IT'S STILL ABOUT OUR HEALTH

Pollution Prevention and Toxics

A Submission on

CEPA Review: The Government Response
Environmental Protection Legislation Designed for the Future - A Renewed CEPA - A Proposal

by

The Canadian Environmental Law Association

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and

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Great Lakes United endorses this submission

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Introduction

There are many environmental challenges facing Canada. The opportunity to address some of these concerns is through the review of the Canadian Environmental Protection Act (CEPA). At this time, there is a strong public mandate for new and stringent regulation to protect the environment. Recent polls reveal that over 75% of Canadians want strong environmental regulations, despite the weak economy. From this we can conclude that Canadians implicitly understand the connection between a healthy environment and a strong economy.

This submission is a response to a government proposal released in December of 1995 to reform CEPA. It attempts to both respond to the proposal and then propose some alternatives where appropriate.

The submission is being submitted by the Canadian Environmental Law Association (CELA) and the Canadian Institute for Environmental Law and Policy (CIELAP). CELA is a legal aid clinic in the province of Ontario that has been active in the reform of federal legislation. During the 1980s, it actively participated in the consultations reform of the Environmental Contaminants Act and the consultations pertaining to the existing CEPA.

CIELAP is an independent, non-profit environmental law and policy research and education organization that has undertaken numerous studies of federal environmental law and policy over the past twenty-five years. In 1994, CIELAP prepared five in-depth background papers on the reform of CEPA, which were presented to the House of Commons Standing Committee.

This submission is organized in the same manner as the government response to the recommendations of the Standing Committee on Environment and Sustainable Development. An attempt has been made to respond to each of the government's proposals. Additional recommendations have been made where the proposals put forth by the federal government are incomplete.

A detailed response is given to the governmental proposal on CEPA. We also consider it useful in some sections of our submission to review the background and history that evolved prior to the tabling of the government response in December of 1995. Some commentary on the role of the federal government with respect to environmental protection is also made. **0.1 Background to Submission**

Under section 139 of CEPA, a Parliamentary Review was required within five years of its 1988 proclamation date. The formal review commenced in May of 1994 when the House of Commons Standing Committee on Environment and Sustainable Development was given the responsibility to review the Act. The Committee commenced its hearings in September of 1994 and subsequently conducted hearings across Canada. Members of the

Toxics Caucus of the Canadian Environment Network made extensive presentations before the committee on a variety of matters.

The Caucus prepared two documents for the Committee. First, it prepared an in-depth series of research papers combined in a document entitled: Reforming the Canadian Environmental Protection Act - A Submission to the Standing Committee on Environment and Sustainable Development. The research papers were drafted by various groups from across Canada, including the Canadian Institute for Environmental Law and Policy, West Coast Environmental Law Association, Pollution Probe, and the Canadian Environmental Law Association. This document is appended as Appendix A to this submission.

In addition to this general document, a summary of the research papers was prepared in a document entitled: The Canadian Environmental Protection Act: An Agenda for Reform. This document was endorsed by more than 50 groups, including health care, environmental, labour, community and women's groups. This document was formally presented to the Standing Committee on November 29, 1994. It is included as Appendix B to this submission.

The Standing Committee completed its work in the Spring of 1995. Some two weeks before the anticipated release of the Standing Committee's report, Environment Canada released a new policy pertaining to toxic substances, the Toxic Substances Management Policy (TSMP). The TSMP was released for consultation in mid- 1994, during the time of the CEPA review. After a consultation meeting, various environmental groups made detailed submissions on the draft TSMP. The groups were highly critical of the policy. They argued that the TSMP moved in the wrong direction in how it proposed to address the problem of persistent toxic chemicals, especially in terms of how it defined "virtual elimination;" "environment;" "predominantly anthropogenic;" "persistence" and "bioaccumulation." The environmental groups response to the TSMP is included as Appendix C to this submission. As salient as is the content of the new policy, its timing also indicates an intention to move backward on toxics. Released just prior to the tabling of the Standing Committee's report, the proposed policy appears to have been tailor-made to challenge the Committee's recommendations.

On June 15, 1995, the Standing Committee tabled its report on CEPA, entitled: It's About Our Health! Towards Pollution Prevention - CEPA Revisited. The report was over 350 pages in length and contained 141 recommendations. It called for a virtual redrafting of the Act, including a renewed role for the federal government in environmental protection, and dramatic reform in existing provisions of CEPA, including those related to toxic chemicals and ocean dumping. It also called for an expanded CEPA to include new parts on biotechnology, an environmental bill of rights, biodiversity, coastal zone management, international water pollution, among other areas. By and large, the environmental community was supportive of the Standing Committee's report.

From June to December of 1995, the federal government worked to prepare its response to the Standing Committee's report within the 150-day time line prescribed by

Parliamentary procedure. During that time, it became apparent that there was a strong lobby to discredit the recommendations proposed by the Standing Committee. The primary criticisms indicated that the Committee's recommendations were not based on "sound science," particularly with respect to the assessment and regulation of toxic substances. The criticisms also proposed that the recommendations would weaken the competitiveness of Canadian industry, would damage federal-provincial relations and were inconsistent with existing government policy.

A number of non-governmental groups responded to these criticisms in a document released on October 24, 1995, entitled: At the Environmental Crossroads: The CEPA Review and the Future of Canada's Environment. This report argues that there is "good science" not only to justify the Standing Committee's recommendations, but to go further. The report also argues that the recommendations are supportive of Canadian competitiveness, and that the recommendations do not have to be an impediment to federal- provincial relations. A copy of this report is appended to this submission as Appendix D. In the fall of 1994, the results of a recent poll were released at a meeting held by the Canadian Council of Ministers of the Environment at Whitehorse, Yukon. The poll stated that 78% of respondents felt that strict environmental regulations must continue, in spite of the recession of the early 1990s. Seventy percent of respondents stated that governments should restrict chemicals even if there is no proof of harm, so long there is evidence of damage. It is interesting to note that the public support for strong environmental regulations interfaces with a KPMG survey of industrial, municipal, educational and health facilities that stated that 95% of the respondents considered that compliance with regulations to be the most important motivating factor in determining the enterprise s environmental performance. Only 16% of respondents cited voluntary government programs as important motivators. In a study of the Greater Toronto Area, it was found that "The environment tops the list of areas in which people would like to see more public money spent, with 59% percent favouring increased municipal spending for 'environmental protection' even if it means increases to the taxes or user fees."

During the time of CEPA review, the Canadian public also spoke. Over 16,000 postcards advocating a positive government response were distributed throughout Canada. Many found their way to offices of Ministers of environment, natural resources, finance, agriculture and industry. In addition, 3000 letters were sent by individual Canadians demanding a strong government response. Newspaper opinion articles were written and published across Canada. Attached to this submission as Appendix E is a copy of one of those articles, published in the Hamilton Spectator, the local newspaper of the then Minister of the Environment, Sheila Copps.

On December 15, 1995, the federal government tabled its response to the Standing Committee's report. The document, CEPA Review: The Government Response - Environmental Protection Legislation Designed for the Future - A Renewed CEPA- A Proposal outlined its strategy to amend CEPA. A detailed analysis of the contents of the response is the primary purpose of this submission. Suffice to say at this point is that the media response was mixed. Industry is quoted as endorsing the package of changes.

The environmental community, on the other hand, gave a very critical response. A report card released shortly after the response, gave the federal government a "D" grade. The report card grades each component of the government response. Failing grades were given to the government proposal for biotechnology and international water and air pollution as they would weaken the existing Act. A copy of the report card is appended to this submission as Appendix F. **0.2 The Call for A Strong Federal Role**

The federal government has traditionally narrowly interpreted its potential constitutional authority in the field of environmental management. The problems in this approach are well demonstrated in the "harmonization" initiative being undertaken under the auspices of the Canadian Council of the Ministers of the Environment (CCME).

Without a strong federal role, the dynamics of the harmonization process may lead to a "race for the bottom" and the adoption of "lowest common denominator" national standards, if indeed, any national standards are adopted at all. There are additional concerns that the process will result in constraints on the ability of provinces to raise standards independently and to adopt innovative policy approaches.

Minimum standards of environmental quality must be achieved for all Canadians, while providing individual jurisdictions with the freedom to adopt more stringent standards if they wish to do so. Achieving these goals requires the federal government to demonstrate leadership in the environmental field. The federal government must affirm its interest in protecting Canada's environment and make it clear that it will intervene to the full extent of its jurisdictional capacity when it feels that such action is necessary.

The federal government must, through the process to enact a new CEPA, affirm its commitment to be a leader shaping appropriate environmental law and policy in Canada. It must also establish minimum standards for environmental protection for all Canadians through the Act.

Chapter 1: Guiding Principals for an Effective CEPA

Introduction

The government proposes to incorporate a number of guiding principles into the Preamble and other elements of CEPA. These generally reflect the recommendations of the House of Commons Standing Committee, and include commitments to sustainable development, pollution prevention, the ecosystem approach, the protection of biological diversity, intergovernmental cooperation, science and the precautionary principle, economic responsibility and user/producer responsibility.

Most of these principles deserve strong support and should be incorporated into a renewed CEPA. However, the government's proposal regarding "economic responsibility," and the introduction of references to "cost- benefit analysis" and "economic flexibility" raise serious concerns and cannot be supported. These references appear to revive the perspective that protection of the environment and economic development are competing objectives in a zero-sum game. They fail to reflect current thinking on the interrelationships between environmental sustainability and economic and social well-being.

Furthermore, the primary objective of CEPA should be to contribute to sustainable development through the protection of the environment and human health. This may be achieved through pollution prevention, the adoption of an ecosystem approach to environmental management, the protection of biological diversity and other measures. Public participation in environmental decision-making should also be recognized as being essential to the achievement of environmental sustainability. **Comments on the Government's Proposals Government Response 1.1 - Sustainable Development**

The government proposes that both the Preamble and Declaration to a renewed CEPA state that the primary objective of CEPA is to contribute to sustainable development, and that sustainable development be defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." **Recommendation:**

1) The Preamble and Declaration of CEPA should state that the primary objective of the Act is to contribute to sustainable development through the protection of the environment and human health. Sustainable Development should be defined as per the Brundtland Definition. **Government Response 1.2 - Pollution Prevention**

The government proposes to amend CEPA to state that the Act is to contribute to sustainable development through pollution prevention.

Recommendation:

2) CEPA should be amended to establish pollution prevention as the priority approach to environmental protection. Pollution prevention should be defined in the Act as "the use of processes, practices, materials, products or energy that avoid or minimize the creation of pollutants and waste, and reduce the potential for harm to human health or the environment."

Government Response 1.3 - Ecosystem Approach

The government proposes to incorporate the ecosystem approach into the Preamble to the Act.

Recommendation:

3) Reference to the ecosystem approach should be incorporated into the preamble of CEPA. Ecosystems should be defined as per the government's proposals. The Act should define "Ecosystem Approach" as "administering the Act in a manner which maintains the functional integrity of ecosystems," as per the recommendation of the House of Commons Standing Committee on Environment and Sustainable Development.

Government Response 1.4 - Biological Diversity

The government proposes to incorporate in the Preamble to CEPA a reference to Canada's international obligations under the Convention on Biological Diversity.

Recommendation:

4) A reference to Canada's international obligations under the Convention on Biological Diversity should be incorporated into CEPA. "Biological Diversity" should be defined as per the Convention.

Government Response 1.5 - Intergovernmental Co-operation

The government states that it will continue to seek the co-operation of the provinces, territories and aboriginal peoples in resolving inter-jurisdictional issues and co-ordination of environmental measures and eliminating duplication and overlap among measures. This is an important commitment. However, it should also be recalled that intergovernmental cooperation is, at best, an instrumental goal. It should be pursued as a means of achieving a primary goal -- in this case, environmental protection, and enhanced accountability to the public -- and not merely as an end in itself.

Furthermore, it should be noted that the actual incidence of "duplication and overlap" in federal and provincial environmental protection efforts is extremely limited. Greater emphasis should be placed on the gaps in environmental protection which are emerging as a result of reduced resources at all levels of government. The importance of federal

leadership on national and international environmental issues, and the role of the federal government in ensuring a minimum standard of environmental quality for all Canadians must also be emphasized.

Recommendation:

5) The federal government should initiate, in co-operation with provincial and territorial governments and self-governing aboriginal peoples, a comprehensive and independent review of current federal, provincial, territorial and aboriginal environmental roles, responsibilities and capabilities for the purpose of identifying essential needs and critical gaps in relation to the present and future state of Canada's environment. The review should be conducted on a realistic time-line, and be supported by thorough research, and appropriate and effective mechanisms for public consultation.

Government Responses 1.6 and 1.7 - Science and the Precautionary Principle

The government proposes to incorporate a reference to science being an integral component of decision- making under CEPA. The government also proposes to incorporate a reference to the UNCED precautionary principle in the Preamble to CEPA.

Recommendation:

6) The precautionary principle should be incorporated into the Preamble to CEPA. It should be defined to mean that where there are potential threats of harm to the environment or human health, the lack of full scientific certainty should not be used as a reason for postponing preventative or remedial measures.

Government Response 1.8 - Economic Responsibility

The government proposes to incorporate into CEPA's preamble a reference to the interrelationship of economic and environmental principles, and acknowledge the role of such economic considerations as the "cost-benefit" approach and "flexible economic decision-making." The inclusion of these principles is not supportable. The incorporation of such references would alter the fundamental purpose of the Act, which is the promotion of sustainable development through the protection of the environment and human health.

7) A reference to the interrelationship between the environment, economy and society should be incorporated into the Preamble of CEPA. Reference should not be made to the "cost-benefit approach" or "flexible economic decision-making" in the Preamble or elsewhere in the Act.

Government Response 1.9 - User/Producer Responsibility

The government states that it agrees with the Standing Committee that the onus should be shifted to the producer, user or importer of a substance to ensure that substances do not

pose an unacceptable risk to the environment or human health, and that this principle should be a guiding principle of CEPA.

Recommendation:

8) The principle of User/Producer Responsibility should be incorporated into CEPA. The principle should be defined as meaning where environmental or health effects are reasonably suspected in relation to an activity or substance, the onus should be on the proponent or producer to demonstrate safety, rather than on governments to prove harm. In addition, where information gaps exist in relation to an activity or substance, the proponent of the activity, or import, manufacturing or use of a substance, must ensure that all necessary information is available to make an assessment of its potential environmental and health effects.

Principles Absent in the Government Response

Public Participation

The government response makes no reference to public participation in decision-making as a guiding principle of CEPA.

Recommendation:

9) Public participation in decision-making should be incorporated as a guiding principle into the Preamble to CEPA and throughout the Act.

Conclusions

CEPA should seek to promote environmentally sustainable development through the protection of the environment and human health. The guiding principles of the act should include pollution prevention, an ecosystem approach, the protection of biological diversity, intergovernmental cooperation, the precautionary principle, a recognition of the inter-relatedness of the environment, economy and society, user/producer responsibility and public participation in decision-making.

Chapter 2: Administration of CEPA

2.1 Introduction

The Standing Committee recommended significant changes to the administrative provisions of CEPA. Its provisions related to intergovernmental environmental agreements (Recommendation 137) the use of economic instruments (Recommendation 33) and non-regulatory approaches to environmental protection (Recommendation 36), and its future review (Recommendation 141).

2.2 Comments on the Government's Proposals

Government Response 2.1 and 2.4 - Advisory Committees

The government proposes to continue to provide for the appointment of advisory committees drawn from a variety of backgrounds.

Recommendation:

10) CEPA should continue to provide for the appointment of advisory committees drawn from a variety of backgrounds.

Government Response 2.2 and 2.3 - CEPA National Advisory Committee

The government proposes to expand the current CEPA Federal-Provincial Advisory Committee to include representatives of Territorial governments and Aboriginal People and rename it the National Advisory Committee. The National Advisory Committee would assume the current roles of the FPAC.

Recommendation:

11) CEPA should be amended to replace the existing Federal-Provincial Advisory Committee with a National Advisory Committee of federal, provincial, territorial and aboriginal representatives.

2.2.1 Equivalency and Administrative Agreements

Government Response 2.5 - Scope of Equivalency and Administrative Agreements

The government proposes to expand the scope of equivalency and administrative agreements to all parts of CEPA. Experience with such agreements is limited and there is growing evidence of problems with their implementation and effectiveness. These concerns are reinforced by the track records of most of the provinces with the

enforcement of the pollution prevention and habitat protection requirements of the Fisheries Act.

Recommendations:

12) The use of administrative and equivalency agreements should not be expanded until an independent review of the implementation and effectiveness of the existing agreements has been completed.

13) As recommended by the Standing Committee (Recommendation 138) criteria for the establishment of such agreements should be developed by Environment Canada. These should include as a precondition of establishment of an agreement the resources and technical capacity required to administer and implement the CEPA regulations in question.

14) Equivalency Agreements should only be permitted where whistleblower protection and citizen enforcement provisions, similar to those proposed under CEPA, exist under the "equivalent" provincial or territorial law.

Government Response 2.6 - Equivalency and Administrative Agreements with the Territories

The government proposes that territorial governments be permitted to enter into CEPA administrative and equivalency agreements.

Recommendation:

15) CEPA should be amended to permit Territories to enter into CEPA administrative and equivalency agreements, subject to their ability to meet the criteria proposed for such agreements including as a precondition to the agreement the resources and technical capacity required to administer and implement the CEPA regulations in question; and in the case of equivalency agreements, provisions for citizen requests for investigations, whistleblower protection, and citizen enforcement actions.

Government Response 2.7 - Administrative Agreements with the Aboriginal Peoples

The government proposes to permit the Minister of the Environment to enter into administrative agreements with Aboriginal Peoples to administer CEPA regulations.

Recommendation:

16) CEPA should be amended to permit Aboriginal peoples to enter into agreements to administer CEPA regulations on their territories, conditional on the existence of the necessary technical and fiscal resources.

Government Response 2.8 - Ratification of Administrative and Equivalency Agreements

The government proposes to provide for the pre-publication of proposed administrative and equivalency agreements and a sixty day public comment period prior to their approval. The Minister of the Environment would be required to account for how all comments received were handled. The Standing Committee on Environment and Sustainable Development would be permitted to review proposed agreements during the sixty day period.

The government's proposals represent some significant progress in this area. However, the government has rejected the Standing Committee's proposal for a positive resolution procedure for the ratification of equivalency and administrative agreements. Furthermore, under House of Commons rules, the Standing Committee already has the discretion to review proposed agreements under its jurisdiction on its own initiative. However, the government is under no obligation to delay the implementation of agreements until the Committee has completed its review and tabled a report. Adequate time should be provided for the Standing Committee to review a proposed agreement if it chooses to do so.

The establishment of a more effective parliamentary oversight mechanism is particularly important in relation to equivalency agreements, which have the legal effect of suspending the application of federal regulations. Such agreements should, therefore, be subject to the same form of parliamentary oversight mechanisms as federal regulations themselves, and in particular a negative resolution procedure. Given the specialized nature of these agreements, the Standing Committee on Environment and Sustainable Development, or its successor, rather than the Standing Joint Committee for the Scrutiny of Regulations, should be designated as the originator of a negative resolution for equivalency agreements.

Recommendation:

17) CEPA should be amended to provide:

i) Pre-publication and Public Review:

proposed administrative and equivalency agreements should be required to be pre-published in the Canada Gazette, followed by a minimum sixty day public comment period;

the Minister should be required to publish in the Canada Gazette an accounting of how all comments received during the comment period were handled; and

the final texts of agreements, following approval by the Governor in Council, should be published in the Canada Gazette and on the proposed public registry.

ii) Review by House of Commons Standing Committee on Environment and Sustainable Development:

the House of Commons Standing Committee on Environment and Sustainable Development, or its successor, should be given thirty days following the publication of a proposed equivalency or administrative agreement to determine if it wishes to review the agreement, and another sixty days in which to conduct its review and present a report and recommendations;

the Standing Committee should be permitted to extend the review period, perhaps by an additional sixty days, if it feels this is necessary to complete its review;

agreements should not be approved by the Governor in Council or published in the Canada Gazette until the Standing Committee has completed its review if the Standing Committee has chosen to exercise its right of review; and

a negative resolution procedure, similar to that which exists for regulations, should be established for proposed equivalency agreements.

Government Response 2.9 - Sunset Clauses

The government proposes that five-year sunset clauses be inserted into administrative and equivalency agreements.

Recommendation:

18) CEPA should be amended to require the insertion of sunset clauses into administrative and equivalency agreements, with the result that agreements expire five years after coming into force. Provision should also be made for the independent review of administrative and equivalency agreements prior to their renewal.

Government Response 2.10 - Annual Reports

The government proposes to continue the requirement for annual reports to Parliament on the administration and enforcement of CEPA regulations which are subject to administrative or equivalency agreements (CEPA ss. 98(3) and 34(10)).

Recommendation:

19) The requirement for annual reports to Parliament on the administration and enforcement of CEPA regulations subject to administrative agreements, and of "equivalent" provincial regulations should be maintained and strengthened. In particular, annual reports should be required to include information regarding:

collection of monitoring data as required by the CEPA regulations in provinces where these regulations are subject to administrative agreements, or under "CEPA equivalent" provincial regulations;

the number, cause and results of public requests for investigations made under section 108 of CEPA or "equivalent" provincial legislation;

the number, cause and results of civil actions initiated under section 136 of CEPA, and the civil cause of action proposed in 3.9 of the government response; and

the numbers and results of inspections, investigations, warnings, injunctions and prosecutions related to CEPA regulations administered through administrative agreements with provinces, territories or self- governing aboriginal peoples, and provincial regulations deemed "equivalent" to CEPA regulations for the purposes of equivalency agreements.

