CEPA Review: The Government Response

Environmental Protection Legislation Designed for the Future - A Renewed CEPA

A Proposal

Response to the Recommendations of the Standing Committee on Environment and Sustainable Development outlined in its Fifth Report

It's about our Health! Towards Pollution Prevention

CEPA Revisited

Canada

CEPA Review: The Government Response

Environmental Protection Legislation Designed for the Future - A Renewed CEPA

A Proposal

Response to the Recommendations of the Standing Committee on Environment and Sustainable Development outlined in its Fifth Report

It's about our Health! Towards Pollution Prevention

CEPA Revisited

Canada

For more information on CEPA, please contact:

The CEPA Office
Environmental Protection Service
Environment Canada
Ottawa, Ontario
K1A OH3

Voice: (819) 953-0152
Fax: (819) 997-0449

This document is available electronically at:
http://www.doe.ca/tandi/cepa/etitles.html
on the Internet.

Catalogue No.: En21-141/1995E
ISBN: 0-662-23913-X

Table of Contents

Foreword

Creating Opportunity, the Liberal Plan for Canada, noted that "preventive environmental care is the foundation of the Liberal approach to sustainable development." That document also committed the Government to use the review of the *Canadian Environmental Protection Act* (CEPA) to enshrine pollution prevention as a national goal. What we need to stress is the responsibility that we have as human beings to protect the Earth from the negative impact of our activities. We can do this by preventing pollution in the first place, by safely managing the use of substances that have or could have adverse environmental effects, by ensuring the efficient use of energy, by reducing our waste, by recycling, and by conserving natural resources. Not only did the Standing Committee of the House of Commons on Environment and Sustainable Development in its CEPA Review Report emphasize that Canadians must look to pollution prevention as the preferred approach to protection of the environment, but we have further underlined pollution prevention as our new way of doing business in *Pollution Prevention: A federal strategy for action* published in June 1995.

The saying "an ounce of prevention is worth a pound of cure" may sound trite and old-fashioned. But prevention is going to be the emphasis of the future CEPA. The Government proposes to incorporate explicit principles of pollution prevention into the statute, based on the definition of pollution prevention as the use of processes, practices, materials, products or energy that avoid or minimize the creation of pollutants and waste and reduce the overall risk to human health and the environment.

The ultimate aim of this review and of the Government Response is to give Canadians legislation that is flexible and has the tools needed to get on with the job of environmental protection. By further building on partnerships with all sectors of society and through the creative use of economic instruments and voluntary initiatives supported by clear policies and good regulations, CEPA can be refashioned into a first-class statute that will be good for all Canadians. CEPA can and will be used to promote environmental protection, to stimulate new technologies, and to help make Canada competitive in a world in which environmental standards are driving competitiveness.

We are pleased that the House of Commons Standing Committee on Environment and Sustainable Development, following its review of CEPA, has provided us with a Report that the Government has used as a basis for a proposal for consideration by the Canadian people.

We encourage you to take the time to review and respond to this proposal which presents a "CEPA to meet the future." This is your chance to tell the Government how best to revise the *Canadian Environmental Protection Act*.

Let us hear your voices!

Sheila Copps
Deputy Prime Minister and
Minister of the Environment

Diane Marleau
Minister of Health

Part One. Overview

Introduction

Canada's principal piece of federal environmental protection legislation - the *Canadian Environmental Protection Act* - was developed in the mid 1980s, at a time when there was growing concern about the presence of toxic substances in the environment. There was broad recognition that an outdated and inadequate web of legislative and regulatory instruments was unable to cope with the new environmental pressures of the time. After an extensive multi-stakeholder consultation process, the *Canadian Environmental Protection Act* (CEPA) was proclaimed in force on June 30, 1988. One of the *Act*'s provisions was a mandatory review of its adequacy within five years of CEPA's enactment.

CEPA was designed to protect the environment and health of Canadians. It embodies an ecosystem vision of the environment by focusing directly on pollution problems in water, on land and through all layers of the atmosphere. The *Act* establishes a comprehensive regime to control toxic substances at each stage of their life cycle from development and manufacture through transport, distribution, use and storage, to their safe, ultimate disposal as wastes. A substance is declared toxic if it is found to threaten the environment, human life or health. CEPA also includes provisions dealing with nutrients, the federal house, enforcement, international air pollution, and ocean dumping.

Under CEPA, various regulations have been passed, including, for example, those to control ozone-depleting substances, PCBs, gasoline, ocean dumping, substances new to Canada and pulp and paper mill effluents. CEPA's regulatory agenda also helped Canada meet its international commitments under the Montreal Protocol on Substances that Deplete the Ozone Layer, the Basel Convention on the Control of the Transboundary Movements of Hazardous Wastes and their Disposal, and the London Convention, 1972.

During the seven years since 1988, the field of environmental science has brought about significant changes in our understanding of the stresses we place on our planet. Science has shown that some organic compounds do not break down and persist in the environment. They stick around for years and, eventually, can be carried by water, sea and air for long distances. They have even been found, for example, in the breast milk of Arctic Aboriginal Peoples. The organic compounds are mainly from the consumption of marine animals which have acquired the compounds from the aquatic food chain. The chemicals we used to use in our refrigerators have been linked, through their impact on the Earth's ozone layer, to higher incidences of skin cancer. Pollution problems are more and more ecosystemic and global in nature. It is, therefore, no surprise that advances in environmental and other fields of science seen during the past seven years need to be reflected in our environmental legislation.

We have a strong partnership with provinces and territories in the field of environmental management. In addition to CEPA and other federal statutes administered by the Government of Canada, provinces and territories have their own environmental legislation. Together, these regimes provide the necessary "safety net" to ensure a safe and healthy environment for all Canadians.

Together, much has been accomplished in the field of environmental protection since CEPA was first introduced. A significant factor in this progress has been an approach of "shared responsibility." We are minimizing overlap and duplication through the use of administrative and equivalency agreements with provinces and territories. More work remains to ensure the greatest level of environmental protection at the least cost. Canadians accept that, as individuals, they must act to protect our environment. Further, individual companies and industry associations have endorsed the principle that environmental protection is good business. Their increasing contribution to shaping Canada's environmental protection regime through voluntary programs and accountability arrangements, coupled with regulatory compliance, will help ensure that we make the protection of our health and environment a priority for all sectors of Canadian society.

The most important change, however, may be the recognition and acceptance by governments of sustainable development. The sustainable development approach provides a means of managing economic development and human growth without destroying the life support systems of our planet. Sustainable development integrates

economic with environmental goals. In addition, in 1995, the Government introduced three new, major, environmental policy initiatives in the areas of toxic substances, pollution prevention and the "greening of government."

The Government's 1995 *Toxic Substances Management Policy* (TSMP) sets the direction for all federal government departments when taking decisions about and managing toxic substances, many of which have become important parts of our everyday life. The TSMP was developed jointly by users of toxic substances and those affected by their use.

Another important step forward is the adoption of *Pollution Prevention - A Federal Strategy for Action.* This strategy is based on the maxim "an ounce of prevention is worth a pound of cure." It shifts the focus of environmental protection programs and processes toward measures that avoid or minimize the creation of pollutants and wastes, and reduce the overall risk to the environment and human health.

In addition, the Government released *A Guide to Green Government.* The *Guide* presents a framework to guide and assist federal departments in the preparation of their sustainable development strategies. The Government recognizes that responsibility for sustainable development is shared across government and that each Minister is accountable for making measurable progress on sustainable development within the sphere of that Minister's mandate.

As required by statute, the House of Commons Standing Committee on Environment and Sustainable Development was tasked in mid-1994 to undertake a review of the effectiveness of CEPA. The Committee held 55 public hearings, heard testimony from 310 witnesses, and reviewed 71 substantive submissions. On June 20, 1995, the Committee tabled its mandatory five-year review of the *Act*, entitled *It's About Our Health! Towards Pollution Prevention, CEPA Revisited.* The proposals contained in the Government Response which is being released for public consultation will form the basis for the renewal of CEPA for protecting Canada's environment - now and for future generations.

This document is divided into three parts. **Part One** is this Overview, consisting of an introduction setting out the context within which a renewed CEPA is being proposed, a section on the need for a cooperative approach, and another on jobs and growth and "good" regulations which describes the critical importance of integrating environmental considerations into economic decision making, and vice versa, in order to achieve a truly sustainable future for both business and environmental interests in Canada.

Part Two is the Executive Summary of each of the 10 chapters of the Response, which we believe will meet our environmental protection requirements for the coming years. The Executive Summary will focus primarily on the new proposals which would be incorporated into a renewed CEPA.

Part Three is the Response in Detail that sets out specific proposals for each of the 10 chapters along with a brief explanation of the problems these proposals are addressing. There is also reference to current arrangements with other jurisdictions and stakeholders for managing these problems as well as the benefits to the public, our partners and stakeholders of proceeding as proposed. Following public consultations on these proposals, the Government proposes to introduce legislative amendments to CEPA. This will permit further public debate and consideration of Canada's environmental protection needs.

While much has been accomplished - challenges remain. Together, these challenges can and will be met.

The Need for a Cooperative Approach

Canada is a federal state with two strong levels of government. The division of powers, laid out in the *Constitution Act, 1867,* makes no explicit mention of "environment." Each level of government has jurisdictional powers which are essential for effective environment management.

The Constitution does define specific federal responsibilities that have an important environmental dimension. They include: seacoast and inland fisheries; migratory birds; federal public lands; Indians and lands reserved for Indians; the activities of the federal government and its agents; the activities of undertakings under federal jurisdiction such as airlines and airports, interprovincial railways, telecommunications carriers, interprovincial and international pipelines, and extraprovincial marine shipping. As well, risk to human health is dealt with by the criminal law, and Parliament can set environmental standards for products as a condition of their

movement in international or interprovincial trade. Lastly, there is authority, if a matter is deemed a national concern, under the residual "peace, order and good government" power.

The constitutional authorities which support a provincial presence are as follows: legislative powers to manage property and civil rights; local works and undertakings; matters of a local or private nature; and proprietary rights over natural resources and provincial Crown lands.

Environmental problems know no territorial boundaries. Increasingly, they are inter-regional, ecosystemic or global in nature. For example, cleaning up the Great Lakes can only come from interprovincial, interstate, national and international cooperation. All Canadians have the right to a clean and safe environment, in order to protect their health. In this area of shared responsibility all Canadian governments have the duty to protect that right.

The solution to these and many other pressing environmental problems lie in effective international and inter-governmental cooperation. The federal government plays an important role in achieving the management of environmental problems by the most efficient and cost-effective means. One of its jobs is to coordinate and facilitate national environmental protection efforts, to ensure that the national interest is maintained, and to represent the interests of Canadians in the design, development and implementation of international solutions to environmental problems.

One point is clear: all jurisdictions must work together as partners to protect the environment and health of all Canadians. History has proven that many severe environmental problems have been prevented, controlled or contained as a result of coordinated federal-provincial-territorial efforts - acid rain, pulp and paper and ozone depletion are prime examples.

Continued intergovernmental cooperation on the environment is essential for the following reasons:

1) Environmental problems like air and water pollution, climate change and accidental spills of toxic substances can transcend geographic and jurisdictional boundaries;
2) Ecosystems frequently encompass more than one jurisdictional territory;
3) Pooling our resources and expertise with the powers and tools of all levels of government to address environmental problems gives Canadians the best possible solutions; and
4) Diminishing government resources, in all parts of Canada, make working together essential.

The Organization for Economic Co-operation and Development, in its 1994 Environmental Performance Review of Canada, credits cooperation among governments as a key reason for first-rate, efficient and effective environmental protection.

The proposals in this document reflect the nature of a shared approach to environmental management. They also recognize the deep seated desire of Canadians for ending unnecessary duplication and overlap. Cooperation and harmonization efforts will continue to be an important part of the revised CEPA.

Jobs and Growth and "Good" Regulation

While it is important that a revised CEPA be an effective national tool for environmental protection, it must also consider the Government's jobs and growth agenda by recognizing the needs of those who create jobs for Canadians - business and industry. Having CEPA contribute to sustainable development provides the means for achieving this goal.

Sustainable development, which recognizes the interdependence between economic, social and environmental policy, is having increasingly pervasive implications for government policy. A healthy Canada is one in which there is continuous improvement in environmental performance to provide quality living and to maintain healthy ecosystems. It is also a Canada that is competitive and attracts investment to create jobs and wealth. Acting on these objectives together, as complementary ideas, will be the key to economic and environmental success for companies, governments and citizens.

Rules and regulations are a fact of life for businesses throughout all countries of the world, including Canada. Whether they relate to health, trade, environmental or competition standards, they exist not only to ensure a level playing field for business, but to protect Canadians and enhance their future. The job of government is not simply to set these regulations, but to ensure they are set fairly.

As stated in the Government's recent *Building A More Innovative Economy* "regulations play an important role in society, helping to assure that our markets are competitive, our products are safe, and our environment clean. They are an important tool of public policy for improving the quality of life. But poorly designed regulations can damage the economy by increasing costs, reducing access to markets, and making it more difficult to introduce innovative products and services. These costs mean fewer jobs and lower levels of growth."

Environmental regulations must be based on science, consider the potential economic impact and be strictly enforced, but not be inflexible. Indeed, smart regulating can stimulate innovations that make Canadian businesses more competitive and allow Canada to be at the leading edge of sustainable growth in the global economy.

