SUBMISSION TO THE SENATE STANDING COMMITTEE ON ENERGY, THE ENVIRONMENT AND NATURAL RESOURCES REGARDING BILL C-32, *THE CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999*

by

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Presentation of the Environmental Law Centre to the Standing Senate Committee on Energy, the Environment and Natural Resources on Bill C-32, the *Canadian Environmental Protection Act*

Introduction

The Environmental Law Centre (Alberta) Society (ELC) was formed in 1982 to provide Albertans with a source of objective information about environmental and natural resources law. To this day, the ELC is a strong non-profit, charitable organization whose environmental law services are used across Canada and whose environmental law expertise and skills are sought after by governments, industry, environmental organizations and members of the public.

ELC lawyers are advocates for the environment. The balance of nature is fragile. We operate on the principle that to ensure its survival, laws must serve to protect and preserve the environment upon which all living things depend. We advocate and use the power of that law to effect change - for a safe, clean, diverse and healthy environment.

The ELC has been involved in *Canadian Environmental Protection Act* (CEPA) since its beginnings. We participated in consultations on the proposed legislation in the late 1980's. We have a representative on the Canadian Environmental Network (CEN) Toxics Caucus Steering Committee (Arlene Kwasniak) and in the past had a representative working in the area of CEPA biotechnology review (Howard Samoil). We have been involved with the CEPA review process since the first consultations in Ottawa in 1993. We participated in the major briefs to the Committee headed by the CEN Toxics Caucus. On behalf of the ELC Arlene Kwasniak submitted a brief to the House of Commons Standing Committee on Environment and Sustainable Development and presented it to the Committee on October 8th, 1998.

Senate and Bill C-32

The Senate has a vital and very fitting role in the CEPA legislative process.

As said by the Honourable Sir John A. Macdonald that the Senate has the Upper House has the sober second thought in legislation.[1] Bill C-32, as passed by the House Commons needs a sober second look.

And, regarding that look,

[1] (The Right Honourable Sir John A. Macdonald, Parliamentary Debates on Confederation of British North American Provinces, [Quebec 1867, Ottawa, 1951] p. 35

> It must be an independent House, having a free action of its own, for it is only valuable as being a regulating body, calmly considering the legislation initiated by the popular branch, and preventing any hasty or ill considered legislation which may come from that body, but it will never set itself in opposition against the deliberate and understood wishes of the people."[2]

And further, the Senate's role is to

> ... counterpoise to prevent any party legislation, and to moderate the precipitancy of any government which might be disposed to move too fast and go too far[3] - I mean a legislative body able to protect the people against itself and against the encroachment of power.

And finally,

> It is not by any manner of means a trifling thing to say when I say that the value of a Senate is not only in what the Senate does, but in what the Senate prevents other people from doing.[4] (Sir Richard Cartwright, Debates of the Senate, May 17, 1906, p. 469)"

From these quotes we may distil the following points:

1. The Senate should calmly and rationally take a close second look where legislation is made in <u>haste.</u>
2. The Senate should make appropriate changes to legislation is <u>ill considered .</u>
3. The value of the Senate is in what it prevents other people from doing.
4. The Senate protects against the encroachment of power.
5. The Senate shall not set itself in opposition against the deliberate and understood wishes of the people.

Haste, Power, Changes and the Wishes of the People

Introduction

At first blush, it might be said that if anything, Bill 32 was not made in haste. After all, from the beginning of CEPA five-year review to these Senate Committee hearings, over five years have passed. However, considering what transpired over these years, it is apparent that it many aspects of Bill 32 were made in haste, and many do not reflect the deliberate and understood wishes of the people. Instead, they reflect intensive lobbying of powerful, self- interested regulated industry.

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[2] Ibid., at 36.

[3] Hon. J. Cauchon, Montmorency, in Parliamentary Debates on Confederation of British North American Provinces, [Quebec 1867, Ottawa, 1951] p. 572)

[4] Sir Richard Cartwright, Debates of the Senate, May 17, 1906, p. 469.

This Submission demonstrates this in the following manner. First it summarizes how six key public interest and health issues were dealt with during the various phases of CEPA review. Following the Summary, it discusses the issues makes recommendations for amendment.

Finally, we wish to note, the identified six issues are not the only matters of concern of the ELC. During our long participation in the CEPA review process we have identified other issues of great concern.

