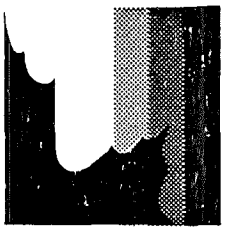
Canadian Environmental Law Research Foundation

La Fondation canadienne de recherche du droit de l'environnement



WORKSHOP PROCEEDINGS

THE CANADIAN ENVIRONMENTAL PROTECTION ACT

DRAFT ENFORCEMENT AND COMPLIANCE POLICY

October 26, 1987

Toronto, Canada

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PROCEEDINGS:

WORKSHOP ON

THE CANADIAN ENVIRONMENTAL PROTECTION ACT DRAFT ENFORCEMENT AND COMPLIANCE POLICY

THE CANADIAN ENVIRONMENTAL LAW RESEARCH FOUNDATION
October 26, 1987
Toronto, Canada

Summary of Proceedings
Prepared by:
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1. INTRODUCTION

On October 26, 1987, the Canadian Environmental Law Research Foundation (CELRF) hosted a workshop in Toronto, Ontario to discuss the Draft Enforcement and Compliance Policy (Draft Policy) for the Canadian Environmental Protection Act (CEPA). The workshop was designed to provide an opportunity for representatives from industry, government and public interest groups from eastern Canada to comment upon the Draft Policy. A similar workshop was held for western Canada by the Environmental Law Centre in Edmonton, Alberta on October 23, 1987. Both workshops are the culmination of a project funded by Environment Canada. The project also included the preparation of critiques of the Draft Policy by four organizations: the Canadian Environmental Law Research Foundation, the Conservation Council of New Brunswick, the West Coast Environmental Law Association, and the Environmental Law Centre. A report presenting these four critiques and the the workshop discussions will be prepared for Environment Canada, and made available to the public.

All participants were provided with the following background documents:

1. Environment Canada, Draft Enforcement and Compliance Policy for Discussion (Spring 1987) , Canadian Environmental Protection Act.

2. Canadian Environmental Law Research Foundation, "A Critique of Environment Canada's Draft CEPA Enforcement and Compliance Policy", (September, 1987).

3. Conservation Council of New Brunswick, "A Critique of the Draft Enforcement and Compliance Policy for the Canadian Environmental Protection Act", (September 30, 1987).

4. West Coast Environmental Law Research Foundation, "A B.C. Public Interest Perspective on the Draft Enforcement and Compliance Policy for the Canadian Environmental Protection Act", (September, 1987).

5. The Environmental Law Centre, "Canadian Environmental Protection Act, Draft Enforcement and Compliance Policy: A Critical Evaluation", (August, 1987)

This report provides a narrative of the issues discussed by seminar participants. As a general rule remarks were not attributed to individual speakers. Departures from this rule occurred in the cases of Ms. Weese of Environment Canada and Mr. Clarke of the Ontario Ministry of the Environment, since it was felt that the reader would benefit from knowing the source of her insights into Environment Canada's approach toward the Draft Policy, and his views concerning Ontario's experience with the enforcement of environmental legislation.

2. AGENDA

The following agenda was the basis of the workshop discussion:

CANADIAN ENVIRONMENTAL PROTECTION ACT

DISCUSSION OF THE CANADIAN ENVIRONMENTAL PROTECTION ACT DRAFT ENFORCEMENT AND COMPLIANCE POLICY

CANADIAN BAR ASSOCIATION 120 ADELAIDE STREET WEST

MONDAY OCTOBER 26, 1987 9:00 AM

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1. Background information
2. Policy objectives
3. Means of achieving voluntary compliance
4. Detections of illegal behaviour
5. Enforcement
6. Federal - provincial arrangements

3. PARTICIPANTS

William Anderson
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Mena Weese
Conservation and Protection
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4. TERMINOLOGY

4.1 COMPLIANCE VS. ENFORCEMENT

The workshop began with a discussion of the terminology that would be used. It was felt that the term "compliance" could be defined as the objective of ensuring that the law is obeyed. A number of tools exist to enable this objective to be reached. These tools form a spectrum ranging from voluntary or incentive driven activities to prosecutions. One participant suggested that "enforcement" encompasses all tools used to achieve the objective of compliance, whereas another suggested that the term "enforcement" should be restricted to the description of activities leading toward prosecution.

