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**Submission on Bill C-32**  
**the**  
***Canadian Environmental Protection Act***

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## TABLE OF CONTENT

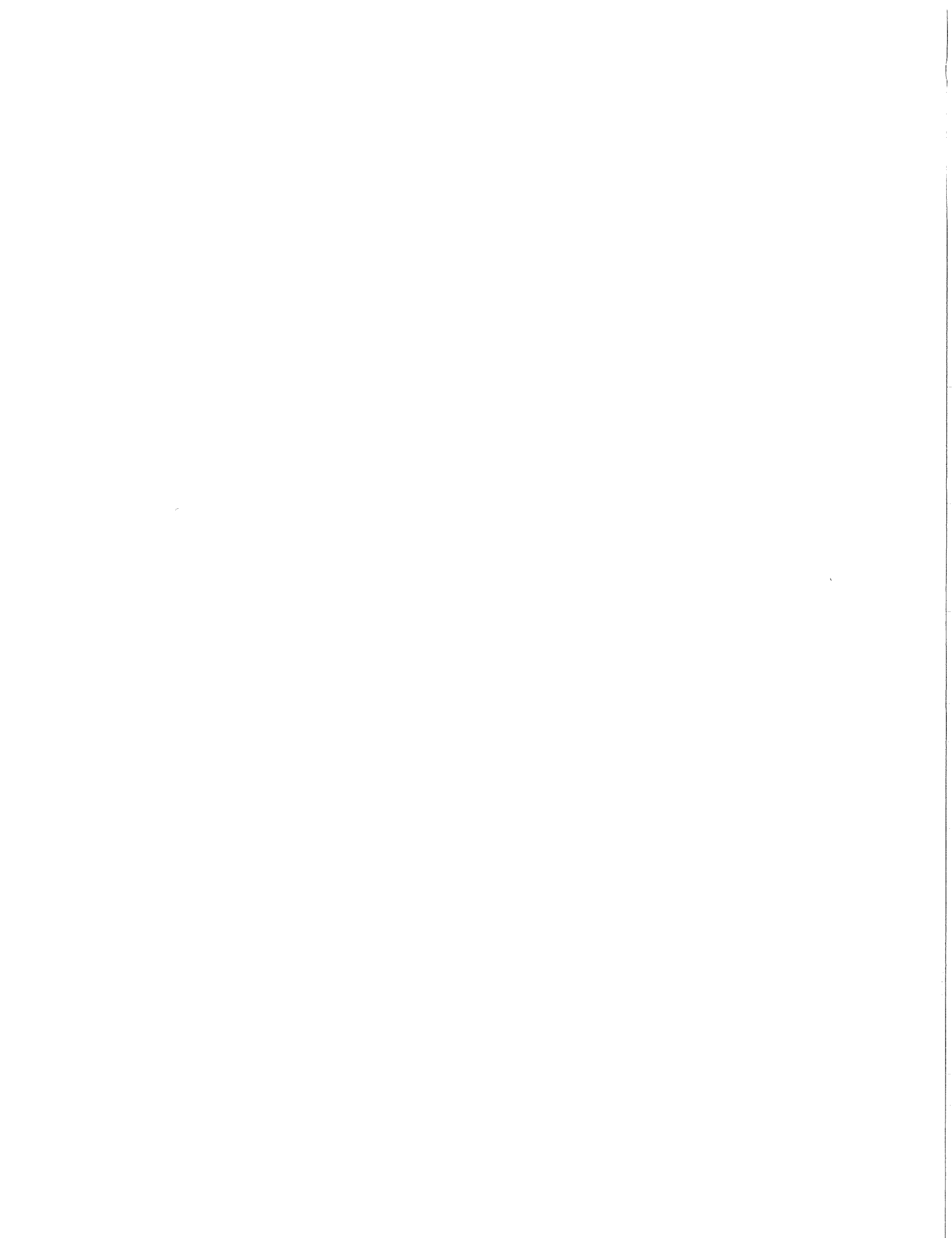
A. INTRODUCTION TO THE SUBMISSION .....	1
B. OVERVIEW OF THE SUBMISSION .....	3
C. ANALYSIS OF Bill C-32 .....	5
DECLARATION .....	5
ADMINISTRATIVE DUTIES .....	9
INTERPRETATION .....	14
PART 1 - ADMINISTRATION .....	19
PART 2 - PUBLIC PARTICIPATION .....	28
PART 3 - INFORMATION GATHERING, OBJECTIVES, GUIDELINES AND CODES OF PRACTICE .....	50
PART 4 - POLLUTION PREVENTION .....	61
PART 5 - TOXIC SUBSTANCES .....	65
PART 6 - BIOTECHNOLOGY .....	113
PART 7 - CONTROLLING POLLUTION AND MANAGING WASTE .....	130
DIVISION 1- NUTRIENTS .....	130
DIVISION 2 - PROTECTION OF MARINE ENVIRONMENT FROM LAND BASED SOURCES OF POLLUTION .....	133
DIVISION 3 - DISPOSAL AT SEA .....	136
DIVISION 4 - FUELS .....	148
DIVISION 5 - VEHICLE, ENGINE, AND EQUIPMENT EMISSION .....	155
DIVISION 6 - INTERNATIONAL AIR POLLUTION .....	165
DIVISION 7 - INTERNATIONAL WATER POLLUTION .....	172
DIVISION 8 - CONTROL OF HAZARDOUS WASTE AND HAZARDOUS RECYCLABLE MATERIAL, AND OF PRESCRIBED NON-HAZARDOUS WASTE FOR FINAL DISPOSAL .....	180
PART 8 - ENVIRONMENTAL EMERGENCIES .....	187
PART 9 - GOVERNMENT OPERATIONS AND FEDERAL AND ABORIGINAL LANDS .....	195
PART 10 - ENFORCEMENT .....	206
PART 11 - MISCELLANEOUS MATTERS .....	247
D. SUMMARY OF RECOMMENDATIONS .....	265
ENDNOTES .....	285

## NOTICE

Please note the following errata with respect to the Submission on Bill C-32: the *Canadian Environmental Protection Act* (by Paul Muldoon, Canadian Environmental Law Association; and Mark Winfield, Canadian Institute for Environmental Law and Policy).

### ERRATA

- \* Delete Recommendation No. 61 (page 101).
- \* Move Recommendation No. 141 from page 203 (Part 9) to page 194 (Part 8). This recommendation should follow Recommendation No. 138. This change should also be made in Section D of the submission titled, "Summary of Recommendation."



# Submission on Bill C-32 the *Canadian Environmental Protection Act*

## A. INTRODUCTION TO THE SUBMISSION

Bill C-32

On March 8, 1998, the federal government tabled Bill C-32, the new *Canadian Environmental Protection Act* (CEPA), in the House of Commons. Although it retains the same basic framework of the existing CEPA, this 221 page, 360 section document includes a number of fundamentally important changes to the present regulatory framework.

Bill C-32 has been a long time coming. The existing CEPA was enacted in 1988. This statute updated and incorporated the *Environmental Contaminated Act* and four other federal environmental statutes into one law. One of the provisions included in CEPA at the time was a requirement to have a Parliamentary Standing Committee review the Act within five years. This review commenced in the spring of 1994. At that time, the Standing Committee on Environment and Sustainable Development held public hearings across Canada on the effectiveness of CEPA. The Toxics Caucus of the Canadian Environmental Network (CEN) undertook in-depth research papers on various aspects of CEPA. In addition, the Caucus developed a summary submission entitled, The Canadian Environmental Protection Act: An Agenda for Reform. This submission was endorsed by some 50 organizations, representing a variety of sectors from across Canada.

In June of 1995, the Standing Committee on Environment and Sustainable Development released its report on CEPA, entitled: It's About Our Health! Towards Pollution Prevention. The report called for a revision to CEPA presenting 141 recommendations for amendments to the Act. In December of 1995 the government released its response to the Standing Committee's report, entitled: Environmental Protection Legislation Designed for the Future - A Renewed CEPA - A Proposal. Intense agriculture, industry, and natural resource lobbies critiquing the Standing Committee's report were evident in the weakness of the government's response to the Standing Committee report. The government response document formed the basis for the drafting of Bill C-74. Contrary to the Standing Committee's recommendations, the government response proposed to weaken the existing Act in a number of key areas, including the regulation of biotechnology.

Bill C-74 died on the order paper, with the spring 1997 election call. In March of 1998, a very similar Bill was introduced, Bill C-32 weakened from C-74, especially with respect to harmonization. This Bill received second reading in April 1998 and was referred to the Standing Committee on Environment and Sustainable Development for clause by clause review.

The purpose of this submission is to present recommendations for amendments to Bill C-32 to the committee.

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## **B. OVERVIEW OF THE SUBMISSION**

The flaws in Bill C-32 **must be addressed** if the new *Canadian Environmental Protection Act* is to truly protect the health and environment of all Canadians. For the most part this will involve **deleting** clauses intended to constrain the ability of the federal government to act to protect human health and the environment. Highlighted in this document are a number of important strengths and weaknesses of Bill C-32. The key weaknesses of the Bill include the following:

### **1) The proposed Harmonization Accord will take precedence over Bill C-32.**

In January 1998, the federal Minister of the Environment and her provincial colleagues endorsed an agreement, the *Canada-Wide Accord on Environmental Harmonization* (Accord) and three sub-agreements to harmonize federal and provincial environmental laws and policies. The Accord has been severely criticized by public interest groups for many reasons. The focus of this criticism has been the withdrawal of the federal government from its responsibility for environmental matters.

This direction is reflected in Bill C-32. Under section 2 of Bill C-32, for example, it is clear that the Accord will take precedence over CEPA; the Bill creates a statutory duty that CEPA be administered in a manner consistent with the Harmonization Accord. In addition, the federal government's ability to act without the agreement of the provinces would be severely constrained in key areas such as environmental emergencies and the implementation of Canada's environmental obligations under international treaties and customary international law. Moreover, Bill C-32 provides for the expanded use of "equivalency" agreements through which federal environmental laws and regulations do not apply in particular provinces.

### **2) Bill C-32 will make CEPA a residual statute.**

Unlike the present CEPA, Bill C-32 proposes to make the Act applicable only where measures taken by other departments of the federal government are not "sufficient" according to the Environment Minister and the Minister responsible for those other measures. The effect of this provision is to make CEPA apply **only** when nothing else does. In other words, CEPA would become a residual statute rather than the cornerstone of federal environmental law and policy.

### **3) Bill C-32 will legitimize the continued generation and use of the worst toxic substances.**

The proposed Bill was supposed to aggressively tackle the problem of toxic substances by providing for the "virtual elimination" (VE) or phasing-out of the most harmful toxic substances. The framework of the legislation is, however, problematic for several

reasons. "Virtual elimination" is defined in a way that allows industry to continue to use or generate extremely dangerous substances, such as dioxin, so long as they are not released at detectable levels where harm can be established. In addition, the Bill creates a labyrinth of requirements for risk assessment and cost-benefit analysis before any action can actually be taken to "virtually eliminate" what the government itself has labelled the "very worst" of pollutants. Rather than working toward the phase-out of these substances, the proposed law is actually a step backward by entrenching the old "end-of-the-pipe" pollution control approach. This approach has been decisively rejected by the International Joint Commission (IJC)<sup>1</sup> and others, including the federal government in its own Pollution Prevention Framework Policy.<sup>2</sup>

#### **4) The citizen rights provisions of CEPA are ineffective.**

Bill C-32 proposes a new right for Canadian citizens to commence court action against those that are violating the provisions of CEPA. The right to bring such an action, however, is subject to many qualifications that it is, in effect, a hollow right. Moreover, the section is only applicable when there has been an **actual** violation. It is not applicable where there is a **likelihood** of such a violation. In this way it is inconsistent with the approach in the Ontario *Environmental Bill of Rights* similar laws in the Yukon, the Northwest Territories, and in the United States (U.S.).

#### **5) Bill C-32 will weaken the existing requirements of CEPA that all biotechnology products and new chemicals undergo environmental and human health evaluations before being introduced into Canada.**

Bill C-32 includes a new part dealing with biotechnology products, such as genetically engineered plants, microorganisms and fish. However, its primary effect would be to permit Ministers other than the Minister of the Environment to exempt biotechnology products from CEPA's existing requirements that they undergo environmental and human health impact reviews prior to their introduction into Canada. The same changes are proposed for CEPA's provisions dealing with new chemicals, such as pesticides, regulated under statutes other than CEPA.

## **C. ANALYSIS OF BILL C-32**

### **DECLARATION**

#### **Bill C-32 STATES:**

It is hereby declared that the protection of the environment is essential to the well-being of Canadians and that the primary purpose of this Act is to contribute to sustainable development through pollution prevention.

### **PREAMBLE**

#### **Bill C-32 STATES:**

(1) Whereas the Government of Canada seeks to achieve sustainable development that is based on an ecologically efficient use of natural, social and economic resources and acknowledges the need to integrate environmental, economic and social factors in the making of all decisions by government and private entities;

(2) Whereas the Government of Canada is committed to implementing pollution prevention as a national goal and as the priority approach to environmental protection;

(3) Whereas the Government of Canada acknowledges the need to control and manage pollutants and wastes if their release into the environment cannot be prevented;

(4) Whereas the Government of Canada recognizes the importance of an ecosystem approach;

(5) Whereas the Government of Canada will continue to demonstrate national leadership in establishing ecosystem objectives and environmental quality guidelines and codes of practice;

(6) Whereas the Government of Canada is committed to implementing the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation;

(7) Whereas the Government of Canada recognizes that all governments in Canada have authority that enables them to protect the environment and recognizes that all governments face environmental problems that can benefit from cooperative resolution;

(8) Whereas the Government of Canada recognizes the importance of endeavouring, in cooperation with provinces, territories and aboriginal peoples, to achieve the highest level of environmental quality for all Canadians and ultimately contribute to sustainable development;

(9) Whereas the Government of Canada recognizes that the risk of toxic substances in the environment is a matter of national concern and that toxic substances, once introduced into the environment, cannot always be contained within geographic boundaries;

(10) Whereas the Government of Canada recognizes the integral role of science in the process of making decisions relating to the protection of the environment and human health and that environmental or health risks and social, economic and technical matters are to be considered in that process;

(11) Whereas the Government of Canada recognizes the responsibility of users and producers in relation to toxic substances and pollutants and wastes, and has adopted the "polluter pays" principle;

(12) Whereas the Government of Canada is committed to ensuring that its operations and activities on federal and aboriginal lands are carried out in a manner that is consistent with the principles of pollution prevention and the protection of the environment and human health;

(13) Whereas the Government of Canada will endeavour to remove threats to biological diversity through pollution prevention and the control and management of toxic substances;

(14) And whereas the Government of Canada must be able to fulfil its international obligations in respect of the environment;

Now, therefore, Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

## **OVERVIEW**

There are 15 paragraphs in the Preamble describing the policy context for CEPA including: the recognition of pollution prevention as a national goal; the polluter pay principle; the precautionary principle; and an ecosystem approach to environmental protection.

Most of these principles are positive with the exceptions that, first, national leadership is limited to the setting of objectives, guidelines and codes of practices rather than federal standards, and second, the protection of biodiversity is limited to threats from toxic substances (without recognizing threats from other sources such as biotechnology).

## **RECOMMENDATIONS ON SPECIFIC SECTIONS**

### **Paragraph 3**

This paragraph acknowledges the need to control, and to manage pollutants if their release cannot be prevented. The paragraph is apparently intended to 'balance' the previous paragraph regarding pollution prevention.

#### **Recommendation No. 1**

**Paragraph should be balanced with the addition of a paragraph acknowledging the need to phase out (or virtually eliminate) the generation and use of the most serious pollutants.**

**Paragraph 3 should read as follows: "Whereas the government of Canada acknowledges the need to phase out the generation and use of the most persistent toxic substances."**

### **Paragraph 5**

This paragraph limits the Government of Canada's powers to establish ecosystem objectives, environmental quality guidelines and codes of practice. The paragraph makes no reference to leadership through the establishment of national environmental standards, or ensuring a minimum level of environmental quality for all Canadians.

#### **Recommendation No. 2**

**Replace with: "Whereas the Government of Canada will continue to demonstrate national leadership in establishing and implementing environmental standards, ecosystem objectives, environmental quality guidelines, and codes of practice."**

### **Paragraph 6**

The Precautionary Principle should be drafted in a way that does **not** incorporate reference to 'cost effective' measures.

#### **Recommendation No. 3**

**Delete the word "cost."**

### **Paragraph 10**

This paragraph is vague and is unclear.

#### **Recommendation No. 4**

**The paragraph should be deleted.**

### **Paragraph 12**

Paragraph as drafted deals with federal lands and aboriginal lands together. Given the unique nature of aboriginal lands, they should be addressed in a separate paragraph.

#### **Recommendation No. 5**

**A new paragraph should be added to the preamble dealing with the role of the federal government on aboriginal lands.**

#### **Paragraph 13**

This paragraph is limited to the removal of threats to biological diversity through pollution prevention and the control and management of toxic substances only. There should also be reference to the removal of threats to biological diversity from the use and release of products of biotechnology. This is required by Article 8(g) of the *Convention on Biological Diversity*.

#### **Recommendation No. 6**

**Replace with: "Whereas the Government of Canada will endeavour to remove threats to biological diversity through pollution prevention, the control and management of toxic substances, and products of biotechnology."**

## ADMINISTRATIVE DUTIES - SECTION 2

### Bill C-32 STATES:

#### Duties of the Government of Canada

2. (1) In the administration of this Act, the Government of Canada shall, having regard to the Constitution and laws of Canada,

- (a) take cost-effective preventive and remedial measures to protect, enhance and restore the environment;
- (b) take the necessity of protecting the environment into account in making social and economic decisions;
- (c) implement an ecosystem approach that considers the unique and fundamental characteristics of ecosystems;
- (d) endeavour to act in cooperation with governments to protect the environment;
- (e) encourage the participation of the people of Canada in the making of decisions that affect the environment;
- (f) facilitate the protection of the environment by the people of Canada;
- (g) endeavour to establish nationally consistent standards of environmental quality;
- (h) provide information to the people of Canada on the state of the Canadian environment;
- (i) apply knowledge, science and technology to identify and resolve environmental problems;
- (j) endeavour to protect the environment, including its biological diversity, from the release of toxic substances;
- (k) endeavour to act expeditiously to assess whether existing substances or those new to Canada are toxic or capable of becoming toxic and assess the risk that such substances pose to the environment and human life and health;
- (l) act in a manner that is consistent with the intent of intergovernmental agreements and arrangements entered into for the purpose of achieving the highest level of environmental quality throughout Canada;
- (m) ensure, to the extent that is reasonably possible, that all areas of federal regulation for the protection of the environment and human health are addressed in a complementary manner in order to avoid duplication and to provide effective and comprehensive protection;
- (n) endeavour to exercise its powers to require the provision of information in a coordinated and cost-effective manner; and
- (o) endeavour to apply and enforce this Act in a fair, predictable and consistent manner.

#### Other Acts of Parliament

(2) For the purposes of paragraphs (1)(m) and (n), if this Act does not provide for the avoidance of duplication where measures can be taken under this Act and under another Act of Parliament to address a matter affecting the environment or human health, the Minister, the Minister of Health where appropriate, and the minister responsible for the other Act will jointly determine whether the measures that can be taken under the other Act are appropriate and sufficient to address the matter.

## OVERVIEW

This section gives the federal government a number of positive duties. Some of these duties include:

- taking preventive measures;
- implementing the ecosystem approach;
- ensuring public participation in decision making;
- the co-operation with other governments;
- application of knowledge, science and technology to resolve environmental problems; and
- acting in a manner that is consistent with intergovernmental agreements.

In addition, according to section 2(2), where other Acts of Parliament may apply, the Environment Minister must get the agreement of the other Ministers to act under CEPA.

Most of the administrative duties are positive. There are, however, some exceptions: pollution prevention measures must be "cost effective"; the protection of biodiversity is limited to threats from toxic substances only; and CEPA must be consistent with inter-governmental agreements (such as the Harmonization Accord), which means that these agreements will supersede CEPA.

## KEY POINTS

- Most of the administrative duties should be supported with noted exceptions. In particular, the Harmonization Accord should not supersede CEPA.
- The references to cost effectiveness should be removed.
- The duty to protect the environment from threats other than toxic substances, for example threats from biotechnology, should be strengthened



## RECOMMENDATIONS ON SPECIFIC SECTIONS

### Section 2(1) - Duties of the Government of Canada

#### Section 2(1)(a)

The word 'cost' introduces a cost-benefit test to actions taken under CEPA. This was not a recommendation in the House of Commons Standing Committee CEPA review report and could present a significant barrier to action to deal with toxic substances and other threats to human health and the environment under the Act. The problems with cost-benefit approaches were highlighted by the Standing Committee in its enforcement report in May 1998.

#### **Recommendation No. 7**

**Delete the word "cost."**

#### Section 2(1)(g)

Current drafting commits the government of Canada to "nationally consistent" standards of environmental quality. No reference is made to the adequacy of these standards.

#### **Recommendation No. 8**

**Replace with: "endeavour to establish the highest national standards of environmental quality."**

#### Section 2(1)(j)

This section makes no reference to the protection of human health. It also fails to make reference to the protection of biological diversity from the release of products of biotechnology. The adoption of measures to protect the conservation of and sustainable biological diversity from the use or release of biotechnology products is required by Article 8(g) of the *Convention on Biological Diversity*.

#### **Recommendation No. 9**

**Replace with: "endeavour to protect the environment, including its biological diversity, and human health, from the use and release toxic substances, products of biotechnology, and other threats."**

## **Section 2(1)(l)**

This section creates a mandatory duty on the part of the Government of Canada to act in a manner consistent with the intent of intergovernmental agreements. The reference to the highest level of environmental quality implies a specific requirement to be consistent with the requirements of the January 1998 *Canada-wide Accord on Environmental Harmonization* (Accord) and its sub-agreements. This is a major concern, given the language of the Accord and sub-agreements requiring that parties "shall not act" under certain circumstances. In effect, the provision would incorporate the provisions of the Accord and sub-agreements into CEPA by reference. The Standing Committee was highly critical of the proposed Accord in its December 1997 report on it.

### **Recommendation No. 10**

**Delete section**

**or**

**Replace with: "act in a manner with regard to the intent of intergovernmental agreements...throughout Canada."**

The phrase "have regard to" would be consistent with 1996 amendments to the Ontario *Planning Act* regarding municipal compliance with provincial land-use planning policies.

A clause requiring the Minister of the Environment to consult with the governments of provinces, and aboriginal members of the National Advisory Committee before taking action has been inserted in numerous locations in the Act including: information gathering (section 47(2)); development of Objectives, Guidelines and Codes of Practice (section 54(3)); Pollution Prevention (section 62(1)); Toxics Substances (General section 69(2); Priority Substances List section 76(2)); Protection of the Marine Environment From Land Based Sources Of Pollution (section 121(2)); Fuels (section 140(3)); International Air Pollution (section 166(2)); International Water Pollution (section 176(2)); Environmental Emergencies (section 197(2)); Federal Government Operations (section 208(2)) and Economic Instruments (section 323).

### **Recommendation No. 11**

**The addition of this clause is an unnecessary barrier to the taking of action under the Act and it should be deleted.**

### **Section 2(1)(m)**

This section, as drafted emphasizes the avoidance of 'duplication' in federal regulation for the protection of human health and the environment. Given the extent of the gaps in the existing regulatory framework for this purpose, the section should be re-drafted to emphasize the need for comprehensive and effective protection.

#### **Recommendation No. 12**

**Delete words: "to avoid duplication and."**

### **Section 2(2)** - Other Acts of Parliament

The effect of this section is to provide Ministers responsible for the administration of other Acts of Parliament, that may be used to address a matter affecting human health or the environment, a veto over the initiation of action under CEPA. Given that CEPA was drafted for the express purpose of the protection of the environment and human health, action under CEPA for these purposes should take precedence over actions under other Acts of Parliament.

#### **Recommendation No. 13**

**Delete section**

**or**

**Redraft section to read: "the Minister, and the Minister of Health, where appropriate, may consult with the Minister responsible for another Act of Parliament as to whether measures could be taken under the other Act that are appropriate or sufficient to address a matter affecting human health or the environment."**

## INTERPRETATION - SECTIONS 3-4

### Bill C-32 STATES:

#### Definitions

#### 3. (1) The definitions in this subsection apply in this Act.

"aboriginal government" means a governing body that is established by or under or operating under an agreement between Her Majesty in right of Canada and aboriginal people and that is empowered to enact laws respecting

- (a) the protection of the environment; or
- (b) for the purposes of Division 5 of Part 7, the registration of vehicles or engines.

"aboriginal land" means

- (a) reserves, surrendered lands and any other lands that are set apart for the use and benefit of a band and that are subject to the *Indian Act*;
- (b) land, including any water, that is subject to a comprehensive or specific claim agreement, or a self-government agreement, between the Government of Canada and aboriginal people where title remains with Her Majesty in right of Canada; and
- (c) air and all layers of the atmosphere above and the subsurface below land mentioned in paragraph (a) or (b).

"air pollution" means a condition of the air, arising wholly or partly from the presence in the air of any substance, that directly or indirectly

- (a) endangers the health, safety or welfare of humans;
- (b) interferes with the normal enjoyment of life or property;
- (c) endangers the health of animal life;
- (d) causes damage to plant life or to property; or
- (e) degrades or alters, or forms part of a process of degradation or alteration of, an ecosystem to an extent that is detrimental to its use by humans, animals or plants.

"analyst" means a person or a member of a class of persons designated as an analyst under subsection 217(1).

"biological diversity" means the variability among living organisms from all sources, including, without limiting the generality of the foregoing, terrestrial and marine and other aquatic ecosystems and the ecological complexes of which they form a part and includes the diversity within and between species and of ecosystems.

"biotechnology" means the application of science and engineering in the direct or indirect use of living organisms or parts or products of living organisms in their natural or modified forms.

"class of substances" means any two or more substances that

- (a) contain the same portion of chemical structure;
- (b) have similar physico-chemical or toxicological properties; or

(c) for the purposes of sections 68, 70 and 71, have similar types of use.

"Committee" means the National Advisory Committee established under section 6.

"ecosystem" means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.

"environment" means the components of the Earth and includes

- (a) air, land and water;
- (b) all layers of the atmosphere;
- (c) all organic and inorganic matter and living organisms; and
- (d) the interacting natural systems that include components referred to in paragraphs (a) to (c).

"environmental emergency" has the meaning given that expression in Part 8.

"environmental quality" includes the health of ecosystems.

"Environmental Registry" means the registry established under section 12.

"federal land" means

- (a) land, including any water, that belongs to Her Majesty in right of Canada, or that Her Majesty in right of Canada has the right to dispose of, and the air and all layers of the atmosphere above and the subsurface below that land; and
- (b) the following land and areas, namely,
  - (i) the internal waters of Canada as determined under the *Oceans Act*, including the seabed and subsoil below and the airspace above those waters, and
  - (ii) the territorial sea of Canada as determined under the *Oceans Act*, including the seabed and subsoil below and the air and all layers of the atmosphere above that sea.

"federal source" means

- (a) a department of the Government of Canada;
- (b) an agency of the Government of Canada or other body established by or under an Act of Parliament that is ultimately accountable through a minister of the Crown in right of Canada to Parliament for the conduct of its affairs;
- (c) a Crown corporation as defined in subsection 83(1) of the *Financial Administration Act*; or
- (d) a federal work or undertaking.

"federal work or undertaking" means any work or undertaking that is within the legislative authority of Parliament, including, but not limited to,

- (a) a work, undertaking or business operated for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship;
- (b) a railway, canal, telegraph or other work or undertaking connecting one province with another, or extending beyond the limits of a province;

(c) a line of ships connecting a province with any other province, or extending beyond the limits of a province;

(d) a ferry between any province and any other province or between any province and any country other than Canada;

(e) airports, aircraft and commercial air services;

(f) a broadcast undertaking;

(g) a bank;

(h) a work or undertaking that, although wholly situated within a province, is before or after its completion declared by Parliament to be for the general advantage of Canada or for the advantage of two or more provinces; and

(i) a work or undertaking outside the exclusive legislative authority of the legislatures of the provinces.

"fuel" means any form of matter that is combusted or oxidized for the generation of energy.

"government" means the government of a province or of a territory or an aboriginal government.

"inspector" means a person or a member of a class of persons designated as an inspector under subsection 217(1).

"investigator" means a person or a member of a class of persons designated as an investigator under subsection 217(1).

"Minister" means the Minister of the Environment.

"movement within Canada" or "transport within Canada" means movement or transport between provinces.

"pollution prevention" means the use of processes, practices, materials, products or energy that avoid or minimize the creation of pollutants and waste and reduce the overall risk to the environment or human health.

"prescribed" means prescribed by regulations made under this Act.

"province" includes a territory.

"release" includes discharge, spray, inject, inoculate, abandon, deposit, spill, leak, seep, pour, emit, empty, throw, dump, place and exhaust.

"sell" includes to offer for sale or lease, have in possession for sale or lease or deliver for sale or lease.

"substance" means any distinguishable kind of organic or inorganic matter, whether animate or inanimate, and includes

(a) any matter that is capable of being dispersed in the environment or of being transformed in the environment into matter that is capable of being so dispersed or that is capable of causing such transformations in the environment,

(b) any element or free radical,

(c) any combination of elements of a particular molecular identity that occurs in nature or as a result of a chemical reaction, and

(d) complex combinations of different molecules that originate in nature or are the result of chemical reactions but that could not practicably be formed by simply combining individual constituents, and, except for the purposes of sections 66, 80 to 89 and 104 to 115, includes

(e) any mixture that is a combination of substances and does not itself produce a substance that is different from the substances that were combined,

(f) any manufactured item that is formed into a specific physical shape or design during manufacture and has, for its final use, a function or functions dependent in whole or in part on its shape or design, and

(g) any animate matter that is, or any complex mixtures of different molecules that are, contained in effluents, emissions or wastes that result from any work, undertaking or activity.

"sustainable development" means development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

"transient reaction intermediate" means a substance that is formed and consumed in the course of a chemical reaction.

"transit" means, except for the purposes of sections 139 and 155, the portion of an international transboundary movement through the territory of a country that is neither the country of origin nor the country of destination of the movement.

"undertaking" includes a business.

#### **Meaning of "Ministers" and "either Minister"**

(2) Where the word "Ministers" is used in this Act, it refers to both the Minister and the Minister of Health, and where the expression "either Minister" is used in this Act, it refers to either the Minister or the Minister of Health.

#### **Class of substances**

(3) For the purposes of this Act, other than subsection (1), "substance" includes a class of substances.

#### **Aboriginal rights**

4. For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from the protection provided for existing aboriginal or treaty rights of the aboriginal peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982*.

## **OVERVIEW**

This section outlines the various definitions used in the Act. They are standard definitions. The definition of "pollution prevention" is excellent.

## RECOMMENDATION ON SPECIFIC SECTION

### Section 3(1) - Definitions

#### Recommendation No. 14

That a definition for hormone disrupting substance be added to section of Bill C-32, as follows:

**“Hormone disrupting substance” means a substance with the ability to disrupt the synthesis, secretion, transport, binding, action, or elimination of natural hormones in organisms that are responsible for the maintenance of homeostasis, reproduction, development and/or behaviour.”**



## PART I - ADMINISTRATION - SECTIONS 6-10

### Bill C-32 STATES:

#### *Advisory Committees*

##### **National Advisory Committee**

6. (1) For the purpose of enabling national action to be carried out and taking cooperative action in matters affecting the environment and for the purpose of avoiding duplication in regulatory activity among governments, the Minister shall establish a National Advisory Committee

- (a) to advise the Ministers on regulations proposed to be made under subsection 93(1);
- (b) to advise the Minister on a cooperative, coordinated intergovernmental approach for the management of toxic substances; and
- (c) to advise the Minister on other environmental matters that are of mutual interest to the Government of Canada and other governments and to which this Act relates.

##### **Composition of Committee**

- (2) The Committee shall consist of the following members:
  - (a) one representative for each of the Ministers;
  - (b) one representative of the government of each of the provinces; and
  - (c) subject to subsection (3), not more than six representatives of aboriginal governments, to be selected on the following regional basis,
    - (i) one representative for all aboriginal governments, except Inuit, in Newfoundland, Prince Edward Island, Nova Scotia and New Brunswick,
    - (ii) one representative for all aboriginal governments, except Inuit, in Quebec,
    - (iii) one representative for all aboriginal governments, except Inuit, in Ontario,
    - (iv) one representative for all aboriginal governments, except Inuit, in Manitoba, Saskatchewan, Alberta and the Northwest Territories,
    - (v) one representative for all aboriginal governments, except Inuit, in British Columbia and the Yukon Territory, and
    - (vi) one representative for all Inuit aboriginal governments.

##### **Absence of aboriginal government**

(3) Where there is no Inuit aboriginal government or aboriginal government for a region referred to in any of subparagraphs (2)(c)(i) to (v), the representative of aboriginal people for the Inuit or for the region, as the case may be, may be selected in accordance with regulations made under subsection (4).

##### **Regulations**

(4) The Minister may make regulations respecting the manner of selecting a representative under subsection (3).

### **Ministerial advisory committees**

**7. (1) For the purpose of carrying out their duties under this Act, the Ministers or either Minister may**

(a) establish advisory committees to report to the Ministers or either Minister; and

(b) specify the functions that the committees are to perform and the manner in which those functions are to be performed.

### **Publication of report**

(2) The report of a committee established under subsection (1), including its recommendations and reasons, shall be made public.

### **Report of various committees**

**8. The Minister shall include in the annual report required by section 342 a report of the activities of the Committee and of any committees established under paragraph 7(1)(a).**

### ***Agreements Respecting Administration***

#### **Negotiation of agreement**

**9. (1) The Minister may negotiate an agreement with a government or with an aboriginal people with respect to the administration of this Act.**

#### **Publication of negotiated agreements**

(2) The Minister shall publish any agreement negotiated under subsection (1) before it is entered into, or give notice of its availability, in the *Canada Gazette* and in any other manner that the Minister considers appropriate.

#### **Comments or objections**

(3) Within 60 days after the publication of an agreement or notice of its availability under subsection (2), any person may file with the Minister comments or a notice of objection.

#### **Publication by Minister of results**

(4) After the end of the period of 60 days referred to in subsection (3), the Minister shall publish in the *Canada Gazette* and in any other manner that the Minister considers appropriate a report or a notice of the availability of a report that summarizes how any comments or notices of objection were dealt with.

#### **Entering into agreements**

(5) The Minister may, after publishing a report or notice under subsection (4),

(a) with the approval of the Governor in Council, enter into an agreement with a government or an aboriginal people with respect to the administration of this Act; and

(b) subject to any terms and conditions that the Governor in Council may specify in the approval, agree to amendments of the agreement.

#### **Publication of final agreements**

(6) The Minister shall publish any agreement under subsection (5), or give notice of its availability, in the *Canada Gazette* and in any other manner that the Minister considers appropriate.

## **Termination**

(7) An agreement made under subsection (5) terminates five years after the date on which it comes into force or may be terminated earlier by either party giving the other at least three months notice.

## **Annual report**

(8) The Minister shall include in the annual report required by section 342 a report on the administration of this Act under agreements made under subsection (5).

## **Agreements Respecting Equivalent Provisions**

### **Non-application of regulations or orders**

10. (1) Except with respect to Her Majesty in right of Canada, the provisions of a regulation made under subsection 93(1), 200(1) or 209(1) or (2) do not apply within the jurisdiction of a government for which there is in force an order, made under subsection (3), declaring that the provisions do not apply within that jurisdiction.

### **Non-application of regulations or orders**

(2) Except with respect to a federal source, the provisions of a regulation made under section 167 or 177 do not apply within the jurisdiction of a government for which there is in force an order, made under subsection (3), declaring that the provisions do not apply within that jurisdiction.

### **Declaration of equivalent provisions**

(3) Subject to subsections (4), (5) and (6), where the Minister and a government agree in writing that there are in force by or under the laws applicable to the jurisdiction of the government

(a) provisions that are equivalent to a regulation made under a provision referred to in subsection (1) or (2), and

(b) provisions that are similar to sections 17 to 20 for the investigation of alleged offences under environmental legislation of that jurisdiction,

the Governor in Council may, on the recommendation of the Minister, make an order declaring that the provisions of the regulation do not apply in an area under the jurisdiction of the government.

### **Publication of agreements**

(4) The Minister shall publish any agreement referred to in subsection (3) before it is entered into, or give notice of its availability, in the *Canada Gazette* and in any other manner that the Minister considers appropriate.

### **Comments or objections**

(5) Within 60 days after the publication of an agreement or notice of its availability under subsection (4), any person may file with the Minister comments or a notice of objection.

### **Publication by Minister of results**

(6) After the end of the period of 60 days referred to in subsection (5), the Minister shall publish in the *Canada Gazette* and in any other manner that the Minister considers appropriate a report or a notice of the availability of a report that summarizes how any comments or notices of objection were dealt with.

### **Publication of final agreements**

(7) The Minister shall publish any agreement referred to in subsection (3) after it is entered into, or give notice of its availability, in the *Canada Gazette* and in any other manner that the Minister considers appropriate.

### **Termination**

(8) An agreement made under subsection (3) terminates five years after the date on which it comes into force or may be terminated earlier by either party giving the other at least three months notice.

### **Revocation of order**

(9) The Governor in Council may, on the recommendation of the Minister, revoke an order made under subsection (3) if the agreement referred to in that subsection terminates or is terminated.

### **Report to Parliament**

(10) The Minister shall include in the annual report required by section 342 a report on the administration of this section.

## **OVERVIEW**

This part provides the administrative structure for implementing aspects of CEPA. Important changes from the current Act include:

- the addition of Aboriginal Representatives to the Federal-Provincial Advisory Committee (FPAC) which assists in the development of CEPA regulations;
- the expansion of administrative and equivalency agreements envisions to permit agreements with aboriginal people or governments;
- the expanded use of equivalency agreements to include regulations dealing with environmental emergencies, environmental management on federal government lands, and international air and water pollution;
- the inclusion of a public notice and comment period prior to the adoption of administrative and equivalency agreements; and
- Five-year sunset requirements for equivalency and administrative agreements.

## **KEY POINTS**

- No amendments with regards to FPAC are required.
- Reporting requirements under administrative agreements should be strengthened.

- Citizen suit and whistle-blower protection provisions in provincial/territorial/aboriginal law should be required prior to the establishment of equivalency agreements.
- Public reporting requirements under equivalency agreements should be expanded.
- The 5-year sunset of equivalency orders should be provided.

## RECOMMENDATIONS ON SPECIFIC SECTIONS

### **Section 9(5)** - Entering into agreements

This section prevents the conclusion of an administrative agreement prior to making public of the report of the board of review.

#### **Recommendation No. 15**

**Replace with: "The Minister may, after publishing a report or notice under subsection (4) and the making public of the report of a Board of Review, if such a Board has been established in response to a notice of objection filed under subsection (3)..."**

A clause should also be added making it clear that no agreement entered into under this section limits, in any way, the ability of the Minister to take any action necessary to administer or enforce the Act, at anytime the Minister deems it necessary to take such action. This is necessary to ensure the effective and timely enforcement of the Act, and to clarify the accountability of the Minister to Parliament and the public for its administration. Such a provision would also be consistent with paragraph 2.11 of the government response *Environmental Protection Legislation Designed for the Future* to the Standing Committee's June 1995 report on the review of CEPA.

#### **Recommendation No. 16**

**Add clause: "no agreement made under this section shall limit or interfere with, in any way, the carrying out of any action the Minister deems necessary for the administration and enforcement of this Act, including the conduct of inspections or investigations."**

**Section 9(7)** - Termination

This section establishes requirements for the inclusion of a report on the administration of the Act under administrative agreements in the annual report to Parliament on the administration of the Act. Annual reports to date have contained virtually no information on the administration of the Act under administrative agreements beyond indicating the existence of such agreements. Specific provisions regarding the contents of reports on activities under administrative agreements should be added to ensure the provision of adequate information to Parliament and the public regarding activities under administrative agreements.

**Recommendation No. 17**

**Add clauses at end of section: "including information on:**

- (a) the collection of monitoring data;**
- (b) the number, dates, locations and results of inspections, investigations, warnings, injunctions, and prosecutions; and**
- (c) the level of resources allocated, in relation to the administration of the Act under agreements made under subsection (5)."**

**Section 10(1)** - Equivalency Agreements

This section expands the federal use of equivalency agreements beyond regulations made under Part 6, controlling toxic substances, to emergencies and international air and water pollution regulations.

**Recommendation No. 18**

**This recommendation should follow the recommendations emanating from the Auditor General's report.**

**Delete references to section 200(1) and 209(1) and (2).**

**Section 10(3)** - Equivalency Agreements

This section establishes the legal tests for equivalency which must be met before agreements can be entered into. The current Bill only makes reference to equivalency agreements to a regulation made under CEPA and CEPA's provisions regarding requests for investigations of alleged offenses. No reference is made to equivalency regarding environmental protection actions and voluntary reports. Without requirements for equivalency to these provisions of CEPA, the protections they provide will be lost when equivalency agreements are established.

**Recommendation No. 19**

**Replace with: "subject to subsections (4), (5), and (6) where the Minister and a government agree in writing that there are in force by or under the law applicable to the jurisdiction of a government:**

- (a) provisions that are at least equivalent to a regulation made under a provision referred to in subsection (1) or (2);**
- (b) provisions that are at least equivalent to sections 17-20 for the investigation of alleged offenses under environmental legislation of that jurisdiction;**
- (c) provisions that are at least equivalent to sections 22-42 (as amended) for environmental protection actions under environmental legislation of that jurisdiction; and**
- (d) provisions that are at least equivalent to sections 16, 96, and 202 regarding voluntary reports under environmental legislation of that jurisdiction, the Governor in Council may, on the recommendation of the Minister, make an order declaring that the provisions of the regulation do not apply in the area under the jurisdiction of the government."**

**Section 10(6)** - Equivalency Agreements

This section as drafted permits the establishment of equivalency agreements prior to completion of a Board of Review where one has been established.

## **Recommendation No. 20**

**Replace with: After the end of the period of 60 days referred to in subsection (5):**

**(a) the Minister shall publish in the *Canada Gazette* and in any other manner the Minister deems appropriate a report or notice of the availability of a report that summarizes how any comments or notices of objection were dealt with; and**

**(b) the Minister shall not recommend to the Governor in Council that it make an order under section 3 until the notice referred to in paragraph (a) has been published or, in the event that a Board of Review has been established in response to a notice of objection filed under subsection (6), the publication of the report of the Board of Review.**

## **Section 10(9) - Equivalency Order Revocation**

These sections as drafted, provide for the expiry of equivalency agreements, but not orders under section 10(3). This means that regulations continue not to apply in jurisdictions into which an agreement has been entered into even though the agreement has expired or been terminated.

The sections also fail to provide for the immediate revocation of orders. This leaves a potential gap in which no regulation would be in place between the notice of termination of agreement, presumably due to the absence of provincial regulation, and the re-establishment of the application of the requirements of the federal regulation. This is potentially very problematic with respect to emergencies and international air and water pollution.

## **Recommendation No. 21**

**Redraft Section 10(9) as follows:**

**(1) An order made by the governor in Council under subsection (3) ceases to be of any force or effect: when the agreement referred to in that subsection terminates or is terminated.**



**(2) the governor in Council may, on the recommendation of the Minister, revoke an order made under subsection (3) at any time it is necessary to do so in order to protect the environment or human life or health from actual or immanent harm.**

**Section 10(10)** - Reports to Parliament

As with section 9(8) this section establishes that the annual report to Parliament on the administration of CEPA include a section dealing with the administration of the equivalency agreement provisions of the Act. Annual reports to date have contained virtually no information regarding the administration of these provisions beyond statements of the existence of equivalency agreements. This level of information provision is inadequate to ensure accountability to Parliament or the public for activities taken under the authority of these provisions of the Act.

**Recommendation No. 22**

**Add clause after words "this section:" "including information on:**

- (a) the collection of monitoring data;**
- (b) the number, cause, and results of public requests for investigations of offenses;**
- (c) the number, cause and results of environmental protection actions or equivalent actions;**
- (d) the numbers, locations, dates and results of inspections, investigations, warnings, injunctions and prosecutions, under laws referred to agreements made under subsection (3); and**
- (e) the level of resources allocated to the administration of those laws."**

## PART 2 - PUBLIC PARTICIPATION - SECTIONS 11-42

### **Bill C-32 STATES:**

11. In this Part, "environmental protection action" means an action under section 22.

#### **Establishment of Environmental Registry**

12. The Minister shall establish a registry, to be called the Environmental Registry, for the purpose of facilitating access to documents relating to matters under this Act.

#### **Contents of Environmental Registry**

13. (1) The Environmental Registry shall contain notices and other documents published or made publicly available by the Minister.

#### **Form and manner of Environmental Registry**

(2) The Minister may determine the form of the Environmental Registry, how it is to be kept and how access to it is to be provided.

#### **Protection from civil proceeding or prosecution**

14. (1) Despite any other Act of Parliament, no civil or criminal proceedings may be brought against any person mentioned in subsection (2) for the full or partial disclosure in good faith of any notice or other document through the Environmental Registry or any consequences of its disclosure.

#### **Persons protected**

(2) The persons against whom the proceedings may not be brought are Her Majesty in right of Canada, the Minister and any person acting on behalf of or under the direction of the Minister.

#### ***Rights under Other Parts***

#### **Additional rights**

15. The rights conferred by this Part are in addition to the right to request the addition of a substance to the Priority Substance List, the right to file a notice of objection under Parts 1, 5, 7 and 11 and the right to request under Parts 5, 7 and 11 that a board of review be established under section 333.

#### ***Voluntary Reports***

#### **Voluntary reports**

16. (1) Where a person has knowledge of the commission or reasonable likelihood of the commission of an offence under this Act, but is not required to report the matter under this Act, the person may report any information relating to the offence or likely offence to an inspector, investigator or any person to whom a report may be made under this Act.

#### **Request for confidentiality**

(2) The person making the report may request that their identity, and any information that could reasonably be expected to reveal their identity, not be disclosed.

### **Requirement for confidentiality**

(3) No person shall disclose or cause to be disclosed the identity of a person who makes a request under subsection (2) or any information that could reasonably be expected to reveal their identity unless the person authorizes the disclosure in writing.

### **Employee protection**

(4) Despite any other Act of Parliament, no person shall discipline, dismiss or harass an employee of any of the following organizations for making a report under subsection (1):

- (a) a department of the Government of Canada;
- (b) an agency of the Government of Canada or other body established by or under an Act of Parliament that is ultimately accountable through a minister of the Crown in right of Canada to Parliament for the conduct of its affairs;
- (c) a Crown corporation as defined in subsection 83(1) of the *Financial Administration Act*; or
- (d) a federal work or undertaking.

### **Investigation of Offences**

#### **Application for investigation by Minister**

**17. (1) An individual who is resident in Canada and at least 18 years of age may apply to the Minister for an investigation of any offence under this Act that the individual alleges has occurred.**

#### **Statement to accompany application**

- (2) The application shall include a solemn affirmation or declaration
  - (a) stating the name and address of the applicant;
  - (b) stating that the applicant is at least 18 years old and a resident of Canada;
  - (c) stating the nature of the alleged offence and the name of each person alleged to have contravened, or to have done something in contravention of, this Act or the regulations; and
  - (d) containing a concise statement of the evidence supporting the allegations of the applicant.

#### **Form**

- (3) The Minister may prescribe the form in which an application under this section is required to be made.

#### **Investigation by Minister**

**18. The Minister shall acknowledge receipt of the application when it is received and shall investigate all matters that the Minister considers necessary to determine the facts relating to the alleged offence.**

#### **Progress reports**

**19. After acknowledging receipt of the application, the Minister shall report to the applicant every 90 days on the progress of the investigation and the action, if any, that the Minister has taken or proposes to take, but a report is not required if the investigation is discontinued before the end of the 90 days.**

#### **Minister may send evidence to Attorney General of Canada**

**20. At any stage of an investigation, the Minister may send any documents or other evidence to the Attorney General of Canada for consideration of whether an offence has been or is about to be committed under this Act and for any action that the Attorney General may wish to take.**

#### **Discontinuation of investigation**

**21. (1) The Minister may discontinue the investigation if the Minister is of the opinion that**

- (a) the alleged offence does not require further investigation; or
- (b) the investigation does not substantiate the alleged offence.

#### **Report**

(2) If the investigation is discontinued, the Minister shall

- (a) prepare a report in writing describing the information obtained during the investigation and stating the reasons for its discontinuation; and
- (b) send a copy of the report to the applicant and to any person whose conduct was investigated.

A copy of the report sent to a person whose conduct was investigated must not disclose the name or address of the applicant or any other personal information about them.

#### **Circumstances when an individual may bring an action**

**22. (1) An individual who has applied for an investigation may bring an environmental protection action if**

- (a) the Minister failed to conduct an investigation and report within a reasonable time; or
- (b) the Minister's response to the investigation was unreasonable.

#### **Nature of the action**

(2) The action may be brought in any court of competent jurisdiction against a person who committed an offence under this Act that

- (a) was alleged in the application for the investigation; and
- (b) caused significant harm to the environment.

#### **Relief that may be claimed**

(3) In the action, the individual may claim any or all of the following:

- (a) a declaratory order;
- (b) an order, including an interlocutory order, requiring the defendant to refrain from doing anything that, in the opinion of the court, may constitute an offence under this Act;
- (c) an order, including an interlocutory order, requiring the defendant to do anything that, in the opinion of the court, may prevent the continuation of an offence under this Act;
- (d) an order to the parties to negotiate a plan to correct or mitigate the harm to the environment or to human, animal or plant life or health, and to report to the court on the negotiations within a time set by the court; and

(e) any other appropriate relief, including the costs of the action, but not including damages.

**Limitation period of two years**

**23. (1) An environmental protection action may be brought only within a limitation period of two years beginning when the plaintiff becomes aware of the conduct on which the action is based, or should have become aware of it.**

**Time during investigation not included**

(2) The limitation period does not include any time following the plaintiff's application for an investigation, but before the plaintiff receives a report under subsection 21(2).

**No action for remedial conduct**

**24. An environmental protection action may not be brought if the alleged conduct**

(a) was taken

(i) to correct or mitigate harm or the risk of harm to the environment or to human, animal or plant life or health, or

(ii) to protect national security, support humanitarian relief efforts, participate in multilateral military or peace-keeping activities under the auspices of international organizations or defend a member state of the North Atlantic Treaty Organization; and

(b) was reasonable and consistent with public safety.

**Exception**

**25. An environmental protection action may not be brought against a person if the person was convicted of an offence under this Act, or environmental protection alternative measures within the meaning of Part 10 were used to deal with the person, in respect of the alleged conduct on which the action is based.**

**Notice of the action**

**26. (1) The plaintiff in an environmental protection action shall give notice of the action in the Environmental Registry no later than 10 days after the document originating the action is first served on a defendant.**

**Notice of other matters**

(2) The court may order any party to the action to give notice in the Environmental Registry of any other matter relating to the action.

**Attorney General to be served**

**27. (1) A plaintiff shall serve the Attorney General of Canada with a copy of the document originating an environmental protection action within 10 days after first serving the document on a defendant.**

**Attorney General may participate**

(2) The Attorney General of Canada is entitled to participate in the action, either as a party or otherwise. Notice of his or her decision to participate shall be given to the plaintiff and be included in the Environmental Registry within 45 days after the copy of the originating document is served on the Attorney General.

### **Right of appeal**

(3) The Attorney General of Canada is entitled to appeal from a judgment in the action and to make submissions and present evidence in an appeal.

### **Other participants**

**28. (1) A court may allow any person to participate in an environmental protection action in order to provide fair and adequate representation of the private and public interests involved.**

### **Manner and terms of participation**

(2) The court may determine the manner and terms of the person's participation, including the payment of costs.

### **Burden of proof**

**29. The offence alleged in an environmental protection action and the resulting significant harm are to be proved on a balance of probabilities.**

### **Defences**

**30. (1) The following defences are available in an environmental protection action:**

- (a) the defence of due diligence in complying with this Act and the regulations;
- (b) the defence that the alleged conduct is authorized by or under an Act of Parliament;
- (c) except with respect to Her Majesty in right of Canada or a federal source, the defence that the alleged conduct is authorized by or under a law of a government that is the subject of an order made under subsection 10(3); and
- (d) the defence of officially induced mistake of law.

### **Other defences not excluded**

(2) This section does not limit the availability of any other defences.

### **Undertakings to pay damages**

**31. In deciding whether to dispense with an undertaking to pay damages caused by an interlocutory order in an environmental protection action, the court may consider any special circumstances, including whether the action is a test case or raises a novel point of law.**

### **Stay or dismissal**

**32. (1) A court may stay or dismiss an environmental protection action if it is in the public interest to do so.**

### **Factors to be considered**

- (2) In deciding whether to stay or dismiss the action, the court may consider
- (a) environmental, health, safety, economic and social concerns;
  - (b) whether the issues raised in the action would be better resolved in some other way;

(c) whether the Minister has an adequate plan to correct or mitigate the harm to the environment or human, animal or plant life or health or otherwise to address the issues raised in the action; and

(d) any other relevant matter.

### **Remedies**

**33. If a court finds that the plaintiff is entitled to judgment in an environmental protection action, it may grant any relief mentioned in subsection 22(3).**

#### **Orders to negotiate plans**

**34. (1) A court order to negotiate a plan to correct or mitigate the harm to the environment or human, animal or plant life or health may, to the extent that it is reasonable, practicable and ecologically sound, require the plan to provide for**

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

(b) the restoration of the environment;

(c) the restoration of all uses, including enjoyment, of the environment affected by the offence;

(d) the payment of money by the defendant as the court may direct to achieve the plan's purposes; and

(e) monitoring the implementation of the plan and the progress made in achieving its purposes.

Before making the order, the court must take into account any efforts that the defendant has already made to deal with the harm.

#### **Other orders**

(2) The court may also make interlocutory or ancillary orders to ensure that the negotiation of the plan runs smoothly, including orders

(a) for the payment of the costs of negotiation;

(b) requiring the plaintiff or the defendant to prepare a draft of the plan; and

(c) setting a time limit for the negotiations.

#### **Appointment of other person to prepare plan**

(3) The court may appoint a person who is not a party to prepare a draft plan if the parties cannot agree on the plan or the court is not satisfied with the plan that they negotiate.

#### **Order to prepare another plan**

(4) The court may order the parties to prepare another plan if it is not satisfied with the plan that they negotiate.

#### **Approval and effective date**

(5) The court may approve a plan that the parties negotiate or a plan prepared by a person appointed under subsection (3) and the approved plan comes into effect on a day determined by the court.

### **Restriction on orders to negotiate plans**

**35. A court may not order the negotiation of a plan to correct or mitigate the harm to the environment or human, animal or plant life or health if it determines that**

- (a) the harm has already been corrected or mitigated; or
- (b) adequate measures to correct or mitigate the harm have already been ordered under this Act or any other law in force in Canada.

### **Settlement or discontinuance**

**36. An environmental protection action may be settled or discontinued only with the approval of the court and on terms that it considers appropriate.**

### **Settlements and orders**

**37. If an environmental protection action results in an order of a court or a settlement approved by a court,**

- (a) the resolution of any question of fact by the order or settlement is binding on a court in any other environmental protection action in which that question arises; and
- (b) no other environmental protection action may be brought with respect to the offence or alleged offence dealt with by the order or settlement.

### **Costs**

**38. In deciding whether to award costs in an environmental protection action, the court may consider any special circumstances, including whether the action is a test case or raises a novel point of law.**

### ***Action to Prevent or Compensate Loss***

#### **Injunction**

**39. Any person who suffers, or is about to suffer, loss or damage as a result of conduct that contravenes any provision of this Act or the regulations may seek an injunction from a court of competent jurisdiction ordering the person engaging in the conduct**

- (a) to refrain from doing anything that it appears to the court causes or will cause the loss or damage; or
- (b) to do anything that it appears to the court prevents or will prevent the loss or damage.

#### **Civil cause of action**

**40. Any person who has suffered loss or damage as a result of conduct that contravenes any provision of this Act or the regulations may, in any court of competent jurisdiction, bring an action to recover from the person who engaged in the conduct**

- (a) an amount equal to the loss or damage proved to have been suffered by the person; and
- (b) an amount to compensate for the costs that the person incurs in connection with the matter and proceedings under this section.



## **Other Matters**

### **Evidence of offence**

**41. (1) In an action under this Part, the record of proceedings in any court in which a defendant was convicted of an offence under this Act is evidence that the defendant committed the offence.**

### **Certificate evidence of conviction**

(2) In the action, evidence that a defendant was convicted of an offence under this Act may be given by a certificate stating with reasonable particularity the conviction and sentence of the defendant.

### **Signature of certificate**

(3) The certificate shall be signed by

(a) the person who made the conviction; or

(b) the clerk of the court in which the conviction was made.

Once it is proved that the defendant is the offender mentioned in the certificate, it is evidence without proof of the signature or the official character of the person appearing to have signed it.

### **Civil remedies not affected**

**42. (1) No civil remedy for any conduct is suspended or affected by reason only that the conduct is an offence under this Act.**

### **Remedies not repealed, etc.**

(2) Nothing in this Act shall be interpreted so as to repeal, remove or reduce any remedy available to any person under any law in force in Canada.

### **Damaged caused by a ship**

(3) No claim for damage caused by a ship may be made under this Act to the extent that a claim for that damage may be made under the *Canada Shipping Act* or the *Arctic Waters Pollution Prevention Act*.

## **OVERVIEW**

This part pertains to increasing public participation measures in CEPA, including:

- the establishment of an Environmental Registry which will contain notices and other CEPA-related documents;
- whistle-blowing provisions (voluntary reports) which protect employees reporting actual or likely violations under CEPA;
- requests for investigation, which are very similar to the provisions in the existing CEPA (section 108);

- the right to sue (Environmental Protection Actions) where any person can initiate a civil action when CEPA is being violated;
- public notice and comment periods on all proposed orders and regulations under CEPA (section 332), except for CEPA equivalency orders regarding new chemicals and biotechnology products regulated under other Acts of Parliament.

Member groups of the Canadian Environmental Network (CEN) have advocated for a long time for legal tools to empower the Canadian public to protect the environment. Bill C-32 does provide some steps forward in this regard by establishing an environmental registry, enhancing whistle-blower provisions, and establishing two causes of action, namely, an "environmental protection action" and an "action to prevent or compensate loss." Such rights are consistent with section 2(1)(e) of the Bill, namely, to "encourage the participation of the people of Canada in the making of decisions that affect the environment."

Although Bill C-32 can be seen as a step forward, the step is both modest and incomplete. First, the public participation provisions in Bill C-32 provide only a limited number of tools compared to those recommended by the Standing Committee's 1995 report, It's About Your Health! Towards Pollution Prevention. In that report, the Standing Committee recommended an "Environmental Bill of Rights." This recommendation was supported and enhanced in CELA's and CIELAP's response to the government response.<sup>1</sup> Although reference should be made to that submission for details of the proposal, the essential components of an Environmental Bill of Rights in the context of Bill C-32 could be summarized as follows:

Second, not only does Bill C-32 fail to include many of the important environmental rights needed by the public, but also Bill C-32's public participation provisions have a number of flaws with the result that some of them will only give the appearance and not the effort of promoting public access and accountability. Hence, in order for Bill C-32 to achieve the goal of encouraging public participation, as stated in the administrative duties (section 2), it will be necessary to add further rights to Part 2 of the Bill and to strengthen those right now proposed in the Bill.

