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June 30, 1997

Lisanne Forand
Director General
Canadian Council of Ministers of the Environment
326 Broadway, Suite 400
Winnipeg, Manitoba.

Fax (204) 948-2125

Dear Ms. Forand,

Re: Proposed CCME Toxics Management Policy

On behalf of the Canadian Environmental Law Association and the Canadian Institute for Environmental Law and Policy, please find attached our submission with respect to the proposed CCME Toxic Management Policy.

Since the time we have faxed you the submission, please note that Great Lakes United has endorsed this submission.

Do not hesitate to contact Paul Muldoon at (416) 960-2284, Mark Winfield at (416) 923-3529 or John Jackson at (519) 744-7503 should you have any questions.

Yours very truly,

Paul Muldoon
Counsel
Canadian Environmental Law Association

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Director of Research
Canadian Institute for
Environmental Law and Policy

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Great Lakes United

GREAT LAKES

An international coalition to const
Great Lakes/St. Lawrence Ri

Comments on the

Proposed CCME Policy

for the

Management of Toxic Substances

Submitted by the

Canadian Environmental Law Association
Brief No. 320

Canadian Institute for Environmental Law and Policy
Brief No. 97/3

Great Lakes United

June 30, 1997

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C. Canadian Institute for Environmental Law and Policy, "Harmonizing to Protect the Environment? An Analysis of the CCME Environmental Harmonization Process" A report prepared for the Harmonization Working Group of the Canadian Environmental Network, November 1996.

D. Canadian Institute for Environmental Law and Policy, "Comments on the Proposed CCME Sub-Agreement on Environmental Standards," November, 1996, pp. 7-8.

1. Introduction

The Canadian Environmental Law Association (CELA) and the Canadian Institute for Environmental Law and Policy (CIELAP) have a long history of involvement in consultations regarding Environment Canada's Toxic Substances Management Plan (TSMP) and the proposed CCME Environmental Harmonization Accord. It is apparent that the proposed CCME Policy for the Management of Toxic Substances (proposed CCME Toxics Policy) is a synthesis of these two initiatives.

CELA and CIELAP do not propose to re-iterate their concerns regarding the TSMP and the proposed Harmonization Accord. Rather we refer the reader to previous documents which outline their critique of these initiatives. This submission provides an overview and summary of concerns regarding the proposed CCME Toxics Policy on the basis of those earlier analyses.

2. General Comments

Following careful review of the proposed CCME Toxics Policy, CELA and CIELAP conclude that they are not in a position to support the initiative and recommend that it be withdrawn. This view is a consequence of both general concerns regarding the proposed CCME Toxics Policy, and specific concerns with respect to its contents.

General Concerns

(i) **The Proposed CCME Toxics Policy Incorporates Problems Associated with Both with the TSMP and the Proposed Harmonization Accord:** CIELAP and CELA have expressed serious concerns regarding both the federal government's TSMP and CCME harmonization initiative. Detailed comments were submitted on the TSMP in November 1994 and comments on the TSMP implementation strategy in February 1997. Copies of these documents are attached to this submission as Attachments A and B, respectively.

Furthermore, CIELAP drafted a critique of the environmental harmonization process for the Harmonization Working Group of the Canadian Environmental Network. This document, entitled, *"Harmonizing to Protect the Environment? An Analysis of the CCME Environmental Harmonization Process"* is attached to this submission as Attachment C. There have also been a number of brief policy statements, endorsed by large numbers of environmental and other organizations from across Canada, expressing opposition to the direction of the CCME harmonization initiative presented to the federal and provincial governments over the past three years.

In essence, the proposed CCME policy superimposes the CCME harmonization process on top of the TSMP. The result is a product of byzantine complexity, and doubtful practicality. The policy is likely to be a further barrier to any serious action by Canadian governments regarding toxic substances which threaten the health and environment of Canadians.

(ii) **The Proposed Harmonization Accord Has Yet To Be Concluded**: The assumption underlying this initiative is that the CCME Harmonization Accord and the Sub-Agreement on Environmental Standards have been concluded between the federal government and the provinces. This is not the case. The Accord has only been approved "in principle," and the Standards Sub-Agreement, to date, has been subject to no political endorsement what-so-ever. The Accord and/or Sub-Agreement may not be concluded or may be amended before they are ratified. Consequently, it is premature, to say the least, to propose a toxics management strategy based on their contents.

(iii) **The Initiative Will Have the Effect of Pre-empting Federal Action on Toxic Substances under CEPA:** The adoption of this proposed policy would significantly encumber the federal government's management of toxic substances under the Canadian Environmental Protection Act (CEPA). The supporting documentation for the policy admits that the federal government is the only jurisdiction with policies directed specifically towards toxic substances management. This immediately raises the question again of why a CCME policy is required in this area. The only possible answer can be to constrain the possibility of independent federal action on the management of toxic substances under its jurisdiction.

(iv) **The Initiative Will Pre-empt the Debate for a Renewed CEPA:** CEPA has been under review since 1993. The review included public hearings and a report by the Standing Committee on Environment and Sustainable Development released in June of 1995 as well as a government response in December of 1995. In December of 1996, Bill C-74 was introduced into Parliament for first reading. Although the bill died on the order paper when the federal election was called, the federal government has committed to re-introduce it early in its new mandate.

Unlike the proposed CCME Toxics Policy, the CEPA review has been the subject of extensive public consultation and debate. Clearly the adoption of a CCME Toxics Policy would significantly constrain further debate regarding the contents of a renewed CEPA. Indeed, this may be the primary rationale for the proposed CCME Toxics Policy. It would be entirely inappropriate that the public and parliamentary debate regarding a new CEPA be pre-empted by a CCME initiative which has only emerged in the last few months and been the subject of virtually no public debate. The legislative debate concerning the

renewed CEPA should precede any CCME initiative pertaining to the TSMP.

(v) **The Consultation Concerning This Initiative is Wholly Inadequate:** A 27 day comment period, without public meetings, the opportunity for dialogue and clarification, and the time to reflect on the consequences of this initiative, is unfair, inappropriate and inadequate. It is apparent that the consultation process is designed to facilitate the adoption of this initiative with claims that it had been the subject of "public consultation."

Moreover, the supporting rationale for the policy was premised, in part, on the views of September 1996 stakeholder meeting to which, to our knowledge no environmental and other non-industry public interest organizations were invited. The supporting rationale gives no indication of who attended this meeting, what interests they represented, the issues that arose or what the final conclusions and recommendations for future actions. Such a process only serves to confirm the worst fears of the environmental community regarding environmental policy-making through CCME processes.

(vi) **There is an Inadequate Rationale for the CCME Initiative:** At present, CEPA provides a process for the identification of substances of concern, their assessment for toxicity, and provides authority to the federal government to regulate those which are found toxic. The Act provides extensive opportunities for the involvement of provincial governments in the process. The provinces can also take action regarding toxic substances under their own legislation.

In light of these considerations, the question arises again regarding the need and actual rationale for the proposed CCME Toxics Policy. It is submitted that the CCME initiative duplicates processes which already exist under CEPA, and is therefore unnecessary.

For these reasons we cannot support the proposed CCME Toxics Policy.

Recommendation No. 1 - The proposed CCME Toxics Policy for the Management of Toxic Substances should be withdrawn at this time. In the alternative, it should be deferred until the enactment of a renewed CEPA, if that statute is updated.

3. Specific Comments

In addition to these general concerns, CIELAP and CELA also have a number of specific concerns regarding the specific provisions of the draft policy document.

3.1 Preamble

The preamble identifies the "reasons for a unified approach." The reasons listed, at best, provide rationale for a more coordinated approach. However, they do not provide an environmental rationale for a unified approach. At best, reason number 3 seems to provide an operative rationale, namely, that a unified approach will provide a better climate for industry.

In order to be effective, a toxics management policy must be premised on an environmental rationale. Such a basis is not provided for the proposed CCME Toxics Policy.

In addition to providing the rationale for a "unified approach," there are number of other elements that should be provided in the preamble to guide the activities of government. These include:

(a) the use and generation of substances which are persistent, bioaccumulative and inherently toxic should be targetted for phased-out. Provision must also be made to deal with substances which pose major threats to the environment, but which do not meet criteria for persistence and bioaccumulation (e.g., endocrine disrupting substances);

(b) the "upward harmonization" of standards should be emphasized; and

(c) emphasis must be placed on improving the regulatory framework for toxic substances, rather than relying on voluntary, measures. This is particularly important given that the substances dealt with under the policy would likely present significant threats to human health and the environment.

It should also be remembered that the proposed CCME Standards sub-agreement under the Environmental Harmonization Accord has yet to be endorsed by Ministers or governments. It is simply premature to move forward on the proposed CCME Toxics Policy until the harmonization accord and sub-agreement have been concluded.

The proposed CCME Toxics Policy specifically excludes issues related to remediation and restoration of contaminated sites. The policy should provide more specific guidance as to how it relates to other initiatives regarding site remediation.

Recommendation No. 2: The preamble should be redrafted to outline in clear terms the rationale for an "unified" approach to toxic substances. The preamble should also include substantive directions to governments. These

should include:

(a) phasing out the use and generation of substances which are bioaccumulative, persistent and inherently toxic. Mechanisms for dealing with other substances of serious concern, which do not meet specific criteria for persistence or bioaccumulation must also be identified;

(b) emphasis on the need to move toward "upward harmonization" of standards rather than moving to the lowest common denominator;

(c) emphasis must be placed on improving the regulatory framework for toxic substances, rather than relying on voluntary measures; and

(d) the relationship between the proposed policy and contaminated site remediation initiatives should be clarified.

3.2 Policy Statement

If adopted, the proposed policy must be significantly amended as follows:

(i) ***Substance Identification***: It is unclear if the CCME will rely on the CEPA Priority Substances List (PSL) nomination process or if the intent is to establish a separate "multilateral" CCME process to identify substances of concern. Moreover, there is no reference to the proposals in Bill C-74, the new CEPA, to provide for a more rational and efficient substances identification and assessment process.

Recommendation No. 3: The CEPA PSL nomination process should be the primary process for substance identification. This process should be accelerated as per the provisions of Bill C-74.

(ii) ***Priority Setting***: Under the proposed policy, decisions on priority substances will be made by CCME, on the basis of "relative risk" and other factors. In light of the few substances suspected of being identified and the number of substances in need of action, it is submitted that a "priority setting" process is unnecessary. Substances nominated through a PSL process should proceed to assessment. The notion of "relative risk" lacks the specificity to give the confidence needed to exclude substances.

Recommendation No. 4: All substances identified or nominated should be assessed without the need for a priority setting process. The substance identification process in Bill C-74 incorporates a priority setting process already.

(iii) ***Assessment of Toxicity***: The proposed policy clearly adopts a risk assessment basis to toxicity. Although the concept of inherent toxicity is recognized, this is done in a very constrained manner. It does not, for example, provide a means of identifying inherently toxic substances, except for those that are persistent or bioaccumulative. Consequently, it does not address the issue of endocrine disrupting substances and other substances that do not fit with the traditional "dose-response" model of toxicity. Further, it would seem that inherent toxicity is defined in the context of a "risk-based assessment" rather than treated as a separate approach.

The Standing Committee on Environment and Sustainable Development, in its review of CEPA, clearly recognized the importance and role of assessing toxic substance using an inherent toxicity approach.

At this point in time, there are no legal or policy barriers from provinces to become more involved in the CEPA assessment process, which is better established and more credible than that proposed under the proposed CCME Toxics Policy.

Recommendation No. 5: The assessment of toxic substances should include the concept of inherent toxicity where substances by nature are candidates for phase-out.

(iv) ***Classification of Track 1 and Track 2***: There are a number of issues raised under this component of the proposed policy. First, the entity which will define the criteria is not identified. Further, those inherently toxic substances that do not meet the traditional dose-response model are virtually excluded from Track 1 substances. Third, naturally occurring inorganic substances, elements and radionuclides are not candidates for virtual elimination on Track 1.

It is important to remember that the concept of "virtual elimination" was developed under the *Great Lakes Water Quality Agreement* to include all substances, specifically including metals. There are no scientific reasons to exclude such substances from Track 1. Many metals are toxic, by definition persistent, and bioaccumulate. The phase-out of the use of such metals and the elimination of anthropogenic sources of emissions of them are entirely feasible public policy goals.

The notion that levels of substances will be reduced to "naturally occurring levels" suggests that the focus on virtual elimination will be on "releases" and not "uses" of substances. Does this mean we would not have targeted the use of lead in gasoline for elimination or the use of mercury in batteries?

A further concern is that the statement "criteria used in the federal TSMP have been considered and recommended for adoption as classification criteria by

the CCME September 1996 workshop." As noted earlier, to our knowledge no environmental organizations were invited to this workshop, it is not known who attended, and what the overall findings and conclusions were.

Recommendation No. 6: Track 1 substances should include all substances, including metals and radionuclides, that meet specific criteria for persistence, bioaccumulation, and inherent toxicity. Furthermore, the criteria for track one substances should be able to evolve to reflect new scientific information. The identification of criteria to capture substances that affect the endocrine systems should be an early priority.

(v) ***Canada-Wide Control Strategies:*** The proposed Canada-wide control strategy approach to toxic substances is fundamentally problematic, for the reasons outlined in Attachment D regarding the proposed CCME Standards Sub-Agreement.

The primary concerns with Canada-wide control strategies can be summarized as follows:

(a) The Notion of "Standards:" The CCME policy is supposed to be consistent with the Environmental Harmonization Accord's Sub-Agreement on Standards. It should be noted that the sub-agreement's use of the term "standards" is a different that normally used. Usually, "standard" suggest a legally binding instrument that sets specified levels of behaviour, the violation of which leads to offences. Under the sub-agreement and the CCME proposal, a "standard" is no more that a suggested guideline, and the provinces are given the complete discretion as to not only how to implement, but effectively whether to implement it.

(b) Pre-emption of Independent Action: One of the real benefits of the Canadian federal system is that some jurisdictions may enact more stringent environmental protection standards to suit local conditions. Hence, for pulp and paper effluent, although the federal government has set a floor, several provinces have set more stringent standards. Under the CCME proposal, the very aim of the endeavour is to ensure that no one jurisdiction "gets out of line" and enacts standards more protective of the environment. The practical effect of the CCME proposal is to promote, if not require, a move towards the lowest common denominator standards.

(c) Control Strategies Work Against Pollution Prevention: The focus of the control strategies, it would appear, is on reduction of "emissions" rather than the "use of substances." For instance, in Annex 1, under the heading "virtual elimination," it states that "The focus of the Canada-wide control strategies developed under this proposed CCME Toxics Policy will be directed at

releases into the environment." This end-of-the-pipe approach is at odds with the federal government's July 1995 Pollution Prevention Strategic Framework and the CCME's own policy statement on pollution prevention. Although the words "pollution prevention" appear in the proposed CCME Toxics Policy, the term is not defined or cross referenced to other documents.

