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**Petition to the Commissioner
of the Environmental & Sustainable Development
Concerning the Proposed
"Canada-wide Accord on Environmental
Harmonization"**

Brief No. 340

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CELA Brief No. 340; Petition to
the Commissioner of the Environment &
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1. Nature of the Petition

Introduction

This petition is being submitted by Paul Muldoon, counsel with the Canadian Environmental Law Association, pursuant to section 22 of the *Auditor General Act*, R.S.C. 1990, as amended, concerning an environmental matter in the context of sustainable development, namely, the intention of the federal government to conclude the "Canada-Wide Accord on Environmental Harmonization" [hereinafter referred to "Environmental Harmonization Accord" or "EHA"] between the federal and provincial governments on January 29 or 30, 1998. A copy of the proposed accord is attached to this petition as Attachment Number 1.

The purpose of this petition is to urge the federal government, and in particular, the Minister of the Environment, not to conclude the proposed EHA for the reasons outlined in section 4. It also urges the Auditor-General to review the EHA generally in terms of whether it is consistent with sustainable development and conduct an environmental audit of the existing bilateral environmental agreements. Other relief requested is outlined in section 5. Background to the EHA and an overview of its terms are provided in sections 2 and 3 respectively.

Conformance with the *Auditor General Act*

It is respectfully submitted that this petition falls within the requirements of section 22 of the *Auditor General Act*. It falls within the requirements for the following reasons:

(a) Paul Muldoon, counsel with the Canadian Environmental Law Association, is a resident of Canada. The Canadian Environmental Law Association is legal aid clinic incorporated under the laws of Ontario.¹

(b) The subject matter of this petition concerns an environmental matter in the context of sustainable development in that the proposed EHA will have a dramatic impact on the environmental roles and responsibilities of the federal government and the loss of federal capacity to protect the environment. It is respectfully submitted that devolution and loss of federal capacity is a matter in the context of sustainable development.

(c) This petition is being directed to Environment Canada which is a category I development as defined under the *Auditor General Act*.

¹ Evidence of residency will be submitted upon request.

This petition relies on a number of other documents in support of its arguments. In particular, it relies on a submission to the Standing Committee on Environment and Sustainable Development prepared by the Canadian Environmental Law Association (CELA) and the Canadian Institute for Environmental Law and Policy (CIELAP). It also relies on the subsequent report by the Standing Committee on this topic. These documents, along with numerous other documents, are attached to this petition as Attachments Number 2 and 3 respectively.

2. Background to the Subject Matter of the Petition

The EHA was developed under the auspices of the Canadian Council of the Ministers of the Environment (CCME).

The CCME environmental 'harmonization' initiative has its grounding in the late 1980s and early 1990s. During this timeframe, the federal government expressed a willingness to reduce its role in environmental matters, and to enhance the role of the Council in the formulation and implementation of national environmental policies.²

Following its November 1993 meeting, the CCME announced that harmonization would be its top priority in the coming two years. A document describing the "Purpose, Objectives and Principles" of the initiative was released in June 1994.³ The first words in the document stated that:

"The elimination of duplication and overlap in federal/provincial/territorial regulatory matters, the harmonization of policies and programs, and the need to redefine working relationships between orders of government, the private sector and the public, have quickly become fundamental issues in the Canadian political context."

By late 1994, environmental organizations responding to the document had begun to express doubts that "duplication and overlap" in federal and provincial environmental programs was a pressing problem. Other criticisms included the inappropriate transfer of authority and responsibility between governments, the stalemate to action and "lowest common denominator" scenario resulting from CCME consensus based decision-making process.

At the fall 1994 CCME meeting the Ministers decided to release a draft Environmental

² K.Harrison, Passing the Buck (Toronto: University of Toronto Press, 1997), pg.155-161.

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

Management Framework Agreement (as it was then called), and four 'schedules' dealing with environmental assessment, national environmental standards, environmental law enforcement, and international environmental affairs. These drafts were the subject of a multi-stakeholder consultation hosted by the CCME in February 1995. Further schedules, on a wide range of issues, were stated to be under development.

