



Voluntary Environmental Initiatives: The State of Play in 2007, and Recommendations Concerning the Ontario Approach

Prepared by Dr. Kernaghan Webb
Kernaghan Webb and Associates

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About Pollution Probe

Pollution Probe is a non-profit charitable organization that works in partnership with all sectors of society to protect health by promoting clean air and clean water. Pollution Probe was established in 1969 following a gathering of 240 students and professors at the University of Toronto campus to discuss a series of disquieting pesticide-related stories that had appeared in the media. Early issues tackled by Pollution Probe included urging the Canadian government to ban DDT for almost all uses, and campaigning for the clean-up of the Don River in Toronto. We encouraged curbside recycling in 140 Ontario communities and supported the development of the Blue Box programme. Pollution Probe has published several books, including *Profit from Pollution Prevention*, *The Green Consumer Guide* (of which more than 225,000 copies were sold across Canada) and *Additive Alert*.

Since the 1990s, Pollution Probe has focused its programmes on issues related to air pollution, water pollution, climate change and human health, including a major programme to remove human sources of mercury from the environment. Pollution Probe's scope has also expanded to new concerns, including the unique risks that environmental contaminants pose to children, the health risks related to exposures within indoor environments, and the development of innovative tools for promoting responsible environmental behaviour.

Pollution Probe offers innovative and practical solutions to environmental issues pertaining to air and water pollution. In defining environmental problems and advocating practical solutions, we draw upon sound science and technology, mobilize scientists and other experts, and build partnerships with industry, governments and communities.

About the Author

Kernaghan Webb is an Associate Professor in the Department of Law and Business, Ted Rogers School of Management, Ryerson University, located in Toronto, Ontario. He is the founding director of the Ryerson University Institute for the Study of Corporate Social Responsibility. He is also a Special Advisor to the United Nations Global Compact, a board member to Transparency International-Canada, a member of the Code of Ethics Advisory Group to Imagine Canada, and on several Standards Council of Canada advisory committees. Prior to joining Ryerson University in December 2006, Dr. Webb was Chief of Research and Senior Policy Advisor to the Office of Consumer Affairs, Department of Industry, Government of Canada. He was also a member of the federal Environmental Performance Agreement Advisory Committee, Department of Environment, Government of Canada. Dr. Webb has written extensively on compliance and enforcement matters, and on innovative regulatory approaches.

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Foreword

This report builds on a considerable body of research prepared and maintained by Pollution Probe. Over the years, Pollution Probe has participated in the development of key instruments pertaining to voluntary environmental initiatives in Canada (e.g., the New Directions Group's *Criteria and Principles for the Use of Voluntary or Non-regulatory Initiatives to Achieve Environmental Policy Objectives*), has acted on advisory groups concerning voluntary environmental initiatives in several Canadian jurisdictions, has sponsored and held major workshops and publications concerning voluntary initiatives, and now maintains an online repository of recent voluntary initiatives and research on them (the Voluntary Initiatives Resources Centre — VIRC — www.crossdraw.com/pprobe). I would like to thank Pollution Probe for their expert assistance in preparing this report. I would also like to express my deep appreciation to those I interviewed for this report (see Annex I), and the academics who are part of the Regulatory Institutions Network who provided me with copies of their research. Their insights were inspirational to me in conducting my research and devising recommendations. The opinions and positions taken and any errors or omissions in the report are mine alone, and should not be considered as reflecting in any way on any organization or institution to which I am or may be affiliated.

Kernaghan Webb, LL.B., LL.M., LL.D.
Toronto, Ontario
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Executive Summary

Drawing on a review of the voluntary environmental initiatives (VEI) literature and interviews with VEI experts, this report provides a preliminary analysis of Ontario's Environmental Leaders (OEL) program, and makes suggestions for refinements to the OEL program, as well as more far-reaching proposals for additional VEI programs and related adjustments to the Ministry of the Environment (MOE) environmental protection approach. Based on the analysis undertaken, the report concludes that VEIs are at somewhat of a crossroads — here in Ontario and elsewhere. If “crossroads” is too strong a term, then perhaps it would be more accurate to say that there is a “convergence” of work in this area, allowing for revisiting of original premises and perceptions, and re-calibration, as VEI use and understanding continues to evolve.

After more than a decade of use of VEIs in Canada and elsewhere, there is now a fairly solid base of experience with a wide variety of VEI types, and improved awareness of their strengths and weaknesses, and the incentives and disincentives underlying their usage. At the same time, experience and understanding with the broader range of command and control and other regulatory techniques has also advanced considerably. As a result, today there are real opportunities to develop and apply VEIs in a more sophisticated and targeted way, as part of an integrated strategy with evolved core regulatory approaches.

All this having been said, there seems to be a certain amount of fatigue and jadedness setting in among some government, private sector and non-governmental players concerning VEIs. One could say that “the bloom is off the rose” — VEIs are no longer considered particularly new or exciting, and some are questioning whether the energies

associated with VEI development, implementation and evaluation are worth the effort. In this environment, there is a real possibility that VEIs will not be systematically pursued in circumstances where they might usefully apply, or alternatively, their use might be restricted to marginal “boutique” situations, isolated from the resources and structure needed in order to make them optimally effective.

The research undertaken suggests that targeted and well structured VEIs can play an important supplementary role to conventional regulatory approaches, as part of an integrated, comprehensive environmental protection regime. The report proposes changes with respect to the use of VEIs in Ontario in the following areas:

1. Possible refinements to the OEL Program
2. An Ontario VEI Challenge Program
3. An Ontario VEI “Good Performer” Program
4. Addressing the Laggards Problem
5. An Industry Association Program
6. A Third Party Inspectorate
7. Additional Incentives
8. Moving Toward Standardized, Mandatory Public Reporting
9. Alignment with the Regulatory Backdrop
10. VEI Case Studies and Conferences

The proposals made here are based on the assumption that VEIs can be a vital and integral component of the Ontario environmental protection approach, although it is clear that VEIs should and must be a complement to the backbone regulatory approach. The objective is to create a suite of VEIs that supports and improves the regulatory activities which must take centre stage, at the same time as MOE's regulatory approach supports and improves the VEIs, with the environment being the ultimate winner.

Introduction

After setting out an overall taxonomy of voluntary environmental initiatives (VEI), this report focuses on one particular type — the government-industry voluntary agreement. The report comes at an opportune time as there have been a number of recent empirical studies that have helped to shed light on the strengths and limitations of VEIs, and the motivations of businesses that participate in VEI programs (and those who do not). Although VEIs are a technical instrument designed to improve environmental performance, they arouse much passionate debate — from a number of different perspectives. It is clear that VEIs straddle a significant divide. Some feel that conventional regulatory approaches are the only way of protecting the environment, and that government-industry VEIs are simply distractions that take government's eye off the regulatory ball. Others feel that regulatory approaches can only go so far, that the private sector can and does respond to impulses other than the threat of fines or jail — be they market, community, ethical, or otherwise — and that there is much that can be learned by all parties from programs that encourage extra-regulatory compliance behaviour.

Regardless of where one might stand in terms of VEIs, it is clear that the yardsticks have changed. Regulatory approaches are evolving and improving (e.g., becoming more results-oriented, with more emphasis on prevention), new citizen-oriented processes, institutions and instruments have emerged, and our understanding of VEIs has evolved as well. The question underlying this report is this — knowing what we now know about the strengths and weaknesses of conventional regulatory programs, and the various improvements and refinements made to such

programs, and knowing what we now know about VEIs, what role can and should VEIs play in environmental protection? To answer this question, the report adopts the following approach: after reviewing the evolving nature of environmental protection regimes, the MOE's flagship VEI — Ontario's Environmental Leaders (OEL) program — is examined. The analysis suggests that the OEL program has some distinctive and promising design features. Although it is too early to make a full assessment of the program (and such an assessment is well beyond the scope of this study), the report identifies some aspects that could perhaps be adjusted to improve transparency and effectiveness. Then the recent VEI literature is examined, revealing a wide number of valuable insights concerning voluntary approaches.

This is followed by a summary of some of the key observations emerging from interviews with VEI experts which suggest that VEIs could go two ways — they could be refined and targeted more effectively to become an important supplement to regulatory approaches, or alternatively, they could be relegated to a dark corner of irrelevance in the government "policy instrument" cabinet. The report provides suggestions for a path forward which would see VEIs more fully integrated into the Ontario approach to environmental protection. Canada has a unique history of government-industry-ENGO-community collaboration on environmental matters which is quite distinctive from other jurisdictions. The research, analysis and proposals provided here attempt to build on this history to create a viable "made-in-Canada" approach to environmental protection which integrates regulatory and voluntary approaches, and as a result is more sustainable and effective.

Definitions, Concepts, Taxonomies and the Focus of this Report

In this report, the term “voluntary environmental initiatives” (VEIs) is taken to encompass the full range of initiatives in which businesses undertake to reduce or minimize or eliminate an environmental impact or impacts, where the businesses are not legislatively required to undertake the initiative in question (*see chart below for types and examples of VEIs*).¹ It is worth

emphasizing at the outset that the concept of *voluntariness* as used here refers only to the fact that *government is not compelling certain business conduct on pain of penalty in the form of an offence punishable by law*. This still leaves considerable room for development of initiatives and activities that would be characterized as voluntary.

Thus, for example, where one company requires as a matter of contract that another company in its supply chain meet certain environmental commitments — e.g., to be certified to an environmental management system standard such as ISO 14001 — as a precondition to being a supplier of the first company, this is considered here as a voluntary environmental initiative, despite the fact that the supplier company may feel that it has no choice but to become ISO 14001 certified if it wants the contract. Another company might agree to curtail certain environmentally harmful activities in order to maintain good relations with a local community. For the purposes of this paper, this too would be considered a VEI, even though the company might have felt continued citizen support “required” that the firm engage in certain emission reductions.

VEIs can be classified in any number of different ways. In this report, VEIs are divided into those that take the form of unilateral commitments² or those where commitments are made as part of agreements with other parties. A number of different variations on the theme of voluntary agreements between

¹ The OECD has articulated a typology dividing VEIs into unilateral programs, private voluntary agreements between polluters and third parties, negotiated voluntary agreements between businesses and public authorities, and challenge programs where government “sets the bar” and industry voluntarily participates (or not). Per OECD, *Voluntary Approaches for Environmental Policy: An Assessment* (Paris: OECD, 2000). Similar to the OECD typology, the editors of a 2007 book on VEIs adopt a three-category taxonomy, consisting of unilateral industry commitments, non-negotiable government-set agreements, and negotiated agreements where targets and timetables are created out of negotiation. See R. Morgenstern, and W. Pizer, eds., *Reality Check — the Nature and Performance of Voluntary Environmental Programs in the United States, Europe, and Japan* (Washington: Resources for the Future, 2007). In “Voluntary Approaches to Environmental Protection: Lessons from the Mining and Forestry Sectors,” a 2002 paper prepared for the OECD as part of its Global Forum on International Investment, N. Gunningham and D. Sinclair describe a four category taxonomy dividing voluntary approaches into public voluntary schemes devised by a public body, negotiated agreements developed through bargaining between a public authority and industry, unilateral commitments set by industry, and private agreements reached through bargaining between stakeholders. In describing this typology, Gunningham and Sinclair cite J. Moffet and F. Bregha, “An overview of issues with respect to voluntary environmental agreements,” CAVA Working Paper, No. 98/11/3.

² Unilateral commitments can either be made by an individual company not involving any agreement with others, or unilateral commitments can be made by a group of companies (an industry association).

industry and other parties are possible, including those that are market-based and those that are not, those involving government and those not involving government, those where there is a significant amount of negotiation, and those that do not, etc..

While VEIs as defined here can take many forms, the focus of attention in this report is on a particular type of VEIs — those in which government makes an agreement with a firm or firms for some “extra-regulatory” change of behavior (usually predicated on compliance with the law), and in exchange government

Types and Examples of VEIs

Types	Examples
Unilateral commitments by single company, no agreement/quid pro with/from other party such as government or NGO or community	During extremely hot weather, and in response to public requests from energy producers, a grocery store agrees to lower energy consumption by reducing air conditioning consumption and lighting during peak energy periods
Unilateral commitments by industry associations on behalf of their members, not done in exchange for certain benefits from other party such as government or NGO or community	Canadian Chemical Producers' Association Responsible Care Program (as originally conceived, because originally there were no MOUs or agreements between CCPA and governments concerning Responsible Care)
Vertical supply-chain programs where one firm requires others it does business with to participate in an initiative	Automobile manufacturers requiring that their suppliers are ISO 14001 certified
Multi-stakeholder, market-based, agreements, in which government is not involved, where firms commit to change their behavior, with third party verification	Forest Stewardship Council certification program, Marine Stewardship Council certification program
Multi-party, market-based agreements, in which government is involved, where firms commit to change their behavior, with third party verification	Environmental Choice Eco-Logo program (Canada), Blue Angel Program (Germany), Energy Star (US and Canada)
Non-market-based government-industry (and others) agreements, with a regulatory focus, where industry agrees to certain “beyond regulatory compliance” conduct in exchange for certain government benefits	Ontario's Environmental Leaders Program, federal Environmental Performance Agreements, Alberta EnviroVista Program, US Performance Track, Colorado Environmental Leadership Program, Wisconsin Green Tier, UK Climate Change Agreements, Danish Agreements on Industrial Energy Efficiency, Dutch Negotiated Environmental Agreements

offers certain benefits.³ The primary aim of the agreement is change of the behaviour of the firm and its processes, rather than of its products (as it is with market-oriented programs such as Energy Star, Environmental Choice, and Blue Angel product certification initiatives).

In the case of the non-market-oriented government-industry agreement initiatives that are the focus of discussion here, the benefits offered by government range from some form of public recognition (e.g., a press release issued by government, or a mention on a government website that an industry player is in some way a good environmental performer), to more tangible benefits, such as expedited permitting processes, reduced inspections, tax incentives, or some other form of preferential governmental treatment. The types of VEIs that fit into this category include Ontario's Environmental Leaders program, the federal Environmental Performance Agreements, the Alberta EnviroVista program, the US federal Performance Track program, the Colorado Environmental Leadership Program, the Wisconsin Green Tier program, the UK Climate Change Agreements, the Danish Agreements on Industrial Energy Efficiency, and the Dutch Negotiated Environmental Agreements.

Within this non-market oriented, government-industry agreement category, there are numerous identifiable sub-categories, such as "challenge-based" initiatives, in which government sets or negotiates specific targets for industry to

meet (as opposed to those where government does not set targets, and instead it is industry that self-selects areas for environmental improvement), sector- or company-wide (as opposed to facilities-based) programs, and rewards-for-good-past-behaviour programs (as opposed to those which focus primarily on future performance).⁴

By indicating that the VEIs that are the focus of discussion in this report are those with a regulatory focus, the intention is to avoid significant examination here of those market-oriented programs that are primarily designed to enhance the ability of industry players to "sell" their products or services in the marketplace (such as with eco-logo or eco-certification type programs).⁵ Literature suggests that the explicitly market/product-oriented programs are a potentially promising category of voluntary initiatives, but because of their market orientation, they differ significantly in terms of design, development, implementation, and incentives from those that are not so oriented. In a way, perhaps the more challenging question is: what motivates business to engage in extra-regulatory behaviour in their production processes and activities where products are *not* the main focus?

