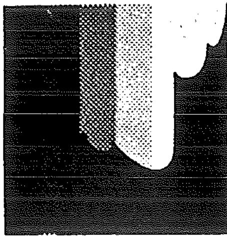

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Submissions by the Canadian Environmental Law Association on Consolidating Environmental Legislations

The Canadian Environmental Law Association (CELA) has the following concerns with respect to the CBA-O Environmental Legislative Sub-committee's draft document regarding the consolidation of environmental statutes (draft):

GENERAL

1. Consolidation of *Environmental Protection Act* (EPA), *Ontario Water Resources Act* (OWRA) and the *Environmental Bill of Rights* (EBR)

Ontarians are currently facing the most drastic roll back of environmental laws in the province's history. The government's track record on environmental issues includes:

1) Bill 20 - rolling back the environmental planning provisions in Bill 163;

2) Bill 26 - significantly weakening environmental protection in six key provincial statutes;

3) Regulation 482/95 exempting all bills which reduce spending from the public notice requirements for environmentally significant proposals under the *Environmental Bill of Rights.*

Furthermore, the Ministry of Environment and Energy's (MOEE) review of seventy-eight regulations will undoubtedly result in weakening environmental protection given the criteria for review. The MOEE has made it clear that environmental protection will not be the guiding principle in the review process. Instead, one of the criteria for review will be whether the regulation is an "irritant" to industry.

As a result of the above, CELA has serious concerns that the Legislative Sub-committee's (sub-committee) proposal to consolidate statutes, will result in further weakening Ontario's environmental laws. Although the sub-committee has stated that it is not advocating a relaxation of standards, we do not believe a review of the statutes can be made without addressing such

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policy issues.

For example, a review of section 30 of the *Ontario Water Resources Act* (OWRA) and section 14 of the *Environmental Protection Act* (EPA), raises the issue of which standard should apply. In previous drafts, the sub-committee advocated the EPA standard should apply to all discharges to water. This position was advanced, despite the fact that everyone acknowledged that the EPA imposed a lower standard for discharges. Although the current draft modifies the earlier position somewhat, the policy issue on which standard should be adopted still remains.

Furthermore, the sub-committee has not cogently established a need for consolidating environmental statutes. Although, there is some duplication in environmental legislations, there is no evidence to suggest that this has resulted in any serious drain on public resources or confusion among the regulated community to warrant a major overhaul and consolidation of environmental statutes. [see discussion under paragraph 1 (a) Discharges of contaminants into water].

It is also inappropriate to state that consolidation of the OWRA and EPA would lead to a new "omnibus" environmental legislation. There are numerous other statutes that pertain to environmental matters, for example, the *Environmental Assessment Act*, the *Planning Act,* the *Niagara Escarpment Planning and Development Act*, the *Lakes and Rivers Improvement Act*, the *Conservation Authorities Act*, the *Game and Fish Act*, the *Public Lands Act*, the *Municipal Act*, the *Aggregate Resources Act* and the *Mining Act.* Consolidating statutes merely because there may be some duplication and overlap is neither a compelling nor a sound rationale. Furthermore, extracting various environmental provisions from a myriad of statutes and consolidating them into one "omnibus" legislation will not make it more user friendly for the public, instead it will result in an extraordinarily cumbersome and confusing piece of legislation.

SPECIFIC COMMENTS ON THE DRAFT

(a) Discharges of contaminants into water

The fact that both section 14 of the EPA and section 30 of the OWRA address discharges to water does not in itself create any unfairness. In the event that a person is charged with the same offence under both the EPA and the OWRA, the court can only convict under one statute. [see *R* v *Black Bird Holdings Ltd.* 6 C.E.L.R (N.S) 138 (Ont. Ct. Prov. Div.)]

Furthermore, there is considerable jurisprudence about the legal standard which applies for discharges under the EPA and the OWRA which provides clarification on how courts have interpreted both statutes.

If environmental statutes are consolidated, we recommend the OWRA standard should apply. Section 30 of the OWRA has been interpreted to mean "that the intention of the legislation is not to prohibit the results of certain acts, but to prevent the discharge of <u>any material which by its nature may impair the quality of the water course.</u>" (emphasis added) [*R* v *Toronto Electric*

Commissioners (1992), 6 C.E.L.R. (N.S.) 301 (Ont. Ct. Gen. Div.)]

CELA submits that if clarification of the law is sought, then the OWRA standard should be adopted since it provides for greater certainty. The courts will not have to enter into conflicting opinions regarding concentrations and quantity to determine whether impairment may occur in the circumstances that existed at the time of the offence. According to one government prosecutor "the message that the law will only tolerate zero discharge in the absence of approval from the government will more clearly and unequivocally deter would be polluters." [see Legal Emissions, Volume 7, Number 3, Fall 1995 *Undermining Toronto Electric Commissioners*, p. 14]

If the OWRA standard is adopted, there is no valid reason to limit it only to discharges to water. Therefore, we would recommend that if consolidation occurs, the OWRA standard should apply to any discharge into the natural environment in order to avoid confusion in matters of compliance.

(b) Impair and Adverse Effect

Please see above comments.

(c) Provincial Officers

It is not clear from the sub-committee's submission how the provincial officers' powers in the OWRA and the EPA cause confusion in matters of compliance.

