Submissions of the
West Coast Environmental Law Association
-to-
the Standing Committee
on Environment and Sustainable Development

Regarding the Bill C-32:
An Act Respecting Pollution Prevention and the Protection of the Environment and Human Health in Order to Contribute to Sustainable Development, 1998

prepared by:
Steven Shrybman
Linda Nowlan
Chris Rolfe

West Coast Environmental Law Association

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INTRODUCTION

In our view the Canadian Environmental Protection Act (CEPA) does not represent a credible response to the enormous environmental challenges we confront. While Bill

C-32 would correct several of the deficiencies of the Act, and strengthen the federal role particularly in the areas of gathering and disseminating information about the environment, it does not address many other, and more fundamental weaknesses of Canada's most important environmental statute.

Canadians have not been served well by CEPA, or by the indifferent performance of the governments' responsible for its implementation and enforcement. Unless substantial changes are made to Bill C-32, achieving critical environmental goals will remain almost as elusive in the future, as they have since CEPA was passed by Parliament 10 years ago.

We firmly believe there is a need for strong, and determined commitments to protect our environment. But as evidence grows of the seriousness of problems such as climate change, biodiversity loss and toxic pollution, the willingness and capacity of political administrations to address these challenges appears to be in retreat. We believe that Bill C-32 will do very little to reverse this disturbing trend.

The following submissions attempt to address the most fundamental deficiencies of the Act, namely its failure to actually establish the principles of environmental protection as matters worthy of unqualified and explicit statutory protection. However, we also address several of the specific issues that are addressed by the Bill, and which are of particular interest to our Association and the constituencies we represent.

We have had the opportunity of working closely with our colleagues in environmental law groups elsewhere and concur largely with their critiques. Our failure to address such issues as the Bill's provisions concerning harmonization and bio-diversity for example should not be taken as an indication that these issues are not of critical concern. Rather we rely upon the submissions of our colleagues on these matters.

FIRST PRINCIPLES

The Right To A Healthy And Safe Environment Should Be Given Statutory Protection

In our view the single most important deficiency of Bill C-32 is its failure to prohibit, as a matter of statutory law, the release of toxic substances to the environment in a manner that may cause significant harm to the environment, human, animal or plant life. Indeed the failure to prohibit such polluting activities even extends to the actions and operations of the federal government, and within the federal house. Thus while the government is empowered by Section 209 to pass regulations proscribing the release of toxic substances to the environment, there is no statutory provision that prohibits such releases.

While we welcome the attention that has recently been paid to the government's poor record of enforcement, even more fundamental is its failure to establish the

laws and regulations that would give rise to enforceable obligations.

It is unacceptable in our view, that on the very central and core purpose of this statute, which is to protect the environment and health from the impacts of toxic substances and polluting activities, there is not one statutory provision that actually ensures this purpose. While the Act does include some strong and proscriptive language concerning such matters as importing substances not on the *domestic substances list* or prohibiting reprisals against "whistle blowers," no such prohibition exists with respect to the release of toxic substances to the environment.

Rather than being provided with such protection, the people of Canada must place their faith entirely in the willingness of political administrations to act, from time to time, to pass regulations for this purpose. Surely the good-will that might have claimed by government a decade ago - that it would move expeditiously to regulate under the Act - has been exhausted by now. In fact on the basis of past performance it will take many more decades for cabinet to regulate just the substances that are currently on the priority substances list, let alone those dozens of substances that should be added to it.

The failure of CEPA and Bill C-32 to include a general prohibition against polluting activity effectively delegates this authority to Cabinet. This represents an arrogation of authority to Cabinet that, we submit properly belongs to Parliament. There is of course a great difference between the accountability and transparency of Parliamentary and Cabinet processes respectively. We believe that Canadians deserve environmental laws that are developed and guarded by parliamentary process, and that are not simply at the mercy of the political exigencies of the day.

To effectively remove from Parliament its prerogatives to make law in this domaine is also corrosive in our view, of the sovereign and democratic prerogatives of elected government. It is essential that strong, and unqualified language be used to ensure that the goals of environmental and health protection are achieved by this statute. These are not outcomes that should be reserved to the discretion of the political administrations.

Indeed, for years environmentalists have argued that the right to environmental security is worthy of constitutional protection, in the same way as the *Canadian Charter of Rights and Freedoms* seeks to insulate basic civil liberties from parochial political considerations. To provide this right with anything less than the full benefit of statutory protection, is simply not an acceptable response.

<u>An Incentive to Regulate</u>

There is also in our view a compelling practical reason to support the inclusion, in a renewed CEPA, of a general prohibition against polluting activities. We believe that the failure of government to move more quickly with its regulatory mandate is a direct consequence of the absence in CEPA of a such a proscriptive provision. By failing to establish such a general prohibition, a significant incentive is provided to

those that would otherwise have to improve their environmental performance, to use their considerable resources to perpetuate the status quo by discouraging or slowing the pace of regulatory initiative. Conversely, were the Act to engender such a prohibition, it would in our view provide an important impetus for regulation to more precisely delineate the range of acceptable conduct.

In other words, the single most important incentive that might be offered to speed the course of regulatory initiative would be a prohibition against releasing toxic substances to the environment in a manner that might cause harm to the environment, biodiversity or health. In the face of such a prohibition, polluters would no longer have an incentive to stall progress of regulatory initiatives. Indeed they might welcome efforts to define with more precision the extent of their exposure to prosecution under the Act. Absent such a prohibition, such polluting activities are likely to remain, for many years to come, entirely un-addressed by either law or regulation.

Recommendation:

1. Bill C-32 should be amended to include a general prohibition against releasing toxic substances to the environment in a manner that may cause significant harm to the environment or human, animal or plant life.

Confusing the Roles of Parliament, Cabinet and the Minister

One of most common and problematic aspects of Bill C-32, is its consistent confusion of the roles of parliament, its Ministers and their cabinet. Similarly the Bill blurs critical distinctions between the proper ambit of law, regulation, policy and programs. Some matters that should be reserved for Parliament, are arrogated to Cabinet. We have already addressed the most important example of inappropriate delegation, but there are several other matters that we submit are deserving of statutory expression, which have instead also been assigned to Cabinet. We address several of these in the sections below.

Conversely other issues that are properly the preserve of Cabinet, are entrenched within the provisions of the statute. Similarly, other matters that are within the policy and administrative prerogatives of the government are also elevated to statutory or regulatory status.