It is worth pointing out that even for these non-market/product-oriented agreements,

³ The author has elsewhere referred to these types of agreements by the inelegant phrase "consent-based non-legislatively required initiatives in which government is one of the parties": see P. Griss and D. Murphy, *Developing and Implementing Credible and Effective Environmental Performance Agreements* (Toronto: New Directions Group, 2007), at p. 9.

⁴ In P. Griss and D. Murphy, *ibid*, the authors classify government-industry agreements into quasi-regulatory, capacity building (performance-based), and capacity building (activity-based) categories. More information on these categories is provided later in this report.

⁵ See review of such programs, and analysis of same, in K. Harrison, "Promoting Environmental Protection Through Eco-Labeling: An Evaluation of Canada's Environmental Choice Program," in K. Webb, ed., *Voluntary Codes: Private Governance, Public Policy and Innovation* (Ottawa: Carleton University Research Unit on Innovation, Science and the Environment, 2004).

government recognition is often an important motivating factor for businesses participating in government-industry VEIs, and there certainly can be a marketing dimension to this recognition. But with Performance Track, the federal Environmental Performance Agreement program, Ontario's Environmental Leaders program, the UK Climate Change Agreements, etc., the sale of products is not the primary orientation of the program as it is with VEIs such as Blue Angel, Environmental Choice, and Energy Star. It also is worth mentioning that a government-industry VEI of the type focused on in this report may draw on significant explicit *financial* incentives for leverage, even if market-orientation is not of central importance. For example, tax incentives can be linked to participation in government-industry agreements,⁶ as can government procurement.⁷

By focusing on the regulatory-oriented, non-market/product-based VEIs in which government and industry are partners, this is in no way meant to suggest that programs where government is not a partner are not important types of VEIs. Nor is it to suggest that the government-industry agreements that are the focus of discussion here cannot and do not also involve other parties. Indeed, the participation of other parties (such as local community representatives, non-governmental organizations, academics) in the development and implementation of these agreements is often crucial to their success.

⁶ As was the case with the UK Climate Change Agreements. See Glachant, M. and G. de Muizon, "Climate change agreements in the United Kingdom: A Successful Policy Experience?" Chapter 4 in Morgenstern, R., and W. Pizer, eds., *Reality Check — the Nature and Performance of Voluntary Environmental Programs in the United States, Europe, and Japan*.

⁷ As is the case, for example, with the Colorado Environmental Leadership Program.

Environmental Protection — The Evolving State of Play

Both regulatory and non-regulatory approaches to protect the environment in use today — and our understanding of their key characteristics, strengths and limitations — have advanced considerably when compared with earlier decades. In order to gauge the situation concerning VEIs in 2007, it is important to position them within this broader evolution of environmental protection approaches more generally, because their actual and potential role today can only be understood against this background.

Changes in the Command and Control Regulatory Approach

Since the 1970s, command and control regulatory approaches have always been the backbone of environmental protection regimes in Canada and other Western jurisdictions. The command and control technique provides “a level of certainty in regulatory outcomes — assuming, of course, that ample resources are dedicated to monitoring and enforcement.”⁸ The approach of banning or restricting behavior through regulation or licensing/permits/certificates of approval, inspecting, and penalizing instances of non-compliance, is straightforward (if administratively intensive), and it “allows administrators to economize on scarce information and achieve greater certitude with respect to results.”⁹ While the fundamentals of command and control regulation have not changed, a number of

significant innovations have been introduced in recent years.

One important development has been the move toward setting performance targets in regulation rather than attempting to prescribe how industry should achieve a particular outcome.¹⁰ Other innovations and improvements of the command and control approach include the following:

- *use of civil penalties in addition to conventional regulatory/criminal penalties* — for example, in June 2007, Ontario introduced a new civil penalty regime whereby identified regulated industries can be subject to significant monetary penalties and there is no defence of due diligence available (although penalties may be reduced if it can be shown that specified environmental management systems were in place);¹¹
- *new requirements for pollution prevention planning* — for example, at the federal level, the *Canadian Environmental Protection Act, 1999* authorizes the Environment Minister to require *pollution*

¹⁰ See, e.g., C. Coglianesi, J. Nash, and T. Olmstead, “Performance-Based Regulation: Prospects and Limitations in Health, Safety and Environmental Protection” (December 2002). KSG Working Paper Series No. RWP02-050.

¹¹ The *Environmental Enforcement Statute Law Amendment Act*, formerly Bill 133, passed June 2005, amended the *Environmental Protection Act* and the *Ontario Water Resources Act*. These amendments allow the Ministry of the Environment to impose financial penalties in response to unlawful industrial spills, unlawful discharges and other related environmental contraventions. Regulations introduced in June 2007 brought the first part of the penalty regime into place (the penalties do not come into force until January 2008).

⁸ Eisner, J., “Corporate Environmentalism, Regulatory Reform, and Industry Self-regulation: Toward Genuine Regulatory Reinvention in the United States,” *Governance: an International Journal of Policy, Administration, and Institutions* Vol. 17, No. 2 (2004), at p. 146.

⁹ *Ibid*, at pp. 146–147.

prevention plans from regulated industries;¹² and,

- *new requirements for ambient monitoring, not just emissions monitoring* — for example, federal command and control regulations for the pulp and paper and mining sector now build in *ambient environmental monitoring of performance* as part of the regulation, so that evidence-based progress in improving the environment can be tracked and mid-course corrections undertaken if necessary.

While the command-and-control regulatory approach is the mainstay approach to environmental protection used in Canada and elsewhere, and it is becoming evermore elaborate and sophisticated in terms of the obligations and penalties imposed, there is also recognition that:

- it is administratively intensive and expensive to operate so that important aspects (such as inspections) are vulnerable to less-than-optimal implementation if fiscal/human resources are limited;¹³

- it tends to create an adversarial and legalistic relationship between regulators and regulated, where every step of the regulator is challenged in court; and,
- there are few incentives for businesses to find solutions beyond that which is required by law.¹⁴

For example, in its 2004 final report, the Ontario *Industrial Pollution Action Team* (IPAT)¹⁵ — an external group of academics, community, worker and First Nation representatives appointed by the then Environment Minister Leona Dombrowsky in 2004 who were charged with the responsibility of examining “the causes of industrial spills and dangerous air emissions and recommend to the government prevention measures for industry and others” — made the following observation:

...our perception was of a system heavily focused on punishing offenders, rather than supporting and rewarding companies with excellent compliance records and those that attempt environmentally protective innovations.¹⁶

¹² Part 4 of the *Canadian Environmental Protection Act, 1999* (CEPA 1999) gives the Minister of the Environment the authority to require the preparation and implementation of pollution prevention plans (P2 plans) for CEPA 1999 toxic substances (substances that have been added to Schedule 1 of CEPA 1999).

¹³ According to the 2005 Ontario Auditor General’s report, total MOE inspection activity was at 73 percent of 1995/1996 levels, and inspectors were averaging fewer inspections annually. “We were informed that this was due to the increased length of time it now takes to conduct inspections.” Office of the Auditor General of Ontario, 2005 Annual Report (Toronto: Queen’s Printer of Ontario, 2005), at p. 336. See also the following statement of the external advisory Industrial Pollution Action Team set up in 2004 by the Ontario Minister of the Environment. Among other things, the Team observed that “...the Ministry’s current approvals system also requires

considerable in-house expertise that is both costly to maintain and quickly made obsolete without extensive staff training/retraining. In our view, the Ministry’s limited human and fiscal resources would be more usefully directed to regular review, revision and enforcement of discharge limits....” (p. 26) Per Industrial Pollution Action Team (Ontario), Discussion Document — Final Report (Ontario: July 30, 2004), at p. 26. The Team also “... observed a system that is quite simply ‘spread too thin’, trying to address virtually all spills, of virtually all materials, from virtually all facilities, under virtually all circumstances. (p. 19).

¹⁴ Eisner, op cit., at pp. 146–147.

¹⁵ Per Industrial Pollution Action Team (Ontario), *Discussion Document — Final Report* (Ontario: July 30, 2004), pp. 5–6.

¹⁶ Ibid, p. 13.

In short, the command and control regulatory approach remains the “backbone” of environmental protection regimes in Canada and elsewhere, and numerous innovations and refinements have been made to this approach, but it continues to have limitations such as those noted above.

The Emergence of Regulatory Check and Balance Mechanisms

A second major trend has been the introduction of new institutions, instruments, and processes designed in part to better equip the citizenry so that they can oversee and challenge the activities of regulators. For example, in both Ontario and at the federal level in Canada, environmental commissioners are now in place who report on how well ministries with environmental responsibilities are doing, and administer citizen petition processes where individuals can challenge government departments concerning particular actions or inactions.¹⁷ Environmental registries have been introduced in both of these jurisdictions, allowing communities and individuals to access permits and permit amendment applications, proposed regulations and other regulatory information.¹⁸ At the federal level, a legislated National Pollutant Release Inventory has been put in place,¹⁹ creating a one-stop access point allowing citizens and communities to ascertain pollutants released, disposed of and recycled by facilities in Canada. The laws concerning class actions

have been liberalized and modernized in most Canadian jurisdictions,²⁰ and an *Environmental Bill of Rights*²¹ has been passed in Ontario, making it easier for citizens to bring legal actions to address environmentally harmful activity.

Taken together, these innovations point to a more citizen-accessible, transparent and accountable environmental protection process than had existed in the past. In spite of these advances, there have been criticisms that the new approaches are poorly understood and underutilized, and that communities need to be more proactively engaged in environmental protection processes.²²

Maturing Industry Associations

Industry associations in Canada are moving from a pure lobbying role on behalf of their members to one with significant self-regulatory dimensions. The basic motivations underlying this transition in roles appears to be recognition by certain industry members that a proactive approach to pollution issues can decrease the likelihood of accidents happening, improve cost-efficiencies, and can anticipate and potentially forestall regulations, thereby better positioning the industry in the eyes of communities, workers, consumers, investors, lenders, insurers, supply chain partners, and governments (i.e., enhancing the industry’s “social licence” to operate in a particular community.

¹⁷ For more information about the Ontario Environmental Commissioner, see www.eco.on.ca. For more information concerning the federal Commissioner of the Environment and Sustainable Development, see www.oag-bvg.gc.ca/domino/cesd_cedd.nsf/html/menu8_e.html.

¹⁸ For the Ontario registry, see www.ebr.gov.on.ca/ERS-WEB-External/. For the federal registry, see www.ec.gc.ca/CEPARRegistry/.

¹⁹ See www.ec.gc.ca/pdb/npri/npri_home_e.cfm.

²⁰ E.g., the Ontario *Class Proceedings Act, 1992*, c. 6.

²¹ SO 1993, c. 28.

²² See, e.g., Industrial Pollution Action Team (Ontario), *Discussion Document — Final Report* (Ontario: July 30, 2004), p. 48, which states: “[a]lthough we recognize the opportunities for comment and action afforded by the Environmental Bill of Rights and its Environmental Registry, those mechanisms are poorly understood by local residents, and thus underutilized for the achievement of community objectives.”

Probably the most advanced example of an evolved industry role of this type is the Canadian Chemical Producer's Association, and its Responsible Care initiative.²³ The program involves principles and detailed codes of behavior, the participation of community, NGO and academics, public reporting, and a unique approach to peer review performance verification involving competitors and others. The Canadian Responsible Care program has been the inspiration for more than 50 other Responsible Care initiatives undertaken by chemical industry associations in developed and developing jurisdictions around the world, and one can see its influence over self-regulatory approaches adopted by the Canadian energy, forestry, mining and plastics sector. Arguably, this shift in roles of industry associations from pure lobbyist to more of a combined self-regulator/lobbyist represents a potentially significant advance for public policy, as the associations move into a position to become a more significant partner in environmental protection with governments and others.

Nevertheless, some commentators have noted continued distrust by communities and have observed that the industry initiatives may lack rigour, and amount to elaborate techniques for delaying or avoiding needed regulations.²⁴

In its 2004 report, the Ontario Industrial Pollution Action team noted as follows:

“[e]ven well-intentioned and probably effective programs like the CCPA's Responsible Care program have failed to dispel this distrust [by communities of industry], in part because they lack regulatory requirements for measurable goals, timelines, or external validation for reducing chemical hazards. The fact that spills continue despite decades under the Responsible Care program suggests that there is indeed justification for this distrust.”²⁵

The Emergence of Market-based, ENGO-driven Certification Instruments

Another significant development in environmental protection in the past two decades has been the emergence of market-based certification instruments spearheaded by environmental non-governmental organizations. Perhaps the best example of this has been the rise to prominence of the Forest Stewardship Council (FSC) and Marine Stewardship Council (MSC) initiatives.²⁶ These types of programs provide the clearest

²³ See, e.g., Moffet et al., “Responsible Care: A Case Study of an Environmental Initiative,” in K. Webb, ed., *Voluntary Codes: Private Governance, Public Policy and Innovation* (Ottawa: Carleton University Research Unit on Innovation, Science and the Environment, 2004).

²⁴ See, e.g., critique of Responsible Care by Gunningham and Sinclair, op cit.

²⁵ Per Industrial Pollution Action Team (Ontario), *Discussion Document — Final Report* (Ontario: July 30, 2004), at p. 46. It has been pointed out to the author by those with a chemical industry background that although there was a slight increase in the number of St. Clair river spill incidents prior to the appointment of the Ontario SWAT team, this can be contrasted with a longer term major decrease in spills. Moreover, those incidents that sparked SWAT action emanated from a small number of companies.

²⁶ For others of this type, see the website of the ISEAL alliance (www.isealalliance.org) of which FSC and MSC are members.

evidence of the transition some ENGOs have made from “rule-takers, on the sidelines” — critics of others, and invited players to the initiatives of others — to “rule makers,” with the credibility and capability to develop and implement elaborate rule systems. Arguably, the ability of ENGOs to influence public policy is enhanced when they can demonstrate their capacity to lead rather than follow in terms of policy innovation. With this sort of initiative, it is not uncommon for ENGOs to work in close partnership with industry, as they develop practical solutions. This having been said, ENGO-driven initiatives can also sometimes trigger the development of rivalrous industry-driven programs. The effect at least in the short term can be a certain amount of market confusion, perhaps diluting the impact of the original ENGO program.²⁷

Evolving Approaches: Summary

Key themes that emerge from the review of the evolving approaches to environmental protection include:

- continued emphasis on command-and-control regulatory approaches as the backbone of effective environmental protection, with more elaborate and sophisticated rules (e.g., performance/outcomes oriented designs) and penalties being developed and imposed, but this is balanced against recognition that there are limitations associated with use of such approaches, such as the fact that they tend to be expensive and administratively intensive to properly operate, they can provoke adversarial legalistic relations, and they may not stimulate industry to engage in positive behavior beyond that stipulated by law;
- a move toward more transparent, accessible approaches to governing, where citizens are provided the information and tools to oversee and challenge the actions of government, although the tools available are still criticized as underutilized and poorly understood by communities; and,
- the rise of collaborative approaches where industry and NGOs play leadership roles, such as industry self regulation and product certification, although there is acceptance that these approaches have limitations such as in terms of rigour and applicability.

