



WEST COAST ENVIRONMENTAL LAW ASSOCIATION

**COMMENTS ON
THE OCEANS ACT
Translating the Vision Into Law
Comments on Bill C-98**

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Part I INTRODUCTION

Since 1974, West Coast Environmental Law Association_(WCELA) has provided legal services to members of the public who are concerned about threats to the environment. WCELA and the West Coast Environmental Law Research Foundation provide legal representation, promote law reform, provide legal education, conduct legal research and maintain a library of environmental legal materials.

We have a long history in the development of federal, provincial and municipal laws and policies regarding protection of the environment. We have participated in amendments to the *Fisheries Act*, recent inquiries on oil spills in marine waters, and major federal laws such as *CEPA (Canadian Environmental Protection Act)* and *CEAA (Canadian Environmental Assessment Act)*. We want to ensure that the oceans, as an integral part of the natural ecosystems on which we all depend, are protected by the best laws and policies possible.

We applaud the government for introducing the *Oceans Act*. The following comments on potential changes to the *Act* are designed to give more substance to the vision shown by Fisheries and Oceans Minister Tobin, in *A Vision for Ocean Management*, released on June 14, 1995. In that statement, Minister Tobin stressed the need for conservation and long-term sustainable resource use. He stated we had come to a turning point, and that we "must turn away from partial, ad hoc and short term expedient measures which have resulted in resource over exploitation and environmental degradation. We must translate our responsibility and good intentions into a policy which will result in sustainable use of resources and environmental protection."

The *Oceans Act* needs some adjustments if it is to match this vision.

Part II PACIFIC ENVIRONMENTAL CONCERNS

We are faced in our region with serious environmental problems, which threaten the health of our ocean waters. These problems include loss of biodiversity, rapid growth and development and past and current pollution sources.

Loss of Biodiversity

The B.C./Washington Marine Science Panel, a body established by the BC/Washington Environmental Cooperation Council released a report on marine waters in 1994.¹ The Panel rated destruction, alteration or degradation of habitat as the highest environmental priority for the region because the impacts are irreversible, the potential harm to the environment is great, and habitat losses are highly preventable. Other urgent environmental threats identified by the Panel also relate to biodiversity – declines in fish and shellfish populations and introduction of exotic species. Accordingly, the Panel recommended action on these three threats as follows:

- prevent estuarine habitat losses
- establish marine protected areas
- protect marine animals and plants

The importance of the preservation of biodiversity cannot be overstated, and the *Oceans Act* must reflect this concern and show the government commitment to take action to prevent the loss of future loss of biodiversity. We have made a number of recommendations about biodiversity in these comments.

Population and Growth Pressures

The Georgia Basin area, which includes the Lower Mainland, the east coast of Vancouver Island and the Straits of Georgia and Juan de Fuca, is one of the most rapidly developing population areas in North America. About 70% of B.C.'s population lives either beside or very near the Strait of Georgia.² Although the region makes up less than 3% of the area of B.C., it contains 2/3 of the province's population. The population density in the Basin is about 25 times the provincial average.

The number of people and the rapid population growth have created significant environmental problems, including conversion of farmland to urban uses, conversion of prime habitat for residential and industrial development and most importantly for the purposes of this *Act*, deteriorating water quality.³

The 1995 Fraser Basin Management Program Report Card on assessing progress towards sustainability in the Fraser Basin rated the region's progress in managing urban growth in a sustainable way with a "D". The Report noted that urban sprawl was continuing at an alarming rate in the Lower Fraser Valley, and non-point source pollution was increasing as more roads, parking lots and buildings are built and more vehicles are used. The Report also noted that only two of the original 50 free-flowing streams in the City of Vancouver still

exist.⁴

The impact of population growth and urban sprawl on the oceans must be part of any assessment of the state of ocean health. The oceans management strategy and integrated management plans developed pursuant to the *Act* must explicitly identify actions to address these threats.

Past and Current Pollution Sources

The Pacific coastal and marine area is plagued by pollution problems. We face a legacy of past contamination from activities such as wood preserving, pulp and paper, metal working, shipyards, aluminum plants, and chloralkali operations. Current sources of marine contamination come from point sources such as sewage outfall stations; non point sources such as urban, agricultural, transportation, and forest industry runoff; direct uses of the marine system including harbour, marinas, ocean disposal of solids and incidental or deliberate discharges from ship traffic, aquaculture and mariculture; and accidental and catastrophic spills.⁵

Compounding the difficulty in taking action to reduce pollution is a lack of data. In fact, data on marine pollution in B.C. has been characterized as "largely absent".⁶ Data is typically more readily available from specific facilities with permits to emit pollution. Complete information gathering is required on non-point sources as well to obtain the necessary data for enhanced environmental management.