We have not conducted an exhaustive review of Bill to try to identify all instances where this roles and responsibilities are either confused or misallocated, and we would encourage the Committee to ensure that such an assessment is undertaken. However we can high-light and suggest amendments with respect to the more significant instances.

For example, there are several provisions of Bill C-32 which authorize the establishment and promulgation of non binding guidelines and codes of practice. These can be found throughout Bill C-32, and include: S. 47 which deals with "cost-

effective" guidelines concerning the collection of information; S. 54 which deals with guidelines concerning environmental quality objectives, releases of toxic substances, and codes of practice; S. 69 provides authority for developing guidelines having to do with administration of Part 5 of the Bill; and, S. 196 which deals with guidelines having to do with emergency preparedness. There are many other examples.

Some of these matters, such as those concerning releases of toxic substances, should be promulgated as regulations, and the authority to establish such regulations is already set out in S. 209 of the Bill. Others, such as those concerning administration, probably do not warrant even the status of government guideline. In all cases however, the absence of any positive and legal obligation to observe such guidelines and codes of practice obviates the need to include them as statutory provisions.

The value of Bill C-32 will not be measured by its weight or the number of provisions it includes. Indeed the inclusion of many matters that do not require statutory expression simply encumbers the Bill and makes its key provisions less accessible.

Recommendation:

2. Bill C-32 should be amended to remove from its provisions all those matters with respect to which the statutory authority of the Minister is already clear, and where no legally binding obligation exists.

Bill C-32 Should not Equivocate in Stating the Government's Obligations to Protect the Environment.

On the central and essential matter of protecting the environment and health, Canada's most important environmental statute must also be clear and uncompromising. Yet with regard to its core purpose, the language, substance and structure of Bill C-32 is qualified, nuanced and ultimately equivocal.

In fact this consistent theme is established by the very first provision of the Bill which sets out the obligations of the Government of Canada. Thus under section 2, the government is obliged not to " protect, enhance and restore the environment" but rather only to "take cost-effective measures" to do so. Similarly, Canada need not "establish nationally consistent standards for environmental quality" or, "protect … biological diversity from the release of toxic substances." Rather it must only "endeavour" to do so.

The use of such language to qualify these obligations warns Canadians that they should anticipate the failure of government to actually achieve the goals of the Act. Given its record to date, this might be understandable, but anything less than an unequivocal resolve to correct this indifferent performance, is clearly unacceptable.

Recommendation:

3. Bill C-32 should be amended to remove all qualifying adjectives and

adverbs that would ameliorate, qualify or otherwise nuance the obligation of government's to achieve the goals of the Act.

In particular Sections 2(1) (g),(j) and (o) should be revised to delete the words "endeavour." The governments obligations to, inter alia, establish nationally consistent standards of environmental quality; protect the environment and biodiversity; and, to enforce the act in a predictable and consistent matter, must be stated without qualification or apology.

"Cost Effectiveness" is Not an Acceptable Precondition for Government Initiative

Of the many qualifications set out in CEPA and Bill C-32,, in our view the most problematic is the proviso that the government's obligations to "protect, prevent and remediate environmental harm", extends only to taking of "cost-effective" measures. The establishment of the principle that government action to protect the environment must be justified in terms of some notion of cost-effectiveness, is offensive in our view.

If the standard of cost effectiveness was to become the precondition for government initiative, many of the fundamental cornerstones of Canadian public policy, from health care for elderly people to child protection, would have to be questioned. The proposition that governments act only when it will have a positive impact on some balance sheet is no more acceptable in the area of environmental protection that it is any other sphere of public policy.

Moreover the explicit inclusion of such a threshold for initiative, clearly indicates that other reasons for taking action are irrelevant and extraneous. Thus, ethical, moral, aesthetic or social considerations are simply and summarily dismissed. In our view. this preoccupation with the "business- case" for government initiative, is evidence of a disturbing and unacceptable disregard for all other societal values. If an important touchstone of sustainable development is the determination to be integrative in crafting environmental policy, there is certainly little evidence of that approach in Bill C-21.

Furthermore, the failure to define "cost-effectiveness" creates uncertainty, invites speculation and encourages litigation. What are we to take "costs" to mean in this context. Is it to include only those costs that might appear on the balance sheets of corporations and/or governments? What about measurable costs to other sectors of society, such as our health care system? What about costs that are more difficult to measure, such as those undermine the sense of well-being and security, or that reduce aesthetic values, or that may not become apparent for years to come? How are we to quantify the costs associated with the impacts of polluting activities on biodiversity, when we have not even identified many of organisms that we are losing daily as a consequence of our poor stewardship?

A similar list of questions and issues may as readily be articulated with respect to the

concept of "effectiveness". How are we to construct the balance sheet that would compare costs with effects, particularly when costs may be imposed on one sector of society, or on specific companies or even foreign investors, and effects, either beneficial or adverse, will be borne by others?

Recommendation:

4. Bill C-32 should be amended to remove all provisions that seek to limit the obligations of governments to act to those instances where some claim to cost-effectiveness might be made. Rather Bill should establish a clear and positive obligation for governments to make all reasonable efforts to achieve the purposes of the Act. In particular,

Section 2(1) (a) should be amended to read:

The Government of Canada shall ... take all reasonable preventive and remedial measures to protect, enhance and restore the environment;

Excessive Use of Permissive Language

Yet another way in which Bill C-32 resiles from making a strong and unequivocal commitment to the goals of the Act arises by reason of the excessive use of the permissive language. While we agree that a certain amount of discretion is appropriate and even necessary to the effective administration of the Act, in our view Bill C-32 provides far too much latitude to the vicissitudes of the political process. We address, in the body of our submissions, several of the areas in which we believe that the discretion allowed by Bill C-32 is either inappropriate or too broadly stated.

PART 3: INFORMATION GATHERING, OBJECTIVES, GUIDELINES AND CODES OF PRACTICE COMMUNITY RIGHT TO KNOW

Section 46(1) of Bill C-32 provides the Minister with improved information gathering powers. The power to gather and make available information on the release and use of a wide range of substances is important for informed policy and regulation-making; to aid in diagnosis of environmental effects; to direct medical research into the effects of chemical exposures; and, to aid in emergency preparedness planning. Reliable and accurate information is also essential for environmental quality monitoring. We support the expansion of the Minister's powers to require provision of information. (In contrast, section 16 of the original *CEPA* did not even support existing programs such as the National Pollutant Release Inventory).

