance have a role, especially in some sectors: markets for environmental products and for shares in environmentally appropriate companies, the emergence of an environmentalist ethic in some corporations reaching as far as the boardroom and the perceived connection between positive environmental performance and good corporate citizenship. However, the fundamental factor that prompted this government action in the first place -- perceived short term economic interests favour polluting and resource depleting activities -- persists as the dominant economic reality, especially in an era of increased global competitiveness.

Two aspects of government rule making have shown themselves to be critically important: a) government's establishment and enforcement of current standards and b) government's ability and willingness to set new standards. In 1994 and 1996 KPMG conducted studies of the factors influencing corporate environmental performance.[9] Companies were asked to name the top five factors "influencing the organization to take action on environmental issues". The results of the survey show that compliance with regulations was mentioned by 95% and 93% in 1994 and 1996 respectively, while Board of directors liability was cited by more than 70% in both years.[10]

A number of environmental actions not required by law are also heavily influenced by government's regulatory function, especially the threat of further regulation. For example, Responsible Care, the voluntary initiative take by the Canadian Chemical Producers Association to improve its environmental performance, was prompted by a combination of concern for legal liability, anticipated further government regulation and the desire for an improved public image. ARET, the voluntary effort involving a large number of Canadian companies appears to have been motivated by concerns over regulatory moves being contemplated by the federal and provincial government. In Ontario, OMMRI, an organization funding the Blue Box program was supported by soft drink manufacturers who wanted to preempt the possibility of regulations requiring beverages in refillable containers.[11]

It has been argued that environmental regulation provides direct benefits to industry. Meeting regulation encourages activities which have stimulated a green industry. Moreover, it has been suggested that appropriate regulation forces companies to take actions which are more likely to give them innovative characteristics and innovative capabilities are central to economic performance and longevity.[12]

Increased regulatory activity will continue to be important in the future. Our understanding of the nature and effect of our activities on the environment is increasing and the most frequent conclusion is that our regulation has been too lax in the past. Information continues to emerge that activities previously considered to be environmental benign or neutral are destructive: for

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[9] KPMG Environmental Services Canadian Environmental Management Survey, 1994 and 1996. In 1994 KPMG surveyed Canada's 1000 largest companies, 500 companies from the Canadian Corporate Disclosure database "as well as hospitals, municipalities, universities and school boards from across Canada." p. 7. In 1996 the survey was of the 1000 largest companies, 400 companies from the Canadian Corporate Disclosure database and hospitals, municipalities, universities and school boards across Canada.

[10] This is a remarkable outcome given that the corporations surveyed knew that the results of the survey were to be made public; it is in the interests of industry to downplay the public perception that regulation is required for environmental performance.

[11] See Gary T. Gallon, The Canadian Experience: How to Make Environmental Voluntary Programs More Effective, Presentation on behalf of the Canadian Environment Industry Association, Ontario Chapter, to the Western Hemisphere Trade and Commerce Forum, Denver Colorado, July 1-2, 1995.

[12] See Michael E. Porter and Claas van der Linde, "Green and Competitive: Ending the Stalemate", Harvard Business Review, September-October, 1995, p. 128.

example, ozone depleting CFC production and the emissions leading to global warming. Therefore government must have the capacity and willingness to make further regulations to protect the environment.

Government is necessary to establish credible standards in the public interest and to ensure compliance with them. However, the mere presence and activity of government in the environmental area is no guarantee of government effectiveness in protecting the public interest. Government can fail to make standards that truly reflect the public interest or fail to ensure appropriate compliance with them. Sources of the failure can range from inadequate resources for discharging its responsibilities to "capture" by the interests that government is regulating.

The following section discusses a framework for assess how changes proposed by the government may affect its ability to protect the environment.

E. FRAMEWORK FOR ASSESSING CHANGES' IMPACT ON ENVIRONMENTAL PROTECTION

It is useful to have a framework to assess the government's assertion that its changes and proposed changes will not affect the systems effectiveness in delivering environmental protection. The framework summarized in this section identifies five factors for particular attention: existing standards, compliance with existing standards, willingness to exceed existing standards and the rule of law/public participation. The five factors are interconnected.

(1) Existing Standards

Does the change lower, maintain or enhance the standards of environmental protection to which individuals and corporations are to be held? (Standards are defined broadly to include both legal requirements and guidelines, policies and related, which while not technically law, have a status in the system akin to law.) If the change does lower standards of environmental protection, is this lowering justifiable -- is a lowering in the public interest?

(2) Compliance with Existing Standards Does the measure change likelihood of compliance with environmental standards?

(a) For new or changed facilities or operations does it change the likelihood of compliance?

(i) Does it change approval requirements?
(ii) Does it change the certainty or predictability about what will be required?
(iii) Does it change the information available about what is required for compliance?
(iv) Does it change the perceived benefits or costs of compliance?

(b) For existing facilities, does it change the likelihood of detecting those in non-compliance and bringing them into compliance? This includes:

(i) The identification of those not in compliance --monitoring, inspecting, auditing functions.
(ii) Prosecuting those not in compliance, in order to bring them into compliance.
(iii) Changing the willingness to comply of those found to be out of compliance, without the necessity of prosecution.

(c) For existing facilities, does it encourage or discourage "voluntary" compliance (ie., compliance without being identified to or by the Ministry as being out of compliance in the first place)?

(i) Does it change the information available about what is required for compliance?
(ii) Does it change the perceived benefits of compliance? The higher the benefits, the more likely is the compliance.
(iii) Does it change the perceived costs of compliance? The lower the costs of compliance, the greater the likelihood of compliance.

(d) Does it change the efficiency/effectiveness of the government officials in encouraging compliance? Are approvals, compliance, enforcement and prosecution officials more likely to exercise discretion in a direction not consistent with public interest in environmental protection? Does it change the willingness or ability of the government to enforce compliance: does it decrease key resources or increase the possibility of "capture" of government regulators by the interests or perspective it is regulating?

(3) Future Standards

Does the change constrain or limit the ability of the government to impose additional standards in the future as the public interest requires? For example:

(a) Does the change push the government in the direction of freezing current standards or in mitigating the requirements for future standards?

(b) Does the change constrain the government's ability to ascertain whether new standards are in the public interest?
(i) Does the change diminish or limit the (ability to develop) sources of reliable information on the state of environmental health, or on the impact of particular substances on human or environmental health?

(ii) Does the change diminish or limit the access of the government to reliable analysis/evaluation of the implications of emerging data for environmental health and appropriate measures for environmental protection?

(c) Does the change contribute to "regulatory capture"; to helping to isolate the government and make it more vulnerable to regulated interests, thereby decreasing its willingness to bring in new standards that are in the public interest?

(4) Willingness To Exceed Current Standards

Is the change likely to change willingness of individuals or groups to go beyond compliance with existing standards and achieve environmental performance which exceeds current standards?

(5) The Rule of Law; Public Participation; Fairness

Ontario's system of environmental protection is founded upon the rule of law. Perceived fairness and justice (procedural and otherwise) are important for their own sake, but also because they can help to make the system more effective and more efficient. Public participation increases transparency of standard setting and enforcement, provides decision makers with information and helps counter "regulatory capture".

(a) Is the change consistent with the rule of law and generally accepted notions of fairness? Does it delegate authority appropriately, does it entail appropriate degrees of discretion? If not, is it likely to be perceived to be unjust and to open the system up to abuses related to excess lobbying, currying of favour or even systemic corruption?

(b) Does the change increase or decrease the participation of the public?

The rest of the paper does not rigorously apply the above framework, Rather, the following sections provide a preliminary review of the changes implemented by the Ontario government using the framework as a backdrop.

Section F sets out, in summary form, changes to MOEE's budget. Section G briefly discusses what appear to be changes in the Ministry's conception of its role, with particular reference to the concept of MOEE's "clients". Both of these sections are important to assess the ability of MOEE to protect the Ontario environment. The resources available to MOEE fundamentally condition its ability to undertake protective activity. MOEE's conception of its role ultimately determines what it chooses to do and how it chooses to do it, including how it exercises the discretion available to it over the short and long term.

Section H reviews changes to standards, Section I discusses changes to compliance activities and Section J addresses changes to MOEE's ability to make new standards. Section K examines the government's commitment to "voluntarism" and Section L reviews changes to public participation.

F. CHANGES TO MOEE's BUDGET

The Ontario government has reduced the operating budgets of both the Ministry of the Environment and Energy (MOEE) and the Ministry of Natural Resources. This section provides an overview of the reductions to the MOEE's budget. Figure 1 shows total MOEE operating expenditures for the fiscal years ending 1995-1997. Table 1 presents the operating expenditure breakdown by budget category.

According to the Expenditure Estimates MOEE's operating expenditures for the present fiscal year (1996/97, ending March 1997) will total $176 million.[13] This is a decline of $110 million from the 1994/95 level of $286 million, when the present government came to power, and constitutes a decrease of 39%. Table 1 demonstrates that reductions are unevenly distributed over MOEE functions with environmental and energy services experiencing the greatest cuts.

There is a projected increase of total capital expenditure for 1997 -- up to $198 million from $58 million in 1995. However, virtually all of this is for water and sewer infrastructure ($187 million of the $198 million). Capital expenditure on environmental services and environmental control has declined from $57 million in 1995 to $10 million in 1997.

It should be noted that this is only the most recent in a series of cuts to the MOEE budget. In 1992 the operating expenditures for MOEE stood at $498 million and were reduced to $286 million in 1995 by the previous government, through a variety of measures, including hiving off the Clean Water Agency. Thus, the operating budget for MOEE has been reduced a total of 64% since 1992. The cuts of the present government are on top of the cuts of the previous government.

When the cuts to the 1997 budget have been completed, MOEE projects that it will have reduced staff by more than 700 positions since 1995.[14]

These are substantial reductions, in keeping with the government's goals of reducing the deficit and providing a tax cut. However, are the cuts consistent with maintaining and enhancing Ontario's environmental protection?

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[13] Ontario Management Board Secretariat, Province of Ontario Expenditure Estimates 1996-97, Queen's Printer for Ontario, ISSN 0837-4740, p. 85 and following.

[14] The Ministry of Natural Resources operating budget was cut to $317 million in 1997 from $477 million in 1995, a total of $160 million (29%), a staff reduction of close to 2100 jobs.

The cuts affect three interconnected areas:

- Direct government expenditures on specific projects enhancing environmental quality have decreased. For example, beaches restoration expenditures, 3Rs grants, and energy conservation grants have been significantly cut back from the Ministry's capital expenditures.

- Governmental resources devoted directly to standard setting and compliance monitoring and enforcement have decreased: environmental control and environmental services expenditures and employment have declined.

- Government resources devoted to gathering and analysing information about the state of the environment have decreased. This information supports the government's regulatory functions and provides information of broader interest to the public at large.

An approach wishing to decrease expenditures while maintaining environmental protection would proceed in steps calculated to eliminate unnecessary expenditures while safeguarding outlays which protect and enhance environmental protection. It would first identify areas of true waste for cutting. It would then pinpoint areas which could be privatized without negative impact on environmental protection (including negative impact on the credibility and reliability of the system) and ensure that those functions could and would be successfully privatized. The total of these reductions would constitute the amount that could be cut without jeopardizing environmental protection.

Unfortunately there is no evidence that the government proceeded in this manner. Rather, it seems that a target for reduction consistent with the government's deficit and tax cutting objectives was identified and cuts were made to conform to this target. The result is significant reductions to areas important to Ontario's long term environmental protection. This issue is further addressed in the sections that follow.

FIGURE 1

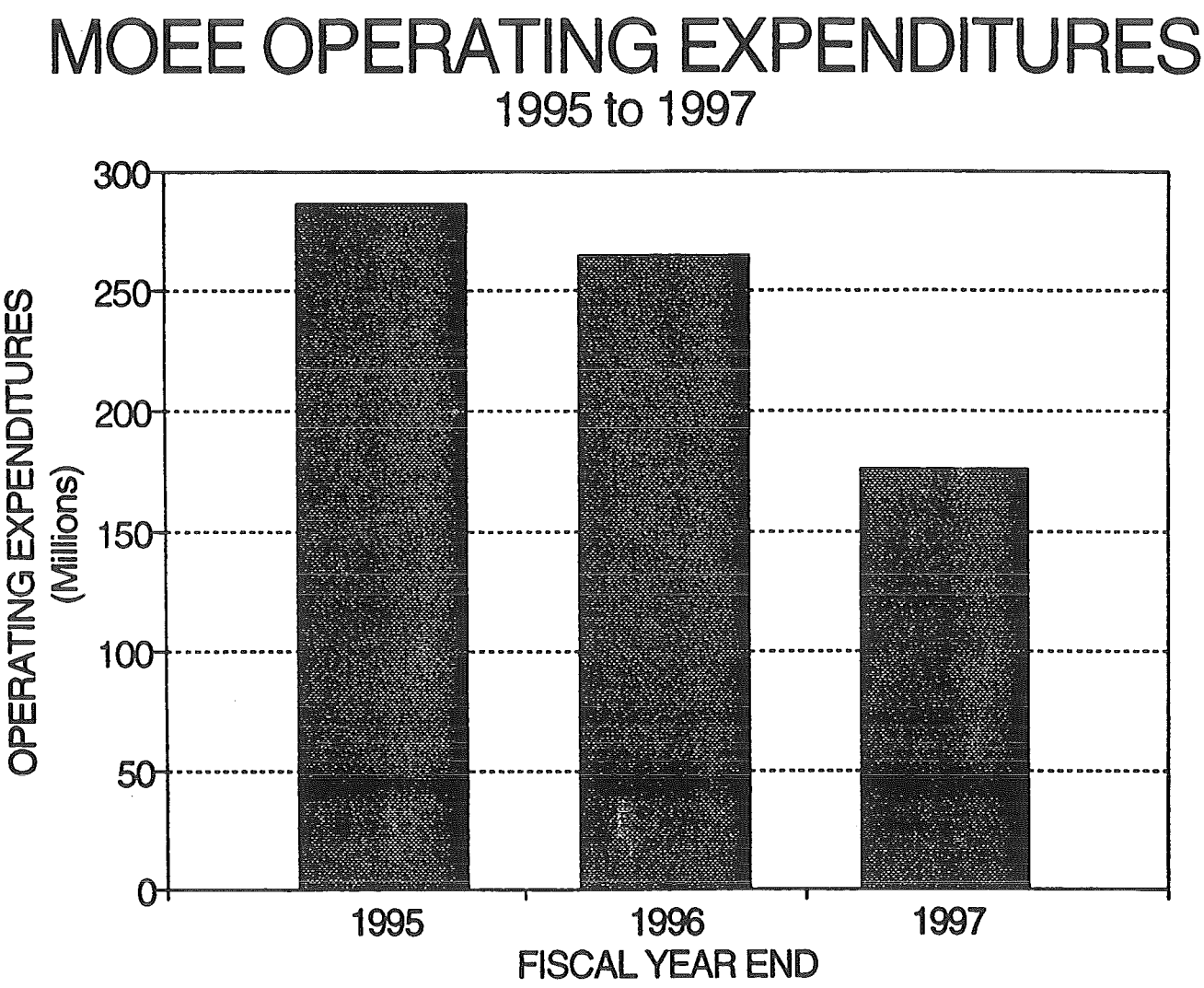
MOEE OPERATING EXPENDITURES
1995 to 1997
OPERATING EXPENDITURES
(Millions)
300
250
200
150
100
50
0
1995
1996
1997
FISCAL YEAR END

TABLE 1
Ministry of Energy and Environment
Operating Expenditures
Fiscal Years 1995 through 1997

	1995	1996*	1997*	Change (1995 to 1997)
Administration	36,012,286	37,825,973	29,703,165	-18%
Environmental And Energy Services	121,684,491	110,868,900	58,579,900	-52%
Environmental Control	101,108,942	94,507,400	82,709,600	-18%
Utility Planning	27,109,246	20,465,400	4,697,900	-83%
Total Operating Expenditure	285,914,965	263,667,673	175,690,565	-39%

* = Estimated

Source: Ontario Management Board Secretariat, Province of Ontario Expenditure Estimates 1996-97, Queen's Printer for Ontario, ISSN 0837-4740, p. 85 and following.