Treatment of sewage outfall in B.C. in marine waters is one example of a long standing controversial pollution issue. Municipal discharges alone are estimated as the sole cause of 15% of all shellfish harvesting closures in British Columbia waters and are implicated in a further 78% of the closings.⁷ The Fraser Basin Report Card gave governments an "F" for their progress in addressing sewage wastes.⁸ Municipal sewage wastes are the largest volume of point source liquid wastes entering the Basin. Over 93% of all municipal sewage wastes in the Georgia Basin originate in the Lower Fraser where sewage receives only primary treatment.

Effluent from Greater Vancouver Regional District (GVRD) waste water treatment plants are frequently in non-compliance with provincial waste management permits. In B.C., the local Annacis Island plant has been out of compliance with federal and provincial environmental laws in eight of the nine reports that have been issued since July 1990. The federal *Fisheries Act* is a powerful tool for environmental control, but is rarely used against municipalities whose sewage treatment plants are breaking the law. There have been repeated attempts by environmental groups in the Lower Mainland to bring private prosecutions for violations of the *Fisheries Act*. However, these private prosecutions have been taken over by the Provincial Attorney General's office and the charges have been stayed in the most recent cases.⁹

The *Oceans Act* must explicitly tackle past and present pollution sources.

Part III SPECIFIC COMMENTS

Proposed New Section 3 – Purpose

The *Act* lacks both a purpose and guiding principles, both of which could be added in one section. This is a very important section of the *Act* and should provide a sense of vision for stewardship of the oceans into the next century. Minister Tobin provided a good purpose for the *Act* in his vision statement – a government commitment to restore, preserve, enhance, monitor and report on the quality of the oceans environment.

legislation to ensure that it provides the legal basis for a comprehensive protection regime for the oceans of Canada. There are some principles currently contained in Section 30 in relation to an ocean management strategy, but the *Act* as a whole would benefit from the addition of a "purpose" section at the beginning, which would define the principles.

These principles include:

- the precautionary principle, that where there is a threat of serious or irreversible environmental harm, action should be taken to prevent contamination before there is conclusive proof of harm;

The precautionary principle is essential as often studies which do not find that an environmental effect is occurring may actually have a very low chance of detecting such an effect if it did exist.¹⁰

- the pollution prevention principle, that it is better to prevent the generation of pollutants than it is to control or clean up such pollutants after they have been created;
- preservation of and prevention of loss of biological diversity;

The importance of maintaining marine biodiversity is critical and should be expressly stated in the *Act*. The *Oceans Act* needs to reflect the serious problem of loss of biodiversity and give some teeth to the commitments made by the federal government when it ratified the *Convention on Biological Diversity*. The B.C./Washington Marine Science Panel stresses the need for protecting all living marine resources.

"Living marine resources in the shared waters have value to humans as commercial and recreational resources, and they have ecological value because they support the marine food web and maintain regional and global biodiversity. The loss of a marine invertebrate species in a critical part of the food web could threaten regional biodiversity as much as the loss of entire salmon runs, the marbled murrelet or other endangered species. Species at all levels of the food chain are equally important for biodiversity and resource production, and are equally important to protect. "¹¹

- sustainable use of biological marine estuarine and coastal resources;
- is also a key concept of the *Convention on Biological Diversity*. Biodiversity conservation depends not only on traditional preservation policies, such as the creation of protected areas, but also on the sustainable use of biological resources.
- public participation, recognizing the vital interests of fishers and coastal communities in participating in the management of their resources;
- intergenerational equity, recognizing the rights of future generations in environmental protection.