However, there are several weaknesses in section 46(1) that may limit its ability to support a full range of information gathering activities. Also, in some instances the

provisions of Bill C-32 are not as strong as provisions in Bill C-74 (*CEPA, 1997*), which died when the 35th Parliament prorogued. In particular:

- Paragraph 46(1)(b) of Bill C-74 allows the Minister to gather information on substances that have not been found to be toxic under Part 5 (Toxic Substances) or Part 6 (Biotechnology) due to the current extent of environmental exposure to them. In comparison paragraph 46(1)(b) of Bill C-32 refers only to substances not found to be toxic under Part 5. Monitoring the extent of use and release of biotechnology products will often be essential to determine their threat to the environment.
- Paragraphs 46(1)(f) and (g) refer to substances that "cause or contribute" or "contribute to" pollution. In many cases it may be impossible to determine whether or not a substance is causing or contributing to pollution without having information on the extent to which it is being used or entering the environment. The purpose of section 46 is to make that determination, but section 46(1)(f) and (g) require the determination to be made prior to information being gathered.
- Paragraph (l) of Bill C-74, referring to information on the manufacture, storage, transportation, of substances referred to in paragraphs (a) to (j), has been deleted from Bill C-32. (Paragraph (k) of Bill C-32 only allows collection on information on the release of substances during their lifecycle.) Not allowing government to collect the fullest range of information on the use of substances could stymie the government's ability to estimate releases or the risk of releases. Information on chemical use is often essential for purposes of determining pathways of release into the environment or tracking worker exposure.

Recommendations:

5. Amend paragraph 46(1)(b) to read "substances that have not been determined to be toxic under Part 5 or Part 6...."

Paragraphs 46(1)(f) and (g) should be amended to refer to substances that "may cause" or "may contribute to" pollution.

Add a paragraph after paragraph (k) stating the Minister may require information on "the manufacture, handling, storage, transportation, recycling, treatment and disposal of, and other activities relating to, the substances referred to in any of paragraphs (a) to (j);"

Section 52 -- Grounds For Confidentiality

We are also supportive of efforts to strengthen the Act to limit emitters' rights to prevent public access to information and reports concerning their emissions. Environment Canada has interpreted the current *CEPA* and the *Access to Information Act* (*AIA*) as not allowing Environment Canada to disclose NPRI information for which confidentiality has been claimed unless it receives a request

under the *AIA* and the Information Commissioner under the *AIA* recommends release of the information.[1] Under the *AIA* the Information Commissioner is to not allow access if the information has been consistently treated as confidential. This essentially gives emitters and users of toxic substances the right to keep their emissions secret. Section 52 removes confidential treatment as a grounds for denying access to data on emissions.

However, polluters can continue to abuse the confidentiality provisions by requesting confidentiality either on the basis that "disclosure of the information would likely cause material financial loss to, or prejudice to the competitive position of, the person providing the information...." or "the disclosure of the information would likely interfere with contractual or other negotiations being conducted by the person providing the information...." These two bases for confidentiality are inappropriate in the context of information required under section 46. In particular,

- Paragraph 52(b) could potentially be used to protect embarrassing information on the environmental releases of a facility on the basis that commercial losses might result from the facility's loss of public image. Commercial losses resulting from greater consumer and public awareness is hardly a valid policy reason for excluding public access to information.
- Paragraphs 52(c) could potentially be used to protect embarrassing information on the environmental releases or use of toxic substances by a facility on the basis that such information would dissuade an investor from investing in the facility, dissuade a bank from loaning money to the facility or dissuade a buyer from purchasing the facility. All of the above are good reasons <u>for</u> making such information available. Increasing the ability of investors and lenders to make inquiries into the environmental behavior and potential environmental liabilities of a company will help commerce take place. We note that, section 53(3) may not allow the Minister to reject this sort of argument because the interest of the investor or lender is a private interest.

The test for confidential information is much tighter under the US Toxic Release Inventory (TRL), requiring the facility requesting confidentiality to show that they have taken reasonable measures to keep the information confidential, that the information is likely to cause substantial harm to their competitive position, and that a substance's chemical identity is not readily discoverable through reverse engineering.[2] Applying these criteria, the EPA allowed only one of 486 trade secret claims made in the reporting years 1987, 1988 and 1989.[3]

Recommendation:

6. Delete paragraphs 52(b) and (c).

<u>Sections 51 And 53: Process For Determining Confidentiality</u>

Under section 51, when a polluter requests confidentiality, they are not required to

substantiate the request (other than specifying the grounds for seeking confidentiality). The Minister has the option of requesting additional justification. This encourages polluters to request confidentiality as there is little effort required in making such a request. In comparison, the US *Emergency Planning and Community Right to Know Act* requires justification for confidentiality to be made at the time the request for confidentiality is made. Moreover, frivolous confidentiality claims are subject to penalties of $25,000 per claim.[4]

Where a Minister rejects a claim for confidentiality, the provider of the information has an opportunity to appeal the decision to the Federal Court. However, where the Minister accepts a claim for confidentiality, the ability of the public to have the federal court review the decision is unclear. Bill C-32 suggests there is no right to request a review, but the *Access to Information Act* could be interpreted to give a superseding right to request a review.

Recommendations:

7. Require companies requesting confidentiality to provide, at the same time they make the request, particulars of their grounds for confidentiality;

8. Make submission of a frivolous request an offence; and'

9. Amend subsection 53(4)to read:

(4) If the Minister accepts the request,

(a) any person has the right to request a review of the Minister's decision under the Access to Information Act; and

(b) information shall not be published accept as provided under the Access to Information Act.

Selections 51 to 53: Restrictions On What Can Be Kept Confidential

Sections 51 to 52 do not distinguish between types of information that can be kept confidential. We strongly believe that Canadians are entitled to all information concerning the release of toxic substances and pollutants by industries operating in their communities. We believe that most Canadians would find repugnant the notion that they may be denied access to such information. The TRI allows withholding information only in relation to the specific chemical identity and, where information is withheld, requires information on the generic class of a release.[5] New Jersey does not allow confidentiality requests in relation to the identity and amount of any substance released into the environment.[6]

Recommendation:

10. Do not allow firms to restrict information on actual releases of toxic substances.

Division 6: International Air Pollution

Although Bill C-32 is intended to give the Governor in Council wide regulation making authority to deal with international atmospheric problems such as climate change in the event provinces do not reduce emissions, there are a number of weaknesses.