In the new paradigm of global competitiveness, the ability to innovate and respond to new technologies determines corporate success. "Good" environmental regulations recognize this new fact. They also recognize that much of pollution can be a flaw in the production process and that environmental improvements can enhance competitiveness.

In a recent Harvard Business Review article, noted Harvard professor Michael Porter asserts,

> "Properly designed environmental standards can trigger innovations that lower the total cost of a product or improve its value. Such innovations allow companies to use a range of inputs more productively - from raw materials to energy to labour - thus offsetting the costs of improving environmental impact and ending stalemate [between regulators and industry managers]. Ultimately, this enhanced resource productivity makes companies more competitive, not less."

Further, Porter goes on to suggest that for innovation-friendly regulations, one should:

- enact strict rather than lax regulations;
- require industry participation in setting standards from the beginning;
- make the regulatory process more stable and predictable;
- develop strong technical capabilities among regulators;
- focus on outcomes, not technologies;
- regulate as close to the end-user as possible;
- employ phase-in periods;
- use market incentives;
- harmonize or converge regulations in associated fields;
- develop regulations in sync with other countries or slightly ahead of them;
- minimize the time and resources consumed in the regulatory process itself.

Making sure that Canada is competitive in the global marketplace is a key responsibility of the Government. As stated on page 66 of *Creating Opportunity*:

> "Tomorrow's winning industries will be those that achieve integrated economic and environmental efficiencies first. The federal government will establish a framework in which environmental and economic signals point the same way."

Use of the proposed enabling authorities in CEPA would be fair and could help increase competitiveness. The key policy thrusts of the Government's *Toxic Substances Management Policy*, strongly supported by Canadian industry, would be incorporated into the revised CEPA, and the *Act* would be consistent with the Government's regulatory reform agenda.

The process for determining new regulatory controls covering pollution prevention and toxics management would be as open as possible. Companies would draw up their own pollution prevention plans. Targets and frameworks for toxic substance treatment would be arrived at in close consultation with industry and other relevant stakeholders.

The renewed *Act* would also provide a role for voluntary approaches, and for the use of economic instruments. Utilizing all the tools to achieve sustainable development and environmental protection goals is necessary for success.

Thus, the ultimate aim of the Government's Response to the Standing Committee's Report is to give Canadians legislation that is flexible and has the tools needed to get on with the job of environmental protection. By further building on partnerships with all sectors of society and through the creative use of economic instruments and voluntary initiatives supported by clear policies and good regulations, CEPA can be refashioned into a first-class statute that will be good for all Canadians. CEPA can and will be used to promote environmental protection, to stimulate new technologies, and to help make Canada competitive in a world in which environmental standards are an important factor driving competitiveness.

In Canada, there are some recent and powerful examples of environmental goals improving economic performance. The pulp and paper industry and its efforts to meet its CEPA obligations and eliminate dioxins and furans is one such example. Today, cleaner plants, better resource productivity and an improved environmental image have helped the pulp and paper sector maintain markets, and capture important new ones.

Under the regulatory standards set in response to the Montreal Protocol, eliminating the production of CFCs to save the ozone layer proved to be good for the economy as well. Canadian companies are now on the leading edge of CFC-free products and services.

Under commitments made in the Canada-US Air Quality Agreement, reducing sulphur dioxide emissions to save lakes and streams also helped economic performance in Canada. By investing in sulphur dioxide abatement programs and modernizing their facilities, base metal producers and other heavy industries are more cost efficient and more energy efficient, and acidified lakes are returning to normal.

By developing innovation-friendly regulations, Canada, in the revised CEPA, will demonstrate that it is a forward-thinking nation, able to develop environmental standards that foster in our country environmental improvement, business innovation and competitiveness at one and the same time.

Part Two. Executive Summary

The Government's Response to the Standing Committee's report *It's About Our Health! Towards Pollution Prevention, CEPA Revisited,* proposes revisions to the *Canadian Environmental Protection Act* (CEPA) that will make it a significant tool for building sustainable development in Canada. The renewed CEPA will be comprised of specific Parts, each with its own purpose.

Chapter 1. Guiding Principles

Since CEPA's proclamation in 1988, the domestic and international agenda has changed dramatically. New concepts and approaches, such as sustainable development, the precautionary principle and pollution prevention, have evolved since CEPA first came into effect. Consequently, the renewed *Act* would be based on guiding principles. They would include statements on pollution prevention, the ecosystem approach, biodiversity, intergovernmental cooperation, science and the precautionary principle, economic responsibility and user/producer responsibility.

Our goal is that a renewed CEPA would: contribute to the goal of sustainable development through pollution prevention, and establish pollution prevention as the priority approach for environmental protection; use the ecosystem approach; contribute to meeting Canada's obligations under the international Convention on Biological Diversity; affirm that science is an integral part of decision-making; use the precautionary principle; apply the concept of user/producer responsibility; acknowledge the interrelationship of economic and environmental principles; and state the need for intergovernmental cooperation such that federal, provincial and territorial governments, and Aboriginal Peoples that operate under self-government, comprehensive claim or specific claim agreements, work as partners in the effort to protect Canada's environment.

Chapter 2. Administration

The Government has made a commitment to work closely with provinces to minimize duplication. The First Minister's Efficiency of the Federation Initiative also called for harmonization - environmental protection included. Over the past two years the Government of Canada has signed a dozen bilateral agreements with the provincial and territorial governments in an effort to reduce overlap and duplication in the area of environmental protection. Another dozen such agreements are currently being negotiated. This chapter is evidence of the Government's strong commitment to working in partnership with others.

Among the proposals contained in this chapter are: a new National Advisory Committee to replace the current Federal/Provincial Advisory Committee and include the participation of Aboriginal Peoples; expanded provisions for equivalency agreements with provinces, territories and Aboriginal Peoples that operate under self-government, specific claims or comprehensive claims agreements; expanded provisions for administrative agreements with provinces, territories and Aboriginal Peoples; and the use of an expanded range of tools, including economic instruments and voluntary initiatives, needed to realize sustainable development and environmental protection goals.

These new tools are needed to ensure CEPA's overall goal is achieved and would provide added flexibility to meet Canada's domestic and international commitments at the lowest possible costs to all Canadians, including Canadian businesses. By further building on partnerships with all governments and sectors of society, and through the creative use of economic instruments and voluntary initiatives supported by clear policies and good regulations, CEPA can be renewed into a first class statute that will be good for all Canadians.

These proposed revisions to CEPA would provide authority for the federal government to enter into a regime of intergovernmental cooperation which would also lower the costs of implementing this legislation and yet continue to be comprehensive and effective in protecting the health of Canadians and Canada's environment.

Chapter 3. Public Participation

Active and effective public participation in environmental protection means Canadians must have better access to information and better legislative means to take action against polluters. The renewed CEPA would serve to make people more aware of the environmental practices of industry and at the same time, make industry more aware of the concerns of the public. These expanded public rights in environmental protection would complement the many initiatives already adopted or considered by provincial and territorial governments. There are proposals to expand or clarify a number of public participation and environmental rights provisions.

It is proposed that: Canadians have the ability to access, through a computer network, a registry of environmental information; that Canadians have greater rights to sue those in violation of CEPA; that all Canadians, including federal employees, who voluntarily report violations of CEPA, be better protected by the law; that the Minister be more accountable to public concerns and complaints; that reasonable requests for investigations of alleged offenses under the Act be acted upon, and if the Minister is seen to have responded to CEPA violations with "unreasonable" delay, this would also be grounds for civil action.

In addition, the Government proposes to include the right to bring a civil suit where there is a violation of CEPA which results in a significant harm to the environment. These proposals on public participation rights are similar to those included in the Ontario Environmental Bill of Rights.

Chapter 4. Ecosystem Science and National Norms

Canadians want to know about the environment. Many questions remain unanswered. A greater knowledge of the effects or non-effects of certain releases on Canada's ecosystems would enable more effective management of our environmental resources now and in the future. The health of the global economy depends in large measure on the health of the global environment. Only through continuous scientific study will answers to many of these questions be revealed. At the heart of scientific pursuit is the need for new and improved information.

Under the renewed CEPA, the Government proposes to gather information and create new data inventories, including the National Pollutant Release Inventory. All information and guidelines which apply to ecosystems would lead to more effective and efficient decision-making and management on the part of all levels of government. And in defining and following the ecosystem approach to environmental protection, there would be extensive intergovernmental cooperation since ecosystems often transcend jurisdictional boundaries.

Chapter 5. Enforcement

The proposals in this chapter focus on providing more flexibility in the use of enforcement tools in order to secure compliance. In a renewed CEPA, enforcement activities would be carried out in a more cost-effective and efficient manner. The use of tools, such as negotiated settlements and administrative monetary penalties in lieu of prosecutions, cease-and-desist orders and ticketing, could reduce court costs, for both government and the private sector, and could result in a quicker return to compliance.

In addition it is proposed that inefficiencies in provisions governing inspector's powers be corrected, that CEPA analysts' powers be expanded, and that a new category of officer called a CEPA investigator be created. More efficient enforcement powers would mean better compliance with the law, better enforcement actions and improved quality of human health and the environment.

Chapter 6. Pollution Prevention

This chapter proposes to shift the focus of environmental protection activities towards minimizing or avoiding the creation of pollutants and wastes. This would move away from the current emphasis on assessing and managing pollutants and wastes already in the environment.

The proposals for this pollution prevention approach are: authority to require mandatory pollution prevention plans for toxic substances; encouragement of voluntary pollution prevention plans in other instances; authority to conduct research and demonstration projects with a focus on promoting clean technologies; authority to

establish a national pollution prevention information clearinghouse; provisions covering prevention, preparedness, response and recovery aspects to deal with environmental emergencies; and authority to adopt appropriate standards, guidelines, and codes of practice for dealing with the environmental aspects of emergencies.

Pollution prevention planning would serve to support, not challenge, the sustainability goals of provinces and territories. For industry, the benefits of preventing pollution, and not having to clean it up, are substantial. It means avoiding the liability associated with clean up costs. It means avoiding a deterrent for financial lending institutions. It means making long term innovations to the production process, rather than short term investment in expensive, stop-gap measures. And it means cost savings and improved worker safety.

For the public, pollution prevention planning means improved community safety, and tax dollar savings. Governments would save time and money due to reductions in monitoring and enforcement requirements.

Chapter 7. Biotechnology

It is proposed that a renewed CEPA continue to work within the existing Federal Framework to address products of biotechnology. As a principle, there would be no overlap and duplication in regulating these products. There is ongoing need, however, for a strong federal presence to ensure the safe and effective use of products of biotechnology and to maintain their economic potential. CEPA would continue to act as the "safety net" for those areas not covered by other federal *Acts*.

Chapter 8. Controlling Pollution and Wastes

In terms of international air pollution, there are proposals for the use of a wider range of tools, such as economic instruments, pollution prevention planning and federal-provincial-territorial agreements on emission reduction targets, and the establishment of a framework for federal and provincial governments to work together address international air issues. There would be consultation with provinces, territories and Aboriginal Peoples in the establishment of the framework

To provide consistent fuels across Canada in order to maintain air quality and protect the environment, there is a proposal to include authority for national standards for fuels. The October 1995 Report on Cleaner Vehicles and Fuels prepared by the Canadian Council of Ministers of the Environment (CCME) further reinforced the need for consistent fuels, by recommending national fuel standards for Canada. In view of the potential efficiency of consolidating most provisions governing fuel, fuel additives and vehicle emissions under a single federal statute, the Government will examine the possibility of transferring responsibility for regulating emissions of new on-road and off-road vehicles from the *Motor Vehicle Safety Act* to CEPA.

In addition, there are proposals to fill the current gap, under CEPA, in the area of international water pollution. The renewed CEPA would include provisions to prevent transboundary water pollution, which would mirror and respect the reciprocity provisions in the *U.S. Clean Water Act*.

There are also proposals to adjust CEPA's current provisions to enable Canada to meet its international commitments in the area of export and import of hazardous wastes as well as to fill an existing gap with respect to interprovincial movement of waste shipments. For provinces, territories and industry, this would mean increased harmonization and a national approach to the control and tracking of interprovincial movement of hazardous and non-hazardous wastes. CCME has endorsed the harmonization of controls for such interprovincial shipments.

CEPA would continue to deal with disposal of wastes at sea, but a new approach of listing, under the *Act*, those wastes whose disposal at sea would be permitted is proposed. Anything not on the list would not be considered for disposal at sea.

Chapter 9. Controlling Toxic Substances

Canadians remain concerned about the risks posed by toxic substances. Currently, the present federal framework for assessing toxic substances does not respond as quickly as the public would like. There have been complaints that the current system is slow, inefficient and prone to delays.

The proposals for the renewed CEPA would address these concerns. The proposals would commit the federal government to a risk-based approach to decision making. The federal government proposes legislative provisions to fast track assessment and control of toxic substances which are banned, sunsetted or severely restricted by the Organization for Economic Co-operation and Development (OECD) countries and Canadian provinces, when those actions are based on science. Also, the new Act would define virtual elimination, and include "stop the clock" provisions when further testing is required to complete risk assessments or when a Board of Review is established.