This Part does, incrementally, give the public additional rights. This Part does not, however, include an Environmental Bill of Rights as recommended by Standing Committee. Moreover, the rights given are very circumscribed. In the case of the right to sue, it is doubtful that the part will be used in light of the following qualifications:

- it requires an unreasonable response from the Minister to a request for right for an action to proceed;
- it requires that there be significant harm to the environment and human health;

- there is no provision to deal with imminent potential for harm to the environment or human health;
- no actions are permitted if action is taken by a respondent to correct or mitigate the harm (refer to section 24 below);
- no actions are permitted if harm results from actions related to national security, peacekeeping, etc.;
- no actions are permitted if conduct was reasonable and consistent with public safety; and
- the court may dismiss action if it is in the public interest to do so.

These barriers, listed above, are far more restrictive than those contained in the Ontario *Environmental Bill of Rights*, or the federal governments proposed *Endangered Species Act* (Bill C-65).

## GENERAL RECOMMENDATIONS TO PART 2

### Recommendation No. 23

**The provisions should be supported, but expanded, to include a comprehensive notice and comment regime so that the public can have notice of and comment on all CEPA regulations, documents and approvals.**

**The qualifications in the right to sue should be removed. Even though these provisions are modelled on the *Ontario Environmental Bill of Rights* and the proposed *Endangered Species Act*, the CEPA provisions are clearly more restrictive.**

**The exemptions from public notice and comment requirements for CEPA equivalency orders for new substances and biotechnology products regulated under other Acts of Parliament should be removed.**

## RECOMMENDATIONS ON SPECIFIC SECTIONS

### Sections 12-14 - Environmental Registry

Sections 12 to 14 of Bill C-32 establish an "Environmental Registry" with the stated purpose of "facilitating access to documents relating to matters" under the statute. The registry shall contain notices and other documents published or made publicly available by the Minister. Issues relating to the form of, and access to, the registry is to be determined by the Minister.

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

Our present concern is the limited use being proposed for the registry. First, a legitimate use of the environmental registry is to disseminate information related to CEPA. In this context, therefore, the Bill should make it clear that all important information items, such as application for approvals, development of, or revisions to, policies and regulations, should be placed on the registry.

Second, not only should the registry be used as a means to disseminate information, but it should also be used as a means to provide notice of impending decisions. As such, the environmental registry should be seen as one part of a notice and comment regime within Bill C-32. If there is the infrastructure within the Bill to give notice of impending decisions, there should also be the opportunity for the public to make comment on those proposals. The marginal cost of providing this additional right would be minimal since the Bill already calls for public notice of proposed decisions.<sup>3</sup>

In our view, a notice and comment regime within CEPA would enhance public participation and provide a more fair access for the public than the notice given presently through the *Canada Gazette*. It is submitted that the minimum notice and comment period given for proposed decisions under the Bill, be sixty days.

#### **Recommendation No. 24**

**Sections 12 and 13 of Bill C-32 should be amended to broaden the purpose and function of the environmental registry to include:**

(a) informing the public of notices, including notices of objections, issued under the Bill;

(b) any proposal for the issuance of any approval, regulation, revision or revocation of a regulation, or order, or any policy under Bill C-32; and

(c) any environmental protection actions under section 22 of Bill C-32.

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

#### **Recommendation No. 25**

In Section 12 delete words "documents relating to matters under this Act." and replace with words "...any proposal for the issuance, amendment or revocation of any regulation, permit, order, approval, policy, guideline, objective, code of practice, standard, under this Act."

#### **Section 16** - Voluntary Reports

##### **Recommendation No. 26**

**Need to provide a remedy in addition to creating offence as per section 174 of the Ontario *Environmental Protection Act*.**

#### **Sections 17-21** - Investigation of Offenses

Sections 17 to 21 of Bill C-32 provide a process to allow any individual resident in Canada to apply to the Minister for an investigation of any offence under the statute that the individual alleges to have occurred. The Minister must report on progress of the investigation every 90 days.

We fully support those provisions in Bill C-32 that will allow Canadians to assist in the enforcement of Canada's environmental laws. It is often argued that such rights are not needed since anyone can request an investigation. Our experience, however, is that there is a need for a legislated opportunity to request an investigation.<sup>2</sup> Legislation enhances accountability of the decision-makers and in addition it provides a process that is clear and predictable in terms of its procedures. The provisions in sections 17 to 21 of Bill C-32 parallel the right to an investigation provided under sections 74 to 81 of the Ontario *Environmental Bill of Rights*. Despite our support for these provisions, there are nevertheless, a number of amendments which are needed to strengthen this important remedy.

First, section 17 expressly excludes corporations from filing an investigation request. The rationale for excluding corporations is not outlined and may work against greater public access to environmental rights. Indeed, many non-government organisations which are active in environmental issues, are corporations without share capital. The Ontario *Environmental Bill of Rights* allows for corporations to file a request for an investigation. Bill C-32 should be amended to allow corporations to file such requests.<sup>3</sup> Further, section 18 of Bill C-32 does not require the Minister to acknowledge the receipt of the application. This acknowledgement is important not only because it confirms that the receipt was received, but it sets the clock running on the time frames established in the Bill.

Bill C-32 does not include any provisions to protect the applicant. Section 81 of the Ontario *Environmental Bill of Rights* states: "[a] notice under section 78 or 80 shall not disclose the names or addresses of the applicants or any other personal information about them." In our view, this is important since the applicants are acting in the public interest and should not have to be subject to fear or apprehension in submitting the application.

Section 19 of Bill C-32 should not give the impression that the investigation can go on forever without any accountability. Otherwise the time lines are not useful. The efficient way to deal with this problem is simply to require the Minister to make an estimate as to how long the investigation will take after the expiry of the initial 90 day period.

#### **Recommendation No. 27**

**Section 17 of Bill C-32 should be amended so as to permit corporations to file an application for investigation. Hence, section 17 should read "An individual or corporation..."**

**Section 18 of Bill C-32 should be amended to require the Minister to acknowledge receipt of an investigation application within 20 days of receiving it. Section 18 should read "The Minister shall acknowledge the receipt of the application within 20 days..."**

**Bill C-32 should be amended to prohibit the disclosure of any information that may identify the applicant.**

**Section 19 of Bill C-32 should be amended to require the Minister to provide the applicant with a written estimate of the time required to complete the investigation where the investigation has not been completed within 90 days.**

**Sections 22-38** - Environmental Protection Action

**OVERVIEW**

Sections 22 to 38 of Bill C-32 enable members of the public to commence an action in the civil courts in order to seek redress for violations under the Bill. This "environmental protection action" is a new right and can be said to serve three purposes: (1) to secure compliance with the Bill; (2) to facilitate public access to the courts in instances involving non-compliance; and (3) to enhance governmental accountability for its enforcement and compliance activities under Bill C-32.

The environmental protection action is roughly similar to the "endangered species protection action" in sections 60 to 76 of Bill C-65, the proposed *Endangered Species Act*. These provisions are consistent with the recent trend at the provincial level, to grant the public various civil rights to go to court to protect the environment.<sup>4</sup>

We fully support the establishment of a new right of action under Bill C-32. However, these provisions are in need of a number of amendments in order to improve the effectiveness and availability of the environmental protection action. The primary problem with the proposed environmental protection action is that it inappropriately incorporates too many qualifications and restrictions. The effect of these qualifications and restrictions is likely to be that the environmental protection action provision will not be used and, hence, will not achieve its purpose as outlined above. Even under less stringent barriers in the Ontario *Environmental Bill of Rights* no action has been initiated to date, despite collapse of enforcement efforts in Ontario. To date, only one action has been initiated in Ontario, despite the evidence of a precipitous decline in the province's environmental law enforcement efforts.

More importantly, Bill C-32 omits two key features found in Ontario's *Environmental Bill of Rights*. First, while the environmental protection action can be commenced where an individual alleges the contravention of Bill C-32, it omits to provide an individual the ability to commence an action where someone "will imminently contravene" the Bill.

Second, it omits the right of citizens to go immediately to court in emergency circumstances without filing an investigation request with government officials. In our view, these shortcomings must be addressed through amendments to the environmental protection action provisions in Bill C-32.

## RECOMMENDATION ON SPECIFIC SECTIONS

### Section 22(1) - Conditions Precedent for Suing

Section 22 establishes two conditions precedent before a person can commence an environmental protection action: (1) the person must have applied for an investigation pursuant to section 17 of Bill C-32; and (2) the Minister must not have responded to the investigation in a reasonable or timely manner. These conditions precedent are virtually identical to found in section 84(2) of the Ontario *Environmental Bill of Rights* and section 60 of Bill-65, the proposed *Endangered Species Act*.

In our view, these conditions are neither warranted nor needed. First, other citizen action provisions both in the United States<sup>5</sup> and in Canada, do not include such conditions. For example, the public right of action under section 19.1 of Quebec's *Environmental Quality Act* does not require the filing of an investigation request before an action can be commenced. The Yukon and Northwest Territories environmental rights statutes also permit citizens to go directly to court in civil enforcement actions without pre-filing an investigation request, or waiting for a response.

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

It is important to note that only one citizen suit has been commenced under the Ontario *Environmental Bill of Rights* since its enactment in 1993. Clearly one reason for this situation relates the numerous qualifications and restrictions placed on the citizen suit



provisions, including the conditions similar to those found in section 22 of Bill C-32. As a consequence, the notion of giving citizens "new rights" is purely illusory.

Finally, the conditions precedent in Bill C-32 are unnecessary since the environmental protection action proposed in the Bill only applies to offences arising from contraventions to the Bill, not other statutes, as is the case under the Ontario *Environmental Bill of Rights*. Its scope of application, therefore, is already narrowly defined. As such, we recommend that the conditions precedent in section 22 be eliminated.

In the alternative, if these conditions precedent are to be retained in section 22, then the Bill must be amended to establish an "emergency exception" to the conditions precedent. As mentioned, although the conditions precedent in section 22 of Bill C-32 are virtually identical to the Ontario *Environmental Bill of Rights* provisions, the Ontario law does include such an "emergency exception" to the fulfilment of the requirement of having filed an investigation request and waiting for a response. That law specifically permits citizens to omit the conditions precedent "where the delay involved in complying with them would result in significant harm or risk of harm to a public resource."<sup>6</sup>

In many cases, offences of Bill C-32 will be occurring and causing harm to the environment. The process of filing a request for an investigation and waiting for a response will mean that valuable time will be lost while harm to the environment is occurring. We strongly recommend that a similar provision be included in Bill C-32.

#### **Recommendation No. 28**

**Delete the conditions precedent in section 22(1) for commencing an environmental protection action, or in the alternative, create an emergency exception to the conditions precedent in section 60(1) for commencing an environmental protection action.**

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

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

Section 22(2) of Bill C-32 states that the new right of action is only available for offences that: (1) were alleged in the plaintiff's request; and (2) caused or will cause significant harm to the environment. In our view, these limitations or conditions are unnecessary.

First, as argued above, investigation requests should not serve as a condition precedent for Bill-32's citizen suit provisions.

Second, Bill C-32 should not include a provision that the action can only be brought where the offense has "caused significant harm to the environment." In our view, **any** harm to the environment should be sufficient to trigger an enforcement action of the statute or its regulation. By definition, any harm to the environment is significant.

It appears that the drafters of Bill C-32 borrowed from section 84(1) of Ontario's *Environmental Bill of Rights*. However, the definition of harm in the *Environmental Bill of Rights* in section 1(1) is not included in Bill C-32. It must be clearly recognized that the requirement for "significant harm" was incorporated into section 84 of the EBR because that citizen suit provision potentially applies to all contraventions of prescribed environmental laws, regulations and approvals in Ontario. Bill C-32, on the other hand, is limited to offences created only within the context of the Bill. Moreover, the fact that an offence is created to deter conduct assumes that such offences are, by their very nature, significant and worthy of enforcement. Further, the inclusion of the need for "significant harm" will lead to intractable debates about what types harm are "significant" and what types are not "significant." Hence, it is not necessary or appropriate to introduce the concept of "significant harm" into section 22(2) of Bill C-32.

#### **Recommendation No. 29**

**Bill C-32 should be amended such that section 22(2)(a) (pertaining to the need for an investigation) and (b) (pertaining to the need for significant harm) be deleted. Section 22(2) should read as stated in the recommendation immediately following.**

#### **(b) The Need to Expand Action for Imminent Contravention of Bill C-32**

Perhaps the most serious flaw of the environmental protection action provisions in Bill C-32 is the absence of the ability to bring an environmental protection action in cases where there is an "imminent" contravention of the Bill as opposed to where the contravention has already occurred. The effect of the present provision is to ensure that these provisions remain reactive in nature. They ensure that preventive action, that is, attempting to prevent violations and harm to the environment, is impossible.

It should be recalled that virtually all citizen suit provisions have a preventive aspect to them. The Ontario *Environmental Bill of Rights*, section 84, states that: "[w]here a person has contravened or **will imminently contravene** an Act, regulation or instrument prescribed for the purposes of Part 5 and the actual or **imminent** contravention has caused or **will imminently cause** significant harm to a public

resource of Ontario, any person resident in Ontario may bring an action against the person in the court in respect of the harm and is entitled to judgment if successful." [emphasis added]

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

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

### **Recommendation No. 30**

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

### **Section 22(3) - Relief that may be Claimed**

Section 22(3) outlines the types of relief that may be claimed with respect to the environmental protection action initiated under section 22(1). Section 22(3)(e) provides the authority to the court to grant other "but not including damages."

We support the prohibition against awarding damages to the plaintiffs in such actions. However, it is submitted that the court should be empowered to order the defendant to pay compensation against the responsible Minister in two circumstances: (1) where the harm to the environment cannot be restored or rehabilitated; and (2) the responsible Minister has taken steps and incurred costs to address the harm to the environment.

In these instances, compensation paid to the Minister should be used expressly for other environmental protection and education purposes, such as public outreach

programs. In effect, the broad powers given to the criminal court in Part 10 should also be given to the court in the civil context.

### **Recommendation No. 31**

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

### **Section 24 - Remedial Conduct**

Section 24 states that an environmental protection action may not be brought if the alleged conduct was taken "to correct or mitigate harm or the risk of harm to the environment or to human, animal or plant life or health..." Section 24(b) states that no action can be taken if the alleged conduct was "reasonable and consistent with public safety."

In our view, these sections are too broad, and are in need of clarification. Does that mean any emission from a pollution control device would be exempted since it is designed to "mitigate harm?" Does the dumping of waste into the ocean qualify for this exemption since it will reduce harm to human health? What are the parameters of reasonableness? What direction does a court have to come to this conclusion.

In our view, the common defence of necessity law would probably deal with any issue defence was attempting to address. It is submitted that the phrases in these sections are so over broad that they are devoid of any precise content, definition, predictability or certainty. These sections will create an enormous amount of debate and protract litigation in attempting to determine their meaning, scope and effect, to the detriment of the public interest plaintiffs. If this section is to remain in Bill C-32, it must be clarified and made more limited.

### **Recommendation No. 32**

**Sections 24(a)(i) and (b) should be deleted. If they do remain, section 24(a)(i) must be amended such that it can only be used in genuine cases, established on a balance of probabilities by the defendant, that it was necessary to protect the environment from further risk. In no circumstances should section 24(b) remain in Bill C-32.**

### **Section 30** - Defences

Section 30 of Bill C-32 provides for the defences of due diligence, statutory authorization, and the defence of officially induced mistake of law.

It is submitted that the only defence needed is that of statutory authorization. The defence of due diligence is well established in common law for statutory offences and simply does not have to be codified into legislation. In fact, a strong argument could be made that, because the defence is so well established in common law, that the articulation of it in Bill C-32 will send signal to the courts that there is a legislative intention to create a new, different defence of due diligence or that there was some intent to change the common law principles. Otherwise, why would Parliament include the defence unless there was some intent for change?

Further, we strongly recommend that section 30(1)(d), the defence of officially induced mistake of law, also be deleted. This is a common law defence and will contribute to confusion as to why this defence was put in Bill C-32, as well as the scope and extent of the defence. In the long run, the inclusion of this defence will pose more difficulties and uncertainties with the law than providing any benefit for either the plaintiff or the defendant.

#### **Recommendation No. 33**

**Delete sections 30(1)(a), the defence of due diligence, and section 30(1)(d), the defence of officially induced mistake of law.**

### **Section 31** - Undertakings to Pay Damages

Section 31 of Bill C-32 gives the court discretion as to whether to dispense with an undertaking to pay damages caused by an interlocutory order in an environmental protection action.

It is submitted that this section is not necessary since the court always has discretion with respect to security for costs and undertakings for damages. Hence, this section should be deleted. If this amendment is not adopted, then it is submitted that section 31 should be amended to either prohibit motions for security for costs, or alternatively, limit security for costs to \$500.00. Public interest plaintiffs already face a number of legal and fiscal constraints in commencing an environmental protection action. In our view, these plaintiffs should not be burdened with unnecessary economic barriers that may shield unlawful conduct from judicial scrutiny. This would be the case if plaintiffs are unable to pay large amounts of money into court in order to proceed with their

litigation. CELA notes that a similar limitation exists in section 19.4 of Quebec's *Environmental Quality Act*.

#### **Recommendation No. 34**

**Delete section 31 or, in the alternative, if there is need for provisions with respect to undertakings for damages, the limit of the undertaking should be \$500.00.**

#### **Section 32** - Stay or Dismissal

Section 32 allows the court to stay an action if it is in the public interest to do so. Factors that may be considered are outlined in section 32(2).

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

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

#### **Recommendation No. 35**

**Section 32 pertaining to the stay of proceeding should be deleted.**

#### **Section 38** - Costs

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

Generally, these factors are traditional considerations that may be taken into account by the court, regardless of whether these considerations are incorporated into Bill C-32. Therefore, section 38 of the Bill does not prohibit, on its face, an adverse cost award against a plaintiff bringing an environmental protection action. This uncertainty over

cost exposure will undoubtedly inhibit many persons from commencing an environmental protection action, which, in effect, defeats the whole purpose of creating a citizen suit provision in Bill C-32.

It is submitted that Bill C-32 should be redrafted to build in a general presumption against cost awards in such actions, unless the court finds special reasons to award costs. Such an amendment would be consistent with recent revisions to the *Federal Court Rules*, which now provide that costs will not normally be awarded in judicial review applications.

**Recommendation No. 36**

**Replace with: "costs will not be awarded to or against any party in an environmental protection action, unless the court finds that there are special reasons to make a cost award."**

**PART 3 - INFORMATION GATHERING, OBJECTIVES, GUIDELINES AND CODES  
OF PRACTICE - SECTIONS 43-55**

**Bill C-32 STATES:**

**43. In this Part and Part 10, "fish" has the meaning assigned by section 2 of the *Fisheries Act*.**

**44. (1) The Minister may**

- (a) establish, operate and maintain a system for monitoring environmental quality;
- (b) conduct research and studies relating to pollution prevention, the nature, transportation, dispersion, effects, control and abatement of pollution and the effects of pollution on environmental quality, and provide advisory and technical services and information related to that research and those studies;
- (c) conduct research and studies relating to
  - (i) environmental contamination arising from disturbances of ecosystems by human activity,
  - (ii) changes in the normal geochemical cycling of toxic substances that are naturally present in the environment, and
  - (iii) detection and damage to ecosystems;
- (d) collect, process, correlate, interpret, create an inventory of and publish on a periodic basis data on environmental quality in Canada from monitoring systems, research, studies and any other sources;
- (e) formulate plans for pollution prevention and the control and abatement of pollution, including plans respecting the prevention of, preparedness for and response to an environmental emergency and for restoring any part of the environment damaged by or during an emergency, and establish, operate and publicize demonstration projects and make them available for demonstration; and
- (f) publish, arrange for the publication of or distribute through an information clearing-house;
  - (i) information respecting pollution prevention;
  - (i) pertinent information in respect of all aspects of environmental quality, and
  - (ii) a periodic report on the state of the Canadian environment.

**Cooperation and agreements**

**(2) The Minister may**

- (a) in establishing a system referred to in paragraph (1)(a), cooperate with governments, foreign governments and aboriginal people and with any person who has established or proposes to establish any such system; and
- (b) with the approval of the Governor in Council, enter into agreements for the operation or maintenance of a system referred to in paragraph (1)(a) by the Minister on behalf of any government, aboriginal people or any person or for the operation or maintenance of any such system by the government or any person on behalf of the Minister.



## **Cooperation with other bodies**

(3) The Minister may, in exercising the powers conferred by paragraphs (1)(b) to (e), act in cooperation with any government, foreign government, government department or agency, institution, aboriginal people or any person and may sponsor or assist in any of their research, studies, planning or activities in relation to environmental quality, pollution prevention, environmental emergencies or the control or abatement of pollution.

## **Role of Minister of Health**

### **45. The Minister of Health may**

- (a) conduct research and studies relating to the role of substances in illnesses or in health problems;
- (b) collect, process, correlate and publish on a periodic basis data from any research or studies done under paragraph (a); and
- (c) distribute available information to inform the public about the effects of substances on human health.

## **Information Gathering**

### **Notice requiring information**

**46. (1) The Minister may, for the purpose of conducting research, creating an inventory of data, formulating objectives and codes of practice, issuing guidelines or assessing or reporting on the state of the environment, publish in the *Canada Gazette* and in any other manner that the Minister considers appropriate a notice requiring any person described in the notice to provide the Minister with any information that may be in the possession of that person or to which the person may reasonably be expected to have access, including information regarding the following:**

- (a) substances on the Priority Substances List;
- (b) substances that have not been determined to be toxic under Part 5 because of the current extent of the environment's exposure to them, but whose presence in the environment must be monitored if the Minister considers that to be appropriate;
- (c) substances, including nutrients, that can be released into water or are present in products like water conditioners and cleaning products;
- (d) substances released, or disposed of, at or into the sea;
- (e) substances that are toxic under section 65 or that may become toxic;
- (f) substances that cause or contribute to international or interprovincial pollution of fresh water, salt water or the atmosphere;
- (g) substances or fuels that contribute significantly to air pollution;
- (h) substances that, if released into Canadian waters, cause or may cause damage to fish or to their habitat;
- (i) substances that, if released into areas of Canada where there are migratory birds, endangered species or other wildlife regulated under any other Act of Parliament, are harmful or capable of causing harm to those birds, species or wildlife;
- (j) substances that are on the list established under regulations made under subsection 200(1);
- (k) the release of substances into the environment at any stage of their life-cycle;

(l) pollution prevention; and

(m) use of federal land and of aboriginal land.

#### **Other recipients**

(2) The Minister may, in accordance with an agreement signed with a government, require that a person to whom a notice is directed submit the information to the Minister or to that government.

#### **Conditions respecting access to information**

(3) An agreement referred to in subsection (2) shall set out conditions respecting access by the Minister or other government to all or part of the information that the person is required to submit and may set out any other conditions respecting the information.

#### **Period of notice and date for compliance**

(4) A notice referred to in subsection (1) must indicate the period during which it is in force, which may not exceed three years, and the date or dates within which the person to whom the notice is directed shall comply with the notice.

#### **Compliance with notice**

(5) Every person to whom a notice is directed shall comply with the notice.

#### **Extension of time**

(6) The Minister may, on request in writing from any person to whom a notice is directed, extend the date or dates within which the person shall comply with the notice.

#### **Manner**

(7) The notice must indicate the manner in which the information is to be provided.

#### **Preservation of information**

(8) The notice may indicate the period during which, and the location where, the person to whom the notice is directed shall keep copies of the required information, together with any calculations, measurements and other data on which the information is based. The period may not exceed three years from the date the information is required to be submitted to the Minister.

#### **Guidelines**

**47. (1) and, in issuing those guidelines, the Minister shall take into account any factor that the Minister considers relevant, including, but not limited to,**

- (a) the costs to the Minister and the person to whom the notice under subsection 46(1) is directed;
- (b) the co-ordination of requests for information with other governments, to the extent practicable; and
- (c) the manner in which the information collected under subsection 46(1) is to be used.

#### **Consultation**

(2) In carrying out the duties under subsection (1), the Minister shall offer to consult with the government of a province and the members of the Committee who are representatives of aboriginal governments and may consult

with a government department or agency, aboriginal people, representatives of industry and labour and municipal authorities or with persons interested in the quality of the environment.

#### **National inventory**

**48. The Minister shall establish a national inventory of releases of pollutants using the information collected under section 46 and any other information to which the Minister has access, and may use any information to which the Minister has access to establish any other inventory of information.**

#### **Publication in whole or in part**

**49. The notice published under subsection 46(1) must indicate whether or not the Minister intends to publish the information and, if so, whether in whole or in part.**

#### **Publication of inventory**

**50. Subject to subsection 53(4), the Minister shall publish the national inventory of releases of pollutants in any manner that the Minister considers appropriate and may publish or give notice of the availability of any other inventory of information established under section 48, in any manner that the Minister considers appropriate.**

#### **Request for confidentiality**

**51. A person who provides information to the Minister under subsection 46(1) may, if the Minister's intention to publish the information has been indicated under section 49, submit with the information a written request, setting out a reason referred to in section 52, that the information be treated as confidential.**

#### **Reasons**

**52. Despite Part 11, a request under section 51 may only be based on any of the following reasons:**

- (a) the information constitutes a trade secret;
- (b) the disclosure of the information would likely cause material financial loss to, or prejudice to the competitive position of, the person providing the information or on whose behalf it is provided; and
- (c) the disclosure of the information would likely interfere with contractual or other negotiations being conducted by the person providing the information or on whose behalf it is provided.

#### **Additional justification**

**53. (1) The Minister may, after studying the reasons provided under section 52, require the person in question to provide, within 20 days and in writing, additional justification for the request for confidentiality.**

#### **Extension of time**

(2) The Minister may extend the period mentioned in subsection (1) by up to 10 days if the extension is necessary to permit adequate preparation of the additional justification.

#### **Minister's decision**

(3) In determining whether to accept or reject the request, the Minister shall consider whether the reasons are well-founded and, if they are, the Minister may nevertheless reject the request if

- (a) the disclosure is in the interest of the protection of the environment, public health or public safety; and
- (b) the public interest in the disclosure clearly outweighs in importance

(i) any material financial loss or prejudice to the competitive position of the person who provided the information or on whose behalf it was provided, and

(ii) any damage to the privacy, reputation or human dignity of any individual that may result from the disclosure.

#### **Acceptance of request**

(4) If the Minister accepts the request, the information shall not be published.

#### **Publication**

(5) If the Minister rejects the request,

(a) the person has the right to ask the Federal Court to review the matter within 30 days after the person is notified that the request has been rejected or within any further time that the Court may, before the expiry of those 30 days, fix or allow; and

(b) the Minister shall advise the person in question of the Minister's intention to publish the information and of the person's right to ask the Federal Court to review the matter.

#### **Applicable provisions**

(6) Where a person asks the Federal Court to review the matter under paragraph (5)(a), sections 45, 46 and 47 of the *Access to Information Act* apply, with any modifications that the circumstances require, in respect of a request for a review under that paragraph as if it were an application made under section 44 of that Act.

#### **Objectives, Guidelines and Codes of Practice**

##### **Formulation by the Minister**

**54. (1) For the purpose of carrying out the Minister's mandate related to preserving the quality of the environment, the Minister shall issue**

(a) environmental quality objectives specifying goals or purposes for pollution prevention or environmental control, including goals or purposes stated in quantitative or qualitative terms;

(b) environmental quality guidelines specifying recommendations in quantitative or qualitative terms to support and maintain particular uses of the environment;

(c) release guidelines recommending limits, including limits expressed as concentrations or quantities, for the release of substances into the environment from works, undertakings or activities; and

(d) codes of practice respecting pollution prevention or specifying procedures, practices or release limits for environmental control relating to works, undertakings and activities during any phase of their development and operation, including the location, design, construction, start-up, closure, dismantling and clean-up phases and any subsequent monitoring activities.

##### **Scope of objectives, etc.**

(2) The objectives, guidelines and codes of practice referred to in subsection (1) shall relate to

(a) the environment;

(b) pollution prevention or the recycling, reusing, treating, storing or disposing of substances or reducing the release of substances into the environment;

(c) works, undertakings or activities that affect or may affect the environment; or

(d) the conservation of natural resources and sustainable development.

#### **Consultation**

(3) In carrying out the duties under subsection (1), the Minister shall offer to consult with the government of a province and the members of the Committee who are representatives of aboriginal governments and may consult with a government department or agency, aboriginal people, representatives of industry and labour and municipal authorities or with persons interested in the quality of the environment.

#### **Publication**

(4) The Minister shall publish any objectives, guidelines or codes of practice issued under this section, or give notice of them, in the *Canada Gazette* and in any other manner that the Minister considers appropriate.

#### **Formulation by the Minister of Health**

**55. (1) For the purpose of carrying out the mandate of the Minister of Health related to preserving and improving public health under this Act, the Minister of Health shall issue objectives, guidelines and codes of practice with respect to the elements of the environment that may affect the life and health of the people of Canada.**

#### **Consultation**

(2) In carrying out the duties under subsection (1), the Minister of Health may consult with a government, a government department or agency, aboriginal people, representatives of industry and labour and municipal authorities or with persons interested in the preservation and improvement of public health.

#### **Publication**

(3) The Minister of Health shall publish any objectives, guidelines or codes of practice issued under this section, or give notice of them, in the *Canada Gazette* and in any other manner that the Minister of Health considers appropriate.

## **OVERVIEW**

This part provides authority for the Minister to:

- conduct environmental research and gather relevant data;
- create data inventories, including collecting data for the National Pollutant Release Inventory (NPRI);
- formulate objectives and codes of practice;
- issue guidelines; and
- report on the state of the environment.

The provisions also allow for the disclosure of confidential information if it is in the public interest to do so, and outweighs material financial losses and damage to privacy and reputation.

There is very limited new authority in this part. Moreover, the whole part only gives the authority to the Minister to act, there is no requirement that anything be done.

There are a number of provisions under Part 3 which have been amended from Bill C-74. The most positive change has to do with sections 48 to 50 where, under this Bill, the Minister **must** establish a pollutant release inventory (which is now called the National Pollutant Release Inventory) while the former Bill gave discretion to the Minister to establish this very important mechanism.

## **RECOMMENDATIONS ON SPECIFIC SECTIONS**

### **Sections 46(1)(b) - Information Gathering**

Under this section, the Minister is empowered to issue notices to collect information for the purposes of conducting research, creating an inventory of data, formulating objectives and codes of practice, issuing guidelines, among other purposes. Under Bill C-74, this section applied to both Parts 5 (Controlling Toxic Substances) and 6 (Biotechnology).

Under this Bill, these powers possessed by the Minister only apply to Part 5, meaning that the Minister cannot exercise such powers for the purposes of biotechnology and other matters.

#### **Recommendation No. 37**

**Section 46(1)(b) should be amended to include Part 6 of the CEPA.**

### **Section 46(1)(f)**

#### **Recommendation No. 38**

**Reword section 46(1)(f):**

**“substances that may cause or contribute to international...”**

**Section 46(1)(g)**

**Recommendation No. 39**

**Reword section 46(1)(g):**

**“substances or fuels that may contribute significantly...”**

**Former Section 46(1)(l)**

Under Bill C-74, a subsection was included that provided wide authority for the Minister to gather important information considering the use, recycling and disposal of substances. More specifically, the subsection read that the Minister is empowered to:

(l) the manufacture, handling, storage, transportation, recycling, treatment and disposal of, and other activities relating to, the substances referred to in any of paragraphs (a) to (j).

This section was removed in Bill C-32. This section should be once again included.

**Recommendation No. 40**

**Section 46(1) of Bill C-32 should be amended to include the following section:**

**“the manufacture, handling, storage, transportation, recycling, treatment and disposal of, and other activities relating to, the substances referred to in any of paragraphs (a) to (j).”**

**Section 47 (1)- Guidelines**

**Recommendation No. 41**

**Section 47(1) requires issuing of guidelines on "cost-effective" use of section 46 powers. Make issuing of guidelines discretionary.**

**Replace the word "shall" with "may" in the first and fourth lines, and delete the words "cost-effective" from the second line.**

**Section 47(2)**- Consultation

**Recommendation No. 42**

**Delete or modify discretionary language using word "may" not "shall."**

**Sections 48 and 50** - National Inventory and Publication of Inventory

These sections provide that the Minister may establish a national inventory of releases of pollutants and any other inventory of information and may publish this inventory.

When a multi-stakeholder committee developed the National Pollutant Release Inventory (NPRI) in 1992, all members (with the exception of the federal government members who did not participate in this part of the discussion) recommended that the NPRI be included in CEPA.

Section 48 provides for an inventory. That inventory may include releases and any other inventory of information. Fortunately, this latter phrase means that the inventory could be expanded under this part to require reporting on use, production and amounts included in products.

A very positive change in this Bill from Bill C-74 is that this Bill makes the development of the pollution release inventory mandatory. This is clearly a needed and welcomed change since that means there will be some certainty and stability in the information collecting program.

However, this section has serious limitations. First, the Minister is to use the powers under section 46 to establish the inventory. Subsection 3 states that a notice to provide information cannot exceed a period longer than three years. This inventory should be an ongoing, permanent inventory so that people always have access to current information on releases into their communities and so that trends can be seen. The effect of section 48(3) is to sunset the inventory programme every three years. This is not acceptable.

Section 50 provides for the publication of any inventory developed under section 48. Unfortunately, this section does not require the Minister to publish an annual report. Members of the multi-stakeholder consultative committee that developed the NPRI unanimously endorsed the publication of an annual report. An annual report should be required by the legislation.



**Recommendation No. 43**

**This Part should be amended to require that the Minister establish and publish each year a report on releases and uses of substances to the environment, including transfers off-site for treatment disposal, recycling, and energy recovery.**

**Recommendation No. 44**

**Section 48 should be amended to read: "The Minister shall establish a national inventory of releases of pollutants and any other inventory of information that the Minister deems important. The Minister shall issue notices requiring any person described in the notice to provide the information required to develop the inventory. This notice shall be in effect until such time as the Minister withdraws or replaces it."**

**Recommendation No. 45**

**Section 50 should be amended to read: "Subject to subsection 53(4), the Minister *shall* publish, in such manner as the Minister considers appropriate, any inventory of information established under section 48."**

**Section 52 - Reasons**

**Recommendation No. 46**

**Delete subsection 52(b) and (c).**

**Section 53(3) - National Inventory**

See detail discussion on the NPRI under section 48 and 50 in this submission.

**Recommendation No. 47**

**Decision on release of confidential information.**

**Recommendation No. 48**

Delete word "clearly" from section 53(3)(b).

**Section 53(4)**

**Recommendation No. 49**

**Amend section 53(4) as recommended by West Coast Environmental Law Association.**

**Where the Minister rejected a request for confidentiality, the provider of the information could appeal the decision under clause 53(5). Where, however, the request was accepted, the public's ability to have the decision reviewed is unclear. The Bill suggests there would be no right to request a review. The uncertainty should be resolved by amending clause 53(4) to state:**

**"53(4) if the Minister accepts the request,  
(a) any person has the right to request a review of the Minister's decision under the *Access to Information Act*;  
(b) information shall not be published except as provided under the *Access of Information Act*.**

**Section 54(3)** - Objectives, Guidelines and Codes of Practice

**Recommendation No. 50**

**Delete or modify to discretionary language. Replace word "shall" with "may."**

## PART 4 - POLLUTION PREVENTION - SECTIONS 56-63

### Bill C-32 STATES:

**56. (1) The Minister may, at any time, publish in the *Canada Gazette* and in any other manner that the Minister considers appropriate a notice requiring any person or class of persons described in the notice to prepare or implement a pollution prevention plan in respect of a substance or group of substances specified on the List of Toxic Substances in Schedule 1.**

#### Contents of notice

- (2) The notice may specify
- (a) the substance or group of substances in relation to which the plan is to be prepared;
  - (b) the commercial, manufacturing, processing or other activity in relation to which the plan is to be prepared;
  - (c) the factors to be considered in preparing the plan;
  - (d) the period within which the plan is to be prepared;
  - (e) the period within which the plan is to be implemented; and
  - (f) any administrative matter necessary for the purposes of this Part.

#### Extension of time

(3) Where the Minister is of the opinion that further time is necessary to prepare or implement the plan, the Minister may extend the period for a person who submits a written request before the expiry of the period referred to in the notice or of any extended period.

#### Publication of notice of extension

(4) The Minister shall publish in the *Canada Gazette* and in any other manner that the Minister considers appropriate a notice stating the name of any person for whom an extension is granted, whether the extension is for the preparation or implementation of the plan, and the duration of the period of the extension.

#### Application for waiver

(5) On a written request submitted by any person to whom a notice under subsection (1) is directed, the Minister may waive the requirement for that person to consider a factor specified under paragraph (2)(c) where the Minister is of the opinion that it is not reasonable or practicable to consider the factor on the basis of reasons provided in the request.

#### Plan prepared or implemented for another purpose

**57. (1) Subject to subsection (2), where a person who is required to prepare or implement a pollution prevention plan under a notice published under section 56 has prepared or implemented a plan in respect of pollution prevention on a voluntary basis or for another government or under another Act of Parliament that meets all or some of the requirements of the notice, the person may use that plan for the purposes of meeting the requirements of this Part and, in that case, the plan shall be considered to be a pollution prevention plan that has been prepared or implemented under this Part.**

### **Where partial requirements met**

(2) Where a person uses a plan under subsection (1) that does not meet all of the requirements of the notice, the person shall:

(a) amend the plan so that it meets all of those requirements; or

(b) prepare an additional pollution prevention plan that meets the remainder of those requirements.

### **Declaration of preparation**

**58. (1) Every person who is required to prepare a pollution prevention plan under section 56 or 291 or under an agreement in respect of environmental protection alternative measures shall file, within 30 days after the end of the period for the preparation of the plan specified in the notice referred to in subsection 56(1) or extended under subsection 56(3), or specified by the court under section 291 or in the agreement, as the case may be, a written declaration to the Minister that the plan has been prepared and is being implemented.**

### **Declaration of implementation**

(2) Every person who is required to implement a pollution prevention plan under section 56 or 291 or under an agreement in respect of environmental protection alternative measures shall file, within 30 days after the completion of the implementation of the plan, a written declaration to the Minister that the implementation of the plan has been completed.

### **Filing of amended declaration**

(3) Where a person has filed a declaration under subsection (1) or (2) and the declaration contains information that, at any time after the filing, has become false or misleading, that person shall file an amended declaration to the Minister within 30 days after that time.

### **Form of declaration**

(4) A declaration referred to in subsection (1), (2) or (3) shall be filed in the form and manner and contain the information specified by the Minister.

### **Requirement to keep plan**

**59. Every person who is required to prepare a pollution prevention plan under section 56 or 291 or under an agreement in respect of environmental protection alternative measures shall keep a copy of the plan at the place in Canada in relation to which the plan is prepared.**

### **Requirement to submit certain plans**

**60. (1) The Minister may publish in the Canada Gazette and in any other manner that the Minister considers appropriate a notice requiring any person or class of persons described in the notice who are required to prepare and implement a pollution prevention plan under section 56 to submit, within the period specified by the Minister, the plan or any part of the plan for the purpose of determining and assessing preventive or control actions in respect of a substance or group of substances.**

### **Submission of plans required by court or agreement**

(2) The Minister may publish in the *Canada Gazette* and in any other manner that the Minister considers appropriate a notice requiring any person or class of persons described in the notice who are required to prepare and implement a pollution prevention plan under section 291 or under an agreement in respect of environmental protection alternative measures to submit, within the period specified by the Minister, the plan or any part of the plan.

## ***Model Plans and Guidelines***

### **Model plans**

61. For the purpose of providing guidance in the preparation of a pollution prevention plan, the Minister may publish in the *Canada Gazette* or in any other manner that the Minister considers appropriate a model pollution prevention plan or a notice stating where a copy of the plan may be obtained.

### **Guidelines**

62. (1) The Minister shall, with particular consideration of paragraph 2(1)(m), develop guidelines respecting the circumstances in which and the conditions under which pollution prevention planning is appropriate.

### **Consultation**

(2) In carrying out the duties under subsection (1), the Minister shall offer to consult with the government of a province and the members of the Committee who are representatives of aboriginal governments and may consult with a government department or agency, aboriginal people, representatives of industry and labour and municipal authorities or with persons interested in the quality of the environment.

### ***Other Initiatives***

#### **Information clearing-house**

63. (1) The Minister may, for the purposes of encouraging and facilitating pollution prevention, establish and maintain a national pollution prevention information clearing-house in order to collect, exchange and distribute information relating to pollution prevention.

#### **Recognition program**

(2) The Minister may establish a program to publicly recognize significant achievements in the area of pollution prevention.

#### **Cooperation with other bodies**

(3) The Minister may, in exercising the powers conferred by subsections (1) and (2), act alone or in cooperation with any government in Canada or government of a foreign state or any of its institutions or any person.

## **OVERVIEW**

This Part is new to the 1988 CEPA. It introduces two new measures into CEPA:

- Pollution Prevention Plans whereby the Minister is given the authority to: (a) require pollution prevention plans for CEPA toxic substances and substances proposed to be added to the Toxic Substances List (TSL); (b) require declaration that plans have been implemented; and (c) to require submission of plans for review.
- A Pollution Prevention Clearinghouse whereby the Minister is given authority to establish a national pollution prevention information clearing-house.

## **GENERAL RECOMMENDATION TO PART 4**

The pollution prevention provisions are useful, but they are all discretionary. There is no requirement that CEPA toxic substances be subject to pollution prevention planning, despite the fact that these substances have been determined to be causing harm to the environment or human health. Hence, whether they will be used is in question. Moreover, they do not reflect the comprehensive pollution prevention approach recommended by both the Standing Committee and non-governmental groups.

### **Recommendation No. 51**

**Amend section to make the development of pollution prevention plans by facilities using, manufacturing or generating CEPA toxic substances or substances nominated to be added to the TSL, mandatory.**

## **RECOMMENDATIONS ON SPECIFIC SECTIONS**

### **Section 56(1)**

#### **Recommendation No. 52**

**Restore wording of section 56(1)(b)(i) of Bill C-74. Pollution prevention planning is triggered by ministerial notice of intention to add to Schedule 1. This would be unnecessary if section 90 is amended to make addition to the TSL automatic on finding of toxicity.**

### **Section 62(2)- Consultation**

#### **Recommendation No. 53**

**Delete or modify discretionary language. Replace word "shall" with "may."**

## PART 5 - TOXIC SUBSTANCES - SECTIONS 64-103

### Bill C-32 STATES:

64. (1) In this Part, "virtual elimination" means, in respect of a substance released into the environment as a result of human activity, the ultimate reduction of the quantity or concentration of the substance in the release below any measurable quantity or concentration that is at or approaching the level of quantification, as defined by the regulations, and that

- (a) is specified by the Ministers or prescribed; and
- (b) in the opinion of the Ministers, results or may result in a harmful effect on the environment or human life or health.

#### Implementation of virtual elimination

(2) For the purposes of implementing the virtual elimination of a substance, any factor or information that, in the opinion of the Ministers, is relevant shall be taken into consideration as provided for in section 91, including, but not limited to, environmental or health risks and any other relevant social, economic or technical matters.

#### Toxic substances

65. For the purposes of this Part and Part 6, a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions that

- (a) have or may have an immediate or long-term harmful effect on the environment;
- (b) constitute or may constitute a danger to the environment on which human life depends; or
- (c) constitute or may constitute a danger in Canada to human life or health.

#### General

##### Domestic Substances List

66. (1) The Minister shall, for the purposes of sections 73, 74 and 81, maintain a list to be known as the Domestic Substances List, and the List shall specify all substances that the Minister is satisfied were, between January 1, 1984 and December 31, 1986,

- (a) manufactured in or imported into Canada by any person in a quantity of not less than 100 kg in any one calendar year; or
- (b) in Canadian commerce or used for commercial manufacturing purposes in Canada.

##### Non-domestic Substances List

(2) The Minister shall, for the purpose of section 81, maintain a list to be known as the Non-domestic Substances List, and the List shall specify substances, other than

- (a) the substances referred to in subsection (1); and
- (b) living organisms within the meaning of Part 6.

### **Amendment of Lists**

(3) Where a substance was not included on the Domestic Substances List and the Minister subsequently learns that, between January 1, 1984 and December 31, 1986, the requirements set out in paragraph (1)(a) or (b) were met in respect of the substance, the Minister shall add the substance to the List and, where necessary, delete it from the Non-domestic Substances List.

### **Amendment of Lists**

(4) Where the Minister includes a substance on the Domestic Substances List and subsequently learns that, between January 1, 1984 and December 31, 1986, the requirements set out in paragraph (1)(a) or (b) were not met in respect of the substance, the Minister shall delete the substance from the List and may add it to the Non-domestic Substances List.

### **Publication of Lists**

(5) The Minister shall publish in the *Canada Gazette* and in any other manner that the Minister considers appropriate the Domestic Substances List, the Non-domestic Substances List and any amendments to those Lists.

### **Designation**

(6) The Minister may, by order, designate any person or class of persons to exercise the powers and perform the duties and functions set out in this section.

### **Regulation of criteria**

**67. (1) The Governor in Council may, on the recommendation of the Ministers, make regulations**

- (a) respecting a property or characteristic of a substance, including, without limiting the generality of the foregoing, persistence and bioaccumulation;
- (b) prescribing the substances or groups of substances in respect of which the property or characteristic may be applicable;
- (c) prescribing the conditions under which and the circumstances in which the property or characteristic may be applicable; and
- (d) respecting the conditions, test procedures and laboratory practices to be followed for analysing, testing or measuring the property or characteristic.

### **Condition**

(2) No regulation that is applicable to a mineral or metal may be made under subsection (1) unless the natural occurrence, properties and characteristics of that mineral or metal in the environment have been taken into consideration.

### **Research, investigation and evaluation**

**68. For the purpose of assessing whether a substance is toxic or is capable of becoming toxic, or for the purpose of assessing whether to control, or the manner in which to control, a substance, including a substance specified on the List of Toxic Substances in Schedule 1, either Minister may**

- (a) collect or generate data and conduct investigations respecting any matter in relation to a substance, including, without limiting the generality of the foregoing,
  - (i) the nature of the substance,



- (ii) quantities, uses and disposal of the substance,
- (iii) the manner in which the substance is released into the environment,
- (iv) the extent to which the substance can become dispersed and will persist in the environment,
- (v) the ability of the substance to become incorporated or accumulate in biological tissues or to interfere with biological processes,
- (vi) methods for testing the effects of the presence of the substance in the environment,
- (vii) the presence of the substance in the environment and the effect of its presence on the environment or on human life or health,
- (viii) methods of controlling the presence of the substance in the environment,
- (ix) the development and use of alternatives to the substance, and
- (x) methods of reducing the quantity of the substance used or produced or the quantity or concentration of the substance released into the environment;

(b) correlate and evaluate any data collected or generated under paragraph (a) and publish results of any investigations carried out under that paragraph; and

(c) provide information and make recommendations respecting any matter in relation to a substance, including, without limiting the generality of the foregoing, measures to control the presence of the substance in the environment.

#### **Formulation of guidelines by the Ministers**

**69. (1) Either Minister or both Ministers, as the case may be, may issue guidelines for the purposes of the interpretation and application of the provisions of this Part for which they have responsibility.**

#### **Consultation**

(2) In exercising the powers under subsection (1), either Minister or both Ministers shall offer to consult with the government of a province and the members of the Committee who are representatives of aboriginal governments and may consult with a government department or agency, aboriginal people, representatives of industry and labour and municipal authorities or with persons interested in assessing and controlling toxic substances.

#### **Guidelines public**

(3) Guidelines issued under this section shall be made available to the public, and the Minister who issued the guidelines shall give notice of them in the *Canada Gazette* and in any other manner that the Minister considers appropriate.

#### **Information Gathering**

#### **Notice to the Minister**

#### **70. Where a person**

- (a) imports, manufactures, transports, processes or distributes a substance for commercial purposes, or
- (b) uses a substance in a commercial manufacturing or processing activity,

and obtains information that reasonably supports the conclusion that the substance is toxic or is capable of becoming toxic, the person shall without delay provide the information to the Minister unless the person has actual knowledge that either Minister already has the information.

#### **Notice requiring information, samples or testing**

**71. (1) The Minister may, for the purpose of assessing whether a substance is toxic or is capable of becoming toxic, or for the purpose of assessing whether to control, or the manner in which to control, a substance, including a substance specified on the List of Toxic Substances in Schedule 1,**

(a) publish in the *Canada Gazette* and in any other manner that the Minister considers appropriate a notice requiring any person who is described in the notice and who is or was within the period specified in the notice engaged in any activity involving the substance to notify the Minister that the person is or was during that period engaged in that activity;

(b) publish in the *Canada Gazette* and in any other manner that the Minister considers appropriate a notice requiring any person who is described in the notice to provide the Minister with any information and samples referred to in subsection (2) that may be in the person's possession or to which the person may reasonably be expected to have access; and

(c) subject to section 72, send a written notice to any person who is described in the notice and who is or was within the period specified in the notice engaged in any activity involving the importation or manufacturing of the substance or any product containing the substance requiring the person to conduct toxicological and other tests that the Minister may specify in the notice and submit the results of the tests to the Minister.

#### **Contents of notice**

(2) A notice sent under paragraph (1)(b) may require any information and samples, including

(a) in respect of a substance, available toxicological information, available monitoring information, samples of the substance and information on the quantities, composition, uses and distribution of the substance and products containing the substance; and

(b) in respect of a work, undertaking or activity, plans, specifications, studies and information on procedures.

#### **Compliance with notice**

(3) Every person to whom a notice referred to in any of paragraphs (1)(a) to (c) is directed or sent shall comply with the notice within the time specified in the notice.

#### **Extension of time**

(4) Despite subsection (3), the Minister may, on request in writing from any person to whom a notice referred to in paragraph (1)(a), (b) or (c) has been sent, extend the time or times within which the person shall comply with the notice.

#### **Exercise of power under paragraph 71(1)(c)**

**72. The Minister may not exercise the power under paragraph 71(1)(c) in relation to a substance unless the Ministers have reason to suspect that the substance is toxic or capable of becoming toxic or it has been determined under this Act that the substance is toxic or capable of becoming toxic.**

## ***Priority Substances and Other Substances***

### **Categorization of substances on Domestic Substances List**

**73. (1) The Ministers shall categorize the substances that are on the Domestic Substances List by virtue of section 66, for the purpose of identifying the substances on the List that, in their opinion and on the basis of available information,**

(a) may present, to individuals in Canada, the greatest potential for exposure; or

(b) are persistent or bioaccumulative in accordance with the regulations, and inherently toxic to non-human organisms, as determined by laboratory or other studies of non-human organisms.

### **Information**

(2) Despite subsection (1), where available information is insufficient to identify substances as referred to in that subsection, the Ministers may, to the extent possible, cooperate with other governments in Canada, governments of foreign states or any interested persons to acquire the information required for the identification.

### **Screening level risk assessment**

**74. The Ministers shall conduct a screening assessment of a substance in order to determine whether the substance is toxic or capable of becoming toxic and shall propose one of the measures described in subsection 77(2) if**

(a) the Ministers identify a substance on the Domestic Substances List to be a substance described in paragraph 73(1)(a) or (b); or

(b) the substance has been added to the Domestic Substances List under section 105;

### **Definition of "jurisdiction"**

**75. (1) In this section, "jurisdiction" means**

(a) a government in Canada; or

(b) the government of a foreign state or of a subdivision of a foreign state that is a member of the Organization for Economic Co-operation and Development.

### **Procedures for exchange of information with other jurisdictions**

(2) The Minister shall, to the extent possible, cooperate and develop procedures with jurisdictions, other than the Government of Canada, to exchange information respecting substances that are specifically prohibited or substantially restricted by or under the legislation of those jurisdictions for environmental or health reasons.

### **Review of decisions of other jurisdictions**

(3) Where the Minister is notified in accordance with procedures developed under subsection (2) of a decision to specifically prohibit or substantially restrict any substance by or under the legislation of another jurisdiction for environmental or health reasons, the Ministers shall review the decision in order to determine whether the substance is toxic or capable of becoming toxic, unless the decision relates to a substance the only use of which in Canada is regulated under another Act of Parliament that provides for environmental and health protection.

### **Priority Substances List**

**76. (1) The Ministers shall compile and may amend from time to time in accordance with subsection (5) a list, to be known as the Priority Substances List, and the List shall specify substances in respect of which the**

**Ministers are satisfied priority should be given in assessing whether they are toxic or capable of becoming toxic.**

#### **Consultation**

(2) For the purposes of subsection (1), the Minister shall offer to consult with the government of a province and the members of the Committee who are representatives of aboriginal governments and may consult with a government department or agency, aboriginal people, representatives of industry and labour and municipal authorities or with persons interested in the quality of the environment or the preservation and improvement of public health.

#### **Request for addition to Priority Substances List**

(3) Any person may file in writing with the Minister a request that a substance be added to the Priority Substances List and the request shall state the reasons for adding the substance to the List.

#### **Consideration of request**

(4) The Ministers shall consider a request filed under subsection (3) and, within 90 days after the request is filed, the Minister shall inform the person who filed the request of how the Minister intends to deal with it and the reasons for dealing with it in that manner.

#### **Amendments to Priority Substances List**

(5) The Ministers may amend the Priority Substances List

(a) by adding a substance to the List where the Ministers are satisfied on the basis of a determination made as a result of a screening assessment conducted under section 74, the review of a decision of another jurisdiction under subsection 75(3), consultation under subsection (2) or a request made under subsection (3) or for any other reason that priority should be given in assessing whether the substance is toxic or capable of becoming toxic; and

(b) by deleting a substance from the List where the Ministers have determined whether the substance is toxic or capable of becoming toxic.

#### **Publication of Priority Substances List**

(6) The Minister shall publish in the *Canada Gazette* and in any other manner that the Minister considers appropriate the Priority Substances List and any amendments to the List.

#### **Publication after assessment**

#### **77. (1) Where the Ministers have conducted**

(a) a screening assessment under section 74,

(b) a review of a decision of another jurisdiction under subsection 75(3) that, in their opinion, is based on scientific considerations and is relevant to Canada, or

(c) an assessment whether a substance specified on the Priority Substances List is toxic or capable of becoming toxic,

the Ministers shall publish in the *Canada Gazette* and either Minister may publish in any other manner that that Minister considers appropriate a statement indicating one of the measures referred to in subsection (2) that the Ministers propose to take and a summary of the scientific considerations on the basis of which the measure is proposed.

### **Proposed measures**

(2) Subject to subsection (3), for the purposes of subsection (1), the Ministers shall propose one of the following measures:

- (a) taking no further action in respect of the substance;
- (b) unless the substance is already on the Priority Substances List, adding the substance to the Priority Substances List; and
- (c) recommending that the substance be added to the List of Toxic Substances in Schedule 1 and, where applicable under subsection (4), virtual elimination.

### **Mandatory proposal**

(3) Where, based on a screening assessment conducted under section 74, the Ministers are satisfied that

- (a) a substance may have a long-term harmful effect on the environment because it is
  - (i) persistent and bioaccumulative in accordance with the regulations, and
  - (ii) inherently toxic to non-human organisms, as determined by laboratory or other studies of non-human organisms, and
- (b) the presence of the substance in the environment results primarily from human activity, the Ministers shall propose to take the measure referred to in paragraph (2)(c).

### **Proposal for virtual elimination**

(4) Where the Ministers propose to take the measure referred to in paragraph (2)(c) in respect of a substance and the Ministers are satisfied that

- (a) the substance is persistent and bioaccumulative in accordance with the regulations,
- (b) the presence of the substance in the environment results primarily from human activity, and
- (c) the substance is not a naturally occurring radionuclide or substance,

the Ministers shall propose virtual elimination of the substance under this Act.

### **Scientific consultation**

(5) Any person may, within 60 days after publication of the statement referred to in subsection (1), file with the Minister written comments on the measure the Ministers propose to take and the scientific considerations on the basis of which the measure is proposed.

### **Publication of final decision**

(6) After taking into consideration in an expeditious manner the comments filed under subsection (5), the Ministers shall publish in the *Canada Gazette*

- (a) a summary of the screening assessment conducted under section 74, of the review of a decision of another jurisdiction under subsection 75(3) or of a report of the assessment of substances specified on the Priority Substances List, as the case may be; and
- (b) a statement indicating.

(i) that the Ministers are confirming or amending their proposal to take the measure that was indicated in the statement published under subsection (1),

(ii) the measure as so confirmed or amended, as the case may be, and

(iii) where the measure as so confirmed or amended is the measure referred to in paragraph (2)(c) in respect of a substance, the manner in which the Ministers intend to develop a proposed regulation or instrument respecting preventive or control actions in relation to the substance.

#### **Report of assessment**

(7) Where the Ministers publish a statement under subsection (6) in respect of a substance specified on the Priority Substances List, the Ministers shall make a report of the assessment of the substance available to the public.

#### **Notice of objection**

(8) Where the Ministers make an assessment whether a substance specified on the Priority Substances List is toxic or is capable of becoming toxic and decide not to recommend that the substance be added to the List of Toxic Substances in Schedule 1, any person may, within 60 days after publication of the decision in the *Canada Gazette*, file a notice of objection with the Minister requesting that a board of review be established under section 333 and stating the reason for the objection.

#### **Recommendation to Governor in Council**

(9) The Ministers shall make a recommendation for an order under subsection 90(1) when publishing a statement under paragraph (6)(b) indicating that the measure that they propose to take, as confirmed or amended, is a recommendation that the substance be added to the List of Toxic Substances in Schedule 1.

#### **Notice of objection**

78. (1) Subject to subsections (2) to (4), where a substance has been specified on the Priority Substances List for a period of five years and the Ministers have not yet determined whether the substance is toxic or capable of becoming toxic, any person may file a notice of objection with the Minister requesting that a board of review be established under section 333.

#### **Notice of suspension of five year period**

(2) Where a substance is specified on the Priority Substances List and the Ministers are satisfied that new or additional information is required to assess whether the substance is toxic or capable of becoming toxic, the Minister shall publish a notice in the *Canada Gazette* indicating

(a) that the period of five years referred to in subsection (1) is suspended and the duration of the suspension; and

(b) the new or additional information that is required to assess whether the substance is toxic or capable of becoming toxic, unless another provision of this Part requires the submission of the new or additional information.

#### **Contents of notice**

(3) Where a notice is published under subsection (2), the operation of subsection (1) in relation to the substance is suspended until the earlier of

(a) the expiry of the period determined by the Ministers, notice of which is given in the *Canada Gazette*, and

(b) the time when the required information becomes available to the Ministers.

### **Notice of objection after a suspension**

(4) Where a notice is published under subsection (2) and the Ministers have not yet determined whether the substance is toxic or capable of becoming toxic within a period of two years after the date on which the suspension referred to in the notice ends, any person may file a notice of objection with the Minister requesting that a board of review be established under section 333.

### **Plans required for virtual elimination**

**79. (1) Where the Minister publishes in the Canada Gazette under subsection 77(6) a statement indicating that the proposed measure, as confirmed or amended, is virtual elimination in respect of a substance, the Minister shall in that statement require any person who is described in it to prepare and submit to the Minister a plan in respect of the substance in relation to the work, undertaking or activity of the person.**

#### **Content of plan**

(2) Every person who is required to prepare and submit a plan under subsection (1)

(a) shall include in it a description of the proposed actions in respect of virtual elimination of the substance in relation to the work, undertaking or activity of the person and the period within which the proposed actions are to be completed; and

(b) may include in it relevant information respecting measurable quantities or concentrations of the substance, environmental or health risks and social, economic or technical matters.

#### **Compliance with statement**

(3) Every person to whom a statement referred to in subsection (1) is directed shall comply with it within the period specified in the statement.

#### **Time delay**

(4) The period of time to be specified in the statement shall begin no earlier than the date on which an order is made under subsection 90(1) adding the substance to the List of Toxic Substances in Schedule 1.

