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SUBMISSIONS BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION AND THE CANADIAN ENVIRONMENTAL LAW RESEARCH FOUNDATION TO ENVIRONMENT CANADA ON THE PROPOSED FEDERAL ENVIRONMENTAL PROTECTION ACT

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I. INTRODUCTION

The Canadian Environmental Law Association (CELA), founded in 1970, is a public interest environmental law group. Since 1980 CELA has focused both its casework and law reform efforts in the area of toxic chemicals, hazardous wastes and pesticides. CELA/CELRF staff have written extensively in the area of toxic chemicals law and have held a series of national roundtable discussions on toxic chemicals, hazardous waste and pesticides law and policy. Most recently, CELA was a member of the Environmental Contaminants Act (ECA) Amendments Consultative Committee. Since its inception, CELA has advocated the need for an Environmental Bill of Rights at both levels of government.

The Canadian Environmental Law Research Foundation (CELRF) is an independent research organization which carries out studies in environmental law matters, in particular with respect to problems posed by toxic chemicals, and disseminates its findings through publications, conferences and seminars. Recent publications include The Regulation of Toxic and Oxidant Air Pollution in North America, Cross-Border Litigation: Environmental Rights in the Great Lakes Basin and Environmental Assessment in Ontario. CELRF also hosted a conference on the Regulation of Biotechnology in 1984 and has held a subsequent seminar on the subject.

II. OVERVIEW

It has long been recognized that Canada's environmental legislation at the federal level was in need of a major overhaul. The myriad pieces of federal legislation administered by several different departments have resulted in fragmented, uncoordinated responses to the problems posed by environmental pollution. As well, our environmental laws have not kept pace with increased understanding of the complexities of environmental problems nor with international initiatives such as the World Conservation Strategy and the development of new approaches to environmental protection.

The Environmental Contaminants Act (ECA), in particular, had been identified since the early 1980s as having serious gaps and limitations. Most notable was the fact that the only notification of new chemicals entering the market in Canada took place only after 500 kilograms of a substance had already entered the market. As well, the government lacked the tools in many instances to require testing or information about both new and existing chemicals. Accordingly, CELA/CELRF welcomed Environment Canada's issuance of the discussion papers in June, 1985 on amendments to the ECA and the establishment of the Environmental Contaminants Act Amendments Consultative Committee later that year. CELA invested considerable time and effort in the work of the committee and commends the government for having taken this approach to the amendment of complex legislation. We believe

that the exercise led to a number of innovative and well thought out suggestions for amendments which were put forward in the committee's report. In addition, there was a considerable amount of consensus among the different interests represented on the committee. Unfortunately, this consensus is not always adequately or accurately reflected in the draft discussion bill.

During the course of the its deliberations, the committee heard that Environment Canada was planning "comprehensive" environmental legislation that would take the form of an "Environmental Protection Act." While the committee was assured that its work on amending the ECA would become part of the new Act, no one from the committee was consulted on the contents of this legislation. To the best of our knowledge, no non-governmental organizations were consulted on the framework or proposed content of the statute.

On December 18, 1986 the Minister of the Environment released the proposed Environmental Protection Act as a draft discussion bill. The proposed Act was touted by the Minister as the most comprehensive piece of environmental legislation in the western hemisphere. Mr. McMillan further stated that the proposed preamble "constitutes the country's first Environmental Bill of Rights." The government's media releases stated that the new Act would deal with all aspects of a toxic chemical's lifecycle, i.e., from "cradle to grave."

As the end of the 1980s approaches, the Minister of the Environment is creating an important opportunity to reform environmental law at the federal level. Realistically, there will not be another such opportunity in the near future. It is therefore crucial to seize this opportunity to review the objectives, relevance and effectiveness of existing legislation and to consider the appropriate direction that federal environmental law should take in the future. It is submitted that the formulation of a comprehensive environmental strategy cannot legitimately proceed in the absence of consideration of two fundamental goals: integrating environmental and economic policies and providing Canadians with environmental rights. It is CELA/CELRF's position that, as presently drafted, this bill does not measure up in terms of it being sufficiently comprehensive or forward-looking and most certainly it does not contain the essential elements of an "Environmental Bill of Rights." As well, in certain respects, the proposed EPA may be a step backward.

It is important to note that environmental problems and concerns have not disappeared during the past decade. Clean air and water are still major issues. In fact, recent opinion polls conducted for the chemical industry have found that environment ranks as number one on the political agenda. The public wants to see action taken to clean up the environment and to prevent harm in the future. A federal Environmental Protection Act could provide that framework. In order to do this effectively, a process is

needed which will allow consultation with as broad an audience as possible. This has been done in part in the consultation carried out with respect to the amendments to the Environmental Contaminants Act but it has not been done at all for the remaining elements of the proposed EPA, nor for the elements of federal environmental law omitted entirely from the proposed Act.

Due to the fact that there has only been consultation on the amendments to the Environmental Contaminants Act and not on the objectives, scope or content of an Environmental Protection Act, CELA/CELRF make the following recommendations:

- To ensure that no further delay takes place, the provisions in the proposed EPA amending the ECA should be put in place as soon as possible with a number of important revisions discussed below. This could take the form of an Environmental Contaminants Amendments Act. At a minimum, the recommendations contained in the ECA Amendments Consultative Committee report should be followed;

- Part V, including the enforcement provisions of the proposed EPA should be enacted, again with certain revisions, and these provisions should be made applicable to all major pieces of federal environmental legislation;

- The Clean Air Act and Part III of the Canada Water Act should remain in force for the time being;

- The government should immediately embark on a public consultation process leading to the enactment of comprehensive federal environmental protection legislation.

Our submissions will focus first on the discussion bill itself, concentrating on Parts I and V. We will then comment briefly on a number of specific areas in which the government has asked for input, and will conclude with suggestions for additional reforms that should be incorporated into either a comprehensive Environmental Protection Act or other federal environmental legislation. Our recommendations in this regard should be taken as an initial step in the debate on improving federal environmental protection law.

III. THE PROPOSED ENVIRONMENTAL PROTECTION ACT (EPA)

A. The Preamble

The discussion bill contains a lengthy preamble which the Minister has referred to as tantamount to an Environmental Bill of Rights. CELA/CELRF will first comment on the general legal effect of preambles in legislation and then offer some suggestions for amendments to the preamble as presently written.

Generally, a preamble in a statute is not enforceable in and of itself but, rather, is to be used only as an interpretive aid in determining the meaning of the substantive provisions, particularly those provisions which are unclear or ambiguous. In an early English case, Lord Halsbury sets out two main principles regarding preambles:

> Two propositions are clear: one that a preamble may afford useful light as to what a statute intends to reach; and the other, that if an enactment is itself clear and unambiguous, no preamble can clarify or cut down the enactment.[1]

Canadian courts have generally adopted these principles.[2] It has also been stated that a preamble "may be legitimately consulted for the purposes of keeping the effect of the act within its scope, and generally to ascertain the legislative intent."[3] What is clear is that no enforceable rights spring from the preamble

and, as discussed later in the brief, it can in no way be construed as an "Environmental Bill of Rights." Indeed, at the consultation meeting held by Environment Canada in Toronto on February 13, 1987 the government lawyer present, when asked what the department's position was on the legal effect of a preamble, responded that it had "no legal effect" and at best sets the spirit within which the Act should be interpreted.

This bill also contains a declaration, which could also be used to construe the meaning of ambiguous sections in the Act, but does not in itself confer any rights.

It appears from the preamble and from discussion with government lawyers involved in the drafting of the bill that the criminal law, trade and commerce, and peace, order and good government powers in the Canadian Constitution are the bases for the legislation. CELA/CELRF have always maintained that pollution and environmental degradation are issues of national concern and that the federal government has the authority under the peace, order and good government power to enact national standards and take a lead role in the protection of the environment. In fact, the constitutionality of the Clean Air Act has been upheld on this basis.[4] It is our submission that while the proposed EPA recognizes the national dimensions of environmental protection, the provisions of the bill do not fully reflect this.