Summary of Review Phases

- **House of Commons Standing Committee on Environment and Sustainable Development Review**

  In June of 1994 the House of Commons referred CEPA review to the Standing Committee on Environment and Sustainable Development. In its review, this Committee criss-crossed the country. heard hundreds of witnesses and read written submissions from the ambit of stakeholders, including members of the public, representatives from aboriginal groups, industry, environment, health, labour, governments and academia. After these processes, in June of 1995, the Committee produced its report titled *Its About Our Health! Towards Pollution Prevention.* In the Committee's words, it made its recommendations

  > "... to reflect the powerful views expressed us during our public meetings over the past year. It is clear that an increasing number of Canadians recognise that environmental and wealth are mutually sustaining and the healthy ecosystems bring not only better health and quality of life, but also a better and more sustained material well-being."[5]

The House Committee's Report reflects the deliberate and understood wishes of the people. It was made after careful consideration, and not in haste. It listened to all sectors and was not overly influenced by powerful self-interested lobbies.

This 365 page document containing 141 recommendations called for a thorough revamping of CEPA to facilitate and compel a more ambitious federal agenda for environmental and health protection. Here is how the Committee addressed the six issues this Submission focuses on:

1. **Federal role in environmental protection:** The Committee recommended a strong, aggressive federal role in environmental protection. This included caution in harmonization, and asserting federal constitutional jurisdiction in areas of environmental protection including setting national standards for products of biotechnology, toxic substances, pesticides, and substances that pose transboundary threats (*Committee Report* pp 15-20).

[5] *Its About Our Health! Towards Pollution Prevention*, June 1995, at xxxi.

2. **Precautionary principle:** The Committee recommended an effective and operative definition and use of the precautionary principle. The Committee formulated the principle as:

> ... where an activity or substance poses a serious threat of harm to the environment pr human health, precautionary measures will be taken even in the face of scientific uncertainty (pp 54-56).

3. **Pollution prevention plans:** The Committee recommended mandatory pollution prevention plans for CEPA toxic substances (p. 84).

4. **Elimination:** The Committee recommended a three-track approach to dealing with toxic substances that required actual phase out of the worst toxic substances. "Phase out," means eliminating a substance from manufacture, production and use (pp 71-74) and not just restricting releases.

5. **CEPA toxicity assessment:** The Committee recommended that CEPA enable a finding of CEPA toxicity through either an inherent (hazard) toxicity assessment or full risk assessment should trigger CEPA action[6]. In its words:

> Nonetheless, the Committee considers that an "inherent toxicity" approach has merit and could help to identify quickly the most harmful substances. We are concerned that some potentially dangerous substances are not being adequately addressed by the current risk assessment-based [Priority Substances List] PSL system. Particularly, the current definition of toxic has contributed to two important problems, both of which could be addressed by moving in the direction of a hazard assessment. First, extensive amounts of data are required to conduct a full risk assessment. For some substances, these extensive data requirements may be extremely difficult to satisfy with the result that the PSL process may be fatally compromised. For 13 substances on the first PSL, the assessment process, unfortunately, could not be completed for this reason. Second, the Committee believes that, in some cases, such exhaustive information is not required in order to justify their regulation (p.67).

6. **Biotechnology products:** The Committee recommended CEPA notification and assessment requirements for all products of biotechnology, including those regulated under other federal Acts, unless Cabinet determines other requirements at least equivalent to CEPA (pp 121- 124).

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[6] With hazard assessment, the intrinsic or inherent toxicity of substances, together with a finding of harmful effect, may be sufficient for CEPA control measures. With risk assessment, CEPA toxicity cannot be found without first determining and quantifying what amount of a substance would constitute harmful exposure. Public interest representatives argue that because of the exposure requirement, risk assessment alone will not facilitate federal regulation of a host of substances or combinations of substances that are obviously toxic. Industry advocates, on the other hand, argue against CEPA's allowing for hazard assessment.

- **Government Response to House of Commons Committee Report**
  The federal government issued its formal response to the Committee's report in December of 1995 (the "Response"). The Response report titled *Environmental Protection Legislation Designed for the Future – A Renewed CEPA*.

No formal public or non-government stakeholder input process was involved in the Response development.