It should also be noted that "voluntary compliance" as used in the seminar discussion corresponds to the term "compliance" which is used in the Draft Policy. According to the Draft Policy, activities which promote compliance include: education and information, technical assistance, liason, environmental quality objectives and guidelines, Codes of Practice, advice from inspectors and other officials, and environmental audits.

4.2 INSPECTION VS. INVESTIGATION

The terms "inspection" and "investigation" were then considered. Inspection was seen as a routine activity. Investigation, on the other hand, is instituted as a result of some suspicion that an illegal activity has occurred.

This distinction is important because different skills are required for each type of activity. Furthermore, the relationship which exists between an inspector and inspected company is very different from that

which exists between an investigator and investigated company.

According to the Draft Policy an inspector may perform both inspections and investigations, although he must signal his role to the person under scrutiny. It was suggested that the Policy needs to address the practical realities of what this will mean to the man in the field, since it may not always be clear whether a person is involved in an inspectorial or investigative function at a specific point in time.

5. POLICY OBJECTIVES

5.1 GUIDING PRINCIPLES AND OBJECTIVES

The Draft Policy sets out eleven guiding principles to be followed in attaining compliance with and enforcement of CEPA.

At least one participant suggested that these guiding principles be made more explicit. The guiding principles should be transformed into clear objectives that are capable of serving as "yardsticks" against which the success of the Policy could be measured.

Another participant felt that there was room for both guiding principles and objectives, provided that both were tight and succinct. "Objectives" would set out the purpose of the policy, whereas "guiding principles" would describe how those objectives are to be met. The current list of guiding principles is much too long to serve as a useful guide for those enforcing the legislation.

5.2 NEED FOR SPECIFIC GUIDELINES

It was suggested that specific guidance is required for people in the field, who must actually apply the CEPA, its regulations, and the enforcement and compliance policy. The inspector/enforcer needs to know how to balance the broad policy principles and objectives against the specific requirements of the regulations. It was agreed that a separate, detailed document was required, "so that an inspector in the field is not left with a very, very broad decision to make on what action to take in a given instance." Very good inspector training would also be necessary to foster predictability and consistency of response across the country.

5.3 POTENTIAL POLICY OBJECTIVES

Suggested policy objectives were: ensuring people obey the Act

(compliance), uniformity in the application of CEPA in each of the ten provinces, rigorous enforcement of the law, protection of the environment, protection of human health, and cost effectiveness.

The objectives of the compliance policy should be differentiated from those of the Act. Environmental protection, for example, is more appropriate as an objective of CEPA than an objective of the Draft Policy.

The participants expressed broad support for including uniformity as an objective of the Draft Policy.

5.4 UNIFORMITY AS AN OBJECTIVE

5.4.1 DEFINITION

According to workshop participants, uniformity requires fair, consistent and predictable behaviour across the country.

One speaker suggested that what is really being sought is "uniformity" of standards and "consistency" in the application of those standards. This consistency would result from the application of stated principles and objectives.

5.4.2 PROBLEMS IN ACHIEVING UNIFORMITY

5.4.2.1 Federal Interdepartmental Concerns

Concern was expressed that the Draft Policy applied only to CEPA, and not to other federal environmental legislation, such as the Fisheries Act.

In response, Ms. Weese of Environment Canada stated that there is a case for having separate enforcement and compliance policies for different environmental acts, because each piece of legislation creates different tools for enforcement and provides for varying responses to violations. She went on to state that Environment Canada intends to be consistent in

the development of enforcement and compliance policies for environmental legislation under its control. A compliance and enforcement policy for s.33 of the Fisheries Act is being developed in much the same way as the CEPA Draft Policy, namely "by developing guiding principles, by developing a set of responses to violations that are clear, and that are much more explicit in terms of what the inspector should do under the section".

Another participant pointed out that the creation of a single, uniform policy at the federal level is hampered because different departments with different mandates administer the existing environmental statutes. For example, Environment Canada, Health and Welfare Canada, the Department of Fisheries and Oceans, and Agriculture Canada pursue differing goals.

5.4.2.2 Federal-Provincial Concerns

One participant felt that the Draft Policy is contradictory because it states that there is going to be consistency in the application of CEPA, yet provides that the Policy will be negotiated with each of the provinces. These negotiations might very well lead to non-uniform application across the country.