It is possible to make a technical argument that Bill C-32 does not apply to emissions which contribute substantially to but may not cause an air pollution problem. *CEPA, 1998, s*ection 166 lays out the conditions that must be met before government regulates under Division VI. The Ministers of Environment and Health must "have reason to believe that a substance released from a source in Canada into the air creates or may reasonably be anticipated to create, (a) air pollution in a country other than Canada; or (b) air pollution that violates, or is likely to violate, an international agreement binding on Canada...." "Air pollution" is defined as the condition of the air caused by the release of substances into it, not the substances *per se*. Because of this, it is possible to argue that Canada did not create the condition of the air but only contributed to it.

This argument is buttressed by the changes in the wording from the current version of *CEPA*. In particular, s. 61 of *CEPA* refers to air contaminants released from Canadian sources resulting in violation of an international agreement, and refers to air contaminants, "either alone or in combination with other air contaminants" creating air pollution. Since, most international air pollution is caused by sources in more than one country, not allowing the federal government to regulate emissions which contribute to an international air pollution problem would negate the effectiveness of *Division 6*.

Bill C-32 may not cover regulation of substances which damage the global atmosphere. The international air pollution divisions in both Acts apply only to substances which cause air pollution. Air pollution is defined broadly, as "a condition of the air" Because air pollution is often used in a way which refers to local and regional air pollution only, one can argue that Bill C-32 does not apply to greenhouse gases.

If some provinces take sufficient action to reduce greenhouse gases, but others do not, it is not clear whether or not the federal government can regulate provincial sources in the provinces that have taken sufficient action.[7] This may restrict the ability of the federal government to establish a national program where a national program is the most efficient means of dealing with a pollution problem.

It is not clear how much time the federal government must give provinces to reduce their greenhouse gas emissions before facing federal regulation. The uncertainty

could delay federal action.

Recommendations:

11. Amend the first part of subsection 166(1) to refer to a substance which "creates, or may reasonably be anticipated to contribute to, ..."

12. Amend the definition of air pollution in section 3 to refer to "a condition of the air or atmosphere ... that directly or indirectly ...(f) interferes with normal climatic processes."

13. Amend paragraph 166(2)(b) to state:

"if a government referred to in paragraph (a) can prevent, control or correct the air pollution, request the government to develop, within a timeframe approved by the Minister, a plan for controlling the source."

14. Add a new subsection 166(2.1)

"The plan requested under paragraph (2)(b) must include a schedule for implementing measures which can reasonably be expected to correct the air pollution within a timeframe specified by the Minister."

15. Amend section 166(3) as follows

"If ... the government referred to in paragraph 2(a) cannot prevent, control or correct the air pollution under its laws, or fails to deliver a plan for controlling the source that meets the requirements of the Minister, or fails to meet the time frames established by the plan, the Minister shall recommend regulations to the Governor in Council ...."

16. Add a new subsection 166(3.1):

"Where sources in more than one province must be controlled to correct an air pollution, and one or provinces in which such sources are located fail to meet the requirements of subsection (3), the Minister may recommend regulations which apply to all provinces in which such sources are located."

PART 4: POLLUTION PREVENTION

The Factory Fence

For too long, the factory fence has operated as a great divide separating those concerned about the workplace environment from those concerned about the

environment beyond the plant gates. This unfortunate and artificial division continues to obscure the fact that the ultimate solution to both workplace and environmental concerns will often require employers, workers and environmentalists to recognize common problems and develop cooperative strategies to address them.

Because environmental policy has until now been focused on end-of-pipe "solutions", there was little reason to look further up-stream to see whether pollution problems might be avoided more effectively than they could be controlled. In fact the failure to address both workplace hazards and environmental impacts at the same time, has at times resulted in environmental and workplace controls actually working at cross purposes. For example, increased ventilation is often used to deal with high levels of airborne toxic chemicals in the workplace. When contaminated workplace air is simply vented to the environment it has created serious hazards for those living in the community, particularly in the mixed neighbourhoods where many older manufacturing plants are still located.

Pollution prevention can shift the focus of environmental programs from managing and controlling the release of pollutants entering the environment, to preventing pollution at its source. For this reason it has the power to finally break down an important barrier that has kept workers, environmentalists and employers from working together to improve the environment for both workers and the greater community.

As pollution prevention has emerged as an important environmental priority, it offers a new chance to build alliances between environmental and community groups, trade unions and business organizations - alliances that might make real breakthroughs in tackling the problems of toxic substances use, generation and release.

Unfortunately having proclaimed its intention to make pollution prevention the cornerstone of its approach to environmental protection, Bill C-32 takes only a tentative and equivocal step in that direction. We believe that there are important deficiencies with its approach to this issue.

Pollution Prevention Can Not Ignore the of Toxic Substances Use

To begin with, it is impossible in our view, to achieve the potential gains of Pollution Prevention without directly addressing the issue of toxic substances use. Unfortunately the approach to pollution prevention presented in Bill C-32 would attempt to do just that.

Thus the issue of toxic substances use is ignored by the the Bill's definition of pollution prevention; by Part 4 which deals with Pollution Prevention planning; and by Part 3, and in particular S.48, which empowers the Minister to establish a "national inventory of releases of pollutants.

By taking this approach the government has decided not to follow the approach adopted by some leading US jurisdictions. We would urge the the government to reconsider its present course, for the following reasons.

The Need to Avoid the Transfer of Risks

Another important missing element of present Federal proposals to make pollution prevention a part of CEPA - is the absence of any express prohibition against shifting risks among workers, consumers, emissions and waste streams, or aspects of the environment. This omission is problematic for workplace health and safety, because when Pollution Prevention efforts are exclusively focused on reducing toxic releases to the external environment, they have the potential for actually making workplace conditions worse.

