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The Environmental Management Framework Agreement - A Model for Dysfunctional Federalism?

An Analysis and Commentary

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Due to shortages of time and resources this analysis is perhaps not as complete as it might be. Any errors or omissions are, of course, the responsibility of the authors.

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PREFACE

This analysis is intended to provide an overview of the major implications of the draft Environmental Management Framework Agreement released by the CCME in October 1995. It builds on the March 1995 analysis developed by the Canadian Institute for Environmental Law and Policy and the Canadian Environmental Law Association of the draft EMFA and four Schedules released in December 1994. It does not attempt to analyze the contents of each provision of the proposed agreement. Nor does it propose amendments to the draft Agreement.

There are three reasons for our decision not to attempt to provide suggestions as to how the draft agreement might be improved. First, the three month public comment period provided by the CCME to respond to the Agreement, consisting of a Framework Agreement and Ten Schedules, was simply inadequate for a project of this scope and implications.

Secondly, no financial resources have been made available to support the development of independent analyses of the Agreement, despite its enormous potential effects on the protection of Canada's environment, and Canada's role on the international environmental stage.

Finally, the Agreement appeared to us to be so fundamentally flawed, that there was little point in attempting to propose specific amendments or adjustments. The purpose, rationale and approach taken to the CCME exercise require fundamental reconsideration.

There is a real need to find means of ensuring environmental protection in the context of reduced government resources. Indeed, many Canadians are concerned about the growing gaps in Canada's environmental protection system as a result of budget restraints at all levels. Unfortunately, the proposed "harmonization" agreement does little to address this problem.

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and

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Toronto, February 1996

EXECUTIVE SUMMARY

I. THE CCME HARMONIZATION PROJECT

The Canadian Council of Ministers of the Environment (CCME) is the major forum in Canada for discussion and joint action on environmental issues of national and international concern. Since November 1993, the CCME has focused on the harmonization of environmental management as its top priority. A Lead Representatives Committee (LRC), consisting of officials from the federal, provincial and territorial governments, released a draft Environmental Management Framework Agreement (EMFA) and four Schedules (Monitoring, Enforcement, International Affairs, and Environmental Assessment) for public comment on December 13, 1994.

The Agreement was originally scheduled to be "endorsed" by the federal, provincial and territorial ministers of the environment at the May 1995 meeting of the CCME, and signed at the October 1995 meeting. However, major disagreements emerged between the federal and provincial and territorial environment ministers at the May 1995 meeting over the direction of the initiative. As a result, there was no agreement to release the proposed Framework Agreement for public consultation.

Following the October 1995 CCME, meeting a new draft Framework Agreement and 10 Schedules (Monitoring, Compliance, International Affairs, Guidelines and Standards, Policies and Laws, Emergency Response, Education, Research and Development and Pollution Prevention) were released for public comment. The Environmental Assessment Schedule, which was contained in the December 1994 draft Agreement, was not released, and environmental assessment is stated by the federal government to be "off the table" for discussion as part of the CCME project.

Harmonization is an ambitious and sweeping project which proposes to orchestrate a new way to manage environmental protection in Canada. On January 21 and 22, 1996, the CCME held a workshop to hear stakeholder input on the draft EMFA. At the workshop it became apparent that the document is profoundly flawed. These flaws are illustrated by seven major cross-cutting issues in relation to the Agreement.

II. THE IMPLICATIONS OF THE AGREEMENT

1. Rational and Justification: The Agreement Proposes to Solve a Problem Which Doesn't Exist

The fundamental cross-cutting issue, and from which all others arise, is that the harmonization agreement sets out to "solve" a "problem" that has never been clearly

identified and, if identified as provincial/federal duplication and overlap, apparently does not exist to the extent or seriousness that the CCME suggests. This has been confirmed in numerous government and independent studies over the past three years. In a study completed this summer for the CCME, for example, KPMG Management Consulting concluded that "most overlap and duplication which existed has been addressed."

2. The Agreement is a Framework for the Devolution of Federal Environmental Roles and Responsibilities

The proposed agreement would delegate responsibility for the enforcement of federal environmental laws to the provinces, except on federal lands and at international borders. In light of the past track records of many provinces with the delegated enforcement of federal environmental law, and the likely absence of resource transfers from the federal government to the provinces, this seems likely to result in the *de facto* repeal of affected federal environmental law.

In addition, the Agreement proposes a process for the systematic review of federal legislation and regulations for "overlap" with provincial environmental requirements. The pulp and paper, mining, and petroleum refining sectors, which are among the largest sources of industrial pollution in Canada are targeted for early action under the proposed Agreement. Given the overall direction of the harmonization exercise, the likely result is the actual repeal of federal requirements which are concluded to "overlap" with provincial laws and regulations.

The proposed Agreement would also pre-empt the ability of the federal government to act on its own to protect the environment in the future. The development of national environmental policies and standards, Canada's positions in international environmental negotiations, and even educational materials on "national" environmental issues, such as air quality, would occur on the basis of agreement between the federal government and all twelve provinces and territories. In effect, the federal government would be unable to undertake any significant environmental action without the consent of the provinces and territories.

A strong federal role in the protection of Canada's environment is essential to ensuring that: Canada meets its international environmental obligations; national environmental issues are dealt with effectively; environmental protection is provided in areas of federal jurisdiction and of national concern and provincial incapacity; an adequate science base exists for environmental policy-making in Canada; and that all Canadians have a minimum level of environmental quality regardless of where they live in Canada.

4. The Agreement Proposes to Create a New Level of Government, which is Illegitimate, Unaccountable and Unworkable

Under the proposed Agreement, environmental issues of concern beyond federal lands would be dealt with through the "national" decision-making process established through the Agreement. Decision-making on "national" issues would occur on the basis of consensus among the thirteen Parties to the EMFA.

The political legitimacy of the establishment of this "national" approach to national environmental issues must be questioned. None of the governments involved in this project can be said to have an electoral mandate to pursue such an approach to national issues, or to participate in the creation of such a wide array of new "national" institutions and processes. The question of legitimacy is particularly serious for the federal government, which obtained its current mandate partially on the basis of commitments to strengthen the role of the federal government in the protection of Canada's environment.

Concerns over the issue of legitimacy are reinforced by the complete absence of any parliamentary, legislative or public accountability mechanisms for the institutions and processes created through the EMFA. The "national" level of government created by the EMFA would no have public mandate and be answerable to no electorate or legislature. In addition, representatives to the potential Parties appear, even at this late stage in the process, uncertain about the legal status of their obligations under the proposed Agreement.

The end result of thirteen different governments being required to reach consensus for action to be taken on "national" environmental issues will be either deadlock, or standards set at a level where they will not interfere with the interests of the most-objecting government, effectively leading to "lowest common denominator" outcomes. The only form of reformed federalism which such an approach seems likely to provide is dysfunctional federalism.

The same problems would apply to the development of Canada's positions on international environmental issues, and in the implementation of Canada's obligations under such international environmental agreements as the *Framework Convention on Climate Change* and the *North American Agreement on Environmental Cooperation*. The establishment of Canada's positions and the implementation of Canada's international commitments would require the agreement of all twelve provinces and territories.

5. The Agreement Fails to Address the Roles of Aboriginal People and First Nations Governments in the Management of Canada's Environment

The EMFA purports to construct a new environmental management framework for Canada. However, aboriginal people and First Nations governments have not been included in the development of the proposed "national" framework, and they are provided no role in the development of national policies and other environmental measures. This is particularly disturbing in light of the consideration that the governments of British Columbia and Ontario have stated their intention to deal with First Nations on a government-to-government basis.

6. The Agreement Fails to Address the Real Emerging Problems in Environmental Protection in Canada

The available research supports the conclusion that the "problem" of government duplication and overlap in environmental management in Canada is more rumoured than real. Yet the EMFA proposes to deal with this alleged problem through the dramatic step of devolving federal powers and responsibilities to the provinces and the "national" decision-making processes established by the Agreement. This approach is unlikely to result in better protection of Canadians' health or environment. At the same time, the Agreement fails to address the gaps in Canada's environmental protection system being caused by current and anticipated reductions in available resources for environmental protection at the federal, provincial and territorial levels.

III. WHY DID THE CCME HARMONIZATION EXERCISE FAIL?

There are a number of reasons for the failure of the CCME exercise to produce a result which would enhance environmental protection in Canada. The CCME made a fatal error in attempting to "solve" a problem which was not clearly identified or defined, and which may not actually be a problem at all. The resulting "solution in search of a problem" is dominated by the overriding political concerns of the potential provincial and territorial Parties to the Agreement.

The Agreement proposes a wholesale restructuring of almost every aspect of environmental management in Canada. However, virtually no supporting research was conducted to indicate where problems may lie or what those problems might be. Nor were effective mechanisms established for consultation with non-governmental stakeholders. The lack of appropriate external consultation structures deprived the drafters of the agreement of the benefit of the input, comments and suggestions of individuals and organizations dealing with problems in the field.

Ultimately, the effort to deal with the full range of environmental management activities at one time, on a very short time line, and without appropriate resources to support background research and proper public consultation processes was simply overambitious. It was impossible to complete effectively even with the best intentions and efforts of the officials involved.

VI. THE NEXT STEPS

There is a real need to find means of ensuring environmental protection in the context of reduced government resources. Indeed, many Canadians are concerned about the growing gaps in Canada's environmental protection system as a result of budget restraints at all levels. Unfortunately, the proposed "harmonization" agreement does little to address this problem.

Future efforts to provide for the more effective and efficient interface of federal, provincial, territorial, and First Nations environmental protection efforts should be conducted on realistic time lines, be supported by independent and sound empirical research, and provide appropriate and effective mechanisms for public consultation. A thorough review of current federal, provincial, territorial and First Nations roles, responsibilities and capabilities for the purpose of identifying essential needs and critical gaps would provide a good starting point for such an exercise.

The Environmental Management Framework Agreement - A Model for Dysfunctional Federalism?

An Analysis and Commentary

I. INTRODUCTION

1. The CCME Harmonization Project

The Canadian Council of Ministers of the Environment (CCME) is the major forum in Canada for discussion and joint action on environmental issues of national and international concern.[1] Since November 1993 the CCME has focused on the harmonization of environmental management as its top priority. A Lead Representatives Committee (LRC), consisting of officials from the federal, provincial and territorial governments, released the draft Environmental Management Framework Agreement (EMFA) and four Schedules (Monitoring, Enforcement, International Affairs, and Environmental Assessment) for public comment on December 13, 1994.

The Agreement was orginally scheduled to be "endorsed" by the federal, provincial and territorial Ministers of the Environment at the May 1995 meeting of the CCME and signed at the October 1995 meeting. However, major disagreements emerged between the federal and provincial and territorial environment ministers at the May 1995 meeting over the direction of the initiative.[2] In the result, there was no agreement to release the proposed agreement for public consultation.

Following the October 1995 CCME meeting a new draft Framework Agreement and 10 Schedules (Monitoring, Compliance, International Affairs, Guidelines and Standards, Policies and Laws, Emergency Response, Education, Research and Development and Pollution Prevention) were released for public comment. The Schedule on environmental assessment, which was contained in the December 1994 draft Agreement was not released, and environmental assessment is stated by the federal government to be "off the table" for discussion as part of the CCME project.

Harmonization is an ambitious project, sweeping in scope, which has proposed since its inception to orchestrate a whole new way to manage environmental protection in Canada.

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[1]This definition is taken directly from the CCME brochure.

[2].See "Harmonization Redux?," CIELAP Newsletter, Summer 1995.

"...a window of opportunity exists to undertake a fundamental review based upon cooperation, and a more effective definition of roles, responsibilities and capacity to act....It is important to note that a new environmental management regime for Canada is not about replacing parts or repairing bits and pieces. It is about designing and building a new vehicle designed to carry us into the next century."[3]

On January 21 and 22, 1996, the CCME held a workshop to hear stakeholder input on the draft EMFA. At the workshop it became apparent that the document is profoundly flawed and should not go forward. A number of cross-cutting issues were identified at the workshop that cast serious doubt on how the CCME could proceed with the proposed Agreement. These cross-cutting issues are discussed below.

The fundamental cross-cutting issue, the one that all the others arise from, is that the harmonization agreement sets out to "solve" a "problem" that has not been clearly identified and, if identified as provincial/federal duplication and overlap, apparently does not exist to the extent or seriousness that the CCME proposes. This issue raises serious questions about what, in fact, the Harmonization Agreement is genuinely about and whether the Agreement would do anything at all to improve environmental protection in Canada.[4]

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[3] CCME, Rationalizing the Management Regime for the Environment: Purpose, Objectives and Principles (Winnipeg: CCME, undated) -- hereafter referred to as the Purposes Document, at 3.

[4] To shed some light on what "duplication and overlap" really means in the context of Harmonization, it should be noted that the dual capacity for enforcement of laws by governments in a federal state have been an issue in Canada since at least 1922. See, for example, *Report of a Committee of the Honourable the Executive Council, dated and approved by the Lieutenant Governor on the 18th of February, 1922 concerning the administration of the Fisheries in the tidal and navigable waters of Quebec that are accessible by way of navigation from the sea* (O.C. 307). Bretton and Scott wrote in 1980 that federal forms of government are often charged as being inefficient. The authors conclude that "federal forms of government are to be preferred to unitary forms `because the inherent competition" implies the existence of alternatives. This is widely recognized, and often criticized, as involving duplication and overlap; but those who fault federalism for competitiveness and duplication fault it for its main virtue." Cited in Peter N. Nemetz, "The Fisheries Act and federal-provincial environmental regulation: duplication or complementarity?" 29 Canadian Public Administration No. 3 (Fall 1986) 401-424 at 415-416.

2. Cross-Cutting Issue #1: Justification

In an area where "sound science" is becoming increasingly prominent, it is peculiar that little or no science was applied to identifying and quantifying the problems Harmonization was supposed to solve. In setting out the justification for Harmonization, the CCME Purposes document identifies three "fundamental issues in the Canadian political context." They are:

1) The elimination of duplication and overlap in federal/provincial/territorial regulatory matters;
2) the harmonization of policies and programs; and
3) the need to re-define working relationships between orders of government, the private sector and the public.[5]

From the very outset, members of the environmental community challenged exactly how fundamental these issues were, particularly for the Canadian public. Beginning with a submission to the Standing Committee on the Environment and Sustainable Development regarding *CEPA* review, the Canadian Institute of Environmental Law and Policy expressed doubts about how detrimental to Canada's environmental management, and, indeed, how extensive, duplication and overlap actually was:

> "Given that there is very little federal environmental law to enforce, and very few people to enforce it, the repeated claims of "duplication" are mysterious. What, exactly, is being duplicated? Where, in a regulatory environment where the federal government acts on only three (of twenty-four) [CEPA] regulations, is there overlap?"[6]

Two reports have been prepared for the CCME with something like a response to these questions as their purpose. In 1994 the CSE Group prepared "Harmonization and the Federal *Fisheries Act*"[7] and in 1995 KPMG prepared "Resource Impacts Assessment

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[5] CCME, Purposes Document, at 1.

[6] Canadian Institute for Environmental Law And Policy, Reforming the *Canadian Environmental Protection Act*: A submission to the Standing Committee on Environment and Sustainable Development (Toronto: Canadian Institute for Environmental Law and Policy, September 1994), Appendix 1, at 18.

[7] The CSE Group, Harmonization and the Federal Fisheries Act: A Case Study for the Development of an Environmental Management Framework for Canada, March, 1994.

Study: Environmental Management Framework Agreement Study Report."[8] Although different in focus, and although the latter report was undertaken on a short time line and dealt with an early draft of the Agreement, both show that "duplication and overlap" is a synonym for "federal functionality in an area of provincial interest." In effect, eliminating duplication and overlap is primarily a process of limiting federal functionality in an area of provincial interst. If "duplication and overlap" really means the overlap and duplication of provincial and federal laws and enforcement activities, then it does not exist, or at least does not exist to the extent suggested by the CCME.

The CSE report addresses the "problem" of the pollution prevention regulations under the *Fisheries Act*, and the question of how they can be harmonized and integrated into the new environmental management framework. The only factual data presented to support the report's analysis and conclusions are brief mentions of two instances where provincial and federal decision-makers disagreed on proposals. The report sketches cases, one of a mining company and another of an industry using water resources to generate its own electricity. The mining company was given provincial approval, but was then prohibited by the federal government from proceeding because its plan to create a tailings pond would destroy what the federal government (but not the provincial government) considered to be crucial habitat. The electricity-generating industry was charged by the federal government for destroying fish habitat even though the province had approved the industry's proposal to lower water levels where whitefish spawned.[9]

The report cites these examples to indicate that the overlapping jurisdiction of the provincial and federal governments is a source of "irritation," "confusion," "interjurisdictional disputes" and "lack of integration in decision-making."[10] All of these claims may well be true, but that does not mean that these cases also exemplify inefficient or unnecessary duplication and overlap. The problem demonstrated by these examples is that the provincial governments did not adequately enquire into federal law legal requirements before approving the projects. It could probably be best characterized then as a communications problem. CSE's proposed solution only solves the communications problem to the extent that it obviates any requirement that the provinces ever again enquire as to the requirements of federal law:

> "most, if not all, of the current pollution prevention regulations under the *Fisheries Act* could either be replaced by equivalent or mirror provincial

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[8] KPMG Management Consulting Project Report: Resource Impacts Assessment Study, Environmental Management Framework Agreement Study Report (Ottawa, August 31, 1995).

[9] The CSE Group, at 11-12.

[10] Ibid.

legislation, or administrative agreements."[11]

This solution, and the report's elaboration on it -- "This would leave the federal role in pollution prevention to the more appropriate legislation, the *Canadian Environmental Protection Act*"[12] -- strongly indicates that "duplication and overlap" is being used in the Harmonization agreement and its supporting documents as an alternative phrase for "federal functionality in an area of provincial interest." The elimination of duplication and overlap, therefore, is not necessarily to increase the efficiency of government, or even to create a more effective environmental management framework for Canada. It is, much more simply, to limit the capacity of the federal government to "interfere" with provincial decision-making.

The study undertaken by KPMG supports the conclusion that the problem of duplication has been exaggerated out of all proportion to its genuine impact on government resources and the competitiveness of Canadian industry.[13] The study requested estimates of the resource impacts of harmonization on Environment Canada, Nova Scotia, Ontario, Alberta and the Northwest Territories. The information the several governments gathered in response to the study's requests showed that, for the most part, either duplication and overlap had been minimized through administrative agreements or, if there is overlap, only one government (the federal government) functions in the field, and, therefore, the situation cannot be properly described as overlap at all.[14]

Other telling information arises in the KPMG report. It has already been noted that the agreement itself is a failure as a solution to anything because it never adequately describes or defines the problems it is supposed to solve. The responses of the various participants to the study also indicate that they don't know what the agreement is

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[11] Ibid, at 18.

[12] Ibid.

[13] KPMG, Resource Impacts Assessment Study.