Our first concern is with the phrase "...and the environment on which human life depends" which is found in both the declaration and the first WHEREAS clause as well as in various sections of the draft bill. It is our opinion that this clause unduly restricts the application of the bill and sets out an outdated, anthropocentric view of the environment, that fails to admit that there is value in protecting the environment for its own sake. Surely the fragile northern tundra and isolated significant water courses, for example, are worthy of protection without considering their relationship to humans and are fully within the authority of the federal government to protect. CELA/CELRF recommend that the phrase "...and the environment on which human life depends" be deleted from the draft bill.

A second concern is with the wording of the third WHEREAS paragraph of the preamble which states that:

> WHEREAS recognizing that it is necessary and desirable for the Government of Canada...to act in cooperation with provincial and territorial governments...and that, having due regard to national policy and to legal and constitutional requirements...

We recommend that the word "necessary" be deleted, as it is clear that in relation to an international or interprovincial pollution and other situations only the federal government has jurisdiction to enact legislation. The word "necessary" could be relied on to unduly limit the federal role. We also recommend that the phrase

"having due regard to national policy and to legal and constitutional requirements" be deleted,as it is vague.

Most importantly, CELA/CELRF recommend that points (a) to (f) (with some minor changes) in the third WHEREAS paragraph be turned into a purpose section for the Act, placed after the preamble and the present section 1. Thus, a new section 2 could read:

> The purpose of this Act is to:
>
> (a) protect and enhance the quality of the environment,
>
> (b) provide leadership in the establishment of nationally consistent standards of environmental quality,
>
> (c) give due regard, in making decisions, to environmental values,
>
> (d) ensure the participation of the people of Canada in the making of decisions that affect their environment,
>
> (e) ensure the development of a social and economic climate that accords environmental values a fundamental role in the making of decisions in the public and private sector, and
>
> (f) provide information to the people of Canada on the state of their environment.

A purpose section incorporated into the body of the legislation would be stronger than a preamble and would help set a clear framework within which this Act should be interpreted.

Our comments on the last WHEREAS paragraph (a) will be dealt with in our suggestions for change to the definition of "toxic substances" in section 5 of the proposed bill. The paragraph should be amended to correspond to the changes made to section 5.

B. Definition Section - Interpretation

CELA/CELRF recommend that a definition of "environment" be included in this legislation. There are many different definitions which could be read in, but it is essential that the boundaries of a leading environmental statute be contemplated in advance. The trend has been for ever broadening definitions of the word "environment" as our understanding of the interrelationships between the biophysical and human worlds has grown. For example, the Ontario Environmental Assessment Act defines "environment" as:

> (i) air, land or water,
> (ii) plant and animal life, including man,
> (iii) the social, economic and cultural conditions that influence the life of man or a community,
> (iv) any building, structure, machine or other devide or thing made by man,
> (v) any solid, liquid, gas, odour, heat, sound, vibration or radiation resulting directly or indirectly from the activities of man, or

> (vi) any part or combination of the foregoing and the interrelationships between any two or more of them...[5]

It is recommended that a similar, broad definition be placed in the proposed EPA.

C. National Environmental Quality Objectives

Section 4 of the proposed EPA gives the Minister of the Environment the authority to formulate environmental quality objectives, guidelines and codes of practices. This section merely affirms the "status quo" as found in the Department of Environment Act[6] and in the Clean Air Act[7].

CELA/CELRF recommend that the authority in section 4 be extended to allow the Minister to formulate environmental quality standards as well as objectives. Section 4 should also contain the following new clause:

> (3) A copy of any national environmental quality standard that the Minister proposes to prescribe shall be published in the Canada Gazette for public comment; and no such environmental quality standard may be prescribed by the Minister except after the expiration of 60 days following such publication thereof.

It should be noted that the preamble states that the intent of the government is to "provide leadership in the establishment of nationally consistent standards of environmental quality." Our proposed section 4(3) would provide the authority to enact these national standards. This section could be used to set national ambient water, drinking water and air emission standards, giving all Canadians a uniform minimum of environmental quality. The provinces could then of course set more stringent requirements to meet specific conditions within their respective boundaries.

As a result of this amendment to section 4 of the proposed EPA, the last WHEREAS of the preamble, clause (e) should be amended to read: "(e) the establishment of national standards and objectives respecting the quality of the environment."

D. Part I - Toxic Substances

1. Interpretation - Definition of Toxic Substance

It is our submission that the definition of toxic substance, which is the cornerstone of Part I of the proposed EPA, needs to be rewritten. In its present form, in section 5, the definition is unclear and may hinder achievement of the stated goals of the statute. It should be noted at the outset that:

- this term is not defined in the existing Environmental Contaminants Act and is not found in any other piece of federal or provincial law (to the best of our knowledge);

- while the ECA Amendments Consultative Committee spent a considerable amount of time defining "substance," the use of a term such as "toxic substance" as the trigger for government regulation was never discussed. Thus, this term has received little scrutiny and should be reviewed carefully.

At present, the ECA allows a "substance" to be put on the schedule if the Ministers of Environment and Health and Welfare are "satisfied" it is entering or will enter the environment in "a quantity or concentration or under conditions that...constitute or will constitute a significant danger in Canada...to human health or the environment." A similar legal test had to be met before testing could be required by the government. The Department, in its 1985 Discussion Papers, and the ECA Amendments Consultative Committee clearly recognized the limitations of that wording. The committee came to the conclusion that the test should be made less stringent. The committee, specifically with regard to information gathering, recommended that the information and disclosure provisions be strengthened and expanded. The report states that:

> Committee members agreed that, to enhance the protection of the environment through preventative measures (such as gathering information) and early action, the wording currently used in subsection 4(1) of the Act should be reviewed and amended so as to be less restrictive on Ministers.[8]

CELA/CELRF believe that the definition of toxic substance as presently drafted in section 5 does not carry out the intent of the ECA Amendments Consultative Committee. Furthermore, because this term must be read into all subsequent sections in Part I where the phrase "a substance is toxic" is found, it may present an even greater impediment to action than the existing wording of the ECA. Specifically, Section 5(a) provides that a substance is toxic if it "is entering or will enter the environment in a quantity or concentration or under conditions that constitute or will constitute a significant immediate or long-term danger in Canada or any area thereof to human life or health or the environment" (underlining added).

It is our submission that the tests of proving that a substance "constitutes" or "will constitute" a "significant immediate or long-term danger" are extremely onerous and undermine the preventative approach which the legislation was intended to implement. In addition, the wording does not embrace harm due to additive, cumulative and synergistic effects of chemicals in the environment. Finally, without a definition of environment in the Act, the range of impacts that would be toxic is unclear.

Section 5(b) contains complicated language and also sets up a number of hurdles which could lead to inaction by the government or challenges in the courts by industry when the government attempts to regulate a "toxic substance." Specifically, section 5(b) provides that a substance is toxic if it, "by reason of the

damage it causes or may cause to biological organisms or to the natural ecological equilibrium has a deleterious and largely irreversible effect on the environment..." (underlining added). It is submitted that this test is much too stringent as a prerequisite for regulation. It would be exceedingly difficult to prove a largely irreversible effect and, in fact, if this was the test, substances which produce acute effects may not be caught. The other hurdle is that the environmental effects must "thereby" interfere with "the biological processes on which human life depends." It is submitted that this test is vague at most and meaningless at worst and, again, as was discussed with respect to the preamble, disavows protection of the environment for its own sake.

We have a number of alternative recommendations to make with respect to amending section 5:

(1) The definition should be amended to provide that a substance is toxic if it constitutes or contributes to or may constitute or contribute to a deleterious effect on human health or the environment. The term "deleterious" is recommended because it has been judicially considered under the Fisheries Act; or

(2) The definition of toxic substance should be amended to reflect the wording stated in the accompanying explanatory note, i.e., a substance is toxic if it may at any time, in Canada or in any part of Canada, endanger human health or the environment.

2. Information Gathering Powers

We support the intent of the proposed EPA to widen the range of information which can be gathered by the Ministers. We also support the change in the text from "reason to believe" to "reason to suspect" as the test for the Ministers to require certain information. However, we are concerned that we may have a "catch 22" situation that will render these sections ineffective. For example, in section 9 the definition of "toxic substance" in section 5 must be read in, with the result that the Ministers may require information when they have reason to suspect that a substance "constitutes or will constitute a significant immediate or long-term danger in Canada..." Yet, at the point of time that the Ministers may want the information, they may not have enough data to have sufficient reason to suspect that the substance will meet the test set out in section 5. An amendment of the definition of toxic substance as recommended above will alleviate this potential catch-22 in the remainder of Part I.

