

## CCPA Response to “A Canadian Perspective on the Precautionary Approach / Principle Discussion Document – September 2001”

CCPA is pleased that the Government of Canada has issued its discussion document and we will be forwarding this response to the Privy Council Office, the government agencies that we primarily deal with and to other departments that we understand are affected by the precautionary principle. This includes: Department of Foreign Affairs and International Trade, Industry Canada, Health Canada, Environment Canada, Natural Resources Canada and Transport Canada.

CCPA’s response to the government discussion paper is based on Responsible Care® and on A CCPA Discussion Paper on the Precautionary Principle as it Applies to Public Policy Decisions which we issued in March, 2000. This is available on our Website: [www.CCPA.ca](http://www.CCPA.ca).

**CCPA believes that the government discussion paper on the precautionary principle is generally sound and well thought out. However, we believe there are several areas where we think the paper needs to be improved and one area, concerning the "burden of proof" issue, where we believe it is very seriously flawed. These concerns are discussed below.**

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### THE POSITIVES

Much of the government discussion paper is similar to, and agrees with, the CCPA discussion paper. Key areas that we would like to particularly reference in this context include:

- Support for the Rio definition (Principle 15)  
*“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full*

*scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*”

- Recognition that the precautionary principle works within a science – risk management framework
- Strong support for consistency in Canada and internationally in applying the precautionary principle (although we have some concerns about whether the paper will actually achieve that objective, as discussed below)
- Support for the benefits of science and recognition that the precautionary principle must not be applied in a way that holds back scientific progress
- Support for the precautionary principle not representing a major new change in government policy

Here we are particularly pleased to see the reference in the “Foreword” (Page 1) that the broad guiding principles for the precautionary principle paper “reflect current government practices”. This point is further amplified in the “Executive Summary” (Page 1) where it is noted that, “Canada also has a long-standing history of implementing the precautionary principle in science-based programs of health and safety, and natural resources conservation”. To our mind, what the precautionary principle does is to provide a policy underpinning for the government’s current approach to dealing with uncertainty and precaution in science based decision making, and we are pleased to see the paper take the same view. It does not represent a fundamentally new and different approach.

- It is very clear throughout the paper, and in particularly in Principle 10, that any measures taken under the precautionary principle need to be cost effective.
- In fact, we see most of what is in the eleven principles in the paper as very positive and as consistent with the eight principles articulated in the CCPA paper. The one principle where we have some concerns, which we will discuss below, is Principle 4. We also think that there should be an additional principle in the paper, one that was in the CCPA paper, about targeting the application of the precautionary principle and this will also be discussed further below.
- There is generally a good discussion of risk based decision making in the paper. For instance, it is recognized that risk is inherent in the activities of individuals and businesses (Page 1), that we cannot guarantee zero risk (Page 1), that it is impossible to prove a negative (Page 16), and that in all cases sound scientific evidence is a fundamental prerequisite to applying the precautionary principle (Page 14). There are many other illustrations in the paper in this regard.
- There is also good recognition in the paper that some may try to abuse the precautionary principle such that it needs to be clearly defined. For example, there is recognition in the paper (Page 2 of Executive Summary) that, “there are concerns that it (precautionary principle) could be applied to perceived risk for which there is no sound scientific basis . . .” Furthermore on Page 3, the paper seems to recognize that the precautionary principle can be used as a backdoor for trade protectionism. While we see the precautionary principle as a useful tool within risk based decision making, we believe it is very important,

as does the government paper, that there is clear recognition that it may be misused and that misuse must be guarded against through a clear and consistent approach to defining and using the principle.

- The paper does a good job in discussing the scientific basis for application of the precautionary principle (Section 2.1). Towards one end of the spectrum, the precautionary principle does not need to “come into play” when there is enough sound, credible scientific information to make a decision without involvement of the precautionary principle. Towards the other end of the spectrum, there will be cases when there is not enough sound, credible scientific information to make any decision at all and invoking the precautionary principle does not change this. The paper does a good job of describing these boundaries, and the space in-between, where the precautionary principle operates. This space is characterized in terms of language such as “sound and credible” evidence exists that there is a risk of serious or irreversible harm and the paper refers to the key concept as being whether or not there is “reasonable evidence”.

### **AREAS WHERE WE WOULD SEE NEED FOR CLARIFICATION IN THE PAPER**

#### **The Role of Societal Values**

There is a lot of discussion of this issue throughout the paper. We are concerned that some of this discussion could be interpreted to allow decisions to be based on values in a way that would take away from decision making within a sound science framework. While the government can certainly decide to take decisions that are not based in a scientific decision making framework, that does not have anything to do with the precautionary principle -- but has to do with fundamental precepts of democracy. However, if decisions unrelated to a science underpinning are taken, some loose reference to a fuzzy concept of the precautionary principle should not be used as a way to pretend the decisions are taken on a sound scientific basis, when in fact they are not.