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G. CHANGES TO THE MOEE's CONCEPTION OF ITS ROLE

MOEE has acknowledged that regulation plays a central part in ensuring environmental protection:

> Regulation will have a continuing role in the future, where it provides an effective solution to problems and where costs are commensurate with benefits. Scientifically sound and well designed regulations and standards provide clear and uniform requirements for regulated parties. Good regulation, solidly enforced provides the assurance of protection desired by the public and the level playing field desired by the regulated community.[15]

However, MOEE has also emphasized that alternative approaches to regulation, including "incentive based" measures such as voluntarism and "partnerships" will play a key role in the future.

Changes in the government conception of MOEE's role underlie the mutation in language used in describing the Ministry's mandate. For the first time, terms typically applied to private sector business have been systematically employed to characterize MOEE's activities: "business plans" and "customer service" are now routinely used.

Perhaps most troubling for those who think that MOEE must have a clear perception that its role is to serve the public interest is the way in which the term "client" has been used by the Ministry. It will be recalled that Brenda Elliott used "client" in her Minister's Message in the May 1996 Business Plan where she said: "It is my pleasure to present the ministry's plan to our clients -- the people of Ontario".

Arguably the appropriate role for MOEE cannot be adequately characterized by a business/client relationship, even if the "client" is defined as the people of Ontario. Of much greater concern, however, is the way in which "client" is used in Responsive Environmental Protection. The term is never defined in that document, but the context of its use appears to indicate that the Ministry now believes its "client" or "clients" are those it is regulating -- typically business and industry. For example:

- "Several waste regulations impose significant administrative requirements on both the Ministry and its clients." p. 43

- "At the outset, in developing solutions to environmental problems, the Ministry will work with its clients to identify appropriate alternatives to regulation." p. 52

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[15] Responsive Environmental Protection, p. 54.

- "Client service will be improved by making regulatory requirements more understandable and accessible." p. 53

- "The Ministry will, in conjunction with its clients and interested parties, seek further opportunities to expand use of certification and accreditation as a means to more effective and efficient environmental protection." p. 56

None of the above usage is consistent with the Minister's earlier statement in the Business Plan that the people of Ontario are MOEE's "client". Does the Ministry now define its "clients" as those it is regulating? Are these the people and organizations the Ministry's activities as "business" are meant "to serve"? If so, how can this conception not colour MOEE's regulatory activities, especially the wide range of discretionary powers it discharges? With this conception of its clientele, how can the Ministry undertake an effective job of protecting the environment in the public interest, on behalf of the people of Ontario? Does this conception not officially "regulatory capture" as MOEE policy?

H. CHANGES TO STANDARDS AND STANDARD SETTING

The government has changed standards and proposed changes to standards in a number of Acts and Regulations. As indicated in Section E, standards are defined broadly to include both legal requirements and guidelines, policies and related, which while not technically law, have a status in the system akin to law.

Changes to Standards Already Implemented

(1) Environmental Protection in the Planning Act. Bill 20 changed key provisions in the Planning Act which had been brought in to safeguard the environment. The provisions had been implemented following the extensive consultation of the Sewell Commission. The phrase which stated that planning decisions "be consistent with" provincial planning policy was replaced with "have regard to", a weaker requirement which had been in the Act prior to the Sewell Commission's deliberations and had provided little environmental protection. The Bill also significantly weakened the role of MOEE and MNR in planning decisions, thus effectively decreasing the environmental and natural resource content of planning considerations. *Decrease in standards.*

(2) Policies Pertaining to Urban Sprawl in the Policies Accompanying the Planning Act. A new provincial policy statement has replaced that which had accompanied the Act. This policy statement has removed many elements of previous policy statement related to such things as transportation, sewer and water infrastructure, which aimed at reducing urban sprawl. The

requirements to protect ecologically significant areas and prime agricultural lands contained in previous policy statement have been seriously weakened.[16] *Decrease in standards.*

(3) Mine Closure Provisions in the Mining Act: Changes to the Act significantly modified closure conditions for mines, weakening the requirement for Ministry approval of closure and eliminating the requirement that companies post financial securities to guarantee cleanup in the case of bankruptcy. *Decrease in standards.*

(4) Permitted Incinerator Emissions. Incineration of municipal waste was prohibited by Ontario law by the previous government. The prohibition was revoked by the present government upon assuming power. An incinerator guideline has replaced the ban. The allowable limits of dioxins, furans, and other pollutants from municipal incinerators have increased from zero to the amounts contained in the guideline. *Decrease in standards.*

(5) Energy Efficiency Standards in the Building Code. Energy efficiency standards were eliminated from the building code. The allowable levels of energy consumption, with their attendant resource and environmental impacts have accordingly increased. *Decrease in standards.*

(6) Permitted Site Cleanup Levels. New guidelines for the cleanup of contaminated sites were introduced in June 1996. These guidelines covered a wider range of contaminants than the previous guidelines, but also contained a provision for using risk assessment in cleanups. The new guidelines had originally been put out for public comment, following formulation by MOEE under the previous government, by the Advisory Committee on Environmental Standards in 1994. The Committee made its report to the Minister in 1995. The guidelines issued by the present government in June 1996 are less rigorous in a number of respects than those originally proposed by the previous government and recommended by ACES in its report. *Increase in standards in comparison with what had been in place prior to revision to Guideline but decrease in standards, when compared to what was proposed by previous government.*

(7) Exemption of Ministry of Finance from Environmental Bill of Rights. In November, 1995, the government promulgated Regulation 482/95 which removed the application of the Environmental Bill of Rights to the Ministry of Finance. Amongst other conditions, this removed the requirement for the Ministry of Finance to prepare a Statement of Environmental Values. Statements of Environmental Values are intended to ensure that Ministries take environmental issues into account in preparing policy and discharging their ongoing mandates. Regulation 482/95 also exempted the measures related to government fiscal restructuring from listing on the Environmental Registry under the Environmental Bill of Rights for a period of ten months, regardless of environmental impact. *Decrease in standards.*

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[16] Canadian Institute for Environmental Law and Policy, Ontario's Environment and the "Common Sense Revolution", prepared by Mark Winfield and Greg Jenish, June 1996, p. 12.

II. Proposed Changes to Standards

The government has proposed changes which will affect a large number of environmental standards in Ontario. The following section summarizes major changes; it is not exhaustive.

Changes to Environmental Legislation

(8) Pesticides Act Licensing. MOEE is proposing changes to the Pesticides Act licensing regime, decreasing the number of licence types, requiring recertification every 5 years, upgrading training materials and adding the requirement that unlicensed assistants take basic health and safety training. There are also proposals to simplify insurance requirements for operators and require a minimum of $1 million in comprehensive third party insurance for all pest control business. *On balance an increase in standards.*

(9) Exemptions from the standards in the Environmental Protection Act and the Ontario Water Resources Act. Bill 57 would amend the two Acts to permit Cabinet to exempt by regulation anyone to any provision of these Acts, without any terms or conditions.[17]

This amendment is similar in spirit to the federal government's ill-fated Regulatory Efficiency Act, which was purportedly introduced in part to increase regulatory "flexibility", but died on the Order Paper following public opposition. In the Regulatory Efficiency Act the federal government had proposed allowing those being regulated to negotiate agreements with any government department to use compliance approaches other than those specified in the regulation. However the Act contained a provision which specified that the same goals had to be met by whatever means were being proposed.

The Ontario version makes no such restriction; it permits the exemption without any requirement that the same environmental goals are fulfilled. Thus the amendment explicitly gives Cabinet authority to exempt anyone affected by the Acts from any of the Act's standards, weakening any standard's scope of application.

This is not an idle power. The government has already shown itself willing to grant exemptions. For example, the Minister of the Environment recently made a regulation exempting certain aggregate owners on the Niagara Escarpment from the necessity to obtain permits for further quarrying activities.[18]

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[17] The proposed amendment reads: "175.1 (a) The Lieutenant Governor in Council may make regulations, (a) exempting any person, licence holder.... from any provision of this Act and the regulations and prescribing conditions for the exemptions from this Act and regulations" (Proposed section 175.1)

[18] The exemption applies to owners with licences predating 1976 and exempts further quarrying activities not requiring the altering or construction of buildings.

Another proposed amendment permits Cabinet to prohibit or control a wide range of activities simply by making a regulation.[19] In combination with the previous amendment this, in effect, gives Cabinet the power to rewrite the Environmental Protection Act and the Ontario Water Resources Act, without receiving the legislature's approval.

It is difficult to see how these amendments increase clarity or certainty of the Act's standards. Arguably they do precisely the opposite. By opening up all of the Act's provisions to Cabinet modification or exemption, they reduce the certainty of Ontario's standards and invite pleas to Cabinet for legislative and regulatory exemption and alteration. *Reduces the certainty of standards and, by opening standards to exemption constitutes a decrease in standards.*

(10) Exemptions From the Standards in the Environmental Assessment Act. Bill 76 proposes to allow the Minister of the Environment to exempt proponents from the essential requirement of identifying and evaluating alternatives to their undertakings. It also proposes to permit exemptions from the requirements to identify and evaluate the rationale for the undertakings and ways in which the undertakings could be mitigated.[20]

A central feature of the Environmental Assessment Act is section 5(3) which requires proponents to identify the rationale for what they are doing and evaluate the environmental implications of what they propose, not just by examining the proposed undertaking but by evaluating alternatives to it as well. In this way, the Act demands that proponents discharge a fundamental tenet of good planning, namely that a range of reasonable alternatives, including the alternative of doing nothing should be evaluated prior to making a decision. This helps to ensure that appropriate projects and project designs are identified and selected.

In the past, because the requirements of section 5(3) were mandatory, proponents subject to the Act understood that they were required to demonstrate to the MOEE (and if a hearing were required, to the Environmental Assessment Board) that they had identified and evaluated alternatives to their undertakings and had assessed ways in which to mitigate their undertakings' environmental impacts. The project planning process reflected these considerations and proponents, by and large, went about their planning business to include the full range of alternatives and mitigation considerations prior to submitting their Environmental Assessments for approval.

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[19] Proposed section 175.1 (b) states: "The Lieutenant Governor in Council may make regulations... prohibiting, regulating or controlling, (including prescribing conditions for the prohibition, regulation or control) the making use, sale display, advertising, transfer, transportation, operation maintenance, storage, recycling, disposal or discharge or manner thereof of any contaminant, source of contaminant, motor vehicle, motor, waste, waste disposal site, waste management system, activity, area, location, matter, substance, sewage system, product, material, beverage packaging, container, discharge, spill, pollutant or thing"

[20] For a comprehensive critique of Bill 76 see the Canadian Environmental Law Association Submissions of the Canadian Environmental Law Association to the Standing Committee on Social Development Regarding Bill 76 -- Environmental Assessment and Consultation Improvement Act. Richard D. Lindgren, Counsel, July 1996.

This will change due to Bill 76. Section 6(3) gives the Minister the discretion to waive any or all of the requirements to assess the environmental impact of alternatives and mitigation measures, and even the requirement to assess the impact of the proposed undertaking.[21] The only constraint on this discretion is an arguably general and vague section in Bill 76.[22] With the Act's requirements no longer certain, proponents may focus their time and efforts on obtaining exemptions rather than getting on with the job of planning their undertakings appropriately. The above-noted apparent willingness of the government to grant exemptions can only encourage this course. *Decrease in standards.*

Changes in Regulations

The government has made a number of proposed changes to regulations. Comprehensive accounts are contained in the Canadian Environmental Law Association (CELA) and Canadian Environmental Institute for Environmental Law and Policy (CIELAP) briefs on Responsive Environmental Protection.[23]

Air

(11) Consolidation of Regulations. There are a number of regulatory changes proposed by the Ministry that are intended to clarify or simplify existing regulations and will have no effect on the required regulatory level:

(a) Consolidate Regulations 337 and 346 into one general air regulation.
(b) Consolidate Ontario's 4 Acid Rain Regulations into a single regulation.
(c) Consolidate and revise 5 regulations dealing with ozone depleting substances. MOEE states the revisions will eliminate requirements which are "outdated, unclear or duplicative of federal requirements".[24]

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[21] Section 6(3) states "The approved terms of reference may provide that the environmental assessment consist of information other than that required by subsection (2)". Subsection (2) lists the requirements to provide information on the purpose of the undertaking, the rationale for the undertaking, including alternative methods, information on the environmental effects of the undertaking and alternatives to it and possible mitigation.

