The spread of "regulatory voluntarism": Abandonment of the goal of zero discharge

by John Jackson

Many governments and polluters now use "environmental controls and regulations" as dirty words. They now espouse voluntarism as the solution to our environmental problems.

The slowness of our national regulatory programmes at regulating chemicals is often cited as a major example of why we should stop focusing on controls and regulations. For example, in Canada, only five chemicals have been regulated under the Canadian Environmental Protection Act in the past five years. The assessment process is seen as too slow to be able to address the environmental problems that confront us quickly enough.

The massive quantities of toxic chemicals discharged every day into our environment by industry is seen as further proof of the fundamental failure of the control and regulatory approach. Despite ever more extensive and tighter regulations over the past twenty years, scientists warn us that chemical discharges to the environment continue to endanger the present and future well-being of all living creatures.

Citing these indications of the failure of the regulatory approach, voluntary programmes are rampant in Canada and the United States today. The regulatory and control approach is being disparagingly shunted aside—only to be used as a final desperate measure.

The new Canada-Ontario Agreement stresses a voluntary approach to reducing the production, use, release, and generation of 43 priority substances and pollutants by the year 2000. Canada promises to do this through its challenge programme under the Accelerated Reduction and Elimination of Toxics programme (ARET).

Ontario promises to achieve these eliminations and reductions through its "4Ps" effort — the Pollution Prevention Pledge Programme. Canada and Ontario also plan to achieve this through Memorandums of Understanding with specific industrial sectors; this is a purely voluntary programme.

The United States is also emphasizing voluntary programmes to achieve the virtual elimination of persistent toxic substances from the Great Lakes. Under the U.S. EPA's 33/50 Program, the emission of 17 selected chemicals annually reported in the Toxics Release Inventory by manufacturing facilities are targeted for voluntary reductions of 50 percent by 1995, with an interim goal of 33 percent reduction by the end of 1992. Under the Auto Industry Pollution Prevention Project, automobile manufacturers are voluntarily surveying their plants to establish priorities for pollution prevention efforts on 65 persistent toxics.

Voluntarism will not, however, get us to the goal we must achieve. It may help us reduce the discharge of chemicals, but it will not get us to zero. Scientists are telling us that the irreparable damage from persistent toxic substances is so great that we cannot risk releasing any more of them into the environment. In other words, we must have zero discharge. The U.S. and Canadian federal governments endorsed this approach when they signed the Great Lakes Water Quality Agreement. The International Joint Commission consistently and with ever greater urgency and passion is pushing the governments to follow through on their commitment.

Industry has had fifty years to prove that the voluntary approach will work

Even some industrial organizations, for example, the Lambton Industrial Society in Canada's chemical valley near Sarnia, have endorsed the need for the virtual elimination of persistent toxic substances. Therefore, it is legitimate to judge voluntarism on its ability to achieve zero discharge of persistent toxic substances.

It is significant to note that it is for these substances—the persistent toxic substances—that the voluntary approach is being stressed. Not even industry is proposing that the regulatory approach for controlling conventional pollutants be relaxed.

The voluntary approach to achieving zero discharge will fail. Zero discharge can only be achieved if there is zero use of persistent toxic substances. Otherwise, contaminants will inevitably leak out eventually. History repeatedly shows us that alternative production processes and alternative substances will not be used until and unless governments require the changeover to them. Alternatives to chlorofluorocarbons started being used when government announced the intention to phase them out. Alternatives already existed but were not being brought in. The same is true for PCBs and other substances now put out of use.

Governments clearly recognize this, since they do not set elimination as the goals in their voluntary programmes:

- The ARET challenge to Canadian industries is to reduce the release of 14 substances by 90 percent by 2000 and 86 other substances by 50 percent by 2000.
- The Canada-Ontario Agreement is targeting 100 percent reduction for only 5 substances that are already banned. For seven other substances the goal is 90 percent reduction by 2000. No targets have been set for the remaining thirty substances.
- The Memorandums of Understanding in Ontario do not state zero as a goal.
- The U.S. 33/50 Program is far from setting zero as a target.