²⁷ See discussion of forestry certification initiatives in G. Rhone, D. Clarke and K. Webb, “Two Voluntary Approaches to Sustainable Forestry Practices,” in K. Webb, ed., *Voluntary Codes: Private Governance, the Public Interest and Innovation* (Ottawa: Carleton University Research Unit on Innovation, Science and the Environment, 2004).

Ontario's Environmental Leaders Program

Introduced in 2004, and developed with participation from a multi-stakeholder group including representatives from industry, ENGOS, and academia, Ontario's Environmental Leaders (OEL) program is the flagship voluntary government-industry environmental agreement initiative of the Ontario Ministry of the Environment (MOE). The OEL program is described by MOE as being part of an "integrated approach to environmental compliance assurance,"²⁸ intended to result in an improved environment, with a long term view to establishing new norms of environmental protection. The stated purpose of the program is to test the delivery of Leadership Agreements and to document their success in motivating continuous improvement.

Drawing on the work of the multi-stakeholder non-governmental New Directions Group²⁹ and the MOE's *Managing the Environment* report,³⁰ the OEL program framework document notes that the program includes the following elements:

- transparency through public involvement and public reporting;
- clear accountability, with specific performance-based targets;
- clear monitoring and reporting requirements;
- third-party verification of performance; and,
- continuous improvement, through the use of incentives and consequences.

The framework document notes that the OEL program is part of MOE's move toward environmental management "based on shared responsibility with the regulated community, NGOs, the public, and the scientific, academic, and technical communities."³¹ The OEL program is described by MOE as being one of many tools that will be made available to motivate the government and regulated entities to improve the way the environment is managed.

The OEL program was previously known as the Cooperative Agreement Initiative, and can be considered the successor to earlier Ontario VEIs such as REVA (Recognize and Encourage Voluntary Action) and Performance Plus (circa 1998–1999).³² In turn, REVA built on the

²⁸ Per Environmental Innovations Branch, Ontario Ministry of the Environment, *A Framework for Ontario's Environmental Leaders Program (formerly known as Cooperative Agreements)* (Toronto: MOE, July, 2004), at pp. 3–4. This section of the report draws extensively from the framework document, as well as the OEL *Application Guide*, and other material located at www.ene.gov.on.ca/envision/general/leadership/index.htm.

²⁹ See particularly the NDG's document *Developing and Implementing Credible and Effective Environmental Performance Agreements*. For more information concerning this document and the NDG generally, go to www.newdirectionsgroup.org/home/.

³⁰ Downloadable at www.ene.gov.on.ca/envision/ergreport/index.htm.

³¹ Per Framework document, op cit., at p. 4.

³² Through this MOU, the signatories agreed that MOE should give greater regulatory flexibility to industrial facilities which voluntarily and consistently exceed basic environmental requirements and meet high standards of environmental performance. While REVA resulted from MOE's work with the chemical industry, the Ministry notes that REVA's policy direction could apply to other industrial sectors as well. Per Environmental Commissioner of Ontario, *Changing Perspectives: Annual Report, 1999 (Supplement)* (Toronto: Environmental Commissioner of Ontario, 1999), "Review of Posted Decision: Recognizing and Encouraging Voluntary Action," pp. S4-14–S4-17.

experience with a 1994 Memorandum of Understanding (MOU) signed by the Ministry of the Environment, the Canadian Chemical Producers' Association, and several CCPA member companies. As the Ministry of Environment's VEIs have evolved, and in response to concerns registered about earlier VEIs, they have become progressively more rigorous and structured,³³ and open and transparent,³⁴ with requirements now for community engagement, seats at the table for ENGOs in the multi-stakeholder management advisory committee, and public reporting now being built in to the design of the OEL program.³⁵

However, the OEL program does not have a statutory basis, and as a result the existence of the program and the terms of its operation lack the sort of visibility, and attendant critical public scrutiny and discussion, and operational accountability that is typical for programs that have an explicit statutory basis. In comparison, VEIs in place in Colorado³⁶ and Wisconsin³⁷ have a legislative

basis, and interviews with personnel familiar with the operations of these programs have suggested that the programs have benefited from being legislatively debated and subject to regular legislative scrutiny.³⁸

In the opinion of the author, quite apart from a more explicit and permanent policy or statutory base for the program, there is room for improvement in terms of the public accessibility and transparency of the OEL program. For example, drafts of a facility's environmental commitments could be published for public comment on the MOE's environmental registry, as could the final versions (the final versions are now published on the OEL website),³⁹ and more information concerning the membership⁴⁰ and operation of the multi-stakeholder management advisory committee could be published.⁴¹

³³ On the OEL program webpage, under the Frequently Asked Questions portion, the OEL program is described as a "next generation non-regulatory Program [that] builds on the requirements of MOUs signed in the past. The main difference is that the OEL Program requires that Facilities specify the substances and environmental aspects targeted for reduction, commit to achieving tangible results, agree to third-party verification, and receive incentives, while MOUs require general commitments to substance reductions, and are usually not verified."

³⁴ Per Ontario Environmental Commissioner's Annual Report, *op cit*.

³⁵ See, e.g., the role of the multi-stakeholder management committee and reporting obligations in the MOE-Canadian Chemical Producers' Association's agreement, downloadable at www.ene.gov.on.ca/envision/general/leadership/leaders/ccpa_agreement.htm.

³⁶ Colorado Rev. Stat. para. 25-6.7-101 et seq. (Environmental Leadership Act).

³⁷ Wisconsin Stat. para. 299.80.

³⁸ See generally, J. Moffet, and B. Davis and B. Mausberg, "Supporting Negotiated Environmental Agreements with Statutory and Regulatory Provisions: An Overview for Ontario," report prepared for Environmental Defence Canada (2002).

³⁹ According to the author's research, references to actual OEL agreements on the Ontario environmental registry ended in about 2003.

⁴⁰ Compare the Ontario approach with the information provided as part of the Wisconsin Green Tier Program: see, e.g., Wisconsin Department of Natural Resources, 2007 Green Tier Biennial Progress Report (Wisconsin: DNR, 2007), downloadable at <http://dnr.wi.gov/org/caer/cea/environmental/reports/2007report.pdf>

⁴¹ There is a requirement under the Alberta EnviroVista program that "[r]ecords of meetings will be summarized and made available to the public": per "EnviroVista Program Advisory Committee Corporate Environmental Leadership Terms of Reference," accessible at www3.gov.ab.ca/env/protenf/approvals/factsheets/doc/EVPAC_Terms_of_Reference.pdf This having been said, in conducting research for this report, the author was able to access the minutes of the Alberta EnviroVista program's advisory committee, and these now do not appear to be accessible from the website. According to

The OEL program is an “extra-regulatory compliance” program aimed at encouraging industry to commit to reductions of priority substances other than that which is required by law.⁴² Facilities must be in good standing with all regulatory approvals and permits,⁴³ and must have an operating environmental management system that integrates pollution prevention principles and commits to continuous improvement. In addition,

facilities must commit to a “provincial priority reduction plan” to be achieved over five years, listing the substance names, methodology and stipulating the third party verification method the facility proposes to use (e.g., targets for solid waste reduction, hazardous waste management, biochemical waste management, emissions reduction, energy conservation and water quality management).

In the second and fifth year of the program, the facilities must undergo third party verification of their progress in achieving their goals. In addition, facilities need to demonstrate their commitment to public outreach and performance reporting. The number and rigour of criteria to be met by the applicants seem to suggest that the program is not directed at small and medium sized enterprises, who in many circumstances are likely to be lacking in the sophistication and resources needed of successful applicants (to date, no small or medium firms have been approved as members under the OEL program).

In terms of inducements encouraging industry to participate in the OEL program, incentives include public recognition (e.g., on the MOE website), technical assistance, a 45-day guaranteed turnaround for processing amendments to certificates of approval (CA), a single-window administrative process,⁴⁴ the possibility of an enhanced comprehensive

Mr. George Murphy, Director, Conservation and Education Branch, Department of the Environment, the Department is overhauling the site to conform to Government of Alberta standards for look and content. The website now promotes the program to applicants, provides easier access to information for applicants and recognizes program participants. Officials continue to make notes available to the public, but not as postings on the website. Officials will provide the notes to anyone who requests them, and members of the committee are free to distribute the notes on their own (or even post them on a website if they want to).

⁴² According to the OEL program’s Senior Program Coordinator, there are three tiers to the program: an “entry level” tier, where the applicant is working towards, but does not yet have a full blown EMS; the middle, or “leaders” tier, where all of the criteria listed here apply; and a “champion” tier, which is for companies that have a fully integrated stewardship approach to their activities and are now working with supply chain partners, acting as mentors for other facilities, etc. At this point, all OEL program participants are in the middle, “leaders” category. There is no information on the three tiers on the MOE website at this point. Per Mr. Steve Neville, Senior Program Coordinator, Environmental Innovations and Energy Sciences Branch, Ontario Ministry of Environment.

⁴³ The Ministry considers a Facility’s compliance record over the past five years as part of the application process. No single instance of non-compliance will exclude a facility from the Program. A Facility’s compliance history is considered as a package, and each applicant is considered on a case-by-case basis. Per OEL webpage FAQs.

⁴⁴ According to the Framework document (op cit.), to enhance customer service, a Ministry Project Coordinator will be assigned to each participating Facility. The Project Coordinator will be familiar with the specifics of the Leadership Agreement and will act as a single window of contact with the Ministry. The Project Coordinator will be responsible for ensuring good customer service including tracking applications and approvals and acting as a liaison between the Facility management and technical and policy contacts within the Ministry.

CA,⁴⁵ and premium access to senior officials concerning policy developments. To date, five agreements are in place under the OEL program: with a meat packing facility, a chemical company, two office furniture manufacturers, one health centre. Also, two industry associations have worked with the MOE to develop umbrella agreements under which their members can join: the Automobile Parts Manufacturing Association, and the Canadian Chemical Producers' Association.⁴⁶ Based on an interview with the OEL program's Senior Program Coordinator, the author is led to believe that an eighth agreement will be announced shortly. A multi-stakeholder Management Committee plays an important operational advisory role. The multi-stakeholder advisory Management Committee consists of three persons:

- Ken Ogilvie, Executive Director, Pollution Probe;
- Norm Huebel, Ontario Regional Director, Canadian Chemical Producers' Association (CCPA); and,
- Bill Humber, Chair, Centre for the Built Environment, Seneca College.

The Management Committee provides recommendations to the Ministry regarding applications, consequences and complaints,

⁴⁵ An enhanced comprehensive CA provides facilities with increased operational flexibility and combines some or all of a company's existing CA requirements into one approval. It offers all the elements of a basic comprehensive CA, with four features added: additional operational flexibility to make process changes and production increases without the need to obtain an amendment; addresses air, water and waste; tailored administrative provisions on a case-by-case basis; and site specific pollution limits. Enhanced comprehensive CAs are exclusively available to members of the OEL program. This information is provided on the OEL webpage under FAQs.

⁴⁶ Information concerning each of the agreements is downloadable at www.ene.gov.on.ca/envision/general/leadership/leaders.htm.

and also provides advice on program implementation issues. The external Management Committee is one manifestation of the way in which the OEL program uses an environmental management approach based on shared responsibility with the regulated community, NGOs, academics and others.

As related to the author by the Ministry of Environment's Senior Program Coordinator, Environmental Innovations and Emerging Sciences Branch, a recent customer satisfaction survey conducted with current OEL program participants suggests that the program is well received by current participants, and that government recognition of industry efforts that address other than that which is required by regulation has been the key benefit (in fact, members wouldn't mind more public exposure).⁴⁷ To date, no participants have asked for a comprehensive Certificate of Approval (one of the regulatory benefits offered through the OEL program), although it is expected that a soon-to-be announced new member will seek such a benefit. Participants have suggested that there may be value for OEL members in having access to a compilation of industry best practices that could be drawn upon for inspiration. According to an interview with the OEL program's Senior Program Coordinator, something that is being considered is a variation on the program for the non-manufacturing sector (e.g., the retail sector, educational institutions, etc.).

The OEL program is a modest and nascent program at this stage, as are its counterparts

⁴⁷ Information in the paragraph provided by Mr. Steve Neville, Senior Program Coordinator, Environmental Innovations and Emerging Sciences Branch, Ontario Ministry of the Environment. It could be observed that by necessity, a survey of current OEL participants is limited in scope, and will not reveal the views of relevant others, e.g., those who have decided against participating in the program.

at the federal level and in Alberta (see comparison chart below). It can be characterized as a non-challenge type program, in the sense that there are no pre-set specific substantive targets set by the Ontario government that participants must meet. Instead, applying firms self-select their extra-regulatory compliance goals. So OEL administrators are put in the position of responding to proposals from applicants, rather than insisting that specific changes to certain production processes or emissions be addressed. The non-challenge approach has both strengths and weaknesses. On the one hand, as operators of particular plants or facilities, applicants are in a very good position to identify promising areas for environmental improvement, and to gauge whether a reduction in environmental emissions or other improvement is capable of being achieved. In this sense, self-selection is practical. Moreover, because the OEL program is open-ended, and does not insist that particular changes be made, the program is likely to be more attractive to businesses than is one which stipulates that specific reductions take place.

On the other hand, there is a danger that applicants in a non-challenge program will select “low hanging fruit” — easy targets, that they might otherwise have undertaken anyway, outside of the structure of the OEL program, as part of their “business as usual” improvements. Where substantive targets are developed by third parties (especially, governments), or at least, with third parties as instigators and in response to specific concerns of third parties, there would appear to be a greater likelihood that the targets selected are genuinely “stretch” in nature (i.e., beyond “business as usual”). However, it could be countered that there is also a possibility that externally driven stretch targets put over-emphasis on a particular issue or problem in isolation from other issues and problems, thus potentially distorting environmental and economic

decision-making and actions at a particular facility in a sub-optimal way (from an environmental standpoint). This having been said, in the OEL program, any proposed environmental improvements are reviewed by the multi-stakeholder management committee, thus allowing an opportunity for members of the committee to challenge any proposals that, in their opinion, are not going far enough.

Because the OEL program requires that the firm commit to extra-regulatory compliance targets (albeit, self selected), and report on its performance, the program is oriented towards future performance (as opposed to programs aimed at recognizing and rewarding good past performance without there being any future-oriented commitments). In contrast, the Alberta EnviroVista program has two tiers: one that rewards and recognizes good past behavior (the “Leaders” category), and a second that is forward-looking, directed at facilities that have committed to more of a comprehensive environmental stewardship or sustainability approach (the “Champions” category, introduced in June 2006) that is forward-looking, directed at facilities that have committed to more of a comprehensive environmental stewardship or sustainability approach. To date, the vast majority of Alberta EnviroVista participants are Leaders, with one in the Champions tier. The federal Environmental Performance Agreement (EPA) program has a single tier, and a forward-looking performance-orientation, rather than rewarding good past performance. None of the OEL program, Alberta EnviroVista or federal EPA set precise targets in advance for participants to meet (i.e., they are not “challenge”-oriented programs) although it should be emphasized that this doesn’t mean that governments are simply setting back and accepting anything proposed by industry. The applicants that are accepted typically meet risk management objectives considered appropriate, as determined through the program’s approval process.