Ms. Weese said that it was not the intention of Environment Canada that the negotiations which would take place would result in different standards across the country. Recent federal-provincial discussions have considered the incorporation of the notion of "equivalency" into CEPA. In the event that the province could demonstrate equivalency of legislation, regulations and enforcement, that fact would be taken into account in determining which level of government did what within the province.

5.4.2.3 Socio-Economic Concerns

The point was raised that socio-economic concerns, such as the closing of the town's only major industry, may undermine the principle of consistency in the application of CEPA. As the participant stated, "I think a lot of members of the public, environmental groups, and everyone else will be very upset if it turns out in the application [of CEPA] that these [socio-economic] factors are being considered, and it isn't expressly said that they are going to be considered right here and now".

Ms. Weese of Environment Canada pointed out that the Draft Policy does not recognize socio-economic factors as criteria for determining a response to a violation of CEPA.

It was recommended that, if the government's intention is indeed to exclude socio-economic factors in determining the response to a violation that, "perhaps what there ought to be is an exclusive statement that no socio-economic factors will have any bearing whatsoever in enforcement". At the very least key socio-economic factors which have influenced the application of the Fisheries Act in the past should be explicitly excluded. However the same speaker expressed doubts about whether it would be realistic to exclude these socio-economic factors.

Another seminar participant noted that industry has a lot of influence in deciding whether or not Canada can afford clean water. The realities of the industrial and government power structures that influence how environmental legislation is enforced should be openly discussed.

It was also suggested that socio-economic standards should not be considered part of the compliance and enforcement policy, but should rather be taken into account in the standard setting process. Standards should be practical and realistic. However, at least one participant

argued that it is unrealistic to exclude socio-economic factors altogether from the Draft Policy, because such factors are taken into account all the time and form an important part of enforcement and compliance policy.

Some felt that socio-economic factors may play a greater role in lesser violations, than in situations where human health is likely to be adversely affected. However, this point was disputed.

It was argued that it is dangerous to continue to address socio-economic factors in establishing a response to violations of the Act, because this practice enables certain industries to play "economic blackmail" with regulatory authorities. The end result is that poorer regions of Canada are subjected to lower environmental standards.

5.4.2.4 Role of Public Perception

Public perception also brings a subjective element into the enforcement of environmental legislation. One participant felt that the size and effectiveness of local public interest groups and the media would play a significant role in determining what gets enforced and what doesn't get enforced. In addition, another participant noted that where there exists a strong public concern about a violation of CEPA, the Act will be enforced because, "[t]here's a provision right in the Act which imposes on the Minister a duty to devote enforcement resources to any allegation raised by 12 citizens".

5.5 THE CITIZENS' CODE OF REGULATORY FAIRNESS

The Citizens' Code of Regulatory Fairness applies to all regulation carried out by any department of the federal government. Whenever Cabinet approval is sought for a federal regulatory initiative, the department is asked whether the initiative accords with this Code. The inclusion of

this Code in the Draft Policy was supported on the grounds that people should be informed of the federal government's position on regulation. Environment Canada has no choice but to take the Code into account in the development of its regulatory policies.

Other participants suggested that the Code be excluded since it does not address the issue of environmental compliance, and is a "totally inappropriate document to be associated with this policy". Another participant pointed out that the inclusion of the Code is confusing and misleading. The Code is concerned with regulation-making, not compliance. Its presence in the Draft Policy is irrelevant.

Perceived conflicts between provisions of the Code and the Draft Policy were cited as a further problem created by including the Code in the Draft Policy.

It was suggested that the inclusion of the Citizens' Code of Regulatory Fairness, in its present form, is misleading because it appears as an integral part of the Draft Policy. If it is to be included at all, it should be introduced in the form of an Appendix and be clearly identified as a requirement of the Government of Canada.

One person recommended the integration of the relevant components of the Citizen's Regulatory Code of Fairness directly into the Draft Policy.

6. VOLUNTARY COMPLIANCE

6.1 ENVIRONMENTAL AUDITS

The Draft Policy states that the federal government will encourage companies to undertake internal environmental audits to ensure that industry is meeting its environmental requirements. However, the Policy also states that such audits may be used as evidence in subsequent litigation against the company.