A commentary on the draft Framework Agreement developed by CIELAP and CELA described it as a "de facto" constitutional amendment, which would result in the effective repeal of most existing federal environmental laws, including CEPA, the *Canadian Environmental Assessment Act*, and the pollution control provisions of the *Fisheries Act*. CIELAP and CELA also noted that the proposed agreement would greatly expand the role of the provinces in the development of Canada's position on international environmental issues. This brief is attached as Attachment Number 4.

During the May 1995 CCME meeting, the Ministers failed to come to agreement on the future direction of the initiative. The following month the House of Commons Standing Committee on the Environment and Sustainable Development released its report on the review of CEPA, calling for a significantly strengthened role for the federal government in the protection of Canada's environment.⁴

In addition, in response to the doubts expressed about the amount and seriousness of duplication and overlap in the environmental programs of the federal, provincial and territorial governments, the CCME commissioned a consultant's report on the topic. The resulting report, completed in August 1995, showed that there was very little actual duplication and overlap, and what there was had been effectively limited by agreements between governments.⁵

At the November 1995 CCME meeting it was agreed to release a new draft of the Framework Agreement and drafts of all of the proposed schedules, except for that dealing with environmental assessment. These dealt with such diverse topics Monitoring, Compliance and Enforcement, Policies and Legislation, Standards and Guidelines, Environmental Education, Environmental Emergencies, State of the Environment Reporting, International Affairs, and Research and Development.

In January, 1996, the CCME held a multi-stakeholder workshop in Toronto to review the

⁴ Standing Committee on Environment and Sustainable Development It's About Our Health! Towards Pollution Prevention (Ottawa: House of Commons, June 1995).

⁵ See 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; and see G.R. Brown, "Canadian Federal-Provincial Overlap and Presumed Government Inefficiency," Publius, 24, (1994),: 21-37.

draft Agreement and Schedules. The drafts were severely criticized by environmental non-governmental organizations, aboriginal organizations, and members of the academic community in attendance.

At the May 1996 CCME meeting, it was agreed to drop the proposed Environmental Management Framework Agreement, and its accompanying eleven schedules. Instead, the Ministers agreed to proceed on the development of a brief "Canada Wide Accord on Environmental Harmonization," and three substantive sub-agreements, dealing with inspections for the purpose of environmental law enforcement, 'Canada-wide' environmental standards, and environmental assessment. At the First Ministers' Conference held the following month, the environment ministers were directed to "make progress" on the initiative by their November 1996 meeting.

At the November 1996 CCME meeting, the Ministers agreed "in principle" to the draft "Canada-Wide Accord on Environmental Harmonization." However, the document was neither initialled or signed by the Ministers. Furthermore, there was no agreement on the proposed sub-agreements on environmental standards, inspections, and environmental assessment. The contents of the Accord and current publicly available drafts of the sub-agreements are discussed in detail in the following section of this petition.

The Ministers were to be scheduled to sign the Canada Wide Accord and the three sub-agreements at the May 1997 CCME meeting. However, this meeting was cancelled due to the June 1997 federal election. The Accord and sub-agreements are now scheduled to be signed at a meeting of the CCME on January 29 and 30 in St. John's, Newfoundland.

As noted, throughout the process, environmental non-governmental organizations have expressed serious concerns regarding the content and direction of the CCME initiative. This has included the release of a series of public statements, endorsed by large numbers of environmental organizations from across Canada, articulating their concerns regarding the project, and calling upon the federal government to provide leadership on national and international environmental issues. Copies of these statements are attached to this petition as Attachments 5, 6 and 7. Last week, organizations from across Canada signed a letter to the Prime Minister of Canada urging him not to support the EHA. This letter is attached to this petition as Attachment Number 8.