**80. The definitions in this section apply in sections 81 to 89.**

"significant new activity" includes, in respect of a substance, any activity that results in or may result in

(a) the entry or release of the substance into the environment in a quantity or concentration that, in the Ministers' opinion, is significantly greater than the quantity or concentration of the substance that previously entered or was released into the environment; or

(b) the entry or release of the substance into the environment or the exposure or potential exposure of the environment to the substance in a manner and circumstances that, in the Ministers' opinion, are significantly different from the manner and circumstances in which the substance previously entered or was released into the environment or of any previous exposure or potential exposure of the environment to the substance.

"substance" means a substance other than a living organism within the meaning of Part 6.

#### **Manufacture or import of substances**

**81. (1) Where a substance is not specified on the Domestic Substances List and subsection (2) does not apply, no person shall manufacture or import the substance unless**

(a) the prescribed information with respect to the substance has been provided by the person to the Minister accompanied by the prescribed fee, on or before the prescribed date; and

(b) the period for assessing the information under section 83 has expired.

#### **Transitional provisions**

(2) Where a person has, between January 1, 1987 and June 30, 1994, manufactured or imported a substance that is not specified on the Domestic Substances List, no person shall manufacture or import the substance after June 30, 1994 unless, within 180 days after that date or on or before the prescribed date, the prescribed information has been provided to the Minister with respect to the substance by that person.

#### **Notification of significant new activity in respect of substance on List**

(3) Where a substance is specified on the Domestic Substances List with an indication that this subsection applies with respect to the substance, no person shall use, manufacture or import the substance for a significant new activity that is indicated on the List with respect to the substance unless

(a) the person has provided the Minister with the information, on or before the date that is specified by the Minister or prescribed, accompanied by the prescribed fee; and

(b) the period for assessing the information specified by the Minister or provided under section 83 has expired.

#### **Notification of significant new activity in respect of substance not on List**

(4) Where a substance is not specified on the Domestic Substances List and the Minister publishes a notice in the *Canada Gazette* indicating that this subsection applies with respect to the substance, no person shall use the substance for a significant new activity that is indicated in the notice unless

(a) the person has provided the Minister with the information, on or before the date that is specified by the Minister or prescribed, accompanied by the prescribed fee; and

(b) the period for assessing the information specified by the Minister or provided under section 83 has expired.

#### **Transfer of rights in respect of substance**

(5) Where prescribed information with respect to a substance has been provided under subsection (1), (2), (3) or (4) by a person who subsequently transfers the right or privilege in relation to the substance for which the information was provided, the information is, subject to any conditions that may be prescribed, deemed to have been provided by the transferee of that right or privilege.

#### **Application**

(6) Subsections (1) to (4) do not apply to

(a) a substance that is manufactured or imported for a use that is regulated under any other Act of Parliament that provides for notice to be given before the manufacture, import or sale of the substance and for an assessment of whether it is toxic or capable of becoming toxic;

(b) transient reaction intermediates that are not isolated and are not likely to be released into the environment;

(c) impurities, contaminants and partially unreacted materials the formation of which is related to the preparation of a substance;



(d) substances produced when a substance undergoes a chemical reaction that is incidental to the use to which the substance is put or that results from storage or from environmental factors; or

(e) a substance that is manufactured, used or imported in a quantity that does not exceed the maximum quantity prescribed as exempt from this section.

#### **Determination as to the requirements set out in paragraph (6)(a)**

(7) For the purposes of the administration of this section, the Minister responsible for the administration of another Act of Parliament referred to in paragraph (6)(a) is responsible for determining that the requirements referred to in that paragraph are met.

#### **Schedule of Acts**

(8) Any Act of Parliament or regulations listed in Schedule 2 have been determined by the Minister responsible for the administration of that Act to meet the requirements referred to in paragraph (6)(a).

#### **Governor in Council power to amend Schedule 2**

#### **Waiver of information requirements**

(10) On the request of any person to whom subsection (1), (2), (3) or (4) applies, the Minister may waive any of the requirements to provide information under that subsection if

(a) in the opinion of the Ministers, the information is not needed in order to determine whether the substance is toxic or capable of becoming toxic;

(b) the substance is to be used for a prescribed purpose or manufactured at a location where, in the opinion of the Ministers, the person requesting the waiver is able to contain the substance so as to satisfactorily protect the environment and human health; or

(c) it is not, in the opinion of the Ministers, practicable or feasible to obtain the test data necessary to generate the information.

#### **Publication of notice of waiver**

(11) The Minister shall publish in the *Canada Gazette* a notice stating the name of any person to whom a waiver is granted and the type of information to which it relates.

#### **Compliance with waiver**

(12) Where the Minister waives any of the requirements for information under paragraph (10)(b), the person to whom the waiver is granted shall not use, manufacture or import the substance unless it is for the purpose prescribed pursuant to regulations made under paragraph 89(1)(f) or at the location specified in the request for the waiver, as the case may be.

#### **Correction of information**

(13) A person who has provided information under this section, including for the purposes of a request for a waiver under subsection (10), or under section 82 or 84 shall notify the Minister of any corrections to the information as soon as possible after learning of them.

#### **Request for information previously waived**

(14) Where the Minister is notified of any corrections to information that was provided for the purposes of a request for a waiver under subsection (10), the Minister may, after consideration by the Ministers of the corrections,

require the person to whom the waiver was granted to provide the Minister with the information to which the waiver related within the time specified by the Minister.

#### **Application of section 84**

(15) Where the Ministers suspect, after considering the information provided under subsection (14), that a substance is toxic or capable of becoming toxic, the Minister may exercise any of the powers referred to in paragraphs 84(1)(a) to (c).

#### **Notification of excess quantity**

(16) Where a person manufactures or imports a substance in accordance with this section in excess of any quantity referred to in paragraph 87(1)(b), the person shall, within 30 days after the quantity is exceeded, notify the Minister that it has been exceeded.

#### **Prohibition of activity**

**82. (1) Where the Minister has reasonable grounds to believe that a person has used, manufactured or imported a substance in contravention of subsection 81(1), (3) or (4), the Minister may, in writing, require the person to provide the information referred to in that subsection and prohibit any activity involving the substance until the expiry of the period for assessing the information under section 83.**

#### **Prohibition of activity**

(2) Where the Minister has reasonable grounds to believe that a person has manufactured or imported a substance in contravention of subsection 81(2), the Minister may, in writing, prohibit any activity involving the substance until the prescribed information is provided to the Minister.

#### **Waiver of information requirements**

(3) On the request of any person required under subsection (1) or (2) to provide information, the Minister may waive any of the requirements for prescribed information if one of the conditions specified in paragraphs 81(10)(a) to (c) is met and, in that case, subsections 81(11) to (15) apply with respect to the waiver.

#### **Assessment of information**

**83. (1) Subject to subsection (4), the Ministers shall, within the prescribed assessment period, assess information provided under subsection 81(1), (3) or (4) or paragraph 84(1)(c) or otherwise available to them in respect of a substance in order to determine whether it is toxic or capable of becoming toxic.**

#### **Assessment of information**

(2) Subject to subsections (3) and (4), the Ministers shall assess information provided under subsection 82(1) or otherwise available to them in respect of a substance in order to determine whether it is toxic or capable of becoming toxic.

#### **Time for assessment**

(3) An assessment of information under subsection (2) shall be made following the date on which the information is provided within a period that does not exceed the number of days in the prescribed assessment period.

#### **Extension of assessment period**

(4) Where the Ministers are of the opinion that further time is necessary to assess any information, the Minister may, before the expiry of the assessment period referred to in subsection (1) or (3), extend the period for

assessing the information, but the extension shall not exceed the number of days in the prescribed assessment period.

#### **Notification of extension**

(5) Where the Minister extends the period for assessing information, the Minister shall, before the expiry of the assessment period referred to in subsection (1) or (3), notify the person who provided the information.

#### **Termination of period**

(6) The Minister may, before the expiry of the assessment period referred to in subsection (1) or (3), terminate the period for assessing information and, immediately before doing so, shall notify the person who provided the information.

#### **Action to be taken after assessment**

**84. (1) Where the Ministers have assessed any information under section 83 and they suspect that a substance is toxic or capable of becoming toxic, the Minister may, before the expiry of the period for assessing the information,**

- (a) permit any person to manufacture or import the substance, subject to any conditions that the Ministers may specify;
- (b) prohibit any person from manufacturing or importing the substance; or
- (c) request any person to provide any additional information or submit the results of any testing that the Ministers consider necessary for the purpose of assessing whether the substance is toxic or capable of becoming toxic.

#### **Additional information or testing**

(2) Where the Minister requests additional information or test results under paragraph (1)(c), the person to whom the request is directed shall not manufacture or import the substance unless

- (a) the person provides the additional information or submits the test results; and
- (b) the period for assessing information under section 83 has expired or a period of 90 days after the additional information or test results were provided has expired, whichever is later.

#### **Variation of conditions and prohibitions**

(3) The Minister may vary or rescind a condition or prohibition specified or imposed under paragraph (1)(a) or (b).

#### **Expiry of prohibition**

(4) Any prohibition on the manufacture or importation of a substance imposed under paragraph (1)(b) expires two years after it is imposed unless, before the expiry of the two years, the Governor in Council publishes in the *Canada Gazette* a notice of proposed regulations under section 93 in respect of the substance, in which case the prohibition expires on the day the regulations come into force.

#### **Publication of conditions and prohibitions**

(5) Where the Minister specifies, imposes, varies or rescinds any condition for or prohibition on the manufacture or importation of a substance, the Minister shall publish in the *Canada Gazette* a notice setting out the condition or prohibition and the substance in respect of which it applies.

### Significant new activity

85. (1) Where the Ministers have assessed any information under section 83 in respect of a substance that is not on the Domestic Substances List and they suspect that a significant new activity in relation to the substance may result in the substance becoming toxic, before the expiry of the period for assessing the information, the Ministers may publish in the *Canada Gazette*, and either Minister may publish in any other manner that the Minister considers appropriate, a notice indicating that subsection 81(4) applies with respect to the substance.

### Variation or revocation

(2) The Minister may, by notice published in the *Canada Gazette*, vary the significant new activities in relation to a substance for which a notice has been given under subsection (1) or indicate that subsection 81(4) no longer applies with respect to that substance.

### Contents of notice

(3) A notice referred to in subsection (1) or (2) shall indicate, by inclusion or exclusion, the significant new activities in relation to the substance in respect of which subsection 81(4) is to apply, and if regulations in respect of those significant new activities are not made under paragraphs 89(1)(c), (d) and (g), specify the information to be provided to the Minister under that subsection, the date within which it is to be provided and the period within which it is to be assessed under section 83.

### Notification of persons required to comply

86. Where a notice is published in the *Canada Gazette* under subsection 85(1) in respect of a substance, every person who transfers the physical possession or control of the substance shall notify all persons to whom the possession or control is transferred of the obligation to comply with subsection 81(4).

### Amendment of Lists

87. (1) The Minister shall add a substance to the Domestic Substances List and, if it appears on the Non-domestic Substances List, delete it from that List, within 120 days after the following conditions are met:

- (a) the Minister has been provided with information in respect of the substance under section 81 or 82 and any additional information or test results required under subsection 84(1);
- (b) the Ministers are satisfied that the substance has been manufactured in or imported into Canada by the person who provided the information in excess of
  - (i) 1 000 kg in any calendar year,
  - (ii) an accumulated total of 5 000 kg, or
  - (iii) the quantity prescribed for the purposes of this section; and
- (c) the period for assessing the information under section 83 has expired; and
- (d) no conditions specified under paragraph 84(1)(a) in respect of the substance remain in effect.

### Amendment of Lists

(2) Where the Minister adds a substance to the Domestic Substances List and subsequently learns that the substance was not manufactured or imported as described in subsection (1), the Minister shall delete the substance from the Domestic Substances List, and if it has been deleted from the Non-domestic Substances List, the Minister shall add it to that List.

### **Significant new activity**

(3) Where a substance is on the Domestic Substances List or is to be added to the List under subsection (1), the Minister may amend the List in respect of the substance to indicate that subsection 81(3) applies with respect to the substance or that it no longer applies or by varying the significant new activities in relation to the substance in respect of which subsection 81(3) is to apply.

### **Contents of amendment**

(4) An amendment referred to in subsection (3) shall indicate, by inclusion or exclusion, the significant new activities in relation to the substance in respect of which subsection 81(3) is to apply, and if regulations in respect of those significant new activities are not made under paragraphs 89(1)(c), (d) and (g), specify the information to be provided to the Minister under that subsection, the date within which it is to be provided and the period within which it is to be assessed under section 83.

### **Publication of masked name**

**88. Where the publication under this Part of the explicit chemical or biological name of a substance would result in the release of confidential business information in contravention of section 314, the substance shall be identified by a name determined in the prescribed manner.**

### **Regulations**

**89. (1) The Governor in Council may, on the recommendation of the Ministers, make regulations**

(a) defining substances or establishing groups of substances for the purposes of the provision of information under section 81 or 82, including groups of inanimate biotechnology products, polymers, research and development substances and substances manufactured only for export;

(b) prescribing maximum exempt quantities for the purpose of paragraph 81(6)(e);

(c) prescribing the information that shall be provided to the Minister under subsection 81(1), (2), (3) or (4) or section 82 and the form and manner in which it is to be provided;

(d) prescribing dates on or before which information shall be provided under subsection 81(1), (2), (3) or (4);

(e) respecting the maintenance of books and records for the administration of any regulation made under this section;

(f) prescribing the purpose for which a substance must be used so as to permit the waiver of information requirements under subsection 81(10);

(g) prescribing periods within which the Ministers shall assess information under subsection 83(1);

(h) respecting the conditions, test procedures and laboratory practices to be followed in developing test data on a substance in order to comply with the information requirements of section 81 or 82 or requests for information under paragraph 84(1)(c);

(i) prescribing quantities for the purpose of section 87;

(j) prescribing the manner of determining a name for a substance for the purpose of section 88; and

(k) generally for carrying out the purposes and provisions of sections 66 and 80 to 88.

### **Prescribed assessment period**

(2) For the purposes of sections 81 and 83, where no assessment period is prescribed or specified with respect to a substance, the prescribed assessment period is 90 days after the Minister is provided with the prescribed information.

### **Prescription of quantities**

(3) Regulations made under paragraph (1)(b) or (i) may prescribe quantities in respect of a substance in terms of

(a) whether or not the substance is on the Non-domestic Substances List or is a member of a group of substances established by regulations made under paragraph (1)(a); or

(b) the purposes for which the substance is manufactured or imported.

### **Prescription of information and assessment periods**

(4) Regulations made under paragraph (1)(c), (d) or (g) may prescribe information, dates or periods in respect of a substance in terms of

(a) whether or not the substance is on the Non-domestic Substances List or is a member of a group of substances established by regulations made under paragraph (1)(a);

(b) the purposes for which the substance is manufactured or imported; or

(c) the quantity in which the substance is manufactured or imported.

**90. (1) Subject to subsection (3), the Governor in Council may, if satisfied that a substance is toxic, on the recommendation of the Ministers, make an order adding the substance to the List of Toxic Substances in Schedule 1.**

### **Deletion from List**

(2) Subject to subsection (3), the Governor in Council may, if satisfied that the inclusion of a substance specified on the List of Toxic Substances in Schedule 1 is no longer necessary, on the recommendation of the Ministers, make an order

(a) deleting the substance from the List and deleting the type of regulations specified in the List as being applicable with respect to the substance; and

(b) repealing the regulations made under section 93 with respect to the substance.

### **Order subject to conditions**

(3) Where a board of review is established under section 333 in relation to a substance, no order may be made under subsection (1) or (2) in relation to the substance until the board's report is received by the Ministers.

### **Publication of proposed regulation or instrument**

**91. (1) Subject to subsections (6) and (7), a proposed regulation or instrument respecting preventive or control actions in relation to a substance shall be published by the Minister in the *Canada Gazette* within two years after the publication of the Ministers' statement under paragraph 77(6)(b) indicating that the measure that they propose to take, as confirmed or amended, is a recommendation that the substance be added to the List of Toxic Substances in Schedule 1.**

#### **Timeframes in relation to virtual elimination**

(2) A proposed regulation or instrument in respect of preventive or control actions in relation to a substance for which a statement has been published under subsection 77(6) indicating that the measure proposed by the Ministers is virtual elimination shall specify the dates on which the preventive or control actions are to take effect.

#### **Measurable quantity or concentration**

(3) In establishing the quantity or concentration that is measurable in relation to a substance for the purposes of a proposed regulation or instrument referred to in subsection (2), the Ministers shall take into consideration information concerning sensitive and readily available analytical methods and any relevant information contained in plans referred to in subsection 79(2).

#### **Additional measures in relation to virtual elimination**

(4) The Minister shall, where applicable, publish in the *Canada Gazette* a statement accompanying the proposed regulation or instrument for a substance referred to in subsection (2) describing any additional measures that the Ministers intend to recommend with respect to virtual elimination and summarizing their reasons for so intending.

#### **Considerations in relation to virtual elimination**

(5) In determining the preventive or control actions in relation to a substance and the dates on which those actions are to take effect that are to be set out in a proposed regulation or instrument referred to in subsection (2), and in determining any additional measures described in a statement published under subsection (3), the Ministers shall take into consideration any factor or information that, in the opinion of the Ministers, is relevant, including, but not limited to,

(a) information contained in plans referred to in section 79; and

(b) environmental or health risks identified in the summary published under subsection 77(6) and any other relevant social, economic or technical matters.

#### **Publication of subsequent proposals**

(6) Any proposed regulation or instrument respecting preventive or control actions in relation to a substance that is made after the publication of a proposed regulation or instrument published within the period of two years referred to in subsection (1) shall be published in the *Canada Gazette*.

#### **Suspension of time where board of review**

(7) Where a board of review is established under section 333, the period of two years referred to in subsection (1) is suspended from the establishment of the board and does not recommence until the board's report is received by the Ministers.

#### **Publication of preventive or control actions**

**92. (1) Subject to subsection (2), any regulation or instrument respecting preventive or control actions in relation to a substance shall be made and published in the *Canada Gazette* within 18 months after the publication of the proposed regulation or instrument under subsection 91(1) or (6), unless a material substantive change is required to be made to it.**

#### **Suspension of time where board of review**

(2) Where a board of review is established under section 333 in relation to a substance, the period of 18 months referred to in subsection (1) is suspended from the establishment of the board and does not recommence until the board has submitted its report to the Minister under subsection 340(1).

## Regulations

**93. (1) Subject to subsections (3) and (4), the Governor in Council may, on the recommendation of the Ministers, make regulations with respect to a substance specified on the List of Toxic Substances in Schedule 1, including regulations providing for, or imposing requirements respecting,**

- (a) the quantity or concentration of the substance that may be released into the environment either alone or in combination with any other substance from any source or type of source;
- (b) the places or areas where the substance may be released;
- (c) the commercial, manufacturing or processing activity in the course of which the substance may be released;
- (d) the manner in which and conditions under which the substance may be released into the environment, either alone or in combination with any other substance;
- (e) the quantity of the substance that may be manufactured, processed, used, offered for sale or sold in Canada;
- (f) the purposes for which the substance or a product containing it may be imported, manufactured, processed, used, offered for sale or sold;
- (g) the manner in which and conditions under which the substance or a product containing it may be imported, manufactured, processed or used;
- (h) the quantities or concentrations in which the substance may be used;
- (i) the quantities or concentrations of the substance that may be imported;
- (j) the countries from or to which the substance may be imported or exported;
- (k) the conditions under which, the manner in which and the purposes for which the substance may be imported or exported;
- (l) the total, partial or conditional prohibition of the manufacture, use, processing, sale, offering for sale, import or export of the substance or a product containing it;
- (m) the total, partial or conditional prohibition of the import or export of a product that is intended to contain the substance;
- (n) the quantity or concentration of the substance that may be contained in any product manufactured, imported, exported, offered for sale or sold in Canada;
- (o) the manner in which, conditions under which and the purposes for which the substance or a product containing it may be advertised or offered for sale;
- (p) the manner in which and conditions under which the substance or a product containing it may be stored, displayed, handled, transported or offered for transport;
- (q) the packaging and labeling of the substance or a product containing it;
- (r) the manner, conditions, places and method of disposal of the substance or a product containing it, including standards for the construction, maintenance and inspection of disposal sites;
- (s) the submission to the Minister, on request or at any prescribed times, of information relating to the substance;



- (f) the maintenance of books and records for the administration of any regulation made under this section;
- (u) the conduct of sampling, analyses, tests, measurements or monitoring of the substance and the submission of the results to the Minister;
- (v) the submission of samples of the substance to the Minister;
- (w) the conditions, test procedures and laboratory practices to be followed for conducting sampling, analyses, tests, measurements or monitoring of the substance;
- (x) the circumstances or conditions under which the Minister may, for the proper administration of this Act, modify
  - (i) any requirement for sampling, analyses, tests, measurements or monitoring, or
  - (ii) the conditions, test procedures and laboratory practices for conducting any required sampling, analyses, tests, measurements or monitoring; and
- (y) any other matter that by this Part is to be defined or prescribed or that is necessary to carry out the purposes of this Part.

#### **Definition of "sell"**

(2) In this section, "sell" includes, in respect of a substance, the transfer of the physical possession or control of the substance.

#### **Advice by Committee**

(3) Before a regulation is made under subsection (1), the Minister shall give the Committee an opportunity to advise the Ministers.

#### **Consultation**

(4) Before a regulation is made under paragraph (1)(f), (g), (i), (j), (k), (l), (m) or (n) with respect to the import or export of a substance or a product containing the substance, the Minister shall consult with the Minister for International Trade.

#### **Exemption**

(5) The Governor in Council may, on the recommendation of the Ministers, make regulations providing for the exemption of the following activities from the application of this Part and any regulations made under it:

- (a) the import, export, manufacture, use, processing, transport, offering for transport, handling, packaging, labeling, advertising, sale, offering for sale, displaying, storing, disposing or releasing into the environment of any substance or a product containing any substance; and
- (b) the release of any substance into the environment, for a period specified in the regulations, from any source or type of source.

#### **Substances regulated under other Acts of Parliament**

(6) The Governor in Council shall not make a regulation under subsection (1) in respect of a substance if, in the opinion of the Governor in Council, the regulation regulates an aspect of the substance that is regulated by or under any other Act of Parliament.

## **Amendment to the List of Toxic Substances in Schedule 1**

(7) A regulation made under subsection (1) with respect to a substance may amend the List of Toxic Substances in Schedule 1 so as to specify the type of regulation that applies with respect to the substance.

### **Interim orders**

#### **94. (1) Where**

(a) a substance

(i) is not specified on the List of Toxic Substances in Schedule 1 and the Ministers believe that it is toxic or capable of becoming toxic, or

(ii) is specified on that List and the Ministers believe that it is not adequately regulated, and

(b) the Ministers believe that immediate action is required to deal with a significant danger to the environment or to human life or health,

the Minister may make an interim order in respect of the substance and the order may contain any provision that may be contained in a regulation made under subsection 93(1) or (5).

### **Effect of order**

(2) Subject to subsection (3), an interim order has effect

(a) from the time it is made; and

(b) as if it were a regulation made under section 93.

### **Approval of Governor in Council**

(3) An interim order ceases to have effect unless it is approved by the Governor in Council within 14 days after it is made.

### **Consultation**

(4) The Governor in Council shall not approve an interim order unless the Minister has

(a) within 24 hours after making the order, offered to consult with all affected governments to determine whether they are prepared to take sufficient action to deal with the significant danger; and

(b) consulted with other ministers of the Crown in right of Canada to determine whether any action can be taken under any other Act of Parliament to deal with the significant danger.

### **Recommendation of regulations**

(5) Where the Governor in Council approves an interim order, the Ministers shall, within 90 days after the approval, publish in the *Canada Gazette* a statement indicating whether the Ministers intend to recommend to the Governor in Council

(a) that a regulation having the same effect as the order be made under section 93; and

(b) if the order was made in respect of a substance that was not specified on the List of Toxic Substances in Schedule 1, that the substance be added to that List under section 90.

### **Contravention of unpublished order**

(6) No person shall be convicted of an offense consisting of a contravention of an interim order that, at the time of the alleged contravention, had not been published in the *Canada Gazette* unless it is proved that, at the date of the alleged contravention, that person had been notified of the interim order.

### **Cessation of effect**

(7) Subject to subsection (3), an interim order ceases to have effect on the earliest of

(a) the day it is repealed,

(b) the day a regulation referred to in subsection (5) is made, and

(c) two years after the order is made.

### **Release of toxic substances**

#### **Report and remedial measures**

**95. (1) Where there occurs or is a likelihood of a release into the environment of a substance specified on the List of Toxic Substances in Schedule 1 in contravention of a regulation made under section 93 or an order made under section 94, any person described in subsection (2) shall, as soon as possible in the circumstances,**

(a) subject to subsection (4) and any regulations made under paragraph 97(b), notify an inspector or any other person designated pursuant to the regulations and provide a written report on the matter to the inspector or other person;

(b) take all reasonable measures consistent with the protection of the environment and public safety to prevent the release or, if it cannot be prevented, to remedy any dangerous condition or reduce or mitigate any danger to the environment or to human life or health that results from the release of the substance or may reasonably be expected to result if the substance is released; and

(c) make a reasonable effort to notify any member of the public who may be adversely affected by the release or likely release.

#### **Application**

(2) Subsection (1) applies to any person who

(a) owns or has the charge, management or control of a substance immediately before its release or its likely release into the environment; or

(b) causes or contributes to the release or increases the likelihood of the release.

#### **Report by property owner**

(3) Where there occurs a release of a substance as described in subsection (1), any person, other than a person described in subsection (2), whose property is affected by the release and who knows that it is a substance specified on the List of Toxic Substances in Schedule 1 shall, as soon as possible in the circumstances and subject to subsection (4), report the matter to an inspector or to any person that is designated by regulation.

#### **Report to provincial official**

(4) Where there are in force, by or under the laws of a province or an aboriginal government, provisions that the Governor in Council, by regulation, declares to be adequate for dealing with a release described in subsection

(1), a report required by paragraph (1)(a) or subsection (3) shall be made to a person designated by those provisions.

#### **Intervention by inspector**

(5) Where any person fails to take any measures required under subsection (1), an inspector may take those measures, cause them to be taken or direct any person referred to in subsection (2) to take them.

#### **Limitation on power of direction**

(6) A direction of an inspector under subsection (5) that is inconsistent with a requirement imposed by or under any other Act of Parliament is void to the extent of the inconsistency.

#### **Access to property**

(7) Any inspector or other person authorized or required to take any measures under subsection (1) or (5) may enter and have access to any place or property and may do any reasonable things that may be necessary in the circumstances.

#### **Personal liability**

(8) Any person, other than a person described in subsection (2), who provides assistance or advice in taking the measures required by subsection (1) or who takes any measures authorized under subsection (5) is not personally liable either civilly or criminally in respect of any act or omission in the course of providing assistance or advice or taking any measures under those subsections unless it is established that the person acted in bad faith.

#### **Voluntary report**

**96. (1) Where a person has knowledge of the occurrence or likelihood of a release into the environment of a substance specified on the List of Toxic Substances in Schedule 1, but the person is not required to report the matter under this Act, the person may report any information relating to the release or likely release to an inspector or to any person to whom a report may be made under section 95.**

#### **Request for confidentiality**

(2) A person making a report under subsection (1) may request that the person's identity and any information that could reasonably reveal the identity not be released.

#### **Requirement for confidentiality**

(3) Where a person makes a request under subsection (2), no person shall release or cause to be released the identity of the person making the request or any information that could reasonably be expected to reveal their identity unless the person making the request authorizes the release in writing.

#### **Employee protection**

(4) Despite any other Act of Parliament, no person shall discipline, dismiss or harass an employee of any of the following organizations for making a report under subsection (1):

- (a) a department of the Government of Canada;
- (b) an agency of the Government of Canada or other body established by or under an Act of Parliament that is ultimately accountable through a minister of the Crown in right of Canada to Parliament for the conduct of its affairs;
- (c) a Crown corporation as defined in subsection 83(1) of the *Financial Administration Act*; or

(d) a federal work or undertaking.

### **Regulations**

#### **97. The Governor in Council may make regulations**

- (a) designating persons for the purposes of paragraph 95(1)(a) and subsection 95(3) and prescribing the form of the report to be made under those provisions and the information to be contained in it;
- (b) respecting the notification and reporting of a release, including prescribing the circumstances in which a notification or a written report is not required to be made under paragraph 95(1)(a);
- (c) declaring provisions to be adequate for the purpose of subsection 95(4); and
- (d) generally for carrying out the purposes and provisions of sections 95 and 96.

### **Recovery of reasonable costs and expenses by Her Majesty**

#### **98. (1) Her Majesty in right of Canada may recover the costs and expenses of and incidental to taking any measures under subsection 95(5) from**

- (a) any person referred to in paragraph 95(2)(a); and
- (b) any person referred to in paragraph 95(2)(b) to the extent of the person's negligence in causing or contributing to the release.

### **Reasonably incurred**

(2) The costs and expenses referred to in subsection (1) shall only be recovered to the extent that they can be established to have been reasonably incurred in the circumstances.

### **Joint and several liability**

(3) Subject to subsection (4), the persons referred to in subsection (1) are jointly and severally liable or solidarily liable for the costs and expenses referred to in that subsection.

### **Limitation**

(4) A person referred to in paragraph 95(2)(b) shall not be held liable under subsection (3) to an extent greater than the extent of the person's negligence in causing or contributing to the release.

### **Procedure**

(5) A claim under this section may be sued for and recovered by Her Majesty in right of Canada with costs in proceedings brought or taken therefor in the name of Her Majesty in right of Canada in any court of competent jurisdiction.

### **Recourse or indemnity**

(6) This section does not limit or restrict any right of recourse or indemnity that a person may have against any other person.

### **Limitation period**

(7) Where events giving rise to a claim under this section occur, no proceedings in respect of the claim may be instituted after five years from the date on which the events occur or become evident to the Minister, whichever is later.

### **Minister's certificate**

(8) A document purporting to have been issued by the Minister certifying the day on which the events giving rise to a claim under this section came to the knowledge of the Minister shall be received in evidence and, in the absence of any evidence to the contrary, the document shall be considered as proof of that fact without proof of the signature or of the official character of the person appearing to have signed the document and without further proof.

### **Remedial measures**

**99. Where, in respect of a substance or a product containing a substance, there is a contravention of this Part or any regulation made under this Part, the Minister may, in writing,**

(a) direct any manufacturer, processor, importer, retailer or distributor of the substance or product to take any or all of the following measures:

(i) give public notice in a manner directed by the Minister of any danger to the environment or to human life or health posed by the substance or product,

(ii) mail a notice as described in subparagraph (i) to every manufacturer, processor, distributor or retailer of the substance or product, or

(iii) mail a notice as described in subparagraph (i) to every person to whom the substance or product is known to have been delivered or sold; and

(b) direct any manufacturer, processor, distributor, importer or retailer of the substance or product to take any or all of the following measures:

(i) replace the substance or product with one that does not pose a danger to the environment or to human life or health,

(ii) accept the return of the substance or product from the purchaser and refund the purchase price, or

(iii) any other measures for the protection of the environment or of human life or health.

### ***Export and Import of Substances***

#### **List of Prohibited Substances**

**100. (1) The Governor in Council may, on the recommendation of the Ministers, make an order adding to the List of Prohibited Substances in Part 1 of Schedule 3 any substance the use of which is prohibited in Canada by or under an Act of Parliament and may, in the same manner, delete any substance from that List.**

#### **Prohibition of export**

(2) No person shall export any substance specified on the List of Prohibited Substances in Part 1 of Schedule 3 except for the purpose of destroying the substance or complying with a direction under subparagraph 99(b)(iii).

#### **List of Substances Requiring Export Notification**

**101. (1) The Governor in Council may, on the recommendation of the Ministers, make an order**

(a) adding to the List of Substances Requiring Export Notification in Part 2 of Schedule 3 any substance, if the Governor in Council is of the opinion that

(i) the uses of the substance are substantially restricted by or under an Act of Parliament or the substance is subject to an international agreement that requires the consent of the importing country before the substance is exported from Canada, and

(ii) a notice should be given under subsection (3) in respect of the proposed export of the substance; and

(b) deleting any substance from that List.

#### **List of Substances Authorities**

(2) The Minister shall compile a list, to be known as the List of Substances Authorities, and the List shall specify each country in respect of which a notice is required under subsection (3) and the authority, body or person to whom the notice shall be given.

#### **Notice of export of substances**

(3) A person shall give notice of the proposed export of a substance specified on the List of Substances Requiring Export Notification in Part 2 of Schedule 3 if the person proposes to export the substance to a country specified on the List of Substances Authorities and the export of the substance by that person is to be for the first time after

(a) the name of the substance is added to the List of Substances Requiring Export Notification in Part 2 of Schedule 3;

(b) any regulation is made or amended under this or any other Act of Parliament restricting or further restricting any activity relating to the substance; or

(c) the government of the country of destination takes any action to prevent the import of the substance into that country and the Minister has published a notice of that action in the *Canada Gazette*.

#### **Form and manner of notice**

(4) A notice under subsection (3) shall be given in accordance with the regulations to the Minister and to the authority, body or person specified on the List of Substances Authorities.

#### **Information to accompany export**

(5) Where a person exports a substance as described in subsection (3), the substance shall be accompanied in the prescribed manner by the prescribed information.

#### **Conditions governing export of substances**

102. Except in accordance with the prescribed conditions, no person shall export a substance in respect of the export of which a notice is required to be given under section 101.

#### **Publication of List of Substances Authorities**

103. (1) The Minister shall publish in the *Canada Gazette* the List of Substances Authorities and any amendments to that List.

#### **Publication of notices re substances**

(2) Where the Minister receives a notice of the proposed export of a substance under section 101, the Minister shall publish in the *Canada Gazette* or in any other manner that the Minister considers appropriate the name or specifications of the substance, the name of the exporter and the country of destination.

## Regulations

(3) The Governor in Council may make regulations

(a) prescribing the contents of a notice required to be given under section 101, the period within which it shall be given and the manner in which it shall be given;

(b) prescribing the information that shall accompany any export of a substance for which a notice is required to be given under section 101 and prescribing the manner in which the information shall accompany the substance;

(c) prescribing the conditions under which a person may export a substance in respect of the export of which a notice is required to be given under section 101; and

(d) generally for carrying out the purposes of sections 101 and 102.

## OVERVIEW

This Part updates Part II of the existing CEPA. Some of the changes to the existing CEPA include:

- the incorporation of the *Toxic Substances Management Policy* (TSMP) where:  
(a) persistent, bio-accumulative and toxic substances (PTBs) are to be "virtually eliminated;" (b) criteria for persistence and bioaccumulation by regulation, with an exemption for metals and minerals are to be established; and (c) the inherent toxicity definition does **not** include consideration of evidence of harm to humans (section 73(1)(b));
- screening of Domestic Substances List (DSL) for PTBs and substances prohibited or substantially restricted in the OECD (only allowed in section 74(3) where not already regulated under another Act of Parliament);
- the addition of PTB's to the TSL if they may have long-term harmful effects on the environment (section 77(3));
- the deletion from the Priority Substances List (PSL) once a substance is determined toxic or not toxic (section 76(5));
- the virtual elimination of a substance if it is persistent, if it is bio-accumulative, if its presence in the environment results from human activity, and if it is not a naturally occurring radio nuclide or substance (section 77(4));
- requests from the Board of Review when Ministers fail to recommend addition of a toxic substance to the TSL (section 77(8));



- Minister's requirements that a person prepare and submit a plan for the virtual elimination of VE substances within time limit specified by Minister (section 79(1)); and
- plans which may include information on environmental and health risks and social, economic and technical considerations.

While the framework for this Part is an improvement, various provisions undermine any such improvements, including the definition of virtual elimination (VE). The definition is incomprehensible and it appears to make the definition to mean no release below detection level and where there is no evidence of injury to the environment or human life or health. This definition is: (a) ensuring that a pollution control approach rather than pollution prevention approach is enshrined in law; (b) inconsistent with the interpretation in the *Great Lakes Water Quality Agreement* (GLWQA); and (c) links implementation of virtual elimination requirements to environmental and health risks, as well as social, economic, and technical considerations.

Furthermore, there is no accommodation for the phase-out of endocrine disrupters. Endocrine disrupters are not likely to be caught in the PTB definition unless they are PTB. Finally, the clause "long-term harmful effect" makes no reference to long-term harmful effects on human health.

Part 5 of Bill C-32 is intended to replace Part II of CEPA. The primary purpose of Part 5 is to develop a process to identify substances in use in Canada, prioritize some of those substances for assessment, undertake assessments and then to regulate those substances found to be toxic. More specifically, all substances in commercial use in Canada must be placed on the DSL. From this list, a process is established to select a number of substances that will be assessed. These substances are placed on the Priority Substances List (PSL). Those substances found to be toxic, as defined under CEPA, are placed on the TSL. Once on the TSL, the Act provides the authority to regulate the substances with a broad array of powers given to the government.

The record of achievement under Part II of the existing CEPA has not been exceptional. Of the 44 substances placed on the first PSL, 25 substances were found to be toxic. None of those substances have been regulated as of yet, although there have been a number of Strategic Options Report drafts recommending new regulations for certain substances. Eleven substances remain unassessed due to the "lack of sufficient data." To date, no determination has been made with respect to those substances. The Canadian Environmental Law Association (CELA) has brought a judicial review action against the Minister of the Environment concerning these 11 substances and the interpretation of various provisions, and in particular, whether substances can be removed from the PSL without a determination of whether the substances are "toxic" or "non-toxic."

Moreover, there is a recognized need to identify more substances for assessment and finding means to identify toxic substances in a more efficient and effective way. The Standing Committee on Environment and Sustainable Development made a number of recommendations in its 1995 report, It's About Our Health! Towards Pollution Prevention. The Canadian Environmental Law Association and the Canadian Institute for Environmental Law and Policy (CIELAP) generally endorsed these recommendations as useful and practical recommendations to improve Part 2 of the Act. The government response to the Standing Committee's recommendations only adopted a few of the committee's recommendations.<sup>7</sup>

One of the problems pervading the evolution of these provisions is the fact that, in June 1995, two weeks before the tabling of the Standing Committee's report, the federal government released the TSMP. The TSMP, in our view, pre-empted legitimate debate on how to deal with the most dangerous toxic substances. Despite the views of the Standing Committee, the TSMP is essentially translated into legislative provisions in Bill C-32. From the very start, non-government organizations have severely criticized the TSMP and, to this day, have provided detailed arguments as why the TSMP is both inappropriate and ineffective. These submissions have fallen on deaf ears since not one recommendation by the non-government community was accepted and incorporated into the TSMP. Hence, the central issues with respect to Part 5 of Bill C-32 will necessarily lead to a discussion as to the legitimacy of the TSMP.

Moreover, Part 5 of Bill C-32 fails to incorporate in full the 1995 recommendations of the Standing Committee or the government response. In fact, under the guise of strengthening Part II of the existing CEPA, there are various provisions that actually weaken the existing law. We would strongly recommend that the amendments stated below be adopted in order to strengthen the proposed Part 5 of Bill C-32 and ensure for the protection of the health of Canadians and their environment.

## **GENERAL RECOMMENDATION TO PART 5**

### **Recommendation No. 54**

**Define VE so that it is consistent with the GLWQA definition and the International Joint Commission (IJC) interpretation.**

**Include endocrine disrupters on the VE track.**

**Include human health under the term "long-term harmful effect."**

**Remove VE restriction on naturally occurring substances and radionuclides.**

**Recognize, explicitly, concept of "inherent toxicity" in the definition of "toxic."**

**Include human health in the definition of "inherent toxicity."**

## **RECOMMENDATIONS ON SPECIFIC SECTIONS**

### **Section 64** - Definition of Virtual Elimination

Section 64 defines the term "virtual elimination" (VE). Virtual Elimination is defined as the release below any measurable quantity or concentration or approaching the level of quantification that is specified by the Minister, and results or may result, in a harmful effect on the environment or human health.

The definition of VE in section 65 must be rejected. Not only is the definition for VE reflective of the definition in the TSMP, but it is also less stringent. There are five arguments why the definition should be rejected. The basic thrust of these arguments is that virtual elimination must mean 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. Only this definition will respond to the human and ecological threat posed by the most dangerous substances, will further the goals of pollution prevention, and be consistent with existing legal and policy commitments. The arguments are as follows:

- *Responding to Ecological and Human Health Threat from Dangerous Substances*

It should be recalled that the goal of virtual elimination is reserved only for the most dangerous substances, such as persistent, bioaccumulative and toxic substances. As such, the goal is to ensure that these substances are not longer in use and generated in Canada. That is the essence of the definition we propose below, rather than the definition in section 65 which will have the effect of allowing and legitimizing the use and generation of these dangerous substances.

- *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 than 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 and process reformulation among other such techniques.

When the goal of virtual elimination is defined as "no measurable release," legitimacy is given to the 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 policy reinforces present practices. It will not encourage innovation rather it will encourage industry to accept more expensive, but ultimately less efficient, end-of-the-pipe measures.

- *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?" 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.

In fact, Environment Canada held a workshop in June of 1996 pertaining to the concept of "limits of quantification." This workshop was supposed to provide some technical backing to the virtual elimination strategy. However, no non-governmental groups were invited nor attended that workshop despite the attendance and participation by industry. One of the reasons given by Environment Canada for not inviting environmental groups was that the workshop was of a "technical" nature, suggesting that non-governmental groups have no technical expertise in this regard.

- *It is Inconsistent with Current Legal and Policy Commitments*

It is our view that the definition used in the TSMP is not consistent with the definition in the GLWQA,<sup>8</sup> the interpretations provided by the International Joint Commission (IJC) in their biennial reports on water quality,<sup>9</sup> the report by the Standing Committee on Environment and Sustainable Development,<sup>10</sup> the federal government response in Pollution Prevention: A Federal Strategy for Action, and the Liberal Red Book.<sup>11</sup>

More particularly, in its Seventh Biennial report, the International Joint Commission (IJC) re-iterated its previous approach and stated:

*[w]e...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 ... [s]ince it seems impossible to eliminate discharges of these chemicals ... a policy of **banning** or **sun setting** their manufacture, distribution, storage, use and disposal appears to be the only alternative.<sup>12</sup>*

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

*[t]here 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 be virtual elimination and zero discharge, but when and how these goals can be achieved.<sup>13</sup>*

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.

The effect of this inconsistency is that Bill C-32 will pre-empt a debate and evolution of the term in the GLWQA over the past 25 years. Moreover, it will pre-determine the negotiating position of Canada both in the context of the Binational Virtual Elimination Strategy being developed by Canada and the United States and the development of the Protocol on Persistent Organic Pollutants (POPs Protocol). Hence, in our view, this definition must be an appropriate and strong one.

- *The Section 65 Definition is Less Stringent than the TSMP Definition*

Section 65(1)(b) is a provision not found in the TSMP. The TSMP stated, in effect, that virtual elimination is where releases are below the level of detection **and** where there are no harmful effects in the environment or to human health. Hence, not only must it

be established that the releases are more than the level of detection, but it must also be established that those releases will have human health or environmental effects. It is submitted that this threshold will never be met in any circumstances since it will always be impossible to establish the correlation between minute releases of dangerous substances and specific environmental and human health effects. By their very nature, most of the effects are chronic in nature.

Hence, the section 65 definition of virtual elimination is doomed for failure. It will be a completely non-enforceable, non-workable provision that will have the result of allowing the continued use and generation of the most dangerous substances.

#### **Recommendation No. 55**

**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 IJC and implemented through a national pollution prevention framework.**

**More specifically, the definition of virtual elimination should mean the elimination of the production, use, and generation of substances.**

**As an alternative, if some aspect of the existing definition is to be maintained, there should be both a policy definition as we defined it, and then another definition for purposes of compliance that would include a more clear and amended definition as now appears in section 65 of Bill C-32.**

**Section 64 of Bill C-32 should be redrafted as follows:**

**64.(1) In this Part, "virtual elimination" means the cessation of the intentional production, use, release, export, distribution or import of a substance or classes of substances.**

**(2) Where a substance is produced as a by-product of the production or use of another substance, virtual elimination means changes to processes, practices,**

**substitution of materials or products to avoid the creation of substance in question.<sup>1</sup>**

**Section 65** - Toxic Substances (Definition of Toxicity)

The government response makes the assumption that the existing definition of "toxicity" in CEPA is sufficient to incorporate and implement the concept of inherent toxicity. It is respectfully submitted that the current section 11 definition of toxicity in CEPA is inappropriate and does not fulfill the purposes of CEPA.

Substances may have characteristics or traits that, intrinsically, give them the potential to cause harm to human health and the environment. For example, some substances are "persistent" or "bioaccumulative." Others are suspected of disrupting the endocrine systems of wildlife and possibly humans.

The simple question is this: Do Canadians want substances with these kinds of characteristics to be freely put into commerce or remain in commerce in Canada?

The current CEPA section 11 definition, however, does not ask this question. Instead, the conditions precedent to having a substance declared toxic requires that it not only have the potential to cause adverse effects, but that Canadians and their environment are being exposed to these substances in sufficient quantities to cause harm.

The need to establish exposure was a major factor in finding those PSL substances known to have intrinsic "toxic" properties are not "toxic" for the purposes of CEPA. Toluene is a good example of this situation where, although the substance has toxic properties, it was not found "toxic" according to the definition in CEPA. Toluene is listed in virtually every provincial hazardous waste and occupational health and safety regulation in the country.

The exposure requirement in the present definition requires that there be sufficient exposure of a substance in the environment before regulatory action be taken, even if the substance is inherently toxic. Hence, it follows then that it is necessary to wait for harm to occur before preventive measures can be established. By its very nature, therefore, the current definition is in contraposition to the precautionary principle, a principle that the government has expressly endorsed.

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<sup>1</sup> For example, a provision could be drafted designed to prohibit the use of processes or products that inevitably lead to the generation or release of substances subject to section 64. In other instances, a provision could be drafted to state that substance is deemed not to be virtually eliminated if its generation or its release is above any measurable quantity or concentration.

In effect, the current definition has defeated the very purpose of Part II of CEPA. Of the 44 substances on the Priorities Substances List (PSL), as many as 13 of them were not assessed because of insufficiency of data. For many of these substances, the information that was lacking related to exposure data. Hence, the narrow definition of toxicity has made it difficult to determine the toxicity of 13 substances. For five years, the assessment process of Part II has yielded only modest results, mostly because of the incredibly onerous requirements of the toxicity definition.

The definition of "toxicity" must be amended in CEPA to remove the exposure requirement and include the concept of inherent toxicity in order to deal with these problems.

#### **Recommendation No. 56**

**The definition of toxicity in CEPA should recognize the concept of inherent toxicity. Toxicity should be determined on the basis of the inherent or intrinsic toxic properties of substances such as acute lethality, chronic/sub-chronic toxicity, carcinogenicity, teratogenicity, genotoxicity, and ability disrupt endocrine systems. This approach should be reflected in section 65 which would read as follows:**

**"For the purposes of this Part, a substance is toxic if it is entering or may enter the environment and:**

- (a) is having or may have an immediate or long term effect on the environment;**
- (b) constitutes or may constitute a danger to the environment on which life depends; or**
- (c) constitutes or may constitute a danger in Canada to human life or health."**

#### **Section 67(1)(a) - Regulation of criteria**

#### **Recommendation No. 57**

**That the criteria set out in Bill C-32 regarding persistence and bioaccumulation "without limiting the generality of the foregoing," be amended as follows:**



**67(1)(a). Respecting a property of characteristic of a substance, including, without limiting the generality of the foregoing, persistence, bioaccumulation, *hormone disrupting ability*, and other chronic effects.**

**Section 67(2)** - Regulation of Criteria

In terms of the differences between Bill C-74 and Bill C-32, the latter Bill amended section 67(2) clearly with the intent of making it more difficult to regulate metals and minerals. At this point, it is unclear what is meant by the requirement that the natural occurrence, properties and characteristics of what metals and minerals have been "taken into consideration." This section is vague with no apparent real purpose but to state the obvious.

**Recommendation No. 58**

**Section 67(2) should be deleted.**

**Section 68** - Research, investigation and evaluation

**Recommendation No. 59**

**Amend section 68 as recommended by World Wildlife Fund Canada. Section 68 could read:**

**68. For the purpose of assessing whether a substance is toxic or is capable of becoming toxic...either Minister shall:**

**(a) Collect or generate data and conduct investigations respecting any matter in relation to a substance including, but not limiting the generality of the foregoing,**

- (i) the capacity of the substance for short term exposure to have significant effects,**
- (ii) the potential of the substance for widespread involuntary exposure to organisms in the environment,**
- (iii) whether the substance exhibits multiple pathways of exposure to organisms,**

- (iv) whether exposure to the substance is inevitable due to ongoing human activity,
- (v) whether the substance causes a reduction in metabolic and defensive functions of an organism,
- (vi) probability of the substance causing delayed/latent effects over a lifetime of an organism;
- (vii) whether the substance has the potential to cause reproductive or survival impairment of an organism;
- (viii) whether the presence of a substance has the potential to contribute to population failure of a species of organisms;
- (ix) whether the substance could have transgenerational effects,
- (x) the potential of the substance to cause disproportionate cascading effects in an organism,
- (xi) whether the substance has the potential to cause false signals of viability in an organism,
- (xii) quantities, uses and disposal of the substance,
- (xiii) the manner in which the substance is released into the environment,
- (xiv) the extent to which the substance can become dispersed and will persist in the environment, and,
- (xv) the development and use of alternatives to the substance.

(b) correlate and evaluate any data collected under paragraph (a) *using weight-of-evidence approach*, and publish results of any investigations carried out under that paragraph; and,

(c) provide information and make recommendations respecting any matter in relation to a substance...*[balance deleted]*

**Section 69(1)** - Formulation of guidelines by the Minister

This section refers to guidelines for implementation of Part 5.

**Recommendation No. 60**

**Delete or modify discretionary language. Replace word "shall" with "may."**

**Section 69(2)** - Guidelines for Implementation of Part V

**Recommendation No. 61**

**Delete or modify discretionary language. Replace word "shall" with "may."**

**Section 73** - Priority Substances and Other Substances

This section and the following section provide for a regime that is intended to enhance or accelerate the assessment substances and focus on those worthy of attention. The focus of these provisions related to those substances where there is the "greatest potential for exposure" (section 73(1)(a)) or are persistent and bioaccumulative (section 73(1)(b)). Hence, all other characteristics and properties of substances are left out of this regime, including endocrine disrupting substances.

**Recommendation No. 62**

**Section 73 should be amended to include a section 73(1)(c) that states: "or any other property or characteristic as defined by regulation or the Minister."**

**Section 73(1)** - Categorization of substances on Domestic Substances List

**Recommendation No. 63**

**Add reference to hormone disrupting substance as recommended by World Wildlife Fund Canada. Sections 73(1) should be amended as follows:**

**73(1). That, by January 1, 2001, the Minister shall categorize the substances that are on the Domestic Substances List by virtue of section 66, for the purpose of identifying those substances on the List that, in their opinion and on the basis of the available information are persistent or bioaccumulative or inherently toxic or *hormone disrupting*, as determined by the regulation.**

**Section 73(1)(b)** - Categorization of substances on Domestic Substances List

**Recommendation No. 64**

**In section 73(1)(b), inherent toxicity only applies to non-humans. Add words "human beings" or non-human organisms. Delete remainder of clause (i.e., "as determined by laboratory or other studies of non-human organisms").**

**Amend to read "are persistent or bioaccumulative in accordance with the regulations, and inherently toxic to human beings or non-human organisms, as determined by laboratory or other studies."**

**Section 75(3)** - Definition

**Recommendation No. 65**

**Delete words "unless the decision related to a substance the only use of which... environmental and health protection."**

**Section 77(3)** - Mandatory proposal

**Recommendation No. 66**

**Add reference to hormone disrupting substance in section 77(3) as recommended by World Wildlife Fund Canada.**

**77(3) Where, based on a screening assessment conducted under section 74, the Ministers are satisfied that:**

**(a) a substance may have a long-term harmful effect on the environment because it is**

**(i) persistent and bioaccumulative in accordance with the regulations,**

**(ii) inherently toxic to non-human organisms, as determined by laboratory or other studies of non-human organisms, or,**

**(iii) a *hormone disrupting substance*, as determined by regulation.**

**[that the substance be added to the Toxic Substances List].**

**Recommendation No. 67**

**Section 77(3)(b) be reworded to “ human activity causes or contributes to the presence of the substance in the environment.”**

**Section 77(4) - Proposal for virtual elimination**

**Recommendation No. 68**

**Add reference to hormone disrupting substance.**

**Section 77(4)(b)**

**Recommendation No. 69**

**Reword to “human activity causes or contributes to the presence of the substance in the environment.”**

**Section 77(4)(c)**

**Section 77(4)(c) does not have a VE proposal for naturally occurring substances or radionuclide.**

## **Recommendation No. 70**

**Delete.**

### **Section 77(3)(ii)** - Mandatory Proposal

In section 77(3)(ii), inherent toxicity only applies to non-humans.

## **Recommendation No. 71**

**Add words "human beings" or non-human organisms.  
Delete remainder of clause.**

### **Section 77(9)** - Recommendation to Cabinet

Section 77 outlines the steps that should be taken where there has been a screening assessment, a review of decision of another jurisdiction or an assessment under the PSL process. Section 77(9) under Bill C-74 gave the Minister 90 days to decide what action should be recommended to Cabinet. The timeline was left out in Bill C-32. This timeline should be reinserted.

## **Recommendation No. 72**

**Section 77(9) should be amended to include a 90 day  
timeframe.**

## **Sections 80-89** - Substances and Activities New to Canada

### **OVERVIEW**

The new chemical substances provisions of the Act are amended in a manner that parallels the amendments to the Biotechnology Part regarding the regulations of substances under other Acts of Parliament. Other Ministers are permitted to determine if their regulations meet CEPA equivalency requirements (established by existing section 26(3)(a)) for products regulated under other Acts. This weakens the existing section 26(3)(a) requirements and is a major loophole for pesticides, foods, and other non-chemical new substances.

These sections provide for the establishment of a list of equivalent regulations and Acts. However, orders by the Governor in Council regarding equivalency of other Acts of Parliament of CEPA, are exempt from public notice and comment provisions (section 332). Furthermore, CEPA equivalency can only be withdrawn on recommendation of Minister responsible for administration of the "equivalent" Act of Parliament.

These sections permit the continued exemption from notification requirements for by-products of new substances or substances "not likely to be released" to the environment.

Finally, these sections strengthen the requirements for reporting and assessment of new uses or activities of previously notified substances (significant new activity reporting requirements (section 85)).

### **GENERAL RECOMMENDATIONS TO SECTIONS 80-89**

#### **Recommendation No. 73**

**Remove exemption from notification for contained uses.**

**Restore and strengthen existing provisions regarding equivalency of notification and assessment of "toxicity" under other Acts of Parliament.**

**Remove exemption from public notice, comment period, and opportunity to file notice of objection, for equivalency orders.**

## KEY POINTS

- Remove exemption from notification for contained uses.
- Restore and strengthen existing provisions regarding equivalency of notification and assessment of "toxicity" under other Acts of Parliament.
- Remove exemption from public notice, comment period, and opportunity to file notice of objection, for equivalency orders.

## RECOMMENDATIONS REGARDING SPECIFIC SECTIONS

**Section 81(6)** - Manufacture or Import of Substances - Application

**Section 81(6)(a)** - Exemption for Substances subject to notification and assessment of toxicity under Other Acts of Parliament

This section retains the language of section 26(3)(a) of the existing Act. However, it is qualified by the addition of sections 87(7), 86(8) and 86(9). See discussion below.

**Section 81(6)(b)** - Exemption for transient reaction intermediates

This section exempts from the notification and assessment requirements "transient reaction intermediates" that are not isolated and "not likely" to be released into the environment. This limits the scope of the new substance assessment in terms of by-products which may be released into the environment.

### **Recommendation No. 74**

**Replace words: "not likely to be" with the words "will not be."**

**Section 81(6)(c)** - Exemption for impurities, contaminants and partially unreacted materials.

This section exempts from the notification and assessment requirements "impurities, contaminants and partially unreacted materials the formulation of which is related to the preparation of the substance." These materials may be of significance from a human health or environmental perspective and should be included in the toxicity assessment of new substances.



## **Recommendation No. 75**

**Delete section 81(6)(c).**

**Section 81(6)(d)** - Exemption for by-products produced as a result of reactions incidental to the use of substance or resulting from storage or environmental factors

This section exempts from the notification and assessment requirements by-products produced when the substance undergoes chemical reactions incidental to its use, or as a result of storage or environmental factors. These materials may be of significance from a human health or environmental perspective and should be included in the toxicity assessment of new substances.

## **Recommendation No. 76**

**Delete section 81(6)(d).**

**Sections 81(7)-(9)** - Determination for Listing on Schedule V - Schedule of Acts - Governor in Council Power to Amend Schedule

These sections have the same effect as the proposed sections 106(7)-(9) for biotechnology products. They would significantly weaken the requirement of the existing section 26(3)(a) of CEPA that new substances, such as pesticides, or foods, regulated under other Acts of Parliament, be subject to notification and toxicity assessment requirements equivalent to those which would take place under CEPA.

The proposed sections 332(1) and 332(4) would exempt regulations establishing the equivalency of regulations made under other Acts of Parliament with the requirements of CEPA under section 81(9) from the general public notice and comment requirements in those sections.

Changes to the new substances equivalency provisions were not proposed in the Standing Committee's report or the government response.

## **Recommendation No. 77**

**Delete sections 81(7), 81(8) and 81(9).**

**The reference to section 81(9) should be deleted from section 332(1), and section 332(4) deleted in its entirety.**

**Sections 81(10)** - Waiver of Information Requirements - Publication of Notice of Waiver

These sections deal with the granting of waivers regarding the notification and assessment of new substances. As drafted, there is no requirement for public notice or the opportunity for the public to comment on the proposed granting of waivers. As the granting of waivers are effective exemptions from the new substances notification and assessment requirements, they should be subject to public notice.

**Recommendation No. 78**

**Add the words, “by order” after the words “the Minister may” in section 81(10).**

The addition of the words “by order” has the effect of triggering the public notice requirements under section 332.

**Section 81(10)(b)** – Exemption for contained uses of new substances

This section permits the Minister to waive the notification and assessment requirements for substances where the proponent is “able to contain the substance so as to satisfactorily protect the environment or human health.” These proposed grounds for waivers cannot be supported, given the risk of spills or other accidental releases of substances from “contained” facilities.

**Recommendation No. 79**

**Delete subsection 81(10)(b).**

**Sections 84(3) and (5)** - Variation of Conditions and Prohibitions - Publication of Conditions and Prohibitions

These provisions, as drafted, permit the variation or rescinding of conditions and prohibitions on substances that are toxic or suspected of being toxic without public notice or the opportunity for public comment.

**Recommendation No. 80**

**Add words, “by order” after the words “The Minister may” in section 84(3).**

The addition of the words "by order" has the effect of triggering the public notice requirements under section 332.

**Section 84(4)** - Expiration of Prohibition

As drafted, this section requires that prohibitions on the import or manufacture of a substance that is toxic or suspected of being toxic expire two years after they are made unless a notice of a proposed regulation under section 93 is published in the *Canada Gazette* by the Governor in Council. This may provide economic departments with a means of vetoing the extension of a prohibition ever where it is justified in terms of the protection of human health or the environment.

**Recommendation No. 81**

**Replace the words in section 84(4) "Governor in Council publishes" with words "Minister publishes."**

## **Sections 90-94** - Regulation of Toxic Substances

### **OVERVIEW**

The addition of toxic substances to the TSL is still at the discretion of the Governor in Council (section 90).