Some participants felt it was unethical to encourage people to carry out environmental audits, and then to later use these audits against the same people who prepared them.

Mr. Clarke of the Ontario Ministry of the Environment felt that no absolute guarantee should be given that an environmental audit will not be used in a subsequent prosecution. Rather the use of the audit in litigation should depend on the intent of the individual or company conducting the audit, and the use that they made of the results of the audit. Where the company deliberately ignores an environmental problem for financial or other reasons, the Ministry should have the option to use the environmental audit in a prosecution. The audit could prove that the company had been aware of a problem over a long period of time, but chose not to remedy the situation. However, where a company has shown diligence in trying to bring a pollution problem under control, prosecution would not be undertaken.

The type of "encouragement" which the government would provide was identified as a crucial issue. In particular, "you have to know what the form of this encouragement will be before you can talk about the morality of using that information against the company . . .". Encouragement could take the form of monetary assistance, incentives (such as eligibility for

government contracts), technical advice, or training.

One speaker suggested that another important consideration in determining whether or not the environmental audit should be a privileged document is the manner in which the government obtains access to this information.

A discussion arose as to whether or not the Draft Policy's explicit statement that environmental audits could be used as evidence in litigious proceedings would discourage the use of environmental audits. It was suggested that industry would continue to carry out such audits since they could be very useful in establishing a defence of reasonable care or due diligence on the part of the company. Stiff penalty sections within CEPA would also encourage companies to carry out environmental audits so that they could identify their pollution problems before they are caught by the government.

Several participants felt that the explicit statement that environmental audits "may be used either by the defence or prosecutor as evidence in any litigative proceeding" would discourage environmental audits or at least influence the manner in which they are conducted. One person suggested that they would become more limited in scope. Another participant continued, "It could well lead to a good deal less candidness in environmental issues as well".

One participant sought to clarify the discussion on environmental audits by noting, "there is a whole range of types of environmental audits that exist, and in any discussion about the use of environmental audits in an enforcement activity, you need to very clearly define, or have a very clear picture of what you really mean by an environmental audit". An environmental audit may be limited to the technical aspect of verifying

compliance with legislation, or it may be a much broader management program. Furthermore it should be recognized that the environmental audit is a new tool which is not widely used across the economy, although it has gained widespread use in certain industries.

One participant questioned the value of an internal audit. He felt that any form of industry self-reporting lacked credibility, and that only third party auditing and verification could be meaningful and trustworthy.

6.2 ENCOURAGING VOLUNTARY COMPLIANCE

The assembled group was asked how government could best go about assisting industry to achieve voluntary compliance. One participant felt that the best starting point would be to determine why industry needs to be encouraged to comply with the law in the first place. If information or technology transfer problems exist, those needs should be met.

It was recommended that industry, government and possibly other groups work together to develop protocols for environmental audits. This effort should also be supplemented with programs for the training and certification of auditors.

The development of Codes of Practice was advocated as an excellent method of obtaining voluntary compliance. These Codes provide industries with guidance on how to achieve the standards imposed upon them, by clearly articulating the standard of care expected from a particular industry under various circumstances.

One speaker suggested that industry requires a clear statement of government expectations, if it is to comply with environmental laws in a continuously changing regulatory climate. Government must develop an increasingly clear definition of environmental requirements. Environmen-

tal limits that apply to a given industrial facility are not always as clear as one might expect.

Some participants expressed concern about the lack of industry comment on the Draft Policy as of October 26, 1987.

6.3 RESOURCES

The workshop discussion then turned to the question of how Environment Canada's resources would be allocated under the Draft Policy. In response to a question on resources, Ms. Weese indicated that the Minister of the Environment's statement of June 26, 1987 announced Cabinet's approval of an additional $37 million to be spent over 5 years in the implementation of CEPA.

Several participants felt that the discussion of how resources would be allocated under the Draft Policy was premature. Other participants disagreed, expressing the opinion that it was important to decide what percentage of resources would be spent on compliance activities and what percentage would be spent on enforcement. In other words, "talking about a compliance policy without talking about the allocation of resources is meaningless".

It was acknowledged that it would be useful to discuss where the emphasis on expediture should be -- on voluntary compliance or on enforcement. In this regard, it would be important to compare the return on spending money on enforcement against the return on allocating similar funds to compliance activities. At least one participant supported a heavier allocation of funds for enforcement activities.