An excellent study by the Massachusetts Toxics Use Reduction Institute, identifies several ways in which Pollution Prevention measures can shift risks to workers:

- from environment to worker (eg. waste recycling projects which prolong worker exposures while reducing quantities of substances used and waste produced);
- from one health effect to another (e.g. substitution of TCM-TB, a severe dermal and respiratory irritant, for the carcinogen pentachlorophenol in treating lumber); or,
- from chemical health risk to safety risk (e.g. the use flammable or explosive substances to replace CFCs for refrigerant or propellant purposes).[8]

US legislation provides a useful example of how pollution prevention can be defined to include explicit recognition of the need to minimize the potential for these risk transfers. Thus under The Massachusetts Toxics Use Reduction Act, pollution prevention is defined as:

> *In -plant changes in production processes or raw materials that reduce, avoid, or eliminate the use of toxic or hazardous substances or generation of hazardous byproducts per unit of product, so as to reduce risks to the health of workers, consumers, or the environment, without shifting risks between workers, consumers, or parts of the environment.*

Mandating Pollution Prevention

To date, Federal programs have concentrated on encouraging voluntary participation in pollution prevention initiatives. This no doubt explains, at least in part, the government's reluctance to accept this Committee's recommendation for making pollution prevention mandatory in certain instances. Clearly we can applaud the efforts of the corporations that have decided to demonstrate leadership in taking up the challenge of Pollution Prevention. Their efforts have demonstrated the utility and cost-effectiveness of these approaches for improving their company's environmental

performance.

However, there is very little evidence to support the notion that voluntary programs are sufficient to effect meaningful change in corporate behavior and attitudes when it comes to environmental or occupational health and safety matters. In fact, experience is very much to the contrary.

For example, when New Jersey commissioned a study to evaluate the effectiveness of pollution prevention planning in that State, researchers asked facilities to project pollution reduction goals both before and after Pollution Prevention planning and found that "reduction goals made through planning were nearly three times as great as projections made before planning was required".[9]

This suggests that the failure to mandate pollution prevention sets up a this "Catch 22:"

If companies knew the true potential of Pollution prevention planning they would do that planning voluntarily. But because they aren't required to plan, they never discover the true potential that Pollution prevention offers.

Tough Environmental Standards Are The Most Effective Incentive

Apart from a legal duty to plan for Pollution Prevention, ultimately the most compelling reason for companies and public sector employers to identify and implement Pollution Prevention measures comes from tough environmental regulation. In this way regulations that mandate the phase-out of certain toxic substances, require expensive pollution controls, or waste treatment, create the greatest real incentive for companies to reduce the costs of pollution control and treatment. Often the most cost effective measure will be the one that eliminates the need for control or treatment altogether.

It is no coincidence then that the most successful pollution prevention efforts have been for substances subject to stringent environmental regulations. For example, a study assessing the performance of Massachusetts landmark Toxic Use Reduction Act shows a direct correlation between the strictness of environmental regulation and the degree of success with toxic use reduction.[10] Examples include CFCs and elemental chlorine. Tough environmental standards aren't the only reason for companies to protect workers and the environment. but they certainly seem to be the most important. We will return to the issue of voluntarism in our analysis of Part 9 of the Bill, below.

Recommendations:

17. Therefore we recommend that Bill C-32 be amended to include the following elements:

- *a definition of pollution prevention that explicitly incorporates the principle toxic substance use reduction;*
- *explicit recognition of the need to consider the workplace environment and a commitment to include workers in pollution prevention planning and implementation;*
- *a commitment to avoid risk transfer from one medium to another, or between the external and workplace environments;*
- *mandatory Pollution Prevention planning for substances on CEPA priority substances list, and for wastes for which export permits are sought, together with an obligation to implement plans, carry out follow-up, monitoring and reporting;*
- *a requirement to report on toxic substances use in addition to obligations arising under the NPRI, and;*
- *clear limits and timetables for eliminating/reducing the use and/or generation of toxic substances.*

PART 7: CONTROLLING POLLUTION AND MANAGING WASTES

Division 2: Protection Of Marine Environment From Land Based Sources Of Pollution

These provisions represent a much needed addition to CEPA, since land-based sources constitute up to 80% of marine pollution.[11] They also recognize Canada's obligations under the *1995 Washington Declaration on Protection of the Marine Environment Against Pollution from Land Based Sources*. This Declaration was the result of a meeting of many of the Parties to the *1982 United Nations Convention Law of the Sea (UNCLOS)* and elaborated on the *UNCLOS*' provisions related to land-based sources of marine pollution. As stated in *It's Still About Our Health!* the best means of eliminating these sources of marine pollution is improving Canada's regulation of toxics and reducing overall land-based pollution.

However, while *Part VII, Division II* is a step in the right direction, it doesn't go far enough in our view to achieve meaningful reductions in the level of marine pollution. Nor does it add anything of substance to the commitments that Canada has already assumed under *UNCLOS* and the *Washington Declaration*.

The main weakness is section 121(1) which allows, but does not require, the Minister to issue environmental objectives and release guidelines and codes of practice to prevent and reduce land-based sources of marine pollution. These voluntary approaches are non-binding and cannot be enforced. A preferable approach is to allow for the creation of regulations to prevent and reduce these pollution sources. Regulations have the advantages of legal certainty, enforceability, and proven capability to change behaviour.

Recommendation:

18. Section 121 should be amended require the Minister to make regulations to prevent and reduce land-based sources of marine pollution.

Division 3: Disposal at Sea

This part of Bill C-32 generally prohibits ocean dumping unless done in accordance with a permit or unless the activity is exempt.

Disposal is defined broadly and includes deliberate disposal at sea:

- from a ship, an aircraft, a platform or other structure,
- of dredged material from any source, and
- of a ship, aircraft, platform or other structure, and also includes disposal
- on the seabed, subsoil of the seabed, or on the ice in an area of the sea.

Disposal may be allowed for "waste or other matter" if a permit is obtained.

In our view, these provisions of Bill C-32 need to be substantially strengthened if they are to represent a meaningful deterrent to these harmful practices.

First, disposal that is "incidental" to the normal operations of a ship, aircraft, platform or other structure and disposal related to seabed exploration, mining and processing are exempt from the permitting requirements. There is no evidence that these activities are environmentally benign.

Recommendations:

19. The exemptions for "incidental" disposal 122 1(g) and seabed mining 122 1(j) should be deleted from s.122.

As recommended in It's Still About Our Health! and as set out in the 1995 Government Response the pollution prevention principle should be fully adhered to for ocean disposal. In our view, Permit applicants should have the onus of proving the need for ocean disposal, and an essential mechanism for doing so, would be the preparation and implementation of a pollution prevention plan.

