REFORMING THE CANADIAN ENVIRONMENTAL PROTECTION ACT

A SUBMISSION TO THE STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

CIELAP Brief 94/7

Edited by:

Mark Winfield, Ph.D.
Director of Research

With contributions by:

Karen Clark, M.A., LL.B.
Kenneth Fisher, LL.B.
Burkhard Mausberg, B.Sc.
Barbara Rutherford, LL.B.
Mark Winfield, Ph.D.

Canadian Institute for Environmental Law and Policy
Suite 400, 517 College St.
Toronto, Ontario
M6G 4A2

September 1994

ACKNOWLEDGEMENT

The Canadian Institute for Environmental Law and Policy would like to thank the Great Lakes Program of the Laidlaw Foundation and the Toxics Caucus of the Canadian Environment Network for providing financial support to this project.

TABLE OF CONTENTS

I. INTRODUCTION 1

II. THE ROLE OF THE FEDERAL GOVERNMENT IN THE PROTECTION OF THE CANADIAN ENVIRONMENT 2

III. CEPA AND ENVIRONMENTAL LAW ENFORCEMENT 4

IV. CEPA AND CHEMICAL NEW SUBSTANCES 7

V. CEPA AND BIOTECHNOLOGY PRODUCTS 12

VI. CEPA AND ECONOMIC INSTRUMENTS 18

VII. CEPA AND THE FEDERAL HOUSE IN ORDER 20

VIII. FIVE YEAR PARLIAMENTARY REVIEWS OF THE PROVISIONS AND OPERATION OF CEPA 21

IX. CONCLUSIONS 21

APPENDIX 1 THE CONSTITUTION, FEDERAL-PROVINCIAL RELATIONS, HARMONIZATION AND CEPA

APPENDIX 2 CEPA AND ENVIRONMENTAL LAW ENFORCEMENT

APPENDIX 3 CEPA, CHEMICAL NEW SUBSTANCES, AND BIOTECHNOLOGY

APPENDIX 4 CEPA AND ECONOMIC INSTRUMENTS

APPENDIX 5 CEPA AND THE FEDERAL HOUSE IN ORDER

REFORMING THE CANADIAN ENVIRONMENTAL PROTECTION ACT

A Submission to the House of Commons Standing Committee on Environment and Sustainable Development

I. INTRODUCTION

The *Canadian Environmental Protection Act* (CEPA) is the government of Canada's principal environmental protection statute. At the time of its passage, CEPA was described as Canada's "first environmental bill of rights, and "the most comprehensive piece of legislation in the western world." Unfortunately, the Act has not lived up to this promise. Indeed, it is difficult to identify ways in which environmental quality in Canada has, to date, been significantly affected by the existence of CEPA.

This failure is due principally to two factors. First, and perhaps most importantly, the federal government has taken a very deferential approach to its role in environmental management within Canada. This problem is particularly evident in the "harmonization" project currently taking place under the auspices of the Canadian Council of Ministers of the Environment (CCME). The Canadian Institute for Environmental Law and Policy (CIELAP) is of the view that the federal government must adopt a more assertive approach to the exercise of its jurisdiction in the environmental field, in order to provide national leadership and ensure minimum levels of environmental protection for all Canadians.

Secondly, the federal Department of the Environment has never fully accepted the regulatory mandate and role with which CEPA provided it. Rather, the department has continued to emphasize its traditional "advisory" and "promotional" approaches to its functions, and has been reluctant to enforce those regulations which have been made under CEPA with much vigour. If CEPA is to succeed, Environment Canada has to accept the regulatory role established for it by the statute, and act on this mandate.

In addition to these two overriding points, CIELAP proposes extensive revisions to CEPA as currently drafted. These include a strengthening of public accountability mechanisms regarding to the use of federal-provincial intergovernmental agreements related to the Act, and the addition of a "citizen suit" provision to CEPA to assist in ensuring that the Act is adequately enforced. Further amendments are proposed to improve the assessment process for new chemical substances under CEPA and to increase opportunities for public participation in the process. A new biotechnology part for CEPA is also recommended. This would expand the range of evaluative criteria employed in the assessment of new biotechnology products, enhance the capacity of the federal government to control the use of biotechnology products, and provide greater opportunities for public input and involvement in the regulation of these products.

The potential use of "economic" policy instruments under CEPA is examined in some detail. CIELAP has very serious concerns regarding the use of emission trading systems, particularly in relation to substances considered "toxic" for the purposes of CEPA. However, the Institute is strongly supportive of the use of taxes or charges on the use or manufacturing of "toxic" substances, both as a means of discouraging their use or manufacturing and as a means of funding environmental remediation and pollution prevention research and development programs.

Finally, the issue of environmental management within the operations of the federal government itself is reviewed. CIELAP proposes a strengthening of the Minister of the Environment's capacity to address environmental management within the federal government. A requirement that each federal department develop an internal environmental management plan, whose implementation would be subject to review by the proposed federal Environmental Commissioner, is also proposed.

II. THE ROLE OF THE FEDERAL GOVERNMENT IN THE PROTECTION OF THE CANADIAN ENVIRONMENT[1]

The Federal Government's Approach to its Domestic Environmental Role

Federal/provincial relations with respect to environmental protection have been strongly coloured by federal reluctance to stand on its constitutional authority to protect the environment. Yet the achievement of environmentally sustainable development in Canada will require a strong federal role. The federal government must exercise its authority to set minimum national quality standards for all Canadians.

The federal government's jurisdiction over toxics is well-supported under several federal heads of power, some of which can provide needed constitutional support to others. The federal government's power to enact criminal law in respect of health, the peace, order and good government clause, the fisheries power, the spending power, the trade and commerce power, and the taxation power, separately and combined, provide the federal government with ample jurisdiction to enact minimum national environmental standards.

1) *In order to ensure that nothing in CEPA prevents a broad reading of the federal government's environmental jurisdiction, particularly its capacity to set minimum national standards, the preamble of CEPA be amended to explicitly state that:*

---

[1].Refer to Appendix 1 - **The Constitution, Federal-Provincial Relations, Harmonization and CEPA**, for a detailed discussion of these issues.

"...Whereas the Government of Canada in demonstrating national leadership should establish national environmental quality objectives, guidelines, codes of practice and standards..."

Equivalency, Administrative and Intergovernmental Agreements and CEPA

Equivalency, Administrative and Intergovernmental agreements are a potentially useful mechanisms for facilitating federal-provincial cooperation in environmental management. However, concerns exist regarding the extremely weak accountability mechanisms associated with the use of these agreements.

2) *In order to address these concerns CEPA should be amended to provide that:*

* *the federal government's intention to negotiate an intergovernmental agreement is made public, through pre-publication, public consultation, and the publication of draft agreements in Part I of the Canada Gazette with appropriate comment periods;*

* *once agreements have been concluded, they be published in the Canada Gazette part II and indexed;*

* *all agreements require detailed annual reporting to Parliament on the administration and enforcement of federal laws or equivalent provincial laws;*

* *all agreements have sunset clauses requiring periodic review; and*

* *all agreements should permit the federal government to retain its right to prosecute under federal statutes when entering into such agreements. Mechanism permitting citizens who believe that enforcement by provincial officials is inadequate to petition for federal enforcement or to undertake private prosecutions, should also be included in agreements.*

Harmonization

Although not currently addressed within CEPA, the "harmonization" exercise presently being pursued through the Canadian Council of Ministers of the Environment (CCME) will have major implications for the future role of the federal government in environmental management in Canada. The harmonization initiative proposes to do something that has never been accomplished before: it attempts to establish clear, consistent, national environmental protection standards for Canada.

Unfortunately, the "harmonization" process currently under way under the auspices of the CCME raises a number of serious concerns, and cannot be endorsed in its present form. The justification presented in support of the effort (duplication and overlap) has yet to be fully demonstrated as a significant problem. In addition, the constitutional propriety of some of what is proposed as part of the exercise is open to question. Furthermore, the dynamics of the harmonization process among the provinces may lead to a "race for the bottom" and the adoption of "lowest common denominator" standards.

The likelihood of such an outcome is reinforced by the emphasis placed in the process on the concerns of business interests. The capacity of the process to result in constraints on the ability of provinces to raise standards independently and to adopt innovative policy approaches is also a major concern.

However, perhaps the most serious flaw in the harmonization project is the underlying potential for the federal government to abdicate any meaningful role in environmental management in Canada. The federal government appears willing to limit itself to whatever role the provinces regard as being appropriate for it. Furthermore, the federal government appears to be distinctly unwilling to press the provinces to adopt standards or requirements beyond which they would be prepared to act upon on their own initiative. This raises questions regarding the federal government's future role in domestic environmental policy.

The federal government must affirm the fact that it is interested in what happens to Canada's environment and will intervene to the full extent of its jurisdictional capacity when it feels it is necessary to do so. The establishment of minimum standards for environmental protection within Canada is clearly provided for by CEPA and other federal statutes. It is now up to the federal government to demonstrate the political will necessary to effectively fulfil these responsibilities.

III. CEPA AND ENVIRONMENTAL LAW ENFORCEMENT[2]

Environment Canada's enforcement practices fall far short of what could be realized under the CEPA. There has been, since before CEPA was passed, a marked reluctance on the part of the federal Department of the Environment to act as a regulatory and enforcement body – a role which CEPA requires it to play. This reluctance, attributable in large part to the "advisory" role originally conceived as the chief purpose of the Department of the Environment, that has resulted in significant failures in CEPA's enforcement. Furthermore, the Act's weak enforcement record has negatively affected the perceived legitimacy of federal action in the field of environmental regulation.

---

[2].Refer to Appendix 2 - **CEPA and Environmental Law Enforcement** for a detailed discussion of these issues.

The federal government must now, as it reviews CEPA, confront the legacy of its reluctance to assert its legitimate jurisdiction to implement and enforce the Act. As reviewed elsewhere in this submission, plans have been initiated to harmonize federal/provincial environmental regulation. There are also increasing international pressures to not only standardize regulations, but to coordinate them with the imperatives of sustainable development and pollution prevention as well. Environment Canada has shown some tentative interest in including these considerations in the CEPA Review. The challenge that now confronts the federal government is how it will demonstrate that it has preserved for itself the regulatory legitimacy that these initiatives will require.

Environment Canada's Departmental Mandate

3) *The Department of the Environment must accept the regulatory mandate provided to it by CEPA. The Department can no longer limit itself to an "advisory" and "promotional" role. CEPA provides the department with clear direction to provide for the life-cycle regulation of toxic substances in Canada and a number of additional regulatory functions. The department must accept and operationalize these regulatory functions as part of its institutional mindset and core administrative policies. In the context of CEPA, Environment Canada's mandate must now be recognized as being two-fold:*

   1) *to provide information clearly, and in a timely fashion to regulated industries; and*

   2) *to enforce compliance with the requirements of the legislation when it is necessary to do so.*

   This regulatory mandate should be affirmed by the Standing Committee on Environment and Sustainable Development and by the government as a whole.

Departmental Restructuring

In order to operationalize this regulatory mandate Environment Canada's enforcement functions should be restructured.

4) *Following the model of the Ontario Ministry of Environment and Energy, information and promotion, and enforcement functions should be clearly separated.*

5) *The need for Environment Canada to obtain permission from the Department of Justice to undertake prosecutions should be eliminated. Rather prosecutions should be handled by Environment Canada's own legal services branch, as is the case with the Ontario Ministry of Environment and Energy.*

6) *Investigative and legal services staff should be given greater authority to decide when to prosecute.*

Sanctions and Enforcement Powers

7) *The quasi-criminal sanctions currently contained in CEPA (ss.111-115) should be retained. The presence of these sanctions in the Act underline the value of respect for the environment itself and stigmatize behaviour causing serious damage to the environment.*

8) *Consistent with the affirmation of Environment Canada's regulatory mandate through CEPA, inspectors' powers under CEPA (ss.100-110) should be expanded to include:*

* *the authority to issue "cease and desist" or "stop" orders to oblige a regulated party to stop an illegal activity, without the requirement for formal court action;*

* *the authority to issue preventative orders to require regulated parties to take preventative or corrective action before a violation actually occurs;*

* *the authority to require regulated parties to report on how they have complied with "cease and desist" or "stop" orders or preventative orders;*

* *the authority to gain entry where an owner refuses consent; and*

* *the right to serve subpoenas and summons in accordance with s.509(2) and s.701(1) of the Criminal Code.*

A Citizen Suit Provision for CEPA

In addition to the strengthening of the enforcement functions within Environment Canada, we propose a further enforcement tool: citizen suits. A citizen suit provision would allow citizens to be the "eyes and ears" of the government -- assisting in the implementation of a clearly articulated enforcement and compliance policy.

9) *CEPA should be amended to permit citizen suits to ensure that the requirements of CEPA and any regulations made under the Act are met. A separate provision should be included in CEPA with the following features:*

* *a clear articulation of any person's right to bring an enforcement action,*

subject to proof of an offence, or imminent offence, on a balance of probabilities;

* *provide for the granting of injunctions ordering the person named in such actions to refrain from any action that may constitute or be directed towards the commission of an offence under CEPA, or to do anything necessary to prevent the commission of an offence under CEPA;*

* *where CEPA has been contravened, the person named in an application can be required to develop and implement a restoration plan to repair any damage caused to the environment in the course of the violation of CEPA;*

* *permits citizens to share in penalties levied against the wrong-doer upon conviction;*

* *in the event that the Attorney-General decides to pursue the case, the citizen, or citizens' group, should be entitled to remain a party to the prosecution;*

* *in the event that the Attorney General settles the case without formal legal proceedings, the citizen should be entitled to participate in the settlement negotiations and should be entitled to become a party to any agreement signed;*

* *specifically stipulate that the court consider whether the case is a test case or raises a novel point of law, in making cost awards in relation to citizen suit actions;*

* *makes available interim cost awards to citizen enforcers;*

* *creates a fund to assist citizen enforcement actions; and*

* *requires that where equivalency agreements are permitted under CEPA, the test for equivalency include the provision of citizen suits under the "equivalent" provincial law.*

IV. CEPA AND CHEMICAL NEW SUBSTANCES[3]

The new substances provisions of CEPA are among the most important aspects

---

[3].Refer to Appendix 3 - **CEPA, Chemical New Substances and Biotechnology**, Part II for a detailed discussion of these issues.

of the Act. Their significance is due to two principal features. First, the pre-commercial evaluation of new substances is the ultimate preventative activity. Rather than waiting for substances to cause damage to the environment or human health, new substances can be assessed and, if necessary, their use controlled, to prevent such outcomes. Secondly, the CEPA new substances provisions are not limited to the assessment of new chemicals. Other new "substances," such as biotechnology products, can also be assessed through the Act. In fact, CEPA was the first environmental statute in Canada to specifically recognize biotechnology products as a distinct category of substances.

The screening of new substances prior to commercialization is an ideal opportunity to apply the principles of pollution prevention and a precautionary approach to the management of potentially harmful substances. These provisions of the Act should be used to provide clear signals to industry regarding the types of new substances which are likely to be approved for use in Canada, and the characteristics of substances which will result in prohibitions or severe restrictions on use. This would provide direction to firms in terms of their investment and research and development decisions.

However, the CEPA new substances provisions, as presently drafted, suffer from a number of significant substantive and procedural weaknesses which make the achievement of this goal difficult. In particular, the relationship between the new substances provisions of CEPA and similar provisions contained in other statutes must be clarified, and the status of the CEPA provisions as providing a minimum assessment standard for all new substances affirmed. In addition, opportunities for public participation in the new substances assessment and approval process must be strengthened, as well as public access to information regarding new substances. The Act must also be amended to widen the scope of the assessment of the potential environmental and health effects of new chemical substances, strengthen the ability of the federal government to deal with substances "suspected of toxicity" or for which inadequate information to assess exists, provide clear provisions regarding the authorization and regulation of field tests of new substances, provide for more realistic assessment time frames, and to ensure the full assessment of substances intended for export from Canada.

In this context, we make the following recommendations:

The Definition of "Toxicity'

10) *The definition of "toxic" for the purposes of CEPA should be refined to stress the intrinsic characteristics of a substance in terms of its potential to cause harm to the environment or human health, rather evidence of its presence in the environment in sufficient quantity or concentration to cause "toxic" effects.*[4]

11) *CEPA should be amended to require that new substances found to be "toxic" for the purposes of CEPA be placed on the Toxic Substances List.*

A "Sunrise" Protocol

12) *CEPA should be amended to require that new substances which are persistent, bioaccumulative and "toxic" not be allowed to be manufactured, imported or used in Canada (a "sunrise" clause). Thresholds for persistence and bioaccumulation should be established through regulation. Exemptions to the "sunrise" clause should only be allowed in exceptional circumstances.*

13) *Pollution prevention plans, acceptable to the Minister of the Environment, should be required to be developed by notifying parties for "toxic" substances whose use or manufacture are not prohibited through the "sunrise" protocol, prior to their use or manufacturing being permitted within Canada.*

The Relationship Between CEPA New Substances Provisions and Other Statutes

14) *Explicit criteria for establishing the equivalency of other statutes for new substances notification and assessment purposes should be included in the CEPA new substances provisions. These criteria should include:*

- *requirements that notice be given prior to the import, manufacture or sale of a substance and for an assessment of whether it would be considered "toxic" for the purposes of CEPA;*
- *provisions for public participation in the notification and assessment process equivalent to those contained in CEPA; and*
- *the availability of federal control options for substances found to be "toxic" or suspected of being "toxic" equivalent in scope to those available under CEPA.*

15) *CEPA should be amended to require the Governor in Council to publish a list of statutes considered equivalent to CEPA for the purposes of new substances assessments.*

---

[4] A supplemental submission on the issue of the definition of "toxicity" will be provided by the Standing Committee by the CEN Toxics Caucus.

Exemptions from CEPA New Substances Provisions

16) *CEPA should be amended to ensure that the assessment of new substances includes consideration of the potential health and environmental effects of by-products arising from the production, use, storage or environmental exposure of a new substance.*

Status of Substances "Suspected of Toxicity."

17) *The capacity of the federal government to control the manufacture, or import of substances "suspected of toxicity" should be strengthened. Prohibitions on the import or manufacturing of substances found to be in this category should be permitted to remain in force beyond the two year time limit currently provided by CEPA, so long as the substance continues to be "suspected of toxicity." Requests for Boards of Review on the status of substances "suspected of toxicity" should be permitted two years after the imposition of a prohibition on the import or manufacturing of such a substance.*

Status of Substances For Which Inadequate Information Exists to Assess "Toxicity."

18) *CEPA should be amended to permit the minister to maintain prohibitions on the importing or manufacturing of a new substance until sufficient information is provided to permit an assessment of the "toxicity" of the new substance. This approach would follow that taken in the Pest Control Products Regulations regarding the registration of pesticides in such circumstances.*

Assessment of Substances for Export Only

19) *CEPA should be amended to ensure that new substances intended for export are assessed for "toxicity" in the same way as substances intended for domestic use. The export of products subject to prohibitions on manufacturing or use in Canada should not be permitted. Similarly, substances subject to conditions on use or processing in Canada should not be permitted to be exported for uses or processes which are not permitted in Canada.*

Assessment Timeframes

20) *The default assessment time limits for assessment contained in sections 32(2) and 29(2) should be extended to a minimum of one hundred eighty days.*

Field Tests of New Substances Under Assessment

21) *CEPA should be amended to require that field tests of new substances receive a specific approval under CEPA. The minister should be permitted to approve tests, approve tests subject to conditions, or to refuse to permit a test. Failure to follow the conditions of a test approval should constitute an offence under CEPA. Failures to follow laboratory procedures required by regulations made under s.32 of CEPA should also constitute an offence under CEPA.*

Public Participation in Decision-Making

22) *CEPA should be amended to require public notice in the Canada Gazette when:*

* *notification information packages are received by Environment Canada and Health Canada regarding new substances; and*
* *field tests involving the open environmental release of a new substance are proposed.*

In addition to providing notice in the Canada Gazette, the minister should be permitted to provide public notice of an impending decision under CEPA in any other manner which he or she feels appropriate.

23) *Public comment periods of not less than sixty days should be provided following all public notices provided under CEPA.*

24) *Public Notice of proposals for field tests involving the environmental release of new substances should be required to be published in a newspaper of general circulation in vicinity of the test. Requirements for the direct notification of the owners and occupiers of lands adjacent to a test site should also be included.*

25) *CEPA should be amended to permit any person to file a notice of objection requesting a Board of Review regarding:*

* *the addition of substances to the DSL (s.30);*
* *the waiving of information requirements (s.26);*
* *the approval with conditions or when prohibitions or conditions regarding substances suspected of being "toxic" are varied or rescinded (s.29);*
* *the approval of field tests of new substances, particularly those involving open release into the environment; and*
* *the need for a regulation to prohibit or control the use, manufacture, processing, sale, offering for sale, import or export of a "toxic" substance or a product containing a "toxic" substance.*

26) *Under each of these circumstances a Board of Review should be required to be established, except for when the request can be shown to be frivolous or vexatious. Ministers should be required to respond to a notice of objection requesting the establishment of Boards of Review within thirty days of receiving the request.*

27) *CEPA should be amended to provide for intervenor funding assistance to bona fide public interest intervenors in CEPA Board of Review Proceedings. A fund should be established to provide for intervenor funding awards. This might be funded through fines imposed in relation to offences under CEPA, charges imposed in the use of "toxic" chemicals, and the imposition of user fees for the new substance notifications and assessments.*

Access to Information

28) *To avoid abuse of its confidentiality provisions, CEPA should be amended to provide that:*

- *the definition of what can be kept confidential be narrowed to include only "trade secrets;"*
- *the claimant for confidentiality be required to provide supportive evidence of confidentiality when making a claim;*
- *requests for confidentiality on the identities of substances which will, or may be, released into the environment, not be permitted;*
- *requests for confidentiality should not be permitted regarding information on toxicology, ecological effects, epidemiology or health and safety studies; and*
- *there be a public appeal process regarding determinations that information is confidential.*

V. CEPA AND BIOTECHNOLOGY PRODUCTS[5]

The current new substances provisions of CEPA are designed to include biotechnology products as well as new chemicals. However, the regulation of new

[5].Refer to Appendix 3 - **CEPA, Chemical New Substances and Biotechnology**, Part III, for a detailed discussion of these issues.

biotechnology products presents a number of special challenges beyond those provided by new chemical substance. Indeed, Environment Canada and Health Canada have recognized biotechnology products as a unique category of new substances. The departments have been developing a separate notification regulation of biotechnology products under section 32 of CEPA. A commitment to establish a national regulatory regime to address the environmental risks of the biotechnology industry by 1995 was made in the federal government's Green Plan.

Biotechnology products present a number of special environmental and health risks which distinguish them from traditional chemical substances. Two major areas of concern have been identified in this regard:

(a) Many biotechnology products include life-forms which are self-replicating. Once released into the environment, they can reproduce, spread and mutate and transfer genetic material. The control of biotechnology products, and their genetic material, once in the environment, will therefore be difficult, if not impossible.

(b) The technologies employed in the development of many new biotechnology products have only emerged over the past twenty years (especially recombinant DNA and cell fusion technologies). The evaluation of such products for potential environmental damage is surrounded by a great deal of uncertainty. Indeed, the scientific literature reflects wide concerns regarding the lack of adequate methodologies and data to properly assess the environmental and health effects of the products of biotechnology.

Methods of predicting the consequences of deliberate introduction of new life forms in the environment are still under development. The potential risks associated with biotechnology products are often described as being of a "low probability, high consequence risk." In other words, although the chances of something going wrong may be very slight, if something does go wrong, the ecological consequences may be tremendous. In addition, concerns have been expressed by a wide range of stakeholders regarding the value and purpose of many of the emerging applications of biotechnology which may be released into the environment.

The "toxicity" test forms the basis for CEPA's regulation of new substances. New substances must be found "toxic" under the definition employed by CEPA in order to be regulated under the Act. A number of problems have been identified with the definition and application of the concept of "toxicity" under CEPA in relation to chemical substances. Furthermore, the "toxicity" standard, as it is presently applied in the context of chemical substances appears to be too narrow an evaluative structure in relation to the potential scope of the effects of the use of biotechnology products. In addition, it is an excessively stringent test in relation to the level of uncertainty regarding the environmental and health effects of these products. This is especially true with respect to the potential long-term, indirect and cumulative environmental and health risks associated with

biotechnology products.

The "toxic" standard employed in CEPA was largely developed for the purpose of establishing federal constitutional authority to regulate potentially harmful chemical substances. It was intended to define a distinct and bounded category of substances to be controlled through the federal parliament's general power to legislate for the Peace, Order and Good Government of Canada. However, the federal authority to regulate biotechnology products may not require the establishment of "toxicity," as is the case with chemical products. Federal jurisdiction over new subjects with national dimensions, and over Agriculture, Fisheries, Trade and Commerce, and criminal law in relation to public health, may provide the basis for federal regulatory authority over biotechnology products independent of "toxicity." Furthermore, those few provinces which have considered the regulation of biotechnology products appear to be prepared to concede primary responsibility for their assessment and approval for use in Canada to the federal government. A division of responsibility similar to that which has emerged regarding pesticides, in which the federal government assesses and registers products for general use in Canada, and the provinces authorize specific applications, may be envisioned for biotechnology products which might be released into the environment.

The unique characteristics of many biotechnology products as life forms, the level of uncertainty regarding the assessment of their potential environmental and human health impacts, and lack of consensus regarding the value of many of their applications makes apparent the need to address these products differently from chemical new substances under CEPA.

A New Biotechnology Part for CEPA

29) *A new and separate part of CEPA should be enacted to deal specifically with biotechnology products. This part would, in effect, establish a federal registration and regulatory system for biotechnology products which may enter the Canadian environment or be exported from Canada.*

The major features of this part would include the following.

Scope

30) *The biotechnology part of CEPA would regulate all releases of genetically engineered organisms, and releases of naturally-occurring organisms into habitats in which they do not occur naturally, or in quantities or concentrations beyond those in which they naturally occur. Notification and assessment requirements would be established to cover all stages of product development in which environmental releases might occur, from laboratory research to*

commercialization.

The Relationship Between CEPA and Other Statutes Regulating Biotechnology Products

31) *As is proposed with respect to new chemicals, biotechnology products could continue exempted from the requirements of the CEPA notification and assessment process, if they are regulated through another statute which clearly provides for an equivalent process. Criteria for equivalency should include:*

- *requirements that notice be given prior to the testing, import, manufacture, use or sale of the substances and for an assessment of the:*
  - *purpose;*
  - *efficacy;*
  - *direct, indirect and cumulative environmental and human health impacts; and*
  - *availability of alternatives to the biotechnology product;*
- *provisions for public participation in the notice and assessment process equivalent to those contained in the CEPA biotechnology part; and*
- *the availability of federal control options equivalent in scope to those available under the CEPA biotechnology part.*

32) *The Governor in Council should be required to publish a list of statutes considered equivalent to CEPA for the purpose of the assessment of new biotechnology products.*

Field Tests and Laboratory Procedures

33) *Field tests of new biotechnology products should require a specific approval under CEPA. The minister should be permitted to approve tests, approve tests subject to conditions, or to refuse to permit a test. Failure to follow the conditions of a test approval should constitute an offense under CEPA.*

34) *Notice of proposals for field tests would be required to be published in a newspaper of general circulation in vicinity of the test. Requirements for the direct notification of the owners and occupiers of lands adjacent to the test site should also be included. A comment period of not less than sixty days should follow notice of a proposed field test. Mechanisms to provide for the filing of notices of objection and the establishment of Boards of Review in the event that members of the public object to the conduct of a field test are also required.*

35) *The capacity of the Governor-in-Council to make regulations regarding laboratory*

procedures regarding biotechnology products should be clearly established. Failures to follow laboratory procedures required by regulations should constitute an offense under CEPA.

Assessment Criteria

36) *In determining whether to approve, approve with conditions or prohibit the use, manufacturing, processing, sale, offering for sale, import or export of a new biotechnology product or products containing the new biotechnology product, the minster should consider:*

- *the information received from the proponents;*
- *comments received from members of the public; and*
- *information available from any other source regarding:*
  - *the purpose for which the biotechnology product has been developed;*
  - *the effectiveness of the product for its intended purpose;*
  - *the biological and ecological characteristics of the biotechnology product*
  - *the potential immediate and long-term direct and indirect environmental and human health effects of the product, including the cumulative effects of commercial scale use and impacts on biodiversity;*
  - *the availability and likely effectiveness of monitoring, control, waste treatment and emergency response plans with respect to the product; and*
  - *the availability of alternative means of achieving the product's purpose which may pose lower environmental and health risks.*

37) *Products whose assessment demonstrates:*

- *the potential for harm to human health or the environment;*
- *ineffectiveness for their intended purpose;*
- *the availability of alternatives which have a lower potential for harm to the environment or human health; or*
- *whose intended purpose is found to not to serve the public interest,*

should not be approved for use or manufacturing in Canada.

Public Participation in Decision-Making

38) *The public participation provisions of the biotechnology product assessment process would parallel those proposed for the assessment of new chemical substances under CEPA. This would include:*

- *public notification when applications for the approval of the manufacture, use, import or export of new biotechnology products, or products containing new biotechnology products are made, in the Canada Gazette.*
- *provision of a public comment period of not less than ninety days following the notice;*
- *public access to the information submitted in response to the information requirements regarding new biotechnology products in a manner consistent with the principles outlined in the Chemical New Substances section of this submission* **(Recommendation 28).**

39) *Notice of the minister's decision regarding the approval for use or manufacturing in Canada of a new biotechnology product would be provided in the Canada Gazette, to the applicant, and to any person who made a comment during the public comment period. A decision to approve or approve with conditions would not take effect for a period of thirty days to provide an opportunity for any person to file a notice of objection requesting the establishment of a Board of Review. Notice and opportunities to file notices of objection should also be available when the variations to approvals, approvals with conditions or prohibitions are proposed.*

40) *Procedures for Boards of Review regarding biotechnology products would follow those proposed for Boards of Review regarding chemical new substances* **(Recommendations 26 and 27).** *Boards would have to be established unless the request is frivolous or vexatious, approvals should be suspended until any notice of objection is resolved, and intervenor funding should be provided for bona fide public interest intervenors.*

Biotechnology Environmental Release Database

41) *The establishment of a data-base on the environmental release of all biotechnology products in Canada should be provided for. All environmental releases should be required to be entered into the data base, and members of the public should have direct access to the data base.*

This proposal for the establishment of a separate biotechnology part of CEPA is intended to provide the basis of a regulatory structure for biotechnology products which

would ensure the protection of environmental integrity and human health, and strengthen public confidence in the government of Canada's evaluative and regulatory processes for these products.

VI. CEPA AND ECONOMIC INSTRUMENTS[6]

As our understanding of the underlying economic and political causes of environmental degradation increases, it has become apparent that it is necessary to expand the range of tools which we employ to protect the integrity of the environment. In this context, "economic" policy instruments, such as the imposition of taxes on environmentally harmful activities, and the creation of markets for permits to emit pollutants, have attracted growing interest over the past few years.

Economic instruments have been incorrectly touted both as "voluntary" mechanisms and as enforcement tools. Economic instruments, such as environmental taxes and tradeable permits, are defined, for the purposes of this discussion, as those instruments having the potential to alter behaviour by providing monetary incentives to reduce and/or eliminate the creation and discharge of contaminants. Economic incentives, such as subsidies, can also alter behaviour, yet they do so through encouragement, rather than as parts of regulatory systems.

There are several critical prerequisites for a successful regulatory regime which includes the use of economic instruments. The first requirement is a discharge monitoring system that allows both the firm and the regulators to measure accurately total discharges and any reduction in discharges for the purposes of approving a trade or levying a tax. Secondly, clearly enforceable environmental quality standards, must be established to serve as baselines for a minimum level of environmental quality that have to be met at all times. These points highlight one of the fundamental obstacles to the use of tradeable permits and discharges fees under CEPA: the general paucity of permitting provisions in the Act.

Economic instruments can be used to supplement traditional regulatory systems. They cannot, however, replace such systems. Furthermore, it is essential, that economic instruments be designed very carefully to promote pollution prevention. Instruments of this nature must be supported by detailed enactments, which clearly establish all of the necessary aspects of the system. This would be especially important in the case of tradeable permit systems. Adequate provisions for monitoring and enforcement must also be made.

---

[6].Refer to Appendix 4 - **CEPA and Economic Instruments**, for a detailed discussion of these issues.

Emissions Trading

Experience with emission trading systems is extremely limited and their effectiveness is a matter of considerable arguement. The practicality of implementing such systems successfully is a matter open to serious question. Trading systems require extensive and complex administrative, monitoring and enforcement structures, and their potential environmental and economic effectiveness, even when such mechanisms are in place, is the subject of continuing debate.

In the context of CEPA, the dearth of permitting provisions under the Act presents a major problem in the design and implementation of a trading system at the federal level. To what federal permission would the tradeable permits attach? In light of the problems surrounding the use of tradeable permit regimes, particularly with respect to "local loading" effects, the authorization of the trading of ocean dumping permits, the only formal approval presently granted under CEPA, cannot be recommended.

The problem of "local loading" and numbers of potential sources of emissions also render trading systems inappropriate for the management substances considered "toxic" for the purposes of CEPA. The maintenance of the integrity of the environment should not be placed at risk to achieve theoretical promises of economic efficiency.

There is, theoretically, a potential federal role in management of a trading system regarding non-"toxic" air emissions which permits interprovincial trades. However, in addition to overcoming the extensive administrative, enforcement, monitoring and distributive problems associated with trading systems, the federal and provincial governments would be required to work together in a manner unprecedented in the Canadian environmental policy experience in order to establish such a system. Legislative provisions to implement a system of this nature could not be considered until a complete system design, acceptable to all stakeholders, was developed.

42) *CEPA should* **not** *be amended to permit the trading of ocean dumping permits or emission trading involving substances considered "toxic" for the purposes of CEPA.*

Fees and Charges

The imposition of discharge fees under CEPA may present a number of problems, especially in relation to the absence of federal discharge permitting systems, except for ocean dumping, and the potential of federal discharge fees to interfere with provincial environmental permitting systems. Charges levied on the manufacture, use, or processing of "toxic" substances would avoid the possibility of interference with provincial jurisdiction, and provide incentives to reduce the manufacturing or use of such substances.

43) *Section 34 of CEPA should be amended to permit imposition of charges on use,*

processing, manufacturing, sale, import, or export of a "toxic" substance or products containing a "toxic" substance.

44) *Revenues raised from such charges should be employed to finance federal contributions to the National Contaminated Sites Rehabilitation Program. Revenues might also be used to support the development and diffusion of skills and technologies related to pollution prevention within Canada.*

VII. CEPA AND THE FEDERAL HOUSE IN ORDER[7]

It is widely accepted that the federal government has failed in its declared goal of demonstrating moral leadership in the field of environmental protection. It has not made the implementation of Part IV of CEPA a high priority, and has relied almost entirely on a voluntary approach to compliance. In order to address this failure we make the following recommendations.