Proposed prevention or control actions for non-VE toxic substances are to be published two years after the recommendation for their addition to the TSL (section 91(1)). There must be consideration of social, economic and technical matters in relation to VE substances (section 91(5)).

Proposed regulations or instruments are to be made 18 months after publication of the proposal, unless a "material substantive change" is to be made to the proposal (section 92).

### **RECOMMENDATIONS ON SPECIFIC SECTIONS**

#### **Section 90(1)** - Addition of Substances to the Toxic Substances list

As currently drafted, this section leaves it to the discretion of the Ministers and the Governor in Council to add substances to the TSL when they have been found to be 'toxic' as defined by the Act.

#### **Recommendation No. 82**

**Redraft section to read as follows: "Where a substance is determined to be toxic by the Ministers, the substance shall be added to the List of Toxic Substances in Schedule 1."**

#### **Section 91(3)** - Publication of proposed regulation or instrument

#### **Recommendation No. 83**

**Replace words "the quantity or concentration" with "a quantity or concentration."**

**Section 93(4)** – Consultation with the Minister of International Trade

This section requires the Minister to consult with the Minister of International Trade before a regulation is made affecting the import or export of a substance. This effectively gives the Minister of International Trade a veto over such measures. There is no equivalent provision in the *Department of Foreign Affairs and International Trade Act* requiring the Minister of International Trade to consult with the Ministers of the Environment or Health before entering into a trade agreement affecting the environment or human health.

**Recommendation No. 84**

**Delete section 93(4).**

**Section 93(6)** – Prohibition on regulation of substances regulated through another Act of Parliament

This provision prohibits the Governor in Council from making regulations under Section 93 (1) regulating “an aspect of the substances that is regulated by or under another Act of Parliament.” This section makes no reference to consideration of the adequacy of the protection of human health or the environment provided for under the other Act of Parliament.

**Recommendation No. 85**

**Delete section 93(6)**

**or**

**Replace with “The Governor in Council may make a regulation under subsection (1), regulating an aspect of an substance that is regulated by or under another Act of Parliament, where, in the opinion of the Governor in Council, it is necessary to do so protect human health or the environment.”**

**Sections 95-99** - Release of Toxic Substances

**OVERVIEW**

These sections provide whistle-blower protection for federal employees in federally regulated workplaces (section 96(4)).

**Section 96(3)** - Requirement for confidentiality

**Recommendation No. 86**

**Add after words "...human health or the environment."  
"In the event of a conflict between a regulation made  
under this Act, and a regulation made under another act  
of Parliament, the regulation made under this Act shall  
prevail."**

## PART 6 - BIOTECHNOLOGY - SECTIONS 104-115

### Bill C-32 STATES:

#### Definitions

104. The definitions in this section apply in this Part.

"living organism" means a substance that is an animate product of biotechnology.

"significant new activity" includes, in respect of a living organism, any activity that results or may result in

(a) the entry or release of the living organism into the environment in a quantity or concentration that, in the Ministers' opinion, is significantly greater than the quantity or concentration of the living organism that previously entered or was released into the environment; or

(b) the entry or release of the living organism into the environment or the exposure or potential exposure of the environment to the living organism in a manner and circumstances that, in the Ministers' opinion, are significantly different from the manner and circumstances in which the living organism previously entered or was released into the environment or of any previous exposure or potential exposure of the environment to the living organism.

#### Adding living organisms to Domestic Substances List

105. (1) The Minister shall, for the purposes of sections 74 and 106, add to the Domestic Substances List maintained under section 66 any living organism if the Minister is satisfied that, between January 1, 1984 and December 31, 1986, the living organism

(a) was manufactured in or imported into Canada by any person; and

(b) entered or was released into the environment without being subject to conditions under this or any other Act of Parliament or of the legislature of a province.

#### Amendment of List

(2) Where the Minister includes a living organism on the Domestic Substances List and subsequently learns that, between January 1, 1984 and December 31, 1986, the requirements set out in paragraphs (1)(a) and (b) were not met, the Minister shall delete the substance from the List.

#### Publication of List

(3) The Minister shall publish in the *Canada Gazette* the Domestic Substances List and any amendment to the List.

#### Designation

(4) The Minister may, by order, designate any person or class of persons to exercise the powers and perform the duties and functions set out in this section.

#### Manufacture or import of living organisms

106. (1) Where a living organism is not specified on the Domestic Substances List and subsection (2) does not apply, no person shall manufacture or import the living organism unless

(a) the prescribed information with respect to the living organism, accompanied by the prescribed fee, has been provided by that person to the Minister on or before the prescribed date; and

(b) the period for assessing the information under section 108 has expired.

#### **Transitional provision**

(2) Where a person has, between January 1, 1987 and June 30, 1994, manufactured or imported a living organism that is not specified on the Domestic Substances List, no person shall manufacture or import the living organism after June 30, 1994 unless, within 180 days after that date or on or before the prescribed date, the prescribed information has been provided to the Minister with respect to the living organism by that person.

#### **Notification of significant new activity in respect of living organism on List**

(3) Where a living organism is specified on the Domestic Substances List with an indication that this subsection applies with respect to the living organism, no person shall use, manufacture or import the living organism for a significant new activity that is indicated on the List with respect to the living organism unless

(a) the person has provided the Minister with the information, on or before the date that is specified by the Minister or prescribed, accompanied by the prescribed fee; and

(b) the period for assessing the information specified by the Minister or provided under section 108 has expired.

#### **Notification of significant new activity in respect of living organism not on List**

(4) Where a living organism is not specified on the Domestic Substances List and the Minister publishes a notice in the *Canada Gazette* indicating that this subsection applies with respect to the living organism, no person shall use the living organism for a significant new activity that is indicated in the notice unless

(a) the person has provided the Minister with the information, on or before the date that is specified by the Minister or prescribed, accompanied by the prescribed fee; and

(b) the period for assessing the information specified by the Minister or provided under section 108 has expired.

#### **Transfer of rights in respect of substance**

(5) Where prescribed information with respect to a substance has been provided under subsection (1), (2), (3) or (4) by a person who subsequently transfers the right or privilege in relation to the substance for which the information was provided, the information is, subject to any conditions that may be prescribed, deemed to have been provided by the transferee of that right or privilege.

#### **Application**

(6) Subsections (1) to (4) do not apply to

(a) a living organism that is manufactured or imported for a use that is regulated under any other Act of Parliament that provides for notice to be given before the manufacture, import or sale of the living organism and for an assessment of whether it is toxic or capable of becoming toxic;

(b) a living organism that is manufactured, used or imported under the conditions and in the circumstances prescribed as exempt from this section; or

(c) impurities and contaminants related to the preparation of a living organism.



#### **Determination as to the requirements set out in paragraph (6)(a)**

(7) For the purposes of the administration of this section, the minister responsible for the administration of another Act of Parliament referred to in paragraph (6)(a) is responsible for determining that the requirements referred to in that paragraph are met.

#### **Schedule of Acts**

(8) An Act of Parliament or any regulations listed in Schedule 4 have been determined by the minister responsible for the administration of that Act to meet the requirements referred to in paragraph (6)(a).

#### **Governor in Council power to amend Schedule 4**

(9) Where the minister responsible for the administration of another Act of Parliament referred to in paragraph (6)(a) has determined that the requirements referred to in that paragraph are met or are no longer met by or under that other Act, the Governor in Council may, on the recommendation of the responsible minister after consultation with the Minister, by order, add the name of that other Act or any regulations made under that Act to the list of Acts set out in Schedule 4 or delete the name, as the case may be.

#### **Waiver of information requirements**

(10) On the request of any person to whom subsection (1), (2), (3) or (4) applies, the Minister may waive any of the requirements to provide information under that subsection if

(a) in the opinion of the Ministers, the information is not needed in order to determine whether the living organism is toxic or capable of becoming toxic;

(b) a living organism is to be used for a prescribed purpose or manufactured at a location where, in the opinion of the Ministers, the person requesting the waiver is able to contain the living organism so as to satisfactorily protect the environment and human health; or

(c) it is not, in the opinion of the Ministers, practicable or feasible to obtain the test data necessary to generate the information.

#### **Publication of notice of waiver**

(11) The Minister shall publish in the *Canada Gazette* a notice stating the name of any person to whom a waiver is granted and the type of information to which it relates.

#### **Compliance with waiver**

(12) Where the Minister waives any of the requirements for information under paragraph (10)(b), the person to whom the waiver is granted shall not use, manufacture or import the living organism unless it is for the purpose prescribed by regulations made under paragraph 114(1)(f) or at the location specified in the request for the waiver, as the case may be.

#### **Correction of information**

(13) A person who has provided information under this section, including for the purposes of a request for a waiver under subsection (10), or under section 107 or 109 shall notify the Minister of any corrections to the information as soon as possible after learning of them.

#### **Request for information previously waived**

(14) Where the Minister is notified of any corrections to information that was provided for the purposes of a request for a waiver under subsection (10), the Minister may, after consideration by the Ministers of those

corrections, require the person to whom the waiver was granted to provide the Minister with the information to which the waiver related within the time specified by the Minister.

#### **Application of section 109**

(15) Where the Ministers suspect, after considering the information provided under subsection (14), that a living organism is toxic or capable of becoming toxic, the Minister may exercise any of the powers referred to in paragraphs 109(1)(a) to (c).

#### **Prohibition of activity**

**107. (1) Where the Minister has reasonable grounds to believe that a person has used, manufactured or imported a living organism in contravention of subsection 106(1), (3) or (4), the Minister may, in writing, require the person to provide the information referred to in that subsection and prohibit any activity involving the living organism until the expiry of the period for assessing the information under section 108.**

#### **Prohibition of activity**

(2) Where the Minister has reasonable grounds to believe that a person has manufactured or imported a living organism in contravention of subsection 106(2), the Minister may, in writing, prohibit any activity involving the living organism until the prescribed information is provided to the Minister.

#### **Waiver of information requirements**

(3) On the request of any person required under subsection (1) or (2) to provide information, the Minister may waive any of the requirements for prescribed information if one of the conditions specified in paragraphs 106(10)(a) to (c) is met and, in that case, subsections 106(11) to (15) apply with respect to the waiver.

#### **Assessment of information**

**108. (1) Subject to subsection (4), the Ministers shall, within the prescribed assessment period, assess information provided under subsection 106(1), (3) or (4) or paragraph 109(1)(c) or otherwise available to them in respect of a living organism in order to determine whether it is toxic or capable of becoming toxic.**

#### **Assessment of information**

(2) Subject to subsections (3) and (4), the Ministers shall assess information provided under subsection 107(1) or otherwise available to them in respect of a living organism in order to determine whether it is toxic or capable of becoming toxic.

#### **Time for assessment**

(3) An assessment of information under subsection (2) shall be made following the date on which the information is provided within a period that does not exceed the number of days in the prescribed assessment period.

#### **Extension of assessment period**

(4) Where the Ministers are of the opinion that further time is necessary to assess any information, the Minister may, before the expiry of the assessment period referred to in subsection (1) or (3), extend the period for assessing the information, but the extension shall not exceed the number of days in the prescribed assessment period.

#### **Notification of extension**

(5) Where the Minister extends the period for assessing information, the Minister shall, before the expiry of the assessment period referred to in subsection (1) or (3), notify the person who provided the information.

### **Termination of period**

(6) The Minister may, before the expiry of the assessment period referred to in subsection (1) or (3), terminate the period for assessing information and, immediately before doing so, shall notify the person who provided the information.

### **Action to be taken after assessment**

**109. (1) Where the Ministers have assessed any information under section 108 and they suspect that a living organism is toxic or capable of becoming toxic, the Minister may, before the expiry of the period for assessing the information,**

- (a) permit any person to manufacture or import the living organism, subject to any conditions that the Ministers may specify;
- (b) prohibit any person from manufacturing or importing the living organism; or
- (c) request any person to provide any additional information or submit the results of any testing that the Ministers consider necessary for the purpose of assessing whether the living organism is toxic or capable of becoming toxic.

### **Additional information or testing**

(2) Where the Minister requests additional information or test results under paragraph (1)(c), the person to whom the request is directed shall not manufacture or import the living organism unless

- (a) the person provides the additional information or submits the test results; and
- (b) the period for assessing information under section 108 has expired or a period of 120 days after the additional information or test results were provided has expired, whichever is later.

### **Variation of conditions and prohibitions**

(3) The Minister may vary or rescind a condition or prohibition specified or imposed under paragraph (1)(a) or (b).

### **Expiry of prohibition**

(4) Any prohibition on the manufacture or import of a living organism imposed under paragraph (1)(b) expires two years after it is imposed unless, before the expiry of the two years, the Governor in Council publishes in the *Canada Gazette* a notice of proposed regulations under section 114 in respect of the living organism, in which case the prohibition expires on the day the regulations come into force.

### **Publication of conditions and prohibitions**

(5) Where the Minister specifies, imposes, varies or rescinds any condition for or prohibition on the manufacture or import of a living organism, the Minister shall publish in the *Canada Gazette* a notice setting out the condition or prohibition and the living organism in respect of which it applies.

### **Significant new activity**

**110. (1) Where the Ministers have assessed any information under section 108 in respect of a living organism that is not on the Domestic Substances List and they suspect that a significant new activity in relation to that living organism may result in the living organism becoming toxic, the Minister may, before the expiry of the period for assessing the information, publish in the *Canada Gazette* and in any other manner that the Minister considers appropriate a notice indicating that subsection 106(4) applies with respect to the living organism.**

### **Variation or revocation**

(2) The Minister may, by notice published in the *Canada Gazette*, vary the significant new activities in relation to a living organism in respect of which a notice has been given under subsection (1) or indicate that subsection 106(4) no longer applies with respect to that living organism.

### **Contents of notice**

(3) A notice referred to in subsection (1) or (2) shall indicate, by inclusion or exclusion, the significant new activities in relation to the living organism in respect of which subsection 106(4) is to apply, and where regulations in respect of those significant new activities are not made under paragraphs 114(1)(c), (d) and (g), specify the information to be provided to the Minister under that subsection, the date on or before which it is to be provided and the period within which it is to be assessed under section 108.

### **Notification of persons required to comply**

**111. Where a notice is published in the *Canada Gazette* under subsection 110(1) in respect of a living organism, every person who transfers the physical possession or control of the living organism shall notify all persons to whom the possession or control is transferred of the obligation to comply with subsection 106(4).**

### **Amendment of List**

**112. (1) The Minister shall add a living organism to the Domestic Substances List within 120 days after the following conditions are met:**

- (a) the Minister has been provided with information in respect of the living organism under section 106 or 107 and any additional information or test results required under subsection 109(1);
- (b) the Ministers are satisfied that the living organism has been manufactured in or imported into Canada by the person who provided the information prescribed for the purpose of this paragraph;
- (c) the period for assessing the information under section 108 has expired; and
- (d) no conditions specified under paragraph 109(1)(a) in respect of the living organism remain in effect.

### **Amendment of List**

(2) Where the Minister adds a living organism to the Domestic Substances List and subsequently learns that the living organism was not manufactured or imported as described in subsection (1), the Minister shall delete the living organism from the List.

### **Significant new activity**

(3) Where a living organism is on the Domestic Substances List or is to be added to the List under subsection (1), the Minister may amend the List in respect of the living organism to indicate that subsection 106(3) applies with respect to the living organism or that it no longer applies or by varying the significant new activities in relation to the living organism in respect of which subsection 106(3) is to apply.

### **Contents of amendment**

(4) An amendment referred to in subsection (3) shall indicate, by inclusion or exclusion, the significant new activities in relation to the living organism in respect of which subsection 106(3) is to apply, and where regulations in respect of those significant new activities are not made under paragraphs 114(1)(c), (d) and (g), specify the information to be provided to the Minister under that subsection, the date on or before which it is to be provided and the period within which it is to be assessed under section 108.

## Publication of masked name

113. Where the publication under this Part of the explicit biological name of a living organism would result in the release of confidential business information in contravention of section 314, the living organism shall be identified by a name determined in the prescribed manner.

## Regulations

114. (1) The Governor in Council may, on the recommendation of the Ministers, make regulations

- (a) defining living organisms or establishing groups of living organisms for the purposes of the provision of information under section 106 or 107, including those that are exotic or indigenous, research and development living organisms and living organisms manufactured only for export, and designating ecozones or groups of ecozones;
- (b) prescribing conditions and circumstances for the purpose of paragraph 106(6)(b);
- (c) prescribing the information that shall be provided to the Minister under subsection 106(1), (2), (3) or (4) or section 107 and the form and manner in which it is to be provided;
- (d) prescribing dates on or before which information shall be provided under subsection 106(1), (2), (3) or (4);
- (e) respecting the maintenance of books and records for the administration of any regulation made under this section;
- (f) prescribing the purpose for which a living organism must be used so as to permit the waiver of information requirements under subsection 106(10);
- (g) prescribing periods within which the Ministers shall assess information under subsection 108(1);
- (h) respecting the conditions, test procedures and laboratory practices to be followed in developing test data on a living organism in order to comply with the information requirements of section 106 or 107 or requests for information under paragraph 109(1)(c);
- (i) prescribing information for the purpose of paragraph 112(1)(b);
- (j) prescribing the manner of determining a name for a living organism for the purpose of section 113; and
- (k) generally for carrying out the purposes and provisions of this Part.

## Prescribed assessment period

(2) For the purposes of sections 106 and 108, where no assessment period is prescribed or specified with respect to a living organism, the prescribed assessment period is 120 days after the Minister is provided with the prescribed information.

## Prescription of conditions and circumstances

3) Regulations made under paragraph (1)(b) may prescribe conditions and circumstances in respect of a living organism in terms of

- (a) whether or not the living organism is a member of a group of living organisms established by regulations made under paragraph (1)(a); or
- (b) the purposes for which the living organism is manufactured or imported.

### **Prescription of information and assessment periods**

(4) Regulations made under paragraph (1)(c), (d) or (g) may prescribe information, dates or periods in respect of a living organism in terms of

(a) whether or not the living organism is a member of a group of living organisms established by regulations made under paragraph (1)(a);

(b) the purposes for which the living organism is manufactured or imported; or

(c) the conditions under which and the circumstances in which the living organism is manufactured or imported.

### **Other regulations**

**115. (1) Subject to subsection (2), the Governor in Council may, on the recommendation of the Ministers, make regulations**

(a) for the purposes of implementing an international agreement,

(i) respecting living organisms, whether or not they are on the Domestic Substances List,

(ii) respecting the safety of the environment or human health, including, but not limited to, the safe transfer, handling and uses of any living organism that is moved across a boundary; and

(b) respecting the effective and safe use of living organisms in pollution prevention.

### **Living organisms regulated under other Acts of Parliament**

(2) The Governor in Council shall not make a regulation under subsection (1) in respect of any living organism if, in the opinion of the Governor in Council, the regulation regulates an aspect of the living organism that is regulated by or under any other Act of Parliament.

## **OVERVIEW**

Bill C-32 includes a new Part for biotechnology. However, the Part as drafted, suffers from a number of weaknesses.

The most important of these flaws is that it would permit other Ministers to determine that their regulations meet CEPA equivalency requirements established by the existing section 26(3)(a) of CEPA for biotechnology products such as plants and fish, regulated under other Acts. As currently drafted, CEPA requires that any new product of biotechnology regulated under another Act of Parliament undergo an assessment of its potential effects on human health and the environment that is at least equivalent to that which would take place under CEPA. The proposed provisions in Bill C-32 would weaken this equivalency requirement.

Moreover, once granted by the Governor in Council, equivalency could only be withdrawn on the recommendation of the Minister responsible for the administration of the other Act of Parliament under which the "equivalent" regulations were made. This is

regardless of whether changes are made subsequently to the 'equivalent' regulation such that it is no longer equivalent to the CEPA standard.

In addition, orders by the Governor in Council regarding the equivalency to the CEPA requirements of regulations made under other Acts of Parliament are exempted from the Act's normal public notice and comment provisions or the opportunity to file a notice of objection. (section 332)

The Part also provides that regulations made under other Acts of Parliament take precedence over regulations made under CEPA Biotechnology Part.

The proposed Biotechnology Part, suffers from a number of other weaknesses as well. As drafted, the Part would only apply to "living organisms" defined as "animate products of biotechnology." This is a narrower category than the current biotechnology provisions on CEPA, which are applied on the basis of the definition of "biotechnology" in the Act. The scope of the existing provisions includes the direct or indirect use of living organisms "or parts or products of living organisms in the natural or modified forms."

The approach contained in Bill C-32 invites endless debates about what constitutes a "living organism" or an "animate" product of biotechnology and leaves the situation of important categories, such as viruses, prions, DNA fragments, and certain types of feeds and foods, unclear. No legal definition of the term "living organism" appears to exist.

The Part makes no provision for public notice of field tests, imposition variation or withdrawal of conditions or prohibitions on biotechnology products found to be 'toxic' or suspected of being toxic, or the granting of waivers which effectively exempt certain products from the Act's notification and assessment requirements.

Finally, the part fails to address requirements of article 8(g) of the *Convention on Biological Diversity* (CBD), which requires the protection of "conservation and sustainable use of biodiversity" from the use and release of biotechnology products. The current definition of CEPA "toxic" on which the Part, as currently drafted relies, makes no direct reference to the conservation and sustainable use of biological diversity. Given the Supreme Court of Canada's September 1997 *Hydro Quebec* decision, serious doubts must be raised about the capacity of the existing definition of CEPA "toxic" to accommodate consideration of impacts on the conservation and sustainable use of biological diversity.

Section 115 provides authority to implement the Advances Informed Agreement (AIA) and other provisions of the proposed Protocol on Biosafety under the United Nations (U.N.) *Convention on Biological Diversity*. However, section 115(2) states that

regulations cannot be made using this authority with respect to an aspect of the organism that is regulated under or by any other Act of Parliament.

## KEY POINTS

- The Part should apply to all products of biotechnology, as defined by CEPA, not just "living organisms." All references to "living organism" in Part 6 of the Bill should be replaced with the words "biotechnology product" or "product of biotechnology."
- A definition of CEPA 'toxic' specific to biotechnology should be provided for in the Part, making specific reference to the "conservation and sustainable use of biodiversity."
- The existing provisions of CEPA regarding equivalency of notification and assessment of toxicity under other Acts of Parliament should be restored and strengthened.
- Provision should be made for public notice and comment periods for field tests, variations of conditions or prohibitions, and the granting of waivers from notification and information requirements.

## GENERAL RECOMMENDATION TO PART 6

### Recommendation No. 87

**All references to "living organism" in Part 6 of the Bill should be replaced with the words "biotechnology product" or "product of biotechnology."**

## RECOMMENDATIONS ON SPECIFIC SECTIONS

### **Section 104** - Definitions

The addition of a new definition of 'toxic' for the purposes of Part 6 in the Act is required to comply with the requirements of Article (8)(g) of the *Convention on Biological Diversity* (CBD). It is, in the view of CIELAP and CELA, extremely doubtful in light of PSL I "toxicity" assessments, and the *Hydro-Quebec* case that reference to impacts on the conservation and sustainable use of biological diversity can be accommodated



within existing definition of 'toxic' contained in section 11 of the existing Act and section 65 of Bill C-32.

**Recommendation No. 88**

**A new definition of 'toxic' should be added for the purposes of Part 6 of Bill C-32. It should read as follows:**

**"For the purposes of this part, a substance is toxic if it is entering or may enter the environment under conditions:**

**(a) having or that may have an immediate or long-term harmful effect on the environment;**

**(b) constituting or that may constitute a danger to the environment on which human life depends;**

**(c) constituting or that may constitute a danger in Canada to human life or health; or**

**(d) having or may have an immediate or long-term harmful effect on the conservation and sustainable use of biological diversity."**

**A conditional amendment is also required to delete words "and Part VI" from section 65.**

**Section 106(6)(a) - Manufacture or Import of Living Organisms - Application**

This section establishes the CEPA equivalency requirement for biotechnology products regulated under other Acts of Parliament contained in section 26(3)(a) of the existing Act.

**Section 106(6)(b)**

This section, as drafted, would permit exemptions from the notification and assessment requirements for any biotechnology product used or imported under conditions and circumstances prescribed as exempt by the Governor in Council. There are no

limitations on the scope of potential exemptions provided through this section. There is no equivalent section in the existing Act.

**Recommendation No. 89**

**Delete subsection 106(6)(b).**

**Section 106((6)(c) - Exemptions**

This section exempts from the notification and assessment requirements impurities or contaminants related to the preparation of a biotechnology product. Impurities or contaminants of these nature may be intrinsic to the preparation of the product, and may be of significance from an environmental or human health perspective and therefore should be included in the product assessment.

**Recommendation No. 90**

**Delete subsection 106(6)(c)**

**or**

**Add phrase: "provided that such impurities and contaminants are considered in the assessment of toxicity made under section 108."**

**Sections 106(7)-(9) - Determination for Listing on Schedule VI - Schedule of Acts - Governor in Council Power to Amend Schedule**

These sections would permit other Ministers to determine that their regulations meet CEPA equivalency requirements established by the existing section 26(3)(a) of CEPA for biotechnology products such as plants and fish, regulated under other Acts. As currently drafted, CEPA requires that any new product of biotechnology regulated under another Act of Parliament undergo an assessment of its potential effects on human health and the environment that is at least equivalent to that which would take place under CEPA. The proposed provisions in Bill C-32 would weaken this equivalence requirement.

Moreover, once granted by the Governor-in-Council, equivalency could only be withdrawn on recommendation of the Minister responsible for the administration of the other Act of Parliament under which the "equivalent" regulations were made. This is

regardless of whether changes are made subsequently to the 'equivalent' regulation such that it is no longer equivalent to the CEPA standard.

In addition, orders by the Governor in Council regarding the equivalency to the CEPA requirements of regulations made under other Acts of Parliament are exempted from the Act's normal public notice and comment provisions or the opportunity to file a notice of objection. (section 332)

### **Recommendation No. 91**

#### **OPTION 1**

**Delete sections 106(6)-(9).**

**Delete reference to section 106(9) in section 332(1), and delete all of section 332(4).**

Under this option, all biotechnology products would fall under CEPA. This would be consistent with the CEN Biotechnology Caucus Recommendation in the March 1996 document For Whose Future?.

#### **OPTION 2**

**Delete sections 106(7)-(9).**

**Delete reference to section 106(9) in section 332(1), and delete all of section 332(4).**

This option will restore the status quo regarding requirements for CEPA equivalency for products regulated under other Acts of Parliament.

### **Section 106(10) - Waivers of Information Requirements**

This section permits the Minister to grant 'waivers' from any requirements of the notification and assessment process without public notice or opportunities to file comments or notices of objection.

## **Recommendation No. 92**

**Add words "by order" after the words "the Minister may."**

The addition of the words "by order" triggers public notice and comment process under section 332 of the Bill.

### **Section 106(10)(b)** - Waivers for contained uses

This section permits the Minister to waive the notification and assessment requirements for biotechnology products where the proponent is "able to contain the substance so as to satisfactorily protect the environment or human health." These proposed grounds for waivers cannot be supported, given the risk of spills or other accidental releases of products from "contained" facilities.

Notification and assessment for contained uses of biotechnology products is provided for in Schedule XVI of the *Biotechnology New Substance Notification Regulations* made under CEPA which came into force in September 1997.

## **Recommendation No. 93**

**Delete subsection 106(10)(b).**

### **Section 106(11)** - Publication of Notice of Waiver

This section as drafted only requires the publication of the granting of waivers and the information to which they apply.

## **Recommendation No. 94**

**Reword section 106(11) as follows: "The Minister shall publish in the *Canada Gazette* a notice stating the name of any person to whom a waiver is granted, the type of information to which it relates and the reasons for its being granted. The notice shall include a report summarizing how any comments or notices of objection were dealt with and where a Board of Review has been established in response to a request filed under (b), no waiver may be granted until the report of the Board is made available to the public."**

**Section 106(12)** - Compliance with Waiver

This section deals with waivers granted as a result of 'contained' uses of biotechnology products under subsection 106(10)(b).

**Recommendation No. 95**

**Delete as a consequence of the deletion of subsection 106(10)(b).**

**Section 107(3)** - Waiver of Information Requirements

This section requires amendment as a consequence of the deletion of paragraph 106(10)(b). The words "by order" should also be added to the Minister's power to grant waivers. This will trigger public notice and comment requirements under section 332.

**Recommendation No. 96**

**Add words "by order" after the words "the Minister may."**

**The reference to "conditions specified in paragraphs 106(10)(a) to (c)" should be modified to reflect the deletion of paragraph 106(10)(b).**

**Section 109(3)** - Variation of Conditions and Prohibitions

This section, as drafted, permits the Minister to vary or rescind, without public notice, any condition or prohibition specified or imposed on a biotechnology product that is toxic or suspected of being toxic.

**Recommendation No. 97**

**Add words "by order" after the words, "the Minister may."**

The addition of the words "by order" will trigger the public notice and comment process under section 332.

**Section 109(4)** - Expiration of Prohibitions

As drafted, this section requires that prohibitions on the import or manufacture of a biotechnology product that is toxic or suspected of being toxic expire two years after they are made unless a notice of a proposed regulation under section 93 is published in the *Canada Gazette* by the Governor in Council. This may provide economic departments with a means of vetoing the extension of a prohibition even where it is justified in terms of the protection of human health or the environment.

**Recommendation No. 98**

**Replace words: "the Governor in Council publishes in the *Canada Gazette*" with words "the Minister publishes in the *Canada Gazette*."**

**Section 109(6)**

This would be a new paragraph allowing the variation of a condition or prohibition without public notice to deal with emergencies.

**Recommendation No. 99**

**Add new paragraph: "The Minister may vary a condition or prohibition specified or imposed under paragraph 1(a) or (b) and publish a notice in the *Canada Gazette* setting out the condition or prohibition and the product of biotechnology in respect of which it applies before the end of the 60 day period referred to in section 332(2) where the Minister believes it is necessary to do so to protect the environment or human health or life from actual or imminent harm."**

**Section 114** - Regulations

If the definition of toxic is changed for the purposes of this Part, there may be a need to amend sections 90, 93(1) and (2).

Section 115 provides authority to implement the Advanced Informed Agreement (AIA) and other provisions of the proposed Protocol on Biosafety under the United Nations Convention on Biological Diversity. However, regulations cannot be made using this

authority with respect to an aspect of the organism that is regulated under any other Act of Parliament.

**Section 115** - Other regulations

Section 115 provides authority to implement the AIA and other provisions of the proposed Protocol on Biosafety under the U.N. *Convention on Biological Diversity*. However, section 115(2) states that regulations cannot be made using this authority with respect to an aspect of the organism that is regulated under or by any other Act of Parliament.

**Recommendation No. 100**

**Delete subsection 115(2)**

**or**

**Replace with: "Where the Governor in Council makes a regulation under subsection (1), this regulation shall apply, even where it regulates an aspect of a product of biotechnology that is regulated by or under any other Act of Parliament."**

The proposed Biosafety Protocol is likely to establish a requirement for the explicit consent of the Party of Import of a "living modified organism" (LMO) before such an import can take place. As biotechnology provisions of CEPA and Bill C-32 operate on a system of implicit consent, this will require further amendments to Part 6 of the new Act, to establish a system of explicit consent for the import of LMOs into Canada.

The Protocol may also establish requirements that Parties of export of LMO's make provision in their domestic law that exports be prohibited unless the exporter has received the explicit consent of the Party of Import. This again would require amendments to CEPA or Part 6 of Bill C-32.

## **PART 7 - CONTROLLING POLLUTION AND MANAGING WASTE - SECTIONS 116-193**

This Part is composed of a number of divisions related to several aspects of pollution and waste management.

### **DIVISION 1- NUTRIENTS - SECTIONS 116-119**

#### **Bill C-32 STATES:**

**116. The definitions in this section apply in this Division and in Part 10.**

"cleaning product" means a phosphate compound or other substance that is intended to be used for cleaning purposes, and includes laundry detergents, dish-washing compounds, metal cleaners, de-greasing compounds and household, commercial and industrial cleaners.

"nutrient" means a substance or combination of substances that, if released in any waters, provides nourishment that promotes the growth of aquatic vegetation.

"water conditioner" means a substance that is intended to be used to treat water, and includes water-softening chemicals, anti-scale chemicals and corrosion inhibitors.

#### **Prohibition**

**117. No person shall manufacture for use or sale in Canada or import a cleaning product or water conditioner that contains a prescribed nutrient in a concentration greater than the permissible concentration prescribed for that product.**

#### **Regulations**

**118. The Governor in Council may, on the recommendation of the Minister, make regulations for the purpose of preventing or reducing the growth of aquatic vegetation that is caused by the release of nutrients in waters and that can interfere with the functioning of an ecosystem or degrade or alter, or form part of a process of degrading or altering, an ecosystem to an extent that is detrimental to its use by humans, animals or plants, including regulations**

(a) prescribing nutrients;

(b) prescribing the permissible concentration of a prescribed nutrient in a cleaning product or water conditioner;

(c) respecting the conditions, test procedures and laboratory practices to be followed for analysing, testing, measuring or monitoring a nutrient, cleaning product or water conditioner; and

(d) requiring persons who manufacture for use or sale in Canada or import a cleaning product or water conditioner

(i) to maintain books and records for the proper administration of this Division and the regulations,

(ii) to submit samples of the cleaning product or water conditioner to the Minister, and

(iii) to submit to either Minister information regarding cleaning products, water conditioners and their ingredients.



## Remedial measures

119. (1) Where there is a contravention of section 117 or the regulations, the Minister may, in writing, direct a manufacturer or importer of a nutrient, cleaning product or water conditioner to take any or all of the following measures in the manner and within the period directed by the Minister:

- (a) give public notice of the contravention and of any danger to the environment or to human life or health posed by the nutrient, cleaning product or water conditioner;
- (b) mail a notice as described in paragraph (a) to manufacturers, processors, distributors or retailers of the nutrient, cleaning product or water conditioner;
- (c) mail a notice as described in paragraph (a) to persons to whom the nutrient, cleaning product or water conditioner is known to have been delivered or sold;
- (d) replace the nutrient, cleaning product or water conditioner with one that meets the applicable requirements;
- (e) accept the return of the nutrient, cleaning product or water conditioner from the purchaser and refund the purchase price;
- (f) take other measures for the protection of the environment or human life or health; and
- (g) report to the Minister on the steps taken in satisfaction of any direction under paragraphs (a) to (f).

## Intervention of Minister

(2) If a person fails to take any measures required under paragraph (1)(a), (b), (c) or (f), the Minister may take those measures or cause them to be taken.

## Recovery of costs

(3) Her Majesty in right of Canada may recover the costs and expenses of and incidental to taking any measures under subsection (2) from the person referred to in that subsection.

## OVERVIEW

These provisions are a definite improvement over the current status of CEPA. These provisions expand the power to control nutrients other than phosphorous.

Excess amounts of nutrients entering water sources are harmful and interfere with human, animal, fish, and plant activities. Too many nutrients in water cause excess growth of algae and weeds.

Under the present CEPA, the federal government can regulate nutrients, specifically phosphates in laundry detergent. A change to the definition of nutrient is, however, definitely supported. Nevertheless, there should be provisions which authorize the government to regulate other nutrients besides phosphates in laundry detergent. For example phosphates in cleaning products such as dish soap, or other nutrients such as water softeners and fertilizers.

## **GENERAL RECOMMENDATIONS TO DIVISION 1**

### **Recommendation No. 101**

**The wording changes to the definition of nutrient are supported and should be implemented.**

**The federal government should undertake a study of nutrient sources and should subsequently, and within good time, regulate other nutrients besides phosphates in laundry detergent.**

## **RECOMMENDATION ON SPECIFIC SECTION**

### **Section 116 - Definition**

#### **Recommendation No. 102**

**Replace words “cleaning product” and “water condition” with term “substance.”**

## DIVISION 2 - PROTECTION OF MARINE ENVIRONMENT FROM LAND BASED SOURCES OF POLLUTION - SECTIONS 120-121

### Bill C-32 STATES:

120. The definitions in this section apply in this Division.

"land-based sources" means point and diffuse sources on land from which substances or energy reach the sea by water, through the air or directly from the coast. It includes any sources under the sea bed made accessible from land by tunnel, pipeline or other means.

"marine pollution" means the introduction by humans, directly or indirectly, of substances or energy into the sea that results, or is likely to result, in

- (a) hazards to human health;
- (b) harm to living resources or marine ecosystems;
- (c) damage to amenities; or
- (d) interference with other legitimate uses of the sea.

### Objectives, guidelines and codes of practice

121. (1) The Minister may, after consultation with any other affected minister, issue environmental objectives, release guidelines and codes of practice to prevent and reduce marine pollution from land-based sources.

### Consultation and conferences

(2) To carry out the functions set out in subsection (1), the Minister

(a) shall offer to consult with the government of a province and the members of the Committee who are representatives of aboriginal governments and may consult with any government department or agency or any person interested in the protection of the sea;

(b) may organize conferences relating to the prevention or reduction of marine pollution from land-based sources; and

(c) may meet with the representatives of international organizations and agencies and other countries to examine the rules, standards, practices and procedures recommended under the *United Nations Convention on the Law of the Sea*, signed by Canada on October 7, 1982.

## OVERVIEW

The provisions in this Division allow the government to issue objectives and guidelines and are a welcome addition to CEPA, since land-based sources constitute up to 80% of Marine pollution.<sup>14</sup> This Division also recognizes the obligations that the 1995 Washington Declaration on Protection of the Marine Environment Against Pollution from Land Based Sources imposes on Canada. This Declaration was the result of a meeting of many of the Parties to the 1982 United Nations Convention on the Law of the Sea

(UNCLOS) and elaborated on in the UNCLOS provisions related to land-based sources of marine pollution. As stated in It's Still About Our Health!, the best means of eliminating these sources of marine pollution is by improving Canada's regulation of toxics, and reducing overall land-based pollution. While Part 7, Division 2, is a start in the right direction, it is far too weak to achieve meaningful reductions in the level of marine pollution, and the Division does not add to the commitments that Canada has already assumed under UNCLOS and the Washington Declaration.

## RECOMMENDATIONS ON SPECIFIC SECTIONS

### Section 121 (1) - Objectives, guidelines and codes of practice

The main weakness is section 121(1) which allows, but does not require, the Minister to issue environmental objectives and release guidelines and codes of practice to prevent and reduce land-based sources of marine pollution. The voluntary approach as stated in section 121(1) is, unfortunately, non-binding. Voluntary approaches cannot be enforced. Currently there are no provisions for the establishment of regulations or other legally binding instruments to control land-based sources of marine pollution. The preferable approach is to allow for the creation of regulations to prevent and reduce these pollution sources. Regulations have the advantages of legal certainty, enforceability, and proven capability to change behaviour.

#### **Recommendation No. 103**

**Section 121 should be amended to allow for the creation of regulations, or the establishment of other binding instruments to prevent and reduce land-based sources of marine pollution.**

### Section 121(2) - Consultations and conferences

According to 121(2), the Minister **MUST** consult the provinces before issuing environmental objectives, release guidelines and codes of practice to prevent and reduce marine pollution from land-based sources. The requirement that provinces must be consulted is new, and it is argued, unnecessary. Federal-provincial cooperation should be furthered, but, the way the section now reads infers some type of condition precedent to federal action, irrespective of the circumstances.

**Recommendation No. 104**

**Delete or modify discretionary language. Replace word "shall" with "may."**

## DIVISION 3 - DISPOSAL AT SEA - SECTIONS 122-137

### Bill C-32 STATES:

**122. (1) The definitions in this subsection apply in this Division and in Part 10.**

"aircraft" means a machine that is used or designed for navigation in the air, but does not include an air cushion vehicle.

"Canadian aircraft" means an aircraft that is registered under an Act of Parliament.

"Canadian permit" means a permit that is issued under subsection 127(1) or 128(2).

"Canadian ship" means a ship that is registered under an Act of Parliament.

"condition" means, in respect of a permit, any term or condition of the permit.

"contracting party" means a state that is a contracting party to the Convention or the Protocol.

"Convention" means the *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* signed by Canada on December 29, 1972, as amended from time to time.

"disposal" means

- (a) the deliberate disposal of a substance at sea from a ship, an aircraft, a platform or another structure,
- (b) the deliberate disposal of dredged material into the sea from any source not mentioned in paragraph (a),
- (c) the storage on the seabed, in the subsoil of the seabed or on the ice in any area of the sea of a substance that comes from a ship, an aircraft, a platform or another structure,
- (d) the disposal of a substance by placing it on the ice in an area of the sea,
- (e) the deliberate disposal at sea of a ship or aircraft, and
- (f) the deliberate disposal or abandonment at sea of a platform or another structure,

but does not include

- (g) a disposal that is incidental to or derived from the normal operations of a ship, an aircraft, a platform or another structure or of any equipment on a ship, an aircraft, a platform or another structure, other than the disposal of substances from a ship, an aircraft, a platform or another structure operated for the purpose of disposing of such substances at sea,
- (h) the placement of a substance for a purpose other than its mere disposal if the placement is not contrary to the purposes of this Division and the aims of the Convention or the Protocol,
- (i) the abandonment of any matter, such as a cable, pipeline or research device, placed on the seabed or in the subsoil of the seabed for a purpose other than its mere disposal, or
- (j) a discharge or storage directly arising from, or directly related to, the exploration for, exploitation of and associated off-shore processing of seabed mineral resources.

"incineration" means the deliberate combustion of a substance on board a ship, a platform or another structure at sea for the purpose of its thermal destruction.

"master" includes every person who has command or charge of a ship but does not include a pilot.

"owner", in relation to any ship, aircraft, platform or other structure, includes the person who has the possession or use, by law or contract, of the ship, aircraft, platform or other structure.

"Protocol" means the *1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972*, as amended from time to time.

"ship" includes a vessel, boat or craft designed, used or capable of being used solely or partly for marine navigation, without regard to its method or lack of propulsion, and includes an air cushion vehicle.

"structure" means a structure that is made by a person.

"waste or other matter" means waste or other matter listed in Schedule 5.

#### **Definition of "sea"**

(2) In this Division and in Part 10, "sea" means

(a) the territorial sea of Canada;

(b) the internal waters of Canada, excluding all the rivers, lakes and other fresh waters in Canada and the St. Lawrence River as far seaward as the straight lines drawn

(i) from Cap-des-Rosiers to the western-most point of Anticosti Island, and

(ii) from Anticosti Island to the north shore of the St. Lawrence River along the meridian of longitude sixty-three degrees west;

(c) any exclusive economic zone that may be created by Canada;

(d) the arctic waters within the meaning of section 2 of the *Arctic Waters Pollution Prevention Act*;

(e) an area of the sea adjacent to the areas referred to in paragraphs (a) to (d) that is specified under paragraph 135(1)(g);

(f) an area of the sea under the jurisdiction of a foreign state, other than its internal waters; and

(g) an area of the sea, other than the internal waters of a foreign state, not included in the areas of the sea referred to in paragraphs (a) to (f).

#### **Prohibitions**

##### **Imports for disposal in waters under Canadian jurisdiction**

123. (1) No person shall import a substance for disposal in an area of the sea referred to in any of paragraphs 122(2)(a) to (e).

##### **Export for disposal in waters under foreign jurisdiction**

(2) No person shall export a substance for disposal in an area of the sea under the jurisdiction of a foreign state or its internal waters.

##### **Loading in Canada for disposal at sea**

124. (1) No person shall, in Canada, load a substance onto any ship, aircraft, platform or other structure for the purpose of disposal in an area of the sea referred to in any of paragraphs 122(2)(a) to (e) and (g) unless

- (a) the substance is waste or other matter; and
- (b) the loading is done in accordance with a Canadian permit.

**Responsibility of master and pilot in Canada**

(2) The master of a ship or pilot in command of an aircraft shall not permit a substance to be loaded onto their ship or aircraft in Canada for the purpose of disposal in an area of the sea referred to in any of paragraphs 122(2)(a) to (e) and (g) unless

- (a) the substance is waste or other matter; and
- (b) the loading is done in accordance with a Canadian permit.

**Responsibility of master and pilot outside Canada**

(3) The master of a Canadian ship or pilot in command of a Canadian aircraft shall not permit a substance to be loaded onto their ship or aircraft outside Canada for the purpose of disposal at sea.

**Exception**

- (4) Subsection (3) does not apply where
- (a) the substance is waste or other matter;
  - (b) the disposal occurs in an area of the sea referred to in paragraph 122(2)(g) or in an area of the sea that is under the jurisdiction of the foreign state where the substance is loaded;
  - (c) if the disposal occurs in an area of the sea referred to in paragraph 122(2)(g) and the loading occurs in the territory of a foreign state that is a contracting party, the loading and disposal are done in accordance with a permit issued under the Convention or the Protocol by that state;
  - (d) if the disposal occurs in an area of the sea referred to in paragraph 122(2)(g) and the loading occurs in the territory of a foreign state that is not a contracting party, the loading and disposal are done in accordance with a Canadian permit;
  - (e) if the disposal occurs in an area of the sea under the jurisdiction of a foreign state that is a contracting party, the loading and disposal are done in accordance with a permit issued under the Convention or the Protocol by that state; and
  - (f) if the disposal occurs in an area of the sea under the jurisdiction of a foreign state that is not a contracting party, the loading is done in accordance with a Canadian permit and the disposal is authorized by that state.

**Disposal in waters under Canadian jurisdiction**

**125. (1) No person shall dispose of a substance in an area of the sea referred to in any of paragraphs 122(2)(a) to (e) unless**

- (a) the substance is waste or other matter; and
- (b) the disposal is done in accordance with a Canadian permit.

**Disposal from Canadian ship, etc., in waters that are not under the jurisdiction of any state**

(2) No person shall dispose of a substance from a Canadian ship, a Canadian aircraft or a Canadian platform or other structure in an area of the sea referred to in paragraph 122(2)(g) unless



(a) the substance is waste or other matter; and

(b) the disposal is done in accordance with a Canadian permit or, if the substance was loaded in the territory of a state that is a contracting party, a permit issued under the Convention or the Protocol by that state.

**Disposal from Canadian ship, etc., in waters under foreign jurisdiction**

(3) No person shall dispose of a substance from a Canadian ship, a Canadian aircraft or a Canadian platform or other structure in an area of the sea referred to in paragraph 122(2)(f) unless

(a) the substance is waste or other matter;

(b) the substance was loaded in the foreign state that has jurisdiction over that area;

(c) if the foreign state is a contracting party, the disposal is done in accordance with a permit issued under the Convention or the Protocol by that contracting party; and

(d) if the foreign state is not a contracting party, that state has authorized the disposal and it is done in accordance with a Canadian permit.

**Disposal of Canadian ship, etc., in waters that are not under the jurisdiction of any state**

(4) No person shall dispose of a Canadian ship, a Canadian aircraft or a Canadian platform or other structure in an area of the sea referred to in paragraph 122(2)(g) unless the disposal is done in accordance with a Canadian permit.

**Disposal of Canadian ship etc., in waters under foreign jurisdiction**

(5) No person shall dispose of a Canadian ship, a Canadian aircraft or a Canadian platform or other structure in an area of the sea referred to in paragraph 122(2)(f) unless

(a) if the foreign state that has jurisdiction over that area is a contracting party, the disposal is done in accordance with a permit issued under the Convention or the Protocol by that contracting party; and

(b) if the foreign state that has jurisdiction over that area is not a contracting party, that state has authorized the disposal and it is done in accordance with a Canadian permit.

**Incineration**

**126. (1) No person shall incinerate a substance on board a ship, a platform or another structure in an area of the sea referred to in any of paragraphs 122(2)(a) to (e) unless**

(a) the substance is waste generated on board the ship, platform or other structure during normal operations; or

(b) the incineration is done in accordance with a permit issued under subsection 128(2).

**Incineration in waters under foreign jurisdiction, etc.**

(2) No person shall incinerate a substance on board a Canadian ship or a Canadian platform or other structure in an area of the sea referred to in paragraph 122(2)(f) or (g) unless

(a) the substance is waste generated on board the Canadian ship or the Canadian platform or other structure during normal operations; or

(b) the incineration is done in accordance with a permit issued under subsection 128(2).

**Permits**

**Minister may issue permit**

**127. (1) The Minister may, on application, issue permits authorizing the loading for disposal and disposal of waste or other matter.**

**Application**

(2) An application for a permit must

(a) be in the prescribed form;

(b) contain the information that may be prescribed or that may be required by the Minister for the purpose of complying with Schedule 6;

(c) be accompanied by the prescribed fees; and

(d) be accompanied by evidence that notice of the application was published in a newspaper circulating in the vicinity of the loading or disposal described in the application or in any other publication specified by the Minister.

**Factors for consideration**

(3) Before issuing a permit under subsection (1), the Minister shall comply with Schedule 6 and shall take into account any factors that the Minister considers necessary.

**Exception**

**128. (1) Paragraphs 125(1)(a), (2)(a) and (3)(a) do not apply if a permit is issued under this section.**

(2) The Minister may, on application, issue a permit to dispose of or incinerate a substance if the Minister is of the opinion that

(a) the disposal or incineration of a certain quantity of the substance is necessary to avert an emergency that poses an unacceptable risk relating to the environment or to human health; and

(b) there is no other feasible solution.

**Application**

(3) An application for a permit must

(a) be in the prescribed form;

(b) contain the information that may be prescribed or that may be required by the Minister for the purpose of complying with Schedule 6;

(c) be accompanied by the prescribed fees; and

(d) subject to subsection (4), be accompanied by evidence that notice of the application was published in a newspaper circulating in the vicinity of the loading, disposal or incineration described in the application or in any other publication specified by the Minister.

### **Publication**

(4) The Minister may permit the publication referred to in paragraph (3)(d) to be made at any time after the application is made.

### **Notice and consultation**

(5) Before issuing the permit, the Minister shall

(a) consult with any foreign state that is likely to be affected by the proposed disposal or incineration and with the International Maritime Organization; and

(b) endeavour to follow any recommendations that are received from the International Maritime Organization.

### **Notice**

(6) The Minister shall inform the International Maritime Organization of any action taken under this section.

### **Conditions of permit**

**129. (1) A Canadian permit shall contain any conditions that the Minister considers necessary in the interests of marine life, any legitimate uses of the sea or human life, including conditions relating to the following:**

(a) the nature and quantity of the substance for loading, disposal or incineration;

(b) the method and frequency of the disposal or incineration authorized including, if necessary, the date or dates on which disposal or incineration is authorized;

(c) the manner of loading and stowing the substance authorized for disposal or incineration;

(d) the site at which disposal or incineration may take place;

(e) the route to be followed by the ship or aircraft transporting the substance to the disposal or incineration site;

(f) any special precautions to be taken respecting the loading, transporting, disposal or incineration of the substance; and

(g) the monitoring of the disposal, the incineration and the disposal site to determine the effects of the disposal on the environment and human life.

### **Duration of permit**

(2) A Canadian permit shall specify that it is valid for a particular date or dates or for a particular period that shall not exceed one year.

### **Powers to suspend, revoke or vary permit**

(3) The Minister may suspend or revoke a Canadian permit or vary its conditions where, having regard to Schedule 6 or the establishment of, or any report of, a board of review under section 333, the Minister considers it advisable to do so.

### ***Exception for Safety Reasons***

#### **Exception**

**130. (1) Despite the other provisions of this Division, a person may dispose of a substance if**

- a) it is necessary to avert a danger to human life or to a ship, a platform or another structure at sea in situations caused by stress of weather or in any other case that constitutes a danger to human life or a threat to a ship, an aircraft, a platform or another structure at sea;
- (b) the disposal appears to be the only way of averting the danger or threat; and
- (c) it is probable that the damage caused by the disposal would be less than would otherwise occur.

#### **Danger to be minimized**

(2) Any disposal under subsection (1) shall be carried out in a manner that minimizes, as far as possible, danger to human life and damage to the marine environment.

#### **Negligence not a defence**

(3) Subsection (1) does not apply if the danger was caused or contributed to by the person's negligent act or omission.

#### **Duty to report**

(4) If disposal takes place under subsection (1), the master of the ship, the pilot in command of the aircraft or the person in charge of the platform or other structure shall report the disposal without delay to an inspector or any other person whom the Governor in Council may, by order, designate, at the location and in the manner that may be prescribed, and the report shall contain any information that may be prescribed.

#### ***Fisheries Act not applicable***

**131. If a person disposes of a substance in accordance with the conditions of a Canadian permit or section 130, subsection 36(3) of the Fisheries Act is not applicable.**

#### ***Site Monitoring***

##### **Monitoring of sites**

**132. The Minister shall monitor sites selected by the Minister that are used for disposal or incineration at sea.**

#### ***Publication***

##### **Publication in the *Canada Gazette***

**133. (1) When issuing a Canadian permit or varying its conditions, the Minister shall publish a copy of the permit and its conditions, or the varied conditions, in the *Canada Gazette*.**

##### **Publication before disposal or loading**

- (2) Publication under subsection (1) shall be made
  - (a) in the case of a permit issued under subsection 128(2), as soon as possible after the permit is issued; and

(b) in every other case, at least 10 days before the first date on which loading, disposal or incineration is authorized by the permit or by the varied conditions.

### **Notice of Objection**

#### **Notice of objection**

**134. (1) Any person may file with the Minister a notice of objection requesting that a board of review be established under section 333 and stating the reasons for the objection, if the Minister**

(a) issues or refuses a Canadian permit; or

(b) suspends or revokes a Canadian permit or varies its conditions, otherwise than in accordance with the recommendations of a report of a board of review established under section 333 in respect of the permit.

#### **Time for filing notice of objection**

(2) A notice of objection under subsection (1) shall be filed within 10 days after

(a) the date the Canadian permit is published in the *Canada Gazette*; or

(b) the date the person received a notice from the Minister that the Canadian permit has been refused, suspended or revoked, or that its conditions have been varied.

### **Regulations**

**135. (1) The Governor in Council may, on the recommendation of the Minister, make regulations for carrying out the purposes and provisions of this Division and Schedule 6, including regulations**

(a) for carrying out and giving effect to the provisions of the Convention or the Protocol;

(b) defining the expression "Canadian platform or other structure";

(c) respecting the report referred to in subsection 130(4);

(d) respecting the conduct of sampling, analyses, tests, measurements or monitoring;

(e) respecting the conditions, test procedures and laboratory practices to be followed for analysing, testing, measuring or monitoring;

(f) respecting the monitoring of disposal sites;

(g) specifying, for the purpose of paragraph 122(2)(e), areas of the sea adjacent to areas referred to in any of paragraphs 122(2)(a) to (d);

(h) limiting the quantity or concentration of a substance contained in waste or other matter for disposal; and

(i) prescribing any other thing that by this Division is to be prescribed.

### **Amendments to Schedules 5 and 6**

(2) The Governor in Council may, on the recommendation of the Minister, by order, amend Schedules 5 and 6.

### **Regulations**

(3) The Minister may make regulations

(a) prescribing the form of an application for a Canadian permit; and

(b) specifying the information required to be contained in or to accompany an application for a Canadian permit.

### ***Costs and Expenses of the Crown***

#### **Costs and expenses recoverable**

136. If the Minister directs an action to be taken by or on behalf of Her Majesty in right of Canada to remedy a condition or mitigate damage resulting from an offence under this Act that arises out of this Division, the costs and expenses of and incidental to taking that action, to the extent that they can be established to have been reasonably incurred in the circumstances, are recoverable by Her Majesty in right of Canada from the person who committed the offence with costs in proceedings brought or taken therefor in the name of Her Majesty in any court of competent jurisdiction.

### ***Service of Documents***

#### **Manner of service**

137. Except where otherwise provided by any rules of the Federal Court that are applicable to proceedings arising out of this Division, any document that, for the purposes of any such proceedings, is to be served on a person may be served

(a) in any case, by delivering a copy of the document personally to the person to be served or, if the person cannot be found, by leaving a copy at their latest known address;

(b) if the document is to be served on the master of a ship or on any other person employed on a ship and service cannot reasonably be effected in the manner provided in paragraph (a), by leaving a copy of the document for the master or other person on board the ship with the person who is, or appears to be, in command or charge of the ship;

(c) if the document is to be served on the pilot in command of an aircraft and service cannot reasonably be effected in the manner provided in paragraph (a), by leaving a copy of the document with the person who is, or appears to be, in charge of the aircraft; and

(d) if the document is to be served on a person in their capacity as owner or master of a ship or owner or pilot in command of an aircraft and service cannot reasonably be effected in the manner provided in paragraph (a) and the ship or aircraft is within an area of the sea referred to in any of paragraphs 122(2)(a) to (e) or in Canada, by leaving a copy of the document with any agent of the owner residing in Canada or, where no such agent is known or can be found, by affixing a copy of it to a prominent part of the ship or aircraft.

## **OVERVIEW**

This Division generally prohibits ocean dumping unless done in accordance with a permit or unless the activity is exempt.

Disposal is defined broadly and includes deliberate disposal at sea:

- from a ship, an aircraft, a platform, or other structure of dredged material from any source; and

- of a ship, aircraft, platform or other structure, and also includes disposal on the seabed, subsoil of the seabed, or on the ice in an area of the sea.

Disposal may be allowed for "waste or other matter" if a permit is obtained.

These provisions pertain to waste disposal from aircraft and ships including: foreign aircraft and ships in Canadian waters; Canadian aircraft and ships in foreign waters; and incineration at sea.

The Division provides for the transition to an "inclusive" list approach to ocean dumping. Only materials on the list are permitted to be disposed of at sea. Currently, any material may be disposed of at sea so long as it is not on a list of prohibited materials.

Division 3 is flawed in several ways. First, disposal that is "incidental" to the normal operations of a ship, aircraft, platform or other structure and disposal related to sea bed exploration, mining and processing, are exempt from the permitting requirements. There is no evidence that these activities are environmentally benign.

There is an exemption for disposal incidental to normal operations of aircraft, ships, and platforms, and for discharges and disposals related to exploration and off-shore processing of sea-bed minerals. There is only a 10 day period for filing notice of objection to permit. There is no public comment period prior to the issuance of permits. There is no provision for the imposition of ocean dumping fees based on the quantity and nature of the material to be disposed of as proposed in the December 1995 government response (paragraph 8.30).

The proposal to require justification of ocean disposal in the December 1995 government response (paragraphs 8.26 and 8.27) has been dropped from the Bill.

### **GENERAL RECOMMENDATIONS TO DIVISION 3**

#### **Recommendation No. 105**

**Re-establish requirement that the need for ocean disposal be justified prior to granting permits as per government response.**

**As recommended in It's Still About Our Health!, and as set out in the 1995 government response, the pollution prevention principle should be fully adhered to for ocean disposal. Permit applicants should have the onus of proving the need for ocean disposal.**

**The national ocean disposal database previously discussed by the government does not appear in Bill C-32. This database should be required as part of the public electronic registry for all information on ocean disposal applications, permits, notices of objections, public comment, Boards of Review, and monitoring of ocean disposal sites or incineration at sea.**

**Bill C-32 should require the establishment of a national ocean disposal database.**

## **RECOMMENDATIONS TO SPECIFIC SECTIONS**

### **Section 122 - Definitions**

#### **Recommendation No. 106**

**Remove exemptions for "incidental" disposal, and disposal related to sea-bed mineral exploration and processing as per section 122.**

### **Section 127(2) - Applications**

#### **Recommendation No. 107**

**Section 127(2) should be amended to require proof that recycling, reuse or treatment are unfeasible or unsafe.**

### **Section 127(3) - Factors for consideration**

#### **Recommendation No. 108**

**Section 127(3) should be amended to require the Minister to consider the applicant's adherence to the pollution prevention principle and the need for ocean disposal before issuing a permit.**



**Section 133** - Publication in the *Canada Gazette*

**Recommendation No. 109**

**Extend public comment period to 60 days as per section 332 for all other public comment periods under the Act.**

**Section 134** - Notice of objection

**Recommendation No. 110**

**The 10 day time period for filing a notice of objection to an application for an ocean disposal permit is too short, and inconsistent with other public comment time limits set out in the Act and should be extended to 60 days.**

**Section 134(1)**

**Recommendation No. 111**

**Section 134(1) should be amended to provide for a 60 day period in which to file a notice of objection.**

**Section 135** - Regulations

**Recommendation No. 112**

**Provide for ocean disposal fees based on quantity and type of material to be disposed of.**

## DIVISION 4 - FUELS - SECTIONS 138-148

### Bill C-32 STATES:

138. In this Division, "national fuels mark" means a mark established by regulation for use in respect of fuels..

#### *General Requirements for Fuels*

##### Prohibition

139. (1) No person shall produce, import or sell a fuel that does not meet the requirements of the regulations.