(d) The Inclusion of an Economic Analysis: A new step in the development of standards for toxic substances is the introduction of cost-benefit analysis. There is no information is provided on how this analysis will be employed, what methodology will be used, or the implications of the approach. Clearly, its practical effect will be to make it more difficult to enact progressive environmental protection requirements.

(e) The Definition of Virtual Elimination: Throughout the document, there is no expressed definition of the term "virtual elimination." It can be assumed that the definition will be consistent with the TSMP. Environmental organizations have opposed this definition for reasons outlined in their comments to the TSMP, attached to this submission as Attachment A. In essence, the definition is in complete contradiction to that in the 1978 *Great Lakes Water Quality Agreement* and the interpretation of the Agreement provided by the International Joint Commission in its Sixth, Seventh and Eighth biennial reports. It also contradicts a pollution prevention approach. The definition of virtual elimination is one of the most profound weaknesses of the proposed initiative.

Recommendation No. 7: Canada-wide strategies component should be amended to:

- *(a) to provide for the establishment of legally binding nation-wide standards;*
- *(b) recognize that any jurisdiction can enact more stringent standards than those established through the CCME process;*
- *(c) focus on the use of pollution prevention approaches, particularly the phase out of the use of Track 1 substances;*
- *(d) outline a rationale for the application of cost-benefit analysis to implementation measures regarding Track 1 substances, and outline the methodologies and approaches to be used; and*
- *(e) incorporate a definition of virtual elimination consistent with the provisions of the Great Lakes Water Quality Agreement.*

(vi) ***Implementation:*** The problems associated with the implementation component relate to the flaws in the Environmental Harmonization Accord's Standards Sub-Agreement. A more detailed critique is provided in "Comments on Standard Sub-Agreement attached to this submission as Attachment D.

The presumption is that the implementation task will be a provincial matter and not a federal matter. Indeed, on page 4 of the policy document, it is noted that "The plans will contain specific performance targets and time commitments which can be specific to the province or region under consideration." The absence of the federal role is a significant weakness of the policy.

Recommendation No. 8: It is recommended that the implementation phase should clearly recognize that the role of the federal government in the implementation of legally enforceable Canada-wide standards.

(vii) ***Monitoring and Reporting:*** Monitoring and reporting, are mentioned in the proposed policy. However, there are no details, commitments or even intentions provided as to how this component will be implemented.

Recommendation No. 9: The proposed CCME Toxics policy must include a comprehensive monitoring and reporting regime to ensure the accountability of the jurisdictions charged with implementing standards. The regime should also include measures to ensure that there is public transparency and involvement in verification of the monitoring data.

4. Conclusions

CIELAP and CELA cannot support the proposed CCME Toxics Policy at the present time. No environmental rationale has been presented for the proposed CCME Toxics Policy, it seems intended to pre-empt the more open and comprehensive debate which must occur around the CEPA review; in addition it appears to duplicate existing processes under CEPA; incorporates a deeply flawed definition of "virtual elimination;" exempts metals and radionuclides as potential targets for "virtual elimination;" fails to address the issue of endrocine disrupting chemicals; adopts a end-of-pipe pollution control, as opposed to pollution prevention approach to dealing with toxic substances; fails to provide for meaningful Canada-wide standards on toxic substances; and fails to establish a meaningful monitoring and reporting system. Furthermore, the consultation process regarding the proposed CCME Toxics Policy has been wholly inadequate. The proposed CCME Toxics Policy should be withdrawn, with the possibility of reconsideration once the CCME harmonization agreement has been ratified, and the direction of the next steps in the CEPA review process are clarified.

ATTACHMENTS

A. A Response to the Proposed Toxic Substances Management Policy For Canada, Submitted to Environment Canada, November, 1994.

B. A Response to Toxic Substances Management Policy: Environment Canada Implementation Strategy for Existing Substances (Final Draft), February, 1997.

C. Canadian Institute for Environmental Law and Policy, "Harmonizing to Protect the Environment? An Analysis of the CCME Environmental Harmonization Process" A report prepared for the Harmonization Working Group of the Canadian Environmental Network, November 1996.

D. Canadian Institute for Environmental Law and Policy, "Comments on the Proposed CCME Sub-Agreement on Environmental Standards," November, 1996, pp. 7-8.

ATTACHMENT A

Canadian Environmental Law Association
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November 30, 1994

Hon. Sheila Copps
Deputy Prime Minister
and Minister of the Environment
House of Commons
Ottawa, Ontario
K1A 0A6

sent by fax: (819)953-3457
original to follow

Dear Ms. Copps,

Please find enclosed the response of the Canadian Institute for Environmental Law and Policy (CIELAP) and the Canadian Environmental Law Association (CELA) to the government's draft Toxic Substances Management Policy (TSMP).

The government of Canada's release of a draft TSMP is an important first step in the development and implementation of a comprehensive policy and regulatory framework for such substances in Canada. Unfortunately, the proposed policy suffers from a number of serious weaknesses, and consequently cannot be endorsed without major revisions.

CELA and CIELAP's major concerns regarding the proposed TSMP include the following:

* the proposed definition of virtual elimination is inconsistent with the principles of pollution prevention and the definition set out by the International Joint Commission;

* the definition of "environment" as outlined in the TSMP excludes occupational environment. The occupational environment should be explicitly included in this definition;

* the criteria of "predominantly anthropogenic" appears to excludes elements and other naturally occurring substances known to have significant health and environmental effects, such as lead and mercury, from action under the proposed TSMP;

* the proposed definition of persistence is inconsistent with the definition of persistence set out by other agencies, including the IJC, and the definition contained in the Great Lakes Water Quality Agreement. Persistence should be defined as having a half-life of 56 days in water and 2 days in air;

* the proposed definition of bioaccumulation is too high and inconsistent with the definitions employed by other agencies. Bioaccumulation should be defined as a bioconcentration factor of at least 500, and preferably 250;

* substances are required to be toxic, persistent and bioaccumulative to be placed on Track 1. A combination of toxicity and persistent, or toxicity and bioaccumulative should be sufficient to place a substance on Track 1;

* the deliberate use and manufacturing of Track 1 substances would be permitted to continue. This approach is inconsistent with that proposed by the IJC for persistent toxic substances;

* there is no commitment to action with respect to Track 2 substances except to encourage voluntary action by users and manufacturers of the substance in question. Pollution prevention plans to eliminate release to the general and occupational environments should be required for such substances; and

* no clear procedures are provided for the "reverse onus" appeal process regarding Track 1 substances. Appeals should require a public hearing before a Board of Review, with provisions for intervenor funding for bona fide public interest intervenors.

CIELAP and CELA look forward to further opportunities to contribute to the development of this important policy by the government of Canada.

Yours sincerely,

M S Mitchell / for

Anne Mitchell
Executive Director
Canadian Institute for Environmental Law and Policy

per Fé de Leon

Paul Muldoon
Counsel
Canadian Environmental Law Association

encl.

cc: Prime Minister Jean Chretien; Charles Caccia, Chair of the Standing Committee on Environment and Sustainable Development; Clifford Lincoln; The Standing Committee on Environment and Sustainable Development; Diane Marleau, Health Canada; Ralph Goodale, Agriculture and Agrifood; Anthony Clarke, Environment Canada; Francois Guimont, Environment Canada

A Response to the Proposed Toxic Substances Management Policy for Canada

Submitted to
Environment Canada

Prepared by

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Canadian Institute for Environmental Law and Policy

Paul Muldoon
Canadian Environmental Law Association

Mark Winfield
Canadian Institute for Environmental Law and Policy

November 1994

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I. INTRODUCTION

Toxic contamination of the Canadian environment remains one of the most vital concerns of Canadians. There is increasing evidence that the problems emanating from toxic contamination are more insidious and their effects more far reaching than previously conceived. Urgent, strong, and comprehensive action is needed.

It is in light of this problem that the Canadian Environmental Law Association (CELA) and the Canadian Institute for Environmental Law and Policy (CIELAP) welcome the opportunity to comment on the proposed "Towards a Toxic Substances Management Policy for Canada" (hereinafter referred to as the TSMP). This document will first provide a context for the TSMP. Then it will review the definitions, thresholds and implementation issues related to the TSMP.

II. CONTEXT FOR TSMP

The proposed TSMP has not been developed in a vacuum. Indeed, it is fair to say that the TSMP emerged from a long history of efforts in various parts of the country to address the problem of toxic chemicals. Perhaps one of the most obvious roots of the TSMP pertains to the legal regime in the Great Lakes.

The Great Lakes Experience

In 1978, the Canadian and U.S. governments signed the Great Lakes Water Quality Agreement. Article II of that Agreement states that:

> "The discharge of toxic substances in toxic amounts be prohibited and the discharge of any or all persistent toxic substances be virtually eliminated."

Annex 12 of that Agreement states that, when designing regulatory strategies to implement Article II, those strategies must be undertaken in the "philosophy of zero discharge."

In reviewing governments' progress in furthering this goal, the International Joint Commission (IJC) stated quite unequivocally its interpretation of these provisions:

> "...it is clear to us that persistent toxic substances have caused widespread injury to the environment and to human health. As a society, we can no longer afford to tolerate their presence in our environment and in our bodies. Their use and presence in the Great Lakes environment are also inherently inconsistent with the Agreement's purpose and specific problems. Hence, if a chemical or group of

chemicals is persistent, toxic and bioaccumulative, we should immediately begin a process to eliminate it.[1]"

The recommendation has been echoed through the Commission's work, including a report of one of its advisory committees, the Virtual Elimination Task Force.[2]

Any policy emanating at the federal level must be consistent with, and contribute to, the implementation of the Great Lakes Water Quality Agreement.

Parliamentary Review of the Canadian Environmental Protection Act

A further context for the TSMP is the Parliamentary Review of the Canadian Environmental Protection Act (CEPA). The Act, which is the primary federal statute governing toxic chemicals, is undergoing this review by the Standing Committee on Environment and Sustainable Development. There has been a strong and consistent message from environmental and labour groups on the need for a pollution prevention approach that includes sunset and sunrise protocols to phase-out persistent toxic substances.[3]

This initiative is important as it is where the government's long term goals and approaches with respect to toxic substances will be determined. As such, any toxics management policy must be coordinated with, and preferably incorporated into, the reform of the Canadian Environmental Protection Act.

The Broader Context for Action

While no detailed review of the more recent literature and studies on the effects of toxic chemicals will be provided, it is clear that the implications of the literature and studies are significant. The recently released Dioxin Reassessment undertaken by the U.S. Environmental Protection Agency, for instance, implies that changes in hormone levels or other adverse health effects can occur in humans at or near levels of exposure to dioxin that are already experienced by members of the public. These trends indicate the need for strong, unequivocal action to protect the environment from toxic substances.

III. DEFINITIONS IN THE TSMP

Definition of "Virtual Elimination" - No Measurable Release

According to the proposed TSMP, substances that meet all four criteria will be placed on Track 1. The proposal then states that: "Track 1 substances will be virtually eliminated from the environment through management strategies that ensure no measurable release of the substance."[4] The implication of this statement is that the

definition of virtual elimination is "no measurable release" into the environment.

This definition of virtual elimination must be rejected. There are a number of reasons why the proposed definition should be rejected.

* It Is Inconsistent with the Concept of Pollution Prevention

The proposed approach, which defines the goal of Track 1 as "no measurable release" allows a pollution control response rather than a pollution prevention response. Pollution prevention is defined as approaches that avoids or prevents the use and generation of toxic substances. Its strength is that it emphasizes changes in the industrial process through such techniques as raw product substitution, process reformulation, substitution, and other such techniques.

When the goal is defined as "no measurable release," legitimacy is given to continuing pollution control models that attempt to reduce emissions at the end-of-the-pipe. TSMP does not promote process change or other measures that avoid the use or generation of toxic chemicals. As such, the proposed TSMP reinforces present practices. It will not encourage innovation. It may lead industry to adopt more expensive, and ultimately less efficient, end-of-the-pipe measures. These investments will preempt other pollution prevention investments. In effect, these facilities will be held "hostage" to traditional pollution control technologies rather than pursuing pollution prevention strategies.

* It Will Lead to Endless Debates as to the Definition of What is "No Measurable Release"

Apart from the general concern, there are also practical problems with the "no measurable release" approach. Most importantly, who will define what is the "not measurable" limit? How will that limit be set? What happens if detection technology improves? The reality is that the determination of what is the "no measurable release limit" will be just as difficult, just as controversial and just as practically complex, as existing limits.

* It is Inconsistent with the International Joint Commission's Definition of Virtual Elimination

In its Seventh Biennial Report, the IJC re-iterated its previous approach and views, and states:

> "we...want to continue attempts to **manage** persistent toxic substances after they have been produced or used, or ... **eliminate** and **prevent** their existence in the ecosystem in the first place, ... Since it seems impossible to eliminate discharges of these chemicals ..., a policy of

banning or **sunsetting** their manufacture, distribution, storage, use and disposal appears to be the only alternative."[5]

The Commission has rejected the "no detectable level" as an appropriate preventative approach. The federal government's approach, therefore, is contrary to the direction suggested by the IJC.

Recommendation No. 1:

The definition of "virtual elimination" as "no measurable release" should be rejected. Virtual elimination should be defined in a manner consistent with the definitions offered by the International Joint Commission and implemented through a national pollution prevention framework.

Reverse Onus

The use of the reverse onus concept in the proposed TSMP is an inappropriate use of the concept. The reverse onus concept is a component of the precautionary principle. The precautionary principle states that where there is uncertainty as to the environmental consequence of an activity, precaution should be exercised such that the activity does not proceed. The reverse onus is a mechanism whereby those undertaking such activities have the onus of establishing that the activity is safe.

In the TSMP, the reverse onus concept does not reverse any onus and place it on industry. It is really fashioned as an objection to the fact that a substance has been deemed to be persistent, bioaccumulative and toxic. As such, this section, if it is to be retained at all, should simply be deemed an objection. If this is a process for objections, then a clear procedure must be established to identify how objections should be undertaken, and timelines and thresholds should be established to make it clear when objections will be accepted or overruled.

Recommendation No. 2:

The reverse onus provision in the TSMP should be removed. If some process is to be included to challenge the decisions taken as to the hazard assessment, then clearly laid out rules and procedures should be articulated.

Definition of Environment

The definition for "environment" outlined in the proposed TSMP is limiting. It fails to include clearly the occupational environment. Occupational exposure is a major source or human exposure to toxic substances and should be considered in the TMP.

Recommendation No. 3:

The TSMP definition for "environment" should explicitly include the occupational environment.

Assessing Substances As a Class

One of the obvious deficiencies of the TSMP is that it takes a substance-by-substance approach rather than a class approach. Admittedly there is no accepted methodology for proceeding with class assessments. However, TSMP should include a commitment to work toward class assessments.