45) *CEPA should be amended to permit, on the recommendation of the Minister of the Environment, the Governor in Council to make regulations for the purpose of the protection of the environment with respect to federal works, undertakings or lands. Such regulations would take precedence over any other regulations resulting in environmental protection applying to federal works, undertakings or lands made under any other Act of Parliament.*

46) *CEPA should be amended to permit, on recommendation of the federal Minister of the Environment, the Governor in Council to make regulations for the protection of the environment with respect to the activities and operations of federal departments, boards, agencies and, where appropriate, corporations named in Schedule III of the Financial Administration Act.*

47) *The Minister of the Environment should be permitted to make "Environmental Protection Orders" for the purpose of protection of the environment with respect to federal works, undertakings or lands, and with respect to the activities and operations of federal departments, boards, agencies and Financial Administration Act Schedule III corporations in the absence of regulations made for this purpose by the Governor in Council. Such orders should be legally binding instruments.*

48) *CEPA should be amended to require that each federal department, board, agency and Financial Administration Act Schedule III Crown corporation develop an environmental management plan. Initial plans should be required to be in place*

---

[7].Refer to Appendix 5 - **CEPA and the Federal House in Order** for a detailed discussion of these issues.

within one year of coming into force of the amendments to CEPA. CEPA should also require that, once in place, Environmental Management Plans be reviewed publicly every four years.

Each Environmental Management Plan would outline:

* *The key environmental issues facing the department, board, agency or corporation in its operations and activities; and*

* *an implementation plan to ensure that in its operations and activities the department, board, agency or corporation:*
  - *practices and promotes pollution prevention through the reduction and elimination of the use, generation or release of pollutants into the environment;*
  - *practices and promotes natural resource conservation through energy efficiency, water efficiency and waste reduction, reuse, recycling and composting;*
  - *protects and enhances biodiversity;*
  - *promotes the conservation, protection and enhancement of ecosystem integrity; and*
  - *protects environmentally sensitive areas.*

The adequacy of Environmental Management Plans and compliance with requirements could be regularly reviewed and reported upon by the proposed federal Environmental Commissioner.

VIII. FIVE YEAR PARLIAMENTARY REVIEWS OF THE PROVISIONS AND OPERATION OF CEPA

49) *CEPA should be amended to require a comprehensive review of the provisions and operation of the Act every five years by such committee of the House of Commons, or of both Houses of Parliament, as may be designated or established by Parliament for this purpose.*

IX. CONCLUSIONS

To date, CEPA's impact on environmental protection in Canada has been a major disappointment. This failure arises from fundamental problems related to the federal government's approach to its role in environmental protection within Canada, and Environment Canada's unwillingness to act on the regulatory mandate provided to it by CEPA. These issues cannot be fully addressed through amendments to Act. Rather, action at the political level is required.

In addition, CEPA is in need of major revisions to strengthen the enforcement of federal environmental statutes, increase public participation in decision-making, improve accountability for decisions made under the Act, enhance the capacity of the federal government to regulate "toxic" substances and biotechnology products, and widen the range of tools available to the federal government in these tasks.

CIELAP anticipates that the review and reform of CEPA will be the major environmental legislative initiative of the federal government in the next two years. We hope that our submission will be of assistance to the Standing Committee in its work, and look forward to further opportunities to contribute to this important process.

APPENDIX 1

THE CONSTITUTION, FEDERAL-PROVINCIAL RELATIONS, HARMONIZATION AND CEPA

Prepared by:

Karen Clark, B.A., M.A., LL.B.

and

Barbara Rutherford, B.A., LL.B.
Research Associates

Canadian Institute for Environmental Law and Policy
September 1994

TABLE OF CONTENTS

I. **INTRODUCTION** 1

II. **FEDERAL JURISDICTION AND CEPA** 2
1) General Principles of Constitutional Law 3
i) The Nature of the Division of Powers 3
ii) Pith and Substance 3
iii) Ancillary Power 4
iv) Paramountcy 4
2) Specific Federal Areas of Jurisdiction Pertaining to CEPA 5
i) Peace, Order and Good Government ("POGG") 5
ii) Criminal Law Power in Relation to Public Health 6
iii) Trade and Commerce 7
iv) Fisheries Power 7
v) Taxation and Spending Powers 8
3) The Canadian Charter of Rights & Freedoms 8
4) Conclusions 8

III. **FEDERAL/PROVINCIAL RELATIONS AND CEPA** 8
1) Cooperative Federalism 9
2) Uncooperative Federalism and Environmental Protection 10
i) Equivalency Agreements under CEPA 10
ii) Administrative Agreements under CEPA 12
iii) Intergovernmental Agreements 12
iv) Reforming the Use of Intergovernmental Agreements Through CEPA 14
3) Federal/Provincial Advisory Committee 14
4) Canadian Council of Ministers of the Environment (CCME) 15

IV. **HARMONIZATION** 16
1. Introduction 16
2) Questions and Concerns Regarding the "Harmonization" Exercise . . 17
i) "Duplication and Overlap" and the Goal of "Efficiency" 18
ii) The Division of Roles and Responsibilities 19
iii) National Standards and the Dynamics of Harmonization 20
iv) "Partnerships" and the Uncertain Role of the Public 24
3) Conclusions 24

V. CONCLUSIONS AND RECOMMENDATIONS 25
1) Constitutional Jurisdiction and The Federal Role in Environmental Management 25
2) Intergovernmental Agreements 25
3) Harmonization 26

ENDNOTES 28

THE CONSTITUTION, FEDERAL-PROVINCIAL RELATIONS, HARMONIZATION AND CEPA

I. INTRODUCTION

In its document providing an overview of the issues for CEPA review,[1] Environment Canada identifies sustainable development and the coordination and harmonization of federal and provincial legislative and regulatory initiatives as two key issues. This paper explores the issues of constitutional basis of the federal role in environmental management, intergovernmental relations and the "harmonization" exercise currently being conducted under the auspices of the Canadian Council of Ministers of the Environment (CCME) in the context of sustainable development.

A brief overview of how governmental responsibility for environmental protection is allocated under the Canadian Constitution is provided. This is followed by a review of the past and current state of federal-provincial relations with respect to the environment. This review concludes that cooperation has been the exception rather than the rule in the environmental field.

Intergovernmental agreements are identified as an important exception to the general history of federal/provincial non-cooperation. Unfortunately, where the federal and provincial government have come to agreements to share responsibility for environmental protection, the results have been disappointing. These agreements present Canadian citizens with a number of challenges, as being administrative in nature, they require neither public comment nor review, and there are no mechanisms within them by which citizens can compel enforcement of the legislation to which the agreements apply.

Although not currently addressed within CEPA, the "harmonization" exercise presently being pursued through the CCME will have major implications for the future role of the federal government in environmental management in Canada. The harmonization initiative proposes to do something that has never been accomplished before: it attempts to establish clear, consistent, national environmental protection standards for Canada. However, given the poor past record of federal/provincial cooperation, and federal government's weak approach to its national role, the harmonization project has the potential to result in a "race for the bottom." The national standards achieved under harmonization may be whatever the lowest provincial standards are now.

Throughout the discussion, it is apparent Federal/provincial relations have been strongly coloured by federal reluctance to stand on its constitutional authority to protect the environment. Yet the achievement of environmentally sustainable development in Canada will require a strong federal role. The federal government must exercise its authority to set minimum national environmental protection standards for all Canadians.

II. FEDERAL JURISDICTION AND CEPA

The extent to which the Constitution of Canada affects the regulatory powers of the federal and provincial governments used to be an esoteric subject matter -- the province of constitutional scholars in their ivory towers. No longer can this be said to be true, as the average Canadian, including the average bureaucrat and politician, has been subjected to more constitutional debate during the past few years than they would likely have ever desired. That being said, it is necessary here to reiterate a summary of the division of powers as it relates to the federal government's management of the environment.

Constitutional law, even with its recent infamy, still remains one of the most complex areas of jurisprudence. Thus while we attempt to present a synopsis of the relevant constitutional issues pertaining to the CEPA review, this discussion should in no way be considered to be a comprehensive legal opinion.[2] Discussion of constitutional law is worse than useless in a vacuum; therefore our primary recommendation at the outset is that the Standing Committee refer specific questions of constitutional law to a panel of well-known and respected constitutional and environmental experts, including lawyers from outside the federal and provincial governments. Moreover, we heartily recommend that this advisory panel be struck with the mandate to recommend how CEPA reform can be accomplished under the constraints of the constitution; rather than encouraging yet another negative pronouncement on why the federal government cannot do what it must do to protect the health and environment of all Canadians. Our constitution is a "living tree" with flexibility to serve many generations of Canadians. What we have been lacking is the vision and innovation to use our constitution in this way. Instead, we allow our politicians and bureaucrats to pass the "jurisdictional buck" back and forth, most often behind closed doors without the public's input.

As should be well-known by all Canadians at this point, the Constitution of Canada has two distinct parts; the *Constitution Act*, 1867 contains the division of powers between the federal and the provincial governments and the *Constitution Act*, 1982, contains the Canadian Charter of Rights and Freedoms. Both parts affect the manner in which environmental regulation can be implemented. The division of powers provides the blueprint for which level of government is entitled to regulate in any specific subject matter, while the Charter constrains the manner in which each government can apply their laws to individuals.

The division of powers presents the largest obstacle to a comprehensive federal environmental regulatory framework, although many hold the opinion that this obstacle is more perceived than real.[3] A growing body of scholarly papers have addressed the constitutional division of powers over the environment, indicating at the very least the

profound concern that the constitution should not limit the ability of Canadian governments to adequately regulate environmental matters.[4] Furthermore, the balance of these writers affirm the necessity for a strong federal role in environmental management.

That the enactment of CEPA was intended to provide this strong federal role in relation to the regulation of toxics is not disputed.[5] Similarly, it is not disputed, at least by the environmental community and some constitutional scholars, that CEPA has not lived up to its potential in terms of the ecological necessity to provide comprehensive management of toxics in the Canadian environment.[6] Finally, it is clear that the constitutional mandate of CEPA should be reviewed in light of the imperative of a pollution prevention approach.[7]

What follows is a brief discussion of general constitutional law principles as well as a brief overview of the most important federal powers over the environment. The general principles provide the basis rules for constitutional interpretation and are provided here to demonstrate that such interpretation is not a simple question of deciding whether an impugned provision or regulation is local or national in scope.[8]

1) General Principles of Constitutional Law

i) The Nature of the Division of Powers

Theoretically, most of the division of powers pursuant to sections 91 and 92 of the Constitution Act, 1867 are supposed to "exhaustive" and "exclusive"; meaning that in respect of the powers enumerated therein, each government is supreme within its own sphere. As a practical matter generally, and particularly with respect to environmental matters, there is considerable overlapping jurisdiction, or "concurrency". The doctrine of concurrency allows the legislative competence of both levels of government to coexist as long as there is no direct conflict[9], and belies the notion of exclusivity.

ii) Pith and Substance

When courts are faced with the question of jurisdictional competence, the first threshold to cross is to determine the "pith and substance" of the impugned law. This inquiry leads to the determination of the most important feature of the law for the purposes of classification according to the division of powers[10]; taking into consideration both the purpose and effect of the law.

The application of the pith and substance doctrine allows one level of government to enact laws that impact substantially on matters outside its jurisdiction.[11] In such

situations, the court finds that the impact on the other government's jurisdiction is permissible as it is merely "incidental" to the constitutionally valid purpose and effect of the law.

A law which contains both federal and provincial powers can in some cases be treated as competent to both the federal and the provincial legislatures.[12] Where concurrent jurisdiction is identified, there exists the possibility for conflict between a valid federal law and a valid provincial law. Federal laws are usually paramount in the case of conflict. The question of how far one government can go in impacting another government's jurisdiction has been the subject of much judicial discussion as the lines of the division of powers can easily become imprecise, upsetting the delicate balance of power between the two levels of government.

iii) Ancillary Power

Whereas the constitutions of the United states and Australia include an "ancillary" power in the enumerated federal powers, there is no such power in the Canadian constitution; nevertheless, several courts have implied such a power.[13] Other courts have developed different tests to set limits to the encroachment by one level of government on areas of jurisdiction of the other.[14] To make this area of constitutional law more oblique, there is *obiter dicta*[15] from the Supreme Court in 1978 that supports the existence of the "ancillary" power but only with respect to the Parliament of Canada.[16] It is not clear why the articulation of such a doctrine is needed given the "pith and substance" doctrine.[17] In any event, as a general conclusion it can be said that some encroachment is allowable sometimes under some circumstances.

When a law is validly enacted, there may arise the question of whether the law validly applies to the other level of government. Such questions of interjurisdictional immunity are beyond the scope of this discussion.

iv) Paramountcy

The doctrine of paramountcy applies when there are inconsistent, or conflicting, federal and provincial laws. In such a situation, the federal law prevails, rendering the provincial law *ultra vires* to the extent that it is inconsistent or in conflict with the federal law. It must be stressed that the question of paramountcy only arises once it is determined that there are conflicting validly enacted federal and provincial laws. Otherwise, the problem of conflict is resolved without recourse to the doctrine of paramountcy. A validly enacted provincial law would have to expressly contradict a federal law for it to be defeated; that is, where "compliance with one law involves a breach of the other".[18]

2) Specific Federal Areas of Jurisdiction Pertaining to CEPA

i) Peace, Order and Good Government ("POGG")

Since the Supreme Court of Canada's decision in 1988 concerning the federal government's regulations under the *Ocean Dumping Control Act*[19], there has been renewed interest in the federal government's peace, order and good government ("POGG") clause[20]. The majority of the court held that marine pollution could be regulated by the federal government under the "national concern" branch of POGG. The majority held that marine pollution fit the national concern test of being a matter that had a "singleness," "distinctiveness," and "indivisibility" such that the provinces, even if they act in unison would be unable to effectively legislate in the area. Le Dain J., for the majority stated: "For a matter to qualify as a matter of national concern... it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution."[21]

This decision has been touted as powerful support for a federal environmental protection power; however, the court has since clarified that the environment is too diffuse a topic to be assigned to one level of government.[22] Thus, it is necessary to look at discrete areas of environmental regulation such as control over toxic substances.

The inability of the federal government to secure adequate provincial cooperation on toxics regulation to date presents strong evidence, in the context of any constitutional challenge to current and future CEPA provisions and regulations, that the provincial inability to regulate toxics requires unilateral federal action.[23] This evidence of unsuccessful efforts to cooperate on these matters of national and international importance would likely help support the federal government's assertion that federal legislation is justified under the "national concern" test.[24] Hogg goes so far to state that: "It seems, therefore, that the most important element of national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it adverse consequences for the residents of other provinces."[25]

Moreover, the development of international law on toxics and biodiversity support that these issues have recently been recognized as matters on international importance and as such require federal regulation.[26]

The residual federal power, or POGG, has been used to fill the "gaps" in the powers divided between the federal government and the provinces,[27] as well as pertain to matters which are of "national concern".[28] The definition of matters on national concern was confirmed in the *Canada Temperance* case as follows:

"In their Lordships' opinion, the true test must be found in the real subject

matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the Aeronautics case and the Radio case), then it will fall within the competence of the dominion Parliament as a matter affecting the peace, order, and good government of Canada, although it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances; so, too, may be the drink or drug traffic, or the carrying of arms. In *Russell v. The Queen*, Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a provincial legislature dealing with an aspect of the same subject in so far as it specially affects that province."[29]

The national concern branch of POGG was relied solely upon by the S.C.C. in three cases concerning; aeronautics[30], the national capital region[31], and marine pollution.[32]

ii) Criminal Law Power in Relation to Public Health

The constitutional validity of several important federal public welfare statutes has been upheld on the basis that the legislation was valid criminal law enacted for the protection of the health and safety of Canadians. The importance of the criminal law power in respect of the constitutionality of CEPA should not be understated. It is crucial that criminal penalties remain a part of CEPA's enforcement regime from a constitutional perspective.

The Hazardous Products Act

The Manitoba Court of Appeal upheld the constitutionality of certain provisions of the Hazardous Products Act which prohibit the selling of particular infant cribs on the ground that they were dangerous.[33]

The Food & Drug Act

The S.C.C. upheld certain provisions of the Food and Drug Act which prohibited the sale of contaminated or adulterate drugs and prohibited the sale of drugs in a false or misleading manner on the basis that the main purposes of the act were characterized as the protection of the public from adulteration and the suppression of fraud.[34]

The Clean Air Act[35]

The Manitoba Court of Appeal upheld the constitutional validity of the Clean Air Act, which prohibited the emission of air contaminants in quantities which would constitute a significant danger to the health of persons. Simonsen J. found that "the dimensions of the health risk arising from air pollution is not proscribed by provincial boundaries. The harmful ingredients in air pose a national health risk."[36]

The main issue in ensuring that the federal government has not used its criminal power to unlawfully usurp provincial power is the extent of the regulation and whether the legislative scheme contains prohibitions and/or the power to prohibit[37] in pursuit of some legitimate public purpose such as "public peace, order, security, health, morality..."[38]

The emerging body of scientific documentation of the adverse, irrevocable and persistent effects of toxics in the environment[39], as well as the evidence of cross-media contamination from toxics in our land, air and water, would support the submission of a very different brief by the government of Canada in 1994 to justify both prohibition of toxics and cradle-to-grave regulation of toxics[40], then would have been possible at the time of CEPA's enactment. Thus the analysis of CEPA's constitutional underpinnings must evolve in light of this new scientific reality. There can be no doubt today that inadequate regulation of toxics in Canada presents dangers to the health of all Canadians and Canadian ecosystems, as well as to other communities and ecosystems in the world.

iii) Trade and Commerce

The federal government has jurisdiction to enact laws in relation to "trade and commerce".[41] In order to limit this potentially pervasive federal power in a way consistent with the division of powers, the courts have determined that there are two prongs; "...(1) political arrangements in regard to trade requiring the sanction of parliament, (2) regulation of trade in matters of interprovincial concern."[42] It may also be that the power would include the general of regulation trade affecting the whole dominion.[43]

iv) Fisheries Power

The federal government also has power over "sea coast and inland fisheries"[44] This power allows the federal government to regulate over environmental matters that adversely affect fish. The courts have found that this power does not permit the federal government to prohibit or regulate water pollution, without there being a direct connection to the health of fish.[45] The regulation of toxics is clearly connected to the health of fish, whether the fish habitat is affected by water pollution or air deposition.

v) Taxation and Spending Powers

The federal government has the power to raise revenue through direct and indirect taxation. This taxation power potentially has many uses for environmental protection. However, the federal government's taxing power cannot be used to indirectly usurp provincial powers. Thus any use of a federal environmental "toxics" tax should be clearly associated with the federal government's toxics management program.

The federal "spending power" is not specifically enumerated in the constitution. However, the federal government can use this power to influence areas of provincial jurisdiction by subsidizing certain provincial activities and by allocating conditional grants to provinces where they follow federal rules. In the absence of a clear concurrent power over environmental protection, the use of such persuasion could be a valuable tool for environmental regulation, especially with respect to national standard setting.

3) The Canadian Charter of Rights & Freedoms

The Charter provides for fundamental rules governing relations between individuals and the government. Again, any discussion of potential Charter infringements must be dealt with in the context of specific CEPA provisions or amendments. The most likely context in which such challenges could arise is in the enforcement provisions. The Charter protects individuals' procedural rights, including the right to silence.[46] Where an accused faces loss of liberty, life or security of the person, they cannot be compelled to provide self-incriminating information.[47] This limitation on the use of self-reporting data indicates the need for administrative penalties for some violations of CEPA.

4) Conclusions

The Canadian constitution presents a challenge in the reform of CEPA. The Act must be amended in a manner which ensures adequate protection of the environment and the health of Canadians from toxic contamination, and other environmental and health matters of national and international concern, while not being potentially subject to years of constitutional litigation. The political sensitivities regarding provincial autonomy[48] must not stand in the way of needed reform. Under several heads of power, the federal government has clear jurisdiction to regulate certain environmental matters, including the matter of the establishment of national standards for the control of toxic substances in Canada.

III. FEDERAL/PROVINCIAL RELATIONS AND CEPA

As argued above, there are clear constitutional grounds for federal jurisdiction over national environmental regulation. It is also clearly the case that, under the Constitution, responsibility for environmental regulation is most properly shared between the federal and provincial governments. This section of the discussion will review first the importance of cooperative federalism. Second, the discussion will review current federal/provincial relations as acted upon, and as provided for, under CEPA. A comparison of the former with the latter discussion will show that, so far as cooperation and coordination of effort are concerned, there is a marked shortfall in what could be accomplished. This shortfall will be relevant in our discussion in the section on harmonization.

1) Cooperative Federalism

Since the early 1980s, public and political attention has focused on the question of strong national standards in Canada. These concerns arose from a variety of factors: changes in the economy including the transition from a resource-based to a post-industrial, information-based economy, increasing awareness of the disparate impacts of these economic changes on the provinces, and an inclination on the part of the federal government to decentralize power.[49] Originally these concerns had to do with the national social support infrastructure (health care, unemployment insurance, pensions), but they also extend to other national concerns such as regulation of transportation and the environment. At approximately the same time that these concerns entered discussions of law and policy, came the Brundtland Report regarding sustainable development. Our Common Future strongly advocates nationally standardized environmental regulation, understanding that uniform standards protect against the creation of "pollution havens," as well as conferring other benefits.[50]

The basic idea of cooperative federalism is that the federal government will work with the governments of the constituent units of the federation to establish uniform and equitable regulatory standards and programmes that will be applied and administered jointly by the governments of the constituent units and the federal government. Cooperative federalism may also require the transfer of resources from the central government to the constituent governments, and the transfer of resources from richer to poorer constituencies. This transfer of resources is necessary because uniform standards require uniform capacity to meet and enforce those standards. In theory, cooperative federalism allows for uniform, consistent and equal provision of services, and application of regulations, in each unit of the federation. The benefits of centralized standards and cooperative federalism are clear: equitable distribution of resources ensure a better standard of living for the nation's citizens; a consistent and consistently applied regulatory regime is more efficient and predictable and therefore, more amenable to the interests of industry and economic activity generally.[51]

In practice, Canadian federalism provides for some elements of the model, such as the national health care system and transfer payments between the federal

government and the provinces. As discussed in the second section of this paper, Canadian constitutional law establishes a legal framework within which mechanisms of cooperative federalism function.

In Canada this has meant achieving national standards without infringing unacceptably upon provincial jurisdiction. It can also mean, in its broader sense, how one can achieve the benefits of national citizenship or policy harmonization without losing the benefits of more effective and efficient program delivery by the provincial or local levels of government.[52] The question of "infringing unacceptably upon provincial jurisdiction" has coloured much of the debate around cooperative federalism in the realm of environmental protection.

2) Uncooperative Federalism and Environmental Protection

There is a disconcerting consensus in discussions of the matter that the provinces resent federal intrusion in the realm of environmental regulation because the provinces were "there first." The consensus is disconcerting because, as "murky" a medium as Canadian constitutional law is, there is nothing in it to support the assertion that jurisdiction over a particular matter belongs to whoever gets "there first." Still, the claims are made:

> "In the short term, the expansion of environmental activities by both levels of government in the late 1980s has led to overlap and increased tension. CEPA was a major contributor to this tension, since it proclaimed a more interventionist federal presence in what had traditionally been largely a provincial domain of activity."[53]

And again:

> "The overall result [of CEPA] is a federal move into environmental protection territory that was previously regarded as largely, if not exclusively, provincial."[54]

The matter of jurisdiction has already been discussed in this paper, and the issue of the putative problem of duplication will be discussed below in the section dealing with harmonization. The rest of this part of the discussion will review the mechanisms under (and in the general vicinity of) CEPA that have attempted to deal with the aversion of the provinces toward the federal government stepping into their regulatory back yard.

i) Equivalency Agreements under CEPA

The equivalency agreements provided for under s. 34 of CEPA were enacted in

response to provincial objections to federal intrusion on an area they already regulated.

> "Flexibility was introduced. [Under equivalency agreements] CEPA regulations, but not the entire Act, would draw back and not apply in provinces where it is agreed in writing between the federal minister and the provincial government that provincial laws are equivalent."[55]

Responses outside of governments to these provisions has been mixed. Some argue that equivalency agreements serve as a "roadblock" to effective, national regulation of toxics and will result in a patchwork of provisions across the country.[56] Others are more optimistic and see the potential in the equivalency agreement provisions for true harmonization of national toxics regulation.

But for the recent publication of the Alberta Equivalency Order, these discussions would be rendered moot by the fact that no province has, until now, entered into an equivalency agreement with the federal government.[57] RFI indicates that negotiations for other agreements have been ongoing for some time, however.[58] Equivalency has been a tough regulatory nut to crack for a number of reasons, only one of which is provincial disinclination to cooperate. RFI cites several problems that have been encountered on the way to equivalency: provincial incapacity to meet the equivalency criteria of sections 108 and 109 of the Act concerning citizen's requests for investigations; the fact that the federal government took more time than expected to put toxics regulations in place; the cost of formulating and implementing equivalency agreements; and the difficulty of determining what, exactly, "equivalent" means.[59]

Although equivalency agreements were to have been a concession to the provinces, RFI notes that "[t]he CEPA provision for equivalency agreements is clearly an irritant in federal-provincial relations."[60] The comments collected by RFI from provincial officials regarding equivalency reflect this:

> "Several provinces expressed their reluctance to change their laws, their priorities or the way they did business "just because the federal government wants to do things differently." They chafe at having to develop equivalent procedures and argue that greater emphasis should be placed on achieving equivalent results instead....They complain about being forced to undertake activities they would have chosen not to carry out....At least four provinces state that they do not intend to negotiate equivalency agreements...[which] reflects more an unwillingness to change their regulatory approach and a skepticism about the federal government's ability to go it alone than an implicit acceptance of the federal role. One provincial official sums up the attitude of several of his colleagues this way: 'Let's stand back and watch them try to enforce all these regulations.'"[61]

The federal government has apparently softened its stance on equivalency, and appears to be bending more toward "equivalency of effect" provisions as opposed to identical provisions in provincial regulations, which may serve to deal with some of the complaints.

However, the other complaints expressed -- the aversion to doing things differently, being forced to undertake tasks not currently undertaken, and the aversion to "all these regulations" -- suggest a completely different kind of problem than federal "arrogance" or strict insistence on the requirement of equivalence.[62] These complaints indicate that the requirements of CEPA are more than some provinces are willing to implement and enforce. At a time when cooperation seems more important than ever, the stance of these provinces is problematic. The impact that this demonstrated provincial reluctance will have on national standards under the harmonization initiative will be discussed below.

ii) Administrative Agreements under CEPA

RFI reviews the main elements of administrative agreements under CEPA:

> "Section 98 of CEPA provides for bilateral federal-provincial agreements with respect to the administration of the Act. Administrative agreements represent "work-sharing" partnerships for the cooperative and reciprocal management of toxic substances under the authority of both federal and provincial legislation. The agreements aim to eliminate overlap and duplication and to provide a "one-window" approach to industry. In order to maintain ministerial accountability under CEPA, administrative agreements will provide information-sharing and other mechanisms to allow the federal government to verify industry compliance with federal regulations. The federal government reserves the right to intervene directly if federal requirements are not being met."[63]

RFI also notes that "administrative agreements do not have to meet the tough tests that equivalency agreements do."[64] While no administrative agreements have been signed to date, four are, apparently, "ready for signing."[65] Administrative agreements do not appear to irritate the provinces as much as equivalency agreements, but RFI notes some provincial officials' suspicion that "the federal government wants the provinces to do things 'the federal way.'"[66]

iii) Intergovernmental Agreements

While there are no administrative agreements, and only one equivalency agreement currently in force in Canada, Franklin Gertler notes that:

> "Environment Canada is party to several hundred intergovernmental agreements...To these agreements must be added certain orders in council that purport to delegate administrative and law enforcement authority."[67]

The fundamental problem posed by some of these agreements to the principle of the rule of law and meaningful accountability to the public for their contents is that:

> "Law and policy for environmental protection in Canada are being articulated and implemented in some considerable measure through an obscure intergovernmental process that is inaccessible to the public and almost unknowable...This process often culminates in intergovernmental agreements and largely escapes both legislative control and judicial review."[68]

On the one hand, as reviewed above, there are many benefits to be gained nationally from co-operative federalism, but it can also have seriously detrimental effects:

> "...while agreements may be in the interest of executive government they may be contrary to the interest of the individual citizen and may undermine such important values as accountability and responsiveness."[69]

Gertler offers as an example of the problems of "bureaucratic administrative federalism" the 1987 "Canada-Alberta Fisheries Agreement", that played an important role in the Oldman River Dam controversy:

> "When [citizens] wrote to the Minister of Fisheries and Oceans demanding the application of the [*Environmental Assessment and Review Process Guidelines Order*] on the grounds that effects on fish habitat and fisheries were federal matters and the responsibility of the department, the Minister refused, in large part on the basis of "long-standing administrative agreements."...The correspondence in the Oldman litigation demonstrates several dangers associated with intergovernmental agreements delegating the administration and enforcement of federal environmental law. First, the general spirit of the agreements is such that federal officials will defer to the scientific evaluations and decisions of provincial authorities. Second, while lip service is paid to ongoing federal involvement and responsibilities, the administrative arrangements are regarded as precluding federal enforcement action...Finally, there are no remedy or appeal provisions in such agreements."[70]

Intergovernmental agreements provide the opportunity for the provinces and the federal government to forget their differences and come to agreement. However, when the two levels of government have in the past managed to agree on environmental protection in this fashion, the agreements have all the appearance of agreeing to do little.

In delegating its authority under these agreements, the federal government appears to actually abandon its responsibilities, leaving the province more-or-less free to do as much, or as little, as it wishes with its delegated authority. The ramifications of this behaviour will be discussed below in more detail in the context of "harmonization."

iv) Reforming the Use of Intergovernmental Agreements Through CEPA

Gertler argues that a separate act dealing with intergovernmental agreements should be made into law. However, specific provisions dealing with intergovernmental agreements could also be made part of CEPA. These new sections might provide that:

* the intention to negotiate an intergovernmental agreement is made public, through pre-publication, public consultation, and the publication of draft agreements in Part I of the *Canada Gazette* with an appropriate comment periods;

* once agreements have been concluded, they be published in the *Canada Gazette* part II and indexed;

* all agreements require *detailed* annual reporting to Parliament on the administration and enforcement of federal laws or equivalent provincial laws; and

* all agreements have sunset clauses requiring periodic review.

In addition, the federal government should always retain its right to prosecute under federal statutes when entering into such agreements. Mechanism permitting citizens who believe that enforcement by provincial officials is inadequate to petition for federal enforcement or to undertake private prosecutions, should also be included in agreements.[71]

3) Federal/Provincial Advisory Committee

Section 6 of CEPA provides for the creation of a Federal/ Provincial Advisory Committee

> "...for the purpose of establishing a national framework for national action and taking cooperative action in matters affecting the environment and for the purpose of avoiding conflict between, and duplication in, federal and provincial regulatory activity..."

According to the CEPA Annual Report 1992-1993:

> "Representatives from Environment Canada, Health Canada and each of the provinces and territories compose the Federal-provincial Advisory Committee (FPAC). This group ensures that the federal and provincial governments consult with each other and take action together to protect the environment form the effects of toxic substances. FPAC also aims to achieve nationally consistent environment standards."[72]

The Annual Report notes that the action undertaken by FPAC so far has been the creation of several FPAC working groups (Ozone-Depleting Substances, Air Quality Guidelines, and CEPA Partnerships). Whether these working groups "ensure" federal-provincial consultation and action to protect the environment from the effects of toxic substances is not clear.

What is clear in the brief RFI review of FPAC is that the Committee does provide the provinces with something else to complain about:

> "Interviews with FPAC members and a review of the minutes of FPAC meetings indicate a general satisfaction with the Committee's operations. It is important, however, not to confuse this satisfaction with provincial acquiescence with the status quo. At least two provinces question whether FPAC should continue to exist; their scenario for CEPA reform, which includes a more modest role for the federal government, has the Environmental Protection Committee of CCME playing the necessary federal-provincial coordinating role."[73]

As will be discussed in detail below, the Canadian Council of Ministers of the Environment (CCME) may already be playing the "necessary federal-provincial co-ordinating role." Whatever role FPAC plays, it appears to be diminishing in importance to the provinces and territories, as suggested by the fact that the committee has never achieved its original plan to meet four times a year.[74] The Committee now meets twice a year, but, at the spring, 1993 meeting, only seven of twelve provincial and territorial representatives attended.[75] The reason offered for the reduced number of meetings, and the reduced number of attendees at the meetings is the expense.[76] A better explanation might be that the work statutorily created for FPAC is understood by the provinces and the territories as being done by another body, the CCME.

4) Canadian Council of Ministers of the Environment (CCME)

In current discussions of interjurisdictional cooperation and harmonization of federal/provincial environmental regulation, FPAC is never mentioned; the CCME, however, is. The Council, comprised of the federal, provincial and territorial Ministers of the Environment, has existed in one form or another since the early 60's. Its current form came into being in 1989. As for the Council's activities, this is what its brochure says:

"The Canadian Council for the Ministers of the Environment (CCME) is the *major inter-governmental forum in Canada for discussion and joint action on environmental issues of national and international concern*. The Council is made up of environment ministers from the federal, provincial and territorial governments. These 13 ministers normally meet twice a year to discuss *national environmental priorities and determine work projects to be carried out under the auspices of CCME*."[emphasis added]

The CCME, so far identical to FPAC in every way, save that it includes the federal Minister of the Environment, differs from FPAC in that it has a wider mandate (FPAC is bound to matters dealing with toxics under CEPA, while CCME has no statutory bounds to the environmental matters it may apply itself to) and it has a permanent Secretariat office in Winnipeg (funds for the office are supplied jointly by the provinces and territories, based on population; the federal government provides one third of the funding). Quite unlike FPAC, which forces the provinces to acknowledge a subordinate status to the federal government, the unique nature of the CCME puts the provinces "in a stronger position to resist federal proposals."[77]

The CCME appears to be one of the best hopes in Canada for achieving cooperative federalism in environmental regulation. The question that must be asked, however, is whether the CCME represents the beginning of a new cooperative federalism in Canadian environmental regulation based soundly on principles of constitutional law, or represents another version of the "bureaucratic administrative federalism" described by Gertler.

IV. HARMONIZATION

1. Introduction

Until it adopted its new form in 1989, the CCME was an obscure, relatively uninfluential, purely political body that allowed off-the-record interaction between Canadian Ministers of the Environment. However, "the Council's long-established norm of consensual decision-making" has evidently strengthened "the provinces' ability to constrain federal involvement, particularly in joint ventures."[78] This is why "revitalization of the Council was consciously pursued by some provinces as a means to establish a credible alternative to federal policy-making."[79] This may also be why the provinces and the federal government have chosen the CCME as the forum within which to work toward harmonization.

