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Publication # 342
ISBN#978-1-77189-385-5

ENFORCEMENT & THE *CANADIAN ENVIRONMENTAL PROTECTION ACT*: THE NEED FOR A FEDERAL ENVIRONMENTAL BILL OF RIGHTS

A Submission to the
Standing Committee on Environment & Sustainable Development

Brief No. 342

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February 24, 1998

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1. Introduction

The issue of enforcement of federal environmental laws is one of vital interest to Canadians. The public increasingly expects more, not less, enforcement of environmental laws. However, for a variety of reasons, rather than moving toward a stricter enforcement regime, the federal government is allowing enforcement to slacken.

The focus of this submission is threefold. First, it will provide a brief review of the enforcement record under the *Canadian Environmental Protection Act* (CEPA) to date. Second, it will provide some context as to why federal enforcement is not being pursued as aggressively as may be appropriate. Third, this submission will argue that the federal government should rebuild its enforcement capacity. One component of this rebuilding strategy should be to establish a federal environmental bill of rights that includes an effective citizen enforcement mechanism.

2. The Federal Enforcement Record to Date

The value of any statute is highly related to the degree to which it is enforced. It follows, therefore, that it is only through effective and consistent enforcement that Environment Canada will be able to ensure that the CEPA lives up to its objectives. Unfortunately, Environment Canada's record on the enforcement of CEPA is disappointing. This failure is largely attributable to, among other reasons, the lack of adequate resources and the lack of coordination and centralization of enforcement functions, discussed below.

The lack of adequate staff to conduct inspections and investigations has historically been a major problem in ensuring compliance with CEPA. A review of this record is informative. Table 1 compiles the enforcement statistics from the annual report on the CEPA. Table 1 reveals that the number of inspections have actually declined between 1990 and 1996. Prosecutions in this period have ranged from 3 to 22 while convictions have ranged from 2 to 17 per year. On average, there have been 12 prosecutions per year and approximately 10 convictions per year.

Table 2 outlines enforcement statistics for Ontario. Between 1991 and 1995, over 1000 charges were laid each year. Only in 1996 did the number of charges drop below 1000, to 752. In 1992, over 2000 charges were laid. There were between 324 and 512 convictions between 1991 and 1996, with an average of 422 convictions each year.

These statistics reveal a number of interesting points. First, they demonstrate the dramatic differences between the scale of enforcement activities between the federal and provincial governments. Conservatively speaking, it would be fair to say that the provincial enforcement rate for Ontario alone rate in terms of convictions is at least

Table 1

Enforcement Activities
Before March 30, 1990 to March 30, 1996

	Ending March 30, 1990[1]	April, 1990 to March, 1991	April, 1991 to March, 1992	April, 1992 to March, 1993	April, 1993 to March, 1994	April, 1994 to March, 1995	April, 1995 to March, 1996[2]
Inspections	5821	2794	1574	1233	1548	1362	963
Investigations		61	120	93	55	64	94
Warnings		78	82	105	120	127[3]	87[3]
Directions		5	6	4	1	0	0
Prosecutions	339	8	16	22	3	8	15
Convictions		6	2	17	10	9	8
Acquittals/ Withdrawals		N/A	N/A	N/A	N/A	N/A	1

[1] In the Canadian Environmental Protection Act Report for the Period Ending March 1990, the Minister of the Environment reported only two kinds of information: Inspection/Investigation and Enforcement Action. There were 5821 Inspections/Investigations and 339 Enforcement Actions.

[2] The statistics for this column reflect the numbers to 12 August, 1996.

[3] These numbers are totals. In the April, 1994 to March, 1995 and the April, 1995 to March, 1996 reports, the Minister divided Warnings into two categories: Government and Other. From April, 1994 to March, 1995 there were 21 government warnings and 106 other warnings. From April, 1995 to March, 1996, there were 13 government warnings and 74 other warnings.

Sources: Environment Canada, *CEPA Annual Report 1990* at pp. 23; Environment Canada, *CEPA Annual Report 1990-91* at pp. 39; Environment Canada, *CEPA Annual Report 1991-92* at pp. 43; Environment Canada, *CEPA Annual Report 1992-93* at pp. 52; Environment Canada, *CEPA Annual Report 1993-94* at pp. 39; Environment Canada, *CEPA Annual Report 1994-95* at pp. 41; Environment Canada, *CEPA Annual Report 1995-96* at pp. 30.

TABLE 2

PROVINCIAL ENFORCEMENT STATISTICS

	1991	1992	1993	1994	1995	1996
Crown Briefs	272	255	224	279	196	143
Charges Against Individuals & Corporations	1,975	2,163	1,587	1,546	1,045	752
Convictions Against Individuals & Corporations	485	399	324	474	512	337
Fines Against Individuals & Corporations	$2,575,145	$3,633,095	$2,533,607	$2,427,833	$3,065,504	$1,204,034

Sources: Ministry of the Environment, *Offences Against the Environment, 1991*; Ministry of the Environment, *Offences Against the Environment, 1992*; Ministry of the Environment, *Offences Against the Environment, 1993*; Ministry of the Environment, *Offences Against the Environment, 1994*; Canadian Institute for Environmental Law and Policy, *Ontario's Enviornment and the "Common Sense Revolution" A First Year Report*, 1996; Canadian Institute for Environmental Law and Policy, *Ontario's Enviornment and the "Common Sense Revolution" Second Year Report*, 1997.

TABLE 3

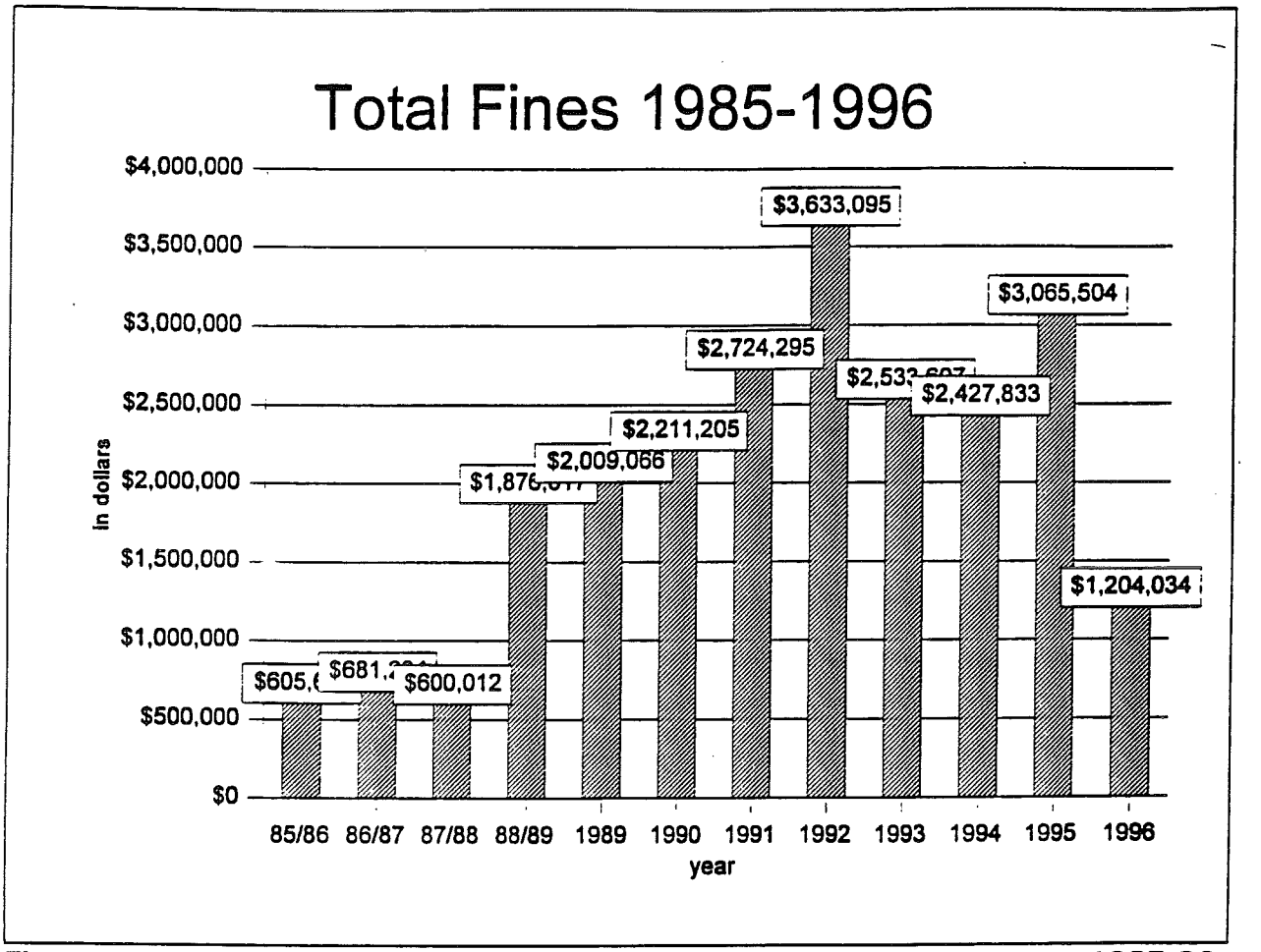

Figure 2: Total fines recorded by the Ministry of Environment and Energy 1985-96.

Source: Canadian Institute of Environmental Law and Policy, *Ontario's Environment and the Common Sense Revolution" A Second Year Report*, 1997.

35 times that of the federal government. There does not seem to be any comprehensive data base comparing provincial and federal prosecutions with sufficient analysis to explain these gross disparities.

Another point of interest is that while the federal enforcement rate has remained level or marginally declined over time, it is apparent that the enforcement rate in Ontario has dramatically declined.[1] A review of the total fines from 1985 to 1996 reveals the situation. The total value of fines plunged in 1996 and in fact was the lowest value since the fiscal year 1987/88, as illustrated in Table 3.

As provinces like Ontario retreat from aggressive enforcement activities, who will enforce environmental laws in this country?

> **Recommendation No. 1: A study should be undertaken to review the enforcement records in all provinces and compare such records with the federal record. An analysis should be undertaken to provide some understanding of the discrepancies between the records.**

3. The Record in Context

When reviewing the enforcement record of the federal government, there is strong evidence to suggest that the record, as problematic as it is, will in fact be worse in future years. There are at least four reasons that explain why the federal enforcement record will remain a significant problem.

(a) The Continuing Lack of Federal Resources

The lack of adequate resources with respect to enforcement is perhaps the most obvious explanation. In fact, it should be recalled that the Standing Committee has already stated that "effective enforcement will require sustained political will and adequate resources."[2] At this point in time, it is unclear what the funding trend has been with respect to enforcement over the past ten years. It is fair to state that resources have not significantly risen and have probably fallen in real dollars.

> **Recommendation No. 2: A study should be undertaken to determine the funding of federal enforcement capacity and those levels should be calculated in real or constant dollar value.**

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[1] M. Mittlestaedt, "Ontario pollution fines plunge" The Globe and Mail January 10, 1997.

[2] Standing Committee on Environment and Sustainable Development, *It's About Our Health! Towards Pollution Prevention,* June 1995, p. 242.

(b) The Impact of Voluntary Initiatives on Enforcement Activities

The most obvious, and perhaps systemic, reason for a poor enforcement record relates to the virtual abandonment of the federal regulatory capacity itself. For a number of reasons, the federal government, including Environment Canada, has moved to a voluntary compliance approaches.

For example, over the past few years, Environment Canada has been negotiating and signing voluntary agreements or "memoranda of understanding" (MOUs) with various industrial sectors. There are, for example, a growing number of existing or proposed "voluntary pollution prevention agreements." Examples of these agreements include, among others: the Motor Vehicle Manufacturers' Agreement, the Canadian Chemical Producers' Agreement, the Metal Finishers' Agreement and the Automotive Parts Manufacturers' Agreement.

The Accelerated Reduction/Elimination of Toxics (ARET) program, which commenced in 1993 despite the withdrawal of public interest groups from the discussions, relies upon voluntary compliance. Many of the Great Lakes programs under the Canada-Ontario Agreement and the commitments under the Bilateral Toxics Management Strategy are also expected to be undertaken through a voluntary approach.

The basic thrust of these agreements and programs is to have industry reduce specific pollutant emissions through a series of actions identified in each initiative. Each initiative is different. Hence, the scope of the pollutants covered, the specificity of the initiatives, the types of activities, the reporting requirements, and the availability of information about progress under the agreement vary from one agreement to another.

There are a number of studies on the problems with the voluntary approach, particularly with respect to the voluntary pollution prevention agreements.[3] Specifically with respect to enforcement, three concerns should be noted. These are:

1) it would appear that Environment Canada is relying almost exclusively on the voluntary, as opposed to the regulatory, approach. This trend is particularly problematic because some of the environmental issues addressed through the voluntary approach are some of the most problematic in Canada;

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[3]For example, see: K.L. Clark, The Use of Voluntary Pollution Prevention Agreements in Canada: An Analysis and Commentary (Toronto: Canadian Institute for Environmental Law and Policy, 1995).

2) Environmental Canada's reliance on the voluntary approach continues despite the lack of external audit and verification of data; and

3) as Environment Canada continues to rely on the voluntary approach, less emphasis will be placed developing regulatory strategies, and as such, less priority and resources will be devoted to enforcement capacity.

Finally, it must be kept in mind that voluntary measures are not enforceable, unlike laws and regulations. This difference is significant. Recent surveys of business attitudes confirm the importance of strong laws and regulations in achieving environmental protection. KPMG Management Consultants conducted polls of over 300 businesses, school boards and municipalities in 1994 and 1996, questioning them about their environmental management programs.[4] Of those that had programs with the necessary elements, over 90 per cent stated that their primary motivation for establishing environmental management systems was compliance with regulations. Approximately 70 per cent cited potential directors' liability, a factor also related to environmental laws. Only 16 per cent claimed to have been motivated by voluntary programs in 1994. This figure rose to 25 per cent in the 1996 survey.

Recommendation No. 3: Environment Canada should review its commitment to the voluntary approach, and examine how to renew an effective regulatory approach.

(c) The Impact of Harmonizing Activities on Enforcement Activities

The third issue that must be related to CEPA's enforcement record pertains to the bilateral agreements that the federal government has negotiated with some provinces to enforce federal law, and to the recently concluded Canada-Wide Accord on Environmental Harmonization. The issues with respect to the bilateral agreements were discussed in our previous submission in October of 1997 with respect to the proposed harmonization accord.[5] Suffice to say at this point that one of the key issues is that there is simply a serious lack of understanding of the enforcement

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[4] KPMG Management Consultants, Canadian Environmental Management Survey, (1994); and KPMG Management Consultants, Canadian Environmental Management Survey (1996).

[5] Canadian Institute for Environmental Law and Policy and Canadian Environmental Law Association, "Brief to the House of Commons Standing Committee Environment and Sustainable Development Regarding the Canadian Council of Ministers of the Environment (CCME) Environmental 'Harmonization' Initiative" October 21, 1997.

record under bilateral agreements. For this reason, the Standing Committee's recommendation that the bilateral agreements be audited by the Auditor-General's office should be pursued.

Moreover, recent evidence suggests that the record of enforcement under the bilateral accords is extremely problematic.[6]

Since the Canada-Wide Accord on Environmental Harmonization was concluded in January of 1998, there is no doubt that more enforcement activities will be devolved to the provinces. This devolution is the result of both the consequences of the inspections sub-agreement to the Accord and the proposal for a new sub-agreement on enforcement.

The implication of this initiative, it is submitted, is to further undercut the present enforcement capacity of Environment Canada. How can the present capacity be maintained when more of the activities will be done by the provinces? The federal government should rethink its it intention to devolve federal enforcement to the provinces.

> **Recommendation No. 4: It is recommended that Recommendation No. 4 of the Standing Committee's report, "Harmonization and Environmental Protection" be pursued, namely, "that the Auditor General of Canada conduct an environmental audit of the effectiveness of the bilateral environmental agreements between the federal and provincial governments such as those under the Canadian Environmental Protection Act (CEPA) and the Fisheries Act." Further, the federal government should rethink its intention to devolve federal standard-setting and enforcement roles to the provinces under the Canada-Wide Accord on Environmental Harmonization and other such initiatives.**

4. A Strategy to Re-Establish a Federal Enforcement Strategy

How can the federal enforcement strategy be improved? It is respectfully submitted that there is no simple answer. First and foremost, the improvement of federal enforcement requires political will. However, in addition to political will, a number of other components are necessary. These include:

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[6] See Press Material of Sierra Legal Defence Fund on the information with respect to the effectiveness of the Quebec enforcement record under a bilateral accord, January, 1998.

(a) Clarification of the Federal Regulatory Role

As noted above, the federal government has virtually abandoned the regulatory approach in favour of voluntary approaches. In effect, Environment Canada has become a facilitator rather than a regulator. Environment Canada is only willing to act where it has consensus from industry, as many recent examples of this approach illustrate.[7]

In addition to the voluntary approach, the Canada-Wide Accord on Environmental Harmonization also will inevitably erode the federal regulatory role. As noted above, the Accord promotes significant devolution of both standard-setting and enforcement roles to the provinces.

Hence, it is essential that Environment Canada defines itself as a regulator in matters within federal constitutional authority and which are a priority for the environment. The challenge of redefinition is an onerous one. However, unless Environment Canada retains the political and institutional will to regulate, any hope of moving the environmental agenda forward is compromised.

Recommendation No. 5: Environment Canada must redefine its role to ensure that its regulatory function is a priority.

(b) Enhance Federal Enforcement Capacity

Another component necessary to re-vitalize federal enforcement is the assurance that there are adequate resources available for inspections, testing facilities, legal staff, and other infrastructure.

The Standing Committee recognized that a credible and effective enforcement program could only be established if Environment Canada underwent substantial restructuring and created an independent decision-making process to ensure enforcement decisions are consistent across the country.[8]

The Standing Committee recommended that Environment Canada revise its

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[7] The most recent example is the failure of Environment Canada to further its own proposal to include pollution prevention as a reporting requirement under the National Pollutant Release Inventory. When industry objected, despite the support from public interest groups and the fact that action would be consistent with the U.S. approach, Environment Canada deferred all action.

[8] *Supra*, note 2.

enforcement approach to CEPA. In particular, the Standing Committee recommended that Environment Canada establish an independent enforcement office with regional branches, revise CEPA's Enforcement and Compliance Policy, ensure that enforcement decisions are made in reference to the policy, establish training programmes for enforcement personnel, keep information of enforcement action in a centralized data bank and set up a legal branch within Environment Canada to prosecute offenses under CEPA.[9] It should be noted that these recommendations are consistent with the practices in jurisdictions such as Ontario, where they have been proven effective.

Recommendation No. 6: Environment Canada should enhance enforcement resources. Further, Environment Canada should establish an independent enforcement office and provide an overall review of the CEPA Enforcement and Compliance Policy.

(c) Enact a Federal Environmental Bill of Rights

Another component to further the enforcement of federal laws pertains to granting participation and enforcement rights to members of the public. *In effect, Canada needs a federal environmental bill of rights that empowers the public to enforce environmental laws. Citizen rights in an environmental bill of rights would supplement governmental enforcement efforts.*[10]

The idea of developing an environmental bill of rights in Canada is not a new one.[11] The Standing Committee on Environment and Sustainable Development, in its report, It's About Our Health! Toward Pollution Prevention, specifically called for a federal environmental bill of rights.

Typically, environmental rights bills have two categories of rights. First, there are rights that seek to further public participation in environmental decision-making, through such vehicles as notice and comment procedures and environmental registries. The second category of rights pertain to citizen enforcement rights or

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[9] Ibid., pp. 245- 246.

[10] It should be noted that an Environmental Bill of Rights is statute. A preferred solution would be a constitutionally recognized right to environmental quality in the Canadian Constitution.

[11] The history of efforts to enact an Environmental Bill of Rights is detailed in: Paul Muldoon and Richard Lindgren, The Environmental Bill of Rights: A Practical Guide (Toronto: Emond Montgomery Publications, 1995), chapter 1.

"citizen suits." This submission will focus on these latter type of rights, although public participation rights are also of considerable importance.

Citizen Enforcement Rights

Citizen enforcement rights or "citizen suits" are of immense importance.[12] In Canada, there are two types of citizen enforcement action.

Private Prosecutions

First, any person can "privately prosecute" for the violation of an offence. In this context, the private prosecutor stands in the shoes of the Crown and proceeds with the case in criminal courts. There is considerable literature on this topic with numerous examples of private prosecutions.[13] Indeed, CELA has successfully used this mechanism to achieve environmental protection.

However, one of the most problematic aspects of this approach is the ability of the Crown to stay the proceeding, which is now happening with increasing frequency.[14]

Recommendation 7: As a general rule, private prosecutions should not be stayed except in the most serious cases of abuse of the private prosecution mechanism. The right to pursue a private prosecution should recognized.

Statutory Cause of Action for Breach of Environmental Statutes

In Canada, the idea of creating a new cause of action to allow citizens to proceed to civil court for the breach of environmental laws is well established. Owing to the fact that such suits are in civil court means that the standard of proof is less than that in criminal court and the range of remedies available are usually much broader. Hence, citizen enforcement suits often hold important advantages over private prosecutions.

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[12] See: Marcia Valiante and Paul Muldoon, "A Foot in the Door: A Survey of Recent Trends in Access to Environmental Justice" in S. Kennett, Law and Process in Environmental Management (Calgary: Canadian Institute for Resources Law, 1993), 142; Jutta Brunnee, "Individual and Group Enforcement of Environmental Law in Quebec" (1992), 41 U. B.C. Law Rev. 107.

[13] See: Bryce C. Tingle, "The Strange Case of the Crown Prerogative over Private Prosecutions or Who Killed Public Interest Enforcement?" (1994), 28 U.B.C. Law Rev. 309.

[14] Ibid.

