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An Act to Amend Ontario's Environmental Protection Act, 1971

SUBMISSIONS CONCERNING BILL 168

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The Canadian Environmental Law Research Foundation is a non-profit coalition of scientists, lawyers and citizens, dedicated to the protection of environmental quality through implementation of existing legal remedies and through development of legal reforms.

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I INTRODUCTION

Amendments to the Ontario Environmental Protection Act given first reading by the Ontario Legislature on June 13th do very little to remedy a pollution control statute that is almost without comparison in North America in terms of its denial of individual rights.

The amendments now being debated in Bill 168 bring only one new idea to the present statute, that being the idea of a compensation fund to pay claims of those who suffer harm to their domestic water supply from nearby waste disposal wells. But on a close reading this provision appears to be primarily a devise to raise further provincial revenue through a tax on those operating such wells; for to prove a claim a householder would need to exert almost the same effort and expend the same amount of money as he would put into an ordinary civil law suit.

Most of the other amendments are of a housekeeping variety, bringing statutes formerly administered by other government departments under the Ministry of the Environment. The remainder of the Bill purports to be redrafting of certain sections to clarify ambiguities caused by poor wording in the present legislation. But under the pretext of redrafting, the Bill would give even further drastic powers to civil servants, but powers which are completely discretionary in such officials as to their execution. The Bill removes the few duties now present on such officials to refuse approvals to polluters to construct or enlarge

their operations, and replaces the duty to refuse with the discretion to make such operations lawful.

When the Ontario Government introduced the Environmental Protection Act in the Summer of 1971, the legislation was immediately subject to severe criticism by the Canadian Environmental Law Research Foundation (CELRF), in a 60 page, two part brief. Such criticism was echoed by the media and by the Opposition Parties. As a result of such criticism by CELRF, the government itself introduced over twenty amendments to its own bill on second reading.

However, the amendments made in 1971 during passage of the original legislation removed only some of the most obvious deficiencies.

Yet except in one area, Bill 168 does not close the disastrous gaps which remain in the Environmental Protection Act and which give to Ontario's environmental Ministry mediaeval, autocratic powers, without either guidelines from the legislature as to their exercise nor provision for invoking such powers by the public if the Ministry refuses to act.

Bill 168 has taken the forward step of requiring public notice and public hearings in certain instances when waste management systems and sites are to be established in a part of the province.

CELRF commends the government for reintroducing such provisions in the Environmental Protection Act, (they formerly existed in the repealed Waste Management Act), but the absence of such notice and hearing provisions when other equally obnoxious industries or sources of pollution are established in the province, especially in areas of the province in which there is no zoning, points out the serious gaps that would remain in Ontario, if Bill 168 were passed in its present state.

Outlined in Section II of this Brief are some of the basic problems that will remain even if Bill 168 is passed in its present state. Section III outlines problems with Bill 168 itself.

PART II

Present Problems in Ontario's Environmental Laws Which are not Relieved by the Amendments Proposed in Bill 168, and CELRF's Suggested Reforms

The general public or the private citizen whose health or property is directly affected by decisions or the Ministry of the Environment have no right (except as proposed in section 7 of Bill 168 dealing with waste disposal sites), to participate directly in the decision making process of the Ministry; they have no right to contest any decision made by the Ministry; no rights to appear before the Appeal or Hearing Boards of the Ministry; no right to activate the provisions of the Act to restrain or alleviate acts of pollution that cause damage to their property or health; no unfettered right to initiate private action against the owner-operator of the source of pollution.

A. Standards of Pollution

Crucial decisions affecting the quality of the environment and the specific property and health of individuals are made without public participation. There are no provisions within the Act to permit submissions from various interested groups respecting the establishment of standards of permissable pollution or the acceptable technology to be used by industry in controlling pollution. Civil servants have complete discretion in setting the maximum pollution

levels for Ontario; no one can force them to make regulations (for example we do not yet have any noise regulations in Ontario); no one can force the review of such levels if they are too high or low, or if new technology renders them obsolete; when published they are often province-wide in scope - allowing for the same degree of air pollution in Muskoka as in Sudbury; and when made, since the process during which such regulations are arrived at is secret, no one knows what values the regulations are designed to protect.