Points that we would like to see included in the discussion paper to clarify the role of social values and the precautionary principle would include:

1. The paper should more clearly recognize that one of society’s values is science based decision making. So decisions outside of that framework could be inconsistent with at least one of society’s values.
2. Almost all decision making is part of an integrative decision making process where a variety of inputs are taken into account, some of them complementary and some of them conflicting. When difficult choices among competing priorities need to be made, that should be done in a clear manner. More and more we are learning that a sustainable development or triple bottom-line approach can be taken where the connections between social, economic and environmental dimensions can, and must, be kept in mind. Although this is a general statement, it also fits (and perhaps particularly fits) when the precautionary principle is applied. CCPA addressed this issue in our discussion paper (at Page 1 of Executive Summary) and stated:

“As the precautionary principle is applied, the connection between social, economic and environmental dimensions, and the role of technology must be kept in mind. The principle must be applied in a context of encouraging technology, that is good for the environment, to move forward in a responsible and conscientious manner, and not as a barrier to innovation holding technology back. Also, just as society must avoid extreme economic or social actions which threaten ecological stability, prudence similarly dictates being wary of actions that do little or nothing for environmental improvement but threaten social or economic well being.”

3. In raising the discussion of social values in the paper, it is important to note the obvious; namely that you cannot please everyone all of the time. When a sufficient consensus has been reached on an issue, society's values have been reflected. Certain elements of society may not agree, but that disagreement is not reflective of societal values.

We believe it would be useful for the government paper to elaborate on the above three points in the discussion of how the issue of societal values interacts with the application of the precautionary principle. While we do not see any major flaws in the paper in this respect, we believe that the discussion could be clearer by addressing the points raised above.

#### **“The Scientific Evidence Required Should Be Established Relative to the Chosen Level of Protection”**

This statement appears in Principle 4 (first sentence). We do not understand what it means and it does not seem to be elaborated on anywhere else in the paper. The discussion elaborating on Principle 4, that is set out in Section 3.4 is primarily about the burden of proof and does not, in our view, provide any further guidance on the sentence in question and on any relationship between “the scientific evidence required” and the “chosen level of protection”. We would recommend that this sentence either be clarified or deleted from the paper.

#### **Reference to Cost-effective**

Although cost-effective decision making under the precautionary principle is clearly supported throughout the paper (particularly in Principle 10 and in the paper supporting the Rio definition), there are several instances where the following phrase is used: “the precautionary approach recognizes that the absence of full scientific certainty shall not be used as a reason for postponing decisions where there is a risk of serious or irreversible harm”. This is almost a repeat of the Rio definition except that the word “cost-effective” should be inserted before “decisions” and the wording should refer to “measures” instead of “decisions”. To provide for consistency with the paper's support for the Rio definition and its articulation of Principle 10, we would suggest that this sentence be reworded where it appears (Executive Summary Page 2, Page 2 of the paper and anywhere else) by including the words “cost effective measures” in place of “decisions”. This would also be consistent with CEPA.

The cost effectiveness discussion in Section 2.3 of the paper also discusses cost benefit. Cost benefit analysis should not be looked at only in simple economic terms (e.g., the cost of implementing a precautionary action or the cost to business of a decision), or only on the

environmental / public health benefit to be gained by such action. It should also assess the potential value lost to society of choosing not to use a given technology due to a precautionary decision, relative to the benefits of such action.

### **Targeting the Precautionary Principle as Precisely as Possible**

As noted above, the CCPA paper suggests as a principle (Principle 4):

“Where the precautionary principle is applied, risk reduction measures should be targeted as precisely as possible at the specific issue or concern (e.g. specific chemical and specific application), using existing and reasonably obtainable scientific knowledge.”

CCPA argued in our paper, that this principle was consistent with how Canadian legislation, for example CEPA, is currently administered and that the precautionary principle has to be applied in a focused, meaningful way. Identifying which problems are the most important and the most urgent and which action should receive the highest priority is important in all decision making and will need to continue to be important under application of the precautionary principle. While there is some language in the government Principle 11 (that measures under the precautionary principle should be the least trade restrictive) that is consistent with the CCPA principle with respect to targeting, we believe that a more generalized approach to this issue is appropriate similar to what we have done in the CCPA paper. We would recommend that the CCPA Principle 4 should be included in the government paper. We would also recommend including the argumentation on this issue from the CCPA paper (see Attachment 1) in the government paper as a rationale for this Principle.