Therefore, we recommend adding a new section 3 as follows:

"3(1) The purpose of this act is to provide for the protection, conservation and sustainability of the environment by

(a) promoting the maintenance and restoration of ecological processes;

(b) endeavouring to preserve and preventing the loss of biological diversity;

(c) minimizing pollution in estuaries, coastal and marine waters;

(d) applying the precautionary principle so that if there are threats of serious or irreversible damage the lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation;

(e) recognizing the importance of public consultation in the formulation of decisions affecting the environment;

(f) protecting the right of present and future generations to a healthful environment.¹²

Section 14 – Sovereign Rights

The concepts of restoration and enhancement should also be added to Section 14, which we recommend rewording as follows: (all suggested additions in bold)

(a) Sovereign rights in the exclusive economic zone of Canada for the purpose of exploring and exploiting, conserving and managing, **restoring and enhancing the natural resources and biological diversity...**

Sections 28 - 39 – Oceans Management Strategy

The part of the *Act* concerning the proposed ocean management strategy should be strengthened. Although we applaud the federal government for adopting an ecosystem approach to marine management, in our opinion it is crucial to ensure that the strategy and integrated management plans that are envisioned by the *Act* will become reality.

The *Act* should commit the government to preparation of a strategic framework for implementation of the proposed strategy, complete with schedules and targets, and end dates for achieving planned ecosystem goals. For example, the Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem (COA), signed in July 1994 contains this type of framework. The COA is an example of shared jurisdiction, similar to the shared jurisdiction over coastal, estuarine and marine ecosystems. However, the COA sets a clear agenda for action, unlike the proposed *Oceans Act*. One of the most innovative features of the COA is its commitment to prepare an action plan to virtually eliminate persistent toxic and bioaccumulative substances from the environment. A similar commitment could be made by the federal government in the *Oceans Act*, as part of the ocean management strategy section.

Section 28 – Part Does Not Apply To Inland Waters.

This section should be reconsidered. Rivers flowing into the ocean will have an impact on the pollution and other wastes entering the ocean. The coastal zone is made up of ocean shore line and estuaries where rivers meet the seas. It is impossible to neatly separate the coastal zone into an "ocean" part and an "inland" part. The interrelationship of these parts of the ecosystem have recently been recognized again in international law, with the adoption of guidelines to protect the world's oceans from land-based pollution.

It may be that this section was intended to clarify the federal jurisdiction over oceans and not inland waters. However, this has been already clarified in Part 1 of the *Act* describing the territorial sea.

As the next section, section 29, goes on to describe the process for developing a national strategy for "management of estuarine coastal and marine ecosystems in waters that form part of Canada", it is confusing to try to divorce the impact of rivers on estuarine, coastal and marine ecosystems.

Therefore, we recommend deleting section 28, or amending it to ensure that the connection between rivers and oceans is recognized in this *Act*.

Section 31- Integrated Management Plans

We recommend expanding this section to list some of the factors that must be taken into account in the development of integrated management plans and to impose reporting obligations on the state of the oceans.

As noted above, there is a need to explicitly list some of the issues that any integrated management plan must address, such as conservation of biodiversity, growth and development and past and current pollution sources.

Effective environmental management includes involving all concerned members of society. To allow policy makers, scientists, researchers, non-governmental organizations, and concerned citizens to meaningfully participate in environmental management, it is essential

to provide them with readily accessible and comprehensive information. One way to do this is through regular reporting. Now that Environment Canada has eliminated funding for federal state of the environment reporting, it is imperative to reiterate the public need for this type of reporting.

Therefore we recommend rewording section 31 as follows (changes or additions in bold):

s. 31 The Minister,... shall:

(1) lead and facilitate the development and implementation of plans for the integrated management of activities in estuaries, coastal waters and marine waters that form part of Canada or in which Canada has sovereign rights under international law.

(2) The integrated management plans referred to in subsection (1) shall include, but not be limited to, actions designed to address the following :

(i) destruction, alteration or degradation of estuarine, coastal and marine habitat ;

(ii) declines or changes in the populations of ocean fish, shellfish, invertebrates, marine mammals, and plants;

(iii) introduction of exotic species;

(iv) impacts of population growth and urban sprawl on ocean environmental quality;

(v) freshwater diversions and alteration;

(vi) toxic contamination;

(vii) oil and chemical spills;

(viii) land based sources of marine pollution.

(3) In carrying out the responsibilities conferred by subsection (1), the Minister shall monitor, assess and report to Parliament on the progress made in implementing the plans and on general environmental conditions of the oceans in an annual State of the Oceans Report.

Section 32 – Implementation of Integrated Management Plans

Section 32 also must be strengthened. This section should be mandatory, rather than discretionary.