##### Exceptions

(2) A person does not contravene subsection (1) if

(a) the fuel is in transit through Canada, from a place outside Canada to another place outside Canada, and there is written evidence establishing that the fuel is in transit;

(b) the fuel is produced or sold for export and there is written evidence establishing that the fuel will be exported;

(c) subject to the regulations, the fuel is being imported and there is written evidence establishing that the fuel will meet the requirements of subsection (1) before the fuel is used or sold; or

(d) subject to the regulations, the fuel is being imported in a fuel tank that supplies the engine of a conveyance that is used for transportation by water, land or air.

##### Regulations

140. (1) The Governor in Council may, on the recommendation of the Minister, make regulations for carrying out the purposes of section 139, including regulations respecting

(a) the concentrations or quantities of an element, component or additive in a fuel;

(b) the physical or chemical properties of a fuel;

(c) the characteristics of a fuel, based on a formula related to the fuel's properties or conditions of use;

(d) the transfer and handling of a fuel;

(e) the keeping of books and records by persons who produce, sell or import fuel;

(f) the auditing of the books and records and the submission of audit reports and copies of the books and records;

(g) the submission, by persons who produce, import or sell fuel, of information regarding

(i) the fuel and any element, component or additive contained in the fuel,

(ii) any physical or chemical property of the fuel or any substance intended for use as an additive to the fuel,

(iii) the adverse effects from the use of the fuel on the environment, on human life or health, on combustion technology or on emission control equipment, and

(iv) the techniques that may be used to detect and measure elements, components, additives and physical and chemical properties;

(h) the conduct of sampling, analyses, tests, measurements or monitoring of fuels and additives and the submission of the results;

(i) the submission of samples of fuels and additives; and

(j) the conditions, test procedures and laboratory practices to be followed for conducting sampling, analyses, tests, measurements or monitoring.

#### **Significant contribution**

(2) The Governor in Council may make a regulation under any of paragraphs (1)(a) to (d) only if the Governor in Council is of the opinion that the regulation could make a significant contribution to the prevention of, or reduction in, air pollution resulting from

(a) direct or indirect effects of the fuel; or

(b) the fuel's effect on the operation, performance or introduction of combustion technology or emission control equipment.

#### **Variations in fuels**

(3) A regulation may distinguish among fuels according to their commercial designation, source, physical or chemical properties, class, conditions of use or place or time of year of use.

#### **Consultation**

(4) Before recommending a regulation to the Governor in Council under subsection (1), the Minister shall offer to consult with the government of a province and the members of the Committee who are representatives of aboriginal governments and may consult with a government department or agency, aboriginal people, representatives of industry and labour and municipal authorities or with persons interested in the quality of the environment.

#### ***National Fuels Marks***

##### **Nature of mark**

141. (1) The national fuels marks are national trade-marks.

##### **Property rights**

(2) The exclusive property in and, except as otherwise provided in this Division, the right to the use of the national fuels marks are hereby vested in Her Majesty in right of Canada.

##### **Prohibition**

142. (1) No person shall use a national fuels mark except in accordance with this Division and the regulations.

##### **Confusing marks**

(2) No person shall use any other mark in such a manner that it is likely to be mistaken for a national fuels mark.

## Requirements for use

### 143. A person may use a national fuels mark in respect of a prescribed fuel if

- (a) the use is authorized by the Minister;
- (b) the fuel conforms to the requirements for that fuel provided for by regulations made under section 145 and any requirements that are applicable to that fuel and that may be provided for by regulations made under subsection 93(1) or 140(1);
- (c) evidence of such conformity has been obtained and produced in accordance with the regulations; and
- (d) prescribed information relating to the fuel has been submitted to the Minister in the prescribed manner.

## Cross-boundary shipments

### 144. (1) No person shall import, or transport within Canada, a prescribed fuel if the requirements set out in paragraphs 143(b) to (d) are not met.

#### Exceptions

- (2) Except as otherwise provided by the regulations, subsection (1) does not apply if
  - (a) the requirements are met before the fuel is used or sold; or
  - (b) the fuel is being used in a fuel tank that supplies the engine of a conveyance that is used for transportation by water, land or air.

## Regulations

### 145. (1) The Governor in Council may, on the recommendation of the Minister, make regulations for carrying out the purposes and provisions of sections 141 to 144 and 147, including regulations

- (a) establishing the national fuels marks;
- (b) determining the fuels for which a national fuels mark may be used;
- (c) respecting any condition or requirement that must be met for a national fuels mark to be used if, in the opinion of the Governor in Council, regulations respecting that condition or requirement may not be made under section 140;
- (d) respecting the conditions and procedures for obtaining authorization to use a national fuels mark;
- (e) respecting the information or other evidence necessary under sections 143 and 144; and
- (f) prescribing or providing for anything that by sections 141 to 144 and 147 is to be prescribed or provided for by the regulations.

## Consultation

(2) Before recommending a regulation to the Governor in Council under subsection (1), the Minister shall offer to consult with the government of a province and the members of the Committee who are representatives of aboriginal governments and may consult with a government department or agency, aboriginal people, representatives of industry and labour and municipal authorities or with persons interested in the quality of the environment.

## Variations in fuels

146. A regulation may distinguish among fuels according to their commercial designation, source, physical or chemical properties, class, conditions of use or place or time of year of use.

### *Temporary Waivers*

#### Temporary waiver

147. The Minister may, in prescribed circumstances, grant a temporary waiver from any of the requirements of a regulation made under section 140 or 145 on any conditions and for any period that may be determined by the Minister.

#### Remedial Measures

148. (1) If, in respect of a fuel, there is a contravention of this Division or a regulation made under this Division, the Minister may, in writing, direct a producer, processor, importer, retailer or distributor of the fuel to take any or all of the following measures in a manner and within the period directed by the Minister:

- (a) give public notice of the relevant characteristics of the fuel and of any danger to the environment or to human life or health that might be posed by the fuel;
- (b) mail a notice as described in paragraph (a) to producers, processors, importers, retailers or distributors of the fuel;
- (c) mail a notice as described in paragraph (a) to persons to whom the fuel is known to have been delivered or sold;
- (d) replace the fuel with fuel that meets the applicable requirements;
- (e) accept the return of the fuel from the purchaser and refund the purchase price;
- (f) take other measures to mitigate the effect of the contravention on the environment or on human life or health; and
- (g) report to the Minister on the steps taken in satisfaction of any direction under paragraphs (a) to (f).

#### Intervention of Minister

(2) If a person fails to take any measures required under paragraph (1)(a), (b), (c) or (f), the Minister may take those measures or cause them to be taken.

#### Recovery of costs

(3) Her Majesty in right of Canada may recover the costs and expenses of and incidental to taking any measures under subsection (2) from the person referred to in that subsection.

## OVERVIEW

Division 4 has expanded the provisions on fuels. In particular, the federal government has the authority to set national fuel standards and marks. The trade and importation of fuels will not take place unless the fuels bear the national marks. Effectively this means that the fuels must meet national standards. Reflected in the addition of these

provisions is the need for consistent fuels (ingredients, additives, physical properties) in order to maintain air quality, and protect the environment.

The Governor in Council is authorized to make regulations regarding the ingredients, additives, and physical properties of fuels; the regulation of fuel emissions at the combustion stage; and the national standards when fuels cross provincial boundaries or are imported. Under section 148, the Minister is authorized to implement remedial measures. This provision is a positive addition to the fuel Division in Bill C-32.

There are, however, significant issues with respect to fuels which must be addressed. First, the Governor in Council is provided with the **discretion**, not the **obligation**, to make regulations concerning the attributes of fuel, and **only** if the regulations could make a "significant contribution" to the prevention of, or reduction in, air pollution. The Act needs to be clearer about the definition of "significant contribution to air pollution."

Second, the Act should recognize that fuels can contribute to air pollution not only upon combustion, but also through evaporation especially when fuels are being stored or transported or when vehicles and equipment are being fueled.

Third, the government has no authority to prohibit the export of harmful fuels and fuel ingredients. Under the current provisions the Minister **may** request the Minister responsible for the National Energy Board to take action.

Fourth, there are **no** public notice, public comment, or notice of objection provisions, nor is there any obligation on the part of the Minister to publish orders and regulations. Under CEPA provisions, the Minister was responsible for publishing every order or regulation in the *Canada Gazette*, and section 48(2) provided "any person" with the opportunity to file notices of objection.

Finally, the Minister is authorized to grant temporary waivers to fuel regulations.

## **GENERAL RECOMMENDATIONS TO DIVISION 4**

### **Recommendation No. 113**

**Authority should be provided for the federal government to control fuels - their ingredients, additives, and physical properties, at ALL stages, especially evaporation during handling and storage.**

The provisions should provide the federal government with the authority to prohibit the export of harmful fuels or fuel additives.

Any exercise of authority taken under these provisions should be subject to public consultation as per section 332, especially the granting of waivers.

Consideration must be given to the recommendation to consolidate all Acts dealing with fuels into one strong piece of legislation. (See Division 5 below.)

## **RECOMMENDATION ON SPECIFIC SECTIONS**

### **Section 140(2) - Regulations**

#### **Recommendation No. 114**

**Adopt amendment proposed Canadian Vehicle Manufacturing Association to section 140(2).**

**Section 140(2) be amended to state:**

**140(2) the Governor in Council may make a regulation under any of paragraph 1(a) to (d) where the regulation may impact air pollution resulting from:**

- (a) direct or indirect effects of the fuel; or**
- (b) the fuel's effect on the operation, performance or introduction of combustion technology or emission control technology.**

### **Section 140(4) and 145(2) - Regulations**

According to sections 140(4) and 145(2), the minister **MUST** consult the provinces before recommending regulations pertaining to fuels and national fuel marks. The requirement that provinces must be consulted is new, and it is argued, unnecessary. Federal-provincial cooperation should be furthered, however, the way the section now reads infers some type of condition precedent to federal action, irrespective of the circumstances.

**Recommendation No. 115**

**Section 140(4) should be amended to state that the federal government may consult provincial governments in the development of the initiatives under this section.**

**Delete or modify discretionary language. Replace word "shall" with "may."**



**DIVISION 5 - VEHICLE, ENGINE, AND EQUIPMENT EMISSION - SECTIONS 149-165**

**Bill C-32 STATES:**

**149. The definitions in this section apply in this Division and in Part 10 as it relates to the enforcement of this Division.**

"company" means a person who

- (a) is engaged in the business of manufacturing vehicles, engines or equipment in Canada;
- (b) is engaged in the business of selling to other persons, for the purpose of resale by those persons, vehicles, engines or equipment obtained directly from a person described in paragraph (a) or the agent of such a person; or
- (c) imports any vehicle, engine or equipment into Canada for the purpose of sale.

"engine" means any prescribed internal combustion engine, but does not include an engine designed to propel

- (a) an aircraft as defined in subsection 3(1) of the *Aeronautics Act*;
- (b) rolling stock as defined in section 6 of the *Canada Transportation Act*; or
- (c) a steamer, steamship or tug as defined in section 2 of the *Canada Shipping Act*.

"equipment" means any prescribed equipment that is designed for use in or on a vehicle or engine.

"manufacture" includes any process of assembling or altering any vehicle, engine or equipment before its sale to the first retail purchaser.

"national emissions mark" means a mark established by regulation for use in respect of emissions from vehicles, engines or equipment.

"standard" means a standard that governs the design, construction, functioning or marking of vehicles, engines or equipment for the purpose of controlling or monitoring their emissions.

"vehicle" means any prescribed self-propelled vehicle, but does not include

- (a) an aircraft as defined in subsection 3(1) of the *Aeronautics Act*;
- (b) rolling stock as defined in section 6 of the *Canada Transportation Act*; or
- (c) a steamer, steamship or tug as defined in section 2 of the *Canada Shipping Act*.

***National Emissions Marks***

**Nature of marks**

**150. (1) The national emissions marks are national trade-marks.**

**Property rights**

(2) The exclusive property in and, except as otherwise provided in this Division, the right to use a national emissions mark are hereby vested in Her Majesty in right of Canada.

## **Prohibition**

(3) No person shall use a national emissions mark except in accordance with this Division and the regulations.

## **Confusing marks**

(4) No person shall use any other mark in such a manner that it is likely to be mistaken for a national emissions mark.

## **Use of marks**

**151. A company authorized by the Minister may, subject to this Division and the regulations, apply a national emissions mark to vehicles, engines or equipment.**

## **Transportation within Canada**

**152. No company shall transport within Canada a prescribed vehicle, engine or equipment that does not have a national emissions mark applied to it.**

## ***Vehicle, Engine and Equipment Standards***

### **Compliance by companies**

**153. (1) No company shall apply a national emissions mark to any vehicle, engine or equipment, sell any vehicle, engine or equipment to which a national emissions mark has been applied or import any vehicle, engine or equipment unless**

- (a) the vehicle, engine or equipment conforms to the standards prescribed for vehicles, engines or equipment of its class at the time its main assembly or manufacture was completed;
- (b) evidence of such conformity has been obtained and produced in the prescribed form and manner or, if the regulations so provide, in a form and manner satisfactory to the Minister;
- (c) prescribed information relating to standards for emissions from the vehicle, engine or equipment has been submitted to the Minister in the prescribed manner;
- (d) information is marked on the vehicle, engine or equipment in accordance with the regulations;
- (e) if required by the regulations, prescribed documentation or accessories accompany the vehicle, engine or equipment;
- (f) prescribed information relating to the operation or use of the vehicle, engine or equipment is disseminated in the prescribed form and manner;
- (g) records are maintained and furnished in the prescribed form and manner in relation to the design, manufacture, testing and field performance of the vehicle, engine or equipment, for the purpose of
  - (i) enabling an inspector to determine whether the vehicle, engine or equipment conforms to all prescribed standards applicable to it, and
  - (ii) facilitating the identification and analysis of defects referred to in subsection 157(1); and
- (h) in the case of engines and equipment, the company maintains a registration system in the prescribed form and manner.

### **Exception**

(2) Except as otherwise provided by the regulations, subsection (1) does not apply with respect to the application of a national emissions mark or an importation referred to in that subsection if the requirements under that subsection are met before the vehicle, engine or equipment leaves the possession or control of the company and, in the case of a vehicle, before the vehicle is presented for registration under the laws of a province or an aboriginal government.

### **Certification by foreign agency**

(3) Any vehicle, engine or equipment is deemed to conform to a prescribed standard if

(a) the regulations provide that an enactment of a foreign government corresponds to that standard; and

(b) a prescribed agency of that government has certified that the vehicle, engine or equipment conforms to the enactment as applied by the agency, unless the Minister determines otherwise.

### **Compliance on importation**

**154. No person shall import any vehicle, engine or equipment of a prescribed class unless the requirements of paragraphs 153(1)(a), (b), (d) and (e) are met in respect of the vehicle, engine or equipment.**

### **Exceptions for certain importations**

**155. (1) Sections 153 and 154 do not apply in respect of the importation of any vehicle, engine or equipment if**

(a) the person importing the vehicle, engine or equipment makes a declaration in the prescribed form and manner that the vehicle, engine or equipment will be used in Canada solely for purposes of exhibition, demonstration, evaluation or testing and will remain in Canada for not longer than one year or any other period that the Minister specifies;

(b) the vehicle, engine or equipment is in transit through Canada, from a place outside Canada, to another place outside Canada and is accompanied by written evidence establishing that the vehicle, engine or equipment will not be sold or used in Canada; or

(c) the vehicle, engine or equipment is being imported exclusively for use by a visitor to Canada or by a person passing through Canada to another country.

### **Vehicles sold in United States**

(2) Except as otherwise provided by the regulations, sections 153 and 154 do not apply in respect of the importation of a vehicle that has been sold at the retail level in the United States if the person importing it makes a declaration in the prescribed form and manner that, before the vehicle is presented for registration under the laws of a province or an aboriginal government,

(a) those requirements will be met; and

(b) the vehicle will be certified, in accordance with the regulations, as conforming.

### **Change in standard since manufacture**

(3) Sections 153 and 154 do not apply in respect of the importation of any vehicle, engine or equipment that does not conform to a standard prescribed for its class at the time of its main assembly or manufacture if, at the time of its importation, that standard is no longer in effect and

(a) the vehicle, engine or equipment conforms to the corresponding standard prescribed for its class at that time; or

(b) there is no corresponding standard at that time.

#### **Imported vehicle or engine**

(4) A vehicle or engine that is imported and for which there is no prescribed standard must conform to the standard prescribed for the class of equivalent vehicles or engines before presentation for registration under the laws of a province or an aboriginal government.

#### **Declarations binding**

(5) No person who makes a declaration referred to in paragraph (1)(a) or subsection (2), or provides evidence referred to in paragraph (1)(b), in respect of any vehicle, engine or equipment shall use or dispose of the vehicle, engine or equipment in a manner contrary to the terms of that declaration or evidence.

#### **Record keeping**

(6) Every person who makes a declaration referred to in paragraph (1)(a) or subsection (2), or provides evidence referred to in paragraph (1)(b), in respect of any vehicle, engine or equipment shall keep a record of the use or disposition of the vehicle, engine or equipment in accordance with the regulations.

#### ***Vehicle or Engine Exemptions***

##### **Exemption from standards**

**156. (1) On application by a company in the prescribed form, supported by prescribed technical and financial information, the Governor in Council may, by order, grant an exemption for a specified period, subject to any conditions specified in the order, for any model of vehicle or engine manufactured or imported by the company from conformity with any prescribed standard applicable to that model if conformity with that standard would, in the opinion of the Governor in Council,**

(a) create substantial financial hardship for the company;

(b) impede the development of new features for safety, emission monitoring or emission control that are equivalent to or superior to those that conform to prescribed standards; or

(c) impede the development of new kinds of vehicles, engines or vehicle or engine systems or components.

##### **Period and extent of exemption**

(2) An exemption for a model may be granted for a period not exceeding

(a) three years, if paragraph (1)(a) applies; or

(b) two years, in respect of a stated number of units of that model not exceeding 1,000 units, if paragraph (1)(b) or (c) applies.

##### **Conditions for granting exemption**

(3) An exemption may not be granted for a model if the exemption would substantially diminish the control of emissions from it or if the company applying for the exemption has not provided evidence that satisfies the Governor in Council that it has attempted in good faith to bring the model into conformity with all applicable prescribed standards.

#### **Further conditions**

- (4) An exemption for substantial financial hardship may not be granted under paragraph (1)(a) if
- (a) the world production of vehicles or engines manufactured by the company, or by the manufacturer of the model that is the subject of the application, exceeded 10,000 vehicles or engines in the 12-month period beginning two years before the beginning of the exemption period; or
  - (b) the total number of vehicles or engines manufactured for, or imported into, the Canadian market by the company exceeded 1,000 vehicles or engines in that 12-month period.

#### **Renewal of exemption**

- (5) On the expiry of the exemption period, a new exemption may be granted in accordance with this section.

#### **Notice of Defects**

##### **Obligation to give notice**

**157. (1) A company that manufactures, sells or imports any vehicle, engine or equipment of a class for which standards are prescribed shall, on becoming aware of a defect in the design, construction or functioning of the vehicle, engine or equipment that affects or is likely to affect its compliance with a prescribed standard, cause notice of the defect to be given in the prescribed manner to**

- (a) the Minister;
- (b) each person who has obtained such a vehicle, engine or equipment from the company; and
- (c) each current owner of such a vehicle, engine or equipment.

##### **Determining owners**

- (2) Current owners are to be determined for the purpose of subsection (1)
- (a) from a warranty issued by the company with respect to the functioning of the vehicle, engine or equipment that has, to its knowledge, been given, sold or transferred to the current owner;
  - (b) in the case of a vehicle, from registration records of a government; or
  - (c) in the case of an engine or equipment, from a registration system referred to in paragraph 153(1)(h).

##### **If notice previously given**

(3) A company is not required to cause notice to be given of a defect of which notice has already been given under this section or under section 10 of the *Motor Vehicle Safety Act*.

##### **Publication of notice**

- (4) If the Minister is satisfied that the name of the current owner of the vehicle, engine or equipment cannot reasonably be determined by a company in accordance with subsection (2), the Minister may
- (a) order the company to give notice of the defect by publication in the prescribed form for a period of five consecutive days in two major daily newspapers in each of the following six regions, namely, the Atlantic provinces, Quebec, Ontario, the Prairie provinces, British Columbia and the Territories, or by dissemination in an alternative medium for any period that the Minister determines; or
  - (b) order that the current owner need not be notified.

### **Contents of notice**

(5) A notice required to be given under subsections (1) and (4) shall contain, in the form and to the extent prescribed, a description of the defect, an evaluation of the pollution risk arising from it and directions for correcting it.

### **Particulars to responsible authorities**

(6) On receiving a notice under subsection (1), the Minister shall forward full particulars of the notice to the person responsible for vehicle or engine administration in each government.

### **Follow-up reports**

(7) Every company that causes notice to be given under subsection (1) shall submit an initial report and subsequent regular reports respecting the defect and its correction in accordance with the regulations.

### **Frequency of reports**

(8) Unless the Minister directs otherwise, the reports referred to in subsection (7) shall be submitted for a period of two years after the day on which notice was given under subsection (1).

### ***Research and Testing***

#### **Powers of Minister**

#### **158. The Minister may**

- (a) conduct any research, studies and evaluations that the Minister considers necessary for the administration and enforcement of this Division;
- (b) undertake research and development programs for the study of the effect of vehicles, engines or equipment or emissions on air pollution, energy conservation and the environment and for the promotion of measures to control that effect;
- (c) establish and operate facilities for the testing of vehicles, engines or equipment and components, and acquire test equipment for that purpose;
- (d) make the facilities referred to in paragraph (c) and all related material, parts and services available to any person; and
- (e) publish or otherwise disseminate information relating to the activities of the Minister under this section.

#### **Emission control tests**

**159. (1) At the request of the Minister and subject to payment by the Minister of the cost of transportation and of rental at a prescribed rate based on capital value, a company shall make available for testing any vehicle, engine, equipment or component that**

- (a) was used in tests conducted by or for the company in order to establish information submitted to the Minister under paragraph 153(1)(c); or
- (b) for the purpose of that testing, is equivalent to a vehicle, an engine, equipment or a component referred to in paragraph (a).

### **Testing by Minister**

(2) The Minister may examine and dismantle any vehicle, engine, equipment or component made available under subsection (1) and conduct all necessary tests to verify the accuracy of tests referred to in paragraph (1)(a).

### **Detention of vehicles or engines**

(3) The Minister may not detain any vehicle, engine, equipment or component for more than 30 days after completion of the tests conducted under subsection (2) unless, before that time, proceedings have been instituted in respect of an offence related to the vehicle, engine, equipment or component, in which case it may be detained until the proceedings are concluded.

### **Regulations**

**160. (1) The Governor in Council may, on the recommendation of the Minister, make regulations for carrying out the purposes and provisions of this Division, including regulations**

- (a) respecting emissions and prescribing standards in relation to emissions;
- (b) establishing the national emissions marks;
- (c) respecting the conditions that must be met for a national emissions mark to be used in relation to vehicles, engines or equipment or a class of vehicles, engines or equipment;
- (d) respecting the manner of applying national emissions marks;
- (e) prescribing the period for which records referred to in paragraph 153(1)(g) or a registration system referred to in paragraph 153(1)(h) shall be retained;
- (f) respecting exemptions from sections 153 and 154;
- (g) respecting the information to be submitted under section 153; and

### **Progressive application**

(2) Regulations prescribing a standard may be made applicable in respect of a specified proportion of vehicles, engines or equipment of a class before they are made applicable in respect of all vehicles, engines or equipment of that class.

### **Definition of "technical standards document"**

**161. (1) In this section, "technical standards document" means a document, published in the prescribed manner by authority of the Minister, that reproduces in the official languages of Canada an enactment of a foreign government with any adaptations of form and reference that will facilitate the incorporation of the enactment under this section.**

### **Incorporation of document**

(2) For greater certainty, regulations made under this Division may incorporate by reference a technical standards document as it reads on a prescribed day or as it is amended from time to time following the incorporation by reference, and may extend, qualify or exclude the application of any provision of the document so incorporated.

### **Publication**

(3) No person is required to comply with a provision of a technical standards document incorporated by the regulations until six months after the publication of the provision in the prescribed manner, if the person continues to comply with the provision for which that provision is substituted.

## **Document not a regulation**

(4) A technical standards document is not a regulation for the purposes of the *Statutory Instruments Act*.

## **Emission credits**

**162. (1) Regulations that prescribe standards in relation to emissions may provide for a system of credits based on the following principles:**

(a) a company may establish that vehicles, engines or equipment conform to those standards by applying credits against emissions of the vehicles, engines or equipment in the prescribed manner and within prescribed limits;

(b) credits may be obtained by a company in the prescribed manner

(i) by reference to emissions of the vehicles, engines or equipment that more than meet the requirements of those standards, or

(ii) by the payment of an amount to the Receiver General determined at a prescribed rate in relation to emissions of the vehicle, engine or equipment; and

(c) credits obtained by reference to emissions may be transferred to or from a company in the prescribed manner.

## **Deemed conformity to standard**

(2) Regulations referred to in subsection (1) may provide that any vehicle, engine or equipment is deemed to conform to a standard if the application of those regulations to all vehicles, engines or equipment of its class sold in Canada and the United States would result in that vehicle, engine or equipment so conforming.

## **Emission report**

(3) Every company shall submit to the Minister, in the prescribed form and manner and at the prescribed time, a report setting out, with respect to a prescribed period, an account of any emission credits obtained or applied by the company and a description of each of the following vehicles, engines or pieces of equipment for which credits were obtained or applied:

(a) vehicles, engines and equipment to which the company applied a national emissions mark during that period, other than those that were exported;

(b) vehicles, engines and equipment bearing a national emissions mark that were sold by the company in Canada during that period; and

(c) vehicles, engines and equipment that were imported by the company during that period for the purpose of sale in Canada.

## **Contents of report**

(4) If credits applied under this section were obtained on the basis of emissions from vehicles, engines or equipment not referred to in paragraph (3)(a), (b) or (c), the report submitted in respect of the application of those credits shall include a description of those vehicles, engines or equipment.

## **Interim order**

**163. (1) If an enactment of a foreign government corresponds to the regulations made under this Division and that enactment is amended by that government or its operation is affected by a decision of a foreign**



court, the Minister may issue an interim order suspending or modifying the operation of the regulations to the extent that they are inconsistent with the enactment as amended or given effect.

**Effective date of order**

(2) An interim order has effect from the time it is made.

**Approval of Governor in Council**

(3) An interim order ceases to have effect 14 days after it is made unless it is approved by the Governor in Council within that period.

**Contravention of regulation modified by an unpublished order**

(4) No person shall be convicted of an offence consisting of a contravention of a regulation to the extent that it is modified or suspended by an interim order that, at the time of the alleged contravention, had not been published in the *Canada Gazette* unless it is proved that, at the time of the alleged contravention, the person had been notified of the interim order.

**Cessation of effect**

(5) Subject to subsection (3), an interim order ceases to have effect on the earliest of

(a) the day it is repealed,

(b) the day the regulation is amended or repealed to give effect to the order, and

(c) one year after the order is made.

**Evidence**

164. In a prosecution under this Act, evidence that any vehicle, engine or equipment bore a name or mark purporting to be the name or mark of a company engaged in the business of manufacturing, importing or selling vehicles, engines or equipment is, in the absence of evidence to the contrary, proof that the vehicle, engine or equipment was manufactured, imported or sold, as the case may be, by the company.

**Evidence**

165. In a prosecution under this Act, evidence that any vehicle, engine or equipment bearing a national emissions mark was manufactured by a company is, in the absence of evidence to the contrary, proof that the national emissions mark was applied by the company.

**OVERVIEW**

Division 5 provisions simply retain the status quo.

This is unfortunate given the fact that Canadian emission standards already lag behind the United States. The provisions authorize the federal government to develop national emission standards for vehicles. However, substantial consultation with provincial counterparts is required before any federal action can take place.

The transfer and consolidation of all Acts which deal with emissions is necessary in order to provide coherent authority and get rid of confused government jurisdiction.

## GENERAL RECOMMENDATIONS TO DIVISION 5

### Recommendation No. 116

Transfer authority to deal with emissions from the *Motor Vehicles Safety Act* and Transport Canada, to the *Canadian Environmental Protection Act* and Environment Canada. Why? First, emissions are an environment issue, not a safety issue, and second, there is the need for public accountability with legislative authority.

Establish provisions providing periodic review processes, public participation, and timelines/deadlines for achievement.

## RECOMMENDATIONS ON SPECIFIC SECTIONS

### Section 149 - Definitions

Section 149 contains exemptions for aircraft, ships, and railway rolling stock. Therefore, additional authority is required to regulate off-road vehicles and utility engines.

### Recommendation No. 117

Remove exemptions for aircraft, ships and rolling stock and engines.

## DIVISION 6 - INTERNATIONAL AIR POLLUTION - SECTIONS 166-174

### Bill C-32 STATES:

**166. (1) Subject to subsection (4), the Minister shall act under subsections (2) and (3) only if the Ministers have reason to believe that a substance released from a source in Canada into the air creates, or may reasonably be anticipated to create,**

- (a) air pollution in a country other than Canada; or
- (b) air pollution that violates, or is likely to violate, an international agreement binding on Canada in relation to the prevention, control or correction of pollution.

### Consultation with other governments

- (2) If the source referred to in subsection (1) is not a federal source, the Minister shall
  - (a) consult with any government responsible for the area in which the source is situated to determine whether that government can prevent, control or correct the air pollution under its laws; and
  - (b) if a government referred to in paragraph (a) can prevent, control or correct the air pollution, offer it an opportunity to do so.

### Ministerial action

(3) If the source referred to in subsection (1) is a federal source or if the government referred to in paragraph (2)(a) cannot prevent, control or correct the air pollution under its laws or does not do so, the Minister shall recommend regulations to the Governor in Council for the purpose of preventing, controlling or correcting the air pollution.

### Reciprocity with other country

(4) If the air pollution referred to in paragraph (1)(a) is in a country where Canada does not have substantially the same rights with respect to the prevention, control or correction of air pollution as that country has under this Division, the Minister shall decide whether to act under subsections (2) and (3) or to take no action at all.

### Other factors

(5) When acting under subsection (3), the Minister shall take into account comments made under subsection 168(2), notices of objection filed under subsection 332(2) and any report of a board of review submitted under subsection 340(1).

### Regulations

**167. The Governor in Council may, on the recommendation of the Minister, make regulations with respect to a substance released from a source in Canada into the air that creates, or may reasonably be anticipated to create, air pollution referred to in subsection 166(1) for the purpose of preventing, controlling or correcting the air pollution, including regulations respecting**

- (a) the quantity or concentration of the substance that may be released into the air;
- (b) the manner in which and conditions under which the substance may be released into the air, either alone or in combination with any other substance;
- (c) the maintenance of books and records for the administration of any regulation made under this section;

(d) the conduct of sampling, analyses, tests, measurements or monitoring of the substance and the submission of the results to the Minister; and

(e) the conditions, test procedures and laboratory practices to be followed for conducting sampling, analyses, tests, measurements or monitoring of the substance.

#### **Notice to other country**

**168. (1) The Minister shall advise the government of any country that would be affected by or benefit from the regulation before it is published under subsection 332(1).**

#### **Comments**

(2) Within 60 days after the publication of a proposed regulation under subsection 332(1), any person, including a representative of the government of any country that would be affected by or benefit from it, may file with the Minister written comments on the proposed regulation.

#### **Notice to other governments**

(3) At the end of the period of 60 days referred to in subsection (2), the Minister

(a) shall advise each government referred to in paragraph 166(2)(a) of any notice of objection filed under subsection 332(2); and

(b) shall publish in the *Canada Gazette*, and may publish in any other manner that the Minister considers appropriate, a report or a notice of the availability of a report that summarizes how any written comments filed under subsection (2) or a notice of objection filed under subsection 332(2) were dealt with.

#### **Report and remedial measures**

**169. (1) Where there occurs or there is a likelihood of a release into the air of a substance in contravention of a regulation made under section 167, any person described in subsection (2) shall, as soon as possible in the circumstances,**

(a) subject to subsection (4) and the regulations, notify an inspector or any other person designated pursuant to the regulations and provide a written report on the matter to the inspector or other person;

(b) take all reasonable measures consistent with the protection of the environment and public safety to prevent the release or, if it cannot be prevented, to remedy any dangerous condition or reduce or mitigate any danger to the environment or to human life or health that results from the release of the substance or may reasonably be expected to result if the substance is released; and

(c) make a reasonable effort to notify any member of the public who may be adversely affected by the release or likely release.

#### **Application**

(2) Subsection (1) applies to any person who

(a) owns or has charge of a substance immediately before its release or its likely release into the air; or

(b) causes or contributes to the release or increases the likelihood of the release.

#### **Report by property owner**

(3) Where there occurs a release of a substance as described in subsection (1), any person, other than a person described in subsection (2), whose property is affected by the release shall, as soon as possible in the

circumstances and subject to subsection (4), report the matter to an inspector or to any person that is designated by regulation.

#### **Report to official**

(4) Where there are in force, by or under the laws of a province or an aboriginal government, provisions that the Governor in Council, by regulation, declares to be adequate for dealing with a release described in subsection (1), a report required by paragraph (1)(a) or subsection (3) shall be made to a person designated by those provisions.

#### **Intervention by inspector**

(5) Where a person fails to take any measures required under subsection (1), an inspector may take those measures, cause them to be taken or direct any person referred to in subsection (2) to take them.

#### **Limitation on power of direction**

(6) Any direction of an inspector under subsection (5) that is inconsistent with a requirement imposed by or under any other Act of Parliament is void to the extent of the inconsistency.

#### **Access to property**

(7) Any inspector or other person authorized or required to take any measures under subsection (1) or (5) may enter and have access to any place or property and may do any reasonable things that may be necessary in the circumstances.

#### **Immunity**

(8) Any person, other than a person described in subsection (2), who provides assistance or advice in taking the measures required by subsection (1) or who takes any measures authorized under subsection (5) is not personally liable either civilly or criminally in respect of any act or omission in the course of providing assistance or advice or taking any measures under those subsections unless it is established that the person acted in bad faith.

#### **Recovery of reasonable costs and expenses by Her Majesty**

**170. (1) Her Majesty in right of Canada may recover the costs and expenses of and incidental to taking any measures under subsection 169(5) from**

(a) any person referred to in paragraph 169(2)(a); and

(b) any person referred to in paragraph 169(2)(b) to the extent of the person's negligence in causing or contributing to the release.

#### **Only if reasonably incurred**

(2) The costs and expenses referred to in subsection (1) shall only be recovered to the extent that they can be established to have been reasonably incurred in the circumstances.

#### **Liability**

(3) Subject to subsection (4), the persons referred to in subsection (1) are jointly and severally liable or solitarily liable for the costs and expenses referred to in that subsection.

#### **Limitation**

(4) A person referred to in paragraph 169(2)(b) shall not be held liable under subsection (3) to an extent greater than the extent of the person's negligence in causing or contributing to the release.

## **Procedure**

(5) A claim under this section may be sued for and recovered by Her Majesty in right of Canada with costs in proceedings brought or taken therefor in the name of Her Majesty in right of Canada in any court of competent jurisdiction.

## **Recourse or indemnity**

(6) This section does not limit or restrict any right of recourse or indemnity that a person may have against any other person.

## **Limitation period**

(7) Where events giving rise to a claim under this section occur, no proceedings in respect of the claim may be instituted after five years from the date on which the events occur or become evident to the Minister, whichever is later.

## **Minister's certificate**

(8) A document purporting to have been issued by the Minister certifying the day on which the events giving rise to a claim under this section came to the knowledge of the Minister shall be received in evidence and, in the absence of any evidence to the contrary, the document shall be considered as proof of that fact without proof of the signature or of the official character of the person appearing to have signed the document and without further proof.

## **Prohibition**

**171. No person shall carry on a work, undertaking or activity that results in the release of a substance in contravention of a regulation made under section 167.**

## **Plans and specifications**

**172. (1) If a person carries on or proposes to carry on a work, undertaking or activity that results or may result in the release of a substance that creates, or may reasonably be anticipated to create, air pollution, the person shall, at the request of the Minister for the purposes of this Division and within the time that the Minister may specify, provide the Minister with plans, specifications, studies, procedures, schedules, analyses, samples or other information relating to the work, undertaking or activity and with analyses, samples, evaluations, studies, mitigation methodologies or other information relating to the substance.**

## **Obtaining information from government**

(2) Before making a request to a person under subsection (1), the Minister shall try to obtain, within a reasonable time, the samples or information from the government responsible for the area in which the person is situated.

## **Interim order**

**173. (1) The Minister may make an interim order that contains any provision that may be contained in a regulation under section 167 if the Minister believes**

(a) that the substance or source referred to in subsection 166(1) is not adequately regulated; and

(b) that immediate action is required to deal with a significant danger to the environment or to human life or health.

## **Effective date of order**

(2) An interim order has effect from the time it is made.

### **Approval of Governor in Council**

(3) An interim order ceases to have effect 14 days after it is made unless it is approved by the Governor in Council within that period.

### **Consultation**

(4) The Governor in Council shall not approve an interim order unless the Minister has

(a) within 24 hours after making the order, offered to consult with all affected governments to determine whether they are prepared to take sufficient action to deal with the significant danger; and

(b) consulted with other ministers of the Crown in right of Canada to determine whether any action can be taken under any other Act of Parliament to deal with the significant danger.

### **Ministerial action**

(5) Where the Governor in Council approves an interim order, the Minister shall, within 90 days after the approval, take measures to comply with section 166 in order to address the significant danger that gave rise to the interim order.

### **Contravention of unpublished order**

(6) No person shall be convicted of an offence consisting of a contravention of an interim order that, at the time of the alleged contravention, had not been published in the *Canada Gazette* unless it is proved that, at the time of the alleged contravention, the person had been notified of the interim order.

### **Cessation of effect**

(7) Subject to subsection (3), an interim order ceases to have effect on the earliest of

(a) the day it is repealed,

(b) the day a regulation is made in accordance with subsection (5), and

(c) two years after the order is made.

### **Repeal of interim order**

(8) No action is required to be taken under subsection (5) if the interim order is repealed.

### **Report to Parliament**

174. The Minister shall include in the annual report required by section 342 a report on the administration of this Division.

## **OVERVIEW**

The Standing Committee on Environment and Sustainable Development maintains that the federal government has an overall mandate to protect the health of all Canadians and their environment. Division 6 provides general provisions which enable the implementation of Canada's international air pollution obligations.

The federal government is authorized to regulate international air pollution where a Canadian source affects air quality in another country or may lead to a violation of an international environmental commitment.

However, federal action is permitted only if another government, such as a province, a territory, or an Aboriginal group cannot prevent, control, or correct the air pollution. Consequently, under these provisions, the federal government **must** consult with the provinces, the territories and the Aboriginal groups.

## **GENERAL RECOMMENDATION TO DIVISION 6**

### **Recommendation No. 118**

**Economic instruments, such as emission trading schemes, should be avoided.**

## **RECOMMENDATIONS ON SPECIFIC SECTIONS**

### **Section 166**

#### **Recommendation No. 119**

**Strengthen the federal authority to act - only require consultation with other governments.**

#### **Recommendation No. 120**

**In emergency situations the federal government should be provided with unilateral authority to act. "Emergency situations" must be clearly defined.**

### **Section 166(1)**

#### **Recommendation No. 121**

**Reword " substance released from a source in Canada into the air creates, or may reasonably be anticipated to contribute to ..."**



**Section 166(2)** - Consultation with other governments

**Recommendation No. 122**

**Replace word "shall' with "may."**

**Section 170(2)** - Recovery of reasonable costs and expenses by Her Majesty - Only is reasonably incurred

**Recommendation No. 123**

**Delete.**

**Section 173(4)** - Consultation

**Recommendation No. 124**

**Delete.**

## DIVISION 7 - INTERNATIONAL WATER POLLUTION - SECTIONS 175-184

### Bill C-32 STATES:

**175. In this Division and in Part 10, "water pollution" means a condition of water, arising wholly or partly from the presence in water of any substance, that directly or indirectly**

- (a) endangers the health, safety or welfare of humans;
- (b) interferes with the normal enjoyment of life or property;
- (c) endangers the health of animal life;
- (d) causes damage to plant life or to property; or
- (e) degrades or alters, or forms part of a process of degrading or altering, an ecosystem to an extent that is detrimental to its use by humans, animals or plants.

### Determination of international water pollution

**176. (1) Subject to subsection (4), the Minister shall act under subsections (2) and (3) only if the Ministers have reason to believe that a substance released from a source in Canada into water creates, or may reasonably be anticipated to create,**

- (a) water pollution in a country other than Canada; or
- (b) water pollution that violates, or is likely to violate, an international agreement binding on Canada in relation to the prevention, control or correction of pollution.

### Consultation with other governments

- (2) If the source referred to in subsection (1) is a not a federal source, the Minister shall
  - (a) consult with any government responsible for the area in which the source is situated to determine whether that government can prevent, control or correct the water pollution under its laws; and
  - (b) if a government referred to in paragraph (a) can prevent, control or correct the water pollution, offer it an opportunity to do so.

### Ministerial action

(3) If the source referred to in subsection (1) is a federal source, or if a government referred to in paragraph (2)(a) cannot prevent, control or correct the water pollution under its laws or does not do so, the Minister shall recommend regulations to the Governor in Council for the purpose of preventing, controlling or correcting the water pollution.

### Reciprocity with other country

(4) If the water pollution referred to in paragraph (1)(a) is in a country where Canada does not have substantially the same rights with respect to the prevention, control or correction of water pollution as that country has under this Division, the Minister shall decide whether to act under subsections (2) and (3) or to take no action at all.

## **Other factors**

(5) When acting under subsection (3), the Minister shall take into account comments made under subsection

## **Regulations**

**177. The Governor in Council may, on the recommendation of the Minister, make regulations with respect to a substance released from a source in Canada into water that creates, or may reasonably be anticipated to create, water pollution referred to in subsection 176(1) for the purpose of preventing, controlling or correcting the water pollution, including regulations respecting**

- (a) the quantity or concentration of the substance that may be released into water;
- (b) the manner in which and conditions under which the substance may be released into water, either alone or in combination with any other substance;
- (c) the maintenance of books and records for the administration of any regulation made under this section;
- (d) the conduct of sampling, analyses, tests, measurements or monitoring of the substance and the submission of the results to the Minister; and
- (e) the conditions, test procedures and laboratory practices to be followed for conducting sampling, analyses, tests, measurements or monitoring of the substance.

## **Notice to other country**

**178. (1) The Minister shall advise the government of any country that would be affected by or benefit from the regulation before it is published under subsection 332(1).**

## **Comments**

**178(2), notices of objection filed under subsection 332(2) and any report of a board of review submitted under subsection 340(1).**

(2) Within 60 days after the publication of a proposed regulation under subsection 332(1), any person, including a representative of the government of any country that would be affected by or benefit from it, may file with the Minister written comments on the proposed regulation.

## **Notice to other governments**

- (3) At the end of the period of 60 days referred to in subsection (2), the Minister
  - (a) shall advise each government referred to in paragraph 176(2)(a) of any notice of objection filed under subsection 332(2); and
  - (b) shall publish in the *Canada Gazette*, and may publish in any other manner that the Minister considers appropriate, a report or a notice of the availability of a report that summarizes how any written comments filed under subsection (2) or a notice of objection filed under subsection 332(2) were dealt with.

## **Report and remedial measures**

**179. (1) Where there occurs or there is a likelihood of a release into waters of a substance in contravention of a regulation made under section 177, any person described in subsection (2) shall, as soon as possible in the circumstances,**

(a) subject to subsection (4) and the regulations, notify an inspector or any other person designated pursuant to the regulations and provide a written report on the matter to the inspector or other person;

(b) take all reasonable measures consistent with the protection of the environment and public safety to prevent the release or, if it cannot be prevented, to remedy any dangerous condition or reduce or mitigate any danger to the environment or to human life or health that results from the release of the substance or may reasonably be expected to result if the substance is released; and

(c) make a reasonable effort to notify any member of the public who may be adversely affected by the release or likely release.

#### **Application**

(2) Subsection (1) applies to any person who

(a) owns or has charge of a substance immediately before its release or its likely release into water; or

(b) causes or contributes to the release or increases the likelihood of the release.

#### **Report by property owner**

(3) Where there occurs a release of a substance as described in subsection (1), any person, other than a person described in subsection (2), whose property is affected by the release shall, as soon as possible in the circumstances and subject to subsection (4), report the matter to an inspector or to any person that is designated by regulation.

#### **Report to official**

(4) Where there are in force, by or under the laws of a province or an aboriginal government, provisions that the Governor in Council, by regulation, declares to be adequate for dealing with a release described in subsection (1), a report required by paragraph (1)(a) or subsection (3) shall be made to a person designated by those provisions.

#### **Intervention by inspector**

(5) Where any person fails to take any measures required under subsection (1), an inspector may take those measures, cause them to be taken or direct any person referred to in subsection (2) to take them.

#### **Limitation on power of direction**

(6) Any direction of an inspector under subsection (5) that is inconsistent with a requirement imposed by or under any other Act of Parliament is void to the extent of the inconsistency.

#### **Access to property**

(7) Any inspector or other person authorized or required to take any measures under subsection (1) or (5) may enter and have access to any place or property and may do any reasonable things that may be necessary in the circumstances.

#### **Immunity**

(8) Any person, other than a person described in subsection (2), who provides assistance or advice in taking the measures required by subsection (1) or who takes any measures authorized under subsection (5) is not personally liable either civilly or criminally in respect of any act or omission in the course of providing assistance or advice or taking any measures under those subsections unless it is established that the person acted in bad faith.

### **Recovery of reasonable costs and expenses by Her Majesty**

**180. (1) Her Majesty in right of Canada may recover the costs and expenses of and incidental to taking any measures under subsection 179(5) from**

(a) any person referred to in paragraph 179(2)(a); and

(b) any person referred to in paragraph 179(2)(b) to the extent of the person's negligence in causing or contributing to the release.

#### **Only if reasonably incurred**

(2) The costs and expenses referred to in subsection (1) shall only be recovered to the extent that they can be established to have been reasonably incurred in the circumstances.

#### **Liability**

(3) Subject to subsection (4), the persons referred to in subsection (1) are jointly and severally liable or solitarily liable for the costs and expenses referred to in that subsection.

#### **Limitation**

(4) A person referred to in paragraph 179(2)(b) shall not be held liable under subsection (3) to an extent greater than the extent of the person's negligence in causing or contributing to the release.

#### **Procedure**

(5) A claim under this section may be sued for and recovered by Her Majesty in right of Canada with costs in proceedings brought or taken therefor in the name of Her Majesty in right of Canada in any court of competent jurisdiction.

#### **Recourse or indemnity**

(6) This section does not limit or restrict any right of recourse or indemnity that a person may have against any other person.

#### **Limitation period**

(7) Where events giving rise to a claim under this section occur, no proceedings in respect of the claim may be instituted after five years from the date on which the events occur or become evident to the Minister, whichever is later.

#### **Minister's certificate**

(8) A document purporting to have been issued by the Minister certifying the day on which the events giving rise to a claim under this section came to the knowledge of the Minister shall be received in evidence and, in the absence of any evidence to the contrary, the document shall be considered as proof of that fact without proof of the signature or of the official character of the person appearing to have signed the document and without further proof.

#### **Prohibition**

**181. No person shall carry on a work, undertaking or activity that results in the release of a substance in contravention of a regulation made under section 177.**

### **Plans and specifications**

**182. (1)** If a person carries on or proposes to carry on a work, undertaking or activity that results or may result in the release of a substance that creates, or may reasonably be anticipated to create, water pollution, the person shall, at the request of the Minister for the purposes of this Division and within the time that the Minister may specify, provide the Minister with plans, specifications, studies, procedures, schedules, analyses, samples or other information relating to the work, undertaking or activity and with analyses, samples, evaluations, studies, mitigation methodologies or other information relating to the substance.

### **Obtaining information from government**

(2) Before making a request to a person under subsection (1), the Minister shall try to obtain, within a reasonable time, the samples or information from the government responsible for the area in which the person is situated.

### **Interim order**

**183. (1)** The Minister may make an interim order that contains any provision that may be contained in a regulation under section 177 if the Minister believes

(a) that the substance or source referred to in subsection 176(1) is not adequately regulated; and

(b) that immediate action is required to deal with a significant danger to the environment or to human life or health.

### **Effective date of order**

(2) An interim order has effect from the time it is made.

### **Approval of Governor in Council**

(3) An interim order ceases to have effect 14 days after it is made unless it is approved by the Governor in Council within that period.

### **Consultation**

(4) The Governor in Council shall not approve an interim order unless the Minister has

(a) within 24 hours after making the order, offered to consult with all affected governments to determine whether they are prepared to take sufficient action to deal with the significant danger; and

(b) consulted with other ministers of the Crown in right of Canada to determine whether any action can be taken under any other Act of Parliament to deal with the significant danger.

### **Ministerial action**

(5) Where the Governor in Council approves an interim order, the Minister shall, within 90 days after the approval, take measures to comply with section 176 in order to address the significant danger that gave rise to the interim order.

### **Contravention of unpublished order**

(6) No person shall be convicted of an offence consisting of a contravention of an interim order that, at the time of the alleged contravention, had not been published in the *Canada Gazette* unless it is proved that, at the time of the alleged contravention, the person had been notified of the interim order.

#### **Cessation of effect**

(7) Subject to subsection (3), an interim order ceases to have effect on the earliest of

(a) the day it is repealed,

(b) the day a regulation is made in accordance with subsection (5), and

(c) two years after the order is made.

#### **Revocation of interim order**

(8) No action is required to be taken under subsection (5) if the interim order is repealed.

#### **Report to Parliament**

184. The Minister shall include in the annual report required by section 342 a report on the administration of this Division.

### **OVERVIEW**

Division 7 provides new provisions regarding water pollution which have filled gaps in CEPA. The provisions are based on the proposed international air pollution provisions. Therefore, as above, Division VII provides the authority for the federal government to regulate international water pollution where a Canadian source affects water quality in another country or may lead to a violation of an international environmental commitment. BUT only if another government, such as a province, territory, or Aboriginal group cannot prevent, control, or correct the water pollution.

In other words, this section requires substantial consultation with provincial counterparts before any federal action can take place. Currently under the proposed Bill, the provinces have veto power over any program development. It would be more appropriate, therefore, to base these provisions on the current CEPA provisions regarding international air pollution.

### **GENERAL RECOMMENDATION TO DIVISION 7**

#### **Recommendation No. 125**

**The provisions need to mirror and respect the reciprocity, or transboundary water provisions of the U.S. *Clean Water Act*.**

## **RECOMMENDATIONS ON SPECIFIC SECTION**

### **Section 176** - Determination of international water pollution

#### **Recommendation No. 126**

**Strengthen the federal authority to act - only require consultation with other governments.**

#### **Recommendation No. 127**

**Cooperation with other governments is recommended/encouraged, however, the federal government should retain, and exercise strong, unilateral authority to maintain international commitments.**

### **Section 176(1)** - International water pollution

#### **Recommendation No. 128**

**Reword "substance released from a source in Canada into water creates, or may reasonably be anticipated to contribute to..."**

### **Section 176(2)** - Consultation with other governments

#### **Recommendation No. 129**

**Replace word "shall" with "may."**

### **Section 180(2)** - Recovery of reasonable costs and expenses by Her Majesty

#### **Recommendation No. 130**

**Delete.**



**Section 183(4)** - Consultation

**Recommendation No. 131**

**Delete.**

**DIVISION 8 - CONTROL OF HAZARDOUS WASTE AND HAZARDOUS  
RECYCLABLE MATERIAL, AND OF PRESCRIBED NON-HAZARDOUS WASTE FOR  
FINAL DISPOSAL - SECTIONS 185-192**

**Bill C-32 STATES:**

**185. (1) No person shall import, export or convey in transit a hazardous waste or hazardous recyclable material, or prescribed non-hazardous waste for final disposal, except**

- (a) after notifying the Minister and paying the prescribed fee;
- (b) after receiving from the Minister whichever one of the following permits is applicable:
  - (i) an import permit or export permit that, except in the case of a permit issued under subsection (4), states that the authorities of the country of destination and, if applicable, of the country of transit have authorized the movement, and that the authorities of the jurisdiction of destination have authorized the final disposal or recycling of the waste or material, or
  - (ii) a transit permit that states that the Minister has authorized the movement; and
- (c) in accordance with the prescribed conditions.

**Refusal to issue permit**

(2) If the Minister is of the opinion that the waste or material will not be managed in a manner that will protect the environment and human health against the adverse effects that may result from that waste or material, the Minister may refuse, in accordance with the criteria set out in the regulations, to issue a permit even if the relevant authorities have given their authorization.

**Consultation with governments**

(3) Before refusing under subsection (2) to issue a permit to import, the Minister shall consult with the government of the jurisdiction of destination.

**Special circumstances to issue permits**

(4) Where the Minister is of the opinion that the waste or material will be managed in a manner that will protect the environment and human health against the adverse effects that may result from that waste or material, the Minister may issue a permit if the relevant authorities inform the Minister that they lack the legal authority to authorize the movement, final disposal or recycling but are not opposed to it.

**Prohibitions - import, export and transit**

**186. (1) For the purpose of implementing international agreements respecting the environment, the Minister may, with the approval of the Governor in Council and taking into account Canada's international obligations, prohibit, completely or partially and under any conditions that may be prescribed, the import, export or transit of waste or material referred to in subsection 185(1).**

**Prohibition of abandonment**

(2) No person shall abandon any waste or material referred to in subsection 185(1) in the course of import, export or transit.

## Publication

**187. After the Minister receives a notification of the proposed import, export or transit of a waste or material referred to in subsection 185(1), the Minister shall publish in the *Canada Gazette*, or in any other manner that the Minister considers appropriate, the name or specifications of the waste or material and**

- (a) in the case of a proposed import, the name of the jurisdiction of origin and the name of the importer;
- (b) in the case of a proposed export, the name of the jurisdiction of destination and the name of the exporter; and
- (c) in the case of a proposed transit, the names of the jurisdictions of origin and of destination and the name of the conveyor.

## Reduction of export for final disposal

**188. (1) For the purpose of reducing or phasing out the export of hazardous waste for final disposal, the Minister may require an exporter, or a class of exporters, of hazardous waste to**

- (a) submit to the Minister, at the same time as the notification referred to in paragraph 185(1)(a) and at any other prescribed time, a plan in accordance with the regulations; and
- (b) implement that plan.

## Declaration of implementation

(2) Every person who is required to implement a plan under paragraph (1)(b) shall file with the Minister, within 30 days after the completion of each stage of the plan, a written declaration that the implementation has been completed.

## Sanction

- (3) The Minister may refuse to issue a permit to an exporter who does not comply with subsection (1) or (2).

## Movement within Canada

**189. (1) No person shall undertake movement within Canada of hazardous waste or hazardous recyclable material otherwise than in accordance with this Division and the regulations and unless the person pays the prescribed fee.**

## Publication

(2) The Minister shall publish in the *Canada Gazette*, or in any other manner that the Minister considers appropriate, information derived from documents received under regulations made for the purpose of this section.

## Permits based on equivalent environmental safety level

**190. (1) The Minister may issue a permit authorizing, subject to conditions fixed by the Minister, any activity to be conducted in a manner that does not comply with this Division if the Minister is satisfied that**

- (a) the manner in which the activity will be conducted provides a level of environmental safety at least equivalent to that provided by compliance with this Division; and
- (b) in the case of the importation, exportation or transit of a waste or material referred to in subsection 185(1), the activity is consistent with international environmental agreements binding on Canada.

### Scope of permit

(2) The permit may authorize the activity in terms of the persons who may conduct the activity and in terms of the waste and material that it may involve.

### Revocation of permit

(3) The Minister may revoke the permit if

- (a) the Minister is of the opinion that paragraph (1)(a) or (b) no longer applies;
- (b) the regulations have been amended and address the activity authorized by the permit; or
- (c) the permit holder does not comply with the conditions of the permit.

### Publication

(4) The Minister shall publish in the *Canada Gazette*, or in any other manner that the Minister considers appropriate, a copy of each permit issued under this section.

### Regulations

**191. The Governor in Council may, on the recommendation of the Minister, make regulations generally for carrying out the purposes and provisions of this Division, including regulations**

- (a) defining, for the purposes of this Division and Part 10, words and expressions used in this Division, and providing criteria, testing protocols and standards in relation to those definitions;
- (b) respecting the notification referred to in paragraph 185(1)(a) and the procedure for applying for a permit under this Division;
- (c) establishing criteria for the purpose of subsection 185(2) that take into account obligations arising from international agreements to which Canada is a party;
- (d) for establishing a classification system for waste and material;
- (e) respecting information and documents to be provided to the Minister;
- (f) respecting conditions governing the import, export, transit and movement within Canada of waste and material;
- (g) respecting plans referred to in subsection 188(1), taking into account
  - (i) the benefit of using the nearest appropriate disposal facility, and
  - (ii) changes in the quantity of goods the production of which generates hazardous waste to be disposed of by an exporter or class of exporters; and
- (h) prescribing anything that by this Division is to be prescribed.

### Forms

**192. The Minister may establish forms for the purposes of this Division.**

## OVERVIEW

These provisions provide for the regulation of the trans boundary movement of hazardous wastes, hazardous recyclable materials and non-hazardous wastes for disposal.

Division 8 takes two significant steps forward from the previous CEPA. These are: the inclusion of non-hazardous waste for final disposal in its provisions; and, the inclusion of provisions to require plans for reduction or phase out of the export of hazardous wastes for final disposal.

The weakness of this Division is that the provisions are permissive instead of requiring the Minister to take certain actions. For example, the Bill only says that the Minister may take action to implement international agreements that Canada has signed, instead of requiring the Minister to take action to implement such commitments.

The provisions also authorize the granting of permits for an activity that "does not comply" with the provisions of this Division if the Minister is satisfied that the activity was conducted in a manner that provides for an equivalent level of safety. The provisions are similar to the *Regulatory Efficiency Act* compliance plan scheme.

## RECOMMENDATIONS ON SPECIFIC SECTIONS

### Section 185 - Import, Export and Transit

The purpose of this section is to require approval from the federal government and foreign governments prior to wastes being imported, exported or sent through a country on route to disposal or recycling facilities.

The most significant addition in this section from the present CEPA is the addition of "prescribed non-hazardous waste" to the list of substances for which notification and permits are required. This is potentially a very significant addition since it would allow for added information about, and controls on, the export and import of municipal garbage. This is an objective that has been shared by environmental groups, by provincial governments and by Environment Canada. The full implications of this addition will not be known until non-hazardous wastes are prescribed in the regulations.

Subsection 185(2) is significant because it allows the Minister to refuse to allow waste into the country even if the provincial or territorial government says that it is willing to receive the waste. This would allow the federal government to ban certain wastes from entering.