[22] Proposed section 5(3) states: "The Minister shall approve the proposed terms of reference if the Minster is satisfied that an environmental assessment prepared in accordance with them will be consistent with the purpose of this Act and with the public interest."

[23] Canadian Environmental Law Association Comments on Responsive Environmental Protection, Submitted to the Ministry of Environment and Energy, October 1996 and Canadian Institute for Environmental Law and Policy Comments Regarding Responsive Environmental Regulation: A Consultation Paper, CIELAP Brief 96/8, October 1996.

[24] Responsive Environmental Protection, Technical Annex, p. 17

(d) Eliminate regulation 336/90 (Air Contaminants from Ferrous Foundries). MOEE states that the regulation superseded by the General Air Pollution Regulation and is obsolete.[25]

(12) Change Provisions in Regulation 338/90. This is one of five acid rain regulations and applies to new and upgraded boilers. It requires the new or upgraded boilers either to use fuel oil with sulphur content less than 1% or to treat stack gases to bring emissions within allowable levels.[26] MOEE is proposing to change the regulation to permit upgraded boilers to use fuel of greater than 1% sulphur, as long as emissions will not be increased over previous levels. This will encourage the upgrade of inefficient boilers, whose upgrade may now be discouraged by the current requirement to use more expensive low sulphur fuel. The MOEE is also proposing to turn this into a standardized regulation, not requiring a certificate of approval. The change may decrease resource use while not increasing emissions if upgrades do adhere to requirements. However, this is questionable due to lack of scrutiny. (See Approvals section below) *Unclear whether increase or decrease in standards.*

(13) Consolidate and Revise Regulations 271/91, 455/94 and 353. These regulations deal with gasoline volatility, gasoline vapour recovery and motor vehicle emissions for smog precursors. This area involves interconnected jurisdiction amongst MOEE, the Ministry of Consumer and Commercial Relations and the federal government and the MOEE will examine options to streamline activities and responsibilities. The revision to Regulation 271/91 would lower permissible summer gasoline volatility levels from 72 kiloPascals to 62 kiloPascals, in keeping with the recommendation of the Canadian Council of Ministers of the Environment. This represents an increase in gasoline volatility standards and will help to decrease smog formation. *Increase in Standards.*

(14) Revoke Regulation 361. This regulation controls the sulphur content of fuels in the Metropolitan Toronto area. MOEE suggests that revoking the regulation would have no environmental impact. In reality, however, revoking Regulation 361 would permit increased emissions of SO_2 and other sulphur compounds.[27] *Decrease in Standards.*

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[25] Responsive Environmental Protection, p. 19.

[26] A wet sulphate deposition rate of less than 0.1 kg/ha/year, using MOEE's Statistical Long Range Transport model. Responsive Environmental Protection, Technical Annex, p.5.

[27] MOEE states: "Regulation 361 has been superseded by Regulation 338 which sets province-wide requirements for sulphur content of fuels for boilers...Regulation 338, which would supersede Regulation 361, provides an equivalent level of air quality protection. Boilers in Metropolitan Toronto that were installed prior to 1986 and have never been upgraded, would be exempt from Regulation 338. However, emissions from these boilers would still be controlled by Regulation 346, which sets emission standards for SO_2" Responsive Environmental Protection, Technical Annex, p. 23. It should be noted that Regulation 338 does not provide "an equivalent level of air quality protection" in that it permits a higher level of sulphur content for Grades 1 and 2 fuel oils (1% compared to .5% for Regulation 361). Moreover, the boilers installed prior to 1986 would not be controlled for SO_2 in the manner suggested in the above statement by Regulation 346. Regulation 346 regulates SO2 at point of impingement; it does not control for the levels of emissions which Regulation 338 seeks to regulate.

(15) Replace Regulation 349 "Hot Mix Asphalt Facilities" with a Code of Practice as a Condition in a Standardized Approval Regulation. MOEE suggests that the adoption of the Code will improve performance of these facilities by dealing with a range of parameters not currently covered in the Regulation.[28] However voluntary codes, by definition, are not legally enforceable. Formally, therefore, regulatory standards will decrease if the regulation is revoked. *Decrease in legally enforceable standards; potential increase in unenforceable performance levels with which industry may voluntarily comply.*

(16) Replace Regulation 350 with a Memorandum of Understanding (MOU). Regulation 350 was implemented to "address frequent exceedences of the SO_2 ambient air quality criteria in Sarnia". Air quality is of particular concern in this area. The Regulation permits the Ministry to declare an alert, requiring industrial facilities to reduce their SO_2 emissions sufficiently to meet the ambient air quality criterion. It gives industry flexibility in meeting the requirement, not specifying how it is to be accomplished.

The Lambton Industrial Society, composed of major emitters in the area has taken the initiative to develop advisories (using LIMA: the Lambton Industrial Monitoring Authority) warning of potential alerts and also monitors ozone, ethylene and other pollutants not covered by the Regulation. According to MOEE "Lambton Industrial Society has a good record of environmental performance...Regulation 350 can be replaced with a non-regulatory mechanism without compromising environmental protection."[29] By revoking the Regulation, MOEE removes the legal basis for invoking and enforcing the alert, thereby decreasing standards having the force of law. The issue of using voluntarism to substitute for existing regulatory requirements is discussed below in section K. *Decrease in legally enforceable standards; potential increase in informal standards with which industry may voluntarily comply.*

Water

(17) Amend Regulation on Ground Source Heat Pumps. Currently Regulation 77/92 exempts all ground source heat pumps from section 9 approvals under the Environmental Protection Act, except those using methanol. Methanol in these pumps poses a potential threat to groundwater and well water. The amendment would prohibit the use of methanol in ground source heat pumps. *Increase in standards.*

(18) Amend MISA (Municipal and Industrial Strategy for Abatement) Pulp and Paper Regulations. MISA effluent limit regulations were promulgated between in 1994 and 1995 following a long process of stakeholder consultation including extensive discussions by the MISA Advisory Committee and the Joint Technical Advisory Committees.

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[28] Responsive Environmental Protection, Technical Annex, pp 8-10.

[29] Responsive Environmental Protection, Technical Annex, p.11

MOEE proposes to remove reference to the goal of zero levels of AOX[30] discharges for the year 2002 in the MISA Pulp and Paper Regulations. MOEE also proposes to delete requirements for pulp and paper mills to report on assessments of how to meet the zero discharge goal by 2002.[31] These proposals represents a retreat from the MISA objective of "virtual elimination" of toxic discharges from Ontario's waterways and run counter to the Great Lakes Water Quality Agreement and statements by the International Joint Commission.[32]

MOEE gives the following rationale for this move: "Recent studies have indicated that detrimental impacts on fish, associated with chlorinated compounds, only occur above AOX levels of 1.5 kg per tonne of pulp."[33] Referencing the 1991 study report[34] seems to ignore both the goal of virtual elimination and the fact that the information in this study was available when the regulation was developed as part of the multistakeholder discussion and negotiation. *Decrease in standards.*

(19) Replace the Marinas Regulation (Regulation 351) with a voluntary Code of Environmental Practice, once the Code is developed and implemented. Regulation 351 supplements Regulation 343 which prohibits the discharge of sewage sludge from pleasure boats into Ontario's waters; it requires marinas to have adequate pump-out and waste disposal facilities on premises.

The rationale for the replacement of the regulation is that the level of environmental protection will not decrease if the regulation is revoked and that the regulation is unnecessarily costly to the regulated community. However, the reasoning behind the lack of impact -- "The current level of environmental protection will be maintained by the Discharge of Sewage from Pleasure Boats Regulation which prohibits sewage discharge from pleasure boats."[35] -- is at odds with the rationale for bringing in the regulation in the first place, namely that pump-out facilities were required to facilitate compliance with the Discharge Regulation (Regulation 343). The effect of

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30 "Total adsorbable organic halides", an indicator of the quantity of chlorinated compounds in pulp and paper effluent.

31 Responsive Environmental Protection, p. 48

32 The Great Lakes Water Quality Agreement, signed by the United States and Canada, states in Article II that the overall goal of the agreement is that the "discharge of persistent toxic substances be virtually eliminated." Annex 12 more specifically outlines the obligations in this regard and states that, when designing regulatory strategies, such strategies should be undertaken in the "philosophy of zero discharge." See Canadian Environmental Law Association, Comment on Responsive Environmental Protection, *supra*, p. 56

33 According to MOEE, the 1999 MISA standard of .8 kg AOX per tonne of pulp is being met by all kraft mills in Ontario. The MOEE states that "The Ministry's current regulated standard of .8 kg per tonne of pulp ensures environmental protection" Responsive Environmental Protection, p. 49.

34 Berry R.M., et al, "The effects of recent changes in bleached softwood kraft mill technology on organochlorine emissions: An international perspective", *Pulp and Paper Canada* 92:5, 1991.

35 Responsive Environmental Protection, p. 49

the voluntary agreement is uncertain as it has yet to be formulated and implemented.[36] Moreover, MOEE staff in their review stated that because marinas can use pump-out fees to recover the costs of the facilities, there is no undue burden and "the benefits of the regulation far exceed the costs for all stakeholders".[37]

MOEE asserts that the voluntary code will go beyond the environmental performance requirements of the current regulation. This issue is discussed in the section on voluntarism, below. *Decrease in legally enforceable standards; potential increase in informal standards with which industry may voluntarily comply.*

Waste Management

(20) Issue Landfill Guidelines. The Ministry has formulated a set of landfill guidelines which it released for public comment in June 1996. The Ministry stated that this was to "enhance certainty and accountability in Ontario's waste management system." (Responsive Environmental Protection, p. 42) and referred to these as "more stringent standards for landfill sites" (Responsive Environmental Protection, p. 46). However, rather than being more stringent, in a number of respects these guidelines appear to weaken landfill requirements which were already in place.[38] For example, the guidelines proposed by the government appear to permit approval of sites which would have been previously rejected on the basis of unacceptable hydrogeological characteristics. They also appear to depart from the previous favouring of sites with natural attenuation features (eg., clay) to an implied preference for engineered sites. Moreover, location restrictions appear to have been weakened for categories such as hazardous lands and lands with "natural heritage features and areas". Additionally there is now no explicit constraint on the use of prime agricultural land, lands with high archaeological importance, or specialty croplands. *Likely decrease in standard.*

(21) Change Solid Waste Management Requirements for Some Types of Hazardous, Municipal and Agricultural Waste Materials. MOEE proposes changes in the definition of "recyclable material" to include certain types of municipal waste, hazardous wastes, agricultural waste and waste derived fuel in Regulation 347. This expands the category of materials that do not need

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[36] According to Responsive Environmental Protection the Clean Marine Partnership (which includes MOEE, Environment Canada, Ontario Marina Operators Association and Ontario Sailing Association) will develop and implement a code of practice dealing with a wide range of issues. "The code will go beyond the current requirement for a marina to have a waste disposal and pump-out facilities and recommend comprehensive environmental protection practices for marinas and yacht clubs." p.48

[37] Canadian Environmental Law Association, Comment on Responsive Environmental Protection, *supra* p. 53.

[38] In the past, landfill performance requirements were decided on a site by site basis, based upon principles emanating from three sources: the Ministry's "Green Hat" policy, its Engineered facilities policy and the jurisprudence of the Environmental Assessment Board (EAB). The EAB jurisprudence followed principles established in the Halton Landfill decision. The principles required that sites have acceptable hydrogeological characteristics. See Letter to Larry Wilcox from Richard Lindgren Re: Regulatory Standards for New Landfilling Sites Accepting Non-Hazardous Waste, EBR Registry #RA6E0006.P , July 17, 1996. CELA brief 290.

to be treated with the environmental care which Part V of the Environmental Protection Act requires to be given to wastes. As such it would increase the possibility of environmental impacts due to inappropriate reuse or recycling of these materials rather than their disposal. It also may increase the possibility of inappropriate waste management through "recycling", which is not really recycling. Fraudulent recycling operations have been a problem for MOEE in the past. Some of what is being proposed may well be reasonable. However, the information made public to date does not reassure that the materials so designated are appropriately handled in this way. *Decrease in standards.*

(22) Change 3Rs Regulations. Under the rubric of "flexibility" MOEE is proposing an amendment to the municipal source separation regulation (Regulation 101/94), which would include merging the existing mandatory and the supplementary Blue Box lists into a single list. Inevitably this will result in the disposal of recyclables that should otherwise be diverted from the waste stream. The MOEE is also proposing to remove the existing 50 metre buffer requirement for municipal waste recycling sites, but has provided no evidence that this buffer has been a significant obstacle in the establishment of these sites or that its removal would not cause significant nuisance and related impacts.

The MOEE is proposing to expand the definition of "waste derived fuel" to permit the burning of non-hazardous solid waste. This would decrease recycling of materials such as plastics and paper (contrary to provincial 3Rs objectives) and could increase air contaminant emissions. *Decrease in standards.*

(23) Change Regulation of Transportation, Tracking and Hazardous and Liquid Industrial Wastes. MOEE proposes several changes in the definition and tracking of Ontario's hazardous and liquid industrial wastes.

> (a) MOEE would harmonize the definition of "hazardous waste" with that used by the federal government. On balance the federal system appears less demanding than that in place in Ontario, so that this is an example of "harmonizing down".[39] *Decrease in standards.*
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> (b) MOEE proposes to introduce a "roster" system which eliminates the requirement to identify and report small volume hazardous waste shipments (i.e. 100 to 500 kg) as they occur. Instead transporters would keep a summary log to be submitted to MOEE on a periodic basis (eg., quarterly, semi-annually). Waste quantity is not a necessary indicator of environmental threat; small quantities of some wastes are more hazardous than large quantities of others. MOEE has not presented evidence or argument to support a conclusion that decreased scrutiny is justified environmentally. Hazardous waste

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[39] The harmonization would add corrosive solid waste to the Ontario definition, but would exempt liquid industrial waste from generator registration and manifest requirements and remove generator registration requirements for registerable solid waste. Both of these latter categories have previously been considered of sufficient concern to be tracked in the system. MOEE has presented no information justifying a change in position.

transportation and recycling operations have been a source of violations in the past and the proposed roster system may increase the difficulty of identifying the source of problems and doing so in a timely manner. *Decrease in standards.*

(c) MOEE proposes to change the definition of "site" under Regulation 347 to include all facilities operated by a company within a specific municipality. This would avoid the registration and tracking of hazardous waste transported on public roads from one operation to another. It would decrease the scrutiny of intra-company transfers and increase the possibility of inappropriate/illegal transport, storage, treatment and disposal going undetected. *Decrease in standards.*

(d) MOEE has proposed to exempt waste generated and collected under "field operations" from hazardous waste registration and reporting requirements, provided that the waste is transported directly to a local waste transfer facility. This decreased scrutiny has not been supported by argument or evidence that there is no significant risk of increased illegal/inappropriate transport, storage, treatment or disposal. *Decrease in standards.*

(24) Change Spill Notification Requirements. MOEE proposes to clarify the language of Regulation 360 and expand its exemption provision, so that spills not having an environmental impact would not be reported, thus decreasing the regulatory burden on the Ministry. MOEE estimates that the number of spills reported could be reduced from 5,000 to 4,000.[40] If the exemption eliminates just the environmentally inconsequential spills, then there would be neither a decrease nor an increase in regulatory stringency. However, the language of the change has not been issued so that it is impossible to tell whether and how only environmentally inconsequential spills are captured. *May be a decrease in standards.*

In summary, the government has proposed a large number of changes directly affecting standards. Some of the changes have, or propose to, increase current standards. However, overwhelmingly the changes and proposed changes decrease or would decrease Ontario's environmental standards.