Section 32 should also be expanded to require monitoring of ecological health, again

fulfilling a promise of the Minister in the vision statement, where he stated that "the quality of the oceans environment would be measured against guidelines, objectives or standards set to maintain habitat quality, resource abundance, quality or diversity."

There should be specific subsections in section 32 stating what types of data will be collected.

This section should also include an obligation to monitor the data collected in subsection (d), and a further obligation to take action based on the monitoring results. Again, this would give effect to our obligations under the *Convention on Biological Diversity*, Article 7(c) which requires us to identify those activities that will have significant adverse impacts as well as "monitor their effects through sampling and other techniques." This is important for conserving biodiversity, and also important for determining the effect of pollutant loading in the marine environment.

This section should further be amended, in our submission, to impose an obligation to take the necessary regulatory action once adverse impacts have been determined from the data collection and monitoring. Although the federal government would be limited to taking action within the scope of its jurisdiction, this is still an important signal to other partner jurisdictions in the area that governments are taking action rather than simply producing data for its own sake. Again, the *Convention on Biological Diversity* provides some useful language. Article 8(1) states where significant adverse effect of biological diversity has been determined..., the Parties shall regulate or manage the relevant processes and categories of activities.

We therefore recommend that section 32 be amended as follows:

(Proposed changes in bold)

s.32 the Minister **shall**

(d) collect data for the purpose of understanding oceans and their living resources and ecosystems, including:

(i) the components of marine biodiversity;

(ii) the processes and categories of activities which are likely to have a significant effect on estuarine, coastal and marine ecosystem health ;¹³

(iii) all sources of contamination of the marine environment, as well as distribution and fate of the contaminants;

(e) set minimum specifications for environmental monitoring, sampling, and analysis:

(f) where a significant adverse effect on the estuarine, coastal and/or marine ecosystem has been determined pursuant to subsection (e), regulate or manage the relevant

processes and categories of activities that are within federal jurisdiction, and recommend and coordinate with other jurisdictional entities on the regulation or management of their policies and programs that are causing significant adverse effects.¹⁴

Section 32(d) – Environmental Quality Guidelines

Currently, s.32(d) provides for the establishment of "marine environmental quality guidelines, objectives and criteria respecting estuaries, coastal waters and marine waters." We recommend that instead of guidelines, it be mandatory that the Minister set ambient water quality standards for polluting substances in regulations. A violation or exceedance of ambient standards should trigger a review of all authorizations in the affected area and actions to deal with any non-point sources of pollution.

Our reasons for making this recommendation are as follows. The value of setting environmental guidelines remains open. Guidelines are not enforceable in a Court, as are regulations. Voluntary approaches to environmental protection are currently favoured by all levels of government. However, voluntary approaches have not worked in the past. Studies show that environmental managers pay much more attention to regulations than to voluntary codes of compliance. A 1994 study prepared by KPMG showed that compliance to regulations was by far the largest motivating factor for Canadian organizations to take action on environmental issues. About 95% of the environmental managers that took part in this survey identified compliance to regulations as a motivating factor, compared to 16% who chose voluntary government programs as a motivating factor.¹⁵

The *Oceans Act* should require regulations to be developed covering marine, coastal and estuarine waters which set enforceable, minimum standards to be applied throughout the different coastal areas of Canada.

The authority to set these regulations should make it clear that the regulations will set minimum standards and that a permit issued by any jurisdictional authority can – and should where necessary – set more stringent standards and set requirements not covered by the regulation. This should occur where the receiving environment is particularly sensitive or loaded with pollutants from other sources, or the existing standards are outdated in relation to current technologies or knowledge of environmental impacts.

We therefore recommend that section 32(d) be deleted and that the regulation-making power in section 35 be added to as follows:

(c) prescribing standards for the protection and management of the marine environment.

Section 33 – Cooperation and Agreements

We recommend that the Minister be required to consult with other interested persons rather than making this function discretionary. This is one of the chief avenues for public

participation and it should be a mandatory duty. The other subsections in section 33 are more properly discretionary decisions of the Minister.

Section 35 – Marine Protected Areas

This should be an environmental priority for the government. The need for these areas in British Columbia is great considering that less than one-tenth of 1% of coastal and marine areas in British Columbia are currently protected.¹⁶

The section on marine protected areas should be expanded.