In the U.S., citizen suits have been incorporated into federal law, such as the Clean Air Act and Clean Water Act, for over two decades. These provisions include both the opportunity to enforce breaches of the law and to challenge administrative actions. These provisions are straight forward and clear in their effect. Citizen suits under these laws are seen as a vital component of federal enforcement policy. Examples of the rights in the U.S. are provided in Appendix 1, in the citizen suit provisions from the *Clean Water Act* and the *Clean Air Act.*

Provincial Law - The Ontario Environmental Bill of Rights

The Yukon, the Northwest Territories, Quebec and Ontario have enacted environmental rights legislation which have provisions that allow citizens to enforce environmental laws to varying degrees.[15] Ontario's Environmental Bill of Rights (EBR), enacted in 1993, is the most comprehensive in nature and was intended to provide an effective citizen enforcement right. Part V (pertaining to investigations) and Part VI (pertaining to citizen enforcement action) are attached to this submission as Appendix 2.

The EBR's citizen enforcement rights section is important for a number of reasons. First, it was intended to be an effective right; yet, as of today, it has not been employed. It is suggested that the reason for this lack of use relates to the onerous preconditions to using it. Second, despite the failure to use this mechanism, it has become the model for federal legislative proposals, including Bill C-65, the proposed *Endangered Species Protection Act* and Bill C-74, the *Canadian Environmental Protection Act.*

Additional commentary on Part VI of the EBR is provided in Appendix 3.

Rights under the Existing *Canadian Environmental Protection Act*

CEPA does not provide for citizen suits or any other citizen enforcement actions. Instead, section 108 allows the public to request an investigation. Section 136 permits any person who suffers injury from the violation of a CEPA to initiate a law suit; however, only persons who have suffered a direct injury arising from the violation can sue.

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[15] For a more complete discussion, see: Paul Muldoon and Richard Lindgren, The Environmental Bill of Rights: A Practical Guide (Toronto: Emond Montgomery Publications, 1993), pp. 17-19.

Bill C-74 - The Proposed New Canadian Environmental Protection Act

The proposed new CEPA, which was introduced in December of 1996 as Bill C-74, contained citizen enforcement rights in Part II of the bill. Apparently, a similar version of the bill will be introduced in the near future. On one hand, public interest groups from across Canada were encouraged that Bill C-74 did include citizen enforcement rights. However, a closer reading of the bill makes it clear that these rights are, in fact, illusory.

Attached as Appendix 4 to this submission is an analysis of these provisions. This analysis will give the Committee some insight into the enormously complex provisions included in the bill. Rather than review in detail the problems of these provisions, a number of key overall problems can be summarized as follows:

(1) The provisions are highly qualified and set extensive preconditions for their use. For instance, a person must first request an investigation, the investigation must be undertaken in an unreasonable manner and the matter must pertain to significant harm to the environment before an action may be commenced.

(2) The provisions are only applicable to violations that are "imminent." Hence, any preventative action may not be allowed.

(3) There are an enormous number of defences and other provisions that would ensure for long, drawn-out litigation even in the most meritorious cases.

There is little doubt that the citizen enforcement sections of Bill C-74 were modelled after the provisions in the Ontario Environmental Bill of Rights. However, the provisions in the EBR were directed to deal with a broad range of provincial statutes. Moreover, it should be mentioned that, after some five years experience, these provisions in the EBR have yet to be used. Certainly that fact must reveal a need for critical evaluation of the proposed provisions.

It should also be mentioned that the citizen enforcement rights in CEPA are in fact more restricted than those in Bill C-65, the former Endangered Species Act bill. Why should one piece of federal legislation have different and weaker citizen enforcement rights than another? Moreover, commentators have been critical of the provisions in Bill C-65. Attached to this submission in Appendix 5 is an analysis of those provisions in Bill C-65 written by Richard Lindgren, counsel at the Canadian Environmental Law Association.

Recommendation 8: The federal government needs to develop an effective federal Environmental Bill of Rights. Among other

components, the federal Environmental of Rights should include clear, workable citizen enforcement rights.

5. Summary

There are many problems with the federal environmental law enforcement strategy. Although the basic problem stems from the lack of political will to aggressively pursue an enforcement strategy, there are many components required for an effective enforcement strategy. Most important, more resources and some major institutional reform, such as the establishment of a special enforcement unit within Environment Canada, are needed.

To overcome the lack of political will, it is imperative that a federal Environmental Bill of Rights be developed. This bill would have a number of important public participation rights, such as the right to comment on important environmental decisions, the right to ask for review of existing policies, regulations and instruments and the right to certain environmental information. One of the most important rights, however, would be the right for citizens to enforce environmental laws. While it is preferable that the government monitor its own legislation, citizen enforcement rights are important to supplement and encourage such efforts.

nonroad engine or nonroad vehicle as defined in section 7550 of this title.

(July 14, 1955, ch. 360, title III, §302, formerly §9, as added Dec. 17, 1963, Pub. L. 88-206, §1, 77 Stat. 400, renumbered Oct. 20, 1965, Pub. L. 89-272, title I, §101(4), 79 Stat. 992, and amended Nov. 21, 1967, Pub. L. 90-148, §2, 81 Stat. 504; Dec. 31, 1970, Pub. L. 91-604, §15(a)(1), (c)(1), 84 Stat. 1710, 1713; Aug. 7, 1977, Pub. L. 95-95, title II, §218(c), title III, §301, 91 Stat. 761, 769; Nov. 16, 1977, Pub. L. 95-190, §14(a)(76), 91 Stat. 1404; Nov. 15, 1990, Pub. L. 101-549, title I, §101(d)(4), 107(a), (b), 108(j), 109(b), title III, §302(e), title VII, §709, 104 Stat. 2409, 2464, 2468, 2470, 2574, 2684.)

Codification

Section was formerly classified to section 1857h of this title.

Prior Provisions

Provisions similar to those comprising subsecs. (b) and (d) of this section were contained in a prior section 1857e, act July 14, 1955, ch. 360, Sec. 6, 69 Stat. 323, prior to the general amendment of this chapter by Pub. L. 88-206.

Effective Date Of 1977 Amendment

Amendment by Pub. L. 95-95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95-95, set out as a note under section 7401 of this title.

§ 7603. [CAA §303]

Emergency powers

Notwithstanding any other provision of this chapter, the Administrator, upon receipt of evidence that a pollution source or combination of sources (including moving sources) is presenting an imminent and substantial endangerment to public health or welfare, or the environment, may bring suit on behalf of the United States in the appropriate United States district court to immediately restrain any person causing or contributing to the alleged pollution to stop the emission of air pollutants causing or contributing to such pollution or to take such other action as may be necessary. If it is not practicable to assure prompt protection of public health or welfare or the environment by commencement of such a civil action, the Administrator may issue such orders as may be necessary to protect public health or welfare or the environment. Prior to taking any action under this section, the Administrator shall consult with appropriate State and local authorities and attempt to confirm the accuracy of the information on which the action proposed to be taken is based. Any order issued by the Administrator under this section shall be effective upon issuance and shall remain in effect for a period of not more than 60 days, unless the Administrator brings an action pursuant to the first sentence of this section before the expiration of that period. Whenever the Administrator brings such an action within the 60-day period, such order shall remain in effect for an additional 14 days or for such longer period as may be authorized by the court in which such action is brought.

(July 14, 1955, ch. 360, title III, §303, as added Dec. 31, 1970, Pub. L. 91-604, §12(a), 84 Stat. 1705, and amended Aug. 7, 1977, Pub. L. 95-95, title III, §302(a), 91 Stat. 770; Nov. 15, 1990, Pub. L. 101-549, title VII, §704, 104 Stat. 2681.)

Codification

Section was formerly classified to section 1857h-1 of this title.

Prior Provisions

A prior section 303 of act July 14, 1955, was renumbered section 310 by Pub. L. 91-604, and is classified to section 7610 of this title.

Effective Date Of 1977 Amendment

Amendment by Pub. L. 95-95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95-95, set out as a note under section 7401 of this title.

Pending Actions And Proceedings

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95-95 (Aug. 7, 1977), not to abate by reason of the taking effect of Pub. L. 95-95, see section 406(a) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

Modification Or Rescission Of Rules, Regulations, Orders, Determinations, Contracts, Certifications, Authorizations, Delegations, And Other Actions

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95-95 (Aug. 7, 1977) to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95-95 (this chapter), see section 406(b) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7604. [CAA §304]

Citizen suits

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to have violated (if there is evidence that the alleged violation has been repeated) or to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties (except for actions under paragraph (2)). The district courts of the United States shall have jurisdiction to compel (consistent with paragraph (2) of this subsection) agency action unreasonably delayed, except that an action to compel agency action referred to in section 7607(b) of this title which is unreasonably delayed may only be filed in a United States District Court within the circuit in which such action would be reviewable under section 7607(b) of this title. In any such action for unreasonable delay, notice to the entities referred to in subsection (b)(1)(A) of this section shall be provided 180 days before commencing such action.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a)(2) of the section prior to 60 days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 7412(i)(3)(A) or (f)(4) of this title or an order issued by the Administrator pursuant to section 7413(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; service of complaint; consent judgment

(1) Any action respecting a violation by a stationary source of an emission standard or limitation or an order respecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In any action under this section, the Administrator, if not a party, may intervene as a matter of right at any time in the proceeding. A judgment in an action under this section to which the United States is not a party shall not, however, have any binding effect upon the United States.

(3) Whenever any action is brought under this section the plaintiff shall serve a copy of the complaint on the Attorney General of the

United States and on the Administrator. No consent judgment shall be entered in an action brought under this section in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator during which time the Government may submit its comments on the proposed consent judgment to the court and parties or may intervene as a matter of right.

(d) Award of costs; security

The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nonrestriction of other rights

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency). Nothing in this section or in any other law of the United States shall be construed to prohibit, exclude, or restrict any State, local, or interstate authority from—

(1) bringing any enforcement action or obtaining any judicial remedy or sanction in any State or local court, or

(2) bringing any administrative enforcement action or obtaining any administrative remedy or sanction in any State or local administrative agency, department or instrumentality,

against the United States, any department, agency, or instrumentality thereof, or any officer, agent, or employee thereof under State or local law respecting control and abatement of air pollution. For provisions requiring compliance by the United States, departments, agencies, instrumentalities, officers, agents, and employees in the same manner as nongovernmental entities, see section 7418 of this title.

(f) "Emission standard or limitation under this chapter" defined

For purposes of this section, the term "emission standard or limitation under this chapter" means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard,

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, or[104]

(3) any condition or requirement of a permit under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment),,[105] section 7419 of this title (relating to primary nonferrous smelter orders), any condition or requirement under an applicable implementation plan relating to transportation control measures, air quality maintenance plans, vehicle inspection and maintenance programs or vapor recovery requirements, section 7545(e) and (f) of this title (relating to fuels and fuel additives), section 7491 of this title (relating to visibility protection), any condition or requirement under subchapter VI of this chapter (relating to ozone protection), or any requirement under section 7411 or 7412 of this title (without regard to whether such requirement is expressed as an emission standard or otherwise);[106] or

(4) any other standard, limitation, or schedule established under any permit issued pursuant to subchapter V of this chapter or under any applicable State implementation plan approved by the Administrator, any permit term or condition, and any requirement to obtain a permit as a condition of operations.[107]

which is in effect under this chapter (including a requirement applicable by reason of section 7418 of this title) or under an applicable implementation plan.

(g) Penalty fund

(1) Penalties received under subsection (a) of this section shall be deposited in a special fund in the United States Treasury for licensing and other services. Amounts in such fund are authorized to be appropriated and shall remain available until expended, for use by the Administrator to finance air compliance and enforcement activities. The Administrator shall annually report to the Congress about the sums deposited into the fund, the sources thereof, and the actual and proposed uses thereof.

(2) Notwithstanding paragraph (1) the court in any action under this subsection to apply civil penalties shall have discretion to order that such civil penalties, in lieu of being deposited in the fund referred to in paragraph (1), be used in beneficial mitigation projects which are consistent with this chapter and enhance the public health or the environment. The court shall obtain the view of the Administrator in exercising such discretion and selecting any such projects. The amount of any such payment in any such action shall not exceed $100,000.

(July 14, 1955, ch. 360, title III, §304, as added Dec. 31, 1970, Pub. L. 91-604, §12(a), 84 Stat. 1706, and amended Aug. 7, 1977, Pub. L. 95-95, title III, §303(a)-(c), 91 Stat. 771, 772; Nov. 16, 1977, Pub. L. 95-190, §14(a) (77), (78), 91 Stat. 1404; Nov. 15, 1990, Pub. L. 101-549, title III, §302(f), title VII, §707(a)-(g), 104 Stat. 2574, 2682, 2683.)

Amendment Of Subsection (a)(1), (3)

Pub. L. 101-549, title VII, Sec. 707(g), Nov. 15, 1990, 104 Stat. 2683, provided that, effective with respect to actions brought after the date 2 years after Nov. 15, 1990, subsection (a) of this section is amended by inserting immediately before "to be in violation" in paragraphs (1) and (3) "to have violated (if there is evidence that the alleged violation has been repeated) or".

References In Text

The Federal Rules of Civil Procedure, referred to in subsec. (d), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

Codification

Section was formerly classified to section 1857h-2 of this title.

Prior Provisions

A prior section 304 of act July 14, 1955, was renumbered section 311 by Pub. L. 91-604, and is classified to section 7611 of this title.

Effective Date Of 1990 Amendment

Section 707(g) of Pub. L. 101-549 provided that: "The amendment made by this subsection [amending this section] shall take effect with respect to actions brought after the date 2 years after the enactment of the Clean Air Act Amendments of 1990 [Nov. 15, 1990]."

Effective Date Of 1977 Amendment

Amendment by Pub. L. 95-95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95-95, set out as a note under section 7401 of this title.

Pending Actions And Proceedings

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95-95 (Aug. 7, 1977), not to abate by reason of the taking effect of Pub. L. 95-95, see section 406(a) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

Modification Or Rescission Of Rules, Regulations, Orders, Determinations, Contracts, Certifications, Authorizations, Delegations, And Other Actions

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95-95 (Aug. 7, 1977) to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95-95 (this chapter), see section 406(b) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7605. [CAA §305]

Representation in litigation

(a) Attorney General; attorneys appointed by Administrator

The Administrator shall request the Attorney General to appear and represent him in any civil action instituted under this chapter to which the Administrator is a party. Unless the Attorney General notifies the Administrator that he will appear in such action, within a reasonable

104. So in original. The word "or" probably should not appear.

105. So in original.

106. So in original. The semicolon probably should be a comma.

107. So in original. The period probably should be a comma.

time, attorneys appointed by the Administrator shall appear and represent him.

(b) Memorandum of understanding regarding legal representation

In the event the Attorney General agrees to appear and represent the Administrator in any such action, such representation shall be conducted in accordance with, and shall include participation by, attorneys appointed by the Administrator to the extent authorized by, the memorandum of understanding between the Department of Justice and the Environmental Protection Agency, dated June 13, 1977, respecting representation of the agency by the department in civil litigation.

(July 14, 1955, ch. 360, title III, §305, as added Dec. 31, 1970, Pub. L. 91-604, §12(a), 84 Stat. 1707, and amended Aug. 7, 1977, Pub. L. 95-95, title III, §304(a), 91 Stat. 772.)

Codification

Section was formerly classified to section 1857h-3 of this title.

Prior Provisions

A prior section 305 of act July 14, 1955, as added Nov. 21, 1967, Pub. L. 90-148, Sec. 2, 81 Stat. 505, was renumbered section 312 by Pub. L. 91-604, and is classified to section 7612 of this title.

Another prior section 305 of act July 14, 1955, ch. 360, title III, formerly Sec. 12, as added Dec. 17, 1963, Pub. L. 88-206, Sec. 1, 77 Stat. 401, was renumbered section 305 by Pub. L. 89-272, renumbered section 308 by Pub. L. 90-148, and renumbered section 315 by Pub. L. 91-604, and is classified to section 7615 of this title.

Effective Date Of 1977 Amendment

Amendment by Pub. L. 95-95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95-95, set out as a note under section 7401 of this title.

Pending Actions And Proceedings

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95-95 (Aug. 7, 1977), not to abate by reason of the taking effect of Pub. L. 95-95, see section 406(a) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

Modification Or Rescission Of Rules, Regulations, Orders, Determinations, Contracts, Certifications, Authorizations, Delegations, And Other Actions

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95-95 (Aug. 7, 1977) to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95-95 (this chapter), see section 406(b) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7606. [CAA §306]

Federal procurement

(a) Contracts with violators prohibited

No Federal agency may enter into any contract with any person who is convicted of any offense under section 7413(c) of this title for the procurement of goods, materials, and services to perform such contract at any facility at which the violation which gave rise to such conviction occurred if such facility is owned, leased, or supervised by such person. The prohibition in the preceding sentence shall continue until the Administrator certifies that the condition giving rise to such a conviction has been corrected. For convictions arising under section 7413(c)(2) of this title, the condition giving rise to the conviction also shall be considered to include any substantive violation of this chapter associated with the violation of 7413(c)(2) of this title. The Administrator may extend this prohibition to other facilities owned or operated by the convicted person.

(b) Notification procedures

The Administrator shall establish procedures to provide all Federal agencies with the notification necessary for the purposes of subsection (a) of this section.

(c) Federal agency contracts

In order to implement the purposes and policy of this chapter to protect and enhance the quality of the Nation's air, the President shall, not more than 180 days after December 31, 1970, cause to be issued an order (1) requiring each Federal agency authorized to enter into contracts and each Federal agency which is empowered to extend Federal assistance by way of grant, loan, or contract to effectuate the purpose and policy of this chapter in such contracting or assistance activities, and (2) setting forth procedures, sanctions, penalties, and such other provisions, as the President determines necessary to carry out such requirement.

(d) Exemptions; notification to Congress

The President may exempt any contract, loan, or grant from all or part of the provisions of this section where he determines such exemption is necessary in the paramount interest of the United States and he shall notify the Congress of such exemption.

(e) Annual report to Congress

The President shall annually report to the Congress on measures taken toward implementing the purpose and intent of this section, including but not limited to the progress and problems associated with implementation of this section.

(July 14, 1955, ch. 360, title III, §306, as added Dec. 31, 1970, Pub. L. 91-604, §12(a), 84 Stat. 1707, and amended Nov. 15, 1990, Pub. L. 101-549, title VII, §705, 104 Stat. 2682.)

Codification

Section was formerly classified to section 1857h-4 of this title.

Prior Provisions

A prior section 306 of act July 14, 1955, ch. 360, title III, as added Nov. 21, 1967, Pub. L. 90-148, Sec. 2, 81 Stat. 506, was renumbered section 313 by Pub. L. 91-604, and is classified to section 7613 of this title.

Another prior section 306 of act July 14, 1955, ch. 360, title III, formerly Sec. 13, as added Dec. 17, 1963, Pub. L. 88-206, Sec. 1, 77 Stat. 401, renumbered Sec. 306, Oct. 20, 1965, Pub. L. 89-272, title I, Sec. 101(4), 79 Stat. 992, renumbered Sec. 309, Nov. 21, 1967, Pub. L. 90-148, Sec. 2, 81 Stat. 506, renumbered Sec. 316, Dec. 31, 1970, Pub. L. 91-604, Sec. 12(a), 84 Stat. 1705, which related to appropriations, was classified to prior section 1857*l* of this title and was repealed by section 306 of Pub. L. 95-95. See section 7626 of this title.

Federation Acquisition Regulation

Pub. L. 103-355, §8301(g), Oct. 13, 1994, 108 Stat. 3397, provided that:

"The Federal Acquisition Regulation may not contain a requirement for a certification by a contractor under a contract for the acquisition of commercial items, or a requirement that such a contract include a contract clause, in order to implement a prohibition or requirement of section 306 of the Clean Air Act (42 U.S.C. 7606) or a prohibition or requirement issued in the implementation of that section, since there is nothing in such section 306 that requires such a certification or contract clause.

§ 7607. [CAA §307]

Administrative proceedings and judicial review

(a) Administrative subpenas; confidentiality; witnesses

In connection with any determination under section 7410(f) of this title, or for purposes of obtaining information under section 7521(b)(4) or 7545(c)(3) of this title, any investigation, monitoring, reporting requirement, entry, compliance inspection, or administrative enforcement proceeding under the[108] chapter (including but not limited to section 7413, section 7414, section 7420, section 7429, section 7477, section 7524, section 7525, section 7542, section 7603, or section 7606 of this title),,[109] the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for emission data, upon a showing satisfactory to the Administrator by such owner or operator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes of such owner or operator, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, to persons carrying out the National Academy of Sciences' study and investigation provided for in section 7521(c) of this title, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subparagraph, the district court of the United States for any district in which such person is found or resides or transacts business, upon application

108. So in original. Probably should be "this".

109. So in original.

by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5)[110] of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title,,[111] under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

(c) Additional evidence

In any judicial proceeding in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as to[112] the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of title 5.

(2) Not later than the date of proposal of any action to which this

110. See References in Text note below.

111. So in original.

112. So in original. The word "to" probably should not appear.

subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

(e) Other methods of judicial review not authorized

Nothing in this chapter shall be construed to authorize judicial review of regulations or orders of the Administrator under this chapter, except as provided in this section.

(f) Costs

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

(g) Stay, injunction, or similar relief in proceedings relating to noncompliance penalties

In any action respecting the promulgation of regulations under section 7420 of this title or the administration or enforcement of section 7420 of this title no court shall grant any stay, injunctive, or similar relief before final judgment by such court in such action.

(h) Public participation

It is the intent of Congress that, consistent with the policy of subchapter II of chapter 5 of title 5, the Administrator in promulgating any regulation under this chapter, including a regulation subject to a deadline, shall ensure a reasonable period for public participation of at least 30 days, except as otherwise expressly provided in section[113] 7407(d), 7502(a), 7511(a) and (b), and 7512(a) and (b) of this title.

(July 14, 1955, ch. 360, title III, §307, as added Dec. 31, 1970, Pub. L. 91-604, §12(a), 84 Stat. 1707, and amended Nov. 18, 1971, Pub. L. 92-157, title III, §302(a), 85 Stat. 464; June 22, 1974, Pub. L. 93-319, §6(c), 88 Stat. 259; Aug. 7, 1977, Pub. L. 95-95, title III, §303(d), 305(a), (c), (f)-(h), 91 Stat. 772, 776, 777; Nov. 16, 1977, Pub. L. 95-190, §14(a)(79), (80), 91 Stat. 1404; Nov. 15, 1990, Pub. L. 101-549, title I, §108(p), 110(5), title III, §302(g), (h), title VII, §702(c), 703, 706, 707(h), 710(b), 104 Stat. 2469, 2470, 2574, 2681-2684.)