**Section 186** - Prohibitions - Import, Export and Transit

This section allows the Minister to prohibit the import, export or transit of wastes in accordance with international agreements.

The intent of this section is good but it is inadequate because it is not strong enough. If Canada has signed an international agreement such as the *Basel Convention* it is morally obliged to fulfil the commitments in the agreement. Therefore, the Minister should be obliged by the Bill to implement these agreements.

**Recommendation No. 132**

**Section 186(1) should be amended so that the words "Minister may..." are changed to "the Minister shall..."**

**Section 187** - Publication

This section requires the Minister to publish in the *Canada Gazette* notices for proposed imports, exports or transit of waste.

The intention of this section is important in terms of giving communities the opportunity to be aware of proposals for the movement of wastes. It is inadequate, however, because communities are not likely to be reviewing the *Canada Gazette* and, therefore, will not really benefit from this process. The Minister should find other ways to notify affected communities of the proposal to move wastes into, out of, or through their communities. The notice should also include a timetable for comment on the proposal.

**Recommendation No. 133**

**Section 187 should be amended by adding the following clause: "The Minister should provide at 30-days for the public to comment on notifications received for the import, export or transit of wastes."**

**In addition, the phrase: "or in any other manner that the Minister considers appropriate" should be amended to read "and in additional ways that will appear in the affected communities..."**

**Section 188** - Reduction of Export for Final Disposal

This section allows the Minister to require an exporter of hazardous wastes to submit a plan for reducing or phasing out the export of that hazardous waste for disposal and requires the exporter to implement the plan. It allows the Minister to refuse to issue a permit for export to an exporter who does not comply with this section. This provision is required to fulfil Canada's obligations under the *Basel Convention on the Transboundary Movement of Hazardous Waste*.

This is an extremely important addition to the federal law on export and import of hazardous wastes. It is consistent with the intent of requiring pollution prevention by phasing out the ongoing export of hazardous wastes. This section is also to be applauded by the fact that it includes within it provisions for taking sanctions against exporters who do not develop or implement reduction or phase out plans. The Minister can use such failure as a reason for refusing to allow the continued export of hazardous wastes. This section has the potential of making Canada become a much more responsible member of the international community.

As now written, this essential section applies only to hazardous waste. It should be expanded to include prescribed non-hazardous wastes. The on-going export of municipal garbage to the U.S., for example, makes Canada an irresponsible actor dumping its wastes into landfills and incinerators in the U.S.

**Recommendation No. 134**

**Section 188(1) should be amended by replacing the phrase: "reducing or phasing out the export of hazardous waste for final disposal" with "reducing or phasing out the export of hazardous waste or prescribed non-hazardous waste for final disposal."**

**Recommendation No. 135**

**The federal government should be required to publish an annual report on waste imports, exports and transits in the Annual Report to Parliament on administration and enforcement on the Act. The annual report should include the following information: jurisdiction or origin and destination; names of the importers or exporters; and the composition of waste exports.**

### **Recommendation No. 136**

**Notices of proposed import, export or transit should be provided in electronic form through the environmental registry proposed in sections 12-14.**

#### **Section 190** - Permits Based on Equivalent Environmental Safety Level

This section allows the Minister to issue a permit for the movement of wastes even if the activity does not comply with the conditions set out in this Division and the regulations set up under it. These exceptions are allowed where the "level of environmental safety [will be] at least equivalent to that provided by compliance with this Division," and the activity is "consistent with" international agreements binding on Canada.

Unfortunately, this section is consistent with two other Federal initiatives that would have negative environmental effects: the *Environmental Management Framework Agreement* and the previously proposed *Regulatory Efficiency Act*. This section could involve the devolution of federal powers to the provincial level and could involve the making of compliance agreements with the private sector. This would mean that the federal government would abdicate its responsibility to protect the environment at home and to act as a responsible member of the international community.

### **Recommendation No. 137**

**Delete the provision for granting of permits based on "equivalent environmental safety."**

**Section 190 should be removed from the Bill.**



## PART 8 - ENVIRONMENTAL EMERGENCIES - SECTIONS 193-205

### Bill C-32 STATES:

**193. The definitions in this section apply in this Part.**

"environmental emergency" means

- (a) an uncontrolled, unplanned or accidental release, or release in contravention of regulations made under this Part, of a substance into the environment; or
- (b) the reasonable likelihood of such a release into the environment.

"substance" means, except in section 199, a substance on the list of substances established under regulations made under this Part.

#### Application

**194. For the purposes of this Part, any power, duty or function conferred or imposed under this Part may only be exercised or performed in relation to those aspects of an environmental emergency that**

- (a) have or may have an immediate or long-term harmful effect on the environment;
- (b) constitute or may constitute a danger to the environment on which human life depends; or
- (c) constitute or may constitute a danger in Canada to human life or health.

#### Research

**195. Despite subsection 36(3) of the Fisheries Act, subsection 123(1) and regulations made under paragraphs 93(1)(a), (b), (c) and (d) and 209(2)(a), (b), (c) and (d), the Minister may**

- (a) examine and conduct research, including tests, respecting the causes, circumstances and effects of and remedial measures for an environmental emergency; and
- (b) conduct and publicize demonstration projects.

#### Guidelines and codes of practice

**196. The Minister may issue guidelines and codes of practice respecting the prevention of, preparedness for and response to an environmental emergency and for restoring any part of the environment damaged by or during an emergency.**

#### Consultation

**197. In carrying out the responsibilities conferred by section 196, the Minister shall offer to consult with the government of a province and the members of the Committee who are representatives of aboriginal governments and may consult with a government department or agency, aboriginal people, representatives of industry and labour and municipal authorities or with persons interested in the quality of the environment or environmental emergencies.**

#### Publication of guidelines and codes of practice

**198. The Minister shall publish in the *Canada Gazette*, or in any other manner that the Minister considers appropriate, guidelines and codes of practice issued under section 196 or a notice stating where copies of those documents may be obtained.**

## **Requirements for environmental emergency plans**

**199. (1)** The Minister may at any time publish in the *Canada Gazette*, and in any other manner that the Minister considers appropriate, a notice requiring any person or class of persons described in the notice to prepare or implement an environmental emergency plan respecting the prevention of, preparedness for, response to or recovery from an environmental emergency in respect of a substance or group of substances specified on the List of Toxic Substances in Schedule 1.

### **Contents of notice**

- (2) The notice may specify
- (a) the substance or group of substances in relation to which the plan is to be prepared;
  - (b) the period within which the plan is to be prepared;
  - (c) the period within which the plan is to be implemented; and
  - (d) any other matter that the Minister considers necessary.

### **Extension of time**

(3) Where the Minister is of the opinion that further time is necessary to prepare or implement the plan, the Minister may extend the period for a person who submits a written request before the expiry of the period referred to in the notice or of any extended period.

### **Plan prepared or implemented for another purpose**

(4) Subject to subsection (5), where a person who is required to prepare or implement an environmental emergency plan under a notice published under this section has prepared or implemented a plan in respect of environmental emergencies on a voluntary basis or for another government or under another Act of Parliament that meets all or some of the requirements of the notice, the person may use that plan for the purposes of meeting the requirements of this Part and, in that case, the plan shall be considered to be an environmental emergency plan that has been prepared or implemented under this Part.

### **Where partial requirements met**

(5) Where a person uses a plan under subsection (4) that does not meet all of the requirements of the notice, the person shall

- (a) amend the plan so that it meets all of those requirements; or
- (b) prepare an additional environmental emergency plan that meets the remainder of those requirements.

### **Application of provisions re declarations and keeping plans**

(6) Sections 58 and 59 apply to environmental emergency plans, with any modifications that the circumstances require, as if any reference to a pollution prevention plan were read as a reference to an environmental emergency plan.

### **Submission of plans**

(7) The Minister may publish in the *Canada Gazette*, and in any other manner that the Minister considers appropriate, a notice requiring any person or class of persons described in the notice who are required to prepare or implement an environmental emergency plan under subsection (1) or section 291 or under an agreement in respect of environmental protection alternative measures to submit, within the period specified by the Minister, the plan or any part of the plan.

## Regulations

**200. (1) The Governor in Council may, on the recommendation of the Minister and after the Committee is given an opportunity to provide its advice to the Minister under section 6, make regulations**

- (a) establishing a list of substances that, if they enter the environment as a result of an environmental emergency,
  - (i) have or may have an immediate or long-term harmful effect on the environment,
  - (ii) constitute or may constitute a danger to the environment on which human life depends, or
  - (iii) constitute or may constitute a danger in Canada to human life or health;
- (b) prescribing, in respect of a substance on the list established under paragraph (a), a minimum quantity;
- (c) respecting the identification of the places in Canada where a substance referred to in paragraph (a), in any quantity or in the quantity prescribed for that substance under paragraph (b), is located and requiring notification to the Minister of those places;
- (d) respecting the prevention of, preparedness for, response to and recovery from an environmental emergency in respect of a substance;
- (e) respecting the notification and reporting of an environmental emergency;
- (f) respecting the notification and reporting of the measures taken
  - (i) to prevent the environmental emergency, or
  - (ii) to repair, reduce or mitigate any negative effects on the environment or human life or health that result from the environmental emergency or that may reasonably be expected to result from it;
- (g) respecting the implementation of international agreements entered into by Canada in relation to environmental emergencies; and
- (h) respecting any other matter necessary for the purposes of this Part.

## Environmental emergencies regulated under other Acts of Parliament

(2) The Governor in Council shall not make a regulation under subsection (1) in respect of a matter if, in the opinion of the Governor in Council, the matter is regulated by or under any other Act of Parliament.

## Remedial measures

**201. (1) Subject to any regulations made under subsection 200(1), where there occurs an environmental emergency in respect of a substance on the list established under the regulations, any person described in subsection (2) shall, as soon as possible in the circumstances,**

- (a) notify an inspector or any other person designated pursuant to the regulations and provide a written report on the environmental emergency to the inspector or other person;
- (b) take all reasonable emergency measures consistent with the protection of the environment and public safety
  - (i) to prevent the environmental emergency, or

(ii) to repair, reduce or mitigate any negative effects on the environment or human life or health that result from the environmental emergency or that may reasonably be expected to result from it; and

(c) make a reasonable effort to notify any member of the public who may be adversely affected by the environmental emergency.

#### **Application**

(2) Subsection (1) applies to any person who

(a) owns or has the charge, management or control of a substance immediately before the environmental emergency; or

(b) causes or contributes to the environmental emergency.

#### **Report by other persons**

(3) A person, other than a person described in subsection (2), shall, as soon as possible in the circumstances, report an environmental emergency to an inspector or to a person designated by the regulations if their property is affected by the environmental emergency.

#### **Intervention by inspector**

(4) Where any person fails to take any measures required under subsection (1), an inspector may take those measures, cause them to be taken or direct any person referred to in subsection (2) to take them.

#### **Limitation on power of direction**

(5) Any direction of an inspector under subsection (4) that is inconsistent with a requirement imposed by or under any other Act of Parliament is void to the extent of the inconsistency.

#### **Access to property**

(6) Any inspector or other person authorized or required to take any measures under subsection (1) or (4) may enter and have access to any place or property and may do anything reasonable that may be necessary in the circumstances.

#### **Personal liability**

(7) Any person, other than a person described in subsection (2), who provides assistance or advice in taking the measures required by subsection (1) or who takes any measures authorized under subsection (4) is not personally liable either civilly or criminally in respect of any act or omission in the course of providing assistance or advice or taking any measures under those subsections unless it is established that the person acted in bad faith.

#### **Voluntary report**

**202. (1) If a person knows about an environmental emergency but the person is not required to report the matter under this Act, the person may report any information about the environmental emergency to an inspector or to a person designated by the regulations.**

#### **Request for confidentiality**

(2) The person making the report may request that their identity and any information that could reasonably reveal their identity not be released.

### **Requirement of confidentiality**

(3) No person shall disclose, or have disclosed, the identity of the person making the request or any information that could reasonably be expected to reveal their identity unless the person making the request authorizes the disclosure in writing.

### **Employee protection**

(4) Despite any other Act of Parliament, no person shall discipline, dismiss or harass an employee of any of the following organizations for making a report under subsection (1):

- (a) a department of the Government of Canada;
- (b) an agency of the Government of Canada or other body established by or under an Act of Parliament that is ultimately accountable through a minister of the Crown in right of Canada to Parliament for the conduct of its affairs;
- (c) a Crown corporation as defined in subsection 83(1) of the *Financial Administration Act*; or
- (d) a federal work or undertaking.

### **Recovery of costs and expenses**

**203. (1) Her Majesty in right of Canada may recover the costs and expenses of and incidental to taking any measures under subsection 201(4) from**

- (a) any person referred to in paragraph 201(2)(a); and
- (b) any person referred to in paragraph 201(2)(b) to the extent of their negligence or wilful conduct in causing or contributing to the environmental emergency.

### **Reasonably incurred**

(2) The costs and expenses referred to in subsection (1) shall only be recovered to the extent that they can be established to have been reasonably incurred in the circumstances.

### **Liability**

(3) Subject to subsection (4), the persons referred to in subsection (1) are jointly and severally liable or solidarily liable for the costs and expenses referred to in that subsection.

### **Limitation**

(4) A person referred to in paragraph 201(2)(b) shall not be held liable under subsection (3) to an extent greater than the extent of their negligence or wilful conduct in causing or contributing to the environmental emergency.

### **Procedure**

(5) A claim under this section may be sued for and recovered by Her Majesty in right of Canada with costs in proceedings brought or taken therefor in the name of Her Majesty in right of Canada in any court of competent jurisdiction.

### **Recourse or indemnity**

(6) This section does not limit or restrict any right of recourse or indemnity that a person may have against any other person.

### **Limitation period**

(7) Where events giving rise to a claim under this section occur, no proceedings in respect of the claim may be instituted after five years from the date on which the events occur or become evident to the Minister, whichever is later.

### **Minister's certificate**

(8) A document purporting to have been issued by the Minister certifying the day on which the events giving rise to a claim under this section came to the knowledge of the Minister shall be received in evidence and, in the absence of any evidence to the contrary, the document shall be considered as proof of that fact without proof of the signature or of the official character of the person appearing to have signed the document and without further proof.

### **National notification and reporting system**

**204. (1) The Minister may establish, in cooperation with the governments of the provinces and aboriginal governments and government departments or agencies, a national system for the notification and reporting of environmental emergencies.**

### **Copies**

(2) Subject to section 314, any person may have access to and a copy of any information contained in the national system established under subsection (1).

### **Liability of owner of substance**

**205. (1) Subject to this Part, the person who owns or has the charge, management or control of a substance immediately before an environmental emergency is liable**

(a) for restoring any part of the environment damaged by or during the emergency;

(b) for costs and expenses incurred by a public department within the meaning of the *Criminal Code* or other public authority in Canada in respect of measures taken to prevent, repair, remedy or minimize the damage to the environment resulting from the emergency, including measures taken in anticipation of the environmental emergency, to the extent that the measures taken and the costs and expenses are reasonable, and for any loss or damage caused by such measures; and

(c) for costs and expenses incurred by the Minister in respect of measures taken to prevent, repair, remedy or minimize the environmental emergency to the extent that the measures taken and the costs and expenses are reasonable, and for any loss or damage caused by such measures.

### **Definition of "public authority in Canada"**

(2) In subsection (1), "public authority in Canada" means Her Majesty in right of a province, an aboriginal government or any other body designated by the Governor in Council for the purposes of that subsection as a public authority in Canada.

### **Strict liability subject to certain defences**

(3) The person's liability under subsection (1) does not depend on proof of fault or negligence, but the owner is not liable under that subsection if the owner establishes that the environmental emergency

(a) resulted from an act of war, hostilities or insurrection or from a natural phenomenon of an exceptional, inevitable and irresistible character;

(b) was wholly caused by an act or omission of a third party with intent to cause damage; or

(c) was wholly caused by the negligence or other wrongful act of government, public department or public authority.

#### **Reduced liability**

(4) Where the person who is liable under subsection (1) establishes that the environmental emergency resulted wholly or partially from

(a) an act or omission done by the person who suffered the damage with intent to cause damage, or

(b) the negligence or wilful conduct of that person,

the liability of the person referred to in subsection (1) to that other person is reduced or nullified in proportion to the degree to which the environmental emergency resulted from the factors mentioned in paragraphs (a) and (b).

#### **Person's rights against third parties preserved**

(5) Nothing in this Part shall be construed as limiting or restricting any right of recourse that the person who is liable under subsection (1) may have against any other person.

#### **Person's own claim for costs and expenses**

(6) Costs and expenses incurred by the person referred to in subsection (1) in respect of measures voluntarily taken to prevent, repair, remedy or minimize damage from the environmental emergency, including measures taken in anticipation of an environmental emergency, to the extent that the measures taken and the costs and expenses are reasonable, rank equally with other claims against any security given by that person in respect of that person's liability under this section.

## **OVERVIEW**

This Part permits the Minister to require emergency plans in relation to TSL substances and substances proposed for addition to the TSL. The Part then requires remedial action in event of an emergency by those who have submitted plans.

This emergency planning power is tied to the CEPA toxic definition which may be a problem given the narrow definition of toxicity.

This Part permits the requirements for emergency plans to be fulfilled by compliance with emergency planning requirements under other Acts of Parliament or under other governments, if all requirements of Environment Canada are met.

## RECOMMENDATION ON SPECIFIC SECTION

Section 197 - Consultation

**Recommendation No. 138**

**Delete or modify discretionary language. Replace word  
"shall" with "may."**



**PART 9 - GOVERNMENT OPERATIONS AND FEDERAL AND ABORIGINAL LANDS**  
- SECTIONS 206-215

**Bill C-32 STATES:**

206. In this Part, "regulations" means regulations made under this Part.

**Application**

Application to Government, etc.

207. (1) This Part applies to

- (a) departments, boards and agencies of the Government of Canada;
- (b) federal works and undertakings; and
- (c) aboriginal land, federal land, persons on that land and other persons in so far as their activities involve that land.

**Crown corporations**

(2) This Part also applies to Crown corporations, as defined in subsection 83(1) of the *Financial Administration Act*, but objectives, guidelines, codes of practice and regulations made under this Part shall not impose any requirements on them that are more stringent than those applicable to persons in the private sector.

**Limitation**

(3) This Part does not restrict any of the following powers in so far as they may be exercised in relation to air and all layers of the atmosphere above federal land or aboriginal land:

- (a) powers under the *Aeronautics Act* or a provision of any other Act of Parliament relating to aeronautics or air transportation; or
- (b) powers under the *National Defense Act* or a provision of any other Act of Parliament relating to national defense and security.

**Objectives, Guidelines and Codes of Practice**

**Minister shall establish**

208. The Minister shall establish objectives, guidelines and codes of practice for the purpose of carrying out the Minister's duties and functions under this Part related to the quality of the environment.

**Consultation**

- (2) In establishing an objective, a guideline or a code of practice under subsection (1), the Minister
  - (a) shall offer to consult with the government of a territory if the objective, guideline or code of practice applies to that territory, and with the members of the Committee who are representatives of aboriginal governments if it applies to aboriginal land over which an aboriginal government has jurisdiction; and
  - (b) may consult with a department, board or agency of the Government of Canada.

## **Regulations**

### **Regulations for the protection of the environment**

**209. (1) The Governor in Council may, on the recommendation of the Minister, make regulations for the protection of the environment, including, but not limited to, regulations respecting**

- (a) the establishment of environmental management systems;
- (b) pollution prevention and pollution prevention plans;
- (c) environmental emergencies, releases of substances and likely releases, including their prevention, preparedness for them, reporting them, both as soon as possible in the circumstances and in detail at a later stage, and the measures to be taken to respond to them and to correct damage to the environment;
- (d) the designation of persons for the purposes of paragraph 212(1)(a) and subsections 212(3) and 213(1) and prescribing the form of the report to be made under those provisions and the information to be contained in it;
- (e) the circumstances in which a report is not required under paragraph 212(1)(a);
- (f) any substance; and
- (g) any other matter necessary to carry out the purposes of this Part.

### **Content of the regulations**

- (2) Regulations with respect to any substance may provide for, or impose requirements respecting,
  - (a) the quantity or concentration of any substance that may be released into the environment either alone or in combination with any other substance from any source or type of source;
  - (b) the places or areas where the substance may be released;
  - (c) the commercial, manufacturing, processing or other activity in the course of which the substance may be released;
  - (d) the manner in which and the conditions under which the substance may be released into the environment, either alone or in combination with any other substance;
  - (e) the quantity of the substance that may be manufactured, processed, used, offered for sale or sold in Canada;
  - (f) the purposes for which the substance or a product containing it may be imported, manufactured, processed, used, offered for sale or sold;
  - (g) the manner in which and the conditions under which the substance or a product containing it may be imported, manufactured, processed or used;
  - (h) the quantities or concentrations in which the substance may be used;
  - (i) the quantities or concentrations of the substance that may be imported;
  - (j) the countries from or to which the substance may be imported or exported;
  - (k) the conditions under which, the manner in which and the purposes for which the substance may be imported or exported;

(l) the total, partial or conditional prohibition of the manufacture, use, processing, sale, offering for sale, import or export of the substance or a product containing the substance and the total, partial or conditional prohibition of the import or export of a product that is intended to contain the substance;

(m) the quantity or concentration of the substance that may be contained in any product manufactured, imported, exported, sold or offered for sale in Canada;

(n) the manner in which, the conditions under which and the purposes for which the substance or a product containing it may be advertised or offered for sale;

(o) the manner in which and the conditions under which the substance or a product containing it may be stored, displayed, handled, transported or offered for transport;

(p) the packaging and labeling of the substance or a product containing it;

(q) the manner, conditions, places and method of disposal or recycling of the substance or a product containing it, including standards for the construction, maintenance and inspection of disposal or recycling sites;

(r) the submission to the Minister, on request or at any times that are prescribed, of information relating to the substance;

(s) the maintenance of books and records for the administration of any regulation made under this section;

(t) the conduct of sampling, analyses, tests, measurements or monitoring of the substance and the submission of the results to the Minister;

(u) the submission of samples of the substance to the Minister;

(v) the conditions, test procedures and laboratory practices to be followed for conducting sampling, analyses, tests, measurements or monitoring of the substance;

(w) the circumstances or conditions under which the Minister may, for the proper administration of this Act, modify

(i) any requirement for sampling, analyses, tests, measurements or monitoring, or

(ii) conditions, test procedures and laboratory practices for conducting any required sampling, analyses, tests, measurements or monitoring; and

(x) the decommissioning and decontamination of storage, handling, transportation, disposal and recycling sites for the substance.

### **Consultation**

(3) Before recommending to the Governor in Council a regulation under this section, the Minister

(a) shall offer to consult with the government of a territory if the regulation applies to that territory, and with the members of the Committee who are representatives of aboriginal governments if it applies to aboriginal land over which an aboriginal government has jurisdiction; and

(b) may consult with a department, board or agency of the Government of Canada.

### **Non-application of regulations**

**210. Where provisions of any other Part of this Act or any other Act of Parliament, or regulations made under them, are in force in respect of an aspect of the protection of the environment and apply to a federal work or**

undertaking, federal land or aboriginal land, regulations made under this Part relating to the same aspect do not apply to the federal work or undertaking, the federal land or the aboriginal land.

#### ***Information about Works and Activities***

##### **Minister may require information**

211. (1) For the purpose of making regulations, the Minister may require information from any person who carries on, or proposes to carry on, a federal work or undertaking or an activity on federal land or aboriginal land.

##### **Kind of information**

(2) The required information shall be information that will enable the Minister to determine any environmental effects that the work, undertaking or activity may have, and it may include

(a) plans, specifications, studies, procedures, schedules, analyses, samples or other information relating to the work, undertaking or activity; and

(b) analyses, samples, evaluations, studies or other information relating to the environment that is or is likely to be affected by the work, undertaking or activity.

#### ***Release of Substances***

##### **Report and remedial measures**

212. (1) If a substance is released into the environment in contravention of a regulation, or if there is a likelihood of such a release, a person described in subsection (2) shall, as soon as possible in the circumstances,

(a) subject to the regulations, notify an inspector or any other person designated pursuant to the regulations and provide a written report on the matter to the inspector or other person;

(b) take all reasonable measures consistent with the protection of the environment and public safety to prevent or eliminate any dangerous condition or minimize any danger to the environment or to human life or health that results from the release or may reasonably be expected to result if the substance is released; and

(c) make a reasonable effort to notify any members of the public who may be adversely affected by the release or likely release.

##### **Application of subsection (1)**

(2) Subsection (1) applies to any person who

(a) owns or has the charge, management or control of the substance immediately before its release or its likely release into the environment; or

(b) causes or contributes to the release or increases the likelihood of the release.

##### **Report by other persons**

(3) A person, other than a person described in subsection (2), shall, as soon as possible in the circumstances, report a release of a substance to an inspector or to a person designated by the regulations if their property is affected by the release and they know that the substance has been released in contravention of a regulation.

### **Intervention by inspector**

(4) Where measures required by subsection (1) are not taken, an inspector may take them, have them taken or direct a person described in subsection (2) to take them.

### **Limitation on direction**

(5) If the direction to the person described in subsection (2) is inconsistent with a requirement imposed by or under any other Act of Parliament, it is void to the extent of the inconsistency.

### **Access to property**

(6) An inspector or other person authorized or required to take measures under subsection (1) or (4) may, for the purpose of taking those measures, enter and have access to any place or property and may do anything reasonable that may be necessary in the circumstances.

### **Personal liability**

(7) A person who provides assistance or advice in taking the measures required by subsection (1), or who takes any measures authorized under subsection (4), is not personally liable either civilly or criminally for any act or omission in the course of providing assistance or advice or taking any measures under those subsections, unless it is established that the person acted in bad faith.

### **Voluntary report**

**213. (1) If a person knows about a release or likely release of a substance into the environment in contravention of a regulation but the person is not required to report the matter under this Act, the person may report any information about the release or likely release to an inspector or to a person designated by the regulations.**

### **Request for confidentiality**

(2) The person making the report may request that their identity and any information that could reasonably reveal their identity not be released.

### **Requirement of confidentiality**

(3) No person shall disclose, or have disclosed, the identity of the person making the request or any information that could reasonably be expected to reveal their identity unless the person making the request authorizes the disclosure in writing.

### **Employee protection**

(4) Despite any other Act of Parliament, no person shall discipline, dismiss or harass an employee of any of the following organizations for making a report under this section or section 212:

- (a) a department of the Government of Canada;
- (b) an agency of the Government of Canada or other body established by or under an Act of Parliament that is ultimately accountable through a minister of the Crown in right of Canada to Parliament for the conduct of its affairs;
- (c) a Crown corporation as defined in subsection 83(1) of the *Financial Administration Act*; or
- (d) a federal work or undertaking.

### **Recovery of costs and expenses**

**214. (1) The costs and expenses related to taking any measures under subsection 212(4) may be recovered by Her Majesty in right of Canada from**

(a) any person referred to in paragraph 212(2)(a); and

(b) any person referred to in paragraph 212(2)(b) to the extent of their negligence or willful conduct in causing or contributing to the release.

### **Reasonably incurred**

(2) The costs and expenses may only be recovered to the extent that they have been reasonably incurred in the circumstances.

### **Liability**

(3) Persons from whom the costs and expenses may be recovered are jointly and severally liable or solidarily liable for them. However, a person mentioned in paragraph 212(2)(b) is not liable to an extent greater than the extent of their negligence or willful conduct in causing or contributing to the release.

### **Recourse or indemnity**

(4) This section does not limit or restrict any right of recourse or indemnity that a person may have against any other person.

### **Court and costs**

**215. (1) A claim under section 214 may be recovered with costs in any court of competent jurisdiction.**

### **Limitation period**

(2) Where events giving rise to the claim occur, no proceedings in respect of the claim may be instituted more than five years after the date on which the events occur or the Minister becomes aware of them, whichever is later.

### **Minister's certificate**

(3) A document purporting to have been issued by the Minister certifying the day on which the events giving rise to a claim under section 214 came to the knowledge of the Minister shall be received in evidence and, in the absence of any evidence to the contrary, the document shall be considered as proof of that fact without proof of the signature or of the official character of the person appearing to have signed the document and without further proof.

## **OVERVIEW**

This Part empowers the federal government to develop measures (such as objectives, codes of practice, guidelines and regulations) with respect to federal government departments, operations and aboriginal lands.

The Part contains a number of positive elements. There are, for example, provisions to protect federal employees who report releases of substances that are in violation of the Act. The new Part also removes the requirement in the existing Act for the concurrence

of the affected Ministers before regulations can be made under CEPA dealing with federal government operations or activities under their jurisdiction.

However, the Part also suffers from a number of significant weaknesses. The provisions state that objectives, codes of practice, guidelines and regulations directed towards Crown Corporations "shall not impose" requirements more stringent than those imposed on the private sector.

In addition, the Part exempts activities related to aeronautics and air transportation and national defense and security from its provisions. The Part also provides that regulations in relation to federal government operations and federal and aboriginal lands made under CEPA do not apply where regulations made under another Act of Parliament apply.

More broadly, questions must be raised as to whether environmental protection on aboriginal lands would be better dealt with under a separate Part of the Act from federal government operations and lands given the qualitative differences between the situation of First Nations and Aboriginal Communities, and federal government agencies.

Furthermore, the Part imposes no specific requirements in terms of the environmental performance of federal government agencies and their activities. There is, for example, no requirement that they not cause adverse effects on the environment, as is the case with section 14 of the Ontario *Environmental Protection Act*.

## KEY POINTS

- The exemption for aeronautics should be removed.
- The exemption for national defense should be limited to wartime and actions under United Nations (UN) Security Council Resolutions.
- The limitations on the application of environmental protection requirements to Crown Corporations should be removed.
- The provisions dealing with conflicts between regulations made under this Part of CEPA and regulations made under another Act of Parliament should be amended so that where there is a conflict, the more stringent requirement shall apply.

- the part should establish a general duty of environmental performance for federal government agencies and operations. This could be based on the "no adverse effect" provisions of the Ontario *Environmental Protection Act*.

## **GENERAL RECOMMENDATION TO PART 9**

The part imposes no specific requirements in terms of the environmental performance of federal government agencies and their activities.

### **Recommendation No. 139**

**The Part should establish a general duty of environmental performance for federal government agencies and operations. This could be based on the "no adverse effect" provisions of the Ontario *Environmental Protection Act*.**

A new clause should be added to Part 9 of CEPA establishing a minimum standard of environmental performance for federal government agencies, federal activities, activities on federal or aboriginal lands, similar to section 14 of the Ontario *Environmental Protection Act*.

### **Recommendation No. 140**

**Add a clause to Part 9 stating that:**

**"Despite any other provisions of this Act or the regulations, no person, department, board, agency, work, undertaking, activity, Crown Corporation, subject to this Part shall release a substance or cause or permit the release of a substance into the environment, or engage in, in cause or permit the engagement in an activity or undertaking that causes or is likely to cause an adverse effect."**



## **RECOMMENDATIONS ON SPECIFIC SECTIONS**

### **Former Section 199 (1)**

#### **Recommendation No. 141**

**Restore section 199(1) as per Bill C-74.**

### **Sections 207(2)** - Application to Government etc. - Crown Corporations

This section states that while the Part also applies to Crown Corporations, the regulations, guidelines and codes of practice made under the Part should not impose requirements on Crown Corporations that are any more stringent than those applicable to the private sector.

This provision presents significant barriers to the imposition of environmental protection requirements on Crown Corporations, many of which engage in activities which have significant impacts on the environment and human health. Furthermore, Crown Corporations, as public entities should be model corporate citizens and therefore can be expected to meet higher standards of environmental performance.

#### **Recommendation No. 142**

**Delete paragraph (2) and add the words: "(d) Crown corporations as defined in subsection 83(1) of the *Financial Administration Act*" to subsection 207(1).**

### **Section 207(3)(a)** - Limitation - Aeronautics or Air Transportation

This subsection exempts from the Part activities related to aeronautics and air transportation. There is no environmental rationale for this exemption, as air transportation may have significant impacts on the environment.

#### **Recommendation No. 143**

**Delete subsection (a) from section 207(3).**

**Section 207(3)(b)** - Limitation - National Defence

This section exempts atmospheric activities related to national defence and security from the provisions of Part 6 of the Act. National Defence and security activities may have major environmental impacts and there is no rationale for their exemption from environmental requirements in peacetime. The exemption should be limited to activities undertaken during wartime, as defined under the relevant Acts of Parliament, and actions taken under resolutions of the United Nations Security Council (UN Security Council).

**Recommendation No. 144**

**Redraft subsection (b) to limit exemption to activities related to national defence and national security during wartime or activities under resolutions of the UN Security Council.**

**Section 210** - Applicability of CEPA vs. Other Acts of Parliament

This section provides that where the provisions of any other part of CEPA or any other Act of Parliament, or regulations made under them are in force with respect to the protection of the environment and apply to a federal work or undertaking, federal land or aboriginal land, regulations made under Part 6 of CEPA do not apply. In effect, this provision makes the requirements made under Part 6 of CEPA subordinate to provisions made under any other Act of Parliament, regardless of their adequacy with respect to the protection of the environment.

**Recommendation No. 145**

**Redraft section as follows:**

**"Where provision of any other Part of this Act or another Act of Parliament, or regulations made under them, are in force in respect of an aspect of the protection of the environment and apply to a federal work or undertaking, federal land or Aboriginal land, the more stringent of the applicable provisions applies."**

This Part imposes no specific requirements in terms of the environmental performances of federal government agencies and their activities.

**Recommendation No. 146**

**The Part should establish a general duty of environmental performance for federal government agencies and operations. This could be based on the "no adverse effect" provisions of the Ontario *Environmental Protection Act*.**

## PART 10 - ENFORCEMENT - SECTIONS 216-312

### Bill C- 32 STATES:

**216. The definitions in this section apply in this Part.**

"conveyance" includes any vehicle, ship or aircraft.

"place" includes any platform anchored at sea, shipping container or conveyance.

"substance" includes hazardous wastes, hazardous recyclable material or non-hazardous waste, as those expressions are defined by regulations made under section 191, and waste or other matter listed in Schedule 5.

#### *Designation of Inspectors, Investigators and Analysts*

##### **Designation**

**217. (1) The Minister may designate as inspectors, investigators or analysts for the purposes of this Act, or any provision of this Act,**

(a) persons or classes of persons who, in the Minister's opinion, are qualified to be so designated; and

(b) with the approval of a government, persons or classes of persons employed by the government in the administration of a law respecting the protection of the environment.

##### **Production of certificate of designation**

(2) Every inspector, investigator or analyst shall be furnished with a certificate of designation as an inspector, investigator or analyst, as the case may be, and on entering any place under section 218 or 220, as the case may be, shall, if so requested, produce the certificate to the person in charge of the place.

##### **Definition of "inspector"**

(3) For the purposes of this Act, "inspector" includes an investigator.

##### **Powers of investigators**

(4) An investigator has all of the powers, duties and functions conferred on an inspector by or under this Act and, in addition, has the power conferred on a peace officer

(a) to apply for a search warrant, on an information submitted by telephone or other means of telecommunication; and

(b) to serve a summons, subpoena or other court document.

##### **Inspection**

**218. (1) Subject to subsection (2), for the purposes of this Act and the regulations, an inspector may, at any reasonable time, enter and inspect any place if the inspector has reasonable grounds to believe that**

(a) there can be found in the place a substance to which this Act applies or a product containing such a substance;

(b) a fuel to which this Act applies is being or has been produced or can be found in the place;

(c) a cleaning product or water conditioner, as defined in section 116, is being or has been produced or can be found in the place;

(d) regulations made under section 209 apply to or in respect of the place;

(e) the place is a source in respect of which regulations have been made under section 167 or 177 or a place in respect of which regulations have been made under section 200;

(f) a substance is being loaded for the purpose of disposal at sea or is being disposed of at sea;

(g) any vehicle, engine or equipment of a class for which standards for emissions have been prescribed that is owned by or is on the premises of a company or a consignee of imported vehicles or engines or imported equipment can be found in the place;

(h) any component to be used in the manufacture of a vehicle, engine or equipment for which standards for emissions have been prescribed can be found in the place;

(i) any record in relation to the design, manufacture, testing and field performance of a vehicle, engine or equipment in so far as it relates to emissions can be found in the place; or

(j) any books, records, electronic data or other documents relevant to the administration of this Act can be found in the place;

#### **Private dwelling-place**

(2) An inspector may not enter a private dwelling-place or any part of a place that is designed to be used and is being used as a permanent or temporary private dwelling-place except

(a) with the consent of the occupant of the place; or

(b) under the authority of a warrant issued under subsection (3).

#### **Warrant for inspection of dwelling-place**

(3) Where on *ex parte* application a justice is satisfied by information on oath that

(a) the conditions for entry described in subsection (1) exist in relation to a private dwelling-place,

(b) entry to the dwelling-place is necessary for any purpose relating to the administration of this Act, and

(c) entry to the dwelling-place has been refused or there are reasonable grounds for believing that entry will be refused,

the justice may issue a warrant authorizing the inspector named in it to conduct an inspection of the dwelling-place subject to any conditions that may be specified in the warrant.

#### **Warrants for inspection of non-dwellings**

(4) Where on *ex parte* application a justice is satisfied by information on oath that

(a) the conditions for entry described in subsection (1) exist in relation to a place other than a private dwelling-place,

(b) entry to that place is necessary for any purpose relating to the administration of this Act,

(c) entry to that place has been refused, the inspector was not able to enter without the use of force or the place was abandoned, and

(d) subject to subsection (5), all reasonable attempts were made to notify the owner, operator or person in charge of the place,

the justice may issue a warrant authorizing the inspector named in it to conduct an inspection of the place, subject to any conditions that may be specified in the warrant, and authorizing any other person named therein to accompany the inspector and exercise any power specified in the warrant.

#### **Waiving notice**

(5) The justice may waive the requirement to give notice referred to in subsection (4) where the justice is satisfied that attempts to give the notice would be unsuccessful because the owner, operator or person in charge is absent from the jurisdiction of the justice or that it is not in the public interest to give the notice.

#### **Use of force**

(6) In executing a warrant issued under subsection (3) or (4), the inspector named in the warrant shall not use force unless the inspector is accompanied by a peace officer and the use of force has been specifically authorized in the warrant.

#### **Stopping and detaining conveyances**

(7) For the purposes of this Act and the regulations, an inspector may, at any reasonable time, stop any conveyance and direct that it be moved and, for a reasonable time, detain any conveyance, platform or other structure.

#### **Powers in relation to ships, etc.**

(8) Subject to subsection (2), for the purposes of this Act and the regulations, an inspector may, at any reasonable time,

(a) board any ship, platform or other structure anywhere in Canada or within Canadian waters or any aircraft if the inspector believes on reasonable grounds that the ship, platform or other structure or aircraft has on board a substance to be disposed of at sea; and

(b) travel on any ship, aircraft, platform or other structure that is loaded with a substance to be disposed of at sea.

#### **Inspector to receive accommodation**

(9) An inspector who travels on a ship, aircraft, platform or other structure under paragraph (8)(b) shall be carried free of charge to and from the disposal site and the person in command of the ship or aircraft or in charge of the platform or structure shall provide the inspector with suitable accommodation and food.

#### **Powers of inspector**

(10) In carrying out an inspection of a place under this section, an inspector may, for the purposes of this Act,

(a) examine any substance, product, fuel, cleaning product or water conditioner referred to in subsection (1) or any other thing relevant to the administration of this Act that is found in the place;

(b) open and examine any receptacle or package found that the inspector believes on reasonable grounds contains any substance, product, air contaminant, fuel, cleaning product or water conditioner, engine, equipment or component;

(c) examine any books, records, electronic data or other documents that the inspector believes on reasonable grounds contain any information relevant to the administration of this Act and make copies of them or take extracts from them;

(d) take samples of anything relevant to the administration of this Act; and

(e) conduct any tests or take any measurements.

#### **Disposition of samples**

(11) An inspector who takes a sample under paragraph (10)(d) may dispose of it in any manner that the inspector considers appropriate.

#### **Analysts**

(12) An analyst may, for the purposes of this Act, accompany an inspector who is carrying out an inspection of a place under this section and the analyst may, when so accompanying an inspector, enter the place and exercise any of the powers described in subsections (8) and (10).

#### **Operation of computer system and copying equipment**

(13) In carrying out an inspection of a place under this section, an inspector may

(a) use or cause to be used any computer system at the place to examine any data contained in or available to the computer system;

(b) reproduce any record or cause it to be reproduced from the data in the form of a printout or other intelligible output;

(c) take a printout or other output for examination or copying; and

(d) use or cause to be used any copying equipment at the place to make copies of the record.

#### **Duty of person in possession or control**

(14) Every person who is in possession or control of a place being inspected under this section shall permit the inspector to do anything referred to in subsection (13).

#### **Production of documents and samples**

**219. (1) The Minister may, for the purposes of this Act and the regulations, by registered letter or by a demand served personally, require any person to produce at a place specified by the Minister anything referred to in paragraph 218(10)(c) or any samples referred to in paragraph 218(10)(d) within any reasonable time and in any reasonable manner that may be stipulated therein.**

#### **Compliance**

(2) Any person who is required to produce anything under subsection (1) shall, despite any other law to the contrary, do so as required.

#### **Search**

#### **Authority to issue warrant for search and seizure**

**220. (1) Where on *ex parte* application a justice is satisfied by information on oath that there are reasonable grounds to believe that there is in any place**

(a) anything by means of or in relation to which any provision of this Act or the regulations has been contravened, or

(b) anything that there are reasonable grounds to believe will afford evidence with respect to the commission of an offence under this Act,

the justice may issue a warrant authorizing an inspector or investigator or authorizing any other person named in the warrant, to enter and search the place and to seize anything referred to in paragraph (a) or (b) subject to any conditions that may be specified in the warrant.

#### **Warrant for seizure of ships, etc.**

(2) Where on *ex parte* application a justice is satisfied by information on oath that there are reasonable grounds to believe that an offence has been committed under section 272 by an owner of any ship, aircraft, platform or other structure, the justice may issue a warrant authorizing an inspector or investigator, or authorizing any other person named in the warrant, to seize the ship, aircraft, platform or structure anywhere in Canada and, in the case of a ship, platform or structure, within Canadian waters.

#### **Search and seizure**

(3) A person authorized by a warrant issued under subsection (1) or (2) may

(a) at any reasonable time enter and search a place referred to in the warrant;

(b) seize and detain anything referred to in the warrant; and

(c) exercise the powers described in subsection 218(10) or (13).

#### **Where warrant not necessary**

(4) An inspector or investigator may exercise the powers described in subsection (3) without a warrant if the conditions for obtaining the warrant exist but by reason of exigent circumstances it would not be practical to obtain the warrant.

#### **Exigent circumstances**

(5) For greater certainty, exigent circumstances include circumstances in which the delay necessary to obtain a warrant under subsection (1) or (2) would result in danger to human life or the environment or the loss or destruction of evidence.

#### **Operation of computer system and copying equipment**

(6) A person authorized under this section to search a place may

(a) use or cause to be used any computer system at the place to search any data contained in or available to the computer system;

(b) reproduce any record or cause it to be reproduced from the data in the form of a printout or other intelligible output;

(c) seize the printout or other output for examination or copying; and

(d) use or cause to be used any copying equipment at the place to make copies of the record.



### **Duty of person in possession or control**

(7) Every person who is in possession or control of a place in respect of which a search is carried out under this section shall permit the person carrying out the search to do anything referred to in subsection (6).

### **Custody**

**221. (1) Any ship, aircraft, platform or other structure seized under section 220 shall be delivered into the custody of any person that the Minister directs.**

### **Discharge of cargo**

(2) Where a thing seized under section 220 has cargo on board, the cargo may be discharged, under the supervision of the person into whose custody the thing was delivered, at the port or place in Canada capable of receiving the cargo that is nearest to the place of seizure or at any other port or place that is satisfactory to that person.

### **Sale of perishable cargo**

(3) Where a thing seized under section 220 has cargo on board that is perishable, the inspector by whom the thing was seized or, if the thing has been delivered into the custody of a person in accordance with subsection (1), that person may sell the cargo or the portion of it that is perishable, as the case may be, and the proceeds of the sale shall be paid to the Receiver General or shall be deposited in a bank to the credit of the Receiver General.

### **Order for delivery of cargo**

(4) The owner of any cargo of anything seized under section 220 may apply to the Federal Court for an order requiring any person who has custody of the cargo or the proceeds of any sale thereof to deliver the cargo or the proceeds of sale to the owner, and the Court may make such an order where it is satisfied that the applicant is the owner of the cargo to which the application relates.

### **Redelivery on deposit of security**

**222. (1) Where a ship, aircraft, platform or other structure has been seized under section 220, the Federal Court may, with the consent of the Minister, order redelivery of the thing or delivery of the proceeds realized from a sale of any perishable cargo under subsection 221(3) to the person from whom the thing was seized if security in the form of a bond in an amount and form satisfactory to the Minister is given to the Minister.**

### **Seized ship, etc., to be returned unless proceedings instituted**

(2) Anything referred to in subsection (1) that has been seized under section 220, or any security given to the Minister under subsection (1), shall be returned or paid to the person from whom the thing was seized within 30 days after the seizure unless, before the expiry of those 30 days, proceedings are instituted in respect of an offence under section 272 alleged to have been committed by the owner of the thing.

### **Detention**

#### **Seizure**

**223. (1) Whenever during the course of an inspection or a search an inspector has reasonable grounds to believe that a provision of this Act or the regulations has been contravened, the inspector may seize and detain anything**

(a) by means of or in relation to which the inspector reasonably believes the contravention occurred; or

(b) that the inspector reasonably believes will afford evidence of the contravention.

### **Limitation**

(2) An inspector shall not seize anything under subsection (1) unless the thing is required as evidence or for purposes of analysis or the inspector is of the opinion that the seizure is necessary in the public interest.

### **Notice of contravention**

(3) An inspector who has seized and detained a thing under subsection (1) shall, as soon as is practicable, advise the person in whose possession it was at the time of the seizure of the provision of this Act or the regulations that the inspector believes has been contravened.

### **Detention and release**

(4) Anything seized under subsection (1) or section 220, other than a ship, aircraft, platform or other structure, shall not be detained

(a) after the owner of the thing or the person in whose possession it was at the time of the seizure applies to the inspector or to the Minister for its release and the inspector or the Minister is satisfied that it is not necessary in the public interest to continue to detain the thing or that it is not required as evidence or for purposes of analysis; or

(b) after the expiry of 90 days after the day of seizure, unless before that time

(i) the thing has been forfeited under section 229,

(ii) proceedings have been instituted in respect of the contravention in relation to which the thing was seized, in which case it may be detained until the proceedings are finally concluded, or

(iii) the Minister has served or made reasonable efforts to serve notice of an application for an order extending the time during which the thing may be detained in accordance with section 224.

### **Storage of seized thing**

(5) A thing seized by an inspector under subsection (1) or section 220, other than a ship, aircraft, platform or other structure, shall be kept or stored in the place where it was seized except if

(a) in the opinion of the inspector,

(i) it is not in the public interest to do so, or

(ii) the thing seized, or a sample of it, is required as evidence and removal and storage of the thing seized is necessary to ensure that the thing or sample will be available as evidence in any related proceedings, or

(b) the person in whose possession it was at the time of the seizure or the person entitled to possession of the place requests the inspector to have it removed to some other place,

In which case it may be removed to and stored in any other place at the direction of or with the concurrence of an inspector and at the expense of the person who requested that it be so removed.

### **Interference with seized thing**

(6) Unless authorized by an inspector, no person shall remove, alter or interfere in any way with anything seized and detained by an inspector under subsection (1) or section 220, but an inspector shall, at the request of the person from whom it was seized, allow that person or any person authorized by that person to examine it and, where practicable, furnish a sample or copy of it to that person.

### **Application to extend period of detention**

**224. (1)** Where proceedings have not been instituted in respect of the contravention in relation to which a thing was seized under section 220 or subsection 223(1), the Minister may, before the expiry of 90 days after the day of the seizure and on serving prior notice in accordance with subsection (2) on the owner of the thing or on the person who at the time of the seizure was in possession of it, apply to a provincial court judge, as defined in section 2 of the Criminal Code, within whose territorial jurisdiction the seizure was made for an order extending the time during which it may be detained.

#### **Notice**

(2) A notice shall be served by personal service at least five clear days before the day on which the application is to be made to the provincial court judge or by registered mail at least seven clear days before that day and shall specify

- (a) the provincial court in which the application is to be made;
- (b) the place where and the time when the application is to be heard;
- (c) the thing seized in respect of which the application is to be made; and
- (d) the grounds on which the Minister intends to rely to show why there should be an extension of the time during which the thing seized may be detained.

#### **Order of extension granted**

(3) Where, on the hearing of an application made under subsection (1), the judge is satisfied that the thing seized should continue to be detained, the judge shall order

- (a) that the thing be detained for any additional period and on any conditions relating to the detention for that additional period that the judge considers proper; and
- (b) on the expiry of the additional period, that the thing be restored to the person from whom it was seized or to any other person entitled to its possession unless, before the expiry of the additional period, an event referred to in subparagraph 223(4)(b)(i), (ii) or (iii) has occurred.

#### **Order of extension refused**

(4) Where, on the hearing of an application made under subsection (1), the judge is not satisfied that the thing seized should continue to be detained, the judge shall order that, on the expiry of 90 days after the day of the seizure, it be restored to the person from whom it was seized or to any other person entitled to its possession unless, before the expiry of the 90 days, an event referred to in subparagraph 223(4)(b)(i) or (ii) has occurred.

#### **Order for restoration**

(5) Where, at the time of the hearing of an application made under subsection (1), 90 days have expired after the day of the seizure, the judge shall order the restoration of the thing without delay to the person from whom it was seized or to any other person entitled to its possession.

#### **Detention of ships**

**225. (1)** Where an inspector has reasonable grounds to believe that the owner or master of a ship has committed an offence under section 272 and that a ship was used in connection with the commission of the offence, the inspector may make a detention order in respect of the ship.

#### **Order in writing**

(2) A detention order made under subsection (1) shall be in writing and be addressed to all persons at any port in Canada where the ship to which the order relates is or will be who are empowered to give a clearance in respect of the ship.

#### **Notice of detention order**

(3) Notice of a detention order made under subsection (1) shall be served on the master of the ship in respect of which the order is made.

#### **Duty of owner or master of ship**

(4) Where notice of a detention order made under subsection (1) has been served on the master of the ship, the owner or master of the ship shall not give an order for the ship to go into an area of the sea referred to in paragraph 122(2)(f) or (g) during the term of the detention order.

#### **Duty of persons empowered to give clearance**

(5) Subject to subsection (6), no person to whom a detention order made under subsection (1) is addressed shall, after notice of the order is received by the person, give clearance in respect of the ship to which the order relates.

#### **When clearance given**

(6) A person to whom a detention order made under subsection (1) is addressed and who has received notice of the order may give clearance in respect of the ship to which the order relates where

(a) the owner or master of the ship

(i) has not, within 30 days after the order was made, been charged with the offence that gave rise to the making of the order, or

(ii) has, within 30 days after the order was made, been charged with that offence and appears in Canada to answer to the charge;

(b) security for payment of the maximum fine that might be imposed as a result of a conviction of the person charged with that offence and of costs related to proceedings in connection with the charge, or payment of any lesser amount that is approved by the Minister or a person designated by the Minister for the purpose, is given to Her Majesty in right of Canada; or

(c) proceedings in respect of the alleged offence that gave rise to the making of the detention order are discontinued.

#### ***Assistance to Inspectors, Investigators and Analysts***

##### **Entry**

**226. An investigator, inspector or analyst or any other person may, while carrying out powers, duties or functions under this Act, enter on and pass through or over private property without being liable for trespass or without the owner of the property having the right to object to that use of the property.**

##### **Assistance**

**227. The owner or the person in charge of a place entered by an inspector, investigator or analyst under section 218 or 220, and every person found in the place, shall**

(a) give the inspector, investigator or analyst all reasonable assistance to enable them to carry out duties and functions under this Act; and

(b) provide the inspector or investigator with any information with respect to the administration of this Act and the regulations that the inspector or investigator may reasonably require.

#### **Obstruction**

**228. While an inspector, investigator or analyst is exercising powers or carrying out duties and functions under this Act, no person shall**

(a) knowingly make any false or misleading statement, either orally or in writing, to them; or

(b) otherwise obstruct or hinder them.

#### **Forfeiture on consent**

**229. (1) Where an inspector has seized a thing under section 220 or subsection 223(1) and the owner or person who was in lawful possession of it at the time of the seizure consents in writing at the request of the inspector to its forfeiture, it is thereupon forfeited to Her Majesty in right of Canada.**

#### **Disposal or destruction**

(2) The Minister may dispose of or destroy anything forfeited under subsection (1) and, if the Minister so directs, the costs of the disposal or destruction shall be paid by the owner or the person who was in lawful possession of it at the time it was seized.

#### **Forfeiture by order of court**

**230. (1) Subject to sections 231 and 232, where a person is convicted of an offence under this Act and anything seized under section 220 or subsection 223(1) is then being detained,**

(a) the thing is, on the conviction and in addition to any punishment imposed for the offence, forfeited to Her Majesty in right of Canada, if the court so directs, in which case

(i) the Minister may dispose of or destroy the thing, and

(ii) the costs of the forfeiture and disposal or destruction shall be paid by the offender; or

(b) the thing shall, on the expiry of the time for taking an appeal from the conviction or on the final conclusion of the proceedings, as the case may be, be restored to the person from whom it was seized or to any other person entitled to its possession on any conditions that may be imposed by order of the court and that, in the opinion of the court, are necessary to avoid the commission of a further offence under this Act.

#### **Things deemed not to have been seized**

(2) For the purpose of subsection (1), anything released from detention under paragraph 223(4)(a) or (b) is deemed not to have been seized under section 220 or subsection 223(1).

#### **Court may order forfeiture**

**231. Where the owner of any ship, aircraft, platform or other structure has been convicted of an offence under section 272, the convicting court may, if the ship, aircraft, platform or structure was seized under section 220 or subsection 223(1), in addition to any other penalty imposed, order that the ship, aircraft, platform or structure, or any security given under subsection 222(1), be forfeited, and on the making of such an order the ship, aircraft, platform, structure or security is forfeited to Her Majesty in right of Canada.**

#### **Disposal of forfeited ship, aircraft, etc.**

**232. (1) Where proceedings referred to in subsection 222(2) are instituted within the time provided in that subsection and, at the final conclusion of those proceedings, any ship, aircraft, platform or other structure or any security given under subsection 222(1) is ordered to be forfeited, it may be disposed of as the Governor in Council directs.**

#### **Return of seized ship, etc., where no forfeiture ordered**

(2) Where anything has been seized under section 220 and proceedings referred to in subsection 222(2) are instituted, but the thing is not, at the final conclusion of the proceedings, ordered to be forfeited, it shall be returned, the proceeds of any sale of the cargo under subsection 221(3) shall be paid or any security given to the Minister under subsection 222(1) shall be returned to the person from whom the thing was seized.

#### **Exception**

(3) Where, at the conclusion of proceedings referred to in subsection (1), the person from whom the thing was seized is convicted of an offence arising out of a contravention of this Part, the thing and any cargo or the proceeds or security may be retained until the fine is paid or the thing and any cargo may be sold under execution in satisfaction of the fine, or the proceeds realized from the sale of the cargo or the security or any part thereof may be applied in payment of the fine.

#### **Application by person claiming interest**

**233. (1) Where anything has been ordered to be forfeited under this Act, any person, other than a person who was a party to the proceedings that resulted in the order, who claims an interest in the thing as owner, mortgagee, lien holder or holder of any other claim under Canadian law may, within 30 days after the thing is ordered to be forfeited, apply by notice in writing to the Federal Court for an order under subsection (5).**

#### **Date of hearing**

(2) The Federal Court shall fix a day for the hearing of an application made under subsection (1).

#### **Notice**

(3) An applicant for an order under subsection (5) shall, at least 30 days before the day fixed under subsection (2) for the hearing of the application, serve a notice of the application and of the hearing on the Minister and on all other persons claiming an interest in the thing that is the subject-matter of the application as owner, mortgagee, lien holder or holder of any other claim under Canadian law of whom the applicant has knowledge.

#### **Notice of intervention**

(4) Each person, other than the Minister, who is served with a notice under subsection (3) and who intends to appear at the hearing of the application to which the notice relates shall, at least 10 days before the day fixed for the hearing, file a notice of intervention in the Registry of the Federal Court and serve a copy of the notice on the Minister and on the applicant.

#### **Order declaring nature and extent of interests**

(5) Where, on the hearing of an application under this section, the Federal Court is satisfied that the applicant, or the intervenors, if any, or any of them,

(a) is innocent of any complicity in any conduct that caused the thing to be subject to forfeiture and of any collusion in relation to any such conduct, and

(b) exercised all reasonable care in respect of the persons permitted to obtain possession and use of the thing so as to be satisfied that it was not likely to be used contrary to the provisions of this Act or, in the

case of a mortgagee or lien holder, other than the holder of a maritime lien or statutory right *in rem*, that the applicant or intervenor exercised such care with respect to the mortgagor or the lien giver,

those of the applicant and the intervenors in respect of whom the Court is so satisfied are entitled to an order declaring that their interests are not affected by the forfeiture and declaring the nature and extent of each of their interests and the priorities among them.

#### **Additional order**

(6) Where an order is made under subsection (5), the Court may, in addition, order that the thing to which the interests relate be delivered to one or more of the persons found to have an interest in it or that an amount equal to the value of each of the interests so declared be paid to the persons found to have those interests.

#### ***Environmental Protection Compliance Orders***

##### **Definition of "order"**

234. For the purposes of sections 235 to 271, "order" means an environmental protection compliance order issued under section 235.

##### **Order**

235. (1) Whenever, during the course of an inspection or a search, an inspector has reasonable grounds to believe that any provision of this Act or the regulations has been contravened in the circumstances described in subsection (2) by a person who is continuing the commission of the offence, or that any of those provisions will be contravened in the circumstances described in that subsection, the inspector may issue an environmental protection compliance order directing any person described in subsection (3) to take any of the measures referred to in subsection (4) and, where applicable, subsection (5) that are reasonable in the circumstances and consistent with the protection of the environment and public safety, in order to cease or refrain from committing the alleged contravention.

##### **Circumstances**

(2) For the purposes of subsection (1), the circumstances in which the alleged contravention has been or will be committed are as follows, namely,

(a) the exportation, importation, manufacture, transportation, processing or distribution of a substance or product containing a substance;

(b) the possession, storage, use, sale, offering for sale, advertisement or disposal of a substance or product containing a substance;

(c) the use of a substance or product containing a substance in a commercial manufacturing or processing activity; or

(d) an act or omission in relation to or in the absence of a notice, permit, approval, licence, certificate, allowance or other authorization or a term or condition thereof.

##### **Application**

(3) Subsection (1) applies to any person who

(a) owns or has the charge, management or control of the substance or any product containing the substance to which the alleged contravention relates or the property on which the substance or product is located; or

(b) causes or contributes to the alleged contravention.

### **Specific measures**

(4) For the purposes of subsection (1), an order in relation to an alleged contravention of any provision of this Act or the regulations may specify that the person to whom the order is directed take any of the following measures:

- (a) refrain from doing anything in contravention of this Act or the regulations, or do anything to comply with this Act or the regulations;
- (b) stop or shut down any activity, work, undertaking or thing for a specified period;
- (c) cease the operation of any activity or any part of a work, undertaking or thing until the inspector is satisfied that the activity, work, undertaking or thing will be operated in accordance with this Act and the regulations;
- (d) move any conveyance to another location including, in the case of a ship, move the ship into port or, in the case of an aircraft, land the aircraft;
- (e) unload or re-load the contents of any conveyance; and
- (f) take any other measure that the inspector considers necessary to facilitate compliance with the order or to protect or restore the environment, including, but not limited to,
  - (i) maintaining records on any relevant matter,
  - (ii) reporting periodically to the inspector, and
  - (iii) submitting to the inspector any information, proposal or plan specified by the inspector setting out any action to be taken by the person with respect to the subject-matter of the order.