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[40] Responsive Environmental Protection, Technical Annex, p. 66.

I. CHANGES TO COMPLIANCE ACTIVITIES

a) Approvals

The cutback in government expenditures has affected the resources available to provide approvals services. As Table 1 and Table 2 (below in section J) the figures for 1995 through 1997 demonstrate deep cuts in all of the Ministry's approvals and related activities.

In addition, the government has proposed a large number of changes to the approvals regime in Ontario.[41] It has stated that these changes will not be done at the expense of environmental protection; one of its objectives in revising the approvals regime is to: "ensure continuance of existing standards of environmental protection"[42]

Are the cuts and the proposed reforms consistent with that objective? It is useful to note that the approvals process, which uses the certificate of approval as its primary instrument, supports environmental protection in three important ways:

- Provides scrutiny prior to start-up, encouraging compliance before an activity begins. It examines proposed activities prior to their commencement in order to ensure that their designed capital and operating features will be consistent with environmental standards. The terms and conditions of certificates of approval provide specific application of the standards' requirements to the situation at hand.

- Provides enforceability after start-up, discouraging non-compliance after the activity begins. It can be very difficult and expensive to identify and successfully prosecute violations of the general provisions of the Environmental Protection Act or the specific performance requirements set out in Regulations (eg., point of impingement standards). The terms and conditions in the certificate provide specific, verifiable performance indicators by which activities can be monitored for compliance or non-compliance with environmental standards.[43] They provide specific performance indicators by which activities may be judged for compliance and non compliance may be prosecuted.

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[41] The government has proposed to revise the approvals process, using the following rationale: "The approvals system affects virtually every sector of economic activity in Ontario. The length, cost and certainty of the approvals process is a key consideration in attracting and maintaining investment, stimulating new economic development and upgrading public infrastructure. By cutting red tape and removing unnecessary requirements in our approvals system, we can reduce overall costs to taxpayers, industry and municipalities and strengthen our focus on environmentally significant matters." REP, p.24. However, the government has provided no analysis of the problems associated with the approvals process. It has provided no estimate of the "length" of the current process (a focus of Ministry efforts beginning in the early 1990's, including increased staffing, which resulted in major improvements in approval times), nor of estimated "cost" or "certainty".

[42] Responsive Environmental Protection, p. 23

[43] For example, a certificate may require the appropriate operation and maintenance of a particular pollution abatement technology known to perform in a manner that will satisfy point of impingement standards.

- Provides notice and access to the public. The Environmental Bill of Rights requires that certificate of approval notice be posted on the Registry and gives the public the opportunity to comment upon, and under certain conditions appeal, projects and activities affecting them.

The government has proposed to reform the approvals process in three major ways: decrease the number of activities for which a certificate of approval will be required; increase the number of activities which will not receive an individual approval or a specific certificate of approval (ie. increase number of activities receiving standardized approval) and decrease the number of activities for which a hearing is required.

(1) Decrease the number of activities for which a certificate of approval will be required

The ministry is considering eliminating the requirement for a certificate of approval for activities having a "negligible environmental impact".[44] It puts forward two examples for consideration: minor ventilation systems and service connections and relining and replacement of watermains and sewers.[45]

No analysis is provided of why these examples, which have up to now have been considered to merit certificate of approval scrutiny, have "negligible" environmental impacts. For example, ventilation systems can cause significant nuisance problems. Dropping the certificate of approval requirement means not only that up-front scrutiny will be missing, but that monitoring and enforcement on the basis of violations of certificates of approval will no longer be possible, because there will be no certificates. Moreover, the public will no longer be given notice via the Environmental Bill of Rights Registry and the opportunity of those directly affected by the implementation of the projects will be lost.

(2) Decrease the number of activities for which individual approval will be required and for which specific certificates will be issued: "Standardized Approvals" ("permit by rule")

Standardized approvals would remove the requirement for individual project review and approval by MOEE or other government officials. The Ministry states that standardized approvals are appropriate where "emissions/discharges are predictable and environmental impacts are understood".[46] It proposes to designate a large number of projects for standardized approvals regulations. For example:

- minor modifications to existing approved facilities and equipment;
- projects that are reviewed and certified by an independent accredited professional

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[44] Responsive Environmental Protection, p. 24.

[45] *Ibid*

[46] *Ibid*

- septic systems
- engineered fill sites
- soil conditioning sites
- waste recycling sites
- scrap yards
- used tire sites
- on-site hazardous waste storage sites (including PCBs)
- burning of hazardous or liquid industrial wastes generated on-site as fuels
- hazardous waste transfer stations.

There are a number of concerns with the standardized approvals proposal and with the specific suggested areas.

(i) Monitoring: Standardized approval appears to eliminate the necessity for proponent application or other self identification. How will the Ministry know the location and characteristics of the undertakings, many of which may require monitoring to encourage/ensure compliance?

(ii) Enforcement. Apart from the difficulty of identifying undertakings that may be a source of environmental problems, how will MOEE deal with violations of a standardized approval? Will prosecution be possible on the basis of a violation of the approval regulation, rather than on the basis of more general provisions of the acts or regulations (eg., violations of point of impingement standards)? If so, will the terms and conditions set out in the standard approval regulation be sufficiently precise to permit the prosecution of a violation? Will not the detail required for successful prosecution run counter to the "flexibility" which the present government is attempting to emphasize?

(iii) Public notice, comment and appeal rights. The public loses its notice, comment and appeal rights under the Environmental Bill of Rights. Even if the standardized approvals apply only to projects whose "emissions/discharges are predictable and environmental impacts are understood" the public is still affected by them and may wish to comment or appeal their issuance. This is of particular concern in areas where special environmental problems exist (eg., ambient air quality is already poor).

(iv) Specific Terms and Conditions. A number of the proposed activity categories may have site specific impacts requiring individualized terms and conditions to ensure performance in keeping with the standards: septic systems, engineered fill sites, soil conditioning sites, waste recycling sites, scrap yards, used tire sites, on-site hazardous waste storage sites (including PCBs), burning of hazardous or liquid industrial wastes generated on-site as fuels, and hazardous waste transfer stations. Standardized approvals do not permit individual specification or scrutiny. All

of these can cause significant environmental problems, heightening the monitoring, enforcement and public access rights concerns set out above.[47]

(v) Privatized Compliance Monitoring. MOEE specifically mentions the use of standardized approvals for "projects that are reviewed and certified by an independent accredited professional"[48] This raises the question of when such certification is appropriate. The government has yet to put forward criteria for determining when independent professionals should be used in the process. It is important for the integrity and performance of the environmental system that the public interest continue to be safeguarded in its essential elements by public officials.

(3) Decrease the number of applications for which public hearings prior to approval will be required.

Public hearings provide a higher level of proposal scrutiny than does a review by Ministry staff. The government has proposed to decrease hearings under the Environmental Protection Act and Ontario Water Resources Act and to decrease and modify the scope of hearings under the Environmental Assessment Act.

Hearings Under the Environmental Protection Act and the Ontario Water Resources Act

The government has proposed to eliminate mandatory hearings requirements for the following:

- Demonstration of innovative or "green" waste management projects;[49]
- Certain alterations to a waste disposal facility (eg.,changes to the daily rate of fill, type of municipal waste accepted)";[50]
- mobile non-incineration hazardous waste destruction systems and sites (including PCBs);
- monofill sites;
- small landfill sites;
- facilities burning liquid waste-derived fuel generated off-site;
- mobile hazardous waste processing systems and sites;
- hazardous waste transportation systems.

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[47] For example septic systems represent one of the greatest potential sources of groundwater and surface water contamination. Ontario's Commission on Planing and Development Reform (Sewell Commission) highlighted this problem and the US Environmental Protection Agency has raised its concerns about disease and contamination associated with septic systems.

[48] Responsive Environmental Protection, p. 25

[49] Responsive Environmental Protection, p. 25.

[50] Responsive Environmental Protection, Technical Annex, p. 73.

The above would be subject to hearings at the discretion of the Director.[51] These proposals constitute a decrease in the mandatory scrutiny afforded to these projects.[52]

Public hearings generate information. MOEE will be faced with making decisions about these proposals with considerably fewer staff and without the benefit of the information generated by the hearings.

Hearings under the Environmental Assessment Act

Under Bill 76, the government proposes to decrease the scope of hearings under the Environmental Assessment Act. The Bill gives the Minister the power to restrict severely the range of issues that will form the subject matter for the hearings.

Moreover, the government has shown itself reluctant to permit hearings under the Environmental Assessment Act. There have been very few references of environmental assessments to the Environmental Assessment Board for hearings. In June, 1996, the Minister Brenda Elliott, decided not to refer the Taro Aggregate environmental assessment to the Board for hearings, despite considerable public opposition to the proponent's proposal. This represented a departure from former practice and is arguably contrary to the intent of the Environmental Assessment Act. Previous ministers had typically used hearings before the Environmental Assessment Board to settle contentious environmental assessment issues falling within the Environmental Assessment Act.

In conclusion, proposed changes to the approvals regime would decrease the environmental scrutiny given to a range of activities. Ontario's ability to avoid non-compliance before it occurs and detect it once it has occurred may be significantly affected as a result.

b) Inspections, Monitoring and Prosecution

As indicated in section F, MOEE staffing cuts have been severe. The Ministry's capability to inspect, monitor and enforce depends upon adequate personnel.

The decreases in the Environmental and Energy Services Program budget are described in section J below. Major cuts to the Ministry's science and technology budgets, including laboratory analysis, mean that essential support functions for monitoring and enforcement have been severely weakened. Decreases in the Ministry's scientific and analytical capacity makes it more difficult to identify violations and successfully prosecute them.

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[51] Responsive Environmental Protection, Technical Annex, p.72.

[52] Of particular concern is the lack of mandatory hearings for hazardous waste operations. These have been the source of some trouble in the past. See Canadian Institute for Environmental Law and Policy, Comments Regarding Responsive Environmental Regulation: A Consultation Paper, CIELAP Brief 96/8, October, 1996.

Discretionary decisions are made every day by Ministry personnel concerning the level and focus of inspection and monitoring and prosecution. The current government's emphasis on eliminating barriers to economic activity (it has repeatedly proclaimed that Ontario is "open for business") and its characterization of the businesses and industry it is regulating as its "clients" (see section G, above) may have a spill-over effect on MOEE personnel, especially in the context of decreased personnel resources, making the discretionary decisions more favourable to business than they have been in the past.

Additionally, the willingness of business (and government ministries subject to Environmental Assessment Act) to comply voluntarily with existing standards may decline, increasing violations of existing standards and decreasing compliance. The government has made it clear that Ontario is "open for business". The government has also opened up a range of Environmental Protection Act and Environmental Assessment Act decisions to discretionary intervention. It is reasonable to assume that business and government ministries subject to Environmental Assessment Act will focus more on obtaining exemptions than they have in the past to the potential detriment of complying with standards.

J. GOVERNMENT ABILITY AND WILLINGNESS TO SET NEW STANDARDS

As previously indicated, the making of new environmental standards is an essential part of the government's role in serving the public's environmental interest.

For example, MOEE has acknowledged that Ontario's standards, especially its air standards, require revamping.[53] MOEE says that it has developed a draft plan to address this need:

> A major challenge facing the Ministry is the need to deliver an increased number of scientifically-sound environmental standards, particularly for air, cost-effectively. To meet this demand, the Ministry has developed a draft plan that identifies standards to be established or revised over the next three years.[54]

A key issue is whether MOEE will be able to deliver on the need to change Ontario's standards (both air standards and standards in other areas such as toxics) in a manner that is consistent with the public interest. Two sets of factors suggest that the government will have difficulty in doing so: the budget cuts and the government's overall position on new regulation as articulated by the Red Tape Commission, especially its emphasis on voluntarism.

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[53] The Provincial Auditor's October 1996 report underlines the problems with Ontario's air standards. "Air Quality Standards Out of Date, Report Says", Globe and Mail, October 16, 1996.

[54] Responsive Environmental Protection, p.18 MOEE has also acknowledged the importance of the continuing role regulation in general: "Regulation will have a continuing role in the future, where it provides an effective solution to problems and where costs are commensurate with benefits. Scientifically sound and well designed regulations and standards provide clear and uniform requirements for regulated parties. Good regulation, solidly enforced provides the assurance of protection desired by the public and the level playing field desired by the regulated community. Responsive Environmental Protection, p. 54.

(1) MOEE Budget Cuts

The Environmental and Energy Services Program contains program and standards development activities, laboratory and environmental monitoring services and environmental science and technology. These are all central components of government standard setting activities. Table 1 in Section F demonstrated that since 1995 this program has been cut by 53%. Table 2 shows how the cuts have been distributed, by activity. Program and standards development have been reduced by 55%. Environmental science and technology, which helps to generate the environmental knowledge necessary to support standard setting has been cut by 72%. Laboratory and environmental monitoring services have decreased by 40%.