References In Text

Section 7521(b)(4) of this title, referred to in subsec. (a), was repealed by Pub. L. 101-549, title II, Sec. 203(2), Nov. 15, 1990, 104 Stat. 2529.

Section 7521(b)(5) of this title, referred to in subsec. (b)(1), was repealed by Pub. L. 101-549, title II, Sec. 203(3), Nov. 15, 1990, 104 Stat. 2529.

Section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977), referred to in subsec. (b)(1), was in the original "section 119(c)(2)(A), (B), or (C) (as in effect before the date of enactment of the Clean Air Act Amendments of 1977)", meaning section 119 of act July 14, 1955, ch. 360, title I, as added June 22, 1974, Pub. L. 93-319, Sec. 3, 88 Stat. 248, (which was classified to section 1857c-10 of this title) as in effect prior to the enactment of Pub. L. 95-95, Aug. 7, 1977, 91 Stat. 691, effective Aug. 7, 1977. Section 112(b)(1) of Pub. L. 95-95 repealed section 119 of act July 14, 1955, ch. 360, title I, as added by Pub. L. 93-319, and provided that all references to such section 119 in any subsequent enactment which supersedes Pub. L. 93-319 shall be construed to refer to section 113(d) of the Clean Air Act and to paragraph (5) thereof in particular which is classified to subsec. (d)(5) of section 7413 of this title. Section 7413(d) of this title was subsequently amended generally by Pub. L. 101-549, title VII, Sec. 701, Nov. 15, 1990, 104 Stat. 2672, and, as so amended, no longer relates to final compliance orders. Section 117(b) of Pub. L. 95-95 added a new section 119 of act July 14, 1955, which is classified to section 7419 of this title.

Part C of subchapter I of this chapter, referred to in subsec. (d)(1)(J), was in the original "subtitle C of title I", and was translated as reading "part C of title I" to reflect the probable intent of Congress, because title I does not contain subtitles.

Codification

In subsec. (h), "subchapter II of chapter 5 of title 5" was substituted for "the Administrative Procedures Act" on authority of Pub. L. 89-554, Sec. 7(b), Sept. 6, 1966, 80 Stat. 631, the first section of which enacted Title 5, Government Organization and Employees.

Pub. L. 101-549, §710(b), which directed that subpar. (H) be amended by substituting "subchapter VI of this chapter" for "part (B) of subchapter I of this chapter", was executed by making the substitution in subpar. (I), to reflect the probable intent of Congress and the intervening redesignation of subpar. (H) as (I) by Pub. L. 101-549, §302(h).

Section was formerly classified to section 1857h-5 of this title.

Prior Provisions

A prior section 307 of act July 14, 1955, was renumbered section 314 by Pub. L. 91-604, and is classified to section 7614 of this title.

Another prior section 307 of act July 14, 1955, ch. 360, title III, formerly Sec. 14, as added Dec. 17, 1963, Pub. L. 88-206, Sec. 1, 77 Stat. 401, was renumbered section 307 by Pub. L. 89-272, renumbered section 310 by Pub. L. 90-148, and renumbered section 317 by Pub. L. 91-604, and is set out as a Short Title note under section 7401 of this title.

Effective Date Of 1977 Amendment

Amendment by Pub. L. 95-95 effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub. L. 95-95, set out as a note under section 7401 of this title.

Pending Actions And Proceedings

Suits, actions, and other proceedings lawfully commenced by or against the Administrator or any other officer or employee of the United States in his official capacity or in relation to the discharge of his official duties under act July 14, 1955, the Clean Air Act, as in effect immediately prior to the enactment of Pub. L. 95-95 (Aug. 7, 1977), not to abate by reason of the taking effect of Pub. L. 95-95, see section 406(a) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

Modification Or Rescission Of Rules, Regulations, Orders, Determinations, Contracts, Certifications, Authorizations, Delegations, And Other Actions

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95-95 (Aug. 7, 1977) to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95-95 (this chapter), see section 406(b) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7608. [CAA §308]

Mandatory licensing

Whenever the Attorney General determines, upon application of the Administrator—

(1) that—

(A) in the implementation of the requirements of section 7411, 7412, or 7521 of this title, a right under any United States letters patent, which is being used or intended for public or commercial use and not otherwise reasonably available, is necessary to enable any person required to comply with such limitation to so comply, and

(B) there are no reasonable alternative methods to accomplish such purpose, and

(2) that the unavailability of such right may result in a substantial lessening of competition or tendency to create a monopoly in any line of commerce in any section of the country,

the Attorney General may so certify to a district court of the United States, which may issue an order requiring the person who owns such patent to license it on such reasonable terms and conditions as the court, after hearing, may determine. Such certification may be made to the district court for the district in which the person owning the patent resides, does business, or is found.

(July 14, 1955, ch. 360, title III, §308, as added Dec. 31, 1970, Pub. L. 91-604, §12(a), 84 Stat. 1708.)

Codification

Section was formerly classified to section 1857h-6 of this title.

Prior Provisions

A prior section 308 of act July 14, 1955, was renumbered section 315 by Pub. L. 91-604, and is classified to section 7615 of this title.

Modification Or Rescission Of Rules, Regulations, Orders, Determinations, Contracts, Certifications, Authorizations, Delegations, And Other Actions

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations, or other actions duly issued, made, or taken by or pursuant to act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub. L. 95-95 (Aug. 7, 1977) to continue in full force and effect until modified or rescinded in accordance with act July 14, 1955, as amended by Pub. L. 95-95 (this chapter), see section 406(b) of Pub. L. 95-95, set out as an Effective Date of 1977 Amendment note under section 7401 of this title.

§ 7609. [CAA §309]

Policy review

(a) Environmental impact

The Administrator shall review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this chapter or other provisions of the authority of the Administrator, contained in any (1) legislation proposed by any Federal department or agency, (2) newly authorized Federal projects for construction and any major Federal agency action (other than a project for construction) to which section 4332(2)(C) of this title applies, and (3) proposed regulations published by any department or agency of the Federal Government. Such written comment shall be made public at the conclusion of any such review.

(b) Unsatisfactory legislation, action, or regulation

In the event the Administrator determines that any such legislation, action, or regulation is unsatisfactory from the standpoint of public health or welfare or environmental quality, he shall publish his determination and the matter shall be referred to the Council on Environmental Quality.

(July 14, 1955, ch. 360, title III, §309, as added Dec. 31, 1970, Pub. L. 91-604, §12(a), 84 Stat. 1709.)

113. So in original. Probably should be "sections".

(b) Repealed. Pub. L. 96-510, title III, Sec. 304(a), Dec. 11, 1980, 94 Stat. 2809

(June 30, 1948, ch. 758, title V, §504, as added Oct. 18, 1972, Pub. L. 92-500, §2, 86 Stat. 888, and amended Dec. 27, 1977, Pub. L. 95-217, §69, 91 Stat. 1607; Dec. 11, 1980, Pub. L. 96-510, title III, §304(a), 94 Stat. 2809.)

Effective Date Of 1980 Amendment

Amendment by Pub. L. 96-510 effective Dec. 11, 1980, see section 9652 of Title 42, The Public Health and Welfare.

§ 1365. [FWPCA §505]

Citizen suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

(b) Notice

No action may be commenced—

(1) under subsection (a)(1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator, except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator; United States interests protected

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(3) Protection of interests of united states.—Whenever any action is brought under this section in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator. No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.

(d) Litigation costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title, (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (7) a regulation under section 1345(d) of this title,.[18]

(g) "Citizen" defined

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

(h) Civil action by State Governors

A Governor of a State may commence a civil action under subsection (a) of this section, without regard to the limitations of subsection (b) of this section, against the Administrator where there is alleged a failure of the Administrator to enforce an effluent standard or limitation under this chapter the violation of which is occurring in another State and is causing an adverse effect on the public health or welfare in his State, or is causing a violation of any water quality requirement in his State.

(June 30, 1948, ch. 758, title V, §505, as added Oct. 18, 1972, Pub. L. 92-500, §2, 86 Stat. 888, and amended Feb. 4, 1987, Pub. L. 100-4, title III, §314(c), title IV, §406(d)(2), title V, §504, 505(c), 101 Stat. 49, 73, 75, 76.)

References In Text

The Federal Rules of Civil Procedure, referred to in subsec. (d), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

§ 1366. [FWPCA §506]

Appearance

The Administrator shall request the Attorney General to appear and represent the United States in any civil or criminal action instituted under this chapter to which the Administrator is a party. Unless the Attorney General notifies the Administrator within a reasonable time, that he will appear in a civil action, attorneys who are officers or employees of the Environmental Protection Agency shall appear and represent the United States in such action.

(June 30, 1948, ch. 758, title V, §506, as added Oct. 18, 1972, Pub. L. 92-500, §2, 86 Stat. 889.)

§ 1367. [FWPCA §507]

Employee protection

(a) Discrimination against persons filing, instituting, or testifying in proceedings under this chapter prohibited

No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

(b) Application for review; investigation; hearing; review

Any employee or a representative of employees who believes that he has been fired or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such alleged violation occurs, apply to the Secretary of Labor for a review of such firing or alleged discrimination. A copy of the application shall be sent to such person who shall be the respondent. Upon

18. So in original.

receipt of such application, the Secretary of Labor shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to such review to enable the parties to present information relating to such alleged violation. The parties shall be given written notice of the time and place of the hearing at least five days prior to the hearing. Any such hearing shall be of record and shall be subject to section 554 of title 5. Upon receiving the report of such investigation, the Secretary of Labor shall make findings of fact. If he finds that such violation did occur, he shall issue a decision, incorporating an order therein and his findings, requiring the party committing such violation to take such affirmative action to abate the violation as the Secretary of Labor deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee or representative of employees to his former position with compensation. If he finds that there was no such violation, he shall issue an order denying the application. Such order issued by the Secretary of Labor under this subparagraph shall be subject to judicial review in the same manner as orders and decisions of the Administrator are subject to judicial review under this chapter.

(c) Costs and expenses

Whenever an order is issued under this section to abate such violation, at the request of the applicant, a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees), as determined by the Secretary of Labor, to have been reasonably incurred by the applicant for, or in connection with, the institution and prosecution of such proceedings, shall be assessed against the person committing such violation.

(d) Deliberate violations by employee acting without direction from his employer or his agent

This section shall have no application to any employee who, acting without direction from his employer (or his agent) deliberately violates any prohibition of effluent limitation or other limitation under section 1311 or 1312 of this title, standards of performance under section 1316 of this title, effluent standard, prohibition or pretreatment standard under section 1317 of this title, or any other prohibition or limitation established under this chapter.

(e) Investigations of employment reductions

The Administrator shall conduct continuing evaluations of potential loss or shifts of employment which may result from the issuance of any effluent limitation or order under this chapter, including, where appropriate, investigating threatened plant closures or reductions in employment allegedly resulting from such limitation or order. Any employee who is discharged or laid-off, threatened with discharge or lay-off, or otherwise discriminated against by any person because of the alleged results of any effluent limitation or order issued under this chapter, or any representative of such employee, may request the Administrator to conduct a full investigation of the matter. The Administrator shall thereupon investigate the matter and, at the request of any party, shall hold public hearings on not less than five days notice, and shall at such hearings require the parties, including the employer involved, to present information relating to the actual or potential effect of such limitation or order on employment and on any alleged discharge, lay-off, or other discrimination and the detailed reasons or justification therefor. Any such hearing shall be of record and shall be subject to section 554 of title 5. Upon receiving the report of such investigation, the Administrator shall make findings of fact as to the effect of such effluent limitation or order on employment and on the alleged discharge, lay-off, or discrimination and shall make such recommendations as he deems appropriate. Such report, findings, and recommendations shall be available to the public. Nothing in this subsection shall be construed to require or authorize the Administrator to modify or withdraw any effluent limitation or order issued under this chapter.

(June 30, 1948, ch. 758, title V, §507, as added Oct. 18, 1972, Pub. L. 92-500, §2, 86 Stat. 890.)

§ 1368. [FWPCA §508]

Federal procurement

(a) Contracts with violators prohibited

No Federal agency may enter into any contract with any person, who has been convicted of any offense under section 1319(c) of this title, for the procurement of goods, materials, and services if such contract is to be performed at any facility at which the violation which gave rise to such conviction occurred, and if such facility is owned, leased, or supervised by such person. The prohibition in the preceding sentence shall continue until the Administrator certifies that the condition giving rise to such conviction has been corrected.

(b) Notification of agencies

The Administrator shall establish procedures to provide all Federal agencies with the notification necessary for the purposes of subsection (a) of this section.

(c) Omitted

(d) Exemptions

The President may exempt any contract, loan, or grant from all or part of the provisions of this section where he determines such exemption is necessary in the paramount interest of the United States and he shall notify the Congress of such exemption.

(e) Annual report to Congress

The President shall annually report to the Congress on measures taken in compliance with the purpose and intent of this section, including, but not limited to, the progress and problems associated with such compliance.

(f) Contractor certification or contract clause in acquisition of commercial items

(1) No certification by a contractor, and no contract clause, may be required in the case of a contract for the acquisition of commercial items in order to implement a prohibition or requirement of this section or a prohibition or requirement issued in the implementation of this section.

(2) In paragraph (1), the term "commercial item" has the meaning given such term in section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12)).

(June 30, 1948, ch. 758, title V, §508, as added Oct. 18, 1972, Pub. L. 92-500, §2, 86 Stat. 891; Oct. 13, 1994, Pub. L. 103-355, §8301(a), 108 Stat. 3396.)

Codification

Subsec. (c) authorized the President to cause to be issued, not more than 180 days after October 18, 1972, an order (1) requiring each Federal agency authorized to enter into contracts or to extend Federal assistance by way of grant, loan, or contract, to effectuate the purpose and policy of this chapter, and (2) setting forth procedures, sanctions and penalties as the President determines necessary to carry out such requirement.

§ 1369. [FWPCA §509]

Administrative procedure and judicial review

(a) Subpenas

(1) For purposes of obtaining information under section 1315 of this title, or carrying out section 1367(e) of this title, the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for effluent data, upon a showing satisfactory to the Administrator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this subsection, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator, to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(2) The district courts of the United States are authorized, upon application by the Administrator, to issue subpenas for attendance and testimony of witnesses and the production of relevant papers,

books, and documents, for purposes of obtaining information under sections 1314(b) and (c) of this title. Any papers, books, documents, or other information or part thereof, obtained by reason of such a subpena shall be subject to the same requirements as are provided in paragraph (1) of this subsection.

(b) Review of Administrator's actions; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(l) of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

(3) Award of fees

In any judicial proceeding under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party whenever it determines that such award is appropriate.

(c) Additional evidence

In any judicial proceeding brought under subsection (b) of this section in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

(June 30, 1948, ch. 758, title V, §509, as added Oct. 18, 1972, Pub. L. 92-500, §2, 86 Stat. 891, and amended Dec. 28, 1973, Pub. L. 93-207, §1(6), 87 Stat. 906; Feb. 4, 1987, Pub. L. 100-4, title III, §308(b), title IV, §406(d)(3), title V, §505(a), (b), 101 Stat. 39, 73, 75; Jan. 8, 1988, Pub. L. 100-236, §2, 101 Stat. 1732.)

Effective Date Of 1988 Amendment

Amendment by Pub. L. 100-236 effective 180 days after Jan. 8, 1988, see section 3 of Pub. L. 100-236, set out as a note under section 2112 of Title 28, Judiciary and Judicial Procedure.

§ 1370. [FWPCA §510]

State authority

Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

(June 30, 1948, ch. 758, title V, §510, as added Oct. 18, 1972, Pub. L. 92-500, §2, 86 Stat. 893.)

§ 1371. [FWPCA §511]

Authority under other laws and regulations

(a) Impairment of authority or functions of officials and agencies; treaty provisions

This chapter shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter; (2) affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation or (B) under the Act of March 3, 1899, (30 Stat. 1112); except that any permit issued under section 1344 of this title shall be conclusive as to the effect on water quality of any discharge resulting from any activity subject to section 403 of this title, or (3) affecting or impairing the provisions of any treaty of the United States.

(b) Discharges of pollutants into navigable waters

Discharges of pollutants into the navigable waters subject to the Rivers and Harbors Act of 1910 (36 Stat. 593; 33 U.S.C. 421) and the Supervisory Harbors Act of 1888 (25 Stat. 209; 33 U.S.C. 441-451b) shall be regulated pursuant to this chapter, and not subject to such Act of 1910 and the Act of 1888 except as to effect on navigation and anchorage.

(c) Action of the Administrator deemed major Federal action; construction of the National Environmental Policy Act of 1969

(1) Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section 1281 of this title, and the issuance of a permit under section 1342 of this title for the discharge of any pollutant by a new source as defined in section 1316 of this title, no action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 852) (42 U.S.C. 4321 et seq.); and

(2) Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to—

(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy of any certification under section 1341 of this title; or

(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.

(d) Consideration of international water pollution control agreements

Notwithstanding this chapter or any other provision of law, the Administrator (1) shall not require any State to consider in the development of the ranking in order of priority of needs for the construction of treatment works (as defined in subchapter II of this chapter), any water pollution control agreement which may have been entered into between the United States and any other nation, and (2) shall not consider any such agreement in the approval of any such priority ranking.

(June 30, 1948, ch. 758, title V, §511, as added Oct. 18, 1972, Pub. L. 92-500, §2, 86 Stat. 893, and amended Jan. 2, 1974, Pub. L. 93-243, §3, 87 Stat. 1069.)

References In Text

Act of March 3, 1899, referred to in subsec. (a), is act Mar. 3, 1899, ch. 425, 30 Stat. 1121, as amended, which enacted sections 401, 403, 404, 406, 407, 408, 409, 411 to 416, 418, 502, 549, and 687 of this title and amended section 686 of this title. For complete classification of this Act to the Code, see Tables.

section 61, the minister shall give notice of his or her decision whether to conduct a review, together with a brief statement of the reasons for the decision to,

(a) the applicants;

(b) the Environmental Commissioner; and

(c) any other person who the minister considers ought to get the notice because the person might be directly affected by the decision.

Notice of completion of review

71.—(1) Within thirty days of completing a review applied for under section 61, the minister shall give notice of the outcome of the review to the persons mentioned in clauses 70(a) to (c).

Same

(2) The notice referred to in subsection (1) shall state what action, if any, the minister has taken or proposes to take as a result of the review.

No disclosure of personal information about applicants

72. A notice under section 66, 70 or 71 shall not disclose the names or addresses of the applicants or any other personal information about them.

Application of Act to proposals resulting from review

73. The provisions of this Act apply to a proposal for a policy, Act, regulation or instrument under consideration in a ministry as a result of a review under this Part in the same way that they apply to any other proposal for a policy, Act, regulation or instrument.

PART V APPLICATION FOR INVESTIGATION

Application for investigation

74.—(1) Any two persons resident in Ontario who believe that a prescribed Act, regulation or instrument has been contravened may apply to the Environmental Commissioner for an investigation of the alleged contravention by the appropriate minister.

Same

(2) An application under this section shall be in the form provided for the purpose by the office of the Environmental Commissioner and shall include,

(a) the names and addresses of the applicants;

(b) a statement of the nature of the alleged contravention;

(c) the names and addresses of each person alleged to have been involved in the commission of the contravention, to the extent that this information is available to the applicants;

(d) a summary of the evidence supporting the allegations of the applicants;

(e) the names and addresses of each person who might be able to give evidence about the alleged contravention, together with a summary of the evidence they might give, to the extent that this information is available to the applicants;

(f) a description of any document or other material that the applicants believe should be considered in the investigation;

(g) a copy of any document referred to in clause (f), where reasonable; and

(h) details of any previous contacts with the office of the Environmental Commissioner or any ministry regarding the alleged contravention.

Statement of belief

(3) An application under this section shall also include a statement by each applicant or, where an applicant is a corporation, by a director or officer of the corporation, that he or she believes that the facts alleged in the application are true.

Same

(4) The statement referred to in subsection (3) shall be sworn or solemnly affirmed before a commissioner for taking affidavits in Ontario.

Referral to minister

75. Within ten days of receiving an application under section 74, the Environmental Commissioner shall refer it to the minister responsible for the administration of the Act under which the contravention is alleged to have been committed.

Acknowledgment of receipt

76. The minister shall acknowledge receipt of an application for investigation to the applicants within twenty days of receiving the application from the Environmental Commissioner.

Duty to investigate

77.—(1) The minister shall investigate all matters to the extent that the minister considers necessary in relation to a contravention alleged in an application.

Same

(2) Nothing in this section requires a minister to conduct an investigation in relation to a contravention alleged in an application if the minister considers that,

(a) the application is frivolous or vexatious;

(b) the alleged contravention is not serious enough to warrant an investigation; or

(c) the alleged contravention is not likely to cause harm to the environment.

Same

(3) Nothing in this section requires a minister to duplicate an ongoing or completed investigation.

Notice of decision not to investigate

78.–(1) If the minister decides that an investigation is not required under section 77, the minister shall give notice of the decision, together with a brief statement of the reasons for the decision, to,

(a) the applicants;

(b) each person alleged in the application to have been involved in the commission of the contravention for whom an address is given in the application; and

(c) the Environmental Commissioner.

Same

(2) A minister need not give notice under subsection (1) if an investigation in relation to the contravention alleged in the application is ongoing apart from the application.

Same

(3) A notice under subsection (1) shall be given within sixty days of receiving the application for investigation.

Time required for investigation

79.–(1) Within 120 days of receiving an application for an investigation in respect of which no notice is given under section 78, the minister shall either complete the investigation or give the applicants a written estimate of the time required to complete it.

Same

(2) Within the time given in an estimate under subsection (1), the minister shall either complete the investigation or give the applicants a revised written estimate of the time required to complete it.

Same

(3) Subsection (2) applies to a revised estimate given under subsection (2) as if it were an estimate given under subsection (1).

Notice of completion of investigation

80.–(1) Within thirty days of completing an investigation, the minister shall give notice of the outcome of the investigation to the persons mentioned in clauses 78(1)(a) to (c).

Same

(2) The notice referred to in subsection (1) shall state what action, if any, the minister has taken or proposes to take as a result of the investigation.