Key elements of the federal *Toxic Substances Management Policy* would be incorporated into the renewed *Act*. Substances meeting criteria for toxicity and persistence and bioaccumulation, that also result from human activity would be subject to virtual elimination, that is, Track 1 substances. All other toxic substances would be managed throughout their life cycles, that is, Track 2 substances.

Prevention and control proposals would be published in the *Canada Gazette* within two years of a substance being determined toxic, and within 18 months of publication, controls would be in place. The authority to require testing and information from users, producers and importers would be strengthened. What's more, industry would be required to submit proposals for achieving virtual elimination.

The benefits for industry would not only come with increased predictability and solid timeframes for substance control, but also from adapting to newer and safer alternatives which foster innovation, better resource productivity and enhanced competitiveness. What's more, Canadian business would be partners with government in developing prevention and control options for toxic substances. They would have independence in setting plans for virtual elimination. And, all stakeholders would have the right to contest or support Track 1 CEPA toxic determinations.

Chapter 10. Government Operations, Federal Lands and Aboriginal Lands

Provincial environmental laws and regulations do not generally apply to the "federal house" (departments, agencies, boards, commissions, Crown corporations, federal land, works and undertakings) - a situation normally referred to as the "regulatory gap." Several limitations have inhibited the use of Part IV of the current CEPA to close this gap. It is proposed that the renewed CEPA contain regulatory authority that clearly encompasses all federal entities. This would include new authority to develop codes of practice and environmental quality objectives as well as guidelines for operations of the "federal house" and activities on federal lands. The new provisions would not only close the regulatory gap, but would bring the process for making regulations for the "federal house" in line with the regulatory process used in other parts of CEPA.

As for lands reserved for Indians, they too come under federal jurisdiction and Part IV of the current CEPA. Here too, however, problems exist and must be addressed. Current CEPA provisions do not take into account the move towards negotiation of self-government for Aboriginal Peoples that is currently underway in accordance with the 1995 Government of Canada Guide to the Negotiation of Aboriginal Self-Government. A renewed CEPA would provide authority for environmental protection regulations on aboriginal lands. It would also provide a mechanism for Aboriginal Peoples to negotiate administrative agreements and, for those Aboriginal Peoples operating under self-government or comprehensive claims agreements, to negotiate administrative and equivalency agreements under CEPA. There would be consultation with Aboriginal Peoples on these matters, as well as on their participation on the CEPA National Advisory Committee.

A Last Word

This is a succinct summary of the Government's proposal for a revised *Canadian Environmental Protection Act*. The Government believes that for CEPA to be more effective it needs to be amended so as to further sustainable development, make pollution prevention a national goal for Canada, and protect Canada's ecosystems for present and future generations. The above chapters are set out in more detail in the following Part.

Part Three. The Response in Detail

Purpose of this Document

The Government of Canada is committed to the following: the integration of economic and environmental goals; the convergence of economic and environmental agendas; stewardship of our environmental and economic capital for future generations; prevention of adverse health effects from the release of environmental contaminants; continuous progress in environmental protection; promotion of eco-efficient industrial practices; playing a leadership role in turning sustainable development thinking into action; empowering consumers and producers to make the market work for the environment; encouraging the greening of government, industry and society.

The quest for sustainable development is a journey that embodies a commitment to continuous improvement. It is a goal that calls for adopting a judicious mix of intervention strategies, from voluntary industry programs, to government guidelines, to regulatory prescribed standards, to restrictions, bans and sunsets. It is a strategy that demands the efficient mobilization of scarce societal resources to make demonstrable, steady and lasting progress towards opportunities for improvement. It is a global endeavour that calls for benchmarking our performance against our international partners, applying indicators to help in maintaining course, and making necessary corrections as we move along, as new priorities arise.

We are making headway. The Canadian environment is generally cleaner today than it was yesterday; the health of Canadians is improving, and so is their lifespan; many in industry are embracing the ethos of environmental protection, resource and energy conservation; consumers are increasingly aware of their role in bringing about more environmentally friendly products and services; governments are acknowledging the need for aligning economic and environmental priorities, among themselves, and between each other; stakeholders have invested time and efforts on numerous environment and economy round table discussions to develop sustainable development plans and strategies, launching a national dialogue on the integration of the environment and economy.

Moreover, Canadian governments have over the years adopted a progressive set of environmental laws and regulations - alongside industry's voluntary initiatives - and the federal government for its part is playing a leadership role in bringing about concerted action at the international and national levels.

But challenges remain. Substances are still routinely released in the natural environment in toxic quantities, putting undue stress on affected ecosystems; effects of long term exposure associated with environmental contaminants are the focus of scientific enquiry and debate; stakeholders debate the rate of depletion of non-renewable natural resources, the sustainability of renewable resource use, the carrying capacity of the receiving environmental sink, and the benefits of economic development; investors are caught in public controversies on environmental impact assessments, and are concerned about the regulatory burden; the role of fiscal incentives and disincentives in support of sustainable development is under scrutiny; the links between trade and environment are part and parcel of trade liberalization talks; the nature of government interventions in support of environmental protection, as well as regulatory reform, are under review as part of the re-engineering of the regulatory process.

It is in this context that one should envision the contribution of CEPA to sustainable development: a tool to move Canada further along on the road to environmental sustainability; yet a tool that must at all times be supportive of an integrated sustainable development agenda.

The purpose of this document is to set before the people of Canada the essential elements of what the Government of Canada proposes to include in a revised *Canadian Environmental Protection Act*. Canadians are invited to review this proposal and transmit their comments, observations, recommendations or criticisms to the Honourable Sheila Copps, Minister of the Environment.

Elements of the Renewed CEPA

The following elements are those which the Government proposes to include in a revised CEPA:

Guiding Principles	the principles that will guide the Government's actions under the law
Administration and Definitions	devices to assist in applying the *Act* and fostering a cooperative relationship between the federal, provincial, territorial governments and Aboriginal Peoples
Public Participation	rights given to residents of Canada to ensure their participation in decisions made under CEPA and the authority for individuals to seek redress through the courts to prevent CEPA violations or secure compensation for damages
Enforcement	a description of powers to be used by inspectors and analysts in enforcing CEPA, a description of offences, criteria for sentencing convicted offenders, penalties including those imposed through the criminal courts and those imposed through administrative procedures, and court orders
Ecosystem Science & National Norms	authority for ecosystem quality objectives, guidelines and codes of practice and the generation of information needed for a thorough understanding of ecosystems and their function
Pollution Prevention	the authority to use an approach that provides opportunities to prevent and reduce environmental and health risks in an effective and cost efficient manner
Biotechnology	authority to assess and control industrial and environmental products of biotechnology within the existing regulatory framework for products of biotechnology
Controlling Pollution and Wastes	authority for a new regime for the management of air emissions including fuels; international water pollution; the control of wastes, including the disposal of wastes at sea; and nutrients
Controlling Toxic Substances	authority and greater accountability around the assessment and control of substances which may pose a danger to the Canadian environment or to human life or health
Government Operations, Federal Lands and Aboriginal Lands	authority to achieve protection of the environment on federal lands, including aboriginal lands, and to ensure environmentally sound activities by federal departments, boards, commissions and other federal entities

Chapter 1. Guiding Principles for an Effective CEPA

The Standing Committee urged the Government of Canada to adopt a new approach for CEPA. The Committee believed that the overarching policy goal of the renewed *Act* should be to contribute to sustainable development. The underlying principles that would support this goal include pollution prevention, the ecosystem approach, biodiversity, the precautionary principle, and user/producer responsibility.

The Government of Canada agrees with the Committee that CEPA is an essential component of Canada's overall strategy for furthering sustainable development. We, too, believe that sustainable development is based on the ecologically efficient use of natural, manufactured and social capital, and that it requires systemic change to integrate economic, social and environmental considerations in all public- and private-sector decisions. Sustainable development relies on participatory approaches and requires environmental stewardship by all levels of government and decision makers. CEPA, along with the full range of governing instruments, such as regulatory, taxation, expenditure, or information can play a critical role in promoting sustainable development.

1.1 We propose to include a strong statement in both the Preamble and the Declaration, as well as in the body of the *Act*, to the effect that the primary objective of a renewed CEPA is to contribute to the goal of sustainable development. The Brundtland definition is widely accepted internationally. The *Act* would define sustainable development to mean development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

The Government of Canada also agrees that the principles of pollution prevention, the ecosystem approach, biodiversity, the precautionary principle, and user/producer responsibility support the goal of sustainable development and should provide the foundation for the revised *Act*. In addition, the federal government believes that the principles of cooperation and coordination between governments, as well as with Aboriginal self-government regimes, and economic responsibility have an important role to play in contributing to the ultimate goal of sustainable development. They, too, should be guiding principles for the revised *Act*.

Pollution Prevention

The Standing Committee recommended a major shift in emphasis in the legislation - from managing pollution after it has been created to preventing pollution in the first place. It saw the primary purpose of CEPA as contributing to sustainable development through pollution prevention. The focus of the legislation should emphasize the anticipation and prevention of the creation of pollutants and waste through the efficient use of energy, raw materials, and other commodities present in or produced by the ecological system.

We, too, believe that pollution prevention is the most sensible approach to sustainable development. In *Creating Opportunity*, the Liberal Party noted that "preventive environmental care is the foundation of the Liberal approach to sustainable development" and committed itself to using the review of CEPA to enshrine pollution prevention as a national goal.

As with the Standing Committee, the Government of Canada, too, is of the opinion that the *Act* should be designed to shift to pollution prevention, and serve to bring Canada into line with countries which are already reaping the economic benefits of clean, competitive, innovative industries with superior products receiving premium prices in global markets. Such an approach to environmental protection could act as a catalyst for technological innovation and new market opportunity, thereby generating considerable savings, and wealth and job creation potential for Canadian society. In addition, the stimulus given to the environmental industry sector also presents an important additional opportunity for wealth and job creation. Pollution prevention is an exemplary means of reinforcing the linkages between the environment, health and the economy, and hence of promoting sustainable development.

The Government of Canada also agrees that pollution prevention is neither a stand-alone strategy nor the answer to all environmental problems. The transition to clean production and practices will take time. There will be cases where pollution control and remediation are the best available options for environmental protection. Nevertheless, CEPA should place the highest priority on pollution prevention.

1.2 The Government of Canada proposes that a strong statement be included in the Declaration to the *Act*, to the effect that the purpose of CEPA is to contribute to the goal of sustainable development through pollution prevention. The Preamble would clearly establish pollution prevention as the priority approach to environmental protection. The definition contained in the federal government's pollution prevention strategy has recently been reached through a multi stakeholder consensus. The *Act* therefore would define pollution prevention as the use of processes, practices, materials, products or energy that avoid or minimize the creation of pollutants and waste, and reduce the overall risk to human health or the environment.

Ecosystem Approach

The Government of Canada agrees that it is imperative to use an integrated approach to environmental protection, an approach that recognizes that the individual components of ecosystems are interconnected. Understanding and maintaining the integrity of these relationships are important to conservation, to a sustainable environment, and hence to sustainable development. A renewed CEPA should be administered in a manner that promotes the structural and functional integrity of ecosystems.

1.3 We propose to incorporate the ecosystem approach in the Preamble to the *Act*. The definition of "ecosystems" used in the Convention on Biological Diversity is widely accepted. The *Act* would define ecosystems as a dynamic complex of plant, animal, micro-organism communities and their non-living environment interacting as a functional unit. Ecosystem approach, based on science, could be defined to mean administering the *Act* in a manner that considers the unique and fundamental characteristics of individual ecosystems and the interdependence of social, economic and environmental systems. The definition of "environment" would be amended to include explicit reference to ecosystems.

Biological Diversity

The Government of Canada agrees with the Committee that there is a role for CEPA, along with other federal laws and with provincial governments, in protecting biological diversity and, therefore, in meeting the obligations of the Convention on Biological Diversity. The potential effects on biological diversity should be taken into account when designing pollution prevention strategies for preventing pollution and assessing and controlling substances. Protecting biodiversity is fundamental to maintaining the integrity of ecosystems.

1.4 We propose to incorporate in the Preamble a reference to Canada's international obligations in respect of the Convention on Biological Diversity. The *Act* could adopt the definition used in the Convention on Biological Diversity, that is, to mean the variability among living organisms from all sources, including *inter alia* terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

Intergovernmental Cooperation

The Standing Committee has noted that, as environmental protection is a matter of shared responsibility in Canada, cooperative approaches to environmental protection are the most effective way to proceed. The Committee recommended that federal, provincial and territorial governments, and Aboriginal Peoples that operate under self-government, comprehensive claim or specific claim agreements, work together as equal partners in co-ordinating their respective environmental management regimes.

1.5 The Government of Canada believes that it is essential that the federal, provincial, and territorial governments and Aboriginal Peoples that operate under self-government, comprehensive claim or specific claim agreements work together. The laws and actions of each jurisdiction are all critical to the protection of the environment, prevention of pollution and sustainable development. Therefore, the Government of Canada will continue to seek the co-operation of provinces, territories and Aboriginal Peoples in resolving

issues requiring inter-jurisdictional solutions and co-ordination of environmental measures and eliminating duplication and overlap among measures.

Science and the Precautionary Principle

Science is an integral part of decision making under CEPA. The Government is committed to a risk-based approach to decision-making.