Recommendation No. 4:

The TSMP should include a commitment to developing a methodology for class assessments and then proceed by way of class assessments rather than substance-by-substance assessment.

The TSMP and the Canadian Environmental Protection Act

At present, the proposed TSMP does not explain how it is to be related to the Canadian Environmental Protection Act (CEPA). This is troublesome as there is a Parliamentary Review of CEPA currently being undertaken. The TSMP should be interpreted as a method to "fast-track" and take the most severe recourse to the most dangerous substances. In this context, the TSMP could provide a means to direct specific action at toxic, persistent and bioaccumulative substances. Indeed, the value of the TSMP may depend, in large part, to the extent to which it is incorporated into CEPA.

Recommendation No. 5:

The TSMP should become a part of CEPA as a means to fast-track and facilitate direct action against inherently dangerous substances.

IV. THRESHOLDS AND CRITERIA

Exclusion of Naturally Occurring Substances

The TSMP explicitly excludes elements and naturally occurring inorganic substances from the virtual elimination goal, thereby ignoring a large category of pollutants which have been shown to cause severe environmental and human health damage.

This exclusion is unique from the perspective of the efforts made by other jurisdictions

and scientific bodies to identify chemicals for virtual elimination. For example, the International Joint Commission and the Ontario Ministry of Environment and Energy (MOEE) have not made this distinction between substances. Their view is that no matter what the nature of a substance, if it is toxic, bioaccumulative and persistent, it should be phased-out and banned. The proposed TSMP does not follow this approach.

Moreover, the TSMP includes an "expert judgement" for those substances which have human-made and natural sources. That is, "expert judgement" will be applied to determine whether or not a substance is released in sufficient quantities by human-made sources in order to justify virtual elimination. This "expert judgement" is a significant step backwards. It allows an administrative judgement, with little or no accountability structures. What one "expert" says may be completely different than what another "expert" says. There is, for example, already a disagreement on whether toxic PAHs are included or not in the proposed TSMP.

Recommendation No. 6:

All substances, regardless of their nature, should be eliminated from human sources if they exceed the thresholds for toxicity and, persistence or bioaccumulation.

Persistence

The TSMP is based on levels of persistence far higher than those proposed by other jurisdictions, scientists, or independent bodies, including those used by Environment Canada for one of its voluntary programs [Accelerated Reduction/Elimination of Toxics (ARET)]. This has two very different implications.

First, Environment Canada would be administering programs based on a dissimilar scientific basis. However, there is a need for consistency in delivering governmental programs, especially since the proposed TSMP is national in scope and is urgently needed. Secondly, by allowing higher persistence levels, the proposed TSMP would allow toxic chemicals into the environment which will remain there for a long time. This would result in continued damage to human health and the environment.

Persistence is measured as the half-life of a substance in the various media in the environment (air, water, soil or sediment). The TSMP proposes a persistence (half-life) of *182 days* in water. But all other scientific evidence says this is too high. In fact, TSMP quotes several scientific sources which propose a lower half-life. The IJC, MOEE, university scientists and even industry suggest a half-life of *56 days* or less as a definition for persistence.[6]

It is surprising that the federal government would propose to use such a high level of persistence. It is especially surprising since the TSMP references scientific evidence

and then chooses to ignore it. It is also surprising since the federal government signed the Great Lakes Water Quality Agreement with the U.S., which specified persistence as a half-life of 56 days in water.

Recommendation No. 7:

The persistence criteria need to reflect, and be consistent with, scientific evidence. In particular, the half-life of a substance in surface water needs to set at 56 days, and at 2 days in air.

Bioaccumulation

The proposed TSMP sets an unusually high level of bioaccumulation for a substance to follow the virtual elimination track. The TSMP indicates that a Bioconcentration Factor (BCF) of greater than 5,000 is the cutoff for substances to be virtually eliminated (if it also exceeds the persistence, toxicity and anthropogenic criteria).

However, all other scientific evidence used by the drafters of the TSMP recommends lower levels of bioconcentration. The MOEE and the ARET processes, for example, uses a BCF of greater than 500 as a cut-off for virtual elimination.

Recommendation No. 8:

The BCF should be lowered to at least 500, and preferably to 250.

Toxicity

In order for a substance to follow the virtual elimination track, it must be toxic as defined by the Canadian Environmental Protection Act (CEPA) or it must be 'CEPA-toxic equivalent.'

This definition of toxic has a number of serious problems, which have been described elsewhere in detail.[7] 'Toxic' as defined by CEPA sets a very high threshold for action, the definition is reactive (i.e., significant damage has to have occurred before action is taken), and the definition assumes that there is enough information to know the quantities or concentrations of substances in the environment.

As a result of using this definition of toxicity, the federal government has recently found only 25 of 44 priority chemicals toxic. Moreover, the federal government found that, by using this definition of toxic, it could not determine whether 13 chemicals were toxic or not. The government cited "insufficient information" as the reason.

Recommendation No. 9:

For the TSMP to work effectively and in a preventative manner, it must be disconnected from the CEPA definition of toxicity. Rather than using the CEPA toxic approach, TSMP should use the hazard assessment developed by the MOEE (see Appendix 1 for the hazard assessment).

Combination of Criteria

For a substance to be virtually eliminated, the TSMP requires that a chemical must meet all the criteria: be predominantly anthropogenic, persistent, bioaccumulative and toxic. Thus, not only does the TSMP require very high thresholds, it also requires that a substance meet all these thresholds. This will allow the continued release of substances clearly damaging to human health and the environment.

Recommendation No. 10:

Substances emanating from human sources should be phased-out and banned if they are toxic and, bioaccumulative or persistent.

V. IMPLEMENTING THE TSMP

Existing Track 1 Substances

The stated goal of the proposed TSMP is the "virtual elimination" of environmental releases of Track 1 substances (toxic, persistent, bioaccumulative, and predominantly anthropogenic). Virtual elimination is defined as "no measurable release."

Given the serious environmental and human health effects associated with substances of this nature, this definition is inadequate as it would permit the use of Track 1 substances within closed-loop systems, or where it is available, end-of-pipe technology to reduce discharges below measurable levels. Even if the environment is defined to include the occupational environment, this approach does not address the possibility of upsets or accidental releases, or the possibility of cross-media transfers which inevitably arise with end-of-pipe pollution control technologies.[8] It may also encourage firms to make investments in end-of-pipe technologies rather than seeking to develop substitutes or alternatives to the substances in question.[9]

Recommendation No. 11:

The intentional manufacturing or use of substances found to meet the Track 1 criteria should be banned through regulations made under CEPA. Exemptions from this rule should only be permitted under truly extraordinary and exceptional circumstances,

such as the substance being a cure for AIDS or Cancer. Exemptions should only be granted following a public review by a Board of Review at the conclusions of which a two-thirds majority of the Board recommends an exemption. In the event that a two-thirds majority of the Board does not recommend an exemption, the substance should be banned from manufacturing or use, with no further appeals. In the event that the Board recommends an exemption, the Minister should still have the option of banning the use or manufacturing of the substance. Any Track 1 substance given exceptional approval should still be required to be subject to a pollution prevention plan to eliminate the possibility of a release of the substance into the general or occupational environments. Intervenor funding for bona fide public interest intervenors in Board of Review Proceedings should be provided.[10]

Where Track 1 substances are created as by-products of the manufacturing or use of non-Track 1 substances, pollution prevention plans should be developed and implemented with respect to the Track 1 substances being created. These plans should provide for the elimination of release of the substance in question into the general or occupational environment. The manufacturing or use of non-Track 1 substances which result in the Track 1 by-products should be discouraged as a matter of public policy.

Existing Track 2 Substances

The proposed TSMP's treatment of Track 2 substances (toxic, but not bioaccumulative, persistent, and predominantly anthropogenic) is extremely disappointing. The proposed TSMP indicates that the federal government will "advocate," not require the life cycle, cradle-to-grave management of these substances (p.3) and "encourage," not require, pollution prevention in relation to them (p.3). Given the very stringent standard of proof which Environment Canada and Health Canada have set for the establishment of "toxicity" for the purposes of CEPA, substances found to be "toxic" for the purposes of CEPA, by definition are having, or have the potential to have, significant environmental or human health effects.

Recommendation No. 12:

The environmental release of such substances should not be permitted under the TSMP. Rather, pollution prevention plans should be required to be developed and implemented for non-Track 1 "CEPA toxic" (Track 2) substances. These pollution prevention plans should be required to provide for the elimination of release into the general and occupational environment of the Track 2 substances in question.

New Substances[11]

The proposed TSMP would permit the use and manufacturing of Track 1 (toxic, persistent, and bioaccumulative) new substances provided that it could be

demonstrated that there would be no release of these new substances into the environment (virtual elimination). Given the potential environmental and human health effects of such substances, this approach should not be adopted.

Recommendation No. 13:

Track 1 New Substances

The intentional use or manufacturing of new substances which meet the Track 1 criteria should not be permitted, except under truly extraordinary and exceptional circumstances similar to those outlined for existing Track 1 substance. As with existing Track 1 substances exemptions should only be granted following a recommendation by a two-thirds majority of a Board of Review. In the event that a two-thirds majority of the Board does not recommend an exemption, the manufacturing or use of the substance should be prohibited, with no further appeals. If the Board recommends an exemption, the Minister should still have option of prohibiting the use or manufacturing of the substance.

Track 2 New Substances

Pollution prevention plans, providing for the virtual elimination from the general and occupational environment of new "CEPA toxic" Track 2 substances should be required prior to their use or manufacturing being permitted in Canada. This would be consistent with the treatment of existing Track 2 substances.

By-Products of New Substances

Current CEPA provisions do not permit new substance assessment of by-products of use of new substances. The deficiency should be addressed during the CEPA review.[12] *If a Track 1 substance is created as an inevitable by-product of the use or manufacturing of a non-Track 1 or even non-"CEPA toxic" new substance, the use or manufacturing of new substance should be prohibited. Exemptions from this rule should only be permitted under exceptional circumstances as defined above. A pollution prevention plan to eliminate release to the general and occupational environments should be required to be developed and implemented if the by-product is a Track 2 substance.*

VI. CONCLUSION

The government of Canada's release of a draft Toxic Substances Management Policy is an important first step in the development and implementation of a comprehensive policy and regulatory framework for such substances in Canada. Unfortunately, the proposed policy suffers from a number of serious weaknesses, and consequently

cannot be endorsed without major revisions.

CIELAP and CELA's major concerns regarding the proposed policy include the following:

* the proposed definition of virtual elimination is inconsistent with the principles of pollution prevention and the definition set out by the IJC;

* the definition of "environment" as outlined in the TSMP excludes occupational environment. The occupational environment should be explicitly included in this definition;

* the criteria of "predominantly anthropogenic" appears to excludes elements and other naturally occurring substances known to have significant health and environmental effects, such as lead and mercury, from action under the proposed TSMP;

* the proposed definition of persistence is inconsistent with the definition of persistence set out by other agencies, including the IJC, and the definition contained in the Great Lakes Water Quality Agreement. Persistence should be defined as having a half-life of 56 days in water and 2 days in air;

* the proposed definition of bioaccumulation is too high and inconsistent with the definitions employed by other agencies. Bioaccumulation should be defined as a bioconcentration factor of at least 500, and preferably 250;

* substances are required to be toxic, persistent and bioaccumulative to be placed on Track 1. A combination of toxicity and persistent, or toxicity and bioaccumulative should be sufficient to place a substance on Track 1;

* the *deliberate* use and manufacturing of Track 1 substances would be permitted to continue. This approach is inconsistent with that proposed by the IJC for persistent toxic substances;

* there is no commitment to action with respect to Track 2 substances except to encourage voluntary action by users and manufacturers of the substance in question. Pollution prevention plans to eliminate release to the general and occupational environments should be required for such substances; and

* no clear procedures are provided for the "reverse onus" appeal process regarding Track 1 substances. Appeals should require a public hearing before a Board of Review, with provisions for intervenor funding for *bona fide* public interest intervenors.

CELA and CIELAP look forward to further opportunities to contribute to the development of this important policy by the government of Canada.

ENDNOTES

1. International Joint Commission, Sixth Biennial Report to the Governments of Canada and the United States (Ottawa - Washington, 1992), p. 4.

2. Report to the International Joint Commission, Report of the Virtual Elimination Task Force (Windsor, 1993).

3. See, for instance, the submission of a number of members of the Canadian Environmental Network Toxics Caucus, Reforming the *Canadian Environmental Protection Act* (September 1994), especially, Paul Muldoon, "Incorporating Pollution Prevention into Part II of CEPA: An Agenda for Reform."

4. Environment Canada, Towards a Toxic Substances Management Policy for Canada (Ottawa, September 1994), p. 2.

5. International Joint Commission, Seventh Biennial Report to the Governments of Canada and the United States (Ottawa-Washington, 1994), p. 26.

6. New Directions Group, Discussion Paper (1991).

7. See: P. Muldoon. "Incorporating Pollution Prevention into Part II of CEPA: An Agenda for Reform." in B. Mausberg, P. Muldoon, and M. Winfield [eds.], Reforming the *Canadian Environmental Protection Act*. (Ottawa: Canadian Environmental Network, 1994).

8. Canadian Institute for Environmental Law and Policy and National Wildlife Federation, Prescription for a Healthy Great Lakes: Report of the Program for Zero Discharge (Toronto and Ann Arbor: CIELAP and NWF, 1991), ch. 4.

9. R. Kemp, "An Economic Analysis if Cleaner Technology: Theory and Evidence," in K. Fischer and J. Schot, Environmental Strategies for Industry (Washington D.C.: Island Press, 1992), p. 281.

10. See M. Winfield, ed., 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 (CIELAP Brief 94/7)), Recommendation 27.

11. These Recommendations expand on Winfield, Reforming the *Canadian Environmental Protection Act*, Recommendations 12 and 13.