No disclosure of personal information about applicants

81. A notice under section 78 or 80 shall not disclose the names or addresses of the applicants or any other personal information about them.

PART VI RIGHT TO SUE

HARM TO A PUBLIC RESOURCE

Definitions

82. In this Part,

"court" means the Ontario Court (General Division) but does not include the Small Claims Court; ("tribunal")

"municipality" means a locality the inhabitants of which are incorporated; ("municipalité")

"public land" means land that belongs to,

(a) the Crown in right of Ontario,

(b) a municipality, or

(c) a conservation authority,

but does not include land that is leased from a person referred to in clauses (a) to (c) and that is used for agricultural purposes; ("terre publique")

"public resource" means,

(a) air,

(b) water, not including water in a body of water the bed of which is privately owned and on which there is no public right of navigation,

(c) unimproved public land,

(d) any parcel of public land that is larger than five hectares and is used for,

(i) recreation,

(ii) conservation,

(iii) resource extraction,

(iv) resource management, or

(v) a purpose similar to one mentioned in subclauses (i) to (iv), and

(e) any plant life, animal life or ecological system associated with any air, water or land described in clauses (a) to (d). ("ressource publique")

Application of ss. 84 to 102

83. Sections 84 to 102 apply only in respect of a contravention of an Act, regulation or instrument that occurs after the Act, regulation or instrument is prescribed for the purposes of Part V.

Right of action

84.—(1) Where a person has contravened or will imminently contravene an Act, regulation or instrument prescribed for the purposes of Part V and the actual or imminent contravention has caused or will imminently cause significant harm to a public resource of Ontario, any person resident in Ontario may bring an action against the person in the court in respect of the harm and is entitled to judgment if successful.

Steps before action: application for investigation

(2) Despite subsection (1), an action may not be brought under this section in respect of an actual contravention unless the plaintiff has applied for an investigation into the contravention under Part V and,

(a) has not received one of the responses required under sections 78 to 80 within a reasonable time; or

(b) has received a response under sections 78 to 80 that is not reasonable.

Same

(3) In making a decision as to whether a response was given within a reasonable time for the purposes of clause (2)(a), the court shall consider but is not bound by the times specified in sections 78 to 80.

Steps before action: farm practices

(4) Despite subsection (1), an action may not be brought under this section in respect of actual or imminent harm to a public resource of Ontario from odour, noise or dust resulting from an agricultural operation unless the plaintiff has applied to the Farm Practices Protection Board under section 5 of the *Farm Practices Protection Act* with respect to the odour, noise or dust and the Farm Practices Protection Board has disposed of the application.

Same

(5) A person seeking to bring an action under this section in respect of harm from odour, noise or dust resulting from an agricultural operation is a person aggrieved by the odour, noise or dust within the meaning of subsection 5(1) of the *Farm Practices Protection Act*.

When steps before action need not be taken

(6) Subsections (2) and (4) do not apply where the delay involved in complying with them would result in significant harm or serious risk of significant harm to a public resource.

Action not a class proceeding

(7) An action under section 84 may not be commenced or maintained as a class proceeding under the *Class Proceedings Act, 1992*.

Burden of proof: contravention

(8) The onus is on the plaintiff in an action under this section to prove the contravention or imminent contravention on a balance of probabilities.

Other rights of action not affected

(9) This section shall not be interpreted to limit any other right to bring or maintain a proceeding.

Rules of court

(10) The rules of court apply to an action under this section.

Defence

85.—(1) For the purposes of section 84, an Act, regulation or instrument is not contravened if the defendant satisfies the court that the defendant exercised due diligence in complying with the Act, regulation or instrument.

Same

(2) For the purposes of section 84, an Act, regulation or instrument is not contravened if the defendant satisfies the court that the act or omission alleged to be a contravention of the Act, regulation or instrument is authorized by an Act of Ontario or Canada or by a regulation or instrument under an Act of Ontario or Canada.

Same

(3) For the purposes of section 84, an instrument is not contravened if the defendant satisfies the court that the defendant complied with an interpretation of the instrument that the court considers reasonable.

Same

(4) This section shall not be interpreted to limit any defence otherwise available.

Attorney General to be served

86.—(1) The plaintiff in an action under section 84 shall serve the statement of claim on the Attorney General not later than ten days after the day on which the statement of claim is served on the first defendant served in the action.

Right of Attorney General

(2) The Attorney General is entitled to present evidence and make submissions to the court in the action, to appeal from a judgment in the action and to present evidence and make submissions in an appeal from a judgment in the action.

Public notice of action

87.—(1) The plaintiff shall give notice of the action to the public in the registry and by any other means ordered by the court.

Same

(2) The plaintiff shall give notice in the registry under subsection (1) by delivering the notice to the Environmental Commissioner who shall promptly place it on the registry.

Same

(3) Within thirty days after the close of pleadings, the plaintiff shall make a motion to the court for directions relating to the notice under this section, including directions as to when the notice should be given.

Same

(4) The notice shall include any information prescribed by the regulations under this Act and any information required by the court.

Same

(5) The court may require a party other than the plaintiff to give the notice.

Costs

(6) The court may make any order for the costs of the notice that the court considers appropriate.

Notice to protect interests

88.—(1) At any time in the action, the court may order any party to give any notice that the court considers necessary to provide fair and adequate representation of the private and public interests, including governmental interests, involved in the action.

Same

(2) The court may make any order relating to the notice, including an order for the costs of the notice, that the court considers appropriate.

Participation in action

89.—(1) In order to provide fair and adequate representation of the private and public interests, including governmental interests, involved in the action, the court may permit any person to participate in the action, as a party or otherwise.

Same

(2) Participation under subsection (1) shall be in the manner and on the terms, including terms as to costs, that the court considers appropriate.

Same

(3) No order shall be made under subsection (1) in an action after the court has made an order under section 93 in the action.

Same

(4) This section shall not be interpreted to limit the orders a court may make under the rules of court or otherwise.

Stay or dismissal in the public interest

90.—(1) The court may stay or dismiss the action if to do so would be in the public interest.

Same

(2) In making a decision under subsection (1), the court may have regard to environmental, economic and social concerns and may consider,

(a) whether the issues raised by the proceeding would be better resolved by another process;

(b) whether there is an adequate government plan to address the public interest issues raised by the proceeding; and

(c) any other relevant matter.

Discontinuance and abandonment

91.—(1) An action under section 84 may be discontinued or abandoned only with the approval of the court, on the terms that the court considers appropriate.

Settlement without court approval

(2) A settlement of an action under section 84 is not binding unless approved by the court.

Effect of settlement

(3) A settlement of an action under section 84 that is approved by the court binds all past, present and future residents of Ontario.

Notice: dismissal, discontinuance, abandonment or settlement

(4) In considering whether to dismiss an action under section 84

without a finding as to whether the plaintiff was entitled to judgment, whether for delay, for public interest reasons or for any other reason, or in considering whether to approve a discontinuance, abandonment or settlement of the action, the court shall consider whether notice should be given under section 88.

Interlocutory injunctions: plaintiff's undertaking to pay damages

92. In exercising its discretion under the rules of court as to whether to dispense with an undertaking by the plaintiff to pay damages caused by an interlocutory injunction or mandatory order, the court may consider any special circumstance, including whether the action is a test case or raises a novel point of law.

Remedies

93.—(1) If the court finds that the plaintiff is entitled to judgment in an action under section 84, the court may,

(a) grant an injunction against the contravention;

(b) order the parties to negotiate a restoration plan in respect of harm to the public resource resulting from the contravention and to report to the court on the negotiations within a fixed time;

(c) grant declaratory relief; and

(d) make any other order, including an order as to costs, that the court considers appropriate.

Damages

(2) No award of damages shall be made under subsection (1).

Farm practices

(3) No order shall be made under this section that is inconsistent with the *Farm Practices Protection Act*.

When order to negotiate not to be made

94. The court shall not order the parties to negotiate a restoration plan if the court determines that,

(a) adequate restoration has already been achieved; or

(b) an adequate restoration plan has already been ordered under the law of Ontario or any other jurisdiction.

Restoration plans

95.—(1) This section applies to restoration plans negotiated by the parties and to restoration plans developed by the court under section 98.

Restoration plans: purposes

(2) A restoration plan in respect of harm to a public resource resulting

from a contravention shall, to the extent that to do so is reasonable, practical and ecologically sound, provide for,

(a) the prevention, diminution or elimination of the harm;

(b) the restoration of all forms of life, physical conditions, the natural environment and other things associated with the public resource affected by the contravention; and

(c) the restoration of all uses, including enjoyment, of the public resource affected by the contravention.

Same

(3) A restoration plan may include provisions to address harm to a public resource in ways not directly connected with the public resource, including,

(a) research into and development of technologies to prevent, decrease or eliminate harm to the environment;

(b) community, education or health programs; and

(c) the transfer of property by the defendant so that the property becomes a public resource.

Same

(4) A provision under subsection (3) shall be included in a restoration plan only with the consent of the defendant.

Same

(5) A provision under clause (3)(c) shall be included in a restoration plan only with the consent of the defendant and the transferee.

Restoration plan: provisions for implementation

(6) A restoration plan may include provisions for monitoring progress under the plan and for overseeing its implementation.

Restoration plans: considerations

(7) When negotiating or developing a restoration plan in respect of harm, the negotiating parties or the court, as the case may be, shall consider,

(a) any orders under the law of Ontario or any other jurisdiction dealing with the harm; and

(b) whether, apart from the restoration plan, the harm has been addressed in the ways described in subsection (2).

Restoration plans: payments

(8) A restoration plan may provide for money to be paid by the defendant only if,

(a) the money is to be paid to the Minister of Finance;

(b) the money is to be used only for the purposes mentioned in subsections (2) and (3); and

(c) the Attorney General and the defendant consent to the provision.

Orders ancillary to order to negotiate

96. If the court orders the parties to negotiate a restoration plan, the court may,

(a) make any interim order that the court considers appropriate to minimize the harm; and

(b) make any order that the court considers appropriate,

(i) for the costs of the negotiations,

(ii) requiring a party to prepare an initial draft restoration plan for use in the negotiations,

(iii) respecting the participation of non-parties in the negotiations, and

(iv) respecting the negotiation process, including, on consent of the parties, an order concerning the use of a mediator, fact finder or arbitrator.

If parties agree on restoration plan

97.—(1) If the parties agree on a restoration plan within the time fixed by the court under clause 93(1)(b) and the court is satisfied that the terms of the plan are consistent with section 95, the court shall order the defendant to comply with the plan.

Same

(2) For the purpose of determining whether an agreed plan is consistent with section 95, the court may,

(a) appoint one or more experts under the rules of court; and

(b) on consent of the parties, hear submissions or receive reports from any mediator, fact finder or arbitrator involved in the negotiation.

Court developed restoration plan

98.—(1) If the parties do not agree on a restoration plan or if the court is not satisfied that a plan agreed to by the parties is consistent with section 95, the court shall develop a restoration plan consistent with section 95 and, for the purpose, the court may,

(a) order the parties to engage in further negotiations for a restoration plan on the terms that the court considers appropriate;

(b) order one or more parties to prepare a draft restoration plan;

(c) appoint one or more persons to investigate and report back on any matter relevant to the development of a restoration plan;

(d) appoint one or more non-parties to prepare a draft restoration plan; and

(e) make any other order that the court considers appropriate.

Same

(2) The rules of court respecting court appointed experts apply with necessary modifications to the appointment of a person under clause (1)(c) or (d).

Order to implement

(3) The court shall order the defendant to comply with the restoration plan developed by the court.

Estoppel

99.—(1) The doctrines of cause of action estoppel and issue estoppel apply in relation to an action under section 84 as if all past, present and future residents of Ontario were parties to the action.

Exception

(2) Subsection (1) does not apply where an action under section 84 has been discontinued, abandoned or dismissed without a finding as to whether the plaintiff was entitled to judgment.

Costs

100. In exercising its discretion under subsection 131(1) of the *Courts of Justice Act* with respect to costs of an action under section 84 of this Act, the court may consider any special circumstance, including whether the action is a test case or raises a novel point of law.

Stay on appeal

101. The delivery of a notice of appeal from an order under this Act does not stay the operation of the order, but a judge of the court to which a motion for leave to appeal has been made or to which an appeal has been taken may order a stay on terms that the judge considers appropriate.

Limitations

102.—(1) No person shall bring an action under section 84 in respect of a contravention that caused harm after the earliest of,

(a) the second anniversary of the day on which the person bringing the action first knew,

(i) that the harm had occurred,

(ii) that the harm was caused by the contravention,

(iii) that the contravention was that of the person against whom the action is brought, and

(iv) that, having regard to the nature of the harm, an action under section 84 would be an appropriate means to seek to address it;

(b) the second anniversary of the day on which a reasonable person with the abilities and in the circumstances of the person seeking to bring the action first ought to have known of the matters referred to in clause (a); and

(c) the second anniversary of the day on which public notice of an action in respect of the contravention and the harm was given under section 87.

Same

(2) Despite subsection (1), if clause (1)(a) or (b) applies to establish the limitation period under subsection (1), a person may bring the action after the end of that period, to the extent permitted by subsections (3) and (4).

Same

(3) If the person bringing the action applied under section 74 for an investigation of the contravention before the end of the period established under subsection (1) by the application of clause (1)(a) or (b), the person may bring the action within 120 days after the day on which the person received a notice under section 78 or section 80 in respect of the contravention.

Same

(4) If the person bringing the action applied under section 5 of the *Farm Practices Protection Act* with respect to the harm before the end of the period established under subsection (1) by the application of clause (1)(a) or (b), the person may bring the action within 120 days after the day on which the Farm Practices Protection Board disposed of the application.

PUBLIC NUISANCE CAUSING ENVIRONMENTAL HARM

Public nuisance causing environmental harm

103.–(1) No person who has suffered or may suffer a direct economic loss or direct personal injury as a result of a public nuisance that caused harm to the environment shall be barred from bringing an action without the consent of the Attorney General in respect of the loss or injury only because the person has suffered or may suffer direct economic loss or direct personal injury of the same kind or to the same degree as other persons.

Farm practices

(2) Subsection (1) shall not be interpreted to limit a right or defence available under the Farm Practices Protection Act.

PART VII EMPLOYER REPRISALS

Definition

104. In this Part, "Board" means the Ontario Labour Relations Board.

Complaint about reprisals

105.–(1) Any person may file a written complaint with the Board alleging that an employer has taken reprisals against an employee on a prohibited ground.

Reprisals

(2) For the purposes of this Part, an employer has taken reprisals against an employee if the employer has dismissed, disciplined, penalized, coerced, intimidated or harassed, or attempted to coerce, intimidate or harass, the employee.

Prohibited grounds

(3) For the purposes of this Part, an employer has taken reprisals on a prohibited ground if the employer has taken reprisals because the employee in good faith did or may do any of the following:

1. Participate in decision-making about a ministry statement of environmental values, a policy, an Act, a regulation or an instrument as provided in Part II.

2. Apply for a review under Part IV.

3. Apply for an investigation under Part V.

4. Comply with or seek the enforcement of a prescribed Act, regulation or instrument.

5. Give information to an appropriate authority for the purposes of an investigation, review or hearing related to a prescribed policy, Act, regulation or instrument.

6. Give evidence in a proceeding under this Act or under a prescribed Act.

Labour relations officer

106. The Board may authorize a labour relations officer to inquire into a complaint.

Labour relations officer

107. A labour relations officer authorized to inquire into a complaint shall make the inquiry as soon as reasonably possible, shall endeavour to effect a settlement of the matter complained of and shall report the results of the inquiry and endeavours to the Board.

(iv) that, having regard to the nature of the harm, an action under section 84 would be an appropriate means to seek to address it;

(b) the second anniversary of the day on which a reasonable person with the abilities and in the circumstances of the person seeking to bring the action first ought to have known of the matters referred to in clause (a); and

(c) the second anniversary of the day on which public notice of an action in respect of the contravention and the harm was given under section 87.

Same

(2) Despite subsection (1), if clause (1)(a) or (b) applies to establish the limitation period under subsection (1), a person may bring the action after the end of that period, to the extent permitted by subsections (3) and (4).

Same

(3) If the person bringing the action applied under section 74 for an investigation of the contravention before the end of the period established under subsection (1) by the application of clause (1)(a) or (b), the person may bring the action within 120 days after the day on which the person received a notice under section 78 or section 80 in respect of the contravention.

Same

(4) If the person bringing the action applied under section 5 of the *Farm Practices Protection Act* with respect to the harm before the end of the period established under subsection (1) by the application of clause (1)(a) or (b), the person may bring the action within 120 days after the day on which the Farm Practices Protection Board disposed of the application.

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Prohibited grounds

(3) For the purposes of this Part, an employer has taken reprisals on a prohibited ground if the employer has taken reprisals because the employee in good faith did or may do any of the following:

1. Participate in decision-making about a ministry statement of environmental values, a policy, an Act, a regulation or an instrument as provided in Part II.

2. Apply for a review under Part IV.

3. Apply for an investigation under Part V.

4. Comply with or seek the enforcement of a prescribed Act, regulation or instrument.

5. Give information to an appropriate authority for the purposes of an investigation, review or hearing related to a prescribed policy, Act, regulation or instrument.

6. Give evidence in a proceeding under this Act or under a prescribed Act.

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The Right To Go To Court

Introduction

As discussed in previous chapters, parts II, III, IV, and V of the *Environmental Bill of Rights, 1993*[1] (EBR) are intended primarily to provide non-judicial means of ensuring public participation in environmental decision making; governmental accountability for environmental decisions; timely reviews of the environmental adequacy of policies, statutes, regulations, and instruments; and timely investigations of suspected environmental offences. If these parts are properly and effectively implemented, it is likely that the need for individual residents to go to court to protect the environment will be substantially diminished.

It was widely recognized, however, that the "political accountability" mechanisms in the EBR may not be sufficient to prevent or remediate significant environmental harm in all instances.[2] Accordingly, part VI of the EBR creates new opportunities for residents to go to court, and section 118(2) of the EBR creates an opportunity to bring judicial review applications to enforce the part II notice and comment requirements with respect to instruments. Thus, the EBR enhances public access to the courts and ensures legal accountability by creating a new statutory cause of action, reforming the law of standing in relation to public nuisances that cause environmental harm, and conferring opportunities to judicially review certain governmental activities under part II.

This chapter briefly reviews the rationale for increasing public access to the courts in environmental cases, analyzes the new legal reforms under the EBR, and identifies some litigation strategies for plaintiffs who wish to use the courts under the EBR.

Rationale for Increasing Access to Environmental Justice

In general, the causes of action traditionally used in the environmental context (that is, nuisance, negligence, trespass, riparian rights, and strict liability) evolved at common law to permit persons to seek redress for personal harm, property damage, or pecuniary loss. Since these causes of

action are aimed primarily at protecting private interests, they have generally proven to be of limited value to public interest plaintiffs seeking to protect public resources such as air, land, or water from degradation or contamination. For example, the law of standing and the public nuisance rule, which are discussed below, have presented serious barriers to public interest environmental litigation in Ontario and elsewhere in Canada.[3] These barriers have prompted some commentators to question the usefulness of existing causes of action to protect the environment.[4]

It is unfortunate that these procedural and substantive hurdles to public interest litigation exist, because such litigation can be used to pursue a number of worthy environmental objectives, including:

- stopping or delaying environmentally harmful projects or unsustainable development;[5]
- ensuring government compliance with regulatory requirements (for example, environmental assessment laws);[6] and
- educating and motivating governments and citizens about necessary law and policy reforms.[7]

In the light of the benefits associated with public interest environmental litigation, the EBR should be viewed as an important breakthrough in facilitating greater public access to the courts to protect the environment. If used with skill in appropriate cases, EBR litigation has significant potential to improve governmental and private sector behaviour in relation to the environment.[8]

Harm to Public Resources: The Right To Sue

Overview of the EBR Cause of Action

Part VI of the EBR creates a new civil cause of action that permits Ontario residents to sue persons, including corporations, who contravene prescribed statutes, regulations, or instruments and cause significant harm to public resources. This cause of action may also be used in an anticipatory or preventive manner where the significant harm or contravention is imminent but has not yet occurred. The part VI action is commenced in the Ontario Court (General Division), and the burden of proof is on the plaintiff to prove his or her case on a balance of probabilities.[9] In general, this means that the plaintiff has the onus of proving that it is more likely than not that the defendant contravened a prescribed statute, regulation, or instrument, and that the contravention caused or may cause significant harm to a public resource. The normal rules of court apply to actions under part VI.[10]

The new cause of action is created by section 84(1) of the EBR, which states:

> Where a person has contravened or will imminently contravene an Act, regulation or instrument prescribed for the purposes of Part V and the actual or imminent contravention has caused or will imminently cause significant harm to a public resource of Ontario, any person resident in Ontario may bring an action against the person in the court in respect of the harm and is entitled to judgment if successful.

As described below, a number of conditions precedent must be satisfied, and several preliminary considerations must be taken into account, before a section 84 action can be commenced.

Conditions Precedent and Preliminary Considerations

Contravention of a Prescribed Statute, Regulation, or Instrument

To bring a section 84 action, a plaintiff must be able to prove an actual or an imminent contravention of a statute, a regulation, or an instrument prescribed for the purposes of part V of the EBR. As described in Chapter 6, part V of the EBR permits residents to request governmental investigation of suspected contraventions under certain statutes, regulations, or instruments.[11]

At present, 18 of the most important environmental statutes in Ontario[12] have been prescribed for the purposes of part V of the EBR (see Table 7.1). These statutes contain numerous offence provisions related to the environment, some of which are quite narrow in their scope and potential application.[13] Therefore, it may be advisable for EBR plaintiffs to plead and rely on the general prohibitions contained in the *Environmental Protection Act*,[14] the *Fisheries Act*,[15] the *Ontario Water Resources Act*,[16] the *Pesticides Act*,[17] and the *Public Lands Act*[18] as triggers for the section 84 action, depending on the circumstances of the alleged contravention. This approach may be preferable for two reasons: first, these prohibitions are quite broad and they could apply to a wide variety of environmentally harmful activities;[19] and, second, there are already numerous cases under these statutes that have decided what constitutes a "contravention" for the purposes of the legislation. However, as EBR plaintiffs (and their counsel) gain additional experience with section 84 actions, they are likely to place greater reliance on the more specific or technical requirements of other prescribed statutes.