1.6 The Government of Canada proposes to incorporate into the Preamble the principle that science is an integral part of decision making under CEPA.

Like the Standing Committee, the Government of Canada also believes that where an activity or substance poses a serious threat or is likely to pose a serious threat of harm to the environment or human health, precautionary measures should be taken even in the face of scientific uncertainty. The federal government committed itself at the *United Nations Conference on Environment and Development* (UNCED) in 1992 to using the precautionary principle.

1.7 We also propose to incorporate the precautionary principle in the Preamble to CEPA. The *UNCED* definition is widely accepted. Accordingly, the *Act* would define precautionary principle to mean that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Economic Responsibility

The Standing Committee's first recommendation calls for the Government of Canada to promote sustainable development in all its programs and policies. Sustainable development, with its emphasis on the integration of economic and environmental decision-making, requires consideration of underlying economic principles as well as environmental principles. Economic considerations enhance our ability to effectively achieve our environmental objectives.

1.8 The Government of Canada agrees with the Standing Committee's recommendation and its belief that the promotion of sustainable development will require changes to better integrate economic, social and environmental considerations in all public and private sector decisions. To that end, we propose to incorporate in the Preamble a reference to the interrelationship of economic and environmental principles and acknowledge the role of such economic considerations as the benefit-cost approach and flexible economic decision-making.

User/Producer Responsibility

The Government of Canada is of the same view as the Standing Committee that the onus should be shifted more to the producer, user or importer of a substance to ensure that substances do not pose an unacceptable risk to the environment or human health, rather than largely being on the government or concerned citizens to establish whether or not a substance is likely to have unacceptable consequences for the environment or human health. This approach is consistent with the polluter-pays principle.

1.9 We agree with the Standing Committee that the concept of user/producer responsibility should be a guiding principle of CEPA. We also agree with the Standing Committee that we will need to undertake further work to clarify to whom and how the concept of user/producer responsibility would apply under a renewed CEPA before including any statement in the Preamble.

Chapter 2. Administration

Acts of Parliament can contain sections that lay out administrative duties for the Minister or Ministers responsible for the legislation, or provide for advisory committees or other administrative mechanisms. As previously noted, the Government of Canada believes that it is essential that the federal, provincial, and territorial governments and Aboriginal Peoples that operate under self-government, comprehensive claim or specific claim agreements work together. *Creating Opportunity* made a commitment to work closely with provincial governments to reduce duplication and improve service delivery in all areas where governments are involved in order to make wise use of Canadian tax dollars. The First Ministers' Efficiency of the Federation Initiative, which provides for bilateral action plans designed to make government work better, includes the harmonization of environmental matters, both multilateral and bilateral as an important component. Accordingly, this section of the proposal sets out provisions that could be contained in part of a renewed CEPA, entitled "Administration and Definitions" that enables intergovernmental cooperation.

Creating Opportunity also made the commitment to use approaches that foster innovation when achieving environmental objectives. Accordingly, this section of the proposal also sets out provisions that could be contained in the Administration part of a revised CEPA to enable the federal government to expand the range of tools it uses to realize sustainable development and environmental protection goals.

As is currently in CEPA, the proposals to revise CEPA are not intended to address aspects of substances that are regulated by or under any other *Act*.

Administrative Tools

Advisory Committees

2.1 In accordance with the commitment that the Government of Canada proposes to make in the Preamble, to seek the cooperation of Provinces, Territories and Aboriginal Peoples, CEPA should continue to provide for the appointment of advisory committees whose members can be drawn from provincial and territorial governments, Aboriginal Peoples, industry, labour, environmental and health groups and other interested groups.

CEPA National Advisory Committee

2.2 The Standing Committee recommended increased participation of Aboriginal Peoples in environmental protection and pollution prevention matters. Accordingly, the Government of Canada proposes to expand the authority under s.6 of the current CEPA requiring the Minister to appoint a Federal-Provincial Advisory Committee (FPAC). We propose to create under the revised *Act* a new CEPA National Advisory Committee, to be composed of representatives of the federal, provincial, territorial governments and Aboriginal Peoples, to replace the current FPAC. We propose to consult with Aboriginal Peoples on the form of their representation on such a National Advisory Committee.

Appointment and Duties

2.3 As is the case with the current FPAC, the new CEPA National Advisory Committee would be appointed by the Minister and would fulfil the same duties as the current body, namely to advise the Minister on proposed regulations governing

- release of toxic substances to the environment,
- storage, display, handling, transport and offer for transport of toxic substances,
- disposal of toxic substances, including construction, maintenance and inspection of disposal sites, and
- other environmental matters of mutual interest.

The CEPA National Advisory Committee could also subsume the current role of FPAC to advise the Minister on any environmental matter on which the Minister chooses to consult the committee members.

Other Committees

2.4 CEPA currently gives authority for the Ministers of Environment and Health to appoint advisory committees for any purpose related to the *Act*. The Government of Canada proposes to continue this provision, so that the Ministers can bring together groups of representatives of other governments, scientists and other academics, technical specialists, members of groups such as labour unions, industry, environmental and health organizations, conservation and other interested groups to provide advice.

Equivalency and Administrative Agreements

CEPA currently allows the Government of Canada to sign agreements with provinces and territories so that it can achieve more efficient and effective administration of CEPA. There are two types of agreements provided for: administrative agreements and equivalency agreements. Administrative agreements are work-sharing arrangements with provincial and territorial governments that can cover activities such as inspections, investigation, gathering of monitoring information and reporting of collected data. They do not release any of the parties from their respective responsibilities under the law, nor do they delegate legislative power from one government to another.

Equivalency agreements are currently provided for under Part II of the *Act* (Toxic Substances) and Part V (International Air Pollution). They are different from administrative agreements. They do not involve work-sharing. They are arrangements by which a CEPA regulation is no longer applied in a province or territory which has equivalent requirements. The provincial or territorial requirement, which takes the form of a regulation, permit or licence, does not have to contain the same wording as the CEPA regulation, but it must be agreed to be of the same effect. CEPA also requires that provinces and territories which are seeking recognition of their requirements as equivalent must have in place rights to allow individuals to compel an investigation by their Minister of a suspected environmental offence, to receive progress reports of that investigation and to be told when the investigation has been discontinued. The equivalency agreement must be confirmed through an Order by the Governor in Council.

In its CEPA Review Report, the Standing Committee recommended greater scrutiny by the House of Commons and the public of proposed administrative and equivalency agreements.

2.5 We propose to maintain authority in CEPA for both administrative and equivalency agreements and extend them to all parts of the *Act*.

2.6 We propose to specifically name territories along with provinces as being able to conclude administrative and equivalency agreements under CEPA.

2.7 Further, we propose to provide authority for the Minister of the Environment to enter into administrative agreements with Aboriginal Peoples to administer regulations, such as those dealing with pollution prevention, pollution control, control of fuel emissions, etc. made under a renewed CEPA.

2.8 We understand the Standing Committee's concern for accountability and public scrutiny in the preparation of such administrative and equivalency agreements. While we agree to consultation of the public on the documents, the recommendation to have the Standing Committee review all agreements and the House of Commons endorse them by vote would encumber the process to develop such agreements to a considerable extent.

The Government of Canada proposes, as an alternative, that:

- the Minister of the Environment publish proposed administrative and equivalency agreements in Part I of the *Canada Gazette;*

- a revised CEPA provide for a 60-day comment period after publication of the agreements in Part I of the *Canada Gazette;*
- the Minister of the Environment ask the Standing Committee to review and comment on proposed administrative and equivalency agreements during the 60-day comment period;
- the Minister publish in Part I of the *Canada Gazette* an accounting of how all comments received during the comment period were handle;
- the Governor in Council approve the final text of the agreements; and
- the final text be published in Part I of the *Canada Gazette* as well as be made available in the public electronic registry which the Government proposes to create for environmental actions under CEPA including regulations, guidelines and codes of practice, in accordance with Standing Committee recommendations.

The approach that we propose would allow for a broader base of public participation and would include review by the Standing Committee, but it would avoid lengthening the process of developing and securing administrative and equivalency agreements with our partners. As well it would preserve the authority of the Minister of the Environment and the Governor in Council with respect to recommending and approving such agreements.

2.9 As recommended by the Standing Committee, sunset clauses would be inserted into administrative and equivalency agreements, with the result that those agreements would expire five years after coming into force.

2.10 CEPA already contains the requirement for an annual report to Parliament on the administration and enforcement of CEPA regulations and equivalent provincial regulations, and we intend to maintain that requirement.

2.11 In all future administrative agreements under CEPA, we propose to maintain clauses that appear in current agreements and that provide for retention of full authority for the federal government to enforce CEPA and for accountability of the Minister of the Environment before Parliament for CEPA and the implementation of any agreements under the *Act*.

General Agreements for Environmental Management

As noted previously, it has long been recognized that environment is a shared responsibility under Canada's Constitution. This can lead to both the perception and the reality of duplication among the federal, provincial and territorial governments and Aboriginal Peoples who increasingly will assume new authorities under self-government regimes. Where duplication in the environmental area is real rather than perceived, the federal, provincial and territorial governments have tried to deal with it in various ways - for example, through equivalency agreements under CEPA, through administrative agreements under CEPA and other federal environmental statutes, through the on-going federal government review of all its programs.

The primary goal of governments has been to ensure the highest level of environmental protection in Canada in the most efficient way. To this, the Government of Canada has added the new objective of making pollution prevention a national goal. Current mechanisms under CEPA, namely equivalency and administrative agreements and the Federal-Provincial Advisory Committee (which under the renewed CEPA would become the CEPA National Advisory Committee comprising federal, provincial, territorial and Aboriginal representation) are partial answers to achieving federal-provincial-territorial-aboriginal co-operation and cohesion in the areas of environmental protection and pollution prevention. However, equivalency agreements under CEPA focus only on one or more federal and provincial regulations, where a provincial requirement or requirements are declared equivalent to those under CEPA, with the provincial requirement then applying instead of the CEPA regulation in the particular province. Administrative agreements are normally work-sharing arrangements which also are limited to one or more federal and provincial regulations.

The concept of environmental management agreements for the comprehensive protection of Canada's environment has been discussed externally among the federal, provincial and territorial governments over the past 18 months. The Government of Canada is committed to work closely with provinces to minimize overlap and duplication. The First Ministers' Efficiency of the Federation Initiative also called for harmonization including in the area of environmental protection. Over the past two years the Government of Canada has signed a dozen agreements with the provincial and territorial governments in an effort to reduce overlap and duplication in the area of environmental protection. Another dozen agreements are currently being negotiated. This is solid evidence of the Government's strong commitment to working in partnership on a multilateral and bilateral basis with provinces.

2.12 The Minister of the Environment, under the *Department of the Environment Act*, already has the authority to negotiate general agreements for environmental management with provinces and territories in order to contribute to a comprehensive management regime for the protection of Canada's environment. The Government proposes to consider expansion of the current authority to include self-governing Aboriginal Peoples.

It is further proposed that any such agreements would include the same accountability and procedural requirements as those being proposed for inclusion in administrative and equivalency agreements under CEPA. These requirements include a five year sunset clause, annual reports, clarification of responsibilities and necessary approvals.

Economic Instruments

In Canada, as in most other industrialized countries, the method of dealing with environmental problems has focused almost entirely on setting out control requirements in regulations. Limits placed on releases of polluting substances to the environment are an example of this type of regulation. Economic instruments are tools created by regulation that influence behaviour in a different way. These instruments directly or indirectly lead to changes in market prices and are designed to encourage more environmentally desirable responses from producers and consumers. They could be used by the federal government to prevent and control toxic substances or to help solve global, national or regional problems that require a coordinated national approach.

Creating Opportunity notes that "approaches that foster innovation must be used to achieve environmental objectives." It is essential to consider a broad range of options, including economic instruments, when determining how best to manage environmental problems and prevent pollution. In *Creating Opportunity*, the Liberal Plan for Canada, there is a commitment to "use economic instruments for environmental protection, as a complement to the traditional regulatory method, where these can offer the lowest-cost and most flexible methods of achieving environmental goals."

Types of Economic Instruments

The four broad types of economic instruments are trading systems, deposit-refund programmes, environmental charges and financial incentive programmes. Trading systems allow participants in a control programme to exchange, buy or sell their "permits" or "credits" where they determine such transactions to be the most cost-effective way of meeting their regulated requirement. These requirements, and the trading rules, are set by the regulators. Deposit-refund programmes create a financial incentive for users to return used substances, products or packaging for reuse, recycling or safe disposal. Environmental charges, sometimes referred to as taxes, levies or fees, can be applied to inputs, to products (for example, a levy on a consumer product containing a toxic substance), to releases (for example, a fee on discharges of pollutants to water) or on the use of environmental resources (for example, on air). These charges are a direct application of the "user pay" and "polluter pay" principles. They are designed to discourage the demand for polluting goods and services and will encourage producers and consumers to search for new processes, technologies, inputs and products. Financial incentives in the form of direct subsidies (for example, government grants) and indirect subsidies (for example, preferential tax treatment) may encourage

environmentally friendly activities such as the development or installation of innovative processes or pollution control equipment.

Current use of Economic Instruments under CEPA

Under the current CEPA there is no explicit authority for the use of economic instruments. In fact, the current wording of the *Act* has allowed for the use of only one economic instrument involving the transfer or sale of unused credits of ozone-depleting substances when approved by the Minister.