12. Winfield, Reforming CEPA, Recommendation 16.

Table 1.6: Ontario MOE Scoring System Summary Chart

Parameter Name	Endpoint & Units	Scoring Criteria 0	4	7	10
Environmental Persistence	$t_{1/2}$ (days)	≤10	>10 to 50	>50 to 100	>100
Bioaccumulation	BCF log k_{ow}	≤20 ≤2.0	>20 to 500 >2.0 to 4.0	>500 to 15000 >4.0 to 6.0	>15000 >6.0

Parameter Name	Endpoint & Units	0	2	4	6	8	10
Acute Lethality	oral LD_{50} mg/kg	>5000	>500-5000	>50-500	>5-50	>0.5-5	≤0.5
	dermal LD_{50} mg/kg	>5000	>500-5000	>50-500	>5-50	>0.5-5	≤0.5
	inhalation LD_{50} mg/m³	>15000	>1500-15000	>150-1500	>15-150	>1.5-15	≤1.5
	aquatic LC_{50} mg/L	>1000	>100-1000	>10-100	>1-10	>0.1-1	≤0.1
Chronic/Subchronic Toxicity, Non-Mammals	aquatic EC_{50}, mg/L MATC, mg/L NOAEC, mg/L	≥20 ≥2 ≥0.2	2-<20 0.2-<2 0.02-<0.2	0.2-<2 0.02-<0.2 0.002-<0.02	0.02-<0.2 0.002-<0.02 0.0002-<0.002	<0.02* <0.002* <0.0002*	<0.02* <0.002* <0.0002*
	terrestrial subchronic NOEL mg/kg/d	≥1000	100-<1000	10-<100	1-<10	<1*	<1*
	chronic NOEL mg/kg/d	≥500	50-<500	5-<50	0.5-<5	<0.5* *in one genus	<0.5* *in different genera
Chronic/Subchronic Toxicity, Plants	Water, mg/L Air, mg/m³ Soil, mg/kg						
	% Mass/Growth Reduction: ≤5% (NOAEL) water air soil	>10 >100 >100	>1-10 >10-100 >10-100	>0.1-1 >1-10 >1-10	>0.01-0.1 >0.1-1 >0.1-1	0.001-0.01 0.01-0.1 0.01-0.1	<0.001 <0.01 <0.01
	>5-50% (EC_{50}) water air soil	>100 >1000 >1000	>10-100 >100-1000 >100-1000	>1-10 >10-100 >10-100	>0.1-1 >1-10 >1-10	0.01-0.1 0.1-1 0.1-1	<0.01 <0.1 <0.1
	>50% water air soil	>1000 >10000 >100000	>100-1000 >1000-10000 >1000-10000	>10-100 >100-1000 >100-1000	>1-10 >10-100 >10-100	0.1-1 1-10 1-10	<0.1 <1 <1
Chronic/Subchronic Toxicity, Mammals**	oral NOEL mg/kg/day	>1000	>100-1000	>10-100	>1-10	>0.1-1	≤0.1
	inhalation NOEL mg/m³	>3000	>300-3000	>30-300	>3-30	>0.3-3	≤0.3
Teratogenicity	mg/kg/day	no terata, or terata only at >1000	terata or developmental anomalies at >50-1000	terata or developmental anomalies at >10-50	terata or developmental anomalies at >1-10	terata at >0.1-1, without overt maternal toxicity	terata at ≤0.1 without overt maternal toxicity
Carcinogenicity	human and animal bioassay data	no tumours in adequate studies on at least two species, and does not interact with genetic material	tumours in only one animal species, negative results in others	causes benign tumours in more than one species, and does not interact with genetic material; promotor only; or causes cell transformation *in vitro* only (negative evidence *in vivo*)	tumourigenic in bioassays at doses causing metabolic enzyme saturation, or associated with lesions that predispose to tumours. No interaction with genetic material	indirect-acting carcinogen, no interaction with genetic material	direct-acting carcinogen that interacts with genetic material

** Note: The *Chronic/Subchronic Toxicity, Mammals* criteria are based on studies of ≥90 days duration. If only shorter-term subchronic studies are available, the data are modified as follows, for scoring purposes:

Study duration 28-89 days - multiply criteria by 10
Study duration ≤28 days - multiply criteria by 100

ATTACHMENT B

CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

COPY

February 3, 1997

Raouf Morcos
Environment Canada
Place Vincent Massey
351 St. Joseph Blvd.
Hull, PQ
K1A 0H3

Fax: 819-953-7970
original by mail

Dear Mr. Morcos:

Re: A Response to Toxic Substances Management Policy: Environment Canada Implementation Strategy for Existing Substances (Final Draft)

Thank you for giving us this opportunity to comment on the following document: Toxic Substances Management Policy: Environment Canada Implementation Strategy for Existing Substances. Attached you will find our comments and recommendations with respect to this document.

While the comments attached provides details as to our positions on various issues, we would like to highlight the following. First, we have a very serious concern with respect to the timing of this policy initiative. Bill C-74, the proposed new Canadian Environmental Protection Act, has just recently been introduced into Parliament and expects to be a focus of discussion for many of the issues outlined in the Toxic Substances Management Policy (TSMP). The proposed implementation strategy for TSMP prematurely presumes that the debate on CEPA will have little or no effect on the TSMP.

Second, many of the weaknesses of the implementation strategy for the TSMP stem directly from the weaknesses of the TSMP itself. The clearest example of this problem are the inappropriate definitions given to key terms such as virtual elimination and reverse onus.

Third, the issues relating to the use of Limit of Quantification (LOQ) in the development of action plans for Track 1 substances has also been a source of concern. The steering committee members of the Toxics Caucus of the Canadian Environmental Network have recently been provided minutes to the July 1996

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workshop on Dioxins and Furans. We have expressed concerns that we were not invited into that workshop and therefore have not had the opportunity to express our views with respect to that issue. In a letter dated January 31, 1997 to you, we requested an opportunity to identify concerns and an opportunity to discuss these concerns with Environment Canada. We are awaiting a response to that request.

Finally, the emphasis of non-regulatory strategies to address Track 1 and Track 2 substances is not supported by the environmental community. We have expressed our views on this issue with respect to the problems of voluntary approaches and the need to strengthen regulatory approaches to environmental protection.

We hope that Environment Canada will not implement the proposed strategy until some of these key issues are addressed in an effective and timely manner.

Please do not hesitate to contact us should you have any questions.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Paul Muldoon
Counsel

Chair, Toxics Caucus
Canadian Environmental Network

cc. Hon. Sergio Marchi, Minister of the Environment
Canadian Institute for Environmental Law and Policy
Canadian Labour Congress
Great Lakes United
Toronto Environmental Alliance
Tom Balint, Caucus Coordinator, Canadian Environmental Network

The Toxic Substances Management Policy - Environment Canada Implementation Strategy for Existing Substances - Final Draft

Comments submitted by:

Canadian Environmental Law Association

Canadian Institute for Environmental Law and Policy

Canadian Labour Congress

Great Lakes United

Toronto Environmental Alliance

January, 1997

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INTRODUCTION

The Toxic Caucus of the Canadian Environmental Network (CEN) is comprised of environmental, labour, community and other public interest groups from across Canada. The Caucus has been actively involved in discussions pertaining to the review of the Canadian Environmental Protection Act (CEPA), the development of the Toxic Substances Management Policy (TSMP) and the Pollution Prevention: A Federal Strategy for Action document. Further, member groups are active participants in the Strategic Options Process as well as other related consultations.

In light of the history of involvement of the members of the Toxics Caucus, the groups endorsing this submission welcome this opportunity to comment on the document, Environment Canada Implementation Strategy for Existing Substances - Final Draft. Our overall message, however, is that we are profoundly disappointed with the proposed implementation strategy. To a large part, the weaknesses of the implementation strategy are directly related to the weaknesses of the TSMP itself. Unless the TSMP itself is significantly reformed, any implementation strategy will be problematic.

PRELIMINARY COMMENTS

Timing of Implementation Strategy Development

It is critical to note that the member groups of the Toxic Caucus were extremely disappointed both in the *process in the development* of the TSMP and the

content of the TSMP. Foremost, member groups were surprised and disappointed when the Policy was released just days before the Standing Committee on Environment and Sustainable Development released its report on its review of the Canadian Environmental Protection Act, *It's About Our Health: Towards Pollution Prevention*. The Standing Committee report addressed issues directly relating to the TSMP and, in fact, made recommendations that contradicted some of the measures outlined in the TSMP.

It is not surprising, therefore, that the Standing Committee on Environment and Sustainable Development expressed similar disappointment to the release of the TSMP.[1] The release of the TSMP prior to the tabling of the Standing Committee's report, in effect, pre-empted debate on the scope, rationale and content of the TSMP.

Member groups were also disappointed in the TSMP development process as not one of the recommendations in the detailed submission forwarded by the member groups was adopted in the final version. For your reference, attached to this submission please find a copy of the submission by the member groups on the TSMP dated November 1994. Many of the concerns identified in that submission manifest themselves in the draft implementation strategy.

Further, the timing of the release of Environment Canada's TSMP implementation strategy for public comment raises some fundamental concerns. With

Bill C-74 having been introduced for first reading in the House of Commons on December 10, 1996, it is unclear to us why there is such an effort to finalize the implementation policy at this time. The debate of how, and to what extent, the TSMP will be incorporated into CEPA is just commencing in the context of the legislative discussion. How can the implementation strategy be finalized if the very core policy dimensions are still before Parliament?

For a policy proposal of this importance, serious concern must be expressed concerning the lack of direct consultation with the public and the inappropriately short timeframe for response. In the end, member groups are not convinced that Environment Canada has a sincere desire to address the concerns the public has in the context of this policy proposal.

> **Recommendation No. 1:** Environment Canada Implementation Strategy for Existing Substances should not be finalized until Bill C-74 has been fully debated and enacted.

Scope of TSMP Implementation

The proposed implementation strategy states that "Environment Canada will identify Track 1 substances that may or do occur in the environment and that are subject to the department's legislative mandate."[2] Is it fair to assume that other departments will be issuing their own implementation policy? What happens if other

departments do not issue an implementation policies? What if there are inconsistencies between the implementation policies?

In our view, as the TSMP is a policy of the government of Canada, the implementation policy should be applicable to all departments. In this way, all substances will be dealt with in a similar manner, including those not under the mandate of Environment Canada.

> **Recommendation No. 2:** An implementation policy for the TSMP should be applicable to all departments in order that all substances of concern are subject to the TSMP.

GUIDING PRINCIPLES AND DEFINITIONS

Another preliminary issue worthy to note also stems from the TSMP. It is appropriate once again to restate our fundamental disagreement with how some general principles are applied and the definitions used in some of the key components of the TSMP. Most important, the definitions pertaining to the term "virtual elimination," the precautionary principle and the term "environment."

Virtual Elimination

The definition of virtual elimination in the TSMP should be rejected. The term "virtual elimination" cannot be equated, as suggested in the TSMP, with the notion of

"no measurable release." Instead, it means the phase-out or sunset of the substance in the sense that the substance is no longer produced as a feedstock or substance, or used or generated within the process. It is our view that the definition used in the TSMP is not consistent with the definition in the Great Lakes Water Quality Agreement,[3] the interpretations provided by the International Joint Commission (IJC) in their biennial reports on water quality,[4] the Standing Committee on Environment and Sustainable Development report on CEPA,[5] the federal government in Pollution Prevention: A Federal Strategy for Action, and in the Liberal Red Book.[6] Our November, 1994 submission on the TSMP outlined the reasons for our position and can be summarized as follows:

(a) It Is Inconsistent with the Concept of Pollution Prevention

The present approach which defines the goal of Track 1 substances as "no measurable release" promotes a pollution control approach rather then a pollution prevention approach. Pollution prevention is defined as a measure that avoids or prevents the use and generation of toxic substances. Its strength is that it emphasizes changes in the industrial process through such techniques as raw product substitution, process reformulation, substitution, among other such techniques.

When the goal of virtual elimination is defined as "no measurable release," legitimacy is given to continuing the use of pollution control techniques that attempt to reduce emissions at the end-of-the-pipe. When using the "no measurable release"

definition of virtual elimination, the thrust of the initiative will be to reduce emissions, not move toward process change or other measures that avoid the use or generation of toxic substances. As such, the proposed implementation strategy reinforces present practices. It will not encourage innovation. It will encourage industry to accept much more expensive, and ultimately less efficient, end-of-the-pipe measures.

(b) The Debate will Now Focus on What is "No Measurable Release"

Apart from the concern with the virtual elimination definition, there are also practical problems with the "no measurable release" definition. Most importantly, who will define what is the "not measurable" limit? How will that limit be set? What happens if detection technology improves? The reality is that the determination of what is the "no measurable release limit" will be just as difficult, controversial and complex, as existing limits.

(c) Consistency with IJC's Definition of Virtual Elimination

In its Seventh Biennial report, the IJC re-iterated its previous approach and views and states:

> we...want to continue attempts to **manage** persistent toxic substances after they have been produced or used, or... **eliminate** and **prevent** their existence in the ecosystem in the first place, ... Since it seems impossible to eliminate discharges of these chemicals ..., a policy of **banning** or **sunsetting** their manufacture, distribution, storage, use and disposal appears to be the only

alternative.[7]

More directly, in the IJC's Eighth Biennial report, it was noted that:

> There are various interpretations of virtual elimination and zero discharge. Virtual elimination is not a technical measure but a broad policy goal. This goal will not be reached until all releases of persistent toxic chemicals due to human activity are stopped.
>
> Zero discharge does not mean simply less than detectable. It does not mean the use of controls based on best available technology or best management practices that continue to allow some release of persistent toxic substances, even though these may be important steps in reaching the goal. Zero discharge means no discharge or nil input of persistent toxic substances resulting from human activity. It is a reasonable and achievable expectation for a virtual elimination strategy. The question is no longer whether there should virtual elimination and zero discharge, but when and how these goals can be achieved.[8]

The Commission has rejected the "no detectable level" as an appropriate prevention approach. The acceptance of this approach by the federal government is contrary, therefore, to the direction suggested by the IJC.

Recommendation No. 3: The definition of "virtual elimination" as stated in the TSMP and carried forward in the proposed implementation strategy should be rejected. Virtual elimination should be defined in a manner consistent with the definitions offered by the International Joint Commission and implemented through a national pollution prevention framework.

The Precautionary Principle - Reverse Onus

In the submission by the member groups in November 1994, concerns were outlined regarding misuse of the concept of reverse onus and the precautionary principle in the TSMP.[9] In essence, the TSMP provides industry opportunities to continue to use substances which already have been deemed as Track 1 substances (and therefore should be subject to virtual elimination). Rather than furthering the precautionary principle and the goal of virtual elimination, the TSMP gives industry the opportunity to argue for the continued use and generation of these substances.

According to the TSMP's interpretation of the precautionary principle and user responsibility, "it place[s] the responsibility on those who generate or use Track 1 substances to demonstrate that these substances will not be released into the environment in measurable concentration at any point in their life cycles,..."[10]
It is submitted that the proposed "reverse onus" measure is not in keeping with true pollution prevention approach as being advocated in Pollution Prevention: A Federal Strategy for Action, which defines pollution prevention in the following manner.

The use of processes, practices, materials, products or energy that avoid or minimize the creation of pollutants and waste; without shifting or creating new risks to human health or the environment.[11]

Recommendation 4: The precautionary principle and user responsibility concepts should be implemented at the onset of the screening process and not during each stage of the life cycle of a Track 1 substance since it is not in keeping with the pollution prevention approach as stated in the Federal Strategy document. If a substance is a Track 1 substance, the issue should be *when* that substance should be phased out, not *if* it should be phased out.