(d) Penalties

The penalty provision, if consolidated, should not lower the available penalties. It is a well recognized principle of sentencing in environmental cases, that the primary aim is to achieve both specific and general deterrence. This is achieved through the imposition of the appropriate penalty. The penalty provision must be sufficiently high enough to serve as deterrence, not simply for individuals and small corporations, but also for large corporations.

(e) Sewage Systems and Sewage Works

It is unclear how consolidation would clarify the need for different approvals for sewage systems under the EPA, and sewage works under the OWRA, since there would still be a need for both types of approvals.

2. Consolidation of certain environmental spill issues of the *Gasoline Handling Act* (GHA) and the *Pesticides Act*

If responsibility for the *Gasoline Handling Act* is transferred to MOEE, it should be accompanied by a sufficient transfer of resources, so that the MOEE can assume this responsibility. It is premature at this point to delve into other considerations which may arise from consolidating the GHA with other environmental statutes.

3. Spills and Discharges

There is a need for the spills section since it addresses not only reporting requirements, but also obligations to clean up, and civil liability resulting from spills.

4. SAC

There is no sound policy reason for the government to be obliged to call the local municipal fire department, police and other specialized services for spills caused by the regulated community. Why should the taxpayers of Ontario have to incur the expense for providing this service to the regulated community? In times of fiscal restraint and spending cuts it is undesirable for the government to incur the additional costs associated with the sub-committee's proposal. Moreover, if the MOEE decides to assume such a responsibility it will expose itself to regulatory negligence law suits, if it fails to contact the appropriate agencies, or is late in notification and damages ensue.

5. Reference to *Environmental Bill of Rights* (EBR)

The EBR, is an entirely distinct legislative framework from that of the EPA and OWRA. Consolidating the EBR with any other statute would result in greater confusion because its scope is much broader than the EPA or the OWRA. The EBR provisions apply to fourteen ministries and not simply the MOEE.

Furthermore, the EBR was designed as a framework for public participation. In other words, it was designed to stand alone. For example, section 3 of the EBR states:

> "This part sets out minimum levels of public participation that must be met before the Government of Ontario makes decisions on certain kinds of environmentally significant proposals for policies, Acts, regulations and instruments."

The recommendation that EBR approvals ought to be incorporated into the statute under which approval is required would result in amendments to numerous statutes to include the applicable EBR provisions. This would be entirely inconsistent with the goal of avoiding overlap and

duplication in statutes.

CELA is opposed to the suggestion that a "change which does not increase or alter emissions" should not be required to be posted on the EBR Registry. An amendment to a Certificate of Approval which does not increase or alter emissions could still have a significant impact on the natural environment. Therefore, the public is entitled to know the type of pollution control equipment being proposed in order to comment on whether it is adequate and whether there are more suitable alternatives which may lower emissions.

One of the main purposes of the EBR is to provide the public with a role in decision making in environmental matters. The Act recognizes that public input into environmental decision making is essential for the sound development of environmental policy and the government decision making process. Encouraging citizens to participate in decisions that affect them and the environment can only be accomplished if citizens are provided with access to the information through the notice provisions of the EBR.

Industries which are seriously committed to modernizing and improving their pollution control devices will do so, irrespective of the notice requirements under the EBR. Indeed, public comments through the EBR may serve to encourage industries to ensure that the best available technology is utilized in addressing pollution.

Finally, unlike the OWRA and the EPA, the EBR is a fairly new legislation which was negotiated among various stakeholders with a view to achieving consensus on major issues. It is CELA's position that there are more pressing issues pertaining to the EBR than renegotiating with stakeholders for the purpose of consolidating it with other statutes.

6. EPA Part V Approvals

It is unclear from the sub-committee's proposal whether the MOEE would have to provide a notice of objection within a specified time period without even being notified by a facility about a change in the facility process or equipment. If this is, in fact, what the sub-committee is proposing, it would require the MOEE to have clairvoyant powers to ascertain which industries throughout the province have changed their facility activities at any given moment in time. This is an absurd suggestion, and therefore CELA assumes this was not the intention of the sub-committee's proposal.

Instead, we assume that what the sub-committee is suggesting is that once an applicant has filed an application for a Certificate of Approval (C of A) or an amendment to a C of A, there should be a presumption of approval, unless the MOEE sends out a notice of objection within a specified time period. This proposal fails to recognize that the applicant has the onus of ensuring all the necessary documentation to obtain a C of A is filed with the MOEE and is accurate. The suggestion that there should be a presumption of approval, unless the MOEE provides a notice of objection shifts this onus onto the government. There is no sound policy rationale for

requiring the government to assume the responsibility for providing a notice of objection.

Instead, a more practical approach would be for a company to contact the Approvals Branch to ascertain the reasons for the delay and attempt to speed up the process. If the MOEE were required to set up a bureaucratic process for providing a notice of objection within a specified time frame, it would delay the approvals process even further.

7. Conclusions

CELA **does not support** the initiative by the sub-committee to consolidate environmental legislations. Furthermore, it is incorrect to state that the sub-committee "believes it would be appropriate to consolidate the EPA, OWRA and the EBR," since this statement does not reflect CELA's position as a member of the sub-committee.

We do not consider it advisable for the sub-committee to place a priority on consolidating environmental statutes when there are far more important environmental issues which have to be addressed. CELA therefore, recommends the sub-committee focus its efforts on responding to more immediate environmental concerns, such as the proposed exemptions of waste disposal sites from the *Environmental Assessment Act*, the continuation of the *Intervenor Funding Act,* or the damaging effects of regulation 482/95.