Incorporation of Enabling Authority for Economic Instruments in CEPA

The Standing Committee has recommended that broad enabling authority for the use of economic instruments be incorporated in the new CEPA.

2.13 In response to this recommendation, the Government of Canada restates its commitment to using economic instruments for environmental protection subject to federal constitutional authority. The Government proposes to enable the use of tradeable permit systems, deposit-refund programmes and direct financial incentives in CEPA, or other appropriate federal statutes.

Implementation of these economic instruments would follow the federal regulatory process including the evaluation of options, the assessment of all impacts including those related to the linkages between the environment and the economy, consultation of affected parties, other interested groups and the public, and would be recommended by the Minister of the Environment for approval by Governor in Council. Proposals for the use of other economic instruments such as environmental taxes and charges or financial incentives in the form of tax measures would be recommended to the Minister of Finance by the Minister of the Environment or other interested Ministers. The process for implementation of the latter type of economic instrument would, in addition to ensuring that options and the views of stakeholders and interested parties are considered, also ensure that implementation of the proposed economic instrument is coordinated with the Government's tax policy.

Non-regulatory Approaches to Environmental Protection

The Standing Committee recommended that the government continue to explore and study the use of non-regulatory measures and, in particular, to learn more about how to use them and what accountability mechanisms are required to ensure that they effectively prevent the generation, use and release of toxics substances.

The Government has been using voluntary approaches with a range of industrial sectors to better manage and control the emissions of toxic substances. Voluntary measures are an important complement to regulatory and non-regulatory instruments. The social and economic benefits of improved environmental performance and the anticipation of regulation are driving corporations to get ahead of legislation and to demonstrate to governments and to the public that self-regulation is a viable option.

Experience has demonstrated that non-regulatory approaches can be used to achieve measurable environmental results. Responsible Care™, the Accelerated Reduction/Elimination of Toxics (ARET), and Mines Environmental Neutral Drainage (MEND) are examples of successful voluntary efforts. In fact, the OECD 1994 report compliments the way voluntary agreements are used in Canada. However, experience is also showing that not all sectors of society will respond positively to non-regulatory approaches and that all toxic substances cannot be managed by voluntary action.

There are a range of voluntary approaches which can be used to address environmental concerns. These include letters of commitment, guidelines and principles, codes of practice, standards, agreements, memoranda of understanding, contracts and so forth. Within each of these vehicles are varying approaches to the treatment of partnerships, financial issues, accountability, government involvement, reporting and stakeholder participation.

Non-regulatory initiatives currently in place will help government assess which sectors respond to this approach and which substances can be managed this way. More importantly, the results of these initiatives can help to focus the government's regulatory regime. Used effectively, non-regulatory action can be used to determine if, when and to what degree regulations are required.

An alternative to current non-binding voluntary agreements is binding environmental performance contracts with accountability built in. The Minister could be provided with the authority to enter into agreements with private sector companies and other government departments to improve their environmental performance. Such agreements should allow for other orders of government and interested stakeholders to help define environmental objectives, establish accountability, elaborate consequences for abrogation and track progress. For example, these agreements could require forfeiture of a bond if the environmental objectives of the agreement were not achieved within the time-frames agreed. Other examples should be developed in the public consultation.

Providing the Minister with authority to enter into this type of binding environmental performance agreement would complement the regulatory, economic instruments and non-binding regulatory approaches currently at the disposal of the Minister under CEPA.

2.14 The Government of Canada proposes to consult on whether this kind of activity should be addressed through the *Department of the Environment Act*. Within that *Act* it would be made clear that non-regulatory approaches should only be used for non-regulated aspects of substances.

Reporting

CEPA currently requires the Minister of the Environment to set before Parliament, as soon after the end of the fiscal year as possible, a report on the administration and enforcement of CEPA for that year. In addition, the *Act* also provides for a review of the statute by Parliament within five years after the enactment of the legislation. The Standing Committee noted that the *Act* does not provide for further Parliamentary reviews beyond this first one. The Standing Committee stated that "Parliamentary reviews serve a useful purpose; they ensure that statutes are regularly scrutinized and updated and they give interested groups and individuals the opportunity to make their views known and to recommend changes. The Committee believes that reviews have particular relevance for environmental legislation. CEPA must not languish on the statute books while new concepts and technologies are being applied to environmental protection." Accordingly, the Standing Committee recommended that CEPA be amended to require a comprehensive review of its provisions and operations every five years.

2.15 In a renewed CEPA, the Government of Canada proposes to retain the requirement for the Minister to report annually to Parliament at the end of the fiscal year on the administration and enforcement of the statute during that fiscal year.

2.16 A revised CEPA proposes to provide for a further review of the statute by Parliament every seven (7) years after the date of its enactment; this review would include an examination of the applicability of CEPA to Aboriginal Peoples and aboriginal lands.

Cost Recovery

Currently, provisions of the *Financial Administration Act* and government policy allow for cost recovery. It would be more useful if these provisions were found directly in CEPA and tailored for the specific needs of CEPA, consistent with current government policy.

2.17 Accordingly, the Government of Canada proposes to amend CEPA to allow for cost recovery in every instance that a service of a beneficial nature is being provided. This is in line with current government policy and the user/producer responsibility principle.

Chapter 3. Public Participation

The Government of Canada believes that everyone shares responsibility for protecting the environment. The Standing Committee clearly stated that the Government of Canada alone cannot - nor should it be expected to - protect the environment. Everyone has a stake in a healthy, clean and safe environment; everyone therefore, has a part to play in ensuring its well-being.

The Canadian public has, over the years, expressed an increasing interest in environmental issues and the desire to be involved in making decisions related to the environment, because they will affect all of us. Rights conferred under legislation and the public's understanding of those rights will enable effective and active participation by members of the public. It is for this reason that, in 1988, Parliament included public participation rights in CEPA.

The Standing Committee entitled one of its chapters "Improved Public Participation and Citizens' Rights" and emphasized the obligation of the government in s.2(d) of the current CEPA, to "encourage the participation of the people of Canada in the making of decisions that affect the environment". It is clear from the Standing Committee report that its recommendation favours expanded rights. Accordingly, the Government proposes to undertake a number of measures to expand the rights of members of the public to protect the environment under CEPA and to inform members of the public about their rights and how they may go about exercising them.

The Expansion of Public Participation Rights

Public participation in decisions that governments make is a common operating principle in democracies such as Canada. Over time, and as a result of an increasing public awareness and interest in important societal decisions, the nature of that participation has evolved. As we approach the 21st century, the notion of a government making a decision without consulting the public has become the exception rather than the rule.

The expansion of public participation rights is not a new phenomenon and in fact, was catalysed in the 1960s and 1970s. This is true in all areas of public policy and most importantly, in environmental policy. Some key principles of public rights in this area include:

- the right to a healthy environment;
- improved access to the courts to prosecute and to sue where one's right to a healthy environment has been infringed upon;
- increased public participation in government decision-making;
- improved monitoring and reporting to the public on the state of the environment;
- increased government responsibility and accountability for the environment; and
- greater protection for those who "blow the whistle" on polluting employers.

The *Michigan Environmental Protection Act* of 1970 is often cited as the single most important law that opened the door to increasing public rights to protect the environment by embodying them into law. In Canada, the provinces of Alberta and Quebec have embraced the expansion of public rights related to the environment in their existing environmental laws. The province of Ontario has gone the furthest in this regard by establishing the *Ontario Environmental Bill of Rights*. In addition, the Yukon Territory has passed environmental bill of rights-type legislation in the form of its *Environment Act*, and the Northwest Territories also has passed the *Environmental Rights Act*.

There has been a trend in recent years in other Canadian provinces and territories, including British Columbia, Nova Scotia, Saskatchewan, and Manitoba, to seriously consider environmental bill of rights legislation.

Commitments in *Creating Opportunity*

In its policy document, *Creating Opportunity*, the Liberal Party recognized that Canadians have surpassed their governmental institutions as far as the desire for environmental protection is concerned and that Canadians "... have expertise and a valued perspective to contribute to environmental policy-making ..." but that "... these assets are often not tapped because of financial or legal restrictions."

In this respect, a commitment was made to "build on this public awareness and give individuals new tools to protect the environment and to participate in environmental decision-making." It further committed to "use the forthcoming review of the *Canadian Environmental Protection Act* to examine giving members of the public access to the courts as a last recourse if the federal government persistently fails to enforce an environmental law."

International Commitments

Canada signed on to several international agreements at the United Nations Conference on Environment and Development, which took place in Rio de Janeiro in 1992. *Agenda 21* outlined numerous principles, goals and activities that governments would strive to adopt and put into practice in adopting sustainable development as a common objective.

In endorsing *Agenda 21*, the Government committed to putting into practice certain principles that would result in broad-based public participation in decision-making. The Preamble to Section III of *Agenda 21* (Strengthening the Role of Major Groups) states: "Individuals, groups and organizations should have access to information relevant to environment and development held by national authorities, including information on products and activities that have or are likely to have a significant impact on the environment, and information on environmental protection measures." The Government of Canada is committed to putting this into practice.

One way for the Government of Canada to meet that commitment is to encourage public dialogue through the strengthening of legislation so that all societal groups, Aboriginal Peoples and their communities, non-governmental organizations, local authorities, workers and trade unions, business and industry, the scientific and technological community and farmers, will have better opportunities to participate more fully in decision-making on environmental matters.

Highlights of Current CEPA Provisions

When CEPA came into force in 1988, it was considered at the fore of environmental legislation because of enhanced environmental rights included in it, such as:

- requirements that lists of toxic substances, drafts of regulations and other types of documents be published so that the public may comment on them;
- opportunities for individuals to file objections to regulations, guidelines, ocean disposal permits, lists of toxic substances, failure to assess substances on the Priority Substances List within the required five-year period, and so forth;
- opportunities to request that a board of review be established, and in certain cases, to compel that one be created;
- public access to information through published notices and documents;
- the right for a member of the public to obtain an injunction to prevent or stop a violation of CEPA;
- the right to sue another person, who commits a CEPA offence, for compensation;
- the right of two individuals resident in Canada and over the age of 18 to request an investigation of a suspected violation of the *Act*;
- protection of the identity of "whistleblowers" who report the unauthorized releases of substances regulated by CEPA; and
- the right to launch a private prosecution of a suspected CEPA violator, as a common law right, available under CEPA and any other federal regulatory statute.

Limitations of Existing CEPA Provisions

The public participation and environmental rights contained in CEPA when it was proclaimed in 1988 were viewed as "cutting edge" concepts in Canadian federal environmental law. But the past seven years have furthered the evolution in thinking about public participation rights. In its CEPA Review Report, the Standing Committee noted what it considered to be limitations of the *Act*, including:

- vagueness regarding the type of information that can be released publicly and procedures and access points for acquiring information;
- limited opportunities for effectively participating in decision-making on *proposed* initiatives undertaken pursuant to the *Act*;
- the limited nature of information that is made available to the public through the recently-established inventory on sources of pollutants, the National Pollutant Release Inventory;
- the limited instances in which decisions can be reviewed;
- the narrow terms under which "whistleblower" protection is provided;
- the limited public awareness about the right that citizens have under CEPA to request an investigation of an alleged offence;
- restrictions governing the rights of citizens to sue for loss or damage suffered in relation to CEPA;
- the lack of a specific provision allowing citizens to prosecute offenders of CEPA, although this is already a common law right under CEPA and any other federal *Act*;
- no mention of how funds that are collected from such things as penalties, fines, fees and levies imposed under CEPA are to be used;
- the lack of a requirement, enshrined in the *Act*, to provide funds to the public for the purpose of participating in decision-making; and
- the fact that Canada does not have comprehensive federal legislation on environmental rights of Canadians and Canadian workers.

Improving Public Participation and Environmental Rights Provisions in a Renewed CEPA

In response to the recommendations of the Standing Committee in its Report, the Government of Canada proposes to modify those public participation and environmental rights provisions under CEPA that require expansion or clarification. We view the nature of Canada's democratic governance as constantly evolving, and thus requiring new and more meaningful mechanisms for public participation.

Access to Information by the Public

3.1 To ensure that information is readily available to those outside government, we propose to create an electronic public registry of environmental information, accessible on the Internet or another wide-net computer information network. There are three options for doing this:

- adding to a renewed CEPA provisions enabling the Minister of the Environment to create, at the Minister's discretion, a public electronic registry;
- enshrining in a renewed CEPA the obligation for the Minister to create such a registry;
- creating the registry through a policy decision without enshrining its creation in law.

A matter to be considered is whether Environment Canada would use this public registry, in addition to the *Canada Gazette*, for all those instances in which the *Canada Gazette* has been used to notify and consult with the public as required by legislation or desired by the Government.

Contents of a Public Registry

3.2 The Government of Canada proposes to use this public registry to simplify information-gathering for the public and could use it to disseminate:

- inventories that include statistical data, emissions, effluents and other types of environmental information;
- monitoring data;
- information submitted to the Government to meet reporting requirements in CEPA or under its regulations;

- information gathered to determine whether or not substances are toxic;
- applications for and the contents of ocean disposal permits issued under CEPA;
- texts of federal-provincial and federal-territorial agreements, as well as agreements with Aboriginal Peoples;
- texts of all environmental quality objectives, guidelines and codes of practice, regulations and studies of the socio-economic impact of regulations; and
- other information.