Comparison of Ontario's Environmental Leaders Program and Other VEIs

Characteristics	Ontario	Alberta	Feds Cdn	Feds US (Performance Track)	Wisconsin	Colorado
EMS required? 3 rd party?	Y, N	Y, 3 rd	N, N	Y	Y-Tier2	Y-Tier3
Record of compliance?	Y	Y	Y	Y	Y	Y
Pollution prevention required?	Y	Tier 2	N	N	N	Y
Specific, pre-set, mandatory government targets?	N	N	N	N	N	N
Facility/sector/both?	Y/Y/Y	Y/N/N	Y/Y/Y	Y/N/N	Y/Y/Y	Y/N/N
Duty: Community outreach?	Y	Tier 2	Y	Y	Tier 2	Tier 3
Binding?	N	Tier 2	N	N	Y	Y
Statutory basis?	N	N	N	N	Y	Y
Benefits: approvals streamlining/flexibility?	Y	Y	N	Y	Y	Y
Benefits: recognition?	Y	Y	Y	Y	Y	Y
Direct financial benefits? tax/procure, fees waived, etc.	N	Tier 2	N	N	N	Y
Duty: NGOs/communities involved?	Y	Tier 2	Y	Y	Tier 2	Y
One, two, three, more tiers?	3	2	1	1	2 plus Charter	3
Monitoring/reporting?	Self: 3 rd party auditing in years 2 and 5	Self	Self	Self	Tier 2-Self Tier	Self-Tier 3
Year started	2004	2005	2001	2000	1996/2004 (law)	1998
Total participants?	5	23 + 1	5	470	23+2+3	60+0+20

A long-identified limitation of voluntary programs is the potential for firms to not participate in a particular initiative and instead to “free ride” on the good behavior and investments of those who agree to higher standards through a voluntary program (i.e., from a competition standpoint, the free riders benefit economically from an uneven playing field, with the higher standards not applying to them). In this regard, an interesting innovation of the federal EPA program is the potential to address free riders in certain circumstances through a “legislative backstop.”⁴⁸ With respect to toxic substances, under the *Canadian Environmental Protection Act, 1999*, the federal Minister of the Environment has the authority to require the preparation and implementation of pollution prevention plans to manage substances that have been added to the List of Toxic Substances on Schedule 1 of the CEPA. This gives the federal Minister a specialized regulatory instrument to stimulate free riders to join into voluntary toxics reduction programs, minimizing the economic disincentives for doing so, and leveling the playing field. There is no counterpart to this legislative backstop at the provincial level.

Ontario’s Environmental Leaders Program: Summary

This report’s review of the OEL program reveals that it is a modest initiative in its early years, targeted at leaders, and is a considerable advance on previous initiatives in terms of the array and quality of incentives it offers, its rigour (i.e., third party verification), its attempts to involve NGOs and the community, and its greater transparency. That said, the OEL program operates in a

reactive as opposed to proactive manner in the sense that the multi-stakeholder management committee is in the position of having to respond to the self-selected “extra regulatory compliance” proposed targets of the applicants. While self-selection has its strengths in that applicants are in an ideal position to identify areas for improvement, there is the potential for self selection to not lead to the sort of optimum environmental performance enhancements that a challenge program might be able to identify and deliver upon. There is the possibility, however, that making the program more rigorous would decrease its attractiveness, and so this is a tradeoff that needs to be kept in mind. In terms of transparency and accountability, the program could arguably be improved by providing an explicit policy and legal base. The Minister could be given a legal tool to address free riders, drafts and final versions of VEI commitments could be published on the environmental registry (and not just on the OEL website), and more information could be provided concerning the members and activities of the multi-stakeholder management advisory committee. In its focus on future performance, the OEL program is not primarily directed at rewarding and recognizing good past compliance behavior. Finally, although the OEL program is capable of applying to industry associations, and in fact has two industry association agreements, the program has no particular elements specifically designed to accommodate and encourage industry associations to engage in environmentally responsible behavior. A program specifically tailored in this way could potentially reach small and medium sized enterprises in a way that the current OEL program has not so far been able to do.

⁴⁸ The following point is noted at www.ec.gc.ca/epa-epe/en/stRpt.cfm.

Literature Review — Key Findings

In some ways, this VEI literature review takes place at an opportune time, because there has been a flurry of useful reports and articles on voluntary programs published in recent years (or have been made available to the author and are soon to be published). The publications highlighted below have been selected because they contribute new understandings relevant to developing recommendations for the Ontario situation in areas such as evidence of effectiveness and efficiency, insights concerning design and implementation, questions concerning the importance of environmental management systems, and the potential importance of having a legal framework for VEIs. Each of the selected key publications is discussed separately.

1. One of the most recent examinations of the VEI topic is a 2007 publication from the Washington-based organization Resources for the Future (RFF) entitled *Reality Check: the Nature and Performance of Voluntary Environmental Programs in the United States, Europe and Japan*.⁴⁹ The book puts considerable emphasis on undertaking quantitative analysis of VEIs — a well-known limitation of many earlier VEI reviews. The editors conclude that voluntary programs *can* work, although the evidence suggests that the successes tend to be modest. The point is also made that the programs often target “leaders”, thus raising a question which is difficult to verify empirically: would firms have made the changes without government support?

⁴⁹ R. Morgenstern, and W. Pizer, eds., *Reality Check — the Nature and Performance of Voluntary Environmental Programs in the United States, Europe, and Japan* (Washington: Resources for the Future, 2007).

In their view, VEIs are best suited for applications where incremental change is sought, rather than more fundamental behavioural changes (for which command and control instruments are likely to be necessary). Key findings⁵⁰ from the book include:

- the growth in voluntary programs reflects factors such as changing societal attitudes about the environment and optimism concerning the possibility of enhanced cooperation between government and business, and frustration with getting conventional regulatory initiatives up and running;
- VEIs are being used to address areas that are difficult to address using conventional approaches;
- VEIs are seen as pragmatic and flexible ways of protecting the environment;
- businesses are motivated to join VEIs because of a desire to be publicly recognized, and differentiate themselves from their competitors, to avoid adverse publicity, to reduce the threat of liabilities and frequency of regulatory enforcement;
- VEIs offer opportunities for business to get hands-on experience with new types of environmental problems without the straightjacket of regulation, and in the process, to enhance their environmental reputation with government and others;
- in some cases, firm participation in VEIs may represent an effort to shape

⁵⁰ The following draws substantially on the opening and concluding chapters, plus some key findings from the other chapters which examine specific VEIs.

- further regulations or stave off mandatory requirements altogether;
 - VEIs offer opportunities for government to gain experience with new problems and new industries, moving more quickly and with lower administrative costs, perhaps fostering common understanding of problems and mutual responsibilities to address them; but the absence of regulatory signals to stimulate change is a clear limitation, as is the ongoing problem with free riding;
 - VEIs may also represent a shift in emphasis of governments from the worst polluters to those most willing to abate on their own;
 - a strong regulatory framework and an environmentally aware public are important for the success of VEIs, providing a credible threat of high cost mandatory regulations and adverse publicity if voluntary actions are not forthcoming;
 - with VEIs, there is a need for highly defined goals, an established baseline, with measurable indicators of whether the program is achieving its goals;
 - significant efforts need to be made to ensure that targets are not just “business as usual”, that monitoring and enforcement provisions are well specified, that there are explicit punishments available for non-compliance (e.g., repaying of any tax rebate), and that clear interim and final targets are set;
 - the success of VEIs may depend to a significant extent on whether the program is used in the right context (e.g., a toxics reduction VEI, with clear targets, might be more likely to succeed than vaguely defined “climate change” initiatives);
 - some regulators see VEIs as a distraction;
 - VEIs may work best when offered in conjunction with clear financial incentives such as was the case with the UK climate change VEI program, where business commitments to reduce energy or CO₂ emissions can result in reductions in energy tax otherwise owed; and,
 - the RFI study indicates that in fiscal year 2006, voluntary programs comprised 1.6 per cent of the US federal Environmental Protection Agency’s budget.
2. A 2007 paper on “industry responsibility programs” written by two executives from the Canadian Chemical Producer’s Association, sets out a number of reasons why, in the opinion of the authors, government-industry voluntary programs fail,⁵¹ such as when:
- the bureaucratic process for recognition of environmental leaders is too time-intensive for parties to get involved in;
 - there are no real incentives to be a high performer in important areas such as permissions or enforcement;
 - there is a lack of cooperation and coordination among governments, resulting in one jurisdiction recognizing the leadership of a company or sector and another not;
 - the program has a limited scope, leaving many key industry areas subject to traditional stove pipe approaches;
 - there is an abandonment of recognition of leadership when new issues emerge; and,
 - there is a lack of a real effort by business to engage in the programs offered by government.

⁵¹ Paton, R., and S. Thurlow, *Industry Responsibility Programs: A Winning Strategy for the Environment, the Government, and the Industry*, Canadian Chemical Producers’ Association, 2007, pp. 39–40.

The paper is useful in that it provides a thoughtful industry perspective on voluntary programs, gives insight as to industry frustration concerning government-industry voluntary programs, and suggests a possible path forward on one type of voluntary program (industry responsibility programs). On the latter point, we will return later in this report.

3. A careful and thorough quantitative-based analysis of Canada's ARET Program, to be published in the fall, 2007, based on the subset of toxics emissions data that was reported through the legally mandated National Pollutant Release Inventory, concludes that the voluntary industry-government toxics reductions program accelerated emission reductions in only five of the 17 substances for which there was sufficient data for analysis.⁵² The ARET program was launched in 1994 and completed in 2000, and can be characterized as a challenge-type program that did not threaten any negative consequences should participants fail to meet their own targets. These findings "are consistent with recent assessments of other public voluntary programs ...which found few or no program impacts after controlling for self selection."⁵³ According to this analysis, there were numerous flaws with the program, including those associated with the availability and credibility of ARET data, the absence of third party verification of participants' claims, the selective reporting of some, but not all, of a facility's emissions, the discretion of participants to choose their own base year up to six years before the launch of

the program, and inattention to whether reductions reported were in fact attributable to the ARET challenge. The authors also conclude that rather than yielding stronger commitment to voluntary reductions as had been hoped, industry co-sponsorship resulted in data confidentiality that undermined the program's credibility. In ARET's defence, it can be pointed out that insistence on external verification of the sort proposed in the article might have discouraged parties from attempting anything at all, and a quantitative analysis of the sort undertaken in the article has difficulty taking into account non-tangible factors that are less amenable to numerical validation, such as the arguably path-breaking role the program played in modeling cooperative multi-partite environmental stewardship behavior, demonstrating that extra-regulatory solutions to environmental problems are possible.

4. Although the focus of this report is on possible ideas for improving VEIs in Ontario, and hence the experience and insights drawn from VEIs used in developed countries are most germane, there are also some significant learnings that can be gleaned from use of VEIs in developing countries. In this regard, a July, 2007, Resources for the Futures report examining the "Clean Industry" program used in Mexico is particularly useful.⁵⁴ The authors of the report note that empirical research in industrialized countries suggests that at least in some cases, the environmental benefits of these programs are limited because they mainly attract firms that are either already

⁵² W. Antweiler, and K. Harrison, "Canada's Voluntary ARET Program: Limited Success Despite Industry Co-sponsorship," *Journal of Policy Analysis and Management* 26(4), Autumn 2007, forthcoming.

⁵³ *Ibid.*, p. 23.

⁵⁴ A. Blackman, B. Lahiri, W. Pizer, M. Rivera Planter, and C. Muñoz Piña, *Voluntary Environmental Regulation in Developing Countries: Mexico's Clean Industry Program* (Washington: Resources for the Future, 2007).

relatively clean or becoming cleaner for reasons unrelated to the program. Such firms have clear incentives to join voluntary programs: the costs are relatively low because no additional pollution control investments are required to meet the voluntary program's environmental performance goals, and the benefits, which may include positive publicity, pollution control subsidies, and preferential treatment by regulators, can be significant.

Firms that join for these reasons are said to "free ride" on unrelated investments in pollution control. In developing countries, by contrast, environmental authorities generally use voluntary regulation to help remedy rampant non-compliance with mandatory regulation resulting from, among other factors, limited public support for environmental protection, weak regulatory institutions, and a paucity of financial and technical resources in the private sector. In short, they use voluntary regulation to shore up weak enforcement of mandatory regulation. The report analyzes Mexico's flagship voluntary initiative, the National Environmental Auditing Program, also known as the Clean Industry Program. Created in 1992, this initiative is administered by the Federal Environmental Attorney General's Office (PROFEPA). Plants volunteering to join the program pay for an environmental audit by an accredited third-party, private sector inspector.

The audit determines what pollution control and prevention procedures the plant has in place and what additional procedures are required to achieve compliance with current environmental regulations. Following the audit, the plant agrees in writing to correct all violations or deficiencies by a specified date. PROFEPA, in exchange, agrees not to penalize the plant for the identified

violations until that date has passed. If the plant abides by this agreement, it is awarded a "clean industry" certificate that exempts it from regulatory inspections for two years. Akin to a seal of good housekeeping, this certificate is commonly used in marketing campaigns. Hence, like many voluntary initiatives, the Clean Industry Program provides a basket of incentives for participation, including an official Clean Industry certificate that can be used as a marketing tool, enforcement amnesty, and the threat of enforcement of mandatory environmental regulations for plants not in the program. Analysis indicates that plants that were inspected and/or fined by PROFEPA were more likely to join the Clean Industry Program, all other things equal.

This finding suggests that the threat of regulatory sanctions does drive participation — a result that echoes findings for voluntary regulatory programs in industrialized countries. The authors also find that plants that sold their goods in overseas markets and to government suppliers, used imported inputs, were relatively large, and were in certain sectors and states were more likely to participate in the Clean Industry Program, all other things equal. The study suggests that the Clean Industry Program depends to some extent on the effectiveness of conventional mandatory regulation: plants join the program to escape regulatory sanctions. In other words, the results suggest that effective mandatory regulation — a strong "background threat" — drives the success of voluntary regulation. For the purposes of this report directed at improving VEIs in Ontario, the creation of a voluntary program that attracts and improves the performance of "non-leaders", and the establishment of a government-approved and supervised inspectorate paid for by industry, whose role supplements that of the government inspectorate corps, are

two aspects of this program that could potentially be adapted and applied in developed country contexts.