These expenditure decreases will make it difficult for MOEE to make and enforce the increases in standards that are in the public interest. The loss in key personnel and programs in Ontario environmental research compounds the deep cuts made by the federal government on a wide range of environmental science projects including Great Lakes and other fresh water environmental research. It is highly unlikely that the government will be able to entice voluntary private sector activity to replace what it has foregone in this area: how likely is it that private will interests undertake research purely in the public interest? It will also be difficult for the government to convince universities, who themselves are under constraints and seeking private money, to undertake scientific and monitoring activity in the public interest.
The data and scientific understanding upon which good regulatory decisions are made will be harder and harder to come by.

(2) The Red Tape Commission's "Less Paper/More Jobs" Test

The government's Red Tape Commission issued its interim "Less Paper/More Jobs Test" in June 1996. It summarizes the government's overall approach to new regulation. Appendix A summarizes the test's 14 principles.

This is the approach that will be applied by all ministries before creating new regulation.[55] Its purpose is to ensure that "unnecessary or inappropriate legislation, regulation or other significant regulatory measures that affect business or other institutions will not be created":

> "The test is designed to ensure Ontario's regulatory framework protects the public interest (protection of health, safety, consumer protection and the environment), strengthens economic growth (job retention and creation) and encourages government efficiencies."[56]

It is to be applied by Ministries when proposing new or amended regulations or legislation that "affect business and institutions before being considered by Cabinet or its subcommittees" and

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[55] Red Tape Commission, Interim Less Paper/More Jobs Test, June 1996. MOEE has indicated that it will develop a regulatory code of practice based upon the test's principles. See Responsive Environmental Protection, p. 52.

[56] Ibid.

also when Ministries are considering regulatory changes that do not require changes to legislation or regulations "but which affect business and institutions".

The period during which the interim test applies begins June 26, 1996 and runs until Cabinet puts a permanent test in place. Additionally, all proposals for regulatory and legislative change and other significant measures affecting business and institutions will be evaluated by the Red Tape Commission before being considered by Cabinet. What is "significant" will be reviewed on a case by case basis by the Commission and the Ministry involved. The onus is on the Ministry to consult with the Commission.

A number of the test's principles in themselves appear to be reasonable and appropriate. However, the test as a whole and the process of its implementation raise a number of concerns about MOEE's ability to bring forward and realise new environmental standards that are in the public interest:

- The emphasis on justifying new regulation in terms of costs and benefits (principles 3 and 4) may act to the environment's detriment. It is well established that environmental benefits are difficult to quantify in monetary terms and that cost-benefit methodologies can significantly underestimate the benefits of environmental protection, especially protection which has long term benefits. On the other hand, the costs of environmental protection (capital expenditures and operating costs) tend to be easily identified. Accordingly the net benefits of environmental protection may be seriously understated.

- The Red Tape Commission may itself provide a barrier to implementation of new environmental standards. All new regulation must first be approved by the Commission. Will the Commission be able to comprehend the special needs of environmental regulation, including the importance of embedding such concepts as the precautionary principle in the approach to setting environmental standards?

- The process of producing new standards is likely to be time consuming and costly. This is compounded by principle 14's requirement to sunset or provide a future review for all new legislation; this is likely to be costly and largely unnecessary for environmental legislation, whose intent is protection against identified risks. With its already significantly diminished budget, MOEE will have difficulty in finding the resources necessary to satisfy all of the Red Tape Commission's requirements. It is interesting to note that the government appears to have a double standard: many of the changes to legislation and regulation appear to have been proposed without undertaking the rigorous process advocated by the Red Tape Commission for new regulation.

- The emphasis on consultation with business and the attention given to ensuring that private sector concerns are addressed may MOEE further toward "capture" by the interests whose role it is to regulate.

FIGURE 2

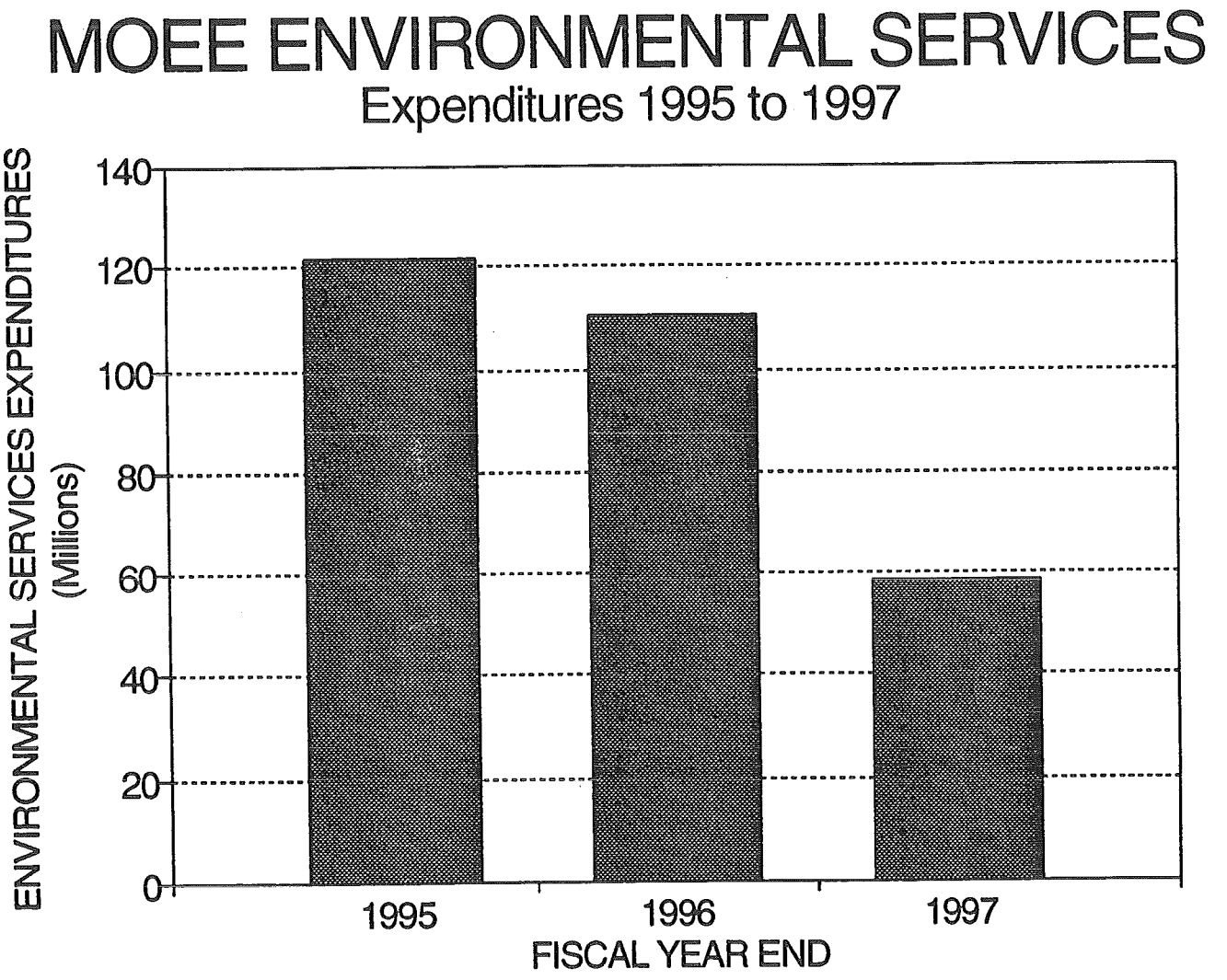
MOEE ENVIRONMENTAL SERVICES
Expenditures 1995 to 1997
ENVIRONMENTAL SERVICES EXPENDITURES
(Millions)
140
120
100
80
60
40
20
0
1995
1996
1997
FISCAL YEAR END

Table 2
Environmental And Energy Services Program

	1995	1996*	1997*	Change (1995 to 1997)
Program Administration	829,304	596,600	557,900	33%
Programs and Standards Development	55,305,771	51,623,000	24,648,600	55%
Environmental Science and Technology	26,179,761	19,338,600	7,248,400	72%
Laboratory and Environmental Monitoring	33,634,754	28,069,100	20,241,000	40%
Energy Development and Management	9,927,036	11,241,600	5,884,000	41%
Total	125,876,626	110,868,900	58,579,900	53%

* = Estimated

Source: Ontario Management Board Secretariat, Province of Ontario Expenditure Estimates 1996-97, Queen's Printer for Ontario, ISSN 0837-4740, p. 85 and following.

- The test stresses that regulation is to be viewed a last resort (principles 1, 2, 5, 9, 14). Proponents of new regulation must go through a number of steps to justify regulation early in the process needing to show why voluntary efforts or self-regulation on the part of the private sector will not work. This puts MOEE at a serious disadvantage when negotiating with business for environmental improvements. The threat of new regulation has much less credibility than in the past. Business knows how difficult it will be for MOEE to get new regulation past the Red Tape Commission and so is in the position to offer voluntary or self-regulation "solutions" which are closer to its special interest.

This last point is centrally connected to the role identified for voluntarism in the government's regulatory plans. The next section addresses this issue directly.

K. MOEE's ABILITY TO PURSUE ITS REGULATORY RESPONSIBILITIES: VOLUNTARISM AND RELATED

(1) The Role of Voluntary Measures

The government has indicated that it will turn more and more to non-regulatory means to achieve environmental protection objectives.[57] The non-regulatory approaches have stressed "voluntarism", including self management. As noted in the previous section the "Less Paper/More Jobs" test gives voluntary management and self regulation pride of place in the government schema. In Responsive Environmental Protection the government has stated that it intends to go "beyond regulation" by using "incentives, partnership approaches and voluntarism" to encourage environmental performance:

> "The use of strict regulatory measures to ensure that polluters obey the law remains a cornerstone of Ontario's system of environmental management. Our system has, however, matured to the point where change can allow us to benefit from emerging trends such as the use of incentives, partnership approaches and voluntarism. Our regulatory system must also be well positioned to capitalize on the major economic opportunities created by sound environmental practices -- both at home and abroad.[58]

> "There is a need to build upon our regulatory base with mechanisms that are incentive based, providing encouragement for self-initiative, environmental stewardship, and continuous environmental improvement beyond the requirements of regulation. We need to combine a baseline of smart effective regulation with meaningful incentives for performance. There is a wide range of policy tools available to complement regulation.

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[57] For an analysis of the trend to self-regulation, Canadian Environmental Law Association Deregulation and Self-Regulation in Administrative Law: A Public Interest Perspective, CELA brief #285, prepared by Michelle Swenarchuk and Paul Muldoon, March 1996.

[58] Responsive Environmental Protection, p. 15.

> The Ministry in conjunction with private sector partners and municipalities, has initiated use of many of these tools and foresees their expanded use." 54

The "policy tools" referred to in this statement are certification and accreditation, industry codes of practice, economic instruments, environmental management systems, performance agreements and performance based regulation. What roles does the Ministry foresee these tools playing? In a system which acknowledges that regulation is necessary and appropriate, what function could voluntary action by industry play in replacing traditional government regulatory functions?

The Ministry has not established any framework, terms or conditions for the role that the voluntary might play in environmental protection. It has not stated how it plans to deal with the "Less Paper/More Jobs" test's requirements for consideration of self management and where or what, if any, self management would be appropriate in the environmental setting.

It has used voluntary techniques in the past however and has proposed some specific new ones in Responsive Environmental Protection, such as the MOU for Lambton and the codes of practice for the asphalt industry. It has also pondered the possible role for ISO 14000 in the regulatory system and talked about emission trading schemes.

Prior to assessing where the Ministry might be headed with its voluntary efforts, it is useful to consider the kind of voluntary action the Ministry may be interested in promoting.

(2) What Kind of Voluntary Activity?

In Responsive Environmental Protection the Ministry refers to voluntary activity to "go beyond" current regulation.

First by its reference to going beyond current standards, the Ministry is apparently not referring to voluntary activity to meet existing standards -- "voluntary compliance". "Voluntary compliance" plays a central role in any regulatory system. The vast majority of compliance with existing standards is accomplished without recourse to legal compulsion through prosecution. Government both relies upon and utilizes a range of factors to encourage "voluntary compliance": the inherent desire on the part of the regulated to abide by the law, the perceived economic costs of non-compliance including the costs of being caught and prosecuted for a violation, the loss of market and standing in the community that go with detected non-compliance, and so on. As the above quote from Responsive Environmental Protection demonstrates, the Ministry is talking about using voluntary activity to go beyond current standards, not comply with them.

Secondly, the Ministry cannot be referring to what might be termed "incidental" voluntarism. This is the kind of voluntary action resulting in behaviour beyond existing standards that occurs normally with most business and industry activity. Most businesses operate well below existing maximum allowable levels for the vast majority of regulated substances, just as a matter of course. For example, only a small minority of business operations emit lead at levels even close to the Ontario standard. Others emit no lead at all or lead quantities well below this level. The

Ministry cannot mean this kind of activity, because it would occur without any outside incentives or disincentives pertaining to environmental activity.

The kind of voluntary action the Ministry is talking about promoting must have the following characteristics:

(a) It must entail activity which has public policy importance: it must be in the public interest for the performance to be better than current standards (otherwise there would be no rationale for the government to encourage the behaviour). So it applies to a situation in which the current standard may be (must be?) insufficiently stringent.

(b) It must involve activity that would not take place without some kind of further positive or negative inducement (otherwise there would be no need for "outside" assistance, such as that by the government).

(c) The kind of inducement that is required is something only the government can, or is willing to, provide or facilitate; otherwise there would be no need for the government to become involved.

What kinds of inducements can the government provide or facilitate that would alter behaviour in this manner? One way of answering this question is to look at voluntary activities already undertaken by business in conscious betterment of current standards.

(3) The Motivation for Voluntary Activity

> Why do industry groups form to agree to restrain their individual behaviours -- that is to produce voluntary codes? One thing is certain, it is always a commercial benefit that is anticipated.[59]

Corporate management must be able to justify its decisions in business terms. What business advantages could rationalize not just abiding by current standards, but going beyond them?

(a) Market advantage: consumers demand higher than standard environmental performance. This applies in some highly environmentally conscious consumer product markets and appears to be growing, particularly in Europe. The objective may be to gain customers

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[59] Bryne Purchase "Political Economy of Voluntary Codes" in Industry Canada and Treasury Board of Canada Exploring Voluntary Codes and Their Role in the Marketplace, A Symposium, September 1996, Ottawa, p. 16

or avoid boycotts of existing products.[60] The scope of this kind of market force is not clear, but the KPMG figure on "voluntary" programs of 20% suggests that the total may be low.

