SPEAKING NOTES

An Environmental Perspective on CEPA: Some Observations on How the Law was Developed and On-Going Issues for Implementation

BRIEF #381

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November 23, 1999

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1. INTRODUCTION

The *Canadian Environmental Protection Act* (formerly Bill C-32 and passed into law in September, 1999) remains one of the cornerstones of federal environmental law and policy. It is not surprising, therefore, that the development of the new statute earlier this year from its 1988 form was such a long and protracted affair. After almost five years in the making, there remain many residue issues arising not only from the process of the development of the new CEPA, but also from the result of the process, that is, the provisions of the law.

The purpose of this paper is to outline the perspective of environmental constituency following the development of the law and with regard to its implementation. Owing to the fact that it took some five years to develop the bill, it is not possible to provide a detailed history or analysis of either the process that lead to the law or CEPA itself. However, what is possible is to provide some general observations that are no doubt echoed by many environmental organizations throughout Canada and hopefully some useful lessons to be gained for future processes.

2. CEPA - THE LEGISLATIVE PROCESS

2.1 The Nature of the Process and Its Implications

As a contextual comment, it is important to realize that CEPA was a very controversial piece of legislation. The controversy concerning the Act was not only due to the nature of its provisions,

but because it was also a lightening rod for a number of important policy debates that raged before, and one suspects, will continue to rage after the passing of CEPA.

The review of the legislation commenced in 1994 and took over five years to complete. It resulted in three sets of public hearings by Parliamentary Committees, including hearings by the Standing Committee on Environment and Sustainable Development during the initial review of the 1988 CEPA,[1] the hearing by the same Committee after Second Reading, and finally Hearings by Senate Energy and Environment Committee as the Bill traveled through the Senate. In addition to these hearings, there were also hearings that were related, but not directly focused on CEPA, including hearings relating to the review of the *Canada Wide Accord on Environmental Harmonization*[2] and Environment Canada=s track record on enforcement.[3]

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[1]The hearings resulted in a report by the Committee entitled: Report of the Standing Committee on Environment and Sustainable Development, *It=s About Our Health! Towards Pollution Prevention* (June, 1995). The federal government responded to this report in their document entitled: Canada, *CEPA Review: The Government Response - Environmental Protection Legislation Designed for the Future - A Renewed CEPA - A Proposal* (December, 1995).

[2]Standing Committee on Environment and Sustainable Development, *Harmonization and*

During the clause-by-clause review of the bill at Second Reading, the Committee debate was one of the protracted debates to date with the highest number of amendments submitted collectively by the different political parties than any other legislative bill in recent memory.

The legacy of the development of the bill is threefold: first, the protracted and largely ineffective consultation process for development of the bill left all stakeholders with the sense that there must be a more efficient and fairer way to develop a bill. Moreover, the bill demonstrated the divisiveness that occurs among federal departments and the lack of access by the public to participate in those inter-departmental debates. The CEPA consultation experience should be further documented and analyzed to address the problems complained of by the stakeholders.

The second legacy of the development of the bill pertains to the views of the environmental community, including members of the Toxics Caucus of the Canadian Environmental Network. The community perceived that not only was the consultation a failure, but that industrial stakeholders had more resources devoted to their campaign, better and more effective access to decision-makers, were better received by decision-makers, and as such were more successful in

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Environmental Protection: An Analysis of the Harmonization Initiative of the Canadian Council of Ministers of the Environment (December, 1997).

[3]Standing Committee and Environment and Sustainable Development, *Enforcing Canada=s Pollution Laws: The Public Interest Must Come First!@* (May, 1998).

changing the bill. In short, the development of CEPA did not focus on the strength and legitimacy of the substantive merits of arguments put forth, but instead, on power politics: who had the resources and access to decision-makers.

The intense, Awinner-take-all@ attitude of industry, while being successful in attaining their desired changes, has reinforced a growing sense of cynicism and ill-will between industrial and non-government stakeholders. Hence, the CEPA experience may well have turned the clock back a decade in the relationship between these two constituencies. The implementation of CEPA may be an interesting challenge for government as they contend with the deep divisions between stake-holders created in the development process.

The third legacy is that, for environmental organizations, CEPA was seen as an important forum to highlight new and emerging policy approaches and an opportunity to implement needed policy innovations. By and large, many of these innovations never saw the light of day within CEPA. However, a number of these were debated and some aspects of them are reflected in CEPA.[4]

While many of the policy innovations were not fully implemented in CEPA, it is of significant importance to recognize that the debate on those issues will continue provided such opportunities arise with respect to CELA implementation or in arenas outside of CEPA itself.