[14] The report notes: "Several jurisdictions concurred that, to a significant degree, the EMFA codifies practices that have evolved over recent years as governments have faced shrinking budgets and increased demands. Accordingly, most overlap and duplication which existed has been addressed by the negotiation of bilateral (federal/provincial) agreements or working relationships." Other jurisdictions, such as Nova Scotia, indicated that D&O still exists in some areas, notably under the pollution prevention provisions of the *Fisheries Act* which may mean only, as in the cases set out in the CSE report, that the requirements of the *Fisheries Act* interfere with provincially sponsored resource development activities.

supposed to solve, either.[15] The report notes that industry expectations of harmonization are markedly different from the actual scope and intent of the agreement.[16]

The KPMG report also shows that while the one thing the harmonization agreement is supposed to solve -- federal and provincial duplication and overlap -- does not exist, the agreement is *not* designed to solve *intra-governmental* duplication and overlap among federal and provincial departments ministries that, apparently, does exist. The CCME's dismissal of the report's findings -- "CCME does not believe the study provides senior decision-makers and stakeholders with sufficient information to assess the impacts of the October 1995 version of the EMFA"[17] -- does not lessen the impact and importance of these findings.

If there is an issue about intra-government-departmental efficiency to be dealt with (and there may be, but there would have to be some evidence to support the claim) the Harmonization Agreement does not address it. Finally, if there were any question prior to the KPMG report about how Harmonization would affect the roles and responsibilities of the federal and provincial governments, the report makes it clear that harmonization is about the complete devolution of the responsibility of implementing federal law to the provincial level.[18]

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[15] The report notes at page iv of the Executive Summary that: "For the jurisdictions in the study scope, based on the four schedules, the EMFA may not have a significant overall resource impact. There was not agreement, however, on whether the EMFA would minimize or eliminate overlap and duplication between Environment Canada and the provincial/territorial jurisdictions. Nova Scotia felt strongly that implementing the EMFA would help set clear and consistent rules for addressing overlap and duplication in Monitoring, Compliance and Environmental Assessments. Alberta was not optimistic that the EMFA would minimize or eliminate duplication and overlap, especially in the area of Environmental Assessments. Environment Canada maintained that the federal and provincial/territorial jurisdictions in several instances have already implemented formal agreements or informal agreements to address duplication."

[16] Page v of the Executive Summary reports that industry has a rather different set of expectations than the EMFA is apparently designed to meet: "[Industry] comments indicate that a concern is the significant overlap and duplication between the provincial governments and various departments in the federal government...In sum, their expectation for "harmonization" address a much broader scope than currently envisioned by the EMFA."

[17] KPMG, Resource Impacts Assessment Study, Preface.

[18] Government respondents all assumed that the effect of the Framework Agreement and four Schedules would be to transfer responsibility for implementing and enforcing federal environmental law to the provinces and territories, with the possible exception, for

The KPMG and CSE reports together support only one conclusion about the Harmonization Agreement: it is not about "efficiency"; it is about eliminating the role of the federal government in environmental management in Canada.

Rather than address this telling conclusion, the CCME has persevered against the chimera of duplication and overlap. Indeed it has gone so far as to take its second "fundamental issue" (to harmonize environmental measures) and turn it into a reiteration of its first. This was accomplished in the October 1995 draft of the EMFA which included a new definition of "harmonize":

> "'harmonize' means to adjust the environmental measures and policies of the Parties to minimize and, where possible, to *eliminate overlap and duplication*, taking into account such matters as the need for consistent, high levels of environmental protection, the diversity of Canada's ecosystems and the needs of Canadians." [emphasis added][19]

On the strength of this new definition, therefore, the EMFA reduced its fundamental issues to two: reduce or eliminate duplication and overlap, and re-define working relationships between orders of government, the private sector and the public.

The second objective was evidently further streamlined. Considerations of re-defining working relationships with the private sector and the public are not so apparent in the agreement as re-defining working relationships between the two orders of government. The EMFA is preoccupied with limiting the capacity of the federal government to act unilaterally in matters of environmental protection at the national and international level.

The events leading up to the CCME's 1993 announcement that harmonization would be its priority indicate a preoccupation on the part of some provinces with getting

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the time being, of the problematic *Fisheries Act.*

[19] It is interesting to compare this definition with the definition of "harmonization" in the Agreement on Internal Trade: "harmonization means to adjust environmental measures to minimize unnecessary differences between Parties without compromising the achievement of the legitimate objectives of each Party." It seems reasonable to assume that minimizing unnecessary differences between provincial regulations and standards would certainly contribute to greater clarity and simplicity especially for industry operating in more than one province in Canada. It is odd, therefore, that the EMFA definition apparently does not contemplate this as an objective of the agreement.

the federal government "out of the gumboots and back in the lab where they belong."[20] Interest in harmonization arose primarily from increased federal activity in environmental regulation, some of it chosen (*CEPA*), some of it thrust upon the federal government by the Supreme Court of Canada (environmental assessment).

> "Unlike CEPA, which provoked dissent primarily from the largest provinces, the provinces were united in their objections to the proposed *Canadian Environmental Assessment Act*...The first of the three recent phases of intergovernmental relations in the environmental field thus drew to a close with the passage of CEAA. During this period, federal-provincial relations were characterized by unilateralism, as both orders of government sought to respond to growing public demand for environmental protection. It bears emphasis, however, that it was *federal* unilateralism that was new and increasingly contentious, since the provinces had long operated with a significant degree of independence in the environmental field." [emphasis in original][21]

There is also evidence indicating that the primary force driving harmonization forward is the strong desire of some of the provinces to regain exclusive control of resource management within provincial boundaries.

> "As one provincial official explained in the context of federal-provincial disagreements over environmental assessment, 'The bottom line is not environmental protection here, but economic development.'"[22]

The CCME made a fatal error in its first estimation that harmonization could "solve" a problem that was not clearly identified or defined or, indeed, "solve" a problem that is not really a serious problem at all. As a "solution in search of a problem" the Harmonization agreement is dominated by the overriding political concerns of the Parties. The agreement proposes to "solve" duplication and overlap solely by engineering the wholesale withdrawal of the federal government from the environmental management arena. Any of the other stated purposes or goals of the agreement pale in the face of this overwhelming agenda.

Moreover, as a proposed wholesale restructuring of almost every aspect of environmental management in Canada with virtually no independent research to indicate

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[20] Kathryn Harrison, "Prospects for Intergovernmental Harmonization in Environmental Policy" in Douglas M. Brown and Janet Hiebert (eds.) Canada: State of the Federation, 1994 (Kingston: Institute of Intergovernmental Affairs, 1994) at 188.

[21] Ibid, at 184.

[22] Ibid, at 191.

where problems may lie or what the problems might be, the agreement's could only be based on the personal anecdotal reflections of the officials involved in its drafting. The resulting agreement is overwrought, opaque and baroquely complicated.

The EMFA is so awkwardly constructed that there is room for doubt that it can accomplish anything other than its political goal of limiting the federal government's role. In its effort to eliminate duplication and overlap, the agreement has the real potential to create "triplication and underlap" -- increasing the capacity for bureaucratic wrangling over environmental measures and starkly limiting the chances that anything will be done to protect the Canadian environment.

In sum, in order to "solve" the "problem" of federal unilateralism, the CCME has created a hugely problematic document which, if it has the capacity to do anything at all, will result in more inefficiency, less clarity, less accountability and less transparency in the protection of Canada's environment. It is clear that the initiative is profoundly flawed in its conception and execution, and should not proceed.

In order to solve the problem of federal unilateralism, the EMFA creates three new problems: the devolution of the federal role in environmental management in Canada; the creation of a new, "national" level of government; and the requirement that this new "national" level of government be bound to a decision-making mechanism that is unaccountable and unworkable. Other problems arise from the document's concern with constraining the federal government's capacity to function independently in the realm of environmental protection. These include the exclusion of First Nations as Parties to the Agreement, and the failure of the solutions proposed by the Agreement to address pressing matters of environmental protection in Canada.

3. Cross-Cutting Issue #2: Devolution of Federal Environmental Responsibilities

As noted above, the chief problem that the Agreement sets out to solve is the intrusion on provincial interests by the federal government. As described in detail in Part Two of this document, the agreement accomplishes this by severely restricting the capacity of the federal government to act unilaterally in its legitimate capacity to regulate environmental matters of national concern, to set national environmental standards, to enter into international environmental agreements or even develop educational materials on environmental issues of national interest.

At best, the agreement seeks to return the federal government to the minimal direct role in environmental matters which it played in the 1970s and early 1980s.[23] Rather than

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[23] "Federal provincial relations in the environmental field were characteristically cooperative from the early 1970s to the late 1980s. The mutually agreeable division of

providing a model of "new federalism," the Harmonization Agreement proposes a return to the "old" federalism, and in doing so, disregards our new understanding of the national, and indeed, global, nature of many environmental issues.

In many respects, the Harmonization Agreement is just one of a number of indicators of the political stresses on the Canadian federal state. There are growing pressures from many provinces for a significant devolution of federal authority and responsibilities. These pressures have been reinforced by the close result of the October 30, 1995 Quebec referendum. A number of provincial Premiers, particularly in Western Canada, have identified the environment as one of the fields which they regard as a priority for devolution.[24]

However, irrespective of Canada's constitutional politics, many serious environmental problems exist, and new ones are emerging. Industrial point sources of air pollution, for instance, remain a significant problem throughout Canada,[25] as does the pollution of surface and ground waters from agricultural activities and urban run-off. In addition, scientific discoveries regarding the hormonal and other effects of environmental contaminants suggests that more must be done with respect to toxic substances.[26] In a wider context, the implications for Canada of global environmental problems, such as climate change, the loss of biological diversity, and the environmental costs associated

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labour between federal and provincial governments that evolved during this period involved the federal government conducting research on environmental problems and control technologies, and setting a limited number of national standards in consultation with the provinces. It was the provinces that took the lead role in environmental protection: setting their own standards, monitoring source performance, and taking responsibility for enforcement of their own and federal regulations. Harmonious intergovernmental relations prevailed largely because the federal government deferred to provincial authority and declined to test the limits of its own jurisdiction. The resulting situation was one of `provincial control of environmental matters being exercised against a background of minimum federal interference'." Harrison, "Prospects for intergovernmental harmonization," at 180.

[24] David Roberts, "Premiers eye shopping list," The Globe and Mail, November 2, 1995.

[25] This was reflected in the First Report of the National Pollutant Release Inventory, released in June 1995. It is also reflected in the Canadian Chemical Producers 1994 Emissions Inventory - Reducing Emissions (Ottawa: CCPA, 1995), Table 1.1.

[26] See, for example, Wingspread Conference Consensus Statement (Wingspread Wisconsin, 1991). See also Environment Canada and EPA, State of the Great Lakes 1995, pg. 19.

with current rates of consumption of new material resources,[27] have barely begun to be addressed meaningfully.

Public opinion regarding the environment reflects the need for more, not less, action by governments. Although the status of the environment has declined as a top-of-mind issue, there continues to be evidence that members of the public place a very strong emphasis on the role of government in the protection of public goods, such as the environment, and the health and safety of citizens. Specifically regarding the environment, a public opinion survey published by the Environics Research Group and Synergystics Consulting in September 1995, for example, found that seventy-eight per cent of the respondents said that environmental regulations should be strictly enforced even in times of recession. In comparison, only twenty per cent suggested that enforcement should be made more "flexible" under such circumstances.[28]

In addition, in both public opinion research and more formal consultations on the appropriate environmental role of the federal government, Canadians have consistently expressed very strong support for substantial, or even expanded, federal environmental responsibilities.[29] In an April 1994 survey, for example, sixty-nine per cent indicated a belief that most attention and resources need to be focused at the international and national levels in order to make significant progress towards protecting the environment. By contrast only seven per cent responded that the primary focus should be at the provincial level.[30]

If the federal government no longer believes that it has the resources to actively enforce its own domestic environmental requirements, then it should consider alternatives to the simple delegation of this responsibility to the provinces. This is especially true in light of the track records of most of the provinces with the enforcement of the pollution

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[27] For a good overview of this issue see J.E. Young, The Next Efficiency Revolution: Creating a Sustainable Materials Economy (Washington, D.C.: World Watch Institute (Paper 121), 1995).

[28] The Environment Monitor - September 1995 (Toronto: Environics Research Group and Synergystics Consulting, 1995).

[29].On recent formal consultations see: House of Commons Standing Committee on the Environment, Environment and the Constitution, (Ottawa: House of Commons, March 1992); Renewal of Canada Conferences, Compendium of Reports - Division of Powers (Halifax, Nova Scotia, January 17-19, 1992); and House of Commons Standing Committee on Environment and Sustainable Development, Its About Our Health! Towards Pollution Prevention (Ottawa: House of Commons, June 1995), esp. Ch.1.

[30] Environics, The Environmental Monitor: 1993-94 Report (April 1994). 18 per cent of respondents indicated that the local level should be the primary focus.

prevention[31] and habitat protection requirements[32] of the *Fisheries Act.* There is also growing concern regarding the performance of a number of provinces under Administrative Agreements entered into through CEPA, particularly with respect to the CEPA pulp and paper effluent regulations.[33]

It is clear that the Canadian public continues to place a major emphasis on the role of governments in the protection of public goods, such as the environment, and the health and safety of their citizens. The role of the federal government in this context must be to act as the guarantor of a minimum standard of environmental quality to all Canadians, as a benefit of their citizenship of Canada. Canadians have consistently expressed their desire to the federal government to play such a role. It is the responsibility of the Government of Canada to respond to this expression of confidence and trust.

The federal government can fulfil this role through a number of means. It must be able to provide assistance to those provincial governments which lack the resources to ensure a minimum level of protection of their residents' environment. In addition, through the existence and active enforcement of federal environmental standards it can ensure that "pollution havens" do not develop among the provinces. This is essential in making certain that pollution in originating one province does not adversely affect the residents of other provinces, and that a "race to the bottom" dynamic does not emerge among the provinces as they attempt to attract investment.

The federal government must also retain responsibility and capacity for providing leadership and action on international and national environmental issues. These responsibilities should not be transferred to CCME, which lacks the legitimacy, accountability mechanisms, functional structures, and constitutional authority necessary to carry them out.

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[31] See, for example, Kenneth M.Dye, Report of the Auditor-General of Canada to the House of Commons (Ottawa: Minister of Supply and Services, 1990).

[32] See F.S.Gertler and Y.Corriveau ENGO Concerns and Policy Options Regarding the Administration and Delegation of Subsection 35(2) of the Fisheries Act, Proposed Section 35(3) and the Consequences for Federal Environmental Assessment (Montreal: Quebec Environmental Law Centre, December 1995).

[33] Regarding the Canada-Alberta Agreement the results of the 1994 *R.v. Proctor and Gamble Inc* prosecution must give rise to serious concern. See Environmental Law Centre News Brief, Vol.9, No.2, 1994. Regarding the Canada-British Columbia Agreement see S.Ochman, "Harmonization:" The Federal/Provincial Agreement on Effluent Controls (Whaletown, B.C: Reach for Unbleached, January 1996).

4. Cross-Cutting Issue #3: The EMFA Creates a New Level of Government

The Agreement also proposes to solve the problem of federal unilateralism by restricting the federal government to the status of one voice among thirteen when environmental matters are considered to be "national" in scope. Effectively, the federal government would cease to be the "national" government of Canada for the purposes of environmental management. Its environmental protection functions would be limited to federal lands and international boarders.

Environmental issues of concern across Canada beyond federal lands would be dealt with through the "national" decision-making processes established through the proposed agreement. The development of national environmental policies, standards, guidelines, and codes of practice, the development of Canada's position in international environmental negotiations, and even the development of educational materials on environmental issues of "national" concern would occur on the basis of agreement between the 13 Parties to the EMFA. The federal government would be unable to take independent initiatives in these areas.

The rationale for this approach appears to be as follows:

> "within the CCME, the provinces...are in a relatively strong position to resist federal proposals. The Council's long-established norm of consensual decision-making also strengthens the province's ability to constrain federal involvement, particularly in joint initiatives. These features help to explain why revitalization of the Council was consciously pursued by some provinces as a means to establish a credible alternative to federal policy making."[34]

The CCME proposal raises major issues with respect to the appropriate role of the federal government in the protection of Canada's environment, as the agreement provides a framework for the transfer of many of its national leadership and integration functions to the CCME. The federal government is entitled to a pre-eminent role in matters of national concern by virtue of it being the only government with a mandate to speak for all Canadians and for Canada on the international stage.

The political legitimacy of the establishment of this "national" approach to national environmental issues must also be questioned. None of the governments involved in this project can be said to have an electoral mandate to pursue such an approach to national issues, or to participate in the creation of such a wide array of new "national" institutions and process.

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[34] Harrison, "The Prospects for Intergovernmental Harmonization," at 192.

The question of legitimacy is particularly serious for the federal government, which obtained its current mandate partially on the basis of commitments to strengthen the role of the federal government in the protection of Canada's environment.[35] Concerns over the issue of legitimacy are reinforced by the complete absence of any parliamentary, legislative or public accountability mechanisms for the institutions and processes created through the EMFA. The "national" level of government created by the EMFA would no have public mandate and be answerable to no electorate or legislature.

The appropriateness of proposals to dealing with issues on a "national" basis without reference to the role of aboriginal people and First Nations governments must be challenged as well. This is especially disturbing in light of the commitments of the governments of British Columbia and Ontario to deal with First Nations on a government to government basis.[36]

5. Cross-Cutting Issue #4: The CCME "National" Model is Unaccountable and Unworkable

Although the Agreement states repeatedly that its processes will be transparent and accountable, the manner in which the agreement has proceeded, and the indeterminate nature of the obligations created by the agreement belie these stated goals.

i) The Process So Far

Although the CCME Purposes document declares that the "development of a new Management Framework for Canada's Environment is an historic undertaking"[37] very few people know about it, and it has been undertaken with astonishing speed.[38] The CCME did establish a National Advisory Group (NAG) of industry and ENGO stakeholders. However, as noted earlier, the process has, the most part, proceeded with little consideration to the comments and concerns of the members of the NAG.

When charged with the reform of planning law in Ontario, the Ontario Commission on Planning and Development Reform undertook extensive consultation with literally

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[35].Creating Opportunity: The Liberal Plan for Canada (Ottawa: Liberal Party of Canada, 1993), esp. Ch.4 ("Sustainable Development").

[36].Ontario, Statement of Political Relationship With First Nations, 1991.

[37] CCME Purposes document, at 9.

[38] In comparison with the Internal Trade Agreement took seven years to complete.

thousands of Ontario residents.[39] By comparison, the CCME has contented itself with two multi-stakeholder workshops over the three year life of the harmonization project. The consultation at these workshops has been inadequate. Rather than being invited into the process of developing the document, stakeholders have been put in the position of having to react to what the CCME proposed.

At the January 1996 workshop, the drafters evidently expected that the workshop would be about minor changes to the document. Instead, CCME and government representatives were confronted by stakeholders who questioned the whole purpose and rationale for the agreement. At the end of the workshop, no one in attendance, be they a representative of industry, First Nations, ENGOs, or the academic community, came forward to defend the agreement.

ii) Indeterminate Nature of the Obligations Under the Agreement

Statements at the CCME workshop indicated that even the representatives of the would-be parties to the agreement could not agree on its legal character, and whether the obligations and responsibilities of the parties would be binding or not. Given that the ramifications of the document are quite dissimilar depending on how its terms are interpreted, the fact that this has not been clearly set out even to the Parties casts serious doubt on any asserted claims of the agreement's "transparency" or "accountability."