Government tells us that if voluntarism does not work they will bring in regulations. The intent with the Canada-Ontario Agreement, for example, is to give voluntary programmes a six-year trial. If they don't work they say they will bring in new regulations after the year 2000. But we cannot wait that long to see if the experiment works or not. Industry has had fifty years already to prove that the voluntary approach will work to eliminate the use and discharge of persistent toxic substances. The experiment has already failed.

Surely it is better for industry to know, today, the goals and regulatory requirements they will be faced with tomorrow. Then they won't waste capital expenditures on halfway measures—on measures that must be discarded later in order to reach zero.

Instead of throwing the baby out with the bath water of regulatory shortcomings, we should set in place new regulatory regimes that overcomes the problems of the present system:

The present regulatory system takes too long. This is undoubtedly true. It takes too long because chemicals are considered innocent until proven guilty. Why should chemicals have the same rights as people? Governments should only have to show that a substance has certain characteristics, e.g., persistence, bioaccumulation, hormone imitation. In these cases, governments should have the right to phaseout use of the substance.

The debate should be over timetables for the phaseout, not whether a substance will be phased out at all. It is astonishing that governments must now show both that a substance has hazardous characteristics and that it is already causing harm to the environment before they can act. This is not prevention.

The pollutants still flow. This is likewise true. The flow continues because our regulations are based on the belief that there is an acceptable level discharge that the environment is capable of assimilating. For persistent toxic substances, there is no acceptable discharge.

Regulations are too prescriptive. Industry sees the need for more flexibility carrying on business. There is nothing wrong with this in principle. Industry is doubtless best able to determine how to achieve its goals. But we must prescribe the goals through regulations. The goals should be developed on the basis of what is necessary for the health of the ecosystem. For example, a regulation must say that chlorine can no longer be used after a certain date. Industry can figure out how to achieve the goal.

Regulations focused on goals must include mechanisms to ensure accountability and enforcement. Too frequently such regulations do not include provisions for enforcement. For example, Ontario's new pulp and paper regulation requires the industry to develop plans to phase out the discharge of chlorinated substances by 2002; the regulation does not, however, require that the plans be implemented. Such regulations are little better than voluntary programmes.

Rather than focusing on voluntary programmes, we should develop pollution prevention regulations that:

1) Set goals, including timetables, based on ecosystem health
2) Let industry figure out how to achieve the goals
3) Impose penalties if industry does not achieve the goals by the specified dates.

It is only by developing regulations based on such principles that we will achieve zero discharge. Those who are pushing for voluntary programmes instead of reforming regulations are clearly not dedicated to achieving zero discharge.

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EPA people in the audience, is that a lot of the money that is coming for pollution prevention permit training is coming from the EPA.

Present company excluded, there is still much too much disjointedness coming down to the states from what EPA wants to see in its programs. I think that the flexibility and grant guidance that was given to the states was absolutely one of the best things that came out of the EPA in years. But it is really being overshadowed by requirements coming down to media-specific permit programs to do other things.

What EPA wants is just not being translated to the people running the permit programs.

I was at Woods Hole five years ago, and I remember someone ranting about EPA rhetoric being different from EPA practice. I have to say I don't think that's changed.

I'm constantly struggling in terms of trying to talk to our permit people, when they've got all these other disjointed new programs that they have to start to implement without any kind of real incentive from EPA to pull them all together.

I think that EPA's money would be better spent on other areas, such as:

1) Encouraging media-specific programs to consolidate, demanding from the start that new programs (i.e., stormwater operating permits) be designed to be integrated with other existing medium-specific programs;

2) Initiating creative new projects at the state level to test new approaches to pollution prevention and then evaluating them; and

3) Maybe even paying some pollution prevention thinkers to conjure up a menu of possible approaches to integrating pollution prevention into permitting and regulations in order to force a more constructive discussion on the two fundamental questions I raised at the beginning of my talk.

In closing, I want to stress that we are at an important thinking/planning/debating time that can map out policy directions for integrating pollution prevention in regulations and permitting. Unfortunately, I think that agencies, industries and non-government organizations have reacted to the implementation phase without having gone through a period of reflection. As a result, the efforts we are seeing to integrate pollution prevention in permitting and regulations are conventional, piecemeal and, quite frankly, dull.