Recommendation:

20. Section 127(2) should be amended to require proof that recycling, reuse or treatment are unfeasible or unsafe. Section 127(3) should be amended to require the Minister to consider the applicant's adherence to the pollution prevention principle and the need for ocean disposal before issuing a permit.

The current working of section 127(3) that the Minister shall "take into account any factors that the Minister considers necessary" grants too much discretion to the Minister.

The national ocean disposal database previously discussed by the government does not appear in Bill C-32. This database should be required as part of the public electronic registry for all information on ocean disposal applications, permits, notices of objections, public comment, Boards of Review, and monitoring of ocean disposal sites or incineration at sea.

Recommendation:

21. Bill C-32 should require the establishment of a national ocean disposal database.

The 10 day time period for filing a notice of objection to an application for an ocean disposal permit is too short, and inconsistent with other public comment time limits set out in the Act.

Recommendation:

22. Section 134(1) should be amended to provide for a 60 day period in which to file a notice of objection.

PART 9 – GOVERNMENT OPERATIONS AND FEDERAL AND ABORIGINAL LAND

The government's environmental record in relation to its own lands and activities "represents a significant failure of political will and has important consequences for environmental protection in Canada...the current combination of low resources, inadequate legal drafting, minimum political will, and almost no regulations is ineffective and must be changed."[12]

If Canada is to make significant gains in preventing pollution, the federal government must show the way by requiring strong environmental standards for federal lands and activities. As the assessment quoted above shows, *CEPA* has failed to do this to date. CEPA 1998 will not change this weak record.

Background

Federal departments, agencies, Crown corporations, and federal lands are under federal jurisdiction, and regulated by federal law. Federal undertakings cannot normally be regulated by provincial environmental laws, if those laws attempt to control the heart of the federal undertaking, though leading constitutional law experts agree that there is no need to maintain interjurisdictional immunity of

federal undertakings from provincial laws that do not threaten the continuing functioning of the undertakings.[13]

Consequently, if no federal law imposes environmental controls on the federal house, and no provincial environmental law applies, activities on federal land take place in a vacuum of environmental law and regulation. Part IV of *CEPA* was designed to fill this regulatory gap, but was rarely used and given little priority by the government. Throughout the long period of development of the new law, many commentators emphasized the need for strong moral leadership from the federal government in environmental protection, and urged the government to enact strong regulatory controls on its own lands and activities.[14] The government itself acknowledged the problem, and pledged to eliminate this regulatory gap in an amended *CEPA*.[15]

CEPA and the Federal House

At the start of the five year review process, a comprehensive evaluation of *CEPA* commissioned by the federal government concluded that:

- the federal government had failed to demonstrate leadership in the field of environmental protection;
- implementation of the old Part IV of *CEPA* was not a high priority for the government; and
- reliance on a voluntary approach to compliance with environmental standards had proved to be a failure.[16]

The original *CEPA* provided in Part IV, *Federal Departments, Agencies, Crown Corporations, Works, Undertakings and Lands*, that regulations could be made for the limited purposes of emission and effluent limits and for waste handling and disposal practices (Section 54(2)). Environment Canada reported many plans to develop regulations on matters such as hazardous waste, air emissions at federal boilers; municipal-type incinerators; underground storage tanks; wastewater treatment, landfills and emergencies, starting with the 1990 Annual Report on *CEPA*.

Astonishingly, only two such regulations have ever been made:

- the *Federal Mobile PCB Treatment and Destruction Regulations*[17]; and
- the *Registration of Storage Tank Systems for Petroleum Products and Allied Petroleum Products on Federal Lands Regulations*.[18]

The most recent report for *CEPA*, for 1995-96, reveals plans for an additional regulation for halocarbons, but apparently even this exceedingly modest commitment has yet to be fulfilled.

Part IV of *CEPA* also authorized the creation of environmental quality guidelines that would apply to the federal house. Again, in another demonstrable failure of the Government's environmental agenda, only two Guidelines: the *Glycol Guidelines*

(1993); and, the *Guidelines for Underground Storage Tanks Containing Petroleum Products and Allied Petroleum Products* (1995), were ever issued.

Bill C-32 and the Federal House - the Good News

Bill C-32, *CEPA* 1998, addresses some of the more pointed criticisms that have been made of this part of CEPA:

- The requirement for ministerial concurrence from an affected minister who had specific authority for lands, works or undertakings before a regulation was proposed to the Governor in Council for approval has been removed.
- The exemption for Crown corporations has been removed.

Bill C-32 also substantially expands the regulation-making power of the government in relation to government operations and federal and aboriginal land. It lists the types of regulations that may be made in Section 209, including:

> (a) the establishment of environmental management systems;
>
> (b) pollution prevention and pollution prevention plans;
>
> (c) environmental emergencies, releases of substances and likely releases, including their prevention, preparedness for them, reporting them, both as soon as possible in the circumstances and in detail at a later stage, and the measures to be taken to respond to them and to correct damage to the environment.

Section 209(2) further expands on how substances may be regulated and includes a long list of possible areas of regulation of substances: (a) the quantity or concentration of any substance that may be released into the environment; (b) the places or areas where the substance may be released; (c) the commercial, manufacturing, processing or other activity in the course of which the substance may be released, etc.

Bill C-32 and the Federal House - the Bad News

Despite the expansion in the regulation making powers to control and prevent pollution in the federal house, no new regulations have been announced. There is no list of future planned regulations. No timetable for introducing new regulations under this Part has been released. There is no reason to believe that the current record of inaction and reliance on voluntary guidelines will change with CEPA 1998.

As we have raised in the introduction to our submissions, the failure of CEPA and now of Bill C-32 to prohibit polluting activity on federal land, and by the federal government, its departments and agencies fundamentally betrays the stated goals of this environmental legislation. Furthermore, it is, as we have argued, the single most likely explanation for the lack of any meaningful progress to regulate activities within

the Federal House.

The other factor that has created the malaise that appears now to afflict the governments environmental agenda, is the apparent belief that no more than voluntary measures are needed to resolve the environmental problems that CEPA exists to address.

This commitment to voluntarism is given expression by the repeated emphasis in Bill C-32 on non-binding objectives, guidelines and codes of practice, which in this instance may be promulgated for the purpose of carrying out the Minister's duties and functions under this part.