5. A report assessing the role of voluntary environmental management arrangements (VEMAs) in agriculture to be released in the fall of 2007 concludes⁵⁵ that, while such arrangements may be useful in providing organizations with a systematic process-oriented approach to identifying and addressing their environmental impacts, those VEMAs that are not directly integrated with and linked to norms, targets and structures set by or with public authorities may lack any significant value, from a public policy standpoint. Thus, for example, as examined in the report, ISO 14001 — the most well known and widely used environmental management system standard in the world — does not guarantee or require any particular environmental performance outcome, nor does it specify rates of improvement, or independent verification, and is focused on continuous improvement of the environmental management system rather than of the environment (although “hopefully the two are related”). Moreover, when compared with the EU-connected Environmental Management and Auditing Scheme (EMAS), ISO 14001 is more vague/less rigorous in terms of stipulations concerning environmental policies, programs, and its specification for audits, and in the breadth and depth

of obligations for public reporting.⁵⁶ The author of the report concludes that the above-noted limitations might be overcome by engaging with a broader and complementary mix of policy instruments and it shows how environmental management systems can only in some respects live up to the expectations some have of them.

6. An article to be published in the fall, 2007, entitled “Rise or Fall of the Co-operative State? On the Contingent Effects of European Law on German Environmental Policy,”⁵⁷ observes that use by the German government of voluntary environmental agreements has tapered off dramatically in recent years. The author challenges the conventional wisdom that suggests the rise and fall in VEI usage in Germany can be explained on functionalist/utilitarian terms (i.e., that starting particularly in the 1980s, the German government and others needed to find new ways to address problems that weren’t being adequately/effectively handled through conventional command and control approaches, and when the cooperative approach didn’t work, they’ve gone back to the tried and true command and control approach), and instead suggests that institutionalist factors (e.g., the introduction of new European laws requiring consistent pan-European environmental laws) provide a better explanation for the re-trenchment of the command and control approach.

⁵⁵ Per N. Gunningham, “Assessing the Role of Voluntary Environmental Management Arrangements in Agriculture: An Australian Perspective,” Report prepared with support from the Rural Industries Research and Development Corporation, 2007.

⁵⁶ Similar conclusions have been reached in recent evaluations from EU-related bodies. See, e.g., F. Fiela et al., *Going Beyond EMS* (Austria: Consumer Council of Austrian Standards Institute/Force Technology, 2006), and ANEC/EEB, *Position Paper on Environmental Management System Standards* (2003).

⁵⁷ A. Toeller, “Rise or Fall of the Co-operative State? On the Contingent Effects of European Law on German Environmental Policy,” submitted to European Integration Online Papers (2007).

7. In the spring, 2007, the US Environmental Protection Agency's internal auditor (Inspector General) released its report reviewing the national Environmental Performance Track program.⁵⁸ Pursuant to the program,⁵⁹ 470 facilities have publicly

committed themselves to voluntary efforts in addition to their legal requirements. In addition, 22 states have put in place similar programs. Facilities completing their first three-year membership cycle in 2005 achieved 96 per cent of their water-use reduction goals, 105 per cent of their energy-use reduction goals, and 135 per cent of their hazardous waste goals. The report notes that 81 per cent of sample facilities reported lower toxic releases than others in their sector and 63 per cent had no compliance problems, outperforming others in their sector in every measure of compliance. In its design, the program can be described as not fitting in to the challenge-type of program, where government sets specific targets (since business set the goals, within pre-determined categories). This raises questions about whether the goals set by individual participants in the Performance Track model are really just "business as usual" goals that do not necessarily stimulate participants to stretch to meet difficult-to-reach targets. Of 27 facilities in a sample investigated by the Inspector General, four increased their emissions of chemicals on EPA's Toxics Release Inventory. The program does not impose consequences on participants when they violate the law (although EPA has declined to renew some memberships because of enforcement problems). According to the report, the Inspector General's office found that 20 per cent of current Performance Track members had significant violations of environmental regulations in the past five years. Among other things, the report states:

⁵⁸ The following information is derived from: Office of Inspector General, Environmental Protection Agency, Evaluation Report: Performance Track Could Improve Program Design and Management to Ensure Value (Washington: EPA, Report No. 2007-P-00013, March 29, 2007); Environmental Integrity Project, "Wrong Track? Some Performance Track Facilities Report Increased Levels of Toxic Pollution" (Washington: Environmental Integrity Project, 2006); C. Hogue, "On or Off Track? Critics say EPA's voluntary program rewards polluters with fewer inspections," *Chemical and Engineering News*, Vol. 84, Number 37, pp. 26-27 (Sept. 11, 2006); C. Hogue, "Poor Performance: EPA's program to reward environmental excellence gets a bad review," *Chemical and Engineering News*, Vol. 85, Number 17, pp. 36-37 (April 23, 2007); R. Otis, "Environmental Performance Track's Successes — Letter," *Chemical and Engineering News*, Vol. 85, Number 25, p. 6.

⁵⁹ The Performance Track program recognizes and rewards facilities that consistently exceed regulatory requirements, work closely with their communities, and excel in protecting the environment and public health. Qualified applicants must have an environmental management system in place such as ISO 14001 or the Responsible Care program. They must have a relatively blemish-free enforcement history with EPA (no more than two significant civil violations in the past three years and no criminal violations in the past five years). They must set three or four specific environmental goals (e.g., reducing greenhouse gases, energy consumption, raw material or water use) to be fulfilled within three years. Businesses self-select their commitments within pre-identified subject areas (e.g., energy consumption, water consumption, and so on). In this regard the program is not so much a challenge program (in which governments set the priorities). They must provide information to the local community about their environmental activities and submit to EPA an annual report of

their activities that demonstrate compliance certification and progress on environmental commitments. In return, Performance Track facilities get fewer EPA inspections and increased access to senior EPA officials.

- “There is no evidence that members differ materially from nonmembers in environmental performance.”
- “EPA has not compared member facilities with their peers for environmental performance indicators to determine if members lead in their sectors.”
- “Although many members do perform above average, Performance Track does not know if its members are ‘top performers,’ despite public claims to the contrary.”
- “Program criteria may deem an applicant a top performer, but this designation may not hold true when the facility is compared with other facilities in its sector.”

While not in principle against programs that recognize “extra regulatory compliance behavior”, some environmental organizations are reported as having some reservations concerning the design/operation of Performance Track.⁶⁰ The Inspector General recommends a number of changes to the

⁶⁰ The Natural Resources Defence Council is reported (in Hogue, “On or Off Track?”, op cit.) as being not unsupportive of the goal of encouraging beyond regulatory compliance behavior and recognizing companies that do so, but does have some concerns with regulatory-based incentives. The Environmental Integrity Project (a watchdog organization) used government-mandated toxics release data to determine that some facilities are exceeding their toxic emissions by significant amounts (and yet are subject to reduced monitoring because they are Performance track members). Per “Wrong Track?”, op cit.. Moreover, some of the commitments appear to be rather tangential to the production activities of the facilities in question (e.g., recycling cafeteria trays at a Dupont facility, or carpooling at a BMW factory), are ambiguous, or offer obvious economic paybacks, and so beg the question as to why they should be rewarded through EPA recognition.

Performance Track program to address the issues raised above.

8. In 2006, prior to the EPA Inspector General’s 2007 report on the Performance Track program, two leading US regulatory scholars prepared a report on the Performance Track program for the John F. Kennedy School of Government at Harvard University.⁶¹ Described here are some key insights about VEIs gleaned from the report.
 - By their very nature, voluntary programs attract “joiners,” who may or may not be the top performers in a particular sector. To empirically ascertain whether a particular program is actually attracting the real top performers is a real challenge. It can, however, be empirically substantiated that some firms desire the external recognition that comes with joining a VEI, and are comfortable with the reporting and other characteristics associated with participation in VEIs. And others who might be top performers may shun government and public recognition, may not be attracted by the other incentives VEI programs offer, and may find the bureaucratic hoops associated with VEI programs not worth the trouble. This observation doesn’t mean that voluntary programs are a failure or a success, but it is certainly a point to keep in mind when assertions are made about VEI programs attracting top performers.
 - In this vein, despite some agency claims that Performance Track is

⁶¹ Coglianese, C. and J. Nash, “Beyond Compliance: Business Decision Making and the US EPA’s Performance Track Program.” Regulatory Policy Program Report RPP-10 (2006). Cambridge, MA: Mossavar-Rahmani Center for Business and Government, John F. Kennedy School of Government, Harvard University.

designed to recognize top environmental facilities, the application and admissions process do not directly address whether Performance Track member performance is better than other comparable facilities that have not applied to the program — nor even whether their progress is in other ways significant. The application process does not necessarily provide EPA with the information it would need to determine whether a facility is a top performer compared with others. While EPA gathers information on aspects of an applicant's environmental performance, it does not and realistically cannot collect information about the performance of similar facilities that do not participate. The program sets forth no specific standards for improvement. Managers interviewed by the authors did not speak of Performance Track as a vehicle for improving environmental performance or enabling innovation; indeed, they largely saw it as "easy" to join because they were already doing many of the things that the program required.

- The authors note the paradox that VEIs that include the most significant incentives tend to attract the least amount of participants, probably because governments tend to impose particularly rigorous eligibility criteria and operational requirements on VEIs with significant incentives. High industry take-up seems to be greater with VEIs that have less onerous eligibility criteria and operational requirements.
- A variety of external, as well as internal, factors influence whether facilities voluntarily invest in environmental protection and join programs like Performance Track. In terms of internal factors, facilities with more employees and greater support

from top level management reported greater receptivity toward voluntary programs like Performance Track. In terms of external factors, facilities that expected new regulations to affect them in the future and facilities that more often sought out the opinions of outside community and environmental advocacy groups tended to be receptive to VEIs. The authors also observed the tendency for managers most receptive towards voluntary programs to be managers who also report seeking out the opinions of outsiders.

- EPA's screening process appears effectively to separate top performers from among all facilities that apply for Performance Track membership. The authors could find no evidence that facilities are improving their environmental performance in order to qualify for membership. The authors found that EPA has been generally successful in identifying so-called top performers from among all facilities that have applied to the program.
- With the Performance Track program, EPA has been successful in designing a program that engages facilities that value relationships with external organizations and have sufficient operational level support to sustain the costs of participation. EPA has much to learn from these facilities about how environmental management systems contribute and fail to contribute to environmental performance improvement as well as about the opportunities and challenges associated with going extra-regulatory behaviour. Even if Performance Track does not adequately recognize and reward the best environmental performers, and even if it does not motivate many average facilities to become stellar, it can be a source of potentially helpful

information to the agency. The agency, in turn, may be able to use that information in designing better regulatory policies and programs, or in helping in other ways to diffuse best practices.

also be used to provide a framework for information gathering prior to taking further action, but they may not contain absolute performance targets.

9. In 2006, the Canadian business- and ENGO-supported New Directions Group held a workshop on negotiated environmental performance agreements (EPAs) that reviewed a wide range of these instruments from around the world, and proposed a new taxonomy for analyzing them. In 2007, a report based on the review and workshop was published, entitled *Developing and Implementing Credible and Effective Environmental Performance Agreements*.⁶² Based on their commonality of purpose and an assessment of how their design features differ among them, the report proposed that EPAs be classified into three categories:

- *quasi-regulatory EPAs*, used in place of formal regulations to achieve an explicit performance target that is written into the EPA or subsequently negotiated between a government and signatories as part of an implementation plan;
- *capacity building: performance-based EPAs*, that encourage participants to meet targets other than those set in regulation or to achieve performance targets that are not currently the subject of regulation; and,
- *capacity building: activity-based EPAs* that encourage participants to improve their environmental performance by putting in place mechanisms such as environmental management systems and they may

In essence, this classification categorizes EPAs according to what the agreements are intended to do. Ideally, EPAs push “beyond compliance” leaders to go further, encourage “in compliance” regulated parties to go beyond compliance, and encourage laggards to move towards compliance, with different types of EPAs used, depending on where an industry might be on the continuum. The report proposes a research agenda addressing issues such as: clarifying the role of EPAs (i.e., ascertaining the circumstances in which EPAs are most appropriate); improving guidance on how to apply and design EPAs; developing better information on the benefits of EPAs; conducting more research on the value of cross-jurisdictional harmonization; improving evaluation of EPAs and use of baselines; and getting a better understanding of the incentives for and consequences of using EPAs.

10. In a book on VEIs published in 2005 by R. Sullivan entitled *Rethinking Voluntary Approaches in Environmental Policy*⁶³ the author concludes that, in theory, VEIs are an important complement to traditional command and control approaches to regulation, as they can allow new issues to be addressed, potentially enhance corporate accountability, and may help companies to internalize environmental costs. Given the complexity of environmental issues, globalization pressures, the backlash against command-and-control approaches, and

⁶² P. Griss and D. Murphy, *Developing and Implementing Credible and Effective Environmental Performance Agreements* (Toronto: New Directions Group, 2007).

⁶³ R. Sullivan, *Rethinking Voluntary Approaches in Environmental Policy* (Cheltenham, UK: Edward Elgar, 2005).

the move of many governments to withdraw from aspects of social and environmental policy, it is likely that VEIs will become an increasingly important part of the environmental policy instrument mix. However, the inherent weaknesses of VEIs, and the paucity of success stories and limited evidence of economic and competitiveness benefits should make governments very reluctant to rely on voluntary approaches as the primary policy response to environmental problems.

11. In a report from 2003 entitled *Voluntary Approaches for Environmental Policy: Effectiveness, Efficiency and Usage in Policy Mixes*, the OECD questions the effectiveness and efficiency of voluntary approaches, noting that it could find few cases where such approaches have demonstrably improved the environment beyond a business-as-usual baseline. The report also raises doubts about the economic efficiency of such approaches because the cost of achieving additional environmental improvements differs considerably between polluters, in part because the environmental targets tends to be set for individual firms or sectors, rather than at a national level. The report suggests that administrative and transactions costs associated with the program vary greatly. However, if too few resources are spent in their preparation, negotiation and implementation of the programs, their environmental impacts are likely to be very modest. The study of policy mixes suggests that combining a voluntary approach with a tax or a tradable permit system can trigger quite significant additional administrative costs.

12. In a 2002 paper prepared by J. Moffet and two others, "Supporting Negotiated Environmental Agreements with Statutory and Regulatory Provisions: An Overview for Ontario"⁶⁴ the authors state that there are some important benefits associated with developing a legislated base for government-industry environmental agreements. For example, framework laws can provide enhanced credibility and certainty and a structure for positive incentives for demonstrated performance and penalties for non-performance, and a credible threat of the imposition of a more conventional regulation in the event the agreement proves ineffective. This having been said, the use of law in support of voluntary programs, needs to be done carefully to ensure adequate legal authority for the intended linkage; avoid fettering the Government's discretion, include appropriate safeguards to avoid regulatory capture, balance the benefits of customization against the need to treat like parties similarly and hence fairly, and not to over-play the regulatory authority so as to lose the interests of firms to continue to improve or even participate. A mere legislative framework cannot ensure efficiency, effectiveness, or credibility. Nor can it ensure that a program will be applied in the right set of circumstances.

⁶⁴ J. Moffet, B. Davis and B. Mausberg, "Supporting Negotiated Environmental Agreements with Statutory and Regulatory Provisions: An Overview for Ontario," report prepared for Environmental Defence Canada (2002).