In some contexts adherence to a voluntary initiative may constitute another form of market advantage, the sort that is provided by restraint of trade. For example, voluntary adherence to a code of practice may be used as a formal criterion for government purchasing. This can be used to exclude rivals.

(b) Shareholder/management demand: Environmentally conscious shareholders require higher than standard environmental performance. The extent of this "green industry" influence is unknown, but is clearly not dominant. It does not register on the KPMG scale of factors.

(c) Concern about future, more exacting standards. Companies anticipating more stringent standards may voluntarily move to higher levels of environmental performance to attempt to preempt, delay, co-opt or anticipate[61] government moves in that direction.

(d) Other: For instance, economic, regulatory monitoring or other incentives/disincentives provided by government or other participants. For example, as noted above, the Ontario government has suggested that it reduce the frequency of effluent tests required of MISA participants, if standards are exceeded over an established period.

On the basis of the limited information available, it appears that a major impetus in the past has been factor (c), the concern about future increased standards and the desire to avoid or preempt government regulation.

The Responsible Care Program, undertaken by the Canadian Chemical Producers Association (CCPA), is perhaps the leading voluntary environmental program undertaken by any major industry in the world. It involves a wide range of activities by CCPA members aimed at good chemical industry practice. Instituted in the mid 1980's the program, amongst other accomplishments, has resulted in enhanced emergency response, hazardous waste management and a reduction of pollution emissions beyond that required by Ontario and Canadian regulatory authorities.

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[60] This was clearly a primary motivation for the attempt to certify sustainable forestry practices by the Canadian forestry industry. See Canadian Environmental Law Association, An Environmentalist and First Nations Response to the Canadian Standards Association Proposed Certification System for Sustainable Forest Management prepared by Michelle Swenarchuk, October 20, 1995.

[61] In some instances anticipation of regulation can gain commercial advantage by placing the corporation at the "leading edge". See Michael E. Porter and Claas van der Linde, "Green and Competitive: Ending the Stalemate", Harvard Business Review, September-October, 1995, *supra.*

Responsible Care was launched in the wake of a series of highly publicized chemical industry disasters (Seveso, Love Canal, Bhopal). A primary concern of the industry was its image in the eyes of government and the public. It wished to preempt further government regulation. "The CCPA hoped that voluntary action would forestall restrictive government regulation."[62] CCPA president Jean Belanger spoke about the motivation for Responsible Care in the following terms "Couple mistrust with a growing public belief that environmental laws and regulations are too lax and you can see that an industry like ours could suddenly find itself the target of harsh and perhaps unmanageable restrictions."[63]

In the waste management area, concern about mandatory packaging requirements prompted private sector action to avoid rigorous regulation. Ontario Multi-Material Recycling Inc. (OMMRI), a coalition of various beverage, packaging, food and newspaper businesses, voluntarily contributed $20 million to assist with Ontario's Blue Box recycling program. "OMMRI provided an alternative to the provincial regulation under the Environmental Protection Act requiring certain levels of refillable bottles for soft drinks."[64]

Accelerated Reduction/Elimination of Toxics (ARET) is a voluntary initiative aimed at reducing toxics. It has involved more than 200 companies and several government departments. ARET originated in efforts by The New Directions Group, comprised of corporate executives and environmentalists to address the issue of the reduction and elimination of toxics. The federal government responded to the group's call for action on toxics, in part by establishing the ARET Committee. The Committee was composed of industry associations, labour and first nations representatives, environmental, health and professional groups, federal and provincial government representatives. In its first phase (beginning in 1992), the ARET process included extensive discussions on the definition of toxicity, a list of target substances and the means by which industry should reduce its toxic emissions.[65]

To the author's knowledge, no formal analysis has been undertaken of the motivation for participation in ARET.[66] However, it appears that a major factor in attracting industry ARET participation was concern about the possibility of tough toxics regulation. Prior to ARET's

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[62] Francois Bregha and John Moffet "Canadian Chemical Producers' Association Responsible Care Program", page 8. in Industry Canada and Treasury Board of Canada "Exploring Voluntary Codes and Their Role in the Marketplace", A Symposium, September 1996, Ottawa.

[63] "Canadian Chemical Producers' Association Responsible Care Program", p.8.

[64] Gary T. Gallon The Canadian Experience: How to Make Environmental Voluntary Programs More Effective *supra*, p. 3.

[65] Environmental Policy Unit "Lessons Learned from ARET: A Qualitative Survey of Perceptions of Stakeholders." School of Policy Studies, Queen's University, Working Paper Series 96-4, June 1996, p. 5

[66] "Lessons Learned from ARET: A Qualitative Survey of Perceptions of Stakeholders", does not include an analysis of participant motivation.

formation, both in the Green Plan and in the Great Lakes Water Quality Agreement, the federal government had committed to eliminate toxics in the Great Lakes.

As for the ARET negotiations, environmental and labour representatives decided to withdraw from the ARET process in September, 1993 after lengthy discussions (the Assembly of First Nations had removed themselves earlier)[67]. The withdrawal of labour and environmental representatives was prompted by the refusal of industry to agree to phase out the production and use of persistent toxics and the refusal to include in the negotiations issues workplace toxics. Industry was committed to an approach that would reduce rather than eliminate these substances and wished to deal only with the environment outside the workplace.[68] This was less demanding than the position the federal government appeared to have publicly espoused and would, of course, be less than any regulatory requirement adopted by the federal government based on that position.

The same concern about further toxics regulation appears to be relevant in the motivation of eight industry sectors who have signed Memoranda of Understanding (MoU) with the Ontario and federal governments.[69] These agreements were signed in "the shadow" of the federal Green Plan and the Great Lakes Water Quality Agreement with the federal government commitment to eliminate toxics in the Great Lakes. These non-enforceable voluntary agreements which deal with the issues of pollution prevention (the 4Ps program) are not enforceable. The agreements explicitly state that signing the agreement does not guarantee that there will be no additional regulation in this area. Thus the MOU is not a guarantee against future, more stringent, regulation. However, it is clear that the agreements fall short of the stated goals of toxic elimination and they appear, largely, to permit industry to set its own pace. It is also clear that the government and the commitment behind these memoranda mean that it is unlikely that government will move beyond them; at least, not so long as the agreements are not violated.

Two conclusions can be drawn about the relationship between voluntary agreements and the threat of regulation:

- Effective voluntary measures depend upon a credible threat of further regulation. Industry's willingness to make voluntary commitments to exceed current regulations depends on a plausible risk that government will impose more rigorous regulation.

  A corollary of this is that the less credible the threat of regulation, the weaker will be industry's motivation to participate in present and future voluntary agreements. This

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[67] The Assembly stated that ARET "was just another process which legitimized the status quo and inaction" and objected to not being recognized as a nation in the discussions.

[68] "Lessons Learned from ARET: A Qualitative Survey of Perceptions of Stakeholders.", p. 12

[69] For an analysis of these and other agreements including a comparison with voluntary measures adopted in other countries, see Canadian Institute for Environmental Law and Policy The Use of Voluntary Pollution Prevention Agreements in Canada, prepared by Karen Clark, April 1995.

might be called the voluntary instrument paradox: the more clearly committed government is to eschewing regulation in favour of voluntary instruments, the less interested will industry be in adopting them.[70]

- Voluntary measures will result in lower standards than would be otherwise instituted. The standard agreed to voluntarily by industry will always be lower than the standard it perceives will be brought in by the threatened regulation. Why would industry voluntarily agree to something as stringent as the possible future regulation, unless it thought the regulation was inevitable. In the absence of additional inducements, therefore, a system favouring voluntary agreements will be a system with lower standards. Assuming that the regulations brought in by government will embody standards in the public interest, standards in a system favouring voluntary agreements will be lower than those consistent with the public interest.

This should not be taken to imply however, that a system depending upon voluntary measures to go beyond current standards would be bereft of further regulation. Often, businesses who have voluntarily agreed to higher performance -- for competitive reasons, for example -- will request government to bring in regulations to that effect in order to eliminate "free riders".[71] But of course, these regulations are not likely to have the rigour that regulations established by government in the public interest would.

Both of these conclusions are highly relevant to the Ontario scene, given the government's commitment to voluntarism for the Ontario government as a whole in the "Less Paper/More Jobs" test and, in Responsive Environmental Protection, for the Ministry of the Environmental and Energy.

(4) ISO 14000: A Special Focus

ISO 14000 is an environmental management system developed by the International Organization for Standardization as the result of a process of international discussion and negotiation. The Canadian Standards Association has managed the process in Canada with the Canadian Environmental Council acting as a steering committee.[72]

Adherence to ISO 14000 is voluntary. Advocates of the system suggest that in the international trade context ISO 14000 will become the leading world-wide benchmark of proper environmental

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[70] In the absence of additional incentives to participate. Government can always make voluntary participation more palatable for industry by sweetening the pot with other incentives: lower regulatory scrutiny, subsidies, etc.

[71] Free riders are members of the industry who do not participate in the voluntary agreement. They gain benefits (eg., avoided regulation) without paying the costs associated with complying with the benefits. They have the added competitive advantage that goes with the lower costs of not complying with an agreement to exceed standards.

[72] The Council includes the International Institute on Sustainable development, Conservation Council of Ontario, Pollution Probe, Canadian Labour Congress and the Consumer's Association of Canada.

management and that there will be important trade and competitive advantages for those adhering to ISO 14000. Advocates of the system have suggested that it will become a popular choice for companies wishing to have environmental performance verification for purposes of international environmental marketing and market acceptance.[73]

ISO 14000 requires companies to establish an environmental policy, identify key environmental issues, set targets and objectives, establish programs for internal auditing and periodic management review and adopt training and documentation procedures. It requires companies to institute a system for responding to and correcting problems as they occur or are discovered. Compliance audits which monitor the system (but not system performance in terms of their impact on the environment) are also part of the framework.

ISO 14000 does not establish environmental standards. Instead it requires companies to commit to compliance with applicable laws in the jurisdiction in which they operate. It also requires companies to commit to continual improvement of their environmental management systems, and to pollution prevention.

Thus companies who adopt ISO 14000 and follow its requirements should be fully aware of the regulatory demands of the jurisdiction in which they operate and should have a system in place which ensures that all reasonable efforts have been taken to comply with them. If ISO 14000 is, as its advocates claim, a state of the art environmental management system, then it should protect its adherents from prosecution under environmental protection legislation, since the ISO 14000 system should meet or exceed what the courts have indicated is needed to demonstrate due diligence.[74] It should provide similar protection against common law claims based in negligence.

Accordingly, ISO 14000 can be viewed as a vehicle for companies to ensure due diligence.

ISO 14000 permits different approaches to demonstrating adherence to its standards. A company can choose "registration", which requires an audit by independent auditors; or it can go the route of "self-declaration", by which a company itself states that it is adhering the standards and produces the required written documentation. Registration has the obvious advantage of credibility that an independent audit brings, but is more costly.

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[73] See for example, Bell, Christopher, L. "ISO 14001: Application of International Environmental Management Systems Standards in the United States." Environmental Law Reporter, V.25 No 12. For an excellent critique of ISO 14000 see Benchmark Environmental Consulting ISO 14000: An Uncommon Perspective: Five Questions for Proponents of ISO 14000 Series, European Environmental Bureau, October, 1995.

[74] See John Moffet and Dianne Saxe Voluntary Compliance Measures in Canada, Draft Report prepared for North American Commission for Environmental Cooperation, January 1996, especially pp 50-53.

It should be emphasized that unlike some other environmental managements systems such as the European EMAS, ISO 14000 does not require the results of the audit to be made public. Nor does it audit, monitor, or report on actual environmental performance. An ISO 14000 audit would examine the existence of prescribed environmental system and report on the presence of required system elements (systems for ensuring awareness of regulatory requirements, training of personnel, etc.).

Concern has been expressed that ISO 14000 has been oversold and that adherence to ISO 14000 can be used as a tool to derive a competitive edge. It has also been suggested that ISO 14000 is being promoted as an alternative to regulation.

The Future of ISO in Ontario

Voluntary adoption of ISO 14000 by companies not currently having an adequate environmental management system should have positive effects for Ontario's environment, since it would increase the care with which Ontario business treats its environmental obligations and decrease the likelihood of environmental violations.

The following observations can be made about the system:

(a) ISO 14000 is not a substitute for higher environmental standards. A move to ISO 14000 in Ontario would not mean an increase in Ontario's environmental performance requirements. ISO 14000 requires commitment to meeting existing standards, not to improving on them.[75] The law already demands due diligence.

(b) There is already an incentive for companies to follow the ISO 14000 approach to environmental management. This is true even for those companies who are not interested in the international marketing advantage which ISO 14000 may bring. ISO 14000 is essentially a system for identifying environmental regulatory requirements and ensuring systems are in place to meet them -- it is a due diligence system. It is in business' interest to perform with due diligence in order to protect itself against prosecution for environmental violations. Moreover, even if ISO 14000 currently requires more than the standards of due diligence currently required by the Ontario courts, it may still be in the interest of companies who do not adopt ISO 14000 voluntarily initially to follow the example of those who do. This is due to fact that voluntary adoption of ISO 14000 by a significant number of companies in Ontario could make ISO 14000 the de facto due

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[75] The requirements for continual improvement and to "pollution prevention" appear vague and unverifiable, at least in their present form.

diligence standard. Courts are influenced by prevailing industry practice in deciding what constitutes due diligence.[76]

(c) ISO 14000 does not replace the need for MOEE monitoring and enforcement activity. ISO 14000 may improve compliance with environmental standards. Companies adhering to ISO 14000 may be able to demonstrate to the MOEE over time, that they require less inspection and monitoring attention because they are good environmental performers. However, ISO 14000 provides no mechanism for detection and reporting of environmental violations. MOEE responsibility for ensuring compliance is an essential component of a credible system.

In light of the above, some of MOEE's comments about ISO 14000 in Responsive Environmental Protection raise concern. For example, it appears that MOEE may be contemplating embedding ISO 14000 requirements in Ontario regulation, rewarding industry for adopting ISO 14000, making performance agreement concessions to industry in return for adherence to an "enhanced" ISO 14000 or in conjunction with adoption of voluntary codes.[77] The advantage of doing any of these things is unclear and potentially detrimental to advancing environmental performance in Ontario.