[4]For a discussion of CELA=s suggested amendments to Bill C-32, see: Canadian Environmental Law Association and the Canadian Institute for Environmental Law and Policy, Submission to the Standing Committee on Environment and Sustainable Development on Bill C-32.

2.2 The Unresolved Issues

The protracted debates concerning CEPA evolved around a number of important principles and concepts. The following represent only a few examples of these principles and concepts.

(a) Virtual Elimination

Perhaps the most controversial component of CEPA has been the provisions relating to the goal of virtual elimination. The issue concerning virtual elimination has been debated for many years and can be stated as such: are there certain pollutants that are so dangerous owing to certain characteristics that there is no safe threshold? If there is no safe threshold, should not these substances be subject to a phase-out (that is, ensuring that there is no use or generation of the substance in question) rather than some emission limit, no matter how small?

The environmental community argued for a regime that would:

1. identify those substances those substances that had inherently toxic properties;
2. allow for the expansion of what was meant by Ainherently toxic;@
3. phase-out or severely restrict the use and generation of those substances that were identified as inherently toxic.

At first reading, the government included a definition of virtual elimination that was simply

incomprehensible. Section 65 essentially stated that virtual elimination meant that designated substances must not be released into the environment at levels higher than the levels of quantification and where such levels can be attributable to some environmental or health effect.

Prior to Second Reading of the bill in the House of Commons, the definition was changed by the government to state that virtual elimination requires that the targeted substances must not be emitted at levels above the level of quantification. This definition was approved at the clause-by-clause review by the Standing Committee on Environment and Sustainable Development. However, at report stage, just prior to the Third Reading of the bill, the government made a number of changes to the bill. One of these changes was to section 65 and various corresponding sections in the bill.

Section 65 of CEPA now states as follows:

> 65.(1) In this Part, Avirtual elimination@ means, in respect of a toxic substance released into the environment as a result of human activity, the ultimate reduction of the quantity or concentration of the substance in the release below the level of quantification specified by the Ministers in the List referred to in subsection (2).
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> (2) The Ministers shall compile a list to be known as the Virtual Elimination List, and the List shall specify the level of quantification for each substance on the List.
>
> (3) When the level of quantification for substance has been specified on the List of referred to in subsection (2), the Ministers shall prescribe the quantity or concentration of the substance that may be released into the environment either alone or in combination with any other substance from any source or type of source, and, in doing so, shall take into account any factor or information provided for in section 91, including, but not limited to, environmental or health risks and any other relevant social, economic or technical matters.

The changes made essentially attempted to correlate requirements to act with respect to the targetted substances with the achievement of the Ainterim@ targets in section 65(3) rather than with the ultimate goal of virtual elimination in section 65(1). Industry fought very hard for these changes hoping that the changes may neuter the goal of virtual elimination.

The environmental community would probably suggest that the virtual elimination provisions of the bill could lead to some progressive changes. First, all of the substances on the Domestic Substances List will assessed in order to determine substances that are toxic, persistent and bio-accumuative. Second, the various provisions do accelerate the priority substances process, at least marginally. And third, persistent, bio-accumulative toxics are now subject to virtual elimination.

Unfortunately, the virtual elimination goal still fails to meet the expectations of the environmental community. One could argue that the definition is still inconsistent with to the pollution prevention declaration of the act (because the definition is oriented to emission reductions like a pollution control regime rather than use and generation issues as required by a pollution prevention approach) and with the *Great Lakes Water Quality Agreement*.

On the other hand, the definition will lead to the identification of persistent, bio-accumulative substances in Canada and target them for action. Three other interesting observations should be made. First, the debate around virtual elimination will now be moved from the legislative arena to the implementation one in terms of defining what substances are subject to virtual elimination,

what is the level of quantification and what are the interim targets pending virtual elimination.

Second, the issue of whether these substances should have to meet section 65(1) or 65(3) endpoints is a debate which will ultimately have to be resolved by the courts. The changes at Third Reading are inconsistent with the thrust of the Act and should the government ignore the overall objective for these substances, it will be interesting how the courts will attempt to reconcile these provisions.

Third, the importance of the CEPA provisions is actually unclear in light of the fact that some of the substances that would be dealt with federally are now being dealt with under the Canada-Wide Standard-Setting process under the *Canada-Wide Accord on Environmental Harmonization*. This matter is discussed in more detail later.