Review of VEI Literature: Summary

The latest research suggests that VEIs can lead to environmental improvements, although the successes tend to be modest, and the effectiveness and efficiency of VEIs to stimulate beyond “business-as-usual” improvements is empirically difficult to ascertain. VEIs tend to be used to address areas that are difficult to address using conventional approaches. Public recognition seems to rank highly as a motivation for participation in VEIs. It may be fruitful to think of VEIs in terms of what they can do to address two categories of regulated actors: those that simply follow the law and do nothing more, and those that address extra-regulatory issues. Different approaches might be needed for each. Experience with VEIs in a developing country context suggests that they can usefully supplement limited regulatory capacity, although a strong background threat of regulation is still important. Government-approved third party inspectors seem to have been used to good effect as part of a VEI in one developing country context. From an industry perspective, one article suggested that government-industry VEIs tend to fail when the application processes are time-intensive, there are no real incentives to be a high performer, there is a lack of coordination among government authorities, the programs have too limited scope, and there is not consistent leadership supporting the program.

The literature also suggests that developing credible and objective baselines and evaluative processes should be designed into VEIs from the outset: in this regard, it is unwise to rely exclusively on industry data without third party verification to determine whether a program is working or not. Other research suggests the rise and fall in use of VEIs in a particular jurisdiction may be attributable to institutional or structural reasons rather than functional explanations. A study suggests that environmental management systems (EMSs) need to be integrated and linked with governmental programs, structures, policies and objectives if they are to be used for public policy purposes. Research concerning the US EPA’s Performance Track program suggests that it is difficult to ascertain whether VEIs attract the top performers in a sector, or just those industry participants who respond to the internal and external incentives to participate in VEI programs. Research also suggests that VEI programs that offer the most significant incentives to participate (e.g., reduced inspections, modified permits) may attract less participants because the rigour of the process associated with programs with significant benefits is discouraging to many industry participants: they tend to prefer VEI programs with easier “entrance requirements” even if the stated benefits are not as great as they are with the most generous VEI programs. There are no insurmountable impediments to VEIs being provided with a statutory base, and there are good reasons why such legal structure is valuable.

Interviews with VEI Experts — Key Findings

The author is grateful to the VEI experts interviewed in the preparation of this report, for providing their insights (see Annex 1). The interviews covered a wide range of topics relevant to voluntary environmental programs. In some cases there was overlap in positions taken from one interviewee to another. In other cases, there were significant divergences of opinion. For some interviewees, their ability to speak without attribution allowed for greater frankness and candour. For this reason, the key points are set out below without attribution.

Although the categories tend to overlap somewhat, the comments are organized into those focusing on:

- environmental non-governmental organizations (ENGOS)
- industry
- government
- industry and ENGOS
- industry, ENGOS and government
- development/design of VEIs
- Environmental Management Systems (EMSS)
- implementation

Comments on VEIs and Environmental Non-governmental Organizations (ENGOS)

1. According to one expert, some ENGOS are “hanging by a thread” in terms of their continued participation in VEIs: they get considerable flack from other ENGOS for being involved in something which is ultimately just another tool in the toolbox that may or may not add value. Compared to the “bang” ENGOS get for fighting for a regulation, investing time and expertise in making a VEI work may not be worth it.

2. One expert felt that participation by ENGOS in VEIs needs to be more adequately compensated: ENGOS engage in considerable research and expend significant resources so that their participation can be meaningful. Hence, funding for ENGOS involvement needs to be sufficient, stable and long term to justify the outlay of energy and resources.
3. Communities and ENGOS need to have access to data concerning VEI operation (at both the individual company and program level) so that they can independently monitor performance of such programs on their own, said one expert.
4. One expert said that there is a worry from some ENGOS that a VEI program that starts off as a supplement will end up becoming a replacement for needed regulatory action. In a mature government context (e.g., as opposed to a developing country context), the potential for this sort of “abdication of regulatory responsibility” is an unsettling prospect and is one reason why ENGOS may be reluctant to participate in a VEI.

Comments on VEIs and Industry

1. In the opinion of one expert, forward-thinking industry associations and firms can take the results of the federal (CEPA) toxics screening process and use them to move ahead with beyond-regulatory-compliance approaches that apply to their operations. The federal Environmental Performance Agreement VEI program is well positioned for industry associations and firms of this type. And certain companies are realizing the market value

of moving ahead to eliminate as many cumulative toxic substances and chemicals from their products and production processes, sometimes doing so without government support or involvement.

2. One expert said that it was his experience that businesses dislike being singled out and publicly identified for failing to participate in sector-wide VEIs. He suggested that perhaps this threat of negative publicity in this sort of context is a lever that can be exploited by governments to encourage greater participation in VEIs (e.g., through the federal authority under CEPA to order pollution prevention plans for those who do not participate in voluntary programs).
3. One expert felt that small, medium and large firms tend to have different motivations with respect to both regulatory compliance and interest in voluntary programs. Small and medium enterprises (SMEs) may lack the resources and sophistication to do anything more than the minimum, whereas more is expected of large firms: they are seen to have the staff and resources to take advantage of government programs, they have significant reputational assets to protect and promote, and they are constantly under the microscope by the media, governments and the public. Hence they are considered to have both the capability and the motivation to engage in environmental protection measures that address issues not currently handled through regulatory initiatives. In addition, large firms are seen to be able to “leverage” positive behavior from SMEs through supply chain relations, and have an incentive to do so to avoid collateral damage to their own reputation via the activities of their suppliers.

Comments on VEIs and Government

1. One expert said that government officials need to be provided with a wide array of tools (such as tailored types of VEIs) and encouraged to try them, in recognition of the fact that businesses — and environmental problems — come in all shapes and sizes and face a wide variety of challenges.
2. Several experts said that the threat of regulation can be an important stimulus for voluntary action, but threats need to be actually carried out from time to time if they’re going to be an effective stimulus. Governments should not shy away from delivering on a threat of regulatory action if voluntary action doesn’t yield expected results.
3. One expert said that there’s a perception that government is constantly moving the markers with VEIs, and this means that those industries who are the first to stick their neck out to support a voluntary initiative can end up being penalized for it (e.g., an early adopter doesn’t get the same rewards for early adoption that a recalcitrant player might eventually obtain).
4. There was a perception by one expert that use of voluntary initiatives had the potential to constrain the ability of government to regulate when regulation is necessary.
5. One expert said that if government provides resources to VEIs at the expense of funding to regulatory programs, this is problematic.
6. One expert said that voluntary programs can be incubators for government innovation as much as they encourage industry innovation.

7. One expert said that with viable VEIs, government should be setting the goals and targets, not industry, although industry (and others) can contribute to the goal/target setting.
8. One expert said that governments should not concern themselves with VEIs until they've taken care of the basics (i.e., ensuring that there are properly running regulatory programs).

Comments on the Role of Industry and ENGOS in VEIs

1. Some business and ENGO experts indicated that they were losing patience for and interest in VEIs, and felt that their continued participation in and support for VEIs was being taken for granted by government. In the business and ENGO world, according to these experts, support for VEIs entails sticking one's neck out, expending capital (tangible and intangible) that could perhaps be better expended elsewhere.

Comments on the Role of Government, Industry and ENGOS in VEIs

1. Several experts said that commitment from senior officials (ideally, opinion leaders) — within government (at the political and bureaucratic level), the private sector, NGOs, and the community — is extremely important to the success of voluntary programs.

Comments on VEI Design/Development

1. Several experts — from government, business and NGOs — indicated that there is now a much clearer understanding of when VEIs work and when they don't, how and why. There is also less patience with poorly thought out or administered programs — in the view of some, there is less opportunity to experiment and “get it wrong” with VEIs than was the case in the 1990s.
2. One expert said that the time for VEIs is now — the limitations of conventional regulatory approaches and the need for programs that go beyond current regulatory requirements have never been more clear. Also, according to this expert, the market reasons for exceeding regulatory requirements are becoming more apparent, and being made more visible through the actions of bankers, investors, insurers, supply chain partners, workers, consumers, and communities. In the view of this expert, businesses are built on the concept of calculated risk. The challenge is to develop instruments and a market environment that taps into and alters business risk decisions so that proactive environmental initiatives are undertaken even when there is not command-and-control regulatory pressure for them to do so. VEIs can potentially assist in doing this.
3. One expert said that in Canada, VEIs may be particularly well suited to address toxic substance reductions that are not currently being addressed through regulatory programs, now that all the toxic substances have been screened and prioritized through the *CEPA* toxics process.
4. One expert said that it is important to “stay the course” with a program (voluntary or otherwise): government

- should not be too quick to switch directions with environmental protection programs. There is a tremendous loss of corporate learning that often accompany program changes (e.g., as a program changes, those who were originally involved not infrequently move on to other files and projects).
5. In the view of several interviewees, having a legislated framework for a VEI is important: it may be contentious to put in place (since it will be a lightning rod for both proponents and opponents to such programs), but in the long run a law reduces friction, creates a line in the sand for all parties to rally around, can make the parameters and criteria of the program and implementation more straightforward, and helps to ensure that the direction and operational details of the program are transparent and publicly understood.
 6. One expert said that it is often not recognized how hard it is for companies to simply stay in regulatory compliance. This, in some ways, can be as impressive an accomplishment as making and meeting a commitment for some activity which is not a regulatory obligation. Government acknowledgement of simple compliance with the law thus may not be not such a bad idea for a VEI recognition program.
 7. One expert was troubled by government offering seemingly significant regulatory concessions (e.g., reduced inspections) in exchange for firms agreeing to meet seemingly trivial and tangential voluntary commitments (e.g., recycling in the cafeteria of a chemical plant should not be the basis for reduced inspections of its production processes).
 8. One expert felt that the ability of government, industry and ENGOS to experiment through a VEI — even if a VEI leads to a regulation — is an important benefit of committing to a VEI, because all parties can potentially gain real insights concerning what works and doesn't that will hold them in good stead in future regulatory deliberations and processes.
 9. One expert said that principles and criteria such as those developed by the New Directions Group are extremely valuable for design and implementation of successful VEIs, but by the same token, they represent an ideal that even regulatory programs rarely can live up to. You've got to be careful that you don't make voluntary programs so procedurally and substantively onerous that no one wants to join.
 10. One expert emphasized that baselines, performance objectives, monitoring and evaluation are important for ascertaining what is working and what is not with a VEI. Regardless of whether a particular initiative has been successful, the results need to be communicated so that all parties can learn.
 11. One expert said that the ability to potentially develop national, uniform initiatives which break down jurisdictional barriers and address problems which are difficult to address through legal approaches are some of the attractions of VEIs.
 12. One expert pointed out that there is a potential unfairness for businesses to go ahead on their own by innovating and exceeding regulatory requirements before a formal government VEI has been put in place. If an industry player has done things before a VEI program is in place, there is a risk that it won't get any credit. How can this pre-formal VEI behaviour be recognized and rewarded?
 13. One expert said that strict enforcement by governments against an industry sector that is making visible efforts to meet and

regulatory standards address problems not currently dealt with through regulatory programs, and putting in place escalated penalty structures capable of being imposed without the availability of a due diligence defence, sends signals that government does not want cooperative and collaborative programs, relations and partners.

14. One expert said that VEIs can't survive as "boutique" programs: they've got to be growing if they're going to survive.
15. Many experts seem to feel that government recognition is one of the most important incentives for firms to make and meet VEI commitments; for example, seemingly small acts of recognition — like letters from government agencies to legislators commending exemplary behavior matter, holding an annual meeting to celebrate those who participate in VEIs, or listing the names of VEI participants in good standing on the government website — can make a difference to a manager responsible for environmental affairs within a company, his superiors, and the firm's customers. And in competitive marketplaces, the fact that one of the firms vying for a contract has been recognized by government for its environmental behavior might make the difference in getting that contract.
16. One expert said that VEIs are at a crossroads: either VEIs are made into coveted status programs for real leaders, with real and substantial incentives, or shut VEIs down.
17. According to one expert, it is difficult to say whether government-industry voluntary agreement programs are attracting the genuine environmental leaders, or whether or not these "true" leaders would exceed regulatory commitments regardless of the existence of VEI programs. Leaders will be leaders anyway.
18. One expert said that there needs to be standardized and mandatory public reporting metrics for VEIs, so that it is easy for governments and others to compare the performance of one VEI member with that of another.
19. Another expert felt that before moving to mandatory standardized measures, there should first be organized analysis of existing data — e.g., what does it reveal, what doesn't it reveal, what needs to be revealed, and so on. The results of the analysis of existing data could be used as the basis for developing new metrics that address some of the more intangible parts of VEIs (e.g., to address issues such as relationships, transparency, comparative economic performance, etc.). This incremental approach toward more standardized performance reporting would be a step toward co-regulation that would likely to be accepted by trade associations (who might otherwise be intimidated by moving too directly to standardized mandatory public reporting, and hence would resist it). An obligation of VEI participants to contribute measurement information that can be used for overall comparisons might be well received, and a step in the right direction.
20. If an incentive for participating in a VEI is the bending or removal of a regulatory rule, then maybe that regulatory rule isn't needed at all for anybody, said one expert.
21. One expert said that VEIs can be good for addressing multi-media issues — this is something that stovepipe single-media oriented regulatory approaches normally are not good at addressing.

Comments on VEIs and Environmental Management Systems (EMSs)

1. One expert said that the EMS hurdle (i.e., making implementation of an EMS a requirement of participation in a VEI) needs to be managed in a more nuanced manner: some industry participants find it too rigorous — perhaps a “ramp up” program is needed, so that members can gradually phase in EMSs.
2. One expert said that in VEIs, government should concern itself with performance, not process (i.e., EMSs). From a public policy standpoint, EMSs are important if they are tied to governmental objectives and frameworks. Otherwise, an EMS by itself does not have any significant public policy dimensions.

Comments on VEIs and Implementation

1. For VEIs to be successful, according to one expert, the government officials running the program need to be the right people, who have the experience to identify and pursue a viable VEI idea or issue or opportunity when it arises, and the credibility to run with it and sell it. Ultimately, these are the people who can build the trust around a successful VEI. The same is true with respect to the type of people who can make things work on the industry and ENGO side of the table. In other words, successful, sophisticated VEIs necessitate involvement of successful and sophisticated personnel. If they are to work, VEIs are not areas that can be handed off to junior staff.
2. Rigorous enforcement of regulatory laws helps to create the space for and attractiveness of voluntary programs, said one expert.

3. It was the view of one expert that governments need to be frank in their communications about why they are engaging in voluntary programs — i.e., governments need to publicly admit that they can’t regulate everything, that they don’t have the resources to inspect everything, and can’t have an inspector on duty 24 hours a day in every regulated facility. They need to make it clear that conventional regulatory approaches can encourage legalistic and adversarial behavior, they should be up front about the fact that they want to encourage behavior which exceeds regulatory limits and admit that there is value in recognizing good environmental behavior. They should also be clear that support for voluntary programs does not imply a lack of desire to use regulatory programs or to enforce if the circumstances warrant, and that these circumstances should be made clear to all concerned.
4. When government enforcement and VEI officials have differences in priorities and fail to communicate among themselves this can disrupt the development and implementation of effective VEIs. Coordination within the Ministry’s various component parts is key.
5. In the opinion of one expert, governments should not boast about VEI programs unless they can back up the boasting with empirical evidence of success.
6. One expert said that political-level support for VEIs is crucial to their success: when the going gets tough, you need to know that the Minister will back you up. ENGOs and industry can sense when there is only “soft” middle-management support for an initiative, and this can undermine industry involvement and effective implementation.
7. One government expert said that VEI programs rarely have non-compliance-

related issues that would necessitate removal of the poorly performing member from a program. But it is considerably more common for VEI administrators to refuse applications at the outset if the applicant is not seen to be genuinely motivated to achieve the VEI's program objectives.