3. Overview to the Proposed Accord and Sub-Agreements

A detailed review of the contents of the proposed EHA and its sub-agreements will not be undertaken in this section since a copy of the EHA and its sub-agreements is provided in the Section III of the CELA-CIELAP Brief to the Standing Committee on Environment and Sustainable Development and attached to this petition as Attachment Number 2.

The Canada-Wide Accord

The Canada-Wide Accord sets out the goals of the harmonization initiative and includes a framework for the contents of the substantive sub-agreements. The Accord places an overwhelming emphasis on the "one-window" delivery of environmental protection services by a single order of government. There is even an explicit bar on action ("shall not act in the role") by the level of government not charged with service delivery (Sub-Agreements Art. 6). This language is repeated in all three sub-agreements.

The Accord also states that the governments "best-situated" to deliver a service are to be the one-window delivery mechanism. The criteria for the definition of the government "best situated," such as physical proximity, and ability to address client and local needs, would appear to favour the provinces in most cases (Sub-Agreements Art. 3).

Furthermore, the Accord would commit governments to seek to amend their existing legislation to bring it into conformity with the Accord (Sub-Agreements Art. 9). Section 2(2)(i) of Bill C-74, the new *Canadian Environmental Protection Act*, appeared to be intended to implement this provision. The Accord would also commit governments to adjust existing programs and budgets to reflect the contents of the Accord (Administration Art. 4).

Finally, the Accord contains no formal sunset clause (Administration Art. 7), and can only be amended by the unanimous consent of the parties (Administration Art. 10). These provisions are repeated in each of the sub-agreements.

Inspections Sub-Agreement

The proposed Inspections Sub-Agreement specifically targets for elimination situations where there is the potential for the backstopping of the efforts of one level of government by another (Section 2.3). Furthermore, under the proposed Sub-Agreement, inspection activities related to industrial and municipal facilities and discharges are to be assigned to the provinces (Section 4.2.1). This presumably includes inspection activities related to the enforcement existing federal laws and regulations, such as those made under CEPA and the *Fisheries Act* which apply to such facilities.

Once this arrangement is in place, the federal government would not be permitted to conduct inspections where a province fails to do so, even in cases where there is potential for immediate harm to the environment and health.

Standards Sub-Agreement

The Accord states that responsibility for the implementation of standards affecting intraprovincial/territorial issues, and the industrial and municipal sectors is to be assigned to the provinces (Art. 6.9). In combination with the other proposed provisions of the sub-agreement, this would appear to eliminate the possibility of the development and implementation of federal baseline standards for the major sources of air and water pollution in Canada in the future. It

The EHA will impede the ability for the federal government to negotiate and implement international obligations. As further sub-agreements are negotiated, it will become apparent that at least one sub-agreement will be negotiated pertaining to the federal role and international agreements. If this sub-agreement is similar to a sub-agreement under the former Environmental Management Framework Agreement, the provinces will have to be consulted and agreement sought with them in the development of international negotiating positions. There are many examples where such a formula has resulted in a recipe for inaction. The clearest example pertains to the recent attempt to arrive at a negotiating position for the climate change conference at Kyoto. The CCME and the provinces negotiated a position which was woefully inappropriate. When the federal government agreed to a different position, the provinces continue to outline their disappointment and refusal to implement the federal position.

The issue pertaining to negotiations and implementation of international obligations is outlined in a CELA-CIELAP document attached to this petition as Attachment Number 4.

(d) The EHA is Inconsistent with Sustainable Development

Although Environment Canada recognized the EHA and committed to conclude the According to its Sustainable Development Strategy (a copy of which is attached to this petition as Attachment 13), it is submitted that for the reasons stated above, the EHA is inherently inconsistent with sustainable development. Moreover, the EHA is inconsistent with some of the principles and commitments in the Department's Strategy itself. For example, under Strategy No. 2, that is, for Environment Canada to "be a more effective advocate of sustainable development," the department commits to build upon the EHA.