3. Non-disclosure of Certain Information - Section 10

The proposed section 10 provides for the non-disclosure of a broad class of information received by the government under various sections of the Act. It is our position that this section departs significantly from the recommendations made by

the ECA Amendments Consultative Committee and from the general trend of greater access to information within the Government of Canada. It should also be noted that the policy reflected in this section, which amounts to "freedom from information," contradicts the stated policy in the preamble of "providing information to the people of Canada on the state of their environment."

As now worded, section 10 prohibits the release of an extremely broad class of information. In fact, it would appear that the mere stamping of confidential on a document could lead to its treatment as such by a civil servant. The wording of clauses 10(a), (b), (c) and (d) is virtually identical to that in section 20 of the federal Access to Information Act. However, there is one important difference. Under the latter Act, only the exemption for the release of trade secrets applies in all cases. The other types of confidential business information listed in that section may be disclosed on the basis of a balancing test, and may be disclosed if it is in the public interest as it relates to public health, public safety or protection of the environment and if the public interest clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with the contractual or other negotiations of a third party.[9]

Case law under the AIA has established: (1) the onus rests on the party resisting disclosure to put forward its claim that each and

every document claimed as confidential should be so treated; and (2) the confidentiality of the information is to be determined on the basis of an objective test and not on the basis of subjective considerations of the party claiming confidentiality.[10] In other words, the mere stamping of documents as confidential does not make them so.

Further, the stated purpose of the AIA is to extend the laws of Canada to provide a right of access to information in records under the control of government in accordance with the principles that government information should be available to the public and that exceptions to the right of access should be limited and specific.[11] This purpose section, at the very least, implies that all exemptions from disclosure should be narrowly defined.

The effect of section 10 of the proposed EPA when read in conjunction with section 20 of the AIA is not clear. As the EPA will be enacted subsequent in time to the AIA and is a more specific statute, it will undoubtedly be given weight. The clear prohibition against disclosure may lead to either the disregarding of the balancing test in section 20 of the AIA or the creation of a scenario where less material will be released to the public because of the existence of section 10.

It is CELA/CELRF's recommendation that section 10, be substantially revised to reflect the recommendations of the ECA Amendments Consultative Committee. The committee favoured an

approach similar to that outlined in the "Workplace Hazardous Materials Information Systems" (WHMIS) report. While it is understandable that a reference to WHMIS cannot be specifically made in the legislation, the spirit of the committee's recommendation for greater access to information, especially in the area of health and safety data, was ignored in the drafting of section 10.

CELA/CELRF specifically recommend that an "access" section replace the present "non-disclosure" section. Specifically, section 10 should contain the marginal note "disclosure of data" and should provide for the disclosure of "health and safety studies" submitted under this Act. Health and safety study should be defined in a new section 10(2) as:

> "any study of any effect of a substance on health or the environment or on both, including underlying data and epidemiological studies, studies of occupational exposure to a substance, toxicological, clinical and ecological studies of a substance, and any test performed pursuant to this Act."

This definition of health and safety studies is similar to that found in the U.S. Toxic Substances Control Act.[12] It is submitted that the government should ensure that it provides for public access to this kind of data. Otherwise, Canadians will be forced to obtain health and safety information about a chemical

used in Canada through U.S. freedom of information legislation.

4. Advisory Committees

Section 12 of the proposed EPA provides for the establishment of advisory committees to review data collection under various sections of the Act. As the explanatory notes state, this provision is the same as that found in section 3 of the ECA.

CELA/CELRF recommend the establishment of an Advisory Council to provide advice to the Ministers along the lines recommended by the labour, industry and environmental groups in the final report of the ECA Amendments Consultative Committee. At the time the recommendation was made the council was seen as operating within the framework of the ECA. CELA/CELRF recommend that the terms of reference of an Advisory Council under the EPA be expanded to allow the council to deal with the administration of the entire Act.

5. Section 14 - Schedules I to III

CELA/CELRF urge the government to ensure that the recommendations of the ECA Amendments Consultative Committee are put into place with regard to the development of an inventory of substances in Canada. It should be made clear that section 15 requires notification of a substance not on Schedule I whether or not it is on Schedule II.

6. Section 15 - Substances New to Canada and Section 16 - Assessment and Determination

At this point in time, until the regulations are put in place, it is impossible to tell whether the recommendations of the ECA Amendments Consultative Committee will be taken into account with regard to notification and testing requirements. CELA/CELRF recommend that draft regulations be tabled as soon as possible with a period for public comment. It is recommended that, at a minimum, the recommendations of the ECA Amendments Consultative Committee be the basis for these regulations.

Section 16 allows the Ministers, after assessing the information on a new substance, to make certain orders if they "suspect that the substance is toxic." Again we are facing a catch-22 situation where the definition of toxic substance as presently worded in section 5 must be read into section 16 before a determination is made. Clearly, it would be very difficult to meet the tests set out in section 5 in respect of a new chemical where its environmental fate is unknown. The definition of toxic substances should be amended as outlined above.

Sections 15 and 16, when read together, require only the provision of information prior to manufacture or importation and do not stay manufacture or importation while that information is being assessed by the Ministers. In order to allow more

certainty, the requirement of assessment "within a reasonable time" in section 16 should be changed to a specific time period. It is suggested that the 90-day period recommended by the ECA Amendments Consultative Committee is reasonable. Section 15 should be amended to prohibit the manufacture or importation until the information provided under this section is assessed and a determination made, or 90 days, whichever is the lesser.

7. Sections 18 and 19 - Schedule IV and the Clear Air Act Regulations Dilemma

The key sections for the regulation of existing chemicals are section 18, which provides for the scheduling of "toxic substances" in Schedule IV and section 19 which sets out the regulation-making powers for scheduled substances. There are now only five substances in Schedule IV, these being the chemicals currently regulated pursuant to the ECA. The five chemicals are PCBs, PBBs, PCTs, mirex and chlorofluorocarbons.

CELA/CELRF support the broad range of regulation-making power found in section 19 as necessary to comprehensive and effective control actions. The only significant omission is the power to set ambient standards. Section 18 allows for scheduling at the instance of the Ministers. We recommend that "any person" be given the power to petition either Minister to include a substance on Schedule IV and the right to appeal a refusal of the Minister to place the substance on Schedule IV to the Board of

Review. The Minister should be required to give reasons if the petition is turned down.

CELA/CELRF are concerned that the existing regulations under the Clean Air Act seem to have disappeared. Specifically, section 7 of the existing Clean Air Act, administered by the Minister of the Environment, allows Cabinet to set legally enforceable national emission standards for stationary sources of air pollution whose emissions constitute a significant danger to human health. This has been done in the case of secondary lead smelters, the asbestos mining and milling industry, chlor-alkali plants and vinyl chloride operations. The Cabinet can also set standards for contaminants that cause transboundary air pollution, but has never done so. While the latter authority would be transferred to the proposed EPA under Part IV, International Air Pollution, the direct authority to enact the existing regulations mentioned above does not seem to have found its way into the new Act.

While the Interpretation Act provides that regulations can remain in force following the repeal of a statute, they will only be deemed to have been made under the new enactment if the regulations are not inconsistent with the new statute.[13] Given the fact that regulations under the proposed EPA can only be promulgated to control emissions of a chemical once it has been found to be a "toxic substance" (as defined in section 5) and placed in Schedule IV, the scheme may indeed be inconsistent with

the existing Clean Air Act which had a simpler process and a different standard for promulgating regulations for emissions from stationary sources.

To get around this dilemma under the proposed EPA, mercury, lead, asbestos and vinyl chloride could be placed in Schedule IV and the current regulations left in place. At the present time, these substances are not listed in Schedule IV. While this may only be an oversight by those who drafted the legislation, the solution of placing these four air pollutants in Schedule IV may not be entirely satisfactory. The existing Clean Air Act is administered solely by the Minister of the Environment, while the decision as to whether a substance is "toxic" under the proposed EPA must be made by both the Minister of the Environment and the Minister of Health and Welfare. Further, we are concerned that the government, which has been promoting the use of asbestos, will be reluctant to label asbestos as a "toxic substance" in Schedule IV. Before the government repeals the Clean Air Act, it should ensure that the existing regulations will in fact survive.