Voluntarism is Not a Credible Response to the Challenges of Controlling Toxic Pollution

If no regulations are in force, the public will have to rely on the federal government to voluntarily comply with strict standards for its own lands and activities. Yet Environment Canada's own offices show that a sole reliance on voluntary compliance has been ineffective in regulating industry. A recent report from the Environment Canada Pacific Region office reviewing 19 different regulatory groups found that those industrial sectors which relied solely on self-monitoring or voluntary compliance had a compliance rating of 60% versus a 94% average compliance rating for those industries which were subject to federal regulations combined with a consistent inspection program.[19]

The three case studies in the report contain graphs which show the dramatic effect on compliance from the introduction of a new regulation. Environment Canada targeted high polluting industries such as the antisapstain industry, pulp and paper industry and heavy duty wood preservation industry with increased inspection and enforcement programs. For each industry, voluntary compliance with new environmental performance requirements proved to be entirely ineffective. The compliance rate markedly improved when regulations were issued and a consistent inspection program was instituted. In the pulp and paper industry, the volume of toxic effluent, including dioxins, furans, and contaminated defoamers and wood chips was reduced by more than 95%. Mills that used antisapstain chemicals to protect freshly cut lumber from molds and fungi had a 99% reduction in their discharges of toxic effluent from the antisapstain chemicals. And in the wood preserving industry, toxic discharges were cut by 94%, after an eight year period in which five voluntary codes of practice developed by Environment Canada did not produce major changes in compliance. The graphs are attached to this report.

This report shows that regulations are a necessary component of environmental performance. The existence of regulations themselves is the important point. Prosecutions were not used in any great measure in this compliance and enforcement program. The author of the report believes that: "You can move a large portion of the (polluting) group into compliance in the inspection phase -- if you have the prosecution hammer in your back pocket."[20] Rather, the program

maximized the use of enforcement tools such as inspections, warning letters and direction letters.

The regulatory backdrop is a key part of obtaining better compliance. The report cites the widely quoted KPMG Environmental Risk Management Survey of 1,547 of the largest Canadian companies, hospitals, universities and school boards which

found that the prime motivating factors for implementing environmental improvements were compliance with regulations which was a motivating factor in over 90% of the cases. Least influential factors were voluntary programs which were responsible for only 15% to 20% of implementation of environmental improvements.

When the government itself admits that regulations are the chief way to obtain improvements in environmental quality, it is surprising that few regulations have been prepared to govern the federal government's own activities. And the impact of federal government activity throughout Canada is major. It has been described as the country's major enterprise, due to the amount of its annual expenditures, the number of its employees, the number of buildings it owns or rents, the amount of land it owns, the amount of goods and services it purchases annually. Environmental controls on these works and activities are minimal.

The government must also make a commitment to devote sufficient resources to enforcement. Environment Canada's Pacific region lost 72% of its operations budget between 1992 and 1998, and the positions of three inspectors were eliminated. The author of the report on enforcement said it would have been impossible to achieve such reductions in water pollution levels with the type of budget he now has available.[21]

Case Study

In response to the Standing Committee's report criticizing the government for not subjecting its own activities to vigorous environmental protection requirements, the government pledged to make regulation of emissions from federal activities that threatened the surrounding community its first priority.

"The government of Canada intends that members of the 'federal house' be held to the same environmental protection and pollution prevention standards as the communities in which they operate. Therefore, Environment Canada is committed to working cooperatively with other federal entities to quickly and effectively close priority gaps and environmental protection for the federal house....The government's first priority would be to regulate federal activities which could result in emissions or other releases that threaten the surrounding community. Environment Canada would work with other federal entities to determine the activities within this range that would be most appropriate to address first."[22]

A case study in Esquimalt would be a good test of this pledge. The Esquimalt Graving Dock is a federal dockyard. It is located on federally owned land and constitutes a

federal undertaking. Particulate air pollution from the dockyard is affecting local residents. The pollution arises from sandblasting of ships in the dockyard. Residue from toxic paints is removed by the sandblasting and is dispersed in the air. While a pollution prevention or abatement order pursuant to the provincial *Waste Management Act* could theoretically be applied to control this pollution , this order would not be valid if it interferes with how the dockyard is managed and controlled. To date the provincial Ministry of Environment has refused to issue such an order because it does not believe it has the power to do so.

The Residents have made many efforts over the past two years to stop the ongoing air pollution from the Esquimalt Graving dock. These efforts have been time consuming, involving long public meetings, numerous phone calls, correspondence, media interviews and neighbourhood information sessions. Last summer, a multistakeholder process was set up with representatives of Public Works, union representatives, the Capital Regional District, engineers and residents of the dock area. The process was unable to resolve the air pollution problem. The group recently withdrew from the consultation process on the advice of its lawyer who believes that the process is not being carried out in good faith.

The efforts of the Esquimalt Graving Dock Residents have also been expensive, and technically challenging. Community groups usually do not have access to the technical expertise and the funds necessary to ensure that environmental laws are being enforced. In this case, the group has managed to take the case as far as they have because of assistance from our organization.

Funding from the West Coast Environmental Law's Environmental Dispute Resolution Fund (EDRF) enabled the Residents to retain an expert in air emissions, who has completed sampling and prepared a report. As well, the funding allowed the residents to retain a lawyer to prepare a legal opinion outlining alternative legal remedies. The lawyer has assisted the group in their efforts to raise public awareness of the air pollution issues which has led to substantial coverage in Esquimalt and Victoria news outlets. Increased media prominence subsequently led to the provincial government agreeing to conduct a year-long air pollution study. The lawyer has met with the provincial Environment Ministry to discuss the possibility of having the Ministry issue a pollution prevention order and has helped the residents obtain access to information requests regarding industry's waste transport that helped determine constituents of the pollutants. The group is currently considering its options.

Despite all these efforts, the air pollution has still not been resolved. This case illustrates the difficulties that members of the public have in attempting to stop pollution on federal land. The EDRF is a source of money and expertise that is available to only a small number of Canadians. Without the EDRF's assistance, the group would not have made as much progress as they have. It is evident that a preferable approach would be to have this type of pollution controlled by strict regulations. CEPA is the legal vehicle that should help these people.

No federal regulations currently apply to the Graving Dock operation. *CEPA* is the logical federal statute to protect the environment in this case, but because no federal regulations to control air emissions from federal undertakings have been developed, a large regulatory gap exists. No new regulations to control these types of emissions are currently being drafted.