(5) Some Examples of Voluntarism in Responsive Environmental Protection

MOEE proposed the use of voluntary codes in three situations in the Responsive Environmental Protection. It also put forward the use of Local Airshed Management Units (LAMUs), voluntary agreements involving industry and the community to deal with special air pollution problems. The following four sections examine these proposals.

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[76] "Thus if voluntary codes have the effect of establishing, documenting, and/or raising the standard for a particular industry it is likely that the courts will apply this standard and the industry members will be judged more harshly than at present. In addition, those who are not adherents to a voluntary code will likely be judged by the standard specified in the code since it is the accepted industry norm." Kernaghan Webb and Andrew Morrison "Legal Aspects of Voluntary Codes: In the Shadow of the Law."

[77] "MOEE has been working closely with the Canadian Standards Association and the Canadian Manufactures' Association, both to promote adoption of environmental management systems and to determine an appropriate method for integrating these systems into the Ministry's regulatory and technical assistance programs. The Ministry sees great advantage in expanding industry adoption of EMS, particularly in conjunction with joint environmental priority setting and development of codes of practice for specific sectors....The Ministry will continue to work with standards organizations, industry groups and others to determine the best approaches for the integration of Environmental Management Systems into our regulatory or non-regulatory programs." Responsive Environmental Protection, p.57.
In regard to contractual performance agreements MOEE says "The relationships would be formalized through contractual performance agreements.. which could include enhanced ISO 14000 with third party auditing, environmental performance measures, public consultation and reporting together with innovative pollution prevention measures, product stewardship measures and/or design for environment measures. Incentives and awards for participation would vary according to the proposals and could include public recognition and technology transfer. If there is a breach of contract, industry would lose all rewards and incentives, and would be subject to regular monitoring and reporting regulatory requirements." *Ibid*

(a) Replace Regulation 349 "Hot Mix Asphalt Facilities" with a Code of Practice as a condition in a Standardized Approval Regulation. As noted above MOEE suggests that the adoption of the Code will improve performance of these facilities by dealing with a range of parameters not currently covered in the Regulation.[78]

MOEE argues in favour of this approach, in part on the basis that the current regulation is inadequate, failing to deal with odour and fugitive dust impacts.[79] A draft code of practice has been developed cooperatively by the Ontario Hot Mix Producers Association (OHMPA) and MOEE. It will be completed in 1996 and subjected to a trial period. MOEE states that it is expected that the code will increase participation in pollution control activities and will address a wider range of impacts. The code would have a trial period and be reviewed; on successful completion of the trial the code could be used as a condition in a Standardized Approval Regulation which would replace the current approval requirements.

This is an example of embedding the code in the regulation. The problem with this, of course is that the voluntary code is likely to be less rigorous. If it is indeed a regulatory activity, then the government should involve others. If it is not to be a variant of writing one's own law, then other interests should be consulted and involved, and it should not be billed as a voluntary agreement.

(b) Replace Regulation 350 with a Memorandum of Understanding (MOU). As noted above, Regulation 350 was implemented to "address frequent exceedences of the SO_2 ambient air quality criteria in Sarnia". It allows the Ministry to declare an alert, requiring industrial facilities to reduce their SO_2 emissions sufficiently to meet the ambient air quality criterion.

The MOEE makes two arguments for the use of the MOU in this context. First, it states that the Lambton Industrial Society (which developed advisories and monitors contaminants not covered by the Regulation) "has a good record of environmental performance...Regulation 350 can be replaced with a non-regulatory mechanism without compromising environmental protection."[80]

Secondly, the MOEE states that "the MOU is a more flexible approach to air quality management and will present opportunities for LIS to go beyond the current requirements of Regulation 350."[81]

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[78] Responsive Environmental Protection, Technical Annex, pp 8-10.

[79] The existing regulation sets in-stack particulate limits, off-property visible emission limitations and a requirement to submit a "notice of relocation" to the Director. But this has proved inadequate in the past. Responsive Environmental Protection, Technical Annex, p. 10.

[80] Responsive Environmental Protection, Technical Annex, p.11

[81] Responsive Environmental Protection, Technical Annex, p. 12

Neither of these arguments is persuasive. First, past compliance does not warrant removing the legal basis for sanctioning behaviour not in accord with the alert. The alert remains desirable; removing the regulation eliminates the government's ability legally to compel behaviour in accordance with the alert. In general, a good compliance record may warrant reduced monitoring, but how can it justify removing the law itself?[82]

Secondly, why is an MOU necessary to "present opportunities for LIS to go beyond the current requirements of Regulation 350"? Industry wishing to do better than current standards can always do so, with or without a contractual agreement with government.

(c) Replace the Marinas Regulation (Regulation 351) with a voluntary Code of Environmental Practice. Regulation 351 supplements the Discharge Regulation (Regulation 343) which prohibits the discharge of sewage sludge from pleasure boats into Ontario's waters. Regulation 351 requires marinas to have adequate pump-out and waste disposal facilities on premises.

As discussed above, MOEE's rationale for the replacement of the regulation is that the level of environmental protection will not decrease if the regulation is revoked and that the regulation is unnecessarily costly to the regulated community.

According to MOEE, the Code of Practice is expected to achieve broader environmental protection and pollution prevention goals as it will deal with all aspects of marina operations that have an impact on the environment (eg., painting and cleaning of boats, environmentally friendly boating products, as well as sewage). The regulation will not be revoked until "a sufficient number of marinas and yacht clubs have adopted and implemented the proposed Code of Practice."[83]

It is not clear how the original objectives of the regulation -- adequate provision of pump out services to encourage boat owners to have their sewage appropriately treated -- will be met by the voluntary code. What mechanism, if any, is there to encourage or enforce this to take place?

(d) Revise Regulation 347 To Permit The Use of Local Airshed Management Units (LAMUs) To Develop Responses To Particular Local Air Pollution Problems. MOEE is proposing to use the negotiation of voluntary agreements between community and industry to address local air quality concerns under particular situations:

> "Under certain conditions -- particularly where air pollution is caused by emissions from many diverse sources, transboundary movements of air pollutants, or unique topographical or meteorological conditions --- new approaches may be more effective for addressing local air quality.

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[82] Would the logic of the MOEE argument not support removing criminal code provisions or tax law regulations for those demonstrating good compliance in the past?

[83] Responsive Environmental Protection, Technical Annex, p. 91

> "Local Airshed Management Units (LAMUs) offer one such approach. A typical LAMU would be comprised of representatives from the community, local industry and the government. LAMU airsheds could be as small as one city or as large as a major industrial region. Under LAMUs, communities, with the guidance of the Ministry would be able to determine what substances to address and what specific actions to take. LAMUs would be empowered to use a wide range of methods, including local airshed management contracts; economic instruments (e.g. emissions reduction trading); pollution prevention activities, and community outreach programs." [84]
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> "The proposed general air regulation would provide uniform provincial minimum environmental protection including human health. Where local air issues are still of concern, the regulation will empower local communities to develop LAMUs to improve air quality in local airsheds. Communities (including residential, commercial and institutional representatives) in cooperation with local industry, local provincial government and interested parties will have the opportunity to define local airsheds as well as develop partnerships, community outreach initiatives, and local "standards". The creation of LAMUs will allow the use of a greater array of tools to address air quality issues. LAMUs will also generate local empowerment and greater local accountability in protecting the environment"[85]

MOEE refers to its experience with local community and industry participation in Windsor as an example of how LAMUs might work to address specific problems:

> "The Ministry has worked with industry and community groups to look at alternative means of reducing air pollution. The Windsor air study is an example of successful local decision-making between the community and industry. The Ministry plans to build on this pilot project experience to implement new ways to address local air quality needs and to promote continuous improvement and increased use of performance-based standards and regulations."[86]

MOEE plans to develop the concept over the next year.

As indicated, the main instrument is to be a contract involving community and industry. The LAMU provides an interesting gesture in the direction of collaborative decision making in light of other moves to decrease public participation (see the next section L). However, there are a number of concerns with the concept:

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[84] Responsive Environmental Protection, p. 20.

[85] Responsive Environmental Protection Technical Annex, p. 27.

[86] Responsive Environmental Protection, p. 20.

- the Windsor air study involved data collection and analysis only. There was no negotiation or implementation of contractual agreements between industry and the community and no management agreements. Thus the concept is untested.

- the enforceability of the contracts is questionable

- the resources necessary to ensure the proper implementation of the concept may not be forthcoming

- the standards which emerge will be the result of a negotiation in which the community will be under-resourced

- the standards which emerge may be significantly different in different parts of the province, reflecting different bargaining strengths of local communities.

L. PUBLIC PARTICIPATION

Changes in Public Participation

The government has made the following changes which affect public participation in the process.

(1) Codification of Public Participation under Environmental Assessment Act. Bill 76 mandates public participation in important segments of the Environmental Assessment process. MOEE had a clear policy which required public participation under the Act to Bill 76. Bill 76 makes this policy mandatory.[87] *Formalizes existing public participation practice.*

(2) Elimination of the Intervenor Funding Project Act. The government permitted the Act to expire on April 1, 1996. This Act required proponents to provide funding for Board-approved intervenors at hearings before the Environmental Assessment Board, the Ontario Energy Board and the Joint Board under the Consolidated Hearings Act. The Act's disappearance makes effective intervention much more difficult both for those directly affected by the projects and for those acting on behalf of the public. *Decreases effective public participation.*

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[87] It is interesting to note that Bill 76 originally excluded public participation from the process of developing the terms of reference for an Environmental Assessment. The terms of reference -- which sets the agenda for the environmental assessment, by defining what issues are to be explored, what alternatives are to be considered, and so on -- was a new feature of the process, added by Bill 76, and so had not been subject to MOEE public participation policy prior to Bill 76's introduction. The material accompanying the Bill and the Minister's comments at Bill 76's release announced that public participation was guaranteed in all aspects of EA; but the text of the Bill revealed that there was no provision for public participation in the development of the terms of reference. This omission was the subject of much comment and criticism during the Standing Committee hearings reviewing the Bill. The Bill was been amended to include provision for public participation in the development of the terms of reference.

(3) Decrease in Hearings under the Environmental Assessment Act. This government has shown itself reluctant to refer EA matters to the EA Board. There have been very few referrals to the Board for hearings. For example, as noted above, despite considerable public opposition the Minister decided not to refer the Taro Aggregate environmental assessment to the Board for hearings. *This is a departure from previous practice and constitutes a decrease in public consultation.*

(4) Decrease in mandatory hearings under the Environmental Protection Act and Ontario Water Resources Act. The Responsive Environmental Protection proposes to reduce the number of undertakings for which mandatory hearings are required (waste demonstration projections, incineration of hazardous waste offsite, etc. See detailed discussion in section on Approvals above). *Decreases mandated public participation.*

(5) Elimination of Advisory Committees. The government eliminated the MISA Advisory Committee, the Advisory Committee on Environmental Standards (ACES) and the Environmental Assessment Advisory Committee (EAAC) on September 29, 1995. The MISA Advisory Committee provided multistakeholder consultation and advice on MISA regulations. ACES conducted public consultations on proposed changes in Ontario's environmental standards and provided advice in public reports to the Minister. EAAC provided public advice in reports to the Minister on exemption requests and other subjects relating to the Environmental Assessment Act, conducting public consultations on EA matters of concern. *Decreases public consultation.*

(6) Exemptions from Environmental Bill of Rights. Regulation 482/95 removed the application of the Environmental Bill of Rights to the Ministry of Finance, eliminating the requirement for the Ministry to list any of its proposals on the Environmental Registry, thus removing the public's right to notice and comment. The Regulation also exempted the measures related to government fiscal restructuring from listing on the Environmental Registry for a period of ten months, regardless of environmental impact. *Decreases public participation.*

(7) Ministry Non-Compliance with Environmental Bill of Rights Requirements. In her special report to the Ontario Legislature on October 10, 1996[88] the Environmental Commissioner of Ontario voiced her concern that some Ministries were not complying with Environmental Bill of Rights requirements to list on the Registry proposals having environmental consequences. She cited three specific examples of this non-compliance

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[88] Keep the Door to Environmental Protection Open. A Special Report to the Legislative Assembly of Ontario, Eva Legeti, Environmental Commissioner of Ontario, October 10, 1996

expressing her concern that the public's right to comment upon and affect the proposals was thereby impaired.[89] *Decreases public participation.*

(8) Reduced time and information to comment upon proposed changes. The Environmental Commissioner has noted that the public has been given inadequate time and information to comment upon the changes to environmental protection regime proposed by this government. The Commissioner pointed out that MOEE gave the public "only 54 days" to comment on the extensive changes to the Environmental Assessment Act proposed in Bill 76 and "only 38 days" to comment on the proposal to exempt Niagara pits and quarries from previously required Niagara Escarpment Planning and Development Act approval ("an abrupt reversal of position taken only 9 days before"[90]). *Decreases the public's ability to participate effective.*

(9) Inadequate information on environmental impacts of proposed changes. The Environmental Commissioner has noted that the information provided to the public on the environmental implications of proposed changes has been inadequate to permit meaningful evaluation and comment on the proposals. "Environmental Registry posting should provide full, clear, and objective proposal descriptions, but incomplete, vague or subjective information continues to prevent Ontarians from understanding environmental implications and provide meaningful comments to safeguard the environment"[91] She cited the Responsive Environmental Protection Technical Annex as providing late, inadequate and sometimes misleading information on the proposed changes. *Decreases the public's ability to participate effectively.*

(10) Reduction of Participation in Land Use Planning. Bill 20's revisions of the Planning Act removed the requirements for public meetings in the subdivision planning process and reduced the comment period from 30 to 20 days. *Decreases the opportunity for public participation.*

(11) Proposed deletions from Environmental Bill of Rights Registry. In Responsive Environmental Protection the MOEE proposes to remove a large number of listings from the Registry, arguing that they are environmentally inconsequential and that their

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[89] The Ministry of Natural Resources did not post the 6 policies in its business plans; nor did it post Bill 52 concerning the aggregate and petroleum industries. Concerning the latter, the Commissioner stated: "Ontarians had little say on a Bill which could reduce the public's right to receive notice of new aggregate permits and licences on the Registry, and reduce or remove the environmental protection conditions currently attached to these licences and permits." Keep the Door to Environmental Protection Open. A Special Report to the Legislative Assembly of Ontario, p. 3 The Ministry of Consumer and Commercial Relations did not post Bill 54, Safety and Consumer Statutes Administration Act, prompting the Commissioner to comment: "Ontarians had little say on a Bill which will allow Ministry to delegate environmental monitoring and health and safety inspection for underground fuel storage tanks to an industry-run, self-funded, not for profit organization." *Ibid*

[90] Keep the Door to Environmental Protection Open, p. 5

[91] Ibid.

elimination will enhance use of the registry by removing unneeded detail.[92] If the proposed targeted deletions indeed had no environmental impact, then their removal would be of benefit. However, no criteria or analysis is presented to demonstrate that the proposed deletions are of this character. Moreover, some of the proposed deletions are clearly of environmental concern -- for example the listing of new pesticides with active ingredients. *Potentially decreases public participation.*

(12) Proposed changes to approvals process eliminating certificates of approval. The MOEE proposals to decrease the number of activities for which a certificate will be required and to increase the use of standardized approvals will eliminate the public's rights of notice and comment under the Environmental Bill of Rights.[93] *Decreases public participation.*

(13) Changes to Access to Information. As part of Bill 26 (the "Omnibus Bill"), the government amended the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act, making it easier for the government to reject information requests from the public. *Potentially decreases the public's access to information.*

On balance the government's changes to date have significantly decreased the public's access to information and its ability to participate in environmental decision making. Decreasing public participation has two sets of interrelated impacts upon i) the effectiveness of environmental protection and ii) the rights of those affected by environmental decisions to know about and influence the decisions that touch them.