Government Response 2.11 - Federal Authority Affirmation Clauses in Administrative Agreements

The government proposes to maintain clauses that provide for the retention of full authority for the federal government to enforce CEPA and for accountability to the Minister of the Environment before Parliament for CEPA and the implementation of any agreements made under the Act.

Recommendation:

20) CEPA should be amended to require insertion of clauses retaining the full authority for the federal government to enforce CEPA and for accountability to the Minister of the Environment before Parliament for CEPA and the implementation of any agreements made under the Act in future administrative agreements.

Government Response 2.12 - General Agreements for Environmental Management

The government proposes to expand the provisions of the Department of the Environment Act to permit the Minister of the Environment to enter into agreements for environmental management with self-governing Aboriginal Peoples. The government also proposes to include in such agreements the same accountability and procedural requirements as those proposed for CEPA's administrative and equivalency agreements. The government response sites the Minister s authority under the Department of the Environment Act as the basis for these agreements, and for efforts undertaken to create the Harmonization agreement spear-headed by the CCME.

It should be noted that extremely serious concerns have been raised by environmental non-governmental organizations, organized labour, First Nations and aboriginal people's organizations, members of the academic community and others, regarding the proposed CCME environmental "harmonization" agreement [the draft Environmental Management

Framework Agreement(EMFA)]. Many have recommended that the federal government not proceed with the proposed EMFA. Even some industry associations have expressed concern over the weakening of federal environmental responsibilities contained in the proposed CCME agreement.

In addition, as noted earlier, serious questions are beginning to emerge regarding the effectiveness of the CEPA administrative and equivalency agreements which have been concluded to date. Finally, the proposed EMFA (October 1995 draft) would seem to contain provisions which go beyond the general authority provided to the Minister of the Environment to conclude intergovernmental environmental agreements by the Department of the Environment Act.

Recommendations:

21) The Department of the Environment Act should be amended to permit the Minister of the Environment to enter into general environmental management agreements with self-governing Aboriginal Peoples.

22) The Department of the Environment Act provisions regarding general agreements for environmental management should be amended to provide the same accountability and procedural requirements as those proposed for CEPA administrative and equivalency agreements including:

i) Pre-publication and Public Review:

proposed environmental management agreements should be required to be pre-published in the Canada Gazette, followed by a minimum sixty day public comment period;

the Minister should be required to publish in the Canada Gazette an accounting of how all comments received during the comment period were handled; and

the final texts of agreements, following approval by the Governor in Council, should be published in the Canada Gazette and on the proposed public registry.

ii) Review by House of Commons Standing Committee on the Environment and Sustainable Development:

the House of Commons Standing Committee on Environment and Sustainable Development, or its successor, should be given thirty days following the publication of a proposed environmental management agreement to determine if it wishes to review the agreement, and another sixty days in which to conduct its review and present a report and recommendations;

the Standing Committee should be permitted to extend the review period by an additional sixty days, if it feels this is necessary to complete its review; and

agreements should not be approved by the Minister or published in the Canada Gazette until the Committee has completed its review if the Committee has chosen to exercise its right of review.

iii) there should be sunset clauses in environmental management agreements, with the result that agreements expire five years after coming into force. Provision should also be made for the independent review of agreements prior to their renewal.

iv) environmental management agreements should provide for the preparation and delivery to Parliament of annual reports on the implementation of environmental management agreements.

v) there should be clauses retaining the full authority for the federal government to enforce federal environmental laws and for accountability to the Minister of the Environment before Parliament for federal environmental laws and the implementation of any agreements made under the Act.

Government Response 2.13 - Economic Instruments

The government proposes to amend CEPA to enable the use of tradeable permit systems, deposit-refund systems and direct financial incentives in CEPA. The use of environmental taxes or charges and financial incentives in the form of tax measures would be recommended to the Minister of Finance by the Minister of the Environment. No authority for such instruments would be placed directly in CEPA.

Authority for the use of environmental taxes and charges should be directly incorporated into CEPA, in order to facilitate the use of such instruments. Revenues from such charges could be dedicated for environmental purposes, such as environmental remediation, and the development of pollution prevention technologies.

With respect to tradeable permit systems, serious concerns have been raised regarding the effectiveness, efficiency and fairness of such schemes, particularly with respect to emissions of pollutants into the environment. Their incorporation into CEPA therefore should be approached with great caution and the necessary legislative provisions designed with care. As stated in the government s response, the Act currently appears to provide the authority necessary to facilitate some trading in the context of the phasing-out of production, as demonstrated by the provisions of the CEPA Ozone-Depleting Substances Regulations. The desirability of providing for trading schemes beyond clearly limited circumstances as substance phase-out is open to serious question.

Recommendations:

23)Section 34 of CEPA should be amended to permit the use of deposit-refund systems in relation to, and imposition of taxes and charges on, the use, manufacture, sale, import, export, or release into the environment of substances found to be "toxic" for the purposes of the Act.

24) CEPA should be amended to permit the imposition of ocean disposal fees, based on the nature and volume of wastes being dumped.

25) CEPA should be amended to permit the imposition of environmental taxes and charges in relation to sources of transboundary air and water pollution within Canada.

26) CEPA should be amended to permit the imposition of environmental taxes and charges in relation to the import and export of hazardous and solid wastes.

Government Response 2.14 - Non-Regulatory Approaches to Environmental Protection

The government proposes to consult on providing the Minister the authority under the Department of the Environment Act to enter into binding environmental performance contracts with private sector actors and other government departments to improve their environmental performance. Such approaches would only be used for "non-regulated" aspects of substances.

This proposal reflects the federal government's increasing emphasis on non-regulatory approaches to the establishment of standards and guidelines, particularly in the environmental field. Over the past two years, Environment Canada has entered into a series of voluntary pollution prevention agreements in the Great Lakes basin with major industrial sectors such as automotive manufacturing, and automotive parts manufacturing.

Governments and industry argue that such agreements are more cost-effective and more accommodating of innovation than regulations. Non-industry stakeholders, on the other hand, have been highly critical of these agreements. Environmental and labour organizations have argued that, while they have no objections to voluntary industry pollution prevention initiatives, they are seriously concerned by the implications of governments entering into formal, signed agreements in relation to such initiatives.

Critics of the agreements argue that they represent a return to bilateral industry-government policy- making, are unenforceable, are unlikely to be cost-effective, and are being employed as a substitute for, rather than a supplement to, a federal regulatory framework for toxic substances. These concerns also have been expressed by some industry representatives, and were reflected in the House of Commons Standing Committee on Environment and Sustainable Development's report on the review of the Canadian Environmental Protection Act.

The Canadian government's use of these agreements has been inconsistent with the approach taken by other Organization for Economic Cooperation and Development (OECD) jurisdictions. In the case of the United States, for example, voluntary pollution prevention programs are employed as a supplement to a comprehensive environmental regulatory framework. The Environmental Protection Agency's 33/50 program, for example, is based on statutory reporting requirements related to the Toxics Release

Inventory (TRI) and does not involve formal industry-government agreements. In the Netherlands, individual firms' "voluntary" commitments are written into their formal environmental approvals.

There are a number of additional concerns with respect to the government's specific proposal regarding the Department of the Environment Act. These include questions regarding the legal status of such agreements, and questions of how they would relate to provincial approvals and other legal provincial requirements.

If authority for such agreements is included in the Department of the Environment Act, there must be requirements for public consultation in the development of agreements, they must require specific performance outcomes within set timetables and public reporting and access to data. The provision of financial assurances to ensure performance must also be a legislative requirement. The assurances could take the form of cash, a letter of credit from a bank named in Schedule I of the Bank Act, a bond of a guarantee company approved under the Guarantee Companies Securities Act (Ontario) or similar provincial legislation, or a pledge of assets.

2.2.2 Reporting

Government Response 2.15 - Annual Reports

The government proposes that the current requirement for annual reports on the administration and enforcement of CEPA should be maintained.

Recommendation:

27) The current requirement for annual reports to Parliament on the administration and enforcement of CEPA should be maintained.

Government Response 2.16 - Parliamentary Review

The government proposes to amend CEPA to provide for Parliamentary reviews of the statute every seven years. The government states that "this review would include the applicability of CEPA to aboriginal peoples and aboriginal lands." It is unclear if this is intended to mean that the focus of the next review will be on the relationship between CEPA and Aboriginal Peoples and aboriginal lands, or if all subsequent reviews are to address these issues.

Given the rapid developments occurring in environmental science, the proposed seven year review period seems excessive, particularly given the delays experienced in the first review.

Recommendation:

28) CEPA should be amended to provide for a review of the Act every five (5) years by the House of Commons Standing Committee on Environment and Sustainable Development or its successor.

Government Response 2.17 - Cost Recovery

The government proposes to amend CEPA to allow for cost recovery in every instance where a service of a beneficial nature is provided. Full-cost recovery and user-pay systems are consistent with the polluter pays principle and have the potential to ensure that the capacity of Environment Canada and Health Canada to protect the environment and health of Canadians is maintained.

However, cost recovery in relation to other services raises significant questions. In particular, cost recovery from members of the public for information under CEPA, such as access to the proposed public registry, National Pollutant Release Inventory data, data from the proposed Biotechnology Release Inventory, and data on toxic substances, and for activities such as the filling of requests for investigations, could present significant barriers to public participation in decision-making and public accountability for the decisions made.

Recommendation:

29) CEPA should be amended to provide for full-cost recovery from proponents in:

the issuing of ocean dumping permits;

notification and assessment procedures for new substances, and biotechnology products, including the monitoring of field trials;

transboundary movements of hazardous and solid wastes; and

the issuing of import/export or other permits in relation to "toxic" substances regulated under section 34 of CEPA.

2.3 Conclusions

The proposed "administrative" amendments to CEPA include a wide range of important subjects, including federal-provincial relations, the use of economic instruments, cost recovery, and the future review of the Act. It is recommended that the CEPA be amended to expand participation in its mechanisms for intergovernmental cooperation to include territorial governments and Aboriginal Peoples. In addition public and parliamentary accountability mechanisms in relation to the use of intergovernmental agreements under the Act should be strengthened significantly.

It is also recommended that provision be made for the use of deposit-refund systems and environmental charges under the Act. A full-cost recovery, user-pay system should be established in relation to the granting of approvals under the Act. Finally, it is recommended that provision be made for a review of the Act by the House of Commons Standing Committee on the Environment, or its successor, every five years.

Chapter 3: Public Participation and Environmental Rights

3.1 Introduction

Canadians need and want legal tools to protect the environment. Presently, CEPA does not provide these tools. There are few areas where there is mandated public participation and even fewer where environmental rights are granted.

3.2 The Need for a CEPA Environmental Bill of Rights

At the present time, there is no right to a healthy environment, or for that matter, any other environmental right entrenched in the Canadian constitution. The "second best" alternative is to have a comprehensive set of environmental and worker rights given through a statute. Although ideally this should be undertaken through a separate statute, the inclusion of a list of environmental and worker rights in CEPA would be a positive and needed step in this direction.

A number of submissions to the Standing Committee on Environment and Sustainable Development provided a detailed agenda for the inclusion of environmental and worker rights in the Act.

Further, in Chapter 14 of its report, the Standing Committee on Environment and Sustainable Development made a number of important recommendations to further environmental and worker rights. These include:

in the establishment of a public registry on the environment;[recommendation 111]

in the right to notice and comment on all proposed regulations, objectives, guidelines, codes of practice, agreements, permits and other matters dealt with under the Act;[recommendation 112]

in expanded rights to:
(a) file notice of objections and require boards of review;
(b) request a review of existing policies, regulations or other instruments; and
(c) expedite the regulation of toxic substances.[recommendation 113]

in the inclusion of general whistle blower protection for workers and the public;[recommendation 116]

in improvements to the administration of the existing right to request an investigation;[recommendation 117]

in the right for citizens to bring a civil action against any party who has violated or is about to violate a provision of the Act or regulations;[recommendation 119]

in the right for citizens to seek a civil remedy for the creation of environmental risk where the measure of damages would be proportional to the increased risk caused by the defendant;[recommendation 120]

in the right for citizens to undertake a private prosecution be affirmed and the articulation of rights of the public where the Attorney General decides to pursue a prosecution initiated by a citizen;[recommendation 121]

the creation of an environmental fund to be used for a variety of environmental protection activities, including the remediation of emergencies and contaminated sites and to fund groups and individuals under a participant funding program;[recommendation 122]

in the establishment of a participant funding program that would be funded from the monies in the environmental fund;[recommendation 123] and

the Government of Canada to develop comprehensive federal legislation respecting the environmental rights of Canadians and Canadian workers.[recommendation 124]

The Standing Committee's recommendations are in line with experience at the provincial level. Over the years, there has been a trend at the provincial level to grant residents environmental rights to protect the environment. The Quebec Environmental Quality Act was seminal in providing a number of rights, albeit limited in their nature and scope, to bring an action against environmentally harmful activities. Since that time, a number of provinces have enacted some type of an environmental bill of rights, such as Northwest Territories, the Yukon and Ontario. These jurisdictions grant a broad array of rights. In addition, a number of other provinces have made proposals for environmental rights.

Finally, support for enhanced public participation and environmental rights can be found in the document, The Environment: A Liberal Vision. Three changes were proposed for the legal framework. The first change called for an Environmental Bill of Rights. The document noted that:

As we reform the economy from an environmental perspective, so must we do for the legal system. At present, the legal system in Canada discourages citizens from bringing law suits in the public interest against polluters to make them accountable for the damages they cause. This can be remedied by legislating an Environmental Bill of Rights that entitles Canadians to a healthy environment by guaranteeing:

in the right to use courts to ensure that federal environmental laws are properly obeyed and enforced; and

in the right to participate fully in the federal government's environmental decision-making.

The Liberal Party, in its policy document, Creating Opportunity: The Liberal Plan for Canada, noted that "Individual Canadians are far ahead of their governments in their

desire for environmental protection... A new Liberal government will build on this public awareness and give individuals new tools to protect the environment and to participate in environmental decision-making." The document also endorsed the proposal for a legal right to sue those breaking environmental laws.

Recommendation:

30) It is recommended that CEPA include a comprehensive set of environmental and worker rights, which can evolve into a CEPA environmental bill of rights. The proposal for a CEPA environmental bill of rights would include the following:

(i) a declaration of public trust over federal lands and natural resources over which the federal government has jurisdiction;

(ii)a provision to allow citizen suits under CEPA and reform of the law relating private prosecutions;

(iii) a provision to remove the barriers to civil causes of action for breaches of CEPA and its regulations;

(iv) a right to request reviews of the adequacy of existing federal regulations to protect the environment; and

(v) a right to receive notices and provide comments on proposed decisions.

Worker rights should include:

(i) the right to a joint worker-management environment committee, or a joint health and safety committee where a joint environment committee is not appropriate;

(ii) the right to refuse to pollute;

(iii) the right to environmental information from the employer;

(iv) the right to have transition mechanisms where job dislocation arises as a result of a move to cleaner technology;

(v) worker representatives must have the right to take part in environmental inspections and investigations, similar to those rights with respect to occupational hazards; and

(vi) the Federal Workplace Hazardous Materials Information (WHMIS) should be amended to require that Material Safety Data Sheets (MSDS) include information regarding environmental hazards and precautions for clean-up of spills and other environmental risks.

3.3 Comments on the Government's Proposals

The government response did include a few proposals for reform affecting environmental and worker rights. A review of these proposals will be undertaken in this section. Necessary environmental and worker rights that are absent in the government response will be discussed in the next section.

Government Responses 3.1 and 3.2 - Establishment of a Government Registry

The government proposes to create an electronic public registry for environmental information. The proposal includes the kinds of information that would be included in the Registry along with the proposal to include authority to adopt cost recovery measures.

The need for such mechanisms has been recognized by the Information Commissioner of Canada. Similar mechanisms are already in place in various jurisdictions, notably Ontario, and were recommended by the Standing Committee on Environment and Sustainable Development.

Overall, the proposal for an environmental registry is strongly supported. Moreover, the kinds of information proposed to be placed on the registry is also highly supported.

Four issues are of concern in the furtherance of this proposal.

First, like the Ontario environmental registry under the Environmental Bill of Rights, there must be a positive legal obligation to established the registry enshrined in CEPA. When the registry is entrenched in law, the registry will be protected, at least to some extent, from quick budget cuts and political decisions. This, in turn, will give the registry the stability and longevity required in order for the public to make good use of it.

Second, the kinds of information that would be placed on the registry should be expressly listed in a regulation. This regulation can be updated from time to time to allow for the further inclusion of information. Explicit requirements for the kind of information to be listed will ensure greater certainty, predictability and quality control for the registry s contents.

Third, the registry should be developed with an advisory committee composed of members of the public, in particular, environmental and worker representatives. Because these constituencies will be the primary users of the service, it is important to understand what is needed and to gain the experience from jurisdictions where registries are in place.

Finally, as an overall principle, the proposal to include authority to adopt cost recovery measures to maintain the public registry is supportable. However, this principle should be fashioned in a way so as not to act as a barrier or impediment to public access. The principle should be amended to include guaranteed access by the public to the registry.

Recommendations:

31) The proposal for an environmental registry is highly supported along with the kinds of information that is intended to be placed on the registry. However:

(a) The obligation for the Minister of the Environment to create such a registry should be enshrined in a renewed CEPA; (b) The information that is proposed to be listed in the registry is supported, although it should be articulated in a regulation once the registry is established;

(c) The registry should be developed with the assistance of a public advisory committee; and

(d) While there is support for the authority to adopt cost recovery measures to maintain the public registry, the principle must be fashioned in a way to also include the right of the public to have access to this information.

Government Responses 3.4 to 3.6 - Right to Request an Investigation

The government does not propose to significantly amend the existing right to an investigation under section 108 of CEPA. Instead, three administrative proposals are made. First, a pamphlet would be written outlining the purpose of CEPA and the rights and remedies that members of the public have under CEPA. Section 109 would be amended so that the Minister would be required to provide a final report on the investigation to the applicants, regardless of whether any action has been taken. Third, a standard form would be available upon request that can be used by applicants to request an investigation.

All of these recommendations were supported by the Standing Committee on Environment and Sustainable Development.

Recommendation:

32) The proposal to provide administrative changes to the right to an investigation, and in particular, public education material, the requirement for a section 109 final report and a standard form for the exercise of the right, are all supported.

Government Response 3.7 - Citizens' Reporting of Violations

The government proposes to continue to encourage the public to prevent violations of CEPA by (a) informing the Minister of the Environment; or (b) by seeking a court injunction, which would direct that activity to be stopped.

The origins of this proposal are unclear. Moreover, there is no indication as to what reform results from this proposal. The proposal states that where a person believes that there is a violation of CEPA, the Government of Canada "proposes to continue to

encourage the public to prevent violations of CEPA (a) by informing the Minister of the Environment, or (b) seeking a court injunction, which would direct that an activity be stopped."[Emphasis Added]

Certainly, anyone now can inform the Minister of the Environment about any violation, although the enforcement branch would be a more direct route. What is genuinely confusing is the statement that the government will "continue to encourage" the use of a court's injunctive power.

At the present time, citizens only have three options in this regard. Citizens can rely on the common law as a basis to seek injunctive relief. There are, however, two significant obstacles to this remedy. The first obstacle is that most citizens would probably not have standing to bring the action unless their health or property were directly affected. Second, any claimant would also have to show that there is a basis for their action, such as the defendant being in breach of a statute. Finally, the usual requirement of the plaintiff posting security for costs in an action for injunctive relief is prohibitive for most citizens.

The second option available to citizen claimants is section 136(2) of CEPA which permits injunctive relief. This section, however, has not been much used because of a barrier similar to that described above for civil injunctions. A pre-condition to using section 136(2) is that the person applying for relief must have "suffered loss or damage as a result of conduct that is contrary to any provision" of CEPA or its regulations. This qualification effectively excludes all citizens who would act in the public interest to halt violations of a federal law and who cannot establish that they have "suffered loss or damage as a result of the conduct."

To further the intention of government, specific amendments to CEPA should allow citizens to seek injunctive relieve for violations of CEPA. This provision could be modelled after the provision of the Quebec Environment Quality Act that allows citizens to bring an action for an injunction to prohibit any act or operation that interferes with the right to a healthy environment as defined in the Act. The Quebec statute also limits the security deposit for costs to a maximum amount of $500.00.

The most direct way of furthering this intention is to redraft section 136(2) of CEPA to remove the qualification that a person must have suffered loss or damage resulting from a violation of CEPA. Further, there should be a limit on the amount of a security deposition for costs.

Recommendation:

33) In principle, government proposal 3.7 that encourages the use of injunctive power to prevent of violations of CEPA is supported. However, for it to be effective, it is necessary to reword section 136(2) to the following:

(2) Any person may seek an injunction from a court of competent jurisdiction to order the person engaged in the conduct:

(a) to refrain from doing any act that it appears to the court causes or will cause loss or damage; or (b) to do any thing that appears to the court will prevent the loss or damage; or (c) Any person seeking such relief from the court shall not be required to post security for costs in an amount greater than $500.00.

This right should correspond to the citizen suit discussed below.