8. Sections 22 and 23 - Release of Toxic Substances and Recovery by the Crown for Reasonable Costs and Expenses

Section 22(1) provides that where a release occurs or where there is an imminent likelihood of a release of a Schedule IV substance in contravention of any regulation made under section 19, the owners or persons in charge, management or control of the

substance shall report the matter to an inspector or other designated person and take reasonable measures to remedy any dangerous condition or mitigate any danger to human life or health or the environment. Section 22(2) allows Cabinet to order that similar measures be taken where it is satisfied on reasonable grounds that a toxic substance that is not regulated under section 19 has been released or that there exists an imminent likelihood of release and that immediate action is necessary.

Section 23(1) allows the Crown to recover the costs and expenses for any remedial measures it has taken under section 22 to contain and clean up the release of a toxic substance. The Crown may recover these costs and expenses from the persons who caused or contributed to the causation of a release of a toxic substance. Section 23(3) provides a defence for potential defendants.

CELA/CELRF have a number of concerns with these sections as drafted, especially when viewed in the light of existing provisions in Part IX (Spills) of Ontario's Environmental Protection Act.[14]

Section 22(1) creates duties only for owners or controllers of Schedule IV substances which have been released in contravention of a section 19 regulation. This section therefore only applies to the five substances presently listed in Schedule IV, for which regulations also exist. In order to make section 22(1)

meaningful, the listing of Schedule IV substances and the drafting of section 19 regulations should be carried out expeditiously.

Thus, for most chemical emergencies, section 22(2) will be the focus. At the outset, it is recommended that Part IX of the Ontario EPA (the Spills Bill) should be reviewed and consideration be given to including that framework in this Act. Part IX generally sets out a comprehensive and workable scheme for response to spills. At the very least, the compatibility and potential overlap between the two enactments must be considered.

Section 22(2) provides that Cabinet may order a cleanup of a release of a "toxic substance." This means that Cabinet must first be "satisfied" that the substance is toxic as defined in section 5 (see discussion supra for need to amend section 5). Part IX of the Ontario EPA, on the other hand, assures prompt reporting and cleanup of a wider range of spills by requiring action where (a) a substance is a pollutant (which is very widely defined) and (b) the release is likely to cause adverse effects. Immediate or long-term danger need not be shown. It would therefore seem highly unlikely that the hurdles set up under section 22(2) would allow action to be taken quickly.

Because prompt action is essential to an effective response to an emergency, CELA/CELRF recommend that the power to issue emergency orders be vested in the Minister of the Environment or Minister

of National Health and Welfare and in the Regional Directors of either department rather than in Cabinet.

Another interesting contrast between the proposed EPA and Part IX is the extent of the duty to report spills. While the proposed EPA only requires the owners or controllers of a substance to "report the matter" to an inspector or authorities designated under the Act, section 80 of Part IX requires the owners and persons responsible for a spill to notify not only the Ministry of the Environment, the municipality in which the spill occurred and the owners of the pollutant where applicable. This notification must set out the circumstances of the spill and the actions the person has taken or intends to take regarding the spill. Clearly, Part IX's provision for broader and more meaningful notification may result in quicker and more effective remedial action. These types of notification requirements should be placed in the regulations which are still to be developed and CELA/CELRF recommend that the public be given an opportunity to comment on these draft regulations.

Perhaps the greatest contrast between the proposed EPA and Part IX lies in the liabilities of owners and controllers under each legislative regime. Section 23(1) of the proposed EPA entitles the federal Crown to recover its cleanup costs and expenses only if the persons who caused or contributed to the causation of the release have not taken all reasonable care in complying with section 22. In other words, a defence of reasonable care is

afforded but is applicable to the behaviour regarding the reporting and clean-up requirements set out in section 22, and not the spill itself. In contrast, Part IX imposes absolute liability on owners and controllers for cleanup costs and expenses. It is our view that this is a fairer and more effective approach.

It should also be noted that while section 22 applies to "persons who own the substance or who have or had at the relevant time the charge, management or control of the substance," i.e., owners and controllers, section 23 allows the Crown to recover only from "any persons who caused or contributed to the causation of the situation." This is confusing because section 22 imposes no duties on persons who cause or contribute, only on owners or controllers, and there are many situations where these would be different persons.

CELA/CELRF would recommend:

- that section 23 be amended to apply to owners and controllers as set out in section 22 and that section 22 be amended to put duties (at <u>least</u> to report) on persons who cause or contribute to spills. There is no reason for this discrepancy. The owners may have a role in creating the risk situation and should bear the costs of cleanup in these situations;
- that section 22(3) should be deleted and a section substituted that "liability does not depend upon fault or

negligence." Absolute liability is entirely justified in the area of toxic chemical releases.

Finally, there may be a potential constitutional problem if sections 22 and 23 of the proposed EPA are enacted in their current form. It is not clear that the federal government can isolate an inspector from civil liability, as set out in section 22(5). In addition, there is potential conflict between the federal and provincial legislation, at least with respect to concurrent jurisdiction over Schedule IV substances. Thus, the doctrine of dominion paramountcy would seem to suggest that the provincial provisions are inoperative, at least in the situation outlined above, and therefore the proposed EPA may have the unintended effect of limiting the scope of Ontario's comprehensive spills legislation.

9. Section 25 - Export of Toxic Substances

CELA/CELRF urge the government to consider amending this section to prohibit the export of substances that are banned in Canada. This would reflect the dissent of the environmental groups on the ECA Amendments Consultative Committee.

10. Sections 26 and 27 - Notice of Objection and Board of Review

CELA/CELRF recommend that section 26(2) be amended to provide for a notice and comment period of 60 days prior to the coming into

effect of any order or regulation proposed under section 14, subsections 18(1) or (2), section 19 and paragraph 21(a). The option of filing a notice of objection should remain, but there may be persons who wish to raise concerns without wanting to go to a Board of Review hearing. They should have the opportunity to comment on proposed regulations and orders prior to these instruments being promulgated. CELA/CELRF recommend a 60-day period for comment.

In regard to the Board of Review, we are pleased that standing has been accorded to "any person." This reflects both the recommendations of the ECA Amendments Consultative Committee and the 1980 PCB Board of Review's report entitled "Outside Review and Public Participation."[15] CELA/CELRF believe that it is very difficult to articulate criteria that would set out when a Board of Review should be established and when it should not be. The PCB Board of Review came to the same conclusion. CELA/CELRF believe that the Ministers should only have the power to reject a request for a hearing if it is frivolous or vexatious. We believe that the test of "if they think fit to do so" as set out in section 27 is vague in law and leaves too much to the discretion of the Ministers. It is recommended that the phrase be deleted and that a section be put in giving the Ministers the authority to reject a request for a hearing if it is frivolous or vexatious. The latter phrase is well known in law and is in accord with many other statutes.

We are concerned that Board of Review proceedings will be used to delay the implementation of regulations. We would therefore recommend that a clause be put in section 27 allowing a person to make application to the Board of Review, once it has been established, requesting that the regulation or order apply in whole or in part pending the determination of the matter where the Board is satisfied that there may be a danger to human health or the environment. We believe this is a reasonable approach given the fact that we are dealing with toxic substances.

In regard to the issue of funding, it is essential that intervenors or applicants who can meet certain criteria receive funds to participate in Board of Review hearings. Our position is that there must either be an intervenor funding mechanism in place or the Board of Review must be given the power to award costs, including interim costs to intervenors or applicants who meet certain funding criteria. The Board of Review should be able to make rules governing its practice and procedure and should be able to set criteria for funding of intervenors and applicants. It is recommended that recent criteria established by the Joint Board in a number of hearings in Ontario be examined.

Finally, CELA/CELRF believe that any person should be given the right to petition for additional chemicals to be added to Schedule IV and to be regulated pursuant to section 19. Further, a decision by the Minister not to act should be appealable to the

Board of Review.

