

Opening statement by Ralph Pentland (check against delivery)

Reality check! The state of Canada's regulatory regimes

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I am going to start by asserting that Canadian water governance has become steadily weaker over the past two decades, and at the same time Canadian water issues have become ever more acute. And I am going to hypothesize that the root cause in both cases is the fact that national governments haven't adapted as quickly as the private sector to the information age and the forces of globalism. Of course that is not unique to water. It is equally true in several other areas of public policy as well. With everything viewed through the lens of international economics, the broader public good has been effectively demoted.

The 1987 federal water policy, which many still hold out as an example of the way things should be done, could not be fully implemented in a period of severe financial constraint. Instead, the federal government issued an environmental green plan in 1990 which promised major new funding, and an entirely new philosophy. The new funding showed up temporarily, but it and a lot more very quickly evaporated. The new "information age" philosophy was that governments should do less and enable more.

Unfortunately the theory remains largely untested – first because subsequent reductions in national scientific capacity and increasingly risk averse public services made knowledge less rather than more available to Canadians; second because international pressures aimed at removing impediments to industrial competitiveness made rule making and enforcement both less transparent and less predictable; and third because we lost many of the public participation opportunities that were open to Canadians under the plethora of intergovernmental agreements in previous decades.

Due to these stresses, many of which emanated from outside the water sector and even outside the country, the capacities of the key parties responsible for Canada's water management are either degraded, inadequate, or at best uncertain; the parties appear less capable than ever of working together effectively; key relationships have become ineffective; and while there are a few bright spots at a local or regional level, the commitment to nurture them is very limited. Clearly we are in state of general confusion and gridlock, just at a time when a national sense of direction is urgently required.

Under those circumstances, we should not be surprised that the chorus of calls for a new national water policy is steadily growing louder.

I would like to spend most of the rest of my time on regulatory trends. On the question of rule making and enforcement, there has been a serious breakdown in the earlier national consensus. The international competitiveness agenda has clearly trumped the public good agenda of earlier decades. That trumping manifested itself first as a minimalist approach in the 1990s, and more recently as so-called smart regulation. The minimalist approach emphasized the reduction of governmental interference in private sector economic activity. Elaborate analytical and procedural requirements were put in place, making the adoption of new regulations virtually impossible. There was also a strong reliance on affected economic interests to regulate the impacts of their own activities on the environment and public health and safety.

In practice, so-called smart regulation included many of the characteristics of the minimalist approach, while adding the even more insidious idea of promoting the interests of regulated entities as explicit goals of regulatory activities. At its core, the federal government's external advisory committee defined smart regulation as raising innovation and competitiveness to co-equal status with protection of public goods as explicit goals of regulatory processes related to health, safety and the environment.

To the extent that the objective was to make regulation more efficient and effective, that was a laudable goal. But, in my view, we went away overboard in virtually abandoning the precautionary principle and any significant amount of governmental enforcement, and by introducing economic analysis in ways that introduced an anti-regulatory bias. Economic analysis always overestimates the cost of regulation because we can't anticipate innovation, and always underestimate the benefits because they can seldom be quantified.

A good example is the phosphate detergent ban of the 1970s. If economics had been allowed to drive that regulatory decision in the first instance, the ban would never have occurred. The industry put forth many powerful arguments about how damaging it would be for their industry and the wider economy. But, once the ban was in place, innovation kicked in, the environmental objective was met, there were large net benefits to society, and there was no lasting damage to the industry's bottom line.

The move to more efficient regulation was in fact "smart". But the head fake that got us to very much weaker regulation definitely wasn't, even from an economic perspective. If one ignores anecdotal and special interest studies, results from rigorous, independent economic analysis suggest that strong

environmental regulation has no negative impact at a macroeconomic level. As well, those studies show that environmentally sensitive corporations generally outperform poor environmental actors on the stock markets. In the water area, it has also been shown that strong environmental regulation leads to major water savings, and in turn significant cost and energy savings. And countries with strong regulatory regimens are leading the way in the rapidly growing green industries market.

One particularly worrisome aspect of our weakened regulatory regime is the uncertainty it has created with respect to longer-term human health trends. For example, according to the Washington-based centre for public integrity, the international joint commission requested a study of the public health implications of hazardous substances in twenty-six U.S. Areas of concern. The centre notes that various drafts of a 400 page report, prepared by the U.S. Centers for disease control and prevention, were reviewed by dozens of independent experts. In July of 2007, several days before the report was to be released, the CDC's agency for toxic substances and disease registry withdrew it saying it needed further review.

Also according to the centre for public integrity, in many of the geographical areas studied, researchers found low birth rates, elevated rates of infant mortality, and increased cancer rates. There could of course be a combination of causes for these elevated health risks, including water pollution, air pollution, lifestyle considerations, and special demographic circumstances. But, in robust democracies, one would expect full disclosure of all publically-funded, peer-reviewed scientific findings, along with any relevant argumentation about cause and effect.

We will never be able to precisely understand all of the cause and effect relationships. But some things are certain. Adverse ecological effects from environmental pollutants occur at all levels of biological organization. The most serious of these effects can influence the ability of species to adapt to other stressors and community interactions, change ecosystem processes, or eliminate valuable species. In human-exposed communities, they can cause subtle developmental, reproductive and possibly immunological deficits that could potentially have profound implications for the population as a whole. Unlike budget deficits, those deficits can't be repaid, which is sufficient reason to ensure open and transparent processes, and to practice the utmost caution.

I will just finish up with an idea from a great little book that just came out. It was written by Merrell-Ann Phare, one of my colleagues on the forum for leadership on water, and is entitled "denying the source: the crisis of first nations water rights". Merrell-Ann suggests that it is time for us "to ask ourselves

whether we are willing to come together to demand of ourselves and our governments that water be treated as a sacred element of our world that requires a higher standard of care, one commensurate with its unique status.” She goes on to suggest that something like the public trust doctrine – the notion that governments have a fiduciary duty to sustain the essence of our water resources for the use and enjoyment of the entire populace – may have the potential of becoming “a legally, culturally and spiritually unifying concept for all Canadians.”