B. Certificates of Approval & Private Rights

When an industry wishes to build or operate a source of pollution, it applies to the government for a Certificate of Approval (licence to pollute). Such an application is dealt with in secret by the Environment Ministry. Except as proposed in section 7 of Bill 168 dealing with waste disposal sites, no notice must be given to other industries or residents of the area. In areas of the province with no zoning (most) this means the Environment Ministry can allow a charcoal factory to build next to a farm, or an oil refinery next to a cottage. The owner of the farm or the cottage has no right to object, no legal right to even know what is going to be their new neighbour, and the first such owners will likely hear of the new development are the sounds of bulldozers. And since a Certificate of Approval means only that the new neighbour must keep within regulations

(set in secret by the Civil Servants - and province wide an application) the owner of the cottage or the farm may have a substantial pollution source nevertheless sitting next to him. If the industry seeking the Certificate of Approval wishes to appeal some term on its Certificate that it does not feel is appropriate, it has an appeal. But no member of the public, and no neighbour of the applicant, such as the farm owner or the cottage owner, or indeed another industry in the area, can appeal the grant of a Certificate. Despite clear proof of injury to health or property a private citizen cannot directly contest or appeal the decision of the Department. And there is no provision for the total environmental impact of the project to be assessed by the Ministry prior to it giving an approval.

C. Environmental Litigation

Another problem in the Environmental Protection Act and an area not even mentioned by Bill 168, is its failure to take into consideration positive effects of direct citizen participation in environmental protection and planning through litigation. Litigation is an invaluable tool to stimulate a high public profile for otherwise routine governmental decisions, consequently ensuring a more comprehensive evaluation of all conflicting interests. Common law actions, for nuisance and negligence, provide some protection for citizens aggrieved by pollution. Yet by failing to

recognize certain developments in recent years, restricting such suits, the government by inaction has effectively precluded citizens from even going to civil courts and obtaining damages and injunctions to stop pollution. The problem is that the courts have characterized activities that affect the community at large as public nuisances and have held that private individuals may not sue for a public nuisance unless they suffer special damages over and above that suffered by other members of the community. Only the Attorney General at present is allowed to seek relief in the courts. But the Attorney General almost always is subject to the same pressures that prevent the Environment Ministry from acting.

And before private citizens can act effectively in court they need much vital information. At present much of that information is secret and remains so because of government policy and ambiguous laws in this area. Access to information is an important problem discussed below.

Related to the question of obtaining evidence is the unduly harsh requirements, at least in environmental cases, which necessitates the Plaintiff in an urban setting proving the contaminants are emanating from the alleged polluter's operation and from no other source. This can be done only with the highest degree of technical expertise, testing facilities and manpower. Both the information and expertise is locked away in government files or in closed-mouthed

government officials.

Another problem of civil litigation is that at present the Plaintiff who seeks a temporary injunction to stop pollution immediately is required to give an undertaking to be responsible for the damages incurred by the Defendant if at the trial the Plaintiff is unable to prove his case. Undertakings to obtain temporary injunction prevent all but millionaires from stopping a real or apprehended danger to their property, (the government can order polluters to cease or cut back offending sources but no method exists for citizens to have the Ministry act).

And the costs payable in civil actions are completely inappropriate to those wishing to act in the public interest and not only to protect their own property.

D. Access to Information & Public Participation

If the Ontario Government is truly intent on encouraging something more than token public participation in its environmental planning then it is essential that the public be given access to information about environmental problems so that their contribution to solutions will be well informed and reasonable rather than merely emotional. A number of amendments and additions must be made to the Environmental Protection Act to provide interested citizens with a right to information about the environment.

Presently, s.19(4) of the Act requires the Ministry to advise an inquirer whether or not a person is under a ministerial order to reduce pollution and if so, to permit the inquirer to inspect the order. This is a step in the right direction; but unfortunately it creates more problems than it solves. Almost always the orders specify equipment to be installed instead of effluent or emission standards and therefore do not tell the public how much pollution is being created by a particular source. Further, notwithstanding the intended usefulness of this kind of information to the general public, the Ministry is very reluctant to release this information. It has been the experience of at least two public groups in Toronto, Pollution Probe and the Environmental Law Association, that government officials open up their list of ministerial orders only after the most persistent demands. Less agressive citizens, unsure of the provisions of the Environmental Protection Act, would undoubtedly be denied even this kind of information.