Environment - Worker Protection

The environmental community has made reference for the need to incorporate the workplace environment into the definition of the "environment" in the TSMP. The TSMP fails to address this concern and therefore is not reflected in the proposed implementation strategy. The importance of this issue is apparent: the present TSMP and its implementation strategy excludes consideration of worker safety since the goal of virtual elimination only applies to releases to the natural environment, irrespective of the concentrations within the plant gates. Moreover, it creates an artificial distinction between the environment within and outside of the facility.

Recommendation No. 5: The implementation strategy should define

environment without excluding directly or indirectly the indoor environment or making a distinction between the environment within or outside of the plant gates.

TRACK 1 SUBSTANCES

The proposed implementation strategy also suffers from the problem that there is no express recognition or commitment to phase-out or sunset Track 1 substances. Track 1 substances represent the most problematic, and all inherently toxic, substances and, consequently, should be subject to a phase-out regime. At present, both the TSMP and the proposed implementation policy fails to incorporate a sunset or phase-out regime.

Further, the criteria for identifying Track 1 substances (i.e., bioaccumulation factor, persistent, CEPA toxic and from predominantly human-made sources), are generally so high that only a few substances will fall under the scheme.

Apart from the high thresholds in the criteria, there also should be provision to put on Track 1 substances that are toxic, even though they may not be persistent or bioaccumulative. Some toxic substances may be so problematic that they warrant a Track 1 status. For example, the meeting of the four criteria as outlined in the TSMP may make it difficult for potentially hazardous substances such as some endocrine disruptors to be dealt with as a Track 1 substances. Many endocrine disruptors

which have not yet been identified may fall under this category. Endocrine disruptors require special attention because they have been known to have a wide range of effects on wildlife species and humans.[12] It is possible for substances to be endocrine disruptors, yet not meet the persistent and bioaccumulative thresholds in the criteria under the TSMP.

> **Recommendation No. 6:** (a) The TSMP implementation strategy should ensure that all inherently toxic substances are Track 1 substances. In particular, Track 1 substances should be broadly defined to include, where appropriate, endocrine disruptors.
>
> (b) Consistent with Recommendation No. 3, Track 1 substances should be targeted for phase-out or sunset in the sense that such substances are no longer produced, used or generated.

Limits of Quantification

There are concerns regarding the use Limit of Quantification (LOQ) when determining action for Track 1 substances. Most important, there has been limited public consultations with respect to this issue. There does not seem to be any background papers providing the rationale and technical basis with respect to the many of the issues concerning LOQ.

A workshop was held by the Task Force on Dioxins and Furans in July of 1996 which included participants from government departments and scientists, but

excluded any participation by non-government environmental groups. It is the only forum we are aware of where the policies and procedures concerning the use of LOQ were discussed. The Canadian Environmental Law Association wrote letters on January 22, 1997 and January 31, 1997 outlining its concern about the lack of public interest involvement in the membership of that task force and in the July, 1996 workshop.

At this point in time, we are reserving our right to further comment on the issue of LOQ. Our absence from the July, 1996 workshop, and the fact that the minutes from that workshop were only forwarded to us in late January of 1997 make it impossible for use to provide useful comment on the issue at this time. We are hoping that we will be given an opportunity to provide comment, and that those issues that are raised will be subject to detailed discussion. At this point in time, it is our position that it is unfair and inappropriate that environmental groups must "accept" the conclusions and determinations arrived at by government and industry, to the exclusion of environmental groups.

A few examples of our concerns about the use of LOQ can be given and can be found on page 4 of the proposed implementation strategy. The implementation strategy states that: "Once an LOQ is established for a sector/source it will not be lowered just because the measurement methods have improved. A new LOQ will only be required when environmental monitoring indicates the need to do so."[13]

Why should LOQ be frozen in time despite the advances of technology and what is the policy basis for that decision? What kind of environmental monitoring is necessary to trigger a change in LOQ? What is meant by the statement "the objective of virtually eliminating a substance from the environment does not mean chasing the substance down to its last molecule."[14] How does LOQ relate to the concept of pollution prevention in that should not the goal be to *avoid* the *use* and generation of toxic substances rather deciding what are the acceptable emissions levels?

The establishment of LOQ provides a signal to industry to invest large amount of resources in control technology to reach established limits rather than focusing on pollution prevention. The resources spent on control technologies can be better invested in clean technology. Further, the process for setting LOQs does not provide for any public accountability and participation.

Recommendation 7: (a) We reserve our right to comment further on LOQ in light of the exclusion of environmental organizations from the July 1996 workshop on the topic and the fact that the minutes from that meeting only became available to us toward the end of January of 1997.

(b) Any future Task Force established to discuss the Dioxins and Furans or other CEPA toxic substances should include participation from the public interest community. The guiding principles by which the task force of this

nature operates should be formalized to provide accountability.

(c) As a general principle, the goal of virtual elimination, as defined as the phase out or sunset of substances, should be the overriding goal for the TSMP. Focus, therefore, should be on the prevention and avoidance on the use and generation of substances rather than on control measures as promoted in the proposed implementation strategy.

Application of Pollution Prevention Approach

On page 5 of the proposed implementation strategy, it is proposed that for Track 1 substances:

* commercial chemicals are to be phased-out;

* by-products, contaminants and wastes are to have reduced emissions through national standards of performance; and

* contaminated sites (which are to have implementation plans based on an analysis of risks, costs and benefits).

We agree with the approach that commercial substances on Track 1 should be phased out. However, Track 1 substances which are by-products, contaminants and wastes should not only be subject to national standards of performance as interim steps, but should also be phased out. Any other interpretation renders the designation of a substance in the Track 1 category as meaningless. When applying the pollution prevention principle, process change, product reformulation and other pollution prevention techniques should be able to avoid the use and generation of

Track 1 substances. As a first step requirement, all Track 1 substances should have pollution prevention planning requirements. In terms of contaminated sites, the prime factor in determining clean-up should be the available technology.

Recommendation No. 8: As a general principle, all Track 1 substances should be slated for virtual elimination. Track 1 substances should be subject to a pollution prevention planning requirement.

TRACK 2 SUBSTANCES

The proposed implementation strategy for Track 2 substances is completely unsatisfactory. The primary tool for Track 2 substances are proposed "national standards of performance" which are based on both prevention and control strategies. There is no definition outlined for the term "national standards of performance." It is not clear whether these are regulatory in nature or only general guidelines. Further, it is very disappointing that these "national standards" include control strategies, especially in light of the commitments in the document, Pollution Prevention: A Federal Strategy for Action.

All Track 2 substances should be subject to rigorous requirements since they have been found to be CEPA toxic. At a minimum, all Track 2 substances should be subject to a clearly defined and comprehensive pollution prevention plans. The plans should require industry to study all sources of the substance, how to change

operations or processes to avoid the use or generation of that substance, and a mechanism to ensure that the plans are reviewed by agency staff in a timely manner.

> **Recommendation No. 9:** Track 2 substances should be subject to a set of rigorous requirements with the aim of preventing their use or generation in Canada. At a minimum, all Track 2 substances should be subject to a requirement for pollution prevention plans.

NON-REGULATORY MANAGEMENT STRATEGIES

The Toxic Caucus has expressed concern over the use of non-regulatory management strategies as opposed to the use of regulations to address persistent toxic substances. Although there may be a role for using non-regulatory methods for addressing hazardous substances, a strong regulatory framework is necessary to ensure that action is taken to protect public health and the environment in a timely manner.

Many of the initiatives currently underway (i.e. Canada-Ontario Agreement, the NOx/VOC Management Plan) include voluntary components. Our concerns about the voluntary approach are well known and well documented.[15] In brief, these initiatives do not provide for sufficient accountability by industry sectors participating in these initiatives. Moreover, it must be stated again that the substances under consideration are those which have already been assessed as "CEPA toxic" and are known to be

causing harm to health or the environment.

Recommendation No. 10: The implementation of TSMP should rely foremost on regulatory initiatives.

STRATEGIC OPTIONS PROCESS

The Toxic Caucus has been monitoring the progress of the Strategic Options Process (SOP) since it commenced in early 1994. Great Lakes United prepared a brief discussion paper outlining the guiding principles and parameters for participation by the Toxic Caucus.[16] With its multi-stakeholder nature, the SOP has proven to be a very complex process raising questions with respect to its effectiveness and the guiding principles under which particular issue tables operate. To date only 7 of 11 issue tables have been completed. In the case of many issue tables, the SOP has been used as another forum for industry and some government departments to attack the assessment decision of some toxic substances. Rarely does the discussion focus on pollution prevention and the phase-out of these substances.

In our view, the SOP requires a full evaluation to ensure that it is an effective forum to address CEPA toxic substances. In light of the CEPA review, the evaluation of the SOP process should be conducted immediately with effective input from public interest groups.

Recommendation No. 11: A comprehensive evaluation of the SOP is required to assess the effectiveness of this process in developing action plans for CEPA toxic substances. This evaluation should be undertaken to ensure that future consultations progress in an efficient and timely manner.

SUMMARY AND CONCLUSIONS

In conclusion, the implementation strategy of TSMP contains some major weaknesses. These weaknesses stem from the flaws of the TSMP and the lack of clarity in many of the concepts employed in the strategy.

It is not clearly indicated in the consultation document the timeframe by which the implementation strategy will be finalized. We strongly recommend that the implementation strategy be delayed until Bill C-74 is passed.

ENDNOTES

1. See Standing Committee on Environment and Sustainable Development, (Ottawa: June 1995), It's About Our Health: Towards Pollution Prevention.

2. Environment Canada, (December 1996), Toxic Substances Management Policy: Environment Canada Implementation Strategy for Existing Substances- Final Draft, p. 3.

3. Great Lakes Water Quality Agreement Between Canada and United States, (1978), Article II and Annex 12.

4. See International Joint Commission, (Ottawa-Washington, 1992), Sixth Biennial Report on Water Quality.

International Joint Commission, (Ottawa-Washington, 1993), Seventh Biennial Report on Water Quality.

5. Standing Committee on Environment and Sustainable Development, (June 1995), It's About Our Health!: Towards Pollution Prevention, pp. 72-74.

6. Creating Opportunity, The Liberal Plan for Canada, (June, 1993), p. 66.

7. International Joint Commission, (Ottawa-Washington, 1994), Seventh Biennial Report to the Governments of Canada and the United States, p. 26.

8. International Joint Commission, (Ottawa-Washington, 1996), Eighth Biennial Report on Great Lakes Water Quality, pp. 8-10.

9. See Mausberg, Burkhard, Paul Muldoon and Mark Winfield, (November 1994), "A Response to the Proposed Toxic Substances Management Policy for Canada," recommendation 2, p. 5.

10. Environment Canada, (December 1996), Toxic Substances Management Policy: Environment Canada Implementation Strategy for Existing Substances - Final Draft.

11. Government of Canada, (1995), Pollution Prevention: A Federal Strategy for Action.

12. For example, see: Theo Colborn et al., (1995), Our Stolen Future.

13. Environment Canada, (December 1996), Environment Canada: Implementation Strategy for Existing Substances, Appendix 4, p. 18.

14. Environment Canada, (December, 1996), Toxic Substances Management Policy: Environment Canada Implementation Strategy for Existing Substances, p. 4.

15. See for a review: Terry Burrell, "Law in the Public Interest - Shrinking Government and the Protection of Ontario's Environment" A paper at CELA's conference entitled: "Law and the Public Interest," November 30, 1996.

Also see: Karen Clark, "The Use of Voluntary Pollution Prevention Agreements in Canada: An Analysis and Commentary" (Canadian Institute for Environmental Law and Policy, April, 1995); and Michelle Swenarchuk and Paul Muldoon, "De-regulation and Self-Regulation - A Public Interest Perspective" A paper prepared for the workshop on "De-regulation, Self Regulation and Compliance in Administrative Law" (March, 1996).

16. See Great Lakes United Letter to Minister Sheila Copps on Strategic Options Process, December 1995.

ATTACHMENT C

CANADIAN INSTITUTE FOR ENVIRONMENTAL LAW AND POLICY

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HARMONIZING TO PROTECT THE ENVIRONMENT?

An Analysis of the CCME Environmental Harmonization Process

Prepared for the Harmonization Working Group
of the Canadian Environmental Network

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PREFACE

The following report has been prepared by the Canadian Institute for Environmental Law and Policy (CIELAP) for the Harmonization Working Group of the Canadian Environmental Network (CEN).

The paper reflects the views of the members of the Working Group regarding the Canadian Council of Ministers of the Environment (CCME) harmonization initiative, particularly as conveyed at a workshop for members hosted by the Working Group in October 1996. At that workshop members of the Working Group choose to focus the contents of this paper on the cross-cutting issues underlying the harmonization initiative, rather than the development of specific comments on the contents of the proposed Accord and Sub-Agreements released by the CCME in August and September 1996.

The specific items on which analysis was requested by Environment Canada in its Terms of Reference to the CEN are addressed in Appendix A.

The paper was developed under severe time and resource constraints. Readers are referred to the earlier commentaries on the CCME initiative developed by CIELAP and the Canadian Environmental Law Association for more detailed analyses of the harmonization initiative.

The Canadian Environmental Network is a not-for-profit, non-advocacy organization that works to coordinate and facilitate the efforts of environmental organizations across Canada. The Harmonization Working Group was founded in late 1994. Its sole focus has been to review and comment on the CCME harmonization initiative.

Established in 1970, the Canadian Institute for Environmental Law and Policy is an independent, not-for-profit environmental law and policy research and education organization.

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EXECUTIVE SUMMARY

This report has been prepared to comment on and propose an alternative to the federal-provincial environmental harmonization project of the Canadian Council of Ministers of the Environment (CCME).

Dynamic Federalism Versus Harmonization -- The report reviews the record of environmental protection under the "dynamic federalism" that has always been an element of Canadian politics and law-making. The record shows that dynamic federalism helps to protect the environment by encouraging action by both levels of government. This two-tier system creates checks, balances and "back-stops." Two levels of environmental protection means there are fewer cracks for things to fall through and result in a more comprehensive and effective environmental protection regime. In the current climate of de-regulation and budget cutbacks, there is no question that environmental protection needs to be improved in Canada, but it is also clear that the benefits of dynamic federalism should be preserved.

Harmonization Past and Present -- The report provides a brief history of harmonization, from the re-vamping of the Canadian Council of Ministers of the Environment (CCME) in the early 1990's, to the direction given by the First Ministers in June 1996, that the Ministers of the Environment "make progress" on harmonization. Since the earliest stages of initiative, commentators have questioned the rationale for harmonization. Although "duplication and overlap" has been offered as justification, a study commissioned in 1995 by the CCME showed that duplication and overlap is not a serious problem in Canadian environmental protection measures.