Nevertheless, it was widely known that regulated industry heavily lobbied government not to accept many of the House of Commons Standing Committee's recommendations. Indeed, in the key six areas mentioned above, the Response did not follow the Committee's recommendations. Instead it recommended:

1. **Government Response on federal role:**

◊ While the Committee recommended scrutiny and caution with equivalency agreements, the Response recommended enlarging the potential for such agreements (p. 17).
◊ Except for regulated toxic substances, contrary to the Committee's recommendation for national standards, the Response favours objectives and guidelines (p. 32).
◊ Whereas the Committee stressed a strong, aggressive federal role in environmental protection, the Response stressed harmonization (p. 7).

2. **Government Response on the precautionary principle**: As urged by industry the Response would add the words "cost effective" to this principle so that it would advise only cost effective measures in the face of scientific uncertainty and serious threats to environment or human health.

3. **Government Response on pollution prevention plans:** The Response would make pollution plans not mandatory, but rather discretionary.

4. **Government Response on elimination:** Where the Committee called for actual elimination from production and use of the worst toxic substances, the Response calls only for "virtual elimination" meaning restricting releases and not actual phase out from manufacture, production and use.
5. **Government Response on CEPA toxicity assessment:** Unlike the Committee having CEPA provide for both hazard and risk assessment, the Response states that it is committed to a risk based approach to determining CEPA toxicity.

6. **Government Response on biotechnology products:** Contrary to the Committee's recommendation that CEPA govern biotechnology unless other federal legislation is at least as stringent, the Response perceives CEPA as a "safety net", suggesting a CEPA control role only where other legislation does not deal with the matter.

Even though the Government Response failed to represent the public interest, environment and health sectors on key issues, the Response was endorsed by regulated industry.[7]

- **Comment period following Government Response**
  The Government gave 90 days for comment on its Response. Written comments were compiled in *CEPA Review: Compilation of Comments on the Government Response.* Although it was not possible for the author to conduct a detailed analysis of the comments, a preliminary review indicates that a high majority of comments supported the House Standing Committee's approach over the Government Response.[8]

- **Bill C-74**
  In December 1996, Government introduced the first CEPA renewal bill, C-74. On the six identified issues this Bill reflected Government Response to the House Committee Report. Bill C-74 died on the order paper with the dissolution of the House for the June, 1997 federal election.

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[7] *See* Submission of the Canadian Chemical Producers' Association to the Standing Senate Committee on Energy, the Environment and Natural Resources (June 1999) especially text following "What Industry Said" [*hereinafter* the CCPA Submission].

[8] An ELC summer law student, Seanna Rohatyn, in a summary fashion reviewed the publication containing comments on the Response. Of the commentators, Ms. Rohatyn counted 157 public interest groups, 154 of which wrote either in support of the Standing Committee's proposed amendments and in opposition to the government's stance in its response to the Standing Committee, or in support of a stronger governmental role in environmental protection generally. Of the remaining three "public interest groups", only one clearly wrote a letter supporting the government response. That one was the Canadian Bar Association National Environmental Law Section, which does not clearly even qualify as a public interest group. As for the other two groups, Ms. Rohatyn could not find letters from them within the bound compilation.

As for statistics:

- There were 411 total contributors listed. Of those, 172, or 42% were private individuals all of whose letters that Ms. Rohatyn read supported stronger environmental protection.
- Public Interest groups accounted for 157 of the contributors or 38%.
- Industry submitted 43 contributions or roughly 10%.
- Government (including municipal bodies) made a total of 10 submissions to make up 2.4%.
- The farming industry and farming interest groups accounted for 15 of the submissions or 3.6%.
- First Nations groups/representatives made 2 submissions to make up .5%.
- "Other" groups contributed 5 submissions to comprise roughly 1.2%. Ms. Rohatyn wasn't sure what these groups were so she grouped them together: Canadian Chamber of Commerce, Federation of Canadian Municipalities, Ontario Waste Management Association, and Toronto Food Policy Council (two submissions).

- **Bill C-32**
  The House of Commons reintroduced the second CEPA renewal bill, C-32 in March 1998. Like Bill C-74, this Bill reflected Government Response positions on key public interest issues instead of the public interest views evident from the two public and stakeholder input processes. These were the Committee's review process and the comment period following the Government Response. On the six identified issues:

  1. **Bill C-32 on federal role:** (Examples)

  ◊ Clause 2(1) (l) states that in administrating CEPA, " ... the Government of Canada shall ... act in a manner that is consistent with the intent of intergovernmental agreements and arrangements entered into for the purpose of achieving the highest level of environmental quality throughout Canada." This language mirrors language in the federal provincial harmonization agreement and would require mandatory compliance with controversial agreements that do not have force of law. In addition, Clauses 2(1)(m), (n) and subsection 2(2) in effect require CEPA to become a residual statute. They would compel CEPA not to apply wherever other federal legislation may apply as determined.