The EMFA is an inter-governmental agreement (IGA); IGAs have a long, although not necessarily distinguished, history in the governance of Canada. Gertler has noted that one effect of governments making private deals between themselves regarding the implementation and enforcement of laws is that it "blurs the effective division of powers and renders ineffective existing mechanisms for legal control over government."[40] As already noted above, the EMFA certainly blurs the effective division of powers, and, if the Agreement truly is the tool box to create a new environmental framework for Canada, then it also appears to serve the purpose of rendering ineffective existing mechanisms for legal control over government.

Elements within the agreement and schedules suggest that the new "national" level of government, once established, will be able to do as much, or as little, as it

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[39] See generally, Commission On Planning and Development Reform in Ontario, New Planning for Ontario (Toronto: Queen's Printer for Ontario, 1993)

[40] Franklin Gertler, "Lost in (Inter-governmental) Space: Cooperative Federalism in Environmental Protection," in Steven A. Kennett ed., Law and Process in Environmental Management: Essays from the Sixth CIRL Conference on Natural Resources. (Calgary: Canadian Institute of Resources Law, 1993) at 255.

chooses. There are no provisions for public review of the inaction of the Parties, and only optional provisions for public participation at late stages in the process should the parties decide to implement a programme, guideline or other environmental measure.[41]

The actual legal status of the agreement is indeterminate. It has been described as an "agreement to agree,"[42] which reflects the co-operative, consensus-based decision-making the Agreement purports to embody. However, it is not clear what will occur when non-parties to the Agreement -- the Canadian public, the environmental community, industry, labour unions, health and safety organizations -- disagree with the consensus reached by the Parties. Most of the Schedules, and the Agreement itself, provide for review of the efficacy of the EMFA by the Parties after five years of coming into force. There are no provisions in the Agreement for any other interested parties to participate in the review. It is questionable how effective this self-scrutiny will be.

There is evident in the Agreement a very powerful inclination to "depoliticize" environmental regulation, an inclination that requires that decision-making and action be actively kept out of public view. The emphasis on rationalizing regulations based on sound science and by consensus indicates that the agreement tries to strip environmental law and policy-making clean of some of the political forces that have resulted in stricter environmental laws in some Canadian jurisdictions.[43] It is true that political, and economic, conditions can result (and have resulted) in a vacillating emphasis on environmental protection. However, one would hope that there would be other options available to decision-makers to coordinate and harmonize government efforts to protect the environment than to create a shadow-level of government, unknown to most of the Canadian public, and unaccountable to any constituent save the other Parties to the agreement.

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[41] The Guidelines, Objectives and Standards Schedule, for example, provides that there "may" be public consultation at the stage of implementation strategy -- that is, after issues have been identified and priorities have already been set, after protocols have already been developed and the guidelines have already been developed, reviewed and *approved*.

[42] Confidential interview.

[43] See Kathryn Harrison, "Prospects for Intergovernmental Harmonization in Environmental Policy" at 190-191: "One would anticipate a shift in the relative influence of interest groups advocating and opposing environmental controls in response to declining salience of environmental issues. During peak periods, governments should be more responsive to environmental groups, which they perceive to speak for the broader public. Objections from regulated industries are likely to carry increasing weight, however, as the prominence of environmental issues declines, and they are replaced in the polls by "bread and butter" concerns like jobs and the economy....It is noteworthy that governments were less receptive to those same concerns when overlapping statutes and regulations were being promulgated at the height of public attention to environmental issues."

(iii) Unworkable Decision-making Mechanisms

The only check the EMFA sets up to counterbalance the unaccountable powers of Canada's new "national" level of government, is the decision-making mechanism which will bind the parties in negotiations for potentially interminable spans of time and could make sure that absolutely nothing is accomplished under the EMFA.

As noted above, the Parties are apparently not legally required by the Agreement to actually accomplish any of the goals or objectives it sets out. This may be just as well, as the consensus-based decision-making required by the Agreement does not appear to lend itself to action. One the one hand, there is a common-sense appeal to the idea that all the provinces and territories and the federal government can sit down and agree among themselves on what, for example, should be Canada's CO_2 emissions targets. On the other hand, the consensus requirement gives every Party the capacity to veto any programme in the event that it competes with its interests. The example of CO_2 emissions targets is used deliberately. Provincial resistance (specifically, Alberta's resistance) to meeting the objectives Canada committed itself to when it signed the Climate Change Convention is well-known, and ongoing.[44]

The end result of thirteen different governments being forced to reach consensus on every environmental issue will be either deadlock, or standards set at a level where they will not interfere with the interests of the most-objecting government, a "lowest common denominator outcome." This concern is particularly acute in terms of the level of detail provided in the schedules and, in the absence of a sunset clause, the proposed perpetual nature of the agreement. These factors could easily combine to put environmental policy at the federal, "national," provincial and territorial level into a

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[44] See Robert Matas, "Canada Behind in Cutting Pollution," The Globe and Mail, Thursday, November 9, 1995, p. A14. and "Copps Finds Few Allies at Meeting" The Globe and Mail, Tuesday, November 21, 1995, p. A14.

Statements cited in the KPMG report provide further evidence that, for Alberta, the harmonization initiative -- particularly the International Agreements Schedule -- is the mechanism by which it will free itself, and its fossil fuel industry, from Canada's international commitments on Climate change. At page 28, the report states: "Where Canada is a partner in an international agreement, the impacts on the provinces need to be considered. For example, initiatives to cut consumption to reduce air emissions could ultimately result in increased costs for firms and loss of tax revenues for the province." This concern is echoed by the private sector industries interviewed for the study: "The [international] agreements may impose unrealistic expectations on industry that has to eventually comply with the requirements such as stabilized carbon dioxide emissions," at 38.

straightjacket.

6. Cross-Cutting Issue #5: The EMFA Ignores the Jurisdictional and Fiscal Capacities of the Parties

The Agreement's solution to federal unilateralism (the new, unconstitutional, "national" level of government) results in the transfer of federal responsibilities and roles to the provincial governments when neither level of government has individually the fiscal capacity to enact the proposed roles. Moreover, the Canadian Constitution does not provide the provinces with the jurisdictional capacity to undertake some of the responsibilities set out for them in the Agreement.

i) Jurisdictional Capacity

In its statement of the principles, objectives and goals of Harmonization the CCME said:

> "All mechanisms relating to the environmental management regime in Canada, up to but not including changes to the Constitution, are open for discussion."[45]

At the January workshop, government spokespeople also claimed that the agreement falls short of changing the constitution. However, the proof of these assertions is in the agreement itself, which shows that attempts to "almost but not quite" amend the Constitution should be approached with great caution.

There is no other way to understand the new "national" level of government created by the Agreement than as an effective change to the Constitution. Under the EMFA, individual provinces will have the power, by withholding their support of any proposed "national" policy, to determine what national environmental policy in Canada will be. This is unprecedented. As discussed in detail below, under the International Environmental Agreements Schedule, any province in Canada has a similar veto power regarding Canada's international obligations.

ii) Provincial Capacity to Assume Federal Environmental Roles and Responsibilities

As well as grant the provinces powers they have never had before, the EMFA, as already noted, grants some of the provinces and the territories responsibilities they have

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[45] CCME Purposes document, at 7.

never had before, and may be unable to fulfil. While the Purposes document indicates that "some jurisdictions may require support to develop their capabilities"[46], and while the EMFA indicates that resource transfers might be necessary for some provisions to come in force, the KPMG study indicates that the federal Department of the Environment (the chief source, it would be assumed, for resources to offset provincial or territorial fiscal incapacity) has no resources to share.[47]

The net result of the EMFA will be, then, the optional (at best) enforcement of federal law in the provinces that have the resources, and simple non-enforcement in the provinces and territories that do not. The likely end result would be the effective repeal of the affected federal environmental laws and regulations.

7. Cross Cutting Issue #6: The EMFA Does Not Include First Nations as Parties to the Agreement

The EMFA purports, "national" agreement to construct a new environmental management framework for Canada. However, aboriginal people and First Nations governments have not been included in the development "national" framework, and they are provided no role in the development of national policies and other environmental measures. First Nations bands are self-governing in many parts of Canada and have their own powers to exercise environmental management measures. First Nations representatives at the 1996 workshop repeated demands they already made to the CCME

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[46] Ibid.

[47] At page vi of the Executive Summary, the report notes: Environment Canada indicated that resources required for compliance activities (such as supporting and leading harmonization-related activities with the National Compliance Forum, the national implementation plan, and associated standards and practices) would be roughly double the current level. However, this is expected to be almost entirely offset by a reduction in the resources required for promoting compliance."

This estimate by Environment Canada for KPMG should also be compared with Environment Canada, Business Plan 1995/95-1997-98, June 1995, at 42: "Environment Canada will focus more on our strengths such as national environmental policies and standards, providing scientific knowledge and expertise for decision-making and managing transboundary issues. Programs and activities that can be better delivered by provincial, territorial or local governments will be rationalized or reduced as appropriate. There will be no devolution of federal responsibility or authority." There will neither be, apparently, any transfer of federal funds to assist the provinces and territories with their new responsibilities.

for an explanation as to why they were not involved in the development of the agreement. This is particularly disturbing in light of the consideration that the governments of British Columbia and Ontario have stated their intention to deal with First Nations on a government-to-government basis.

8. Cross-Cutting Issue #7: The Harmonization Agreement Does Not Solve the Chief Problems Confronting Canadians and the Environment

All the evidence that exists supports the conclusion that the "problem" of government duplication and overlap in environmental management in Canada is more rumoured than real. The evidence also supports the conclusion that the EMFA is really only about devolution of federal powers and responsibilities and surrender of national environmental management to the provinces.

There is no evidence, however, to support the conclusion that devolution and surrender will do anything to better protect the Canadian environment or the health of Canadians. On the contrary, growing evidence everywhere indicates that environmental issues are increasingly international, as well as national and local. The only government that has the jurisdiction to act on behalf of Canadians at the national and international level is the federal government.

The problem evident in January 1996 is not duplication and overlap of government activity in protecting the environment. Rather, the problem is how governments with shrinking resources and catastrophically de-funded departments of the environment will maintain effective levels of environmental protection and ensure that Canada's international environmental obligations are met.

The solution to this problem however, is not, as proposed by the Harmonization Agreement, a sprawling, "one size fits all" scheme that seeks primarily to put the federal government out of the business of environmental protection. The solution would be better conceived as a framework enabling cooperative action between federal and provincial governments, focused resource sharing and coordinated efforts based on the findings of sound empirical research.

II. DETAILED DISCUSSION OF THE FRAMEWORK AGREEMENT AND SCHEDULES

1. THE FRAMEWORK AGREEMENT

i) Introduction

As argued in detail in Part One, the EMFA purports to erect a new management structure as a solution to a problem that does not exist. It proposes to solve the problem of duplication and overlap by constructing a new "national" level of government, and by binding this new environmental shadow cabinet to a consensus-based decision-making mechanism. Although Article 9 of the EMFA establishes that nothing in the EMFA shall alter the authority of either government with respect to their legislative or other authorities, the decision-making structure erected by the EMFA casts genuine doubt on how that authority will fare under the agreement.

One of the problems with the Framework Agreement is that it is only a draft. Government representatives at the 1996 workshop could not answer some basic questions about the Agreement, such as whether or not it was legally binding (the majority answered no, it was not legally binding), or, if the agreement is not legally binding, why is the language so tortured, obscure and legalistic. It was suggested that some of the problems stakeholders had with the agreement arose from the fact that they did not "understand" it.

Evidently, given the wide range of responses to questions posed about the agreement at the January 1996 workshop, almost no one understands it. This key indeterminacy regarding the nature of the agreement casts serious doubts on its ability to meet its stated goals of "[clarifying] the roles and responsibilities of the Parties for environmental management," and "[providing] greater clarity, predictability and certainty in government decision-making processes." Rather, as graceless *de facto* amendment of the Canadian Constitution, the Agreement makes government roles much less clear, and government action much less certain.[48]

The chief problems that arise under the agreement stem from the definition of "national", the stated "interests" of the parties, the creation of "national" policies, standards and other environmental measures, and how these three things weave together under a restrictive, unaccountable, and ultimately unworkable decision-making structure.

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[48] See detailed, section-by-section comments and analysis of the Framework Agreement and Schedules, below.

Definition of "National"

"National" is defined in the agreement as meaning: "that the common interest is shared by federal, provincial and territorial governments, or that, even if one order of government has the lead role, shared decision-making is required or desired by that order of government." There are a number of things wrong with this definition, over and above the primary problem that it does not make any sense.[49] The key term "lead role" is not defined in the Framework Agreement. It is defined in Schedule I, Monitoring, where it says "lead role" means "the primary, but not exclusive, responsibility for the majority of monitoring activity." This clumsy drafting requires that "lead role" apply only to monitoring, and be therefore inapplicable to any other kind of activity. Another key term -- "common interest" -- is nowhere defined in the agreement. On the contrary, the "interests" of the Parties are segregated into two separate lists in Article 4. The content of the lists of interests show that "national" does not mean the legitimate and Constitutional jurisdiction of the Federal government.

The federal government has its interests set out in Article 4.2. The provincial and territorial government have interests set out in Article 4.3. The agreement states that the statements of interests will be used to determine the roles and responsibilities of the governments. National policies (that is policies where the common interest is shared by all levels of government, even though none of these have been identified by the Agreement), however, may also define roles and responsibilities. The Interests of the Parties identified in the agreement eliminate "overlap" by restricting federal roles and responsibilities to matters that are not "national," but rather limited to federal lands and international boarders.

In effect, the EMFA excludes any acknowledgement of the federal government's peace, order and good government power that gives it the jurisdiction to legislate on matters of national concern or that have a national dimension. The provinces have their own clearly delineated set of interests, including developing and implementing "national environmental measures." The EMFA, therefore, appears to transfer the federal government's POGG power, at least as it applies to environmental law and policy, to the provinces and territories.

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[49] Parsing this definition is almost impossible. It conflates interests that are held by all levels of government (and the roles and responsibilities that they have under the agreement) with a completely different thing: shared decision-making. While it was acknowledged by members of the Lead Representatives Committee that the definition "needs work," this definition exemplifies the inherent difficulty of the task of "almost but not quite" amending the Canadian Constitution.

Unworkable Decision-making Mechanism

It has already been noted that the CCME committed a fundamental error in proposing to erect a framework to "solve" a problem that has never been defined and which apparently does not exist on the scale suggested by the agreement's sponsors. The CCME made another error when it decided that solving the problem of duplication and overlap (federal functionality in matters of provincial interest, in other words) would solve the third problem of "jurisdictional disputes." There is a naive supposition in the framework's consensus-based decision-making framework that, once the federal government is no longer "supreme", the provinces and federal government will be able to amicably and cooperatively sit down and work out their disagreements.

Even a willing withdrawal of the federal government from the national-policy-making sphere will not serve to diminish the variant local interests of the individual provinces. It was in recognition of provincial incapacity to effectively engineer national policies that the national concern dimension of the federal POGG power was articulated:

> ...the most important element of national dimension or national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it grave consequences for the residents of other provinces.[50]

The decision-making mechanism of the EMFA inverts this doctrine so that national policy will be *determined* by the "failure of one province to cooperate." In other words, unless all provinces agree to a proposed national policy, there will be no national policy at all. Under the EMFA, any party may veto a national standard simply by refusing to agree to it. Consensus-decision-making will result in either standards set to the level of interests of the most-objecting province, or simple deadlock. The EMFA also requires that any province wishing to raise its standards must first give notice to the other Parties.[51]

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[50] *R. v. Crown Zellerbach*, 3 C.E.L.R. (N.S.) 1 at 29.

[51] Framework Agreement. Article 9.3. It was observed at the 1996 workshop that it was a little odd that while Parties are required to give notice before enacting *stricter* standards, there were no notice requirements in the event that a Party wished to enact *lower* standards.

It should be noted that, without the EMFA, the federal government has the power to make national standards, so that, even if provinces disagree with the standards, at least standards exist. Moreover, the current legal framework provides any province with the ability to set standards higher than the federal standards if it so chooses.

There appears in the Agreement a supposition that the track record of the CCME to date indicates that the EMFA will not lead to deadlock or lowest common denominator standard setting. However, to date, the CCME has been an unofficial, informal, off-the-record forum for interaction among Canada's ministers of the environment. If the EMFA is signed, the role, stature and nature of the CCME will markedly change. It will become, as noted above, a new "national" level of government. It is one thing to reach agreement on non-legally-binding guidelines when nothing is at stake. It is another thing altogether to sit down and try to reach agreement on *real* national policy.

It is, however, naive to believe that all the parties are going to play the same when the EMFA changes the rules, and the game is played for keeps. The EMFA proposes to solve the "problem" of a dynamic federal structure, characterized by jurisdictional disputes between the provinces and the federal government by creating a static, consensus-mired, dysfunctional federal structure, characterized by jurisdictional disputes between provinces and provinces and the territories and the federal government.

ii) Specific Comments

Article 1: Definitions

"Environment"

This definition is narrow compared with that found in some provincial environmental legislation. The Ontario *Environmental Assessment Act*, for example, defines the environment to include: "air, land or water; plant and animal life, including man; social, economic and cultural conditions that influence the life of man or a community; any solid, liquid, gas, odour, heat, sound vibration or radiation resulting directly or indirectly from the activities of man; or any part or combination of the foregoing and the interrelationships between any two or more of them."[52]

"Environmental Measure"

This definition is limited to measures taken to achieve environmental protection in Canada. However, the Agreement makes reference to the implementation of measures arising out of international agreements, which may be intended to protect the environment outside of Canada.

"Environmental Protection"

This definition is limited to the support, maintenance and restoration of ecosystem

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[52] *Environmental Assessment Act*, R.S.O., Ch.E.18, s.1.

health in Canada. However, the Agreement makes reference to the implementation of measures arising out of international agreements, which may be intended to support, maintain or restore the environment outside of Canada.

"Federal"

There is no recognition of the unique position of the federal government as the only government with a mandate to speak for all Canadians.

"Harmonize"

The definition of "harmonization," which is effectively the goal of the Agreement, should place the achievement and maintenance of high levels of environmental protection ahead of the goal of the elimination of overlap and duplication.

"National"

As noted earlier, the definition of "national" is unclear. No reference is made to the role of First National governments in relation to "national" interests or decision-making.

General Comments

A number of key definitions (e.g.: "interests," "common interest", "Committee of the Parties," and "Lead Role,") are not provided, and a number of other key terms are defined and employed differently throughout the Agreement.

Article 2: Objectives

The Objectives statement is a mixture of goals, intentions, principles and commitments. This probably reflects the lack of agreement among the potential Parties to the Agreement regarding its purposes. No reference is made to the need to ensure that gaps do not emerge in Canada's environmental protection system as a result of reduced government resources, or to ensure that new problems are dealt with in an effective and timely manner.