Moreover, harmonization is now clearly being pursued as a political solution to a political problem: the unity crisis triggered by the October 1995 Quebec Referendum. As a political solution to an political problem, harmonization is unlikely to result in improved environmental protection. In fact, the current proposals are likely to result in diminished protection of Canada's environment.

As an alternative, the report proposes an approach which seeks to address the pressing problems in environmental protection in Canada today, particularly reduction in financial resources available to all governments.

Harmonize to Protect the Environment -- The report proposes that, rather than the federal government delegating its authority to the provinces, and transforming the CCME from a forum for informal discussion to a national decision-making body accountable to no one, the federal and provincial governments should work cooperatively to protect the Canadian environment. There are examples in place that show how governments can share responsibility, retain their capacity in their respective roles, and work together to efficiently and effectively protect the environment. This is the model the harmonization project should follow. The report makes recommendations that will support the implementation of an alternative approach.

In the event that the federal and provincial governments pursue the harmonization project as presently conceived, the report also makes alternative recommendations that will serve to partially address the problems raised by the CCME acting as a decision-making body. The report emphasizes, however, that while these recommendations may partially mitigate these problems, they will not remove them. The proposed decision-making role of the CCME, for example, presents fundamental problems in terms of accountability that, short of constitutional change, cannot be solved.

I. Introduction: Dynamic Federalism Versus Harmonization

1. Dynamic Federalism Protects the Canadian Environment

> "Federal forms (of government) are to be preferred to unitary forms because the inherent competition implies the existence of alternatives. This [is called] duplication and overlap, but those who fault federalism for competitiveness and duplication, fault it for its main virtue."[1]

Canada is a federal state. For good reason, it was designed to have two levels of government. In terms of environmental protection, the main virtues of federalism are that it encourages government action, and it provides checks, balances and "backstops" so that one government can "step in" when the other level of government fails to act.

Dynamic federalism creates the potential for more all-inclusive environmental protection regimes. When both levels of government have the ability to enact laws in a particular area (such as the environment), they tend to both want to "occupy the field." In Canada, when the federal government has moved to put environmental laws into effect at the national level, provincial governments have often been prompted to take actions which they otherwise would not have taken.

In 1975, for example, the federal government enacted the *Environmental Contaminants Act* which, for the first time, permitted it to regulate the manufacturing, import and use of toxic substances. Alberta responded by passing the *Alberta Hazardous Chemicals Act*. Quebec amended its *Environmental Quality Act*. Ontario set up its Hazardous Contaminants Programme.[2]

The possibility of unilateral federal action has also been an important motivator of provincial action to protect the environment. The threat of unilateral federal action was, for example, fundamental to the achievement of agreement between the federal government and the seven eastern provinces to take action to curb acid rain in 1984.[3]

The result of dynamic federalism an environmental protection regime in which both levels of government play a significant role, providing a system of checks, balances and "backstops." The effect is better environmental protection. When both governments have laws in a particular area, both have the capacity to enforce those laws. If one government, for whatever reason, chooses not to enforce its laws, then the other level can still act to enforce its laws.

In addition, the involvement of both levels of government means fewer cracks for things to fall through. It also provides for more consistent coverage for environmental protection nation-wide. When the federal government signed the Montreal Protocol (the ozone-depleting substances treaty), for example, some provinces had regulations in place first. The national standard followed the lead of the provinces, but covered areas not included in the provincial

laws. The provincial and federal governments' combined actions created a reasonably comprehensive regime.

2. *Dynamic Federalism is Not the Problem*

Harmonization proposes that Canada's federal structure has had a negative effect on environmental protection. The project proposes as a solution to "duplication and overlap" the surrender of the federal role in environmental protection. This solution is unlikely to deal with the problem of ensuring adequate protection of the environment and the health of Canadians. In fact, it is likely to result in diminished environmental protection for all Canadians.

3. *Improving Environmental Protection Through Cooperative Government Action*

The challenge now -- in times of budget cut-backs and de-regulation -- is how to improve environmental protection in Canada. Harmonization proposes that the solution is to put only one government in place where there used to be two. But most provinces, and even the federal government, no longer have the resources (if they ever had) to operate alone. As well, "backstops" and other benefits of dynamic federalism will be lost if only one government has the capacity and right to act.

There is no question that environmental protection in Canada needs to be improved. However, eliminating dynamic federalism will not result in the improvements we need. Effective harmonization of environmental protection in Canada can be best achieved by changing *how* governments act, and not by changing *which* government acts. The emphasis should be on cooperative government action, not the delegation of federal responsibilities to the provinces.

II. The Harmonization Process -- Past and Present

Prior to 1992, the Canadian Council of Ministers of the Environment, and its predecessor, the Canadian Council of Resource and Environment Ministers (CCREM) were informal forums for off-the-record exchanges between provincial, territorial and federal ministers of the environment. Since the early 1990s, however, the CCME has played an increasingly important role. At the 1992 United Nations Conference on Environment and Development Prime Minister Mulroney identified it as one of four key organizations in Canada's sustainable development strategy.[4] In all of the different versions of harmonization that which have been proposed to date, the Council would assume a central role in environmental policy-making in Canada.[5]

In November, 1993, the CCME announced that harmonization would be its top priority in the coming two years. The first important release was the "Purpose, Objectives and Principles" document that was approved by the Ministers of the Environment in June 1994.[6] 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 programmes,

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, non-governmental organizations responding to the "Purpose" document expressed doubt that "duplication and overlap" was as pressing a problem as it was being made out to be. A submission presented to the House of Commons Standing Committee on Environment and Sustainable Development in September 1994 asked, for example: "Given that there is very little federal law to enforce, and very few people to enforce it, the repeated claims of "duplication" are mysterious. What, exactly, is being duplicated? Where...is there overlap?"[7]

In November 1994, the first formal non-governmental organization (NGO) commentary on harmonization -- endorsed by thirty different environmental groups -- was released.[8] Among other observations, the commentary noted that harmonization seemed to propose to grant powers to governments that they did not lawfully have. It also seemed likely that harmonization would result in "lowest common denominator" national standards.

In December 1994, the CCME released the first draft "framework" document, and four "schedules," dealing with monitoring, compliance, environmental assessment and international agreements. The direction of the proposed agreements was clearly towards a significant devolution of federal authority over the environment to the provinces. A workshop concerning these drafts was hosted by the CCME in Toronto in February, 1995. During the workshop it became clear that governments had not thought through the full ramifications of the agreements. Government representatives could not, for example, answer fundamental questions regarding the legal status of the proposed agreement.

In January, 1995, the federal government proclaimed into force the *Canadian Environmental Assessment Act*. In response, Quebec suspended its participation in CCME processes.

Environmental non-governmental organizations continued to express concern over the direction of the harmonization initiative. In February 1995 the Prime Minister received an open letter, signed by almost eighty organizations from across Canada, expressing concern over the harmonization project and asking that the federal government withhold its ratification of any harmonization agreement until the completion of public hearings on the environmental responsibilities of the federal government by the House of Commons Standing Committee on Environment and Sustainable Development.

In March, 1995, the Canadian Institute for Environmental Law and Policy (CIELAP) and the Canadian Environmental Law Association (CELA) presented a detailed analysis of the draft harmonization agreement and schedules released in December 1994.[9] In their commentary CIELAP and CELA concluded that: the agreement would constitute a *de facto* constitutional amendment; no analysis of the problems which the agreement was to solve have been developed; the agreement was a framework for federal abandonment of the environmental field; and that

the agreement would lead to diminished environmental protection in Canada.

The conclusions of this commentary were subsequently endorsed by 65 environmental organizations from across Canada in an April 1995, statement entitled "Environmental Harmony or Environmental Discord?" The statement asked that the federal government not endorse the proposed harmonization agreement at the May 1995 CCME meeting, and that it: initiate a meaningful study of the needs and gaps in Canada's environmental protection system; provide a clear statement of the federal government's vision of its environmental role; and refer any agreement if concluded, to the House of Commons Standing Committee on the Environment and Sustainable Development for public hearings prior to signature and ratification.

At the May 1995 CCME meeting then federal Minister of the Environment Sheila Copps objected to the proposed schedule of the agreement on environmental assessment. This objection stalled the harmonization project, and its direction appeared to be in serious question. In the meantime, responding to the doubts expressed about the amount and seriousness of duplication and overlap in environmental protection in Canada, the CCME asked a consultant to prepare a report on the topic. This report, delivered in August 1995, showed that there was very little actual duplication and overlap, and what there was had already been limited by agreements between governments.[10]

The issue of environmental harmonization was raised at the Premiers' meeting in September 1995. Following their meeting, the Premiers presented a letter to the Prime Minister requesting that the harmonization project -- stalled by Minister Copps' objections -- be revived.

Subsequently, at October 1995 meeting of the CCME, the Ministers agreed to release a draft *Environmental Management Framework Agreement* (EMFA) and eleven schedules, dealing with monitoring, enforcement, policy and legislation, standards and guidelines, international affairs, environmental education, research and development, emergency response, state of the environment reporting and pollution prevention. Minister Copps' continuing objections prevented the release of the environmental assessment schedule, and the issue of environmental assessment was stated to be "off the table" for the purposes of harmonization by the federal government.

On October 30, 1995, Quebec held a referendum on whether or not the province would stay within the Canadian federation. By a very narrow margin, the people of the province voted to stay. This narrow victory prompted the federal government to focus on a "unity agenda" more aggressively than it had before.

In particular, Prime Minister Chrétien appointed Stéphane Dion as Minister of Intergovernmental Affairs in January 1996. The new Minister arranged a number of meetings with the provinces in the following months. During these meetings, he was told that the provinces wanted, among other things, control over the environment, especially environmental assessment.

Meanwhile, in January 1996, the CCME held a multi-stakeholder workshop in Toronto on the draft agreements released in October 1995. At the workshop, it became clear that the Accord could not go forward. Non-governmental organizations identified seven cross-cutting issues that pointed to serious problems with the project, including the continuing issue of its justification, the proposed devolution of federal responsibilities, and the degree to which the agreement proposed that the CCME replace the federal government as Canada's national environmental policy-making body. Other stakeholders, including aboriginal and first nations organizations and some academic and industry representatives also expressed serious concerns over the contents of the proposed agreement and schedules. A detailed critique of the agreement was presented by CIELAP in February 1996, describing it the proposals as a model for "dysfunctional federalism."[11]

The future of the harmonization agreement again appeared uncertain, particularly as the CCME secretariat suffered fifty per cent cut to its budget early in 1996.[12] February 1996 saw a new federal Minister of the Environment, Sergio Marchi, appointed to Cabinet. During the same month, the Speech from the Throne, reflecting the results of Mr. Dion's meetings with the provinces, spoke of "new partnerships" with the provinces, including partnerships on environmental management.

In April, in anticipation of the May 1995 CCME meeting environmental non-governmental organizations released a third statement, signed by more than seventy organizations, opposing the proposed CCME Environmental Harmonization Agreement and requesting that the Ministers not endorse, sign or ratify the proposed agreement, and that they initiate instead a comprehensive and independent review of current federal, provincial, territorial, First Nations and aboriginal environmental roles, responsibilities and capabilities, for the purposes of identifying essential needs and critical gaps in relation to the present and future state of Canada's environment.

Under intense pressure from the Prime Minister's Office,[13] Minister Marchi agreed at the May CCME meeting to pursue a new Framework Accord and three new sub-agreements dealing with environmental assessment, inspections and standard-setting. These were to seek to achieve the "highest" possible standard for environmental protection in Canada. It was seen by the federal government to be particularly important that the CCME reach agreement, as for the first time in almost two years, the Minister from Quebec was also at the table.

In late May, in anticipation of the June 1996 First Minister's Conference a Statement for Support For A Strong Federal Role in Environmental Protection was released. It was signed by more than 140 environmental and other organizations representing every province and territory.

At the First Minister's Conference, the Prime Minister and the Premiers agreed to direct their environment ministers to "make progress" on harmonization by the November 1996 CCME meeting. By late June, the three new draft documents agreed to in May were circulating among governments. A draft national accord and draft agreements in the areas of standard setting and inspections were released to the public in August. A proposed "approach" to the issue of the

harmonization of environmental assessment regimes has also been released.

III. The Current CCME Harmonization Proposals

The August and September draft Accord and Schedules include changes addressing some of the criticisms made about harmonization. The proposed National Accord states, for example, that "addressing gaps and weaknesses" (rather than duplication and overlap) will be one of the ways harmonization will achieve its objectives.[14] However, the chief problems remain: the transformation of the CCME into a decision-making body, and the devolution of federal authority to enforce federal laws and set national environmental standards to the provinces.

There are other problems. The project appears, for example, to be intended to apply retroactively. That is, existing laws will be changed in order to conform to whatever objectives are identified under the harmonization process. This will create a high degree of uncertainty regarding environmental regulations and standards. It will also have the inequitable result of punishing industries that have re-tooled their plants in order to comply with "pre-harmonized" laws. Finally, the proposed harmonized system has never addressed the environmental law-making capacities of other ministries besides ministries of the environment (such as natural resources, municipalities, fisheries and oceans, and so on).

The legal and political context in Canada has changed dramatically since 1989. The end of the 1980s bore witness to government activity on the environment the likes of which this country may never see again. While hoping to gain politically by taking strong stances on environmental protection, governments were also concerned about the effect their tougher laws might have on economic activity in their provinces. It was around this time that some ministers started to talk about harmonization, understanding that if all jurisdictions had standards as high as theirs, they would not lose industries to other provinces.[15]

More recently, however, many governments have drastically cut back on environmental regulation, and reduced funding their environmental agencies and curtailed their environmental law enforcement activities.[16] Environment Canada's budget, for example, has been cut by thirty per cent. The CCME commissioned study cited earlier found that there never really was a problem with duplication and overlap. It certainly is not a problem now.

This raises the question of what the federal and provincial governments are really "making progress" on through the harmonization project. Of the reasons first set out to justify harmonization, the only one left is provincial "irritation" with the authority the federal government has to regulate within their boundaries. In addition, in the context of the October 1995 Quebec referendum, there is a perceived need show that federalism "still works."

It seems then that the CCME harmonization process is less and less about protecting the environment. Rather, it has increasingly apparent that the project is being pursued as a political solution to a political problem.[17] As such, harmonization is unlikely to result in improved

environmental protection. In fact, the current proposals are likely to result in diminished protection of Canada's environment by reducing the role of the federal government, and constraining its ability to take independent action to protect the environment in the future.

IV. Conclusions: Harmonize To Protect the Environment

The discussion that follows sets out an alternative design for harmonization. It assumes that the purpose of harmonization is to find ways, in a period of scarce government resources, to effectively protect the environment.

1. Environmental Protection must be the Primary Focus

Environmental protection must be the primary reason for harmonization. The other reasons given for harmonization either do not exist (duplication and overlap) or are about problems that have nothing to do with the environment (national unity).