The other part of the present Act dealing with public access to information is s.81. This section starts from the premises that all information is secret, except "information in respect of the deposit, addition, emission or discharge of a contaminant into the natural environment". At first blush this section seems to give the public basic information about emissions; but in fact that is not the case.

The Ministry seems to have interpreted this section to mean information that is not secret is not necessarily public and therefore, although the Act purports to make certain information available to the public, it does nothing of the sort. Requests for this information by public environmental groups have always been denied.

Reforms Urgently Needed (And Not Touched upon by Bill 168)

In the problem areas indicated above, there is a basic need for amending legislation to recognize the public's right to a healthy and attractive environment and the recognition that individuals may play a meaningful role in environmental planning and preservation.

To achieve this, the following reforms are urgently needed:

I Notice - before any decision is to be made concerning the establishment of regulatory effluent standards or the granting of approval for pollution programs, the public must be given suitable notification and a right to examine the plans in order to consider presenting their views.

Whenever a particular industry or activity, private or governmental, is applying for a certificate of approval, if on probable grounds it is shown that the project, work or undertaking may affect the natural environment in a manner other than that disclosed by the applicant in its material, then any citizen must be at liberty to obtain an

order of the Surpeme Court to compel the applicant to prepare a statement containing full disclosure of the probable environmental transitions likely to occur as a result of the project, work or undertaking and to obtain a further order preventing commencement of such work until an adequate statement is published.

II Hearings - if the consequences of a government decision affect in a substantial or major manner the interests of a particular citizen or a particular group of industries or tax payers, then such individuals and interests should be granted a forum to present their views, cross examine opposing views and question proposed plans by submission of feasible alternatives at public hearings.

It will be noted that both reforms suggested above are proposed by the Ministry in Bill 168 in relation to certain waste management sites.

There is as much urgency for such reforms with regard to all other projects and proposed standards - at least in the great majority of the province without zoning.

III Petitions - this is a vital administrative reform which will provide public access to environmental decision makers, either where there has been no effluent standards established or where they do exist, but the responsible agency declines to enforce them.

What is needed here is a type of statutory procedure by which interested and concerned citizens can force a responsible agency to take action in the above situations.

Such legislation will not force the Ministry to act completely at the whim of citizens, but it would ensure that public hearings will be held on such issues except where such a request, expressed through a petition, is considered by the agency to be frivolous and unreasonable - a decision which is subject to judicial review, the court being entitled to substitute its opinion as to the frivolous nature or unreasonableness of a particular situation.

IV Environmental Ombudsman (Environmental Council) - Provision is made in the Environmental Protection Act, 1971 for an environmental council. Yet almost one year since the Environmental Protection Act was passed, no members of the Environmental Council had been appointed, and of course it has carried out no functions. Such a Council, or an environmental ombudsman, is a fundamental necessity to aid in bringing the government and its bureaucracies into touch with environmental concerns, and in demanding reviews of Ministry decisions and lack of action. It should also report periodically on the state of the provincial environment, and act generally as a watchdog on environmental abuse, both on behalf of citizens and on behalf of industries who come into conflict with the Environment Ministry.

V Environmental Litigation - Some of the fundamental reforms needed here are :

a) to allow any person willing to act as a Plaintiff in a public nuisance situation to sue but require that it be a class action. That is, his action would be brought on behalf of all of those persons who are suffering from that particular source of pollution. The intervention or the permission of the Attorney General would not be required. At present any citizen can prosecute another for an alleged violation of the criminal law, and any ratepayer can restrain by an injunction the breach of a municipal by-law. Extending the right of any citizen to sue in public nuisance would be consistent with these traditional methods of citizen litigation.

b) The Legal Aid Act and regulations must be amended to allow citizens willing to act in public interest environmental situations to receive assistance so as to appear adequately represented before their municipal councils, the Ontario Municipal Board, the Pollution Appeal Tribunals and the Courts where either they are suffering special harm in an environmental situation or where they are willing to act in the public interest.

c) either through amendments to the Legal Aid Plan or through special grants, environmental groups who are willing to act in the public interest on behalf of citizens

should be given the government's support so that the proper expertise and other preparation necessary to properly represent the public interest can be put forward to those officials and agencies making important environmental decisions.