Government Response 3.8 - "Whistleblower" Protection

Under the government response, whistleblower protection is proposed to be broadened to apply to anyone who voluntarily reports violations of CEPA and anyone who is a federally-regulated employee. Under this protection, the person would be protected from dismissal, harassment or discipline in the workplace owing to their reporting of a CEPA violation.

Recommendation:

34) The government proposal pertaining to the broadened "whistleblower" protection is fully supported.

Government Response 3.9 - The Right to Sue

The government proposes to include a right for citizens to take civil action against a party who has violated CEPA or its regulations. In principle, the right to sue is strongly supported. It was a core part of the submission by a number of groups and supported by the Standing Committee on Environment and Sustainable Development.

However, this right as set out in the government response is restrictively qualified. In order to invoke this right, the following conditions apply:

- in the violation must result in significant harm to the environment;
- in there must first have been an application under section 108 of CEPA and the Minister took an unreasonable amount of time to respond or the Minister's response was unreasonable;
- in there can be no personal gain resulting from the action; and
- in other qualifications similar to the Ontario Environmental Bill of Rights.

The additional qualifications in the Environmental Bill of Rights include:

- in the action must be with respect to actual or imminent harm to a public resource;
- in actions with to harm to public resources from odour, noise, dust resulting from an agricultural operation unless they have gone through a process pursuant to the Farm Practices Protection Act;
- in the establishment of new defences, such as the defence that an instrument is not contravened if the defendant satisfies the court that the defendant complied with an interpretation of the instrument that the court considers reasonable;

- in the imposition of the court s broad discretion to stay or dismiss the action, including having regard to "economic" concerns;
- in a prohibition from the imposition on the award of damages; and
- in the usual "loser pays" cost rules continues apply.

Depending how one reads the right to sue provisions of the Environmental Bill of Rights, the qualifications may indeed number more than the ten listed above.

The experience under the Ontario law is instructive. In the two years since the Bill of Rights became law, no citizen has ventured to use the right to sue provisions. In effect, the enormous number of qualifications have rendered the right to sue a potentially hollow and effective right.

The federal government should understand and learn from the Ontario experience. The right to sue should be clear, certain and predictable. There are many examples of citizen suits that work, particularly in the U.S. Hence, while the principle of including the right to sue in a renewed CEPA is strongly supported, the right must be virtually without qualification in order to make it an effective right.

Recommendations:

35) Support in principle is given to the government proposal to include a right to sue for violations of CEPA and its regulations. However, the right proposed in the government response is too restrictively qualified. Instead, a variation of section 136(1) could be revised to state:

(1) Any person may, in any court of competent jurisdiction, bring an action for harm resulting in the environment or to human health arising from a violation of this Act or its regulations, regardless of whether that person has personally suffered loss or damage.

There should be no need to first request an investigation under section 108. This is an unnecessary barrier to access to the courts for public interest litigants.

36) Only common law defences (i.e., due diligence and statutory authorization) should be applicable in such actions and a provision should be included that would in effect exempt public interest litigants from an adverse cost award.

37) Section 136 should also be expanded to allow any person to recover the cost of preventing or remediating environmental damage caused by conduct contrary to CEPA or its regulations.

Government Response 3.10 - The Right to Prosecute

The government proposal is not to incorporate any additional rights or make any changes to the citizen right to prosecute privately where the Attorney General has not itself prosecuted a violation. There is no mention as to whether the court is authorized to award the private prosecutor any part of the fine.

This is an extremely important issue for public interest groups. This issue, along with appropriate recommendations, are fully discussed in Chapter 5, section 5.3, pertaining to Enforcement provisions of CEPA.

3.4 Environmental and Worker Rights Absent in the Government Response

The government response is silent on a number of environmental and worker rights that were proposed in various submission by the public before the Standing Committee and the supported by recommendations of the Committee itself.

This section will outline these rights. These rights are more fully discussed in the background research documents appended to this submission (Appendix A) and various pages of the Standing Committee's report (see also recommendations 97 and 152 of this brief).

Recommendations:

38) The Declaration of Public Trust

CEPA should be amended to declare a public environmental trust regarding land and natural resources over which the federal government has jurisdiction.

The beneficiaries of the trust should be defined as the past, present and future generations of Canadians. Provisions should be included that provide for the enforcement of the trust in appropriate circumstances by the courts upon the application of any resident(s) of Canada, and that in enforcing the trust, the courts have broad authority to impose current and future obligations on governments and persons. The terms of the trust should include references to basic principles such as the precautionary principle and the principle of sustainability.

39) Request for Review

CEPA should be amended to grant a member of the public a right to request that the government review an existing policy, statute, regulation or instrument to determine if it adequately protects the environment. The decision whether or not to grant a review should be made on the basis of criteria established in CEPA, and reasons for the decision should be required to be given.

Further, a member of the public should have the right to request a review in relation to substances assessed as "toxic", but for which regulations or other measures have not been promulgated within two years following completion of the toxicity assessment. The request should be granted unless the request is considered frivolous or vexatious.

The Ministers should be required to respond to a request for a review within sixty days.

40) Notice and Comment

CEPA should be amended to require public notice and an opportunity to comment on all proposed regulations, environmental quality objectives, guidelines codes of practice, agreements, permits and other instruments under the Act. A minimum of sixty days comment period should be mandated (except in the case of emergencies) and that the Minister be expressly required to consider the comment that were made by the public and provide a written summary outlining how these comments were taken into account.

Additional Notices of Objections

41) CEPA should be amended to allow a notice of objection to be filed by any person with respect to: (a) the addition of substances to the Domestic Substances List (DSL);
(b) the removal of substances from the Priority Substances List (PSL) before a determination is made with respect to their toxicity;
(c) the waiving of information requirements;
(d) the approval with conditions or when prohibitions or conditions regarding substances suspected of being "toxic" are varied or rescinded;
(e) the approval of field tests in relation to new substances, particularly those involving open release into the environment; and
(f) the issuance of an ocean dumping permit or a variation of its terms and conditions.

42) CEPA should be amended to require the Minister of the Environment to establish a Board of Review in the foregoing cases unless the Minister considers that the request for review is frivolous or vexatious.

43) Creation of an Environmental Fund

CEPA should provide the authority to establish an environmental fund to be used for a variety of environmental protection activities, including the provision of financial assistance to groups and individuals under a participant funding program. This fund should be administered by Environment Canada and financed by the penalties, fines, fees and levies imposed under CEPA, as well as the monetary awards granted under the proposed citizen suit provisions.

44) Participant Funding

A participant funding program should be established under CEPA, including provisions for interim funding, with funds coming from the environmental fund. The program would be used to fund public interest participants before boards of review.

Joint Worker-Management Environment Committees

45) CEPA should institute joint environment committees with rights, functions, powers and authority equivalent to those of the joint health and safety committee. Specific environmental powers should include the right to participate in workplace environmental audits, where these are required by federal law or by contract. Joint committees should have the right to participate fully in the development of workplace Pollution Prevention Plans (PPP). Worker members of the committee should have the right to register objections to the PPP to the government.

46) Legislation should provide that, where workers and management agree, the joint environment committee may be amalgamated with the joint health and safety committee with an expanded mandate.

47) Right to Refuse to Pollute

CEPA should be amended to allow work stoppage when any worker has reason to believe that any polluting activity is contrary to CEPA, and, to the extent possible under federal jurisdiction, to allow work stoppages where workers have reason to believe pollution is illegal, reckless, deliberate or in excess of the norm for the enterprise. Employers should not be permitted to ask other employees to pollute when one employee refuses to do so.

48) Further Information

As a consequential amendment to the reforms proposed for CEPA, there should be changes to WHMIS legislation and regulations ensuring the addition of environmental information to MSDSs. Trade secrecy claims should not be permissible if a substance is released into the environment. In other cases, trade secrecy should be governed by existing HMIRC process.

3.5 Conclusions

Environmental rights and the principle of public participation are of fundamental importance to Canadians. The government response simply does not address this gap at the federal level. The recommendations articulated above would assist in developing a federal environmental bill of rights for Canada.

Chapter 4: Ecosystem Science and National Norms

4.1 Introduction

One of the traditional strengths of the federal government in the field of environmental protection is the capacity and ability of the government to exercise leadership in monitoring, research and development of national norms. This role is essential to further the overall goal of a healthy environment and the protection of human health for **all** Canadians.

This chapter in the government response essentially reaffirms the federal government's present role, without a strong commitment to strengthening it. Perhaps one of the most important components of this chapter, the enshrining into legislation of the National Pollutant Release Inventory (NPRI) is an important step forward, although there is no commitment to overcome some of the problems with the present NPRI.

4.2 Comments on the Government's Proposals

Government Response 4.1 - Authority to Carry Out Monitoring and Research

The government proposes to better reflect the ecosystem approach in its authority to carry out monitoring and research.

Recommendation:

49) The government response 4.1 should be supported and implemented.

Government Response 4.2 - Authority to Gather Further Information

The government proposes to give the Minister additional authority to require the submission of information for research and publication.

Recommendation:

50) The government response 4.2 should be supported and implemented. This authority should include the authority to require the submission of information regarding the life-cycle aspects of products and processes, including energy and material use, the use of toxic substances, and emissions to the environment.

Government Response 4.3 - National Pollutant Release Inventory

The government response proposes to enshrine the NPRI in CEPA. The proposal to enshrine NPRI in legislation is strongly supported. However, the government proposes to use a multi-stakeholder consultative process for change to NPRI.

There are two issues that are raised by this proposal. First, there are needed reforms to the existing NPRI. Second, although a multi-stakeholder forum to assist in fashioning these changes is important, it must be a forum that has government direction on which reforms to NPRI will be effected.

Changes to NPRI

There currently are serious limitations in the information that dischargers are required to report under the NPRI. Environment Canada has noted two important concerns in a recent report. In that report, it is stated:

as they are currently configured, the NPRI and TRI Inventories collect only a limited amount of information regarding Great Lakes priority substances (e.g., Canada-Ontario Agreement substances). This is due, in part, to the fact that only a subset of these substances are listed under the NPRI and TRI. The other major factor is that many of these priority substances like micropollutants, and therefore the quantities that are manufactured, processed, or otherwise used by industry do not trigger reporting to the NPRI and TRI inventories. Changes to the NPRI and TRI will be required if these inventories are to effectively track emissions of Great Lakes priority substances.

The primary limitations of the NPRI can be summarized as follows:

(a) **Thresholds are Too High:** Reporting thresholds for the amount of substance that may be manufactured, processed or otherwise used without reporting releases and transfers are so high that many facilities with these substances do not have to report;

(b) **Many Substances are Not Included:** Many priority substances of concern for human and wildlife health reasons, such as PCBs, dioxins, pesticides, toxaphene, octachlorostyrene are not on the list of substances that must be reported;

(c) **No Hazardous Substances Used at a Facility:** The NPRI does not include reporting of amounts of hazardous substances used at a facility. This information would assist pollution prevention initiatives and encourage and track progress on reducing the use and production of hazardous substances. It is also essential for addressing accident prevention, and occupational health problems that may arise in the workplace where these substances are used.

(d) **The Definition of Transfer:** The definition does not include hazardous materials transferred to consumers in product. This information is essential because these hazardous materials will eventually be released into the environment either when they are used or when they are disposed of.

(e) **Off-Site Recycling:** Polluters are not required to report on materials transferred off-site for recycling, including energy recovery at facilities such as cement kilns. This category is listed on the NPRI form, but reporting is voluntary.

These and other concerns are articulated in a document entitled: National Pollutant Release Inventory Citizens' Caucus, Recommendations in Brief to the Minister of the Environment. This document is attached to this submission as Appendix I.

Recommendation:

51) It is recommended that the NPRI be reformed in a number of areas, including lowering the thresholds, including more substances, inclusions of amounts of hazardous waste used at a facility, defining the term "transfer" to include materials transferred to consumers in product, and requiring that facilities report materials transferred off-site for recycling.

Process for Determining Contents of NPRI

The government proposes to "use a multi stakeholder consultative process for changes to NPRI." While consultation is a laudable principle, it is incumbent on government to take action, even if industry does not agree with it. Up to this point in time, the government has only been willing to implement NPRI where industry has agreed to it. After the last consultation process on the NPRI, the government acted only on those items that all members at the table had agreed to and set the outstanding issues aside.

Industry representatives in the consultation objected to the inclusion of transfers of materials off- site for recycling. As a result, in the second year of reporting under the NPRI, the government moved reporting on transfers of materials for recycling from a required category to a voluntary category because objections from industry. This omission undermines the effectiveness of NPRI and meaningfulness of data. In effect, it would mean intermedia transfers of pollutants not fully tracked by NPRI.

Recommendation:

52) While supporting a multi-stakeholder process to give advice to the government, the government must implement changes to the NPRI. Strong federal leadership is needed as well as strong commitment to the principles that underlie the NPRI. The federal government must act upon these principles even if there is not a full consensus by industry with respect to the needed reforms. The government has a responsibility to protect the environment and should do what is required to do to fulfill this obligation.

Government Responses 4.4 to 4.6 - Requests for Confidentiality

The government proposes to allow industry to request confidentiality of information based on explicit criteria.

The current regime for confidentiality in CEPA as applied to the NPRI is totally inadequate. Taken literally, all facilities could claim confidentiality for all information with respect to the NPRI.

The use of confidentiality provisions under NPRI should be such that it is used only in exceptional circumstances. The regime proposed in the government response has the potential to make any information at all qualify for confidentiality requests, which defeats the purpose of the NPRI. The solution to this problem is to set firm criteria for confidentiality requests and firm guidelines for how the requests should be evaluated. A full discussion of the recommended criteria and guidelines is set out in this document in Recommendations 97 and 152, below.

Recommendation:

53) Confidentiality requests in relation to NPRI data should be based on the narrow criteria of "trade secrets." Such requests should be granted only under exceptional circumstances. (See recommendation 97 (iii) for a more detailed discussion of the issue of confidentiality). Additional principles and recommendations in this regard are provided in Recommendation 97 which are applicable to NPRI.

National Norms

Government Responses 4.7 and 4.8 - Retention of the Obligation

The government proposes to develop national norms, and include in those norms the concepts of pollution prevention and an ecosystem approach. However, government response 4.7 states that a new paragraph would read "the prevention of pollution, recycling, reusing, treating, storing, or disposing of substances, or reducing releases."

As it will be discussed in Chapter 6 of this submission, pollution prevention has a very specific definition that focuses on process change and rejects pollution control techniques -- techniques currently contemplated within the government response. Government response 4.7 should ensure that the term pollution prevention is defined in the appropriate manner.

Recommendation:

54) Government responses 4.7 and 4.8 are supported, except that the term pollution prevention should be appropriately defined as per Recommendation 2 of this brief.

Conclusions

As noted above, one of the key components for a federal environmental protection strategy must be leadership in research, science and information. The NPRI is an excellent example of where the federal government can make an invaluable contribution by giving vital information to Canadians regarding the discharge of pollutants into the environment and in what amounts. However, to further this end, the NPRI must be significantly improved in accordance with the recommendations outlined above.
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CHAPTER 5 : ENFORCEMENT

Introduction

The Standing Committee made recommendations to enhance the right of citizens to undertake private prosecutions and also recommended restructuring Environment Canada to promote its enforcement role. Unfortunately, the government proposal does not accept these key recommendations. The government proposal did, however, adopt the Standing Committee's recommendations with respect to alternative enforcement options and additional enforcement powers for CEPA officials. Although these recommendations will strengthen the enforcement framework of CEPA, these amendments alone will not improve enforcement activity.

Comments on the Government's Proposals

Government Responses 5.1 to 5.3 - Administrative Monetary Penalties (AMPs)

The government proposal recommends the imposition of administrative monetary penalties (AMPs) for a violation which would be determined through an administrative process. AMPs in essence are penalties imposed as a consequence of a failure to comply with a legal requirement. AMPs gives the person a chance to appeal the administrative penalty, but the appeal takes place usually before an impartial government official who did not participate in the decision or before an administrative tribunal. AMPs would be an alternative to prosecution and would be used for offences for which no term of imprisonment would be sought as a penalty.

In addition, the government proposal also recommended that a provision be created in CEPA enabling the government to prosecute AMPs through the courts if the government so chooses. Situations where this may be desirable would be when the offender s conduct demonstrates a disregard for the law or if the individual is a repeat offender. The government response also provides for a number of methods to enforce AMPs ranging from registration in court to possible withholding of refunds of federal taxes.

The advantage of AMPs is that it is more expeditious and requires less government resources than undertaking a prosecution. However, there is a risk the government may overly rely on AMPs to address violations under CEPA because it is a less resource intensive scheme. Therefore, it is recommended the government establish clear guidelines outlining the criteria to determine when the use of AMPs would be appropriate.

Overall the proposal to create an AMP scheme and to enforce it is supported.

Recommendation:

55) The creation of an administrative monetary penalty scheme and the proposal to prosecute AMPs in court and ensure enforcement of AMPs is supported. However:

(a) there should be guidelines in place providing government officials with guidance in determining whether the use of AMPs is appropriate to address a violation; and

(b) AMPs should not be used for:

- serious offences, which carry a threat of imprisonment;
- where the violation has posed a significant risk or will have serious adverse effects on the environment;
- where the offence has been deliberate; or
- where the violation has been repeated.

Government Responses 5.4 and 5.5 - Negotiated Settlements

The government proposal recommends the use of negotiated settlements to increase compliance and to decrease reliance on prosecutions. Negotiated settlements are made after the regulatee is found to have broken the law and instead of proceeding with a prosecution, the regulator negotiates with the regulatee to identify steps the regulatee will take to ensure that another violation will not occur. The government proposal recommends that negotiated settlements would be in addition to any AMPs imposed for violation or could replace the payment of an administrative penalty. In addition, the government proposal also proposes to examine options for the most effective ways to ensure enforcement of negotiated settlements.

Recommendation:

56) A provision in CEPA allowing the use negotiated settlement is supported provided it will not be used in lieu of prosecution, but will only be utilized as an addition to any AMPs imposed or to replace the payment of a monetary penalty.

Government Response 5.6 - Ticketing

The Standing Committee recommended ticketing as a enforcement option. Furthermore, the Standing Committee recommended that the Department of Justice also give priority status to the proclamation of the Contravention Act to expedite the ticketing provisions under section 134 of CEPA. The Act is intended to set up a general ticketing framework for federal regulatory offences and would use the ticketing systems in the provinces and the territories to process tickets issued under the Act. However, the Act which was passed over two years ago has not yet been proclaimed.

Therefore, the government proposal considered it prudent to retain authority in CEPA to make regulations designating CEPA offences, which can be punishable by tickets and to

establish fines for these offence. Consequently, the government proposal recommended removing the application of the Contravention Act to CEPA.

Recommendation:

57) The proposal to create the authority under CEPA to make ticketing regulations for offences and establishing fines for these offences is fully supported.

Government Response 5.7 - Cease and Desist Orders

The Standing Committee recommended CEPA inspectors' powers be expanded to issue cease and desist or stop orders to halt any activity in contravention of the Act or the regulations in circumstance where it is necessary to prevent or contain any danger or threatened danger to human health or to the environment. The Standing Committee restricted the right to use cease and desist orders to these specific circumstances as there are other means in the Act to address other violations.

The government proposed CEPA be amended to provide for the use of cease and desist orders; however, no restriction was placed on the conditions under which CEPA inspectors could utilize this power.

Without any limitation, there is potential for CEPA inspectors to rely on their cease and desist powers to address all types of violations under the Act or regulations thereby avoiding other enforcement actions such as prosecution. This is a matter of concern because the Department of Environment has had an historical emphasis on abatement as opposed to enforcement actions. Therefore, there should be written guidelines outlining the circumstances when a cease and desist order may be utilized.

Recommendation:

58) It is recommended that the CEPA inspector only use a cease and desist order to prevent or contain danger or threatened danger to human health or to the environment.

59) It is also recommended that legislation should specify the circumstances under which cease and desist orders may be issued, and that guidelines should be drafted to assist CEPA inspectors in determining when circumstances warrant a cease and desist order.

Government Responses 5.8 to 5.10 - CEPA Inspectors, CEPA Investigators and CEPA Analysts

The Standing Committee recommended that the existing powers of inspectors to take or order preventative or remedial releases under section 36 and 37 be extended to all relevant parts of CEPA including any new parts which may be added under the Act. Furthermore, it was also recommended that the related provisions respecting access to property to be extended to all relevant parts of the Act and that a person against whom a

preventive or remedial order is issued be required to report on the measures taken to comply with the order.

The government proposal accepted the Standing Committee recommendations to correct the anomalies, inconsistencies and omissions in the inspectors' powers.

With respect to the investigators' powers, the Standing Committee noted that the powers available were insufficient for the job. It recommended that CEPA be amended to provide CEPA investigators with the powers of a peace officer. The powers of peace officers include the power to deliver notices for court appearances, summonses and similar documents, the power to secure a warrant by telephone and a limited use of force such as authority to break locks on doors and filing cabinets during the execution of a search warrant. The inclusion of these powers would serve to distinguish the inspection and investigation roles for CEPA officers and would also enhance efficiency and facilitate enforcement.

The government proposal in accordance with the Standing Committee's recommendation proposed the creation of a new category of officer called the investigator, who would have all the powers of an inspector and would also have certain powers similar to a peace officer.

The Standing Committee recommended that official analysts be granted powers to enter premises under section 100(1) and the powers to open and examine receptacles and packages, take samples and measurements and conduct tests under section 100(5). The purpose of such a provision is to allow official analysts to assist inspectors in exercising their duties under the Act. For example, a regulated party is required to conduct compliance tests under the supervision of an inspector. The supervising inspector, however does not always have the specialized knowledge of an official analyst and cannot ensure the testing is done properly.