### **Diagram 1 at Page 2**

We believe that this diagram is confusing and moreover, it is not referenced anywhere in the text. We would recommend that it be deleted.

### **Positive Legal Duty to Act**

Although the paper does not specifically address this issue, the general tone of the paper would seem to imply that there is a positive legal duty to act, that is associated with the precautionary principle. The positive duty to act does not arise out of the plain meaning of Principle 15. Principle 15 allows government action without full scientific certainty, but does not require it. The phrase “according to their capabilities” in the introductory sentence of the Rio Definition indicates that action depends on the economic and social priorities of the agreeing states. The only requirement is not to use lack of full scientific certainty as a reason for postponing cost effective measures.

Principle 15 does not preclude other government reasons for postponing action. At most, it is arguable that there may be implicitly a duty to take cost effective measures to avoid environmental degradation according to a country’s capabilities where there is a likely cause of serious or irreversible damage. However, this duty only comes at the end of the decision making process after the threat and cost effective measures are established, but does not create a duty to take action pre-emptively because of uncertainty.

We believe that there should be a section added to the government paper that clearly spells out, as described above, that there is no positive legal duty to act that is associated with the precautionary principle.

### **MAJOR CONCERN WITH PAPER – Burden of Proof**

**The area of the government paper that gives CCPA the most concern, and which we see as seriously flawed, is the discussion with respect to the burden of proof that is set out in Principle 4. Here we are concerned on two fronts:**

- 1. Principal vs. Operational Issue:** First, we do not believe that the question of burden of proof is an issue that should be described in terms of a “principle” for general application of the precautionary principle. Instead we believe any burden of proof issue should be addressed on an operational basis that depends on what makes sense in a given set of circumstances.

A debate on a general principle of who should bear the burden of proof is not necessary to get into in the discussion of the precautionary principle. If the issue were to be approached from a question of principle, many might argue that the overarching principle should be that in a democratic society, people should be free to pursue activities only subject to normal statutory and common law liabilities. That is generally the approach that has been taken in Canada and there are only a limited and narrow number of common law situations or statutory provisions (e.g. CEPA New Substances Notification requirements) where there is some form of a reversal in the burden of proof. Company codes of practice may also address this issue.

As CCPA said in our discussion paper (Page 15):

“The precautionary principle should not be described as requiring parties engaging in potentially harmful activity to overcome a “rebuttable presumption” that this activity should be prohibited. Such a “reverse onus” would require companies developing new products or processes to attempt to demonstrate the absence of adverse effects (which is clearly impossible) as a condition for their introduction into commerce. Principle 15 of the Rio Declaration, by contrast, requires a credible threat of serious or irreversible harm before the precautionary principle comes into play.”

A precautionary approach can arise in other instances, outside of a regulatory context, such as in initiatives like Responsible Care®. The CCPA Responsible Care® Research and Development Code states:

“Prior to initiating an R&D project, every member and partner company conducting research and development of new chemicals and chemical products, processes, equipment or applications shall require that:

2.1 protocols and methodology are in place to ensure that health, safety and environmental hazards are identified and evaluated as early as possible, and standards for operations are defined. This procedure applies not only to the research phase but also to pilot plant operations, manufacturing and marketing as they progress. Particular attention is given early to long term health and

environmental effects related to chemicals, chemical products, processes and new uses and the management of associated wastes;

2.2 periodic reviews and checkpoints are established which dictate project continuance or termination dependent on performance versus such standards;

2.3 potential applications are defined and analyzed for hazards both initially and as work proceeds;"

If there is a burden of proof issue arising out of the Principle 15, the main burden is on the person who is alleging that there are threats of serious or irreversible damage. If this condition is not established, the precautionary principle does not operate. If the condition is established, the principle operates and the lack of full scientific certainty should not be used (by governments) as a reason for postponing cost effective measures. The only shifting of burden is the practical one that once a persuasive case of a "threat of serious or irreversible harm" is made out, the person who disagrees may have to rebut the case by introducing evidence that proves that there is no serious or irreversible threat. Moreover, the interpretation of "threat" should be "likely cause of harm" (Concise Oxford Dictionary). Accordingly, the person alleging that the condition precedent is satisfied, should have to prove based on the best available science that the activity is a likely cause of serious or irreversible harm rather than the mere establishment of a remote possibility.

**To sum up, our first concern is that the question of reversal of burden of proof should not be addressed on the basis of it being a principle associated with the precautionary principle, but that this should be an issue that is addressed on a case-by-case basis.**

2. **Consistency and Transparency:** Our second concern with how the government paper addresses the issue of the reversal of burden of proof, is that the paper is very inconsistent. Sometimes the paper takes the approach of framing the question of the burden of proof in an operational case-by-case basis, but in other instances it discusses this issue in terms of a more fundamental principle.