d) The threat of having to pay costs for persons suing in a public nuisance situation ought to be removed from the Rules of Practice governing civil law suits, unless in the Court's opinion the suit was completely frivolous.

e) the requirement to give an undertaking for damages to obtain a temporary injunction ought to be replaced by the necessity only to post a bond for a maximum of $500. to ensure that the action is prosecuted to trial, unless the Defendant consents otherwise.

f) the burden of proof must be shifted from the Plaintiff and the prosecutor in environmental law suits so that after a prima facie case is established that the contaminant emanates from an area in which the Defendant has his plant or source of operation, the burden then shifts to the Defendant to show that the contaminant does not emanate from that operation.

VI Access to Information - CELRF recommends that s.87 of the present Act be amended so that it provides that

"except as to information of a nature which places a person or industry in a competitive advantage with another person and which is not otherwise ascertainable anywhere, every provincial officer shall communicate all matters that come to his knowledge in the course of an inspection, examination, test or inquiry made under this Act or the regulations to any person requesting such information.

At the very least, all ministerial orders and certificates of approval should be published in detail in the Ontario Gazette or the right to copies of such information must be legislated.

Further, the right of the public to obtain information in respect of emissions from particular sources must be legislated including sufficient details concerning present equipment and emissions therefrom that a qualified non-government expert could assess the adequacy of the equipment specified in the certificate of approval as being sufficient to bring emissions within the act and the regulations.

PART III CRITIQUE OF BILL 168

1. Waste Management Systems and Sites

The provision for public hearings is welcome. There is an obvious gap in the present Environmental Protection Act provisions, in that although an applicant is required to advertise his intent to apply for a certificate of approval, no hearings are provided for. Yet they seemed to take place. The amendments will at least ensure hearings of a kind in certain cases.

However, the proposed s.33a(1) is ambiguous in that it possibly can be interpreted to mean, anytime domestic waste of not less than 1,500 persons must be disposed of, a hearing must be held. Does the draftsman mean this?

More serious are the inadequate provisions with regard to notice in proposed s.33a(2). At least the present Environmental Protection Act, 1971, in s.37 requires an applicant to publish notice in a newspaper "having general circulation in the locality where the system or site is or is to be located, once a week for three successive weeks ... " Such newspaper notice should continue to be required, as well as mailed notice to all persons who would be entitled to notice on a hearing of a rezoning application before the Ontario Municipal Board in addition to notice proposed by the Bill to adjoining land owners.

And although it would be difficult to have a "public

hearing" without members of the public, there is no provision in Bill 168 or under the provisions in the Ontario Water Resources Act s.9a, as to who is entitled to take part in such hearings. The right of such persons who would receive mailed notices, as suggested above, to appear, together with a "fair representation" of all other persons wishing to appear, should be legislated.

Under s.33b the Director would be able to issue a certificate in an emergency without a hearing. A time limit in which such a certificate expires should be included in an emergency permit.

Under the proposed s.33c the Director is given a discretion as to whether or not he will hold a hearing for systems and sites other than those which come under s.33b. So that the proper degree of objectivity is ensured on the part of the Director when he exercises this discretion, the provision for advertising of such applications in local newspapers ought to also be applied to applications for such sites and systems. And further, the Director should be required to direct a hearing if he receives a written request to do so from five persons owning adjoining land or others who would be entitled to written notice as under our proposal above with regard to a s.33a application.

The proposed section 35 gives far too much power to the Minister to alter or bury a municipal by-law prohibiting

waste disposal sites. When anything like the environmental impact of such a site is proposed for a municipality which had prohibited such sites, the Minister is in effect unilaterally rezoning the municipality. Natural justice at the least requires that all persons in the municipality receive some form of notice of intention to suspend or revoke such a bylaw, and the right to object. Yet the Minister can restrict both who can appear and object before the Hearing Board: 35(1). If he does not restrict such notice and right to object, the Hearing Board can: 35(4). Who argues before the Hearing Board for those citizens not given notice of the proposed hearing and who may wish to object?

2. Waste Well Liability Fund

No new legal rights are created by these provisions (section 16 of Bill 168). At present a person who can prove his source of domestic water is being interfered with or polluted can at common law obtain not only damages so that he can secure an equivalent source of supply but also the common law will give him an injuction to stop his present source from being damaged in the future.