Article 3: Principles

3.1 (ii) - Precautionary Principle

This statement is extremely weak version the precautionary principle, deviating

from both the weak Rio Declaration definition[53] and proposed federal legislative definition.[54]

3.1 (iv) Relationship with First Nations

This clause should state parties' recognition of treaty and aboriginal rights as per s.34 of the *Canadian Charter of Rights and Freedoms*. See also Cross-Cutting Issue #6, above.

Article 4: Statement of Interests

"Interests" of the Parties

It is surprising that the Parties have provided a statement of their "interests," as opposed to a statement of their overall roles and responsibilities under the Agreement. It is disappointing to see such a direct indication of governments seeking to pursue and promote their interests as institutions, as opposed to providing a statement of what they believe to be their roles and responsibilities in promoting and protecting the public interest. The public pays taxes to governments to protect, among other things, its environment, health and safety, and not to support governmental institutions in the pursuit of their "interests." This statement speaks volumes about the content and purpose of the agreement, which seems far more focused on the definition and protection of governmental "turf" than the protection of the environment.

4.2: Federal Government

(a) This article makes no reference to provision of leadership in development of national and transboundary measures and policies. It is also unclear if "transboundary measures and policies" are in relation to international or interprovincial boundaries. 4.2 (h) appears to suggest that it refers only to international boundaries.

No reference is made to how the federal government is to ensure that national and transboundary measures and policies result in a consistent high level of protection.

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[53].Rio Declaration 1992, Article 15.

[54].Government of Canada, CEPA Review: the Government Response/Environmental Protection Legislation Designed for the Future - A Renewed CEPA/A Proposal (Ottawa: Minister of Supply and Services, 1995).

No reference is made to ensuring that federal environmental laws and regulations are enforced rigorously and uniformly, in cooperation with, where appropriate, the provinces, territories and First Nations.

(b) No reference is made to the federal government's role in the development of Canada's position on international environmental issues or in its interest in ensuring the fulfilment of Canada's international environmental obligations.

(c) Ties federal government to cooperation with provinces with respect to managing environmental matters in relation to federal works and undertakings. As worded, this article requires that federal management activities can only take place in cooperation with the provinces.

No reference is made to environmental protection with respect other aspects of federal jurisdiction established through sections 91, 92.10, and 95 of the *Constitution Act*, such as *interprovincial and international trade and commerce*, *sea coasts and inland fisheries*, *navigation and shipping*, *interprovincial transportation*, and *agriculture*.

(d) Makes no reference to treaty and aboriginal rights as per s.34 of the *Canadian Charter of Rights and Freedoms*. The clause also establishes no federal responsibilities with respect to ensuring environmental protection on aboriginal lands. This seems part of the federal government's fiduciary relationship with First Nations People.[55]

(e) Explicit reference has not been made to federal interest in publication of regular reports on the state of Canada's environment.

(f) Limits federal role to ensuring protection, maintenance and restoration of "nationally significant ecosystems," and then only in cooperation with the provinces and territories. The possibility of unilateral federal action is ruled out, even if this is necessary to protect a "Nationally significant ecosystem." The term "Nationally Significant Ecosystem" is not defined in the agreement.

This clause also appears to exclude the federal government from any role in relation to ecosystems which are not "nationally significant." The federal government would have no interest in the protection, maintenance or restoration in locally or regionally significant ecosystems. This may have significant implications for the federal role in relation to *Great Lakes Water Quality Agreement* Areas of Concern Remedial Action Plans, National Contaminated Site Remediation

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[55].For an excellent overview of this issue see generally, CEPA and Environmental Protection on Indian Lands (Ottawa: Environment Canada, 1994).

Program (or a possible successor program) sites, migratory bird habitat, and the protection of inland fish habitat through section 35(2) of the *Fisheries Act*. The clause also makes no reference to the possibility of the federal government working with municipal governments or other local authorities (e.g. Conservation Authorities in Ontario).

(h) Limits federal role to "facilitation" of resolution of interjurisdictional environmental matters, and then only when provinces cannot deal with it themselves.

Limiting the federal role to "facilitation" also appears to surrender any federal claim to act on an environmental issue on the basis of "provincial incapacity" as established through the Supreme Court of Canada's 1988 *R.v.Crown Zellerbach Canada Ltd* decision.

4.3: Provincial Governments

(a) The Word "citizens" is a drafting error. The term "citizen" has a specific meaning under the federal *Citizenship Act*.[56] Canadians are citizens of Canada and residents of individual provinces.

(b) Provinces are given an explicit stake in development and fulfilment of Canada's international environmental objectives and obligations, acknowledged by the federal government through its anticipated signature on the proposed agreement. This raises serious questions which are developed in detail in the discussion of the International Affairs Schedule of the EMFA.

The provinces have no constitutional claim to a role in the development of Canada's international positions. The federal government, as the only government with a mandate to speak for Canada on the international stage, is responsible for the conduct of Canada's international relations. The federal government is also ultimately responsible to Canada's international partners for the fulfilment of Canada's international obligations. The roles and responsibilities of the federal government and the provinces with respect to international affairs must reflect this reality.

It is also uncertain whether the federal Minister of the Environment has the mandate to commit the federal government to such an acknowledgement of a provincial role in the development of Canada's international positions, and the implementation of its international obligations. This seems to fall under the primary mandate of the Minister of Foreign Affairs.

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[56].R.S.C., 1993, Chapter C-29.

(d) Reference should be made to respecting Aboriginal and Treaty Rights as per s.34 of the *Canadian Charter of Rights and Freedoms*. See Cross-Cutting Issue #6, above.

(f) Development of cooperative relationships and partnerships with jurisdictions outside of Canada should occur in cooperation with the federal government given the federal government's pre-eminent role in international matters.

(g) No reference is made to working cooperatively with the federal government in the development of national environmental measures. The federal government may also have a role in the development of provincial measures through the provision of scientific or technical support.

Article 5: Roles and Responsibilities

It is not clear why this article is in the Agreement. Section 5.1 should be incorporated into Article 4. The issues raised by section 5.2 are dealt with under the Legislation and Policy Schedule.

Article 6: Schedules and Sub-Agreements

6.2 Addition of Schedules

No reference is made to the process for adding schedules to the Agreement. No process is identified for the deletion of schedules either. It must be assumed that these steps can only occur by unanimous agreement of the Parties.

6.3 Goals of Development, Implementation or Amendment of Schedules

(c) Goal of consistency may stifle innovation within provinces. This goal should be explicitly qualified by a statement of the right of Parties to introduce more stringent environmental measures to reflect specific circumstances or to protect environments or environmental values under its jurisdiction.

(e) Reference should be made to respecting Aboriginal and Treaty Rights as per s.34 of the *Canadian Charter of Rights and Freedoms*. See also Cross-Cutting Issue #6, above.

(j) It has not been established that duplication and overlap of environmental measures is a significant current problem, or that the existence of environmental measures applied by different jurisdictions is inconsistent with the goal of the "improve(ment of) environmental protection or promotion of sustainable

development in Canada" (2.1(i)).

No reference is made to public consultation or public consultation in the development of new Schedules. No reference is made to ensuring that gaps in the Canadian environmental protection system are filled in the development of new Schedules.

6.5 Paramountcy

(a) As the Schedules are generally more specific than the Framework Agreement they usually will take precedence over the provisions of the Framework Agreement. This renders the provisions of the Framework Agreement effectively meaningless. What is the point in having a Framework Agreement if it doesn't provide a binding framework for specific actions?

Key commitments regarding the primacy of environmental protection, transparency and public participation, the statements of commitments to work with First Nations and the right of Parties to establish more stringent standards are contained in the Framework Agreement. These are meaningless unless the Framework Agreement prevails over the Schedules.

At the 1996 workshop LRC members, when asked about the impact of this article on the rest of the agreement, responded that the "interpretation clause" had been taken more or less verbatim from the British Columbia *Interpretation Act.* When they were told that the article required that the more specific terms of the schedules would supersede the terms of the Framework Agreement, they indicated that had not been the intention of the drafters at all.

(b) This seems meaningless. Who is responsible for determining what reading is "most consistent" with the Framework Agreement?

Article 7: Referrals to a Committee of the Parties/Dispute Resolution

7.3 Dispute Resolution

This provision provides that disputes will be referred to a committee of the parties (presumably all 13) for resolution. This raises serious problems. The reference of disputes to a committee of the parties is inconsistent with the practices under other intergovernmental and international agreements. The common practice under such agreements is to provide for the resolution of disputes through clearly established

procedures involving neutral third party arbitrators.[57]

The proposed dispute resolution process is particularly problematic from the viewpoint of the federal government. If it finds itself in a dispute with a province over the failure of a province to fulfil its obligations under the Agreement, or alternatively, in conflict with a province which argues that the federal government has overstepped its responsibilities under the agreement the dispute would be resolved by a body with 12 provincial and territorial representatives and one federal one. This can hardly be described as fair.

The issue of dispute resolution raises major questions regarding legal status of the EMFA. Does the Agreement enjoy the status of a legal contract among the parties? Are its provisions legally binding on the parties? Could a party court seeking a civil resolution in the event of a dispute?

No indication of what form remedies to a dispute might take is provided either. As all decisions under the EMFA are by unanimous consent, it must be assumed that a resolution of a dispute can only be implemented with the agreement of all Parties to the dispute.

Article 8: Fiscal and Resource Matters

8.1 Resource Transfers

This article provides for resource transfers to accompany transfers of functions. However, there is no provision requiring that a Party demonstrate its capacity to fulfil a function before a function can be transferred. Given the nature of the Agreement, this opens the possibility of the transfer of functions where no capacity to fulfil the function exists on the part of the Party to whom the function is transferred.

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[57].The 1988 *Canada-U.S. Free Agreement* and the Uruguay GATT/WTO Agreement, for example, provides for the establishment of dispute resolution panels. However, it should be noted that these arrangements have be strongly criticized for their lack of openness and transparency. Similar criticisms have been levelled at the environmental dispute resolution provisions of the 1993 *North American Agreement for Environmental Cooperation*. See Z.Makuch and S.Sinclair, Environmental Implication of the NAFTA Environmental Side Agreement (Toronto: Canadian Environmental Law Association, 1993).

Article 9: General Provisions

These provisions describe the structure and workings of the new "national" institutions being created through the EMFA. These provisions raise serious questions regarding the accountability and functionality of what is proposed.

9.3 Right of Parties to Implement More Stringent Measures

This provision permits parties to implement more stringent measures to reflect specific circumstances or to protect environments or environmental values *located within* their jurisdiction. Notice is required to be given to the Committee of the Parties if a jurisdiction takes such action.

This provision appears to preserve the right of provinces or territories (within the limits of the jurisdiction of the territorial legislatures) to raise their environmental standards, although this right is not unqualified. It is conceivable that a move by a province or territory could be challenged by another Party on the basis that it doesn't qualify under the grounds provided by this section.

This section is even more limited in terms of its protection of the right of the federal government to act outside of the framework provided by the Agreement. The words *located within* appear to limit the application of this right to environments, circumstances and environmental values, *physically located* within its jurisdiction (i.e. federal lands and lands reserved for Indians). In other words the federal government would only be able to raise standards in relation to the subjects covered by part VI of the *Canadian Environmental Protection Act* (CEPA) and possibly in relation to sea coasts (maybe navigable waterways as well?). The right of the federal government to act in relation to other subjects covered by CEPA, such as biotechnology products, or toxic substances, or to impose more stringent standards in relation to the protection of inland fisheries, through the habitat protection and pollution prevention provisions of the *Fisheries Act*, are not protected by this clause.

The ability to act in these areas is essential to the federal government's capacity to fulfil its interest in "ensuring that national and transboundary environmental measures and policies result in a consistent, high level of environmental protection" (s.4.2(a)), and in relation to the fulfilment of Canada's international obligations.

It should also be noted that there is a potential conflict between provisions 9.1 and 9.3. Provision 9.1 states that the Agreement does nothing to alter the legislative authority to Parliament or the provincial or territorial legislatures or of the federal government or of the provincial/territorial governments or the rights of any of them with respect to the exercise of their legislative or other authorities under the Constitution of Canada. This, of course, must be the case with respect to Parliament and the Legislatures. Their right to make legislation within their jurisdictional capacity established by the *Constitution Act*

and in a manner consistent with the provisions of the *Canadian Charter of Rights and Freedoms*, cannot by altered by an intergovernmental agreement. These rights can only be changed through a constitutional amendment.

9.6 Committee of the Parties

This provision creates an apparently permanent body termed the Committee of the Parties. It is effectively the manifestation of the new level of government being created through the EMFA. Despite its central role in the EMFA, the draft Agreement provides remarkably little information about its roles and responsibilities and its mode of operation. No public accountability mechanisms are proposed in relation to its activities and operations.

9.9 Expiry of Agreement

The Agreement is apparently intended to continue in perpetuity. No provision are made for the termination of the agreement except, apparently, by the unanimous agreement of the Parties. The Agreement continues, for example, even if a majority of the parties withdraw from it. The failure to provide for a sunset clause is surprising for an Agreement which there is no precedent in Canada and of such sweeping scope. It is also inconsistent with the federal government's December 1995 proposal regarding the provision of legislative authority for Environmental Management Agreement, which makes explicit reference to a legislative requirement for a five year termination clause.[58]

9.10 Withdrawal by a Party

Parties are permitted to withdraw from the Agreement on one year's notice. This is inconsistent with the provisions of other intergovernmental agreements, including the 1993 *North American Free Trade Agreement* and the 1988 *Canada-U.S. Free Trade Agreement*, which permit Parties to withdraw on six month notice. No rationale is provided for the one year notice requirement.

9.11 Amending Formula

This provision permits the EMFA to be amended only by unanimous consent of the Parties. This is also reflected in the Schedules, where again, action can only be taken through the unanimous agreement of the Parties.

This structure is likely to lead to serious problems. Indeed, it will probably render the entire structure for dealing with national environmental issues proposed through the Agreement dysfunctional. The requirement for unanimous consent effectively grants all

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[58].Environmental Protection Legislation Designed for the Future, pg. 19, Proposal 2.12.

13 Parties a veto over amendments to the agreement and over any action undertaken under the Agreement. This guarantees that changes will only occur on the basis of the weakest position among the parties. If effect, under the EMFA, Canada's "national" environmental standards, guidelines and policies, and positions on international environmental agreements would reflect the "lowest common denominator" among the positions of the provinces and territories.

Unanimous consent requirements are rarely employed in legislative or decision-making processes for this reason. Usually unanimous consent requirements are applied only to the most fundamental structural elements of the decision-making or legislative process in question. Canada's constitution, for example, only requires the unanimous consent of the provincial legislatures for changes to the Offices of the Queen, Governor-General, Lieutenant- Governors, the right of a province to a number of members of the House of Commons not less than the number of Senators by which the province is entitled to be represented, the use of the English or French Language, and the composition of the Supreme Court of Canada.[59]

Processes intended to deal with more routine, functional decisions typically operate on a different basis. The general amending formula for the Canadian Constitution, for example, operates on the basis of a requirement for the consent of the federal parliament, plus two-thirds of the provincial legislatures, representing 50 per cent of the Canadian population (according to the most recent census) to amend the constitution.[60]

For its part, the European Union Council of Ministers operates on a weighted voting system, taking decisions by a "qualified majority" rather than by unanimity. This involves giving states multiple votes on the Council, somewhat in proportion to their population (the range of votes is from two to ten). A qualified majority is 54 votes out of 76. The effect is that a qualified majority is achieved when a minimum number of states - between seven and ten, depending on size - vote together. On some matters the support of eight member states is required. No combination of two states, no matter how large, constitutes a blocking coalition.[61]

9.13 Review by Parties

This article provides for a five year review of the effectiveness of the agreement by the Parties. This provision suffers from a number of serious problems. Even if the Parties felt that there was a need for amendments arising out of their review, amendment could

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[59].*The Constitution Act, 1982,* s.41.

[60].Ibid., s.38.

[61].For a detailed discussion of the E.U. system see P.Leslie, The European Community: A Political Model for Canada? (Ottawa: Minister of Supply and Services, 1991).

only occur by unanimous consent of the Parties. Otherwise the EMFA has to continue in its original state due to section 9.9. In addition, the Parties cannot, by definition, provide an independent review of the Agreement. Provision must be made for an independent, transparent, public review of the Agreement.

iii) Conclusions

The EMFA provides the framework for the establishment of a range of new "national" institutions, which collectively could be described as effectively constituting a new level of government within Canada. These new "national" institutions and processes appear to be intended to undertake many of the national leadership, integration and policy-making functions currently carried out by the Government of Canada.

Notwithstanding the significance of this direction, the "national" structures created by the Agreement are remarkably ill-defined. What details the Agreement does provide suggests that the new structures will be dysfunctional from the outset. The requirement for unanimous agreement for decision-making is particularly problematic in this context. The requirement for unanimous consent to take *any* decisions under the agreement, in combination with the perpetual nature of Agreement, the level of detail provided in its schedules, have the potential to place environmental decision-making in Canada in a straightjacket. Effectively, the structures and approaches contained in the EMFA will be frozen in time, regardless of how environmental conditions or public priorities change.

This problem is particularly serious from the viewpoint of the federal government, whose capacity to act in relation to subjects of national concern within federal jurisdiction is not protected by the provisions of Article 9.3. However, given that the Article 9.3 protection is subordinate to the provisions of the Schedules to the Agreement (Art. 6.5(a)), it is of limited usefulness to the provinces and territories either.

2. SCHEDULE I - MONITORING

i) Introduction

This Schedule is similar to that presented in the December 1994 draft EMFA. The major criticisms presented then remain valid today.[62] The essence of this Schedule is to devolve responsibility for discharge-based (i.e. pollution) monitoring in relation to federal environmental regulations to the provinces. No studies of existing federal and provincial roles and responsibilities in this area have been presented to support the approach proposed in the Schedule.

What empirical evidence exists suggests that federal and provincial "overlap and duplication" in this area is not a serious problem. In fact, the resource impacts study commissioned by the CCME concluded that the benefits of this Schedule would be "minor"[63] and that in ambient environmental monitoring there "will be no elimination of overlap and duplication because it is believed that programs are already well-harmonized."[64] Furthermore, given the differences in legal structure in each province, if duplication did exist between federal and provincial discharge monitoring requirements it could only be practically addressed on a cases-by-case basis.

There are a number of serious problems with the approach to discharge-based monitoring proposed in the Schedule. In the context of shrinking resources, it is far from certain that any of the provinces have the resources necessary to take on responsibility for monitoring discharges in relation to federal environmental requirements as well as their own. Indeed, a number of provinces have actually been weakening their own discharge based monitoring programs in recently years, and have been moving towards self-monitoring by industrial dischargers.

Serious problems appear to be emerging with self-monitoring systems already. These have been most clearly demonstrated by the results of the 1994 *R.v.Proctor and Gamble* prosecution in Alberta. In that case 124 charges were dropped due to concerns over the adequacy and admissibility of industry self-monitoring data.[65]

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[62].See Kaufman, Muldoon and Winfield, The Draft EMFA: An Analysis and Commentary, pp. 28-33.

[63].KPMG Management Consulting, Resource Impacts Assessment Study, p.16.

[64].Ibid., p.17.