6.4 CLARIFICATION OF COMPLIANCE POLICY

Most participants agreed that the compliance policy was too vague in

its present form. One person commented that the policy was inadequate, since it was too vague to serve as a basis for the allocation of funds. Clarification is required with respect to what activities are envisioned under certain headings, such as "technical assistance". The compliance section is much less clear than the corresponding chapter on enforcement. It was suggested that the Draft Policy could be described as an enforcement policy, with a vague chapter on compliance.

7. DETECTION OF ILLEGAL BEHAVIOUR

7.1 METHODS OF DETECTING ILLEGAL BEHAVIOUR

Three basic mechanisms for the detection of illegal behaviour were identified:

1. Complaints from the public and company employees;
2. Routine inspections; and
3. Information obtained from intelligence activities.

7.2 COMPLAINTS OF THE PUBLIC AND COMPANY EMPLOYEES

Based on his experience, Mr. Clarke of the Ontario Ministry of the Environment emphasized the importance of public involvement in the detection of polluters. He stated that if extra funds were available he would put them into educating the public to bring environmental violations to the Ministry's attention. A discussion arose concerning the type of education that the public would require. Certain participants felt that members of the general public would require a list of violations under the Act, whereas others felt that the public need only be encouraged to report suspicious behaviour. The creation of a 1-800 number for reporting environmental violations was recommended by one speaker.

Another issue raised was whether CEPA should include a provision that would entitle an informant under the Act to claim one-half of the penalty imposed upon a company as a result of the information he provided. (Such a provision would be modelled on the existing Penalties and Forfeitures Proceeds Regulations under the Fisheries Act). Some participants expressed uneasiness with this concept. Instead they felt that a public information hotline similar to "Crime Stoppers" would be more appropriate.

It was further noted that any public education program would have to

be supported with sufficient investigative and enforcement resources to enable the regulatory agency to follow up the complaints.

In certain circumstances the only person in a position to provide information of the violation would be a company employee. It was noted that CEPA provided statutory protection for "whistle blowers" who reported violations of environmental laws by their employers. Further inside information about violations might be obtained under Occupational Health and Safety legislation.

7.3 ROUTINE INSPECTIONS

Routine inspections and spot checks were identified as an integral part of detection activities. One participant went on to suggest that funds for detection would be wisely spent in ensuring that inspection staff are properly instructed.

One participant indicated a need for more information concerning who will be carrying out the inspections and the authorities to whom they should report.

It is expected that Environment Canada will have an inspection program that will designate and train inspectors. The designation of provincial people as inspectors under CEPA and the determination of the persons to whom they should report are matters which would likely be considered under federal-provincial agreements.

The role of public police forces in detection and enforcement was briefly discussed. It was suggested that past experience with the RCMP has shown that they are reluctant to enforce legislation for which they do not have primary enforcement responsibility. The Metropolitan Toronto Police Force is also unlikely to accept responsibility for the enforcement of environmental legislation.

7.4 INTELLIGENCE SYSTEM

It was agreed that some means of detecting covert, illegal behaviour is required. This need can be met by the creation of some form of intelligence system.

The heart of the intelligence system would be a well-developed information base. Currently, the movement of waste is documented under the Ontario Environmental Protection Act and the federal Transportation of Dangerous Goods Act. CEPA will create a new registry of imported, exported, and manufactured substances. When these registries are integrated a complete "cradle to grave" tracking of the legal movements of environmentally significant substances will be available. The intelligence group could use this information base to obtain clues about surreptitious movements outside the system.

Another participant indicated the importance of ensuring that the intelligence group would be able to communicate with U.S. authorities, because dangerous substances travel across international boundaries.

It was recommended by one participant that a special team be developed within Environment Canada to detect covert illegal activity by particular industries. This team would be given a special surveillance function.

7.5 RESOURCES

Detection activities involve considerable expense. Some idea of the resources which would be required was provided by Mr. Clarke of the Ontario Ministry of the Environment. He stated that their budget on the investigative side alone amounted to approximately $3.7 million per year for 66 people. This figure did not include the budget for Ontario's

abatement staff of approximately 300 people. In addition the Ontario waybill system would easily cost about $2 million per year.