Because under these proposed provisions a claimant appears to have to prove that a specific waste disposal well is causing his water supply problems, a claimant may well have to hire a lawyer and expend the same time, effort, and money as he would to sue at common law to satisfy the Executive Director that he has a valid claim.

If this legislation was to make compensation for such injury easier to obtain, the aspect of the claimant having to prove the relationship between the harm to his water supply and the activities of a specific owner of a waste disposal well must be made much more clear.

Further, under the proposed amendments the Executive Director by the proposed s.46a(12) needs merely to set out in a certificate that he will or will not allow a claim. The Bill should be changed so as to ensure a claimant receives the details of the investigations made by the Exeuctive Director,

the facts as found by him, and any analysis carried out, together with full reasons for allowing or not allowing the claim.

Without such amendments, the legislation appears more to be a new method of raising revenue for the government than a plan to truly compensate for damaged water supplies.

3. Sewage Systems

The provisions under s.23 of the Bill appear to transfer jurisdiction with regard to septic tanks, privies and other "private" sewage systems from the jurisdiction of the Medical Officers of Health to the Ministry of the Environment.

In theory this transfer will allow a province-wide approach to private sewage disposal systems. The Ministry should not be as easily influenced by local pressures in regulating standards as may have been the case when such approvals were under the jurisidction of the local Medical Officer of Health. However, the Director is given the same discretion in prescribing standards for what is acceptable technology for these systems as was possessed by the Medical Officer of Health.

What if the Ministry persists in prescribing standards for septic tanks that do not protect the natural environment? What if new technology is developed making obsolete that which is laid down as acceptable standards by the Ministry? The Director through the regulations is given powers to make such standards without input from either residents of an area, industry, manufacturers of sewage systems, or others concerned with this problem. Public hearings must be held, as they are in British Columbia, Manitoba and most American states, when the Ministry proposes such regulations governing standards in this area, just as such hearings must be held with regard to the establishment of maximum allowable effluent or technological standards to be used in any pollution abatement area.

A technical problem related to the proposed section 57 is that if a person contravenes the section and commences to construct a sewage system, or a building or structure to be used in connection with a sewage system, without first obtaining a certificate of approval, that person can be charged with violating the Act but one time. The legal offence would be "commencing" construction, and of course construction can only commence at one point in time. The words "enlarge, extend or alter" would be applicable only in respect of an existing work or structure. This problem in draftsmanship is repeated throughout the Act and Bill 168. To overcome this problem, it is suggested that the word "construct" be added so that the proposed s.57 and other like sections read as follows :

"No person shall commence to construct, <u>construct</u>, install, establish, etc." By making this amendment, a person who continues to construct without a certificate of approval could be charged for violating the Environmental Protection Act for every day of such construction. At the present time, he could only be charged and convicted for one occasion, and would then face a maximum $5,000 fine, but which in practice would be rarely even $500. However, if such a person can be charged with committing the same offence on repeated occasions, this jumps to a potential $10,000. per day.

4. Certificates of Approval for Air and Land Discharges

By changing one word, from "shall" to "may" (in the proposed section 8(4) which would replace the present section 9) Bill 168 in s.2 will give absolute power to the Director of the Air Management Branch to allow new sources of air or land pollution to be established or enlarged that do not comply with the Act or the regulations.

At the present time, section 9 requires that the Director, before he issues a certificate, "shall require such changes as may be necessary" in the plans and specifications submitted for approval so that the proposed operation will not "emit or discharge any contaminant into the natural environment contrary to this Act or the regulations."

The proposed section 8(4) replaces that duty to refuse approval with the discretion to make such operations lawful. This is a retrograde step.

Because the word "may" is used, no court can review the Director's approval, whereas at the present time, if the Director purported to approve an operation that did not comply with the Act or the regulations, the Director could be ordered by a court to revoke his approval.

This is of course the same deficiency that is contained in the proposed section 59 dealing with sewage works.

Another fundamental criticism in the proposed section 8 is that the Ministry is concerned only with "emissions and discharges of contaminants". Such wording does not provide any control over such activities as :

- highway widenings
- channelization of streams
- rerouting of traffic through residential areas

In other words, the present Act and the new Bill do not concern themselves with works, projects and undertakings if they do not "emit" or "discharge" contaminants even if they nevertheless may have fundamental and disastrous environmental impact and in regard to which there may be no existing legislation ensuring that such an impact is considered.