[65].Provincial Court of Alberta, Docket No.21662804P. See D.Thomas, "Whistle Blower," The Edmonton Journal, March 26, 1994.

More broadly, the historical record suggests that the federal government must be wary of relying on provincial efforts to enforce federal environmental laws.[66] This is especially true in light of the track records of most of the provinces with the enforcement of the pollution prevention[67] and habitat protection requirements[68] of the *Fisheries Act*. There is also growing concern regarding the performance of a number of provinces under Administrative Agreements entered into through CEPA, particularly with respect to the CEPA pulp and paper effluent regulations.[69]

If the federal government is dependant on the provinces to provide the discharge and other monitoring data necessary to enforce federal environmental requirements, and the provinces fail to provide such data, the federal government would be unable to take enforcement action of its own.

The Schedule provides no accountability mechanisms regarding the quality of, and public access to data. No indication is provided of who is to be responsible for coastal zone discharge monitoring under CEPA and the *Fisheries Act* is provided in the Schedule.

ii) Specific Comments

Article 1: Scope of Schedule

1.2 No reference is made to monitoring in relation to environmental law enforcement.

Article 2: Definitions

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[66].See generally, K.Harrison, "Is Cooperation the Answer? Canadian Environmental Enforcement in a Comparative Context," Journal of Policy Analysis and Management (14 Spring 1995), pp.221-245.

[67].See, for example, Kenneth M.Dye, Report of the Auditor-General of Canada to the House of Commons (Ottawa: Minister of Supply and Services, 1990).

[68]See F.S.Gertler and Y.Corriveau, ENGO Concerns and Policy Options Regarding the Administration and Delegation of Subsection 35(2) of the Fisheries Act and Consequences for Federal Environmental Assessment (Montreal: Quebec Environmental Law Centre, 1996).

[69].Regarding the Canada-British Columbia Agreement see S.Ochman, "Harmonization:" The Federal/Provincial Agreement on Effluent Controls (Whaletown, B.C: Reach for Unbleached, January 1996).

All definitions should be provided in the Framework Agreement and used consistently throughout the Agreement.

Article 3: Objectives

No references are made to the effectiveness, comprehensiveness or quality of monitoring programs and data.

Article 4: Principles

No reference to providing public with monitoring data, or to the ensuring the comprehensiveness and quality of data.

Article 5: Division of Roles

5.3(b) Term "transboundary" is not defined. Does it refer to international or interprovincial boundaries. Does this include discharge-based monitoring related to the fulfilment of international obligations related to, for example, Carbon Dioxide or SOx emissions under the 1992 *United Nations Convention on Climate Change* or the 1991 *Canada-U.S. Agreement on Air Quality* respectively.

5.3(c) Term "federal monitoring program" is not defined. What does it mean?

No federal role in discharge based monitoring programs, even in relation to federal discharge based regulations under CEPA and the *Fisheries Act.*

No indication of relationship with, or even recognition of, the National Pollutant Release Inventory.

5.4(a) All discharge-based and ambient monitoring programs delegated to provinces including discharges monitoring in relation to CEPA and the *Fisheries Act.* How will devolution to the provinces support consistent approaches in these areas? It seems likely to have the opposite effect.

Why are arrangements with ambient monitoring being changed if KPMG has concluded that there is no problem in this area?

Who is responsible for discharge-based monitoring which relates to requirements established through international agreements?

Who is responsible for discharge-based monitoring in coastal zones?

Article 7: Development and Implementation of Monitoring Programs of National Interest

7.3(a)-(d) Does this refer to federal or provincial regulations in these areas? On what basis were these regulations selected for priority attention?

Article 8: Resources

As noted earlier serious questions exist about the capacity of many provinces to assume responsibility for monitoring in relation to federal requirements. If the provinces fail to deliver effective monitoring programs, the result will be the *de facto* repeal of the relevant federal legislation and regulations.

Article 9: Review

No provision is made for the independent review and public reporting on the Schedule.

The Schedule apparently applies in perpetuity (no expiry date)

The Schedule can apparently only be amended by unanimous consent of the Parties. As noted earlier this is a recipe for deadlock and lowest common denominator outcomes.

iii) Conclusions

This Schedule suffers from severe problems. No evidence has been presented to support the claims of the Schedule's proponents that significant problems of duplication and overlap of federal and provincial efforts exist in this area. What evidence has been provided suggests that the problem is of very limited scope. No argument is provided to support the contention that the solution to whatever problems exist in this area is simply to devolve all monitoring responsibilities to the provinces. If national consistency is an important goal, a case could be made for upwards delegation to the federal government.

The net result of the Schedule will be to leave the federal government entirely dependant on the provinces for monitoring data related to the enforcement of its legislation, except with respect to federal lands and international agreements. The monitoring and enforcement of federal legislation will be a function of the provinces' capacity and will to fulfil this expanded mandate. Given the unlikelihood of federal resource transfers, and the track record of some provinces in the area, the net result

seems likely to be the *de facto* repeal of the federal pollution control requirements as there will be no reliable data to support their enforcement.

The practicality of the proposed "harmonization" of discharge based monitoring must also be questioned. Given the differences in legal requirements in each province, the integration of federal and provincial monitoring and reporting requirements will have to occur on a case by case basis. The "one size fits all" model proposed in the Schedule simply is not practical.

No provisions for public access to monitoring data are established by the Schedule. There is no indication of how the provisions of this Schedule are to relate to existing monitoring databases, such as the National Pollutant Release Inventory.

3. SCHEDULE III - COMPLIANCE[70]

i) Introduction

This Schedule is largely unchanged from the December 1994, and the problems outlined with it then continue to exist.[71] Effectively, the Schedule provides for the devolution of responsibility for the enforcement of federal environmental law to the provinces, except on federal lands and at international borders. As with the monitoring Schedule, no description of the alleged problems in this area has been provided by the proponents of the Agreement in support of such a shift.

The existing track record of the provinces where the enforcement of federal environmental legislation has been delegated to them is not strong.[72] This pattern seems unlikely to shift significantly in the future, particularly in the absence of resource transfers from the federal government to the provinces. They net effect may be the *de facto* repeal of federal environmental protection requirements. Among other things, this raises concerns regarding the ability of the federal government to fulfil its obligations under the 1993 *North American Agreement on Environmental Cooperation* to ensure the enforcement of its environmental laws.

Other problems may emerge with this approach when the province is the proponent or sponsor of a project which may require federal approval, or finds itself in violation of a federal environmental law. Furthermore, certain federal environmental regulations are of a highly specialized nature, and require consistent nation-wide enforcement in order to be effective. The purpose of the *Chemical New Substances Notification Regulations* made under CEPA, of ensuring the pre-manufacturing or import environmental and human health evaluation of substances new to Canada, for example, would be undermined if a province failed to enforce the regulation effectively.

The involvement of both the federal and provincial levels of government in seeking compliance with their environmental laws may result in enhanced environmental protection. It has the advantage of providing for oversight and back-stopping. One level of government may choose to act where the other has failed to do so.

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[70].This commentary was developed with the assistance of the Canadian Environmental Law Association.

[71].See Kaufman, Muldoon and Winfield, The Environmental Management Framework Agreement: An Analysis and Commentary, pp. 34-38.

[72].See, for example, Dye, Report of the Auditor-General of Canada to the House of Commons, 1990. See also, Harrison, "Is Cooperation the Answer? Canadian Environmental Enforcement in a Comparative Context," pp.221-245.

ii) Specific Comments

Article 2: Definitions

All definitions should be provided in the Framework Agreement and used consistently throughout the Agreement.

2.1 Reference to "voluntary compliance" and "compliance agreements." Neither term is defined. "Voluntary compliance" is widely considered an oxymoron in relation to legally binding requirements to which penalties for violation are attached.

Serious problems related to legality, constitutionality, effectiveness and accountability have been identified in relation to "compliance agreement" schemes, such as that proposed in the federal *Regulatory Efficiency Act* (Bill C-62).[73]

The status of international waters (i.e. the Great Lakes) as being included under the definition of federal, provincial or territorial lands is not clear.

Article 3: Objectives

Strangely, ensuring compliance with federal, provincial and territorial environmental protection requirements is not a stated objective of the Schedule.

As noted earlier, no case has been made regarding the advantages of the proposed "one-window" approach proposed in the Schedule. The involvement of both levels of government increase the chances that one level will take compliance action when it is necessary to do so. In addition, the "one-window" approach does not ensure effective environmental protection when the government providing the "one-window" is a sponsor of activities which may violate federal or provincial requirements, or where it might violate those requirements itself.

Article 4: Principles

Parties are not committed to ensuring compliance with their legislation.

Parties are stated to be ultimately responsible for ensuring compliance with their own legislation. However, in practice, this responsibility is likely to prove meaningless for

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[73].See Secretariat to the Standing Joint Committee of the House of Commons and Senate, Report on Bill C-62, February 1995.

the federal government. If the Schedule is implemented it seems likely that the federal government will have no capacity to ensure compliance on its own. Furthermore, if the proposals contained in Appendix B to Schedule VI (Policy and Law) to repeal overlapping or duplicative legal or regulatory requirements are implemented, federal laws and regulations may no longer exist, rendering any responsibility for their enforcement meaningless.

Article 5: Roles and Responsibilities

5.2 Federal government is surrendering responsibilities for ensuring compliance with federal legislation except at international borders, federal lands, and in relation to legislation for which responsibility has not been devolved to the provinces and international agreements.

What is covered under international agreements category? Does it include the CEPA *Ozone Depleting Substances Regulations* and ocean dumping regulations? What are the implications in relation to the 1978 *Great Lakes Water Quality Agreement* (GLWQA) and the 1991 *Canada-U.S. Agreement on Air Quality* and other similar agreements? Will the federal government retain enforcement responsibility for federal regulations necessary to fulfil Canada's commitments under these agreements, such as CEPA Part V international air pollution control regulations, or CEPA and *Fisheries Act* regulations related to "toxic" substances named in the (GLWQA).

5.3 The Provinces are given responsibility for enforcement in relation to all industrial sectors, municipalities, individuals, and service industries including interprovincial service industries. There is apparently to be no federal role in these areas with respect to the enforcement of federal environmental laws.

No indication is provided of who is responsible for ensuring compliance on international waters or in relation to coastal zone waters (i.e. discharges regulated under CEPA and *Fisheries Act* to coastal waters.

5.4(a) Terms "national compliance measures" and "compatible implementation approaches" are not defined.

5.5(b) As noted earlier this commitment may be of limited practical meaning if federal enforcement capacity is wound down, or federal laws and regulations are suspended or repealed through the proposed legislative harmonization process.

Article 6: Implementation

6.2 None of the proposed implementation mechanisms are defined or described.

6.2(b)(iv) Rescinding portions of legislation has serious implications for effectiveness and accountability. It would eliminate the back-up and oversight mechanisms provided by the current structure.

Article 7: National Compliance Form

The purpose, structure, membership and decision-making processes for the Proposed National Compliance Forum are not defined.

Article 8: Development and Implementation of a National Compliance Plan

8.3 Problems related to decision-making under proposed national guideline, standard and policy processes will apply to the National Compliance Plan. Deadlock or a lowest common denominator plan are the likely outcomes.

8.4 Are nationally-consistent approaches to these matters desirable? Note that requirements for consensus in decision-making under Agreement will lead to lowest common denominator outcomes in each of these areas, where agreement can be reached at all. Parties with strong enforcement policies, who are in a minority at the present time, could find themselves under pressure to be consistent with practices of Parties with weak policies.

8.5 Why have these sectors been selected for priority action? Why should Canada's largest polluters to the first beneficiaries of the proposed streamlining effort?

Article 9: Accountability

9.1&9.2 National compliance report is likely to be self-congratulatory unless developed by a body independent of the Parties to the Agreement

9.3 Evaluative criteria should be set by an independent body, not the Parties through the National Compliance Forum.

9.4 How would these accountability mechanisms be financed? How would their independence be ensured?

No public accountability mechanisms are proposed. There is, for example, no

mechanism for members of the public to make complaints against a Party for failure to enforce its environmental laws or regulations, or to enforce another Party's laws and regulations where it is responsible for doing so. A mechanisms of this nature is provided under the 1993 *North American Agreement on Environmental Cooperation*.[74]

Article 10: Resources

As noted earlier serious questions exist about the capacity of many provinces to assume responsibility for compliance in relation to federal requirements. If the provinces fail to deliver effective compliance programs, the result will be the *de facto* repeal of the relevant federal legislation and regulations.

Article 11: Review of Schedule

No provision is made for the independent review and public reporting on the Schedule.

The Schedule apparently applies in perpetuity (no expiry date)

The Schedule can apparently only be amended by unanimous consent of the Parties. This requirement is likely to lead to lowest common denominator outcomes, where agreement can be reached at all.

iii) Conclusions

This Schedule delegates responsibility for enforcement of federal environmental legislation to the provinces. However, the provinces lack the resources, and in some cases the will, to take on this responsibility. The capacity of the federal government to provide the necessary conditional resource transfers to the provinces is open to serious question. Furthermore, where delegation has occurred, the results have been judged unsatisfactory by parliamentary authorities and other independent commentators.

The likely result of the scheme proposed in this schedule, with or without federal resource transfers, appears to be a *de facto* repeal of affected federal environmental law. Indeed, *de jure* withdrawal is under consideration in certain circumstances. Furthermore, the purpose of certain key elements of federal environmental law, particularly the new substances notification process under CEPA, would be undermined by devolution of

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[74].It should be noted that the NAAEC public complaint process has been the subject of substantial criticism from non-governmental commentators in Canada, the United States and Mexico. See Makuch and Sinclair, Environmental Implications of the NAFTA Environmental Side Agreement.

enforcement responsibility to the provinces. The withdrawal of federal enforcement efforts, capability and ultimately law, would weaken existing oversight and back-stopping mechanisms which provide for more effective environmental protection in Canada.

The value of the proposed National Compliance Form, the major departure in this Schedule from the December 1994 draft is limited. In fact, given its structure and mandate to ensure "consistency" it may have the effect of placing pressure on those Parties with strong enforcement policies to weaken those policies to make them more consistent with those of other Parties. Furthermore, the KPMG resource impacts study suggests that resources will be withdrawn from field enforcement activities by the federal government to support this new bureaucracy.[75] Given the gaps in federal enforcement efforts which have been identified,[76] the wisdom of such an allocation of resources must be questioned.

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[75].KPMG, EMFA Resource Impact Study, p.iv.

[76].See, for example, House of Commons Standing Committee on Environment and Sustainable Development, Its About Our Health! Towards Pollution Prevention (Ottawa: House of Commons, June 1995) , Chapter 15.

4. SCHEDULE IV - INTERNATIONAL ENVIRONMENTAL AGREEMENTS[77]

i) Introduction

This Schedule is one of, if not the most, problematic elements of the proposed Environmental Management Framework Agreement. It establishes the roles and responsibilities of the federal and provincial governments in the preparation for and negotiation, implementation and amendment of international environmental agreements. The Schedule's most significant feature is the new role it outlines for provinces and territories in the negotiation and implementation of international agreements. It effectively proposes that the federal government share its treaty-making and treaty-implementing powers with the provinces.

There is currently little doubt about the authority of the federal government to negotiate and enter into international agreements on behalf of Canada without the consent, participation or agreement of the provinces or territories. Although some provinces have asserted that they have the right to make treaties based on the 1937 *Labour Conventions* decision of the Judicial Committee of the Privy Council, there is no case law to support this contention, nor is it recognized in international law.[78]

The federal government's capacity to implement international obligations through federal legislation which affects subjects under provincial jurisdiction is less clear. In the *Labour Conventions* case, the Privy Council held that the federal government could not enact legislation to fulfil treaty obligations affecting areas of provincial jurisdiction under s.92 of the *British North America Act*. It would be up to the individual provinces to decide whether to implement a treaty affecting a subject under their jurisdiction.

However, more recently the Supreme Court of Canada has indicated, particularly in its 1976 *Macdonald* v. *Vapor Canada Ltd*[79] decision that, the time may be coming to reconsider the *Labour Conventions* case. In its *Vapor Canada Ltd.* decision the Court suggested that the federal power to implement treaties in the provinces under provincial heads of power may not be as restricted as the *Labour Conventions* case indicated. The Court concluded that Federal legislation to implement treaties could legitimately encroach on provincial legislation, provided that the federal legislation clearly shows an intent to

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[77].This commentary was developed with the assistance of the Pembina Institute for Appropriate Development.

[78]P.Hogg, The Constitutional Law of Canada (3rd ed.) (Toronto: Carswell, 1992) at 11.5 (d).

[79],[1977] 2 S.C.R. 134

implement the treaty and stays within the limits of the treaty.[80]

Furthermore, Professor Peter Hogg suggests in his analysis of the case *R.* v. *Crown Zellerbach Canada Ltd*[81] that the federal government's capacity to implement treaty obligations in areas of provincial jurisdiction may be reinforced in a number of other ways. In particular, Hogg argues that an existence of an international treaty, such as the 1972 *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* (The London Convention) will often be relevant to the characterization of corresponding Canadian legislation and will tend to support the federal parliament's power to enact the legislation under the POGG power. It can therefore be argued that treaties that are implemented by the federal government under a power not specifically enumerated in s. 91 or 92, which have corresponding federal legislation, could be deemed to be national in scope and *intra vires* Parliament.

In addition, other scholars have noted that the federal government must have general treaty-making and treaty-implementing powers in order to be able to pursue a coherent and consistent foreign policy.[82] Furthermore, the 1969 *Vienna Convention on the Law of Treaties* does not allow states to be excused from international obligations due to internal conflicts.[83] The federal government is ultimately responsible to the other parties to international agreements for Canada's fulfilment of its international obligations.

Many international environmental agreements touch on matters within provincial jurisdiction. Notwithstanding the legal capacity of the federal government to implement international obligations, the politically preferable option is to implement these agreements in co-operation with the provinces. This Schedule departs from current practice by enshrining an obligation to include provincial and territorial Parties in the development of Canada's positions and the actual negotiation of international agreements by Canada.

Provincial lead representatives have interpreted these provisions as meaning that provincial representatives will be "at the table" in international negotiations. This amounts to the surrender of substantial federal powers to the provinces. Under current best

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[80].See David Vanderzwaag and Linda Duncan, "Canada and Environmental Protection: Confident Faces, Uncertain Hands" in Robert Boardman ed., Canadian Environmental Policy: Ecosystems, Politics and Processes (Toronto: Oxford University Press, 1992), pp.5-6.

[81],[1988] 1 S.C.R. 401

[82].J.S.Friegel, "Treaty Making and Implementing Powers in Canada: The Continuing Dilemma, " in B.Cheng and E.D. Brown, eds., Contemporary Problems of International law: essays in Honour of George Schwartzenberger on his Eightieth Birthday (London: Stevens & Sons Ltd., 1988), p.338.

[83].8, I.L.M., 679, Art.27.

practice, the federal government consults with provinces, territories, and stakeholders, and seeks to best represent the common interests that emerge. However, if common interests do not emerge, the federal government has the ability to take a consistent position into negotiating fora.