Harmonization is not an initiative under CEPA. However, as harmonization will have a tremendous impact on all environmental regulation in Canada, it is important that it be discussed in the context of CEPA review.

The equivalency agreements under CEPA were intended to achieve harmonization -- that is, they were supposed to eliminate duplication and overlap of laws emanating from different levels of government. They were also, in theory, to establish consistent, minimum standards for environmental protection nation-wide. The imperative of reducing overlap and duplication remains at the heart of the new harmonization imperative, although now there is more at stake than simple efficiency:

"Protection of the environment, while remaining vitally important to Canadians, must now be seen in a broader context. A context that includes maintenance of jobs and social programs, expenditure control, greater public participation in decision making and the globalization of economic and environmental considerations....

...Canada's Ministers of the Environment have recognized these changing trends and have concluded that the way in which we manage our environmental responsibilities has to change. They believe that a window of opportunity exists to undertake a fundamental review of Canada's environmental management regime and to establish a new regime based on cooperation, and a more effective definition of roles, responsibilities and capacity to act. They believe that our environmental protection objectives can be best met through a new management regime."[80]

Toward creating that new management regime, the Ministers established a Task Group to define the scope of and develop a process leading to a Management Framework for Canada's Environment.[81] The Task Group proposes that the purpose of the harmonization initiative should be:

"to develop a new Management Framework for Canada's Environment, based upon cooperation and an effective and efficient definition of roles and responsibilities, that will lead to and enhance the maintenance of a consistent and high level of protection of Canada's environment."[82]

The Task Force also proposes a number of objectives and principles that should guide the development and implementation of the Framework. Attention should be drawn to the fact that the proposal scrupulously avoids mention of the words "law", "regulation", "statute" or anything that might suggest legislative or parliamentary involvement, or attract the requirements of public notice and publication in the Gazettes. The whole plan is proposed as a "management framework", and will result in an intergovernmental agreement the form of which has yet to be determined, although it may be roughly similar to one recently signed in Australia.[83]

2) Questions and Concerns Regarding the "Harmonization" Exercise

If the resulting intergovernmental agreement is to be similar to the ones discussed above, then the proposal must raise serious concerns. Harrison notes that the provinces have worked to revitalize the CCME because it has strengthened their ability to "constrain federal involvement", and provides an "alternative to federal policy making." Will the harmonization agreement -- as did the Canada/Alberta Fisheries Act agreement -- also result in an "alternative" to federal enforcement of federal laws? In the absence of federal enforcement under the harmonization agreement, will the provinces be free -- as Alberta was -- not to follow federal legislation?

These questions, and other concerns, arise from four aspects of the plan in particular:

i) the focus on the issues of "efficiency" and "duplication and overlap," as opposed to environmental protection;

ii) the proposals that "roles and responsibilities" be determined on the basis of "effective use" of labour and capacity and not, apparently, on the basis of legally defined responsibilities under the Canadian constitution;

iii) the potential for the intergovernmental dynamics of the harmonization exercise, particularly in the context of a weak federal role, to generate a "race to the bottom" in terms of environmental standards; and

iv) the emphasis on "partnerships" with regulated sectors in the implementation of a "harmonization" agreement.

In sum, the harmonization initiative's objectives of clear, effective national standards for environmental protection and of interjurisdictional cooperation are worthy of support. However, there is a concern that, in an effort to achieve harmony, efficiency and standardization, the initiative might lose sight of the requirements of the Constitution and the rule of law. It may also lose sight of the goal of effective environmental protection.

i) "Duplication and Overlap" and the Goal of "Efficiency"

The ineffective implementation and enforcement of federal environmental laws have been reviewed elsewhere in this submission. Our conclusion in that section was that the failure of the legal regime to achieve much in the realm of environmental protection had more to do with lack of political will -- as evidenced by an under-funded, inadequately trained and imprecisely mandated Department of the Environment -- than any inherent flaw in the legislation. Given that there is very little federal environmental law to enforce, and very few people to enforce it, the repeated claims of "duplication" are mysterious. What, exactly, is being duplicated? Where, in a regulatory environment where the federal government acts on only three (of twenty) regulations, is there overlap?

Clear evidence of the existence and the detrimental effects of "duplication and overlap" on industry, the public and the environment should be provided, as there is a serious concern that the ultimate effects of the harmonization exercise, as presently conceived, may be lower environmental standards, less regulation and less effective enforcement. This concern is reinforced by the description of the second objective of the exercise, which is to "lead to greater clarity, predictability and certainty in government decision making processes." This objective is more fully explained:

> "The public and the business sector will be assured of more predictable and consistent environmental decision making. This will facilitate decision making by companies that operate in more than one jurisdiction and will help ensure that the public will not have to deal with duplicative processes. Both the public and the private sector will face reduced costs and will bear a lighter regulatory burden."[84]

It is not clear how "the public" has to deal with "duplicative processes." Indeed, members of "the public" currently deal with a dearth of processes that allow them to work to protect the environment. Complaints about "duplicative processes" and the current "regulatory burden" are chiefly made by business interests. The concerns of industry are valid and important. However, as presently conceived, harmonization appears to privilege these interests over others, which casts some doubt on how much the initiative can or will serve the interests of the Canadian public and the environment.

ii) The Division of Roles and Responsibilities

While there is not a lot of law in Canada regarding the delegation of powers, what little there is is clear: constitutionally identified legislative powers may not be delegated.[85] As argued elsewhere in this paper, the division of powers provides significant protection for the environment and for the rights of Canadians. But, were one to deviate from the recognized, legal, mechanisms in the name of efficiency and harmonization, one would "[blur] the effective division of powers and [render] ineffective existing mechanisms for legal control over government."[86] The harmonization initiative must, therefore, not lose sight of the requirements of Canadian constitutional law.

Unfortunately, there are indications within the objectives and principles of harmonization that "lose sight" is just what the Task Force has done. It is difficult to disagree with the Task Force's conclusion that "efforts to address environmental issues through changes to the Constitution are not...an effective method for cooperation at this time."[87] Indeed, it is far from clear that changes to the Constitution are even necessary to provide for effective environmental management in Canada. However, the criteria proposed by the Task Force for the division of roles and attribution of responsibilities appear to take no notice at all of what the Canadian constitution requires.

defensive provinces to which the federal government deferred. Thus, in many respects, the new federal regulations reflect the lowest common denominator among the provinces, rather than reinforcing the position of more stringent provinces."[92]

The first important pattern of governmental behaviour to note is that governments generally attend to environmental issues only in the context of high public concern about the environment. In times of low public interest, government activity correspondingly declines.[93] The second important pattern -- competition between jurisdictions in regulation-setting -- is attached to the first pattern: politicians take strong stances on environmental protection when there is political capital to be gained from doing so. The third important pattern to note is that, once the opportunity for political gain has passed, so too does the governmental resolve to regulate. Insecurity about the effects of strict regulation on industry sets in, and the provinces with strong regulations start to talk about "harmonization." The fourth, and final, pattern is unique to the federal government. While Harrison finds it "striking" that the federal government capitulated to the lowest common denominator, this seems entirely consistent with the general pattern of federal regulatory activity, or, more accurately, lack thereof in the environmental field.

There are parallels between these patterns of behaviour and the harmonization initiative, as well as some inconsistencies. One glaring inconsistency is that, although virtually all environmental regulation has arisen in whole or part as a response to citizen concerns about the environment, the harmonization initiative has arisen without the help of marked public concern. Rather, it is generally accepted that the recession of the early 90s has focused public attention on other matters.[94] Recall that the Task Force mentions in the Principles and Objectives paper that the Ministers of the Environment believe that a window of opportunity exists to undertake a fundamental review of Canada's environmental management regime and to establish a new regime based on cooperation, and a more effective definition of roles, responsibilities and capacity to act.[95]

Is this "window of opportunity" the current public inattention to the environment? If so, and if the patterns described above work in reverse, then one should be concerned that, in the absence of strong public interest in the environment, governments may take the "opportunity" to downgrade environmental protection laws.

Public preoccupation with other concerns links harmonization with the second pattern of governmental behaviour. In a time where there is little political capital to be gained from taking a strong stance regarding environmental protection, it follows that there is little to be lost if environmental laws are eroded. This is particularly true if other concerns provide alternative sources for gaining political capital. These concerns are outlined by the Task Force: "fiscal constraints, [and] demands for deregulation[96]...concerns over the competitiveness of Canadian industry, serious reductions in government expenditures at all levels and increased public concern about

the public debt issue and government inefficiency."[97] One could reasonably surmise that the political gains to be made by meeting these concerns will more than compensate for whatever, limited, losses may arise from whittling away at environmental standards.

However, it should be noted that while the environmental concerns of the Canadian public are not necessarily top of mind, they have neither disappeared completely. Harrison notes that the environment has become a "core issue" for Canadians, and is something they are always generally concerned about, even if other issues take occasional priority.[98] A general awareness of this fact on the part of Canada's Ministers of the Environment may account for the comparatively low profile of the harmonization initiative.

The harmonization initiative exactly parallels the third behaviour pattern described above. As already noted, harmonization is primarily concerned with the interests of industry, and the interests of government in keeping industry in Canada, which is analogous to the concern the "competing" provinces had once the competition over pulp mill regulations had settled down. Their worry then was the regulatory disadvantage they had created for themselves. The analogous concern for harmonization is the "competitiveness of Canadian industry." The harmonization initiative expressly targets "competitive standard setting" as something it will work to avoid. It will avoid competition by setting national standards at a level reached by consensus.

The stated goals of setting standards by consensus and avoiding competitive standard setting are completely at odds with well understood dynamics of policy innovation in federal systems. In federal systems, new policies are usually first developed and adopted at the state or provincial level, and then implemented nationally. The "anti-competition" element of the CCME proposal has the potential to significantly constrain the capacity of individual provinces to raise standards and experiment with innovative policy approaches in the absence of the consent of their partner governments in the federation.[99]

The fourth pattern indicates what will be the likely result of consensus-based standard-setting. The patterns that played themselves out over the pulp mill regulations will repeat themselves. The larger, richer provinces with high standards will push for standards like their's across the country. The provinces with lower standards, and fewer resources to enforce them, will have no interest in raising standards. The federal government, for all that it plays a lesser role in the forum of the CCME, will have to have the final say. And that say will be to set the standards in line with the poorer provinces. The national standards achieved by harmonization will be whatever the lowest standards are now. This result is inevitable so long as the federal government is unwilling to press the provinces to do anything more than what the least active province is prepared to do.

A "race for the bottom" does not have to be the inevitable result of harmonization. The fourth pattern of behaviour can and should be modified. The federal government can

assert the authority it has to ensure environmental standards are not eroded.

iv) "Partnerships" and the Uncertain Role of the Public

One of the stated principles of the initiative is that "the development of the Framework will include an effective stakeholder involvement and consultation process." The annotation elaborates:

> "While the Framework is essentially a government to government initiative, public and stakeholder support will be essential to its success. Partnerships between governments and stakeholders will be developed."[100]

This raises at least two questions. First, what happens after the Framework has been developed? Second, which stakeholders have the resources and are therefore the most likely to develop partnerships with the governments, and what will the effect of those partnerships be on regulation and enforcement?

Regarding the first question, recall Franklin Gertler's arguments reviewed above. Remember, in the Oldman River Dam controversy, that after Alberta and the federal government came to their agreement about administration of the Fisheries Act, the public found virtually no toe hold to force either government to comply with the law. Public review, opportunity to comment and opportunity to compel enforcement of the provisions of the agreement, as provided for in Gertler's recommendations below, are necessary in order to prevent this circumstance from arising again.

Regarding the second question, the strengthening of "partnerships" between the government and stakeholders raises serious problems. As already discussed, harmonization currently privileges the interests of industry; "partnerships" between industry stakeholders and the government will further exacerbate this imbalance. Furthermore, the role of government is to regulate and enforce; "partnerships" will confuse and distort this role, and, as experience as shown, will make enforcement more difficult, if not impossible.[101]

3) Conclusions

In light of the seriousness of the four concerns reviewed above, it is difficult, if not impossible, to endorse the CCME harmonization exercise as presently conceived. The justification presented in support of the effort (duplication and overlap) has yet to be fully demonstrated as a serious problem. In addition, the constitutional propriety of some of what is proposed as part of the exercise is open to serious question. Furthermore, the dynamics of the harmonization process among the provinces may lead to a "race for the

bottom" and the adoption of "lowest common denominator" standards.

The likelihood of such an outcome is reinforced by the emphasis placed in the process on the concerns of business interests, and the weakness of the federal government's role as promoter of strong national environmental standards. The capacity of the process to result in constraints on the ability of provinces to raise standards independently and to adopt innovative policy approaches is also a serious matter. Finally, the process as presently conceived insufficiently provides for meaningful public participation before and after the "management framework" is agreed upon and made.

V. CONCLUSIONS AND RECOMMENDATIONS

1) Constitutional Jurisdiction and The Federal Role in Environmental Management

The federal government's jurisdiction over toxics is well-supported under several federal heads of power, some of which can provide needed constitutional support to others. The federal government's power to enact criminal law in respect of health, the peace, order and good government clause, the fisheries power, the spending power[102], the trade and commerce power, and the taxation power, separately and combined, provide the federal government with ample jurisdiction to enact minimum national environmental standards.

RECOMMENDATION

In order to ensure that nothing in CEPA prevents a broad reading of the federal government's environmental jurisdiction, in particular its capacity to set minimum national standards, the Preamble of CEPA be amended to explicitly state that:

> *"...Whereas the Government of Canada in demonstrating national leadership should establish national environmental quality objectives, guidelines, codes of practice and standards..."*

2) Intergovernmental Agreements

Intergovernmental agreements are a potentially useful mechanism for facilitating federal-provincial cooperation in environmental management. However, concerns exist regarding the extremely weak accountability mechanisms associated with the use of these agreements.

RECOMMENDATION

CEPA should be amended to provide that:

* *the federal government's intention to negotiate an intergovernmental agreement is made public, through pre-publication, public consultation, and the publication of draft agreements in Part I of the Canada Gazette with appropriate comment periods;*

* *once agreements have been concluded, they be published in the Canada Gazette part II and indexed;*

* *all agreements require detailed annual reporting to Parliament on the administration and enforcement of federal laws or equivalent provincial laws;*

* *all agreements have sunset clauses requiring periodic review; and*

* *all agreements should permit the federal government to retain its right to prosecute under federal statutes when entering into such agreements. Mechanism permitting citizens who believe that enforcement by provincial officials is inadequate to petition for federal enforcement or to undertake private prosecutions, should also be included in agreements.*

3) Harmonization

The "harmonization" process currently underway under the auspices of the CCME raises a number of serious concerns, and cannot be endorsed in its present form. The justification presented in support of the effort (duplication and overlap) has yet to be fully demonstrated as a significant problem. In addition, the constitutional propriety of some of what is proposed as part of the exercise is open challenge. Furthermore, the dynamics of the harmonization process among the provinces may lead to a "race for the bottom" and the adoption of "lowest common denominator" standards.

The likelihood of such an outcome is reinforced by the emphasis placed in the process on the concerns of business interests. The capacity of the process to result in constraints on the ability of provinces to raise standards independently and to adopt innovative policy approaches is also a major concern.

However, perhaps the most serious flaw in the harmonization project is the underlying potential for the federal government to abdicate any meaningful role in environmental management in Canada. The federal government appears willing to limit itself to whatever role the provinces regard as being appropriate for it. Furthermore, the

federal government appears to be distinctly unwilling to press the provinces to adopt standards or requirements beyond which they would be prepared to act upon on their own initiative. This raises questions regarding the federal government's future role in domestic environmental policy.

The federal government must affirm the fact that it is interested in what happens to Canada's environment and will intervene to the full extent of its jurisdictional capacity when it feels it is necessary to do so. The establishment of minimum standards for environmental protection within Canada is clearly provided for by CEPA and other federal statutes. It is now up to the federal government to demonstrate the political will necessary to effectively fulfill these responsibilities.

ENDNOTES

1. Environment Canada. Reviewing *CEPA*: An Overview of the Issues (Ottawa: Environment Canada, 1994)

2. The general principles we elaborate herein are meant to provide a road map for constitutional interpretation in the context of specific issues, should any arise during the review of *CEPA*.

3. See for example, T. Vigod and R. Lindgren, Overview of Federal Law, Regulation and Policy (Toronto: The Canadian Environmental Law Association)

4. See for example; Rodney Northey, "Federalism and Comprehensive Environmental reform: Seeing beyond the Murky Medium," Osgoode Hall Law Journal (1989), Vol.29, No.1, p.127; D.P Emond, "The Case for a Greater Federal Role in the Environmental Protection Field" (1972) 10 Osgoode Hall Law Journal 647; D. Gibson, "Constitutional Jurisdiction over Environmental Management in Canada" (1973) 23 U.T.L.J. 54; D. Tingley, ed., Environmental Protection and the Canadian Constitution (Edmonton: Environmental Law Centre, 1987) including A.R. Lucas, "Natural Resources and Environmental Management: A Jurisdictional Primer," p. 31; A.R. Lucas, "Case Comment on R. v. Crown Zellerbach Canada Ltd." (1989) 23 U.B.C.L.Rev. 355; D. Gibson, "Environmental Protection and Enhancement under a New Canadian Constitution," in Beck and Bernier, eds., Canada and the New Constitution (Montreal: The Institute for Research on Public Policy, 1983); Mains, "Some Environmental Aspects of a Canadian Constitution", (1980) 9 Alternatives 14; R. Lindgren, "Toxic Substances in Canada: The Regulatory Role of the Federal Government," in Into the Future: Environmental Law and Policy for the 1990s (Edmonton: Environmental Law centre, 1989); P. Muldoon and B. Rutherford, Environment and the Constitution: Submission to the House of Commons Standing Committee on Environment 1991 (Toronto: The Canadian Environmental law Association, Brief No.200); and P. Muldoon and B. Rutherford, "Designing an Environmentally Responsible Constitution," 18 Alternatives No.4, May/June 1992; and B. Rutherford, "The Constitutional Division of the Environment: A Comment on the Oldman River Decision", National Journal of Constitutional Law, Vol.2, No.2, July 1992.

5. *CEPA*'s preamble is evidence of this, declaring among other important environmental facts of life that "....the presence of toxic substances in the environment is a matter of national concern;" that "...toxic substances, once introduced into the environment, cannot always be contained within geographic boundaries;" and that "..the Government of Canada in demonstrating national leadership should establish national environmental quality objectives, guidelines and codes of practice."

6. CELA, Overview of Federal law, Regulation and Policy. See also R. Northey, "Federalism and Comprehensive Environmental reform," p.129; wherein it is stated that "The government retreated from regulating all toxic chemicals from cradle-to-grave..."

7. Mandating the reduction of the use, and the zero discharge, of toxic chemicals is consistent with the pollution prevention approach. Accordingly, regulation of the use of toxics in commerce must be part of *CEPA*'s mandate.

8. The veiled reference here is to the 1992 decision of the Quebec Superior Court: *The Attorney General of Canada v. Hydro-Quebec and The Attorney General of Quebec* (File No. 410-36-000024-914; August 6, 1992; Andre Trotier, J.S.C.)

9. Where there is conflict, the doctrine of paramountcy is invoked. federal laws are always paramount to, that is take precedence over, provincial laws.

10. Peter Hogg, Constitutional Law of Canada, (Toronto: Carswell Company of Canada, 2nd. ed., 1985), p.314.

11. Ibid.

12. This is known as the "double aspect" doctrine; but the courts have not made it clear when it is necessary to choose between the federal and provincial features of a challenged law. Hogg, ibid., at p.317 adopts Lederman's explanation:

> ...the double aspect doctrine is applicable when "the contrast between the relative importance of the two features is not so sharp." In other words, the double aspect doctrine is the course of judicial restraint.

When the court finds that the federal and provincial characteristics of a law are roughly equal in importance, then the conclusion is that laws of that kind nay be enacted by either the Parliament or a Legislature.

13. Hogg, The Constitutional Law of Canada, p:334.

14. This branch of constitutional law has developed into a truly confusing and conflicted doctrine. The S.C.C., in the span of three weeks, decided two cases which are in direct conflict. In *Multiple Access v. McCutcheon* [1982] 2 S.C.R. 161, the court upheld a federal law that impacted on provincial jurisdiction because the impact had a "rational, functional connection" with the federal law. In contrast, in *Regional Municipality of Peel v. MacKenzie* [1982] 2 S.C.R. 9, the court would not uphold an extension of the federal criminal law where it could not be shown that such an extension was "essential" to the legislative scheme. The former test is less strict and preferred by Hogg. (See Hogg, pp.334-337).

15. "Obiter dicta" are words of an opinion entirely unnecessary for the decision of the case. Such words are not binding as precedent. Black's Law Dictionary, Abridged 5th Edition, 1983.

16. In Laskin C.J.'s dissent in *A.-G. Que. v. Kellogg's of Canada* [1978] 2 S.C.R., in which the majority upheld a provincial law regulating advertising on television (television being

within federal jurisdiction) directed at children, he states that: "...in so far as the British North America Act may be said to recognize an ancillary power or a power to pass legislation necessarily incidental to enumerated powers, such a power resides only in the Parliament of Canada." (p.216)

17. As stated above, according to the pith and substance doctrine, a valid law can encroach upon areas outside the enacting legislature's jurisdiction. See *Bank of Toronto v. Lambe* (1987) 12 App. Cas. 575, and Hogg, Constitutional Law of Canada p.314.

18. *Smith v. The Queen* [1960] S.C.R. 776, p.800.

19. (S.C. 1974-75-76, c.55). The case is called *R. v. Crown Zellerbach*, [1988] 1 S.C.R. 401.

20. The opening words of s.91 of the *Constitution Act, 1867* confer on the federal Parliament the power:

> to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by
>
> this Act assigned exclusively to the Legislatures of the provinces...

21. *Crown Zellerbach* [1988] 1 S.C.R. 401, 438. Interestingly, Hogg finds the S.C.C.'s substitution in 1979 (*The Queen v. Hauser*, [1979] 1 S.C.R. 984) of the criterion of "newness" for "distinctness" (from the *Anti-Inflation Reference* and later to be referred to in *Crown Zellerbach*.) to specious. He concludes that "newness" is irrelevant and unhelpful..." See also Lysk on this point, (1979) 57 Can. Bar Rev. 531, 571-572 and *Crown Zellerbach*, 432, per LeDain J. for the majority. Hogg cautions about the reference to `newness' by LaForest J. dissenting at p.458.

22. *Friends of Oldman River Society v. Canada*, [1992] 1 S.C.R. 3, at pp.63-64.

23. The opportunity for establishing equivalency agreements under CEPA also works in the favour of justifying federal jurisdiction.

24. See Hogg Constitutional Law of Canada. In the second S.C.C. case on "national concern," *Munro v. National Capital Commission* [1966] S.C.R. 663, Cartwright J. writing for a unanimous court referred to the unsuccessful efforts to zone the national capital region through the cooperative action of the two provinces of Ontario and Quebec.

25.See Hogg, Constitutional Law of Canada 3rd. ed., s.17.3(c). The provincial inability test was referred to in *Crown Zellerbach*, *Labatt Breweries v. A.-G. Can.* [1980] 1 S.C.R. 914, 945; *Schneider v. The Queen* [1982] 2 S.C.R 112, 131; *The Queen v. Wetmore* [1983] 2 S.C.R 284, 296.

26. The United Nations Conference on the Law Of the Sea was referred to in *Crown Zellerbach*. Although the *Labour Conventions* case seemed to rule out a separate international treaty power, Hogg suggests that the earlier Radio Reference case (*Re Regulation and Control of Radio Communication in Canada* [1932] A.C. 304) holding that the federal power to perform treaties came within POGG may be finding renewed judicial favour. See Hogg, s.17.2.

27. Hogg, Constitutional Law of Canada 3rd. ed., s.17.3(a); for example, treaties, official languages and offshore resources.

28. *Canada Temperance Federation*; *Russell v. The Queen* (1882); *A.-G. Ont. v. A.-G. Can* (Local Prohibition)[1896] A.C. 348: "Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local or provincial and that which has ceased to be merely local or provincial, and has become a matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada." (p.361).

29. *Canada Temperance*, pp.205-206.

30. *Johannesson v. West St. Paul* [1952] 1 S.C.R. 292.

31. *Munro v. National Capital Commission* [1966] S.C.R.663.

32. *R. v. Crown Zellerbach* [1988] 1 S.C.R. 401.

33.*R. v. Cosman's Furniture* (1972) Ltd. et al. (1976), 32 C.C.C. (2d) 345 (Man. C.A.).

34. *R. v. Wetmore et al.* (1983), 2 D.L.R. (4th) 577 (S.C.C.).

35. This act was repealed by s.145 of *CEPA*. Part IV of *CEPA* allows the federal government to regulate air pollution from federally controlled works, undertakings and activities such as nuclear power plants, railways and airlines. The regulation of fuels and fuel additives under the former *Clean Air Act* is now contained in ss.46-48 of *CEPA*. Part V of *CEPA* (sections 61-65) pertains to domestic sources of air pollution that have international effects. Section 61(2) codifies the "provincial inability" test and s.63(3) allows for equivalency agreements regarding federal regulations attempting to curb air pollution with international dimensions (either causing international air pollution or causing (or likely to cause) a "violation of an international agreement entered into by the Government of Canada in relation to the control or abatement of pollution." Note that the reference is to any international agreement regarding pollution, not just air pollution.

36. *Re Canada Metal Co. Ltd. and The Queen* (1982) 44 D.L.R. (3d) 124 (Man.Q.B.), pp.130-131.

37. Mere regulation of an activity is not criminal law. See *Re Information Retailers Association of Metropolitan Toronto Inc.* (1985), 22 D.L.R. (4th) 161 (O.C.A.), *City of Montreal v. Arcade Amusements Inc. et al.* (1985) 18 D.L.R. (4th), 161 (S.C.C.) and *Labatts*.

38. These decisions all applied the test in the seminal case regarding the true nature of criminal law: see *Reference re Validity of s.5(a) of Dairy Industry Act* (The Margarine Reference) [1949] 1 D.L.R. 433 at pp. 472-3. Some legitimate public purpose must underlie the prohibition:

A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened. Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? *Public peace, order, security., health, morality: these are the ordinary though not exclusive ends served by that law...*"(emphasis added).

39. Dr. Theo Colburn's work for World Wildlife Fund US, recent reports of the International Joint Commission, Toxic Trade Update 6.4 (Greenpeace) citing Environmental Research Foundation, Rachel's Hazardous Waste News, #343, June 24, 1993.

40. This is probably true of biotechnology given the signing of the Biodiversity Convention, the rapid loss of biodiversity and the patenting of life-forms around the globe. In addition, the discovery and use of indigenous plant species for medicinal purposes is also

41. S.91(2).

42. *Citizens' Ins. Co. v. Parsons* (1881), 7 App. Cas. 96

43.Ibid.

44.*Constitution Act, 1867*, s.91(12).

45.See *R.v. Fowler*, [1980] 2 S.C.R. 213, 113 D.L.R. (3d) 513 and compare *Northwest Falling Contractors Ltd. v. The Queen*, (1980), 113 D.L.R. (3d) 1 (S.C.R.)).

46. The right to silence is considered to be a component of the procedural rights contained in s.7, and is also protected by s.11(c), 11(d), and s.13.

47.For example, see *R. v. Weill's Food Processing Ltd.* (1991), 6 C.E.L.R. (N.S.) 248 (Ont. Ct. J.), wherein the Ontario Court of Justice held that using mandatory spill reports as evidence would be contrary to an accused's right to silence.

48. Such sensitivities are reinforced by court decisions such as the *Hydro Quebec* case wherein a Que. Supreme Court struck down a PCB regulation under CEPA as being unconstitutional ("ultra vires"). Until, this vaguely-reasoned decision has been taken to the S.C.C., it cannot be considered to be a definitive statement on the constitutionality of the regulation. Moreover, should it be found to be unconstitutional by the S.C.C., it is likely possible to sever this regulation from the remainder of *CEPA*, leaving the balance of the Act and its regulations intact. In such a scenario, the appropriate response, we submit, is to identify possible inadequacies of the evidence put forward by the federal government to support its constitutional mandate and/or determine how better to define the scope of regulations under *CEPA* to avoid overstepping provincial jurisdiction.

49. Institute of Intergovernmental Relations. Approaches to National Standards in Federal Systems. (Kingston: Queen's University Press, September, 1991) at 1.

50. World Commission of Environment and Development. Our Common Future. (New York: Oxford University Press, 1987) at 314 ff.

51. The analysis in this paragraph is discussed generally in, Institute of Intergovernmental Relations, Approaches to National Standards, ibid.

52. Institute of Intergovernmental Relations, ibid, at 3.

53. Resource Futures International. Evaluation of the Canadian Environmental Protection Act: Final Report. (Ottawa: Ministry of Supply and Services, 1993) at 99.

54. Alastair R. Lucas, "Jurisdictional Disputes: Is 'Equivalency' a Workable Solution?" in Donna Tingley, Ed. Into the Future: Environmental Law and Policy for the 1990's. (Edmonton: Environmental Law Centre, 1990) at 25.

55. Lucas, ibid, at 25-26.

56. See Toby Vigod and Rick Lindgren "Overview of Federal Law, Regulation and Policy: A paper presented to the Canadian Institute two day course on Environmental Law and Regulation in Ontario", (Toronto: Canadian Environmental Law Association, 1994) at 25-26.

57. See *Canada Gazette, Part I (July 23, 1994), at p. 3459.*

58. Resource Futures International, Evaluation of CEPA, at 104.

59.Ibid., pp.102-103.

60.Ibid, at 103.

61.Ibid.

62.Ibid., at 103.

63.Ibid, at 104.

64.Ibid.

65. Ibid, at 105. One of these agreements, the Quebec/Canada agreement on pulp and paper effluent, is, according to Stephania Trombetti at Environment Canada, waiting only on the signature of the Premier of Quebec, which, at the time of writing, August 1994, may wait until the elections in Quebec are over. An Access to Information request has been entered by the author for this agreement.

66.Ibid, at 105.

67. Franklin Gertler, "Lost in (Intergovernmental) Space: Cooperative Federalism in Environmental Protection", in Steven A, Kennett ed., Law and Process in Environmental Management: Essays from the Sixth CIRL Conference on Natural Resources. (Calgary: Canadian Institute of Resources Law, 1993) at 261-262.

68. Ibid., at 260.

69. N. Bankes, "Co-operative Federalism: Third Parties and Intergovernmental Agreements in Canada and Australia" (1991) 29 Alta. L. Rev. 792 at 797.

70. Gertler, "Lost in Intergovernmental Space," at 274.

71. Ibid., at 281-282.

72. Environment Canada. Canadian Environmental Protection Act: Report for the period April 1992 o March 1993. (Ottawa: Minister of Supply and Services, 1993) at 3-4.

73. Resource Futures International, Evaluation of CEPA, at 100.

74.Ibid.

75.Ibid.

76. Ibid.

77. Kathryn Harrison, "Prospects for Intergovernmental Harmonization in Environmental Policy," forthcoming in Douglas Brown, Janet Hiebert, eds., Canada -- The State of the Federation 1994 (Kingston: Institute of Intergovernmental Relations, 1994) at 27.

78. Ibid, at 28.

79. Ibid.

80. Canadian Council of Ministers of the Environment. "Rationalizing the Management Regime for the Environment: Purpose, Objectives and Principles," undated, at 2-3.

81. The Harmonization Task Group members are: Dr. David Besner, Director, Policy and Intergovernmental Affairs, Department of the Environment, Fredericton, NB; Mr. Andre Harvey, Assistant Deputy Minister, Sustainable Development and Conservation, Department of Environment and Wildlife, Sainte-Foy, Quebec; Ms. Janet Bax, Director, Federal Provincial Relations Branch, Policy and Communications Directorate, Environment Canada, Hull, Quebec; Ms. Jisele Jacob, Acting Director General, Program Integration Directorate, Environment Canada-EPS, Hull, Quebec; Mr. Ken Richards, Coordinator, Intergovernmental Relations Office, Ministry of the Environment and Energy, Toronto, Ontario; Mr. Dick Stephens, Director, Legislation and Intergovernmental Affairs, Department of Environment, Winnipeg, Manitoba; Mr. Bob Ruggles, Director, Water Quality Branch, Environment and Resource Management, Regina, Saskatchewan; Mr. Ron Hicks, Assistant Deputy Minister, Research and Strategic Services, Alberta Environment Protection, Edmonton, Alberta; Mr. Jamie Alley, Director, Corporate Policy, Planning and Legislation, Ministry of Environment, Land and Parks, Victoria, British Columbia.

82. Canadian Council of Ministers of the Environment, "Rationalizing the Management Regime," at 4.

83. The Australian "Intergovernmental Agreement on the Environment, May, 1992" was the original model for the Canadian intergovernmental agreement on Harmonization. However, according to Barbara Czech, Director of Communications, CCME, the final Canadian agreement may take a form completely unlike the Australian agreement.

84. Canadian Council of Ministers of the Environment, "Rationalizing the Management Regime," at 5.

85. *A.G. Nova Scotia v. A.G. Canada* (Interdelegation Reference), [1951] S.C.R. 31.

86.Gertler, "Lost in (Intergovernmental) Space," at 255.

87. Canadian Council of Ministers of the Environment, "Rationalizing the Management Regime," p.7.

88. Ibid.

89. Ibid, at 8.

90. Ibid, p.9.

91. Kathryn Harrison, "The Regulator's Dilemma: Regulation of Pulp Mill Effluent in a Federal State," presented at the Annual Meeting of the Canadian Political Science Association, Ottawa, June 1993.

92. Ibid, at 31-33.

93. Many writers beside Harrison have noted this tendency. See, among others, Toby Vigod and Richard D. Lindgren, "Overview of Federal Law, Regulation and Policy" (Toronto: Canadian Environmental Law Association, 1994); George Hoberg, "Environmental Policy: Alternative Styles", in Michael M. Atkinson, ed., Governing Canada: Institutions and Public Policy (Toronto: Harcourt Brace Jovanovich, 1993); Tom Conway, "Taking Stock of the Traditional Regulatory Approach" in G. Bruce Doern, ed., Getting It Green: Case Studies in Canadian Environmental Regulation (Toronto: C.D. Howe Institute, 1990); Ted Schrecker, "Of Invisible Beasts and the Public Interest: Environmental Cases and the Judicial System" in Robert Boardman, ed., Canadian Environmental Policy: Ecosystems, Politics and Process (Toronto: Oxford University Press, 1993).

94. See George Hoberg, "Environmental Policy: Alternative Styles" in Michael M. Atkinson (ed.) Governing Canada: Institutions and Public Policy (Toronto: Harcourt Brace Jovanovich, 1993) 307.