  ◊ Except for regulated toxic substances, contrary to the Committee recommendation for national standards, Bill C-32 enables only objectives and guidelines, and then only after consultation with provinces and others (ss 55-56).

  2. **Bill C-32 on precautionary principle:**
     Following the Response, the sixth paragraph of the preamble to Bill C-32 contains a modified version of this principle. The sixth paragraph of Bill C-32 states in effect that the precautionary principle may be applied only where it is cost effective to do so.

  3. **Bill C-32 on pollution prevention plans**: Following the Response, Bill C-32 makes imposition o**f** pollution plans to be discretionary (s. 56).

  4. **Bill C-32 on elimination:** Following the Response, Bill C-32 calls only for "virtual elimination" meaning ultimate reduction on the release below any measurable amount at or approaching level of quantification "as defined by the regulations".

  5. **Bill C-32 on toxicity assessment:** Following the Response, Bill C-32 CEPA toxicity assessment relies solely on risk assessment (s. 65).

  6. **Bill C-32 on biotechnology products:** Bill C-32 follows the Response in its characterising CEPA as a "safety net" and not as the leading federal statute for environmental and health protection. Instead assuring that CEPA would apply to these products unless it is determined that some other federal statute is at least as strict, Bill C-32 states that CEPA provisions do not apply if the Minister

responsible for administrating the other statute determines that the other statute's meets CEPA's provisions (s. 106).

- **Standing Committee on Environment and Sustainable Development Amendments**
  After second reading of Bill C-32 much debate ensued. The Bill was referred to the Committee. The Committee review took place over 11 months. It accepted submissions and heard witnesses from every relevant sector.[9] Following clause by clause review, it made 157 amendments. Although many of these were of a technical nature, some were substantive and from a public interest, environmental and health advocates prospective, strengthened the Bill.

This second Committee process like the first, and the amendments that resulted, are based on a careful, lengthy review at which the entire range of stakeholders was represented.

On the six identified issues:

1. **Bill C-32 as amended by Committee on federal role**
   Although a far cry from its 1995 Report, on the basis of presentations made to it, the Committee strengthened federal role provisions. For example, clause 2 (1) (l) was amended so that the Act was to be administered only with "regard to" federal/provincial and other agreements and not "consistent with" as at First Reading.

2. **Bill C-32 as amended by Committee on precautionary principle:**
   The Committee listened to the public interest, including health and environment concerns by removing the words "cost effective" from at the statement of the precautionary principle in the preamble.

3. **Bill C-32 as amended by Committee on pollution prevention plans:**
   Bill C-32 enables the Minister to require pollution prevention plans in some circumstance when faced by international air pollution. Although industry urged that such plans could only be required in respect of listed toxic substances and where no provincial plans were required,[10] the Committee did not make these changes.

4. **Bill C-32 as amended by Committee on elimination:** At First Reading, "virtual elimination" meant ultimate reduction of ... the substance ... below that level of quantification as defined by the regulations. A Committee amendment changed "as defined" to "specified". This change appears to remove discretion to define what "below the level of quantification" means (s.65).

[9] The Environmental Law Centre brief may be accessed through the ELC homepage at www.elc.ab.ca.
[10] *See*, for example, CCPA Submission at 23.

As well, the Committee changed s. 65 to add a provision relating to achieving virtual elimination, Section 65(3) enables the Ministers set interim targets by limiting releases in order to achieve virtual elimination. Section 65(3) works in tandem with other sections to achieve virtual elimination. Sections 77(2)(c) and 77(4) enable the Ministers to recommend that substances be subject to virtual elimination and to require virtual elimination plans. Sections 91(2) and (4) require virtual elimination timeframes and an outline of measures to meet virtual elimination. Section 92.1 enables the Minister to make regulations to implement virtual elimination.

5. **Bill C-32 as amended by Committee on toxicity assessment:** The Committee amended the assessment provisions so that where appropriate CEPA may authorize control action on the basis of evidence other than a full blown risk assessment. This is possible where a substance or combination is inherently toxic, persistent and bioaccumulative and has a long-term harmful effect on environment (Ss 64, in conjunction with ss 73 - 74).