2. Focus on Cooperative Government Action, Not the Delegation of Authority

The problem in environmental protection in Canada today is not "duplication and overlap." It is finding ways to use increasingly thin government resources to effectively protect the environment. The solution proposed by harmonization is to give twice the responsibility to only one government -- in most cases, a provincial government. The inspection sub-agreement states, for example, that a government that has delegated its inspection responsibilities will hold its authority "in abeyance." In other words, the federal government will completely withdraw from the field. This is the "one window" approach.

While, at first look, this may seem more efficient, as there is only one face at the window instead of two, closer examination shows it is not. The enforcement of some federal regulations requires specially trained technical staff, which the provinces currently do not have. In order for the provinces to be able to inspect, they will have to retrain their staff, or hire new staff. This means a financial burden will be transferred from the federal government to the provinces. Most provinces do not have the resources to manage this burden. Furthermore, there is another problem: conflict of interest where a province is sponsoring, funding or operating a project which it would inspect for the purposes of federal law enforcement.

A better way to harmonize environmental protection in Canada is for governments to work out how they can most effectively coordinate the resources they have. Transferring burdens is not the solution. Neither is delegating responsibility. Governments must remain responsible for their operations under their own legislation and retain the ability to enforce their own laws.

Both levels of government have the responsibility to protect the environment. In some areas, such as inland waters, these responsibilities are shared. Governments can no longer afford to "duplicate" resources in areas where they share responsibility. Nor, however, can they afford to "go it alone." Instead, they have to find a way coordinate their efforts to make the most of their resources and to achieve effective environmental protection.

More effective communication between governments will make it easier to find out how resources can be efficiently coordinated. A by-product of better communication will be a better, less contentious, more efficient system. There are examples of projects in Canada that have worked to open communication, and have improved the environment. An important element of these successful projects was that they included mid-level management people as well as the Ministers. Better understanding of one anothers' concerns at the management level smooths out disagreement, and encourages action.

A very good example of cooperative government action is the *Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem* (COA). For more than twenty years, the two governments have been sharing the task of improving environmental quality in the Great Lakes basin. The 1994 COA is the fourth partnership agreement on the Great Lakes that the governments have entered.[18] The COA bears all the hallmarks of what is being recommended here: better environmental protection through cooperative government action involving mid-level management personnel; effective stakeholder participation through consultation and joint action; open communication of goals; regular progress reports.

Two points in particular need to be mentioned about the COA. The first is that it has worked reasonably well without the proposed harmonization agreement. The second is that the success of the COA has been limited recently by budget cut-backs and the restructuring of the Ontario Ministry of Environment and Energy. Even efficient, effective cooperative government action fails without adequate funding and coherent staffing policy.

3. *The CCME Should be a Forum of Discussion, Not a Decision-Making Body*

The role proposed for the CCME is one of the most serious problems associated with the harmonization initiative. Since the 1995 draft, it has been proposed that the CCME become the central decision-making body for environmental protection in Canada. Currently, individual Ministers of the Environment and cabinets of which they are members make decisions regarding environmental protection within their jurisdictions. Ministers and cabinets must to answer for the decisions they make to either Parliament, or their provincial legislature, and the people they represent.

The CCME, on the other hand, exists in "intergovernmental space," outside of Canada's current constitutional/legal structure. Consequently, no formal accountability mechanisms exist in relation to the CCME. It is answerable to no legislature or electorate for its collective decisions.

This is not a problem if the CCME is simply a forum for discussion. However, it is an enormous problem if the CCME acts as a decision-making body as is contemplated under the draft harmonization agreement. If the CCME becomes a decision and policy-making body, then a significant component of environmental policy-making would be moved out of the reach and oversight of the Legislatures, Parliament and the electorate.

Furthermore, the link between governments and the adequacy of the level of environmental quality which they provide within their jurisdictions would be significantly weakened. Environmental standards within each jurisdiction become a function of CCME decisions, and not the decisions of individual governments for which they can be held directly to account.

The only way to maintain these lines of accountability is for the role of the CCME to remain essentially as it is now. The CCME could be the forum where Ministers and their officials meet to discuss their concerns. The Council could also be the office that administers consultation and working groups similar to those used in the COA, discussed above.

If the CCME is to become the place where national environmental standards are made, there will have to be firm rules put in place. Appendix B describes a possible model that could be followed. It works, as much as possible, to preserve Ministerial and government accountability. A point worth repeating, however, is that, even with these rules, the lines of accountability between governments, Parliament, the Legislatures and the electorate will be less clear. It will be harder, with harmonization, to make governments and ministers accountable for the decisions they make about environmental protection in Canada.

In the event that the CCME is to be made a new decision-maker for environmental protection in Canada, more than clear rules about decision-making will be needed. The process must be open and knowable. Debates and discussions at the CCME must be published and made available to the public. All of the priorities, deadlines, and actions agreed on, should be a matter of public record. The terms of every agreement made between governments about inspections or other functions should also be readily available.

4. Create a Public Advisory Committee to the CCME

As an intergovernmental forum for discussion, the CCME would benefit greatly from the creation of a Public Advisory Committee. Such a committee, composed of stakeholders from all sectors, could assist in the identification of priorities and other matters.

5. Governments Must Commit to Providing Adequate Funding to Protect the Environment

While it is recognized that government resources are limited, it must also be

acknowledged that it is a false economy to cut back on environmental protection. Weakening environmental laws and institutions will impose enormous costs for clean-up, remediation and health care on future generations of Canadians. The greatest economy can be achieved by governments working together.

Unfortunately, the harmonization proposal simply proposes to shift responsibilities from one level of government which lacks the resources to carry them out, which also lacks the necessary resources. It does not provide a framework for the effective sharing of resources to ensure that essential functions are fulfilled.

6. *The Power of the Public to Act: Environmental Bills of Rights*

Harmonization should in no way restrict the few mechanisms presently available to the public to act to protect the environment. Recognizing that governments sometimes fail to perform their responsibilities to protect the environment, the public should be empowered, through environmental bills of rights in each jurisdiction, to help to address these failings.

7. *Effective Aboriginal Participation*

Harmonization has always been understood as an agreement "between governments." However, the role of aboriginal communities and first nations governments in the process has never been clear. They should have full status as parties and participate in the process as do the provincial and federal governments.

8. *The Next Steps*

The future of the harmonization initiative will be determined at the November 1996 CCME meeting. It is recommended that, in light of the foregoing recommendations, approval of the proposed National Accord and, in particular, the proposed sub-agreements on standards and inspections, be deferred until such time as a full consultation process, supported by appropriate background research, has been established.

Full consultation would entail broad-based stakeholder participation in the development and drafting of harmonization proposals, with appropriate support for non-governmental participants. It should also include case studies of how the proposed harmonized system would work in specific cases.

V. Recommendations in the Alternative if the CCME Takes On The Role Presently Contemplated in the Draft Accord and Sub-Agreements

In the event that the federal and provincial governments agree to follow the provisions of the draft documents and the CCME becomes a new decision-making body regarding environmental protection measures in Canada, then the following recommendations apply. The preceding recommendations five, six and seven would apply as well. It should be noted, as already discussed, that this new role for the CCME creates serious accountability problems. These problems may be addressed somewhat by the recommendations below. However, they cannot be fully addressed without fundamental constitutional change.

1. CCME Decision-making Should Be Subject To Clear Rules

As described in Appendix B, strict rules must apply to the deliberations of the CCME. Governments, and particularly the federal government, must retain the capacity to accept or reject CCME decisions on all aspects of environmental management. If a government rejects CCME decisions, then it must retain its powers, capacities and all its existing laws and policies. All governments have to retain the ability to set standards higher than those agreed to at the CCME. Most importantly, the federal government, if it believes the standard agreed to at the CCME is not high enough to adequately protect the environment, then it must retain the capacity to set a national standard that does.

2. All CCME Deliberations and Documents Should Be Matters of Public Record

As a new decision-making body whose deliberations will directly impact every Canadian, the CCME should be as "transparent" as the Legislatures and Parliament. There should be Hansard-like reports issued for all discussions and decisions made at the CCME. All priorities, time-lines, progress indicators, progress reports, audit reports (see below) and any other documentation should be readily available to the public.

3. Create A CCME Audit Committee

All actions undertaken under a "harmonized" environmental protection regime should be subject to review by a independent third-party audit committee. The committee should be responsible for the development of annual, public reports on activities under the harmonization agreement. The committee should be in a position to investigate complaints from parties to the agreement and members of the public regarding the failure of parties to adopt or implement national standards developed through the CCME process.

4. Undertake a Limited Test of Harmonization

Because the process is unprecedented, and proposes a radical change from normal procedures, harmonization should be tested on one area first. Reasonable time limits should be set. Benchmarks should be established to determine progress under the harmonized measure, and a full audit of the final results of the test should be made. Once the test has shown that harmonization actually works to protect the environment, then the full project could proceed.

APPENDIX A -- Legitimacy, Accountability and Governments "Best Situated"

Environment Canada has requested as part of this report analysis on three particular aspects of the harmonization process. These are: legitimacy, accountability and what makes a government "best situated" to put environmental protection measures into effect. The discussion in the main body of the report has dealt with "accountability" and "best situated." These points will be elaborated on here. This appendix also deals with the question of legitimacy.

1. Legitimacy

In the draft Accord, and the Inspections sub-agreement, governments are required, once they have delegated their authority, to hold their power "in abeyance." Only when the government that has been delegated the responsibility persists in not acting may the delegating government act. There are many serious problems with this part of the harmonization proposal.

One key problem is that authority "held in abeyance" is a contradiction in terms. Authority that is not used ceases to be authority at all. For example, the federal government technically has the power to "disallow" provincial laws, as provided by s. 90 of the Constitution Act, 1867. This power still sits "on the books", but has not been used since 1943.[19] If the federal government were to try to act on this power, there would be considerable political costs to pay.

As expressed in the following excerpt from the CIELAP and CELA commentary of March 1995,[20] authority -- particularly federal authority over the environment -- cannot be held in "abeyance" and still retain legitimacy:

> "... the devolution of federal responsibility for environmental protection through the EMFA raises a number of questions. In effect, the federal government is agreeing not to exercise its constitutional capacity to establish and implement national environmental standards through federal legislation. This *de facto* abandonment of legitimate legislative authority by federal government could make a re-assertion of this authority in the future extremely difficult.
>
> This would be partly a consequence of the federal government's loss of institutional capacity in the field due to the elimination of fiscal and human resources. In addition, once it is established by practice and convention that the federal government not exercise its legislative authority, and that the provinces fully occupy the field, an effort by the federal government to re-assert its legal authority would be likely to engender intense federal-provincial conflict.
>
> ...Administrative delegation may have the same *de facto* result as legislative delegation. Even if the courts continue to distinguish legislative delegation because Parliament has maintained the authority to withdraw that delegation, as

time goes on, it is less and less likely to occur. This is partly a practical result, as the federal government loses its institutional capacity to fulfil that role due to reduced resources. However, it also is a political consequence, as an effort by the federal government to re-assert its legal authority would be likely to prompt strong provincial resistance."

In other words, if a government does not use its authority, it will lose it. It follows, therefore, that in order to retain authority, and the perceived legitimacy of the use of that authority, governments have to retain an operative role in the field.

The alternative to holding powers in abeyance has been proposed in the main body of the report. Governments may rationalize their activities in the field in order to eliminate any real duplication of effort, but both should retain a presence. Both levels of government have the responsibility and power to protect the environment. It follows that in order to keep the exercise of their power legitimate, both levels of government must continue to actively exercise their authority.

2. *Accountability*

The chief accountability problem of the harmonization project is the proposed role of the CCME. As an intergovernmental body, there is no legislature or electorate which can hold the CCME to account for its collective decisions under the proposed harmonization agreement. It is also contemplated within the Standards sub-agreement (Section 6) that the CCME will be the body of final resort in the event that parties to the agreement are not meeting their obligations. This is problematic in that it makes Ministers accountable not to their own legislature or electorates, but to the CCME. It is also problematic in that it takes governments' responsibility to the public to protect the environment and makes it solely a matter for discipline at the CCME.

In the Inspections sub-agreement the chief accountability issue arises under the proposed delegation of inspection duties and the unspecified "due process" that evidently must be followed before a delegating government may act to conduct an inspection for the purpose of enforcing its own law. This will severly weaken, if not sever, the fundamental line of accountability between ministers and the legislatures which have charged them with the responsibility for the administration and enforcement of their laws. If the principle of ministerial responsibility is to upheld, then the judgement as to whether a delegated government is failing to conduct inspections in relation to the delegating government's laws, and decision for the delegating jurisidiction to therefore initiate its own inspection, must lie with the Minister of the delegating jurisdiction responsible to Parliament or a legislature for the administration of the law in question.

As noted in the main body of the report, the problems attached to the CCME as a decision-making body cannot, ultimately, be "fixed." The proposal set out in Appendix B can address the problem somewhat. All of the reporting and auditing functions set out in the recommendations may make CCME deliberations and decisions more knowable and transparent. But, as a decision-making body, the CCME presents insurmountable accountability problems.

As a facilitator of cooperative government action along the lines of the COA, the CCME may act as a forum for discussion and provide administrative assistance to governments. None of these functions are inherently problematic in the least. However, as soon as the CCME takes on a decision-making role, all of the problems described above arise.

3. Government "Best Situated"

The presumption evident in the draft documents is that the government "best situated" is the one territorially closest to the enterprise or undertaking subject to environmental protection measures. In other words, aside from borders and federal lands, the Accord and sub-agreements assume the provinces are "best situated." The agreements also assume that the "best situated" government will be delegated the authority to implement the other government's laws. However, as noted in the body of the report, government capacity is best determined by other criteria. Moreover, for reasons reviewed in the discussions above regarding legitimacy and accountability, cooperative government action is preferable to delegation of government authority.

Ideally, the "best situated" government is the one with constitutional authority, applicable legislation, trained staff and the resources to perform environmental protection functions. In the event that both governments meet all or most of these criteria, they can cooperatively determine where their resources can be most effectively directed. Effective cooperation requires that both governments retain a role and the capacity to perform that role. The chief purpose of cooperative action should be to reduce (and eliminate if possible) any duplication of effort, either on the part of government or regulated enterprises. Cooperative action may be formalized into bilateral agreements (such as the COA), and the agreements could be structured around legislation, sectors, sites or areas of concern. If both governments remain active in the field, the problem of conflict of interest will be lessened.

Rather than delegate their authority, governments should work together to determine how they can exercise their authority so as not to duplicate effort and to provide effective environmental protection. Retaining an active role will also serve to preserve the legitimacy of government action. It will also preserve Ministerial accountability for the implementation of environmental legislation.

APPENDIX B: The CCME as a Decision-Making Body in National Standard Setting: Key Problems

Note: The analysis that follows applies in particular to the standard-setting function of the CCME. Some of the comments may apply generally to any process by the CCME.