The government proposal recommended CEPA be amended to allow CEPA analysts to accompany inspectors, and when accompanying inspectors, to enter premises, to open and examine receptacles and packages, and take samples and measurements and to conduct tests.

Recommendation:

60) The recommendation to broaden the powers of CEPA inspectors, investigators and CEPA analysts be expanded as outlined in the government proposals 5.8-5.10 is fully supported.

Government Response 5.11 - The Need for Classification

The Standing Committee recommended the classification of offences under the Act to provide the courts with some guidance about the seriousness of offenses. This proposal was accepted in the government proposal for two reasons, namely that it would assist the

courts in determining the seriousness of the offence and it would also be necessary for use of AMPs.

Recommendation:

61) The recommendation to amend CEPA to provide for classification of offenses to provide guidance to the courts as well as the use of AMPs is supported.

Government Responses 5.12 to 5.14 - Guidelines for Sentencing and Court Orders

The Standing Committee recommended that CEPA be amended to enable courts to recover the costs incurred in the investigation and prosecution of offences under the Act, require administrative and monetary penalties collected under the Act be placed either in whole or in part, in an environmental fund, provide sentencing guidelines for the court's consideration and Environment Canada to continue to sensitize the judiciary to the gravity of environmental offences.

The government response accepted the Standing Committee's recommendation to broaden the discretion under CEPA to impose court orders for payment of fines to an environment groups or for research and to require the offender to publish an apology for the offence. The government response also accepted the recommendation for CEPA to be amended to provide sentencing guidelines for the court's consideration.

Recommendation:

62) The government proposal recommending amendments to CEPA to broaden the types of orders which may be issued by the courts and providing for sentencing guidelines is fully supported.

5.3 Weakness in the Existing Enforcement Provisions

5.3.1 Government Response - The Right to Prosecute

The government proposal did not accept any of the Standing Committee's recommendations regarding measures to strengthen the role of private prosecutions under CEPA, such as allowing citizens to remain a party in the event the Attorney General intervenes in a private prosecution and a provision allowing a recovery of costs for investigating and prosecuting a private prosecution.

The Right of Citizens to Prosecute

A citizen's right to pursue a private prosecution is a fundamental part of our criminal justice system, which goes back to the earliest days of our legal system, and is now codified in the Criminal Code. Because citizens are committed to values enshrined in environmental laws, they are more likely to be inspired to launch a private prosecution for offenses against the environment. Private prosecutions have, therefore, played an

important role in the context of environmental protection. Indeed, some of the most significant environmental cases began as private prosecutions. A study done by the Law Reform Commission of Canada concluded that "a criminal justice system that makes full provision of private prosecution of criminal and quasi-criminal offenses has advantages over one that does not. In any system of law, particularly one dealing with crimes, it is of fundamental importance to involve the citizen positively. The opportunity of a citizen to take his case before a court, especially where a public official has declined to take up the matter is one way of ensuring such participation."

The right to launch a private prosecution has also provided an important safeguard against government laxity and inaction. This safeguard is particularly relevant in view of the federal government's weak enforcement record under CEPA. Consequently, there is a compelling need to strengthen the role of private prosecution. However, a citizen's right to commence a private prosecution should be not regarded as a replacement for government inaction under CEPA. Compared to the average citizen, the federal government has enormous resources and expertise to investigate and prosecute offenses. The government also has a mandate to do so. The role of private prosecutions should be regarded, at most, as a necessary safeguard against government's unwillingness to prosecute.

Attorney General's Powers to Intervene

The Attorney General's power to intervene in a private prosecution is regarded as necessary to prevent abusive private prosecution by citizens. However, if this discretion in not circumscribed by legislation and guidelines, this broad discretionary power may be subject to abuse.

The experience of private informants in both British Columbia and Alberta is that regardless of the strength of the evidence collected by private informants or their agents, the Crown has intervened to stay the proceedings. For example, the Sierra Legal Defence Fund, an environmental public interest group, has initiated a number of prosecutions which have been stayed by the Provincial Attorney General. The most recent case involved a private prosecution against the Greater Vancouver Regional District for offenses relating to sewage discharge. The Attorney General's office took over the case, had it adjourned fourteen times over two years, admitted that the evidence was "impeccable" and then stayed the charges on grounds that a "handshake agreement" between the province and the municipality allowed excessive sewage discharges in certain circumstances.

British Columbia and Alberta s record on private prosecutions raises serious concerns about the potential for the Attorney General or his agents to abuse their intervention powers. According to the government response, the "official policy" of the Federal Attorney General is to intervene only when there is insufficient evidence to sustain a charge or it is not in the public interest to prosecute. The ambit of staying charges under "public interest" is, however, extraordinarily broad and given the reluctance of courts to review the Attorney General s decision to stay proceedings, the potential for abuse

remains. There is no valid policy reason why the only protection against an abuse should depend upon the public's reliance of exemplary conduct by the Attorney General. Instead, protection should be afforded to the public by legislative enactments and specific guidelines outlining the circumstances which warrant intervention. Without such protection, citizens will be reluctant to expend considerable effort and money necessary to initiate a private prosecution.

Section 2(d) and 2(e) of CEPA, respectively, requires the federal government to encourage the participation of Canadians in making decisions that affect the environment and protecting the environment. Unlike other federal statutes, there is an explicit recognition in CEPA that citizens have a essential role to play in upholding the Act. The enforcement provision in CEPA should therefore, be amended to reflect these principles.

Recommendation:

63) It is recommended that CEPA be amended to specify the following conditions:

a) stipulate the circumstances when the Attorney General will intervene in a private prosecution. In addition, guidelines should be enacted specifying the factors which warrant intervention. These factors should be balanced with sections 2(d) and 2(e) of CEPA;

b) allow for the citizens to remain a party to a prosecution should the Attorney General decide to intervene in a private prosecution; and

c) permit citizens to take part in plea negotiations and make submissions in court on sentencing in a private prosecution.

Private Prosecutions - Costs

The costs of commencing a private prosecution can be considerable, and thus be a disincentive to citizens to enforce CEPA. Many environmental groups recommended to the Standing Committee that the private prosecution provisions of CEPA be strengthened by enacting a provision permitting the recovery of costs. The Standing Committee addressed their concerns by recommending that the courts be empowered to order the recovery of costs incurred in the investigation and prosecution of offenses under the Act. The inclusion of such a provision would provide a considerable incentive in encouraging citizens to play a role in the enforcement of CEPA.

Recommendation:

64) It is recommended CEPA be amended to provide the court with the power to order the recovery of costs incurred in the investigation and prosecution of offences under the Act by private citizens.

5.3.2 Restructuring Environment Canada

The Standing Committee recognized that a credible and effective enforcement programme could only be established if Environment Canada underwent substantial restructuring and created a special prosecution team, separate from its abatement role.

The Standing Committee recommended Environment Canada revise its enforcement approach to CEPA. In particular, the Standing Committee recommended that Environment Canada establish an independent enforcement office with regional branches, revise CEPA's Enforcement and Compliance Policy, ensure that enforcement decisions are made with reference to the policy by lawyers within Environment Canada, establish training programmes for enforcement personnel, keep information of enforcement actions in a centralized data bank and set up a legal branch within Environment Canada to prosecute offences under CEPA. Following these measures will help develop within Environment Canada the expertise and experience of its legal counsel. It should be noted that these recommendations have been applied in jurisdictions such as Ontario and proven extremely effective.

Recommendation:

65) It is recommended that Department of Environment Canada should be restructured in order to operationalize its regulatory mandate in accordance with the recommendations made by the Standing Committee. In particular:

a) an independent enforcement office with regional branches should be established within Environment Canada, that would report directly to the Minister of Environment or Deputy Minister;

b) The CEPA Enforcement and Compliance Policy be revised and updated and procedures be established to ensure that enforcement decisions are made with reference to the policy. Training programmes for enforcement personnel should be provided where needed and a summary of all enforcement actions should be prepared and made available on a centralized databank;

c) Permanent objectives be set and methods for evaluating effectiveness of enforcement actions should be developed;

d) Information on enforcement actions should be provided in a consistent and detailed manner on an electronic public registry and a separate publication on enforcement actions be prepared annually and tabled in Parliament;

e) The decision to undertake a prosecution be approved by the lawyers assigned to Environment Canada and not any other officials within the Department of Justice; and

F) All important CEPA cases, with significant legal and/ or environmental implications should be assigned to senior prosecutors who have both expertise in both litigation and environmental law.

5.4 Conclusions

The government proposals will enhance the enforcement framework of CEPA. However, they will not necessarily lead to an increase in enforcement activity. The enforcement practices of Environment Canada must undergo substantial reform if there is to be any improvement in the enforcement of CEPA. In particular, the Department must shift its focus from that of an advisory and promotional role and be willing to make a greater use of prosecutions to ensure regulatory compliance with the Act. In view of the government s laxity in enforcing CEPA, there is also a need to strengthen the role of private prosecution to supplement the federal role in enforcement.

Chapter 6: Pollution Prevention

Introduction

Pollution prevention is one of the most important legislative concepts for the 1990s and beyond. Although there are some positive proposals in the government response, the proposed reforms to CEPA will not create a comprehensive pollution prevention regime for Canada. The proposed reforms are incomplete and insufficient to assist Canada in catching-up with other countries that have focussed on clean production and pollution prevention.

In particular, it is disappointing that the pollution prevention principle has not been engaged throughout CEPA and in particular, not put into practice in Part II of the Act. Some constructive suggestions on how to implement pollution prevention in CEPA were submitted to the Standing Committee on Environment and Sustainable Development and reference should be made to that document, an overview of which is be presented below.

Further, it seems apparent that the pollution prevention provisions must be enhanced to ensure that the renewed CEPA is consistent with the Liberal commitments to pollution prevention as articulated in the document, Creating Opportunity. That document stated that:

"In the past, environmental policy has focused on managing and controlling the release of pollutants entering the environment. This approach has had only limited success. Canada needs a new approach that focuses on preventing pollution at source. ... Manufacturing innovations are needed to avoid the use or creation of pollutants in the first place; for example, through raw material substitution or closed-loop processes that recycle chemicals within the plant. There is no alternative if Canadians wish to stop long-term toxic pollutants from entering our air, soil, and water. A Liberal government will use the upcoming five-year review of the Canadian Environmental Protection Act to make pollution prevention a national goal and to strengthen the enforcement of federal pollution standards."

Before comment can be made on the government proposals, some general recommendations are first in order. It should be apparent, however, that if the Government of Canada is serious about pollution prevention, there should be a comprehensive re-examination of the way pollution prevention is being implemented under the federal authority.

Overriding Considerations

6.2.1 Pollution Prevention as a National Priority

When CEPA was drafted in 1988, it was argued that it should be based on pollution prevention. The message was not heard then. That the government now accepts pollution prevention as a guiding principle (Government Response 1.2) is a positive step, as is the government s statement committing Canada to the pollution prevention approach. Attention should be drawn to the fact that the national pollution prevention policy for Canada is not only an environmental policy, but an industrial policy as well. At the Environmental Crossroads (see Appendix D) describes pollution prevention s fundamental assumption: it applies everywhere, to all things, at all times. Pollution prevention is an attitude, not a point solution. As such, it should be the intention of the federal government to commit all departments to this approach and the goals set under it, and then conduct their activities accordingly.

Further, it is appropriate, as proposed in government response 1.2, that the term pollution prevention be defined. The proposal to define pollution prevention in legislation in the document: Pollution Prevention: A Federal Strategy for Action is supported, subject to the comments made in a submission on the issue endorsed by some 11 environmental and labour groups. A copy of this submission is included in Appendix H to this submission.

Recommendation:

66) CEPA should be amended to include a statement of purpose to the effect that the government of Canada declares it to be the national policy of Canada that the use, generation and release of pollutants should be prevented in order to protect the health and well-being of Canada and the environment. The government of Canada should develop policies, undertake programs and cooperate with other jurisdictions to effect this declaration.

6.2.2 Definition of Pollution Prevention Scope of Measures

One of the most important issues with respect to pollution prevention is whether a "pure" approach is taken to include in the definition only those measures that avoid the creation of pollution; or any measure, including pollution control measures, that seek to reduce pollution entering the environment. It is submitted that the former approach is the appropriate one; the latter simply reinforces and legitimizes the status quo.

Focus Must be on Use and Generation, Not Emissions

The focus of some definitions of pollution prevention is on the "release to the natural environment" of substances. This focus excludes the option of examining the use of chemicals and implies that industrial process change, product reformulation and substitution measures are not part of the definition. The most effective way of dealing with discharges to the environment is by moving up the pipe to examine ways to rethink

the industrial process. Sometimes this requires an examination of feedstock chemicals and raw products. A definition that focuses on "release to natural environment" pre-empts such examinations.

Focus Should be on Use and Generation, Whether in the Workplace or the Environment

Some definitions of pollution prevention focus on emissions to the "natural environment" and are meant to exclude workplace issues. Pollution prevention is fundamentally important to worker safety and in-house pollution issues and as such, must be broad enough to encompass the workplace.

Out-of-Process Recycling Process is not Part of Pollution Prevention

Some definitions of pollution prevention include practices such as one facilities' waste being used as a feedstock by another facility. Similarly, these definitions allow for facilities' waste to be used for out- of-process recycling. However, including these practices in the definition of pollution prevention would, by implication, also permit measures such as: incineration, and on-site disposal, among others. An appropriate definition of pollution prevention should not include out-of-process recycling of substances. This issue is fully discussed in the report by the Pollution Prevention Legislative Task Force.

Recommendation:

67) CEPA should define pollution prevention as per recommendation 2) of this brief. The definition should focus on the "use" of substances, including those used in the workplace. Out-of-process recycling process should not be included in the definition of pollution prevention.

6.3 Comments on the Government's Proposals

Government Response 6.1 - Pollution Prevention Plans

The government proposes to give the Minister authority to require the preparation and implementation of pollution prevention plans for toxic substances. While this proposal is supported, it must go further in pollution prevention planning.

First, pollution prevention plans should be required for all substances that have been identified on a list promulgated pursuant to a regulation. This list would include all NPRI substances, CEPA toxic substances, and other substances where elimination or reduction is preferable. There is clear authority in CEPA's information gathering provisions to require the submission of such information.

Second, the government proposal only gives the authority to the Minister to impose a pollution prevention planning process. This provision should require a pollution planning regime for certain substances and certainly for any CEPA toxic substance.

Recommendation:

68) Pollution prevention plans should be required for all substances so designated by regulation and these substances would include CEPA toxic substances and NPRI substances. Pollution prevention plans should be mandatory for these substances.

Government Response 6.2 - Furthering Pollution Prevention Plans

The government proposes to specify through the Canada Gazette some implementing measures concerning pollution prevention plans. This proposal is supported generally. However, it should be noted that if the above recommendation is accepted, that is, that pollution prevention planning is required for designated substances, the regime does far less complex and more certain in terms of who is required to undertake the plan and what substances are included.

Further, the pollution prevention plan, as suggested in the commentary to government proposal 6.2, should not focus on "control and treatment" and "safe disposal" since these are not pollution prevention techniques and are not included in the definition noted above.

Recommendation:

69) Pollution prevention plans should not focus on "control and treatment" and "safe disposal" as these not appropriate pollution prevention techniques.

Government Response 6.3 - Pollution Prevention Plans for Infractions of CEPA

The government proposes that the Minister should be able to require preparation and implementation of pollution prevention plans where there is an infraction of CEPA, one of its regulations or where there is a finding of liability under the administrative monetary penalty system.

In the U.S., where there is mandated pollution prevention planning under state law, the result has been very positive economic and environmental effects from the perspectives of affected firms.

Consequently, pollution prevention planning, as a planning regime, should not be limited to "bad actors." It should be used as a positive measure in the move toward cleaner technology. In this context,

Recommendation:

70) CEPA should be amended to permit the courts to require pollution prevention planning activities beyond those proposed in Recommendation 68, as a sentencing or settlement option in the adjudicatory process.

Government Response 6.4 - Model Pollution Prevention Plans

The government proposal to develop model pollution prevention plans is supportable. However the list of components given is incomplete and should include various components that are required in other jurisdictions. These are not onerous but would assist the facility in furthering pollution prevention objectives.

Recommendation:

71) Model pollution prevention plans should be comprehensive in nature and include:

- a definition of their own production units and processes;
- the development of process flow diagrams and material balances that described the operations (a material balance requires that raw materials be tracked from process input to process output);
- a calculation of the cost of using substances by production unit;
- the development of options to avoid the use and generation of the substances; and
- the development of time lines to implement those options.

Government Responses 6.5 and 6.6 - Submission of Pollution Prevention Plans

The government proposes to require the submission of a declaration that a pollution prevention plan has been prepared and to create an offence for non-production of the declaration. Additional information gathering powers would also be given to the Minister.

These provisions need to be strengthened. First, a summary of the plan must be submitted to the Minister, and should also be available for public review. The summary would essentially review whether the pollution prevention planning requirements had been fulfilled.

Second, there is need for an institutional framework to have these plans reviewed by qualified personnel. Hence, there should be a system to certify pollution prevention planners. These planners would be certified through specialized courses at designated universities. There should also be formal recognition of the National Office of Pollution Prevention.

Finally, provision should be made to give the Minister the authority, in some circumstances, to require the implementation of the plans.

Recommendations:

72) Those preparing pollution prevention plans should have to submit summaries of those plans to Environment Canada. Further, there should be provision to have these summaries available to the public for review and comment.

73) Provisions should be made such that, in appropriate circumstances, the federal government can require the implementation of the plan.

74) The National Office of Pollution Prevention should be made inter-departmental in nature and should be given a statutory basis.

75) The pollution prevention plans submitted by industry should be certified by experts in the field. These experts should have to undergo training at Pollution Prevention Institutes established at universities throughout Canada.

Government Response 6.7 - Tracking Pollution Prevention

The government proposes to revise the National Pollutant Release Inventory to provide a means for industry to report on pollution prevention activities. This proposal is supportable, however, the tracking proposal should be mandatory.

Recommendation:

76) The National Pollution Release Inventory should require that the industry report on pollution prevention activities.

Government Response 6.8 - Targets and Schedules

The government proposal to include targets such as those set out by the Business Council for Sustainable Development is inappropriate and should be rejected. The controlling targets should be those that Canada has already agreed to in the international fora, and strong goals that are both practical and feasible. One goal, for example, should the virtual elimination of persistent toxic substances as stated under the Great Lakes Water Quality Agreement.

Recommendations:

77) The government of Canada has committed itself to virtually eliminate the use, generation and discharge of persistent toxic substances no later than 2004 and to reduce the use, generation and release of other toxic substance by 50% by the year 1999.

78) It is recommended that, as part of the pollution prevention regime, there be requirements for the setting of sectoral and facility based goals and targets to meet the national goals and to adjudge progress generally.

Government Response 6.9 - Technology Development and Transfer

The government response to promote technology development and transfer with respect to pollution prevention is supported.

Recommendation:

79) Government response 6.9 is supported and should be implemented.

Government Response 6.10 - Pollution Prevention Clearinghouse

The government proposal to establish a clearinghouse on pollution prevention is supported.

Recommendation:

80) Government response 6.10 is supported and should be implemented.

Government Response 6.11 - Recognition and Awards

The government response to establish award programs for pollution prevention is laudable, but such programs do not need to be established in the context of legislative reform to CEPA.

Recommendation:

81) While the principle in government response 6.11 is supportable, there is no need to amend CEPA to establish awards programs for pollution prevention.

6.4 Other Measures to Further Pollution Prevention Not in the Government Response

There are a number of initiatives that should be incorporated into CEPA that are not mentioned in the government response. These include technical and financial programs. Further, the above programs and activities seek to encourage pollution prevention. However, there are also measures that should be incorporated that are more regulatory in nature. The following programs are recommended:

Recommendations:

82) The federal government should facilitate pollution prevention through a capital loan program. This program would only support pollution prevention initiatives and would be carefully monitored as such.

83) The federal government should undertake a study examining all barriers, including a study of the Income Tax Act to ensure that provisions encourage pollution prevention.

84) Pollution Prevention and Federal Approvals: The federal government gives a number of environmental approvals. These approvals should be undertaken in light of the pollution prevention regime proposed above.

85) Other Powers for CEPA - Reforming section 34: There are many other programs and activities that would assist in the furtherance of the pollution prevention regime. Hence, it

is important that CEPA be amended to ensure that the Minister has broad powers to undertake such measures. These measures might include:

- amendments to section 8 that would direct the Minister to formulate environmental objectives, codes of practice and guidelines to further pollution prevention goals; and
- amendments to section 34 to provide for the requirement of pollution prevention plans along with other measures, including:
    - the power to prohibit the sale and manufacture of specific products; and
    - the power to require product substitution.

6.5 Environmental Aspects of Emergencies

Government Response 6.12 - Prevention, Preparedness, Response and Recovery Framework

The government proposes to amend CEPA to include new provisions to enable the Minister to establish a legislative framework for environmental emergencies.

This is a constructive proposal, however, there is need for more specificity in terms of the content of this legislative framework. This framework should include the development of emergency response plans and the reduction of hazardous chemicals stored on site.