The same blind-folded thinking is used in the proposed new section 14 (found in s.3 of Bill 168). This section is the most powerful one in the entire legislation for controlling environmental degradation, and yet a close reading shows again that the government is not concerned with what ought to be fundamental concerns such as the environmental impact of dams, highways, airports, etc. but only with "emissions of contaminants".

CELRF submits that the proposed section 8 must be amended so that it provides that, whenever any work, project or undertaking, private or governmental, will materially affect the protection and conservation of the natural environment, such work, project, or activity must receive a certificate of

approval prior to its commencement unless there is adequate legal provision in other legislation to ensure that such environmental impact may be disclosed and an opportunity given to all persons interested in objecting to the commencement of the project.

Similarly, the proposed section 14 must be amended to add "activities, works, and undertakings," so that it is clear that emissions are not the only things that may "cause" the problems specified and so that such activities, works, and undertakings, can be controlled.

One positive feature of Bill 168 related to the proposed section 8 is that in the proposed section 8(4)(b) the Director is given further powers to refuse to issue approvals on much wider grounds than he possessed previously, including "on probable grounds, to prevent impairment of the quality of the environment for any use that can be made of it."

But in line with CELRF's views on the delegation of such great discretionary powers to civil servants, CELRF believes that some form of review procedure must be established for all those with such powers, as outlined in Part II of this Brief.

More critical however is the answer to the question of where the Director is going to obtain his "probable grounds"? If an applicant for a certificate does not have to submit an environmental impact statement to the Ministry as part of his application for a certificate of approval, and such an appli-

cation is made without notice to other persons or industry in the area, then any consideration of the "impairment of the quality of the natural environment for any use than can be made of it" must rest solely with the Director. It is submitted that this is an awesome responsibility for the Director to have imposed on him. Even with the best of intentions, he simply will not have the necessary input of information before him in most cases to carry out the purpose of the Act, "to protect and conserve the natural environment" unless notice of such applications is given in the area likely to be affected.

The proposed section 15(1) is not that different from the present one. The change is not as significant as the continued weakness of the section when considered in light of the fact that the Ministry refuses (or has in the past refused) to reveal to persons who observe discharges of contaminants "out of the normal course of events" from a particular source whether or not such discharge was reported to the Ministry by that source. Surely the Ministry does not have enough staff to ensure that all possible sources which may infringe this section report unusual discharges. Why does the Ministry not accept the idea of confirming to persons who observe such unusual discharges under this section, and the present s.13, whether or not that source has reported?

This change in policy would likely cause those who presently feel free to flaunt this requirement without fear of the consequences to change their policy and obey what is an important part of the Act.

5. Pesticides

The provisions in the Bill appear to do little more than complete transfer of jurisdiction in this area from the Pesticides Act to the Environmental Protection Act.

What is objectionable here is the proposed section 52b which allows the Director to again exempt an applicant or licensee "from any provisions of the regulations ... and issue a licence upon such terms ... as the Director considers proper."

Why must the Director be given such broad powers to exempt someone from that which the Legislature has said shall be the requirements? At the very least, the Director's discretion to exempt an applicant "where in the opinion of the Director, it is in the public interest to do so", must be reviewable by a court. The public interest must not be placed solely in the hands of an appointed civil servant who is given no guidelines by the legislature for the exercise of that discretion and when the legislature has prescribed no minimum qualification for the person holding the position of Director.

6. Conclusion

This, Part III, is a brief critique of Bill 168. It has been done in haste as the Bill has been public for less than a week at the time this was being written. However, haste was necessary lest the most blatant defects which have been pointed to herein be passed off on the people of Ontario and its representatives in the Legislature as "mere housekeeping".

What is needed are fundamental reforms to Ontario's environmental legislation as indicated in Part II.

At the very least the government must submit this Bill to a standing committee and allow public input at that stage, as it is not provided for anywhere else in Ontario's present environmental legislation.

Without such public input and changes suggested, Ontario will be left with one of the most autocratic and anachronistic pieces of environmental legislation to be found in North America.