E. Part III - Departments, Agencies, Crown Corporations and Federal Works, Undertakings, Lands and Waters

1. Section 30 - Guidelines

CELA/CELRF recommend that the power to establish guidelines be vested in the Minister alone and that Cabinet approval need not be sought. This would conform to the power in the Minister to set national environmental quality guidelines and objectives under section 4.

2. Section 32 - Plans and Specifications

Section 32 gives the Minister the authority to ask for plans and specifications from anyone who proposes a federal work or undertaking that is likely to result in the release of a substance into the environment. This is similar to the authority given to the Minister under the Fisheries Act in relation to activities that may result in harm to fisheries.[16] However, while under the Fisheries Act the Minister is given the additional authority to modify or prohibit the proposed activity if harm to fisheries may occur, section 32 of the proposed EPA does not give the Minister a similar authority to prohibit a proposed undertaking if environmental harm may occur.

CELA/CELRF recommend that section 32 be amended to give the Minister the specific authority to modify or prohibit an undertaking if he is of the opinion that damage to health or the environment may occur.

3. Federal Environmental Impact Assessment Legislation

The Minister has during the past year stated that the present Environmental Assessment and Review Process (EARP) at the federal level is "woefully inadequate." This has long been recognized by a number of commentators and, as well, by the FEARO office itself in a 1983 discussion paper. In that paper, the authors note that:

> The deficiencies of the present system... cover a number of fronts and collectively have brought the efficiency and credibility of EARP into question both within and outside the federal government.[17]

In our opinion, the fact that the process is voluntary and one of self assessment is a major flaw. As well, there is a lack of public input into the process, especially in the early screening stages. It would seem appropriate that any environmental protection legislation with an emphasis on prevention should provide a legislative basis for environmental assessment of federal undertakings. Conservative Member of Parliament Mr. Robert Wenman, in three private members bills introduced in Parliament between 1976-78, advocated a legislative basis for

federal environmental assessment.18

Key areas of reform to the existing process in the context of legislation would include:

- a broad definition of environment;
- consideration of alternatives to the undertaking;
- inclusion of all undertakings unless specifically exempted;
- public involvement in the process;
- right to require a hearing before a board;
- intervenor funding mechanism or expanded cost power to lie with a hearing board; and
- administration of the Act by the Minister of the Environment.

CELA/CELRF recommend that the government immediately embark on a consultation process leading to the enactment of federal environmental assessment legislation.

F. Part IV - International Air Pollution

This part of the proposed EPA brings in part of section 7(1) and all of sections 8, 21.1. and 21.2 of the Clean Air Act. These provisions allow Cabinet, on the recommendation of the Minister of the Environment alone, to establish three different instruments: national emission standards, national emission guidelines and specific emission standards in relation to

international pollution.

Section 34 provides for the setting of "national emission standards" that apply to classes of stationary sources for air emissions that would be likely to result in the violation of an international air pollution obligation entered into by Canada. The language of this section, "violation of a term or terms of any international obligation entered into" by Canada, implies that there must be a treaty or binding agreement in place that will be violated before standards may be set. If this is so -- and it is not clear because it has never been relied on nor tested in court -- then obligations that are part of customary international law, such as the obligation not to cause harm to the environment of one's neighbours, can be violated and the Cabinet will have no authority to act. Because there are so few international (bilateral or multilateral) treaties respecting control of air pollution, it is recommended that this provision be amended to allow the setting of standards when an international obligation of the Government of Canada is likely to be violated.

It is further recommended that the phrase "relating to the control or abatement of air pollution" be deleted from section 34. Pollution not only crosses boundaries but it also crosses from air to water and back again. Thus, air emissions from Canada contribute substantially to pollution of the oceans and the Great Lakes in violation of the 1978 Great Lakes Water Quality

Agreement. Deletion of this wording would reflect an up-to-date understanding of cross-media impact and give authority for control action in Canada in such situations.

Finally, limiting controls to stationary sources continues a long-standing quirk of federal law -- that motor vehicle emission controls are the responsibility of the Department of Transport under the Motor Vehicle Safety Act. While section 19 of the proposed EPA could conceivably be used to regulate mobile sources, major emissions from mobile sources may not fall within the definition of a "toxic substance." It is recommended that the limitation in section 34 to stationary sources be removed. We could then be in a position to control NO_x and HC emissions from vehicles contributing to pollution in the U.S.

Section 35 of the proposed Act provides for the publication of national emission guidelines specifying recommended emissions from stationary or mobile sources. It is not clear why this section has been left in. By including it in Part IV, the drafters appear to intend to limit these guidelines to situations of international air pollution whose control may be beyond provincial authority. This section also seems redundant in light of section 4 which allows the Minister to formulate environmental quality objectives and guidelines. This should be clarified.

Sections 36 and 37 parallel sections 21.1 and 21.2 of the CAA, allowing the formulation of "specific emission standards" where

emissions from a Canadian source cause air pollution that poses a significant danger to the health, safety or welfare of persons outside Canada where their government affords essentially the same kind of benefits to Canadians and the provinces fail to act. This complex provision was originally formulated to reflect the provisions of section 115 of the U.S. Clean Air Act in order to allow the Americans to control acid precursor emissions to protect Canada.

These provisions should be reviewed in detail. Of particular concern is the lack of consideration given to consistency with the rest of the proposed EPA. For example, unlike section 5 which defines toxicity in terms of danger to health or the environment, section 36 continues to use the term "danger to the health, safety or welfare of persons" including only those environmental impacts that can be interpreted as "welfare" impacts. This wording reflects the wording of the U.S. Act and, it is submitted, that is no longer appropriate with a comprehensive EPA, especially if it is amended as we have suggested. At minimum, section 36 should be amended to allow for control to protect the environment.

Another area of inconsistency is the particular procedure for enactment of these standards. The only Canadians who are given a right to make representations on a proposed standard are those who will be "affected" thereby. It is important that there be a uniform procedure for the making of regulations under this Act.

This includes the right to "any person" to notice and an opportunity to comment, to have those comments considered and to appeal with respect to all standards and regulations promulgated under this statute. There is no justification for this difference.

Another issue of concern is continuation of the requirement of reciprocity. It is not clear why, if Canadian sources are causing significant harm to the residents of another country, Canada must wait to act to control those sources until the government of that country enacts a similar provision to section 36. This section would be relied on in the absence of a treaty obligation (in which case section 34 would apply) but where a rule of customary international law is violated. In that situation, Canada has an obligation to remedy the violation irrespective of the internal legislation of the violated country.

Finally, the requirement that the provinces in which the sources are situated must have a "right of first refusal" to regulate may not be necessary from a constitutional point of view.

Aside from the specific provisions of Part IV, our foremost concern about this part of the proposed EPA is that it is limited in scope to air pollution. It thereby fails to recognize (1) that Canada contributes to international <u>water</u> pollution, and (2) that pollutants cycle through the environment, with, e.g., air emissions constituting significant sources of water pollution.

It is therefore recommended that Part IV be revised to allow for regulation of "international pollution" and the sections in this Part should be revised to allow for control of sources of water pollution beyond Canada's borders. It is important to note that the U.S. Clean Water Act contains a provision similar to section 115 of the Clean Air Act, which is not reflected anywhere in the proposed EPA.

G. Part V - General

1. Inspection, Search and Seizure

CELA/CELRF support broad powers for inspectors to ensure compliance with the EPA. Detection of non-compliance and gathering of evidence are important elements of a compliance strategy and the statute must pave the way. Although not a matter to be included in the Act itself, it is essential that inspectors receive appropriate training and support in carrying out their functions.

2. Offences and Punishment

Sanctions are an important part of a compliance strategy. The primary goal of sanctioning is deterrence, both general (deterring others from committing the same offence) and specific (deterring repeat offences), and any offence and punishment framework must be measured in terms of its deterrent value.

The proposed EPA creates a hierarchy of offences for contravention of the Act with increasingly severe penalties for increasingly serious offences. The penalties include maximum fines ranging from $100,000 to $1 million and imprisonment for up to five years for certain offences upon indictment. CELA/CELRF support this increase in the range of available fines and the inclusion of imprisonment as a penalty. While penalties are only one part of achievement of compliance, it must be made clear to potential offenders that it is not worth their while to contravene the Act.