In addition to any other mandatory notice procedures, the public registry could be used to provide notices concerning field tests of new substances and biotechnology products, and their CEPA assessment process; and comments for proposals for regulations, instruments, policies, guidelines and standards.

3.3 In a renewed CEPA, the Government of Canada proposes to include authority to adopt cost recovery measures to maintain the public registry. Such a provision would provide authority, if needed, and would likely require that the fee structure for users of the registry be set out in regulations. The regulations would then go through the federal regulatory process, which includes required public consultation, in addition to a public comment period once the draft regulations are published in Part I of the *Canada Gazette*.

The Right to Information

The Government of Canada recognizes the public's right to information and proposes to establish an electronic public registry to house environmental information. The Government of Canada proposes also to continue to provide opportunities for broad-based public consultation on regulations, environmental quality objectives, guidelines, codes of practice, agreements, permits and other matters with which CEPA deals. In addition, Canadians could have access to the inventories of public information that would be created under the "Ecosystem Science and National Norms" Part.

The Right to Request an Investigation

Section 108 of the current CEPA creates a right for any two persons resident in Canada who are at least 18 years old to request an investigation of an alleged offence under the *Act*. To date, this provision has not been used extensively. Part of the reason for this is the nature of CEPA regulations. For example, the Vinyl Chloride Release Regulations prohibit releases of vinyl chloride to the atmosphere in excess of regulated limits. However, individuals other than those who work in vinyl chloride or polyvinyl chloride plants are not likely to know if instruments in the plants demonstrate unlawful releases.

3.4 In its report, the Standing Committee noted that the degree of success of public rights provisions in CEPA depends largely on members of the public having knowledge of their rights under the *Act*. In this respect, the Government of Canada proposes to publish a pamphlet outlining the purpose of CEPA and the rights and remedies that members of the public have under CEPA.

3.5 CEPA currently requires the Minister to report within 90 days to applicants under s.109 on the progress of the investigation and on any action that has been taken in respect of their application under s.108. In an effort to strengthen the accountability measures of CEPA, the Government proposes to amend this current requirement so that the Minister would be required to provide a final report to applicants, whether or not any legal action has been taken.

3.6 As a means to encourage the public to use s.108 where it is appropriate, the Government of Canada proposes to develop a standard form that would be made available upon request that can be used by applicants to request an investigation.

Citizens' Reporting of Violations

Apart from provisions of a renewed CEPA to provide greater access by the public to environmental information and greater access to the courts through civil suits, the Government of Canada would continue to rely on citizen action to assist in correcting violations of CEPA and its regulations.

3.7 Consequently, where the public has reason to believe that a violation of CEPA is about to occur and could reasonably be expected to result in significant harm to the environment, we propose to continue to encourage the public to prevent violations of CEPA

(a) by informing the Minister of the Environment, or
(b) by seeking a court injunction, which would direct that an activity be stopped.

"Whistleblower" Protection

In addition to expanding rights for public participation, the Standing Committee emphasized the need to expand protection for members of the public who voluntarily report violations of CEPA. The Committee also pointed out how limited the "whistleblower" protection provisions for federal employees are because they apply only to employees working in a "department, board, commission or agency of the Government of Canada, or of a corporation named in Schedule III of the *Financial Administration Act* or of a federal regulatory body." They therefore do not protect anyone who is employed by or under contract to a federal department or other federal agency that does not fall within the definition noted above.

3.8 Accordingly, the Government of Canada proposes to broaden the protection provisions currently in CEPA by:

(a) adding a general "whistleblower" protection provision which would protect from disclosure the identity of all persons who request anonymity in a case where they have, in good faith, reported or proposed to report to a CEPA Inspector or other Environment Canada official, any violation or probable violation of CEPA or its regulations; and
(b) amending CEPA so that all federally-regulated employees would be able to report any violation of CEPA or its regulations - not just an offence involving a release - and, upon so doing, would, as in the current *Act*, continue to be protected from dismissal, harassment or discipline in the workplace.

The Right to Sue

The Standing Committee noted that CEPA is currently limited with respect to the right of members of the public to sue since they must show that they suffered loss or damage as a result of a violation of the *Act*. The Standing Committee recommended that this right to sue be expanded to allow members of the public to sue in situations where they have suffered loss or damage as a result of an activity that has been permitted under the *Act*, such as ocean disposal. It is not proposed that the Government of Canada amend CEPA to provide a means of redress for damages arising from activities that are **authorized** under the *Act*. A means of redress to seek such compensation already exists as persons currently have a common law right to bring suits to seek damages.

The Standing Committee recommended that CEPA include a right which permits citizens to take civil action against a party who has violated CEPA or its regulations and where such a violation results in significant harm to the environment. The Standing Committee recommended that such suits be allowed to proceed only if an application requesting an investigation of the alleged offence under s.108 has been first made and subsequently, the court has determined that the Minister took an unreasonable amount of time to respond to the request or that the Minister's response was unreasonable. It is clear that the intent of the Standing Committee's recommendation was to ensure that citizen civil suits are not frivolous or without substantial foundation.

Creating Opportunity committed to using "the forthcoming review of the *Canadian Environmental Protection Act* to examine giving members of the public access to the courts as a last recourse if the federal government persistently fails to enforce an environmental law."

3.9 Accordingly, the Government proposes to amend CEPA to include a right for citizens to take civil action against a party who has violated CEPA or its regulations and where such a violation results in significant harm to the environment. Such suits would be allowed to proceed only if an application under section 108 of CEPA has first been made and subsequently the court has determined that the Minister took an unreasonable amount of time to respond or that the Minister's response was unreasonable. The Government proposes to include a safeguard to prevent personal gain. The Government will also consider, after consultation, appropriate safeguards, rights and remedies in the current Ontario Environmental Bill of Rights.

In terms of procedure, the person bringing the suit would be required to serve notice to the Attorney General, who may subsequently decide to become a party to the action.

Dispute Resolution as an Alternative to Civil Suits

In recent years, federal and provincial courts have become overburdened, and civil suits can be very lengthy. Consequently, parties who would normally bring disputes to the court system for resolution have begun turning to Alternative Dispute Resolution. These are less formal than a court hearing, but still allow for the complete airing of the dispute by all parties before a neutral person, such as mediator, arbitrator or other independent person. The Government of Canada proposes to explore ways in which Alternative Dispute Resolution measures can be used, in order to accommodate the objectives of citizens' suits. If the resolution procedure fails to resolve the complaint, then resort to civil action would still be available.

Civil Remedy for Environmental Risk

The Standing Committee encouraged the Government of Canada to include in a new CEPA a civil remedy for the creation of environmental risk, allowing for damages that are proportional to the level of risk caused by the defendant. It further recommended that where a plaintiff has presented a *prima facie* case (a preliminary showing) demonstrating that the defendant had caused the environmental risk complained of, the defendant be required to disprove causation of injury to the plaintiff. As this recommendation will deviates from Canada's common law convention of civil liability, the Government of Canada proposes to take this recommendation under advisement and will consult with legal experts. The notions of "environmental risk", "prima facie case" and "reverse onus on the defendant to disprove causation" need to be researched further.

The Right to Prosecute

The Standing Committee has recommended that the citizens' right to undertake a private prosecution be enshrined in CEPA. However, as noted by the Standing Committee, citizens already have the right under the Criminal Code of Canada to bring a prosecution under any federal law. The Criminal Code also provides for the Attorney General to assume control of the prosecution and continue it him or herself or suspend the charges.

The Committee's concern appears to focus on the latter possibility noted above, namely suspension of a charge. That appears to be why it has recommended that CEPA be amended so that the right of citizens to bring private prosecutions is incorporated into CEPA and coupled with:

(a) the right of a citizen to remain a party to the prosecution if the Attorney General assumes control of the case; and

(b) the right of a citizen to participate in the negotiations to determine the penalty or reach an out of court settlement.

3.10 Within the context of Canadian criminal law, it would appear that incorporation of such rights into a renewed CEPA would fetter the discretion of the Attorney General. Such an incorporation, is therefore not appropriate. It should be noted that the Government's public prosecution policy on private prosecutions assumed by the Attorney General states that charges should be suspended by the Attorney General **only when**:

- there is insufficient evidence to sustain a charge, or
- it is not in the public interest to prosecute.

The Government of Canada intends to continue with this policy.

Other Public Rights

The Government of Canada is interested in receiving comments on public rights to file notices of objections, requests for review of approvals and of regulations, and for intervenor funding for appearances by interested parties before Boards of Review.

Chapter 4. Ecosystem Science and National Norms

Importance of Science

The Standing Committee noted that "science is the essential, if often overlooked, foundation of an environmental protection strategy." The Committee also noted its belief that, "because the results of the federal government's environmental science programs are broadly applicable across the country, the federal government should continue to act as the main source of scientific information on the Canadian environment and of improved scientific techniques, such as ecosystem science, risk assessment methodologies and environmental effects monitoring."

To say that CEPA provides the base for many Environment Canada programs for environmental protection, prevention of pollution and pollution control may seem like a truism. But it is a truism that bears repeating when the Government of Canada is seeking to create a renewed CEPA for the 21st century. The questions that we are seeking to answer through science are: What is happening in Canada's environment? Why is it happening? Is it significant? How could science be applied, under CEPA, to remedy negative and reinforce positive effects of the impact of human activity on Canada's environment? Could national norms in the form of ecosystem objectives, guidelines, release guidelines or codes of practice be helpful in reinforcing behaviour that has a positive effect on ecosystems, or change behaviour that has a negative impact?

Ecosystem Approach

Earlier in this document, the Government of Canada proposes the adoption of an ecosystem approach to meet the objectives of CEPA. By ecosystem, we mean the dynamic complex of plant, animal, micro-organism communities and their non-living environment interacting as a functional unit. The ecosystem approach to environmental decision making includes the following:

- planning for and management of the environment;
- the inter-related nature of components of the environment;
- the recognition that humans are a key component of the environment;
- equal emphasis on concerns related to the environment, the economy and the community.

To adopt this approach means not only an adjustment in how we make decisions to protect ecosystems under the *Act* or restore them to health, but also requires:

- a better understanding of the structure, functions and interactions of and in ecosystems;
- more research on the ways that specific substances, mixtures of substances, effluents and wastes enter the environment and their eventual fate in the environment, as well as the cumulative effects of these multiple stresses on ecosystems; and
- improved environmental monitoring to assess effects on ecosystems and to assess the effectiveness of private voluntary action and of environmental policies, guidelines, regulations and public actions to prevent pollution.

These needs reinforce the requirement for science to achieve the goals of a renewed CEPA.

Authority for the Minister to Carry out Monitoring and Research

The current *Act* provides authority for the Minister to:

- establish, operate and maintain systems of environmental quality monitoring stations;
- collect, process and publish data on environmental quality in Canada that are gathered from environmental quality monitoring stations and other appropriate sources;
- conduct research and studies relating to the nature, transportation, dispersion, effects, prevention, control, and reduction of environmental pollution;

- conduct research and studies relating to,
  (a) environmental contamination arising from disturbances of ecosystems caused by human activity; and
  (b) changes in the normal geochemical cycling of toxic substances that are naturally present in the environment;
- develop plans and designs for the prevention, control and reduction of environmental pollution;
- establish, operate and publicize demonstration projects for such prevention, control and reduction of environmental pollution, and make the projects available for demonstration; and
- publish or otherwise distribute
  (a) a report on the state of the Canadian environment, and
  (b) data to advise the public in respect of all aspects of the quality of the environment, including the prevention, control and reduction of environmental pollution.

4.1 Accordingly, within a renewed CEPA, the Government of Canada proposes to retain the authorities described above but to change the wording as appropriate to better reflect the Ecosystem approach.

Authority for the Minister to Require Submission of Information for Research and Publication

To further the progress of environmental science and to compile the types of information that will allow publication of a State of the Environment Report for Canada and development of ecosystem objectives, guidelines, codes of practice and inventories under CEPA, the Minister of Environment will need information gathering powers that are not limited to the National Pollutant Release Inventory.

4.2 Accordingly, it is proposed that a renewed CEPA could contain authority, at the discretion of the Minister of the Environment, to require submission of whatever data is in one's possession or control such as:

(a) information to enable the Minister to report on the State of the Canadian Environment in subject areas such as mine waste rock and tailings from Canadian mines, releases to the environment in all phases of the life cycle of product, emissions from primary smelters, parks and recreation areas, water withdrawals from Canadian lakes and rivers, and land use;
(b) information on substances appearing on the Priority Substances List;
(c) information on substances that have been determined not to be toxic due to their current level of exposure, but whose presence in the environment requires monitoring, as increased levels of exposure may result in their becoming toxic;
(d) information on nutrients that may be released into water or are in products of nutrients;
(e) information on substances released into or disposed of at sea;
(f) information on
  - substances that are toxic or capable of becoming toxic;
  - substances that contribute to or cause interprovincial or international air or water pollution;
(g) information on substances whose air emissions have a significant contribution to air pollution;
(h) information on substances, that, when deposited to Canadian fisheries waters, are harmful or capable of causing harm to fish or fish habitat.
(i) information on substances, that, when released to the areas of Canada where there are migratory birds and other wildlife under federal jurisdiction, are harmful or capable of causing harm to those birds or that wildlife;
(j) information pertaining to pollution prevention (see 6.10).