95. Canadian Council of Ministers of the Environment. "Rationalizing the Management Regime," p.3.

96. Ibid, p.9.

97. Ibid, p.1.

98. Harrison, "Prospects for Intergovernmental Harmonization in Environmental Policy," p.23.

99. For a discussion of the dynamics of policy innovations in federal systems see, for example, K.McRoberts, "Federal Structures and the Policy Process," in M.Atkinson, ed., Governing Canada: Institutions and Public Policy (Toronto: Harcourt Brace Jovanovich, 1993), pp.159-160.

100. Canadian Council of Ministers of the Environment, "Rationalizing the Management Regime," p.8.

101. George Hoberg, "Environmental Policy: Alternative Styles," at 315.

102. Northey suggests that "... the federal government could use its spending power to provide uniform administration and enforcement of comprehensive environmental regulation across Canada. Equally, it could use this power to link regional economic development to environmental performance. Secondly, the federal government could use its declaratory power to create a national scheme of toxic waste disposal sites, thus removing a major regulatory burden facing the provinces. Federal responsibility for this area could encourage provinces to assist the federal government in thoroughly controlling the remaining aspects of a comprehensive cradle-to-grave scheme." (p.180)

APPENDIX 2

CEPA AND ENVIRONMENTAL LAW ENFORCEMENT

Prepared by:

Karen Clark, B.A., M.A., LL.B.

and

Barbara Rutherford, B.A., LL.B.
Research Associates

Canadian Institute for Environmental Law and Policy
September 1994

TABLE OF CONTENTS

I. **INTRODUCTION** 1

II. **THE IMPORTANCE OF ENVIRONMENTAL LAW ENFORCEMENT** 2
- 1) The Enforcement "Debate" 2
- 2) Importance of Criminal Sanctions in CEPA 3

III. **THE CEPA ENFORCEMENT RECORD** 4
- 1) The CEPA Review - What is at Stake? 5
- 2) Environment Canada's CEPA Enforcement Record 5
  - i) Eroding the Legitimacy of a Federal Role in Environmental Protection 7
- 3) CEPA'S Defeating Political Paradox 8
- 4) Lack of Constitutional Capacity or Lack of Political Will? 9
  - i) Constitutional Reticence 9
  - ii) Inadequate Resources 10
  - iii) Uncertain Departmental Mandate 11
- 5) Conclusion - A Failure of Political Will 13

IV. **STRENGTHENING CEPA'S ENFORCEMENT THROUGH CITIZEN INVOLVEMENT** 14
- 1) Introduction 14
- 2) The U.S. Experience with "Citizen Suits" 15
- 3) Citizen Suits and The Ontario *Environmental Bill of Rights* 17
- 4) Requirements for Effective Citizen Enforcement 17
- 5) A Citizen Suit Provision for CEPA 18

V. **CONCLUSIONS AND RECOMMENDATIONS** 19
- 1) Environment Canada's Departmental Mandate 20
- 2) Departmental Restructuring 20
- 3) Sanctions and Enforcement Powers 21
  - i) Sanctions 21
  - ii) Enforcement Powers 21
- 4) Citizen Suits 21

ENDNOTES 23

CEPA AND ENVIRONMENTAL LAW ENFORCEMENT

I. INTRODUCTION

The discussion that follows reviews the implementation of, and enforcement practices under, CEPA since it became law in 1988. We argue that both implementation and enforcement practices fall far short of what could be realized under the Act. The important question arising from our analysis is: why has there been such a shortfall? One argument, reviewed below, that has arisen in the past is that enforcement practices fail when sanctions under an environmental protection statute are "too strict." It is beyond the scope of this discussion to deal with the question of whether or not this argument is correct in relation to any other environmental statute. We believe, however, that this argument cannot be properly applied to CEPA, as there has never been a demonstrated effort to rigorously implement or enforce the Act.

What there has been, since before CEPA was passed, is a marked reluctance on the part of the federal Department of the Environment to act as a regulatory and enforcement body -- the role CEPA requires it play. It is this reluctance, attributable in large part to the "advisory" role originally conceived as the chief purpose of the Department of the Environment, that has resulted in failures in CEPA's implementation and enforcement.

The discussion below first reviews the "enforcement debate", and discusses the importance of criminal sanctions in environmental law. We conclude that, contrary to the "all or nothing" stances that dominate the "enforcement debate", regulatory regimes enacted to protect the environment should occupy a full range of mechanisms, from voluntary compliance agreements to the fullest sanction permitted by law. Next, we discuss enforcement patterns under CEPA. We argue that the Act's weak enforcement record has negatively impacted on the federal government's perceived legitimacy to act in the field of environmental regulation. We review the evidence of the absence of the political will that meaningful implementation and enforcement of the Act requires: the Department of the Environment's constitutional reticence; its chronic lack of adequate resources; and its unclear mandate. We conclude that the shortfall in implementation and enforcement of CEPA since 1988 is the result of these weaknesses.

It may very well be, however, that there are inadequate resources allocated to the inspection and enforcement branches of Environment Canada. Although we recommend that some reallocation of Environment Canada's budget take place to reflect the importance of enforcement in CEPA achieving its goals, we also advocate an additional enforcement tool: citizen suits. A citizen suit provision would allow citizens to be the "eyes and ears" of the government -- assisting in the implementation of a well-known and widely articulated enforcement and compliance policy.

II. THE IMPORTANCE OF ENVIRONMENTAL LAW ENFORCEMENT

The solution is not less law, but better law.[1]

In its overview of the issues for CEPA review, Environment Canada asks how the Act can contribute to sustainable development, and suggests that "environmental management" needs to be rationalized and generally improved. This section of our discussion assumes that "environmental management" cannot be distinguished from environmental *regulation*.

1) The Enforcement "Debate"

From the inception of contemporary environmental regulation in the 70s, a debate has raged regarding which method of obtaining compliance is the most effective. It is generally agreed that, in Canada, there have been two common approaches:

> "...the two approaches may be referred to as "promotion" and "enforcement." The former...consists of non-coercive measures to encourage or promote improved environmental performance. An enforcement strategy...relies more heavily on the use of prosecution and formal sanctions."[2]

Each approach has its advocates, and each its opponents. Studies undertaken within the last decade have shown that where strict sanctions have been provided for under the legislation, there has been a marked shortfall in enforcement.[3] For some writers, this shortfall indicates that negotiated, promotional agreements are swifter, surer and more economically feasible than hard line prosecutions.[4] Others argue that prosecutions are swifter, surer and more economically feasible than long, drawn out negotiations.[5] Strict enforcement policies, some say, damage the relationship between the regulated parties and the enforcing ministry; the relationship becomes adversarial, and cooperation becomes impossible.[6] Still others argue that firm enforcement practices improve the relationship between the enforcers and the regulated party, indicating that once the regulated parties understand that the rules of the regime will be enforced, they become more cooperative.[7]

For all that these positional debates appear to cancel one another out, they do point to the helpful conclusion that there is no one best way to obtain compliance with environmental regulation. The fact that neither approach is entirely effective does not mean that either should be entirely abandoned. It is our understanding, however, that "voluntary" compliance will occur sooner and more efficiently if regulated industries understand that regulators will enforce compliance if need be.

As enduring as the promotion/enforcement debate has been, it is clear that the polarized positions within it are becoming anachronistic. As Canada and other jurisdictions approach a quarter century of environmental regulation, it is increasingly acknowledged by all sides that any regulatory regime must embrace a full spectrum of approaches, from the entirely voluntary to the strictest expression and fullest sanction available under the law. The challenge before us is to bring CEPA up to date with current thinking.

2) Importance of Criminal Sanctions in CEPA

It must be emphasized that criminal sanctions have a key role to play in environmental regulation. The first attempts at environmental regulation in Canada proposed strict prohibitions, and swift enforcement. These laws were a response to increasing public awareness of the dangers posed by pollution to human health and the environment. These laws also sought to express the public's abhorrence of wanton acts of environmental destruction, and to act as a deterrent to anyone who might commit such a crime. The strictness of and the stigma attached to these sanctions were understood to represent society's opinion of criminal polluters. So far as can be determined, this opinion has not changed.[8]

However, even before CEPA was passed into law, discussions arose suggesting that, not only did strict sanctions militate against effective enforcement of environmental laws, they were markedly disproportionate to the lion's share of environmental offenses.[9] The conclusion proposed by Webb and others was that criminal sanctions should be reserved for undefined "egregious" offenses against the environment, if, indeed, there should be criminal sanctions at all. The position that appears to be emerging from this conclusion is that there is no place in environmental regulation for criminal sanctions, which casts some doubt on the fate of the offence provisions under CEPA.[10]

However, Webb's discussion deals exclusively with the question of whether or not there should be a new *Criminal Code* offence dealing with crimes against the environment. In this specific context, Webb concludes that current provisions in the Code deal adequately with environmental offenses that endanger or take human life. Elsewhere in his discussion, Webb indicates that he does not believe that the general run of environmental offenses (regulatory violations such as improper storage, or accidental spills) fit the legal definition of a criminal act, and attaching "criminal stigma" to these acts merely obfuscates the issues and complicates enforcement.

Webb is correct that regulatory infractions often are not comprised of what the law requires to be the elements of a criminal offence. He is also correct that at least some of the current regulatory regime can adequately deal with these infractions without extending further into criminal law. However, it would be a grave error to extrapolate from Webb's conclusions that there can be no such thing as an environmental crime, nor any

need for criminal sanctions.

The "mens rea" (guilty mind) requirement of criminal law and the standard of proof "beyond a reasonable doubt" do not obviate the need for criminal sanctions against crimes against the environment. These requirements are part of criminal law in order to protect the civil rights of the accused. There is no reason to believe that convicting environmental criminals will be any easier than convicting other criminals. But there is nothing persuasive in the argument that there cannot be a "crime against the environment" simply because it will be difficult to gain a conviction. Finally, Webb's conclusions appear to be influenced by his understanding that actual criminal acts against the environment are uncommon. Murder is also rare; that does not prevent society from extending its fullest sanction against it. Moreover, were murders to stop tomorrow, it is unlikely that the crime of murder itself would be stricken from the Code. The frequency or infrequency of crimes against the environment is irrelevant to whether or not there should be laws against them.

Webb's and others' thinking on the question of whether or not there must be a Criminal Code sanction against crimes against the environment appears to be influenced by the polarized debates described above. There is an "all or nothing" air to their positions. For example, dissenting Law Reform Commission of Canada Commissioners state that criminal sanctions on top of regulatory sanctions will send "conflicting signals to the regulated parties" and "divert attention away from the real problems of regulatory enforcement."[11] Whatever the Commissioners believe to be the "real" problems of regulatory enforcement, they also appear to believe that sanctions must either be all regulatory, or all criminal, with nothing in between. As noted above, and as will be discussed below in detail, the most effective new environmental regulatory regime will occupy all the points between.

The Law Reform Commission wrote that the majority of the Commissioners are convinced of the need to use criminal law to underline the value of respect for the environment itself and stigmatize behaviour causing disastrous damage with long-term loss of natural resources.[12] We are also convinced of that need.

Many things have changed since the early days of contemporary environmental protection laws. Two decades of enforcement have educated us about the strengths and weaknesses of regulatory and non-regulatory methods to control threats to the environment. One thing that has not changed is society's abhorrence of those who would deliberately or recklessly threaten the health of the environment. Neither has the need changed to deter such behaviour. The expression of public abhorrence and the deterrence of criminal polluters are functions that have been performed by the offence provisions under CEPA, and are functions they should continue to perform.

III. THE CEPA ENFORCEMENT RECORD

1) The CEPA Review - What is at Stake?

CEPA has been at the centre of its own "enforcement debate." The Act's passage was accompanied by statements that Environment Canada intended to "get tough" with polluters. However, in the result, "toughness" does not appear to have played a significant role in the Department of the Environment's strategy to control polluters. Rather, the Department follows a "promotional" strategy, preferring to cooperate with regulated industries in order to attempt to secure compliance. Only rarely does the Department prosecute under the Act. The prosecutions that do arise pertain to infractions of only a few of the regulations under CEPA. These prosecutions generally do not result in high fines. The key question in the context of the CEPA review is whether this contradictory situation of a strong Act and weak enforcement practices can accomplish the goals of sustainable development and pollution prevention. In our view, it cannot.

Improving the effectiveness of the Act requires more than merely changing the Act, and more than restructuring the enforcement branch of the Department of the Environment (although both of these changes are required). As discussed in detail below, two fundamental policy changes are also required. First, the federal government must accept and act on its clear authority and responsibility to make and enforce environmental regulations. Secondly, the Department of the Environment must move beyond the "advisory" role that was its original mandate, and accept the mandate which CEPA provides to it: that of a strong regulatory agency.

The federal government must now, as it reviews CEPA, confront the legacy of its reluctance to assert its legitimate jurisdiction to implement and enforce the Act. As reviewed elsewhere in this submission, plans have been initiated to harmonize federal/provincial environmental regulation.[13] There are also increasing international pressures to not only standardize regulations, but to coordinate them with the imperatives of sustainable development and pollution prevention as well. Environment Canada has shown some tentative interest in including these considerations in the CEPA Review.[14] The challenge that now confronts the federal government is how it will demonstrate that it has preserved for itself the regulatory legitimacy that these initiatives will require.

2) Environment Canada's CEPA Enforcement Record

The record of enforcement practices under CEPA suggests that when Environment Canada feels it can act, it does.[15] However, this resolve to action has resulted in an average of less than five prosecutions per region per year under CEPA and the *Fisheries Act*, and a cumulative national average of approximately ten prosecutions per year under CEPA. The highest incidence of CEPA-related prosecutions come under the Ozone-Depleting Substances Regulations (twenty-five, or forty-two per cent of CEPA prosecutions), the Ocean Dumping provisions under s. 67 (fourteen, or approximately twenty-four per cent), the PCB Storage Regulations and Interim Order (eleven, or

approximately nineteen per cent) and the Gasoline Regulations (eight, or seven per cent). It should be noted that prosecutions in Ontario brought under the Gasoline Regulations have been withdrawn or stayed as the government plans to change the regulations.[16]

While prosecutions are rare, the incidence of guilty pleas and convictions is comparatively high; all regions score conviction rates of eighty per cent or higher, four out of five score ninety per cent or higher. High fines are only infrequently levied; over sixty per cent (forty-eight out of a total of seventy-eight fines levied under CEPA and the *Fisheries Act*) have been less than ten thousand dollars. Of the remaining thirty fines, only two have been for one hundred thousand dollars or more. The highest fine ever levied by the courts was one million dollars for thirty-six counts of violations under s. 36(3) of the *Fisheries Act*. The next-most-frequently prosecuted offenses, under the Ozone Depleting Substances regulations, have resulted in fines ranging between three and one hundred thousand dollars; fines for PCB regulations offenses occupy a range between three and thirty thousand dollars.

The fact that fines are rarely very high does not necessarily indicate anything other than judicial reluctance to levy harsh penalties. It does cast significant doubt, however, on the arguments, cited above, that suggest severe penalties are a disincentive to enforcement. If the worst Environment Canada officials thought an offender was going to get in court was a fine between ten and thirty thousand dollars, one would expect, according to the logic of the arguments, that they would undertake more than ten prosecutions a year.

There are a total of twenty-four substance-controlling regulations under CEPA, half of which existed originally under the Acts CEPA sought to consolidate.[17] Yet, only three (the ozone-depleting substances regulations, the ocean dumping regulations, the PCB regulations) of them are enforced with any frequency. The conclusion that we draw from this review of the statistical record is that Environment Canada is most likely to act when:

1) there is overwhelmingly clear precedent in the law (the *Fisheries Act* has been law since just after Confederation; federal jurisdiction over ocean dumping has been affirmed by the Supreme Court of Canada);

2) there is virtually no overlap with provincial jurisdiction (the CFC regulations arise from Canada's international obligations under the Montreal Protocol);

3) there is high public awareness of and concern over certain substances that makes action politically popular (the PCB regulations);or

4) some combination of the above factors.[18]

What these patterns of enforcement indicate is that the federal government has whittled down its jurisdiction -- and its perceived legitimate scope of action -- to a small,

safe, sphere, from which the federal government may find it difficult to extricate itself when the time comes to do so.

i) Eroding the Legitimacy of a Federal Role in Environmental Protection

By "legitimacy," this discussion means the perception that a government, by occupying a field of activity (that it has legal grounds to occupy) and by exerting its influence in that field, presents to the public, industry and other governments the message that it is in the field, it is supposed to be there, that it is effective, and that the effects of its presence and activity are for the general benefit. When a government operates in a circumspect manner in a field it is supposed to act in -- as the federal government has done in the field of environmental regulation and enforcement -- it undermines its perceived legitimacy to occupy the field. That is to say, even though the federal government has uncontradicted jurisdiction to regulate in some fields of environmental law, its muted behaviour has resulted not only in the perception of its shirking its responsibility, but also in the sacrifice of the legitimacy of its actions in the field.

The greatest blow against legitimacy, of course, occurs when a government's reluctance to act creates an incapacity to act, such as that described by Conway:

> "The ... result has been a malleable regulatory process based heavily on exhorting compliance agreements. When spending could be called for on employment and regional equity grounds, neither the capacity nor the desire for regulators to act was there. In short, regulators often found themselves without the carrot or the stick."[19]

Legitimacy is also eroded when whatever action is taken has little positive effect. There are, for example, only a few concrete indications that promotional practices have effected marked gains in environmental protection. There is, on the other hand, considerable evidence that promotional strategies are particularly ineffective with large, heavily-polluting companies:

> "In 1987 the Canadian Environmental Advisory Council (CEAC) ...identified a pattern of almost two decades of systematic non-enforcement of the antipollution provisions of the *Fisheries Act* in Quebec, despite the existence of a number of land-based sources of continuous discharge of highly toxic substances which seem to enjoy complete immunity from prosecution....An internal memorandum by a Department of Fisheries and Oceans official leaked in December, 1989, was bitterly critical of the federal 'negotiate and compromise at all costs philosophy' of non-enforcement of *Fisheries Act* violations against a number of large firms in British Columbia."[20]

Others have noted that the "bipartite deal-making" (the basic framework of promotional strategies) between federal regulators and those they regulate generally serves the interests of the regulated, not the regulators.

> "While state institutions are relatively weak, business has formidable power resources at its disposal. In addition to large financial resources and control over vital information, business has clear organizational advantages...Since environmental regulation tends to be organized by sector...Canadian business has been well organized to influence the process. Moreover, where it really counts, where the regulator meets the polluter in the enforcement function -- at the level of the firm -- Canadian business is quite strong. On top of these organizational advantages, business control over investment is an extremely powerful resource, giving business the ability to threaten divestment if regulation becomes too stringent."[21]

Promoting as opposed to enforcing the requirements of CEPA has had the effect, therefore, of not only starkly limiting the effectiveness of regulatory activity, but has put the federal government in a position where it is subordinate to the industries it is supposed to regulate.

If the federal government intends to take on the challenges of pollution prevention and sustainable development under CEPA and possibly other legislation, it cannot continue to stay within its small, safe sphere. Rather, it must return to the "first principles" of its constitutional authority to regulate the environment and to its own claims made when CEPA became law. As described in detail below, CEPA rode in on the fanfare of getting tough with polluters. There is a strong inclination now, on the part of Environment Canada, to readily attribute its weak enforcement history, following the analysis of Webb and others, to the failings of this approach. However, as there has been no demonstrated will to rigorously enforce CEPA, the rationalization that CEPA enforcement failed because it was too rigorous seems wrong. It is our understanding that other factors have had a strong role to play in CEPA's weak enforcement record.

3) CEPA'S Defeating Political Paradox

Enforcement practices under CEPA have been confounded by the political paradox that has coloured government action under and around the Act since the day it was passed into law. CEPA was "sold" to the Canadian public, in the words of Minister of the Environment Tom McMillan, as "the country's first environmental bill of rights", "the most comprehensive piece of legislation in the western world",[22] and as an Act under which punishment would be swift, significant and sure:

> "Sanctions will include million-dollar-a-day fines. ... The new law will also place responsibility squarely where it belongs--on the shoulders of the chief executive officers and presidents of companies who permit violations to occur. They will be subject to jail sentences of one to five years. And the government intends to enforce the law with vigour."[23]

Whatever the government's intentions were with the passage of CEPA into law, they were not as stated. One might be inclined to hazard the suggestion that the word "vigour" more accurately describes the way in which the federal government has avoided its responsibilities under the Act.

When CEPA was enacted, the government of the day seems to have concluded that CEPA provided it with an opportunity for cosmetic environmental regulation: the Act gave the appearance of implementing a strong regulatory regime, without requiring the government to actually do so.[24] One result of this evident strategy has been a high degree of public cognitive dissonance about the federal government's role in environmental protection, and an ongoing erosion of the general perception of the legitimacy of federal activity in the realm of environmental regulation.[25] If the political agenda underlying the passage of CEPA was to dissociate the federal government from perceptions that it had a strong role to play in environmental regulation, then one must accept the conclusion that CEPA has been something of a success. However, this is not the "success" one would reasonably expect from the fanfare CEPA rode in on, or, indeed, from the words of the Act itself. Nor does this "success" meet the requirements of sustainable development and pollution prevention.

Any review of CEPA must acknowledge that many of the failings of Act's implementation and enforcement have to do with this political paradox, and not with the Act itself.

4) Lack of Constitutional Capacity or Lack of Political Will?

The bold statements by the Minister of the Environment notwithstanding, little else of the federal government's actions relating to the Enforcement of CEPA show much boldness. On the contrary, as discussed in detail below, the federal Department of the Environment operates with the triple handicap of constitutional reticence, inadequate resources and an uncertain mandate. These factors lead to the circumspect, inefficient and ineffective patterns described above and must be remedied in order for CEPA to meet the requirements of sustainable development and pollution prevention.

i) Constitutional Reticence

The federal government has clear and legitimate jurisdiction over certain matters requiring environmental regulation. However, the federal Department of the Environment

has been largely pre-occupied -- before and after CEPA -- with not interfering with what it considers to be matters under provincial jurisdiction, and with not "[aggravating] federal-provincial relations."[26] It is our view, shared by many other commentators, that the federal government's concern with its jurisdictional authority is more perceived than real.[27] The political purpose served by these concerns is that they have provided the federal government with an excuse not to effectively implement and enforce CEPA. The history, mandate and internal policies of the Department of the Environment all reflect the federal aversion to exerting its constitutional authority in the realm of environmental regulation.

ii) Inadequate Resources

Since before CEPA, the federal Department of the Environment has been staffed by individuals inadequately trained to achieve the department's ostensible mandate.[28] In the mid-70s, the problems with the staff and its capacities were described as:

> "...its inability to establish and carry out rigorous compliance procedures; an overtaxed and declining scientific and investigative capacity; uncertainty and insecurity in federal-provincial and interdepartmental relations; and a lack of economic and legal literacy.[29]

While CEPA was to have directly addressed some of these problems, recent stock-taking by Resource Futures International (RFI) of Department of the Environment behaviour under CEPA shows little improvement. The department is understaffed, and the staff is inadequately trained. The Department of the Environment investigation and enforcement staff for the entire country number eight-six people,[30] approximately the same number of people employed by the Ontario Ministry of Environment and Energy to undertake investigation and enforcement. Hiring policies populate the department with people with technical expertise, but with little training or direction by their superiors to enforce the Act.

The information resources for the department, in this day of international computer communications, are woefully inadequate, and significantly contribute to the inefficacy, inefficiency and inconsistency of enforcement policies.

> "...There is no standard format for inspection of investigation reports. Enforcement staff in each region are organized differently, use different administrative procedures and in some cases rely on different enforcement priorities...Compliance histories and inspection and investigation information are decentralized and incomplete, both within and across the regions...Each region has a different tracking system. Ontario and Quebec have no tracking system...Since information on enforcement from other regions is not available, except by ad hoc phone contact, there is a lack of consistency in enforcement across the country...Inspection results are not always reported back to the company being inspected. Inspectors are not always informed of investigation results."[31]

RFI reports that *one person* has been hired to create a centralized data management system for the whole country in order to solve these problems. This further suggests that a realistic commitment of resources to effective implementation and enforcement has yet to be achieved.[32]

iii) Uncertain Departmental Mandate

As already noted, when CEPA was enacted the federal government pledged, on the one hand (the hand proffered to the public) to "get tough" with polluters. On the other hand (the hand that appears to be actually controlling the Act's implementation), the government supports a cooperative, promotional approach. The net result of this legislative schizophrenia is a federal department that does not know what its job is. It cannot be surprising, then, that it has difficulty getting its job done.

The history of the creation and the first eighteen years of the federal Department of the Environment (from 1970 to 1988, when CEPA was passed into law) reveals that the department was not originally conceived as one with powers to regulate and enforce. Rather, its role was to provide information to other federal departments.

> "In this sense, the Department of the Environment shared many features with the Ministries of State for Science and Technology and Urban Affairs, which were created at the same time. Like the Ministries of State, Environment Canada, with its extensive environmental research programmes, but limited regulatory and program delivery role, appears to have been intended to operate largely on the principle that 'knowledge is power.'"[33]

The understanding was that other departments would look to the Department of the Environment for its "expertise" in environmental matters. However, the fashion in which the department was cobbled together from disparate and distinct departments of other ministries,[34] the fact that the duties of the department were often shared with other departments,[35] and the comparatively low status in Cabinet of Ministers of the Environment,[36] made the accomplishment of even this limited role quite difficult. Brief periods of concern over high-profile environmental issues such as acid precipitation occasionally raised the profile of the Department of the Environment. At least ostensibly, the department did have a role to play in assessing the environmental impacts of federal undertakings.[37] However, then, as now, there was strong opposition to any initiative that appeared to interfere with the jurisdiction of the provinces.[38] The department responded to this opposition by sticking to an advocacy strategy, and working through

partnerships with regulated industries and provincial environmental officials.[39] The passage of CEPA did not appreciably change this pattern of behaviour. The "information support" role of the department as originally conceived has not fundamentally changed.

However, the passage of CEPA has created a pressure point in the Department of the Environment, one that has been described as the department's "promotion/enforcement" dichotomy. The tensions created by the dichotomy arise directly from the inconsistencies between "tough" wording of CEPA and the conciliatory strategies of the department. Investigations staff, as already mentioned, are hired for their technical proficiency. Their first purpose, apparently, is to promote the goals of the Act rather than to enforce it. RFI notes that good technicians do not necessarily make good enforcers.

> "...many of Environment Canada's inspectors are reluctant to enforce because they are technically trained and therefore do not have an "enforcement mentality." They deal with other technically trained people in the regulated industries and share a common professional problem-solving ethos, which is not congruent with the enforcement approach. Inspectors are also reluctant to enforce because they inevitably develop relationships with the regulated industries that they are reluctant to disrupt by "getting tough." This problem is particularly severe when the same people are inspecting as are investigating and laying charges."[40]

The problem becomes even more severe when investigators (who may actually have more of an "enforcement mentality" than RFI grants) have to rely on the decisions of senior management regarding whether or not a prosecution will go forward.[41] Once passed senior management, a case must also pass the scrutiny of the Prosecution Group of the Justice Department which makes the final decision of whether or not to prosecute. According to one Department of the Environment official, however, the Justice Department is not the bottleneck in the prosecution process.[42] The indications are, rather, that senior management stonewall lower-level initiatives to prosecute. RFI notes that the direction senior management at the Department of the Environment is tending toward is more promotion, and less enforcement.

> "Within Environment Canada, recent policy statements have created the perception among many of the enforcement staff that official policy has moved away from the relatively strict approach outlined in the Enforcement and Compliance Policy."[43]

The role that senior management has played in keeping a close rein on CEPA enforcement policies must be acknowledged, and must be addressed.

Change as a result of the CEPA review must happen not only in how the department is structured, but in how the role of the department is conceptualized. The

Ontario Ministry of Environment and Energy provides a model for how the federal Department could be restructured. Ontario's Ministry of Environment and Energy has separate information and enforcement branches. It also has an in-house legal services department that works with the enforcement branch. This approach appears have been extremely successful in bringing about a vigourous enforcement policy in that province.[44]

However, enlarging and creating new structures within the federal Department of the Environment alone will not be sufficient to address the failings of its enforcement practices. The department must also accept the clear regulatory mandate provided to it by CEPA.

5) Conclusion - A Failure of Political Will

That CEPA has fallen so short of its stated goals is simply unacceptable. The Act and the regulations promulgated under it propose to control a very short list of toxic substances, and control activities very clearly within the jurisdiction of the federal government. Yet the Department of the Environment has always been under-funded, inadequately staffed and indifferently managed by the senior bureaucracy. Enforcement of CEPA has been infrequent and disproportionately focused on only three regulations.[45]

The situation does not suggest, as has been proposed by the "Reviewing CEPA: An Overview of the Issues" document issued by Environment Canada, that a serious problem with environmental regulation in Canada has been "overlap and duplication of effort."[46] On the contrary, the serious problem with CEPA has been the federal government's own reluctance to assert its clear constitutional authority to regulate the environment and enforce those regulations. This absence of political will and leadership has significantly contributed to all the failings noted above. The inefficacy, inefficiency, and lack of certainty that surround environmental regulation in Canada are not because of the law, but because of the failings of those people whose elected responsibility it is to see that the law is effectively implemented and enforced.

The provision more and better-trained enforcement staff, the reallocation of funds to improve information management infrastructure, the clear separation of promotional and enforcement functions branches, in themselves will not adequately address the failings of Environment Canada's enforcement practices. The underlying problems regarding the acceptance of the regulatory mandate provided by Environment Canada by CEPA, by the department's senior staff and political leadership, must also be addressed.

IV. STRENGTHENING CEPA'S ENFORCEMENT THROUGH CITIZEN

INVOLVEMENT

Qui tam pro domino rege quam pro seipso[47]

1) Introduction

Citizens have participated in enforcement since the earliest beginnings of the English common law system.[48] This history is important because it shows that citizen participation in enforcement, also known as "private prosecution", is not a foreign concept to the roots of our legal system.

Enforcement of any law is an essential prerequisite to achieving the law's objectives. One need only glance at the former environmental regimes of some of the countries in Central and Eastern Europe to realize that it is not enough to have forward-looking progressive laws enacted.[49] The regulated community must know that transgressions will be discovered and prosecuted with diligence.

We have examined the enforcement experience under CEPA and found it to be lacking in vigour. Although we make several specific recommendations regarding remedies for these inadequacies, in this section we advocate for the addition of a citizen suit provision to CEPA to help ensure that CEPA's goals are met.

Understanding the evolution of citizen enforcement lends context to the debate about enhancing public participation in environmental law.[50] Initially, in thirteenth and fourteenth century England, citizen enforcement supported the government in its protection of the public interest. The public health acts of the day, analogous to present day environmental legislation, included specific reference to citizen enforcement.[51] So-called "common informers" would initiate prosecutions and were entitled to receive a share of the penalty imposed upon conviction. Such financial rewards unfortunately created the incentive for unscrupulous citizens to advance vexatious proceedings. Public outcry about this kind of harassment resulted in these types of informer actions being abolished temporarily. However, given the need for citizen enforcement to implement English penal laws, these informer actions were subsequently reintroduced with safeguards against such abuse.[52]

As the tasks associated with protecting health and welfare grew in the context of the industrial revolution, a centralized bureaucracy was assembled to administer the new and/or expanded factory, public health, and food and drug legislation in the nineteenth century. This bureaucracy soon realized the need for a "...centralized and professional inspectorate charged with the responsibility of administering and enforcing..."[53] this social welfare legislation. This increase in volume and sophistication of social legislation made it very difficult for the average citizen to conduct private prosecutions.[54]

With the advent of the regulatory offence[55] and the defence of "due diligence"[56],

the private prosecutor needed to address governmental action or inaction as well as the conduct of the accused. This is because the government will often have a duty to regulate corporate environmental behaviour and may have in fact issued a permit or a control order concerning the behaviour which has given rise to the private prosecution. Compliance with any governmental permissions regarding the polluting activity will be entered as evidence of "due diligence."

Thus the citizen suit has evolved from a necessary and expected aid to government in implementing laws to a role that includes this "supplementary" function but also includes policing the government itself in its regulatory sphere.

The Attorney General has the primary responsibility for prosecutions. However, in our legal system, the Attorney-general has a potential conflict of interest as both the representative of the Crown responsible for public prosecution and as a member of Cabinet.[57] This conflict of interest is compounded by our legal tradition of delegating prosecutorial discretion to the Crown.[58] Citizens are left out of the decision-making when the Attorney-General decides whether to prosecute. This is particularly true with respect to the generally "invisible" decision not to prosecute.

Under Canadian common law, consistent with our English common law roots, there has always been the option of pursuing a private prosecution, as a supplement to the powers of the Attorney General to enforce a public crime or offence. Under the common law rules, a citizen has the right to lay a charge to bring an alleged wrong-doer to account before a court of law. Citizens who initiate in a private prosecution may act in the place of the Attorney General in such circumstances. However, the Attorney General is always entitled to exercise her discretion to take over the prosecution, and even abandon it, leaving the citizen with no specific role to play or recourse.[59]

A "citizen suit," on the other hand, is a *civil* action in which a private party has a statutory cause of action to seek relief in the civil courts to enforce the provisions of a statute. As such, a citizen suit has some advantages over a private prosecution. In a civil suit, the emphasis is on compensation rather than deterrence. In some instances this may be a more appropriate approach. Furthermore, the consent of the Attorney General generally is not required to pursue a citizen suit. Perhaps even more importantly, the burden of proof in a citizen suit is the civil one of "on a balance of probabilities," which a lesser onus than the criminal burden of beyond a reasonable doubt.[60]

2) The U.S. Experience with "Citizen Suits"

In the United States, citizen suits have been a legislated part of environmental regulation since the *Clean Air Act* was amended in 1970.[61] This enactment of a citizen suit provision has been used as a model in almost every major environmental statute

enacted in the U.S. during the last two decades.[62] These provisions permit citizens to take civil actions to seek injunctions against activities, either by private actors or government agencies, which violate the statutes in question.[63]

Civil penalties, payable to the government, are sometimes also provided for in U.S. citizen suit provisions.[64] These are designed to punish the violator, to eliminate any profit earned by the violator from the polluting activities, and to compensate for environmental caused by the polluting activity.[65] These penalties are generally reserved for the government to claim.

In addition, while in the U.S. citizens are normally entitled to intervene in government prosecutions where they can show an interest in the property or transaction at issue, most U.S. environmental statutes allowing citizen suits also grant citizens the right to intervene in government enforcement proceedings.[66] Where a case is settled, even before court proceedings are initiated[67], a citizen that has intervened becomes a party to the agreement and can participate in the settlement negotiations.

Citizen suits[68] have been recognized in the U.S. as a vital component of that country's environmental regulatory regime. Indeed, citizens are uniquely placed to act as the governments "eyes and ears" when it comes to monitoring the environment in which they live.