The dangers of the EMFA's proposed approach become apparent when the proposed formal and mandatory participation by provincial and territorial Parties in development of Canada's international positions and actual international negotiations is combined with the consensus-seeking model of the overall Framework Agreement. The proposed arrangement seems likely to lead to situations in which Canada's international negotiating positions will reflect lowest common denominator positions among the provincial and territorial Parties to the EMFA. These may reflect uniquely strong concerns of individual provinces or territories. Furthermore, it introduces a potentially cumbersome process into an arena in which decisiveness and flexibility are critical.

While the Schedule outlines significant federal accommodation of provincial demands for a greatly increased direct role in negotiating international environmental agreements, no converse pledge to implement the agreements negotiated in this more co-operative fashion is provided by the provinces. In addition, no provisions are made regarding the role of First Nations governments in the development and implementation of Canada's international environmental obligations, or regarding the role of members of the public in the development of Canada's international positions.

ii) Specific Comments

Article 2: Definitions

2.1 The definition of "international environmental agreement" only addresses agreements between nation-states. It does not include international agreements at the sub-national level, such as the province-to-state agreements in the Great Lakes Basin.

Article 3: Objectives

Surprisingly, this section makes no reference to ensuring that Canada fulfils its international environmental obligations, or that Canada plays a leadership role in global efforts to promote environmental sustainability.

Article 4: Principles

4.1 This article attempts to reconcile the hazards of unilateral provincial/territorial veto power and unilateral federal actions by seeking positions that "reflect, as much as possible, the interests of all Parties and stakeholders." However, the principles

section does not provide any indication of how a situation in which there is no convergence of interests between the Parties is to be dealt with. Canada's positions on international environmental issues must not be held hostage to the parochial interests of a single province or territory. The principles should clearly state that in such situations the federal government that has right and responsibility to determine Canada's positions.

Article 5: Roles and Responsibilities

5.1 Parties are obligated to *jointly determine* their respective roles in preparation for, negotiation, implementation, or amendment of international agreements. The federal government cannot determine its role in these matters without the consent of the other Parties to the Agreement. This is a significant surrender of federal authority and responsibility for the conduct of Canada's international affairs.

5.2 This article states that the federal government has the responsibility to prepare for, negotiate and conclude international environmental agreements and amendments and is accountable internationally for their implementation. However, it does not assert federal authority to be the final arbitrator of Canada's negotiating positions, or to ensure that Canada's international obligations are fulfilled. Even subject to these limitations, this article appears to contradict article 5.1, which states that the parties will *jointly determine* their respective roles in the preparation for, and negotiation of international agreements.

5.3 This article provides that the provinces and territories *will* participate directly in the *preparation for*, *negotiation*, *implementation* and *amendment* of international environmental agreements. The extent and conditions of this participation are unclear, but it can be interpreted to mandate the direct participation of individual provincial governments in international negotiating sessions. This appears to contradict the provisions of Article 5.2, which states that the federal government has the responsibility to prepare for, and negotiate international environmental agreements, and is accountable internationally for their implementation within Canada.

The provincial and territorial Parties are under no obligation to take steps necessary to implement Canada's international environmental obligations, despite their expanded role in their negotiation, amendment and implementation.

Article 6: Assessing Interests

As with Article 4 of the EMFA, the references to Parties pursuing their "interests" is deeply disturbing. Taxpayers expect their governments to pursue and promote the

public interest, not their interests as institutions.

Article 11: Issue Identification and Setting Priorities

11.2 The "Parties" are given an explicit role in the definition of Canada's interests, and the shaping of Canada's international priorities. This again grants the provinces and territories an explicit role in the formulation of Canada's environmental foreign policy.

Article 13: Negotiations

13.1 This article describes the elements involved in the negotiation phase of an international environmental agreement. There is no clear statement that the ultimate authority for the development and articulation of Canada's position in international negotiations lies with the federal government, in a manner consistent with the provisions of international law. Nor is there any clarification of the extent and terms of provincial and territorial participation in each of the five listed stages of the negotiation phase.

Article 14: Implementation

Terms "confirmation of obligations" and "ratification" are not defined. Does the Schedule imply that the provinces have a role in the "ratification' of Canada's international obligations?

Article 15: Implementation Planning

This provision binds the Parties to use the *cooperative arrangement* established through the Schedule in the discussion of the implications of Canada becoming a party to an agreement, and *to determine how* the agreement will be implemented if Canada becomes a party. In effect, these provisions tie the federal government to interests, concerns and consent of the provinces and territories in the development of Canada's international environmental positions, and the implementation of Canada's international environmental obligations. The possibility of independent federal action in the development of Canada's international positions, or the implementation of international obligations, is excluded.

Article 16: Monitoring and Reporting

This section should include an obligation to make progress reports from all Parties available to the public, in order to increase the accountability of all Parties. No provision is made to deal with the failure of a provincial or territorial Party to provide to the federal government information necessary for Canada to meet its international reporting obligations.

Article 17: Amendment

The Federal government is tied to the use of cooperative, joint mechanisms in developing and implementing amendments to existing international agreements. The federal government cannot independently agree to an amendment to an existing international agreement on behalf of Canada without the agreement and participation of the Provincial and Territorial Parties to the EMFA.

Article 18: Creation of Co-operative Arrangements

The Parties are *obligated* to *jointly determine* what *cooperative arrangements* are appropriate in the involvement of all interested parties (including provinces and territories) in preparation for, negotiation, implementation and amendment of an agreement and to determine how an agreement should be implemented in Canada. This provision again appears to exclude the possibility of independent federal action to negotiate, amend or implement an international environmental agreement.

This section makes no reference to arrangements to enable the public and non-governmental stakeholders to be involved in the preparations for Canadian negotiating positions or the implementation of the ensuing commitments.

Article 19: Nature of the Co-operative Arrangement

19.1 This section should reflect a recognition that, notwithstanding its interest in entering into cooperative arrangements concerning international environmental agreements, the ultimate responsibility for negotiating, concluding and implementing international environmental agreements remains with the federal government.

19.2 This section also should reflect a recognition that, notwithstanding its interest in entering into cooperative arrangements concerning international environmental agreements, the ultimate responsibility for negotiating, concluding and implementing international environmental agreements remains with the federal

government.

Article 22: Review of the Schedule

No provision is made for the independent review of the Schedule. The Schedule applies in perpetuity (no expiry date).

No provision is made for the amendment of the Schedule itself. Presumably this can only occur through unanimous consent of the Parties. This means that even if the review reveals a need for changes, the refusal of one Party to agree to a change means the Schedule continues to apply. This is particularly serious from the perspective of the federal government, as if the arrangements proposed under the Schedule prove unworkable, or prevent Canada from fulfilling its obligations under international law, the consent of all ten provinces and both territories would have to be obtained to alter the provisions of the Schedule.

iii) Conclusions

This Schedule is deeply problematic, and would substantially change existing arrangements for the development, negotiation and implementation of international environmental agreements Canada. The federal government would, under the Schedule, effectively surrender its authority to speak for Canada on the international stage, and its capacity to ensure that Canada's international obligations are fulfilled. Article 5.2 of the Schedule does *not* safeguard the position of the federal government in this regard.

When the proposed formal and mandatory participation of provincial and territorial Parties to the EMFA in the development of Canada's international positions and in actual international negotiations is combined with the consensus-seeking model of the overall Framework Agreement serious risks become apparent. It is very likely that the resulting Canadian negotiating positions in international fora will reflect the lowest common denominator positions among the Parties to the EMFA.

Furthermore, the proposed arrangement introduces a potentially cumbersome process into an arena in which decisiveness and flexibility are critical. The ability of the federal government to fulfil its obligations, under international law, to the other parties to international agreements of ensuring that Canada meets its commitments is also called into serious question by the proposed structure. The federal government would be unable to act to implement an international commitment without the consent of the provinces and territories, although it would remain accountable to the other parties to an international agreement for the fulfilment of these commitments.

It is wholly appropriate and necessary for the federal government to *consult* with

the provinces before acting on environmental issues of international concern. However, the Government of Canada must retain the ultimate authority to act in this areas where it is necessary to do so in order to the promote the well-being of present and future generations of Canadians and other members of the global society of which Canada is a part.

The Schedule makes no provision for the role of First Nations governments in the process of the development, negotiation, and implementation of international environmental agreements by Canada. Nor are provisions are made regarding consultation with members of the public in such processes.

In many ways, this Schedule demonstrates the flaws underlying the entire EMFA. The International Affairs Schedule appears to have no basis in an objective, documented and empirically-based understanding of current practices, problems and federal, provincial, territorial and First Nations roles and responsibilities in the negotiation and implementation of international agreements by Canada. Rather, it appears to be grounded on the anecdotal reflections, concerns and institutional interests of the officials involved in the development of the Schedule.

A proposed intergovernmental agreement in this area should have been based upon, and supported by:

* an objective and independent review of the relevant Canadian constitutional law conducted by individuals with recognized expertise in the field;

* an objective and independent review of the relevant international law conducted by individuals with recognized expertise in the field;

* an objective and independent review and evaluation of the approaches taken to this question by comparable federal jurisdictions, such as Australia, the United States, and the European Union, conducted by individuals with recognized expertise in the field;

* an objective and independent review and evaluation of existing Canadian practices and federal, provincial, territorial, First Nations and public roles and responsibilities in this area, preferably accompanied by case studies demonstrating strengths and weakness of the current approaches; and

* the presentation of a range of options, based on the forgoing research, for public review and comment.

In the absence of such background research, it is difficult to imagine how effective, efficient, fair, and accountable structures can be established in this, or any other area, addressed by the EMFA.

5. SCHEDULE V - GUIDELINES, OBJECTIVES AND STANDARDS

i) Introduction

This schedule is intended to deal with all aspects of activities related to the development and implementation of national guidelines, objectives, standards, and codes of practice for the assessment and protection of the ambient environment and the control of industrial and municipal discharges to the environment. As noted above, responsibility for the development of national standards in these areas is to be transferred from the federal government to the "national" process created by this Schedule. The development of national environmental quality objectives, guidelines and codes of practice by the federal Ministers of the Environment and of Health is currently provided for in Part I of CEPA.

The intended scope of the Schedule is unclear. Would a federal emission or effluent standard made under CEPA regarding substances considered to be "toxic", for example, be considered "standards" for the purposes of this Schedule. Would their development therefore be subject to the "national" development process outlined in the Schedule? Does this mean that in the future the federal government can only develop regulations under CEPA and the *Fisheries Act* through the process established by this Schedule? Appendix C appears to imply that it does as it assigns the Development of Site Specific Objectives to Provincial and Territorial Jurisdictions except on federal lands.

Serious questions also have to be raised regarding the structure of this Schedule. The national standards development process is to work by consensus. This structure ensures that any guidelines, objectives, standards or codes of practice which emerge from the process will reflect the "lowest common denominator" position among the Parties, where agreement can be reached at all.

Given the drive for consistency which underlies the overall EMFA, Parties with standards above the national levels which emerge from the proposed process may face pressures to lower their standards. In fact, this Schedule commits the Parties to implement national standards and guidelines, and as this provision of the Schedule can be considered more "specific" than the provisions of the Framework Agreement, the Parties may have no right to implement "more stringent" environmental measures.[84]

Furthermore, no mechanisms are proposed to ensure the implementation by the Parties of the standards which emerge from the process as national minimum standards. No provision is made for the development of necessary national standards, objectives, guidelines or codes of practice by the federal government in the absence of agreement

[84] This is (could be?) a result of the relationship between Articles 6.5(a) and 9.3 of the Framework Agreement.

among the parties, or when agreement is only possible on very weak standards. No commitments are made in the Schedule regarding openness, transparency, or public participation in the development of "national" guidelines, objectives, standards or codes of practice.

The use of the terms "standards", "guidelines," "objectives," and "codes of practice" is very loose throughout the Schedule. In places they seem to be used interchangeably, although the terms can have very different meanings.

ii) Specific Comments

Article 2: Definitions

"Standard"

The definition is unclear. Do national "standards" include legally binding federal emission and effluent standards established through regulations made under CEPA and the *Fisheries Act*?

"Non-degradation approach"

Discharge-based guidelines are defined in terms of being "technology-based." However, discharge guidelines need to consider the likely environmental effects of pollutants. The proposed approach ties guidelines to what is achievable through end-of-pipe pollution control technology. It implies no means of addressing substances for which it has been determined that the only acceptable level of discharge is zero -- such as federal Toxic Substances Management Policy Track 1 Substances -- through process changes and other pollution prevention techniques.

"Risk Assessment"

No reference is made to a hazard assessment approach. Such an approach was used in the Ontario Candidate Substances for Bans or Phase-Outs process[85] the federal Accelerated Reduction and Elimination of Toxics (ARETS) program,[86] and the federal government's response to the June 1995 Report of the House of Commons Standing

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[85].See Candidate Substances for Bans or Phase-Outs (Toronto: Ontario Ministry of the Environment, 1991).

[86].See Environmental Leaders 1: Voluntary Commitments to Action on Toxics through ARET (Hull: ARET Secretariat, March 1995), p.6.

Committee on Environment and Sustainable Development on CEPA.[87]

"Risk Management"

No reference is made to pollution prevention in this Schedule. Risk management and risk assessment imply a regressive and reactive management approach to potential environmental and human health hazards.

Article 4: Principles

4.1 No Reference is made to the application of the precautionary principle in the development of guideline and standards, although reference is made to the precautionary principle in the Framework Agreement (Article 3.1).

Reference is made to cumulative effects, but no reference is made to synergistic effects between pollutants.

Article 5: Roles and Responsibilities

These articles prescribe for the Federal government a minor, coordinating, subordinate role.

5.3(a) The Federal government is given a lead role in the development of ambient environmental quality guidelines and protocols. However it can only act in accordance with a work plan approved by the National Coordinating Committee, which is dominated by provincial and territorial governments.

5.3(b) Federal government only plays lead coordinating role with respect to ensuring the development of discharge based guidelines.

5.3(c) &(d) Federal government is given only support and secretariat roles.

5.3(e) Federal implementation role limited to federal lands. Does this include Lands Reserved for Indians?

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[87].Government of Canada, Environmental Protection Legislation Designed for the Future: A Renewed CEPA, p.70.

5.4(a) Provinces committed by this article to implement national guidelines. What happens if they fail to do so? Are provinces permitted to act on guidelines of their own which are more stringent than the national guidelines?

Article 6: Establishment of National Coordinating Committees

6.1 Creates National Coordinating Committee. Who are the members? How are its operations to be supported?

6.2(a) The National Coordinating Committee is to operate on consensus basis. This guarantees that any standards, guidelines, codes or practice or objectives developed under its auspices will reflect a lowest common denominator position among the Parties, where agreement can be achieved at all.

6.4(d) National Guidelines Task Groups are to be supported by a technical secretariat. Where will this be located? How will it be funded?

Article 8: Implementation of National Guidelines and Codes of Practice

Provides for the development of an implementation strategy to be agreed to by the parties. No provisions are made regarding the failure of a party to implement a national guideline or code of practice.

No provision is made for the development of a national guideline, code of practice or objective by the Federal government, or any other body, in event of a failure of the Parties to agree on a guideline, code of practice or objective, where one is necessary, even on an interim basis. If the Parties fail to agree there will be no nation guideline, code of practice or objective. In particular, the federal government is provided with no means to move the process forward even if it is of the view that a national guideline, code of practice or objective is needed to protect the health or environment of Canadians, or that the measure agreed to through the EMFA process is inadequate.

Article 11: Review of the Schedule

11.1 Schedule applies in perpetuity. Even if the review reveals the need for change, changes can only be made by agreement of all of the Parties. No provision is made for an independent review of the implementation of the Schedule.

Appendices

The National Guideline Development and Implementation process diagrammed in Appendix C does is not described in the text of the Schedule.

Notwithstanding the commitment to openness, transparency and public participation, in Framework Agreement Art 3.1 no reference to public participation is made in the Schedule except in the Appendices.

The process outlined in the Appendices appears to be extra-ordinarily complex. How long will it take to develop national guidelines, objectives, codes of practice or standards?

iii) Conclusions

This Schedule transfers responsibility for the development of national guidelines, objectives, standards and codes and practice from the federal government to the new "national" institutions created by the Schedule. The process is to work on the basis of consensus among the 13 Parties. This is certain to result in lowest common denominator standards, where agreement can be reached at all.

It is unclear if the Schedule is intended to apply to the development of legally binding federal environmental standards, such as those currently in place through CEPA and the *Fisheries Act*. Would the development of such standards in the future have to occur through the process described by the Schedule?

No mechanisms are provided to ensure the implementation of nationally development guidelines, standards, objectives or codes of practice by the Parties. No provision is made for the development of standards, guidelines, objectives or codes of practice necessary to protect the health and environment of Canadians in the event of a failure to agree on the development of such instruments by the Parties.

No provisions for openness, transparency and public participation in the development of standards, guidelines, codes of practice, or objectives are made in the Schedule. No provisions are made for independent review of the results of the Schedule. No provisions are made regarding the role of First Nations governments in the development and implementation of national standard, guidelines, objectives or codes of practice.

Finally, *despite the consideration that the process articulated in the Schedule is certain to generate lowest common denominator standards, the Parties may have no right to implement higher standards*. This is a result of the specific commitment provided by Art 5.3(e) and 5.4(a) that the Parties implement the national guidelines developed through the process established by the Schedule. This specific commitment apparently overrides

the general right of the Parties to implement higher standards provided by Art 9.3 of the Framework Agreement by virtue of the provisions of Art 6.5(a) of the Framework Agreement.

6. SCHEDULE IV - POLICY AND LEGISLATION[88]

i) Introduction

This schedule is one of the most important in the Harmonization Agreement. It establishes a process similar to that set out in Schedule V (Standards and Guidelines) for the development and implementation of national policies. In addition, the Schedule outlines a work plan for the "harmonization" of environmental legislation.

The national policy development framework suffers from the same structural and accountability problems as the "national" standards and guidelines process outlined in Schedule V. The requirement for unanimous consent of the parties will result in lowest common denominator outcomes, where agreement can be reached at all. Public participation in the development of national policies is only optional. No leadership role is provided for the federal government in the development of national policies.

No provision is made for the role of First Nations governments in the development of "national" policies. No provision is made for the federal government to develop and implement national environmental policies independently in relation to subjects under its jurisdiction where it is necessary to do so to protect the health, safety and environment of Canadians.

Virtually no detail is provided with respect to the process for "harmonizing" legislation although this is a central goal of the CCME project. What information is provided suggests that the systematic review and repeal of federal legislation which "overlaps" with provincial requirements is the likely outcome of the proposed work plan. No provisions for public participation are made in relation to the proposed legislative "harmonization" process.

ii) Specific Comments

Summary

The summary makes reference to the existence of overlap and duplication of federal and provincial legislation, but provides no examples. As discussed in detail under Cross-Cutting Issue #1: Justification, the studies that have been done show that overlap

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[88].This commentary was developed with the assistance of the West Coast Environmental Law Association.

and duplication between federal and provincial legislation is extremely limited.[89] Many stakeholders have expressed much more serious concerns about the incidence of "underlap and gaps" in the existing federal, provincial and territorial environmental protection system,[90] particularly as governmental resources are reduced at all levels.