CELA/CELRF feel these penalties, coupled with a vigorous prosecution strategy, have the potential to bring that message. We recommend the following modifications to these sections. First, it is appropriate in situations of the more serious offences to have a minimum fine. Second, it may be appropriate to have the available fine vary for corporations and for individuals to reflect their disproportionate ability to pay and to ensure sufficient deterrence for corporations. Third, a provision should be added that would allow for a sharing of the fine imposed, in the case of a private prosecution, between the private informant and the government. A similar provision is now found in the Fisheries Act and the Migratory Birds Convention Act.

Section 54 must be isolated for comment. It is the "crime against the environment" offence and the penalties are a fine of no fixed limit and/or imprisonment for up to five years. Despite the good intentions of the drafters, the section is drafted in such a way that it will be of little use in practice. The offence is composed of a number of steps: there must be a contravention of the Act; there must either be a "disaster" caused knowingly or recklessly that results in loss of use of the environment or be serious damage to the environment caused knowingly, recklessly or negligently that results in serious harm or death or in the risk thereof.

It is recommended that this "crime" not be dependent upon contravention of this Act. In particular, this section should not be limited to disasters involving only those chemicals found in Schedule IV and regulated pursuant to section 19. The other offence sections address contravention of the Act and perhaps an enhanced penalty provision should be added for certain actions rather than limit this section in that way.

Use of the word "disaster" creates a major difficulty for enforcing this provision. This language does not now appear in Canadian environmental legislation and has therefore not been judicially interpreted. The focus in any prosecution would likely be on whether or not certain actions constitute a disaster rather than on the underlying reason for the offence -- severe harm to the environment or health. It is also important that the

offence not be diluted by requiring harm that results in further harm. Rather, the provision should be clear about what acts are prohibited.

We therefore recommend that subsection (a) be deleted and that section 54 be amended to read:

> Every person who knowingly, recklessly or negligently causes
> (a) serious damage to the environment,
> (b) risk of death or serious harm to another person; or
> (c) death or serious harm to another person,
> is guilty...

Section 65 allows a court to order an offender to pay the amount of any monetary benefit gained as a result of commission of an offence to be paid as an additional fine. While we support this provision, a court should also be given the power to order restitution of that benefit to any person who suffers as a result.

Section 66 contains an innovative list of orders a court may impose in addition to the penalty for an offence. While we fully support the concept of using such orders, it is recommended that their use not be limited to an "application on behalf of the Minister." Rather, that language should be deleted in order to allow private prosecutors, intervenors or the court of its own

initiative to impose such orders. This will allow their use in appropriate situations, whether or not the Minister intercedes. The phrase "on the application of the Minister" should also be deleted from section 70.

Section 69 allows for the establishment of a ticketing system. While we generally support this provision, two comments are necessary. In subsection (a), use of the phrase "lay an information" implies the requirement of attending before a justice of the peace. This is inconsistent with the concept of issuing and serving a summons by use of a ticket and should be deleted. In addition, subsection (6) should be amended by substituting the word "person" for "accused."

3. "Whistleblowers" Protection

CELA/CELRF recommend that consideration be given to the inclusion of provisions which would afford "whistleblowers" protection against dismissal or discipline by federal sector employers for complying with the EPA, regulations or orders made pursuant to the Act or for seeking enforcement of the EPA or giving information to the departments or inspectors relating to matters covered by the legislation. As well, we would recommend the incorporation of a right for any person to refuse work which could result in potential harm to the environment.

There have been a number of examples over the past years where employees have reported infringements of environmental law, only to be later fired or disciplined. In Ontario, the government responded to these situations by amending the Environmental Protection Act in 1983 to provide some protection for whistleblowers. Under these provisions, the employee can seek redress at the Ontario Labour Relations Board. It is suggested that a similar scheme be implemented at the federal level with redress from the Canada Labour Relations Board for private sector employees, and from the Public Service Staff Relations Board for public servants.

IV. ADDITIONAL ISSUES FOR CONSULTATION

A. EPA Outline for an Enforcement and Compliance Policy

The EPA Outline for an Enforcement and Compliance Policy is a preliminary document containing many interesting and valuable ideas; however, it is necessary to know how the concepts will be put together into a coherent strategy before in depth comments can usefully be made. What is required is to establish a process to be followed in the development of the compliance strategy. The elements for such a process should include:

- development of compliance principles
- consultation
- draft policy
- peer review and public comment.

In order to develop compliance principles, it is important to be able to understand the complex nature of the subject of compliance. It is trite to say that legislation is only effective to the extent it is complied with. However, because legislation is used as a tool to implement a governmental policy, there are two questions to be answered: are the requirements of the act met and is the policy behind the act achieved. In the case of the EPA, where the policy is maintenance of public health and environmental protection, the provisions of the act must be assessed in terms of their potential, if complied with, to

achieve these objectives. The difficulty is that there is no way to measure such achievement at the present time. Even so, it is useful to keep policy objectives in mind when developing and assessing compliance principles.

Compliance is usually thought of in terms of enforcement measures -- number of prosecutions, high fines, etc. -- but these are only a part of a compliance strategy. The purpose of a compliance strategy is to ensure that identified persons behave in a particular way on an ongoing basis or in response to particular situations. Thus, it is necessary to have clear standards of behaviour and tools to encourage proper behaviour and to deter improper behaviour. Judging the propriety of the tools chosen depends on agreement on the criteria to be followed in establishing a compliance strategy. The criteria should be:

- effectiveness
- efficiency -- for both regulator and regulatee
- fairness
- consistency with Canadian legal principles (e.g., concepts of criminality, procedural protections and other Charter guarantees).

There are a large number of tools available to ensure compliance with legislated requirements and many ways to look at them. A useful way to categorize them, in the context of the EPA, is between tools for encouraging certain behaviour and thus preventing non-compliance, and tools used in reaction to

non-compliance. Both approaches are necessary, because it is unrealistic to develop a compliance strategy without both "carrots" and "sticks." The deterrent value of a hefty fine and adverse publicity cannot be underestimated.

There are many mechanisms that goverments use to encourage desired behaviour. One of the most effective is communication and education, letting persons know what behaviour is expected and how they can go about implementing it. The government can also provide access to training, technical assistance and can cooperate in the development of new technologies. The provision of financial incentives, through the use of tax breaks or direct grants, is often important to the ability of businesses to make major technological changes.

Requirements in licences or permits also serve to regulate behaviour because they can be made dependent upon the installation of certain equipment, adequate insurance coverage, bonding and the like. Licences are not now contemplated under the EPA but it may still be appropriate for the federal compliance strategy to present a uniform set of requirements for provincial licensing regimes.

Most of the provisions in the EPA relating to compliance deal with inspection, creation of regulatory offences and the array of sanctions available upon conviction. The primary purpose of imposing sanctions under regulatory statutes is deterrence rather

than punishment -- both general and specific deterrence. The difficulty with focusing only on prosecutions is that they are primarily snapshots of behaviour, relating to single incidents with sanctions imposed after the fact, and the behaviour the policy and legislation seeks to encourage is the ongoing behaviour over the long term. Both reliance on a mix of compliance mechanisms and development of criteria for the use of different mechanisms continue to achieve effective compliance in the long run.

While the catalogue of sanctions in the EPA is broad and potentially very effective, particularly if their limitation to the Minister is removed, the test of an effective compliance strategy is not just in the range of sanctions but in their certainty of imposition. In other words, if it is very unlikely that a person will be caught violating the act or unlikely that he or she will be prosecuted, that person is unlikely to incur the expense of a behavioural change.

Consideration of the likelihood of getting caught requires consideration of the tools necessary to detect non-compliance, such as inspections and the monitoring and evaluation of information. Developing effective detection tools requires inspection and monitoring that provides a continuing rather than occasional check on behaviour and a commitment of funds for equipment, staff and training. The issue of the likelihood of facing a sanction upon detection requires the development of

criteria to limit the discretion of those deciding what action to take in response to non-compliance and to ensure consistency of treatment to those similarly situated. Consistency is also enhanced by separating the enforcement function from those involved with regulated persons on an ongoing basis.