> "Citizens are on the of the nation's greatest resources for enforcing environmental laws and regulations. They know the country's land and natural attributes more intimately than a government ever will. Their number makes them more pervasive than the largest government agency. And because citizens work, play, and travel in the environment, each has a personal stake in its beauty, health, and permanence. Citizens are omnipresent, motivated, and uniquely interested in environmental quality."[69]

Public involvement in enforcement is also an important component of a democratic political system that encourages public participation in the creation of environmental statutes and regulations.[70]

When citizens suits were first enacted in the United States, there was considerable opposition to the concept. Warnings of a proliferation of lawsuits that would flood already overburdened courts were put forward. Others raised concerns about the ability of governments to shape their own prosecution policies, without interference from an overzealous citizenry. This opposition shaped the first citizen suit provision in the U.S. The result was provisions that allowed citizens to sue, but only after notifying appropriate regulatory agencies and giving them the chance to sue first. In addition, citizens were only allowed to sue to redress statutory violations, but not for damages.

In practice, citizen suits have tended to occur only in cases of serious and

egregious violations of environmental laws,[71] and it is generally held that citizen enforcement of environmental laws has supplemented governmental efforts which have been subject to resource constraints. Indeed, a number of U.S., government agencies have expressed their appreciation for citizen suit enforcement efforts.[72] In addition, allowing citizen suits as formal parts of environmental legislation has acted as an incentive to governments to actively enforce environmental laws, even when they may be reluctant to do so to political reasons.[73]

3) Citizen Suits and The Ontario *Environmental Bill of Rights*[74]

The new Ontario *Environmental Bill of Rights*, following the model of U.S. environmental citizen suit provisions, creates a new right for Ontario citizens to bring a law suit against an alleged polluter or other person suspected of breaking the law and causing harm to a significant public resource[75], that removes some of the obstacles to citizen participation in enforcement. Although, notice must be given to both the Attorney General and the Environmental Commissioner, under the Act[76], the Attorney General does not have the right to take over the proceeding, thereby exclude the citizen enforcer.

In order to ensure that the government has had an opportunity to investigate and decide whether to prosecute themselves, the citizen wanting to sue must first have submitted a Request for Investigation to the Environmental Commissioner and either not received a response within a reasonable time period or received an unreasonable response. Once the citizen initiates her suit, the Attorney General is entitled to present evidence and make submissions to the court in the action, as well as to appeal the judgment and call evidence and make submissions at the appellate level.[77] Although there are many remedies available in a successful citizen suit, including an injunction and an order to develop a plan for clean-up and restoration, the citizen cannot claim monetary damages personally. Costs are awarded pursuant to the court's discretionary power[78]; however, the court may take into consideration "...any special circumstance, including whether the action is a test case or raises a novel point of law."[79]

4) Requirements for Effective Citizen Enforcement

Successful citizen participation in enforcement requires support from other elements of the environmental protection system. Citizen suits must be permitted through an explicit statutory provision. The Ontario *Environmental Bill of Rights* is one of the few Canadian environmental statutes with such a provision.[80] A second requirement is that there be clear statutory standards of conduct against which the behaviour of potential violators can be measured. Specific emission levels, and deadlines for compliance, for example present the citizen, as well as the government enforcer, with more opportunities to enforce the law.

A third prerequisite to effective citizen enforcement is a public education program to ensure that citizens know about the various options for participation. Indeed, an enlightened government could use citizen volunteers to implement a comprehensive enforcement strategy.[81]

The provision of financial incentives to encourage such participation is essential. In the U.S. only one quarter of citizen suits filed between 1984 and 1988 were brought by individual or local coalitions, while the rest were brought by national or regional environmental organizations.[82] This statistic is likely largely influenced by the prohibitive costs of environmental litigation. Subsidizing citizen environmental enforcement directly is a potentially effective form of encouragement.[83] Indirect subsidy through provision of technical assistance, such as government experts and testing facilities, is also an appropriate role for government in the context of encouraging citizen participation in enforcement. The provision of assistance of this kind could be seen as part of the federal government's duty flowing from its statutory commitment to "encourage the participation of the people of Canada in the making of decisions that affect the environment" contained in CEPA.[84]

Generous cost rules are also necessary to encourage citizen suits to be brought in the public interest, allowing the court to exercise its discretion to not award costs against a unsuccessful citizen plaintiff where the suit was a test case or raised a novel point of law.

Finally, a crucial element in the success of citizen suits in the U.S. has been access to information on pollution levels supplied by polluters themselves, as part of regulatory self-monitoring and reporting regime.[85] Examples include the discharge monitoring reports required under the U.S. *Clean Water Act* and information available through the *Freedom of Information Act*. An enlightened government agency might also assist citizens in information-gathering by affirmatively disseminating environmental data collected in the course of its regulatory duties. An important component of the information requirements is reporting of non-compliance so that citizens can ascertain when the government has chosen to not enforce the statute in question.

5) A Citizen Suit Provision for CEPA

CEPA should be amended to permit citizen suits. This statutory recognition is necessary to overcome problems associated with private prosecution[86], such as the potential exclusion of the citizen from participation if the Attorney-General exercises his or her discretion to prosecute and/or enter a settlement with the alleged wrong-doer.

CEPA presently permits citizens to apply to the court for damages, or an injunction, where they have suffered personal loss, or will suffer personal loss, as a result of a violation of CEPA. However, the individual citizen must prove this loss or damage.[87]

CEPA also permits the minister to seek an injunction against activities which are, or may lead to, a violation of CEPA, or to obtain a court order requiring that the person named in the order take action to prevent a violation of CEPA.[88]

These existing provisions should be expanded to provide a clearly articulated citizen's right to bring an civil enforcement action, subject to proof of an offence, or imminent offence, on a balance of probabilities[89] in the event of a violation or imminent violation of CEPA. Remedies available under such actions should include the granting of injunctions ordering the person named to refrain from any action that may constitute or be directed towards the commission of an offense under CEPA, or to do anything necessary to prevent the commission of an offence under CEPA.[90] In the event that CEPA has been contravened, the person named in an application might be required to develop and implement a restoration plan to repair any damage caused to the environment in the course of the violation of CEPA.[91] Consideration should be given to allowing citizens to share in penalties levied against the wrong-doer upon conviction as well.[92]

The citizen suit provision should require notice to the Attorney General prior to initiation of the suit. However, where the Crown decides to pursue the case, the citizen, or citizens' group, should be entitled to remain a party to the prosecution. Where the Attorney-General settles the case without formal legal proceedings, the citizen should be entitled to participate in the settlement negotiations and permitted to become a party to any agreement signed.

The court's discretion regarding cost awards in citizen suit actions should be specifically stipulated to include considerations of whether the case is a test case or raises a novel point of law. Interim cost award should be made explicitly available under the citizen suit provision. In addition, a fund for providing enforcement costs to citizen enforcers should be created.[93]

The information dissemination provisions of CEPA should be reviewed to ensure that they encourage citizen participation in enforcement. The possibility of including voluntary citizen enforcers in their enforcement strategies should be considered. At a minimum, citizens should have access to monitoring information, and information regarding non-compliance, and decisions by the Attorney General not to prosecute.

Finally, in the Canadian federal context, the importance of clear standards under any delegation agreement cannot be overstated. Where equivalency agreements are permitted under CEPA, it should be made clear that the test for equivalency includes the provision of citizen suits under the "equivalent" provincial law.[94]

V. CONCLUSIONS AND RECOMMENDATIONS

There is no question but that Environment Canada's enforcement practices regarding CEPA require reform. Nor is there any question but that reform must not only address the past failings of government action under CEPA, but must also address the imperatives of sustainable development and pollution prevention.

RECOMMENDATIONS

1) Environment Canada's Departmental Mandate

The Department of the Environment must accept the regulatory mandate provided to it by CEPA. The Department can no longer limit itself to an "advisory" and "promotional" role. CEPA provides the department with clear direction to provide for the life-cycle regulation of toxic substances in Canada and a number of additional regulatory functions. The department must accept and operationalize these regulatory functions as part of its institutional mindset and core administrative policies. In the context of CEPA, Environment Canada's mandate must now be recognized as being two-fold:

1) to provide information clearly, and in a timely fashion to regulated industries; and

2) to enforce compliance with the requirements of the legislation when it is necessary to do so.

This regulatory mandate should be affirmed by the Standing Committee on Environment and Sustainable Development and by the government as a whole.

2) Departmental Restructuring

In order to operationalize this regulatory mandate Environment Canada's enforcement functions should be restructured. In particular:

* *following the model of the Ontario Ministry of Environment and Energy, information and promotion, and enforcement functions should be clearly separated;*

* *the need for Environment Canada to obtain permission from the Department of Justice to undertake prosecutions should be eliminated; rather prosecutions should be handled by Environment Canada's own legal services branch, as is the case with the Ontario Ministry of Environment and Energy; and*

* *investigative and legal services staff should be given greater authority to decide when to prosecute.*

3) Sanctions and Enforcement Powers

i) Sanctions

The quasi-criminal sanctions currently contained in CEPA[95] should be retained. The presence of these sanctions in the Act underline the value of respect for the environment itself and stigmatize behaviour causing serious damage to the environment.

ii) Enforcement Powers

Consistent with the affirmation of Environment Canada's regulatory mandate through CEPA, inspectors' powers under CEPA[96] should be expanded to include:

* *the authority to issue "cease and desist" or "stop" orders to oblige a regulated party to stop an illegal activity, without the requirement for formal court action;*

* *the authority to issue preventative orders to require regulated parties to take preventative or corrective action before a violation actually occurs;*

* *the authority to require regulated parties to report on how they have complied with "cease and desist" or "stop" orders or preventative orders;*

* *the authority to gain entry where an owner refuses consent; and*

* *the right to serve subpoenas and summons in accordance with s.509(2) and s.701(1) of the Criminal Code.*

4) Citizen Suits

CEPA should be amended to permit citizen suits to ensure that the requirements of CEPA and any regulations made under the Act are met. A separate provision should be included in CEPA with the following features:

* *a clear articulation of any person's right to bring an enforcement action, subject to proof of an offence, or imminent offence, on a balance of probabilities;*

* *provide for the granting of injunctions ordering the person named in such actions to refrain from any action that may constitute or be directed towards the commission of an offence under CEPA, or to do anything necessary to prevent the commission of an offence under CEPA;*

* *where CEPA has been contravened, the person named in an application can be required to develop and implement a restoration plan to repair any damage*

caused to the environment in the course of the violation of CEPA;

* *permits citizens to share in penalties levied against the wrong-doer upon conviction;*

* *in the event that the Attorney-General decides to pursue the case, the citizen, or citizens' group, should be entitled to remain a party to the prosecution;*

* *in the event that the Attorney General settles the case without formal legal proceedings, the citizen should be entitled to participate in the settlement negotiations and should be entitled to become a party to any agreement signed;*

* *specifically stipulate that the court consider whether the case is a test case or raises a novel point of law, in making cost awards in relation to citizen suit actions;*

* *makes available interim cost awards to citizen enforcers;*

* *creates a fund to assist citizen enforcement actions; and*

* *requires that where equivalency agreements are permitted under CEPA, the test for equivalency include the provision of citizen suits under the "equivalent" provincial law.*

ENDNOTES

1. J. William Futrell, "Law of Sustainable Development" (March/April, 1994) 11 The Environmental Forum p.21.

2. Resource Futures International. Evaluation of the Canadian Environmental Protection Act (CEPA) Final Report. (Ottawa: Environment Canada: December, 1993).

3. Richard Brown and Murray Rankin, "Persuasion, Penalties, and Prosecution: Administrative v. Criminal Sanctions" in M. Freidland (ed.) Securing Compliance (Toronto: University of Toronto Press, 1990) p.325.

4. Eugene E. Kupchanko, "A Case For Compliance Through Administration of Licenses and Permits" in Linda F. Duncan (ed.) Environmental Enforcement (Edmonton: Environmental law Centre, 1985) at 8.

5. David Estrin, "A Response" in Linda F. Duncan (ed.) Environmental Enforcement, p.15.

6. See, among others, Eugene E. Kupchanko, "A Case For Compliance Through Administration of Licenses and Permits" and Nicholas Gwyn "Structuring Administrative Discretion: Making Compliance Systems Fairer, More Effective and Less Costly" in Linda F. Duncan (ed.) Environmental Enforcement, pp.8 and 18.

7. See John Z. Swaigen "A Case for Strict Enforcement of Environmental Statutes" in Linda F. Duncan (ed.) Environmental Enforcement, p.2.

8. "Recent polling data indicate that most of the public support the need for strict environmental regulation." See Resource Futures International, Evaluating CEPA, p. 78.

9. See, among others, K. Webb, Pollution Control in Canada: The Regulatory Approach in the 1980's (Ottawa: Law Reform Commission of Canada, 1988) and, generally, M. Friedland (ed.), Securing Compliance (Toronto: University of Toronto Press, 1990).

10. The sanctions provided for under CEPA are, some argue, technically *not* criminal sanctions:

> "...section 115...is linked to contravention of the Act. These are thus regulatory, rather than essentially criminal offenses..."

from Alastair R. Lucas, "Jurisdictional Disputes: Is "Equivalency" a Workable Solution?" in Donna Tingley (ed.) Into The Future: Environmental Law and Policy for the 1990's (Edmonton: Environmental Law Centre, 1990) at 30. Whether or not the provisions fall entirely into the criminal law power of the federal government, the expression of societal approbation is still clear, and still necessary.

11. Law Reform Commission of Canada. Recodifying Criminal Law (Ottawa: Law Reform Commission of Canada, 1987) p.95.

12.Ibid., p. 93.

13.K.Clark and B.Rutherford, "Constitution, Federal-Provincial Relations, Harmonization, and CEPA," in M.Winfield, ed., Reforming CEPA: A Submission to the Standing Committee on Environment and Sustainable Development (Toronto: Canadian Institute for Environmental Law and Policy, 1994).

14. The exact words in the "Issues Overview" document are:

> "In addressing [the issue of sustainable development], several factors should be kept in mind. It is well recognized that sustainable development cannot be promoted entirely by one level of government, or through a single piece of legislation or other instrument. (Reviewing CEPA: An Overview of the Issues, at 6)

This statement suggests that the body that has "well recognized" these conclusions is the federal government, and that the "single piece of legislation" that cannot promote sustainable development all by itself is CEPA.

15. All of the figures cited in the following discussion are taken from Environment Canada, "Office of Enforcement Legal Activities (CEPA and the *Fisheries Act*)", May, 1994.

16.Canada Gazette, Part I, 13 May, 1993, EXTRA No. 3, Vol. 127
Gasoline Regulations -- Amendment. The nature of the amendment to the Gasoline Regulations will be to explicitly state the non-applicability of the regulations to aircraft and competition vehicles.

17. The regulations under CEPA are:

Replacing Previous Regulations under the Clean Air Act:

1. Secondary Lead Smelter Release Regulations; SOR/91-155 (Gaz. 13/3/91, p. 1043).
2. Vinyl Chloride Release Regulations, 1992; SOR/92-631 (Gaz. 2/12/92, p. 4512).
3. Chlor-Alkali Mercury Release Regulations; SOR/90-130 (Gaz. 28/2/90, p. 790) ss. 3(1)-(3), 4, 7; Scheds. I-III: am. SOR/93-231 (Gaz. 2/6/93, p. 2420).
4. Asbestos Mines and Mills Release Regulations; SOR/90-341 (Gaz. 4/7/90, p. 2442) s. 3(1); Scheds. I,II: am. SOR/93-231 (Gaz. 2/6/93, p. 2420).
5. Gasoline Regulations (replacing 2 previous regulations); SOR/90-247 (Gaz. 9/5/90, p. 1700) Sched.: am. SOR/92-587 (Gaz. 21/10/92, p. 4094).
6. Fuels Information Regulations, No. 1; (C.R.C. 1978, c. 407) ss. 4(1), 5(1); Sched. Form 1 items 2(a), 7-8(new); Sched. form 2 ss. 3,4: am. SOR/79-280 (Gaz. 11/4/79, p. 1175).

Replacing Previous Regulations under the Environmental Contaminants Act
7. Chlorobiphenyl Regulations (replacing 3 previous regulations); SOR/91-152 (Gaz. 13/3/91, p. 1030).
8. Polybrominated Biphenyl Regulations, 1989; SOR/90-129 (Gaz. 28/2/90, p. 787).
9. Polychlorinated Terphenyls Regulations, 1989; SOR/90-128 (Gaz. 28/2/90, p. 784).
10. Mirex Regulations, 1989; SOR/90-126 (Gaz. 28/2/90, p. 778).

Replacing Previous Regulations Under the Canada Water Act
11. Phosphorous Concentration Regulations; SOR/89-501 (Gaz. 8/11/89, p. 4510).

Replacing Previous Regulations under the Ocean Dumping Control Act
12. Ocean Dumping Regulations, 1988; SOR/89-500 (Gaz. 8/11/89, p. 4490) ss. 3,4, 4(g)(iii), 4(1), 5, 6; Sched.: am. SOR/93-433 (Gaz. 8/9/93, p. 3621).

New Regulations
13. Contaminated Fuel Regulations; SOR/91-486 (Gaz. 28/8/91, p. 2538).
14. Export and Import of Hazardous Wastes Regulations; SOR/92-637 (Gaz. 2/12/92, p. 4553).
15. Federal Mobile PCB Treatment and Destruction Regulations; SOR/90-5 (Gaz. 3/1/90, p. 20).
16. Gasoline Regulations; SOR/90-247 (Gaz. 9/5/90, p. 1700) Sched.: am. SOR/92-587 (Gaz. 21/10/92, p. 4094).
17-20. Ozone-depleting Substances Regulations No.1,2,3 and 4.
No. 1; SOR/89-351 (Gaz. 19/7/89, p. 3425).
No. 2; SOR/90-583 (Gaz. 12/9/90, p. 3735).
No. 3; SOR/90-584 (Gaz. 12/9/90, p. 3720).
No. 4; SOR/93-214 (Gaz. 19/5/93, p. 2243).
21. Pulp and Paper Mill Defoamer and Wood Chip Regulations; SOR/92-268 (Gaz. 20/5/92, p. 1955).
22. Pulp and Paper Mill Effluent Chlorinated Dioxins and Furans Regulations; SOR/92-267 (Gaz. 20/5/92, p. 1940).
23. Storage of PCB Material Regulations; SOR/92-507 (Gaz. 9/9/92, p. 3566).
24. Toxic Substances Export Notification Regulations; SOR/92-634 (Gaz. 2/12/92, p. 4533).

18. Another factor may be the annual National Inspection Plan, a confidential document that targets industries that, on the basis of data received from regulated companies, present the most serious problems to the environment. The Plan is kept confidential in order not to "tip off" bad actor corporations. One might also guess that it is kept confidential so that the corporations not on the list will not be "tipped off" that they may be enjoying a regulation holiday that year.

19. Tom Conway, "Taking Stock of the Traditional Regulatory Approach" in G. Bruce Doern (ed.) Getting it Green: Case Studies in Canadian Environmental Regulation

(Toronto: C.D. Howe Institute, 1990) p.37.

20. Ted Schrecker, "Of Invisible Beasts and the Public Interest: Environmental Cases and the Judicial System" in Robert Boardman (ed.) Canadian Environmental Policy: Ecosystems, Politics and Process (Toronto: Oxford University Press, 1992) p.91.

21. George Hoberg, "Environmental Policy: Alternative Styles" in Michael M. Atkinson (ed.) Governing Canada: Institutions and Public Policy (Toronto: Harcourt Brace Jovanovich, 1993) p.315.

22. These quotations are cited in Toby Vigod and Rick Lindgren, "Overview of Federal Law, Regulation and Policy: A paper presented to the Canadian Institute two day course on Environmental Law and Regulation in Ontario", (Toronto: Canadian Environmental Law Association, 1994) p.2.

23. Cited in Resources Futures International, Evaluating CEPA, p.77.

24. See Vigod and Lindgren, Overview of Federal Law, Regulation and Policy, p.27.

25. A recent article in the Ottawa Citizen ("Environmentalists decry lack of charges for pollution offenses", July 18, 1994, p. A3) makes news of the fact that the federal Department of the Environment does not prosecute and convict polluters in the same way as the Ontario Ministry of Environment and Energy. A Ministry official, Paul Cuillerier, is quoted as saying that the primary role the federal government plays in environmental regulation is: "[not] directed at suspected pollution cases. It's focused instead on the storage of PCBs." See also Tom Conway, "Taking Stock of the Traditional Regulatory Approach."

26. Resource Futures International, Evaluation of CEPA, p.80.

27.See Clark and Rutherford, "The Constitution, Federal-Provincial Relations and CEPA."

28. See, for example, Tom Conway, "Taking Stock of the Traditional Regulatory Approach," p.25.

29. Conway, "Taking Stock of the Regulatory Approach," pp.34-35.

30. This number was provided during a confidential interview with a Department of the Environment official. It should be noted that, in its appendix to its report, RFI indicates that there are a total of 132 inspectors, and a total of 20 investigators working in the five regions (Appendix, p. c-15). However, there are also discrepancies between the information RFI cites regarding prosecutions, and the Department of the Environment's own Prosecution and Enforcement Report. Why the information is inconsistent is unknown.

31. Resource Futures International, Evaluating CEPA p.84.

32. Ibid, p.84.

33. Mark Winfield, "The Federal Department of the Environment as a Test Case," unpublished manuscript, 1991, at 6. Document on file with the Canadian Institute of Environmental Law and Policy, Toronto, Ontario.

34. "The new agency was based principally upon the existing Department of Fisheries and Forestry. However, a number of elements were added from other agencies. The Canadian Meteorological Service was transferred from the Department of transport, as were the Air Pollution Control Division form the Department of National Health and Welfare, the Canadian Wildlife Service from the Department of Indian and Northern Development, the Canadian Land Inventory from the Department of Regional Economic Expansion, and the water related branches of the Department of Energy, Mines and Resources." Mark Winfield, "The Federal Department of the Environment as a Test Case," p.5.

35. Ibid, p.9.

36.Ibid, p.10.

37. "The Department of the Environment did envision for itself a significant responsibility in the control of the environmental impacts of major new development projects. Despite this aim, the limitations to Environment Canada's capacity to assert a meaningful coordination and review role beyond its information function were particularly evident in the structure of the Federal Environmental Assessment Review Process...The procedure was to apply to programs and projects initiated by federal departments and undertakings for which federal funds were sought, which involved federal property or for which there were possible federal regulatory considerations. However, it would be the task of the "initiating" department or the department with the principal funding or regulatory interest, rather than the Department of the Environment, to make a preliminary review of an undertaking and decide if its impacts were significant enough to warrant an environmental assessment review." Ibid, p. 7.

38. Ibid, p. 14.

39.Ibid, p. 17.

40. Resource Futures International, Evaluating CEPA, p.80.

41. Confidential interview.

42. Confidential interview.

43. Resource Futures International, Evaluating CEPA, p.78.

44.See Environmental Prosecutions in Ontario various editions, 1991-1994, (Toronto: Ontario Ministry of Environment and Energy).

45. The Ozone-Depleting Substances, Ocean Dumping and PCB Storage Regulations are the most often enforced. See discussion above, under "Reviewing the Record."

46. Environment Canada. Reviewing CEPA: An Overview of the Issues, 1994, p.9.

47. Latin for "he who as much for the King as for himself;" the special means in the thirteenth century of bringing a citizen enforcement of penal offenses.

48. See Note, "The History and Development of Qui Tam" (1972) Wash. Univ. L. Qtly 81; cited in Kernaghan Webb, "Taking Matters into Their Own Hands," 36 McGill L. J. 770, p.789.

49. See Bowman & Hunter, "Environmental Reforms in Post-Communist Central Europe: From High Hopes to Hard Reality", 13 Michigan J. Int'l L. 301, 351.

50. See Webb, "Taking Matters into Their Own Hands."

51.Ibid., p.791.

52.Ibid.

53. Ibid.

54. Another barrier to citizen participation was the courts' establishment, by the nineteenth century, of the necessity to prove guilt in all penal cases. Proving malicious intent on the behalf of corporate defendants presented then, as it still does today, a formidable obstacle to any prosecutor, private or public. See Webb, "Taking Matters into their Own Hands," pp.791-780.

55. The phrase "regulatory offence" refers to the body of public welfare offenses that do not require proof of "mens rea," or intent, to obtain conviction. See *R. v. City of Sault Ste. Marie* (1977) , [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353.

56. The phrase "due diligence" refers to the reverse onus on an accused to show, once their wrong-doing has been proven beyond a reasonable doubt, that what they did to avoid the wrong-doing was reasonable in the circumstances.

57. See Webb, "Taking Matters into their own hands," p.783.

58. "Unlike some other Western legal systems [such as in Germany] Canada follows the English lead in not subjecting government enforcement authorities... to a general duty to prosecute for all cases which come to their attention." Webb, "Taking Matters into their own hands," pp.817-818; citing Glanville Williams, "Discretion in Prosecuting" (1956) Crim.

L. Rev. 222, at p.222.

59. See generally, P. Burns, "Private Prosecutions in Canada: the Law and a Proposal for Change" McGill Law Journal 21 (1975), p.269.

60.There is however, a significant potential disadvantage with the pursuit of a citizen suit in Canada, as under the costs rules for civil actions, an award of costs can be made against an unsuccessful plaintiff. These rule do not apply in quasi-criminal proceedings, such as private prosecutions.

61. See 42 U.S.C. Section 7604 (1982).

62. Steven M. Dunne, "Attorney's Fees for Citizen Enforcement of Environmental Statutes: The Obstacles for Public Interest Law Firms" 9 Stanford Environmental Law Journal 1, at p.1. The single major exception is the *Federal Insecticide, Fungicide, and Rodenticide Act* (FIFRA), 7 U.S.C. Sections 135-136y (1982). Two recent examples are citizen suit provisions included in the 1984 amendments to the *Resource Conservation and Recovery Act* (RCRA) and in the 1986 *Superfund Amendments and Reauthorization Act* (SARA); see 42 U.S.C. Sections 6972, 9659 (1982 & Supp. V 1987). Citizen suits are not unique to U.S. federal environmental legislation; they can be found in recent legislation protecting consumer and other social interests. See Jeffrey G. Miller and the Environmental Law Institute (ELI), Citizen Suits: Private Enforcement of Federal Pollution Control Laws, (Washington, D.C.; 1987)

63. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*, 484 U.S. 49 (1987).

64. See the *Clean Water Act*, s.505(a); the *Resource Conservation and Recovery Act*, s. 7002(a); and the *Clean Air Act*, s.304(a). In one successful citizen suit brought to enforce a waste-water treatment plant's permits, the appellate court found that the trial court's civil penalty award of $3.2 million was too low. The court instructed the lower court to reassess the penalty, suggesting the statutory maximum of $4.2 million was more appropriate under the circumstances. See *Public Interest Research Group of New Jersey v. Powell Duffyn Terminals, Inc.*, 720 F. Supp. 1158 (D,N,J, 1989), aff'd in part and rev'd in part, 913 F.2d 64 (3d Cir. 1990).

65. Under the *Clean Air Act* (S.304(g)(2)), judges may assign up to $100,000 of these penalties to a fund which will be used for "beneficial mitigation projects which are consistent with the *Clean Air Act*."

66. See M. Axline, Environmental Citizen Suits, s.503, at 5-3 & n.5 (1991).

67. Such settlements are called "consent decrees" in the U.S.

68. It is important to understand that such suits are civil actions requiring proof only a "balance of probabilities" only; while explicitly preserving anyone's right to commence a private prosecution for non-compliance of the Act, including requesting relief against an administrator or State agency. See *Clean Air Act*, s. 304.

69. ELI Working Paper, The Role of the Citizen in Environmental Enforcement (Washington D.C.; August 1992; A Working Paper prepared under the auspices of the Environmental Law Institute's Environmental Program for Central and Eastern Europe.), p.1.

70. Many other countries besides the U.S. allow public participation in the enforcement of environmental laws. See Preston, "Public Enforcement of Environmental Laws in Australia," 6 J. Envt'l. L. & Litigation 39 (1991); Webb "Taking matters into their own hands," p.770; Participation and Litigation Rights of Environmental Associations in Europe (M. Fuhr & G. Roller eds. 1991)

71. The 1970 *Michigan Environmental Protection Act* (MEPA) was the first state statute in the U.S. to expressly authorize citizen suits. From 1972 to 1983, only 183 cases were brought. For further discussion see Paul Muldoon, "The Fight for an Environmental Bill of Rights," Alternatives Vol. 15, No.2 1988.

72. See *Chesapeake Bay Foundation v. Bethlehem Steel Co.*, 652 F. Supp. 620, 625 (D. Md. 1987) citing Brief of the U.S. as *amicus curiae* in support of the *Clean Water Act* at 1-2; *Student Public Interest Research Group v. Monsanto*, 600 F.Supp. 1474 (D,N,J, 1985) indicating that the EPA Administrator enthusiastically supported the role of citizens in enforcement proceedings; and Price, "Private Enforcement of the *Clean Water Act*," 1 Nat. Resources & Environment 31, at p. 60 (1986).

73. See Webb, "Taking Matters into Their Own Hands," p.819.

74.For a detailed discussion of the Ontario *Environmental Bill of Rights* see G.Crann, G.Ford, and M.Winfield, Achieving the Holy Grail? A Legal and Political Analysis of the Ontario Environmental Bill of Rights (Toronto: Canadian Institute for Environmental Law and Policy, forthcoming).

75. Note that where the citizen alleges that a law is broken, this suit is equivalent to a private prosecution, whereas the allegation of harm to a public resource would not necessarily involve a prosecution under a particular statute.

76.Ontario *Environmental Bill of Rights*, s.78 and 86(1).

77.Ibid., s.86(2).

78. According to the *Courts of Justice Act* (s.141(1)).

79.Ontario *Environmental Bill of Rights*, s.100. The Ontario Rules of Civil Procedure also allow the courts discretion to award costs against or for a party depending on a number of factors, including the complexity of the proceeding and the importance of the issues (R.57.01(1)(c) and (d)). Although the general rule is that the successful party is entitled to their costs, the fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against a party in a proper case (R.57.01(2)).

80.Other examples include the Quebec *Environmental Quality Act*, the *Northwest Territories Environment Rights Act*, and the *Yukon Environment Act*.

81. Such an enlightened strategy would prevent potential conflicts from piecemeal enforcement efforts and help the government meet its enforcement objectives.

82. ELI, The Role of the Citizen in Environmental Enforcement, p.35, n.96; citing Greve, "The Private Enforcement of Environmental Law," 65 Tul.L.Rev. 339, 352-53 (1990).

83. A territory in Australia has employed this method of encouragement; see Preston, "Public Enforcement of Environmental Laws in Australia," 6 J. Envtl. L. & Litig. 39 (1991).

84. CEPA, s.2(d); see Webb, "Taking matters into their own hands," p.826.

85. ELI, The Role of the Citizen, p.36 and n.100.

86. Webb suggests that private prosecutions result from distrust of government and inadequate information about the government's enforcement policy. At the very least, if the government does not amend CEPA to include a citizen suit provision, the CEPA Compliance and Enforcement Policy should be amended to reflect the government's policies in respect of private prosecutions. See Webb, pp. 826-828, wherein he suggests that the following be included in such a policy: (1) when will the government decide not to prosecute; (2) what information will be supplied about a decision not to prosecute; (3) how will the AG treat private prosecutions; (4) what ongoing compliance or non-compliance reports should be regularly published; (5) what further information will be made available to the public; (6) will government officials conduct samples supplied to citizens?; (7) what technical assistance will be provided to private prosecutors? and (8) what financial assistance will be provided to private prosecutors? See also Web's specific suggestions for additions to CEPA's "flawed" Enforcement and Compliance Policy along the same lines as just noted. (p.830)

87. CEPA, s.136.

88.CEPA, s.135.

89. See Ontario's *Environmental Bill of Rights*, s. 84 and the U.S. *Clean Air Act*, s.304, for examples.

90.This proposal is based on the application for an injunction in such circumstances currently available to the minister. See CEPA s.135.

91.This would follow the provisions of the Ontario *Environmental Bill of Rights* in this regard. See Ontario EBR, s.95.

92. There is a Canadian precedent in the *Fisheries Act Forfeitures Regulations.*

93. Models for funding to be considered should be the Australian example given, as well as the Canadian examples of the *Intervenor Funding Project Act*, funding under the *Canadian Environmental Assessment Act* and the former Canadian Charter of Rights and freedoms Court Challenges Program.

94. See discussion in Webb, "Taking Matters into their own hands," pp. 820, and 829-830.

95.CEPA, ss.111-115.

96.Currently sections 100-110 of CEPA.

APPENDIX 3

CEPA, CHEMICAL NEW SUBSTANCES, AND BIOTECHNOLOGY

Prepared by:

Mark S. Winfield, Ph.D.
Director of Research

Burkhard Mausberg, B.Sc
Project Officer

Canadian Institute for Environmental Law and Policy
September 1994

TABLE OF CONTENTS

Page

INTRODUCTION 1

PART I: THE EXISTING CEPA NEW SUBSTANCES PROVISIONS 2

PART II: CEPA AND NEW CHEMICALS: PROBLEMS AND RECOMMENDATIONS FOR REFORM 5

1. Introduction 5
2. The Definition and Treatment of "Toxic" Substances under CEPA 5
3. A "Sunrise" Protocol for CEPA 6
4. Relationship Between CEPA New Substances Provisions and Other Statutes 6
5. Exemptions from CEPA New Substances Provisions 7
6. Status of Substances "Suspected of Toxicity." 7
7. Status of Substances For Which Inadequate Information Exists to Assess "Toxicity." 8
8. Assessment of Substances for Export Only 9
9. Assessment Timeframes 9
10. Field Tests of New Substances Under Assessment 9
11. Public Participation 10
    - i) Notice and Comment 10
    - ii) Appeals 11
    - iii) Intervenor Funding 12
12. Access to Information 13
13. Conclusions 14

PART III: CEPA AND NEW PRODUCTS OF BIOTECHNOLOGY: PROBLEMS AND RECOMMENDATIONS FOR REFORM 16

1. Introduction 16
    - i) What is Biotechnology? 16
    - ii) The Biotechnology Industry and Its Applications 17
        - a) Agriculture 17
        - b) Mining and Petrochemicals 18
        - c) Waste water Treatment 18
        - d) Bioremediation 18
        - e) Forestry 18
        - f) Fisheries 19
    - iv) Biotechnology and "Toxicity" 21

v) Biotechnology and Federal Jurisdiction 21
vi) Biotechnology and CEPA 22

2. A New Biotechnology Part for CEPA 23
i) Introduction 23
ii) Scope 24
iii) Relationship Between CEPA and other Statutes Regulating Biotechnology Products 24
iv) Information Requirements 25
v) Field Tests and Laboratory Procedures 26
vi) Assessment and Listing Process 27
a) Public Participation 27
b) Assessment Criteria 27
c) Approvals 28
d) Notice of Approval 28
e) Appeals 29
viii) Biotechnology Environmental Release Database 29

3. Conclusions 29

ENDNOTES 31

INTRODUCTION

The new substances provisions of the *Canadian Environmental Protection Act* (CEPA)[1] are among the most important aspects of the Act. Their significance is due to two principal features. First, the pre-commercial evaluation of new substances is the ultimate preventative activity. Rather than waiting for substances to cause damage to the environment or human health, new substances can be assessed and, if necessary, their use controlled, to prevent such outcomes. Secondly, the CEPA new substances provisions are not limited to the assessment of new chemicals. Other new "substances," such as biotechnology products, can also be assessed through the Act. In fact, CEPA was the first environmental statute in Canada to specifically recognize biotechnology products as distinct category of substances.