First, a definition of a marine protected area should be included. There are a number of possible definitions, which would encompass a wide range of uses for these protected areas. It is crucial to ensure that some protected areas are of the category known as harvest refugia, a term established by the IUCN (International Union for Conservation of Nature or World Conservation Union). The definition of a harvest refugia is an area consisting of "a unique or representative ecosystem or subset with geographically defined boundaries that is set aside or 'protected' for non-consumptive usage."¹⁷ In our province, not all extractive uses are prohibited even in ecological reserves, the strictest form of legal designation available under B.C. law. Commercial fishing may still occur in marine ecological reserves.¹⁸

There is a need to define in the *Act* the purposes for which a marine protected area can be created. First and foremost, ecological objectives such as ecological representativeness, biodiversity and species preservation must be listed. Other possible objectives include cultural and educational. Recreational objectives for marine protected areas are currently taken into account in the establishment of provincial marine parks, under relevant provincial laws.

In the development of the ocean management strategy, or an individual action plan made pursuant to a strategy, a target should be set for establishing a defined number and size of marine protected areas encompassing full representation of the wide spectrum of marine ecosystems.

Planning and management, with full public involvement are also needed in this section.

The *Act* should require:

- requirements for regular reporting on the state of marine protected areas and progress towards establishing new marine protected areas;
 - time limits for preparing management plans after a marine protected area has been declared and presenting the plans to Parliament ; and,
 - public participation in the preparation and review of the management plans.
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ENDNOTES

1. *The Shared Marine Waters of British Columbia and Washington*, A Scientific Assessment of Current Status and Future Trends in Resource Abundance and Environmental Quality in the Strait of Juan de Fuca, Strait of Georgia and Puget Sound, Report to the British Columbia and Washington Environmental Cooperation Council by the British Columbia and Washington Marine Science Panel, August 1994 .

2. West, Fyles, King and Peeler "The Effects of Human Activity on the Marine Environment of the Georgia Basin: Present Waste Loadings and Future Trends" in *Review of the Marine Environment and Biota of Strait of Georgia, Puget Sound, and Juan de Fuca Strait*, Province of B.C., Department of Fisheries and Oceans, Canadian Technical Report of Fisheries and Aquatic Sciences, No. 1948, 1994 at 12.

3. Georgia Basin Initiative – Creating a Sustainable Future, British Columbia Roundtable on the Environment and the Economy, May 1993 p.4-6.

4. *Report Card – Assessing Progress Toward Sustainability in the Fraser Basin*, Fraser Basin Management Program 1995 at 4.

5. West, Fyles, King and Peeler, op.cit., at 13.

6. *State of the Environment Report for British Columbia*, Province of B.C., Environment Canada, 1993 at 32.

7. Data from Wells and Rolston, 1991, *Health of our Oceans. A status report on Canadian marine environmental quality*. Conservation and Protection, Environment Canada, Ottawa and Dartmouth, cited in *Effects of Human Activity on Marine Environment of the Georgia Basin*, at 21.

8. Op. cit. at fn. 4.

9. See for example, *Transboundary Sewage Report*, People for Puget Sound and Save Georgia Strait Alliance, February 1995 at 14-15.

10. Jaccard, Mark, *Abatement Costs and Energy Resource Planning: Revealing Social Preference*, presentation to the OECD, Paris, May 24, 1992.

11. *The Shared Marine Waters of British Columbia and Washington*, op. cit. at fn. 1 at 47.

12. This clause has been drafted in part, based on a similar provision in the proposed B.C. Environmental Protection Act, which in turn drew on a clause from the New Zealand Resource Management Act.

13. This would codify our existing obligations under the Convention on Biological Diversity, Articles 7(a) and (c).

14. This clause is adopted in part from Arlene Kwasniak, Biodiversity and the Ecosystem Approach – Issues for the Five Year Review of the *Canadian Environmental Protection Act* for the Environmental Law Centre (Alberta) Society, September 1994.

15. KPMG Canadian Environmental Management Survey 1994, KPMG Environmental Services cited in Terrascope, Environment Canada.

16. Richard Paisley, Regional Marines Issues Overview Paper – West Coast. Prepared for National Marine Conservation Strategy Program in the CARC/CNF *National Marine Conservation Strategy Program Vancouver Workshop*, Westwater Research Centre March 7-8, 1995 at 11.

17. Ibid.

18. The Marine Protected Areas Society is working in the province to create marine reserves in which no extractive uses are permitted and has been successful with the creation of Whytecliffe Marine Sanctuary, the first such reserve of this kind in Canada.