Once a prescribed statute is subject to part V of the EBR, any regulations made under that statute are also prescribed for the purposes of part V, and contraventions of those regulations can be used to trigger a section

Table 7.1 Prescribed Statutes for the Right To Sue: EBR Section 84(1)

Statute	Date subject to parts V and VI
Aggregate Resources Act	April 1, 1996
Conservation Authorities Act	April 1, 1996
Crown Timber Act[a]	April 1, 1996
Endangered Species Act	April 1, 1996
Energy Efficiency Act	August 15, 1994
Environmental Assessment Act	August 15, 1994
Environmental Protection Act	August 15, 1994
Fisheries Act (Canada)	April 1, 1996
Game and Fish Act	April 1, 1996
Gasoline Handling Act	April 1, 1996
Lakes and Rivers Improvement Act	April 1, 1996
Mining Act	April 1, 1996
Ontario Water Resources Act	August 15, 1994
Pesticides Act	August 15, 1994
Petroleum Resources Act	April 1, 1996
Provincial Parks Act	April 1, 1996
Public Lands Act	April 1, 1996
Waste Management Act	August 15, 1994

[a] The Ontario government has enacted the *Crown Forest Sustainability Act* (Bill 171), which repeals the *Crown Timber Act*. Thus, O. reg. 73/94 should be amended accordingly.

Source: O. reg. 73/94, as amended, section 9.

84 action.[20] Given the extensive regulatory regimes under some environmental statutes,[21] this provision offers EBR plaintiffs additional options for drafting statements of claim. A sample statement of claim under section 84(1) is reproduced in Appendix 3.

"Instruments"[22] are prescribed for the purposes of part V if they are considered to be class I, II, or III instruments under the EBR.[23] Thus, in appropriate cases, an EBR plaintiff will be able to plead that a defendant has contravened the terms and conditions of a class I, II, or III instrument, provided that significant harm to a public resource has occurred or will occur as a result of the contravention. At present, the Ministry of Environment and Energy has classified a number of its statutory approvals as class I, II, or III instruments, including control orders, certificates of approval,

director's orders, and water-taking permits.[24] It is also noteworthy that many of the environmental statutes listed in Table 7.1 make it an offence not to comply with the terms and conditions of licences, permits, orders, or certificates of approval.[25] Again, this provides EBR plaintiffs with considerable latitude and flexibility when drafting pleadings in a section 84 action.

It is important to note that the section 84 action applies only to a contravention of a statute, a regulation, or an instrument that occurs *after* the statute, regulation, or instrument is prescribed for the purposes of part V.[26] This provision is intended to prevent plaintiffs from pursuing contraventions or environmental harm that occurred years or decades ago. However, in cases where a contemporary contravention has caused further damage to a public resource previously harmed by the defendant, the EBR does not prevent plaintiffs from commencing a section 84 action to enjoin the recent harm and remediate the public resource. In such cases, the issue of distinguishing between "historic" harm and recent harm may be addressed during the development of an appropriate restoration plan. It is arguable that the same principle would apply where a defendant's contravention has harmed a public resource that has been or is being degraded by other persons.[27] It should be noted that a general two-year limitation period governs the commencement of the section 84 action.[28]

As noted above, the alleged contravention must be proven "on a balance of probabilities" rather than "beyond a reasonable doubt," which is a more onerous standard used in the criminal courts. This presents the EBR plaintiff with some strategic considerations when a contravention has occurred: the plaintiff may elect to commence a private prosecution against the defendant (with all of the attendant advantages and disadvantages of a prosecution[29]); or the plaintiff may elect to commence a section 84 action under the EBR.[30] Interestingly, the EBR Task Force expressly noted that the new cause of action does not replace or repeal the right of private prosecution.[31]

Factors that may lead an EBR plaintiff to pursue the contravention through a section 84 action rather than a private prosecution include:

- ►► a lower standard of proof (balance of probabilities versus beyond reasonable doubt);
- ►► the ability to use the Rules of Civil Procedure (including discovery of the defendant);
- ►► the opportunity to recover costs;
- ►► the opportunity to obtain declaratory or injunctive relief, including interlocutory relief; and
- ►► the opportunity to obtain a restoration plan.

However, other factors may militate against pursuing the contravention through a section 84 action, including:

- ►► the greater cost and complexity of civil proceedings;

- ►► the length of time to get to trial; and
- ►► the potential of being ordered to pay costs, post security for costs, or provide an undertaking for damages.

In summary, before commencing a section 84 action, an EBR plaintiff must take into account the usual factors that should be considered before commencing civil litigation.[32]

Significant Harm to a Public Resource

Assuming that a contravention has occurred or will imminently occur, a plaintiff must also prove, on a balance of probabilities, that the contravention has caused, or will imminently cause, "significant harm to a public resource of Ontario."

"Harm" is broadly defined in section 1 of the EBR as

> any contamination or degradation and includes harm caused by the release of any solid, liquid, gas, odour, heat, sound, vibration or radiation.

The EBR does not attempt to define what constitutes "significant" harm to a public resource. This omission is attributable, in part, to the difficulty in establishing a generic definition of "significant" that would be appropriate for the diverse range of cases that are likely to be pursued under section 84. Therefore, as occurred in Michigan under the first EBR legislation,[33] the courts will have to develop a common law threshold of what constitutes "significant" harm to a public resource.

"Public resource" is broadly defined in section 82 as

> (a) air,[34]
>
> (b) water,[35] not including water in a body the bed of which is privately owned and on which there is no public right of navigation,
>
> (c) unimproved public land,[36]
>
> (d) any parcel of public land that is larger than five hectares and is used for,
>
> (i) recreation,
>
> (ii) conservation,
>
> (iii) resource extraction,
>
> (iv) resource management, or
>
> (v) a purpose similar to one mentioned in subclauses (i) to (iv), and
>
> (e) any plant life, animal life, or ecological system associated with any air, water or land described in clauses (a) to (d).

The broad definition of "public resource" allows EBR plaintiffs to bring a section 84 action in a variety of circumstances where a contravention of

a prescribed statute, regulation, or instrument has caused or may cause significant harm to

- conservation authority land,
- provincial parks,
- Crown land and timber,
- fish and wildlife,
- lakes, rivers, and other public water courses,
- wetlands, or
- airsheds.

The EBR does not define what constitutes a public resource "of Ontario." As remedial legislation, however, the EBR should be interpreted broadly,[37] and section 84 should be understood to include public resources that are located in Ontario or that are otherwise within Ontario's legislative jurisdiction. Accordingly, where a public resource is partially or wholly within Ontario's jurisdiction, it should be protected under the EBR, including section 84.[38]

Request for Investigation

In general, where an EBR plaintiff believes that an *actual* contravention has occurred, a section 84 action cannot be commenced unless the plaintiff has applied for an investigation under part V of the EBR and the government's response is not reasonable or is not received within a reasonable time.[39] It is significant that the EBR does not attempt to define explicitly what is "reasonable" with respect to the content or timing of the government response.[40] Accordingly, the courts will have to make the determination of "reasonability" on a case-by-case basis until some common principles or standards are developed and understood.

The policy objective underlying this preliminary step is clear. If a plaintiff alleges harm to a public resource, the responsible public agency should be notified and given the opportunity to take appropriate action, because the public agency presumably has the mandate, resources, and interest to pursue the matter. However, if the agency refuses to respond to the request, or has responded in an inadequate and unreasonable fashion, the EBR plaintiff may elect to proceed with the section 84 action. It should also be noted that by filing a request for an investigation, the EBR plaintiff may gain the tactical advantage of receiving additional proof of the contravention at government expense.

The plaintiff's request for an investigation is an important preliminary step in section 84 litigation and should be carefully pleaded in the statement of claim. In particular, the plaintiff's pleadings should include: the date and content of the investigation request; the grounds for the request; the date and content of the government response, if any; and an

indication of why the government response, if any, is unreasonable. In some ways, this approach parallels current practice in private prosecutions, where individuals often build a "paper trail" of complaints to government before appearing before a justice of the peace to commence the private prosecution.

Under part V of the EBR, two persons are required to prepare, swear, and submit the application for an investigation.[41] However, since section 84 refers only to "plaintiff" in the singular, it appears that only one of the applicants needs to be named as the plaintiff in a section 84 action, although there is no barrier to naming both applicants as co-plaintiffs. It should also be kept in mind that only "persons" – that is, natural persons or corporations – are able to file requests for investigation under the EBR. Thus, prospective EBR plaintiffs should avoid filing requests in the name of unincorporated associations or other entities that lack the capacity to sue or be sued. Similarly, it may also be advantageous for strategic reasons, such as minimizing cost exposure, to bring a section 84 action in the name of a corporation where a person and a corporation have jointly filed a request for an investigation under part V of the EBR.

It is noteworthy that section 84 expressly requires that the plaintiff be "resident in Ontario." However, as discussed in the context of parts IV and V of the EBR, the legislation contains no specific residency requirements. It appears, then, that persons or corporations who are ordinarily "resident"[42] in Ontario may be eligible to bring section 84 actions. This is somewhat more restrictive than the approach taken in some American jurisdictions, which permit non-residents to bring environmental actions in state or federal courts.[43] It should also be noted that it is not necessary for the EBR plaintiff to have experienced personal loss, injury, or damage from the alleged contravention in order to commence a section 84 action.

Farm Practices Protection Act

Where actual or imminent harm to a public resource results from odour, noise, or dust from an agricultural operation, a plaintiff may not commence a section 84 action unless he or she has applied to Ontario's Farm Practices Protection Board under the *Farm Practices Protection Act*.[44] Under this statute, a hearing is held to determine whether the noise, odour, or dust results from a "normal farming practice." If it does, the farmer is protected from liability.[45] If, however, the board determines that the conduct complained of is not a "normal farming practice," litigation may proceed in the normal course. Thus, if the circumstances that give rise to a complaint require a prospective EBR plaintiff to apply to the Farm Practices Board before proceeding with the action, the plaintiff should apply to the board and plead that fact in his or her statement of claim to avoid arguments later that the action is statute-barred by reason of the *Farm Practices Protection Act*.

Although there appear to have been very few successful nuisance claims against Ontario farmers, the EBR Task Force recommended that the *Farm Practices Protection Act* continue to provide protection to normal farming practices within the province.[46] However, given the limited scope of the statutory protection (that is, odour, noise, and dust), it is unlikely that the *Farm Practices Protection Act* will be used to pre-empt appropriate section 84 actions where significant harm to a public resource has resulted from contraventions involving agricultural operations.

Exception to Filing a Request for Investigation or Applying to the Farm Practices Protection Board

Given the various requirements associated with applying for investigations under part V of the EBR, it is not unreasonable to expect that it may take time for applicants to prepare and submit the application, and further time for the government to investigate, report, or act on the investigation request. Similarly, complaints about odour, noise, or dust from an agricultural operation may take some time to prepare, present, and process under the *Farm Practices Protection Act*. Because such delay may threaten a public resource that has been or is being harmed by a contravention or continuing contravention, the EBR Task Force recommended that "a resident should not be required to await the outcome of an Application for Investigation prior to instituting proceedings to protect the public resource."[47] Accordingly, the EBR provides that plaintiffs do not have to file an investigation request, or go to the Farm Practices Protection Board, where the delay involved would result in "significant harm or serious risk of significant harm to a public resource."[48]

Aside from linking "significant harm" to "delay," the EBR contains no explicit criteria for determining when a plaintiff can rely on this exception and avoid the prescribed preliminary steps in section 84 litigation. It is arguable, however, that when an actual contravention has caused or continues to cause significant harm to a public resource, the public resource is clearly in jeopardy and the plaintiff should be permitted to commence the action immediately (and perhaps seek pretrial or interim relief) rather than wait several months or more for the government to respond. By any objective standard, a situation that can clearly be regarded as an emergency or a serious occurrence should be capable of being brought to court without delay.

If the EBR plaintiff intends to rely on this exception, he or she must state the relevant facts carefully and forcefully in the statement of claim. Otherwise, this manoeuvre may inadvertently provide the defendant with the basis to raise an additional roadblock, such as a motion to strike out the action on the ground of non-compliance with section 84(2). Similarly, a failure to give the government an opportunity to act may lead the Attorney General to seek a stay or dismissal of the action under section 90 of the

EBR. (Stays, dismissals, discontinuances, abandonments, and settlements are discussed in greater detail below.)

Class Proceedings

The EBR expressly provides that a section 84 action may not be brought as a class proceeding under the *Class Proceedings Act*.[49] The origin of this provision is somewhat unclear, because previous drafts of the EBR did not include this prohibition and the EBR Task Force viewed "class proceedings reform as an integral part of an EBR."[50] In any event, a section 84 action cannot be framed or brought as a class proceeding. There is, however, nothing to prevent a representative plaintiff in an environmental class proceeding from including a section 84 action as an alternative claim in his or her personal capacity, provided that the elements of the section 84 action (that is, a contravention resulting in significant harm to a public resource) can be proven. Nevertheless, as a practical matter, the resulting complexity may prove to be unwieldy and undesirable.

Other Proceedings

The EBR provides that the new cause of action does not limit any other right to bring or maintain a proceeding.[51] In the environmental context, this means, among other things, that a plaintiff is still free to bring common law actions (that is, nuisance, negligence, trespass, riparian rights, or strict liability). In such claims, however, the plaintiff may elect to include a section 84 action as an alternative claim in the pleadings, particularly if the plaintiff's primary goal is to obtain injunctive relief or environmental restoration rather than damages.

Practice and Procedure

Notice of Section 84 Action

Once a statement of claim is prepared by a plaintiff, it is issued by the court and served on the defendant(s) in the normal course under the Rules of Civil Procedure. Since the EBR binds the Crown,[52] it is possible to name the Crown as a defendant in appropriate cases.[53]

EBR plaintiffs must be mindful of section 86, which provides that the statement of claim is to be served on the Attorney General within 10 days of service on the first defendant.[54] Once the Attorney General has been served, he or she is entitled to present evidence, make submissions, and undertake appeals.[55]

The plaintiff must also provide public notice of the action by giving notice to the Environmental Commissioner, who shall promptly place it on the Environmental Registry established under part II of the EBR.[56]

Moreover, within 30 days after the close of pleadings, the plaintiff is required to bring a motion for directions from the court with respect to public notice of the action.[57] It is noteworthy that the court is empowered to order parties other than the plaintiff to give or fund notice of the section 84 action.[58] Similarly, the court is empowered to order any party at any stage in the proceeding "to give any notice that the court considers necessary to provide fair and adequate representation of the private and public interests, including governmental interests, involved in the action."[59] It goes without saying that, in appropriate cases, counsel for EBR plaintiffs should consider arguing in favour of vesting the cost and the responsibility of giving notice on the defendants.

Participation in the Action

Given the public interest nature of section 84 litigation, the court has been provided with broad powers to permit the participation of a variety of interests in the action, as parties or otherwise.[60] This should enable other persons to participate in section 84 actions, but the court can limit the scope and nature of such participation through terms, including terms relating to costs.[61] Significantly, an order permitting additional persons to participate in the action cannot be made after the court has ordered the parties to negotiate a restoration plan or has made other orders under section 93 of the EBR.[62]

By permitting additional persons to participate in section 84 litigation for the purpose of representing "private and public interests" involved in the action, the EBR appears to contemplate a broader right of intervention than is currently found in rule 13 of the Rules of Civil Procedure.[63] It remains to be seen whether the court will develop new categories of intervention (for example, non-party participant), or whether the court will stick to traditional categories (for example, added party or friend of the court).

Stays, Dismissals, Discontinuances, Abandonments, and Settlements

The court has been empowered to stay or dismiss a section 84 action if it is in the "public interest" to do so.[64] Although the term "public interest" has not been defined in the EBR, the court is directed to have regard for environmental, economic, and social concerns, and the court may consider whether the issues are better resolved in another process or whether there is an adequate government plan in place to address the public interest issues raised in the action.[65] Presumably, a motion for a stay or a dismissal may be brought at any stage of the proceeding by the defendant(s) or the Attorney General, although such motions are likely to be brought at the earliest possible opportunity. In addition, in order to

apprise the court of the relevant facts, the party that brings the motion to stay or dismiss will have to present supporting evidence, presumably in the form of an affidavit, although in some cases oral evidence may also be appropriate. When faced with a motion for a stay or a dismissal, counsel for EBR plaintiffs should consider cross-examining the moving party's affidavits, and should present persuasive evidence outlining the reasons against the stay or dismissal.

Once a section 84 action is commenced, it may be discontinued or abandoned only with the approval of the court, which may impose appropriate terms.[66] Similarly, a settlement of a section 84 action is not binding unless it is approved by the court; however, once it is approved, the settlement is binding on all past, present, and future residents of Ontario.[67] Interestingly, when the court is considering the dismissal of an action, or the approval of a discontinuance, an abandonment, or a settlement of an action, the court is expressly directed to consider whether public notice should be given.[68]

Defences

The EBR recognizes three specific defences to the section 84 action:[69]

1. where the defendant satisfies the court that it exercised "due diligence" in complying with the prescribed statute, regulation, or instrument;
2. where the defendant satisfies the court that the act or omission alleged to be a contravention is statutorily authorized; and
3. where the defendant satisfies the court that it complied with an interpretation of an instrument that the court considers reasonable.

Accordingly, in each case the evidentiary burden is on the defendant to prove these defences to the satisfaction of the court. It is also noteworthy that the EBR does not limit any other defence that otherwise may be available.[70]

Due Diligence

Section 85(1) of the EBR recognizes "due diligence" as a potential defence to a section 84 action. The defence of due diligence, or reasonable care, already exists at common law and in numerous statutes, including environmental legislation.[71] Due diligence is generally defined as "taking all reasonable steps in the circumstances to prevent the occurrence of the prohibited conduct."[72] Accordingly, even where significant harm to a public resource has occurred, a defendant may be able to avoid liability under a section 84 action by satisfying the court that all due care was taken.

In determining whether a defendant has exercised due diligence, the court will consider what a reasonable person would have done in the

circumstances. This determination typically focuses on a number of factors, including:

- Did the defendant have control or an ability to control or influence the offending conduct?
- What alternatives were reasonably available to the defendant?
- What was the likelihood and gravity of potential harm that could result from the defendant's activity?
- Did the defendant comply with accepted industry practices?
- Did the defendant ensure adequate training and supervision for its employees?
- Did the defendant undertake adequate monitoring or inspection of its operations?
- Did the defendant use adequate equipment or technology?
- Did the defendant have a backup system or an emergency response plan or equipment?
- Did the defendant have a sufficient maintenance or repair program?
- Was the defendant aware of the particular problem or of similar problems in the past?[73]

The question whether a defendant has exercised all due care in the circumstances is highly fact-specific, and it is difficult to provide a detailed description of what will succeed as a due diligence defence. In general, however, the courts have required a very high standard of conduct from defendants who seek to avoid liability on the basis of due diligence.[74]

Statutory Authority

Section 85(2) of the EBR recognizes "statutory authority" as a potential defence to a section 84 action. This means that a defendant must satisfy the court that the act or omission alleged to be a contravention is, in fact, authorized by a federal or provincial law, regulation, or instrument. The defence of statutory authority evolved at common law to provide protection against civil liability to persons acting under statute. For example, the courts have generally held that public authorities are not liable in nuisance if the authority has a duty under law to carry out the offending activity and nuisance is the inevitable consequence of the activity.[75] However, if the law merely permits, but does not require, the public authority to carry out the activity, the defence of statutory authority is not available to the public authority.[76] It is noteworthy that the Supreme Court of Canada has narrowed the scope and potential availability of this defence.[77]

Statutory authority often exists for public utilities such as municipal sewage treatment plants, provided that they are operated in full compliance with their statutory authority.[78] However, licences, certificates of approval, or other instruments issued under the *Environmental Protection Act* or other statutes do not generally confer "statutory authority" unless the instrument expressly directs the defendant to undertake its activity in a specified manner and the inevitable result is the creation of a nuisance.[79]

Reasonable Interpretation

Section 85(3) of the EBR provides that an instrument is not "contravened" for the purposes of a section 84 action if the defendant "complied with an interpretation of the instrument that the court considers reasonable." This appears to be a new defence not previously known to civil law.[80] Moreover, given that statutory instruments have legal force and effect, this section seems to sanction "mistake of law" as a potential defence despite the well-known doctrine that mistake of law is not a defence.[81] However, the EBR Task Force expressly stipulated that the "reasonable interpretation" defence was not intended to create a "mistake of law" defence.[82] Instead, this defence was created in recognition that certain instruments, particularly older ones still in existence, are not always drafted concisely and may contain some ambiguity about what is required or prohibited.[83] Accordingly, if the defendant can satisfy the court that its interpretation of the instrument is reasonable and that it has complied with that interpretation, the defendant may not be liable in a section 84 action.

Because this defence is not intended to create a mistake of law defence, the "reasonable interpretation" defence may be analogous to the "mistake of fact" defence that has evolved at common law.[84] If it is, a defendant cannot simply contend that he or she was unaware of the facts or ignorant of what the instrument did or did not permit. Instead, the defendant must be able to demonstrate that its interpretation of the instrument was honestly held and based on reasonable inquiries to ascertain the correct interpretation.

It appears, then, that due diligence, mistake of fact, and reasonable interpretation are closely related, if not identical, because all three defences essentially ask whether the defendant exercised all reasonable care.[85]

Remedies

Before a section 84 action reaches trial, a plaintiff may seek a pretrial injunction or a mandatory order. This pretrial relief may be particularly appropriate where the harm to the public resource is significant, continuing, or possibly irreparable.[86] However, where interlocutory injunctive relief is sought, the defendant(s) may request the court to order that the plaintiff provide an undertaking to pay damages if the action is ultimately dismissed at trial. It is noteworthy that the EBR codifies the court's discretion to dispense with this undertaking if the court finds that "special circumstances" exist (that is, if the action is a test case or it raises a novel point of

law).[87] Given the novelty and public interest nature of section 84 actions, EBR plaintiffs should be able to point to sufficient "special circumstances" to dispense with the undertaking to pay damages in appropriate cases.

After the trial of a section 84 action, the court is empowered to grant various remedies, including:[88]

- ►► granting an injunction against the contravention;
- ►► ordering the parties to negotiate a restoration plan;
- ►► granting declaratory relief; and
- ►► making any other orders, including cost orders, that the court considers appropriate.