Recommendation:

86) The proposal for a new legislative framework for environmental emergencies is supported. This framework should include:

(a) the requirement for Environment Canada to identify a list of chemicals which have the potential to cause serious accidents and then identify their appropriate threshold quantities. For those substances over the threshold, the facilities should report the maximum and average quantities on site. This information should be public;

(b) All facilities which meet the threshold limits, including those owned operated by the federal government, should prepare reduction measures and emergency preparedness plans; and

(c) CEPA should mandate the federal government to work with the provinces and, if necessary, to act unilaterally, to prepare mandatory emergency planning requirements for all industries.

Government Response 6.13 - Standards, Guidelines and Codes of Practice

The authority for the Minister to develop and or adopt appropriate standards, guidelines and codes of practice is proposed to be included in the Act.

Recommendation:

87) Government proposal 6.13 is supported and should be implemented.

Government Response 6.14 - MIACC

The government proposes to work with MIACC and other organizations in the development of standards, guidelines and codes of practice related to environmental emergencies.

Recommendation:

88) While support should be given for proposal 6.14, there should also be consultation with regional and local community groups interested in the issue.

Government Response 6.15 - The "Federal House"

The government proposes to vest additional authority with the Minister to address federal house issues and environmental emergencies.

Recommendation:

89) Government proposal 6.15 is supported and should be implemented.

Government Response 6.16 - Site Identification and Registration

The government proposes to explore a system of identifying sites containing quantities of hazardous materials in excess of specified thresholds.

Recommendation:

90) Government proposal 6.16 is supported. However, the proposal should be made mandatory, not optional.

Government Response 6.17 - Reporting of Spills, Leaks and Other Such Incidents

The government proposes to continued discussions to explore a national spill reporting network.

Recommendation:

91) The idea of a national spill reporting network is supported. The federal government should facilitate the development of this network so that it may be operational within one year.

Government Response 6.18 - Recovery of Costs of Damages

The federal government proposes to expand cost recovery provisions.

Recommendation:

92) The proposal to expand cost recovery provisions related emergency preparedness is supported.

6.6 Conclusions

Pollution prevention is one of the foundations for CEPA. Despite the ostensible support for the concept in the government proposal, the practical effect of its acceptance is not significant as presently stated. What is needed is a comprehensive pollution prevention strategy across the entire government. CEPA should be the spark for this review and provide a platform for a focussed strategy for implementation.

Chapter 7: Biotechnology

7.1 **Introduction**

The Standing Committee recommended major changes to CEPA s treatment of the regulation of products of biotechnology. Partially in response to a proposal made by the Canadian Institute for Environmental Law and Policy (CIELAP), the Standing Committee recommended that a new biotechnology part for CEPA be established to provide standards and procedures for the assessment of the environmental and human health impacts of biotechnology products (Recommendations 68 and 69). The intention was that this part provide a benchmark for the evaluation of products of biotechnology, including genetically engineered plants, microorganisms, fish, and animals.

Unfortunately, the proposals regarding the regulation of biotechnology contained in the government's response to the House of Commons Standing Committee on Environment and Sustainable Development's report on the Canadian Environmental Protection Act (CEPA) would significantly weaken the existing regulatory framework for biotechnology products established by the Act. The government's response proposes a biotechnology part in CEPA, but its primary purpose would be to exempt from the requirements of CEPA products which are, or may be, regulated under other acts. The current minimum standard for notification and health and environment assessment of all biotechnology products established by section 26(3)(a) of CEPA would be eliminated.

The "safety net" provided by the current Act would also be weakened. Currently, CEPA applies to a product if a regulation requiring notification and assessment of potential toxicity has not been made under another Act. The government s response would change this to CEPA being applicable only where there is no potential to make a regulation related to biotechnology under another Act.

This proposal cannot be supported. Instead, CEPA should be amended in a manner consistent with the intent of the Standing Committee's recommendations. A new biotechnology part should be established under CEPA which would apply to all products of biotechnology which may enter the environment, including those currently proposed to be regulated under other statutes, such as the Seeds Act, Pest Control Products Act, Fertilizers Act, and Plant Protection Act. This new biotechnology part would establish assessment procedures and criteria for all products of biotechnology, and provide for public participation in decision-making regarding biotechnology products. This issue is discussed more fully below in the section dealing with Government Proposal 7.4.

7.2 The Existing CEPA Biotechnology Provisions

CEPA current only makes reference to biotechnology products in its definitions section and section 32, which provides authority to make a notification regulation for products of

biotechnology. In effect, biotechnology products are treated as a category of new substances for the purposes of Part II of the CEPA. Section 26 of CEPA Part II, requires that notice be given to Environment Canada and Health Canada prior to the import, manufacture or sale of a new substance, and that it be assessed for whether the substance is capable for becoming "toxic," as defined for the purposes of CEPA.

Conditions or prohibitions on the import, manufacture, use or sale of a new substance may be imposed by the Ministers of Environment and of Health on substances "suspected of being toxic," although prohibitions on manufacturing or importation are limited to not more than two years. If a new substance is found to be "toxic" for the purposes of CEPA, its import, manufacture, use, or sale may be regulated or prohibited through section 34 of the Act. One of the most important aspects of the existing structure of CEPA is that it provides that all new substances are subject to pre-manufacturing, import or sale notification and assessment of "toxicity." New substances, including all products of biotechnology, can only be exempted from the requirements of CEPA in this regard if they are regulated under another act of Parliament that provides for notice to be given prior to their manufacture, import or sale, and for an assessment of whether they are "toxic" as defined by CEPA. In effect, CEPA is intended to ensure that all substances new to Canada, including products of biotechnology, are subject to notification and assessment requirements, and that a common minimum standard of assessment is used in all assessments.

7.3 Weaknesses in the Existing Biotechnology Provisions of CEPA

The Standing Committee's recommendation that new biotechnology part be added to CEPA was based on a number of considerations. These included the following.

7.3.1 The Treatment of Biotechnology Products as a Adjunct to Chemical New Substances

CEPA currently deal with products of biotechnology as an add-on to the Act's provisions regarding chemical new substances. This approach fails to recognize the special environmental and human health risks posed by biotechnology products which distinguish them from traditional chemical substances. Two major areas of concern have been identified in this regard:

(a) Many biotechnology products include life-forms which are self-replicating. Once released into the environment, they can reproduce, spread and mutate and transfer genetic material. The control of biotechnology products, and their genetic material, once in the environment, will therefore be difficult, if not impossible.

(b) The technologies employed in the development of many new biotechnology products have only emerged over the past twenty years (especially recombinant DNA and cell fusion technologies). The evaluation of such products for potential environmental damage is surrounded by a great deal of uncertainty. Indeed, the scientific literature

reflects wide concerns regarding the lack of adequate methodologies and data to properly assess the environmental and health effects of the products of biotechnology.

The specific environmental risks which have been identified in relation to biotechnology products include:

- the creation of new pests, such as the escape of a transgenic salt tolerant rice from cultivated fields into estuaries;
- the enhancement of the effects of existing pests or creation of new pests through hybridization or gene transfer to related plants or microorganisms;
- the enhancement of the effects of existing pests as a result of the selective pressures provided by plants modified for pest resistance or intensified pesticide arising in conjunction with the modification of plants for pesticide resistance;
- infectivity, pathogenicity, toxicity or other harm to non-target species, including humans;
- disruptive effects on biotic communities, resulting in the elimination of wild or desirable natural species through competition or interference;
- adverse effects on ecosystem processes and functions, such as nutrient cycling; and
- incomplete degradation of hazardous chemicals by microorganisms employed in bioremediation, and waste water treatment, leading to the production of even more toxic by-products.

These specific risks sometimes overshadow the more general risk of reducing biological diversity in any given ecosystem. Introduced species may, for example, disturb food-chains or habitats, which in turn will affect biodiversity. Biotechnology can also threaten the biodiversity through its implicit drive to breed uniformity in plants and animals, and by furthering and encouraging monoculture.

It is important to note that these environmental and health risks not be limited to the introduction of genetically engineered or modified organisms. Naturally occurring organisms can behave as "exotic" species when introduced into ecosystems of which they are not native inhabitants. In addition, the introduction of a naturally occurring species into a natural habitat can have disruptive effects if the species is introduced in very high concentrations or quantities. It has also been argued that certain naturally occurring species of microorganisms that have potential to be used in bioremediation may be opportunistic human pathogens.

7.3.2 Biotechnology and the CEPA "Toxic" Test

The "toxicity" test forms the basis for CEPA's regulation of new substances. New substances must be found "toxic" under the definition employed by CEPA in order to be regulated under the Act. A number of problems have been identified with the definition and application of the concept of "toxicity" under CEPA in relation to chemical substances.

Specifically with respect to products of biotechnology, the "toxicity" standard, which is rooted in chemical toxicology, provides too narrow an evaluative structure in relation to the potential scope of the effects of the use of biotechnology products. It also may be an excessively stringent test in relation to the level of uncertainty regarding the environmental and health effects of biotechnology products. This is especially true with respect to the potential long-term, indirect and cumulative environmental and health risks associated with biotechnology products, such as impacts on biodiversity.

The need to determine that a substance is "toxic" prior to its regulation under CEPA is related to particular constitutional concerns regarding the establishment of the jurisdiction of Parliament to regulate toxic chemicals. However, a strong case can be made that products of biotechnology constitute a unique and bounded subject of national concern, which cannot be dealt with effectively by the provinces acting individually or collectively. Consequently, Parliament may have the constitutional authority regulate biotechnology products through its power to legislate of the Peace, Order and Good Government of Canada, without having to establish that they are "toxic" for the purposes of CEPA. Federal jurisdiction over Agriculture, Fisheries, Trade and Commerce, and Criminal Law in relation to public health, provide additional bases for the establishment of federal regulatory authority over biotechnology products.

7.3.3 Public Participation in Decision-Making

The existing provisions of CEPA regarding the notification and assessment of new substances, including products of biotechnology, make virtually no provision for public participation in decision-making. No notice is provided to the public when new substances enter the assessment process, or when field trials of new substances, including products of biotechnology, are conducted. Furthermore, there are no routes of appeal when a substance is added to the DSL, when information requirements are waived, when conditions on substances "suspected of toxicity" are varied or rescinded, or when a field test of a new substance is approved. Public access to information regarding new substances, including products of biotechnology, is also extremely limited.

7.3.4 Regulation of Biotechnology Products not Regulated through CEPA

The problems related to the adequacy of the legislative framework for biotechnology products are not limited to CEPA. There are also continuing concerns over the scope of the legislative authority regarding environmental and human health evaluations of biotechnology products provided by the statutes under which Agriculture and Agri-Food Canada and other departments currently propose to regulate biotechnology products, using the CEPA section 26(3)(a) exemption through equivalent notification and assessment process mechanism. CEPA is presently the only federal regulatory statute which explicitly establishes regulatory authority in relation to biotechnology products.

In addition, many of the statutes under which it is proposed that biotechnology products be regulated contain no clear legislative authority for the evaluation of regulated products from an environmental or human health perspective. This is particularly true with respect

to a number of the key agricultural statutes including the Seeds Act, the Fertilizers Act, and the Feeds Act. Indeed, an examination of the legislative record in relation to these statutes indicates that they were drafted primarily for the purpose of the prevention of fraud, and no reference was made to the conduct of evaluations for the purpose of the protection of the environment or human health.

This situation leaves significant portions of the government's proposed regulatory framework vulnerable to legal challenge. At best, the proposal to establish regulations for the environmental and human health assessment of biotechnology products under statutes which make no reference to biotechnology, and which provide no explicit authority for such evaluations amounts to a form of legislative amendment through regulation. This practice has been strongly criticized on numerous occasions by Parliamentary Committees, and by legal and constitutional scholars.

There are also a number of additional gaps in the legislative authority provided by such statutes as the Seeds Act, the Fertilizers Act and the Feeds Act. These include:

- the absence of provisions establishing legislative authority for the evaluation of biotechnology products in terms of their likely impacts on biodiversity, or the regulation of the transboundary movement of biotechnology products, despite the likely establishment of such requirements through the proposed Biodiversity Convention Biosafety Protocol;
- the absence of any provisions regarding public participation in decision-making, such as notice and comment provisions regarding major decisions, or public access to information regarding new products;
- the absence of provisions establishing or designating appellate bodies for appeals of decisions made under these Acts, or regarding standing in, or outlining procedures for, such appeals;
- the absence of any provisions regarding civil liability for harm to the environment or human health by regulated products; and
- weak enforcement and penalty structures in comparison to CEPA.

Beyond these legal issues, consideration must also be given to the multiple roles being played by Agriculture Canada in relation to agricultural biotechnology. The Department has acted simultaneously as the lead creator, tester, promoter and regulator of agricultural biotechnology products in Canada. The conflicts of interest inherent in these promotional and regulatory functions must be recognized and addressed.

7.4 The Standing Committee's Recommendations Regarding Products of Biotechnology

In its report, the Standing Committee recommended that CEPA be amended to include a new part to deal specifically with products of biotechnology. This Part was to include minimum notification and assessment standards for all products of biotechnology released into the environment, including those regulated under other Acts. Other federal statutes should only prevail over CEPA in regard to the assessment of the environmental

impact assessment of biotechnology products, if their notification, assessment and regulatory standards are at least equivalent to those prescribed in CEPA. The Committee also recommended that CEPA be amended to require the Governor-in-Council to publish a list of statutes considered to be at least equivalent to CEPA with respect to their assessment processes for products of biotechnology.

7.5 Comments on the Government's Proposals

The government's proposal regarding the regulation of biotechnology products under CEPA represents the most serious retrenchment contained in the government's response to the Standing Committee's report. It has the potential to endanger the health, safety and environment of Canadians by eliminating the minimum pre- manufacturing or importation environmental and health evaluation requirements for products of biotechnology currently provided by CEPA. In effect, the government is proposing to create a new biotechnology part for CEPA, but its primary purpose would be to exempt products of biotechnology from the Act's provisions.

Specific comments on the government's proposals are as follows:

Government Response - Introduction

The introduction to this Chapter of the government response indicates the direction of its proposal. Paragraph 3 of the introduction to the Chapter places the promotion of innovation, encouragement of investment, technology transfer and Canadian competitiveness, ahead of the protection of human health, safety, and the environment. Indeed, the government of Canada fails to acknowledge itself the possibility of adverse environmental or human heath effects arising from products of biotechnology, attributing these concerns to "many."

Potential adverse environmental and health effects related to the manufacturing and use of products of biotechnology have been widely recognized within the scientific community. The government's unwillingness to acknowledge the potential of biotechnology products to cause harm places the health, safety, and environment of Canadians as risk. The protection of the health, safety, and environment of Canadians should be the overriding concern of the government of Canada in the regulation of products of biotechnology. Results of public opinion research indicate that Canadians place a much greater emphasis on the role of governments to protect health, safety and the environment in relation to biotechnology products than on the promotion of the interests of industry.

Recommendation:

93) The Government of Canada should provide a clear statement that the protection of human health, safety and the environment is its primary consideration in the regulation of products of biotechnology.

Government Response 7.1 - Definition of Biotechnology

The government proposes to retain the current definition of biotechnology contained in CEPA. The current definition of biotechnology contained in CEPA is adequate and should be retained.

Recommendation:

94) The current definition of biotechnology contained in CEPA should be retained.

Government Responses 7.2 to 7.4 - Separate Part for Live or Animate Products of Biotechnology

In these paragraphs, the government proposed to establish a new biotechnology part of CEPA, to apply to living products of biotechnology. Unfortunately, the proposed part would seriously weaken the existing provisions of CEPA in a number of ways.

Government Response 7.2 - Scope of the Proposed Biotechnology Part

The government proposes that the scope of the proposed part be limited to "living products of biotechnology." The term "living products of biotechnology" is not defined, and it is unclear if it is intended to apply to genetic material as well as living organisms. The CEPA biotechnology part should be focussed on products of biotechnology which may enter the environment. In general, it should not apply to medical applications of biotechnology (i.e., diagnostic tools) except where these applications may have an impact on the environment or human health beyond the individuals to who have provided their informed consent to the application of the product.

Recommendation:

95) The proposed CEPA biotechnology part should apply to all products of biotechnology which may enter the environment.

Government Response 7.3 - Structure of the Proposed Biotechnology Part

The government proposes to use the existing CEPA section 11 criteria for "toxicity" and Canada's international commitments under the United Nations Convention on the Conservation of Biological Diversity to establish evaluative criteria for biotechnology products under the proposed CEPA biotechnology Part.

As noted earlier, the CEPA section 11 "toxicity" concept may not capture the full range of potential human health and environmental effects of biotechnology products. The potential indirect and long-term cumulative environmental and health impacts of commercial scale uses of products of biotechnology must be considered. Particular attention should be given to the full range of impacts of the pest control and other "systems" of which biotechnology products are sometime integral parts. This must

necessarily include an evaluation of the purposes of products, their capacity to react with and contaminate the natural environment (including naturally-occurring species), and the availability of potentially less harmful alternatives.

Recommendation:

96) The evaluative criteria established by the CEPA biotechnology Part should include consideration of:

- potential immediate or long-term, direct or indirect, harmful effects on human life or health, including cumulative impacts and the effects of occupational exposure;
- potential immediate or long-term, direct or indirect, harmful effects on the environment, including cumulative impacts;
- potential immediate or long-term, direct or indirect, harmful effects on biological diversity, including cumulative impacts;
- the availability and likely effectiveness of monitoring control, waste treatment and emergency response plans with respect the product;
- the potential effectiveness of the product for its intended purpose; and
- the availability of alternative means of achieving the product's purpose which may present lower potential for harm to the environment and human health.

The government's proposals make no provisions for public participation in decision-making regarding products of biotechnology.

97) The new CEPA Biotechnology Part should make the following provisions for public participation in decision-making regarding products of biotechnology:

i) Public Notice:

(a) notification, in the Canada Gazette and/or on the proposed public registry, when applications are made for the approval of the manufacture, use, import or export of new biotechnology products, or products containing new biotechnology products, followed by a public comment period of not less than ninety days following the notice.

(b) notification, in the Canada Gazette and/or on the proposed public registry, of the Ministers' decisions to approve, approve with conditions or prohibit, the import, manufacture, use, sale, export or discharge into the environment of biotechnology products, followed by a public comment period of not less than thirty days for decisions to approve or approve with conditions the import, manufacture, sale, export, or discharge into the environment of biotechnology products.

(c) notification, in the Canada Gazette and/or on the proposed public registry, of ministerial intentions to vary or rescind conditions or prohibitions imposed on the use, import, manufacturing, sale, export or discharge into the environment of biotechnology products, followed by a public comment period of not less than ninety days.

(d) notification, in a newspaper of general circulation in vicinity of the test and on the proposed public registry, of proposals for field tests of products of biotechnology. Direct notification of the owners and occupiers of lands adjacent to the test site should also be required. A comment period of not less than sixty days should follow notice of a proposed field test.

ii) Notices of Objection

Members of the public should be permitted to file notices of objection under the following circumstances (also see recommendations in chapter 3 of this brief):

(a) following public notice of the Ministers' decisions to approve, approve with conditions or prohibit, the import, manufacture, use, sale, export or discharge into the environment biotechnology products;

(b) following public notice of the Ministers' intention to vary or rescind conditions or prohibitions imposed on the use, import, manufacturing, sale, export or discharge into the environment of a biotechnology product; and

(c) following public notice of proposals for field tests of products of biotechnology.

Boards of Review should be required to be established unless the request is frivolous or vexatious, approvals should be suspended until any notice of objection is resolved, and intervenor funding should be provided for bona fide public interest intervenors.

iii) Access to Information

The public should be provided to the information submitted in response to the to the information requirements regarding new biotechnology products in a manner consistent with the following principles:

- the definition of what can be kept confidential be narrowed to include only "trade secrets;"
- the claimant for confidentiality be required to provide supportive evidence of confidentiality when making a claim;
- requests for confidentiality on the identities of substances which will, or may be, released into the environment, should not be permitted;
- requests for confidentiality should not be permitted regarding information on toxicology, ecological effects, epidemiology or health and safety studies; and
- there be a public appeal process regarding determinations that information is confidential.

iv) Biotechnology Release Database

The biotechnology part of CEPA should also provide for the establishment of a data-base on the environmental release of all biotechnology products in Canada. Such a data base

would be of assistance to governments, researchers, and other members of the public in assessing the overall use and effects of biotechnology products released into the Canadian environment. All environmental releases should be required to be entered into the data base, and members of the public should have direct access to the data base.

Government Response 7.4 - Application of the New CEPA Biotechnology Part

The application of the government's proposed CEPA biotechnology part will be much narrower than the current provisions of CEPA, and unlike the existing provisions, no minimum notification and environmental and human health assessment standard will be established for products of biotechnology regulated under other Acts.

The current CEPA provisions require that all products of biotechnology be regulated either under CEPA or another Act of Parliament which provides for pre-manufacturing or import notification and an assessment of potential "toxicity." The government's proposal would weaken this standard in three ways.

First, the government's proposal states that the new CEPA part would not apply to products of biotechnology that may be regulated under other Acts of Parliament. This means that products would be exempted from the CEPA requirements on the basis of a potential to be regulated under another Act, and not the actual existence of notification and assessment regulations equivalent to those made under CEPA, as is presently the case. In practice, this provision would mean that it would be unlikely that the new CEPA biotechnology part would actually apply to any products of biotechnology, including those currently expected to be regulated under the proposed the CEPA New Substances Notification Regulation Part III - Biotechnology Products, such as microorganisms used in bioremediation, mining, waste-water treatment, and other applications.