However, the question remains as follows: how can Environment Canada advocate for the goal of sustainable development when in it is about to divest its traditional roles and responsibilities over the environment to the provinces? It is respectfully submitted that Environment Canada's is misleading the public as to the practical implications and effects of the agreement. The EHA will, in effect, devolve traditional federal responsibilities over standard-setting and enforcement over the to provinces, weaken the role of federal environmental assessment and eventually devolve other areas as additional subagreements are negotiated.

5. Relief Requested

This petition is being submitted with a request for the following relief:

- (a) The Minister of the Environment should not conclude the EHA. Instead, new and alternative approaches for federal-provincial cooperation should be explored with full stakeholder involvement.

- (b) Further to (a), the following actions should be undertaken as a basis prior to the development of alternative approaches for federal-provincial cooperation:
- (i) there is a need for a comprehensive study or series of studies undertaken by the federal government identifying gaps, overlap and duplication in Canada's environmental management regime are conducted and made public;
 - (ii) the Auditor General of Canada should: (i) conduct a review of the implications of devolvement of federal environmental roles and responsibilities and comment on whether it is consistent with sustainable development principles and practice; and (ii) conduct an environmental audit of the effectiveness of the bilateral environmental agreements between the federal and provincial governments such as those under the *Canadian Environmental Protection Act* (CEPA) and the *Fisheries Act*; and
 - (iii) a comprehensive study by the federal government should be undertaken outlining the implication of any harmonization initiative on the negotiation and implementation of international obligations.
- (c) The federal government should explore options with respect to the development of new and alternative approaches to federal-provincial cooperation in a manner that includes full and effective public participation.

Attachments

1. Canadian Council of Ministers of the Environment, "A Canada-Wide Accord on Environmental Harmonization" November, 1996.
2. Paul Muldoon and Mark Winfield, Brief to the House of Commons Standing Committee on Environment and Sustainable Development Regarding the Canadian Council of Ministers of the Environment (CCME) Environmental 'Harmonization' Initiative (CIELAP Brief 97/4; CELA Brief 332) Canadian Environmental Law Association and Canadian Institute for Environmental Law and Policy (October 21, 1997).
3. 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).
4. S.Kaufmann, P.Muldoon, and M.Winfield, the Environmental Management Framework Agreement: An Analysis and Commentary (Toronto: CIELAP and CELA, March 1995).
5. Take the Harm Out of Harmonization - A Statement by Non-Governmental Organizations Regarding the Proposed CCME Environmental Harmonization Agreement (Ottawa: Harmonization Working Group, CEN, November 1996).
6. The CCME Environmental Harmonization Agreement: A Statement by Canadian Environmental Non-Governmental Organizations (Ottawa: Harmonization Working Group, CEN, April 1996).
7. Environmental Harmony or Environmental Discord? An Analysis of the Draft Environmental Management Framework Agreement and A Statement of Principles for the Protection of Canada's Environment (Ottawa: Harmonization Working Group, CEN, April 1995).
8. Letter to Rt. Hon. Jean Chretien, Prime Minister of Canada, from the Environmental Harmonization Working Group and others, dated January 14, 1998.
9. Submission to the Canadian Environmental Assessment Agency Regarding the Third Draft Sub-Agreement on Environmental Assessment (Under the Environmental Harmonization Accord (Ottawa: Environmental Assessment Caucus and Harmonization Working Group of the Canadian Environmental Network, April 1997).
10. S.Bryant, The Implications of Harmonization for Environmental Assessment in

Newfoundland and Labrador (St.John's: Action!Environment, 1997).

11. K.Clark and M.Winfield, The Environmental Management Framework Agreement: A Model for Dysfunctional Federalism? (Toronto: CIELAP, February 1996).
12. K.Clark and M.Winfield, Harmonizing to Protect the Environment: An Analysis of the CCME Environmental Harmonization Process (Toronto: CIELAP, October 1996).
13. Environment Canada, Sustainable Development Strategy (April 1997).

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