CELA/CELRF therefore recommend:

- commencement of compliance policy development process;
- development of criteria for actions in response to non-compliance;
- written policy that limits discretion;
- strong, continuing commitment to encouragement techniques, especially education;
- commitment of funds to training, evaluation and adequate staff.

B. Biotechnology

1. Overview

Biotechnology offers potential benefits. Like any other new technology, however, it also carries with it potential risks. At this time, the nature or full extent of those risks is not known.

Biotechnology is not now regulated. Regulation is required in order to maximize benefits and minimize risks. Development of regulatory policy, however, is difficult because of the lack of

information about potential environmental effects and because biotechnology may be applied in a number of different areas, which means there are a large number of federal and provincial agencies which may potentially play a regulatory role.

Biotechnology is defined here as the use of recombinant DNA and cell fusion techniques to create new, genetically altered organisms. Traditional methods of changing genetic make-up, such as plant or animal breeding, are not included in this definition. The focus of these comments is limited to living organisms created by modern genetic engineering techniques which are released intentionally or accidentally to the open environment and it does not deal with "contained" applications. A further distinction is made between release of discrete, limited quantities of a biotechnology product for experimental purposes and the on-going manufacture, distribution, sale and use of biotechnology products.

It is recommended that Environment Canada use the proposed federal EPA to regulate experimental releases, in cases where a provincial government has not assumed that role. No specific recommendations are advanced at this time for on-going commercial regulation. Rather, CELA/CELRF recommend that development of a permanent, national regulatory system for commercial biotechnology be given a high priority by Environment Canada.

As outlined below, it is recommended that biotechnology not be regulated in the same manner as toxic substances under Part I of the EPA but, instead, that a different regulatory approach be used and either enacted as a new section of the comprehensive EPA specifically devoted to biotechnology or as a new piece of legislation.

2. Purpose of Regulation

The first objective in regulating biotechnology is to ensure protection of human health and the environment. The second is clarification of regulatory requirements, to allow industrial development.

3. Jurisdiction

As mentioned above, regulatory jurisdiction is not clear-cut because different applications of biotechnology might potentially be regulated by a number of different agencies, at different levels of government.

Since the issue was first publicly raised in Canada in 1984, almost no progress has been made in clarifying regulatory responsibilities. This is because federal and provincial governments have not given the matter priority and have not devoted sufficient resources to the process of allocating regulatory responsibilities.

It is recommended that Environment Canada give higher priority to clarification of jurisdictional responsibilities than it has to date. CELA/CELRF recommend that during this process of clarification one principle be adhered to -- namely, that releases to the open environment for experimental purposes require the approval of the federal or provincial departments which are specifically charged with the mandate of environmental protection. At this stage, other departments with other mandates should not exercise this approval function.

4. Conceptual Approach to Regulation

The briefing notes distributed by Environment Canada ask if biotechnology should be regulated "in the same manner as proposed for toxic chemicals?" It is concluded that this is not appropriate for the following reasons:

- living, genetically-altered organisms capable of reproduction are inherently different from inanimate chemical substances;
- Part I of the proposed EPA only allows regulation of substances if they are found to be toxic: biotechnology products, however, may ultimately be found to be benign and not toxic -- nevertheless, they must be regulated now precisely because their environmental effects are not known; legislation intended for the regulation of proven toxic substances is not suitable for that purpose;

- the goal of regulation is to provide certainty and predictability to the regulated industry and to avoid confusion; this can best be done by developing new legislative definitions and requirements which apply specifically to biotechnology;
- risk assessment methodologies used for toxic chemicals are not adequate for biotechnology products; new tests, which can predict such things as survival, growth, multiplication, travel and interactions with other organisms, are required;
- the term "substance," because it is not specifically defined as referring to living organisms, is not adequate for regulation of biotechnology;
- the definition of "class of substances," designed for chemical substances, is not applicable to biotechnology products, which are most usefully classified by the extent to which they contain genetic material from pathogenic, non-indigenous or dissimilar source organisms.

Thus it is recommended that biotechnology not be regulated under Part I of the EPA, but that a new approach be followed and implemented either through a new EPA Part devoted solely to biotechnology or through new legislation.

5. Interim Regulation of Experimental Releases under EPA

Applications for approval of experimental releases have been submitted to governments in Canada and more can be expected in

the near future. This is the first regulatory challenge, therefore, which Environment Canada must face.

As more experience is gained, experimental release to the environment of biotechnology products may no longer require prior approval. At this stage, however, when it is impossible to predict environmental effects, all proposed releases should undergo an assessment and approval process.

At the present time it is not clear if existing legislation gives governments in Canada the power to prohibit release of biotechnology products. To avoid confusion either new legislation should be enacted or existing legislation amended.

It is recommended, therefore, that a new section be added to the EPA or new legislation be enacted which would:

- provide a legislative definition of biotechnology which would distinguish between traditional and modern genetic engineering techniques;
- require approval by Environment Canada prior to the release of a biotechnology product to the open environment.

It will be necessary for Environment Canada to decide on testing procedures which will be used to evaluate potential environmental effects and the process to be followed for assessment and approval or prohibition. Opportunities for public comment must be included in that process.

6. Development of National Biotechnology Policy

As soon as possible, a national procedure should be put in place for regulation, presumably by both levels of government, of commercial biotechnology activity. Such a regulatory procedure must include all issues associated with other forms of environmental regulation, including approvals procedures, monitoring and compliance methods, allocation of liability and provision of compensation when necessary.

Establishment of such a procedure is a detailed and complex process which can only be done in an acceptably short time-frame if it is given a higher priority and greater allocation of resources than has been done to date.

It is recommended that Environment Canada initiate a process of public consultation on the design of a national biotechnology regulatory policy.

7. Summary of Recommendations

- Do not regulate under the toxic chemical provisions of EPA.

- Add a new section to EPA specifically devoted to biotechnology or enact new legislation.

- Prohibit all releases which have not received approval by Environment Canada or the appropriate provincial agency.

- Begin public consultation on development of national policy for regulation of the biotechnology industry.

V. SUGGESTIONS FOR COMPREHENSIVE ENVIRONMENTAL PROTECTION LEGISLATION

A. Overview

The pattern of environmental regulation to date has been remedial, in reaction to problems that come to the attention of scientists, the media or the public. The Minister himself has acknowledged the inadequacy of this approach and called for "anticipate and prevent" strategies. If we as a society value a healthy environment and maintenance of public health and there is agreement that we are not now meeting this goal using the "reactive" approach, clearly a new approach is needed.

The work of the World Commission on Environment and Development (the Brundtland Commission), which is fully supported by Environment Canada, is aimed at doing just that. (Such an approach has also been called for by the OECD, Economic Council of Canada, Macdonald Commission, Brandt Commission, et al.) The Brundtland Commission is to report later this year to the United Nations General Assembly on implementation of what they call "the alternative agenda," that is, this new, anticipatory approach to environmental regulation. It is incumbent on the Government of Canada to do likewise.

Implementation of a new approach requires a fundamental rethinking about environmental problems and a real attempt to integrate environmental and economic policies. Until now environmental problems have been viewed as part of a separate category of political issues, and regulation has followed as separate, an "add-on." In fact, environmental problems represent the consequence of economic and development policies; there can be no long-term lasting gains in the absence of this understanding.

Thus, the only way to effectively integrate environmental and economic policies is to unravel and rethink Candian policies on energy, agriculture, forestry, industrialization, regional development, trade, fisheries and finance in terms of a number of concepts. In particular, these concepts include sustainability of economic development in terms of resources and ecological processes and accounting for the full costs of development in terms of damage to health, the environment and the resource base. Obviously, this is no small task. It requires creativity on the part of the government and all Canadians to bring about real and lasting change.

B. An Environmental Bill of Rights

Canadians possess many rights, arrayed in a hierarchy based in the common law and culminating in our fundamental rights and freedoms enumerated in the Charter which supersede every

governmental action. In between are rights conferred by statute (which override the common law) and statutory provisions such as the Canadian Bill of Rights, which take precedence over other federal legislation. At each level of this hierarchy there are rights Canadians can use to protect their health and their environment. However, there remain many serious impediments to public action for environmental protection, particularly those persisting in the common law.