- In Principle 4, it is stated that the burden of proof can be assigned, and clearly this can be done by statute as per the New Substance Notification regulations.
- It is also stated that the burden of proof may shift as the knowledge evolves. We agree that this could make sense, not as a matter of principle, but on a case-by-case basis. Indeed, that is how CCPA's discussion paper addresses this question (Page 14) when it looks at the situation of who pays for development of additional information and analysis when the precautionary principle is applied, such that decisions based on it are provisional.
- At Page 6 the paper clearly takes what is, in our view, the appropriate approach of noting that the burden of proof is best "decided on a case-by-case basis".
- However at Page 11, the paper states that, "an effect of codifying the precautionary principle in statute is to shift the burden of proof from an intervener, who opposes a proposal because it may threaten serious environmental harm, to the applicant of the proposal, who must then prove that the proposed action or activity will not in fact result in the alleged harm". **This is untrue in fact as it will depend on the wording of the statute whether there is a shift in the**

**burden of proof.** The statute could do this but the statute could equally well not shift the burden of proof. It is not at all clear that it would be good public policy to have a general prohibition in federal legislation against activity until the government has been satisfied that there are no threats of serious or irreversible damage.

While the point is made in Section 1.2 of the paper that “governments can rarely act on the basis of full scientific certainty and cannot guarantee zero risk”, in the discussion of burden of proof it would also be useful to note that risk assessors cannot prove the absolute absence of risk or of adverse consequences. They can only define the level at which an activity could cause adverse consequences to public health or the environment (hazard), and assess the likelihood that such levels will result in the deployment of a technology (exposure).

Overall, we believe that the paper needs to be much more consistent and clearer in terms of its discussion of the burden of proof issue. It should address this on an operational basis rather than as a point of principle and it should ensure that there is a consistent approach, that concludes the shifting of the burden of proof is decided on a case-by-case basis depending on what makes the most sense in a particular set of circumstances.

### **CONSISTENCY OF GOVERNMENT POLICY**

As noted above in discussing the positive aspects of the paper, CCPA believes that there is a very good discussion in the paper on the need for consistent application by Canada of the precautionary principle, both domestically and internationally. **We would assume that government departments will need to take into account and adhere to the policy guidance on consistency and other aspects that are in the discussion paper.** We recognize that adherence to the guidelines needs to be flexible and responsible to the needs of particular circumstances as is stated in the paper.

In this context of promoting consistency we would expect that once the paper is finalized, after comments have been received and incorporated, that the disclaimer statement on the front of the government discussion paper will be removed and the paper will not remain “for discussion purposes only”.

**At the present time CCPA is very concerned about the level of inconsistency in government policy with respect to the application of the precautionary principle as evidenced by the language in Bill C-10 (National Marine Conservation Areas Act) that has gone forward to The Senate.** For more detail on our concerns on this issue, see the attached letter of December 6<sup>th</sup> (Attachment 2).



ATTACHMENT 1

Extract from CCPA Paper:  
**“A CCPA DISCUSSION PAPER ON THE PRECAUTIONARY PRINCIPLE  
AS IT APPLIES TO PUBLIC POLICY DECISIONS – March 2000”**

2. Where the precautionary principle is to be applied, how discriminating should one be in targeting actions for risk reduction?

CCPA believes that the precautionary principle has to be applied in a focused meaningful way. This means that it is necessary to identify which problems are the most important and the most urgent and which actions should receive the highest priority. As human and economic resources are inevitably limited, it is important to the protection of human health and the environment that decision making frameworks are established and used that allows society to deal first with the most important and pressing problems.

What must be avoided in the application of the precautionary principle is casting the net too broadly and without regard for the social and economic costs. This implies a need for some means of prioritizing the various precautionary actions that may be needed and where they should be applied – without prejudice to taking, as needed and as resources permit, still further precautions at a later date. In other words, the broader interests of society demand an explicit and scientifically grounded linkage tying the specific "threat" that is to be addressed by the precautionary principle to the specific chemicals and applications of concern. To do otherwise is to burden society with the added risk of loosing the benefits of chemicals and chemical uses that are not contributing to the identified threat. This leads to the fourth principle.

**FOURTH PRINCIPLE:**

Where the precautionary principle is applied, risk reduction measures should be targeted as precisely as possible at the specific issue or concern (e.g. specific chemical and specific application), using existing and reasonably obtainable scientific knowledge.

This Principle is consistent with how CEPA is currently administered.

**ATTACHMENT 2:** CCPA concerns about consistency in application of the precautionary principle and Bill C-10



C10.pdf