Second, the government's proposal suggests that there may be "circumstances where (notification and assessment) regulations are not required" for biotechnology products. This means that there may be categories of products of biotechnology which are left unregulated from an environmental and human health perspective. The existing provisions of CEPA require that all products of biotechnology be subject to notification and assessment either under CEPA or under another Act of Parliament.

Third, under the government's proposal, CEPA would no longer provide a benchmark standard of assessment for products of biotechnology regulated under other Acts of Parliament. Currently, in order to obtain an exemption from CEPA, a product must be regulated under another Act which provides for pre-manufacturing or import notification and assessment of its potential to be "toxic" as defined by CEPA. This benchmark standard would be eliminated by the government's proposal. Different standards of notification and assessment would apply to different products of biotechnology depending upon under which other Act of Parliament they fall. Any consistency in notification and assessment processes for biotechnology products in Canada would be lost.

The government's proposal is clearly a major step backwards from the existing provisions of CEPA. It is a distortion of the intent of the Standing Committee's recommendation, and it has the potential to endanger the lives, health and environment of Canadians as well as undermine any consistency in the regulation of products of biotechnology in Canada. It must be rejected for these reasons.

Furthermore, the multiple roles being played by Agriculture and Agri-Food Canada in relation to agricultural biotechnology need to be recognized. The Department has acted simultaneously as the lead creator, tester, promoter and regulator of agricultural biotechnology products in Canada. The conflicts of interest inherent in these promotional and regulatory functions must be addressed.

Recommendation:

98) The new biotechnology part for CEPA should apply to all products of biotechnology which may enter the environment, without exception, including those currently proposed to be regulated under other Acts of Parliament, such as the Seeds Act, Pest Control Products Act, Fertilizers Act, and Feeds Act. The new CEPA biotechnology, and regulations made under it, should be administered by Environment Canada and Health Canada.

Government Response 7.5 - Cost Recovery

The government's proposals on this issue addresses two distinct issues. The first is to establish authority for setting fees for services provided to Canadians in relation to CEPA regarding biotechnology products, such as the conduct of notification and assessment procedures, the issuing of permits, and the monitoring of environmental effects of activities authorized under permits. These proposals deserve strong support. They are consistent with the polluter pays principle, and provide a means of ensuring that Environment Canada and Health Canada's capacity to assess and oversee the importation, manufacturing, testing, sale and use of biotechnology products in Canada is maintained.

Recommendation:

99) The new CEPA biotechnology part should include authority to impose a full-cost-recovery, user-pay system for the processing of notification and assessment information, the approval and monitoring of field trials of products on biotechnology, and monitoring related to conditions imposed on the import, manufacture, use, sale, or export or products of biotechnology.

The government also proposes to establish clear authority for the issuing of permits relative to the importation, testing, manufacturing or use of biotechnology products that are regulated under CEPA. This proposal appears to be consistent with CIELAP's recommendation that the process for granting approvals for field trials, and the import, sale, manufacturing or use of products of biotechnology be clarified. Implicit in this proposal is a separation of federal regulatory authority over biotechnology products from

a finding of "toxicity" under CEPA. This is also consistent with CIELAP's recommendations to the House of Commons Standing Committee.

Recommendation:

100) The CEPA biotechnology part should establish clear authority for the issuing of permits relative to the importation, testing, manufacturing or use of biotechnology products that are regulated under CEPA. This authority should include the capacity to:

- approve the testing, manufacture, use, processing, release or discharge into the environment, sale, offering for sale, import or export the new biotechnology product and products containing the new biotechnology product without conditions;
- approve the manufacture, use processing, release or discharge into the environment, sale, offering for sale, import or export of the new biotechnology product and products containing the new biotechnology product subject to any conditions which the Minister chooses to impose; or
- impose a total, partial, or conditional prohibition of the manufacture, use, processing, release or discharge into the environment, sale, offering for sale, import or export of the biotechnology product or a product containing the new biotechnology product.

Government Response 7.6 - International Commitments

The government proposes to provide authority to make regulations necessary to implement agreements made under international protocols and conventions, where regulations do not exist under other federal Acts. The proposal to have provision of authority to implement international commitments in relation to products of biotechnology which may enter the environment is supported. As Environment Canada and Health Canada would be lead agencies responsible for the environmental and health regulation of biotechnology products, the CEPA biotechnology part should be the government's primary vehicle for the implementation of such commitments.

Recommendation:

101) The CEPA biotechnology part should provide authority to make regulations to implement international agreements regarding biotechnology to which Canada is a Party.

Government Response 7.7 - Application to Pollution Prevention

The government proposes to provide authority in CEPA to set criteria for the effective and safe use of live products of biotechnology in pollution prevention where regulatory authority does not exist under other federal Acts. The rationale for this provision is unclear, as the necessary authority to deal with such products would be provided elsewhere in the proposed CEPA biotechnology part.

Government Response 7.8 - Agreements to Develop, Gather, and Share Data on Biotechnology

The government proposes to provide authority in a renewed CEPA for the Ministers of the Environment and of Health to enter into bilateral, multilateral and international agreements to develop, gather and share data on biotechnology.

Recommendation:

102) CEPA should be amended to provide the Ministers of the Environment and of Health the authority to enter into bilateral, multilateral and international agreements to develop, gather and share data on biotechnology.

7.6 Conclusions

The government's proposal for a new biotechnology part for CEPA would significantly weaken the provisions of the existing Act as they apply to biotechnology. The minimum standards for notification and assessment of toxicity for all products of biotechnology currently provided for by CEPA would be eliminated. The application of the proposed CEPA biotechnology part would also be much narrower than is currently the case. In effect, the government is proposing a biotechnology part which would be unlikely to actually apply to any products of biotechnology, and would not set a standard of assessment for environmental and human health evaluations of biotechnology products under other Acts.

This proposal is inconsistent with the intent of the Standing Committee's recommendations regarding the regulation of biotechnology under CEPA, and could potentially endanger the health, safety and environment of Canadians. Consequently, the government's proposal cannot be supported.

As an alternative, it is proposed that, consistent with the intent of the Standing Committee's recommendations on the regulation of biotechnology products under CEPA, the a new biotechnology part be established under the Act. The new CEPA biotechnology part would:

- apply to all products of biotechnology which may enter the environment, including those which the government currently proposes to regulate under other Acts, such as the Seeds Act, the Pest Control Products Act, and the Fertilizers Act.
- establish requirements for the assessment of biotechnology products in terms of their:

    - potential immediate or long-term, direct or indirect effects on human life and health, the environment, and biodiversity;
    - potential effectiveness of the product for their intended purpose; and
    - the availability of alternative means of achieving the product's purpose which may present lower potential for harm to the environment and human health;

- provide for public participation in decision-making regarding biotechnology products, including:

    - public notice of major decisions regarding biotechnology products;
    - public notice of proposed field tests of biotechnology products;
    - opportunities to appeal government decisions regarding biotechnology products, including the approval of field tests; and
    - enhanced access to information regarding products of biotechnology;

- provide authority to implement international environmental agreements regarding products of biotechnology;
- provide for the establishment of a database of environmental releases of products of biotechnology in Canada; and
- provide for establishment of a full-cost-recovery, user-pay system for the processing of notification and assessment information, the approval and monitoring of field trials of products on biotechnology, and monitoring related to conditions imposed on the import, manufacture, use, sale, or export or products of biotechnology.

This proposal for the establishment of a separate biotechnology part of CEPA is intended to provide the basis of a regulatory structure for biotechnology products which would ensure the protection of environmental integrity and human health, and strengthen public confidence in the government of Canada s valuative and regulatory processes for these products.

Chapter 8: Controlling Pollution and Wastes

8.1 Introduction

Chapter 8 of the government response focuses on a number of issues: international air pollution, fuels, motor vehicle emissions, international water pollution, nutrients, hazardous and non-hazardous wastes and oceans. Some of the proposals are positive (such as the proposals pertaining to the ocean dumping provisions of CEPA) and should be supported. Others weaken the existing CEPA and must be rejected. Each of these areas will be discussed below.

8.2 International Air Pollution

Government Response 8.1 - International Air Pollution

The government proposes to "put to better use the current provisions of Part V" of CEPA. This part of CEPA allows the federal government to develop regulations to control sources in Canada when the Ministers of Environment and Health have reason to believe that air pollution in Canada is creating air pollution in another country or results in or is likely to result in the violation of an international agreement entered into by Canada.

Transboundary air pollution is a major problem both between Canada and the United States and globally. Unfortunately, the U.S.-Canada Air Quality Agreement and other international accords are not the complete answer. Canada must take strong action to curb air pollution emanating from Canada. Part V of CEPA provides the regulatory authority for Environment Canada to undertake this task.

The Standing Committee studied Part V of CEPA. In reviewing this section, it was the Committee s view that these provisions should be used to deal with international air contaminants such as greenhouse gases. In fact, the Committee recommended that these provisions of CEPA be used by the federal government to meet its international commitment to stabilize greenhouse gas emissions at 1990 levels by the year 2000. The Committee also recognized the Liberal Party's commitment to improve energy efficiency and increase the use of renewable energies with the aim of cutting carbon dioxide emissions by 20 percent from 1988 levels by the year 2005.

However, the government proposal is extremely confusing in terms of the proposal's intent and effect. Even though the proposal commits to a "framework" to deal with the problem and "comprehensive management," the effect of this proposal will not meet these commitments.

While ostensibly dealing with international air pollution, the effect of the government proposal would be to pre-empt federal action because, apparently, all federal initiatives would have to be undertaken with agreements with the provinces. Clearly, in the vast

majority of instances, there would be enormous difficulty in getting all of, even most of, the provinces to agree on strong environmental commitments.

Hence, it is preferable at this point in time not to amend Part V of CEPA. The federal government should retain its authority to address sources contributing to international air pollution. Under these provisions there are already clear obligations to consult with the provinces. The federal government already has the legislative power to deal with international air pollution and process to accommodate federal-provincial relations.

Recommendation:

103) Part V of CEPA should be retained as stated. Hence, government proposal 8.1 should not result in any legislative change. While the federal government is under a duty to consult with the provinces, the federal government should be reminded of its overall mandate which is to protect the health of Canadians and their environment. Part V of CEPA is a tool that can be used to deal with various air pollution problems.

8.3 Fuels

The government has outlined a number of proposals with respect to fuels.

Government Response 8.2 - National Standard for Fuels

The government proposes to incorporate into CEPA the authority to make regulations setting national standards for fuels, where the fuels would cross provincial borders or are imported into Canada.

Recommendation:

104) Government proposal 8.2 concerning the addition of authority to make regulations setting standards for fuels that cross borders or are imported into Canada is supported. However, there will be need for public consultation when the government intends to exercise this authority by making regulation.

Government Response 8.3 - Performance Based Regulations

The government proposes to add wording to CEPA to allow regulations to specify a range of characteristics.

Recommendation:

105) Government proposal 8.3 concerning the addition to CEPA of the authority to specify a range of characteristics is supported. However, there will be need for public consultation when the government intends to exercise this authority by making regulation.

Government Response 8.4 - Impact of Fuels on Pollution Control Equipment

The government proposes to add to CEPA wording that would provide authority to deal with the negative impact that certain characteristics or constituents of fuels may have on pollution control equipment.

Recommendation:

106) Government proposal 8.4 concerning adding addition authority to deal with the impact of fuels on pollution control is supported.

Government Response 8.5 - "on the combustion of the fuel in ordinary circumstances"

The government proposes to amend the wording of CEPA to allow for Environment Canada to regulate fuels at other than the combustion stage of use. One example is to regulate evaporation stages which is considered to be a significant source of air pollution.

The Standing Committee made a similar recommendation to amend section 46 and 47 of the Act, and in particular, to ensure that CEPA had adequate authority to permit Environment Canada to regulate additives to protect the environment. Moreover, the Standing Committee wanted this authority to be undertaken based on the weight of evidence.

Recommendation:

107) Government proposal 8.5 is supported. However, it should be made explicit that sections 46 and 47 of CEPA be amended to empower Environment Canada to make regulations in respect of fuels and fuel additives quickly and efficiently, based on a weight of evidence approach.

Government Response 8.6 - Authority to Prohibit Export of Environmentally Harmful Fuels and Fuel Ingredients

The government proposes to address the issue of control of export of fuels. The proposal identifies that position that the government does have the authority to regulate and prohibit the export of most hydrocarbon fuels under the National Energy Board Act. The Standing Committee proposed that CEPA be amended to provide more direct authority to Environment Canada to ensure that the same health and environmental standards are fuels and fuel additives that are applied in Canada are applied to fuels and fuels additives destined for export to other countries.

Recommendation:

108) Despite the position by the federal government that it has the authority to regulate fuels under the National Energy Board Act, a more direct authority is needed under

CEPA to ensure that the standards for fuels and their additives in Canada are applied to fuels and fuels additives destined for export to other countries.

8.4 Motor Vehicle Emissions

The government has made two proposals with respect to motor vehicle emissions: the first to transfer authority over vehicle emissions to Environment Canada; and the second to grant greater authority to regulate.

Government Response 8.7 - Transfer of Authority to Environment Canada

The government proposes to examine the possibility of transferring legislative authority for emissions from new motor vehicles from the Motor Vehicle Safety Act to CEPA, thus consolidating most authority for fuels, fuel additives and vehicles emissions under a single federal Act.

The Standing Committee went further than the government proposal in that it recommended that the authority be transferred.

Recommendation:

109) Legislative authority for vehicle emissions should be transferred from the Motor Vehicle Safety Act and Transportation Canada, to the CEPA and Environment Canada, thus consolidating authority for fuels, fuel additives and vehicle emissions under a single federal Act.

Government Response 8.8 - Additional Authority to Regulate

The government also proposes to give additional authority to regulate emissions from new off-road vehicles and utility engines for equipment such as generators.

Recommendation:

110) The proposal to add authority to regulate emissions from new off-road vehicles and utility engines is supported and should be implemented.

8.5 International Water Pollution

The government proposes to draft new sections for CEPA that would address international water pollution, parallel to those provisions for international air pollution. Also, these provisions would meet the reciprocity requirements of the U.S. Clean Water Act.

The government proposal is supportable and long overdue. However, the government proposal also states that these new provisions "could be modelled on the international air pollution prevention provisions in Part V of the current CEPA." This proposal is

problematic in that, if the government models the international water pollution provisions after the changes proposed in response 8.1, then federal action will be constrained by the need to acquire provincial agreement. As noted above, the proposed changes in response 8.1 have the effect of diminishing the capacity of the federal government to deal with international air pollution. Hence, the proposal to provide authority to deal with international water pollution should be premised on the present Part V of CEPA, not the proposed amendment.

Recommendation:

111) The government proposal to give authority to the federal government to address international water pollution is supported. This authority should be modelled on the existing provisions of CEPA Part V - International Air Pollution.

8.6 Nutrients

The government proposed two changes to Part III of CEPA that deals with nutrients.

Government Response 8.10 - Definition of Nutrient

The government proposed a number of wording changes to the definition of nutrient. These changes were recommended by the Standing Committee.

Recommendation:

112) The government proposal 8.10 pertaining to the definition of nutrients is supported and should be implemented.

Government Response 8.11 - Regulation of Nutrients

The government proposes to undertake a study within the next 12 months regarding the environmental effects of nutrients entering the environment.

The Standing Committee recommended that Environment Canada regulate phosphate content of cleaning agents other than laundry detergents under Part III of CEPA within one year of the tabling of their report. It also recommended a study for nutrients in cleaning agents other than phosphates.

Recommendation:

113) It is appropriate that Environment Canada undertake an in-depth study on nutrients from sources other than laundry detergents. Moreover, upon the completion of the study and the finding of adverse environmental effects, there must be a commitment to regulate as soon as practical after that time.

8.7 Reduction of Hazardous Wastes and Non-Hazardous Wastes

The government proposes a number of reforms to the reduction of hazardous and non-hazardous wastes.

Government Response 8.12 - Waste Definition

The government proposes to embark on a process to develop an appropriate definition of waste to be used in OECD discussions and for domestic purposes.

Recommendation:

114) Canada should develop an appropriate definition of waste. This definition should include hazardous recyclable waste and materials sent to incineration and energy-from-waste facilities.

Government Response 8.13 - Responsibilities of Users and Producers

The government proposes to incorporate the principle of producer and user responsibility into CEPA and would apply this principle to substances as well as products.

Recommendation:

115) The principle of producer and user responsibility should be incorporated into CEPA.

Government Response 8.14 - Maintaining Current Controls

The government proposes to maintain the current authority in CEPA to require notice be given to Canadian authorities before hazardous wastes are exported from or imported to Canada, and to set conditions governing export and import of hazardous wastes for the purposes of disposal and recycling.

Recommendation:

116) The government's proposal to maintain current controls and to set conditions for disposal and recycling is supported. The government should then use this authority to amend current regulations to implement the Basel Convention such that the export of hazardous waste to non-OECD countries destined for recovery-recycling operations be phased-out by the end of 1997.

Government Response 8.15 - Reduce/Phase-out the Quantity of Hazardous Waste

The government proposes that CEPA be amended to require exporters to have plans for reducing/phasing out the quantity of hazardous waste that is being exported for the sole purpose of final disposal. This could include plans to reduce at source, recycle or recover

material from this waste stream. Hazardous wastes being exported for the sole purpose of recycling would not be affected by this provision.

Recommendation:

117) Government proposal 8.15 requiring exporters to have the plans for the reducing and phasing out of hazardous waste is supported. However, this requirement should also include plans for recycling of hazardous wastes since there are environmental releases to the environment occurring in the recycling process and in the use of the recycled material.

Government Responses 8.16 and 8.17 - New Authority to Ban Exports and Imports and New Authority to Control Exports and Imports

The government of Canada proposes to amend CEPA to clarify the authority to make regulations to ban exports and imports of hazardous waste to and from any country when required under international environmental agreements to which Canada is a party. It is also proposed by the government to amend CEPA to give authority to Environment Canada to refuse the export or import of a hazardous waste if the waste in question is not to be managed in an environmentally sound manner according to international agreements to which Canada is a party.

The Standing Committee recommendations on the matter went further than the government proposal. It proposed that CEPA and its regulations should be amended to ban immediately all exports of hazardous wastes destined for disposal to non-OECD countries, and to phase-out the export of hazardous waste to non-OECD countries destined for recovery-recycling operations by the end of 1997.

Recommendation:

118) Further to the recommendation above, CEPA and its regulations should be amended to ban immediately all exports of hazardous wastes destined for disposal to non-OECD countries, and to phase-out the export of hazardous waste to non-OECD countries destined for recovery-recycling operations by the end of 1997. As a general principle, when Canada is party to an international environmental agreement, the requirements for that agreement should automatically be incorporated into regulations.

Government Responses 8.18 and 8.19 - New Controls for Non-Hazardous Solid Wastes and Authority to Ban Exports and Imports

The government proposes to add authority for the government to control the export from and import into Canada of non-hazardous solid wastes for final disposal. The proposal is also to add authority to CEPA to ban the export and import of non-hazardous solid wastes for final disposal.

The Standing Committee recommended that CEPA be expanded to include authority to implement Canada's commitment under the Canada-U.S.A. Agreement on the Transboundary Movement of Hazardous Waste to control the movement of non-hazardous solid to or from the United States.

It has also proposed that the import and export of movement of municipal solid wastes be scheduled within a reasonable time.

Recommendation:

119) Authority should be provided through CEPA to control the export from and import into Canada of non- hazardous solid wastes for final disposal as well as the authority to ban the export and import of non-hazardous solid wastes for final disposal. Further, however, the import and export of movement of municipal solid waste should be scheduled for phase-out within a reasonable timeframe.

Government Response 8.20 - Interprovincial/Territorial Movements of Hazardous Wastes

The government proposes to amend CEPA to include authority to control the interprovincial/territorial movement of hazardous recyclables destined for recovery operations and of hazardous waste for final disposal, through a manifest system, to ensure that such movements are properly tracked and destined to environmentally sound facilities.

Recommendation:

120) Government proposal 8.20 to add authority to control interprovincial provincial/territorial waste movements for recovery and final disposal is supported.

Government Response 8.21 and 8.22 - Implementation of a Cost Recovery System

The government proposes to amend CEPA to provide authority to charge fees for and thereby recover government costs of processing applications, notices and other documents related to the export and import of hazardous wastes and to the movement of those wastes within Canada. Further, there is the proposal to extend the authority for cost recovery to the processing of any applications, notice or other documents for the export and import of non-hazardous solid wastes.

Recommendation:

121) Government proposals 8.21 and 8.22 for the authority to implement a cost recovery system with respect the administration of the Acts provisions regarding the transboundary movement of hazardous and non-hazardous wastes are supported.

Additional Recommendation:

The government response document discusses, without issuing a recommendation, international negotiations concerning commitments with respect to liability and compensation. These are important issues. Not only should these issues be discussed at the international level, but also within Canada.

122) The government should establish a liability and compensation regime related to environmental damage arising out of the transboundary movement of hazardous wastes.

8.8 Ocean Disposal

8.8.1 Introduction

The Standing Committee recommended a number of relatively minor changes to the ocean dumping provisions in CEPA (Part VI). The government has responded to most of these recommendations positively, although several recommendations have been ignored and the support for others is equivocal.

The limited nature of both the Committee's recommendations and the government's response should not be taken as a sign that all is well in Canada's oceans. Ocean dumping is a relatively small contributor to marine pollution in Canada. As stated by Resource Futures International in their evaluation of CEPA, "The fundamental problem is that Canada currently does not have an effective overall strategy to address the problem of land-based pollution. Land-based sources constitute up to 80% of marine pollution.."