### **Additional measures for certain alleged offences**

(5) For the purposes of subsection (1), an order in relation to an alleged contravention of section 124 or 125 or any regulations made under section 135 may specify that the person to whom the order is directed, whether that person is not a permit holder or is contravening a condition of a permit, take any of the following measures, in addition to any of the measures referred to in subsection (4):

- (a) cease dumping or cease loading a substance; or
- (b) refrain from disposing of any ship, aircraft, platform or structure.

### **Contents of order**

- (6) Subject to section 236, an order must be made in writing and must set out
- (a) the names of the persons to whom the order is directed;
  - (b) the provision of this Act or the regulations that is alleged to have been or will be contravened;
  - (c) the relevant facts surrounding the alleged contravention;
  - (d) the measures to be taken and the manner in which they are to be carried out;
  - (e) the period within which a measure is to begin and is to be carried out;
  - (f) subject to subsection (7), the duration of the order;



(g) a statement that a request for a review may be made to the Chief Review Officer; and

(h) the period within which a request for a review may be made.

#### **Duration of order**

(7) An order may not be issued for a period of more than 180 days.

#### **Exigent circumstances**

**236. (1) In the case of exigent circumstances, an order may be given orally, but within the period of seven days immediately after it is so given, a written order must be issued in accordance with section 235.**

#### **Definition of "exigent circumstances"**

(2) For greater certainty, "exigent circumstances" includes circumstances in which the delay necessary to issue a written order that meets the requirements of subsection 235(6) would result in danger to human life or the environment.

#### **Notice of intent**

**237. (1) Except in exigent circumstances, the inspector shall, wherever practicable, before issuing an order,**

(a) provide an oral or a written notice of the intent of the inspector to issue the order to every person who will be subject to the order; and

(b) allow a reasonable opportunity in the circumstances for the person to make oral representations.

#### **Contents of notice of intent**

(2) A notice of intent to issue an order shall include

(a) a statement of the purpose of the notice;

(b) a reference to the statutory authority under which the order will be issued; and

(c) a statement that the party notified may make oral representations to the inspector within the period stated in the notice.

#### **Compliance with the order**

**238. (1) A person to whom an order is directed shall, immediately on receipt of the order or a copy of it or on being directed by an inspector under an order given orally under section 236, comply with the order.**

#### **No bar to proceedings**

(2) The issuance of or compliance with an order in respect of a person's alleged contravention of this Act or the regulations is not a bar to any proceedings against the person under this or any other Act in relation to the alleged contravention by that person.

#### **Intervention by inspector**

**239. (1) Where any person fails to take any measures specified in an order, an inspector may take the measures or cause them to be taken.**

### **Access to property**

(2) An inspector or other person authorized or required to take measures under subsection (1) may enter and have access to any place or property and may do any reasonable things that may be necessary in the circumstances.

### **Personal liability**

(3) Any person, other than a person described in subsection 235(3), who provides assistance or advice in taking the measures specified in an order or who takes any measures authorized under subsection (1) is not personally liable either civilly or criminally in respect of any act or omission in the course of providing assistance or advice or taking any measures under that subsection unless it is established that the person acted in bad faith.

### **Recovery of reasonable costs and expenses by Her Majesty**

**240. (1) Her Majesty in right of Canada may recover the costs and expenses of and incidental to taking any measures under subsection 239(1) from**

(a) any person referred to in paragraph 235(3)(a); and

(b) any person referred to in paragraph 235(3)(b) to the extent of the person's negligence in causing or contributing to the alleged contravention.

### **Reasonably incurred**

(2) The costs and expenses referred to in subsection (1) shall only be recovered to the extent that they can be established to have been reasonably incurred in the circumstances.

### **Liability**

(3) Subject to subsection (4), the persons referred to in subsection (1) are jointly and severally liable or solidarily liable for the costs and expenses referred to in that subsection.

### **Limitation**

(4) A person referred to in paragraph 235(3)(b) shall not be held liable under subsection (3) to an extent greater than the extent of their negligence in causing or contributing to the alleged contravention.

### **Procedure**

(5) A claim under this section may be sued for and recovered by Her Majesty in right of Canada with costs in proceedings brought or taken therefor in the name of Her Majesty in right of Canada in any court of competent jurisdiction.

### **Recourse or indemnity**

(6) This section does not limit or restrict any right of recourse or indemnity that a person may have against any other person.

### **Limitation period**

(7) Where events giving rise to a claim under this section occur, no proceedings in respect of the claim may be instituted after five years from the date on which the events occur or become evident to the Minister, whichever is later.

### **Minister's certificate**

(8) A document purporting to have been issued by the Minister certifying the day on which the events giving rise to a claim under this section came to the knowledge of the Minister shall be received in evidence and, in the absence of any evidence to the contrary, the document shall be considered as proof of that fact without proof of the signature or of the official character of the person appearing to have signed the document and without further proof.

### **Variation or cancellation of order**

**241. (1) At any time before a notice requesting a review of an order is received by the Chief Review Officer, the inspector may, in accordance with section 236, after giving reasonable notice,**

- (a) amend or suspend a term or condition of the order, or add a term or condition to, or delete a term or condition from, the order;
- (b) cancel the order;
- (c) correct a clerical error in the order; or
- (d) extend the duration of the order for a period of not more than 180 days less the number of days that have passed since the day on which the order was received by the person who is subject to the order.

### **Notice of intent**

(2) Except in exigent circumstances, the inspector shall, wherever practicable, before exercising a power under paragraph (1)(a) or (d),

- (a) provide an oral or a written notice of the intent of the inspector to do so to every person who will be subject to the order; and
- (b) allow a reasonable opportunity in the circumstances for the person to make oral representations.

### **Contents of notice of intent**

- (3) A notice of intent to exercise a power under paragraph (1)(a) shall include
  - (a) a statement of the purpose of the notice;
  - (b) a reference to the statutory authority under which the power will be exercised; and
  - (c) a statement that the party notified may make oral representations to the inspector within the period stated in the notice.

### **Limitations on exercise of inspector's powers**

(4) An inspector shall not exercise any of the powers referred to in paragraph (1)(a), (b) or (d) if doing so would result in

- (a) impairment or serious risk of impairment of the quality of the environment for any use that can be made of it;
- (b) injury or damage or serious risk of injury or damage to any property or to any plant or animal life; or
- (c) danger to the health or safety of any person.

## **Regulations**

### **242. The Minister may make regulations**

(a) prescribing the form of reporting to inspectors under subparagraph 235(4)(f)(ii) and specifying the information required to be contained in or to accompany the report; and

(b) of either particular or general application, respecting representations made to inspectors under subsection 237(1) or 241(2).

## **Review Officers**

### **Roster of review officers**

#### **243. The Minister shall establish and maintain a roster of review officers.**

### **Chief Review Officer**

**244. (1) The Minister shall appoint one of the review officers as the Chief Review Officer to perform the functions of the Chief Review Officer as and when required.**

### **Functions of Chief Review Officer**

(2) The Chief Review Officer shall

(a) perform administrative functions related to the work of review officers, including assigning review officers to conduct review hearings; and

(b) in certain cases, conduct review hearings.

### **Absence, etc., of Chief Review Officer**

(3) If the Chief Review Officer is absent or unable to act or if the office is vacant, any other review officer that is designated by the Minister shall perform the functions of the Chief Review Officer.

### **Term of members**

**245. (1) Review officers shall be appointed to hold office during good behaviour for a term of not more than three years, but may be removed by the Minister at any time for cause.**

### **Re-appointment**

(2) A review officer may be re-appointed.

### **Publication in *Canada Gazette***

**246. The Minister shall publish the roster of review officers in the *Canada Gazette*.**

### **Knowledge**

**247. A person is not eligible to be appointed as a review officer unless the person is knowledgeable about the Canadian environment, environmental health or administrative law.**

### **Other employment**

**248. Review officers shall not accept or hold any office or employment inconsistent with their functions under this Act.**

## **Remuneration and fees**

**249. (1) The Chief Review Officer shall be paid such remuneration as is fixed by the Minister, and each other review officer is entitled to be paid such fees for that other review officer's services as are fixed by the Minister.**

## **Expenses**

(2) Review officers are entitled to be paid

(a) reasonable travel and other expenses incurred by them in the course of their duties under this Act while absent from their ordinary place of work; and

(b) any other reasonable expenses incurred by them in the course of their duties under this Act.

## **Pension**

(3) A review officer is deemed not to be employed in the Public Service for the purposes of the *Public Service Superannuation Act*.

## **Acting after expiry of term**

**250. If a person who is engaged as a review officer in respect of any matter ceases to be a review officer before rendering a decision in respect of the matter, the person may, with the authorization of the Chief Review Officer, continue, during a period of not more than 180 days, to act as a review officer in respect of the matter.**

## **Secretary and other staff**

**251. The Minister may, at the request of the Chief Review Officer, make available to review officers any staff and other assistance that are necessary for the proper conduct of the business of review officers.**

## **Government services and facilities**

**252. In performing their functions a review officer shall, where appropriate, make use of the services and facilities of departments, boards and agencies of the Government of Canada.**

## **Immunity**

**253. No criminal or civil proceedings lie against a review officer for anything done or omitted to be done in good faith in performing any functions of a review officer under this Act.**

## **Crown not relieved**

**254. Section 253 does not, by reason of section 10 of the Crown Liability and Proceedings Act, relieve the Crown of liability in respect of a tort or extracontractual civil liability to which the Crown would otherwise be subject.**

## **Liability**

**255. Review officers are servants of Her Majesty in right of Canada for the purposes of the law of tort or of extracontractual civil liability.**

## **Reviews**

### **Request for review**

**256. (1) Any person to whom an order is directed may, by notice in writing given to the Chief Review Officer within 30 days after receipt by the person of a copy of the written order or after the oral order is given, make a request to the Chief Review Officer for a review of the order.**

### **Extension of period for request**

(2) The Chief Review Officer may extend the period within which a request for a review may be made where, in the Chief Review Officer's opinion, it is in the public interest to do so.

### **Review**

**257. On receipt of a notice under subsection 256(1), the Chief Review Officer shall conduct a review of the order, including a hearing, or cause a review and hearing of the order to be conducted by a review officer assigned by the Chief Review Officer.**

### **No automatic stay on appeal**

**258. (1) Subject to subsection (2), the request for a review by a review officer does not suspend the operation of an order.**

### **Suspension on application**

(2) A review officer may, on application made by a person subject to the order before the beginning of the hearing, suspend the operation of the order if the review officer considers it appropriate in the circumstances and, in that case, impose on all the persons subject to the order conditions that are reasonable in the circumstances and consistent with the protection of the environment and public safety.

### **Suspension of 180 day period**

(3) Where the operation of an order is suspended under subsection (2), the period for which the order is issued is suspended until the review is completed.

### **Right to appear**

**259. All parties to the review, including the Minister, may appear in person or may be represented by counsel or by an agent.**

### **Powers**

**260. (1) A review officer may summon any person to appear as a witness before the review officer and may order the witness to**

(a) give evidence orally or in writing; and

(b) produce any documents and things that the review officer considers necessary or desirable for the purpose of performing any of the review officer's functions.

### **Fees for witnesses**

(2) A witness who is served with a summons under subsection (1) is entitled to receive the fees and allowances to which persons who are summoned to appear as witnesses before the Federal Court are entitled.

## **Enforcement of summonses and orders**

**261. Any summons to a witness issued or order made under subsection 260(1) by a review officer may be made a summons to a witness or an order of the Federal Court or of the superior court of a province and is enforceable in the same manner as a summons to a witness or an order of that court.**

### **Procedure**

**262. To make a summons issued or an order made under subsection 260(1) by a review officer a summons or an order of the Federal Court or of the superior court of a province, the usual practice and procedure of the court in such matters may be followed, or a certified copy of the summons or order may be filed with the registrar of the court and the summons or order thereupon becomes a summons or an order of the court.**

### **Powers of review officer**

**263. The review officer, after reviewing the order and after giving all persons who are subject to the order reasonable notice orally or in writing of a hearing and allowing a reasonable opportunity in the circumstances for those persons to make oral representations, may**

- (a) confirm or cancel the order;**
- (b) amend or suspend a term or condition of the order, or add a term or condition to, or delete a term or condition from, the order; or**
- (c) extend the duration of the order for a period of not more than 180 days less the number of days that have passed since the day on which the order was received by the person who is subject to the order, not counting the days during which the order was suspended under subsection 258(3).**

### **Variation or cancellation of review officer's decision**

**264. At any time before a notice of appeal to the Federal Court is filed in relation to an order, the review officer may, on the review officer's own motion, after giving reasonable notice orally or in writing and allowing a reasonable opportunity in the circumstances for the person subject to the order to make oral representations, modify the decision of the review officer in respect of the order and exercise any of the powers of the review officer under section 263 in respect of the order.**

### **Limitations on exercise of review officer's powers**

**265. A review officer shall not exercise any of the powers referred to in section 263 in relation to an order issued by an inspector if doing so would result in**

- (a) impairment or serious risk of impairment of the quality of the environment for any use that can be made of it;**
- (b) injury or damage or serious risk of injury or damage to any property or to any plant or animal life; or**
- (c) danger to the health or safety of any person.**

### **Decision of review officer**

**266. The review officer shall, within five days after the completion of the review of an order, render a decision and give written reasons for doing so within 10 days after the completion of the review, and provide a copy of the decision and those reasons to all persons to whom the order was directed and to the Minister.**

### **Rules**

**267. The Chief Review Officer may, with the approval of the Minister, make rules**

(a) governing the practice and procedure in respect of the review of orders;

(b) generally, for the work of review officers; and

(c) for preventing trade secrets and information described in section 20 of the *Access to Information Act* from being disclosed or made public as a result of their being used as evidence before a review officer, including rules providing for hearings or parts of hearings to be held in public or private.

#### **Orders and notices**

268. Every order or varied order under section 263 or 264 or a copy of one and every notice under those sections shall be provided to the Minister and every person to whom the original order is directed and, where applicable, all other persons to whom the amended order is directed, in accordance with Part 11.

#### **Federal Court**

##### **Appeal to Federal Court**

269. The Minister or any person to whom an order, as confirmed or varied by a review officer under section 263, is directed may, by filing a written notice of appeal within 30 days after the written reasons are provided by the review officer under section 266, appeal to the Federal Court — Trial Division from the decision of the review officer.

##### **Standing on appeal to Federal Court**

270. The Minister or the person to whom the order is directed, as the case may be, has the right, on an appeal to the Federal Court made under section 269, to be heard on all questions of fact and law.

##### **Order not suspended**

271. The filing of a notice of appeal under section 269 does not suspend the operation of an order, as confirmed or varied by a review officer.

#### **Offences and Punishment**

##### **Contravention of the Act, the regulations or agreements**

272. (1) Every person commits an offence who contravenes

(a) a provision of this Act or the regulations;

(b) an obligation or a prohibition arising from this Act or the regulations;

(c) an order or a direction made under this Act;

(d) an order, direction or decision of a court made under this Act; or

(e) an agreement respecting environmental protection alternative measures within the meaning of section 295.

##### **Penalties**

(2) Every person who commits an offence under subsection (1) is liable

(a) on conviction on indictment, to a fine of not more than \$1,000,000 or to imprisonment for a term of not more than three years, or to both; and



(b) on summary conviction, to a fine of not more than \$300,000 or to imprisonment for a term of not more than six months, or to both.

**False or misleading information, etc.**

**273. (1) Every person commits an offence who, for the purpose of complying with this Act or the regulations,**

(a) provides any person with any false or misleading information, results or samples; or

(b) files a document that contains false or misleading information.

**Penalties**

(2) Every person who commits an offence under subsection (1) is liable

(a) on conviction on indictment, to a fine of not more than \$1,000,000 or to imprisonment for a term of not more than three years, or to both, if the offence is committed knowingly;

(b) on summary conviction, to a fine of not more than \$300,000 or to imprisonment for a term of not more than six months, or to both, if the offence is committed knowingly;

(c) on conviction on indictment, to a fine of not more than \$500,000 or to imprisonment for a term of not more than three years, or to both, if the offence is committed negligently; and

(d) on summary conviction, to a fine of not more than \$200,000 or to imprisonment for a term of not more than six months, or to both, if the offence is committed negligently.

**Damage to environment and risk of death or harm to persons**

**274. (1) Every person is guilty of an offence and liable on conviction on indictment to a fine or to imprisonment for a term of not more than five years, or to both, who, in committing an offence under subsection 272(1) or 273(1),**

(a) intentionally or recklessly causes a disaster that results in a loss of the use of the environment; or

(b) shows wanton or reckless disregard for the lives or safety of other persons and thereby causes a risk of death or harm to another person.

**Criminal negligence**

(2) Every person who, in committing an offence under subsection 272(1) or 273(1), shows wanton or reckless disregard for the lives or safety of other persons and thereby causes death or bodily harm to another person is subject to prosecution and punishment under section 220 or 221 of the *Criminal Code*.

**Limitation period**

**275. (1) Proceedings by way of summary conviction in respect of an offence under this Act may be instituted at any time within, but not later than, two years after the time when the Minister became aware of the subject-matter of the proceedings.**

**Minister's certificate**

(2) A document purporting to have been issued by the Minister, certifying the day on which the Minister became aware of the subject-matter of any proceedings, shall be received in evidence and, in the absence of any evidence to the contrary, the document shall be considered as proof of that fact without proof of the signature or of the official character of the person appearing to have signed the document and without further proof.

### **Continuing offence**

276. Where an offence under this Act is committed or continued on more than one day, the person who committed the offence is liable to be convicted for a separate offence for each day on which it is committed or continued.

### **Construction of subsection 389(5) of *Canada Shipping Act***

277. Subsection 389(5) of the *Canada Shipping Act* is not to be construed so as to relieve any person from liability under this Act.

### **Regulations**

278. The Governor in Council may make regulations prescribing the manner in which the proceeds or any part of the proceeds resulting from the payment of a fine or the execution of an order in relation to an offence under this Act shall be distributed in order to reimburse any person, government or body that has commenced the proceedings in respect of the offence for costs incurred by that person, government or body in respect of the prosecution of the offence.

### **Nearest court has jurisdiction for Division 3 of Part 7 offences**

279. (1) Where an offence arising out of a contravention of Division 3 of Part 7 is committed by a person, whether or not the person is a Canadian citizen, in Canadian waters, the offence

(a) is within the competence of and shall be tried by the court having jurisdiction in respect of similar offences in the territorial division nearest to the place where the offence was committed; and

(b) shall be tried in the same manner as if it had been committed within that territorial division.

### **Where offence deemed to have been committed**

(2) An offence to which subsection (1) applies is, for the purpose of that subsection, deemed to have been committed either in the place where the offence was actually committed or in the place in which the accused is found.

### **Any court has jurisdiction for Division 3 of Part 7 offences**

(3) Where an offence arising out of a contravention of Division 3 of Part 7 is committed by a person, whether or not the person is a Canadian citizen, in an area of the sea referred to in paragraph 122(2)(f) or (g), the offence

(a) is within the competence of and shall be tried by any court having jurisdiction in respect of similar offences committed by persons within the limits of its ordinary jurisdiction; and

(b) shall be tried in the same manner as if it had been committed within the jurisdiction of the court before which it is tried.

### **Liability of directors**

280. (1) Where a corporation commits an offence under this Act, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence, and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted.

## **Duties of directors**

(2) Every director and officer of a corporation shall take all reasonable care to ensure that the corporation complies with

(a) this Act and the regulations; and

(b) orders and directions of, and prohibitions and requirements imposed by, the Minister and inspectors, investigators and review officers.

## **Identifying owner, master, etc.**

281. The owner or master of a ship, the owner or pilot in command of an aircraft or the owner or person in charge of any platform or other structure may be charged with an offence arising out of a contravention of Division 3 of Part 7 as owner, master, pilot in command or person in charge, as the case may be, of the ship, aircraft, platform or structure if it is adequately identified, and no such charge is invalid by reason only that it does not name the owner, master, pilot in command or person in charge, as the case may be, of the ship, aircraft, platform or structure.

## **Proof of offence**

282. (1) In any prosecution of an offence under this Act, other than an offence under section 273 if the offence is committed knowingly or under section 228 or 274, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the accused, whether or not the employee or agent is identified or prosecuted for the offence.

## **Proof of offence**

(2) In any prosecution of the master of a ship, the pilot in command of an aircraft or the owner or person in charge of any platform or other structure for an offence arising out of a contravention of Division 3 of Part 7, it is sufficient proof of the offence to establish that it was committed by a crew member or other person on board the ship, aircraft, platform or structure, whether or not the crew member or other person is identified or prosecuted for the offence.

## **Defence**

283. No person shall be found guilty of an offence under this Act, other than an offence under section 273 if the offence is committed knowingly or under section 228 or 274, where the person establishes that the person exercised all due diligence to prevent its commission.

## **Importing substances by analysts**

284. Despite any other provision of this Act or the regulations, the Minister may, subject to any reasonable condition specified by the Minister, authorize in writing an analyst to import, possess and use a substance for the purpose of conducting measurements, tests and research with respect to the substance.

## **Certificate of analyst**

285. (1) Subject to subsections (2) and (3), a certificate of an analyst stating that the analyst has analysed or examined a substance or product and stating the result of the analysis or examination is admissible in evidence in any prosecution for an offence under this Act and, in the absence of evidence to the contrary, is proof of the statements contained in the certificate without proof of the signature or the official character of the person appearing to have signed the certificate.

### **Attendance of analyst**

(2) The party against whom a certificate of an analyst is produced may, with leave of the court, require the attendance of the analyst for the purposes of cross-examination.

### **Notice**

(3) No certificate of an analyst shall be received in evidence unless the party intending to produce it has given to the party against whom it is intended to be produced reasonable notice of that intention together with a copy of the certificate.

### **Safety marks and prescribed documents**

**286. In any prosecution for an offence under this Act, evidence that a means of containment or transport bore a safety mark or was accompanied by a prescribed document is, in the absence of evidence to the contrary, proof of the information shown or indicated by the safety mark or contained in the prescribed document.**

### ***Sentencing Criteria***

#### **Sentencing considerations**

**287. A court that imposes a sentence shall take into account, in addition to any other principles that it is required to consider, the following factors:**

- (a) the harm or risk of harm caused by the commission of the offence;
- (b) an estimate of the total costs to remedy or reduce any damages caused by the commission of the offence;
- (c) whether any remedial or preventive action has been taken or proposed by or on behalf of the offender, including having in place an environmental management system that meets a recognized Canadian or international standard or a pollution prevention plan;
- (d) whether any reporting requirements under this Act or the regulations were complied with by the offender;
- (e) whether the offender was found to have committed the offence intentionally, recklessly or inadvertently;
- (f) whether the offender was found by the court to have been negligent or incompetent or to have shown a lack of concern with respect to the commission of the offence;
- (g) any property, benefit or advantage received or receivable by the offender to which, but for the commission of the offence, the offender would not have been entitled;
- (h) any evidence from which the court may reasonably conclude that the offender has a history of non-compliance with legislation designed to prevent or minimize harm to the environment; and
- (i) all available sanctions that are reasonable in the circumstances, with particular attention to the circumstances of aboriginal offenders.

### ***Discharge***

#### **Absolute or conditional discharge**

**288. (1) Where an offender has pleaded guilty to or been found guilty of an offence, the court may, instead of convicting the offender, by order direct that the offender be discharged absolutely or on conditions having any or all of the effects described in paragraphs 291(1)(a) to (q).**

### **Conditions of order**

(2) Where an order is made under subsection (1) and the offender contravenes or fails to comply with it, or is convicted of an offence under this Act, including an offence under paragraph 272(1)(c), the prosecutor may apply to the court to revoke the discharge, convict the offender of the offence to which the discharge relates and impose any sentence that could have been imposed if the offender had been convicted at the time the order was made.

### **Suspended sentence**

**289. (1) Where an offender is convicted of an offence under this Act, the court may suspend the passing of sentence and may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order under section 291.**

### **Application by prosecutor**

(2) Where the passing of sentence has been suspended under subsection (1) and the offender contravenes or fails to comply with an order made under section 291, or is convicted of an offence under this Act, including an offence under paragraph 272(1)(c), the prosecutor may apply to the court to impose any sentence that could have been imposed if the passing of sentence had not been suspended.

### **Additional fine**

**290. Where an offender has been convicted of an offence under this Act, the court may, where it is satisfied that as a result of the commission of the offence the offender acquired any property, benefit or advantage or that any property, benefit or advantage accrued to the offender, order the offender to pay, despite the maximum amount of any fine that may otherwise be imposed under this Act, an additional fine in an amount equal to the court's estimation of the amount of that property, benefit or advantage.**

### **Orders of court**

**291. (1) Where an offender has been convicted of an offence under this Act, in addition to any other punishment that may be imposed under this Act, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order having any or all of the following effects:**

- (a) prohibiting the offender from doing any act or engaging in any activity that may result in the continuation or repetition of the offence;
- (b) directing the offender to take any action that the court considers appropriate to remedy or avoid any harm to the environment that results or may result from the act or omission that constituted the offence;
- (c) directing the offender to prepare and implement a pollution prevention plan or an environmental emergency plan;
- (d) directing the offender to carry out environmental effects monitoring in the manner established by the Minister or directing the offender to pay, in the manner prescribed by the court, an amount for the purposes of environmental effects monitoring;
- (e) directing the offender to implement an environmental management system that meets a recognized Canadian or international standard;
- (f) directing the offender to have an environmental audit conducted by a person of a class and at the times specified by the court and directing the offender to remedy any deficiencies revealed during the audit;
- (g) directing the offender to publish, in the manner directed by the court, the facts relating to the conviction;
- (h) directing the offender to notify, at the offender's own cost and in the manner directed by the court, any person aggrieved or affected by the offender's conduct of the facts relating to the conviction;

(i) directing the offender to post any bond or pay any amount of money into court that will ensure compliance with any order made under this section;

(j) directing the offender to submit to the Minister, on application by the Minister made within three years after the date of conviction, any information with respect to the offender's activities that the court considers appropriate and just in the circumstances;

(k) directing the offender to compensate the Minister, in whole or in part, for the cost of any remedial or preventive action taken by or caused to be taken on behalf of the Minister as a result of the act or omission that constituted the offence;

(l) directing the offender to perform community service, subject to any reasonable conditions that may be imposed in the order;

(m) directing that the amount of any fine or other monetary award be allocated, subject to the *Criminal Code* and any regulations that may be made under section 278, in accordance with any directions of the court that are made on the basis of the harm or risk of harm caused by the commission of the offence;

(n) directing the offender to pay, in the manner prescribed by the court, an amount for the purposes of conducting research into the ecological use and disposal of the substance in respect of which the offence was committed or research relating to the manner of carrying out environmental effects monitoring;

(o) directing the offender to pay, in the manner prescribed by the court, an amount to environmental, health or other groups to assist in their work in the community where the offence was committed;

(p) directing the offender to pay, in the manner prescribed by the court, an amount to an educational institution for scholarships for students enrolled in environmental studies; and

(q) requiring the offender to comply with any other reasonable conditions that the court considers appropriate and just in the circumstances for securing the offender's good conduct and for preventing the offender from repeating the same offence or committing other offences.

#### **Publication**

(2) Where an offender fails to comply with an order made under paragraph (1)(g) directing the publication of the facts relating to the offence, the Minister may publish the facts in compliance with the order and recover the costs of publication from the offender.

#### **Debt due to Her Majesty**

(3) Where the court makes an order under paragraph (1)(k) directing an offender to pay costs or the Minister incurs publication costs under subsection (2), the costs constitute a debt due to Her Majesty in right of Canada and may be recovered in any court of competent jurisdiction.

#### **Coming into force and duration of order**

(4) An order made under subsection (1) comes into force on the day on which it is made or on any other day that the court may determine and shall not continue in force for more than three years after that day.

#### **Compensation for loss of property**

292. (1) Where an offender has been convicted of an offence under this Act, the court may, at the time sentence is imposed and on the application of the person aggrieved, order the offender to pay to that person an amount by way of satisfaction or compensation for loss of or damage to property suffered by that person as a result of the commission of the offence.

## **Enforcement**

(2) Where an amount that is ordered to be paid under subsection (1) is not paid forthwith, the applicant may, by filing the order, enter as a judgement, in the superior court of the province in which the trial was held, the amount ordered to be paid, and that judgement is enforceable against the offender in the same manner as if it were a judgement rendered against the offender in that court in civil proceedings.

## **Variation of sanctions**

**293. (1) Subject to subsection (2), where a court has made, in relation to an offender, an order or direction under section 288, 289 or 291, the court may, on application by the offender or the Attorney General, require the offender to appear before it and, after hearing the offender and the Attorney General, vary the order in one or any combination of the following ways that is applicable and, in the opinion of the court, is rendered desirable by a change in the circumstances of the offender since the order was made:**

(a) make changes in the order or the conditions specified in it or extend the period for which the order is to remain in force for any period, not exceeding one year, that the court considers desirable; or

(b) decrease the period for which the order is to remain in force or relieve the offender, either absolutely or partially or for any period that the court considers desirable, of compliance with any condition that is specified in the order.

## **Notice**

(2) Before making an order under subsection (1), the court may direct that notice be given to any persons that the court considers to be interested and may hear any such person.

## **Subsequent applications with leave**

**294. Where an application made under subsection (1) in respect of an offender has been heard by a court, no other application may be made with respect to the offender except with leave of the court.**

## ***Environmental Protection Alternative Measures***

### **Definitions**

**295. The definitions in this section apply in sections 296 to 309.**

"agreement" means an agreement respecting environmental protection alternative measures.

"Attorney General" means the Attorney General of Canada or an agent of the Attorney General of Canada.

"environmental protection alternative measures" means measures, other than judicial proceedings, that are used to deal with a person who is alleged to have committed an offence under this Act.

"person" includes individuals, Her Majesty in right of Canada or of a province and public bodies, bodies corporate, societies and companies.

### **When measures may be used**

**296. (1) Environmental protection alternative measures may be used to deal with a person who is alleged to have committed an offence under this Act only if it is not inconsistent with the purposes of this Act and the following conditions are met:**

(a) the measures are part of a program of environmental protection alternative measures authorized by the Attorney General, after consultation with the Minister;

(b) the offence alleged to have been committed is an offence under this Act, except an offence under

(i) paragraph 272(1)(a) or (b), in respect of subsection 16(4), 81(1), (2), (3) or (4), 82(1) or (2), 84(2) or 96(4), section 99, subsection 106(1), (2), (3) or (4), 107(1) or (2), 109(1) or (2), 119(1), 148(1), 202(4) or 213(4) or section 227 or 228,

(ii) paragraph 272(1)(c) or (d),

(iii) subsection 273(1), if the offence is committed knowingly, or

(iv) subsection 274(1) or (2);

(c) an information has been laid in respect of the offence;

(d) the Attorney General, after consulting with the Minister, is satisfied that they would be appropriate, having regard to the nature of the offence, the circumstances surrounding its commission and the following factors, namely,

(i) the protection of the environment and of human life and health and other interests of society,

(ii) the person's history of compliance with this Act,

(iii) whether the offence is a repeated occurrence,

(iv) any allegation that information is being or was concealed or other attempts to subvert the purposes and requirements of this Act are being or have been made, and

(v) whether any remedial or preventive action has been taken by or on behalf of the person in relation to the offence;

(e) the person has been advised of the right to be represented by counsel;

(f) the person accepts responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed;

(g) the person applies, in accordance with regulations made under section 309, to participate in the measures;

(h) the person and the Attorney General have entered into an agreement within the period of 180 days after the Attorney General has provided initial disclosure of the Crown's evidence to the person;

(i) there is, in the opinion of the Attorney General, sufficient evidence to proceed with the prosecution of the offence; and

(j) the prosecution of the offence is not barred at law.

#### **Restriction on use**

(2) Environmental protection alternative measures shall not be used to deal with a person who

(a) denies participation or involvement in the commission of the alleged offence; or

(b) expresses the wish to have any charge against the person dealt with by the court.



#### **Admissions not admissible in evidence**

(3) No admission, confession or statement accepting responsibility for a given act or omission made by a person as a condition of being dealt with by environmental protection alternative measures is admissible in evidence against the person in any civil or criminal proceedings.

#### **Dismissal of charge**

(4) Where environmental protection alternative measures have been used to deal with a person alleged to have committed an offence, the court shall dismiss the charge laid against the person in respect of that offence where the court is satisfied on a balance of probabilities that the person has complied with the agreement.

#### **No bar to proceedings**

(5) The use of environmental protection alternative measures in respect of a person who is alleged to have committed an offence is not a bar to any proceedings against the person under this Act.

#### **Laying of information, etc.**

(6) This section does not prevent any person from laying an information, obtaining the issue or confirmation of any process, or proceeding with the prosecution of any offence, in accordance with the law.

#### **Sentencing considerations**

297. Where an information in respect of an offence of contravening an agreement under section 272 has been laid and proceedings in respect of the alleged offence for which the agreement was entered into have been recommenced, the court imposing a sentence for either offence shall take into account, in addition to the factors referred to in section 287, any sentence that has previously been imposed for the other offence.

#### **Nature of measures contained in agreement**

298. (1) An agreement may contain any terms and conditions, including, but not limited to,

(a) terms and conditions having any or all of the effects set out in section 291 or any other terms and conditions having any of the effects prescribed by the regulations that the Attorney General, after consulting with the Minister, considers appropriate; and

(b) terms and conditions relating to the costs of laboratory tests and of field tests, travel and living expenses, costs of scientific analyses and other reasonable costs associated with supervising and verifying compliance with the agreement.

#### **Supervisory bodies**

(2) Any governmental or non-governmental body may supervise compliance with an agreement.

#### **Duration of agreement**

299. An agreement comes into force on the day on which it is signed or on any later day that is specified in the agreement and continues in force for the period, not exceeding three years, specified in the agreement.

#### **Filing in court for the purpose of public access**

300. (1) Subject to subsection (5), the Attorney General shall consult with the Minister before entering into an agreement and shall cause the agreement to be filed, as part of the court record of the proceedings to which the public has access, with the court in which the information was laid, within 30 days after the agreement was entered into.

## Reports

(2) A report relating to the administration of or compliance with an agreement shall, immediately after all the terms and conditions of the agreement have been complied with or the charges in respect of which the agreement was entered into have been dismissed, be filed with the court in which the agreement was filed in accordance with subsection (1).

### Confidential information or material injury

(3) Subject to subsection (4), the following information that is to be part of an agreement or the report referred to in subsection (2) must be set out in a schedule to the agreement or to the report:

(a) trade secrets of any person;

(b) financial, commercial, scientific or technical information that is confidential information and that is treated consistently in a confidential manner by any person;

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, any person; or

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of any person.

### Agreement on information to be in schedule

(4) The parties to an agreement must agree on which information that is to be part of an agreement or a report is information that meets the requirements of paragraphs (3)(a) to (d).

### Manner in which schedules to be kept secret

(5) A schedule to an agreement or to the report referred to in subsection (2) is confidential and shall not be filed with the court.

### Prohibition of disclosure

(6) The Minister shall not disclose any information set out in a schedule to the agreement or to the report referred to in subsection (2), except under section 307 or under the *Access to Information Act*.

### Filing in Environmental Registry

301. A copy of every agreement and report referred to in subsection 300(2) and every agreement that has been varied under subsection 303(1), or a notice that the agreement or report has been filed in court and is available to the public, shall be included in the Environmental Registry.

### Stay and recommencement of proceedings

302. Despite section 579 of the Criminal Code,

(a) the Attorney General shall, on filing the agreement, stay the proceedings or apply to the court for an adjournment of the proceedings in respect of the offence alleged to have been committed for a period of not more than one year after the expiry of the agreement; and

(b) proceedings stayed in accordance with paragraph (a) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the expiry of the agreement, the proceedings are deemed never to have been commenced.

### **Application to vary agreement**

**303. (1) Subject to subsection 300(5), the Attorney General may, on application by the person bound by an agreement and after consulting with the Minister, vary the agreement in one or both of the following ways that, in the opinion of the Attorney General, is rendered desirable by a material change in the circumstances since the agreement was entered into or last varied:**

- (a) make any changes to the agreement or to its terms and conditions; or
- (b) decrease the period for which the agreement is to remain in force or relieve the person, either absolutely or partially or for any period that the Attorney General considers desirable, of compliance with any condition that is specified in the agreement.

### **Filing of varied agreement**

(2) An agreement that has been varied under subsection (1) shall be filed with the court in which the original agreement was filed in accordance with section 300.

### **Records of persons**

**304. Sections 305 to 307 apply only to persons who have entered into an agreement, regardless of the degree of their compliance with its terms and conditions.**

### **Records of police forces and investigative bodies**

**305. (1) A record that relates to an offence that is alleged to have been committed by a person, including the original or a copy of any fingerprints or photographs of the person, may be kept by any police force or body responsible for, or participating in, the investigation of the offence.**

### **Disclosure by peace officer or investigator**

(2) A peace officer or investigator may disclose to any person any information in a record kept under this section that it is necessary to disclose in the conduct of the investigation of an offence.

### **Disclosure to insurance company**

(3) A peace officer or investigator may disclose to an insurance company any information in a record kept under this section that it is necessary to disclose for the purpose of investigating a claim arising out of an offence that is committed or alleged to have been committed by the person to whom the record relates.

### **Government records**

**306. (1) The Minister, inspectors, analysts and investigators and any department or agency of a government in Canada with which the Minister has entered into an agreement under section 308 may keep records and use information obtained as a result of the use of environmental protection alternative measures to deal with a person**

- (a) for the purposes of an inspection under this Act or an investigation of an offence under this Act that is alleged to have been committed by the person;
- (b) in proceedings against the person under this Act;
- (c) for the purpose of the administration of environmental protection alternative measures programs; or
- (d) otherwise for the purposes of the administration or enforcement of this Act.

### **Supervision records**

(2) Any person may keep the records and use the information obtained by the person as a result of supervising compliance with an agreement that are necessary for the purpose of supervising compliance with the agreement.

### **Disclosure of records**

**307. (1) Any record or information referred to in section 305 or 306 may be made available to**

(a) any judge or court for any purpose that relates to proceedings relating to offences that are committed or alleged to have been committed by the person to whom the record relates;

(b) any investigator, inspector, prosecutor or peace officer

(i) for the purpose of investigating an offence that the person is suspected on reasonable grounds of having committed, or in respect of which the person has been arrested or charged, or

(ii) for any purpose that relates to the administration of the case to which the record relates;

(c) any member of a department or agency of a government in Canada, or any agent of such a department or agency, that is

(i) engaged in the administration of environmental protection alternative measures in respect of the person, or

(ii) preparing a report in respect of the person under this Act; or

(d) any other person who is deemed, or any person within a class of persons that is deemed, by a judge of a court to have a valid interest in the record, to the extent directed by the judge, if the judge is satisfied that the disclosure is

(i) desirable in the public interest for research or statistical purposes, or

(ii) desirable in the interest of the proper administration of justice,

and if that person gives a written undertaking not to subsequently disclose the information except in accordance with subsection (2).

### **Subsequent disclosure**

(2) Where a record is made available to a person under subparagraph (1)(d)(i), the person may subsequently disclose information contained in the record, but shall not disclose it in any form that could reasonably be expected to identify the person to whom it relates and any other person specified by the judge.

### **Information, copies**

(3) Any person to whom a record is authorized to be made available under this section may be given any information that is contained in the record and may be given a copy of any part of the record.

### **Evidence**

(4) Nothing in this section authorizes the introduction into evidence of any part of a record that would not otherwise be admissible in evidence.

#### **Exception for public access to court record**

(5) For greater certainty, this section does not apply to an agreement, a varied agreement or report that is filed with the court in accordance with section 300.

#### **Agreements respecting exchange of information**

**308. The Minister may enter into an agreement with a department or agency of a government in Canada respecting the exchange of information for the purpose of administering environmental protection alternative measures or preparing a report in respect of a person's compliance with an agreement.**

#### **Regulations**

**309. The Minister may make regulations respecting the environmental protection alternative measures that may be used for the purposes of this Act including, but not limited to, regulations**

- (a) excluding specified offences under this Act from the application of those measures;
- (b) prescribing the form and manner in which and the period within which an application to participate in the measures is to be made, and the information that must be contained in or accompany the application;
- (c) respecting the manner of preparing and filing reports relating to the administration of and compliance with agreements;
- (d) respecting the types of reasonable costs and the manner of paying the costs associated with supervising and verifying compliance with an agreement; and
- (e) respecting the terms and conditions that may be provided for in an agreement and their effects.

#### **Contraventions**

##### **Ticketing**

**310. (1) Despite anything in this Act, the Governor in Council may, by regulation, on the recommendation of the Minister, designate any offence under this Act as an offence with respect to which, despite the *Criminal Code*, an inspector may lay an information and issue and serve a summons by completing a ticket in the prescribed form, affixing to it the inspector's signature and delivering it to the person who is alleged to have committed the offence specified in it at the time the offence is alleged to have been committed.**

##### **Regulations**

- (2) Any regulations made under this section
  - (a) shall establish a procedure for entering a plea and paying a fine in respect of each offence to which the regulations relate;
  - (b) shall prescribe the amount of the fine to be paid in respect of each offence; and
  - (c) may prescribe any other matter necessary to carry out the purposes of this section.

##### **Failure to respond to ticket**

(3) Where a person is served with a ticket and does not enter a plea within the time prescribed by the regulations, a justice shall examine the ticket and

- (a) if the ticket is complete and regular on its face, the justice shall enter a conviction in the person's absence and impose a fine of the prescribed amount; or

(b) if the ticket is not complete and regular on its face, the justice shall quash the proceedings.

#### **Other Remedies**

##### **Injunction**

**311. (1) Where, on the application of the Minister, it appears to a court of competent jurisdiction that a person has done or is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence under this Act, the court may issue an injunction ordering any person named in the application**

(a) to refrain from doing any act or thing that it appears to the court may constitute or be directed toward the commission of an offence under this Act; or

(b) to do any act or thing that it appears to the court may prevent the commission of an offence under this Act.

##### **Notice**

(2) No injunction shall be issued under subsection (1) unless 48 hours notice is given to the party or parties named in the application or the urgency of the situation is such that service of notice would not be in the public interest.

##### **Defence**

**312. In a prosecution for a contravention of a provision of Division 5 of Part 7 by a company engaged in the business of assembling or altering vehicles, it is a defence for the company to establish that the contravention occurred as a result of work previously done on a vehicle by another company engaged in the manufacture of the vehicle.**

## **OVERVIEW**

This Part permits environmental protection compliance orders by inspectors where there are reasonable grounds of violation under CEPA; appeal processes for those orders; and alternative measures where the Act has been violated.

There are provisions to permit the ticketing of offences. There is no automatic stay of orders under review.

The enforcement provisions under the Bill provide for a broad range of mechanisms to ensure compliance, including ticketing and environmental compliance orders. In addition, the inspectors powers of entry have been enhanced and a new category of officers, CEPA investigators, has been established. This will help ensure an independent enforcement branch to administer CEPA and overcome previous concerns about the lack of clear distinction between enforcement and abatement activities.

While the legislation itself has been improved with respect to enforcement, any legislation and regulation is only effective as long as there is the political will to ensure enforcement. The lack of adequate staff to conduct inspections and investigations has

historically been a major problem in ensuring compliance with CEPA. In 1994, the province of Ontario instituted more than two hundred prosecutions for violations of provincial environmental laws and achieved an extremely high conviction rate.<sup>15</sup> In contrast, during the 1994 - 1995 fiscal year, federal enforcement under CEPA resulted in only eight prosecutions.<sup>16</sup> Not surprisingly, therefore, Environment Canada is considered to have a poor record on enforcing environmental laws in comparison to jurisdictions such as Ontario. In fact, the Standing Committee recently released its report, Enforcing Canada's Pollution Laws: The Public Interest Must Come First! The report outlined 24 recommendations calling for, among other things, enhanced resources for federal enforcement.

## **RECOMMENDATIONS ON SPECIFIC SECTIONS**

### **Section 218 - Inspections**

Section 218 sets out the inspection power and sets out the procedures for obtaining warrants during inspections. The only clauses of concern under the inspection provisions are sections 218(3) and 218(14).

### **Section 218(3) - Private Dwelling-Place**

Section 218(3) sets out the criteria for inspecting a private dwelling-place, which can be done only by means of a warrant for inspection issued by a justice of the peace.

The use of terminology, namely "warrant" in section 218, however, could result in confusion. A warrant issued under section 218(8) is not the same as a search warrant since the informant is not required to demonstrate reasonable and probable grounds that an offence has been committed.

### **Recommendation No. 147**

**Section 218 should be amended so as to distinguish between an "warrant for inspection" and a "search warrant" to clarify the differences in the requirements of these. This could be done by replacing the term "warrant" with the term "orders" to clarify that they are not the same as search warrants.**

**Section 218(11)** - Powers of Inspector

Subsections 218(11)(a) and (b) allow inspectors to examine any open packages. However, in some instances an inspector may need to go beyond a mere examination and make necessary excavations to ascertain whether a substance, product, air contaminant, fuel, cleaning product, engine, equipment or component, is in a place. The inspectors' powers should, therefore, be broadened to give Inspectors the powers to make necessary excavations.

**Recommendation No. 148**

**Section 218 (11) should be broadened to give inspectors the powers to make necessary excavations.**

**Section 218(14)** - Operation of Computer System and Copying Equipment

Subsections 218(14)(a), (b) and (c) allow an inspector to operate a computer system and copying equipment. However, in some instances it may not be possible for an inspector to have ready access to copying equipment. Inspectors, therefore, should have the power upon giving a receipt, to remove from a place, documents, for the purpose of making copies or extracts and promptly returning them to the person who produced them.

**Recommendation No. 149**

**Section 218(14) should be amended so that inspectors have the power upon giving a receipt, to remove from a place, documents, for the purpose of making copies or extracts and promptly returning them to the person who produced them.**

**Section 219** - Production of Documents and Samples

Section 219 permits the Minister to demand production of documents. It is not clear why the power of requiring production is provided to the Minister as opposed to the Inspector.

It would be more expeditious to provide inspectors with the power to demand production of documents that is required to be kept under the Act or Regulations and any other document that is related to the purposes of the inspection. The inspector



should be allowed to make such a demand without going to the Minister, since to do so would simply cause unnecessary delay of inspections.

**Recommendation No. 150**

**Inspectors should also be provided with the power to make reasonable inquiries of any person either orally or in writing. In addition, both inspectors and investigators should have the power to exclude from questioning any person, except the counsel of the person being questioned, as provided by Ontario's *Environmental Protection Act*. This would ensure that inspectors' and investigators' witnesses are not intimidated by the presence of employers during the course of an interview.**

**Sections 234 - 242 - Environmental Protection Compliance Orders**

The new CEPA permits Environmental Protection Compliance orders (EPC orders), which may be used to stop illegal activities and correct violations. The EPC orders are valid for 180 days and a person subject to the order can seek a review, with rights to further appeal to a court.

The benefit of these EPC orders is that it provides a speedy mechanism to ensure compliance without resorting to a court. Given the delay and cost of undertaking a prosecution, and that a prosecution is not always warranted, the EPC orders provide an appropriate enforcement tool. Moreover, the issuance of an EPC order does not preclude prosecution in the future. EPC orders should be utilized to address only less serious violations under the Act and should not be used as a means of avoiding prosecution. It is, therefore, imperative that CEPA inspectors are given guidance as to when the use of EPC orders are appropriate, otherwise EPC orders may be used to address more severe egregious offenses, rather than resort to prosecution.

**Recommendation No. 151**

**It is recommended that guidelines be prepared providing criteria as to when CEPA inspectors will issue EPC orders. An EPC order should only be used to address less serious offenses under the Act.**

### **Sections 256-268** - Reviews

Section 256 to 268 set out the procedures for requesting a review. A request for a review does not suspend the operation of the order although a Review Officer, may, on application of a person, suspend the operation of the order. The Review Officer also has power to summon witnesses. A Review Officer, after reviewing the order giving all persons the opportunity to make representations, may confirm or cancel the order or amend it and impose terms and conditions.

Rules of Practice governing the hearing before Review Officers should be adopted covering such items as order of service of documents, adjournments, motions, disclosure of documents and witnesses. There should also be rules governing the hearing process adopted along the lines of the rules before other administrative tribunals.

#### **Recommendation No. 152**

**These provisions should provide rules of practice governing the hearing before Review Officers covering such items as order of service of documents, adjournments, motions, disclosure of documents and witnesses. There should also be rules governing the hearing process adopted along the lines of the rules before other administrative tribunals.**

### **Sections 272-286** - Offences and Punishment

Sections 272 to 286 set out the penalty provisions under CEPA. Although the potential penalties for contravention are substantial, there is no provision for minimum fines for any offences, or for repeat offenders.

It is recommended that for certain types of offences or offenders, there should be a minimum fine as well as a maximum fine. For example, for those offences which result in actual or potential pollution, the fines should be a minimum fine to reflect the gravity of these types of offences.

Furthermore, repeat offenders should be exposed potentially to higher penalties than first time offenders to ensure both general and specific deterrence. Moreover, the penalty provisions should also distinguish between potential penalties for individuals and corporations in order to recognize the difference in their respective ability to pay the fine. Imposing a higher penalty provisions against corporations would send a message

to the courts that Parliament recognized the need to ensure that corporations do not treat the fine as the cost of doing business.

**Section 287** - Sentencing Criteria

Section 287 sets out the factors that the court must consider in sentencing, including, harm or risks of harm, remedial costs to any environmental damage, evidence of recklessness, and all available sanctions that are reasonable in the circumstances, with particular attention to the situation of Aboriginal offenders.

There is a public perception that fines are low for environmental offences.<sup>17</sup> It is necessary for courts to also take into account the ability of an offender to pay, and the size and wealth of corporations.

**Recommendation No. 153**

**It is recommended that these additional factors be included in the sentencing considerations under section 287.**

**Sections 295-309** - Environmental Protection Alternative Measures

Sections 295 to 309 set out the provisions for Environmental Protection Alternative Measures (EPAM). The Attorney General may enter into an EPAM with the offender provided it is not inconsistent with the purposes of the Act, and the measures are part of a program of EPAM authorized by the Attorney General. In addition, the use of EPAM applies only after a conviction for certain types offences. EPAM is not a tool that can be used with regard to more serious offences. Essentially, EPAM is an alternative to prosecution but it is not a bar to proceedings against the offender under CEPA.

**Recommendation No. 154**

**There should be specific guidelines as to when a EPAM will be entered into by the Attorney General. For instance, it is not evident whether repeat offenders would be eligible for EPAM although the Attorney General is required to take this factor into consideration. The use of EPAM will raise public policy issues and consequently there should be public input as to what types of EPAM programmes will be set up by the Attorney General.**

### **Sections 310 - 311 - Contravention**

Sections 310 - 311 address ticketable offences. Section 310 provides the Minister with the authority to designate an offence under CEPA as a ticketable offence and sets out the procedure for issuing a ticket.

Ticketing is a more expeditious mechanism to address environmental violations, however, the fines available for ticketable offences are normally less than for a prosecution under the Act. The more egregious environmental violations should not be ticketable offences.

#### **Recommendation No. 155**

**It is recommended that the Minister should not be given authority to designate the more serious violations as ticketable offences.**

## PART 11 - MISCELLANEOUS MATTERS - SECTIONS 313-343

### Bill C-32 STATES:

**313. (1)** A person who provides information to the Minister under this Act, or to a board of review in respect of a notice of objection filed under this Act, may submit with the information a request that it be treated as confidential.

#### Contents of request

(2) A request under subsection (1) shall be submitted in writing and contain any supplementary information that may be prescribed.

#### Prohibition of disclosure

**314.** The Minister shall not disclose any information in respect of which a request for confidentiality has been made under section 313, except in accordance with section 315, 316 or 317.

#### Disclosure by Minister for public interest

**315. (1)** The Minister may disclose information, other than information in respect of which section 318 applies, where

(a) the disclosure is in the interest of public health, public safety or the protection of the environment; and

(b) the public interest in the disclosure clearly outweighs in importance

(i) any material financial loss or prejudice to the competitive position of the person who provided the information or on whose behalf it was provided, and

(ii) any damage to the privacy, reputation or human dignity of any individual that may result from the disclosure.

#### Notice of disclosure

(2) Subject to subsection (3), at least 24 hours before disclosing any information under subsection (1), the Minister shall give notice of the proposed disclosure to the person who provided the information or on whose behalf it was provided.

#### Exception

(3) Notice under subsection (2)

(a) is not required where the person to whom it is to be given cannot be found after reasonable efforts have been made to do so; or

(b) may be given later than the time required by that subsection where an emergency exists.

#### Certain purposes for which information may be disclosed

**316. (1)** Information may be disclosed

(a) with the written consent of the person who provided it or on whose behalf it was provided;

(b) as may be necessary for the purposes of the administration or enforcement of this Act;

(c) under an agreement or arrangement between the Government of Canada or any of its institutions and any other government in Canada, the government of a foreign state or an international organization or any of its institutions, or between the Minister and any other minister of the Crown in right of Canada, where

(i) the purpose of the agreement or arrangement is the administration or enforcement of a law, and

(ii) the government, international organization, institution or other minister undertakes to keep the information confidential;

(d) under an agreement or arrangement between the Government of Canada and the government of a foreign state or an international organization, where the government or organization undertakes to keep the information confidential; or

(e) to a physician or prescribed medical professional who requests the information for the purpose of making a medical diagnosis of, or rendering medical treatment to, a person in an emergency.

**Disclosure by physician, etc.**

(2) A physician or prescribed medical professional to whom information is disclosed under paragraph (1)(e) shall not disclose the information except as may be necessary for the purposes referred to in that paragraph.

**Disclosure of personal information**

(3) Personal information as defined in section 3 of the *Privacy Act* may not be disclosed under paragraph (1)(b) or (c) unless

(a) the disclosure is in the interest of public health, public safety or the protection of the environment; and

(b) the public interest in the disclosure clearly outweighs in importance any damage to the privacy, reputation or human dignity of any individual that may result from the disclosure.

**Disclosure by Minister**

**317. (1) The Minister may disclose information in respect of which a request for confidentiality has been made under section 313 where the Minister determines that the disclosure would not be prohibited under section 20 of the *Access to Information Act*.**

**Application of certain provisions of *Access to Information Act***

(2) Where the Minister intends to disclose information under subsection (1), sections 27, 28 and 44 of the *Access to Information Act* apply, with any modifications that the circumstances require, and, for that purpose, that information is deemed to be contained in a record that the Minister intends to disclose and any reference in those sections to the person who requested access shall be disregarded.

**Protection from civil proceeding or prosecution**

(3) Despite any other Act of Parliament, no civil or criminal proceedings lie against the Minister, or against any person acting on behalf of or under the direction of the Minister, and no proceedings lie against the Crown for the disclosure in good faith of any information under this Act, for any consequences that flow from that disclosure or for the failure to give any notice required under section 27 or any other provision of the *Access to Information Act* if reasonable care is taken to give the required notice.

***Hazardous Materials Information Review Act***

**318. Except as provided in sections 316 and 317, information in respect of which a request for confidentiality has been made under section 313 shall not be disclosed where**

(a) a claim for exemption has been filed in respect of the information under section 11 of the *Hazardous Materials Information Review Act*;

(b) the information is exempt under section 19 of that Act from the requirement in respect of which the exemption is claimed; and

(c) the person claiming the exemption has disclosed the contents of the claim to the Minister.

#### **Regulations**

##### **319. The Governor in Council may make regulations prescribing**

(a) information that shall accompany a request made under section 313; and

(b) medical professionals for the purposes of paragraph 316(1)(e).

#### **Non-disclosure by Minister of National Defence**

**320. Despite any other provision of this Act, the Minister of National Defence may refuse to disclose under this Part any information the disclosure of which could reasonably be expected to be injurious to the defence or security of Canada or of a state allied or associated with Canada.**

#### **Security requirements for disclosure**

**321. Any person, except an analyst, inspector or investigator, who receives, obtains or has access to information under this Act shall comply with any security requirements applicable to, and take any oath of secrecy required to be taken by, persons who normally have access to and use of the information.**

#### ***Economic Instruments***

##### **Guidelines, programs and other measures**

**322. The Minister may establish guidelines, programs and other measures for the development and use of economic instruments and market-based approaches to further the purposes of this Act, respecting systems relating to**

(a) deposits and refunds; and

(b) tradeable units.

#### **Consultation**

**323. In carrying out the responsibilities conferred by section 322, the Minister shall offer to consult with the government of a province and the members of the Committee who are representatives of aboriginal governments and may consult with a government department or agency, aboriginal people, representatives of industry and labour and municipal authorities or with persons interested in quality of the environment or the preservation and improvement of public health.**

#### **Publication of guidelines and programs**

**324. The Minister shall publish any guidelines, programs and other measures established under section 322, or shall give notice of their availability, in the *Canada Gazette* and in any other manner that the Minister considers appropriate.**

#### **Regulations for systems relating to deposits and refunds**

**325. The Governor in Council may, in the exercise of a regulation-making power under section 93, 118 or 209, make regulations respecting systems relating to deposits and refunds, including, but not limited to, regulations providing for, or imposing requirements respecting,**

- (a) deposits, including the amount of any deposit and the substance, product containing a substance or activity in relation to which a deposit is required, the conditions for the use of a deposit and the conditions for and manner of paying a deposit;
- (b) the period during which a deposit may be held;
- (c) refunds, including the amount of any refund and the substance, product containing a substance or activity in relation to which a refund may be granted and the conditions for and manner of paying a refund;
- (d) the establishment of a fund for deposits, and the operation, management and administration of the fund;
- (e) the designation of a person to administer the fund for deposits and the conditions for the designation;
- (f) reports and forms related to deposits, refunds and the fund for deposits;
- (g) the maintenance of books and records for the administration of any regulation made under this section; and
- (h) the forfeiture of deposits, including unclaimed deposits and the conditions under which and the circumstances in which deposits may be forfeited.

#### **Regulations for tradeable units systems**

**326. The Governor in Council may, in the exercise of a regulation-making power under section 93, 118, 140, 167, 177 or 209, make regulations respecting systems relating to tradeable units, including regulations providing for, or imposing requirements respecting,**

- (a) the substance, product containing a substance or quantity or concentration of the substance that is released or activity in relation to which the system is established;
- (b) the methods and procedures for conducting sampling, analyses, tests, measurements or monitoring under the system;
- (c) the description and nature of a tradeable unit, including allowances, credits or coupons;
- (d) the baselines to be used for comparison or control purposes in relation to the system and the maximum limits applicable to the system and the manner of determining those baselines and maximum limits;
- (e) the conditions related to the creation, distribution, exchange, sale, use, variation or cancellation of a tradeable unit;
- (f) the creation, operation and management of a public registry related to the system;
- (g) the conditions for the use of and participation in the system, including environmental or temporal limits;
- (h) reports and forms related to the system; and
- (i) the maintenance of books and records for the administration of any regulation made under this section.



## **Ministerial orders**

**327. Despite any regulation made under section 326, the Minister may issue an order setting conditions in respect of the trading or suspend or cancel trading of tradeable units or invalidate any trade of tradeable units where the Ministers are of the opinion that the trade or use of a tradeable unit**

- (a) has or may have an immediate or long-term harmful effect on the environment;
- (b) constitutes or may constitute a danger to the environment on which human life depends; or
- (c) constitutes or may constitute a danger in Canada to human life or health.