The screening of new substances prior to commercialization is an ideal opportunity to apply the principle of pollution prevention and a precautionary approach to the management of potentially harmful substances. These provisions of the Act should be used to provide clear signals to industry regarding the types of new substances which are likely to be approved for use in Canada, and the characteristics of substances which will result in prohibitions or severe restrictions on use. This would provide direction to firms in terms of their investment and research and development decisions.

However, the CEPA new substances provisions, as presently drafted, suffer from a number of significant substantive and procedural weaknesses which make the achievement of this goal difficult. This submission to the Standing Committee on Environment and Sustainable Development reviews these deficiencies and makes proposals for reform in three parts. The first part describes the existing new substances provisions of CEPA. Part Two makes proposals for reform of these provisions regarding new *chemical* substances. The chemical new substances provisions of CEPA were proclaimed to be in force in June 1994.

Part Three deals specifically with *biotechnology* products. Due to the consideration that biotechnology products can be self-replicating life forms, these products raise a number of unique issues with respect to the new substances provisions of CEPA. Regulations to implement the CEPA new substances regime for biotechnology products are still under development after a seven-year consultation process.[2] This submission suggests significant revisions to the way in which CEPA addresses new biotechnology products. These recommendations are contained in a proposal for a new biotechnology part for CEPA, and build upon CIELAP's work on the environmental regulation of biotechnology products over the past decade.[3]

PART I: THE EXISTING CEPA NEW SUBSTANCES PROVISIONS

The Substances New to Canada provisions of Part II (TOXIC SUBSTANCES) of CEPA are complex and challenging. Section 25 of CEPA establishes a Domestic Substances List (DSL), consisting of all substances known to have been manufactured or imported into Canada in a quantity of more than 100 kg in any one calendar year, or in Canadian Commerce or used for commercial manufacturing purposes between January 1, 1984 and December 31, 1986. The establishment of a Non-domestic Substances List, consisting of specified substances other than substances placed on the DSL is also provided for. Amendments to the DSL and Non-dSL must be published in the *Canada Gazette*.[4]

Section 26 of CEPA requires that substances not appearing on the DSL not be manufactured or imported into Canada until required information is provided to the Minister, and the established period for assessing this information has expired. These requirements to provide information to the Minister do not apply to substances which are regulated under other federal statutes which provide for the prior notification of the federal government of the import or manufacture of new substances, and provide to an assessment as to whether the substance is "toxic."[5] Exemptions from the CEPA new substances provisions are also provided for materials incidentally generated in the preparation of the substance,[6] substances produced when a substance undergoes a chemical reaction that is incidental to the use of the substance or that results from storage or from environmental factors,[7] and for substances which do not exceed the maximum quantities exempted from the new substances provisions of the Act.[8]

The information requirements for new substances can also be waived where, in the opinion of the Minister, the information is not needed to determine if the substance is "toxic," the substance is used or manufactured in a location where it is sufficiently contained to protect the environment and human life, or it is not feasible or practicable to obtain the data necessary to generate the information.[9] Notice of waivers granted by the Minister must be published in the *Canada Gazette*.[10]

The information regarding new substances to be provided to the Minister is to be prescribed in regulations made under the Act.[11] These regulations may also define substances or establish groups of substances for the purposes of assessment, including groups of biotechnology products, polymers, research and development substances and substances manufactured for export only.[12] Test and laboratory procedures to be followed in the development of test data may also be prescribed.[13]

The Ministers are required to assess the information provided to them regarding a new substance to determine if it is "toxic."[14] The time period for this

assessment may be set through regulation.[15] Where assessment periods are not established in this way, the prescribed assessment period is ninety days.[16] The assessment period can be extended up to the length of the prescribed assessment period where the Minister believes this is necessary to complete the assessment process.[17]

Once the Ministers have assessed any information provided to them regarding a new substance, and they suspect that the substance may be "toxic," they may permit the import or manufacture of the substance subject to any conditions the ministers specify, prohibit the import or manufacture of the substance, or request additional information from any person regarding the substance for the purpose of assessing its "toxicity."[18] The Minister may vary or rescind any condition or prohibition imposed on a substance which is suspected of being "toxic."[19] Notice of the imposition, variation or rescindment of any condition or prohibition must be published in the *Canada Gazette*.[20]

Where additional information is requested the substance cannot be imported or manufactured until the prescribed period for assessing the substance has expired, or ninety days after the provision of the additional information, whichever is later.[21] In the case of prohibitions, a prohibition expires within two years of its imposition unless notice of a proposed regulation to be made under CEPA is published within the *Canada Gazette*. The prohibition then expires on the date the regulation comes into force.[22] However, the structure of CEPA is such that the substances must be found to be "toxic" before such a regulation can be imposed.

When the Minister has been provided with the information required through CEPA for a new substance, the substance is manufactured or imported into Canada in sufficient quantities, and no conditions on is use made on the basis of a suspicion of "toxicity" (s.29(1)(a)) remain in force," the substance must be added to the DSL.[23]

Where a substance is found to be "toxic," the substance may be added to the Toxic Substances List (TSL).[24] Substances may also be deleted from the TSL where the Governor in Council (cabinet) believe that it is no longer necessary to include the substance on the List.[25] Once placed on the TSL, the substance may be made subject to regulations made under CEPA. The Act grants the Governor in Council the power to impose a wide range of conditions and requirements on TSL substances including complete prohibitions on their manufacturing, use, processing, sale, import or export, or on products containing the substance.[26] However, regulations cannot be made under CEPA if, in the opinion of the Governor in Council, the regulation would regulate an aspect of the substance that is regulated by any other federal statute.[27]

Reviews by a Board of Review of additions to and deletions from the TSL may be requested under CEPA. Reviews of regulations regarding TSL substances may

also be requested.[28] The actual establishment of a Board is at the Minister's discretion.[29] Wide standing is provided before Boards of Review[30] and cost awards may be made by Boards.[31] There are, however, no provisions for intervenor funding.

Sections 10-24 of CEPA relate to the disclosure of information. In general, the disclosure of information submitted for the purposes of CEPA is prohibited if requested by the submitter of the information.[32] However, certain types of information may be released when, in the opinion of the Minister, it is necessary for the purposes of the Act.[33] Information of this type may include summaries of health and safety data, occupational exposure studies, and toxicological, clinical or ecological studies of the substance.[34] Physical or chemical data which would reveal the identity of the substance cannot be released without the permission of the person who provides it.[35] Even when substances are added to the DSL or TSL, where the publication of the explicit chemical or biological name of the substance would result in the release of confidential business information, the name may be masked in a manner to be prescribed through regulations made under the Act.[36]

PART II: CEPA AND NEW CHEMICALS: PROBLEMS AND RECOMMENDATIONS FOR REFORM

1. Introduction

The screening of new substances prior to commercialization is an ideal opportunity to apply the principle of pollution prevention and a precautionary approach to the management of potentially harmful substances. These provisions of the Act should be used to provide clear signals to industry regarding the types of new substances which are likely to be approved for use in Canada, and the characteristics of substances which will result in prohibitions or severe restrictions on use. This would provide direction to firms in terms of their investment and research and development decisions.

However, the CEPA new substances provisions, as presently drafted, suffer from a number of significant substantive and procedural weaknesses which make the achievement of this outcome unlikely. This part of CIELAP's submission to the Standing Committee proposes a number of amendments to strengthen the potential effectiveness of the new substances notification and assessment provisions of CEPA regarding chemical new substances.

2. The Definition and Treatment of "Toxic" Substances under CEPA

Serious deficiencies have been identified with respect to the existing definition of "toxicity" under CEPA. In particular, concerns have been expressed that substances with "toxic" properties (e.g Toluene) have been found to be not "toxic" for the purposes of CEPA, due to CEPA's emphasis on the need to establish evidence of presence in the environment of a "toxic" substance in sufficient quantity or concentration to cause "toxic" effects.[37]

a) *The definition of "toxic" for the purposes of CEPA should be refined to stress the intrinsic characteristics of a substance in terms of its potential to cause harm to the environment or human health, rather evidence of its presence in the environment in sufficient quantity or concentration to cause "toxic" effects.*[38]

CEPA currently does not require that substances found to be "toxic" be placed on the Toxic Substances List.

b) *CEPA should be amended to require that new substances found to be "toxic" for the purposes of CEPA be placed on the Toxic Substances List.*

3. A "Sunrise" Protocol for CEPA

Directly related to the definition of "toxicity" is the development of an appropriate regulatory response once a new chemical has been declared toxic. Currently, there is little guidance as to how the Governor in Council will regulate new substances once placed on the Toxic Substances List. While section 34 of CEPA grants the Governor in Council broad powers to regulate new substances, it does not specify exactly what the regulatory response should be. Due to the likelihood of severe environmental and health effects, substances which are "toxic," persistent and bioaccumulative should not be permitted to be used or manufactured in Canada.[39]

Recommendations:

a) *CEPA should be amended to require that new substances which are persistent, bioaccumulative and "toxic" not be permitted to be manufactured, imported or used in Canada (a "sunrise" clause). Thresholds for persistence and bioaccumulation should be established through regulation. Exemptions to the "sunrise" clause should only be allowed in exceptional circumstances.*

b) *Pollution prevention plans, acceptable to the Minister of the Environment, should be required to be developed by notifying parties for "toxic" substances whose use or manufacture are not prohibited through the "sunrise" protocol, prior to their use or manufacturing being permitted within Canada.*

4. Relationship Between CEPA New Substances Provisions and Other Statutes

CEPA states that substances, for which another act of Parliament provides for the assessment of "toxicity" prior to manufacturing or import, are exempt from the new substances provisions of CEPA. In effect, only substances which are not assessed for "toxicity" under other statutes will be regulated under CEPA. However, the criteria for these exemptions are vague, and do not appear to be being applied stringently.

As the principal federal statute dealing with environmental matters, the role of CEPA in providing a minimum standard for the assessment of new substances, regardless of their intended use, should be affirmed and strengthened. The assessment criteria and procedure, and the range of regulatory options available to the federal government regarding new substances provided by another statute, should

be at least equal to CEPA to provide for an exemption from the CEPA new substances requirements.

Recommendations:

(a) *Explicit criteria for establishing the equivalency of other statutes for new substances notification and assessment purposes should be included in the CEPA new substances provisions. These criteria should include:*

- *requirements that notice be given prior to the import, manufacture or sale of a substance and for an assessment of whether it would be considered "toxic" for the purposes of CEPA;*
- *provisions for public participation in the notification and assessment process equivalent to those contained in CEPA; and*
- *the availability of federal control options for substances found to be "toxic" or suspected of being "toxic," equivalent in scope to those available under CEPA.*

(b) *A provision should be added requiring the Governor in Council to publish a list of statutes considered equivalent to CEPA for the purposes of new substances assessments.*

5. Exemptions from CEPA New Substances Provisions

Currently CEPA exempts a range of substances, including impurities, contaminants and partially unreacted materials, and additional substances produced when a new substance under assessment undergoes a chemical reaction incidental to its use or that results from environmental factors affecting the new substance under assessment.[40] By-products of the production, use, storage or environmental exposure of new substances under assessment have the potential to produce significant health or environmental effects of their own, and therefore should be considered in the assessment of new substances.

Recommendation:

CEPA should be amended to ensure that the assessment of new substances includes consideration of the potential health and environmental effects of by-products arising from the production, use, storage or environmental exposure of a new substance.

6. Status of Substances "Suspected of Toxicity."

The existing provisions of CEPA require that substances must go onto the DSL

s.29(1)(a) conditions have been imposed before the end of the assessment period. Such conditions can apparently remain in place indefinitely. This structure provides strong incentives to approve the manufacturing or import of substances suspected of being "toxic," subject to conditions, as if a substance cannot be conclusively shown to be "toxic" and therefore eligible to be added to the TSL, prohibitions on its use or manufacture cannot be maintained beyond a two-year period.

The application of the precautionary principle suggests that substances suspected of being "toxic" should be treated as "toxic" in terms of the available control options, including prohibitions on manufacture, use, import or export, until they can be demonstrated not to be "toxic" for the purposes of CEPA. The possibility of a Board of Review review of the status of a substance prohibited on the basis of a suspicion of "toxicity," might be provided for at the end of the two year period, rather than requiring that the prohibition be replaced with an approval subject to conditions at the end of two years.

Recommendation:

The capacity of the federal government to control the manufacture, or import of substances "suspected of toxicity" should be strengthened. Prohibitions on the import or manufacturing of substances found to be in this category should be permitted to remain in force beyond the two year time limit currently provided by CEPA,[41] so long as the substance continues to be "suspected of toxicity." Requests for Boards of Review on the status of substances "suspected of toxicity" should be permitted two years after the imposition of a prohibition on the import or manufacturing of such a substance.

7. Status of Substances For Which Inadequate Information Exists to Assess "Toxicity."

Section 29 1(c) of CEPA permits the minister to request additional information regarding a substance in order to assess its "toxicity." However, in the event that this additional information proves inadequate to permit an assessment of "toxicity," the minister is not permitted to request additional information, and prohibitions on importing or manufacturing the substance expire, under such circumstances, at the end of the assessment period.[42] These provisions appear to permit the possibility of substances whose "toxicity" has not been fully assessed being manufactured or imported, due to the unavailability of information necessary make such an assessment.

Recommendation:

CEPA should be amended to permit the minister to maintain prohibitions on the

importing or manufacturing of a new substance until sufficient information is provided to permit an assessment of the "toxicity" of the new substance. This approach would follow that taken in the Pest Control Products Regulations regarding the registration of pesticides in such circumstances.[43]

8. Assessment of Substances for Export Only

Section 32(1)(a) of CEPA permits the establishment of notification and assessment categories for substances only intended for export from Canada. This presents the possibility of different, and potentially lower notification requirements and assessment criteria for substances intended for export only, than would be the case for substances intended for domestic use. Such a distinction is inappropriate. Canada should not permit the export of products which have not been fully assessed and approved for use in Canada.

Recommendation:

CEPA should be amended to ensure that new substances intended for export are assessed for "toxicity" in the same way as substances intended for domestic use. The export of products subject to prohibitions on manufacturing or use in Canada should not be permitted. Similarly, substances subject to conditions on use or processing in Canada should not be permitted to be exported for uses or processes which are not permitted in Canada.

9. Assessment Timeframes

Section 32(2) of CEPA provides for a default period of ninety days for the assessment of new substances. The period for the assessment of additional data requested under section 29(1)(c) is also set at ninety days. Given the potential complexity of the data associated with new substances, the default period should be extended.

Recommendation:

The default assessment time limits for assessment contained in sections 32(2) and 29(2) should be extended to a minimum of one hundred eighty days.

10. Field Tests of New Substances Under Assessment

Field tests are situations in which new substances whose toxicity has yet to be fully assessed may be released into the environment, as tests may be necessary to

develop data for s.26 notification information packages. Section 32(1)(g) of CEPA permits the development of regulations regarding test conditions, procedures and practices. However, there is no specific requirement to obtain an approval from Environment Canada and Health Canada to conduct a field test, and it is not clear whether a failure to follow the requirements of a section 32(1)(g) regulation would merely invalidate the resulting information, or if such behaviour would constitute an offense under CEPA.

Recommendation:

CEPA should be amended to require that field tests of new substances receive a specific approval under CEPA. The minister should be permitted to approve tests, approve tests subject to conditions, or to refuse to permit a test. Failure to follow the conditions of a test approval should constitute an offense under CEPA. Failures to follow laboratory procedures required by regulations made under s.32 of CEPA should also constitute an offense under CEPA.

11. Public Participation in Decision-Making

i) Notice and Comment

Opportunities for public participation in the new substances assessment process are extremely limited. Public notices in the *Canada Gazette* are required in four instances:

(a) when information requirements are waived (s.26(5));
(b) when conditions or prohibitions are imposed on substances suspected of being "toxic," (s.29(5));
(c) when substances are added to or deleted from the DSL (s.25(4)) or the TSL; and
(d) when regulations are proposed for TSL substances (s.48).

No public notice is required when information regarding new substances is received by the Ministers (i.e. notifications), or when field tests of new substances are conducted for the purposes of developing data for new substances assessments.

Expanded public notice and comment provisions will ensure that the public is aware of, and has an opportunity to participate in, decisions regarding the approval for use in Canada of substances which may negatively affect the environment and human health. Notice and comment provisions would also improve accountability in the administration of CEPA. In addition, opportunities for public participation may enhance the quality of decision-making by providing members of the public, including non-governmental organizations and members of the academic community, with an opportunity to bring to the attention of CEPA administrators information of which they

might not otherwise be aware.

Recommendation:

CEPA should be amended to require public notice in the Canada Gazette when:

* *notification information packages are received by Environment Canada and Health Canada regarding new substances; and*
* *field tests involving the open environmental release of a new substance are proposed.*

In addition to providing notice in the Canada Gazette, the minister should be permitted to provide public notice of an impending decision under CEPA in any other manner which he or she feels appropriate. Public comment periods of not less than sixty days should be provided following all public notices provided under CEPA.

Additional public notice requirements regarding field tests may be appropriate, as such tests may involve the potential release of substances into the environment whose "toxicity" is yet to be fully assessed. Notice of proposals for field tests might be required to be published in a newspaper of general circulation in vicinity of the test. CEPA s.71(1)(d) provides a precedent for such public notice requirements. Requirements for the direct notification of the owners and occupiers of lands adjacent to a test site should also be included.

ii) Appeals

The current appeal provisions in CEPA are limited and unbalanced. No appeals to a Board of Review are available when substances are added to the DSL (in effect, when there is a finding of not "toxic"). In addition, no appeals are available when information requirements are waived,[44] when the manufacturing or import substances suspected of being "toxic" are approved with conditions, or when prohibitions or conditions on such substances are varied.[45] No appeal processes are apparent regarding the approval of field tests involving open releases of new substances under assessment.

Regulations proposed under s.34 in relation to TSL substances can be the subject of a request for a Board of Review. However, the regulation of substances placed on the TSL is not automatic, and there is no corresponding provision permitting a request for a Board of Review to inquire as to the need for a regulation to prohibit or control the manufacturing, use, processing, sale, offering for sale, import or export of a "toxic" substance if such a regulation has not been introduced by the Governor-in-Council. It should be noted that provisions of the recently enacted Ontario *Environmental Bill of Rights* permit members of the public to request the development

of new regulations.[46]

Recommendation:

CEPA should be amended to permit any person to file a notice of objection requesting a Board of Review regarding:

* *the addition of substances to the DSL (s.30);*
* *the waiving of information requirements (s.26);*
* *the approval with conditions or when prohibitions or conditions regarding substances suspected of being "toxic" are varied or rescinded (s.29);*
* *the approval of field tests of new substances, particularly those involving open release into the environment; and*
* *the need for a regulation to prohibit or control the use, manufacture, processing, sale, offering for sale, import or export of a "toxic" substance or a product containing a "toxic" substance.*

Under each of these circumstances a Board of Review should be required to be established, except for when the request can be shown to be frivolous or vexatious. Ministers should be required to respond to notices of objection requesting the establishment of Boards of Review within thirty days of receiving the request.

iii) Intervenor Funding

The Board of Review provisions of CEPA currently provide for final and interim cost awards.[47] However, there are no provisions for the provision of intervenor funding to *bona fide* public interest intervenors in Board of Review proceedings. This represents a serious barrier to the use of the Board of Review process by members of the public. Boards of Review are likely to involve complex technical, scientific and legal issues. Consequently, public interest intervenors may require legal and expert assistance to participate effectively in their proceedings. The need for intervenor funding in public hearing and inquiry processes is well-established,[48] and numerous examples of intervenor funding arrangements exist under federal and provincial legislation, including the *Canadian Environmental Assessment Act*[49] and the Ontario *Intervenor Funding Project Act*.[50]

Recommendation:

CEPA should be amended to provide for intervenor funding assistance to bona fide public interest intervenors in CEPA Board of Review Proceedings. A fund should be established to provide for intervenor funding awards. This might be funded through fines imposed in relation to offenses under CEPA, charges imposed in the use of

"toxic" chemicals,[51] and the imposition of user fees for the new substance notifications and assessments.

12. Access to Information[52]

The current provisions of CEPA place significant constraints on the ability of members of the public to access information regarding potentially toxic substances which may be released into the Canadian environment. The paramountcy of the goal of protecting confidential business information (CBI) regarding the nature of potential pollutants, which are a matter public interest and in the public domain, cannot be accepted in principle.

The protection of critical information, particularly regarding the chemical and physical characteristics of substances and the full contents of health and safety, occupational exposure, toxicological, clinical and ecological studies as CBI undermines public accountability for decision-making under CEPA. The lack of full access to information of this nature also limits the capacity of members of the public to comment substantively on information regarding new substances, to assess the adequacy of proposed control measures, and to determine whether requests for Boards of Review are appropriate.

Environment Canada interprets CEPA section 20 as requiring it to keep such information confidential, unless a request for information is submitted under the *Access to Information Act* (AIA) and the Information Commissioner determines that the information is not confidential.[53] The process of applying for information under the AIA is slow, unwieldy and likely to be unable to provide adequate responses to public requests for information in the context of the timeframes provided by CEPA for the assessment of new substances.

CEPA's provisions regarding the protection of confidential business information are much wider than is the case in corresponding U.S. legislation. In the United States, only "trade secrets" can be kept confidential. "Trade secrets" include information such as formulas or compounds which are used in a business, know only to that business and its employees and which give that business a commercial advantage over competitors.[54] A similar standard should be employed in CEPA.

Furthermore, confidentiality requests should not be permissible for information relating to substances which may be released into the environment, either through waste streams or products, or for information relating to the environmental effects resulting from the use or processing of the substance. Confidentiality claims should also be disallowed regarding information regarding potential occupational exposure to new substances under assessment.[55]

Recommendations:

To avoid abuse of its confidentiality provisions, CEPA should be amended to provide that:

* *the definition of what can be kept confidential be narrowed to include only "trade secrets;"*

* *the claimant for confidentiality be required to provide supportive evidence of confidentiality when making a claim;*

* *requests for confidentiality on the identities of substances which will, or may be, released into the environment, not be permitted;*

* *requests for confidentiality should not be permitted regarding information on toxicology, ecological effects, epidemiology or health and safety studies;*[56] *and*

* *there be a public appeal process regarding determinations that information is confidential.*

13. Conclusions

The new substances provisions of CEPA are potentially one of the Act's most important components. The screening and assessment of new chemical substances prior to their release into the environment is the ultimate preventative step. However, in order to be fully effective, the chemical new substances provisions of CEPA require a number of amendments.

In particular, the relationship between the new substances provisions of CEPA and similar provisions contained in other statutes must be clarified, and the status of the CEPA provisions as providing a minimum assessment standard for all new substances affirmed. In addition, opportunities for public participation in the new substances assessment and approval process must be strengthened, as well as public access to information regarding new substances. The Act must also be amended to widen the scope of the assessment of the potential environmental and health effects of new chemical substances, strengthen the ability of the federal government to deal with substances "suspected of toxicity" or for which inadequate information to assess exists, provide clear provisions regarding the authorization and regulation of field tests of new substances, provide for more realistic assessment time frames, and to ensure the full assessment of substances intended for export from Canada.

PART III: CEPA AND NEW PRODUCTS OF BIOTECHNOLOGY: PROBLEMS AND RECOMMENDATIONS FOR REFORM

1. Introduction

The new substances provisions of CEPA are designed to include biotechnology products as well as new chemicals. However, the regulation of new biotechnology products presents a number of special challenges beyond those provided by new chemical substance. Indeed, Environment Canada and Health Canada have recognized biotechnology products as a unique category of new substances. The departments have been developing a separate notification regulation of biotechnology products under section 32 of CEPA. A commitment to establish a national regulatory regime to address the environmental risks of the biotechnology industry by 1995 was made in the federal government's Green Plan.[57]

i) What is Biotechnology?

Biotechnology is defined in CEPA as:[58]

"the application of science and engineering in the direct or indirect use of living organisms or parts or products of living organisms in their natural or modified forms."

Such a broad definition includes a wide range of activities, many of which are hardly new or revolutionary. Fermentation in the making of beer or the biological processes used in sewage treatment plants, for example, can be considered applications of biotechnology. Most agricultural practices could be described in the same way.

Modern biotechnology, however, is different from these traditional practices. All living things have the same genetic material called DNA (deoxyribonucleic acid), the hereditary information code which determines life. What makes each species, and each member of a species, unique, is the distinctive arrangement of its DNA. Since the early 1970s, scientists have been able to take this genetic material from one species and implant it into an unrelated one. By doing so, they can add very specific characteristics to plants, animals, and microorganisms, resulting in genetic combinations which otherwise would not naturally occur. This is called genetic engineering and it is fundamentally different from traditional genetics where scientists could only breed closely related species. According to one commentator,

"[T]he principal significance of the new technology was that it made possible

the transfer of genes between species with considerable specificity and ease. It, therefore, removed the specific barriers of conventional genetics."[59]

Genetic engineering means that the desirable characteristics or attributes of one organism or species, whether a plant, or animal, or bacteria can be transferred to another to create new life forms or "genotypes." These new life forms, in turn, can pass on the new characteristics to their offspring.

ii) The Biotechnology Industry and Its Applications

The discovery and refinement of genetic engineering techniques has been followed by the emergence of a "biotechnology" industry over the past decade. Applications of biotechnology involving the use of both engineered and naturally occurring life forms are now approaching the commercialization stage. Many of the applications involve the potential or deliberate release of biotechnology products into the environment. The fields in which biotechnology applications involving the environmental release of biotechnology products are under development include the following:

a) Agriculture

The range of potential applications of biotechnology to agriculture are enormous. They include the development modified engineered (transgenic) crops, new applications of naturally occurring and genetically engineered microorganisms (GEMs), and animal health and production products.

Transgenic crops: Using a variety of techniques, scientists are now able to breed crops with specific characteristics or traits. Some new crop strains are being developed to improve crop nutritional and growth characteristics. However, the overwhelming majority of the transgenic crops presently under development in Canada are to increase resistance to specific pesticides.[60] Monsanto, for example, is developing canola (a plant used to make vegetable oil) to be resistant to its herbicide glyphosate. This would permit use of the herbicide against weeds without affecting that specific strain of canola.

GEMs: One of the earlier applications of biotechnology was the use of microbes that can be sprayed on temperature-sensitive plants and crops to help protect them from frost damage. This so-called "ice-minus" bacterium allows longer growing seasons and a reduction in crop loss due to late frosts. The use of microbes to increase nitrogen fixation in soil is also under investigation.[61]

Animal Products: Biotechnology products currently under development include drugs to induce growth in animals. In addition, the controversial hormone recombinant

bovine Somatotropin (rbST), produced by genetic engineering techniques, can be injected into cows to substantially increase their milk production. The development of animal vaccines using biotechnology techniques to fight chronic cattle diseases such as shipping fever and bovine virus diarrhoea is also taking place.

b) Mining and Petrochemicals

There are a variety of biotechnology applications by the mining industry under development. Microorganisms may, for example, be able to leach minerals such as copper, nickel, and gold from ores and tailings in concentrations that could not be extracted economically by traditional means.[62]

With respect to petrochemicals, the desulfurization of coal and crude oil through the use of modified microorganisms is currently under investigation.[63] The use of microbes to enhance oil recovery, to produce fuel, and in the production of enzymes and specialty chemicals is also being explored.[64]

c) Waste water Treatment

New biotechnology products such as microorganisms may also be used to accelerate processes of degrading and removing toxic substances from inoculated sludge at waste water treatment facilities.[65] The Canada Centre for Inland Waters in Burlington, and the National Research Council's Biotechnology Research Institute in Montreal, for example, have research programs oriented toward the use of biotechnology for the treatment of municipal and industrial waste water.

d) Bioremediation

Other uses that may further environmental protection goals include the creation and use of microorganisms capable of de-toxifying hazardous waste or rendering organic pollutants such as polychlorinated biphenyls (PCBs) less toxic. Similarly, new and naturally occurring life forms may be able to clean up oil and other chemical spills, providing the foundation for new waste management technologies.[66]

e) Forestry

Canadian forestry companies are currently undertaking biotechnology research in three main areas. These are pulp and paper manufacturing, the regeneration of harvested forests, and the protection of existing and new forests. In the pulp and paper sector, research is under way into new enzyme technologies, allowing for

significant reductions in the use of chemical bleaching agents. Research into techniques related to reforestation is being pursued vigorously in a number of laboratories across Canada. Methods have been developed to rapidly produce thousands of genetically-improved trees. This is to facilitate faster reforestation. In addition, researchers at Forestry Canada are developing technologies for biological pest control as alternatives to synthetic chemical treatments.[67]

f) Fisheries

A number of applications of biotechnology to fisheries are under development to increase the tolerance of fish to environmental stresses, and the increase their rate of growth. Examples include the modification of Atlantic salmon to carry the "antifreeze gene" taken from winter flounder, and the modification of coho salmon to carry a growth hormone gene from sockeye salmon.[68]

iii) The Unique Risks of Biotechnology Products

Biotechnology products present a number of special environmental and health risks which distinguish them from traditional chemical substances. Two major areas of concern have been identified in this regard:

(a) Many biotechnology products include life-forms which are self-replicating. Once released into the environment, they can reproduce, spread and mutate and transfer genetic material. The control of biotechnology products, and their genetic material, once in the environment, will therefore be difficult, if not impossible.

(b) The technologies employed in the development of many new biotechnology products have only emerged over the past twenty years (especially recombinant DNA and cell fusion technologies). The evaluation of such products for potential environmental damage is surrounded by a great deal of uncertainty. Indeed, the scientific literature reflects wide concerns regarding the lack of adequate methodologies and data to properly assess the environmental and health effects of the products of biotechnology.[69]

Methods of predicting the consequences of deliberate introduction of new life forms in the environment are still under development. The potential risks associated with biotechnology products are often described as being of a "low probability, high consequence risk."[70] In other words, although the chances of something going wrong may be very slight, if something does go wrong, the ecological consequences may be tremendous. As a result, we must ask *not* only whether something may go

wrong, but also what is the present capability to address the consequences if it does.[71]

These concerns are reinforced by the consideration that, in many cases, biotechnology products *must* survive, grow and multiply in the environment in order to fulfil their intended functions. In general, the environmental risks which have been associated with the release of biotechnology products into the environment are predicted on the basis of extension of past experiences with the introduction of "exotic" species, such as zebra mussel, dutch elm beetle, common sparrow, gypsy moth and various species of plants, including the purple loosestrife, into existing ecosystems.[72] The specific environmental risks which have been identified in relation to biotechnology products include:[73]

* the creation of new pests, such as the escape of a transgenic salt tolerant rice from cultivated fields into estuaries;
* the enhancement of the effects of existing pests or creation of new pests through hybridization or gene transfer to related plants or microorganisms;
* the enhancement of the effects of existing pests as a result of the selective pressures provided by plants modified for pest resistance or intensified pesticide arising in conjunction with the modification of plants for pesticide resistance;
* infectivity, pathogenicity, toxicity or other harm to non-target species, including humans;
* disruptive effects on biotic communities, resulting in the elimination of wild or desirable natural species through competition or interference;
* adverse effects on ecosystem processes and functions, such as nutrient cycling;
* incomplete degradation of hazardous chemicals by microorganisms employed in bioremediation, and waste water treatment, leading to the production of even more toxic by-products.

These specific risks sometimes overshadow the more general risk of reducing biological diversity in any given ecosystem. Introduced species may, for example, disturb food-chains or habitats, which in turn will affect biodiversity.[74] Biotechnology can also threaten the biodiversity through its implicit drive to breed uniformity in plants and animals, and by furthering and encouraging monocultures.

It is important to note that these environmental and health risks are not limited to the introduction of genetically engineered or modified organisms. Naturally occurring organisms can behave as "exotic" species when introduced into ecosystems of which they are not native inhabitants as well. In addition, the introduction of a naturally occurring species into a natural habitat can have disruptive effects if the species is introduced in very high concentrations or quantities. It has also been argued that certain naturally occurring species of microorganisms that have potential

to be used in bioremediation may be opportunistic human pathogens.[75]

iv) Biotechnology and "Toxicity"

The "toxicity" test forms the basis for CEPA's regulation of new substances. New substances must be found "toxic" under the definition employed by CEPA in order to be regulated under the Act. A number of problems have been identified with the definition and application of the concept of "toxicity" under CEPA in relation to chemical substances.[76] Furthermore, the "toxicity" standard, as it is presently applied in the context of chemical substances appears to be too narrow an evaluative structure in relation to the potential scope of the effects of the use of biotechnology products. In addition, it an be excessively stringent test in relation to the level of uncertainty regarding the environmental and health effects of these products. This is especially true with respect to the potential long-term, indirect and cumulative environmental and health risks associated with biotechnology products.

v) Biotechnology and Federal Jurisdiction

The "toxic" standard employed in CEPA was largely developed for the purpose of establishing federal constitutional authority to regulate potentially harmful chemical substances. It was intended to define a distinct and bounded category of substances to be controlled through the federal parliament's general power to legislate for the Peace, Order and Good Government of Canada.

However, the federal authority to regulate biotechnology products may not require the establishment of "toxicity," as is the case with chemical products. The federal parliament's capacity to legislate on new subjects of national significance, such as aeronautics,[77] radio communications,[78] nuclear energy,[79] and the national capital area,[80] is well established. Biotechnology products which are intended to be, or may be, released into the environment, particularly those involving the application of recombinant DNA and cell fusion technologies seem to fall within this category.[81] Biotechnology products are a distinct and bounded category of subjects and therefore would appear to be able to meet the test of "singleness, distinctiveness and indivisibility," clearly distinguishing them from matters of provincial concern.[82]

In addition, a federal notification, assessment, and registration system for biotechnology products would appear to be something whose "scale of impact on provincial jurisdiction is reconcilable with the fundamental distribution of legislative power under the Constitution."[83] It is also unlikely that an effective notification, assessment and registration system could be established by the provinces acting individually or cooperatively.[84] Given the status of biotechnology products as living organisms capable of being transported and of reproducing, the failure of one

province to cooperate would carry with it potential adverse consequences for residents of other provinces. Those few provinces which have considered the regulation of biotechnology products appear to concede primary responsibility for their assessment and approval for use in Canada to the federal government.[85] A division of responsibility similar to that which has emerged regarding pesticides, in which the federal government assesses and registers products for general use in Canada, and the provinces authorize specific applications,[86] appears to be emerging for biotechnology products which may be released into the environment.