I think that what is really needed are forums for people to talk about and experiment with real approaches to integrating medium-specific programs along with pollution prevention before we implement a certain approach or set of approaches just to say we did it.

Drawbacks to voluntary pollution prevention agreements in Canada

by Paul Muldoon, Counsel
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Whenever the issue of toxic chemicals is discussed with agency officials in Canada, it is not long before the topic of voluntary pollution prevention agreements is mentioned. In fact, the notion of voluntary pollution prevention agreements is probably one of the most apparent trends in environmental policy, although it has not been subject to significant public debate.

A voluntary pollution prevention agreement is an arrangement between industries, organizations representing industrial sectors, the Ontario Ministry of the Environment and Energy, and Environment Canada. These arrangements are formalized in documents called "memorandums of understanding" (MOUs) and have as their purpose to reduce pollution levels.

It is difficult to generalize about existing and proposed MOUs since they differ significantly. Industry sectors with MOUs already concluded or on the way to conclusion include:

- Printing and graphics (draft)
- Dry cleaning (draft)
- Comprehensive municipal (November 23, 1993)
- Automotive manufacturing (June 3, 1993)
- Metal finishing (June 4, 1993)
- Automotive parts manufacturing (December 9, 1993)

Some of these agreements, such as in automotive manufacturing between the Motor Vehicle Manufacturers Association, General Motors, Ford, Chrysler, Ontario Ministry of the Environment and Energy, and Environment Canada, have demonstrated actual reductions. Other agreements seem so vague that it is unclear what is going to be done.

If industry is doing something short of regulation, and if there is, at times, some progress, then what is the problem with voluntary agreements? Three concerns can be given that suggest that there should make policy-makers and the public think again about the use of the instruments.

Secret negotiations

One of the emerging hallmarks of the regulatory system is that, by and large, they are open processes. Regulations are drafted, released for public debate, and then finalized. Although many often disagree with the result, the point is that at least the voices from various interests are heard.

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One of the hallmarks of the voluntary agreements is that they are negotiated behind closed doors. Hence, the years and years of struggle to open up the regulatory process to allow public participation quickly evaporates with voluntary agreements. In most instances, it is only after they are negotiated that public comment is welcomed.

The response to this criticism is simple: since these are voluntary agreements, what interest does the public have in the negotiations? The responses deal with preemption and the issue of who is setting the policies?

Preemption: Policy prevention

Governments have viewed the emergence of voluntary agreements very favourably, since industry takes action without government intervention. Or is that so? Why then is government a party to these agreements? Why are they involved at all?

Although the agreements are not legally binding, it can be argued that there is a tacit understanding that government would be hesitant, if not preempted, to regulate the industries on matters that are covered under a voluntary agreement. In other words, industry is willing to do something to prevent regulations, which might force them to do a lot more.

In many instances, of course, the fact that there is an implicit understanding not to regulate is irrelevant. Government still retains the legal power to regulate. Moreover, the government often has no regulatory agenda with respect to matters covered under the voluntary agreement. However, the notion of preemption is important for another reason.

Who sets policy

If the agreements covered areas that would not be covered by regulations, perhaps it would be more difficult to comment on these instruments. However, in many cases, the agreements cover areas of environmental policy that are the most controversial policy issues of the day.

For example, one of the most nagging and protracted debates has been the definition of "pollution prevention." By and large, industry defines pollution prevention as any measure the reduces pollution levels, including pollution control measures. Pollution prevention, however, should be defined as change in process that avoids or prevents the use or generation of pollutants in the first place. While none of the voluntary agreements define pollution prevention, the implication flowing from all of them is that the industry definition is acceptable.

Another example pertains to zero discharge. One of the fiercest debates in environmental policy is whether persistent toxic chemicals have to be phased out (as argued by environmentalists) or only reduced (as argued by industry). The implication by some voluntary agreements is that reduction of significant levels is sufficient.

In the end, although voluntary agreements make some gains, they are not without some losses. These include the possible sacrifice of the principle of public participation, the sacrifice of a more comprehensive regulatory framework, and the sacrifice of better environmental policies. These are sacrifices that environmentalists should be very careful in accepting.