However, the court cannot award damages to the EBR plaintiff, nor can the court make an order that is inconsistent with the *Farm Practices Protection Act*.[89]

Injunctions

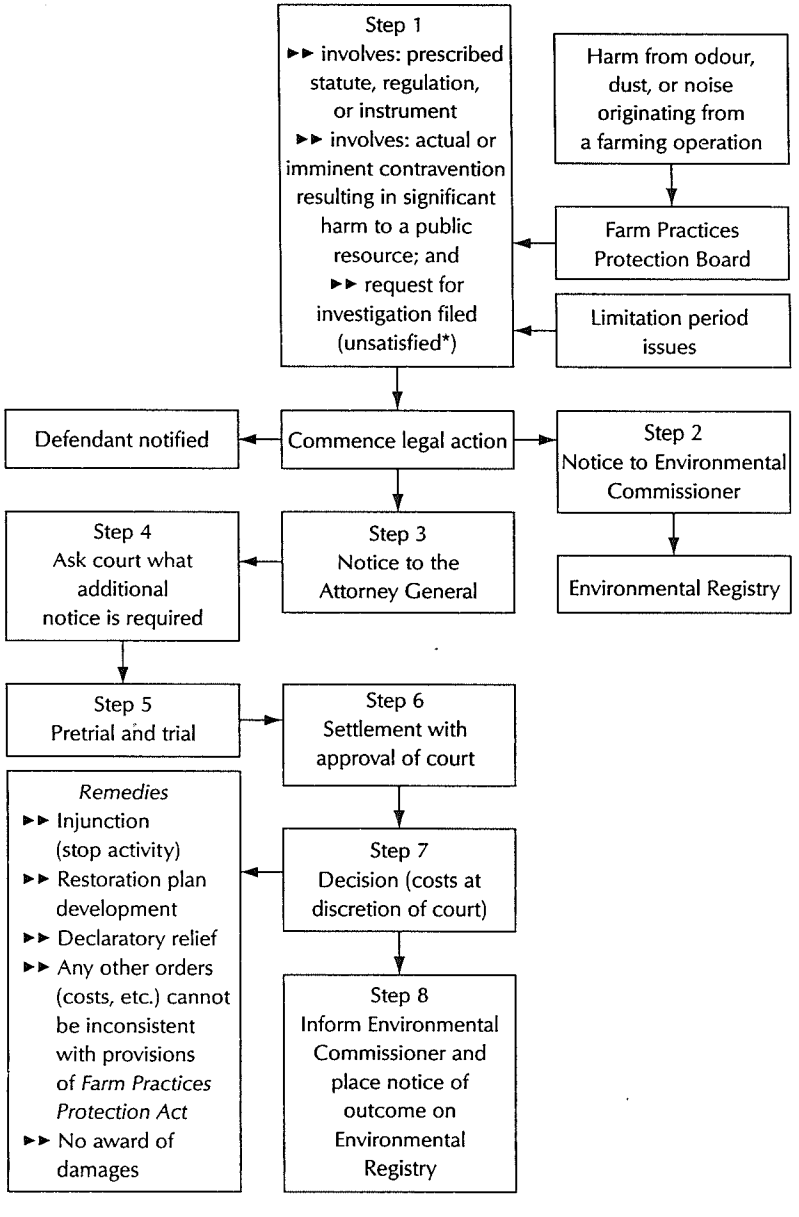
Section 93(1)(a) of the EBR provides that the court may "grant an injunction against the contravention." There are several different forms of injunctions that a court could order:

- ►► a *mandatory injunction*, which requires the defendant to undertake a positive act or measure;
- ►► a *prohibitive injunction*, which restrains the defendant from undertaking specified acts;
- ►► an *interlocutory injunction*, which binds the defendant before trial; and
- ►► a *quia timet injunction*, which may be granted against the defendant before any harm has actually occurred.[90]

Restoration Plans

The EBR provides the court with broad powers with respect to the negotiation and content of restoration plans. In particular, the court shall not order the parties to negotiate a restoration plan where adequate restoration has already occurred (for example, voluntary remedial work by the defendant), or where an adequate restoration plan has been ordered under the law of Ontario (for example, a cleanup order under the *Environmental Protection Act*) or any other jurisdiction (for example, a restoration order under the federal *Fisheries Act*).[91] Because the term "adequate" has not been defined under the EBR, the courts will have to determine the adequacy of previous or ongoing restoration efforts on a case-by-case basis. It is clear that partial restoration or emergency cleanup measures previously undertaken by the defendant do not prevent the court from ordering the parties to negotiate a plan for comprehensive, long-term restoration.

Right To Sue



* A request does not have to be filed for an investigation if there is otherwise a significant risk of harm to a public resource.

Source: Adapted from Ontario, *Environmental Bill of Rights Users' Guide* (1995).

If a restoration plan is necessary, the court may order the parties to negotiate a reasonable, practical, and ecologically sound plan that provides for:

- ►► the prevention, diminution, or elimination of the harm;
- ►► the restoration of all forms of life, physical conditions, the natural environment, and other things associated with the public resource affected by the contravention; and
- ►► the restoration of all uses, including enjoyment, of the public resource affected by the contravention.[92]

Establishing the need for, and developing the content of, a restoration plan will obviously require close work between counsel and consultants for EBR plaintiffs. In many cases, this is likely to require extensive expert evidence from a variety of disciplines (for example, hydrology, hydrogeology, wildlife biology, forest ecology, or landscape design), depending on the severity of the harm and the nature of the public resource. Significantly, the court is empowered to make orders with respect to the costs of negotiating a restoration plan.[93] As a matter of practice, EBR plaintiffs should seek to recover the costs of retaining experts for negotiating restoration plans and undertaking other EBR litigation-related work.

In appropriate cases, a restoration plan *may* include provisions that require research into pollution prevention or abatement technology; community, education, or health programs; or the transfer of property by the defendant so that the property becomes a public resource.[94] However, such provisions can be included in the restoration plan only with the consent of the defendant.[95] Similarly, a restoration plan *may* provide for the payment of money by the defendant; however, the money must be payable to the Minister of Finance; the money must be used for general restoration or similar purposes; and both the Attorney General and the defendant must consent to the payment.[96] Counsel for EBR plaintiffs should keep these provisions in mind during settlement discussions, particularly where it is unfeasible or prohibitively expensive to undertake a full and complete restoration of the damaged public resource or its uses. It is also important to ensure that the restoration plan includes provisions for monitoring, reporting, and implementation.[97]

If the court orders the parties to negotiate a restoration plan, the court may make a number of interim orders (for example, short-term remedial work) and other ancillary orders (for example, requiring a party to prepare a draft plan).[98] If the parties successfully negotiate a restoration plan, the court must approve it and order the defendant to comply with the plan.[99] If the parties cannot agree on an acceptable restoration plan, the court may develop its own restoration plan with the assistance of court-appointed experts.[100] It is anticipated that this provision will provide an incentive for the parties to work out an acceptable restoration plan.

Declarations and Other Orders

Section 93(1)(c) of the EBR provides that the court may grant declaratory relief. A declaratory order is a discretionary remedy used by the court to make declarations of rights, status, or entitlement.[101] Declarations are particularly important when the defendant is the Crown, which has traditionally enjoyed common law and statutory immunity from injunctive relief. For example, the *Proceedings Against the Crown Act* provides that injunctions are not available against the Crown, but the courts may issue a declaratory order instead of an injunction.[102]

Section 93(1)(d) of the EBR provides that the court may make "any other order ... that the court considers appropriate." This gives the court a wide-ranging discretion to craft appropriate remedies[103] to address the defendant's contravention or the resulting harm to a public resource.

Costs

The court's normal cost rules (that is, "costs follow the event") apply to a section 84 action. This means that the losing side may have to pay some, most, or all of the winning side's costs. However, the EBR codifies the court's discretion not to order costs against an unsuccessful plaintiff if "special circumstances" exist (that is, if the action is a test case or it raises a novel point of law).[104] It is noteworthy that section 31 of the *Class Proceedings Act* contains a similar provision. In many cases, counsel for unsuccessful EBR plaintiffs should be able to argue that costs should not follow the event because the action was a test case, raised a novel point, or otherwise involved important matters that were in the public interest to bring to court.

Appeals

The EBR provides that the filing of an appeal from a court order under the EBR does not operate as a stay of the order; however, a motion may be brought before an appellate judge to stay the order under appeal.[105]

The judgment of the court in a section 84 action is binding on all residents of Ontario by reason of the doctrines of cause of action estoppel and issue estoppel.[106] These doctrines do not apply if an action has been discontinued, abandoned, or dismissed without a decision on the merits of the case.[107]

Are the "Floodgates" Open?

Given the experiences in Michigan and other jurisdictions with EBR-like provisions, it is unlikely that section 84 will result in a flood of new environmental litigation in Ontario. As noted above, the new cause of action has a

number of built-in safeguards and procedural requirements that should serve to screen out frivolous or vexatious lawsuits. In addition, the new cause of action is still subject to the existing rules of practice that permit Ontario's courts to dismiss or discourage unmeritorious actions. Moreover, it is clear that environmental groups generally prefer using non-judicial means (for example, policy work, political lobbying, public education, or media campaigns) to achieve their objectives.[108]

Although environmentalists now have a new EBR cause of action to use in Ontario, it is reasonable to expect that environmentalists will continue to carefully and strategically focus their litigation activity on the most appropriate cases, particularly in the light of the costs, risks, and time-consuming nature of litigation. Initially, it appears likely that section 84 plaintiffs will focus on traditional "end-of-pipe" industrial pollution cases where contraventions and environmental damages are sometimes easier to document. However, as plaintiffs and their counsel gain experience with the section 84 action, it is reasonable to expect increasing interest in using the new cause of action in the context of resource management activities.

Public Nuisance Causing Environmental Harm

The Public Nuisance Rule

The EBR's creation of a new civil cause of action to protect public resources does not necessarily assist persons who have suffered private loss or injury from a "public nuisance" that causes harm to the environment. The definition of a public nuisance is elusive. In general, the term can be defined as an injury inflicted on or an interference with the rights of the community at large rather than individual members. Hence, public nuisance pertains generally to public wrongs.[109] Traditionally, widespread or communal harm has been actionable only at the instance of the Attorney General, who was presumed to be the guardian of the public interest. Tort law, however, developed a distinction between "public" and "private" nuisance, and the courts have generally held that only persons who suffer "special" or "unique" damages beyond that suffered by the community at large could sue with respect to the private loss or injury caused by the public nuisance. In practice, however, the distinction between private and public nuisance has been blurred by many courts.[110] As a result, actions to recover damages for private loss that arose from public nuisance have been dismissed on the ground that the plaintiffs lacked standing (or status) to sue, or lacked "special" damages that set them apart from other members of the community.[111]

There have been a number of arguments in favour of dismantling this rule. In the environmental context, one commentator has noted a problem with the rule as follows:

> if a person does a bit of damage to an immediate neighbour that is private nuisance which can be redressed through suit; if, however, the wrongdoer does a really good job of polluting the entire neighbourhood it then becomes a public nuisance and access to justice is no longer available as of right.[112]

Not only does the public nuisance rule have the practical effect of immunizing polluters from judicial action, it also provides a monopoly for government to protect the public interest.[113] As has been pointed out, however, "in a pluralistic, multicultural society, there is no single, monolithic public interest; there are several conflicting interests."[114]

Public Nuisance Actions Under the EBR

The EBR reforms the public nuisance rule by expressly providing that where direct economic loss or personal injury results from a public nuisance that causes environmental harm, the plaintiff shall not be barred from court because the Attorney General has not consented to the action or because other persons have suffered loss or injury of the same kind or degree. In particular, section 103 of the EBR provides:

> No person who has suffered or may suffer a direct economic loss or direct personal injury as a result of a public nuisance that caused harm to the environment shall be barred from bringing an action without the consent of the Attorney General in respect of the loss or injury only because the person has suffered or may suffer direct economic loss or direct personal injury of the same kind or to the same degree as other persons.

The EBR goes on to specify that this provision does not limit a right or defence under the *Farm Practices Protection Act*.[115]

Remaining Barriers: The Law of Standing

The EBR's reform of the public nuisance rule does not confer "wide-open" standing to environmentalists who are concerned about public nuisances that cause environmental harm. In public nuisance cases, the prospective plaintiff must still be able to demonstrate direct economic loss or personal injury; otherwise, the plaintiff will lack standing to sue in respect of the public nuisance. It is noteworthy that the Supreme Court of Canada has relaxed standing requirements in a number of well-known constitutional and administrative law challenges to governmental action.[116] In Ontario, however, standing must still be pleaded and proven by plaintiffs in public nuisance cases. Accordingly, where an environmentalist suffers no direct

economic loss or personal injury that arises from a public nuisance, he or she should consider whether it is possible to bring a section 84 action to enjoin the public nuisance and to restore the public resources harmed by the activity.

Judicial Review under the EBR

General Principles

"Judicial review" refers to the courts' supervisory jurisdiction over administrative actions by persons, boards, commissions, or tribunals that exercise statutory powers.[117] In Ontario, judicial review is largely governed by the *Judicial Review Procedure Act*.[118] In general, an application for judicial review is heard by the Divisional Court, although the application can be heard by a single judge of the Ontario Court (General Division) in cases of urgency.[119] Relief orders that may be ordered by the court in a judicial review application include mandamus,[120] prohibition,[121] certiorari,[122] declaration,[123] and interim relief.[124] It is important to note that these orders are discretionary, and the court may refuse to grant relief even if the applicant demonstrates grounds for judicial review.

There are numerous grounds that may be pleaded in support of an application for judicial review, including:

- breach of the rules of natural justice or principles of fairness,[125]
- lack or excess of jurisdiction,
- improper delegation of statutory power,
- failure to comply with statutory procedural requirements,
- reasonable apprehension of bias,
- irrelevant considerations or abuse of discretionary powers,
- error of law on the face of the record, and
- lack of evidence to support the decision.

Judicial Review and the EBR

As discussed in Chapter 3, the most important component of the EBR is part II, which establishes a public notice and comment regime for environmentally significant policies, statutes, regulations, and instruments. If this regime is implemented properly to ensure meaningful public participation in environmental decision making, the need for environmental litigation should be diminished and the courts will be used only as a last resort.

To ensure compliance with the requirements under part II with respect to instruments, the EBR permits Ontario residents to bring applications

under the *Judicial Review Procedure Act* on the ground that a minister or his or her delegate failed "in a fundamental way" to comply with the requirements of part II.[126] The EBR does not provide any explicit criteria to determine what constitutes "fundamental" non-compliance with part II. However, a failure to place a notice on the Environmental Registry, a decision to abridge mandatory comment periods, an improper exercise of discretion with respect to emergency powers, or a failure to provide adequate notice may invite judicial review by public interest applicants. Applications for judicial review must be brought within 21 days after the minister provides notice of his or her decision about the issuance of the instrument.[127] The right to apply for judicial review in these circumstances is in addition to the public right under part II to appeal certain instruments to an appellate tribunal.

Privative Clause

Section 118(1) of the EBR contains a broad privative clause that is intended to immunize most governmental activity under the EBR from judicial review:

> Except as provided in section 84 and subsection (2) of this section, no action, decision, failure to take action or failure to make a decision by a minister or his or her delegate shall be reviewed in any court.

Therefore, while there are opportunities to seek legal accountability for certain government actions (for example, section 84 actions or applications for judicial review with respect to instruments), the EBR also depends on mechanisms for political accountability (for example, the Office of the Environmental Commissioner) to ensure compliance with the EBR. Nevertheless, it should be noted that, in some instances, the courts have been willing to entertain judicial review applications on jurisdictional grounds even in the face of a privative clause. However, it should also be noted that the courts are increasingly unwilling to overturn the impugned decision unless it is "patently unreasonable" or "clearly irrational."

Conclusions

It is anticipated that the EBR will not result in a flood of new public interest environmental litigation in Ontario; environmentalists are likely to continue to use the courts as a last resort for resolving environmental disputes. At the same time, however, the EBR provides a carefully crafted cause of action that permits Ontario residents to enjoin unlawful conduct that has significantly harmed a public resource. Similarly, the EBR modifies the public nuisance rule in order to facilitate claims arising out of public nuisances that have caused environmental harm. In addition, the EBR provides the

right to apply for judicial review to ensure governmental compliance with the EBR requirements for public notice and comment on instruments.

For these reasons, Ontario's EBR has been properly described as "evolutionary" rather than "revolutionary," and it creates no new liability for private and public sector actors who comply with the province's environmental laws:

> Companies which are already making serious and sustained efforts to comply with the law have little to fear from this Bill. Lawbreakers, however, will have additional headaches.[128]

ENDNOTES

1 *Environmental Bill of Rights, 1993*, SO 1993, c. 28 (herein referred to as "the EBR").

2 *Report of the Task Force on the Ontario Environmental Bill of Rights* (Toronto: Ministry of the Environment, July 1992) (herein referred to as "the EBR Task Force report"), 83-85.

3 See, for example, *Fillion v. New Brunswick International Paper Co.*, [1934] 3 DLR 22 (NBC); *Hickey v. Electric Reduction Co.* (1970), 21 DLR (3d) 368 (Nfld. SC); *Green v. The Queen in Right of Ontario*, [1973] OR 396 (HC); and *Rosenberg v. Grand River Conservation Authority* (1976), 12 OR (2d) 496 (CA).

4 See, for example, J.P.S. McLaren, "The Common Law Nuisance Actions and the Environmental Battle: Well-Tempered Swords or Broken Reeds?" (1972), 10 *Osgoode Hall L.J.* 505; Andrew J. Roman, "Locus Standi: A Cure in Search of a Disease," in J. Swaigen, ed., *Environmental Rights in Canada* (Toronto: CELRF, 1981); and Ontario Law Reform Commission, *Report on the Law of Standing* (Toronto: the commission, 1989), chapter 3.

5 See, for example, *Waste Not Wanted Inc. v. Her Majesty the Queen in Right of Ontario* (1987), 2 CELR (NS) 24 (FCTD).

6 See, for example, *Canadian Wildlife Federation Inc. v. Canada (Minister of the Environment)* (1989), 3 CELR (NS) 287 (FC TD), aff'd. (1989), 4 CELR (NS) 1 (FCA); *Friends of the Oldman Dam Society v. Canada (Minister of Transport)* (1992), 7 CELR (NS) 1 (SCC).

7 E.J. Swanson and E.L. Hughes, *The Price of Pollution: Environmental Litigation in Canada* (Edmonton: Environmental Law Centre, 1990), 105 and 112-14. See also P. Muldoon and M. Valiante, "A Foot in the Door: A Survey of Recent Trends in Access to Environmental Justice," in S.A. Kennett, ed., *Law and Process in Environmental Management* (Calgary: Canadian Institute of Resources Law, 1993), 143-44.

8 See, for example, Andrew J. Roman and Mart Pikkov, "Public Interest Litigation in Canada," in D. Tingley, ed., *Into the Future: Environmental Law and Policy for the 1990's* (Edmonton: Environmental Law Centre, 1990), 165: "The presence or absence of public interest litigation in the environmental field in Canada can have an important impact, not only on specific environmental decisions made but also on the bureaucratic and corporate atmosphere in which such decisions are considered."

9 EBR section 84(8). The civil standard of proof ("balance of probabilities") is less onerous than the more exacting criminal standard of proof ("beyond a reasonable doubt"), but this standard can still be difficult to satisfy in the environmental context. See D. Estrin and J. Swaigen, eds., *Environment on Trial*, 3d ed. (Toronto: Emond Montgomery, 1993), 79.

10 EBR section 84(10).

11 EBR sections 74 to 81.

12 Other important statutes such as the *Niagara Escarpment Planning and Development Act* and the *Planning Act* are conspicuous in their absence from this list of prescribed statutes.

13 See, for example, section 38 of the *Lakes and Rivers Improvements Act*, RSO 1990, c. L.3, which appears to be directed at waste deposits from saw, pulp, or paper mills.

14 *Environmental Protection Act*, RSO 1990, c. E.19 (herein referred to as "the EPA"), section 14.

15 *Fisheries Act*, RSC 1985, c. F-14, sections 35(1) and 36(3).

16 *Ontario Water Resources Act*, RSO 1990, c. O.40 (herein referred to as "the OWRA"), section 30.

17 *Pesticides Act*, RSO 1990, c. P.11, section 4.

18 *Public Lands Act*, RSO 1990, c. P.43, section 14.

19 This is particularly true of EPA section 14, which has been characterized as "one of the strongest anti-pollution provisions in Canadian legislation." See *Environment on Trial*, 3d ed., supra endnote 9, at 437.

20 O. reg. 73/94, section 10.

21 See, for example, the regulatory standards in regulations 346 and 347 under the EPA.

22 An "instrument" is defined in EBR section 1(1) as "any document of legal effect issued under an Act and includes a permit, licence, approval, authorization, direction or order issued, under an Act, but does not include a regulation."

23 O. reg. 73/94, section 11. The classification of "instruments" under the EBR is described in greater detail in Chapter 3.

24 O. reg. 681/94.

25 See, for example, EPA sections 186(2) and (3).

26 EBR section 83.

27 The courts have held that it is no defence that other parties may have contributed to the pollution problem, or the affected environment was not in pristine condition. See, for example, *R. v. Falconbridge Nickel Mines Limited* (1983), 12 CELR 137 (Ont. Dist. Ct.).

28 EBR section 102.

29 For a summary of the advantages and disadvantages of prosecution, see *Environment on Trial*, 3d ed., supra endnote 9, at 50-54.

30 Or, arguably, the plaintiff could do both, although the advisability of doing so is questionable.

31 *Report of the Task Force on the Ontario Environmental Bill of Rights: Supplementary Recommendations* (Toronto: Ministry of the Environment, December 1992) (herein referred to as "the EBR Task Force supplementary recommendations"), 32.

32 These factors would include the likelihood of success, the cost risks, and whether the defendant is judgment-proof by reason of impecuniosity or insolvency.

33 *Michigan Environmental Protection Act*, Mich. Comp. Laws Ann. 691.1201-1207 (West Supp., 1984). See D.K. Stone, "The Michigan Environmental Protection Act: Bringing Citizen-Initiated Environmental Suits into the 1980s" (1984-85), 12 *Ecol. Law Q.* 271.