These consideration support the conclusion that the federal government has the constitutional authority regulate biotechnology products in Canada through its power to legislate of the Peace, Order and Good Government of Canada, without having to establish that they are "toxic" for the purposes of CEPA. Federal jurisdiction over Agriculture,[87] Fisheries,[88] Trade and Commerce,[89] and criminal law in relation to public health,[90] provide additional bases for the establishment of federal regulatory authority over biotechnology products.

vi) Biotechnology and CEPA

The disconnection of federal regulatory authority over biotechnology products from the need to establish "toxicity" would provide a number of advantages. The health and environmental effects of new biotechnology products could continue to be assessed as they are now under CEPA. However, a firm establishment of "toxicity" would not be required for the federal government to take regulatory action to prohibit or impose conditions on the processing, use, manufacture, sale, offering for sale, import or export of new biotechnology products or products containing new biotechnology products. The proposal of this more flexible standard reflects the level of uncertainty which currently exists regarding the potential environmental and health effects of biotechnology products.

Furthermore, if the federal role is not limited to regulation on the basis of the establishment of "toxicity," the assessment and regulatory process for biotechnology products could be widened to include broader considerations of the potential environmental and human health effects of these new products. Such effects could include the long-term direct and indirect cumulative environmental effects of the commercial scale use of a biotechnology product. This would more effectively capture the range of possible environmental and health effects which have been identified with respect to biotechnology applications in relation to deliberate or accidental releases into the environment.

This approach would also permit the range of factors to be considered in the evaluation of biotechnology products to be expanded. Concerns have been expressed by a wide range of stakeholders regarding the value and purpose of many of the

emerging applications of biotechnology. It has been argued, for example, that the modification of crops for resistance to specific herbicides will entrench the dependance of agricultural production on external chemical inputs. This may result in a further narrowing of the genetic base employed for agricultural purposes, thereby undermining efforts to development more environmentally sustainable agricultural practices.[91] Similarly, it has been contended that the development of genetically modified faster growing trees to be used in reforestation efforts would address a symptom, rather than the cause, of the problem of the overharvesting of trees.[92]

The recent controversy over the approval for use in Canada of rbST has demonstrated in the inability of the existing regulatory system for biotechnology products, with its narrowly defined focus on safety, to even consider wider policy issues of this nature.[93] The need to widen the range of factors considered in the assessment of biotechnology products was reflected in the recommendations of the Standing Committee of the House of Commons on Agriculture and Agri-Food in its April 1994 report rbST in Canada.[94] This stress on the consideration of the wider environmental, ethical and social impacts of biotechnology applications is a reflection of the potential power of the technology and the lack of consensus within Canadian society regarding the appropriateness of many of the applications of biotechnology which are emerging.

The unique characteristics of many biotechnology products as life forms, the level of uncertainty regarding the assessment of their potential environmental and human health impacts, and lack of consensus regarding the value of many of their applications makes apparent the need to address these products differently from chemical new substances under CEPA. A new and separate part of CEPA should be enacted to deal specifically with biotechnology products. This part would, in effect, establish a federal registration and regulatory system for biotechnology products which may enter the Canadian environment or be exported from Canada.

2. A New Biotechnology Part for CEPA

i) Introduction

The proposed new Biotechnology Part for CEPA would provide for the evaluation and listing for use, manufacture, processing, sale, offering for sale, import and export of biotechnology products, and products containing new biotechnology products which may be released into the environment. The proposed part follows the notification and assessment structure of the existing CEPA new substances provisions. However, the proposed section would expand the range of evaluative criteria employed in the assessment of biotechnology products, and remove the need to establish "toxicity" in order for the federal government to control the use of a biotechnology product.

ii) Scope

As Canada's principal environmental protection statute, CEPA should provide a framework for the evaluation of all biotechnology products which may be released into the environment. This would include all releases of genetically engineered organisms, and releases of naturally-occurring organisms into habitats in which they do not occur naturally, or in quantities or concentrations beyond those in which they naturally occur. Enabling provisions for notification and assessment requirements would be established to cover all stages of product development in which environmental releases might occur, from laboratory research to commercialization.

The existing provisions of CEPA require that the triggers for the application of the CEPA New Substances provisions (s.26(3)), additions to the DSL (s.30) and the development of notification groups in new substances regulations (s.32(1)h) be expressed in terms of quantities. Given the nature of most biotechnology products self-replicating life forms, such triggers are inappropriate for biotechnology products.[95] The proposed biotechnology Part would permit the use of non-quantity based triggers for biotechnology products.

iii) Relationship Between CEPA and other Statutes Regulating Biotechnology Products

Potential releases of biotechnology products into the environment are currently regulated under a number of federal statutes administered by a variety of departments. Among the most important of these are the *Pest Control Products Act*,[96] the *Seeds Act*,[97] the *Fertilizers Act*,[98] the *Plant Protection Act*[99] and the *Fisheries Act*.[100] However, very few of the statutes under which other departments propose to use in the regulation of biotechnology products, appear to be able to meet even the existing CEPA s.26(3) exemption criteria.[101] As is proposed with respect to new chemicals, biotechnology products could continue exempted from the requirements of the CEPA notification and assessment process, if they are regulated through another statute which clearly provides for an equivalent process.

However, the status of CEPA as providing the minimum standards for the assessment of biotechnology products should be affirmed and strengthened. Explicit criteria for establishing the equivalency of other statutes for biotechnology notification and assessment purposes should be included in the proposed CEPA biotechnology part. These criteria should include:

* requirements that notice be given prior to the testing, import, manufacture, use or sale of the substances and for an assessment of the:
  - purpose;

  - efficacy;
  - direct, indirect and cumulative environmental and human health impacts; and
  - availability of alternatives to the biotechnology product;
* provisions for public participation in the notice and assessment process equivalent to those contained in the CEPA biotechnology part; and
* the availability of federal control options equivalent in scope to those available under the CEPA biotechnology part.

A provision should also be included requiring the Governor in Council to publish a list of statutes considered equivalent to CEPA for the purpose of the assessment of new biotechnology products.

iv) Information Requirements

The biotechnology Part of CEPA would contain a section similar to the existing provisions of s.32 of CEPA, permitting the development of regulations establishing information requirements for biotechnology products. These requirements would include information regarding:

* the purpose for which the biotechnology product has been developed;
* the effectiveness of the product for its intended purpose;
* the method of use and mode of action of the product;
* biological and ecological characteristics of the biotechnology product;[102]
* potential immediate and long-term direct and indirect environmental and human health effects of the biotechnology product, including the cumulative effects of commercial scale use and impacts on biodiversity;[103]
* availability and effectiveness of monitoring, control, waste treatment and emergency response plans with respect to the biotechnology product;[104]
* the availability of alternative means of achieving the product's purpose which may pose lower environmental and health risks; and
* any other information which the minister determines necessary to assess the potential environmental and human health impacts of the biotechnology product.

These requirements are based on those currently under development by Environment Canada and Health Canada for the CEPA biotechnology notification regulation[105], Agriculture and Agri-Food Canada for the environmental assessment of genetically modified plants[106] and the United States Environmental Protection Agency for the assessment of biotechnology products under the *Toxic Substances Control Act*.[107] However they are also expanded to include information regarding the purpose, effectiveness, availability of alternatives, potential long-term direct, indirect and cumulative environmental and human health effects of the use of the

biotechnology product.

The Government of Canada's acceptance of the need for the assessment of the effectiveness of biotechnology products was affirmed in the its August 1994 response to the Standing Committee on Agriculture and Agri-Food's report rbST in Canada[108] and a "merit" test is currently applied in the registration process for pest control products under the *Pest Control Products Regulations* made under the *Pest Control Products Act*.[109] The inclusion of the consideration the purpose, availability of alternatives and long-term indirect and cumulative environmental and human health effects is intended to bring principles widely accepted as components of environmental assessment procedures[110] into the assessment of biotechnology products. This is to provide a means of addressing the range of concerns regarding the value, purpose and potential long-term environmental and health effects of biotechnology products which may be released into the environment, that have been expressed by many stakeholders.[111]

v) Field Tests and Laboratory Procedures

As noted in the chemical new substances part of this submission, field tests involve potential releases of new substances into the environment whose potential environmental and human health effects have yet to be fully assessed and evaluated. As is proposed for new chemical substances, a separate section regarding the field tests of biotechnology products should be included in the biotechnology part of CEPA.

Field tests of new biotechnology products should require a specific approval under CEPA. The minister should be permitted to approve tests, approve tests subject to conditions, or to refuse to permit a test. Failure to follow the conditions of a test approval should constitute an offense under CEPA. Notice of proposals for field tests should be required to be published in a newspaper of general circulation in vicinity of the test.[112] Requirements for the direct notification of the owners and occupiers of lands adjacent to the test site should also be included. A comment period of not less than sixty days should follow notice of a proposed field test. Mechanisms to provide for the filing of notices of objection and the establishment of Boards of Review in the event that members of the public object to the conduct of a field test are also required.

This section should also establish the capacity of the Governor-in-Council to make regulations regarding laboratory procedures regarding biotechnology products. Failures to follow laboratory procedures required by regulations should constitute an offense under CEPA.

vi) Assessment and Listing Process

a) Public Participation

The public participation provisions of the biotechnology product assessment process would parallel those proposed for the assessment of new chemical substances under CEPA. This would include:

(a) public notification when applications for the approval of the manufacture, use, import or export of new biotechnology products, or products containing new biotechnology products are made, in the *Canada Gazette*.
(b) provision of a public comment period of not less than ninety days following the notice;
(b) public access to the information submitted in response to the to the information requirements regarding new biotechnology products in a manner consistent with the principles outlined in section **11** of the Chemical New Substances section (**Part II**) of this submission.

b) Assessment Criteria

The proposed biotechnology part would outline the criteria to be considered by the minister in assessing a new biotechnology product. In determining whether to approve, approve with conditions or prohibit the use, manufacturing, processing, sale, offering for sale, import or export of a new biotechnology product or products containing the new biotechnology product, the minster should consider:

* the information received from the proponents;
* comments received from members of the public; and
* information available from any other source regarding:
  - the purpose for which the biotechnology product has been developed;
  - the effectiveness of the product for its intended purpose;
  - the biological and ecological characteristics of the biotechnology product
  - the potential immediate and long-term direct and indirect environmental and human health effects of the product, including the cumulative effects of commercial scale use and impacts on biodiversity;
  - the availability and likely effectiveness of monitoring, control, waste treatment and emergency response plans with respect to the product; and
  - the availability of alternative means of achieving the product's purpose which may pose lower environmental and health risks.

c) Approvals

At the conclusion of the public comment and product assessment period, the minister would be permitted to:

* approve manufacture, use, processing, release or discharge into the environment, sale, offering for sale, import or export the new biotechnology product and products containing the new biotechnology product without conditions:
* approve the manufacture, use processing, release or discharge into the environment, sale, offering for sale, import or export of the new biotechnology product and products containing the new biotechnology product subject to any conditions which the minister chooses to impose; or
* impose a total, partial, or conditional prohibition of the manufacture, use, processing, release or discharge into the environment, sale, offering for sale, import or export of the biotechnology product or a product containing the new biotechnology product.

Products whose assessment demonstrates:

* the potential for harm to human health or the environment;
* ineffectiveness for their intended purpose;
* the availability of alternatives which pose a lower potential for harm to the environment or human health; or
* whose intended purpose is found to not to serve the public interest,

should not be approved for use or manufacturing in Canada.

Products approved without condition would be placed on a Biotechnology Domestic Substances List. Products approved subject to conditions could be placed on a Biotechnology Conditional Domestic Substances List. Products subject to prohibitions would be placed on a Prohibited Biotechnology Substances List. Approvals, conditional approvals and prohibitions could be varied by the minister if new information regarding the biotechnology product becomes available. Notice of the minister's intention to vary such conditions should have to be provided in the *Canada Gazette*, and be followed by a public comment period of not less than ninety days.

d) Notice of Approval

Notice of the Minister's decision would be provided in the *Canada Gazette*, to the applicant, and to any person who made a comment during the comment period. A decision to approve or approve with conditions would not take effect for period of thirty days. This would provide an opportunity for the filing of notices of objection by

any person. Notice and opportunities to file notices of objection should also be available when variations to approvals, approvals with conditions and prohibitions are proposed.

e) Appeals

The filing of a notice of objection would be the first step is seeking a Board of Review regarding the minister's decision regarding a biotechnology product. The procedures for Boards of Review regarding biotechnology products would follow those proposed for Boards of Review regarding chemical new substances (**Part II 7.2.** and **7.3.** of this paper) Boards would have to be established unless the request is frivolous or vexatious, approvals should be suspended until any notice of objection is resolved, and intervenor funding should be provided for *bona fide* public interest intervenors

viii) Biotechnology Environmental Release Database

The biotechnology part of CEPA should provide for the establishment of a data-base on the environmental release of all biotechnology products in Canada. Such a data base would be of assistance to governments, researchers, and other members of the public in assessing the overall use and effects of biotechnology products released into the Canadian environment. All environmental releases should be required to be entered into the data base, and members of the public should have direct access to the data base.

3. Conclusions

Biotechnology products, being self-replicating life forms, represent a unique category of new substances, distinct from chemical new substances. Therefore they should be dealt with through a new separate part of CEPA. This part would follow the structure of the existing new substances provisions. However, the scope of the evaluative criteria would be expanded to include factors beyond the assessment of "toxicity," as currently defined for the purposes of CEPA. This is to reflect to the potential range of environmental and health impacts associated with biotechnology products and the concerns which have been expressed by many stakeholders regarding the merit and value of many of these products.

In addition, "toxicity" would not have to be established in order to justify the exercise of federal regulatory authority over biotechnology products. This approach is proposed to take into consideration the level of uncertainty which currently exists regarding the assessment of the potential environmental and health effects of

biotechnology which may enter the environment. Furthermore, in a manner consistent with CIELAP's proposals regarding the chemical new substances provisions of CEPA, the status of CEPA as providing the basic model of the evaluation of the effects of environmental releases of biotechnology would be affirmed and strengthened. Opportunities for public participation in decision-making regarding biotechnology products would also be increased.

This proposal for the establishment of a separate biotechnology part of CEPA is intended to provide the basis of a regulatory structure for biotechnology products which would ensure the protection of environmental integrity and human health, and strengthen public confidence in the government of Canada evaluative and regulatory processes for these products.

ENDNOTES

1.The *Canadian Environmental Protection Act*, 1988, ss.25-32.

2.See July 1993 Draft Regulations.

3.See, for example, The Regulation of Biotechnology (Toronto: Canadian Environmental Law Research Foundation, 1984), Biotechnology Policy Development (2 Vols.) (Toronto: Canadian Institute for Environmental Law and Policy, 1988).

4.CEPA, s.25(4).

5.Ibid, s.26(3)(a).

6.Ibid, s.26(3)(b) and (c).

7.Ibid, s. 26(3)(d).

8.Ibid., s.26(3)(e).

9.Ibid, s.26(4).

10.Ibid., s.26(5).

11.Ibid, s.32(1)(c).

12.Ibid., s.32(1)(a).

13.Ibid s.32(1)(g).

14.Ibid., s. 28(1).

15.Ibid., s.32(1)(f).

16.Ibid., s.32(2).

17.Ibid., s.28(4).

18.Ibid., s.29.

19.Ibid, s. 29(3).

20.Ibid., s.29(5).

21.Ibid., s.29(2).

22.Ibid., s.29(4).

23.Ibid., s.30.

24.Ibid., s.33(1)

25.Ibid., s.33(3).

26.Ibid., s.34.

27.Ibid., s.34(2).

28.Ibid., s.48.

29.Ibid., s.89(1).

30.Ibid., s.91.

31.Ibid., s.94.

32.Ibid., s.20(1).

33.Ibid., s.20(4).

34.Ibid., 20(2)(f).

35.Ibid., s.20(2).

36.Ibid., s.31.

37.See, for example, Canadian Environmental Protection Act Priority Substances List Assessment Report No.4: Toluene (Ottawa: Environment Canada, Health and Welfare Canada, 1992).

38.A possible amendment of CEPA s.11 might be to require that a substances be considered "toxic" for the purposes of CEPA if it has any one, or combination of, the following characteristics:

- has or may have an immediate or long-term harmful effect on the environment;
- constitutes or may constitute a danger to the environment on which human life depends; or
- constitutes or may constitute a danger to human life or health.

A supplemental submission to the Standing Committee on Environment and Sustainable Development will be developed by the Canadian Environment Network Toxics Caucus to address this issue in detail.

39.On this issue of the environmental effects of persistent toxic substances see for example, A Prescription for Healthy Great Lakes: Report of the Program for Zero Discharge (Toronto and Ann Arbor: Canadian Institute for Environmental Law and Policy, National Wildlife Federation, 1991), esp.ch.2 and 3.

40.Ibid., ss.26(3)(b), (c), and (d).

41.Ibid., s.29(4).

42.CEPA, s.29(2).

43.*Pest Control Products Regulations*, CRC 1978 c.1253, s.18(b).

44.CEPA, s.26(4)(b)

45.Ibid., ss.29(1) and (3)

46.*An Act Respecting Environmental Rights in Ontario*, S.O. 1993, ch-28, Part IV.

47.CEPA, s.94.

48.P. Finkle, K. Webb, W.T. Standbury, P. Pross, Federal Government Relations with Interest Groups: A Reconsideration (Ottawa: Supply and Services Canada, 1994), esp. ch.9.

49.S.C. 1992, c.37.

50.R.S.O. 1990, c.I.13.

51.See B.Rutherford, CEPA and Economic Instruments (Toronto: Canadian Institute for Environmental Law and Policy, 1994).

52.For a detailed discussion of public access to information issues and CEPA see Ensuring Meaningful Public Involvement in Environmental Protection (Vancouver: West Coast Environmental Law Association, 1994).

53.A number of environmental groups have questioned Environment Canada's interpretation of the law; however, their interpretation of the law carries little weight so long as Environment Canada considers itself bound by its own interpretation. These lawyers unanimously believe that this issue needs to be clarified.

54.See *Rimes v. Club Corporation of America* (Tex. Civ. App.) 542 S.W. 2d 909 at 913.

55.CEPA s.20(1)(f) states that summaries of occupational exposure information may be released despite requests for confidentiality.

56.CEPA s.20(1)(f) only allows releases of summaries of this type of information.

57.Canada's Green Plan: Canada's Green Plan for a Healthy Environment (Ottawa: Supply and Services Canada, 1990), p.50.

58.CEPA, s.3(1). Similarly, a biotechnology product is defined as "a product manufactured through the application of biotechnology" in Part I of the *New Substances Notification Regulations*.

59. Sheldon Krimsky, Regulatory Policies on Biotechnology in Canada (October 1984), at 19.

60.Information supplied to CIELAP by Agriculture and Agri-Food Canada in July 1994 indicates that, for the 1994 growing season, of 881 trials of genetically modified plants for which applications were received, 715 involved modifications for herbicide resistance.

61.Clement International Corporation Issue Paper: Development of Ecological Tier Testing Schemes for Microbial Biotechnology Applications (Washington D.C: United States Environmental Protection Agency, and Environment Canada December 1993), p.22.

62.Ibid., p.19.

63.Ibid.

64.Ibid.

65.National Biotechnology Advisory Committee, *National Biotechnology Business Strategy: Capturing Competitive Advantage for Canada* (Ottawa: Department of Industry, Science and Technology, 1991), p.32.

66.Ernst and Young and the Environmental Bio-Industry Council, A Brief Examination of the Canadian Bioremediation Industry (DRAFT) (Ottawa: Environment Canada, 1994).

67.See generally, L.D. Nickerson, and W.M. Cheliak, Regulating Environmental Releases of Genetically Modified Trees: Scientific, Forestry and Legal Considerations (Ottawa: Science Directorate, Forestry Canada, 1991).

68.See generally, Transgenic (Genetically Modified) Aquatic Organisms: Policy and Guidelines for Research with, or for use in Natural Aquatic Ecosystems in Canada (Draft) (Ottawa: Department of Fisheries and Oceans, 1993).

69.Ecological Society of America, "The Release of Genetically Engineered Organisms into the Environment: A Perspective from the Ecological Society of America," Ecology Vol. 20, No.2, April 1989.

70.U.S. Environmental Protection Agency, Chemical Control Division, Office of Toxic Substances, "Regulation of Genetically Engineered Substances under TSCA," in United States Congress, House of Representatives Committee on Science and Technology, The Environmental Implications of Genetic Engineering (Washington D.C.: U.S. Government Printing Office, 1984), p. 13.

71.Krimsky Regulatory Policies for Biotechnology in Canada, p.16 and M.A.Valiante and P.R.Muldoon, "Biotechnology and the Environment: A Regulatory Proposal," 23 Osgoode Hall Law Journal (Summer 1985), 376.

72.U.S. EPA, "Regulation of Genetically Engineered Substances under TSCA," in United States Congress, House of Representatives Committee on Science and Technology, The Environmental Implications of Genetic Engineering, pp.18-19.

73.J.M. Tiedje, R.K. Colwell, Y.L. Grossman, R.E. Hodson, R.E.Lenki, R.N. Mack, and P.J. Regal, "The Planned Introduction of Genetically Engineered Organisms: Ecological Considerations and Recommendations," Ecology 1989, Vol. 20, No. 2 p. 301. See also E.Smit, J.D. van Elsas, and J.A. van Veen, "Risks Associated with the Application of genetically modified microorganisms in terrestrial ecosystems," FEMS Microbiology Reviews 88 (1992), 263-278, and M.Mellon and J.Rissler, Perils Amid the Promise: The Ecological Risks of Transgenic Crops on a Global Market (Washington, D.C.: Union of Concerned Scientists, 1994).

74. D. Pimentel, M.S. Hunter, J.A. LaGro, R.A. Efroymson, J.C. Landers, F.T. Mervis, C.A. McCarthy, and A.E. Boyd. "Benefits and Risks of Genetic Engineering in Agriculture", Bioscience (1989), Vol.39, No.9, pp.606-614, at 609.

75.Ernst and Young and Bio-Industry Council, A Brief Examination of the Bioremediation Industry p.38.

76.See Muldoon, CEPA, Toxic Substances and Pollution Prevention.

77.*Johanneson v. West St. Paul* (1952), 1 S.C.R. 292.

78.*Re Regulation and Control of Radio Communication* (1932), A.C. 304.

79.*Pronto Uranium Mines v. Ontario Labour Relations Board*(1956), 5 D.L.R.(2d) 342.

80.*Monroe v. National Capital Commission* (1966) S.C.R. 663.

81.See M. Valiante and P. Muldoon, "The Regulation of Biotechnology," (Toronto: Canadian Environmental Law Research Foundation, 1984), pp.49-50.

82.*R. v. Crown Zellerbach*, (1988), p. 438.

83.Ibid.

84.On this test see P.Hogg, The Constitutional Law of Canada (Toronto: Carswell, 1992), s.17.3(c).

85.See, for example, Biotechnology in Ontario - Growing Safely (Toronto: Government of Ontario, 1989). See also the Alberta *Environmental Protection and Enhancement Act*, S.A. 1992, Ch.E-13-3, s.248(2)(x) and Alberta Regulations 110/93 and 242/93 and the Draft *British Columbia Environmental Protection Act*, Part 8 (Biotechnology) (February 1994 Draft).

86.On pesticides regulation, see generally, J.Castrilli, and T. Vigod, "Pesticides," in J. Swaigen, ed., Environment on Trial: A Guide to Ontario Environmental Law and Policy (Toronto: Canadian Institute for Environmental Law and Policy and Emond-Montgomery Publishers, 1994), ch.20.

87.The *Constitution Act*, 1982, s.95.

88.Ibid., s.91(12).

89.Ibid., s.91(2).

90.Ibid., s.91(27). See *Re Canada Metal Co. Ltd., and the Queen*, (1982) D.L.R.(3d) 124 (Man Q.B.) See also K.Clark and B.Rutherford, on constitution.

91.R.Goldburg, J. Rissler, H. Shand, C. Cassebrook, Biotechnology's Bitter Harvest: Herbicide Tolerant Crops and the Threat to Sustainable Agriculture (Washington D.C.: Environmental Defense Fund, National Wildlife Federation, Rural Advancement Fund International, and Centre for Rural Affairs, 1990).

92.B.Mausberg and P.Muldoon, "The Regulation of Biotechnology," in Swaigen, ed., Environment on Trial, p.241.

93.See, for example, "An Open Letter to the Rt. Hon. J.Chretien Regarding rbST in Canada," August 10, 1994. The 50 signatories included the Canadian Institute for Environmental Law and Policy, the Canadian Environmental Law Association, the Canadian Labour Congress, the Canadian Organic Growers, the National Action Committee on the Status of Women, the Humane Society of Canada, the National Farmers' Union, the Rural Advancement Fund International, The Registered Nurses Association of Ontario, the National Anti-Poverty Organization, the Ecumenical Coalition for Social Justice and the Council of Canadians.

94.See, in particular, Standing Committee on Agriculture, rbST in Canada (Ottawa: House of Commons, 1994), Recommendation 7.

95.Resource Futures International, Evaluation of the Canadian Environmental Protection Act (CEPA): Final Report (Ottawa: Environment Canada, December 1993), p.53.

96.RSC.P-10.

97.RSC 1985, c.S-8.

98.RSC 1985, c.F-10.

99.SC 1990, c.22.

100.RSC 1985, c.F-14.

101.Ibid.

102.This would include: strain or variety history; life cycle; requirements for growth, survival and replication; potential for toxic production; specific resistance factors; extra chromosomal genetic elements; potential to transfer genetic material; antibiotic susecptibilty and resistance; and survival, competitive and environmental dispersal characteristics.

103.This might include: potential for consumer or occupational exposure; infectivity, toxicity and pathogenicity on plants, animals, and microorganisms; degradation or other modifications to the structural integrity of target and non-target substances; and effects on the integrity and functions of ecological systems and cycles.

104.This provision is based on *Council Directive of 23 April 1990 on the Deliberate Release into the Environment of Genetically Modified Organisms* (90/220/EEC), Part B, Article 5, s.2(a)(v).

105.See *New Substances Notification Regulations for Biotechnology Products under the Canadian Environmental Protection Act* (July 1993 Draft).

106.See Food Production and Inspection Branch, **Regulatory Proposal:** *Assessment Criteria for Determining Environmental Safety of Genetically Modified Plants* (Ottawa: Agriculture and Agri-Food Canada, June 1994).

107.See "Points to Consider for Microorganism Premanufacturing Notice Submissions under TSCA," (Washington D.C.: Office of Pollution Prevention and Toxics) quoted in Clement International Corporation, Issue Paper, pp.4-12.

108.Government Response to the Report of the Standing Committee on Agriculture and Agri-Food "rbST in Canada" (Ottawa: Government of Canada, August 1994), p.8.

109.*Pest Control Products Regulations*, s.18.

110.R. Northey and J. Swaigen, "Environmental Assessment," in Swaigen, Environment on Trial, pp. 189-191.

111.See, for example, note 90, supra.

112.CEPA s.71(1)(d) provides a model for such public notice requirements.

APPENDIX 4

CEPA AND ECONOMIC INSTRUMENTS

Prepared by:

Barbara Rutherford, B.A., LL.B.
Research Associate

Mark S. Winfield, Ph.D.
Director of Research

Canadian Institute for Environmental Law and Policy
September 1994

111.See, for example, note 90, supra.

112.CEPA s.71(1)(d) provides a model for such public notice requirements.

APPENDIX 4

CEPA AND ECONOMIC INSTRUMENTS

Prepared by:

Barbara Rutherford, B.A., LL.B.
Research Associate

Mark S. Winfield, Ph.D.
Director of Research

Canadian Institute for Environmental Law and Policy
September 1994

TABLE OF CONTENTS

I. **INTRODUCTION** 1

II. **INPUT AND OUTPUT FEES AND CHARGES** 1
1) Theoretical Basis 1
2) Use in Canada and Other Industrialized Jurisdictions 2
3) Fees and the Federal Government 2
4) The Use of Revenues Generated by Charges on "CEPA Toxic" Substances 3

III. **TRADEABLE PERMITS** 4
1) Theoretical Basis 5
2) Rights to Pollute? 5
3) Experience in Other Industrialized Jurisdictions 5
4) System Requirements 6
5) The Problem of "Local Loading" 6
6) The Allocation of Permits 6
7) Emission Reduction Credits 7
8) Administration and Enforcement 8
9) What would be Traded under CEPA? 8

IV. **CONCLUSIONS AND RECOMMENDATIONS** 9
1) General 9
2) Emissions Trading 9
3) Fees and Charges 10

ENDNOTES 11

CEPA AND ECONOMIC INSTRUMENTS

I. INTRODUCTION

As our understanding of the underlying economic and political causes of environmental degradation increases, it has become apparent that it is necessary to expand the range of tools which we employ to protect the integrity of the environment. In this context, "economic" policy instruments, such as the imposition of taxes on environmentally harmful activities, and the creation of markets for permits to emit pollutants, have attracted growing interest over the past few years.[1] This paper will analyze these instruments with respect to their relevance to the Standing Committee on the Environment and Sustainable Development's review of the *Canadian Environmental Protection Act* (CEPA).

Economic instruments have been incorrectly touted both as "voluntary" mechanisms and as enforcement tools.[2] Economic instruments, such as environmental taxes and tradeable permits, are defined, for the purposes of this discussion, as those instruments having the potential to alter behaviour by providing monetary incentives to reduce and/or eliminate the creation and discharge of contaminants. Economic incentives, such as subsidies, can also alter behaviour, yet they do so through encouragement, rather than as a parts of a regulatory system.

There are several critical prerequisites for a successful regulatory regime which includes the use of economic instruments. The first requirement is a discharge monitoring system that allows both the firm and the regulators to measure accurately total discharges and any reduction in discharges for the purposes of approving a trade or levying a tax. Secondly, clearly enforceable environmental quality standards must be established to serve as baselines for a minimum level of environmental quality that have to be met at all times. These points highlight one of the fundamental obstacles to the use of tradeable permits and discharges fees under CEPA: the general paucity of permitting provisions in the Act.

II. INPUT AND OUTPUT FEES AND CHARGES

1) Theoretical Basis

In general the use of fees and charges for environmental purposes can take three forms:

i) charges against a firm based on the amounts of pollutant discharges from the firm to the air, land or water;

ii) charges levied on feedstocks used by a firm in its productive process;

iii) charges levied on final products whose production, use or disposal is associated with high environmental costs.

Levying a fee or tax on emissions, or for the use of particular inputs, provides a disincentive to emit or use the substance being taxed. The theoretical basis for a fee or tax mechanism is that firms will reduce their discharges or use of the targeted substance up to the point where the marginal cost of another unit of reduction equals or exceeds the charge levied by the government. A fee set high enough to encourage the reduction of discharges would act as a catalyst for the implementation of technological changes to prevent the pollution. Similarly, an appropriate level of tax on the use of a substance in production would encourage the development of pollution prevention technologies to eliminate the use of the substance.[3]

2) Use in Canada and Other Industrialized Jurisdictions

Input and output fees are widely employed instruments in the United States and many European jurisdictions. In the U.S., taxes on the use of particular chemical feedstocks are employed to support the federal Superfund program created through the *Comprehensive Environmental Response, Compensation and Liability Act* of 1980, and state superfund, toxic use reduction, and pollution prevention programs, in at least 26 states.[4] Several states also currently charge fees under the *Clean Water Act* permitting system.[5] Within Europe, Germany has developed an extensive system of charges related to discharges to water and the generation of hazardous wastes.[6]

In Canada waste discharge fees are presently levied by the federal government under the ocean dumping control part of CEPA.[7] In addition, fees are levied by British Columbia under its *Waste Management Act*.[8] The Ontario government charges a permit fee for Certificates of Approval issued under the *Environmental Protection Act*. The 1993 report of the Ontario Fair Tax Commission recommended that Ontario establish a system of pollution taxes on the discharge of a range of substances selected from generally recognized pollutants, such as those covered by the National Pollutant Release Inventory.[9]

3) Fees and the Federal Government

Although the Constitution grants the federal government the power to raise revenue by "any mode or system of taxation,"[10] the federal government's capacity to apply charges of this nature is not unlimited. In particular, the federal government cannot use its taxation power to undermine valid provincial regulatory systems, such as permitting systems for discharges into the environment.[11] However, The federal

government would appear to have the jurisdictional capacity to be secure in applying charges for the discharge or use of substances which are found to be "toxic" for the purposes of CEPA.[12] Other taxes, such as a generic discharge fee, may be constitutionally harder to justify, particularly where such fees interfere with provincial environmental regulatory systems.

Input vs. Output Fees

In addition to their potential to be found constitutionally invalid as a result of interference with provincial regulatory systems, discharge fees suffer from a number of additional disadvantages from a federal perspective. Among the most significant is the absence of a federal permitting system for discharges of pollutants into the environment, except for ocean dumping, for which fees are already charged. Consequently, the federal government does not have information on discharges necessary to set and administer fees readily available. The provinces would have to be asked to provide the necessary data.

Furthermore, although the federal government has authority to impose discharge fees with respect to "toxic" substances, the provinces regard the regulation of specific discharges to the environment as being under their jurisdiction and, as noted earlier, several have already, or are considering, imposing such charges themselves. As a result, federal action in this regard would have the potential to engender significant federal-provincial conflict.[13]

The levying of fees on the use, import, manufacturing, processing or export of "CEPA toxic" substances by the federal government would, on the other hand, be an attractive option for a number of reasons. Such an approach would be highly consistent with the theme of pollution prevention through toxics use reduction, as charges could be employed to discourage the production or use of "toxic" chemicals. In addition, the application of fees on the manufacturing, processing or use of "toxic" substances has a strong appeal as a point of federal intervention, as attempts by provinces to impose such fees would run a very high risk of being characterized as indirect taxation, and therefore constitutionally invalid. Such charges would also be less likely to be construed as interfering with provincial regulatory systems governing discharges into the environment.

4) The Use of Revenues Generated by Charges on "CEPA Toxic" Substances

In the event that the imposition of charges on the use, manufacturing or processing of "CEPA toxic" substances were to be authorized through amendments to CEPA, the question arises as to the use of any funds generated. In this context, the issue of financing the clean-up of contaminated land, where the parties responsible cannot be ascertained, or are impecunious, has been the subject of much debate in Canada. It has

been estimated that there are approximately 10,000 active and inactive waste disposal sites in Canada and another 20,000 that may have been contaminated by underground gasoline storage, industrial operations or accidental spills.[14] What proportion of these are "orphan sites" (meaning that liability cannot be assigned) is unclear.

Under the auspices of the Canadian Council of Ministers of the Environment (CCME), the federal and provincial governments announced a National Contaminated Sites Remediation Program (NCSRP) in October 1989. The program was designed in part to finance the clean-up of orphan sites. Shared provincial and federal funding totalling $200 million was designated over a five year period ending March 31, 1995 for this purpose.