1. Accountability

The CCME exists in "intergovernmental space," outside of Canada's current constitutional/legal structure. Consequently, no formal accountability mechanisms exist in relation to the CCME. It is answerable to no legislature or electorate for its collective decisions.

This is not a problem if the CCME is simply a forum for discussion. However, it is an enormous problem if the CCME acts as a decision-making body as is contemplated under the draft harmonization agreement (particularly the standards schedule). If the CCME becomes a decision and policy-making body, then a significant component of environmental policy-making would be moved out of the reach and oversight of the legislatures, parliament and the electorate.

Furthermore, the link between governments and the adequacy of the level of environmental quality which they provide within their jurisdictions would be significantly weakened. Environmental standards within each jurisdiction become function of CCME decisions, and not the decisions of individual governments for which they can be held directly to account.

The lack of public records of discussions and decisions within the CCME is also seriously problematic. Without such records, there is no public record of the actual decisions taken by the Council. Ministers cannot be held to account for their decisions, when the public, the legislatures and parliament don't even know what those decisions are. The lack of any record of the positions taken by individual ministers in decisions, also means that there is no way in which they might be held to account in their home legislatures for their actions within the CCME.

The lack of formal processes for ratification, independent review, sunset, and renewal of agreements are also problematic.

Possible Solutions to The Accountability Problem

The only complete "potential solution" to the problem posed by the CCME as a decision-making body would be to amend the constitution, and make the CCME a new, elected, national body, or make it accountable to such a body. It is unlikely that this solution will ever occur. Failing constitutional amendment, all that remains are the imperfect solutions that follow.

One alternative is to give the federal government a veto over any CCME proposal or decision which would limit its actions. In other words, the CCME can proceed on a priority, or set a new standard only if the federal government agrees. If the federal government does not agree, then all other jurisdictions, including the federal government, would exercise their authority as if there had been no CCME decision.

In effect, the federal Minister of the Environment would take responsibility for CCME decisions. The federal government would only surrender its authority to set national standards if it feels that the standard and implementation scheme proposed by the CCME are adequate to protect the health of Canadians and the environment. This model has the additional advantage of providing incentives to the provinces to agree to stronger standards as it preserves federal capacity to act unilaterally.

The primary flaw in this proposed solution is that, in practice, the line of accountability established through such a structure is still tenuous at best. In addition, the likelihood of actual exercise of federal power of veto is low. The proposal is also unlikely to be accepted by the provinces.

The problems associated with the CCME acting as a decision-making body can also be tempered somewhat by clauses in the accord and/or sub-agreements that make it very clear that any jurisdiction that wishes to enact standards higher than those agreed to at the CCME may do so. The presence of such a clause will ensure that individual ministers remain accountable to the needs of their own jurisdictions.

As noted in the main body of the report, if the CCME is going to be a decision-making body, then its deliberations and decisions have to be part of the public record.

Finally, the last imperfect accountability measure that can help to mitigate, but not entirely solve the problems presented by a decision-making CCME is that all of the harmonization agreements should have sunset, review, amendment, withdrawal and termination clauses.

2. *The Decision-Making Process*

Harmonization has always assumed that decisions will be made by the Council on a consensus basis. The most recent drafts still for the most part preserve this assumption. However, a repeated criticism has been that consensus decision-making results either in deadlock, or, most commonly, in lowest-common-denominator outcomes. If the rule is that everyone must agree, then the most-objecting jurisdiction has a veto.

Potential Decision-Making Models

Unanimous decision-making can have a role in the harmonization process. It is sensible to impose the rule that all jurisdictions agree to proceed with standard-setting in a given area. Unless all parties agree, there is no point in going forward. In the absence of consensus, then all jurisdictions may continue as before.

Once the parties have agreed to proceed with a standard-setting process, there must still be a reasonable time-limit, such as two years, set. If a decision is not reached within the time limit, then the process should end, and all parties continue as before. A time-limit will serve to ensure that issues assigned to the process are not lost in the "intergovernmental fogbank" forever.

As noted above, the unanimous consent model will not be suitable for determining standards as it tends to result in lowest common denominator outcomes. A possible model to follow as an alternative is based on the general constitutional amending formula: two thirds of the provinces and territories representing 50% of the population and the federal government. If there is no agreement, then all jurisdictions may continue as before. Again, jurisdictions must retain the right to raise standards above the agreed national standard. The advantage with this approach is that the most objecting governments no longer hold a veto over a proposed standard, and therefore, higher standards are likely to result.

Finally, there must be formal processes introduced in order to ensure that it is clear what is being agreed to. Public records of all decisions must be kept.

3. *Implementing Standards*

Without any constitutional or legal status, the CCME has no lawful authority to compel its member jurisdictions to adopt agreed upon standards. This means that, while "national" standards may be agreed to at the CCME, there are no legal mechanisms in place to ensure that every jurisdiction actually implements the standard. The result could be a nation with "national" standards in some jurisdictions but not others. Jurisdictions could fail to enact agreed upon standards for a number of reasons. One reason could be that the cabinet or legislature rejects the proposed CCME standard. Another could be that an objecting jurisdiction simply does not implement the standard. Aside from exerting political pressure on the Ministers of non-complying jurisdictions, there is nothing the CCME can do to compel implementation.

Possible Solutions To Implementation Issues

The problems around implementing agreed-upon standards highlights the main weakness of the "decision-rule" approach described above. The approach is beneficial in that it permits parties to set standards higher than those proposed by the most objecting jurisdictions.

However, dissenting jurisdictions (the ones outside the two-thirds/fifty percent majority) may "opt out" and fail to implement the standard.

There are a number of mechanisms that can improve how standards are implemented under the CCME process, and mechanisms that can put some pressure on jurisdictions to perform. For example, parties should agree to implement standards within a set time, and back their performance up with reports to the legislatures, Parliament and the public. The means by which the standard is implemented should also be precisely delineated, with meaningful sanctions if the standards are not met by enterprises in each jurisdiction. "Voluntary programmes," for example, would not be an acceptable means in implementing "Canada-wide" standards.

Another mechanism to ensure compliance with the standard would be to establish a process where another jurisdiction, or a member of the public, can make a complaint against a non-complying jurisdiction. The complaint could trigger a third-party report on whether or not the party in question has implemented or maintained the standard as required. The report should be prepared by an independent third party and made available to all governments and the public. Such a report, however, would bring only political pressure to bear on the offending jurisdiction.

The only constitutional and legal mechanism available to implement national standards that really would apply nationally is for the federal government to implement the agreed standard. In practice, the federal government would have to implement the agreed standard using its authority and then possibly enter into equivalency agreements in provinces where the standard is met or exceeded. However, equivalency should only be permitted where an independent third party confirms that the agreed to standard has been met or exceeded. Otherwise the federal standard would remain in place.

Provisions should also be made for the withdrawal of equivalency agreements where equivalency with the federal standard is no longer met either as a result of the lowering of the standard or a failure to implement and enforce the standard by a province or territory. This requires a compliant procedure (from another party or public) and a third party body to determine if equivalency is still met. Continued monitoring of compliance by an independent third party would also be required. In all cases, the decision to grant equivalency and to withdraw it must rest with the federal Minister of the Environment.

ENDNOTES

1.Peter N. Nemetz. "The Fisheries Act and Federal-Provincial Environmental Regulation: Duplication or Complementarity?" in (1986) 29 CANADIAN PUBLIC ADMINISTRATION 401 at 415-416..

2. Mark Winfield, "The Ultimate Horizontal Issue: The Environmental Policy Experiences of Alberta and Ontario, 1971-1993" , in (March, 1994) 27 CANADIAN JOURNAL OF POLITICAL SCIENCE 129.

3. Doug MacDonald. The Politics of Pollution (Toronto: MacLellan and Stewart, 1991) at pp. 250-252.

4.The other three institutions were the International Development Research Centre, The International Institute for Sustainable Development, and the National Round Table on Environment and Economy.

5. The reason for the increasing importance of the CCME is described by Kathryn Harrison. In a time of conflict and disagreement because the federal government had taken a stronger role in environmental management in Canada, the CCME emerged as a forum that moderated federal power:

> "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 provinces' ability to constrain federal involvement, particularly in joint initiatives. These features can help explain why revitalization of the Council was consciously pursued by some provinces as a means to establish a credible alternative to federal policy-making.

Kathryn Harrison, "Prospects for Intergovernmental Harmonization in Environmental Policy," in Brown and Hiebert (eds.) Canada: The State of the Federation 1994 (Kingston: Queens University, Institute of Intergovernmental Relations, 1994) at 192.

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

7. K. Clark and B. Rutherford, "The Constitution, Federal-Provincial Relations, Harmonization and CEPA" in M. Winfield (eds) Reforming the Canadian Environmental Protection Act: Submission to the House of Commons Standing Committee on Environment and Sustainable Development (Toronto: Canadian Institute for Environmental Law and Policy, 1994) at 19.

8.S. Ochman, ed., An Environmentalists' Perspective on Harmonization: A Preliminary Analysis (Ottawa: Harmonization Working Group, November, 1994).

9. S.Kaufman, P.Muldoon and M.Winfield. The Environmental Management Framework Agreement: An Analysis and Commentary (Toronto: The Canadian Institute of Environmental Law and Policy and the Canadian Environmental Law Association, 1995).

10.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," Pubilus, 24, (1994),: 21-37.

11. M. Winfield and K. Clark, The Environmental Management Framework Agreement - A Model for Dysfunctional Federalism? An Analysis and Commentary (Toronto: The Canadian Institute of Environmental Law and Policy, 1996).

12.R.Matas, "Cash low to cut red tape," The Globe and Mail, January 24, 1996.

13.R.Spiers, "Environmental safety sacrificed for 'harmony'" The Toronto Star, July 2, 1996.

13.However, the drafts also indicate that harmonization will proceed on identified "priorities" -- a process that by definition will leave gaps in the harmonized regime. Unless "addressing gaps and weaknesses" is identified as a priority, then it would appear that harmonization will create more gaps in environmental management in Canada.

15. See Harrison, op cit, for a full discussion of the provincial and federal response to the "my standard is better than yours" dynamic in Canada in the late 1980s.

16.See, for example, on the case of Ontario, M.Winfield and G.Jenish, The Common Sense Revolution and Ontario's Environment (Toronto: Canadian Institute for Environmental Law and Policy, June 1996).

17. Rosemary Speirs, "Environmental Safety Sacrificed for 'Harmony'", *Toronto Star*, 2 July, 1996; and "Harmonized Environmental Rules A Recipe For Disaster, *Toronto Star*, 26 September, 1996. See also "Victory in the Referendum in Quebec Led to a New Showdown," Maclean's Magazine, October 21, 1996 at 27:

> "Even before the referendum campaign began, the Liberals had been planning a post-referendum charm offensive. They wanted to appear more cooperative in areas where the federal government and the provinces shared control, such as health care and the environment. On September 27, Chretien wrote a note

to Sheila Copps, in her role as environment minister, pointedly suggesting that she end jurisdictional disputes she was entangled in with several provinces. "Dear Colleague," the letter began, "I am writing to seek your assistance in the management of several potentially difficult issues during the period of national reconciliation which will follow the referendum." Proposed actions would be studied on several fronts, the letter continued, including "...environment in order to demonstrate both federal commitment and leadership in forging a stronger federation."

Excerpted from Edward Greenspon and Anthony Wilson Smith, Double Vision: The Inside Story of the Liberals in Power (Toronto: Doubleday, 1996)

18. *The Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem, 1994*. Under "Principles" the agreement states:

> Canada and Ontario recognize their shared responsibility for managing the Great Lakes and that neither government can succeed alone. Programs and activities resulting from this Canada-Ontario Agreement will be shared in such a way as to reflect the unique roles and responsibilities of each government, to minimize cost and to avoid duplication and overlap.

See also: *First Progress Report Under the 1994 Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem*; and *The Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem, 1994 Stream 2 Progress Report (July 1994-July 1995), August 16, 1995.*

19. Peter Hogg. Constitutional Law of Canada. 2nd Ed. (Toronto: Carswell, 1985) at 90.

20.Kaufman, Muldoon and Winfield, The Environmental Management Framework Agreement: An Analysis and Commentary.

ATTACHMENT D

6. Implementation

6.1. - implementation of standards with intraprovincial/territorial effects at discretion of responsible government (i.e. provinces and territories)

6.2 - implementation of standards related transboundary or interprovincial/territorial effects to be determined by CCME (i.e. no federal implementation independent of CCME) N.B. lack of balance with 6.1)

6.5 - measures to implement standards to include guidelines, codes of practice, MOU's, voluntary programs
  - again standards aren't really standards at all.

6.8. - federal role limited to science support, and implementation of standards at international borders and federal lands, international representation, and product standards
  - no role in implementation of domestic standards
  - also cuts provinces out of implementation of product standards.
    - means province couldn't implement a product ban.

6.9. - provinces given lead in implementation of standards from industrial, municipal and other sectors.
  - implication of no real national standards like CEPA and Fisheries Act pulp and paper standards, Fisheries Act standards for other industrial sectors.

7. Management and Administration

7.2. - amendment by unanimous consent

7.4. - five year review. No provision for public or independent review, no sunset clause
  - in light of 7.2 means we are stuck with this thing until the end of time.

The whole thing is Alice in Wonderland. Standards that aren't really standards at all. Intended to provide the appearance of doing something while actually doing nothing.

STANDARDS SUB-AGREEMENT

2. Scope

2.2 - focus is on ambient standards

3. Principles

3.1.5.- Results oriented - focus is on ambient standards, not meaningful standards which apply to individual facilities.

3.1.6.- Flexibility - measures to obtain standards are at discretion of responsible governments (i.e. no requirement to actually do anything - Canada wide standards aren't standards at all).

3.1.7.- Sustainable Development Context - implies cost-benefit analysis requirements for new standards.

3.1.8.- Public and Stakeholder Participation - certainly not in evidence to date in proposals for the development of standards under sub-agreement so far.

4. Accountability

4.2 - re-iterates "flexibility" of governments in implementation of "standards."

4.4 - "shall not act" clause once one level of government charged with implementation other level barred from acting.
- if feds set a standard, means province can't adopt a higher standard on its own. No clarity if Accord Principle 11 trumps this clause.

4.5 & 4.6 - what happens when a government fails to fulfil obligation? Concerned governments to develop and "alternative plan" within six months.
- what happens in the meantime?
  - who are the "concerned governments?"
  - what constitutes a failure to fulfil an obligation, especially in light of the "flexibility" referred to in 3.1.6, 4.2 and 6.1.

5. Development of Standards

5.1.1.- Ministers establish priorities for Canada-wide standards.

5.2.2.- standards development to be internal to CCME or "other agreed upon fora" "other agreed upon fora" not defined.