Even where ocean dumping occurs, land based pollution is often the source of the problem. Ninety percent of all material dumped at sea under ocean dumping permits is ocean sediment, much of which is contaminated with toxics from land based activities. Heavy metals, agricultural chemicals, and organic compounds in dredged material are dangerous because of both persistence, toxicity and their bioaccumulation potential. The key answer to reducing these sources of pollution lies not in improving ocean dumping provisions of CEPA but in improving regulation of toxics.

8.8.2 The Existing CEPA Ocean Dumping Provisions

The provisions of CEPA Part VI, and its predecessor, the Ocean Dumping Act, closely reflect developments in international law. The international community adopted the London Dumping Convention in 1972 after belated recognition that the ocean could not continue to be used as an unlimited dump ground for everything from fish offal and construction debris to municipal waste and toxic waste. The London Dumping Convention has been improved over the years, being amended most recently in 1993 to prohibit the dumping of most industrial wastes. Most recently signatories have developed a Waste Assessment Framework aimed at reducing the use of oceans for dumping. Agenda 21 also calls for reduced ocean dumping.

Part VI of CEPA regulates ocean dumping through a system of permits and inspection. Part I of Schedule III lists substances that may not be dumped, and Part III of Schedule

III lists a number of factors to be considered in the issuance of ocean dumping permits. Under section 71(3) the Minister may not generally grant permits for dumping unless in the opinion of the Minister either

(a) in the substance will be rapidly rendered harmless by physical, chemical or biological process of the sea, or

(b) in the substance does not contain prohibited substances in a quantity greater than that permitted by the regulations.

The Ocean Dumping Regulations, 1988 specify the information that must be provided in an ocean dumping permit application and specifies maximum concentrations of certain substances that may be dumped. The Regulations also set a $2,500 permit fee.

8.8.3 Weaknesses in the Existing Ocean Dumping Provisions of CEPA

As noted in the introduction, Canada's greatest failure in dealing with ocean pollution is its failure to fully regulate land based sources of pollution. The best means of eliminating the source of marine pollution is improving Canada's regulation of toxics and reducing overall land-based pollution.

While Part VI of CEPA may not be the mechanism which controls all sources of ocean pollution, there are still a number of improvements that can be made to Part VI and its administration.

First, Part VI has a limited conception of ocean dumping. It is restricted to dumping from ships, aircraft etc., and does not include disposal off wharves and in the intertidal zone. Nor does the definition of dumping in CEPA include disposal of ships, drilling platforms and other manufactured structures. (It appears that CEPA is administered to include these activities. Inclusion would be consistent with the definition of dumping in the London Dumping Convention.)

Whether or not Canada's regulation of toxics and control of land-based pollution are improved, there will be a continued need to ensure that dumping of sediments and other waste does not cause damage to the environment. Environment Canada's administration of the Part VI has improved in the last decade, with increased attention to monitoring of dumping sites.

Environment Canada is in the process of developing sediment quality interim guidelines for a number of substances aimed at ensuring against adverse environmental impacts. Present and future guidelines may be inadequate in identifying long term effects caused by persistent toxics in sediment. Ongoing development of guidelines should be aimed at ensuring that long term impacts of contaminated sediment are fully considered. Where long term impacts are not fully understood the precautionary principle should be applied.

Part of the difficulty in setting appropriate guidelines for sediment quality is the poor level of understanding regarding the cumulative effects and long term fate of contaminants in dumped material. This level of understanding can only be improved by extensive environmental effects monitoring. Monitoring of dump sites has improved markedly but is dependent on budgetary allocations.

It should be noted that sediment quality guidelines do not have the effect of law. Section 71(3) of CEPA allows permits to be issued where concentrations of prescribed substances is below specified limits or where biological processes would rapidly render substances harmless. Section 71(3) suggests that permits may be issued even where biological processes would not render a substance harmless.

Other weaknesses in the ocean dumping provisions of CEPA include:

Failure to fully incorporate pollution prevention principles: The permit application form used in the Ocean Dumping Regulations, 1988 requires applicants to list efforts to reduce, reuse and recycle material dumped, but neither CEPA nor the regulations clearly incorporate a pollution prevention hierarchy or refer to the pollution prevention principle. (Part III only states that Environment Canada should consider the practical availability of alternative land-based methods of treatment, disposal or elimination.)

Failure to fully incorporate the polluter pay principle: A flat fee of $2,500 is charged to cover Environment Canada's cost of processing applications, but the fee does not fully recover the complete cost of monitoring, enforcement, or public consultation, let alone the environmental costs of dumping. Also, the fee does not vary depending on the nature or quantity of the material dumped. The low cost of ocean disposal is likely a factor in the failure to develop adequate fish offal recycling facilities on the East Coast.

Public Involvement: The Ocean Dumping provisions of CEPA are also weak in terms of their provisions for public involvement. The public has no regulated role in the selection of ocean dumping sites. While permit applicants or holders can require a Board of Review if a permit is denied or amended, the public has no right to even request a Board of Review in challenging a permit issuance. Even if the public did have such a right it would be negated by the possibility that dumping can occur within one day of public notice being given.

8.8.4 The Standing Committee's Recommendations regarding Ocean Dumping

The Standing Committee made a number of recommendations to improve the ocean dumping provisions of CEPA. Firstly, the Committee recommends that Part VI be amended to include explicit references to the polluter pays principle, the ecosystem approach, the precautionary principle and the pollution prevention principle. Also they recommend incorporation of these principles in practice. For instance, the Committee has recommended that permit fees fully cover all monitoring, enforcement and permit administration costs. Other recommendations include expansion of the definition of ocean dumping and proof that ocean dumping is the environmentally preferable disposal

method, development of recommendations for the environmentally sound disposal of contaminated sediment, and improved public process.

8.8.5 The Government's Response to the Standing Committee's Proposal

The government has responded positively to most of the recommendations in the Standing Committee's Report. The government response includes a number of proposed improvements to the current regulation of ocean dumping.

Other proposals and several failures to make proposals require comment.

Guiding Principles

The Standing Committee recommended amendments to Part VI of CEPA to include explicit references to the polluter pays principle, the ecosystem approach, the precautionary principle and the pollution prevention principle. This call for incorporation of guiding principles into Part VI of CEPA is not referred to in the government's response, other than the government's suggestions for changes to the preamble and declaration section of CEPA. (When suggesting these changes many of the suggested definitions are significantly weaker than recommended by the Standing Committee). Incorporation of fundamental principles such as the ecosystem approach, precautionary principle and pollution prevention principle directly into Part III of Schedule III to CEPA will ensure their consideration in the issuance of permits.

Recommendation:

123) The government should amend Part VI of CEPA to include explicit references to the polluter pays principle, the ecosystem approach, the precautionary principle and the pollution prevention principle. These principles should be defined as recommended by the Standing Committee. Part III of Schedule III should also be amended to incorporate the ecosystem approach, the precautionary principle and the pollution prevention principle as principles to be considered in the issuance of ocean dumping permits.

Government Response 8.23 - Environmental Objectives and Codes of Practice

The government proposes to amend CEPA to authorize the creation of environmental objectives and codes of practice to preserve the quality of coastal areas and to guide reduction of contamination from land-based sources of pollution.

Recommendation:

124) The proposal to authorize environmental objectives and codes of practice is supported.

Government Response 8.24 - Definition of "Dumping"

The government response calls for amending the definition of dumping to include disposal from wharves and intertidal zones. This is a positive improvement.

The government has not responded to the Standing Committee's recommendation that the definition of "ocean dumping" be expanded to include the destruction and subsequent dumping of manufactured structures such as ships, etc. As discussed previously this amendment would be consistent with both the administrative practice under CEPA and the London Dumping Convention.

Recommendation:

125) The definition of 'dumping' should be amended to capture both dumping in the intertidal zone and off wharves and to include disposal of ships, and other manufactured structures such as artificial islands and platforms.

Government Response 8.25 - Creation of a List of Wastes Authorized for Disposal in the Ocean

The government has proposed an exclusive list of authorized material and wastes which may be disposed of in the ocean. The use of an exclusive list is preferable to the existing scheme in Part VI of CEPA. However, the acceptability of disposal of many of the items on the list will depend on the administration of ocean dumping permits. For instance, a recent article in the B.C. Environmental Report was critical of Environment Canada for allowing the sinking of ships containing asbestos and toxic anti-fouling paint. Clear publicly accessible protocols for disposal of all types of waste which can be dumped would help ensure a minimum standard is adhered to. There do not appear to be any clear protocols for disposal of materials other than sediment.

Recommendation:

126) The government should continue with its proposal to use an exclusive list with materials for ocean dumping. However, protocols governing permit issuance for all materials that can be dumped should be developed and made publicly accessible.

Justifying the Need for Ocean Disposal

The government has committed to examining the final version of the Waste Assessment Framework to ensure that it is accurately reflected through CEPA provisions, and, if not, to make necessary adjustments. The government then states that the final version of the Waste Assessment Framework may include requirements to recycle, reuse or treat waste if opportunities exist to do so.

Recommendation:

127) Either Ocean Dumping Regulations, the text of CEPA or Part III of Schedule III should be amended to clearly require proof that re-cycling, re-use or treatment are unfeasible or unsafe. Clear incorporation of pollution prevention principles should not be dependent on the extent to which they are included in the WAF.

Government Responses 8.26 and 8.27 - Environmentally Preferable Method

The government also notes that the Waste Assessment Framework may be amended to require a comparative assessment of different disposal options to ensure that ocean disposal is the environmentally preferable option. The recommendation of the Standing Committee was that permit applicants be responsible for proving that ocean disposal was the best option from an environmental perspective.

Recommendation:

128) Permit applicants should be responsible for proving that ocean disposal is the best option from an environmental perspective. This principle should not be dependent on its inclusion in the WAF. Section 71(3) of CEPA should be amended to prohibit issuance of an ocean dumping permit if the Minister is not of the opinion that substances being dumped are either harmless or will rapidly be rendered harmless.

Government Response 8.28 - Disposal of Contaminated Substances

The government proposes continued consultation on national guidelines for contaminated dredge sediments.

Recommendation:

129) This government should continue its work in this regard, ensuring that long term sub-lethal impacts of contaminants are considered. Adequate resources should be allocated to the quick completion of interim guidelines.

Government Responses 8.29 and 8.30 - Applicant and Ocean Dumping Fees

The government proposes applicant fees that will cover the cost of evaluating ocean dumping proposals and sliding scale disposal fees. These fees are intended to cover partial or full costs of permitting, pollution prevention and environmental effects monitoring. These recommendations are significant steps forward, although consideration should be given to creating a specific fund for long term monitoring.

Recommendations:

130) The proposals are supportable. However, the government could improve on this commitment by creating a special fund for environmental effects monitoring.

131) The government should also commit to full cost recovery from fees. Reference should be made to Recommendation 29 of this submission for more detailed comment.

Government Response 8.31 - National Ocean Disposal Database

The government intends to develop a national ocean disposal database by 1997 which would be part of the public electronic registry.

Recommendation:

132) The government proposal for the development of a national ocean disposal database is supported. Reference should also be made to Recommendation 31 of this submission for additional comment.

Government Response 8.32 - Granting of Ocean Disposal Permits - Notification and 10-Day Objection Period

The government proposes that there is a ten day period during which members of the public can file a notice of objection with respect to the issuance of a ocean disposal permit.

The ten day period for the filing of the notice of objection is too short. It should be extended to thirty days. Experience, with other legislation such as Ontario's Environmental Bill of Rights and limitation periods in other provincial legislation indicates that parties are hard pressed to meet thirty day limitation periods. Ten day limitation periods for notices of objection may simply be so tight as to be useless in practice. Indeed the current limitation for ocean dumping permittees filing a notice of objection is thirty days and the limitation period for filing notices of objection in other parts of CEPA are generally sixty days.

Recommendation:

133) The government proposal for the ability for the public to file notices of objection is supported. However, the ten day period is simply too short a time. This period should be extended to thirty days.

Government Proposals 8.33 and 8.34 - 10 Day Notices

The government proposes to retain the right of an applicant to file a notice of objection, but this notice must be filed in ten days. Where no notices have been filed by either the public or the applicant, the permit would take effect at the end of the ten days.

Recommendations:

134) The period for the filing of all notices of objections should be thirty days.

135) The permit should take effect after thirty days if no notices of objections have been filed.

Government Response 8.35 - Refusal by Minister to Issue Permit

The government proposes that notices of objections can be filed by the applicant or the public where there has been a refusal to issue a permit; vary its terms; or revokes or cancels a permit. There is a ten day period to file the notice.

Recommendation:

136) The proposal to permit notices of objections where ocean dumping permits have been refused, varied or revoked is supported. However, the ten day period to file the notices should be extended to thirty days.

Government Response 8.36 - Convening Boards of Review

The government proposes that CEPA have a requirement that the Minister be required to convene a Board of Review in all the cases where a notice has been filed unless the Minister determines that the objection or objections are frivolous or vexatious.

137) The proposal to require boards of review in certain circumstances is supported.

Government Response 8.37 - Consideration of Notices

The government proposes the require the Minister to consider all notices of objection and report on how the Minister took the objections into account in making his or her decision.

138) The proposal to require the Minister to consider all notices is supported.

Chapter 9: Controlling Toxic Substances

9.1 Introduction

Chapter 9 of the government response deals with the proposals for reform of Part II of CEPA - the part of the law that addresses the issue of toxic substances. Essentially, the reforms proposed would slightly increase the number of substances assessed, clarify the interpretation of some of the various provisions within Part II, and incorporate parts of the Toxics Substances Management Plan. Moreover, it is uncertain at best, and probably unlikely, that the proposed reforms will address even the most important weaknesses of current regime. Some of the problems identified under the current law include:

- the small number of individual substances that are placed on the Priority Substances List (PSL);
- the failure to complete assessments of the "toxicity" of 13 of the 44 substances placed on the PSL in 1988 within the prescribed 5 year time-frame;
- the finding of a number of substances known to have toxic properties and to be present in the Canadian environment, such as Toluene and Used Crankcase Oils, not to be "toxic" for the purposes of the Act; and
- since CEPA came into force only three regulations on toxic substances have been put in place.

9.2 The Recommendations of the Standing Committee

The Standing Committee on Environment and Sustainable Development, in chapter 5 of its report, called for major overall Part II of CEPA. One of its essential themes was a call for the incorporation of the concept of "inherent toxicity" and a revision to the section 11 definition of "toxicity" to accommodate the incorporation of this term (Recommendation 9). To further the inherent toxicity concept, the Committee proposed two mechanisms: first, a new regulation would be established with specific criteria for inherent toxicity and any substance meeting that criteria would be deemed to be toxic (Recommendations 14 and 15). Substances on the Domestic Substances List (DSL) would be evaluated in light of the criteria and if found to meet the criteria, they would be targeted for sunset. An appeal route was given to those that use or generate the substances (Recommendation 16). Second, those substances that have been banned or phased-out in another OECD country or Canadian province would also be deemed to be toxic (Recommendations 13 and 18). Finally the Committee made a number of recommendation to deal with the problem where there is insufficient information to make an assessment within the required five years (Recommendations 20 and 21).

The Committee's recommendations present a bold new direction for CEPA. It is a vision that implements the Liberal government's commitment to phase-out persistent toxic substances.

9.3 The Weakness of the TSMP

The proposals for the reform of Part II of CEPA are so confusing that it is difficult to understand either how it will work or its effect. One reason for this confusion is that the government proposals are hinged upon the Toxic Substances Management Policy (TSMP). Since the TSMP is extremely problematic, so too then the government proposals. The TSMP was released for discussion in mid-1994, in the midst of the Parliamentary Review of CEPA. It was finalized and released in June of 1995, a matter of weeks before the release of the report of the Standing Committee on Environment and Sustainable Development.

Environmental organizations were highly critical of the proposed policy. In a document entitled "A Response to the Proposed Toxic Substances Management Policy for Canada" a number of comments were made with respect to the policy. The highlights of these comments can be summarized as follows:

- in the proposed definition of virtual elimination is inconsistent with the principles of pollution prevention, the definitions set out by international agencies such as the International Joint Commission and the government's own pollution prevention policy statement, Pollution Prevention: A Federal Strategy for Action;
- in the definition of "environment" as outlined in the TSMP excludes occupational environment;
- in the criteria of "predominantly anthropogenic" appears to excludes elements and other naturally occurring substances known to have significant health and environmental effects, such as lead, cadmium, and mercury, from action under the TSMP;
- in the proposed definition of persistence is inconsistent with the definition of persistence set out by other agencies, including the International Joint Commission, and the definition contained in the Great Lakes Water Quality Agreement;
- in the proposed definition of bioaccumulation is too high and inconsistent with the definitions employed by other agencies;
- in substances are required to be toxic, persistent and bioaccumulative to be on Track 1. A combination of toxicity and persistent, or toxicity and bioaccumulative should be sufficient to place a substance on Track 1;
- in the deliberate use and manufacturing of Track 1 substances would be permitted to continue;
- in there is no commitment to action with respect to Track 2 substances except to encourage voluntary action by users and manufactures of the substances in question; and
- in no clear procedures are provided for the "reverse onus" appeal process regarding Track 1 substances.

The full submission outlining in detail these criticisms is given in Appendix G.

It is curious and unfortunate that the government decided to release the TSMP when: (a) there was severe criticism of the TSMP during the public consultation, none of which were addressed with the re-drafting of the TSMP; and (2) the government knew or ought to have known that the Standing Committee on Environment and Sustainable Development would be commenting on exactly the same issues addressed in the TSMP. There is an inescapable conclusion that the TSMP was released to pre-empt a more full and comprehensive debate and to thwart the kinds of reforms that were to be forthcoming by the Standing Committee.

The TSMP cannot stand in the way of legislative reform to CEPA, and the kinds of reform needed to address the problems being cause the continued use and release of toxic substances in Canada.

Recommendation:

139) The TSMP as a policy should be reviewed and its fundamental weaknesses which must be addressed in the context of CEPA. The current TSMP should not be a barrier to a more effective CEPA; instead, CEPA should be considered the legislative opportunity to overcome the weaknesses of the TSMP.

9.4 What is Needed - A Simple, Predictable Method to Identify and Address Toxic Substances in Canada

Chapter 9 of the government's proposal could result in a more complex and less effective regime than the present one depending on how it is interpreted and how it is implemented. What is needed is a clear legislative mandate and process to identify, assess and regulate toxic substances.

The Standing Committee's recommendations provide a solid framework in this regard although it too could be strengthened. One of the cornerstone concepts found in both the government response and the Standing Committee's recommendations is the recognition of the concept of inherent toxicity - the ability to find a substance toxic owing to its attributes or characteristics, without proof of actual harm through exposure.

The new Part II CEPA regime should be composed of three components:

1) in constructing an enhanced Priority Substances List;

2) in re-defining the "toxicity" for the purposes of the Act; and

3) in applying an enhanced management regime on CEPA "toxic" substances.

9.4.1 Constructing A New Priority Substances List (PSL)

The PSL should be used as a vehicle to identify more substances of concern for the purposes of assessment. In this context, "assessment" should not only refer to risk

assessment of substances, but hazard assessment also. To this end, the PSL should consist of the following components:

(i) all substances on the DSL that meet specified criteria for such characteristics as inherent toxic properties (such as acute lethality, chronic/sub-chronic toxicity, carcinogenicity, teratogenicity, genotoxicity, and the ability to disrupt endocrine systems), persistence and bioaccumulation. This list of characteristic could expand over time as more properties are recognized;

(ii) substances banned, phased-out or severely restricted in other OECD jurisdictions or in a Canadian province or territory; and

(ii) other substances identified through the existing PSL nomination process.

The PSL, therefore, would be a considerable longer list of substances than to date. It would contain both substances that have been placed their because of their known properties, because substances have been regulated in another country or province or because they have been identified as priorities for assessment through nominations.

9.4.2 Re-Defining "Toxicity"

The current definition is a barrier to the appropriate assessment regime for toxic substances. The problem with the current definition is that:

- evidence is needed of toxic properties, evidence of entry into the environment; and exposure at a sufficient levels to cause effects and evidence of actual effects; and
- many substances on the PSL with toxic properties were found to be not "toxic" or not assessed due to lack of data regarding exposure or effects.

A new definition of toxicity would remove the exposure component of the definition. A proposed definition is given in Recommendation 143 of this brief pertaining to government proposal 9.5. In effect, it would lower the threshold of proof in the exposure component of the assessment to only require evidence of entry or potential entry into the environment. Evidence of exposure in amounts sufficient to cause effects to the environment, danger to the environment or danger to human life and evidence of actual effects would not be required to establish "toxicity" for the purposes of CEPA.

The implication of a new definition of toxicity is that the concept of inherent toxicity could be implemented. Hence, there would be three ways to have a substance could be found to be toxic:

1) it is assessed "toxic" according to the existing risk assessment protocols;

2) it could be assessed as being "toxic" on the basis of having inherent toxic properties such as acute lethality, chronic/ sub-chronic toxicity, carcinogenicity, teratogenicity, genotoxicity, or the ability to disrupt endocrine systems; or

3) it could be "deemed" toxic on the basis of having been banned, phased-out, or severely restricted in another OECD country or a Canadian province.

A fourth means of finding a substance toxic should also be considered, namely, substances being targetted for action through an international agreement which Canada is a party.