## ***Regulations Respecting Fees and Charges***

### **Services and facilities**

**328. (1) Subject to subsection (2), the Minister may make regulations**

- (a) prescribing the fees or a scale of fees or the manner of determining the fees to be paid for a service, the use of a facility or any right, privilege, process or approval;
- (b) prescribing the persons or classes of persons by whom or on whose behalf the fees are to be paid and requiring the fees to be paid by those persons or classes of persons;
- (c) exempting any person or class of persons from the requirement to pay any of those fees; and
- (d) generally, in respect of any condition or any other matter in relation to the payment of fees for a service, facility, right, privilege, process or approval referred to in paragraph (a).

### **Appropriate Minister**

(2) For the purpose of subsection (1), where the Minister or the Minister of Health or both Ministers have responsibility for a service, facility, right, privilege, process or approval referred to in paragraph (1)(a), that Minister or both Ministers, as the case may be, have the power to make the regulations under subsection (1) in relation to that service, facility, right, privilege, process or approval.

### **Amount not to exceed cost**

(3) Fees for a service or the use of a facility that are prescribed by or under regulations made under subsection (1) may not exceed the cost to Her Majesty in right of Canada of providing the service or the use of the facility.

### **Amount**

(4) Fees for processes or approvals that are prescribed by or under regulations made under subsection (1) shall in the aggregate not exceed an amount sufficient to compensate Her Majesty in right of Canada for any reasonable costs incurred by Her Majesty for the purpose of providing the processes or approvals.

### **Consultation**

**329. The Minister making a regulation under section 328 shall do so after consulting with any persons or organizations that the Minister considers to be interested in the matter.**

## **General Regulation-making Powers and Exemptions**

### **Exercise of regulation-making power**

**330. (1) The Governor in Council may, in the exercise of any regulation-making power under this Act in respect of a substance, prescribe**

- (a) the minimum, average or maximum quantity or concentration of the substance; and
- (b) the method of determining such a quantity or concentration.

### **Incorporation by reference**

(2) For greater certainty, a regulation made under this Act incorporating by reference a standard, specification, guideline, method, procedure or practice may incorporate the standard, specification, guideline, method, procedure or practice as amended from time to time.

### **Particular regulations**

- (3) A regulation under this Act may be made applicable
  - (a) with respect to any part of Canada or throughout Canada;
  - (b) in respect of any person or class of persons; and
  - (c) in respect of any activity or class of activities.

### **Manner of service**

(4) The Minister may make regulations respecting the manner of providing or serving orders, copies of orders, notices or other documents that are to be provided under this Act.

### **Exemption from *Statutory Instruments Act***

**331. An interim order made under section 94, 163, 173 or 183**

- (a) is exempt from the application of sections 3, 5 and 11 of the *Statutory Instruments Act*; and
- (b) shall be published in the *Canada Gazette* within 23 days after it is approved by the Governor in Council.

### **Prepublication Requirements**

#### **Publication of proposed orders and regulations**

**332. (1) The Minister shall publish in the *Canada Gazette* a copy of every order or regulation proposed to be made by the Minister or the Governor in Council under this Act, except an order referred to in subsection 81(9) or 106(9) or a list or an amendment to a list referred to in section 66, 87, 105 or 112.**

#### **Notice of objection**

(2) Within 60 days after the publication of a proposed order or regulation in the *Canada Gazette* under subsection (1) or a proposed instrument respecting preventive or control actions in relation to a substance that is required by section 91 to be published in the *Canada Gazette*, any person may file with the Minister comments with respect to the order, regulation or instrument or a notice of objection requesting that a board of review be established under section 333 and stating the reasons for the objection.

**Single publication required**

(3) No order, regulation or instrument need be published more than once under subsection (1), whether or not it is altered after publication.

**Other ministers**

(4) For greater certainty, subsection (1) does not require a copy of an order proposed to be made under subsection 81(9) or 106(9) to be published in the *Canada Gazette* by a minister other than the Minister.

**Board of Review Proceedings**

**Establishment of board of review**

**333. (1) Where a person files a notice of objection under subsection 77(8) or 332(2) in respect of**

- (a) a decision or a proposed order, regulation or instrument made by the Governor in Council, or
- (b) a decision or a proposed order or instrument made by either or both Ministers,

the Minister or the Ministers may establish a board of review to inquire into the nature and extent of the danger posed by the substance in respect of which the decision is made or the order, regulation or instrument is proposed.

**Establishment of board of review**

(2) Where a person files a notice of objection under subsection 9(3) or 10(5) in respect of an agreement or a term or condition of the agreement, the Minister may establish a board of review to inquire into the matter.

**Mandatory review for international air and water**

(3) Where a person or government files with the Minister a notice of objection under subsection 332(2) with respect to regulations proposed to be made under section 167 or 177 within the time specified in that subsection, the Minister shall establish a board of review to inquire into the nature and extent of the danger posed by the release into the air or water of the substance in respect of which the regulations are proposed.

**Mandatory reviews for certain regulations**

(4) Where a person files with the Minister a notice of objection under subsection 332(2) with respect to regulations proposed to be made under Part 9 or section 118 within the time specified in that subsection, the Minister shall establish a board of review to inquire into the matter raised by the notice.

**Review for permits**

(5) Where a person files with the Minister a notice of objection under section 134 within the time specified in that section, the Minister may establish a board of review to inquire into the matter raised by the notice.

**Mandatory review for toxics**

(6) Where a person files with the Minister a notice of objection under section 78 in respect of the failure to make a determination about whether a substance is toxic, the Minister shall establish a board of review to inquire into whether the substance is toxic or capable of becoming toxic.

**Number of members of board**

**334. A board of review shall consist of not fewer than three members.**

#### **Appearance before board**

**335. A board of review shall give any person or government a reasonable opportunity, consistent with the rules of procedural fairness and natural justice, of appearing before it, presenting evidence and making representations.**

#### **Withdrawal of notice of objection**

**336. Where a notice of objection referred to in section 333 is withdrawn by the person who filed it and no other notice of objection is filed in respect of the same matter, the Minister or Ministers may dissolve a board of review established in respect of the notice of objection.**

#### **Powers of board**

**337. For the purposes of an inquiry under this Act, a board of review has all the powers of a person appointed as a commissioner under Part I of the *Inquiries Act*.**

#### **Costs**

**338. (1) A board of review may award costs of, and incidental to, any proceedings before it on a final or interim basis and those costs may be fixed at a sum certain or may be taxed.**

#### **Payment**

(2) A board of review may, in accordance with the rules, direct by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.

#### **Absent member of board**

**339. Where a member of a board of review is absent or unable to proceed with or complete an inquiry, the remaining members of the board may, if there is still a quorum, proceed with or complete the inquiry.**

#### **Report**

**340. (1) As soon as possible after the conclusion of an inquiry, a board of review shall submit a report to the Minister or the Ministers who established the board, together with its recommendations and the evidence that was presented to it.**

#### **Publication of report**

(2) The report of the board of review shall be made public immediately after its receipt by the Minister or Ministers, subject to section 314 or the conditions of any other Act of Parliament.

#### **Rules for boards of review**

**341. The Minister or the Ministers may, with respect to boards of review that the Minister or the Ministers establish, make rules of either particular or general application**

- (a) for regulating the proceedings of the boards;
- (b) for regulating the conduct of hearings, including the presentation of evidence, the making of representations, the holding of hearings, the length of hearings and the date on or before which the boards shall report;
- (c) fixing the remuneration of board members and the travel and living expenses to which they are entitled;

(d) prescribing the criteria to be considered by boards in directing interim or final costs to be paid, taxed and allowed and prescribing a scale under which costs are to be taxed; and

(e) generally, for regulating the conduct and work of the boards.

### ***Report to Parliament***

#### **Annual report**

**342. The Minister shall, as soon as possible after the end of each fiscal year, prepare and cause to be laid before Parliament a report on the administration and enforcement of this Act for that year.**

#### **Permanent review of Act by parliamentary committee**

**343. (1) The administration of this Act shall, every seven years after the coming into force of this Act, be reviewed by the committee of the House of Commons, or of both Houses of Parliament, that may be designated or established by Parliament for that purpose.**

#### **Review and report**

(2) The committee designated or established by Parliament for the purpose of subsection (1) shall undertake a comprehensive review of the provisions and operation of this Act and shall, within a year after the review is undertaken or within any further time that the House of Commons may authorize, submit a report to Parliament thereon including a statement of any changes to this Act or its administration that the committee would recommend.

## **OVERVIEW**

This Part contains provisions dealing with a number of important issues including information disclosure, economic instruments, public notice requirements prior to the making of orders and regulations, the establishment and proceedings for Boards of Review, annual reports to Parliament on the Act's administration and enforcement, and the next Parliamentary review of the Act.

## **KEY POINTS**

- strengthen powers of the Minister to disclose confidential information when it is in the public interest to do so;
- prohibit the establishment of emission trading systems for CEPA 'toxic' substances;
- permit the application of fees and charges up to the full environmental costs of permitted activities;
- remove exemptions for new substances and biotechnology product 'equivalency' orders from public notice and comment requirements;

- provide for intervenor funding in Board of Review proceedings;
- establish requirements regarding the contents of annual reports to Parliament on the administration and enforcement of the Act; and
- establish requirement for regular 5 year Parliamentary reviews of the CEPA.

## **RECOMMENDATIONS ON SPECIFIC SECTIONS**

### **Sections 313-321** - Disclosure of Information

#### **Section 315(1)** - Disclosure by Minister for Public Interest

This section, as drafted, requires that the Minister meet a legal test that the public interest in the disclosure of information about which a confidentiality claim has been made outweighs the economic interests of the person who provided the information and the privacy, reputation or human dignity of any individual that may result from the disclosure.

The Minister's discretion in this area should be strengthened, given that the release of information in relation to matters dealt with under CEPA, such as the protection of the environment and human health, is fundamental to the public's right to know, and to hold the government to account for the consequences of its actions.

#### **Recommendation No. 156**

**Add words "in the opinion of the Minister" after word "where"**

**and**

**Delete the word "clearly" from subsection 315(1)(b).**

### **Sections 322-327** - Economic Instruments

#### **OVERVIEW**

Section 323 requires the Minister to offer to consult with provincial governments and representatives of aboriginal governments on the National Advisory Committee before taking any measure for the development or use of economic instruments and market-

based approaches for the purposes of the Act. Consultation with other actors is at the discretion of the Minister.

Section 325 permits the application of deposits in relation to CEPA toxic substances, nutrients, and federal government lands and operations.

Section 326 permits emission trading and the creation of tradeable units in relation to CEPA toxic substances, nutrients, fuels, international air and water pollution, and federal government lands and operations.

Sections 328(3) and (4) permit fees and charges for cost administrative cost recovery with respect to approvals under the Act.

## **KEY POINTS**

- remove requirement to offer to consult with provinces before taking measures for the development and use of economic instruments;
- prohibit the establishment of trading schemes for emissions for toxic and other substances harmful to the environment or human health.
- levy environmental charges and fees in relation to toxic substances, nutrients, fuels, ocean dumping, international air and water pollution and transboundary waste movements beyond administrative cost recovery.

### **Section 323** - Requirements for Consultation

This clause requires the Minister to offer to consult with provincial governments and aboriginal representatives on the National Advisory Committee before taking any measure to develop or use an economic instrument for the purposes of the Act. Consultation with other stakeholders is at the discretion of the Minister. This is the standard "harmonization" "shall offer to consult" clause which has been introduced throughout the Bill C-32. Such clauses were not present in Bill C-74.

### **Recommendation No. 157**

**Delete section 323**

**or**

**Replace word "shall" with "may," and remove the words "and may offer to consult with" in section 323.**

**Section 326** - Regulations for Tradeable Units Systems

This section, as drafted would permit the establishment of emission trading schemes involving toxic substances, and trading of emissions between media. The trading of emissions of toxic substances is of serious concerns due to problems of environmental justice and local loading and should be prohibited. The trading of emissions between media is also problematic, given the different impacts of different pollutants in different media.

Unlike to provisions dealing with charges and fees, there are no requirements for consultation prior to the establishment of tradeable units.

**Recommendation No. 158**

**Add new subsections:**

**"(2) Regulation-making power under subsection (1) shall not be used (a) to establish systems relating to tradeable units for releases to the environment of substances listed under Schedule I of the Act; or (b) to establish systems related to tradeable units for releases to more than one environmental media**

**(3) Before making a regulation under section 326, the Minister shall offer to consult with such persons or organizations interested in the matter."**

**Sections 328-329** - Regulations Respecting Fees and Charges

**OVERVIEW**

These sections permit the imposition of fees and charges for services or uses of facilities provided by the federal government, or the costs of providing processes or approvals. Fees are not permitted to be imposed to reflect the environmental or social costs of activities for which approvals are granted. Section 329 requires consultation with any interested person prior to the imposition of fees or charges.



## RECOMMENDATIONS ON SPECIFIC SECTIONS

### Section 328(4) - Amount

This section requires require fees and charges imposed for processes or approvals not exceed the cost to the federal government of providing those processes or approvals. This prohibits the imposition of fees or charges which reflect the environmental costs of activities. This effectively limits the potential use of fees and charges as a means of discouraging environmentally damaging behaviour, such as the disposal of waste at sea.

#### **Recommendation No. 159**

**Delete subsection 328(4)**

**or**

**Replace with the following: "Fees for processes or approvals that are prescribed by, or pursuant to, regulations made under subsection (1) may reflect the full administrative and environmental costs of the approved activities."**

### Section 329 - Requirement to Consult

This section requires the Minister to consult with any interested person regarding the imposition of fees or charges.

#### **Recommendation No. 160**

**Replace with: "The Minister making a regulation under section 328 may offer to consult with any persons or organizations the Minister considers to be interested in the Matter."**

### Sections 330-331 - General Regulation-Making Powers and Exemptions

#### Section 330(2) - Incorporation by reference

This section permits the incorporation by reference of materials into regulation. This effectively this allows for "double-delegated" legislation as the regulation may be

changed as a result of changes to the incorporated material. These changes may not be subject to public consultation or Parliamentary review.

**Recommendation No. 161**

**Delete subsection.**

**Section 332** - Pre-publication Requirements

This section requires pre-publication and a 60 day period for public comments or filing of notices of objection for every order or regulation proposed by the Minister or Governor in Council under the Act.

**Section 332(1)** - Publication of proposed orders and regulations

This subsection exempts orders granting CEPA equivalency status to other Acts of Parliament for purposes of notification and the evaluation of the potential toxicity of biotechnology products and other new substances regulated under these acts.

**Recommendation No. 162**

**Delete words "an order referred to in subsection 81(9) or 106(9) or."**

**Section 332(2)** - Notice of objection

This section permits the filing of comments or notices of objection during the public comment period. However, it establishes no requirement that there be an explanation of how comments that were received were considered in decision-making.

**Recommendation No. 163**

**Add new subsection (3) to section 332: "After the end of the period of 60 days referred to in subsection (2), the Minister shall publish in the *Canada Gazette* and in any other manner the Minister considers appropriate, a report or a notice of the availability of a report that summarizes how any comments or notices of objection were dealt with."**

**Section 332(4)** - Other Ministers

This section related to the exemption from public notice and comment requirements and the opportunity for the filing of notices of objection equivalency orders related to new substances and biotechnology products regulated under other Acts of Parliament.

**Recommendation No. 164**

**Delete subsection 332(4).**

**Sections 333-341** - Board of Review Proceedings

Under these sections establish the structure and procedural rules for Boards of Review. The provisions make a provision for cost awards but make no provision for intervener funding.

**Section 333(3)** - Mandatory Review for International Air and Water

This clause requires that a Board of Review be established with respect to a notice of objection regarding a proposed regulation regarding international air or water pollution. The establishment of Boards of Review under other circumstances is at the discretion of the Minister.

**Recommendation No. 165**

**Replace word "shall" with "may."**

**Section 333(4)** - Mandatory Reviews for Certain Regulations

This clause requires that a Board of Review be established with respect to a notice of objection regarding a proposed regulation regarding federal government operations and federal and aboriginal lands and with respect to nutrients. The establishment of Boards of Review under other circumstances is at the discretion of the Minister.

**Recommendation No. 166**

**Replace word "shall" with "may."**

**Section 338** - Costs

This section permits both interim and final cost awards in Board of Review proceedings, but not the awarding of intervenor funding.

**Recommendation No. 167**

**Make provision for intervener funding.**

**Section 338(3)**

**Recommendation No. 168**

**The Board may make costs an interim basis.**

**Section 338(4)**

**Recommendation No. 169**

**The Board may grant intervenor funding upon application by parties or intervenors.**

**Sections 342** - Report to Parliament

This section requires an annual report to Parliament on the administration and enforcement of the Act by the Minister. However, it does not specify in any way the contents of this report.

**Recommendation No. 170**

**Amend section 342 to specify that the contents of these report shall include, but not be limited to the following:**

- **the number cause, and results of public requests for investigations of offenses under the Act;**
- **the number, cause and results of environmental protection actions initiated under the Act;**

- **the numbers locations dates and results of inspections, investigations, warnings, inspectors orders, injunctions, tickets, environmental protection alternative measures and prosecutions initiated under the Act;**
- **the level and allocation of resources allocated for the administration and enforcement of the Act;**
- **number and outcomes of assessments of substances new to Canada conducted under Part 5;**
- **the number and outcome of assessments of new biotechnology products conducted under Part 6;**
- **number, location and nature of ocean dumping permits issued under Part 8; and**
- **number, quantities and composition of waste imports and exports authorized under Part 8.**

**Section 343** - Parliamentary Review

This section provides for a Parliamentary review of the Act every seven years. Under this provision the next review would not occur until 2005 at the earliest. The review period is excessive in light of the pace of change in the environmental field. Furthermore, the provision does not designate the Standing Committee on the Environment and Sustainable Development, or its successor, as the body charged with the conduct of the review.

**Recommendation No. 171**

**Replace with subsection (1) with the words: "The Administration of this Act shall, every five years after the coming into force of this Act, be reviewed by the House of Commons Standing Committee of the Environment and Sustainable Development, or its successor."**

**Section 343(2)** - Review and Report

This is an amendment conditional to the amendment of section 343(1).

**Recommendation No. 172**

**Delete words "or established by Parliament" from section 343(2).**

## D. SUMMARY OF RECOMMENDATIONS

Section	Recommendation No.	CELLA/CIELAP Recommendations
<u>Preamble - Paragraph 3</u>	1	Paragraph should be balanced with the addition of a paragraph acknowledging the need to phase out (or virtually eliminate) the generation and use of the most serious pollutants.  Paragraph 3 should read as follows: "Whereas the government of Canada acknowledges the need to phase out the generation and use of the most persistent toxic substances."
<u>Paragraph 5</u>	2	Replace with: "Whereas the Government of Canada will continue to demonstrate national leadership in establishing and implementing environmental standards, ecosystem objectives, environmental quality guidelines, and codes of practice."
<u>Paragraph 6</u>	3	Delete the word "cost."
<u>Paragraph 10</u>	4	The paragraph should be deleted.
<u>Paragraph 12</u>	5	A new paragraph should be added to the preamble dealing with the role of the federal government on aboriginal lands.
<u>Paragraph 13</u>	6	Replace with: "Whereas the Government of Canada will endeavour to remove threats to biological diversity through pollution prevention, the control and management of toxic substances and products of biotechnology."
<u>Administrative Duties - Section 2</u> <u>Section 2(1)(a)</u>	7	Delete the word "cost."
<u>Section 2(1)(g)</u>	8	Replace with: "endeavour to establish the highest national standards of environmental quality."
<u>Section 2(1)(j)</u>	9	Replace with: "endeavour to protect the environment, including its biological diversity, and human health, from the use and release toxic substances, products of biotechnology, and other threats."
<u>Section 2(1)(l)</u>	10	Delete section or replace with: "act in a manner <u>with regard to</u> the intent of intergovernmental agreements...throughout Canada."
<u>Section 2(1)(l)</u>	11	The addition of this clause is an unnecessary barrier to the taking of action under the Act and it should be deleted.

<b><u>Section 2(1)(m)</u></b>	12	Delete words: "to avoid duplication and."
<b><u>Section 2(2)</u></b>	13	Delete section or redraft section to read: "the Minister, and the Minister of Health, where appropriate, may consult with the Minister responsible for another Act of Parliament as to whether measures could be taken under the other Act that are appropriate or sufficient to address a matter affecting human health or the environment."
<b><u>Section 3(1)</u></b>	14	That a definition for hormone disrupting substance be added to section of Bill C-32, as follows:  "Hormone disrupting substance" means a substance with the ability to disrupt the synthesis, secretion, transport, binding, action, or elimination of natural hormones in organisms that are responsible for the maintenance of homeostasis, reproduction, development and/or behaviour."
<b><u>Administration</u></b> <b><u>Section 9(5)</u></b>	15	Replace with: "The Minister may, after publishing a report or notice under subsection (4) and the making public of the report of a Board of Review, if such a Board has been established in response to a notice of objection filed under subsection (3)..."
<b><u>Section 9(5)</u></b>	16	Add clause: "no agreement made under this section shall limit or interfere with, in any way, the carrying out of any action the Minister deems necessary for the administration and enforcement of this Act, including the conduct of inspections or investigations."
<b><u>Section 9(7)</u></b>	17	Add clauses at end of section: "including information on: (a) the collection of monitoring data; (b) the number, dates, locations and results of inspections, investigations, warnings, injunctions, and prosecutions; and (c) the level of resources allocated, in relation to the administration of the Act under agreements made under subsection (5)."
<b><u>Section 10(1)</u></b>	18	This recommendation should follow the recommendations emanating from the Auditor General's report.  Delete references to section 200(1) and 209(1) and (2).



<b><u>Section 10(3)</u></b>	19	<p>Replace with: "subject to subsections (4), (5), and (6) where the Minister and a government agree in writing that there are in force by or under the law applicable to the jurisdiction of a government:</p> <p>(a) provisions that are at least equivalent to a regulation made under a provision referred to in subsection (1) or (2);</p> <p>(b) provisions that are at least equivalent to sections 17-20 for the investigation of alleged offenses under environmental legislation of that jurisdiction;</p> <p>(c) provisions that are at least equivalent to sections 22-42 (as amended) for environmental protection actions under environmental legislation of that jurisdiction; and</p> <p>(d) provisions that are at least equivalent to sections 16, 96, and 202 regarding voluntary reports under environmental legislation of that jurisdiction, the governor in Council may, on the recommendation of the Minister, make an order declaring that the provisions of the regulation do not apply in the area under the jurisdiction of the government."</p>
<b><u>Section 10(6)</u></b>	20	<p>Replace with: After the end of the period of 60 days referred to in subsection (5):</p> <p>(a) the Minister shall publish in the <i>Canada Gazette</i> and in any other manner the Minister deems appropriate a report or notice of the availability of a report that summarizes how any comments or notices of objection were dealt with; and</p> <p>(b) the Minister shall not recommend to the governor in council that it make an order under section 3 until the notice referred to in paragraph (a) has been published or, in the event that a board of review has been established in response to a notice of objection filed under subsection (6), the publication of the report of the Board of Review.</p>
<b><u>Section 10(9)</u></b>	21	<p>Redraft Section 10(9) as follows:</p> <p>(1) An order made by the governor in Council under subsection (3) ceases to be of any force or effect:</p> <p>when the agreement referred to in that subsection terminates or is terminated.</p> <p>(2) the governor in Council may, on the recommendation of the Minister, revoke an order made under subsection (3) at any time it is necessary to do so in order to protect the environment or human life or health from actual or immanent harm.</p>
<b><u>Section 10(10)</u></b>	22	<p>Add clause after words "this section:" "including information on:</p> <p>(a) the collection of monitoring data;</p> <p>(b) the number, cause, and results of public requests for investigations of offenses;</p> <p>(c) the number, cause and results of environmental protection actions or equivalent actions;</p> <p>(d) the numbers, locations, dates and results of inspections, investigations, warnings, injunctions and prosecutions, under laws referred to agreements made under subsection (3); and</p> <p>(e) the level of resources allocated to the administration of those laws."</p>

<p><b>General Recommendations to Part 2 - Public Participation</b></p>	<p>23</p>	<p>The provisions should be supported, but expanded, to include a comprehensive notice and comment regime so that the public can have notice of and comment on all CEPA regulations, documents and approvals.</p> <p>The qualifications in the right to sue should be removed. Even though these provisions are modelled on the <i>Ontario Environmental Bill of Rights</i> and the proposed <i>Endangered Species Act</i>, the CEPA provisions are clearly more restrictive.</p> <p>The exemptions from public notice and comment requirements for CEPA equivalency orders for new substances and biotechnology products regulated under other Acts of Parliament should be removed.</p>
<p><b>Sections 12-14</b></p>	<p>24</p>	<p>Sections 12 and 13 of Bill C-32 should be amended to broaden the purpose and function of the environmental registry to include:</p> <p>(a) informing the public of notices, including notices of objections, issued under the Bill;  (b) any proposal for the issuance of any approval, regulation, revision or revocation of a regulation, or order, or any policy under Bill C-32; and  (c) any environmental protection actions under section 22 of Bill C-32.</p> <p>A new section or series of sections should be included in CEPA that would allow for not only notice of proposals for decisions, but the opportunity for public comment on those impending decisions. The minimum time period for public comment should be 60 days.</p>
<p><b>Section 12</b></p>	<p>25</p>	<p>In Section 12 delete words "documents relating to matters under this Act." and replace with words "...any proposal for the issuance, amendment or revocation of any regulation, permit, order, approval, policy, guideline, objective, code of practice, standard, under this Act."</p>
<p><b>Section 16</b></p>	<p>26</p>	<p>Need to provide a remedy in addition to creating offence as per sections 104-116 of the <i>Ontario Environmental Bill of Rights</i>.</p>
<p><b>Section 17-21</b></p>	<p>27</p>	<p>Section 17 of Bill C-32 should be amended so as to permit corporations to file an application for investigation Hence, section 17 should read "An individual or corporation...".</p> <p>Section 18 of Bill C-32 should be amended to require the Minister to acknowledge receipt of an investigation application within 20 days of receiving it. Section 18 should read "The Minister shall acknowledge the receipt of the application within 20 days..."</p> <p>Bill C-32 should be amended to prohibit the disclosure of any information that may identify the applicant.</p> <p>Section 19 of Bill C-32 should be amended to require the Minister to provide the applicant with a written estimate of the time required to complete the investigation where the investigation has not been completed within 90 days.</p>

<u>Section 22(1)</u>	28	Delete the conditions precedent in section 22(1) for commencing an environmental protection action, or in the alternative, create an emergency exception to the conditions precedent in section 60(1) for commencing an environmental protection action.
<u>Section 22(2)</u>	29	Bill C-32 should be amended such that section 22(2)(a) (pertaining to the need for an investigation) and (b) (pertaining to the need for significant harm) be deleted. Section 22(2) should read as stated in recommendation immediately following.
<u>Section 22(2)</u>	30	It is recommended that section 22(2) be amended to include the opportunity to bring an action where there may be imminent contravention of the Act and should include wording such as: "The action may be brought in any court of competent jurisdiction against a person who committed an offence or who will imminently commit an offence under this Act."
<u>Section 22(3)</u>	31	Section 22(3) should be amended to allow for the awarding of damages to the responsible Ministers in cases where the harm to the environment cannot be restored or rehabilitated or where the Minister has incurred costs to address the harm.
<u>Section 24</u>	32	Sections 24(a)(i) and (b) should be deleted. If they do remain, section 24(a)(i) must be amended such that it can only be used in genuine cases, established on a balance of probabilities by the defendant, that it was necessary to protect the environment from further risk. In no circumstances should section 24(b) remain in Bill C-32.
<u>Section 30</u>	33	Delete sections 30(1)(a), the defence of due diligence, and section 30(1)(d), the defence of officially induced mistake of law.
<u>Section 31</u>	34	Delete section 31 or, in the alternative, if there is need for provisions with respect to undertakings for damages, the limit of the undertaking should be \$500.00.
<u>Section 32</u>	35	Section 32 pertaining to the stay of proceeding should be deleted.
<u>Section 38</u>	36	Replace with: "costs will not be awarded to or against any party in an environmental protection action, unless the court finds that there are special reasons to make a cost award."
<u>Part 3</u> <u>Sections 46(1)(b)</u>	37	Section 46(1)(b) should be amended to include Part 6 of the CEPA.
<u>Section 46(1)(f)</u>	38	Reword section 46(1)(f): "substances that <u>may</u> cause or contribute to international..."
<u>Section 46(1)(g)</u>	39	Reword section 46(1)(g): "substances or fuels that <u>may</u> contribute significantly..."
<u>Former Section 46(1)(l)</u>	40	Section 46(1) of Bill C-32 should be amended to include the following section: "the manufacture, handling, storage, transportation, recycling, treatment and disposal of, and other activities relating to, the substances referred to in any of paragraphs (a) to (j)."

<u>Section 47 (1)</u>	41	Section 47(1) requires issuing of guidelines on "cost-effective" use of section 46 powers. Make issuing of guidelines discretionary.  Replace word "shall" with "may" in the first and fourth lines, and delete the words "cost-effective" from the second line.
<u>Section 47(2)</u>	42	Delete or modify discretionary language using word "may" not "shall."
<u>Section 48 and 50</u>	43	This Part should be amended to require that the Minister establish and publish each year a report on releases and uses of substances to the environment, including transfers off-site for treatment disposal, recycling, and energy recovery.
<u>Sections 48</u>	44	Section 48 should be amended to read: "The Minister shall establish a national inventory of releases of pollutants and any other inventory of information that the Minister deems important. The Minister shall issue notices requiring any person described in the notice to provide the information required to develop the inventory. This notice shall be in effect until such time as the Minister withdraws or replaces it."
<u>Section 50</u>	45	Section 50 should be amended to read: "Subject to subsection 53(4), the Minister <i>shall</i> publish, in such manner as the Minister considers appropriate, any inventory of information established under section 48."
<u>Section 52</u>	46	Delete subsection 52(b) and (c).
<u>Section 52(3)</u>	47	Decision on release of confidential information.
<u>Section 53(3)</u>	48	Delete word "clearly" from section 53(3)(b).
<u>Section 53(4)</u>	49	Amend section 53(4) as recommended by West Coast Environmental Law Association.  Where the Minister rejected a request for confidentiality, the provider of the information could appeal the decision under clause 53(5). Where, however, the request was accepted, the public's ability to have the decision reviewed is unclear. The Bill suggests there would be no right to request a review. The uncertainty should be resolved by amending clause 53(4) to state:  "53(4) if the Minister accepts the request, (a) any person has the right to request a review of the Minister's decision under the <i>Access to Information Act</i> , (b) information shall not be published except as provided under the <i>Access of Information Act</i> ."
<u>Section 54(3)</u>	50	Delete or modify to discretionary language. Replace word "shall" with "may."
<u>General Recommendation to Part 4</u>	51	Amend section to make the development of pollution prevention plans by facilities using, manufacturing or generating CEPA toxic substances or substances nominated to be added to the TSL, mandatory.

<u>Section 56(1)</u>	52	Restore wording of section 56(1)(b)(l) of Bill C-74. Pollution prevention planning is triggered by ministerial notice of intention to add to Schedule 1. This would be unnecessary if section 90 is amended to make addition to the TSL automatic on finding of toxicity.
<u>Section 62(2)</u>	53	Delete or modify discretionary language. Replace word "shall" with "may."
<u>General Recommendations to Part 5</u>	54	<p>Define VE so that it is consistent with the GLWQA definition and the International Joint Commission (IJC) interpretation.</p> <p>Include endocrine disrupters on the VE track.</p> <p>Include human health under the term "long-term harmful effect."</p> <p>Remove VE restriction on naturally occurring substances and radionuclotides.</p> <p>Recognize, explicitly, concept of "inherent toxicity" in the definition of "toxic."</p> <p>Include human health in the definition of "inherent toxicity."</p>
<u>Section 64</u>	55	<p>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 IJC and implemented through a national pollution prevention framework.</p> <p>More specifically, the definition of virtual elimination should mean the elimination of the production, use, and generation of substances.</p> <p>As an alternative, if some aspect of the existing definition is to be maintained, there should be both a policy definition as we defined it, and then another definition for purposes of compliance that would include a more clear and amended definition as now appears in section 65 of Bill C-32.</p> <p>Section 64 of Bill C-32 should be redrafted as follows:</p> <p>64. (1) In this Part, "virtual elimination" means the cessation of the intentional production, use, release, export, distribution or import of a substance or classes of substances.</p> <p>(2) Where a substance is produced as a by-product of the production or use of another substance, virtual elimination means changes to processes, practices, substitution of materials or products to avoid the creation of substances in question.<sup>2</sup></p>

<sup>2</sup> For example, a provision could be drafted designed to prohibit the use of processes or products that inevitably lead to the generation or release of substances subject to section 64. In other instances, a provision could be drafted to state that substance is deemed not to be virtually eliminated if its generation or its release is above any measurable quantity or concentration.

<u>Section 65</u>	56	<p>The definition of toxicity in CEPA should recognize the concept of inherent toxicity. Toxicity should be determined on the basis of the <u>inherent</u> or intrinsic toxic properties of substances such as acute lethality, chronic/sub-chronic toxicity, carcinogenicity, teratogenicity, genotoxicity, and ability disrupt endocrine systems. This approach should be reflected in section 65 which would read as follows:</p> <p>"For the purposes of this Part, a substance is toxic if it is entering or may enter the environment and:</p> <p>(a) is having or may have an immediate or long term effect on the environment;  (b) constitutes or may constitute a danger to the environment on which life depends; or  (c) constitutes or may constitute a danger in Canada to human life or health."</p>
<u>Section 67(1)(a)</u>	57	<p>That the criteria set out in Bill C-32 regarding persistence and bioaccumulation "without limiting the generality of the foregoing," be amended as follows:</p> <p>67(1)(a). Respecting a property of characteristic of a substance, including, without limiting the generality of the foregoing, persistence, bioaccumulation, <i>hormone disrupting ability</i>, and <i>other chronic effects</i>.</p>
<u>Section 67(2)</u>	58	Section 67(2) should be deleted.

<u>Section 68</u>	59	<p>Amend section 68 as recommended by World Wildlife Fund Canada. Section 68 could read:</p> <p>68. For the purpose of assessing whether a substance is toxic or is capable of becoming toxic...either Minister <i>shall</i>:</p> <p>(a) Collect or generate data and conduct investigations respecting any matter in relation to a substance including, but not limiting the generality of the foregoing,</p> <p>(i) the capacity of the substance for short term exposure to have significant effects,</p> <p>(ii) the potential of the substance for widespread involuntary exposure to organisms in the environment,</p> <p>(iii) whether the substance exhibits multiple pathways of exposure to organisms,</p> <p>(iv) whether exposure to the substance is inevitable due to ongoing human activity,</p> <p>(v) whether the substance causes a reduction in metabolic and defensive functions of an organism,</p> <p>(vi) probability of the substance causing delayed/latent effects over a lifetime of an organism;</p> <p>(vii) whether the substance has the potential to cause reproductive or survival impairment of an organism;</p> <p>(viii) whether the presence of a substance has the potential to contribute to population failure of a species of organisms;</p> <p>(ix) whether the substance could have transgenerational effects,</p> <p>(x) the potential of the substance to cause disproportionate cascading effects in an organism,</p> <p>(xi) whether the substance has the potential to cause false signals of viability in an organism,</p> <p>(xii) quantities, uses and disposal of the substance,</p> <p>(xiii) the manner in which the substance is released into the environment,</p> <p>(xiv) the extent to which the substance can become dispersed and will persist in the environment, and,</p> <p>(xv) the development and use of alternatives to the substance.</p> <p>(b) correlate and evaluate any data collected under paragraph (a) <i>using weight-of-evidence approach</i>, and publish results of any investigations carried out under that paragraph; and,</p> <p>(c) provide information and make recommendations respecting any matter in relation to a substance...[<i>balance deleted</i>]</p>
<u>Section 69(1)</u>	60	Delete or modify discretionary language. Replace word "shall" with "may."
<u>Section 69(2)</u>	61	Delete or modify discretionary language. Replace word "shall" with "may."
<u>Section 73</u>	62	Section 73 should be amended to include a section 73(1)(c) that states: "or any other property or characteristic as defined by regulation or the Minister."

<u>Section 73(1)</u>	63	Add reference to hormone disrupting substance as recommended by World Wildlife Fund Canada. Sections 73(1) should be amended as follows:  73(1). <i>That, by January 1, 2001, the Minister shall categorize the substances that are on the Domestic Substances List by virtue of section 66, for the purpose of identifying those substance on the List that, in their opinion and on the basis of the available information are persistent or bioaccumulative or inherently toxic or hormone disrupting, as determined by the regulation.</i>
<u>Section 73(1)(b)</u>	64	In section 73(1)(b), inherent toxicity only applies to non-humans. Add words "human beings" or non-human organisms. Delete remainder of clause (i.e., "as determined by laboratory or other studies of non-human organisms").  Amend to read "are persistent or bioaccumulative in accordance with the regulations, and inherently toxic to human beings or non-human organisms, as determined by laboratory or other studies."
<u>Section 75(3)</u>	65	Delete words "unless the decision related to a substance the only use of which... environmental and health protection."
<u>Section 77(3)</u>	66	Add reference to hormone disrupting substance in section 77(3) as recommended by World Wildlife Fund Canada.  77(3) Where, based on a screening assessment conducted under section 74, the Ministers are satisfied that: (a) a substance may have a long-term harmful effect on the environment because it is (i) persistent and bioaccumulative in accordance with the regulations, (ii) inherently toxic to non-human organisms, as determined by laboratory or other studies of non-human organisms, or, (iii) a hormone disrupting substance, as determined by regulation.  [that the substance be added to the Toxic Substances List].
<u>Section 77(3)(b)</u>	67	Section 77(3)(b) be reworded to "human activity causes or contributes to the presence of the substance in the environment."
<u>Section 77(4)</u>	68	Add reference to hormone disrupting substance.
<u>Section 77(4)(b)</u>	69	Reword to "human activity causes or contributes to the presence of the substance in the environment."
<u>Section 77(4)(c)</u>	70	Delete.
<u>Section 77(3)(ii)</u>	71	Add words "human beings" or non-human organisms. Delete remainder of clause.



<b><u>Section 77(9)</u></b>	72	Section 77(9) should be amended to include a 90 day time frame.
<b><u>General Recommendations to Sections 80-89</u></b>	73	Remove exemption from notification for contained uses.  Restore and strengthen existing provisions regarding equivalency of notification and assessment of "toxicity" under other Acts of Parliament.  Remove exemption from public notice, comment period, and opportunity to file notice of objection, for equivalency orders.
<b><u>Section 81(6)(b)</u></b>	74	Replace words: "not likely to be" with the words "will not be."
<b><u>Section 81(6)(c)</u></b>	75	Delete section 81(6)(c).
<b><u>Section 81(6)(d)</u></b>	76	Delete section 81(6)(d).
<b><u>Section 81(7)-(9)</u></b>	77	Delete sections 81(7), 81(8) and 81(9).  The reference to section 81(9) should be deleted from section 332(1), and section 332(4) deleted in its entirety.
<b><u>Section 81(10)</u></b>	78	Add the words, "by order" after the words "the Minister may" in section 81(10).
<b><u>Section 81(10)(b)</u></b>	79	Delete subsection 81(10)(b).
<b><u>Section 84(3)</u></b>	80	Add words, "by order" after the words "The Minister may" in section 84(3).
<b><u>Section 84(4)</u></b>	81	Replace the words in section 84(4) "Governor in Council publishes" with words "Minister publishes."
<b><u>Section 90(1)</u></b>	82	Redraft section to read as follows: "Where a substance is determined to be toxic by the Ministers, the substance shall be added to the List of Toxic Substances in Schedule 1."
<b><u>Section 91(3)</u></b>	83	Replace words "the quantity or concentration" with "a quantity or concentration."
<b><u>Section 93(4)</u></b>	84	Delete section 93(4).
<b><u>Section 93(6)</u></b>	85	Delete section 93(6) or replace with "The Governor in Council may make a regulation under subsection (1), regulating an aspect of an substance that is regulated by or under another Act of Parliament, where, in the opinion of the Governor in Council, it is necessary to do so protect human health or the environment."
<b><u>Section 96(3)</u></b>	86	Add after words "...human health or the environment." "In the event of a conflict between a regulation made under this Act, and a regulation made under another act of Parliament, the regulation made under this Act shall prevail."

<b><u>General Recommendation to Part 6</u></b>	87	All references to "living organism" in Part 6 of the Bill should be replaced with the words "biotechnology product" or "product of biotechnology."
<b><u>Section 104</u></b>	88	A new definition of 'toxic' should be added for the purposes of Part 6 of Bill C-32. It should read as follows:  "For the purposes of this part, a substance is toxic if it is entering or may enter the environment under conditions:  (a) having or that may have an immediate or long-term harmful effect on the environment; (b) constituting or that may constitute a danger to the environment on which human life depends; (c) constituting or that may constitute a danger in Canada to human life or health; or (d) having or may have an immediate or long-term harmful effect on the conservation and sustainable use of biological diversity."  A conditional amendment is also required to delete words "and Part VI" from section 65.
<b><u>Section 106(6)(b)</u></b>	89	Delete subsection 106(6)(b).
<b><u>Section 106(6)(c)</u></b>	90	Delete subsection 106(6)(c) or add phrase: "provided that such impurities and contaminants are considered in the assessment of toxicity made under section 108."
<b><u>Section 106(7)-(9)</u></b>	91	OPTION 1  Delete sections 106(6)-(9).  Delete reference to section 106(9) in section 332(1), and delete all of section 332(4).  OPTION 2  Delete sections 106(7)-(9).  Delete reference to section 106(9) in section 332(1), and delete all of section 332(4).
<b><u>Section 106(10)</u></b>	92	Add words "by order" after the words "the Minister may."
<b><u>Section 106(10)(b)</u></b>	93	Delete subsection 106(10)(b).

<u>Section 106(11)</u>	94	Reword section 106(11) as follows: "The Minister shall publish in the <i>Canada Gazette</i> a notice stating the name of any person to whom a waiver is granted, the type of information to which it relates and the reasons for its being granted. The notice shall include a report summarizing how any comments or notices of objection were dealt with and where a Board of Review has been established in response to a request filed under (b), no waiver may be granted until the report of the board is made available to the public."
<u>Section 106(12)</u>	95	Delete as a consequence of the deletion of subsection 106(10)(b).
<u>Section 107(3)</u>	96	Add words "by order" after the words "the Minister may."  The reference to "conditions specified in paragraphs 106(10)(a) to (c)" should be modified to reflect the deletion of paragraph 106(10)(b).
<u>Section 109(3)</u>	97	Add words "by order" after the words, "the Minister may."
<u>Section 109(4)</u>	98	Replace words: "the Governor in Council publishes in the <i>Canada Gazette</i> " with words "the Minister publishes in the <i>Canada Gazette</i> ."
<u>Section 109(6)</u>	99	Add new paragraph: "The Minister may vary a condition or prohibition specified or imposed under paragraph 1(a) or (b) and publish a notice in the <i>Canada Gazette</i> setting out the condition or prohibition and the product of biotechnology in respect of which it applies before the end of the 60 day period referred to in section 332(2) where the Minister believes it is necessary to do so to protect the environment or human health or life from actual or imminent harm."
<u>Section 115(2)</u>	100	Delete subsection 115(2) or replace with: "where a regulation made under this Act regulates an aspect of the product of biotechnology that is regulated by, or under any other Act of Parliament, the regulation made under this Act shall apply."
<u>PART 7 - General Recommendation to Division 1</u>	101	The wording changes to the definition of nutrient are supported and should be implemented.  The federal government should undertake a study of nutrient sources and should subsequently, and within good time, regulate other nutrients besides phosphates in laundry detergent.
<u>Section 116</u>	102	Replace words "cleaning product" and "water condition" with term "substance."
<u>Division 2 - Section 121(1)</u>	103	Section 121 should be amended to allow for the creation of regulations, or the establishment of other binding instruments to prevent and reduce land-based sources of marine pollution.
<u>Section 121(2)</u>	104	Delete or modify discretionary language. Replace word "shall" with "may."

<u>General Recommendations to Division 3</u>	105	<p>Re-establish requirement that the need for ocean disposal be justified prior to granting permits as per government response.</p> <p>As recommended in <u>It's Still About Our Health!</u>, and as set out in the 1995 government response, the pollution prevention principle should be fully adhered to for ocean disposal. Permit applicants should have the onus of proving the need for ocean disposal.</p> <p>The national ocean disposal database previously discussed by the government does not appear in Bill C-32. This database should be required as part of the public electronic registry for all information on ocean disposal applications, permits, notices of objections, public comment, Boards of Review, and monitoring of ocean disposal sites or incineration at sea.</p> <p>Bill C-32 should require the establishment of a national ocean disposal database.</p>
<u>Section 122</u>	106	Remove exemptions for "incidental" disposal, and disposal related to sea-bed mineral exploration and processing as per section 122.
<u>Section 127(2)</u>	107	Section 127(2) should be amended to require proof that recycling, reuse or treatment are unfeasible or unsafe.
<u>Section 127(3)</u>	108	Section 127(3) should be amended to require the Minister to consider the applicant's adherence to the pollution prevention principle and the need for ocean disposal before issuing a permit.
<u>Section 133</u>	109	Extend public comment period to 60 days as per section 332 for all other public comment periods under the Act.
<u>Section 134</u>	110	The 10 day time period for filing a notice of objection to an application for an ocean disposal permit is too short, and inconsistent with other public comment time limits set out in the Act and should be extended to 60 days.
<u>Section 134(1)</u>	111	Section 134(1) should be amended to provide for a 60 day period in which to file a notice of objection.
<u>Section 135</u>	112	Provide for ocean disposal fees based on quantity and type of material to be disposed of.

<b><u>General Recommendations to Division 4</u></b>	113	<p>Authority should be provided for the federal government to control fuels - their ingredients, additives, and physical properties, at ALL stages, especially evaporation during handling and storage.</p> <p>The provisions should provide the federal government with the authority to prohibit the export of harmful fuels or fuel additives.</p> <p>Any exercise of authority taken under these provisions should be subject to public consultation as per section 332, especially the granting of waivers.</p> <p>Consideration must be given to the recommendation to consolidate all Acts dealing with fuels into one strong piece of legislation. (See Division 5 below.)</p>
<b><u>Section 140(2)</u></b>	114	<p>Adopt amendment proposed Canadian Vehicle Manufacturing Association to section 140(2).</p> <p>Section 140(2) be amended to state:</p> <p>140(2) the Governor in Council may make a regulation under any of paragraph 1(a) to (d) where the regulation may impact air pollution resulting from:</p> <p>(a) direct or indirect effects of the fuel; or</p> <p>(b) the fuel's effect on the operation, performance or introduction of combustion technology or emission control technology.</p>
<b><u>Sections 140(4) and 145(2)</u></b>	115	<p>Section 140(4) should be amended to state that the federal government may consult provincial governments in the development of the initiatives under this section.</p> <p>Delete or modify discretionary language. Replace word "shall" with "may."</p>
<b><u>General Recommendations to Division 5</u></b>	116	<p>Transfer authority to deal with emissions from the <i>Motor Vehicles Safety Act</i> and Transport Canada, to the <i>Canadian Environmental Protection Act</i> and Environment Canada.</p> <p>Establish provisions providing periodic review processes, public participation, and timelines/deadlines for achievement.</p>
<b><u>Section 149</u></b>	117	Remove exemptions for aircraft, ships and rolling stock and engines.
<b><u>General Recommendation to Division 6</u></b>	118	Economic instruments, such as emission trading schemes, should be avoided.
<b><u>Section 166</u></b>	119	Strengthen the federal authority to act - only require consultation with other governments.
<b><u>Section 166</u></b>	120	In emergency situations the federal government should be provided with unilateral authority to act. "Emergency situations" must be clearly defined.

<u>Section 166(1)</u>	121	Reword " substance released from a source in Canada into the air creates, or may reasonably be anticipated to contribute to ..."
<u>Section 166(2)</u>	122	Replace word "shall' with "may."
<u>Section 170(2)</u>	123	Delete.
<u>Section 173(4)</u>	124	Delete.
<u>General Recommendation to Division 7</u>	125	The provisions need to mirror and respect the reciprocity, or transboundary water provisions of the U.S. <i>Clean Water Act</i> .
<u>Section 176</u>	126	Strengthen the federal authority to act - only require consultation with other governments.
<u>Section 176</u>	127	Cooperation with other governments is recommended/encouraged, however, the federal government should retain, and exercise strong, unilateral authority to maintain international commitments.
<u>Section 176(1)</u>	128	Reword "substance released from a source in Canada into water creates, or may reasonably be anticipated to contribute to..."
<u>Section 176(2)</u>	129	Replace word "shall" with "may."
<u>Section 180(2)</u>	130	Delete.
<u>Section 183(4)</u>	131	Delete.
<u>Division 8 - Section 186</u>	132	Section 186(1) should be amended so that the words "Minister may..." are changed to "the Minister shall..."
<u>Section 187</u>	133	Section 187 should be amended by adding the following clause: "The Minister should provide at 30-days for the public to comment on notifications received for the import, export or transit of wastes."  In addition, the phrase: "or in any other manner that the Minister considers appropriate" should be amended to read " <u>and</u> in additional ways that will appear in the affected communities..."
<u>Section 188</u>	134	Section 188(1) should be amended by replacing the phrase: "reducing or phasing out the export of hazardous waste for final disposal" with "reducing or phasing out the export of hazardous waste <u>or prescribed non-hazardous waste</u> for final disposal."

<u>Section 188</u>	135	The federal government should be required to publish an annual report on waste imports, exports and transits in the Annual Report to Parliament on administration and enforcement on the Act. The annual report should include the following information: jurisdiction or origin and destination; names of the importers or exporters, and the composition of waste exports.
<u>Section 188</u>	136	Notices of proposed import, export or transit should be provided in electronic form through the environmental registry proposed in sections 12-14.
<u>Section 190</u>	137	Delete the provision for granting of permits based on "equivalent environmental safety."  Section 190 should be removed from the Bill.
<u>PART 8 - Section 197</u>	138	Delete or modify discretionary language. Replace word "shall" with "may."
<u>General Recommendation to Part 9</u>	139	The Part should establish a general duty of environmental performance for federal government agencies and operations. This could be based on the "no adverse effect" provisions of the Ontario <i>Environmental Protection Act</i> .
<u>General Recommendation to Part 9</u>	140	Add a clause to Part 9 stating that:  "Despite any other provisions of this Act or the regulations, no person, department, board, agency, work, undertaking, activity, Crown Corporation, subject to this Part shall release a substance or cause or permit the release of a substance into the environment, or engage in, in cause or permit the engagement in an activity or undertaking that causes or is likely to cause an adverse effect."
<u>Former Section 199(1)</u>	141	Restore section 199(1) as per Bill C-74.
<u>Section 207(2)</u>	142	Delete paragraph (2) and add the words: "(d) Crown corporations as defined in subsection 83(1) of the <i>Financial Administration Act</i> " to subsection 207(1).
<u>Section 207(3)(a)</u>	143	Delete subsection (a) from section 207(3).
<u>Section 207(3)(b)</u>	144	Redraft subsection (b) to limit exemption to activities related to national defence and national security during wartime or activities under resolutions of the UN Security Council.
<u>Section 210</u>	145	Redraft section as follows: "Where provision of any other Part of this Act or another Act of Parliament, or regulations made under them, are in force in respect of an aspect of the protection of the environment and apply to a federal work or undertaking, federal land or Aboriginal land, the more stringent of the applicable provisions applies."
<u>Section 210</u>	146	The Part should establish a general duty of environmental performance for federal government agencies and operations. This could be based on the "no adverse effect" provisions of the Ontario <i>Environmental Protection Act</i> .

<u>Part 10 - Section 218(3)</u>	147	Section 218 should be amended so as to distinguish between an "warrant for inspection" and a "search warrant" to clarify the differences in the requirements of these. This could be done by replacing the term "warrant" with the term "orders" to clarify that they are not the same as search warrants.
<u>Section 218(11)</u>	148	Section 218 (11) should be broadened to give Inspectors the powers to make necessary excavations.
<u>Section 218(14)</u>	149	Section 218(14) should be amended so that inspectors have the power upon giving a receipt, to remove from a place, documents, for the purpose of making copies or extracts and promptly returning them to the person who produced them.
<u>Section 219</u>	150	Inspectors should also be provided with the power to make reasonable inquiries of any person either orally or in writing. In addition, both inspectors and investigators should have the power to exclude from questioning any person, except the counsel of the person being questioned, as provided by Ontario's <i>Environmental Protection Act</i> . This would ensure that inspectors' and investigators' witnesses are not intimidated by the presence of employers during the course of an interview.
<u>Sections 234-242</u>	151	It is recommended that guidelines be prepared providing criteria as to when CEPA inspectors will issue EPC orders. An EPC order should only be used to address less serious offenses under the Act.
<u>Sections 256-268</u>	152	These provisions should provide rules of practice governing the hearing before Review Officers covering such items as order of service of documents, adjournments, motions, disclosure of documents and witnesses. There should also be rules governing the hearing process adopted along the lines of the rules before other administrative tribunals.
<u>Section 287</u>	153	It is recommended that these additional factors be included in the sentencing considerations under section 287.
<u>Section 295-309</u>	154	There should be specific guidelines as to when a EPAM will be entered into by the Attorney General. For instance, it is not evident whether repeat offenders would be eligible for EPAM although the Attorney General is required to take this factor into consideration. The use of EPAM will raise public policy issues and consequently there should be public input as to what types of EPAM programmes will be set up by the Attorney General.
<u>Section 310-311</u>	155	It is recommended that the Minister should not be given authority to designate the more serious violations as ticketable offences.
<u>PART 11 - Section 315(1)</u>	156	Add words "in the opinion of the Minister" after word "where;" and delete the word "clearly" from subsection 315(1)(b).
<u>Section 323</u>	157	Delete section 323 or replace word "shall" with "may" and remove the words "and may offer to consult with" in section 323.



<b><u>Section 326</u></b>	158	Add new subsections:  "(2) Regulation-making power under subsection (1) shall not be used (a) to establish systems relating to tradeable units for releases to the environment of substances listed under Schedule I of the Act; or (b) to establish systems related to tradeable units for releases to more than one environmental media.  (3) Before making a regulation under section 326, the Minister shall offer to consult with such persons or organizations interested in the matter."
<b><u>Section 328(4)</u></b>	159	Delete subsection 328(4) or replace with the following: "Fees for processes or approvals that are prescribed by, or pursuant to, regulations made under subsection (1) may reflect the full administrative and environmental costs of the approved activities."
<b><u>Section 329</u></b>	160	Replace with: "The Minister making a regulation under section 328 may offer to consult with any persons or organizations the Minister considers to be interested in the Matter."
<b><u>Section 330(2)</u></b>	161	Delete subsection.
<b><u>Section 332(1)</u></b>	162	Delete words "an order referred to in subsection 81(9) or 106(9) or."
<b><u>Section 332(2)</u></b>	163	Add new subsection (3) to section 332: "After the end of the period of 60 days referred to in subsection (2), the Minister shall publish in the <i>Canada Gazette</i> and in any other manner the Minister considers appropriate, a report or a notice of the availability of a report that summarizes how any comments or notices of objection were dealt with."
<b><u>Section 332(4)</u></b>	164	Delete subsection 332(4).
<b><u>Section 333(3)</u></b>	165	Replace word "shall" with "may."
<b><u>Section 333(4)</u></b>	166	Replace word "shall" with "may."
<b><u>Section 338</u></b>	167	Make provision for intervener funding.
<b><u>Section 338(3)</u></b>	168	The Board may make costs an interim basis.
<b><u>Section 338(4)</u></b>	169	The Board may grant intervenor funding upon application by parties or intervenors.

<u>Section 342</u>	170	<p>Amend section 342 to specify that the contents of these report shall include, but not be limited to the following:</p> <ul style="list-style-type: none"> <li>• the number cause, and results of public requests for investigations of offenses under the Act;</li> <li>• the number, cause and results of environmental protection actions initiated under the Act;</li> <li>• the numbers locations dates and results of insepection, investigations, warnings, inspectors orders, injunctions, tickets, enviromental protection alternative measures and prosecutions initiated under the Act;</li> <li>• the level and allocation of resources allocated for the administration and enforcement of the Act;</li> <li>• number and outcomes of assessments of substances new to Canada conducted under Part 5;</li> <li>• the number and outcome of assessments of new biotechnology products conducted under Part 6;</li> <li>• number, location and nature of ocean dumping permits issued under Part 8; and</li> <li>• number, quantities and composition of waste imports and exports authorized under Part 8.</li> </ul>
<u>Section 343</u>	171	<p>Replace with subsection (1) with the words: "The Administration of this Act shall, every five years after the coming into force of this Act, be reviewed by the House of Commons Standing Committee of the Environment and Sustainable Development, or its successor."</p>
<u>Section 343(2)</u>	172	<p>Delete words "or established by Parliament" from section 343(2).</p>

## ENDNOTES

1. See discussion on section 64 in this submission.
2. Government of Canada, Pollution Prevention: A Federal Strategy for Action (1995).
3. Under the similar provisions of Ontario's *Environment Bill of Rights*, approximately 28 applications for investigation were filed from 1994 to 1996.
4. Generally, see: Paul Muldoon and Richard Lindgren, The Environmental Bill of Rights: A Practical Guide (Emond Montgomery, 1995), chapter 1; P. Muldoon and J. Swaigen, "Environmental Bill of Rights," in Estrin and Swaigen (eds.) Environment on Trial (Emond Montgomery, 1993); and M. Valiante and P. Muldoon, "A Foot in the Door: A Recent Survey of Recent Trends in Access to Environmental Justice" in Kennett (ed.) Law and Process in Environmental Management (Canadian Institute for Resource Law, 1993), pp. 142-69.
5. For a further discussion of citizen suits in the U.S., see: Paul Muldoon, Cross Border Litigation: Environmental Rights in the Great Lakes Ecosystem (Toronto: Carswell, 1986).
6. *Environmental Bill of Rights*, section 84(6).
7. See: CELA and CIELAP, It's Still About Our Health! CELA Brief No. 283 and CIELAP Brief 96/3, March 1996, pp. 99-116.
8. *Great Lakes Water Quality Agreement Between Canada and the United States*, (1978), Article II and Annex 12.
9. See International Joint Commission, (Ottawa-Washington, 1992), Sixth Biennial Report on Great Lakes Water Quality; International Joint Commission, (Ottawa-Washington, 1994), Seventh Biennial Report on Great Lakes Water Quality.
10. Standing Committee on Environment and Sustainable Development, (June, 1995), It's About Our Health! Towards Pollution Prevention, pp. 72-74.
11. Creating Opportunity, The Liberal Plan of Canada, (June, 1993), p. 66.
12. International Joint Commission, (Ottawa-Washington, 1994), Seventh Biennial Report to the Governments of Canada and the United States, p. 26.
13. International Joint Commission, (Ottawa-Washington, 1996), Eighth Biennial Report on Great Lakes Water Quality, pp. 8-10.
14. Resource Futures International, Evaluation of the Canadian Environmental Protection Act, Final Report, (Ottawa, 1993).
15. Government of Ontario, Offences Against the Environment - Convictions in 1994, pp. 7-8.
16. Environment Canada, Canadian Environmental Protection Act, Report for the Period April 1994 to March 1995, Ministry of Supply and Services Canada, 1996, p. 41.
17. J. Swaigen and G. Bunt, Sentencing in Environmental Cases, Law Reform Commission of Canada, p. 25.