6. **Bill C-32 as amended by Committee on biotechnology products:** The Committee amended the Bill so that the Ministers of Environment and Health would determine whether the other federal legislation meet CEPA's notice and assessment requirements (ss 106(6) and (7)).

- **Bill C-32 as passed by the House of Commons:**

On April 15, 1999 the Standing Committee reported to the House of Commons. Notwithstanding the fact that the Committee made its amendments on the basis of an 11-month careful review in which all relevant stakeholders had ample opportunity to participate, Government introduced and passed amendments that turned back many of the substantive changes. Here is how the Government dealt with some of the six identified issues:

1. **Bill C-32 as passed by the House of Commons on federal role:** Government amendments increase the statutory duties to consult with provinces and territories before taking CEPA action.

2. **Bill C-32 as passed by the House of Commons on precautionary principle:** As urged by industry, Government amendments re-inserted the words "cost effective" into the precautionary principle in the preamble.[11]

3. **Bill C-32 as passed by the House of Commons on pollution prevention:**

[11] *See* for example, historical review of industry position in the CCPA Submission on p.13.

As desired by industry, the Bill was amended so that a Cabinet decision is necessary for the Minister to commence action aimed at requiring a source of international air pollution to provide pollution prevention plans (s.166).

4. **Bill C-32 as passed by the House of Commons on elimination**:
   As urged by industry, Government made amendments to the virtual elimination provisions that in effect gut them. The amendments make it so that CEPA would only authorize virtual implementation plans aimed at meeting interim targets, instead of the goal of virtual elimination. This was accomplished by amending section 65(3) to remove the words "When taking steps to achieve the virtual elimination of a substance". Removing these words render section 65(3) to only state that the Ministers shall prescribe amounts of substances slotted for virtual elimination that may be released. As well, Government made amendments to sections 77(2)(c), 77(4)(c), 79(1) and (2)(a), 92(2) and 92(4) to remove references to the goal of virtual elimination and to replace them with reference to section 65(3) -- in essence, release limitations. Accordingly, although "virtual elimination" remains defined in CEPA, the goal is not operative in substantive provisions that allow release controls.

5. **Bill C-32 as passed by the House of Commons on toxicity assessment:**
   Government amendments changed the definition of toxic substances in section 64 to remove the reference to "inherent toxicity" and thereby making full risk assessment a requirement for determining CEPA toxicity.

6. **Bill C-32 as passed by the House of Commons on biotechnology products:**
   Government amendment altered the Committee's change so that Cabinet – and not CEPA administrators -- determine whether CEPA's requirements are met by other legislation.

Discussion and Recommendations on Identified Issues

Federal Leadership – Harmonization

Throughout the many years of CEPA review, all CEPA processes at which the public interest sectors, including environment and health, participated, the message was clear: CEPA should promote active, aggressive leadership role for the Federal Government in environmental and health protection. Regulated industry, however, would have the federal government, in particular in exercize jurisdiction under CEPA, recede into the background. Instead, industry favours less federal leadership and more harmonization, which it takes to mean that where the provinces and the federal government share jurisdiction there should only be provincial regulation.[12] The Canadian Chemical Producers Association's Submission, for example, contains requests for changes that, if

[12] *See* comments on harmonization from the ELC Submission to the Standing Committee on Environment and Sustainable Development.

followed, would mean further erosion of federal role in environmental protection.[13] We sincerely hope that the Senate Standing Committee will not be unduly swayed by these requests. We bring to your attention that Brian Emmett, Commissioner of Environment and Sustainable Development, in his 1999 Report advises caution in harmonization. In the main points, the Report notes:

> **Federal-provincial agreements to protect the environment.** The federal government has entered into environmental partnership agreements with the provinces to reduce overlap and duplication. The seven agreements we audited cover activities such as inspection, enforcement, monitoring and reporting. We found that these agreements do not always work as intended: many activities that are essential to implementing them are not working as well as they could.
>
> Before entering into these agreements, the federal government did not formally analyze and document the potential for failure, including whether both parties could do what they were agreeing to do. There is no ongoing analysis of the impact of the agreements on environmental performance or on the industries involved. The federal government does not have a documented plan in the event that a province is unable to carry out its assigned responsibilities or an agreement is terminated.

Recommendations on harmonization:

Do not further dilute federal power or authority by making further amendments to compel harmonization.