Ms. Weese of Environment Canada responded by highlighting the fact that the $37 million over 5 years which was allocated to the implementation of CEPA is a new, extra resource. Furthermore, it is not Environment Canada's intention to duplicate resources which already exist at the provincial level.

This statement was criticized, because it "assumes that the Ontario efforts are now operating at somewhere close to 100 per cent efficiency, and there's no indication that that's the case". It may well be justified to double the money spent on detection in Ontario.

7.6 REQUIRED STATISTICS

One particpant expressed a concern that statistics on detection were badly needed. These should include some indication of how many incidents are reported each year, how many are followed up, and what action results from these investigations. He also felt that it would also be useful to know how many inspectors are designated under all federal environmental legislation and how many of these inspectors are actually assigned to inspection duties.

8. ENFORCEMENT

8.1 WARNINGS

Clarification was sought regarding the circumstances under which warnings would be issued. The general consensus was that warnings would only be used for minor or administrative types of violations. Warnings should probably be used for violations which are less serious than those warranting a ticket.

Mr. Clarke noted that in Ontario warnings are formalized by issuing a written "violation notice", which informs the offender that he has broken the law. A record is kept of such violation notices. It may be possible for members of the public to obtain access to such records provided that no further investigation or follow up of the offence is anticipated. The possibility of publishing these violation notices was briefly discussed. It was suggested that this possibility "certainly raises questions of civil liberties, because under our system of government, you are presumed innocent until you have been charged and convicted".

8.2 COMPLIANCE GUARANTEES

The Draft Policy defines a "compliance guarantee" as follows:

> A Compliance Guarantee is a written commitment to compliance made by an individual or company that has failed to meet a requirement of the Canadian Environmental Protection Act. The objective of the Guarantee is to ensure compliance with the Act and to prevent repetition of the offence.
>
> A Compliance Guarantee will contain technical details of what measures the individual or company will be required to undertake to attain or to ensure continued compliance. Enforcement officials and the company will negotiate its terms.

Compliance guarantees are not referred to directly in CEPA, nor are they legally enforceable documents.

Most participants felt that if compliance guarantees are to be used as an enforcement option, they should be specifically included as a provision of CEPA.

It was also recommended that the legally unenforceable compliance guarantee be replaced by a control order, since a company can be prosecuted for failure to comply with a control order. Otherwise, the potential exists for the expiration of a limitation period or the need to collect new evidence in the case of a continuing violation. A control order also protects the company from prosecution while it is in place.

Another person criticized the idea of incorporating control orders into the Draft Policy. At present, there is no room for public participation in the negotiation of control orders. Furthermore, Ministry of the Environment officials appear to give considerable weight to socio-economic factors in determining the terms of such orders.

Compliance guarantees were further criticized since they make it possible to perpetuate ongoing violations so long as a company is supposedly working toward resolving an environmental problem. Entering into a compliance guarantee enables a company to delay expenditures on pollution abatement. Another participant felt that these guarantees were "an insidious form of failure to enforce". He went on to suggest that the Act should provide tight controls over the circumstances under which compliance guarantees could be given, and set limits on the time period that they could cover.

It was suggested that these problems could be alleviated to some extent by the use of control orders which list interim measures for compliance along with dates by which these measures must be implemented. A failure to meet any of these interim measures could result in

prosecution.

A compliance guarantee might also be used as a diversionary response to an offence, much like plea bargaining in a criminal case. The consequence of a failure to comply with the guarantee would be that environment officials would proceed with the prosecution.

Another speaker felt that compliance guarantees should not be readily dismissed as a tool for achieving compliance. However, compliance guarantees should be included in the Draft Policy in the chapter on compliance (Chapter II) rather than the chapter on enforcement (Chapter III).

8.3 EMERGENCY ORDERS

Concern was expressed that emergency orders under the Draft Policy could only be issued where a toxic presents "an immediate and significant danger to the environment, human life or health".

The policy further states that "such an order may require consultation with the provinces to determine whether they might more effectively address the situation". This requirement was supported by one participant on the grounds that consultation is required to prevent a polluter from being subjected tc conflicting federal and provincial orders to take remedial action. Another speaker suggested that the purpose of this consultation should be made explicit in the Draft Policy.