Impact on Effectiveness of the Environmental Protection Regime

a) Information and Good Environmental Decisions. Individuals and public interest groups contribute information that may not otherwise be available to the decision maker, including information which may be counter to that originating from an undertaking's proponent or the government itself. Decreasing participation reduces the availability of that information and diminishes the likelihood that appropriate decisions will be made. As the Environmental Commissioner put it in her second special report to the legislature:

> I am compelled to submit this special report because I believe that the elected members of the Legislative Assembly must fully understand that changing or eliminating environmental safeguards too quickly and without adequate public consultation produces

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[92] Exempt the following Environmental Protection Act s. 9 Certificate of Approval (air) applications from listing: ventilation equipment, hospital sterilizers, prescribed burns for forestry control, composting operations, spray irrigation, snow-making and skywriting, exhaust systems for battery charging operations, laboratory exhausts, pilot tests and demonstration projects. Also exempt listing of new pesticides with active ingredients under Regulation 914. Responsive Environmental Protection, p.33.

[93] See the discussion of changes to approvals, above in section I.

> poor decisions that will need to be fixed later on. That costs money and does little to safeguard the environment. Hasty proposals do not produce effective or efficient results.[94]

b) Awareness, Involvement and Environmental Stewardship. Public knowledge of and participation in environmental decisions can encourage values associated with environmental stewardship. Increased environmental stewardship implies an expanded willingness and ability to undertake environmentally appropriate actions. It can decrease the need for resources devoted to government environmental protection by increasing the willingness of individuals and groups to comply with and go beyond legal environmental requirements.

Impact on Other Values

Over the past two decades Ontarians have had increased access to information and to rights of participation in environmental decision making. Access to information and participation in decision making touch upon key democratic rights. The credibility of the system of environmental protection and its consequent ability to inspire respect and commitment are fundamentally affected by the transparency and fairness of the decisions made by that system.

The government has acknowledged the importance of transparency and public involvement and committed itself to them in making regulation:

> In developing regulations, we will employ collaborative, transparent decision making.[95]

However, the actions of the government to date have eroded the public's access to environmental decision making.

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[94] Keep the Door to Environmental Protection Open, p. 3.

[95] Responsive Environmental Protection, p. 17

M. CONCLUSIONS

The present government's stated objective is "doing more with less" and they have taken a number of measures aimed at the environmental sector. The government has:

- cut government expenditures and jobs for the Ministry of Environment and Energy by more than 30%;
- undertaken or proposed a series of changes to Ontario's environmental regulatory framework and made a number of other decisions directly impinging on the environment;
- eliminated or curtailed public involvement in environmental decisions across a wide front of environmental decision making.

The government has repeatedly said that the quality of the environment will not suffer as a result of its actions and that Ontario's environmental protection will not be diminished. A brief examination of the government's action to date leads to the following conclusions:

(1) Decreased standards. The government has initiated and proposed a significant number of changes to Ontario's environmental standards. A few of these changes have resulted in increased stringency of regulation but by far the largest number and those with the greatest significance have been to decrease environmental standards.

Some of these decreases have been a direct weakening of environmental performance standards. For example, the government has lowered standards of environmental protection in the Planning Act, weakened the Mining Act provisions for closure and cleanup, repealed the ban on municipal waste incinerators, exempted the Ministry of Finance from the provisions of the Environmental Bill of Rights, eliminated energy conservation performance requirement from the Building Code, proposed removal of the reference to the goal of zero levels of AOX discharges for the year 2002 in the MISA Pulp and Paper Regulations and proposed the elimination of the hearings requirement for selected hazardous and municipal waste projects.

Other decreases have removed the certainty of environmental expectations by opening up previously unequivocal standards to the possibility of weakening by bureaucratic, ministerial or governmental discretion. For example, the key provision of the Environmental Assessment Act requiring all undertakings under the Act to consider a full range of reasonable alternatives will be subject to the discretion of the Minister.

In addition there is the ominous prospect of further decreases in existing standards. On more than one occasion the government has relaxed environmental standards in direct response to business requests, despite existing precedent or advice to the contrary. For example, Brenda Elliott as Minister made a decision not to hold an Environmental Assessment hearing in the Taro landfill case, directly counter to the purpose of the Environmental Assessment Act and contrary to established precedent pursuant to the Act.

On a number of occasions, the government made proposals in Responsive Environmental Protection which ran counter to recommendations of MOEE staff concerns about environmental protection. Norman Sterling, current Minister, recently exempted, by regulation, established aggregate concerns from the necessity to obtain a permit for aggregate operations expansions (not involving building alterations or additional water requirements); this responded to a court decision which found that permits were required for these firms. The message business may take from this is that requests for the weakening of standards or exemptions to them will be looked upon favourably.

(2) Decreased capability to ensure compliance. MOEE (and MNR) staffing cuts have been severe. The Ministry's capability to inspect, monitor and enforce is hampered by lack of personnel.

Certificates of Approval play an important role in enabling the Ministry to enforce Ontario's environmental standards. The proposed elimination of C of A requirements for a whole range of activities (eg., ventilation) and the proposed permit by rule approach may reduce the Ministry's ability to monitor and enforce environmental violations.

Major cuts to the Ministry's science and technology budgets, including laboratory analysis, mean that essential support functions for monitoring and enforcement have been severely weakened. Decreases in the Ministry's scientific and analytical capacity makes it more difficult to identify violations and successfully prosecute them.

Discretionary decisions are made every day by Ministry personnel concerning the level and focus of inspection and monitoring and prosecution. The current government's emphasis on eliminating barriers to economic activity, and its changing conception of its role (viewing business as MOEE's "client") may have a spill-over effect on MOEE personnel, especially in the context of decreased personnel resources, making the discretionary decisions more favourable to business than they have been in the past.

Additionally, business (and government ministries subject to Environmental Assessment Act) willingness to comply voluntarily with existing standards may decrease, increasing violations of existing standards and decreasing compliance. The government has made it clear that it favours business interests. The government has also opened up a whole range of Environmental Protection Act and Environmental Assessment Act decisions to discretionary intervention. It is reasonable to assume that business and government ministries subject to Environmental Assessment Act will focus more on obtaining exemptions than they have in the past to the potential detriment of complying with standards.

(3) Decreased ability to make future standards and make further improvements in Ontario's environmental health: the Problems with Voluntarism

The government's regulatory philosophy has made making additional regulations much more difficult: the "Less Paper/More Jobs" test, with its focus on cost-benefit analysis, the priority

given to voluntarism and the need for all new regulations to go through the Red Tape Commission make it much more difficult for the Ministry to bring in further environmental regulation.

The government's ability to make future regulations is hampered in a number of other respects as well. The decline in scientific and monitoring activity erodes the knowledge base from which new regulations must be made. It is highly unlikely that the government will be able to entice voluntary private sector activity to replace what it has foregone in this area: how likely is it that private will interests undertake research purely in the public interest? It will also be difficult for the government to convince universities, who themselves are under constraints and seeking private money, to undertake scientific and monitoring activity in the public interest.

The Ministry has emphasized the role of voluntary measures in achieving further environmental improvements. Voluntary agreements will almost inevitably result in lower standards than would issue from a regulated standard set by the government in the public interest. It is not in industry's interest to agree voluntarily to what would be otherwise be brought in by regulation and that means that Ontario will get a set of standards which are closer to what business considers in its own interest. Fundamental reliance on the voluntary likely may mean that there will be little further standard setting which is truly in the public interest.

(4) Decreases in Public Participation and Environmental Stewardship

On balance the government's changes to date have significantly decreased the public's access to information and its ability to participate in environmental decision making. Decreasing public participation, reduces the effectiveness of environmental protection, diminishes the rights of those affected by environmental decisions to know about and influence the decisions that touch them and discourages environmental stewardship.

N. WHAT RESPONSE?

What can be done by those interested in protecting Ontario's environment in response to the Ontario government? The government has already eroded Ontario's environmental protection system. The government's policies and its changes to date have set in process a dynamic which, if not checked, will continue the erosion. It is particularly important that this dynamic is countered.

It may be useful to think of two areas to focus the reply to the Ontario government's environmental course: the government itself and business/industry.

(1) The Ontario Government

The government says that it wishes only to cut waste, duplication, regulatory unclarity and inefficiency. It says that it is committed to continuing to protect the Ontario environment. However, its actions have had, and promise to have, a very different impact.

Two possible explanations for this are:

(a) The government does not understand that its actions are having negative consequences.

(b) The government understands that its actions are having negative consequences but it does not want to pay the political price of either i) publicly acknowledging this and changing course or ii) publicly acknowledging this and changing its professed goals so that it explicitly states that its "revolution" has significant negative environmental impacts.

The difference between the government's words and deeds has already been noted in the media. It is important that this continue and if possible intensify. At the very least, the public must be effectively informed about what is happening to Ontario's system of environmental protection. This provides an important basis for effective organization. The more information that is publicly available, the greater will be the pressure on the government and the greater will be the likelihood that the government will take notice and alter its course.

It is important for environmentalists anxious about the Ontario environment's state to remember that they are not alone in being concerned about Ontario government policy. There are similarities in the government's performance on the environment and its actions with respect to labour, welfare, health and daycare. It appears that the government is about to make similar moves in education. Links with others can heighten effectiveness.

(2) Business/Industry

The government is fond of saying that Ontario is "open for business". It appears that the more pressure business puts on this government for regulatory weakening or exemption, the more likely the government is to accede to the pressure.

It is important to attempt to reduce business demands for exemptions and regulatory weakening. Business should be publicly and privately encouraged to act in accord with the best interests of the environment. Corporate management may find it distasteful to be labelled as being a contributor to the process which is diminishing Ontario's environmental protection system. This is particularly true for the businesses and whole industry sectors who like to identify themselves publicly as being environmentally friendly. Shareholders and the public should know if these companies are putting forward a pro-environment public face while privately lobbying government for exemptions and a reduction in environmental performance requirements.

APPENDIX A

Interim Less Paper/More Jobs Test[96]

Summary of Principles

1. Implementation of regulatory action is restricted to instances where there is a problem requiring intervention.

2. Ontario Government will only legislate/regulate in ares consistent with its roles and priorities (eg. business plans).

3. Benefits of the policy must outweigh the risks/consequences from lack of intervention.

4. Costs to government and affected parties should not outweigh the benefits (criteria here include impact on Ontario's competitiveness; and "is this approach the most cost effective?").

5. The Ontario Government should explore all realistic alternatives to legislation/regulation by government.

   (Can voluntary codes, self management/self regulation or partnerships be used instead of government regulation; if not why not? Can all or some of the functions be carried out by private, non-profit, third party or partnership arrangements: eg., accreditation, certification, registration, delivery of program, monitor and audit. If not, why not?)

6. Where possible, the Government will harmonize with existing international, national, provincial or other existing standards or regulations. (Does it duplicate other government standards? Ways to adopt policy and/or delivery consistent with those standards? Can another Ministry, public or private group deliver all or part of the policy or program? What avenues were rejected and why?)

7. The need for regulation will be assessed early and in continued consultations with affected businesses, individuals and groups. (Has government consulted all those affected? What results of researching needs, costs, risks and benefits; what are the costs/benefits/risks?)

8. Legislation/regulation will be drafted and implemented in a manner which stresses the objective or the result to be achieved, not the process or detailed means of achievement.

9. The resources necessary for effective implementation and compliance/enforcement will be identified and obtained prior to implementation. (Are necessary fiscal and staffing

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[96] Red Tape Commission, Interim Less Paper/More Jobs Test, June 1996.

resources available? New resources needed? Training, technology and flexibility provided to staff? "How can staff adapt the interpretation of the regulation to changing conditions in keeping with the intent?")

10. The paper burden and process requirements of any legislation/regulation will be streamlined, minimized or eliminated as much as possible. (Has every avenue other than paper compliance been explored? "How have procedures and compliance requirements been minimized?")

11. Good customer service will be emphasized in designing implementation and compliance.

12. Enforcement and compliance will be consistent with the objectives of the policy and the risks and remedies assessed for non-compliance. (How will enforcement and compliance be carried out consistent with the highest risks of non-compliance and the intent of the legislation/regulation; can enforcement and compliance be done outside the government by a third party?)

13. Performance indicators based on the objectives and results desired will be used to measure the value, affectiveness and impact of the legislation/regulation. (What performance measures will be put in place to assess results achieved against the objective and the impact on the affected groups/individuals? How will the government monitor the views of those affected by the legislation at regular intervals after its passage? How will it report on the costs and benefits to the private sector after the legislation/regulation is passed?)

14. Each regulatory measure will have a sunset provision or a review date assigned to it when it is approved. (Is there a sunset clause? Why not? Provisions for review and feedback from those affected; are there international or national standards which may be adapted? at what point can the legislation/regulation be eliminated?)