(b) Pollution Prevention Planning

Part 4 of CEPA provides the opportunity for the Minister of the Environment to require any person to prepare pollution prevention plans for any substance or class of substances on the Toxic Substances List (that is, a substance found to be toxic under CEPA). These kinds of planning requirements emanate from the relatively successful efforts in the United States with respect to toxic use reduction laws.

The environmental community argued that pollution prevention planning should be *required* for

all substances on the Toxic Substances List *and* those substances on the National Pollutant Release Inventory. Part 4, as it now stands, therefore, is a far cry from the provisions that were hoped for during the legislative process. In effect, the provisions are only triggered upon the exercise of discretion by the Minister and only for substances on the Toxic Substances List. At this point, it is not clear under what circumstances the Minister would intend to exercise his or her discretion (for example, will the Minister routinely require pollution prevention planning for substances on the Toxic Substances List)?

Moreover, there is still some debate as to the scope and content of the plans, something that will have to be assessed to determine the long-term benefit of these provisions.

Despite these uncertainties though, there is significant potential for pollution prevention plans to spark innovation to dramatically reduce or eventually eliminate some of the targetted substances. This potential is particularly reinforced since the definition of Apollution prevention@ in section 3 is defined in a positive way to ensure that the focus will be on the prevention of the creation or use of pollutants rather than on pollution control measures.[5]

(c) Citizen Rights

Citizen rights is another area that led to considerable controversy in the development of the bill. Essentially, the environmental community proposed a whole array of citizen rights to allow

[5]Section 3 of CEPA defines pollution prevention to mean: Athe use of processes, practices, materials, products or energy that avoid or minimize the creation of pollutants an waste

citizens to:

- have greater access to environmental information related to CEPA activities;
- provide notice and comment opportunities guaranteed in law with respect to new policies, regulations and approvals emanating from CEPA;
- ensure that citizens have the right to request an investigation of possible violations of CEPA;
- effective legal action where there are actual or likely violations;
- effective whistle blower law; and
- other ancillary rights.

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and reduce the overall risk to the environment or human health.@

CEPA only includes a few of these rights and their effectiveness is far from certain. It is interesting to note the federal government=s failure to understand the importance of legislating a notice and comment regime. For the purposes of CEPA, it would have provided a one-window, predictable means for consultation in a cost effective way, especially since the bill already called for an environmental registry. The registry is now in the design stages and in light of how these type of registries are already used, including the environmental registry in Ontario under the *Environmental Bill of Rights*,[6] the federal government has missed a golden opportunity to advanced public participation principles for all constituencies.

The right to sue provisions were the most controversial provisions with respect to citizen rights. Under these provisions, there is the opportunity to bring a violator of the Act to court, subject to a number of qualifications and preconditions. These provisions are generally modelled after similar provisions under Ontario=s *Environmental Bill of Rights*.[7] Ironically, these provisions have seldom been used, and certainly no claim has yet to be fully litigated under them.

CEPA=s provisions actually complicates the regime that it used as a model under the *Environmental Bill of Rights*. There is no doubt that, in the proper circumstances, these sections will be useful, especially the right to request an investigation (which is a precondition to the

[6]Statutes of Ontario, c. 28, sections 5 and 6.

[7]*Ibid*., Part VI.

triggering of the right to sue in the first place.) The key benefit of such provisions is ffor situation where environmental clean-up and remediation is required. Otherwise, the more simple and often more effective route is through a private prosecution, where any person can lay a charge and prosecute Ain the shoes of Attorney General.@ In Ontario, this route has been successful in a number of cases.

In the end, CEPA has made a relatively simple notion very complex and cumbersome for all. Rather than making the citizen enforcement action Auser friendly,@ the federal government encumbered such rights with numerous qualifications and preconditions, probably to appease the industrial lobbyists who feared a Afloodgate@ of litigation under these provisions. Ironically, while there will not be a floodgate of litigation, one can presume that any litigation under these provisions will no doubt be protected since some of the qualifications are not known to common law and are not found in the law it was modelled after, Part VI of the *Environmental Bill of Rights*. What was overlooked by the federal government is that the Courts are in the best position to control their own process, including vexatious and frivolous claims. Hence, floodgates arguments will only arise if, in fact, there are that many violators of the law.

(d) Other Issues

There are a number of other issues that were quite controversial:

(i) Precautionary Principle: The use of the precautionary principle was incorporated in

the bill, although its use is qualified to Acost-effective@ measures, a term that is not defined and the subject of some debate.

(ii) International Air and Water Provisions: CEPA includes powers that can be exercised to limit instances of international air and water provisions. Until last minute changes, these powers were to be exercised by the Minister of the Environment. However, amendments at the report stage changed these provisions to require cabinet to authorize any actions. These changes were interpreted by some non-governmental groups as a means to constrain the powers of the environment minister.