The summary also makes reference to open, transparent and participatory processes in the implementation of national policies. However, public consultation in the development of such policies is optional, and no provisions for public consultation, openness or transparency are made with respect to the harmonization of legislation.

Article 3: Objectives

Public Participation

Reference is made to a policy development process which is open, transparent and promotes effective public participation. However, public participation in the national policy development process is at the discretion of the parties. No provisions are made regarding openness or transparency.

Elimination of Overlap and Duplication

Numerous studies have concluded that the actual overlap and duplication between federal and provincial legislation is extremely limited.[91] Many stakeholders have expressed much more serious concerns about the incidence of underlap and gaps in the

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[89].See, for example: Environment Canada, Regulatory Review: Discussion Document (Ottawa: November 1993); G.R. Brown, "Canadian Federal-Provincial Overlap and Presumed Government Inefficiency," Pubilus, 24, (1994),: 21-37; and KPMG Management Consulting Resource Impacts Assessment Study: Environmental Management Framework Agreement Study Report, (Ottawa/Winnipeg: Canadian Council of Ministers of the Environment/KPMG August 1995).

[90].This was strongly reflected in the testimony of witnesses before the House of Commons Standing Committee on Environment and Sustainable Development in its 1994-95 review of the Canadian Environmental Protection Act (CEPA). See Standing Committee on Environment, Its About Our Health!, esp. ch.1.

[91].See, for example: Environment Canada, Regulatory Review: Discussion Document (Ottawa: November 1993); G.R. Brown, "Canadian Federal-Provincial Overlap and Presumed Government Inefficiency," Pubilus, 24, (1994),: 21-37; and KPMG Management Consulting, Resource Impacts Assessment Study.

existing federal, provincial and territorial environmental protection system.[92] Furthermore, no case has been made that overlap and duplication of legislative requirements, if they exist, are injurious to environmental protection. In fact, many students of federalism argue that such outcomes provide for oversight and backstopping,[93] and thereby enhance environmental protection.[94]

One-Regulator Approach

As noted earlier, no case has been made by the proponents that a "one-regulator approach" will result in better environmental protection, or that the lack of such an approach is injurious to environmental protection. Where one regulator fails to act on a serious problem, the other may. The "one-regulator" model also fails to address the problem of situations where the "one-regulator" is the proponent or sponsor of a given undertaking. There is an obvious potential for conflict of interest in such situations.

Accountability

No public or parliamentary accountability mechanisms are provided under this Schedule.

Promotion of Efficiency, Effectiveness and Consistency in Legal Mechanisms

Serious questions must be raised about the practicality and desirability of the promotion of "consistency" in legal mechanisms. One of the advantages of federalism is the degree to which it permits policy innovation in individual jurisdictions. Measures successfully employed in one jurisdiction may then be adopted by other jurisdictions in the federation.[95] The drive for "consistency" underlying this Schedule seeks to shut down this dynamic.

With respect to practicality, the limits of what the executive branch can guarantee with respect to the amendment of legislation must be recognized. The amendment of

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[92].This was strongly reflected in the testimony of witnesses before the House of Commons Standing Committee on Environment and Sustainable Development in its 1994-95 review of the Canadian Environmental Protection Act (CEPA). See Standing Committee on Environment, Its About Our Health!, esp. ch.1.

[93].See, for example, K.McRoberts, "Federal Structures and the Policy Process," in M.Atkinson, ed., Governing Canada: Institutions and Public Policy (Toronto: Harcourt Brace Jovanovich, 1993).

[94].See, for example, Harrison, "Prospects for Intergovernmental Harmonization."

[95].McRoberts, "Federalism and the Policy Process," in Atkinson, ed., Governing Canada.

legislation is ultimately the choice of Parliament and the legislatures, not of the federal and provincial governments. Each of the 13 jurisdictions which may be signatories to this agreement are at different stages in their electoral cycles, and may elect new governments, with differing environmental priorities, as the proposed legislative harmonization process proceeds.

Article 5: Information Sharing

No reference is made to public access to government information on emerging issues and on contemplated policies.

PART I - National Environmental Policy Development Framework

Article 7: Implementing the National Policy Development Framework Process

7.1 Term "Committee of the Parties" not defined here or in 7.2 or 7.3. Who is it? How does it operate?

7.2 Priorities for "national" policy development will be set by "Committee of the Parties," not the federal government.

7.3 Leadership on development of "national" policies to be determined by "Committee of the Parties," not the Federal government. The term "most effective actor" is not defined.

No role is articulated for First Nations governments in the development of "national" policies despite commitment on part of some of the proposed Parties to the draft Agreement to deal with First Nations on a government to government basis. See Cross-Cutting Issue #6, above.

Article 8: Development and Implementation of National Policies

8.1 All decisions appear to be made by the Committee of the Parties. Committee of the Parties is not defined in the Agreement. No procedures for decision-making by the Committee of the Parties are provided. On the basis of past CCME practice this may be assumed to be a consensus approach. As with Standards and Guidelines this is likely to lead to "lowest common denominator" outcomes, where agreement can be reached at all. No provisions are made to deal with situations in which a national policy may be necessary to protect the health, safety and environment of Canadians and the Committee of the Parties cannot agree on such a policy.

8.2 There is no description of the mechanism leading to the Parties' "endorsement" of a national policy. Will it be the Ministers' signature? Do all parties have to endorse a proposed national policy for it to become a "national" policy which they are obligated to implement? Note that there is no "endorsement" process for Schedule V, standards, guidelines and codes of practice.

Article 9: Public Consultation

Despite stated objectives of openness, accountability and public participation, public consultation is national policy development is at the discretion of the Committee of the Parties.

Article 10: Implementation Plan

Implementation plans are to be developed jointly by the Parties. The problems of deadlock and "lowest common denominator" outcomes will apply here as well. No specific mechanisms are identified to ensure that Parties implement policies which they endorse. Nor is there any provision permitting Parties to implement more stringent policies to subjects under their jurisdiction.

No provision is made for the independent evaluation and public reporting of the implementation and effectiveness of policies developed under the proposed process.

PART II - Harmonizing Legislation

Article 11: General Guidelines

11.2 This article appears to limit the Parties to the options contained in Appendix B of the Schedule. Other options are apparently ruled out. What was the basis for selecting the options in Appendix B? How have they been evaluated?

11.4 Among other things, the Parties are not committed to ensuring that Legislation is effective in promoting environmental protection, providing for public participation in decision-making, or adhering to the polluter pays and precautionary principles.

11.4(c) Does this mean that the Parties have created "unnecessary" barriers in the past? Can they provide examples of such "unnecessary" barriers?

11.4(d) As noted earlier, serious questions must be raised about the desirability and practicality of achieving a "harmonized" and "consistent" environmental management regime. What about the achievement of an effective environmental

management regime? "Harmonization" and "consistency" should not be seen as ends in themselves. They are (perhaps) instrumental means to the actual end -- an effective and efficient system for protecting Canada's environment.

11.5 As with 11.2, Parties appear to be limited by this article to options provided in Appendix B of the Schedule. As noted earlier, the Parties, (i.e. the executive branches of the federal and provincial governments) cannot bind Parliament and the Legislatures to enact any legal mechanism. Indeed, the members of Parliament or a given Legislature may choose to defeat such legislation, or enact alternative legislation, and thereby potentially bring down the government which is a signatory to the Agreement.

11.6 As noted earlier, no compelling evidence has been presented by the proponents of the Agreement that there is significant overlap and duplication in federal and provincial environmental legislation. Indeed, significant evidence has been presented to the contrary and to the existence of substantial gaps in the existing legislative framework. Nor have the parties presented any argument as to why legislative overlap or duplication is necessarily injurious to environmental protection. It may, in fact, it may enhance environmental protection by providing for oversight and backstopping.

Article 12: Appendices

Amendments to the appendices (e.g. the addition of new "legal mechanisms" or changes to the legislative harmonization work plan) may only be made by unanimous consent of the Parties. This is likely to lead to deadlock and leave the process unable to change to respond to changing circumstances and priorities.

Article 14: Review

No provision is made for the independent review of the Schedule. The Schedule applies in perpetuity (no expiry date).

No provision is made for the amendment of the Schedule itself. Presumably this can only occur through unanimous consent of the Parties, meaning even if the review reveals a need for changes, the refusal of one Party to agree to a change means the Schedule continues to apply as is.

Appendix A

The process is, as elsewhere in the Agreement, extraordinarily complex. No

explanation of the diagrammed process is provided. How will it ever work? How long will it take to develop and implement a "national" policy.

Appendix B

How were these options selected? Many suffer from serious constitutional, legal, effectiveness and accountability problems. Under 2.2(a) Interdelegation to Individuals, for example, the discussion with respect to pulp and paper effluent discharges implies that federal controls on pollution from pulp mills under CEPA and the *Fisheries Act* would, under the proposed agreement, no longer be a federal responsibility, but would be subject to veto by any provincial government (as a "national" subject).

Canada would not have the pulp and paper mill pollution standards that we have today if this provision had been in effect when the federal standards were developed and adopted. In addition, the statement implies that site specific controls on pollution from pulp and paper mills would no longer by a federal responsibility under the *Fisheries Act*, but would become an exclusive provincial responsibility. The site specific regulations regarding the mill in Port Alberni, British Columbia, under the *Fisheries Act*, would not be in effect today if this provision had been in effect when those regulations were developed and adopted.

Appendix C - Work plan to Harmonize Existing Legislation

This appendix provides no work plan, no timetable, and no procedures for decision-making. However, it is intended to outline what may be the most important element of the "harmonization" Agreement. No indication is provided as to why legislation applying to "industrial development" is targeted for initial review under the Schedule, nor is the term "industrial development" defined. Further comment is not possible without more information although it seems to suggest, given the overall direction of the Agreement, a work plan to review all federal environmental laws and regulations against provincial requirements and repeal those federal laws and regulations which overlap with provincial ones.

iii) Conclusions

This Schedule represents the core of the harmonization process. It exemplifies the fundamental failure of the whole agreement, discussed in detail in Part One. The Schedule proposes the surrender of federal leadership and authority to develop national environmental policies to the "Committee of the Parties." No decision-making processes are articulated with respect to this Committee, although it seems intended to operate on the basis of the unanimous consent of the Parties. This virtually guarantees deadlock and

"lowest common denominator" outcomes in the proposed "national" environmental policy process. The federal government appears to retain no right of action to develop and implement national environmental policies where such policies may be necessary to protect and promote the national public interest.

No public accountability mechanisms are proposed in relation to national policy development and implementation. Public participation in the process is at the discretion of the Parties. No role for First Nations governments is provided for in the "national" policy development process.

The desirability and practicality of the legislative "harmonization" process proposed in the Schedule must also be questioned. The proposed drive for consistency seems likely to shut down legislative and policy innovation among the parties. In addition, it seems clear from the tone of the Schedule and the overall Agreement that federal environmental legislation and regulations are to be systematically targeted for repeal where there is overlap with provincial requirements. This would eliminate important backstopping provisions which establish minimum national environmental protection standards for all Canadians.

No effort is proposed to identify gaps in the existing federal and provincial legislative and policy frameworks. No rationale is provided for the targeting of laws and regulations affecting "industrial development" as priorities for "harmonization." No provisions are made for public participation or accountability in the "harmonization" of "legal mechanisms."

Finally, there is a fundamental failure to recognize that governments cannot bind Parliament and the Legislatures through intergovernmental agreements. Ultimately Parliament and the Legislatures may enact any legislation they wish within their jurisdictional capacity established by the *Constitution Act* and consistent with the provisions of the *Canadian Charter of Rights and Freedoms*. Furthermore, newly elected governments may not feel bound by the provisions of a "harmonization" agreement which they did not sign. Indeed, a government, conceivably could be elected on the basis of a platform opposed to the direction of the Agreement and feel no compulsion to participate in its proposed process for legislative "harmonization."

education have always fallen within provincial jurisdiction. If a need for national standards exists for environmental education, it would be expected to be required for core subject areas as well.

ii) Specific comments

Article 3: Objectives

Elimination of Duplication

For a great many issues not defined as "national," eliminating duplication between the federal and provincial levels, will not eliminate duplication in the development of educational materials. There will continue to be significant duplication among the provinces in areas such as forestry eduction and wildlife conservation

Establishment of Standards

This is very ambiguous, and can be interpreted as implying that control will be exerted over the way issues are dealt with by various jurisdictions. Upon what criteria will the quality of materials be judged, and how will these standards be developed and articulated?

Sustainable Future

This term is undefined.

Article 4: Principles

"Informing the public about the goals, objectives, achievements, policies and initiatives of the government" does not qualify as environmental education. It may be that governments see environmental education products as an appropriate medium for self-promotion, but educators and others do not.

Article 5: Roles and Responsibilities

5.3 Not all provincial governments have the same resources to pass down to their education departments. Therefore, there will be a high degree of inconsistency across provinces and territories with respect to the level of resources supplied to their education departments. Smaller, less well-funded jurisdictions have traditionally relied heavily on federal sources of quality environmental education materials, which have been both cheap and widely available.

ii) Specific Comments

Article 5: Roles and Responsibilities

Federal Roles and Responsibilities

5.1(a) Federal responsibility is limited to "international borders and international agreements." It is not clear what the latter means in terms of response responsibilities. Does it mean that the federal government can act, for example, to fulfil its obligations under the 1993 International Labour Organization *Convention on the Prevention of Major Industrial Accidents* to formulate, implement and periodically review a coherent national policy on major industrial accidents? There is no statement in the Schedule indicating that the federal government is ultimately responsible for the provision of an emergency response capability even though this agreement obligates it to ensure the presence of such capabilities.

Federal jurisdiction over emergencies also implies that the federal government has ultimate responsibility to ensuring that adequate emergency response capabilities exist for all Canadians.

No reference is made to responsibility for environmental emergence response on Indian Lands. It would have been assumed that this is a federal responsibility flowing from federal jurisdiction over "Indians and Lands Reserved for Indians."

5.1 (c) Federal response responsibility is limited to marine spills, spills in the Great Lakes and spills from federal facilities and vessels, and on federal lands that are contained within federal lands. It is unclear whether, if a spill on federal lands enters provincial lands, it becomes provincial responsibility

The responsibilities for spills from vessels inland but not on the Great Lakes are unresolved. The implications of federal jurisdiction over inland fisheries, and navigable waterways must be considered.

Provincial Roles and Responsibilities

5.2 (c) Provinces are responsible for responses to spills on provincial lands and in inland waters. What is the relationship between this responsibility and the provisions of applicable federal legislation such as the *Fisheries Act*, and the *Navigable Waters Protection Act*?

5.2(d) Provinces are responsible for responses with respect to waste management. Does this include spills occurring during the international and interprovincial transportation of wastes? What is the relationship with the

federal *Transportation of Dangerous Goods Act*? With respect to international movements of waste, it should be remembered that it is the federal government which is ultimately responsible to Canada's international partners for ensuring an adequate response by Canada.

Article 6: Cooperative Arrangements

6.1 If there is already a CCME Memorandum of Agreement for Environmental Emergencies why is this Schedule needed? Is the memorandum of agreement inadequate? If so, why?

6.2 This section recognizes the need for a bilateral approach in this area, but provides no national baseline in terms of response capability that Parties will seek to achieve through such Agreements.

6.4 Implementation to be directed by Committee of Parties. Does not recognize federal government has ultimate responsibility to ensure adequate emergency response in light of 1993 ILO *Convention on the Prevention of Major Industrial Accidents*.

Article 7: Resources

The section provides no qualification regarding the existence of provincial or territorial capacity to respond prior to transfer of responsibilities from the federal government to a province or territory.

Article 8: Review

No provisions for an independent review of Schedule. No provisions for the amendment of the Schedule.

iii) Conclusions

The federal government appears to surrender responsibility and authority to act in this area, despite its responsibilities under international agreements to ensure Canada's capabilities in the field. No provision is made regarding emergency response on Indian lands.

The value of the approach underlying this Schedule is limited. Given the variations among the provinces and territories in terms of capability, environmental conditions, and economic structure, the "one size fits all" approach proposed in the Schedule cannot succeed.

The federal government must proceed in a manner which tailors its roles and responsibilities to reflect the situation in each province and territory to ensure that an adequate emergency response capability exists in each jurisdiction.

It is not clear why a Schedule is needed in this area give the existence of the 1990 CCME Memorandum of Understanding for Environmental Emergencies and other existing cooperative agreements.

9. SCHEDULE IX - RESEARCH AND DEVELOPMENT

i) Introduction

In light of reduced resources, the question of the emergence of gaps in environmental research and development is a much more serious question. This concern is especially acute in the areas of atmospheric science and freshwater science, as a result of the federal government's Program Review with respect to Environment Canada and the Department of Fisheries and Oceans. Provincial research and development budgets have also recently suffered severe cuts, particularly in Alberta and Ontario.

In this context, there may be some value to be gained from the better integration of federal and provincial environmental research and development activities. Consequently, it may be appropriate for an agreement in this area to proceed, even if the EMFA is not adopted. Indeed, there is no need for the EMFA for an agreement to be reached in this area.

However, as currently drafted, the Schedule may limit the capacity of the federal government to participate in research on local and regional issues where it is necessary for it to do so. In addition, the federal government's capacity to provide leadership in research on national environmental issues may also be weakened.

It is unclear if the Schedule is intended to apply only to research conducted by parties, or to apply to the funding of independent funded by the parties. Furthermore, as the Schedule largely describes the status quo in terms of research and development activities, it is not clear what the value-added arising from the proposed Schedule is intended to be.

ii) Specific Comments

Article 5: Roles and Responsibilities

5.2 and 5.3 Federal and Provincial Roles and Responsibilities

These provisions appear to reflect the current situation with respect to environmental research and development in Canada. In particular, the importance of the current federal role in regional and local environmental research and development is acknowledged, although it may be limited by the addition of the term "participation." This implies that the federal government cannot undertake independent research and development activities in relation to a regional or local activity. It should be noted that in some cases a federal role in regional or local research arises out of international commitments, such as with the Remedial Action Plans initiated under the Canada-U.S. *Great Lakes Water Quality Agreement.*

The definition of regional research is unclear. Does this mean research on a region within a province, or a region in ecosystem sense, even if the region includes areas in more than one province?

The issue of sectoral research is unaddressed by the Schedule. The federal government's role in this regard should continue, as this provides for a more efficient use of resources. Sectoral research efforts should be focused on strategic technologies in the areas pollution prevention, energy and water efficiency and waste reduction, reuse and recycling.

Article 6: Guidelines for Research and Development

6.1 (a) The rationale for this provision is unclear. It appears to be intended to preclude the possibility of the federal government undertaking or leading research and development on a local or regional issue without the agreement of the province in question. In other words a province could prevent federal research into an environmental question which it doesn't want investigated.

6.1(c) Care must be taken to ensure that "partnerships" with the private sector are of benefit of the public as well as to the private interests involved. Concerns have also been widely expressed regarding the degree to which such "partnerships" give control over the public research agenda to private interests.