Recommendations:

23. It is necessary to develop the series of regulations that are needed to control harmful environmental effects of federal activities. The government should make a commitment to introducing comprehensive new regulations to control harmful environmental effects from all its activities and on all its lands. A list of planned regulations and a timetable for when they will be introduced should be made publicly available as soon as possible.

A second possibility, to avoid delay, would be to subject federal lands and entities to the applicable laws of the provinces and territories in which they are located. This could be done by amending CEPA 1998 to allow for the adoption by reference of provincial environmental standards. In its initial review of the CEPA issues, Environment Canada proposed adding a new section to CEPA allowing for the adoption by reference of provincial regulations, which would be listed in a Schedule to the Act. The Standing Committee endorsed this approach, and said incorporating provincial environmental laws by reference "would eliminate the existing double standard and put the federal government on a par with the private sector, thus restoring its credibility in this area."[23] The government's response to the Standing Committee report also proposed to "respect the intent of comparable provincial and territorial environmental protection requirements, which could include incorporation by reference of standards outlined in provincial or territorial regulations."[24]

Bill C-32 does not contain any provisions about incorporation of provincial environmental standards.

Another alternative would be a new provision in CEPA that states that provincial environmental laws of general application are applicable to federal activities and lands. This would remove the need for new federal regulations and would automatically make provincial standards applicable to pollution on federal land and deriving from federal activity. The precedent for this type of provision exists with s.88 of the Indian Act which holds that provincial laws of general application apply to Indians in a province.

One test of how well CEPA 1998 will work is whether it will end the double standard for federal government operations. On the one hand, the government requires industry to strictly conform with CEPA, while on the other hand it continues the current inadequate regulatory controls on its own operations. By neglecting to fill

this regulatory gap, the government sets a poor example for the rest of society and is in a weak position to exert influence on the private sector or individual citizens.[25]

ENDNOTES

1. Based on discussions with Francois Lavallee, Environment Canada.

2. 42 U.S.C.S. §11042(b).

3. United States Environmental Protection Agency, "Toxic Release Inventory: Trade Secret Claims" (September 1991) 2:5 *Emergency Planning and Community Right to Know Reports* 2.

4. 42 U.S.C.S. §11045(d).

5. 42 U.S.C.S. §11042(a).

6. N.J. Stat. Ann. 1991 34:5A-15(h) and 13:1D-47(l).

7. The term "provincial sources" is used here to mean sources (provincial or federal) which are not "federal sources" under *CEPA, 1997* or "federal works and undertakings" in the case of *CEPA*. *CEPA, 1997* defines federal sources as the federal government, federal crown agencies and federal crown corporations and federal works undertakings (e.g. inter-provincial railways, airlines etc.). Section 166(2)(3) and 167 of *CEPA, 1997* and s. 61 of *CEPA* state that before regulating provincial sources the Minister of Environment must consult with provincial governments. If the provincial governments can prevent or control the pollution under their laws, and are willing to do so, the Minister does not have the authority to act.

8. Jennifer Penney, Rafeal Moure-Eraso, Application of Toxics Use Reduction to OSHA Policy and Programs, Toxics Use Reduction Institute, University of Massachusetts Lowell, 1995.

9. Hampshire Research Associates, Inc. *Evaluation of the Effectiveness of Pollution Prevention Planning in New Jersey*: A Program Based Evaluation (1996) at p.36

10. Geiser and Rossi, Toxic Chemical Management in Massachusetts: The Second Report on Further Chemical Restriction Policies; The Toxics Use Reduction Institute, University of Massachusetts Lowell, January 1995.

11. Resource Futures International, *Evaluation of the Canadian Environmental Protection Act, Final Report,* Ottawa, 1993.

12. Resource Futures International, *Evaluation of the Canadian Environmental Protection Act - Final Report* (Ottawa: Environment Canada) December 1993, p.113.

13. Peter Hogg, *Constitutional Law of Canada*, 1997, 15-29, 15-30.

14. See, Dianne Saxe, "Application of Provincial Environmental Statutes to the Federal Government, Its Servants and Agents" 4 C.E.L.R. (N.S.) 115; Resource Futures International, *Evaluation of the Canadian Environmental Protection Act - Final Report* (Ottawa: Environment Canada) December 1993; Kenneth Fisher, "CEPA and the Federal House in Order: Reforming the Federal Government's Environmental Performance" in *Reforming the Canadian Environmental Protection Act* (CEN Toxics Caucus: Toronto) Sept.1994; Standing Committee on Environment and Sustainable Development, *It's about Our Health! Towards Pollution Prevention* (House of Commons: Ottawa) June 1995.

15. Environment Canada, *Reviewing CEPA, The Issues #5, The "Federal House" in Order* (Minister of Supply and Services: Ottawa) 1994; *CEPA Review: The Government Response - Environmental Protection Legislation Designed for the Future - A Renewed CEPA, a Proposal* (Environment Canada: Ottawa) 1995.

16. Resource Futures International, *Evaluation of the Canadian Environmental Protection Act - Final Report* (Ottawa: Environment Canada) December 1993, p. 107.

17. SOR/90-5.

18. SOR/97-10.

19. Peter K. Krahn, *Enforcement vs Voluntary Compliance: An Examination of the Strategic Enforcement Initiatives Implemented by the Pacific and Yukon Regional Office of Environment Canada 1983 to 1998,* Regional Program Report 98-02, March 9, 1998.

20. "Federal budget cuts may let polluters off hook", Ottawa Citizen, April 20,1998, A4.

21. Ibid.

22. *CEPA Review: The Government Response - Environmental Protection Legislation Designed for the Future - A Renewed CEPA, a Proposal* (Environment Canada: Ottawa) 1995.

23. *It's about Our Health! Towards Pollution Prevention* (Standing Committee on Environment and Sustainable Development : Ottawa) June 1995, 173-74.

24. *CEPA Review: The Government Response Environmental Protection Legislation Designed for the Future - A Renewed CEPA* (Environment Canada: Ottawa) December, 1995, 79.

25. Mr. Raymond Cote, Director, School for Resource and Environmental Studies,

Dalhousie University, testimony to Standing Committee on Environment and Sustainable Development, *It's about Our Health! Towards Pollution Prevention* (House of Commons: Ottawa) June 1995, 169.