It is essential that any comprehensive revision to federal environmental law be updated in its provision of public rights to protect the environment. Even without initiating a Charter amendment, the federal government acting alone can go a long way toward redressing the impediments to public action and enhancing the rights of Canadians.

In an "Environmental Bill of Rights," the federal government could confer rights within its legislative authority by statute and could suggest a uniform code of rights to be enacted by the provinces.

Such a Bill of Rights should include both substantive rights and procedural rights. The substantive rights should include the following:

- the right to a "healthy" environment;
- the right to protection by government of common resources and the public trust therein.

Procedural rights should include the following:

- the right of a member of the public to seek a declaration or injunction for actual or threatened environmental harm or breach of federal law, without the necessity of having to show personal injury to health or property interests of that individual. This would involve reform of standing requirements at the federal level;
- the right of the public to become involved in the federal environmental decision-making process through:
  - i) the right to request and participate in the formulation of a new environmental standard,
  - ii) the right to request a public hearing upon the proposal of a new or revised environmental standard,
  - iii) the right to financial assistance, where necessary, to ensure effective public participation;
- the right of the public to judicial review of administrative action or inaction concerning the environmental decision-making process;
- the right of broad access to environmental information;
- ensuring that the onus is on a proponent to justify a proposal which may cause significant adverse environmental impacts;

- reform of present Federal Court rules concerning class actions and costs to allow members of the public to effectively advocate matters of environmental significance.

The concept of an environmental bill of rights for Canada is not a new one. CELA has been advocating the enactment of an environmental bill of rights at both the federal and provincial level since its inception in 1970. At the provincial level, all three major political parties, while in opposition, have introduced such bills. The Michigan Environmental Protection Act has since 1970 granted the public the right to sue government "for the protection of air, water and other natural resources and the public therein from pollution, impairment or destruction."[19] Finally, Mr. McMillan in July, 1981 eloquently supported the elements of the Environmental Bill of Rights CELA has been advocating over the years.[20]

CELA/CELRF recommend that public consultation should immediately take place on the details of implementing an environmental bill of rights in federal legislation.

VI. CONCLUSIONS AND RECOMMENDATIONS

It is common ground that federal environmental legislation is in need of a major overhaul. The Environmental Contaminants Act, in particular, had been identified since the early 1980s as having serious gaps and limitations. Accordingly, CELA/CELRF welcomed Environment Canada's initiative in establishing the ECA Amendments Consultative Committee. The report issued by that committee contained a number of innovative and well thought out suggestions for amendments to the ECA. Unfortunately, there was no opportunity for consultation on the proposed framework or contents of what became the draft discussion bill issued by the Minister on December 18, 1986.

It is CELA/CELRF's position that, as presently drafted, this bill is not sufficiently comprehensive or forward-looking and most certainly does not contain the essential elements of an "Environmental Bill of Rights."

CELA/CELRF have spent considerable time reviewing the draft bill and offer the following recommendations for the Department's consideration:

General Recommendations

1. To ensure that no further delay takes place, the provisions in the proposed EPA amending the ECA should be put in place

as soon as possible with a number of important revisions discussed below. This could take the form of an Environmental Contaminants Amendments Act. At a minimum, the recommendations contained in the ECA Amendments Consultative Committee report should be followed.

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3. The Clean Air Act and Part III of the Canada Water Act should remain in force for the time being.

4. The government should immediately embark on a public consultation process leading to the enactment of comprehensive federal environmental protection legislation.

Specific Comments and Recommendations on Provisions of the Draft Bill

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environmental bill of rights which would include a number of substantive and procedural rights.

38. CELA/CELRF recommend that public consultation should immediately take place on the details of implementing an environmental bill of rights in federal legislation.

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VII. ENDNOTES

1 Powell v. Kempton Park Racecourse, [1899] A.C. 143 (H.L.) at p. 157.

2 Re Farmers' Creditors Arrangement Act, 1934, [1942] 3 W.W.R. 705 (Sask.C.A.), Re Clearwater Election (1913), 6 Alta. L.R. (Alta.C.A.) and Stephenson v. Parkdale Motors (1924), 55 O.L.R. 680; affd. 56 O.L.R. 180 (C.A.)

3 Midland Rwy. of Cda. v. Young (1893), 22 S.C.R. 190 (S.C.C.) at p. 200.

4 Re The Canada Metal Company Limited and the Queen (1982), 12 C.E.L.R. 1 (Man. Q.B.).

5 Environmental Assessment Act, R.S.O. 1980, c. 140, s. 1(c).

6 Department of the Environment Act, R.S.C. 1970, c. 14 (2nd Supp.).

7 Clean Air Act, S.C. 1970-71-72, c. 47, s. 4.

8 Environmental Contaminants Act Amendments Consultative Committee, Final Report (Ottawa: Minister of Environment, Minister of National Health and Welfare, September 1986) at pp. 53-54.

9 Access to Information Act, S.C. 1980-81-82-83, c. 111, s. 20(6).

10 Re Maislin Industries Ltd. and Minister for Industry, Trade and Commerce, Regional Economic Expansion (1984), 10 D.L.R. (4th) 417.

11 Supra, note 9, s. 2.

12 Toxic Substances Control Act (15 U.S.C. 2601), s. 3(6).

13 Interpretation Act, R.S.C. 1970, c. I-23, s. 36(g).

14 Environmental Protection Act, R.S.O. 1980, c. 141, Part IX, ss. 79-111.

15 Environmental Contaminants Board of Review, Outside Review and Public Participation (Ottawa: Environmental Contaminants Board of Review, July 1980).

16 Fisheries Act, R.S.C. 1970, c. F.-14, s. 33.1.

17 See Robert Gibson and Grace Patterson, "Environmental Assessment in Canada," Environmental Education and Information, Vol. 3, No. 3, 230 at p. 236.

SUBMISSIONS

BY

THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION (CELA) AND THE CANADIAN ENVIRONMENTAL LAW RESEARCH FOUNDATION (CELRF)

TO ENVIRONMENT CANADA ON THE PROPOSED ENVIRONMENTAL PROTECTION ACT

EXECUTIVE SUMMARY

On December 18, 1986 the Minister of the Environment released the proposed Environmental Protection Act (EPA) as a draft discussion bill. The proposed Act was touted by the Minister as the most comprehensive piece of environmental legislation in the western hemisphere. Mr. McMillan also stated that the proposed preamble "constitutes the country's first Environmental Bill of Rights." The government's media releases stated that the new Act would deal with all aspects of a toxic chemical's lifecycle, i.e., from "cradle to grave."

As the end of the 1980s approaches, the Minister of the Environment is creating an important opportunity to reform environmental law at the federal level. Realistically, there will not be another such opportunity in the near future. It is therefore crucial to seize this opportunity to review the objectives, relevance and effectiveness of existing legislation

the recommendations contained in the ECA Amendments Consultative Committee report should be followed.

2. Part V including the enforcement provisions of the proposed EPA should be enacted, again with certain revisions, and these provisions should be made applicable to all major pieces of federal environmental legislation.

3. The Clean Air Act and Part III of the Canada Water Act should remain in force for the time being.

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As well, CELA/CELRF made a number of specific comments and recommendations in respect to the provisions of the draft bill. They are as follows:

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and to consider the appropriate direction that federal environmental law should take in the future. It is submitted that the formulation of a comprehensive environmental strategy cannot legitimately proceed in the absence of consideration of two fundamental goals: integrating environmental and economic policies and providing Canadians with environmental rights. It is CELA/CELRF's position that, as presently drafted, this bill does not measure up in terms of it being sufficiently comprehensive or forward-looking and most certainly it does not contain the essential elements of an "Environmental Bill of Rights." As well, in certain respects, the proposed EPA may be a step backward.

CELA/CELRF noted that while parts of the discussion bill had been the subject of extensive consultation by the Environmental Contaminants Act (ECA) Amendments Consultative Committee, of which CELA was a member, the scope and contents of an Environmental Protection Act had not been the subject of public consultation. Due to this lack of consultation on where federal environmental legislation should be heading in the future, CELA/CELRF make the following general recommendations:

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