Article 7: National Environmental Science Forum

The article appears to create yet another new "national" institution, the National Environmental Science Forum of the Parties. The structure and membership of this forum are unclear. Who would attend? Who is responsible for its organization? Will it be open to the Public? Why is it needed? What does it add to existing fora provided through Environment Canada, professional and scientific associations, and international bodies such as the International Joint Commission and the North American Commission on Environmental Cooperation. It would be unfortunate if scarce resources were drawn away from needed environmental research activities to support an additional bureaucratic structure.

7.1(c) Given the federal government's statement of interests, traditional role, and the provisions of section 5.2 of this Schedule, it would have been assumed that it would have been given lead responsibility for "national" research and development activities.

7.2 National Environmental Research and Development Database

Given the federal government's statement of interests, traditional role, and the provisions of section 5.2 of this Schedule, it would have been assumed that it would have been given the lead responsibility for the creation and maintenance of such a database. It is surprising that one does not exist already, particularly in light of the need to rationalize research efforts in the context of reduced budgets. The creation of such a database may be the most useful proposal in this the Schedule.

iii) Conclusions

This Schedule raises relatively few major issues. However, it would weaken the capacity of the federal government to undertake research and development activities on local or regional environmental matters, and to provide leadership in the formulation of the national environmental research agenda. Amendments may be appropriate to clarify the right of the federal government to undertake research and development activities on regional or local issues where appropriate or necessary.

If these matters with respect to the federal government's role are addressed, it may be appropriate for an agreement to proceed in this area regardless of the fate of the EMFA as a whole. A clear rationale for the National Science Forum must be presented to justify the dedication of scarce resources to its support. The proposal for a national research and development database should be pursued regardless of the fate of this Schedule or the EMFA as a whole.

10. SCHEDULE X - STATE OF THE ENVIRONMENT REPORTING[100]

i) Introduction

This Schedule could exist without the rest of the Harmonization Agreement. In fact, should the Agreement be abandoned this schedule should be pursued by both levels of government through an administrative agreement as there are significant advantages to be obtained through the harmonization state of the environment reporting practices.

ii) Specific Comments

Article 2: Definitions

2.1 "SOE reporting activities" are defined to include "data analysis, frameworks, and database inventories." It is essential that members of the public have access to the data used in the preparation of SOE reports.

Article 5: Roles and Responsibilities

5.2 Does national mean the traditional meaning of "national" or the EMFA definition of "national." There is no federal role if a province fails to provide SOE reporting data.

Article 10: Data Sources and Access to Data

10.1 Rules regarding access to data to be defined on the basis of agreement by the Parties. It is essential that members of the public have access to the data used in the preparation of SOE reports.

Article 14: Resources

Recent reports indicate that the federal government has reduced its SOE funding. The effects of such developments on the Schedule should be addressed.

Article 15: Review

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[100].This commentary developed with the assistance of the West Coast Environmental Law Association.

No provision is made for the independent review of the Schedule. The Schedule applies in perpetuity (no expiry date).

No provision is made for the amendment of the Schedule itself. Presumably this can only occur through unanimous consent of the Parties, meaning even if the review reveals a need for changes, the refusal of one Party to agree to a change means the Schedule continues to apply as is.

iii) Conclusions

This Schedule should proceed regardless of the fate of the EMFA as a whole. Provision should be made for public access to the data on which SOE reports are to be based.

11. SCHEDULE XI - POLLUTION PREVENTION[101]

i) Introduction

The most serious problem with the Pollution Prevention schedule is that it -- as was noted by industry and ENGO participants at the 1996 workshop -- has not been clearly integrated with the other major schedules: Monitoring, Compliance, Guidelines, Objectives and Standards and Policy and Legislation. It has been noted elsewhere that Schedules I, III, V and VI focus on end-of-pipe and command and control models of pollution management, all of which are fundamentally out of synchronization with the precepts of pollution prevention. The Pollution Prevention Schedule appears to be, therefore, an afterthought schedule. LRC members at the 1996 workshop indicated that the schedule was relegated to this secondary status because of the reluctance of some of the Parties to fully commit themselves to pollution prevention.

The second serious problem with this schedule is that it appears to contemplate that the only way pollution prevention will be achieved is through voluntary action on the part of regulated industries. Although "legislation" is mentioned once in Appendix A to the schedule, the rest of Appendix A describes the increasingly familiar process of undertaking demonstration projects, creating partnerships with regulated industries, facilitating, promoting and sharing of information that are all the hallmarks of the current trend toward voluntary compliance.

There are several problems with the voluntary approach. First, it is unclear how any level of government (Appendix A clarifies the question of which government only so far as to indicate that, for the most part, both levels of government will be involved to one extent or the other with the initiatives) will have the resources available to undertake the lengthy negotiations involved in creating voluntary compliance agreements with regulated industries.[102] Second, although there have been some demonstrated good results arising from these agreements with large, well-organized and sophisticated industrial sectors, such as automotive manufacturing, past attempts to achieve voluntary compliance among sectors characterized by small, independent operations have shown uneven success.[103]

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[101].This commentary developed with the assistance of the Canadian Environmental Law Association.

[102] The average length of time to negotiate existing pollution prevention agreements, for example the Motor Vehicle Manufacturer Association's agreement with the Ontario and Federal governments, is two to three years.

[103] See K. Clark, The Use of Voluntary Pollution Prevention Agreements in Canada: An Analysis and Commentary, (Toronto: The Canadian Institute for Environmental Law and Policy, April, 1995), at 19: ... past experience with

In spite of this uneven record, Appendix A indicates that governments will attempt the expensive, potentially fruitless process of steering small and medium-sized enterprises toward pollution prevention, rather than develop regulations, which may be faster, and more effective. In this area in particular, as with many other areas addressed by the Schedules, research should be undertaken beforehand to show whether or not this plan is an efficient use of scarce government resources.

The final, and most serious problem with voluntary compliance is that it has not been proven effective for the long term. Industry interest in voluntarism arose not accidentally in the late 1980's in response to the increasing environmentally activist positions taken by governments, and increasingly strict environmental laws. Focusing their significant resources on the question of avoiding their liability under these new laws, industries found that they could, if given the opportunity, respond more efficiently to government requirements than government regulation sometimes permitted. Industry then targeted government regulations as barriers in their paths to better environmental protection. In their turn, suddenly-deficit-sensitive governments responded to the industry position by encouraging "voluntary" compliance. This response has been different in different jurisdictions. In the United States and some European countries, voluntary pollution prevention has been supported by comprehensive legislation. In Canada, where governments at all levels have always followed a more cooperative and promotional

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voluntary initiatives indicates that the end result of some of these projects is regulation in any case, which raises the question of where the claimed efficiency lies. The progression of events from an attempt to promote voluntary compliance among industry players to the formulation of regulations tends to occur most often when government attempts to achieve voluntary compliance in sectors of the economy where regulated industries are small, independent and diverse in location and activity. The problems faced by these initiatives -- examples of which are the Ontario Multi-Materials Recycling Incorporated (OMMRI) recycling programme, and the Canadian Petroleum Producers Institute Stage 1 Vapour Control project -- relate to the matter of cost.

Simply put, when proposed voluntary initiatives are too costly to be supported by individual companies, the companies opt out of their voluntary obligations, and the initiative collapses. After the initiative collapses, government will resort to regulation, sometimes at the request of industry. In order to deal with free-riders on the Ontario Blue Box programme, OMMRI asked the Ontario government to legislate the obligations companies would not otherwise voluntarily comply with. Similarly, after meeting wide-spread resistance from small, independent gasoline distribution companies to the voluntary Stage 1 vapour control project, the Ontario Ministry of Environment and Energy introduced a regulation.

strategy to achieve compliance, the legislative route to encourage pollution prevention has been avoided. In Canada "voluntary compliance" and "pollution prevention" are virtually synonymous. The problem this strategy erects, however, is, if interest in voluntary pollution prevention arose from the impending threat of regulation, then, if Canadian jurisdictions do not propose to regulate, the impetus for further voluntary action will disappear. There may be no question that some environmental gains have been made under existing voluntary compliance plans. There is a real question, however, if Canadian governments abandon the regulatory model altogether, how many more environmental gains will be made.

Following are more specific comments about the Pollution Prevention Schedule.

The Schedule Does Not Cover the Ambit of Pollution Prevention

The basic lay-out of the schedule is: Scope, Definitions, Objectives, Principles, Division of Roles, Implementation, Resources, Review of Schedule and Coming Into Force. What seems to be missing in the schedule is the actual substance of what is encompassed in a programmatic sense in pollution prevention. In other words, while there is significant detail as to the definition of pollution prevention, there is little detail on what programs serve to operationalize the term. Hence, the clues to the programs encompassed in the term can be found in Appendix A - titled: "Federal, Provincial/Territorial and National Roles Organized by Strategy." This "Strategy" is, in fact, the proposed components or programs of pollution prevention as envisioned by the Parties. They include: (1) Leadership; (2) Partnerships; (3) Practical Tools; and (4) Incentives.

What is abundantly clear from the articulation of programs is the absence of many programs that are commonly in pollution prevention programs. In fact, one will note that virtually all of the programs proposed in Appendix A are *voluntary, educational, or other types of non-regulatory type programs*. Although the provisions can be interpreted differently, it does seem that none of the programs call for regulatory action either at the federal or provincial level.

What should also be noted is that there is at this point a dynamic discussion as to the role the federal government with respect to pollution prevention. First, in June of 1995, the federal government released its pollution prevention strategy entitled: Pollution Prevention: A Federal Strategy for Action (Government of Canada, 1995). This document commits the federal government to the concept of pollution prevention, and this is further discussed below.

Second, the Standing Committee on Environment and Sustainable Development tabled its report on revisions to the Canadian Environmental Protection Act (CEPA). Chapter 6 of that report provides a comprehensive review of the concept along with a number of recommendations. Two of these recommendations pertain to the use of

mandatory pollution prevention plans and integrated permitting strategies.

Third, in December of 1995, the government of Canada released its response to the Standing Committee's report, entitled: CEPA Review: The Government Response - Environmental Protection Legislation Designed for the Future - A Renewed CEPA (December, 1995). Chapter 6 of that report commits the federal government to the concept of pollution prevention as the preferred method of dealing with pollution. It does carve out a very defined and proactive federal role. From a regulatory point of view, the report calls for the mandating pollution prevention plans for CEPA Toxic Substances and infractions for CEPA and using the National Pollutant Release Inventory to track progress on the pollution prevention. It also calls a large federal role in the development of model pollution prevention plans.

It should be noted that the Appendix to the Pollution Prevention Schedule does not mention any of these reports; does not mention any of these federal commitments; and does not mention most of these programs, and in particular, pollution prevention planning, among others. *There is No Connection to Existing Policies and Programs.*

Finally, it should be noted that pollution prevention is area intimately tied to the standard-setting and regulatory programs of the various jurisdictions. This schedule does not connect or refer to how pollution prevention will be incorporated or integrated into the existing policy and programs of the various jurisdictions.

For example, the federal government response to the Standing Committee's report would make the federal government more active in terms of increasing the number of substances that are to be assessed, and thus, potentially found to be toxic. How will this schedule interrelate with these proposals? It is simply inappropriate to discuss pollution prevention outside the context of existing policy and programs.

Added Value of the Schedule

Subject to the above comments, most of the provisions in the schedule are satisfactory in the sense that they fairly interpret the concept and do not backslide on existing obligations. On the other hand, the schedule, on a whole, does not seem to add much to the status quo. What is the rationale for this schedule at this point? It may well be that the schedule lends to more confusion rather than clarity since at this point, there has been no real issues requiring harmonization of efforts.

ii) Specific Comments

As mentioned, the particular provisions in the schedule do not seem to be problematic. One of the guide posts for the review is whether the provisions are consistent with the federal document: Pollution Prevention: A Federal Strategy for Action. This document is used as a guide post since it is a commitment of the government of

Canada to the principle of pollution prevention and it is the most recent pronouncement.

Article 1: Scope of the Schedule

1.2 In section 1.2, pollution prevention is accepted as the preferred strategy. Other strategies are also outlined including "destruction." If destruction includes incineration, then this statement is wrong. Incineration is never an acceptable strategy for pollution prevention or pollution control.

Article 2: Definitions

The definition provided is essentially the same one from the federal Pollution Prevention: A Federal Strategy for Action document. One of the key differences is that the federal Pollution Prevention document lists "clean production" in section 2.1(b) as a legitimate tool while this item is not listed in the Schedule. Clean production is an important tool and should be included. In its place, "product life-cycle" is included without any definition. Hence, it is unclear what is meant by this term.

Article 4: Principles

These principles are weak and counterproductive. They fail to:

(a) recognized the need for federal leadership and governmental leadership generally in pollution prevention;
(b) emphasize the need for regulatory action in this field rather than the emphasis it places on voluntary action;
(c) provide a stronger programmatic thrust and especially in relation to the absence of the pollution thinking to existing regulatory programs; and
(d) rather than the need to harmonize, there is the need to act to implement pollution prevention.

Further, the third to last principle talks about "cradle to grave." Pollution prevention is designed to prevent the use or creation of pollutants; hence, that principle is in need of clarification.

iii) Conclusions

The proposed Schedule no connection to existing federal and provincial pollution prevention programs. There is also an excessive focus on promoting voluntary actions on pollution prevention. The most successful pollution prevention programs to date in the United States been regulatory in nature.

III. CONCLUSIONS

1) The EMFA as a Model for Dysfunctional Federalism

In an exercise such as the CCME harmonization agreement, it is important to recall that intergovernmental cooperation is, at best, an instrumental goal. It is pursued as a means of achieving a primary goal, in this case improved environmental protection, minimizing costs to government and regulated interests, and enhanced accountability to the electorate, rather than an end in itself.[104] In many ways, the drafters of the agreement seem to have lost sight of this critical insight. The result has been an Agreement which promises to do little to enhance the protection of Canada's environment and which, in fact, could lead to a reduced level of environmental quality for Canadians.

The draft Agreement contains some potentially significant proposals to improve the level of coordination and cooperation among governments in the protection of Canada's environment. Measures such as the better integration of state of the environment reporting activities, and the establishment of a data base on environmental research projects sponsored and undertaken by federal, provincial territorial and First Nations governments would be particularly useful. Unfortunately, these proposals are overshadowed by the profound problems which lie at the core of the CCME harmonization project.

In effect, the CCME attempted to solve one alleged problem -- unilateral action in environmental protection on the part of the federal government -- by describing it as another alleged problem -- "duplication and overlap" -- and then proceeding without making any effort to identify, quantify or describe the problem which it set out to resolve. This, in combination with too short a time line, insufficient resources and a weak consultative structure, has lead to failure.

A strong federal role in the protection of Canada's environment is essential to ensuring that: Canada meets its international environmental obligations; national environmental issues are dealt with effectively; environmental protection is provided in areas of federal jurisdiction and of national concern and provincial incapacity; an adequate science base exists for environmental policy-making in Canada; and that all Canadians have a minimum level of environmental quality regardless of where they live in Canada.

As drafted, the primary effects of the agreement would be to delegate areas of federal responsibility to the provinces and pre-empt the ability of the federal government to act on its own to protect the environment. Responsibility for enforcement of federal

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[104].Pers. comm., Prof. K.Harrison, Department of Political Science, University of British Columbia, January 1996.

environmental legislation would be delegated to the provinces, except on federal lands and at international borders. Given the past track record of many provinces with the delegation of responsibility for federal environmental law enforcement, and without federal resource transfers, the likely result will be the *de facto* repeal of the affected federal environmental legislation. The withdrawal of federal enforcement efforts and capability would weaken existing oversight and back-stopping mechanisms which provide for more effective environmental protection in Canada.

The Agreement also proposes a process for the systematic review of federal legislation and regulations for "overlap" with provincial environmental requirements. The pulp and paper, mining, and petroleum refining sectors, which are among the largest sources of industrial pollution in Canada are targeted for early action under the Agreement. The likely result seems the repeal of federal requirements which are concluded to "overlap" with provincial laws and regulations.

In addition, the proposed Agreement would replace federal leadership and policy-making on national and international environmental issues with "national" decision-making processes. The development of national environmental policies and standards, Canada's positions in international environmental negotiations, and even educational materials on "national" environmental issues, such as air quality would occur on the basis of agreement between the federal government and all twelve provinces and territories. In effect, the federal government would be unable to undertake any significant environmental action without the consent of the provinces and territories.

No role is provided for First Nations and aboriginal people in the proposed "national" decision-making processes, and no public accountability mechanisms are established in relation to them. The whole proposed structure seems guaranteed to produce deadlock and lowest common denominator outcomes. The only form of reformed federalism the CCME's proposed model would be likely to provide is dysfunctional federalism.

2) The EMFA as a Case Study in Poor Public Policy Development

Unhappily, the development of the draft agreement has been, in many ways, a case study in poor public policy development. The Agreement's basis in empirical reality is limited. It proposes a wholesale restructuring of almost every aspect of environmental management in Canada. However, virtually no supporting research has been conducted to indicate where problems may lie or what those problems might be. The resulting agreement is overwrought, opaque and baroquely complicated. It fails to address the real emerging problems in the protection of Canada's environment as government resources are reduced.

In order to have any chance of success, future exercises of this nature should be based upon, and supported by:

* an objective and independent review of the relevant Canadian constitutional law and international law conducted by individuals with recognized expertise in the field;

* an objective and independent review of the relevant areas where new mechanisms can be developed, conducted by individuals with recognized expertise in the field;

* an objective and independent review and evaluation of the approaches taken to environmental management mechanisms in these areas by comparable federal jurisdictions, such as Australia, the United States, and the European Union, conducted by individuals with recognized expertise in the field;

* an objective and independent review and evaluation of existing Canadian practices and federal, provincial, territorial, First Nations and public roles and responsibilities in these areas, preferably accompanied by case studies demonstrating the strengths and weakness of the current approaches; and

* the presentation of a range of options, based on the foregoing research, for public review and comment.

Such an effort might first be attempted in a specific field, such as international affairs, or in relation to a particular sector.

The absence of appropriate mechanisms for meaningful consultation with non-governmental organizations and other stakeholders, must also be recognized as an underlying reason for the failure of the CCME exercise. The lack of appropriate external consultation structures deprived the drafters of the Agreement of the benefit of the input, comments and suggestions of individuals and organizations dealing with problems in the field. It also meant that there was no external constituency with any stake in the contents of the proposed Agreement and therefore a motivation to defend it publicly.

Ultimately, the effort to deal with the full range of environmental management activities at one time, on a very short time line, and without appropriate resources to support background research and proper public consultation processes was simply overambitious. It was impossible to complete effectively even with the best intentions and efforts of the officials involved.

3) Addressing Canada's Environmental Protection Needs in the Future

There is a real need to find means of ensuring environmental protection in the context of reduced government resources. Indeed, many Canadians are concerned about the growing gaps in Canada's environmental protection system as a result of budget restraints at all levels. Unfortunately, the proposed "harmonization" agreement does little to address this problem.

Future efforts to provide for the more effective and efficient interface of federal, provincial, territorial, and First Nations and other aboriginal environmental protection efforts should be conducted on realistic time lines, be supported by independent and sound empirical research, and appropriate mechanisms for public consultation. A thorough review of current federal, provincial, territorial and First Nations roles, responsibilities and capabilities for the purpose of identifying essential needs and critical gaps would provide a good starting point for such an exercise.