The data referred to in paragraph (a) would be gathered for statistical purposes and could only be published anonymously, that is, without identification of individual sources, unless those persons who submitted the

information consent to publication by source. Where appropriate, the Minister of Environment will consult the Minister responsible for Statistics Canada when seeking the types of statistical data described in (a). The information described at paragraphs (b) through (j) could be published in the form of inventories giving sources, quantities, components, processes or uses, and could be published or made public in other than written form. It could also be used for the formulation of ecosystem objectives, guidelines or codes of practice. In recognition of the burden that may be placed on industry, the Minister would be required by the *Act* to exercise these powers only when necessary and in a cost-effective manner.

National Pollutant Release Inventory (NPRI)

The Standing Committee recommended an explicit statutory basis in CEPA for the National Pollutant Release Inventory (NPRI). NPRI is a specialized inventory. It lists pollutants and the quantities in which they are released to the environment; these data are provided source by source, plant by plant.

4.3 The Government of Canada proposes to enshrine the NPRI in CEPA using the above general power for the gathering of information. The Government of Canada further proposes to use a multi stakeholder consultative process for changes to NPRI and any other national inventory.

Inventories to be Publicly Available Information

It is proposed, under a renewed CEPA, where the Minister has power to create inventories, they would be publicly available, either in written or electronic form. When the Minister issues a notice made to require submission of specified information for the inventory in question, the Minister would specify that the inventory will be published. There will be cases, however, where providers of the information may believe that confidential treatment of their data is appropriate.

Requests for Confidentiality

Although CEPA provides for the making of regulations requiring that justification for a claim of confidentiality be submitted with the information, such regulations have never been made under the *Act*.

4.4 Consequently, it is proposed that a revised CEPA would allow those who provide information for the purposes of CEPA inventories to request confidentiality of that information.

4.5 The *Act* could further enable the Minister to require that the providers of data substantiate the reasons for that request. Such reasons which could be set out in the statute or in regulations, could be, for example, that:

- the information is a trade secret
- disclosure could reasonably be expected to result in financial harm to or prejudice the competitive position of the provider; or
- disclosure could reasonably be expected to interfere with contract or other negotiations.

These criteria to substantiate confidentiality are similar to those contained in the federal *Access to Information Act*.

4.6 The Minister could then examine the request, determine whether or not it met the stated criteria, and advise the provider of the information of his or her decision to accede to the request for confidentiality or reject it. In the case of rejection, the provider of the data could appeal to the Federal Court of Canada.

Alternative dispute resolution processes may also be explored where the provider of the information or data does not agree with the decision of the Minister on the issue of confidentiality. These would be less formal

than a court hearing, but still allow for the complete airing of the dispute by all parties before a neutral person, such as mediator, arbitrator or other independent person. The Government of Canada would explore ways in which alternative dispute resolution measures could be used, to settle disputes between the Minister of the Environment and the provider of data with respect to the Minister's intent to disclose information. If the resolution procedure failed to resolve the complaint, then resort to the Federal Court would still be available.

The provisions proposed above would balance the ability of providers of information for inventory purposes to request confidentiality against the intent to increase, through expanded information, public participation in environmental protection.

National Norms

The Standing Committee stated its belief that "national environmental standards are imperative" and that "only national standards can ensure the right of all Canadians to the same minimum levels of health and environmental protection." It seems clear from the Report that the Committee's use of the term "standards" encompasses both regulations and voluntary measures. For the purposes of this document, the Government of Canada deals with regulation-making powers under the chapters where it intends to use such powers. For example, in "Pollution Prevention, Controlling Toxic Substances", "Controlling Pollutants and Wastes", and "Government Operations, Federal Lands and Aboriginal Lands", we discuss authority to enable the making of regulations to implement or otherwise further the objectives of those sections. This chapter does **not** deal with regulations, as they are discussed elsewhere, but deals with "benchmarks" such as ecosystem quality objectives, and other national norms that will take the form of ecosystem quality guidelines, release guidelines and codes of practice. It is important to note that science and scientific data form the basis on which ecosystem objectives, guidelines and codes of practice are constructed.

It is also important to note the value of federal-provincial-territorial cooperation in the development of guidelines and codes of practice. Dialogue with provinces and territories in the development of guidelines and codes of practice has been the Government's way of doing business in the past and will continue to be so in the future. Federal-provincial-territories discussions on approaches to improving processes for developing national guidelines and codes of practice and the establishment of priorities in this area have been ongoing in recent years and will continue to evolve. The Government proposes to expand this cooperation and these discussions to include Aboriginal Peoples.

Obligation of the Ministers of the Environment and Health to Develop Objectives, Guidelines and Codes of Practice

The function of creating or adopting objectives or standards relating to environmental quality or control of pollution and the responsibility "to promote and encourage institution of practices and conduct leading to the better preservation and enhancement of environmental quality" were assigned to the Minister of the Environment under the *Government Organization Act* (1979) and, subsequently, the *Department of the Environment Act.* CEPA built upon these responsibilities. But CEPA replaced the discretion which, under the *Department of the Environment Act,* allowed the Minister to develop norms if he or she deemed it appropriate, with the **obligation** for the Minister to "formulate:

(a) environmental quality objectives specifying goals or purposes toward which an environmental control effort is directed;
(b) environmental quality guidelines specifying recommendations in quantitative or qualitative terms to support and maintain particular uses of the environment;
(c) release guidelines recommending limits, including limits expressed as concentrations or quantities, for the release of substances into the environment from works, undertakings or activities; and
(d) environmental codes of practice specifying procedures, practices or release limits for environmental control relating to works, undertakings and activities during any phase of their development and

operation, including the location, design, construction, startup, closure, dismantling and clean-up phases and any subsequent monitoring activities."

The *Act* further specifies that the objectives, guidelines and codes of practice "shall relate to:

(a) the environment;
(b) recycling, reusing, treating, storing, or disposing of substances, or reducing releases;
(c) activities and works that affect or may affect the environment; or
(d) conservation of natural resources and sustainable development."

In the current CEPA, there are similar provisions obliging the Minister of Health to develop, for the purposes of carrying his or her functions and duties under the *Act*, "objectives, guidelines and codes of practice with respect to the elements of the environment that may affect the life and health of the people of Canada."

Retention of the Obligation

4.7 The Government of Canada would maintain within a renewed CEPA the obligations outlined above but would add wording as appropriate to better reflect the Ecosystem Approach. Furthermore we propose to add the wording "pollution prevention" to the types of procedures that can be included in codes of practice and to paragraph (b) above, such that the paragraph would read as follows: "the prevention of pollution, recycling, reusing, treating, storing, or disposing of substances, or reducing releases."

Weaving the ecosystem approach and pollution prevention concepts into the obligation to adopt national objectives or norms will do two things. First, it will ensure that future guidelines and codes of practice are developed with attention given to the unique and fundamental characteristics of individual ecosystems. Second, it will ensure pollution prevention practices are incorporated effectively into guidelines and codes of practice.

The release guidelines and codes of practice would, wherever, possible be results-oriented, without specifying particular technologies that are recommended for achieving that result.

4.8 We propose also to retain the similar existing requirement for the Minister of Health to develop objectives, guidelines and codes of practice with respect to the elements of the ecosystem that may affect the life and health of the people of Canada.

Chapter 5. Enforcement

The Standing Committee stated that it "strongly believes that effective and consistent enforcement under CEPA is imperative if the *Act* is to live up to its objective of protecting human health and the environment." The Committee also remarked: "The recent jurisprudence respecting the liability of the Crown for failure to enforce regulatory standards must also be considered. The case law suggests that if the government has a regulatory scheme in place, and that scheme is generally enforced so that the public has a reasonable expectation of a given standard of behaviour, the government may be held at least partially liable for any damage caused by its failure to live up to that standard."

The Government of Canada acts on the premise that its goal is compliance by Canadians with its laws, including environmental statutes like CEPA. The Government agrees with the Standing Committee that it is essential to have powers within CEPA to allow effective enforcement of the law. Enforcement activities under CEPA include inspection and monitoring to verify compliance and investigation of suspected violations. Inspections and monitoring are necessary to verify whether or not regulates are complying with the law. We also rely on other means to verify compliance: (1) requiring regulates to monitor their own pollutants and correct any violations that regulates themselves identify; (2) requiring regulates to monitor their activities and report to the Minister on the results of that monitoring. Where investigation confirms a violation, the Government needs to have recourse to measures to ensure correction of any violations and inspections by inspectors to
verify compliance.

Since CEPA's enactment, the primary enforcement tools in the statute to compel compliance have been formal court processes, namely injunction and prosecution. Both of these involve lengthy, formal court proceedings. The delay between when the offence is discovered and the time when the Government of Canada could be sure compliance was restored could be a long one. The Standing Committee criticized the enforcement record under CEPA and the tools available under the statute. In full recognition of the load of cases before the Canadian courts, the Committee recommended new tools to correct violations, without the Government of Canada being obliged to resort to the courts. These tools include administrative monetary penalties (AMPs), negotiated settlements, ticketing and "cease-and-desist orders."

Administrative Monetary Penalties (AMPs)

Administrative monetary penalties (AMPs) are penalties that are imposed for a violation and that are determined through an administrative process, rather than through prosecution and court hearings. AMPs would be an alternative to prosecution and would be used for offences for which no term of imprisonment would be sought as a penalty. Systems that incorporate AMPs must, of course, function on a basis of procedural fairness. This means that those on whom an administrative penalty has been imposed must have a chance to appeal. An appeal process may involve an initial review by an impartial government official who did not participate in the original decision that determined the violation and the penalty, and a subsequent appeal to an outside court or tribunal, if the offender does not achieve satisfaction from the internal review. There are some AMPs schemes under which offenders can avoid the internal review and address themselves directly to the outside court or tribunal to appeal the determination of liability, the amount of the penalty or any of the conditions attached to the penalty in terms of payment, conditions imposing "good conduct" or requiring restoration of the damaged environment, or other action.

AMPs are not new to Canadian law. The federal *Customs Act*, *Income Tax Act*, *Aeronautics Act*, and *Unemployment Insurance Act* all incorporate AMPs schemes. Provincial statutes such as Ontario's labour legislation and British Columbia's occupational health and safety law provide for AMPs. The United States *Occupational Health and Safety Act* and American federal laws administered by the U.S. Environmental Protection Agency also have AMPs systems.

The evidence available suggests that AMPs systems have advantages over traditional prosecution in the courts. There is increased likelihood of response to the violation. Frequently, evidence of the violation itself is not disputed; the only question generally in dispute for an AMPs offence is the amount of the penalty imposed and whether or not other conditions such as a negotiated settlement requiring work to restore the damaged environment

should be imposed. The installation of pollution prevention or pollution control technologies, the development and implementation of emergency prevention and/or emergency response plans, etc., may also be conditions imposed.

Regulatory officials often cite the complexity, cost and slowness of prosecutions as key factors in the relative lack of formal enforcement activities for regulatory programs. When a response is easier and less costly, it is more likely to be used. AMPs systems are designed to make regulatory enforcement easier by simplifying and systematizing the setting of the penalty and any appeal procedures. Enforcement costs are thereby reduced.

The Standing Committee recognized the value of AMPs as another tool to achieve effective enforcement of CEPA. It recommended that authority for an AMPs system be incorporated into the *Act*.

5.1 Accordingly, the Government of Canada proposes to provide for administrative monetary penalties in a renewed CEPA, where it is constitutionally possible.

5.2 We also propose that a renewed CEPA contain a provision to enable the Government of Canada to prosecute AMPs offences through the courts if the Government so chooses. This may be desirable in cases, where the degree of risk or severity of harm to the environment is particularly significant, where the offender's conduct shows a general disregard for the law, or where this is a recurring offence by the same offender. These are examples of circumstances under which the Government may determine that a court prosecution, rather than an administrative proceeding is in the public interest.

A renewed CEPA would have to provide in some way for the means to enforce AMPs where the offender does not pay or does not pay the full amount of the penalty imposed. Enforcement of AMPS can be achieved through ways such as:

- registration of the penalty and any conditions attached thereto in the form of an order with the Federal Court of Canada or an administrative tribunal, so that the AMP would be as enforceable as any order of that court or tribunal, if the offender defaults on payment;
- registration of the penalty and its conditions in the form of an order with a superior court of the province in which the offender resides or operates the business, service, company or facility which committed the offence or where the offender carries out the activity in respect of which the offence was committed, so that the court can use the enforcement mechanisms at its disposal, including sheriffs, bailiffs, seizure, etc.;
- authority to withhold ocean dumping permits, notification to allow export or import of hazardous wastes or other types of authorization under CEPA until the offender pays the AMP and/or fulfils conditions that are part of the administrative penalty;
- possible delisting of the person from Government of Canada lists of approved contractors or approved suppliers of goods and services;
- possible withholding of refunds of federal taxes such as income tax or Goods and Services Tax (GST); or
- co-operative arrangements with other federal entities, provincial, territorial or aboriginal governments, either through agreement or legislative amendment, for withholding of licences, permits or other types of authorizations granted by those entities or governments.