Re 1, Federal Leadership – mandatory consultation

As stated in the Submission of the Canadian Institute of Environmental Law and Policy Brief to this Standing Senate Committee:

> Bill C-32, as passed by the House of Commons, requires offers of consultation with the provinces and territories are made before the Minister under the Act can take virtually any substantive action. Clauses requiring offers of consultation appear at least thirteen times within the Bill, including: s.47 (information gathering); s.54 (objectives, guidelines and codes of practice); s.62 (pollution prevention); s.69 (guidelines re: toxic substances); s.76 (priority substances); s.121 (land based sources of marine pollution); s.140 (fuels); s.166 (international air pollution); s.176 (international water pollution); s.197 (emergencies); ss.208 & 209 (government operations and aboriginal lands); and s.323 (economic instruments).
>
> These clauses were not present in Bill C-74, and no reference to such provisions was made in the government's December 1995 was made in the government's December 1995 response to the Standing Committee's June 1995 report. The original provisions of Bill C-32 required that there be offers of consultation to the provinces and territories before action was taken. However, clauses added by the government to each section at report stage in the House of Commons appear to have elevated this requirement to a statutory duty to consult, which may also bar the Minister from acting if an offer to consult is accepted by a province. (P.3)

[13] *See*, for example, CCPA Submission, p. 22, clause 4.5, p.12 and p. 23.

Recommendations on mandatory consultation

Amend the provisions in the Bill, which require consultation with provinces or territories 69(2); 76(2); 121(2)(a); 140(4); 166(2); 176(2) 197(1); 208(2)(a); 209(3)(a) and 323(1).

Delete sections 47(3) 54(3.1); 62(3); 69(3); 76(2.1); 121(3); 140(5); 197(2); 208(3); 209(4); and 323(2).

Re 1, Federal Environmental Leadership -- Residualization

Sections 2(1)(m), (n) and subsection 2(2) in effect require CEPA to become a residual statute. In other words, they will compel CEPA not to apply wherever other federal legislation may apply.

It is essential to the health and welfare of Canadians that the federal environmental statute not be precluded from regulating environmental matters just because they may also be regulated under another statute. This is especially so then the other Act is a special interest statute, for example, one concerning agriculture.

Recommendation re section 2(1)(m), (n) and subsection 2(2)

Delete these clauses and this subsection.

Re 2, Precautionary principle

Government amendments have followed industry's urging that the words "cost effective" be inserted in the precautionary principle. Industry has stated that this makes the statement of the principle in line with the "internationally accepted" definition.[14] This is not so. There is no one "internationally accepted" definition and indeed the bulk of characterizations do not include reference to "cost effective". **.**[15]

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[14] CCPE submission at 11.

[15] For examples:

The North Seas Conferences:

(i.) Bremen 1984 – 'damage to the environment can be irreversible or remediable only at considerable expense and over long periods and that, therefore, coastal states and the EEC must not wait for proof of harmful effects before taking action'.

(ii.) London (1987) – [Explicit reference in London Declaration to a "precautionary approach"]

(iii.) Hague 1990 – Parties ... 'will continue to apply the precautionary principle, that is to take action to avoid potentially damaging impacts of substances that are persistent, toxic and liable to bioaccumulate even when there is no scientific evidence to prove that a causal link between emissions and effects' "

(iv.) Esbeejerg Declaration 1995 - recommends that the precautionary principle be also applied where fisheries management policies are concerned.

London Dumping Convention (1972): In 1991 the parties' implementation be with the guidance of the precautionary principle. They agreed that this implies that

The inclusion of the words "cost effective" disparages the precautionary principle and makes it nearly impossible to apply. To determine whether a step is cost effective, involves assessing the costs of not taking the step and the benefits of what is to be gained from taking the step as against the costs of taking the step. It likely will be impossible to weigh the costs of, for example, changing industrial technologies to eliminate releases of a chemical (a quantifiable amount) against the costs of potential, serious, and even irreversible effects on ecosystem and health (largely unquantifiable), of not taking the step.

Recommendations on precautionary principle

(a). At the very least. delete "cost effective" from paragraph 5 of the Preamble to restore the House Committee amendment.
(b). Preferred recommendation is (a) above, plus, removing other references to "cost effective' in relation to the principle and to operationalize the precautionary principle throughout the legislation.