Interviews with VEI Experts: Summary

It is difficult to summarize such a rich and varied set of observations. That said, in the opinion of the author, some key points seem to emerge. First, there is a sense from many experts that VEIs are on a much tighter leash than before — the willingness of all parties to expend the resources and political capital to develop VEIs seems less than it has been in the past. A probable explanation for this is that we now know more about VEIs than we did in the past, as noted in the earlier discussion of recent results of VEI research. At the same time, some experts feel that properly structured and targeted VEIs are playing an important role as a supplement to conventional approaches. Through the activities of lenders, investors, supply chain partners, consumers, workers, and communities, the market is now in a better position to reward behavior that is not currently being addressed in regulation than ever before, and VEIs can assist in stimulating this sort of behaviour. Moreover, there seems to be increasing recognition of the limits of conventional regulatory approaches, which create opportunities for VEIs that address the limitations of such approaches.

ENGOs and industry seems to be more wary about participating in VEIs, and increasingly are looking for indications of leadership from governments that voluntary programs are an important part of the environmental protection strategy, before they invest their own time and energies on such initiatives.

There appears to be some recognition that VEIs are as much about governmental rule innovation as they are about industry innovation. There seems to be some concern that governmental involvement in VEIs can detract from its regulatory activities, and that regulation is the true and proper role of government (and in the eyes of some, perhaps the sole legitimate role).

It is clear from the comments of several experts that if VEIs are not properly structured, there is a perception if not a reality that such programs could undermine the mainstay command and control function. Structuring in this context seems to involve such things as giving VEIs an explicit legal basis and framework, maintaining control over the setting of targets, ensuring that meaningful, comparable performance information is gathered and made publicly available, making sure that rewards offered through VEI programs are commensurate with and proportionate to the substantive improvements in environmental protection that result from the program, and moving from voluntary to regulatory interventions where circumstances warranted. EMSs are worthy of encouragement, but need to be tied to substantive performance of government approved objectives, and for those firms that do not currently have EMSs in place, perhaps a ramp-up or transition program or phase should be recognized.

In terms of implementation, according to some experts, the likelihood of successful VEI operation seems to be enhanced considerably when there is not only high level buy-in from government, industry and ENGO participants, but also that capable sophisticated personnel from all three sets of players are directly involved in implementation. Laudatory promotion by government of such programs should await empirical evidence that the program is achieving significant environmental improvements.

Underlying the variety of points made by experts seems to be the idea that there is an important role to be played by VEIs, but that role needs to be carefully circumscribed and structured so that it fits well with the backbone command and control regulatory approach. Where there is proper use of regulatory approaches (i.e., consistent use of regulatory tools where the circumstances warrant), this assists in creating the climate for VEIs (i.e., it drives businesses to develop or participate in beyond regulatory compliance programs that diminish the

likelihood of more regulatory action taking place). But VEIs should not be undertaken in a way that undermines the regulatory approach. An integrated approach is needed, whereby VEIs work in a complementary manner to regulatory and other instruments, institutions, processes and actors. This is a difficult challenge, but, in the opinion of the author, it is a surmountable challenge. Drawing on the insights of the experts, a possible path forward is provided in the next section.

Synthesis and Path Forward

To this point, this report has reviewed the evolving approaches to environmental protection, examined Ontario's Environmental Leaders program, highlighted key new learnings based on a VEI literature review, and set out some of the insights and observations gleaned from interviews with VEI experts. In this section of the report the key points emerging from the earlier sections are summarized, and on that basis, suggestions for a path forward are provided.

The analysis undertaken in this report suggests that conventional command and control regulatory approaches continue to be the backbone of effective environmental protection. Indeed, as has been discussed here, there have been many refinements to the regulatory approach that have improved their effectiveness, such as a move to more performance-oriented rules, ambient environmental monitoring, and use of civil penalty regimes to supplement conventional criminal and regulatory approaches. However, there continue to be limitations associated with conventional command and control approaches, such as the fact that they tend to be administratively intensive and expensive to properly operate, and they tend to lead to legalistic, adversarial relations with the private sector that fail to encourage companies to engage in beyond-regulatory-compliance behaviour.

This report has also noted the rise of more participative approaches to governing — such as environmental commissioners, environmental registers, certification programs, and industry self-regulatory programs — where NGOs, communities, industry and others play important governance roles alongside government. Some of the key characteristics associated with

VEIs (e.g., applications to reward good past behaviour and encourage behaviour going beyond that required by law, inclusive multi-stakeholder approach to implementation, and non-adversarial nature) may be well positioned to support the evolved regulatory instruments described here.

Gunningham and Sinclair put the case for use of a combination of instruments as follows:

...the importance of utilizing a broader mix cannot be over-emphasized. Often, the best solution is to design complementary combinations using a number of different instruments, thus: self-regulation, government regulation, and third party oversight may be capable of being combined in complementary combinations that work better than any one or even two of these instruments acting together.⁶⁵

For purposes of this report, what emerges from this analysis is recognition that any government's approach to VEIs needs to be targeted and tailored to the specific circumstances of that jurisdiction, in a way which is integrated with and complements the other instruments and approaches available.

The examination of Ontario's Environmental Leaders (OEL) program undertaken in this report suggests that the program shows considerable promise, and represents an advance over earlier Ontario VEI programs in terms of formality, incentives offered, eligibility criteria, and involvement of diverse stakeholders in program management. That said, the OEL program would benefit from a more explicit and permanent legal and policy

⁶⁵ Gunningham and Sinclair, op cit., p. 25.

basis. A number of improvements to transparency are possible, including provision of more information concerning the multi-stakeholder management committee and its operations, inclusion of draft and final versions of OEL facility commitments on the environmental registry, and publication of an annual OEL report on progress and developments. The OEL program is directed at leaders, but does not set any specific challenge benchmarks to be met by applicants. The OEL program could be complemented by a separate program targeted at those who are “good performers” (i.e., in legal compliance), that rewards past performance. A separate program could also be created for industry associations that have developed and implemented codes for their members. These points are discussed below.

The review of recent VEI literature suggests that VEIs have only been modestly successful, and that VEIs are perhaps better suited for incremental changes, rather than for fundamental shifts of behaviour. One key challenge is determining how to separate those industry participants who would meet extra-regulatory requirements anyway, without government prompting, from those who would do so only because of the existence of a formal VEI. The literature review also reveals that there may be value in developing differently targeted VEIs for different regulated actors. Thus, for example, programs directed at leaders may take a different approach than those directed at good performers (i.e., those in continual compliance with the law, but who do not attempt anything beyond what is legally required). There may be interesting lessons to be learned from the experience of VEIs in developing countries, in particular, the creation of third party inspectorates, approved by government, and paid for by industry as per the Mexican experience as described earlier. A paper prepared by Canadian industry executives provides evidence of a certain amount of private sector

frustration with a perceived lack of recognition and support of industry association initiatives, and also suggests problems with inadequate incentives, lack of coordination among levels of government, and inconsistent leadership on VEIs. The literature also suggests the need for development of credible and objective baselines and evaluative processes built into the design of VEIs from the outset. Finally, according to recent research, environmental management systems should be supported by government only when they are specifically linked to a government framework and policy objectives.

The interviews with VEI experts suggest that now that the strengths and weaknesses of VEIs are better understood, there is a need to ensure that the VEIs in use today are carefully targeted and designed to operate as effective supplements to the conventional regulatory programs. At the same time, it is increasingly apparent that businesses are developing and implementing extra-regulatory programs in response to a host of market and community signals (i.e., non-command and control impulses). Consumer and public pressure can help to steer industry toward the achievement of public policy environmental protection goals. Most importantly, the interviews with VEI experts suggest that a careful strategy on use of VEIs is necessary, so that they complement regulatory approaches.

Path Forward

An important learning emerging from the foregoing analysis is the need to position VEIs within the broader regulatory context in which they operate, so that each element complements the other, ensuring that all elements are aligned and integrated to create a cohesive and comprehensive environmental protection regime. With this in mind, the following suggested path forward is organized into the following elements:

1. Possible Refinements to the OEL Program
2. An Ontario VEI Challenge Program
3. An Ontario VEI “Good Performer” Program
4. Addressing the Laggards Problem
5. An Industry Association Program
6. A Third Party Inspectorate
7. Additional Incentives
8. Moving Toward Standardized, Mandatory Public Reporting
9. Alignment with the Regulatory Backdrop
10. VEI Case Studies and Conferences

Each of these is discussed in turn below.

1. Possible Refinements to the OEL Program

Analysis undertaken here suggests that OEL program is a well designed program that is still in its early years of operation. At this early stage, sweeping reforms of any sort would be premature and ill-advised. However, the following comparatively minor refinements should be considered.

- Provide a clear policy and statutory base for the program. This would send a signal that MOE’s voluntary initiatives are an established, not transitory, tool in the regulatory toolbox. There would appear to be little downside to MOE establishing or supporting a small multi-stakeholder project to draft and consult on a possible law to support the OEL program, drawing on existing programs from other jurisdictions.
- Create a “Corporate Leaders” tier, for companies that have multiple facilities participating in the OEL program, and who commit to a plan to ensure that all of their facilities will join the OEL program over a period of time (the US EPA’s Performance Track has a similar feature).
- Create a legislative power for the Minister of the Environment to order pollution prevention plans. Even if the idea of a statutory base for the OEL program is

rejected, MOE should explore the feasibility of adding a new power for the Minister to order pollution prevention plans similar to that existing at the federal level, to address the free rider problem, as discussed earlier.

- Publish drafts of VEI facility commitments on the environmental registry for public comment, and publish the final versions of the VEI on the environmental registry as well. The fact that final versions of VEI commitments are published on the OEL website is commendable, but not publishing them on the environmental registry diminishes their profile and scrutiny, and suggests that they are somehow lesser policy instruments.
- Regularly publish information on the membership and operation of the multi-stakeholder advisory committee. This would assist all parties in tracking developments.
- Publish an annual report on progress under the program. This also would assist all parties in tracking developments.

2. An Ontario VEI Challenge Program

As noted earlier, while the OEL program is well positioned to attract proposals for improvements from industry participants, it operates in a reactive manner, where the multi-stakeholder management committee waits for and responds to the ideas for environmental improvement to emanate from the private sector. A VEI Challenge Program would allow government, ENGOs, communities, or even industry leaders to take a more proactive approach. With support from MOE, the “challengers” could devise and propose actions of particular individual companies, sectors, or multiple sectors. Such a challenge program could operate as an offshoot “pilot” to the OEL program. It may be helpful to look at the experience of the US EPA’s Performance Track, where a “challenge” component was introduced to its program in 2006, with its own special incentives. At first

instance, MOE could support a small project to further explore the feasibility of such a program. It might be useful to have the project ultimately “workshopped” by the multi-stakeholder management committee and existing OEL members in good standing. Care must be taken not to make the challenge program so onerous as to discourage industry participation.

3. An Ontario VEI “Good Performer” Program

As noted by a VEI expert earlier in the report, it is a considerable challenge for a facility to maintain its operations in compliance with the law, and consistent compliance with the law is not something to be lightly regarded. In fact, an argument can be made that it is something to be recognized and rewarded, although not to the same extent as a “leader” program. In fact, in those jurisdictions that have multiple tier VEIs, it is not uncommon to have the lower tier essentially devoted to acknowledging good past regulatory performance. On the other hand, if such a program were to be put in place, it should involve minimal costs for government, and minimal procedural hurdles for applicants. As envisaged here, the successful applicant would receive a simple form of government recognition (e.g., a certificate and inclusion in a “good performer” roster on the MOE website) but no other benefits. However, there is an administrative challenge to creation of such a category: the sad reality is that, due to limited inspectorate budgets,⁶⁶ it is possible

⁶⁶ According to the 2005 Ontario Auditor General’s report, total MOE inspection activity was at 73 per cent of 1995/96 levels, and inspectors were averaging fewer inspections annually. “We were informed that this was due to the increased length of time it now takes to conduct inspections.” Office of the Auditor General of Ontario, 2005 Annual Report (Queen’s Printer of Ontario, 2005), at p. 336, downloadable at www.auditor.on.ca/en/reports_en/en05/408en05.pdf.

for a facility to be perceived as in full compliance with the law when in fact it has simply not been the subject of inspection for a considerable time. To address this reality, the suggestion is made that to be eligible for good performer recognition, the applicant must have a spotless compliance record for the past five years (i.e., no convictions), but also that it must submit itself to and pass an inspection by an approved third party inspector (the third party inspection model is discussed further below). The third party inspection would be paid for by the applicant.

4. Addressing the Laggards Problem

The above suggestions, if acted upon, would target leaders and good performers. However, it would do nothing to address the laggards (i.e., those in non-compliance with the law).⁶⁷ Of course, the most self-evident way of addressing laggards is through regulatory enforcement action. What is suggested here builds on and assumes that such enforcement action will take place when it is appropriate. The suggestion here is that MOE introduce and publish a quarterly prosecutions, compliance, enforcement and convictions activity report, the data of which would be tabulated and disseminated annually.⁶⁸ Other jurisdictions have done this.⁶⁹ Currently in

⁶⁷ Note that those within a particular sector who do not participate in a voluntary initiative can also be characterized as “laggards.” However, for the purposes of this paper, those within a particular sector who do not participate in a program would be described as free riders, and approaches for addressing them are dealt with elsewhere (e.g., through providing the Minister with a power to order pollution prevention).

⁶⁸ MOE publishes annual “Environmental Compliance Reports” (the most recent on the MOE website being for 2005).

⁶⁹ For example, the British Columbia Ministry of the Environment publishes a quarterly “Compliance and Enforcement Summary.” See www.env.gov.bc.ca/main/prgs/compliancereport.html.

Ontario, press releases concerning convictions are already made available. A short project exploring the feasibility of publishing a quarterly and annual tabulation of prosecutions, compliance, enforcement and convictions activity could be undertaken, drawing on the experience in other jurisdictions. If such a program were in place, then MOE would have information-oriented initiatives addressed at those who wish to go beyond regulatory compliance (e.g., the OEL program, and the proposed challenge program), as well as those who consistently meet regulatory requirements but do not go beyond what is required (proposed above), and one addressed at those who do not meet regulatory requirements (proposed here). A ladder of government recognition, from negative to positive to laudatory is thus created.