As the original mandate of the NCSRP comes to an end, the federal and provincial governments must examine the choices available for funding future orphan site remediation. The CCME secretariat currently estimates a need for an annual expenditure of $30 to $50 million for the ongoing remediation of orphaned sites for some time to come.[15] Two options for meeting this requirement exist: continued funding out of general revenues; or finding a new source of revenue. The continued use of existing general revenue, given the current fiscal situation of Canadian governments would result in increased levels of public debt, or require the reallocation of funds from other programs. This would also set an undesirable precedent for the socialization of major future environmental liabilities.

The funding of further federal contributions to the NCSRP through the use of the revenues generated by the imposition of charges on the use, manufacturing or processing of "CEPA toxic" substances would avoid these problems. At the same time, such an approach would provide incentives to prevent future pollution through the reduction of the manufacturing and use of toxic substances. Some of the revenues generated by the "CEPA toxic" substance charges could also be employed to support the development and diffusion of skills and technologies in the area of pollution prevention in Canada.

III. TRADEABLE PERMITS

Tradeable permits are another economic instrument that can be used in conjunction with traditional command and control regulation to promote pollution prevention. However, these instruments suffer from a number of serious problems in terms of the practicality of their implementation by the federal government.

1) Theoretical Basis

In an emission trading system, the government would determine what level of pollution is allowed and then allocate the permission to discharge this pollution amongst regulated firms through units such as "permits," "credits," or "allowances." A firm may not exceed its permitted level of emissions. However, if a firm is able to reduce its emissions below its permitted level, it can sell the reduction to another firm, so that firm can increase its emissions. A firm can also save its emission reduction credits for future use.

In order to effect the economic gains from the creation of a market, there must be competition.[16] This means many buyers and sellers are needed so that one seller or buyer cannot affect the price of the permits. Second, transaction costs should be kept to a minimum so that trading can be as smooth as possible.[17]

Neoclassical economic theory posits that, under these circumstances, tradeable permits will net a guaranteed level of environmental quality at the least cost to the regulated community. In practice, however, for reasons outlined in the following discussion, these theoretical efficiency gains may not adequately compensate for the increased administrative costs of a tradeable permits system properly designed would ensure improvements in environmental quality.

2) Rights to Pollute?

One of the major concerns which have been identified regarding emissions trading systems is their underlying assumption that market mechanisms, particularly the establishment of proprietary rights to use environmental resources, must be extended to the environment in order to protect it from abuse.[18] Trading systems have, consequently, been criticized as a form of "privatization" of the environment.

This objection is more than theoretical. If permits were interpreted as creating property rights to pollute, the result could be tremendous regulatory problems for governments in the form of legal challenges to changes in the permit systems, as well as the potential for the requirement of compensation for the revocation of permits. In order to forestall this problem, any permit system must be enacted with the proviso that the permits are licenses revocable at the pleasure of the Crown.

3) Experience in Other Industrialized Jurisdictions

Tradeable permits have only been used in the United States. The phase down of lead in gasoline was, for example, implemented through an allowance trading system. In addition, air emissions trading has been part of the U.S. regulatory regime since the mid-1970s under the *Clean Air Act*. Recent amendments to this Act created a new

trading system for sulphur dioxide (SO2) emissions from utility plants.[19]

4) System Requirements

The U.S. experiences offer important lessons about the minimum regulatory framework necessary for an environmentally effective tradeable permits system. First, the emissions being traded must be easily measurable and there must be a measurement system in place that is accurate and reliable. The acid rain trading program involves a finite number of utilities which emit measurable levels of SO2 from their smokestacks. A continuous emissions monitoring system has been developed, which it is claimed can track emissions with a high degree of precision.[20] It has been stated that "without this continuous monitoring technology, the program would fail."[21]

5) The Problem of "Local Loading"

A further major problem which has been identified regarding trading programs is their the potential to cause a phenomenon called "local loading." Under perfect free market conditions, build up of localized pollutants could occur based upon the different marginal costs of compliance faced by each firm. The U.S. acid rain program is designed to avoid this problem by mandating health-based ambient SO2 standards which prevent any one utility from emitting unhealthy levels of SO2. However, this control mechanism would not work with pollutants that have strong localized effects, such as toxic substances. Consequently, such substances are generally not regarded as suitable subjects for emissions trading programs.[22]

6) The Allocation of Permits

The initial allocation of tradeable permits is very important from a number of perspectives. If the total amount of emissions permitted is too high, the environmental quality will suffer as a result. In order to encourage pollution prevention, the total emissions permitted should be set at a decreasing rate over time. The U.S. acid rain program, for example, involves a lowered cap on total SO2 emissions each year. This is intended to ensure actual reductions in acid rain.

The creation of a market also has important distributional effects. By allocating to firms the right to emit x tons of a pollutant, the government is creating wealth and distributing it to the firms. The initial allocation, if based upon current emissions, will create a bias towards polluting industries[23], as they would be provided them with a windfall on the basis of their present pollution prevention efforts.

In order to be compatible with a pollution prevention approach, the initial allocation,

if based upon historic emissions, should be less than the historic emissions levels,[24] as well as being based upon standards achievable through best available control technology. Actual permitted emissions under the trading scheme should then result in an improvement of the environmental quality. At the very least legislation would have to specifically provide that the total amounts permitted under the initial allocation can be no greater than amounts estimated to be released from affected sources under existing legislation.[25]

Enabling legislation would also have to provide for reductions in the levels of emissions allowed by each permit, so that new sources can purchase emission permits through auctions without increasing the total loading. Revenues generated through the auction process could be allocated to the government agency to pay for the administration of the permit system. This system for the subsequent allocation of permits would be consistent with the "polluter pays"[26] principle. In addition, an auction system would help to combat strategic behaviour on behalf of firms who might be inclined to hoard permits to exclude competitors from the market.[27] Auctions could also conceivably act as an incentive for strict enforcement if governments depend on the revenue generated.[28]

7) Emission Reduction Credits

Emission reduction credits and allowing opting-in of new sources are additional means of allocating tradeable permits. Emission credits could be allotted on the basis of reductions from sources with existing permits and sources that do not have tradeable permits.[29] Even though it is important from the economic efficiency perspective to encourage as many firms to participate as possible in the tradeable permitting program, allowing such opting-in and other reduction credits may present a large challenge to the ability of a tradeable permits system to prevent pollution.

This possibility is a result of the consideration that without continuous monitoring technology, in practice it will be very difficult to measure actual emissions. It will obviously be to the advantage of firms to overestimate their emissions initially and to overestimate their reductions as this overestimation can translate into monetary gains. Thus, the creation of a tradeable permits system, based upon estimations of emissions could easily result in a total increase in pollutants to the environment. In the context of the U.S. emission reductions program, for example, credit was given for a 20% reduction in emissions which was later determined to have actually resulted in a 36% increase in emissions.[30] Other problems with such reduction credits arise where sources receive credit for reductions that would have occurred in any event.[31]

It should be noted that emissions reduction credits are one of the major sources of criticism regarding tradeable permits systems. There has been considerable litigation in the U.S. concerning whether credits given for reductions already achieved, or for

reductions that would have been achieved through compliance with the pre-existing law, are contrary to the intent of Congress.[32]

8) Administration and Enforcement

From the perspective of economic efficiency, the administrative oversight of a tradeable permits system should be minimal so as to allow trading without significant transaction costs. The lead trading program in the United States involved self-monitoring and reporting by gasoline refineries, with little oversight by the U.S. Environmental Protection Agency.[33] The manageable number of large utilities subject to the acid rain trading program was intended to ensure that administrative oversight would not create significant transaction costs. However, there is growing evidence that even this simple program has resulted in a significant and complex administrative burden. The administrative oversight of a volatile organic compound (VOC) trading system or an allowance trading system for hazardous waste generators would be even more cumbersome, given the number of sources involved.[34]

This is a serious problem, as effective monitoring and enforcement systems are absolutely essential to the success of any program. Continuous monitoring systems could be prohibitively expensive in some cases and the aforementioned monetary incentive to cheat would be enhanced if enforcement efforts were widely known by the regulated community to be lax.[35] The self-reporting of emissions data is especially open to potential abuse given these factors.[36]

Given the financial incentive to sell as many units of emissions as possible, firms are likely to emit very close to their legal allotments, meaning there will be an increased need for inspection. There must be a real deterrent against permit violations in the form of a high probability that offenders will be caught and prosecuted.[37]

In general, the necessary level of regulatory oversight, such as pre-approval of trades and frequent inspections, and the necessity of continuous monitoring systems, may make a tradeable permits system unwieldy and expensive to operate. Indeed, as the West Cost Environmental Law Research Foundation (WCELRF) has noted, the necessity for restrictions on trading and other regulatory oversight mechanisms may greatly reduce the alleged cost-effectiveness of such systems over traditional regulatory models.[38] These considerations are of particular concern given Environment Canada's limited experience in regulatory program administration and enforcement.[39]

9) What would be Traded under CEPA?

Finally, it is difficult to envision a tradeable permits regime given the federal government's lack of permitting powers under CEPA. Given the nature of the "local

loading" problem, it would seem imprudent to allow trading of ocean dumping permits. The same concerns apply to the trading of "CEPA toxic" substances.

Tradeable air permits are the other possibility. However, the federal government shares jurisdiction over air pollution with the provinces. A trading regime is not the only way in which air toxics might be dealt with. It is therefore unlikely that the federal government would be able to rely on its general power to implement trading regulations. Rather, a level of federal-provincial cooperation, hitherto unknown in the environmental field,[40] would be required to implement such a system on a national basis.

IV. CONCLUSIONS AND RECOMMENDATIONS

1) General

Economic instruments can be used to supplement traditional regulatory systems. They cannot, however, replace such systems. Rather, the effective application of economic instruments requires the existence of enforceable environmental quality standards which serve as baselines for a minimum level of environmental quality that must be met in all cases.

Furthermore, it is essential, that economic instruments be designed very carefully to promote pollution prevention. Instruments of this nature must be supported by detailed enactments, which clearly establish all of the necessary aspects of the system.[41] This would be especially important in the case of tradeable permit systems. Adequate provisions for monitoring and enforcement are essential.

2) Emissions Trading

Experience with emission trading systems is extremely limited and their effectiveness is a matter of considerable arguement. The practicality of implementing such systems successfully is a matter open to serious question. Trading systems require extensive and complex administrative, monitoring and enforcement structures, and their potential environmental and economic effectiveness, even when such mechanisms are in place, is the subject of continuing debate.

In the context of CEPA, the dearth of permitting provisions under the Act presents a major problem in the design and implementation of a trading system at the federal level. To what federal permission would the tradeable permits attach? In light of the problems surrounding the use of tradeable permit regimes, particularly with respect to "local loading" effects, the authorization of the trading of ocean dumping permits, the only formal approval presently granted under CEPA, cannot be recommended.

The problem of "local loading" and numbers of potential sources of emissions also render trading systems inappropriate for the management substances considered "toxic" for the purposes of CEPA. The maintenance of the integrity of the environment should not be placed at risk to the pursuit of theoretical promises of economic efficiency.

There is, theoretically, a potential federal role in management of a trading system regarding non-"toxic" air emissions which permits interprovincial trades. However, in addition to overcoming the extensive administrative, enforcement, monitoring and distributive problems associated with trading systems, the federal and provincial governments would be required to work together in a manner unprecedented in the Canadian environmental policy experience in order to establish such a system. Legislative provisions to implement a system of this nature could not be considered until a complete system design, acceptable to all stakeholders, was developed.

RECOMMENDATION:

CEPA should **not** *be amended to permit the trading of ocean dumping permits or emission trading involving substances considered "toxic" for the purposes of CEPA.*

3) Fees and Charges

The imposition of discharge fees under CEPA may present a number of problems, especially in relation to the absence of federal discharge permitting systems, except for ocean dumping, and the potential of federal discharge fees to interfere with provincial environmental permitting systems. Charges levied on the manufacture, use, or processing of "toxic" substances would avoid the possibility of interference with provincial jurisdiction, and provide incentives to reduce the manufacturing or use of such substances.

RECOMMENDATIONS:

Section 34 of CEPA should be amended to permit imposition of charges on use, processing, manufacturing, sale, import, or export of a "toxic" substance or products containing a "toxic" substance.

Revenues raised from such charges should be employed to finance federal contributions to the National Contaminated Sites Rehabilitation Program. Revenues might also be used to support the development and diffusion of skills and technologies related to pollution prevention within Canada.

ENDNOTES

1.See for example, Economic Instruments for Environmental Protection (Ottawa: Environment Canada, 1992).

2. Fines levied under administrative penalties, such as ticketing under s.134 of CEPA, or levied by a court upon conviction are part of an enforcement strategy. We distinguish economic instruments from these monetary penalties.

3.For a more detailed discussion of the use of environmental taxes and charges see, B.Heidenreich and M.Winfield, "Sustainable Development, Public Policy and the Law," in J.Swaigen, ed., Environment on Trial: A Guide to Ontario Environmental Law and Policy (Toronto: Emond-Montgomery Publishers Ltd. and the Canadian Institute for Environmental Law and Policy, 1993), pp.xxx-xxxi.

4. Glenna Ford, Doug MacDonald and Mark Winfield, "Who Pays for Past Sins? Policy Issues Surrounding Contaminated Site Remediation in Canada," Alternatives, Vol. 20, No.4, October 1994, pp.28-34.

5. Environmental Law Institute (ELI), The Tools of Prevention: Opportunities for Promoting Pollution Prevention Under federal Legislation (Washington, D.C.: ELI April 1993), p.23

6.The Application of Economic Instruments for Environmental Protection (Paris: Organization for Economic Cooperation and Development, 1989), p.43.

7.CEPA, Part VI.

8.*Waste Management Fees Regulation*, B.C. Reg. 299-92.

9.Ontario Fair Tax Commission, Fair Taxation in a Changing World (Toronto: University of Toronto Press, 1993), p.559.

10.The *Constitution Act*, 1982, s.91(3).

11.L.Nowlan and C.Rolfe, Economic Instruments and the Environmental Protection: Selected Legal Issues (Vancouver: West Coast Environmental Law Research Foundation) 1993), pp.25-26; citing *Re: Agricultural Products Marketing Act* [1978] 2 S.C.R. 1198 and *Re: Employment and Social Insurance Act* [1936] S.C.R. 427.

12.For a more detailed discussion of these issues, see Nowlan and Rolfe, Economic Instruments and the Environment.

13.It should be noted that provincial authority to impose such charges beyond administrative costs is an increasingly open question in light of recent jurisprudence. It has been suggested that such charges are a form of indirect taxation. See, for example, *Re Allard Contractors Ltd. and District of Coquitlam and four other applications* (S.C.C.), 109 D.L.R. (4th) 46. See also G.V. La Forest, The Allocation of Taxing Power Under the Canadian Constitution (2nd ed., 1981), pp.162-165.

14. Ned Lynch, National Contaminated Sites Remediation Program (Ottawa: Environment Canada, October 1991); William M. Glenn, et al., Toxic Real Estate Manual (Toronto: Corpus Information Services, 1988), p.4 speculates that there may be "...30,000 industrial sites...that are potentially contaminated with toxic material."

15. InterGroup Consultants Ltd., Sharing the Unfairness (Toronto: Canadian Council of Ministers of the Environment, background paper prepared for CCME Contaminated Site Liability Task Force Orphan Site Funding Workshop, January 1994.

16. Over time there is a tendency for market concentration to occur. See H.Daly and J.Cobb, For the Common Good (Boston: Beacon Press, 1989) p.49.

17. Transaction costs diminish the economic benefits of a trading scheme. In addition, the application of the Coase Theorem is relevant here. This theorem holds that where transaction costs are not negligible, the initial allocation of the right is a critical consideration, as whoever "owns" the right does not have to pay the transaction costs, and without transaction costs, the initial allocation is theoretically irrelevant.

18.Heidenreich and Winfield, "Sustainable Development, Public Policy and the Law," pp.xxxiii-xxxiv.

19.*Clean Air Act Amendments* of 1990, Title IV, Pub. L. No. 101-549, 104 Stat. 2399 (1990).

20.Concerns have been expressed regarding the reliability of this system. D.Doniger, Counsel, Natural Resources Defense Council, "Remarks Regarding the *Clean Air Act* SO2 Trading System," to Ontario Ministry of Environment workshop on Economic Instruments and the Environment, September 1992.

21. ELI, The Tools, p.25.

22. Ibid.

23. This would be the result of the recommendation in Discussion Paper on Emission Trading by the Working Group of the Canadian Ministers of the Environment, to allocate emissions on the basis of average emissions in recent years. Although the CCME Working Group recognizes the unfairness of rewarding firms who have lagged behind in pollution prevention, their solution of reducing allocation rights faster for those firms does not completely remove this inequality. The West Coast Environmental Law Research Foundation (WCELRF) recommends that firms out of compliance with standards achievable with best available control technology, be required to attain those emissions levels within 5 years.

24. This is the allocation system used under the U.S. 24. *Clean Air Act* sulphur dioxide emissions trading program for utilities.

25.Nowlan and Rolfe, Economic Instruments and the Environment, p.112.

26. This principle was first articulated by the Organization for Economic Cooperation and Development (OECD) in 1972; see OECD, "Guiding Principles Concerning International Economic Aspects of Environmental Policies," Council Recommendation C(72)128 (May 26, 1972).

27. However, combatting strategic behaviour would also require that the enabling legislation authorize the regulators to refuse sales to the highest bidder where there are reasonable grounds to believe that the bidder intends to use the permits for the purpose of excluding competitors from the market. The power to refuse such sales should be supported by the power to compel bidders to provide information as to their abatement costs. It may be prudent to require demonstration that marginal abatement costs exceed the price of the permit as a precondition of approval of purchases. Nowlan and Rolfe, Economic Instruments, p.115.

28.Nowlan and Rolfe, Economic Instruments, p.115. Concerns have been expressed that it is highly unlikely that the cost of a permit will accurately reflect the externalized cost of the harm done by the emissions. There are also concerns that the ability of community groups to purchase permits on the market to reduce pollution is significantly limited, given their relative lack of resources, compared to firms that would likely receive tax deductions for their purchases.

29. The U.S. EPA's emission reduction credits policy has four elements; offsets, netting, bubbles and banking. A full description of these elements is contained in Robert W. Hahn & Gordon L. Hester, "Marketable Permits: Lessons for Theory and Practice," 16, Ecology Law Quarterly, (1989) pp.370-375.

30. Richard Liroff, Reforming Air Pollution Regulation: The Toil and Trouble of EPA's Bubble (Washington, D.C.: Conservation Foundation, 1986) pp. 91- 97.

31. See David Hawkins, "Providing Economic Incentives in Economic Regulation," (1991) 8 Yale Journal of Regulation, p.463.

32.Nowlan and Rolfe, Economic Instruments and the Environment, p.121; see also "New York Sues to Limit Acid Rain Trading; EDF Suit Seeks to Close Credit Loophole" (March 19, 1993) Environment Reporter.

33. The minimal oversight is said to have played a significant role in the program's success. Hahn & Hester, "Marketable Permits: Lessons for Theory and Practice."

34. ELI, The Tools, p.25. ELI also notes, in footnote 102, the strong public opposition to the idea of allowance trading among hazardous waste generators, primarily due to the administrative oversight which would be required under such a scheme.

35. Arguably, that is the case presently under CEPA and other federal environmental statutes.

36. Fraud can occur in-house at the firm level and by laboratories hired to conduct such measurements. See United States General Accounting Office, Environmental Enforcement: EPA Cannot Ensure the Accuracy of Self-Reported Compliance Monitoring Data (Washington, D.C.: GAO/RCED, March 1993) at 21, 51, and 55-57.

37.Nowlan and Rolfe, Economic Instruments and the Environment, p.128, citing Barakat & Chamberlain, Study of Atmospheric Emission Trading Programs in the United states: Final Report (Winnipeg: Canadian Council of Ministers of the Environment, 1991) at G-14 and E.Rehbinder and R-U Sprenger, The Emissions Trading Policy in the United States of America: A Evaluation of it Advantages and Disadvantages and Analysis of its Applicability to the Federal Republic of Germany (Washington D.C.: Environmental Protection Agency, 1985)p.193.

38. Nowlan and Rolfe, Economic Instruments, p.103.

39.See generally K.Clark and B.Rutherford, "CEPA and Environmental Law Enforcement" in M.Winfield, ed., Reforming CEPA: A Submission to the House of Commons Standing Committee on Environment and Sustainable Development (Toronto: Canadian Institute for Environmental Law and Policy, 1994)

40.See generally K. Clark and B.Rutherford, "The Constitution, Federal-Provincial Relations, Harmonization and CEPA," in Winfield, ed., Reforming CEPA.

41.It should be noted that the U.S. *Clean Air Act* provisions for trading SO2 and nitrous oxides, Title IV, are 40 pages long.

APPENDIX 5

CEPA AND THE FEDERAL HOUSE IN ORDER:
Reforming the Federal Government's Environmental Performance

Prepared by:

Kenneth Fisher, LL.B.
Research Assistant

Canadian Institute for Environmental Law and Policy
September 1994

TABLE OF CONTENTS

I. INTRODUCTION 1

II. THE CANADIAN ENVIRONMENTAL PROTECTION ACT 1

III. CEPA'S FEDERAL HOUSE IN ORDER PROVISIONS 1
1. Introduction 1
2. CEPA Section 54 2
3. Obtaining Compliance - Regulatory or Voluntary Approach? 3

IV. REVIEWING THE RECORD - AN ENVIRONMENTAL FAILURE 3

V. ENVIRONMENT CANADA'S PROPOSED AMENDMENTS TO PART IV . . 4
1. The Three-Pronged Approach 4

VI. CONCLUSIONS AND RECOMMENDATIONS 5

ENDNOTES 8

CEPA AND THE FEDERAL HOUSE IN ORDER:
Reforming the Federal Government's Environmental Performance

I. INTRODUCTION

The following brief examines the House in Order provisions in the *Canadian Environmental Protection Act* (CEPA) and provides some analysis of the issues and problems with the provisions in their current form. In addition to examining the relevant sections of CEPA, we have made reference to the following material:

1. Reviewing CEPA: An Overview of the Issues ("Reviewing CEPA")

2. Evaluation of the Canadian Environmental Protection Act - Final Report (The "RFI Report")

3. CEPA Review Workshop (Nov. 23-24, 1994) - Federal House in Order Discussion Paper - CEPA Review Issue Analysis (The "Discussion Paper")

The first source is an examination of the CEPA House in Order provisions by Environment Canada. The second source is a report submitted to Environment Canada by Resource Futures International (RFI). The third source is a discussion paper sponsored by Environment Canada which contains suggested changes to some of the House in Order provisions. These three sources are useful in understanding some of the issues and problems in the House in Order provisions of CEPA (Part IV - sections 52-60).

II. THE CANADIAN ENVIRONMENTAL PROTECTION ACT

CEPA was proclaimed in 1988 and is a cornerstone of federal environmental legislation. CEPA was enacted to improve legislation protecting the environment. The federal government passed CEPA in response to an array of environmental problems, particularly the control of toxic substances.[1]

III. CEPA'S FEDERAL HOUSE IN ORDER PROVISIONS

1. Introduction

It is well known that the activities of the federal government have a significant impact on the environment. In the Green Plan, the government stated that:

"Federal operations must be exemplary in meeting and frequently exceeding all regulations and standards ... "[2]

Federal works and activities are subject to all federal legislation, including CEPA. However, such works and activities are *not* subject to provincial legislation. Part IV of CEPA is intended to fill this gap by ensuring that federal activities (as defined in sec. 52) which are subject to provincial legislation only, and would otherwise be exempt since there is no comparable federal legislation, will meet adequate environmental standards. Examples of items regulated by provincial legislation only, and thus not covered by federal legislation) include discharge and storage of wastes.[3]

2. CEPA Section 54

The House in Order provisions of CEPA (Part IV) are contained in sections 52-60. Part IV "gives the Minister of the Environment ["the Minister"] the authority to regulate waste handling and disposal practices, as well as emissions and effluent of federal departments and agencies and Crown corporations. In addition, Part IV gives the Minister the authority to make regulations and guidelines that apply to federal lands, works and undertakings when no other act of Parliament applies."[4] This authority is vested in the Minister under sections 53 and 54.

Under s. 54, the ability of the Minister to enact regulations governing the activities of federal departments is severely restricted. Section 54 states that regulations can only be enacted if there is no other federal legislation which provides for regulations to protect the environment which apply to federal works, undertakings or lands. This provision thus has the curious effect of preventing any improvements to federal legislation dealing with the environment through CEPA, since the House in Order provisions are valid only in cases where no federal legislation exists.

If there is no legislation concerning the environmental impact of federal activities, s. 54 will apply. However, the section continues by stating that the Minister may *recommend* to cabinet that regulations be enacted *only after the Minister has obtained the concurrence of the department whose activities are the subject of the proposed regulations* before such regulations can be enacted. It is highly unlikely that a Minister of a particular department would grant permission to the Minister to enact regulations against that department. The result is that the Minister cannot recommend regulations to cabinet without the permission of the department which stands to be regulated. Such a restriction has proven to be a severe impediment to effective regulation of federal activities on the environment. To date, Part IV regulations are in place only for the treatment and destruction of PCB wastes.[5]

3. Obtaining Compliance - Regulatory or Voluntary Approach?

One of the disturbing aspects of the RFI Report is its finding that

"Since the proclamation of CEPA, there has been a marked shift in emphasis in the implementation of Part IV away from regulation towards voluntary approaches ..." [6]

As part of the Green Plan, the government has undertaken several non-regulatory initiatives designed to improve its environmental record. The RFI Report notes that these initiatives need to be evaluated together with Part IV of CEPA since they are "mutually reinforcing and are sometimes used as alternatives to each other".[7] These supporting initiatives beyond Part IV of CEPA include:

- Code of Environmental Stewardship (Federal Government)
- Office of Environmental Stewardship (Federal Government)
- Environmental Accountability Partnership (Environment Canada)[8]

The RFI report discusses these initiatives in some detail, noting that the Code of Environmental Stewardship "merely sets the *principles* by which the government is to manage its internal operations." [emphasis added] [9] There are no formal sanctions in place in the event that a department does not meet the requirements of the Code.

Clearly, Part IV or any other initiative cannot be effective if no mechanism is in place to ensure compliance. Lack of compliance is perhaps the most serious defect with Part IV in its current form, particularly s. 54. Environment Canada recognizes the difficulty of monitoring government activities through voluntary compliance, although it is somewhat enthusiastic about the progress made to date:

"As indicated in the Stewardship annual report, departments are making progress in responsible environmental stewardship, although it may not be as fast or as comprehensive as might be wished."[10]

IV. REVIEWING THE RECORD - AN ENVIRONMENTAL FAILURE

The RFI report states that the federal government has failed in its declared goal of demonstrating leadership in the field of environmental protection. The government has failed to make implementation of Part IV of CEPA a high priority, and has relied mostly on a voluntary approach to compliance.[11] The RFI Report then quotes Diane Saxe, a prominent environmental lawyer, in a sharply-worded attack on the lack of action by the government to adequately address the impact of its operations on the environment:

"Although these gaps have been frequently brought to the attention of federal officials, little has been done. Part IV of the Canadian Environmental Protection Act ... purports to authorize the necessary regulations, ... Not only has the federal government failed to bring in adequate measures of its own, it has also refused to comply with provincial measures. ..."[12]

The RFI Report concludes with the following comment regarding government's environmental housekeeping efforts:

"The low priority assigned to controlling the environmental effects of federal government activities represents a significant failure of political will and has important consequences for environmental protection in Canada. ... the current combination of low resources, inadequate legal drafting, minimum political will and almost no regulations is ineffective and must be changed."[13]

The government has not disputed the points stated in the RFI report, and admits that "To date, very little has been accomplished in implementing Part IV of CEPA."[14] Clearly, Part IV has been ineffective and must be amended if the government is to adequately control the effects of its activities on the environment.

V. ENVIRONMENT CANADA'S PROPOSED AMENDMENTS TO PART IV

1. The Three-Pronged Approach

Environment Canada's Federal House in Order Discussion Paper regarding CEPA recommends a three pronged approach which would eliminate sections 53 and 54 of CEPA and replace them with sections which would strengthen the role of the Minister of Environment. The Discussion Paper, which was written by Environment Canada, provides the following description of the proposed amendments which would give the Minister the following powers:

1. Ability to make regulations pertaining to federal real property and operations related to any environmental issue with *the concurrence of the Ministers of the departments to which it applies*. [emphasis added]

2. Ability to selectively adopt provincial regulations, by reference, thereby making them federal regulations for federal facilities in that province.

3. Ability to issue codes and best practices guides to give discretionary direction to departments and assist them with their responsibilities related to environmental stewardship, pollution prevention and environmental emergencies.[15]

The Discussion Paper does not provide the actual wording which the new sections would have, but goes into some detail about problems under the current wording of Part IV and how the three-pronged approach would enable the government to do a better job of regulating the impact of its activities on the environment.

This proposal does not appear to adequately address the problems with the House in Order provisions in their current form. In point #1 of the three-pronged approach, the ability of the Minister to make regulations regarding federal activities remains contingent on the concurrence of the departments engaged in these activities. As discussed earlier, this is a severe restriction on the power of the Minister to enact regulations under Part IV of CEPA.

Point #3 refers to "codes" and "best practice guides" - the problem of lack of enforcement under a voluntary system has not been addressed. Environment Canada admits that the federal departments "would prefer more emphasis on the more voluntary Stewardship approach rather than either provincial or federal legislation."[16] Finally, the suggestion in point #2 that provincial regulations be adopted by reference into federal legislation may be problematic from a legal standpoint - this suggestion would have to be carefully scrutinized to verify that it is legally valid.

The Discussion Paper summarizes several possible approaches to improving Part IV, and provides the "pros" and "cons" of each approach.[17] A review of the Discussion Paper indicates that Environment Canada appears to favour the three-pronged approach.

VI. CONCLUSIONS AND RECOMMENDATIONS

The activities of the Federal government have a profound impact on the environment. The legislative provisions which are meant to deal with this issue are sections 52-60 of CEPA (Part IV). It is clear from the RFI Report, which is very critical of the performance of the federal government as well as from publications put out by Environment Canada that the House in Order provisions in CEPA have been ineffective and that the government has failed to fulfil its mandate of adequately protecting the environment from its activities.

The government has undertaken other initiatives in addition to Part IV to protect the environment, and these programs should be examined in the evaluation of the impact of federal government activities on the environment. One of the major flaws with Part IV of CEPA is its *voluntary* nature - federal departments must give their consent before regulations which will affect them can be enacted under CEPA. As a result, the Minister of Environment has made very few regulations under Part IV.

The sources examined in this brief are useful in analyzing the problems with and possible amendments to Part IV. The RFI Report is sharply critical of how the

government has dealt with the House in Order issue, and the Reviewing CEPA: A Overview, written by Environment Canada, admits to serious difficulties with Part IV. The Discussion Paper of Environment Canada reviews the problems with Part IV in its present form and details a three-pronged approach which it feels is the most practical and effective to improving the House in Order provisions of CEPA. Our proposal is more far-reaching than the three-pronged approach and gives the Minster of the Environment much greater power to regulate the impact of federal department activities on the environment.

Clearly there are severe problems with Part IV of CEPA - there is a pressing need to amend these sections of CEPA and to ensure that compliance with CEPA by federal departments is *mandatory*. It is hoped that the government's re-evaluation of CEPA in the months to come will result in substantial and meaningful amendments to the Act. In this context we make the following proposals.

Recommendations

1) *CEPA should be amended to permit, on the recommendation of the Minister of the Environment, the Governor in Council to make regulations for the purpose of the protection of the environment with respect to federal works, undertakings or lands. Such regulations would take precedence over any other regulations resulting in environmental protection applying to federal works, undertakings or lands made under any other Act of Parliament.*

2) *CEPA should be amended to permit, on recommendation of the federal Minister of the Environment, the Governor in Council to make regulations for the protection of the environment with respect to the activities and operations of federal departments, boards, agencies and, where appropriate, corporations named in Schedule III of the Financial Administration Act.*

3) *The Minister of the Environment should be permitted to make "Environmental Protection Orders" for the purpose of protection of the environment with respect to federal works, undertakings or lands, and with respect to the activities and operations of federal departments, boards, agencies and Financial Administration Act Schedule III corporations in the absence of regulations made for this purpose by the Governor in Council. Such orders should be legally binding instruments.*

4) *CEPA should be amended to require that each federal department, board, agency and Financial Administration Act Schedule III Crown corporation develop an environmental management plan. Initial plans should be required to be in place within one year of the coming into force of the amendments to CEPA. CEPA should also require that, once in place, Environmental Management Plans be reviewed publicly every four years.*

Each Environmental Management Plan would outline:

* *The key environmental issues facing the department, board, agency or corporation in its operations and activities; and*

* *an implementation plan to ensure that in its operations and activities the department, board, agency or corporation:*
  - *practices and promotes pollution prevention through the reduction and elimination of the use, generation or release of pollutants into the environment;*
  - *practices and promotes natural resource conservation through energy efficiency, water efficiency and waste reduction, reuse, recycling and composting;*
  - *protects and enhances biodiversity;*
  - *promotes the conservation, protection and enhancement of ecosystem integrity; and*
  - *protects environmentally sensitive areas;*

The adequacy of Environmental Management Plans and compliance with requirements could be regularly reviewed and reported upon by the proposed federal Environmental Commissioner.[18]

Under CIELAP's proposals, the status of CEPA as the paramount federal environmental protection statute would be affirmed and strengthened. The Minister of the Environment would be granted the power to enact regulations to ensure that the environment is protected in the conduct of activities under federal jurisdiction, and each federal agency would be required to incorporate environmental considerations into its internal management and operational practices. These would be important steps in ensuring that the federal government leads by example through the sound environmental management of its own affairs.

ENDNOTES

1. Environment Canada, Reviewing CEPA: An Overview of the Issues (Ottawa: Environment Canada, 1994), p.1

2. Resource Futures International, Evaluation of the Canadian Environmental Protection Act - Final Report (Ottawa: Environment Canada December 1993), p.107

3. Ibid., p.107

4. Ibid., p.107

5. Ibid., p.108

6. Ibid., p.110

7.Ibid.

8.These initiatives are discussed in the RFI Evaluating CEPA report at pages 108-109, and in Environment Canada, Reviewing CEPA: An Overview at page 12.

9. RFI, Evaluation of the Canadian Environmental Protection Act, p.110.

10. Environment Canada, Reviewing CEPA: An Overview of the Issues, p.12

11. RFI, Evaluation of the Canadian Environmental Protection Act, p.111

12. Ibid., p.112

13. Ibid., p.113

14. Environment Canada, Reviewing CEPA: An Overview of the Issues, p. 13.

15. Environment Canada, Environment Protection Service, CEPA Review Workshop, Federal House in Order Discussion Paper - CEPA Review Issue Analysis, (Ottawa: Environment Canada, October 1993) p.1

16. Ibid., p.3

17. Ibid., pp.7-9

18.Standing Committee on Environment and Sustainable Development The Commissioner of the Environment and Sustainable Development (Ottawa: House of Commons, May 1994).