> " appropriate preventive measures are taken where there is reason to believe that substances or energy introduced into the marine environment are likely to cause harm, even when there is no conclusive evidence to prove a causal relation between inputs and their effects."

Bergen Declaration on Sustainable Development 1990. This (non-binding) declaration states:

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

Helsinki Convention 1992. This Convention concerns protection and use of transboundary watercourses and lakes. Article 2(5)(a) states:

> .. by virtue of which action to avoid the potential transboundary impact of the release of hazardous substances shall not be postponed on the ground that scientific research has not fully proved a causal link between those substances, on the one hand, and the potential transboundary impact, on the other hand.

These examples are from The following historical presentation of occurrences of the principle is from a paper titled *The precautionary principle* by Wybe Th. Douma, of the T.M.C. Asser Institute, The Hague, The Netherlands.

Re 3, Pollution prevention

Discussion

As noted above, Industry wants the Bill's pollution prevention provisions to be further watered down. We recommend that this Committee not follow Industry in this request but rather follow the public interest.

Recommendations re pollution prevention:

(a). At minimum, restore the amendment to section 166 made by the Committee so that the Minister may require pollution prevention plans.
(b) Preferably, amend Part 4 to add a provision reading:

"The Minister shall require a pollution prevention plan in respect of facilities using, manufacturing or generating any substance determined to be toxic in accordance with this statute."

(b). In keeping with requirement in the United States under the Toxic Release Inventory, amend Part, or alternatively Part 3 so as to require pollution prevention activities relating to substances to be reported on the National Pollutant Reporting Inventory.

Re 4, Elimination

Elimination vs. virtual elimination

As stated in its comments to the Committee, the ELC is greatly concerned about the concept of virtual elimination. Firstly, the public interest community has long been urging a characterization of elimination that requires elimination from production, use and release. This more restrictive concept is even more necessary to be adopted than when first proposed by the public interest community in view of evidence that hormonal level alteration and endocrine disruption can occur as a result of exposure to substances at a much lower level than previously thought to pose a danger. Indeed, there is evidence that there is no safe level of release of many toxic chemicals. Virtual elimination should mean elimination, as far as is physically and technically possible and not just reduction.[16]

[16] *See* Comments on Bill C-32 of the World Wildlife Fund Canada to the Standing Committee on Environment and Sustainable Development, especially at 14-15.

Elimination, virtual elimination and proposed POP's treaty

Canada is participating in negotiations for an international treaty to eliminate and control persistent organic pollutants ("POPs"). Current discussions indicate that "elimination" for the purposes of this draft treaty means elimination from production and use, although some POPs might be slotted for severe release restriction rather than actual phase out.[17] Under current treaty negations 12 substances have been identified for elimination and processes are being developed to add new substances on to the elimination track. The manufacture and use of some of the original substances already are prohibited under CEPA, [18] some are restricted[19] and some are regulated under other legislation.[20]

Under the virtual elimination provisions, even as amended by the Committee prior to Government amendments, it is not clear that Canada could meet its obligations under the POPs Treaty for any substance that is not already prohibited. This is because CEPA as amended by the Committee calls only for mandatory virtual elimination of substances set on that track, and not elimination, as may be required for POPs under the Treaty. Any interim measure taken under section 65(3) must, as its end objective be virtual elimination. Since virtual elimination still allows some release, logically, any interim goals must allow some larger release.

The situation is even worse for Canada with respect to Bill C-32 as passed by the House. As discussed earlier, section 65(3) requires that the Ministers prescribe admissible release amounts for substances on the Virtual Elimination List without the goal of virtual elimination**.**

Recommendations on elimination and virtual elimination:

(a) At the very least restore the wording of sections 65(3), 77(2)(c) and (4)(c), 79(1) and (2)(a), 91(1) and 91(4) as in Bill C-32 as amended by the Standing Committee.
(b) Preferred recommendation is to amend CEPA so as to require the actual elimination from the use, generation and release of substances of substances identified for elimination.

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[17] Based on consultations between the Canadian negotiating team and members of the CEN Toxics Caucus and draft treaty documents. Documents relating to this proposed treaty may be accessed via the UNEP webpage at <http://www.irptc.unep.ch/pops>.
[18] Mirex and PCB's, Schedule II of CEPA, first of Prohibited Substances,
[19] For example, dioxins and furans.
[20] Notably, the *Pest Control Products Act* (R.S.C. 1985, c. P-9).