5. An Industry Association Program

As noted earlier, a significant and distinctive development in Canada has been the evolution and transition of some industry associations from pure lobbying/advocacy bodies into self-regulating bodies, with elaborate public interest-oriented rule development and implementation processes, and associated information disclosure features. This evolution has largely taken place without direct government prompting or support — even though it is arguably a significant positive development in terms of governance in the public interest when industry takes on the responsibility of policing its own members and dialoguing with communities, NGOs, and others. As non-legislated programs, such self regulatory initiatives can readily address issues on a whole-of-facility rather than issue-specific manner, and can also address multiple contexts (e.g., both environmental and health and safety contexts). Recently, comments from leading industry sectors have suggested a desire for government recognition of such

industry association self regulatory activity.⁷⁰ Although the OEL program does permit applications from industry associations, the program is not actually designed in a way which specifically recognizes the unique characteristics and features of industry associations. In the United Kingdom, a statutory-based approved code of conduct program has recently been created in the consumer context.⁷¹ Code sponsors (e.g., industry associations) must meet pre-approved criteria in terms of their organization and its influence on the sector and the adequacy of resources to ensure that the code's objectives are met, the nature, openness and inclusiveness of the code development consultation process, multi-stakeholder involvement in code implementation, the substance of the code itself, the training and awareness of members concerning the code, clarity and truthfulness of the code, code monitoring, enforcement, publicity, evaluation and reporting. A project exploring the feasibility of developing and implementing such a program for Ontario (and perhaps preferably, a national program recognized in each province) could be undertaken, drawing on the UK experience.

6. A Third Party Inspectorate

As noted above, environmental ministries such as MOE are chronically understaffed and underfunded and inspections are an area that is often negatively affected.⁷² Unfortunately,

⁷⁰ See Paton and Thurlow, op cit.

⁷¹ See section 8 of the UK Enterprise Act 2002, and the Office of Fair Trading website for publications, such as the following concerning the codes approval scheme at www.of.gov.uk/shared_of/consumer_codes_approval_scheme/of390.pdf.

⁷² According to the 2005 Ontario Auditor General's report, total MOE inspection activity was at 73 per cent of 1995/96 levels, and inspectors were averaging fewer inspections annually. "We were informed that this was due to the increased length of time it now takes to conduct inspections."

this situation is not likely to change any time soon. At the same time, it is clear that for all VEIs, the issue of third party verification is of central importance. It would be difficult to justify that such third party verification be undertaken by cash-strapped public inspectors. As noted earlier, the Mexican environmental authorities have overseen the creation of third party inspectors, operating under their supervision and approval, but funded by industry members who seek their services.⁷³ A similar model could be attempted in Ontario, perhaps drawing on the system in Ontario for certified laboratories.⁷⁴ The inspectors could be used in conjunction with the OEL program, the modified challenge version of OEL program, the “good performer” program, and the industry association model. Qualified EMS auditors could perhaps seek the additional training and approval needed for such a designation, although it should be emphasized that the process orientation and non-public nature of much current management system auditing would not be appropriate or sufficient for purposes of third party inspectorates in the public interest.

7. Additional Incentives

One possible additional incentive for businesses to participate in beyond regulatory compliance programs could be access to government procurement. Eligibility could depend upon being included on a roster of leaders, good performers, and approved

industry association program members. An additional incentive might be a tax incentive to offset the capital costs of participating in an approved leaders program, good performer program or approved industry association program. Some jurisdictions have provided tax incentives for businesses implementing an approved EMS — what is suggested here is similar, but the behaviour that is rewarded is acceptable performance, from a public policy standpoint, not the implementation of a process that may or may not yield public policy benefits. Finally, MOE administrators could liaise with social/environmental investment organizations to make them aware of the OEL program and related programs to be used as part of their investment calculus (the US EPA has done this as part of its Performance Track program). A study exploring the feasibility of making such incentives available could be undertaken.

8. Moving Toward Standardized Mandatory Reporting

Information is vital to the proper functioning of both regulatory programs and VEIs. The addition of the environmental registry in Ontario (and its equivalent in other jurisdictions) is an important innovation, as is the National Pollutant Release Inventory, and the Pollution Probe online Voluntary Initiatives Research Centre.⁷⁵ In order to facilitate public accountability and transparency, a term and condition of participation in approved VEIs could be mandatory standardized reporting. This would help to address the current problem where each company reports through annual reports and on its website in its own way — perhaps emphasizing the good and massaging and minimizing the bad.

Office of the Auditor General of Ontario, 2005 Annual Report (Queen’s Printer of Ontario, 2005), at p. 336, downloadable at www.auditor.on.ca/en/reports_en/en05/408en05.pdf.

⁷³ See Blackman et al, op cit.

⁷⁴ The Ontario Safe Drinking Water Act requires both laboratory accreditation through the Standards Council of Canada (working with the Canadian Association of Environmental Analytical Laboratories CAEAL) and certification by the Ministry of the Environment’s Laboratory Services Branch.

⁷⁵ Since its introduction in March 2004, the Pollution Probe’s Voluntary Initiatives Research Centre has received a steadily increasing number of hits. The cumulative amount to date is 107,455 as of June, 2007, with about 10,000 hits each month.

Standardized reporting enhances the ability for governments, members of the community, and ENGOs to have comparable, valuable information in order to assess the performance of companies that are participating in government-approved programs. But before moving to mandatory standardized measures, it would be useful to have an organized analysis of existing data – e.g., what does it reveal, what doesn't it reveal, what needs to be revealed, and so on. The results of the analysis of existing data could be used as the basis for developing new metrics that address some of the more intangible parts of VEIs (e.g., to address issues such as relationships, transparency, comparative economic performance, etc.). This incremental approach toward more standardized performance reporting would be a step toward reporting metrics co-regulation that would likely to be accepted by trade associations (who might otherwise be intimidated by moving too directly to standardized mandatory public reporting, and hence would resist it). An obligation of VEI participants to contribute measurement information that can be used for overall comparisons might be well received, and a step in the right direction. The environmental organization Pollution Probe has been operating an online Voluntary Initiatives Research Centre for several years now. As such, it may be well positioned to assist in the development and implementation of a strategic move toward more standardized reporting.

9. Alignment with the Regulatory Backdrop

Both the literature and VEI interviews confirm that a strong and supportive regulatory program is essential to a proper functioning VEI. In Ontario, the increased frequency of compliance “sweeps” and the reforms to the regulatory penalties regime are in principle not inconsistent with the idea of an optimally functioning VEI program or programs. They speak to a Ministry making a concerted effort to address the laggards. This creates pressure on regulated parties to ensure that they are in full compliance with the law, and to seek out pro-active programs and approaches such as VEIs which will put them in a positive light with regulators, the public, and others. On the other hand, if the inspection and enforcement activity is perceived as random, and/or not taking into account past good behavior, this can undermine support for VEIs. Rightly or wrongly, there is anecdotal evidence to suggest that this is how some of the recent regulatory activity in Ontario is perceived.⁷⁶ Public policies towards compliance and enforcement — developed after multi-stakeholder consultations — that clarify that such activities are undertaken on a risk- and harm-based manner, taking into account (but not being fettered by) participation of industry members in approved government programs, would go a long way towards ensuring that regulatory and VEI approaches are not only aligned, but are seen to be aligned.

⁷⁶ See, e.g., the presentation by Mr. Jeffrey M. Lipton, Nova Chemicals, to the Sarnia Lambton Environmental Association AGM, May 18, 2005, downloadable at www.ccpa.ca/files/Public_Affairs/Jeff_Lipton_-_Sarnia_Lambton_JML_19_MAY_05.pdf.

10. VEI Case Studies and Conferences

Industry, government, ENGOs, communities and academics would all benefit from rigorous, structured publicly accessible case studies of how and why individual businesses have successfully engaged in beyond regulatory compliance conduct. A multi-jurisdictional multi-stakeholder agreement on the parameters of such case studies could lead to a highly useful sharing and learning event. The case studies should be publicly accessible at no cost from a centralized depository such as Pollution Probe's VIRC and its equivalent in other jurisdictions.

The underlying objective of these suggestions is creation of an integrated, comprehensive suite of initiatives that supports and complements the existing MOE environmental protection approach. Most of the suggestions could be explored first in small projects, and then discussed in multi-stakeholder forums to test their viability, before moving any further.

Recommendations

It should be emphasized that this is a very limited study, based solely on a literature review, interviews with several VEI experts, and a brief “desk” review of the OEL program. It hopefully sets the stage for more comprehensive research of the VEIs that might include a thorough examination and interviews with each of the current OEL participants, surveys of those who have not yet participated in the OEL program, a review of the OEL admissions process, and more comprehensive examinations of programs in operation in other jurisdictions. With this caveat, and based on the analysis undertaken above it is recommended that MOE’s Environmental Innovations and Emerging Sciences Branch:

1. explore the feasibility of making the refinements to the OEL program outlined above;
2. sponsor a small research and multi-stakeholder consultation project concerning the feasibility of adding an Ontario VEI Challenge Program as a pilot adjunct to the existing OEL program;
3. sponsor a small research and multi-stakeholder consultation project concerning the feasibility of adding an Ontario VEI “Good Performer” Program;
4. sponsor a small research and multi-stakeholder consultation project concerning the feasibility of addressing the regulatory laggards problem in the manner described above;
5. sponsor a small research and multi-stakeholder consultation project concerning the feasibility of adding a VEI program specifically directed at industry associations;
6. sponsor a small research and multi-stakeholder consultation project concerning the feasibility of creating a third party inspectorate as an adjunct to the existing and proposed VEIs discussed in this report;
7. sponsor a small research and multi-stakeholder consultation project concerning the feasibility of adding additional incentives as discussed in this report;
8. sponsor a small research and multi-stakeholder consultation project concerning the feasibility of moving toward standardized, mandatory public reporting as part of all the existing and proposed VEIs discussed in this report;
9. sponsor a small research and multi-stakeholder consultation project concerning the feasibility of ensuring optimal alignment between the existing and proposed VEIs discussed in this project and the MOE regulatory approach; and,
10. sponsor the multi-stakeholder and multi-jurisdictional development of a standardized template for VEI case studies, sponsor the development of Canadian case studies, encourage other jurisdictions to research and publish their own case studies, and share the results.

Conclusions

Drawing on a review of the VEI literature and interviews with VEI experts, this report has analyzed Ontario's Environmental Leaders (OEL) program, and made suggestions for refinements to the program, as well as more far reaching proposals for additional VEI programs and related adjustments to the MOE environmental protection approach. Based on the analysis undertaken, the report concludes that understanding of VEIs is now at a new, higher level — here in Ontario and elsewhere. On the one hand, there is now a fairly solid base of experience with a wide variety of VEI types, the strengths and weaknesses and incentives and disincentives are quite well known, and experience and understanding with the broader range of command and control and other regulatory techniques has also advanced considerably, so that today there are real opportunities to develop and apply VEIs in a sophisticated and targeted way, as an effective adjunct to the core regulatory approaches.

On the other hand, there seems to be a certain amount of fatigue and jadedness setting in among some government, private sector and non-governmental players concerning VEIs. One could say that “the bloom is off the rose” — VEIs are no longer considered particularly new or exciting, and some are questioning whether the energies associated with VEI development, implementation and evaluation is worth the effort. In this environment, there is a real possibility that VEIs will not be systematically pursued in circumstances where they might usefully apply, or alternatively, their use might be restricted to marginal “boutique” situations, isolated from the resources and structure needed in order to make them optimally effective.

Although studies suggest that it is difficult to ascertain whether government-industry VEIs are generating change that would not take place outside of the program, and that it is difficult to ascertain whether VEIs really are attracting top performers, what is also clear is that VEIs are comparatively inexpensive ways for governments, businesses, NGOs, communities, and others to test out new approaches, and do so in a non-adversarial manner quite different from that associated with conventional regulatory programs.

Scholars have referred to consent as the most powerful basis for governing,⁷⁷ since both parties have strong incentives to make the agreement work. This is the dynamic underlying government-industry VEIs, and it stands in contrast to the regulatory dynamic, where one party (the regulated) is usually acting in a certain way to avoid punishment. With VEIs, government and business are “hostages of each other,”⁷⁸ both benefiting from a positive experience, and both losing from a negative result (and where NGOs are partners in the program, they too are “hostages”). A business that participates in a VEI of this nature, and is subsequently discovered to be not complying with either underlying regulatory requirements or

⁷⁷ B. Purchase, “The Political Economy of Voluntary Codes,” in K. Webb, ed., *Voluntary Codes: Private Governance, the Public Interest, and Innovation* (op cit.).

⁷⁸ To the best of the author's knowledge, the expression “hostages of each other” was first used by Professor Joe Rees to describe the dynamic in play among nuclear facility operators in the US, who were said to be desirous to bring to US regulators' attention any non-compliant behaviour of their peers and thus decrease the likelihood of a major nuclear calamity taking place that could ultimately have significant consequences on them.

voluntary commitments makes both the particular business, and the government (and NGOs, where applicable) that endorsed the business as a good performer, look bad — thus, all parties are desirous of avoiding negative publicity of this type, and so, arguably, all will try diligently to prevent sub-optimal performance from happening in the first place. Thus, with VEIs, there is a more of a positive partnership and trust dynamic in operation, in which parties to the initiative have a strong incentive to make the agreement work, in contrast to more of an adversarial, distrustful dynamic in operation with conventional regulatory relations, where regulated parties only begrudgingly carry out requirements because they have to and because there are inspections and the threat of enforcement actions.

In the Canadian regulatory context there has been a significant history of constructive government-industry-NGO cooperation with respect to environmental protection and other public policy contexts.⁷⁹ In a way, the

approach to use of VEIs suggested in this report attempts to build on this culture of collaboration. The proposals made here are based on the assumption that VEIs can be a vital and integral component of the Ontario and Canadian environmental protection approach, although it is clear that VEIs should and must be a complement to the backbone regulatory approach. The objective is to create a suite of VEIs that supports and improves the regulatory activities which must take centre stage, at the same time as MOE's regulatory approach supports and improves the VEIs, with the environment being the ultimate winner. A carefully designed suite of VEIs — a suite of VEIs that variously rewards past good behaviour, encourages self-selected pollution reduction behaviour, sets challenge stretch targets, that operates at minimal cost to government, and tests new approaches — helps to create a regulatory environment where positive behaviour is encouraged at the same time as negative behaviour is appropriately addressed.

⁷⁹ For more examples, see K. Webb, "Sustainable Governance, in the 21st Century: Moving Beyond Instrument Choice," in P. Eliadis, M. Hall and M. Howlett, eds. *Designing Government: From Instruments to Governance*. pp. 242–280. Montreal: McGill-Queen's University Press.

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Annex I — List of Interviewees

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Ms. Jill Cooper, Lawyer, Faegre and Benson, Denver, Colorado, formerly Director of Environmental Programs, Colorado Department of Public Health and Environment

Ms. Sonja Graci, Assistant Professor and former employee, Ontario Ministry of the Environment

Mr. Paul Griss, Coordinator, New Directions Group

Mr. Don Hames, Chair, Environmental Performance Agreement Advisory Committee, Environment Canada

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Mr. Jason Morrison, Director, Economic Globalization and the Environment Program, Pacific Institute

Mr. George Murphy, Director, Conservation and Education Branch, Alberta Environment

Mr. Steve Neville, Senior Program Coordinator, Environmental Innovations and Emerging Sciences Branch, Ontario Ministry of the Environment, Toronto

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