(iii) Biotechnology: Under the 1988 CEPA, the Environment Canada retained residual power under CEPA to regulate the products of biotechnology. The new CEPA further weakens the powers of Environment Canada to regulate this industry.

4. CEPA AND THE CANADIAN NATIONAL AGENDA: THE INTER-RELATIONSHIP WITH THE CANADA-WIDE HARMONIZATION ACCORD

After the enactment of CEPA, one of the key questions that remains is the interface of CEPA with the *Canada-Wide Accord on Environmental Harmonization.*[8] The *Canada-Wide Accord,* an initiative by the Canadian Council of the Ministers of the Environment (CCME), was concluded by nine provinces (excluding Quebec) and two territories. In addition to the overall Accord, three sub-agreements were concluded, including sub-agreements on inspections, standard-setting

[8]Concluded January 29, 1998 in St. John=s, Newfoundland. The agreements can be attained from CCME=s homepage.

and environmental assessment.[9]

[9]It is being proposed that the Inspections sub-agreement is replaced by a sub-agreement on inspections and enforcement.

The Accord and its proposed processes has been subject to intense criticism[10] and a court challenge remains on going.[11] One of the key concerns was that the Accord would lead to the devolution of federal roles and responsibilities to the provinces and that the standards would represent a Arace to the bottom@ since all the parties would have to agree to a Canada-Wide standard (which is really an objective). Once a standard has been agreed upon, a determination has to be made as to which level of government is Abest situated@ to further the standard (which can be done by both regulatory and non-regulatory mechanisms). When one order of government has been designated to deal with the issue, the other order of government Ashall not act@ during the duration of the Accord or sub-agreement.

At this point, some nine substances have been undergoing the development of standards further to the standard-setting sub-agreement. Some substances, such as dioxins and furans, are clearly

[10]While the Accord was intensely criticized by non-governmental groups, also see: Standing Committee on Environment and Sustainable Development, *Harmonization and Environmental Protection: An Analysis of the Harmonization Initiative of the Canadian Council of Ministers of the Environment* (December, 1997).

[11]Canadian Environmental Law Association v. Minister of the Environment, April 27, 1999, Federal Court of Canada. In this case, while the Court noted with interest a number of the arguments by CELA, the Accord was upheld. The case is now under appeal and will be heard some time in early 2000.

within federal jurisdiction to regulate. The consultation process is still in its early stages. It will be interesting to see whether the federal government will be eager to exercise its powers or wait for provincial action.

It is apparent that the federal government is not willing to act except in accordance with the Accord. This raises the question of the role of CEPA. It would seem that its role is subordinate to the processes and inter-jurisdictional agreements emanating from the harmonization accord.

5. CEPA AND THE INTERNATIONAL AGENDA - THE DEVELOPMENT OF THE POPS TREATY

While CEPA must be put in the national context with such initiatives as the Harmonization Accord, it is also important to understand the international context. To a large extent, the same kind of policy and legislative debates that have been happening in Canada over the past decade are now occurring through the international negotiations concerning a binding treaty to address persistent organic pollutants (usually called the POPs treaty). Three negotiation sessions have already occurred with the fourth scheduled for March of 2000. The proposed treaty is to address 12 POPs, at least initially, with possibly more to be added.

With respect to the Canadian context, 10 of the 12 POPs are pesticides or substances already banned or not in use in Canada. Hence, the key substances where the proposed treaty could impact Canadian national policy is with respect to dioxins and furans. Certainly, this debate is an important one since Canada will no doubt take the new CEPA as a model for international

action. However, there are some indications that countries would like the Treaty to go further.

6. SUMMARY AND CONCLUSIONS

CEPA remains an important law. However, the long debates over it probably will not end just because the bill has been passed into law. CEPA raises very fundamental issues as to how to regulate toxic substances, issues that will endure for some time both within Canada and internationally.

Like any new law, its success will ultimately depend on how it is implemented by the federal government, including whether there are sufficient resources to undertake the task. Certainly its provisions could move the yard sticks forward in arresting the environmental and human health problems emanating from toxics substances.

Hence, one of the legacies of the bill will be the commitment the federal government gives to fully implementing the law, even though there are a number of deficiencies to the law noted above. A final legacy will be with respect to the process in the development of the law. Non-government groups remain displeased, to say the least, with the lack of environmental leadership demonstrated by the federal government and its inability to find ways forward in face of contrary views in a number of issues. It is a legacy that non-governmental agencies will no doubt long remember.