Re 5, Toxicity assessment

Discussion

As noted consistently by public interest advocates, an acceptable framework for assessment of toxicity must incorporate and accept the following:

- That a substance by substance approach is not sufficient as chemicals can act cumulatively or synergistically.[21]
- That science cannot always ascertain at what level exposure to a chemical becomes a risk.[22]
- That human and other animal health and the systems on which they rely for survival and quality of life must receive the benefit of the doubt over likely, though not provable harmful chemical use.

Current CEPA does not recognize all of the above. To determine whether a substance or combination is CEPA toxic requires a full-blown risk assessment.

Although effective provisions regarding inherent toxicity did not make it into Bill C-74 or C-32 at First Reading, as a result of nearly a year of public and stakeholder representations the Committee added provisions to enable CEPA action on the basis of a finding that a substance or combination was inherently toxic, persistent and bioaccumulative, harmful substances, without an exposure assessment. This was done through s.77, which reads:

> s. 77(3) Where, based on a screening assessment conducted under section 74, the Ministers are satisfied that:
> (a) a substance may have a long-term effect on the environment because it is
> (i) persistent and bioaccumulative in accordance with the regulations;
> (ii) inherently toxic to human beings or non-human organisms, as determined by laboratory or studies; and
> (b) the presence of the substance in the environment results primarily from human activity, the Ministers shall propose to take measures referred to in paragraph (2)(c).

[21] For example, regarding hormone disrupting chemicals, a non-estrogenic chemical (e.g. chlordane) may increase the potency of an estrogenic chemical (e.g. endosulfane). regarding potentially harm to endocrine systems, It is not meaningful to determine the risk of either chemical alone. *See* M. O'Brien, "Our Current Toxic Framework, *Our Stolen Future* and Our Options", *Journal of Environmental Law and Litigation*, Volume 11(2) (1996) at 349.

[22] For example, overexposure to some chemicals may produce intolerance to others. Many north Americans suffers from chemical sensitivities and intolerance and accordingly "safe" exposure amounts may be meaningless. As well, it may be pointless to attempt to determine risk related to endocrine disrupting chemicals since they may act in any number of combinations with varying, and sometimes subtle but serious declines in functional abilities. *Ibid.*, especially at 346-7.

Unfortunately, even these careful and restrictive provisions did not survive Government amendments. Following industry lobbying, section 77 was amended to add the following words (italicized):

s. 77(3)	Where, based on a screening assessment conducted under section 74, *the substance is determined to be toxic or capable of becoming toxic and* the Ministers are satisfied that: (a) a substance may have a long-term effect on the environment because it is: (i) persistent and bioaccumulative in accordance with the regulations; (ii) inherently toxic to human beings or non-human organisms, as determined by laboratory or studies; and (b) the presence of the substance in the environment results primarily from human activity, the Ministers shall propose to take measures referred to in paragraph (2)(c)

Under this amendment, the fact that a substance is inherently toxic is irrelevant to the kind of assessment it must undergo in order to be controlled under the Act. An inherently toxic substance, that is persistent and bioaccumulative and that causes harm, must undergo a full risk assessment, just like any other substance on the PSL. The effect of this amendment is to render inoperative the concept of inherent toxicity. Since the amendment requires that a substance must meet the toxicity requirements of the Bill, whether the substance is inherently toxic or otherwise toxic is of little relevance.

Recommendation on toxicity assessment:

Amend Section 77(3) to reflect the wording as amended by the Committee.

Re 6, Biotechnology products

Discussion

The current CEPA requires that any new product of biotechnology regulated under any other federal Act undergo an assessment of human health and environment effects at least equivalent to that under CEPA. Section 106(7) severely weakens the current equivalency provisions by stating that the notification and assessment provisions of CEPA not apply in respect of biotechnology product assessed under any other federal Act for toxicity. The need for specific CEPA equivalency has been dropped and moreover, the minister administering the other Act may determine whether the weakened equivalency provisions apply.

CEPA is an environmental statute and not, for example an agricultural statute, which also might regulate biotechnology products. We believe that all biotechnology products should fall under CEPA because of potential adverse environmental and health impacts, regardless of agricultural or other economic benefits

Recommendations re biotechnology products

Delete subsections 106(7) so that all new biotechnology products fall under CEPA, or at minimum, delete these sub-sections and restore current CEPA's equivalency provisions for biotechnology.