34 EBR section 1 defines "air" as "open air not enclosed in a building, structure, machine, chimney, stack or flue."

35 EBR section 1 defines "water" as "surface water and groundwater."

36 EBR section 82 defines "public land" as land owned by the provincial Crown, municipalities, and conservation authorities. Note that EBR section 1 specifies that "land" includes "wetlands" and "lands covered by water."

37 *Interpretation Act*, RSO 1990, c. I.11, section 10.

38 As a matter of constitutional law, provincial legislation cannot have extraterritorial effect. However, the courts have recognized that with respect to natural resources that are subject to shared provincial and federal jurisdiction, such as international watercourses, both levels of government can enact and enforce legislation. See *R. v. Nitrochem Inc.* (1993), 14 CELR (NS) 151 (Ont. Ct. (Prov. Div.)).

39 EBR section 84(2). However, see also section 84(6), which negates the need to take this preliminary step when the delay involved in submitting the request would result in significant harm or serious risk of significant harm to a public resource.

40 However, when assessing whether a government response was received within a "reasonable time," the court is directed to consider the timeframes prescribed in EBR sections 78-80. See EBR section 84(3).

41 EBR section 74.

42 "Residence" generally refers to a person's domicile, although some authorities regard "residence" merely as physical presence in a particular locality.

43 See P. Muldoon et al., *Cross-Border Litigation: Environmental Rights in the Great Lakes Ecosystem* (Toronto: Carswell, 1986), chapter 2.

44 EBR sections 84(4) and (5). Again, it is not necessary to take this preliminary step if the delay in doing so would result in significant harm or serious risk of significant harm to the public resource.

45 See *Farm Practices Protection Act*, RSO 1990, c. F.6, section 2(1).

46 EBR Task Force report, at 178-79.

47 Ibid., at 100.

48 EBR section 84(6).

49 EBR section 84(7).

50 EBR Task Force report, at 90. In commenting on an earlier draft of the EBR, a former member of the Attorney General's Advisory Committee on Class Action Reform observed that there was no reason why a section 84 action could not be certified as a class proceeding, provided that the certification criteria were otherwise satisfied. See T.J. O'Sullivan, "Public Access to the Courts under the Proposed Environmental Bill of Rights" (Canadian Institute, October 9, 1992), 19.

51 EBR section 84(9).

52 EBR section 120.

53 See EBR Task Force report, at 98.

54 EBR section 86(1).

55 EBR section 86(2).

56 EBR sections 87(1) and (2).

57 EBR section 87(3).

58 EBR sections 87(5) and (6).

59 EBR section 88.

60 EBR section 89(1).

61 EBR section 89(2).

62 EBR section 89(3).

63 For further analysis of the nature and scope of public interest intervention, see P. Muldoon, *The Law of Intervention: Status and Practice* (Aurora, ON: Canada Law Book, 1989).

64 EBR section 90(1).

65 EBR section 90(2).

66 EBR section 91(1).

67 EBR sections 91(2) and (3).

68 EBR section 91(4).

69 EBR section 85.

70 EBR section 85(4).

71 See, for example, section 78.6 of the *Fisheries Act*, supra endnote 15.

72 *R. v. Sault Ste. Marie (City)*, [1978] 2 SCR 1299, at 1326. For a detailed review of the due diligence defence, see J. Swaigen, *Regulatory Offences in Canada* (Toronto: Carswell, 1992), 85-137, and D. Saxe, *Environmental Offences* (Aurora, ON: Canada Law Book, 1990), chapter 6.

73 *Regulatory Offences in Canada*, supra endnote 72, at 104-37.

74 Swanson and Hughes, supra endnote 3, at 168.

75 The defence of statutory authority may also be pleaded by defendants in civil actions based on trespass, riparian rights, or strict liability.

76 *Environment on Trial*, 3d ed., supra endnote 9, at 113. For a detailed discussion of the evolution and nature of the defence of statutory authority, see Beth Bilson, *The Canadian Law of Nuisance* (Toronto: Butterworths, 1991), 94-110.

77 See, for example, the majority decision of Madam Justice Wilson in *Tock v. St. John's Metropolitan Area Board*, [1989] 2 SCR 1181.

78 See OWRA section 59.

79 *Environment on Trial*, 3d ed., supra endnote 9, at 113.

80 Although it has been suggested that certain elements of "reasonable interpretation" may be subsumed within the concept of due diligence.

81 *Regulatory Offences in Canada*, supra endnote 72, at 82.

82 EBR Task Force supplementary recommendations, at 33.

83 Ibid.

84 *Regulatory Offences in Canada*, supra endnote 72, at 79-85.

85 Ibid., at 80-81.

86 As noted above, it may be appropriate in such urgent cases to dispense with the prerequisite of filing a request for investigation.

87 EBR section 92.

88 EBR section 93(1).

89 EBR sections 91(2) and (3).

90 In general, see R.J. Sharpe, *Injunctions and Specific Performance*, 2d ed. (Aurora, ON: Canada Law Book, 1992).

91 EBR section 94.

92 EBR section 95(2). Note the similarity between this section and part X of the EPA with respect to spills.

93 EBR section 96(b)(i).

94 EBR section 95(3).

95 EBR section 95(4).

96 EBR section 95(8).

97 EBR section 95(6).

98 EBR section 96.

99 EBR section 97.

100 EBR section 98(1).

101 See section 97 of the *Courts of Justice Act*, RSO 1990, c. C.43.

102 See section 14 of the *Proceedings Against the Crown Act*, RSO 1990, c. P.27.

103 Presumably, any order within the jurisdiction of the Ontario Court (General Division) may be made in a section 84 action.

104 EBR section 100.

105 EBR section 101.

106 EBR section 99(1). This type of "estoppel by judgment" is a doctrine of law that prevents persons from relitigating or calling into question facts or issues that have been agreed on or previously determined by a court.

107 EBR section 99(2).

108 Roman and Pikkov, supra endnote 7, 166.

109 T.A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986), 17-19.

110 Bilson, supra endnote 76, chapter 3.

111 See the cases cited in endnote 2.

112 A.J. Roman, "From Judicial Economy to Access to Justice: Standing and Class Actions," a paper presented to the Canadian Bar Association – Ontario, 1991 Annual Institute of Environmental Law, January 19, 1991, at 6.

113 For a fuller discussion, see Muldoon and Valiante, supra endnote 7, at 153-54.

114 Roman, supra endnote 112, at 7.

115 EBR section 103(2).

116 See Muldoon and Valiante, supra endnote 7, at 150-51. In general, see Cromwell, endnote 109.

117 See H.M. Evans et al., *Administrative Law* (Toronto: Emond Montgomery, 1989), 21-22.

118 See also rule 68 of the Rules of Civil Procedure.

119 See section 6 of the *Judicial Review Procedure Act*, RSO 1990, c. J.1.

120 Mandamus is an order that requires the performance of a mandatory duty.

121 Prohibition is an order that prohibits the taking of a specified action or the making of a decision.

122 Certiorari is an order that quashes or sets aside decisions that have already been made.

123 Declarations are discussed above under the heading "Declarations and Other Orders."

124 See section 4 of the *Judicial Review Procedure Act*, supra endnote 119.

125 In general, this refers to the duty to give affected persons a reasonable opportunity to be heard, and the duty to fairly listen to both sides and to reach a decision free of bias.

126 EBR section 118(2).

127 EBR section 118(3).

128 D. Saxe, "The Bill of Rights: Evolutionary, Not Revolutionary" (August 1992), *Hazardous Waste Management* 25.

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Whistle Blowing: Protection Against Employer Reprisals

Overview: Protection Against Employer Reprisals

General

As described throughout this book, the *Environmental Bill of Rights, 1993*[1] (EBR) provides a number of tools to members of the public to assist them in protecting the environment. One set of specialized tools protects employees against reprisals from employers in situations where the employees are attempting to exercise their rights under the EBR. The policy rationale underlying these protective provisions is that employees may not want to "blow the whistle" on the illegal polluting activities of employers out of fear of being fired, demoted, or harassed. Hence, the EBR attempts to protect employees who exercise rights that are shared with all other persons in Ontario under the EBR.

Part VII of the EBR[2] sets out a number of grounds on which employers are prohibited from undertaking reprisals against employees. The EBR then establishes a procedure to allow an aggrieved employee to file a complaint with the Ontario Labour Relations Board if a reprisal is undertaken on a prohibited ground. Once the complaint is before the board, the onus is on the employer to establish that there was not a reprisal on a prohibited ground as alleged by the complainant.

Interrelationship with Other Employee Environmental Rights

"Whistleblower" legislation is not new in Ontario. Indeed, there have been employee protection provisions in the *Environmental Protection Act* (EPA) for over a decade.[3] The employee protections of the EBR, in fact, are very closely modelled after those in the EPA. There are, however, two apparent differences between the EBR and the EPA "whistleblower protection" regimes.

APPENDIX 4

A Preliminary Analysis of Part II "Public Participation" Provisions of Bill C-74

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February, 1998

Introduction

The purpose of this paper is to provide a review of Part II of Bill C-74. The overall conclusion of the paper is that the citizen rights provided are but a modest step forward. The citizen right to bring an action to enforce CEPA is very weak and should be substantial rewritten.

Section-by-Section Analysis

Environmental Registry - Sections 12-14

Sections 12 to 14 of Bill C-74 establish an "environmental registry" with the stated purpose of "facilitating access to documents relating to matters" under the statute. This information shall contain notices and other documents published or made publicly available by the minister. Issues relating to the form and access to the registry are to be determined by the minister.

We support the establishment of an environmental registry. The proposed registry will complement other such registries at the provincial level, such as the environmental registry established under sections 5 and 6 of the Ontario Environmental Bill of Rights. We have many comments on design, capacity and format of the proposed registry drawing from our experience with the Ontario registry. However, we will strive to relay those comments at implementation stage of the registry.

The concern is not that an environmental registry is being proposed, but the limited use being proposed for it. First, a legitimate use of the environmental registry is to disseminate information related to the Act. In this context, therefore, the bill should make it clear that all important information items, such as application for approvals, development of, or revisions to, policies and regulations, should be placed on the registry.

Second, not only should the registry be used as a means to disseminate information, but it should be used as a means to provide notice of impending decisions. As such, the environmental registry should be seen as one part of a notice and comment regime within Bill C-74. If the bill provides the infrastructure to give notice of impending decisions, it should also afford the opportunity for the public to make comment on those proposals. The marginal cost of providing of this additional right would be minimal since the bill already calls for notice.

In our view, a notice and comment regime within CEPA would enhance public participation and provide fairer access for the public than the notice given presently

through the Canada Gazette. It is submitted that the minimum notice and comment given for proposed decisions under the bill be sixty days.

Recommendation No. 1

Sections 12 and 13 of Bill C-74 should be amended to broadened the purpose and function of the environmental registry to include:

(a) informing the public of notices, including notices of objections, issued under the Bill;
(b) any proposal for the issuance of any approval, regulation, revision or revocation of a regulation, or any policy under Bill C-74; and
(c) any environmental protection actions under section 22 of Bill C-74.

Recommendation No. 2

A new section or series of sections should be included in CEPA that would allow for not only notice of proposals for decisions, but the opportunity for the public to comment on those impending decisions. The minimum time period for public comment should be sixty days.

Investigation of Offenses Sections 17-21

Sections 17 to 21 of Bill C-74 provide a process to allow any individual resident in Canada to apply to the minister for an investigation of any offence under the statute that the individual alleges to have occurred. The minister must report on progress of the investigation every 90 days.

We fully support those provisions in Bill C-74 that will allow Canadians to assist in the enforcement of the country's environmental laws. It is often argued that such rights are not needed since anyone can request an investigation. However, our experience is that there is a need for a legislated opportunity to request an investigation.[16] It enhances accountability of the decision-makers as well as provides a process that is clear and predictable in terms of its procedures. The provisions in sections 17 to 21 of Bill C-74 parallel the right to an investigation provided under sections 74 to 81 of the Ontario Environmental Bill of Rights.

Despite our support in general for these provisions, a number of amendments are

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[16] Under the similar provisions of Ontario's Environmental Bill of Rights, approximately 28 applications for investigation were filed from 1994 to 1996.

needed to strengthen this important remedy. First, section 17 expressly excludes corporations from filing an investigation request. The rationale for excluding corporations is not outlined and may work against greater public access to environmental rights. Many non-government organizations active in environmental issues are corporations without share capital. The Ontario Environmental Bill of Rights allows for corporations to file a request for an investigation. Bill C-74 should be amended to allow corporations to file such requests.

Further, section 18 of Bill C-74 does not require the minister to acknowledge the receipt of the application. This acknowledgement is important not only because it confirms that the receipt was received, but it sets the clock running on the time frames established in the bill.

Bill C-74 does not include any provisions to protect the applicant. Section 81 of the Ontario's Environmental Bill of Rights states: "A notice under section 78 or 80 shall not disclose the names or addresses of the applicants or any other personal information about them." In our view, this protection is important since the applicants are acting in the public interest and should not have to be subject to fear or apprehension in submitting the application.

Section 19 of Bill C-74 should not give the impression that the investigation can go on forever without any accountability. Otherwise, the timelines are not useful. The efficient way to deal with this problem is simply to require the minister to estimate how long the investigation will take after the expiry of the initial 90 day period.

Recommendation 3

Section 17 of Bill C-74 should be amended so as to permit corporations to file an application for investigation

Section 18 of Bill C-74 should be amended to require the responsible minister to acknowledge receipt of an investigation application within 20 days of receiving it.

Bill C-74 should be amended to prohibit the disclosure of any information that may identify the applicant.

Section 19 of Bill C-74 should be amended to require the responsible minister to provide the applicant with a written estimate of the time required to complete the investigation where the investigation has not been completed within 90 days.

Environmental Protection Action Section 22 to 38

Overview of Environmental Protection Action Provisions

Sections 22 to 38 of Bill C-74 enable members of the public to commence an action in civil courts in order to seek redress for violations under the bill. This "environmental protection action" is a new right and can be said to serve three purposes: (1) to secure compliance with the bill; (2) to facilitate public access to the courts in instances involving non-compliance; and (3) to enhance governmental accountability for its enforcement and compliance activities under Bill C-74.

We fully support the establishment of a new right of action under Bill C-74. However, these provisions are in need of a number of amendments in order to improve the effectiveness and availability of the environmental protection action. The primary problem with the proposed environmental protection action is that it inappropriately incorporates too many qualifications and restrictions. The effect of these qualifications and restrictions is that the environmental protection action will not be used and hence will not achieved its purpose as outlined above.

More importantly, Bill C-74 omits two key features found in Ontario's Environmental Bill of Rights. First, while the environmental protection action can be commenced where an individual alleges the contravention of Bill C-74, it omits to provide an individual the ability to commence an action where someone "will imminently contravene" the bill.

Second, it omits the ability of citizens to go immediately to court in emergency circumstances without filing a prescribed investigation request with government officials. In our view, these shortcomings must be addressed through amendment to the environmental protection action provisions in Bill C-74.

Section 22 (1) - Conditions Precedent for Suing

Section 22 establishes two conditions precedent before a person can commence an environmental protection action: (1) the person must apply for an investigation pursuant to section 17 of Bill C-74; and (2) the minister must not responded to the investigation in a reasonable or timely manner.[17]

In our view, these conditions precedent are neither warranted nor needed. First,

[17] Bill C-74, section 22(1)(a)(b).

other citizen provisions both in the United States[18] and in Canada do not include such conditions. For example, the public right of action under section 19.1 of Quebec's Environmental Quality Act does not require the filing of an investigation request before an action can be commenced. The Yukon and Northwest Territories environmental rights statutes also permit citizens to go directly to court in civil enforcement actions without pre-filing an investigation request or waiting for a response.

Further, such conditions are based on the assumption that the environmental protection action will lead to a floodgate of frivolous actions. Experience has demonstrated that only serious and substantive cases have been brought forward, often when governmental authorities did not have the capacity or will to do so. It is simply unnecessary to use section 22 as a means of screening out or preventing frivolous or vexatious lawsuits. There is already sufficient protection from such lawsuits in the common law such that adding new ones only discourages the bringing of meritorious claims.

Finally, the conditions precedent in Bill C-74 are unnecessary since the environmental protection action proposed in the bill only applies to offenses arising from contraventions to the bill, not numerous other statutes as is the case under the Ontario Environmental Bill of Rights. Hence, its scope of application is already quite narrow and defined.

As such, we recommend that the conditions precedent in section 22 be eliminated.

In the alternative, if these conditions precedent are to be retained in section C-74, then the bill must be amended to establish an "emergency exception" to the conditions precedent.

In many cases, offenses under Bill C-74 will be occurring and causing harm to the environment. The process of filing a request for an investigation and waiting for a response will mean that valuable time will be lost and that the potential of further harm to the environment will be almost inevitable.

We strongly recommend that a similar provision be included in Bill C-74.

Recommendation 4

It is recommended that section 22 of Bill C-74 be amended in order to:

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[18] For a further discussion of citizen suits in the U.S., see: Paul Muldoon, Cross Border Litigation: Environmental Rights in the Great Lakes Ecosystem (Toronto: Carswell, 1986).

delete the conditions precedent in section 22(1) for commencing an environmental protection action; or

in the alternative, create an emergency exception to the conditions precedent in section 60(1) for commencing an environmental protection actions.

Section 22 (2) - Nature of the Environmental Protection Action

(a) Need for an Investigation and "Significant Harm"

Section 22(2) of Bill C-74 states that the new right of action is only available for offenses that: (1) were alleged in the plaintiff's request for an investigation; and (2) caused or will cause significant harm to the environment. In our view, these conditions are unnecessary. First, as argued above, investigation requests should not serve as a condition precedent for Bill-74's citizen suit provisions.

Second, Bill C-74 should not provide that the action can only be brought where the offence has "caused significant harm to the environment." In our view, any harm to the environment should be sufficient to trigger an enforcement action of the statute or its regulation. By definition, any harm to the environment is significant.

It appears that the drafters of Bill C-74 borrowed from section 84(1) of Ontario's Environmental Bill of Rights (although the definition of harm in the Environmental Bill of Rights in section 1(1) is not included in Bill C-74). It must be clearly recognized that the requirement for "significant harm" was incorporated into section 84 of the EBR because that citizen suit provision potentially applies to **all** contraventions of prescribed environmental laws, regulations and approvals in Ontario. Bill C-74, on the other hand, is limited to offences created only within the context of the bill. Moreover, the fact that an offence is created to deter conduct assumes that such offences are by their very nature significant and worthy of enforcement. Further, the inclusion of the need for "significant harm" will lead to intractable debates about what types harm are "significant" and what types are not "significant." Hence, it is not necessary or appropriate to impose the concept of "significant harm" into section 22(2) of Bill C-74.

Recommendation 5

Bill C-74 should be amended such that section 22(2)(a) (pertaining to the need for an investigation) and (b) (pertaining to the need for significant harm) be deleted. Section 22(2) should read as stated in Recommendation 6 below.

(b) The Need to Expand Action for Imminent Contravention of Bill C-74

Perhaps the most serious flaw of the environmental protection action provisions in Bill C-74 relates the absence of the ability to bring an environmental protection action in cases of where there is "imminent" contravention of the bill as opposed where the contravention has already occurred. The effect of the present provision is to ensure that these provisions remain totally reactive in nature and ensuring that preventive action, that is, action attempting to prevent violations and harm to the environment, is impossible.

It should be recalled that virtually all citizen suit provisions have the preventive aspect to them. The Ontario Environmental Bill of Rights, in section 84, states that:

> Where a person has contravened or **will imminently contravene** an Act, regulation or instrument prescribed for the purposes of Part V and the actual or **imminent** contravention has caused or **will imminently cause** significant harm to a public resource of Ontario, any person resident in Ontario may bring an action against the person in the court in respect of the harm and is entitled to judgment if successful. [emphasis added]

Similarly, in Bill C-65, the Endangered Species Act, there is also provision for preventative actions. Section 60(2) states that "the action may be brought in any court of competent jurisdiction against a person who committed, or **has done anything directed towards the commission of**, ..." [emphasis added]

The absence of the ability to bring an action except where there may be imminent contravention of the statute severely limits the utility of the provisions and reduces the opportunity to protect the Canadian environment. A classic example of where this provision would be useful is where a member of the public became aware that a large shipment of a banned substance is about to be transported to Canada. Rather than waiting for that shipment to arrive and dealing with the consequences, it would be far more expedient to simply deal with that the imminent violation before the shipment occurs.

> Recommendation 6
>
> It is recommended that section 22(2) be amended to include the opportunity to bring an action where there may be imminent contravention of the Act and should include wording such as:
>
> > 22 (2) The action may be brought in any court of competent jurisdiction against a person who committed an offence or who will imminently commit an offence under this Act.

Section 22(3) - Relief that may be Claimed

Section 22(3) outlines the types of relief that may be claimed with respect to the environmental protection action initiated under section 22(1). Section 22(1)(e) provides the authority to the court to grant orders "but not including damages." We support the prohibition against awarding damages to the plaintiffs in such actions. However, it is submitted that the court should be empowered to order the defendant to pay compensation against the responsible minister in two circumstances: (1) where the harm to the environment cannot be restored or rehabilitated; and (2) the responsible minister has taken steps and incurred costs to address the harm to the environment.

In these instances, compensation paid to the minister should be expressly used for other environmental protection and education purposes, such as public outreach programs. In effect, the broad powers given to the criminal court in Part X should also be given to the court in the civil context.

Recommendation 7

Section 22(3) should be amended to allow for the awarding of damages to the responsible ministers in cases where the harm to the environment cannot be restored or rehabilitated or where the minister has incurred costs to address the harm.

Section 24 - Remedial Conduct

Section 24 states that an environmental protection action may not be brought if the alleged conduct was taken "to correct or mitigate harm or the risk of harm to the environment or to human, animal or plant life or health...." Section 24 (b) states that no action can procede if the alleged conduct was "reasonable and consistent with public safety." In our view, these sections are too broad and are in need of clarification. Do they mean that any emission from a pollution control device would be exempted since it is designed to "mitigate harm"? Does the dumping of waste in the ocean qualify for this exemption since it will reduce harm to human health? What are the parameters of reasonableness? What direction does a court have to come to this conclusion? In our view, the common law defence of necessity would probably protect any problem this defence was attempting to deal with at any rate. It is submitted that the phrases in these sections are so overbroad that they are devoid of any precise content, definition, predictability or certainty. These sections will create an enormous amount of debate and protracted litigation in attempting to determine the meaning, scope and effect of these phases, much to the detriment of the public interest plaintiffs.