8.4 MANDATORY PROSECUTIONS

Several seminar participants suggested that the mandatory prosecution requirements of the Draft Policy are misguided, as a result of the inflexibility which results from requiring prosecution whenever certain features exist. It was noted that, "if you take this policy seriously,

you'll be using 90 per cent of your resources to prosecute". Another seminar participant pointed out that according to the mandatory prosecution policy, the only response to each of the four case scenarios prepared by the Environmental Law Centre was prosecution. These scenarios are hypothetical infractions of CEPA, which do not represent "worst case" scenarios. They include the failure of a plant foreman to notify the Minister that a grease used on company equipment may contain a toxic substance, the failure to supply the Minister with information about an imported susbstance not specified on the Domestic Substances List, the release of a toxic substance into water in a concentration greater than that permitted by regulation, and the failure to advise of the release of a toxic substance.

One speaker indicated that he didn't have any great concern about the inflexibility of the mandatory prosecution policy.

9. FEDERAL - PROVINCIAL AGREEMENTS

9.1 EFFECTS ON UNIFORMITY

Several participants were concerned that uniformity in enforcement may be hampered as a result of the negotiation of ten different federal-provincial agreements.

9.2 FEDERAL ENFORCEMENT

One participant suggested that CEPA should be enforced solely by the federal government. The only way to achieve consistency is to have federal enforcement of a federal Act.

Complete federal enforcement does, however, pose certain problems. Although federal enforcement may appear to be the most efficient and effective way of ensuring the uniform application of CEPA across the country, it may not be a constitutionaly acceptable option. These constitutional issues have not really been discussed with regard to CEPA and the Draft Policy. The legislation was introduced to the provinces with the very clear understanding that the federal government would enter into administrative agreements with the provinces. In the absence of this type of understanding, the provinces could be expected to raise constitutional arguments.

9.3 COMBINED FEDERAL AND PROVINCIAL ENFORCEMENT

One participant suggested that the federal government should enforce CEPA directly in most provinces, in order to ensure effective enforcement. Provincial enforcement may be acceptable in Ontario, which has demonstrated an enforcement philosophy that conforms to the federal government's stated goal of rigorous enforcement of the law and which has

substantial enforcement resources already in place.

Another suggested option was to have combined federal and provincial enforcement. Provinces who wish to take on responsibility for the enforcement of CEPA must prove that they are able to perform the task and have access to the necessary resources.

A strong objection to mixed federal and provincial enforcement was voiced by one participant who felt that "[t]here's nothing more likely to promote inequitable -- grossly inequitable -- treatment of people". However, he admitted that combined federal and provincial enforcement could be made more equitable if the federal government undertook very strict auditing of provincial performance in the enforcement of CEPA. A very good enforcement and compliance policy would be required. Furthermore the federal government would have to be prepared to exact compliance from the provinces. In fact, it should be prepared to take back its delegation of enforcement powers from the provinces. However, the more rigorous the controls by the federal government, the less likely it becomes that the provinces will accept them.

9.4 PROVINCIAL ENFORCEMENT

It was suggested that the enforcement of CEPA by a single federal agency would pose significant practical problems in a country as large as Canada. It would be best to use provincial people in the field that already possess experience in enforcing environmental legislation.

However, it was pointed out that certain provinces simply do not have the resources to administer and enforce CEPA, although financial assistance from the federal government could resolve this problem.

One speaker mentioned that enforcement by the province could become a problem if the federal government is intent on rigorously enforcing CEPA,

but a province has a policy of non-enforcement and negotiation when it comes to the application of environmental legislation.

9.5 RESOURCES

One participant stated that the resources which Environment Canada has currently allocated to the implementation of CEPA are insufficient to support federal administration of this Act on a Canada-wide basis.

Ms. Weese indicated that the federal government must use its limited resources wisely. Where a province is already doing an adequate job in protecting the environment, federal funds are more wisely allocated to some other area.

One speaker noted that the allocation of resources by the federal government has the effect of determining environmental priorities for the poorer provinces. He suggested that where provinces such as Newfoundland, Nova Scotia or New Brunswick are offered federal funds to enforce CEPA, it is likely that this Act will be the only piece of environmental legislation enforced within those provinces. However, the environment of these provinces might be better protected by enforcing other environmental laws, such as those setting effluent standards.

---- The workshop then adjourned. ----