9.4.3 Applying a Management Regime for CEPA "Toxic" Substances

Toxic substances should be dealt with on a two-track system.

1) Track 1 Substances: Toxic substances meeting defined criteria, such as persistence and bioaccumulation, specified through a regulation, would be targeted for virtual elimination. Virtual elimination would be defined as the elimination of the manufacturing, use, sale, generation, import, export and release into the environment of the substance in question in Canada.

2) Track 2 Substances: All other "toxic" substances. These would be subject to regulatory control within a two-year timeframe. In addition, all "toxic" substances would be subject to requirements for mandatory pollution prevention planning as well.

Recommendation:

140) CEPA must be provide a clear mandate and structure to address the problem of toxic substances in Canada. To further this goal,

> (i) there must be an increase in the number of substances assessed and eventually regulated. One of the most important mechanisms to realizing this goal is to develop a methodology for evaluating and eventually regulating classes of substances. (ii) to achieve this goal, CEPA should be amended such that:
>
> (a) the PSL is expanded by including:
>
> (1) all substances on the DSL that meet specified criteria such as inherent toxicity, persistence and bioaccumulation. This list of characteristic could expand over time as more properties are recognized; (2) substances banned, phased out or severely restricted in another OECD jurisdiction or in a Canadian province; and (3) other substances identified through the existing PSL nomination process;
>
> (b) the section 11 definition of "toxic" is amended to:
>
> 1) accommodate the concept of assessing substances on the basis of their inherent toxic properties; 2) to permit substances banned, phased-out or severely restricted in another OECD jurisdiction or

in a Canadian Province to be deemed "toxic" for the purposes of CEPA; and 3) to permit substances banned, phased-out or severely restricted through an international agreement to which Canada is a Party, to be deemed "toxic" for the purposes of CEPA; and

(c) establish a regulatory regime with:

1) a Track 1 for "toxic" substances targeted on the basis of specific criteria for virtual elimination; and 2) a Track 2 for "toxic" substances targeted for less severe regulation but mandatory pollution prevention planning.

While this is the basic model proposed, elaborations of some of the components are outlined in the comments on the specific proposals put forth by the government.

9.5 Comments on the Government's Proposals

9.5.1 Prioritizing Substances for Action

The government response proposes three mechanisms to identify priorities substances for action. Under the proposal, substances can become candidates if (a) they met certain criteria; (b) they have been banned, sunsetted or severely restricted in an OECD country or Canadian province; and (c) they have otherwise been placed on the PSL through the current CEPA nomination process.

Government Response 9.1 - Substances Meeting Persistent or Bioaccumulation or Other Criteria

The government proposes to introduce a number of measures relating to prioritizing substances based on express criteria. More specifically, it is proposed that:

(a) substances on the DSL would be categorized with respects to persistence or bioaccumulation and inherent toxicity to environmental organisms;

(b) substances on the DSL with the greatest potential for exposure for Canadian would be categorized; and

(c) substances categorized would be candidates for screening level risk assessments based on science, which could result in no further action, addition to the PSL or proposal for preventative or control action consistent with the TSMP.

This proposed mechanism to prioritize substances is supportable in principle. The thrust of this proposal is to accept the principle of inherent or intrinsic toxicity. However, it has a number of significant weaknesses which must be addressed. Most importantly, the criteria for inherent toxicity is too narrowly defined. A substance should be a priority for action if it has any array of toxic properties, including, but limited to, persistence, ability to disrupt endocrine systems, among others. The present proposal should include the

authority to develop criteria for inherent toxicity, without limiting the authority to the present state of knowledge. Comment on the definition of this criteria is discussed below.

The government proposal intend to categorize substances for the purposes of identifying which substances should be priorities for action. The problem is that there is no requirement that anything has to be done, once identified. It seems that substances can be deemed toxic, placed on the PSL or simply ignored. Why go through this process if the substance, even if meeting the criteria, does not result in any action? Criteria should be identified such that any substance meeting that criteria should be automatically deemed toxic and then targeted for phase-out. Once a substance has been found to meet the criteria, it should be phased out according to an orderly schedule.

Recommendation:

141) It is recommended that criteria should be established that, if met, substances on the DSL will be placed on the PSL. The criteria should include inherent toxic characteristics (such as acute lethality, chronic/sub-chronic toxicity, carcinogenicity, teratogenicity, genotoxicity, and ability to disrupt endocrine systems) and persistence or bioaccumulative potential.

Government Response 9.2 - Substances Banned, Sunsetted or Restricted in an OECD Country or a Province

The government response would also identify substances that have been banned, sunsetted or restricted in an OECD country or another province.

Recommendation:

142) CEPA should be amended that substances on the DSL that have been banned, phased-our or severely restricted in another OECD jurisdiction or Canadian province are added to the PSL.

Government Response 9.3 - Nomination through Existing PSL Development Process

The third mechanism to prioritize substances for action is to continue with the present PSL process.

Recommendation

143) This proposal is supported, except that the thrust of the nomination process should focus on classes of substances rather than individual substances.

Government Response 9.4 - Conditions for Deletion of Substances from the PSL

The government proposed to clarify that the Minister can only take a substance from the PSL if the substance has been assessed to be toxic or not toxic. This section would

remedy the situation where the Minister has taken substances off the PSL that have not been assessed. The fact that the Minister believes that there is unfettered discretion to remove PSL substances that have not been found to be toxic or non- toxic, means that all public remedies and rights can be extinguished by the Minister removing substances. For example, if a substance has been on the PSL for five years or more and has not been assessed, any person can file a notice of objection and demand a board of review. However, the Minister at this point in time can remove those substances at any time and effectively defeat the public remedy.

Recommendation:

144) The proposal to ensure that the Minister can only delete substances from the PSL if they have been assessed to be toxic or not toxic is strongly supported.

9.5.2 Deciding Which Substances are Toxic Under CEPA

The government has made a number of proposals to clarify the circumstances as to when a substance is "toxic."

Government Response 9.5 - 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 CEPA is inappropriate and does not fulfil 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 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 the finding of PSL substances known to have intrinsic "toxic" properties not to be "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.

In effect, the current definition has defeated the very purpose of Part II of CEPA. Of the 44 substances on the Priority Substances List, 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 of effort, 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:

145) 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 such as acute lethality, chronic/ sub-chronic toxicity, carcinogenicity, teratogenicity, genotoxicity, and ability to disrupt endocrine systems. This approach should be reflected in a redrafted CEPA section 11 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."

Government Response 9.6 - Virtual Elimination of Track 1 Substances in TSMP

The government response proposed to legislate in CEPA the virtual elimination of Track 1 substance as set out in TSMP. The overall goal of CEPA should be the phase-out of persistent toxic substances, and any other substance that meet the criteria (such as endocrine disruptors). As such, substances scheduled for phase out should be all those substances that meet the phase-out criteria, which could be broader than the characteristics of persistence and bioaccumulation.

Recommendation:

146) All "toxic" substances that meet established criteria should be scheduled virtual elimination. These criteria may include persistence and potential for bioaccumulation. Other substances may be targeted for virtual elimination in the criteria apart from persistent substances, such as endocrine disruptors.

147) It should be made clear that toxic substances will be dealt with on two tracks: Track 1 criteria would be defined by regulation, which if met, would target the substance for virtual elimination. All other toxic substances would be Track 2 substances for which control and prevention measures and mandatory pollution prevention planning would be required.

Government Response 9.7 - Definition of Virtual Elimination

The government response proposes to define virtual elimination in the same way as it is defined in the TSMP. According to the proposed TSMP, the definition of virtual elimination is "no measurable release" into the environment.

The TSMP definition of virtual elimination should be rejected. There are a number of reasons which support the rejection of the proposed definition.

The Proposed Definition is Inconsistent with the Concept of Pollution Prevention

The "no measurable release" definition of virtual elimination promotes a pollution control approach rather then a pollution prevention approach. No "measurable release" gives legitimacy to continuing pollution control techniques that attempt to reduce emissions at the end-of-the-pipe to the non-detectable level rather than focusing up-the-pipe process change. This approach will force industry to invest in much more expensive, and ultimately less efficient, end-of-the-pipe measures. These investments will preempt other pollution prevention investments. In effect, these facilities will be held "hostage" to traditional pollution control technologies rather than pursuing pollution prevention strategies. The definition of virtual elimination should focus on pollution prevention activities that avoid or prevents the use and generation of toxic substances. Its strength is that it emphasizes changes in the industrial process through such techniques as raw product substitution, process reformulation, substitution, among other such techniques.

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

Apart from the general concern, there are also practical problems of trying to define what is meant by "no measurable release." Most important, who will define what is the "not measurable" limit? How will that limit be set? What happens if detection technology improves? The reality is that the determination of what is the "no measurable release limit" will be more difficult to implement in practice than a definition based on pollution prevention.

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

In its Seventh Annual report, the International Joint Commission (IJC) re-iterated its previous approach and views and states:

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

Further, the Commission noted:

We know that it is impossible to achieve that objective -- virtual elimination and restoration of integrity -- if we continue to input those persistent toxic substances generated by human activities.... Zero discharge means just that: halting all inputs from all human sources and pathways to prevent any opportunity for persistent toxic substances to enter the environment as a result of human activity. To prevent such releases completely, their manufacture, use transport and disposal must stop; they simply must not be available. Thus, zero discharge does not mean less than detectable.

The Commission has implicitly rejected the "no detectable level" definition for virtual elimination.

The Proposed Definition is Inconsistent with the Document - Pollution Prevention: A Federal Strategy for Action

In its July 1995 policy statement, Pollution Prevention: A Federal Strategy for Action, the federal government committed to the pollution prevention approach. The definition of virtual elimination to include "no measurable release" is contrary to this policy statement.

Recommendation:

148) The concept of defining "virtual elimination" as "no measurable release" should be rejected. Virtual elimination should be defined as the elimination of use, manufacturing, sale, import, export or release into the environment of the substance in question.

Government Response 9.8 - Deeming Toxic Substance Banned, Phased-Out or Restricted in OECD Countries or Provinces

The government proposes to deem toxic those substances that have been banned, phased-out or severely restricted in other OECD countries or provinces. This is a very positive proposal that should be supported.

Recommendation:

149) It is recommended that government proposal 9.8 be implemented. Substances deemed "toxic" in this manner should be targeted for action at least as stringent that taken in the jurisdiction in which they have been banned, phased-out or severely restricted.

150) It is recommended that CEPA be amended to permit substances targetted for action through international agreements to which Canada is a Party, to be deemed "toxic" for the purposes of the Act.

Government Response 9.9 - Requirement for Further Information Gathering

The government proposal to strengthen the information gathering provisions of CEPA is strongly supported. Those interests that will produce, generator, use or release these substances should take increased responsibility for information gathering, including additional testing.

Recommendation:

151) It is recommended that government proposal 9.9 be implemented.

Government Response 9.10 - Where there is Insufficient Information for the Determination of Toxicity

The government proposal to establish a time frame to complete assessments, even where there is a lack of information, is a positive step and a proposal that should be supported. This proposal will assist in avoiding the problem that occurred in the context of the first round of the PSL where the assessment for 13 substances could not be completed.

Recommendation:

152) It is recommended that government proposal 9.10 be implemented.

9.5.3 New Substances

Government Response 9.11 - Mandatory Reporting of Significant New Uses

The government proposes to amend to CEPA enable the ministers to require the mandatory reporting of significant new uses of substances which have been through the new substances notification and assessment process, as a means of ensuring the continuing safety of the substance in light of the change in use pattern.

Recommendation:

153) CEPA should be amended to require the reporting of significant new uses of substances.

Government Response 9.12 - Accountability Provisions for New Substances

The Standing Committee made a number of recommendations to improve accountability in the new substances assessment process (Recommendation 113). In its response to the Committee's report, the government rejects these proposals on the basis of the "overriding need for rapid decision-making." Instead, the government makes reference to the scheduled review of the New Substances Notification Regulations. Given the extremely limited information available to the public regarding new substances and their assessment, it is unlikely that this review process will produce significant results. In effect, the government is placing the need for rapid decision-making over the need of accountability to Canadians regarding the new substances which may enter their environment and affect their health each year.

Recommendation:

154) CEPA should be amended to provide for the following additional public accountability mechanisms in the new substances assessment process:

> i) Public Notice: (a) notification, in the Canada Gazette, and/or on the proposed public registry, when notification information packages are received by Environment Canada and Health Canada regarding new substances; and (b) notification, in the Canada Gazette, and/or on the proposed public registry when field tests involving the open environmental release of a new substance are proposed.

In both cases, public notices should be followed by public comment periods of not less than sixty days.

ii) Appeals:

CEPA should be amended to allow the filing of a notice of objection with respect to:

- the addition of substances to the DSL (i.e., a finding of not "toxic" or "suspected of being toxic");
- the waiving of information requirements;
- the approval with conditions or when prohibitions or conditions regarding substances suspected of being "toxic" are varied or rescinded; and
- the approval of field tests of new substances, particularly those involving open release into the environment.

> Boards of Review should be required to be established unless the request can be shown to be frivolous or vexatious, approvals should be suspended until any notice of objection is resolved, and intervenor funding should be provided to bona fide public interest intervenors.
>
> iii) Public Access to Information

Public access to information submitted in response to new substance notification requirements should be provided in a manner consistent with the principles outlined in this submission with respect to information regarding products of biotechnology (Recommendation 97).

Government Response 9.13 - By-Products, Contaminants and Impurities

The government proposes to review the need for further information regarding requiring information with respect to the by-products of the use, manufacturing, storage, or release into the environment of new substances.

Recommendation:

155) CEPA should be amended to remove the exemption contained in Section 26(3)(d) of the Act regarding by-products of the use or storage of a substance or the impacts of environmental factors on a substance.

156) The potential human health and environmental effects of by-products of the use, manufacturing, storage or the impacts of environmental factors on a substance should be considered in the assessment of new substances.

9.5.4 Managing Risks Posed by Toxic Substances

Government Response 9.14 - Incorporation of TSMP Provisions

The government proposes to incorporate the key elements of TSMP. As noted above, this approach is not supported. In designing CEPA, innovations should not be restricted to those in the TSMP.

The two year time frame suggested in this proposal is too general. One year is more appropriate. Further, substances that are CEPA toxic should be scheduled for regulatory action within the one year time frame.

Further, for Track 1 substances, there should be authority for the Minister to require transition plans to ensure that workers and communities are not inequitably affected by the move to cleaner technologies.

Recommendation:

157) It should be made clear that there will be two tracks for managing "toxic" substances: Track 1 criteria would be defined by regulation, which if met, would target the substance for virtual elimination. All other substances would be Track 2 substances that would require regulatory control and mandatory pollution prevention planning. There should be authority give under CEPA for the development of transition plans in specified cases.

Government Response 9.15 - Stopping the Clock for a Board of Review

The "stopping the clock" provision upon the granting of a board of review is supportable.

Recommendation:

158) It is recommended that government proposal 9.15 be implemented.

Government Response 9.16 - Onus on Industry for Evidence that Toxic Substance Should Not be On Track 1

The government proposes that industry be given the opportunity to challenge whether substances should be targeted for virtual elimination.

Concern is expressed over this proposal. Unless it is carefully worded with a large number of qualification, the section has the potential to be constantly used as a means to challenge and delay the operation of CEPA. Moreover, there is ample opportunity for industry to submit data and information within the context of the CEPA process to challenge the information upon which decisions are made, and appeal routes regarding the determination of a substance as toxic, and proposed regulatory actions already exist in CEPA.

Recommendation:

159) Government proposal 9.16 should not be implemented as there are many opportunities for industry to submit information and data in support of their position.

Government Response 9.17 - Authority for Minister to Require Information for "Toxic" Substances

The government proposal to have the authority to require additional information for substances found to be toxic is supported.

Recommendation:

160) It is recommended that government proposal 9.17 be implemented.

Government Response 9.18 - Control Measures in Place within 18 Months

The government proposal to have controls in place within 18 months of the publication of control proposals is too generous. A one year time frame is more appropriate.

Recommendation:

161) It is recommended that CEPA be amended to require that control measures be in place within one year of the publication of the control proposals.

Chapter 10: Government Operations and Federal Lands

10.1 Introduction

CEPA's "Federal House" provisions (Part IV) have been widely criticized as having been among the least effective components of the Act. The government proposes comparatively minor amendments to these provisions of the Act, despite the strong support for the Standing Committee's proposals from a wide range of non-governmental stakeholders, including industry.

10.2 Comments on the Government's Proposals

Government Response 10.1 - New Title for Part IV

The government proposes the title "Government Operations, Federal Lands, and Aboriginal Lands" to replace the current title of Part IV of CEPA.

Recommendations:

162) Part IV of CEPA should be retitled: Government Operations and Federal Lands.

163) Environmental Protection on Aboriginal Lands should be dealt with through a new part of CEPA.

Government Response 10.2 - Federal Lands

The government proposes to provide separate definitions for "federal lands" and "aboriginal lands." As noted in 2(I) environmental protection on "aboriginal lands" should be dealt with through a new part of CEPA to reflect the unique situation of such lands.

Recommendation:

164) "Federal Lands" should be defined for the purposes of the Act as proposed in the government response.

Government Responses 10.3 and 10.4 - Regulation Making Authority

Scope of Regulatory Authority

The government proposes to amend CEPA to ensure that it encompasses all federal entities, lands and operations as well as tenants occupying federal lands. A separate section may be added to provide regulatory authority in relation to Crown Corporations.

Recommendation:

165) CEPA should be amended to ensure that the regulatory authority in Part IV encompasses all federal entities, lands and operations as well as tenants occupying federal lands. Clear regulatory authority in relation to federal Crown Corporations should also be provided.

Range of Activities Regulated

The government proposes to include in a revised CEPA the authority to make environmental regulations to protect the environment with respect to the conduct of federal activities, regardless of their type or aspect.

Recommendation:

166) CEPA should be amended to ensure that it includes the Authority to make regulations to protect the environment with respect to the conduct of federal activities, regardless of type or aspect, including the examples provided in the government response.

Paramountcy of CEPA Regulations

The current provisions of CEPA only permit regulations to be made under Part IV of CEPA if the authority to make the necessary regulations does not exist under another Act of Parliament (CEPA section 54(1)). This issue is not addressed in the government response.

Recommendation:

167) CEPA should be amended to remove the limitation that there be no authority for regulations to be made regarding an environmental protection matter under another Act of Parliament before regulations can be made under Part IV of CEPA. A at minimum CEPA should be amended to permit regulatory action under section 54 where no regulations regarding an environmental matter have been made under another Act of Parliament.

Government Response 10.5 - Regulation Making Process

The government states that affected Ministers, who have specific authority for lands, works or undertakings, be fully consulted before regulations are proposed to the Governor in Council for approval under Part IV of CEPA. It is unclear if the intention is to remove the current requirement of CEPA for the concurrence of affected Ministers before the Minister of the Environment can propose CEPA Part IV regulations to the Governor in Council.

Recommendation:

168) The existing requirement for ministerial concurrence under section 54 of CEPA should be eliminated.

Government Response 10.6 - Other Tools

The government proposes to incorporate into CEPA authority to develop codes of practice and environmental quality objectives as well as guidelines for operations of the "federal house" and in relation to activities on federal lands.

Recommendation:

169) CEPA should be amended to provide authority to the Minister of the Environment to develop codes of practice and environmental quality objectives for operations of the "federal house" and in relation to activities on federal lands.

Government Response 10.7 and 10.8 - Priorities for Closing the "Regulatory Gap"

Priorities for Regulations

The government proposes to prioritize the regulation of federal activities which could result in emissions or other releases that threaten the surrounding community.

Respect for Intent of Comparable Provincial and Territorial Environmental Protection Requirements.

The government proposes to respect the intent of comparable provincial and territorial environmental protection requirements. The federal government could incorporate by reference standards outlined in provincial and territorial regulations into regulations made under Part IV.

Recommendations:

170) As an interim measure to deal with the existing gaps with respect to the environmental regulation of federal entities, CEPA should be amended to permit the adoption by reference of relevant provincial and territorial environmental standards. Should the regulatory regime of a particular province or territory be incomplete, gaps should be filled by reference to the highest standards adopted in other jurisdictions.

171) CEPA should be amended to permit the Minister of the Environment to make orders for the purpose of protection of the environment with respect to federal government operations and on federal lands, in the absence of regulations made for this purpose by the Governor-in-Council. Such orders should be legally binding instruments. At a minimum, the interim order powers, contained in section 35 of CEPA, should be expanded to apply to federal government operations and federal lands. This is necessary

to deal with emergency situations where there is a need for immediate action to avoid serious and/or irreversible harm to the environment.

10.3 Conclusions

It is clear that there are serious problems with Part IV of CEPA. The government's proposals do not adequately address these concerns. CEPA should be amended to ensure that Part IV provides the authority necessary to deal with the environmental aspects of all federal entities and activities on federal lands. In addition, Part IV should be amended to establish CEPA as the paramountcy federal legislation with respect to environmental protection on federal lands and in relation to federal activities, and to remove the requirement for ministerial concurrence from section 54 of the existing Act.

In addition, CEPA Part IV should be amended to provide for the adoption by reference of provincial or territorial environmental standards. It should also be amended to provide authority to the Minister of the Environment to make orders necessary to ensure environmental protection on federal lands and in relation to federal activities, which are not addressed through regulations made under CEPA Part IV, or regulation made through another Act of Parliament. Environmental Protection on aboriginal lands should be dealt with through a new separate Part of CEPA.