If this section is to remain in Bill C-74, it must be clarified and made more limited.

Recommendation 8

Section 24 (a) (i) and (b) should be deleted. If they do remain, section 24 (a) (i) must be clarified such that it can only be used in genuine cases, established on a balance of probabilities by the defendant, that the was necessary to protect the environment from further risk. In no circumstances should section 24 (b) remain in Bill C-74.

Section 30 - Defences

Section 30 of Bill C-74 provides for the defences of due diligence, statutory authorization, and the defence of officially induced mistake of law. It is submitted that the only defence needed is that of statutory authorization. The defence of due diligence is well established in common law for statutory offenses and simply does not have to be codified into legislation. In fact, a strong argument could be made that, because the defence is so well established in common law, that the articulation of it in Bill C-74 will send signal to the courts that there is a legislative intention to create a new, different defence of due diligence or that there was some intent to change the common law principles. Otherwise, why would Parliament include the defence unless there was some intent for change?

Further, we strongly recommend that section 30(1)(d), the defence of officially induced mistake of law, also be deleted. This is a common law defence and will contribute to substantial judicial confusion as to why this defence was put in Bill C-74, as well as to the scope and extent of the defence. In the long run, the inclusion of this defence will pose more difficulties and uncertainties with the law than provide any benefit for either the plaintiff or the defendant.

Recommendation 9

It is recommended that sections 30 (1) (a), the defence of due diligence and section 30 (1) (d), the defence of officially induced mistake of law, be deleted from section 30 of Bill C-74.

Section 31 - Security for Costs and Undertakings for Damages

Section 31 of Bill C-74 gives the court discretion as to whether to dispense with an undertaking to pay damages cause by an interlocutory order in an environmental protection action.

It is submitted that this section is not necessary since the court always has discretion with respect to security for costs and undertakings for damages. Hence, this section should be deleted. If this amendment is not adopted, then it is submitted that section 31 should be amended to either prohibit motions for security for costs, or

alternatively, limit security for costs to $500.00. Public interest plaintiffs already face a number of legal and fiscal constraints in commencing an environmental protection action. In our view, these plaintiffs should not be burdened with unnecessary economic barriers that may shield unlawful conduct from judicial scrutiny if plaintiffs are unable to pay large amounts of money into court in order to proceed with their litigation. CELA notes that a similar limitation exists in section 19.4 of Quebec's Environmental Quality Act.

Recommendation 11

It is recommended that section 31 be deleted. In the alternative, if there is need for provisions with respect to undertakings for damages, the limit of the undertaking be $500.00.

Section 31 - Stay of Proceeding

Section 31 allows the court to stay an action if it is in the public interest to do so. Factors that may be considered are outlined in section 31(2). It is submitted that this section is not needed. The public interest plaintiff takes the risk of commencing the action and should not have it stayed over. How are the factors in section 32(2) to be assessed? What evidence is needed? For example, in section 32(2)(a), does the fact that economic factors can be considered mean that industry will flood the court with data on the economic costs of the offence? Will the court have to weigh the economics of that facility with the merits of the action?

In the end, this section will create more uncertainty for all sides and provide a futile ground for delay and litigation.

Recommendation 12

Section 31 pertaining to the stay of proceeding should be deleted.

Sections 38 - Costs

Section 38 gives the court discretion whether to award costs in the environmental protection action. In both sections 31 and 38, the criteria for the exercise of discretion is the same, namely, whether the case raises any "special circumstances, including whether the action is a test case or raises a novel point of law.

Generally, these factors are traditional considerations that may be taken into account by the court, regardless of whether these considerations are incorporated into Bill C-74. Therefore, section 38 of the bill does not prohibit, on its face, an adverse cost award against a plaintiff bringing an environmental protection action. This lingering uncertainty over cost exposure will undoubtedly inhibit may persons from

commencing an environmental protection action, which, in effect, defeats the whole purpose of creating a citizen suit provision in Bill C-74.

It is submitted that Bill C-74 should be redrafted to build in a general presumption against cost awards in such actions, unless the court finds special reasons to award costs. Such an amendment would be consistent with recent revisions to the Federal Court Rules, which now provide that costs will not normally be awarded in judicial review applications.

Recommendation 13

Section 38 of Bill C-74 should be amended as follows:

> Costs will not be awarded to or against any party in any environmental protection action, unless the court finds that there are special reasons to make a cost award.

(EXCERPT)

Submissions of the Canadian Environmental Law Association To the Standing Committee on Environment and Sustainable Development Regarding (*Canada Endangered Species Protection Act*) **BILL C-65**

Prepared by:
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December 10, 1996

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- **issue binding administrative orders (i.e. stop orders) against any individual or corporation who may be contravening the Act, regulations, or emergency orders; and**

- **seek injunctive relief in civil courts in respect of actual or imminent contraventions of the Act, regulations, or emergency orders.**

3.8 Endangered Species Protection Actions

(a) General

Subject to certain qualifications and conditions precedent, sections 60 to 76 of Bill C-65 enable members of the public to go the civil courts to seek redress for violations under Bill C-65. Known as an "endangered species protection action", this new right of action serves three important purposes: (1) to secure compliance with the Bill; (2) to facilitate public access to the courts in instances involving non-compliance; and (3) to enhance governmental accountability for its enforcement and compliance activities under Bill C-65.

It is noteworthy that the federal government has committed to include a similar "citizen suit" provision in the Canadian Environmental Protection Act (CEPA)[37] after the Standing Committee on Environment and Sustainable Development had recommended that this reform be incorporated into CEPA.[38] These reforms are consistent with the recent trend at the provincial level to grant citizens various civil rights to go to court to protect the environment.[39]

CELA fully supports the creation of the new right of action under Bill C-65, but submits that there are a number of amendments that are necessary to improve the effectiveness and availability of endangered species protection actions. The main problem with Bill C-65's citizen suit provision is that it needlessly incorporates too many of the qualifications and restrictions found

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[37] See CEPA Review: The Government Response (1995), page 27, Recommendation 3.9.

[38] Standing Committee on Environment and Sustainable Development, It's About Our Health! Towards Pollution Prevention - CEPA Revisited (June 1995), page 228, Recommendation 119.

[39] Generally, see P. Muldoon and R. Lindgren, The Environmental Bill of Rights: A Practical Guide (Emond Montgomery, 1995), Chapter 1; P. Muldoon and J. Swaigen, "Environmental Bill of Rights", in Estrin and Swaigen (eds.), Environment on Trial (Emond Montgomery, 1993); and M. Valiante and P. Muldoon, "A Foot in the Door: A Survey of Recent Trends in Access to Environmental Justice", in Kennett (ed.), Law and Process in Environmental Management (Canadian Institute of Resources Law, 1993), pp.142-69.

in Part VI of Ontario's EBR.[40] At the same time, Bill C-65 omits a key feature of the EBR's citizen suit provision, viz. the ability of citizens to go immediately to court in emergency circumstances without filing the prescribed investigation request with government officials. In CELA's view, these and other shortcomings must be addressed through several amendments to Bill C-65's citizen suit provision.

(b) Conditions Precedent for Suing under Bill C-65

Section 60 of Bill C-65 establishes two conditions precedent before a person can commence an endangered species protection action: (1) the person must have applied for an investigation pursuant to section 56 of Bill C-65; and (2) the responsible minister has not responded to the investigation request in a reasonable or timely manner.[41] These conditions precedent appear to have been lifted directly from section 84(2) of Ontario's EBR.

In contrast, it must be noted that the citizen suit provisions in American environmental statutes do not include these conditions precedent. Instead, these statutes confer broad public rights to seek civil relief in respect of environmental offences under federal and state law.[42] Similarly, the public right of action under section 19.1 of Quebec's Environment Quality Act does not require the filing of an investigation request before an action can be commenced. The Yukon and Northwest Territories environmental rights statutes also permit citizens to go directly to court in civil enforcement actions without pre-filing an investigation request or waiting for a government response.[43]

The American and Canadian citizen suit provisions have existed for a number of years, and the litigation experience under these statutes indicates that only serious and substantive cases are brought forward. In other words, it does not seem necessary to impose conditions precedent (i.e. filing investigation requests/waiting for a government response) in order to screen out or prevent frivolous or vexatious lawsuits. As noted above, the investigation request under Bill C-65 is an important tool for triggering governmental enforcement activity, but it is inappropriate to use investigation requests/governmental response as a barrier to public interest litigation intended to protect endangered species or their habitat.

In Ontario, where these conditions precedent have been superimposed upon the EBR cause of action, not a single citizen suit has been commenced under the EBR since its enactment in 1993.

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[40] S.O. 1993, c.28.

[41] Bill C-65, section 60(1)(a) to (d).

[42] Generally, see P. Muldoon, Cross-Border Litigation (Carswell, 1986).

[43] See P. Muldoon and R. Lindgren, The Environmental Bill of Rights: A Practical Guide (Emond Montgomery, 1995), pp.22-25.

This complete lack of litigation activity suggests that the EBR's numerous qualifications and restrictions have made the citizen suit provision somewhat illusory. For these reasons, CELA strongly recommends that Bill C-65 be amended so as to delete the requirement that prospective plaintiffs be required to file an investigation request and wait for a government response before going to court.

In the alternative, if these conditions precedent are to be retained in Bill C-65, then the Bill must be amended to establish an "emergency exception" to the conditions precedent. It is indeed curious that when the drafters of Bill C-65 lifted section 84(2) from Ontario's EBR, they failed to lift from the EBR an important exception to these conditions precedent. In particular, Ontario's EBR specifically permits citizens to skip the conditions precedent "where the delay involved in complying with them would result in significant harm or risk of harm to a public resource".[44] In CELA's view, such an "emergency exception" is particularly appropriate for an endangered species protection action, and should therefore be incorporated into Bill C-65.

It should be recalled that the principal purpose of an endangered species protection action is to prevent, enjoin, or remediate ongoing or imminent harm to species at risk or their critical habitat. Where, for example, critical habitat is about to be unlawfully destroyed, it makes little sense to make prospective plaintiffs wait two or three months (or more) for a government response to an investigation request before the plaintiff can commence an action to seek interlocutory injunctive relief.

(c) Nature of the Endangered Species Protection Action

Section 60(2) suggests that the new right of action is only available for offences that: (1) were alleged in the plaintiff's investigation request; and (2) caused or will cause significant harm to a listed endangered species or threatened species or its critical habitat. In CELA's view, neither constraint is warranted. First, as described above, investigation requests should not serve as a condition precedent for Bill C-65's citizen suit provision. Second, Bill C-65 should be amended to delete the requirement that "significant harm" be done to a species or its critical habitat. In CELA's view, any harm to a species or its habitat in contravention of Bill C-65 or its regulations is, by definition, significant.

In addition, the phrase "significant harm" appears to have borrowed from section 84(1) of Ontario's EBR (although the drafters of Bill C-65 declined to include the Ontario definition of "harm" in section 1(1) of the EBR). It must be recalled that the requirement for "significant harm" was incorporated into section 84 of the EBR because that citizen suit provision potentially applies to **all** contraventions of prescribed environmental laws, regulations and approvals in

[44] EBR, section 84(6).

Ontario.[45] On the other hand, the Bill C-65 citizen suit is limited to the serious offences under the Bill and its regulations, which, by definition, are highly significant and involve an element of harm. Thus, it does not seem necessary or appropriate to superimpose the concept of "significant harm" into section 60 of Bill C-65. Moreover, the deletion of this concept from section 60 will neatly avoid endless and intractable debates about what types of harm are "significant" and what types are not "significant".

For the foregoing reasons, CELA submits that the Bill C-65 citizen suit provision should be reframed to focus on actual or imminent offences under the prohibition against takings (section 31), the prohibition against harm to residence (section 32), the regulations (section 33), and emergency orders (section 34). The action should be available to any person, regardless of whether an investigation request has been filed. CELA's suggested re-wording for the Bill C-65 cause of action is as follows:

> **Where a person has contravened, or will imminently contravene,**
>
> **(a) section 31;**
>
> **(b) section 32;**
>
> **(c) a regulation enacted under section 33; or**
>
> **(d) an emergency order under section 34,**
>
> **any person resident in Canada may bring an action in a court of competent jurisdiction against the person in respect of the actual or imminent contravention.**

(d) Relief Available in an Endangered Species Protection Action

In general, CELA supports the types of judicial relief available under section 60(3) of Bill C-65, such as injunctive orders, declaratory orders, and restoration orders. CELA also supports the prohibition against awarding damages to the plaintiffs in such actions. However, CELA suggests that the court should be empowered to order the defendant to pay compensation to the responsible Minister in two circumstances: (1) where harm to a species' residence or critical habitat cannot be restored or rehabilitated; or (2) the responsible Minister has taken steps (and incurred costs) to address the harm to a species or its habitat.

In such instances, any compensation payable to the Minister should be expressly used for the

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[45] Such as conditions of approval that require proponents to file monitoring reports. If this requirement is contravened by a proponent, it is unlikely, in most instances, to directly result in environmental harm, which calls into question the need for a citizen suit to address this "paper" offence.

protection of species at risk or their habitat, which could include funding site-specific remediation, endangered species research, public education programs, or recovery plans. CELA notes that under Bill C-65, the criminal court is empowered to make similar monetary orders against a person convicted of an offence under Bill C-65,[46] and CELA sees no reason why the civil court should not have the same power. CELA further notes that similar compensatory provisions exist in Ontario's EBR,[47] but suggests that unlike the EBR, the compensatory provisions under Bill C-65 should not be dependent upon the consent of the defendant.

(e) Defences to an Endangered Species Protection Action

Section 62 of Bill C-65 prohibits an endangered species protection action in certain circumstances, such as where the impugned conduct was taken to protect species at risk or its habitat. CELA has no objection to this specific limitation, on the understanding that the defendant, on a balance of probabilities, will have to satisfy the court that the unlawful conduct was actually necessary to protect a species or its habitat.

However, CELA strongly objects to the other limitations set out in section 62, which would prohibit the civil action where the impugned conduct was alleged undertaken to "protect the environment", "national security", safety and health, including plant and animal health", and "reasonable and consistent with public safety". These ambiguous phrases are so overbroad that they are devoid of any precise content, definition, predictability, or certainty. Moreover, most of these "quasi-defences" are not known in law at the present time, which means that considerable judicial resources will inevitably be spent in trying to determine the meaning, scope and effect of these phrases.

In CELA's view, only common law defences (i.e. statutory authority) should be available in an endangered species protection action. However, CELA would have no objection if section 62 were amended to provide that a statutory authorization issued under section 46 of Bill C-65 was a defence available in an endangered species protection action. CELA was pleased to see that the drafters of Bill C-65 wisely chose to avoid the wholly inappropriate "mistake of law" defence prescribed in section 85(3) of Ontario's EBR.

(f) Costs, Security for Costs, and Undertakings for Damages

Section 74 of Bill C-65 requires the court to consider various factors when deciding which party, if any, should pay the costs of the endangered species protection action. Again, this provision

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[46] Bill C-65, section 84(d).

[47] EBR, sections 95(3) and (8).

appears to have been lifted directly out of section 100 of Ontario's EBR, and it merely directs the court to consider whether the action involved "special circumstances", a "test case" or a "novel point of law". Generally, these factors are traditional cost considerations that may be taken into account by the court, regardless of whether these considerations are incorporated into Bill C-65. Therefore, section 74, on its face, does not prohibit an adverse cost award against a plaintiff bringing an endangered species protection action. This lingering uncertainty over cost exposure will undoubtedly inhibit many persons from commencing an endangered species protection action, which, in effect, defeats the whole purpose of creating a citizen suit provision in Bill C-65.

Having regard for the public interest nature of an endangered species protection action, CELA submits that section 74 should be redrafted to build in a general presumption against cost awards in such actions, unless the court finds special reasons to award costs. Such an amendment would be consistent with recent revisions to the Federal Court Rules, which now provide that costs will not normally be awarded in judicial review applications. CELA's suggested rewording for section 74 of Bill C-65 is as follows:

> **Costs will not be awarded to or against any party in an endangered species protection action, unless the court finds that there are special reasons to make a cost award.**

If this amendment is adopted, then there is little need to address the issue of whether defendants should be able to seek security for costs against public interest plaintiffs in an endangered species protection action. If this amendment is not adopted, then CELA submits that section 74 should be amended to either prohibit motions for security for costs, or alternatively, limit security for costs to $500.00. Public interest plaintiffs already face a number of legal and fiscal constraints in commencing an endangered species protection action. In CELA's view, these plaintiffs should not be burdened with unnecessary economic barriers that may shield unlawful conduct from judicial scrutiny if plaintiffs are unable to pay large amounts of money into court in order to proceed with their litigation.

CELA further submits that a similar limitation should be placed on the plaintiff's undertaking to pay damages pursuant to section 68 of Bill C-65. CELA notes that a similar limitation exists in section 19.4 of Quebec's Environment Quality Act.

(g) Civil Liability for Damages Arising from Contraventions

Sections 76(1) and (2) of Bill C-65 provide that the endangered species protection action does not affect any other legal remedy that may be available in relation to the impugned conduct. CELA submits that section 76 should go one step further and create a new civil cause of action to permit persons to recover damages for loss or injury, or to be reimbursed for cleanup or restoration costs and expenses, arising from contraventions of Bill C-65. CELA notes that a

similar cause of action already exists in section 136 of CEPA, and there is a civil liability provision in the Fisheries Act that permits commercial fishermen to sue for loss of income resulting from the unlawful deposit of deleterious substances into water frequented by fish.[48] CELA suggests that Bill C-65's civil liability provision could be worded as follows:

> **Any person who has suffered loss or damage, or who has incurred cleanup, restoration, or preventative costs and expenses, resulting from a contravention of,**
>
> **(a) section 31;**
>
> **(b) section 32;**
>
> **(c) a regulation under section 33; or**
>
> **(d) an emergency order under section 34,**
>
> **may commence an action in a court of competent jurisdiction against the person responsible for the contravention, and if entitled to judgment, the person may be awarded:**
>
> **(a) an amount equal to the loss or damage proven to have been suffered by the person;**
>
> **(b) an amount equal to the costs and expenses proven to have been incurred by the person;**
>
> **(c) injunctive or declaratory relief;**
>
> **(d) costs; or**
>
> **(e) such further or other orders as may be appropriate.**

The imposition of civil liability arising from contraventions of Bill C-65 will not only assist affected persons in recovering compensation, but it should also provide a further incentive to persons, corporations and governments to comply with Bill C-65.

CELA RECOMMENDATION #30: **Section 60 of Bill C-65 should be amended in order to:**

- **delete the conditions precedent in section 60(1) for commencing an endangered species protection**

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[48] Fisheries Act, R.S.C. 1985, c.F-14, section 42(3).

action; or

- **in the alternative, create an emergency exception to the conditions precedent in section 60(1) for commencing an endangered species protection action;**

- **reword section 60(2) so that the endangered species protection action may be brought by any person in relation to actual or imminent offences under section 31, section 32, regulations under section 33, or emergency orders under section 34; and**

- **expand the list of remedies in section 60(3) to empower the court to order the defendant to pay monetary compensation to the responsible Minister where restoration or rehabilitation of harm resulting from the defendant's conduct is not possible, or where the responsible Minister has undertaken steps (and incurred costs) to address the harm arising from the defendant's conduct.**

CELA RECOMMENDATION #31: **Section 62 of Bill C-65 should be amended so as to delete references to "protect the environment", "national security", "safety and health, including plant and animal health", and "reasonable and consistent with public safety".**

CELA RECOMMENDATION #32: **Section 68 of Bill C-65 should be amended to limit a plaintiff's undertaking to pay damages to a maximum of $1,000.00.**

CELA RECOMMENDATION #33: **Section 74 of Bill C-65 should be amended to:**

- **provide that costs will not be awarded to or against any party in an endangered species protection action, unless the court finds that there are special reasons for making a cost award; or**

- **in the alternative, prohibit motions for security for costs in endangered species protection actions,**

or alternatively, limit security for costs to a maximum of $500.00.

CELA RECOMMENDATION #34:

Section 76 of Bill C-65 should be amended to include a new civil cause of action to permit persons to recover damages for loss or injury, or to recover cleanup, restoration, or preventative costs and expenses, resulting from contraventions of section 31, section 32, regulations under section 33, or emergency orders under section 34.

With these few, relatively straightforward amendments, public access to the courts under Bill C-65 will be significantly enhanced.

3.9 Offences, Punishment and Alternative Measures

Section 77(1) of Bill C-65 sets out the penalties for contraventions under the Bill. While the prescribed maximum fines appear impressive on paper, CELA notes that these penalties are actually lower than those established under other federal environmental statutes. For example, persons who harm fish habitat, or who deposit a deleterious substance into water frequented by fish, face maximum fines under section 40 of the Fisheries Act of $300,000 upon summary conviction, and $1,000,000 if convicted on an indictable basis. Similar maximum fines are found in sections 113 and 114 of CEPA.

In comparison, section 77(1) of Bill C-65 prescribes maximum fines of only $50,000 (persons) and $100,000 (corporations) for summary conviction offences, and maximum fines of $250,000 (persons) and $500,000 (corporations) for indictable offences. To ensure consistency and to enhance deterrence value, CELA submits that section 77(1) should be amended to make the penalty provisions at least equivalent to those found under the Fisheries Act and CEPA.

Indeed, in light of the gravity and significance of harming species at risk, it could be argued that contraventions of endangered species legislation should attract higher fines that those available under more general environmental statutes. For the same reason, consideration should be given to amending section 77(1) so as to prescribe substantial minimum fines (i.e. $25,000). Thus, potential offenders would know that if convicted, they will automatically receive the minimum fine, and they may, in fact, receive a higher fine ranging up to the maximum.

Subject to the foregoing comments about section 77(1), CELA generally supports the offence, punishment, and alternative measures provisions of Bill C-65. However, CELA recommends that section 84(b) be amended to include a reference to "residence or habitat" to allow the court to make remedial or preventative orders in relation to these matters if appropriate.

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