5.3 The Government of Canada proposes to examine these options and provide, within a renewed CEPA, authority for the most effective means to ensure enforcement of AMPs.

Negotiated Settlements

The term "negotiated settlement" refers to an agreement reached between a regulatee and a regulator. The goal of negotiated settlements is to increase compliance and decrease the need to prosecute or seek an injunction. The settlement is made after the regulatee has been found to have broken the law, in this case, CEPA and/or its accompanying regulations. Instead of prosecuting or taking another enforcement action, the regulator negotiates with the regulatee to identify the steps that the regulatee will take to ensure that another violation will not occur. The

agreement takes as a starting point that the regulatee will correct the violation. It is important to note that compliance with the law is not negotiable - the regulatee must comply. The only thing being negotiated is the steps that the regulatee will take to return to a state of compliance with the law and to ensure that the violation does not recur.

Negotiated settlements offer the regulatee and the regulator an opportunity to agree on such things, as, for example, the regulatee's commitment to set up better monitoring mechanisms, improve pollution prevention or pollution control measures, or changes to the production process to reduce the possibility of future offences. Negotiated settlements can also specify the type of corrective measures that the regulatee will take to clean up environmental damage resulting from the offence or the restitution that the regulatee will offer. Settlements can include a time frame for the regulatee's actions, a requirement to file status reports with the regulator, and a list of specific consequences if the regulatee fails to live up to the terms of the settlement. Negotiated settlements do not stand alone. Under a renewed CEPA, they would be one enforcement mechanism among a spectrum of options and would be used in conjunction with an administrative penalty scheme to either supplement the monetary penalty or to replace it.

As is the case with administrative monetary penalties, negotiated settlements in various forms, including assurances of voluntary compliance (AVCs), compliance plans, consent orders and consent agreements, are not new to North American law. For example, AVCs are used in Canada in provinces such as British Columbia, Newfoundland and Quebec in relation to business and trade practices. Compliance plans exist under the Ontario *Occupational Health and Safety Act*. Consent agreements are found in the federal *Canadian Human Rights Act* and *Competition Act*, and both the *Ontario Business Practices Act* and *Discriminatory Business Practices Act*. The Alberta *Agricultural Service Board Act* provides for "negotiations." The U.S. Environmental Protection Agency uses consent orders and consent agreements.

Negotiated settlements under CEPA could include terms such as:

- the regulatee's admission that a violation occurred;
- a plan setting out how the regulatee would try to ensure that another violation does not occur;
- the understanding that a regulatee's failure to respect the terms of a negotiated settlement is itself a violation;
- the understanding that, if the regulatee fails to follow the terms of the settlement, the regulator will take immediate, formal action;
- an agreement that the negotiated settlements will be part of the public record;
- an agreement that the regulatee will file periodic status reports with the regulator, which will be part of the public record, to show how the regulatee is fulfilling the terms of the negotiated settlement; and
- an agreement that the parties can re-negotiate the settlement if circumstances change.

The Standing Committee recommended that a renewed CEPA include authority for negotiated settlements as another enforcement tool.

5.4 Accordingly, the Government of Canada proposes to include in CEPA authority for conclusion of negotiated settlements within an administrative monetary penalty system (AMPs). The negotiated settlement would be in addition to any AMPs imposed for the violation or could replace the payment of an administrative penalty.

As with administrative monetary penalties (AMPs) discussed above, a renewed CEPA would have to provide for the means to enforce negotiated settlements where the offender does not fulfil any or all of the conditions of the settlement. Enforcement of negotiated settlements can be achieved using options described with respect to AMPs.

5.5 The Government of Canada proposes to examine these options and provide, within a renewed CEPA, authority for the most effective means to ensure enforcement of negotiated settlements.

Ticketing

CEPA currently provides authority for the Governor in Council to designate, by regulation, offences under the Act that can be punishable through issuance of a ticket, rather than through the formal procedure of laying charges and prosecuting through a court hearing. Tickets are a form of prosecution, which allows the accused to plead guilty and pay a fine, without having to appear in court. It is not a new tool, but one which, from 1988 to the present, has been unused under the *Act*. The Minister of the Environment has never recommended such regulations to the Governor in Council in view of the development and eventual passage of the *Contraventions Act*. However, as the Standing Committee noted the *Contraventions Act*, while passed two years ago, has not yet been proclaimed. It is therefore likely prudent at this time to retain authority in CEPA to make ticketing regulations for offences such as failure to file reports or failure to provide information requested by the Minister.

5.6 Consequently, the Government of Canada proposes to remove application of the *Contraventions Act*, to CEPA, and proposes to maintain in a renewed CEPA, authority to make regulations designating CEPA offences which can be punishable by tickets and establishing fines for these offenses.

In terms of safeguards under such regulations, the accused would still have the opportunity to plead "not guilty" and have the charge heard by the courts. Ticketing regulations under CEPA could also provide the accused with an opportunity to request a hearing to ask for a lower fine or a longer period to pay the fine imposed or to plead extenuating circumstances.

Cease-and-Desist Orders

"Cease-and-desist orders", often called "stop orders", are legal orders that can be used to bring to a halt activity that may be illegal under CEPA and/or its accompanying regulations, or to require action to be taken to correct a violation. For example, if, during the course of an inspection related to any one of the ozone-depleting substances regulations under CEPA, the inspector discovers that a person is importing substances whose importation is prohibited or that the person is importing substances in a quantity that exceeds the ceiling amount, the inspector can bring an immediate end to the illegal importation activity through a cease-and-desist order. Similarly, if an inspector observes that a person with an ocean dumping permit is proceeding to a dump location that is not the one specified on the ocean dumping permit, the inspector by using a cease-and-desist order could order that the person proceed to the correct latitude and longitude specified in the ocean dumping permit. These orders are not foreign to Canadian environmental legislation. The former federal *Clean Air Act* (now part of the current CEPA) provided for such orders, and a number of provincial environmental laws also vest provincial Ministers of the Environment or senior officials of their Ministries with the power to issue such orders. The only power currently found in CEPA which provides an immediate tool is the inspector's direction. But, it can only be used in those circumstances where there is a potential or actual release of a regulated substance in excess of regulated limits.

The Standing Committee recognized that the inspector's direction power does not cover all situations that may threaten the environment. A cease-and-desist order by a CEPA inspector could provide an immediate remedy to direct that the illegal activity cease or that the offence under CEPA be corrected, without having to seek an injunction, prosecute, or seek an administrative penalty - all of which involve formal procedures and time before remedies can take effect and restore the regulatee to a state of compliance with the law.

5.7 Therefore, in accordance with the recommendation of the Standing Committee, we propose to amend CEPA to provide for cease-and-desist orders.

As the Standing Committee pointed out, there would have to be terms and conditions that govern when inspectors may issue cease-and-desist orders. There would need to be procedural controls to balance the powers of the inspector against the rights of those who are subject to CEPA and its regulations. The Government would therefore consider terms and conditions relating to the issuance of cease-and-desist orders, such as the following: the cease-and-desist order would be valid for a specific period of time not to exceed 180 days; and the person subject to

the cease-and-desist order would have an opportunity to object to the order through an appeal to the Minister of the Environment, or to an administrative tribunal at arm's length from the Minister or to a court. Further, the inspector would be able to renew the order only through an administrative tribunal or court, and if the cease-and-desist order is to be renewed, the person who would have to comply with it would have the same rights of appeal as were provided when the original order was issued.

CEPA Inspectors

CEPA inspectors have the most frequent and regular contact with those companies, individuals and government agencies who are affected by and required to comply with the *Act*. But, under the current CEPA, there are inconsistencies in the powers granted to inspectors. For example, inspectors can direct that preventative or corrective action be taken when there is the possibility of an illegal release or an actual release of a toxic substance in contravention of CEPA regulations. If the person receiving the inspector's direction refuses to act, the inspector can act. However, if there were to be a similar situation under the ocean dumping provisions in Part VI or international air pollution under Part V of the current *Act*, the inspector would have no authority to issue a direction or take action. Also, where the occupant of a premise refuses to allow a CEPA inspector to enter and carry out an inspection to verify compliance, such refusal is an offence under the *Act*. However, the inspector has no ability to ask a justice of the peace for an inspection warrant, because no such authority for justices of the peace currently exists in the *Act*. Further, while inspectors have authority under the current CEPA to enter and inspect places listed in the *Act*, their authority to inspect shipping containers, trucks and other conveyances, and platforms anchored at sea has been placed in doubt, due to the fact that these are not listed in CEPA as "places" which the inspector is allowed to enter and inspect.

These anomalies and others like them exist in CEPA. In its report, the Standing Committee noted that certain provisions governing inspectors' powers and various omissions require correction, so that inspectors have the tools that they need to do their jobs.

5.8 In accordance with the Standing Committee's recommendations, the Government of Canada proposes to correct the anomalies, inconsistencies and omissions in inspectors' powers.

Fuller discussion of the Government proposals, including which inspectors' powers would be retained in a renewed CEPA, appears below.

Designation of Inspectors and Analysts

The Government would retain the authority to designate individuals as inspectors and official analysts to be responsible for enforcing the law. They would continue to carry official identification.

Current Inspectors' Powers under CEPA

Entry and Inspection

Current inspectors' powers would be retained. Those powers are:

- to enter and inspect a place, where:
  - there are substances controlled under CEPA or products containing those substances,
  - there are fuels, water conditioners or cleaning products,
  - there are regulations that apply to federal bodies or federal lands,
  - the place is a source of air or water pollution regulated under the International Air and Water Pollution Part of the *Act*, or
  - there are any books, records, data or other documents related to the *Act*;
- to examine substances or other material controlled under CEPA;
- to open containers and packages that contain things regulated under the *Act*;
- to take samples of any thing relevant to the *Act*;

- to conduct tests and take measurements;
- to use, at the place where the inspection is being carried out, any copying equipment and any computer system to examine data stored in it;
- to seek a warrant for inspection of residential premises.

Inspector's Powers Specific to Ocean Disposal

Specific to the situation of disposal of wastes at sea, CEPA inspectors may enter a place where the waste intended for ocean disposal is being loaded, and to examine and sample those wastes. They are further entitled to:

- board a ship, aircraft, platform or other structure that has, on board, wastes intended for dumping or disposal at sea
- travel on any ship, aircraft, platform or structure loaded with a substance to be dumped at sea
- detain ships, aircraft, platforms and structures.

Inspector's Direction

The Government would also retain the inspectos' direction power. This power allows inspectors to act when a person has spilled or otherwise released substances to the environment in violation of CEPA or its regulations. The inspector has authority

- to direct the person to take preventive or corrective measures or to notify affected members of the public, when the person has failed to take such measures,
- to notify the public or to take preventive or corrective measures themselves, where the person responsible for the unauthorized release refuses to do so,
- to hire or contract with qualified persons to notify the public or take the required measures.

Search Warrants and Seizure of Evidence

Inspectors would also maintain their authority

- to get search warrants,
- to seize evidence and to remove evidence from the place where the inspector seized it, and
- to take action without a search warrant in urgent circumstances, such circumstances being when the delay necessary to obtain a search warrant could result in danger to human life or the environment, or in the loss or destruction of evidence.

New Powers for CEPA Inspectors

Places that Enforcement Personnel May Enter and Inspect

In accordance with the Standing Committee's recommendation, the list of places that an inspector may enter and that is given in paragraph above entitled "Entry and Inspection", would be expanded. A renewed CEPA would provide that the term "place" or "places" includes platforms anchored at sea, shipping containers, motor vehicles and other conveyances.

CEPA analysts who accompany inspectors would also have authority to enter all places which inspectors may enter.

The Government also proposes to amend CEPA so that inspectors, analysts and investigators who are obliged to cross private property to reach an inspection site and carry out their duties under the *Act* would not be liable to charges of trespass.

Inspection Warrants for Non-Residential Premises

In the majority of cases, inspectors are able to conduct inspections to verify compliance on a routine basis with no impediments or problems. There are, however, occasions when inspectors arrive to conduct an inspection at

a non-residential site and they are refused entry. Inspectors sometimes find the site locked or abandoned. In its review of CEPA, the House of Commons Standing Committee recognized the difficulty in which inspectors find themselves on such occasions, when they are attempting to enter a site to verify compliance. The Committee recommended authority within CEPA for inspection warrants, and was clear on the point that inspection warrants were to be used for verifying compliance, and **not** for searching and seizing evidence of the commission of an offence.

Accordingly, the Government proposes to amend CEPA to allow inspectors to seek inspection warrants from a justice of the peace, authorizing entry into all premises and places for the purpose of carrying out an inspection only. To secure such a warrant, CEPA inspectors would be required to satisfy the justice of the peace that the inspector indeed found the site locked, abandoned or was otherwise prevented from entering and that all reasonable attempts were then made to notify the regulatee of the need to inspect said premises. The justice of the peace could require that notice of the inspector's application for an inspection warrant be given to the regulatee, or could dispense with such notice

- if the urgency of the situation is such that service of notice would not be in the public interest, or
- if the inspector satisfies the justice of the peace that service of notice would be unsuccessful due to the regulatee's being absent from the jurisdiction or for other reasons.

In the inspection warrant, the justice of the peace may authorize the use of force, such as the breaking of a lock, removal of barriers, etc. and set any other terms and conditions that he or she deems appropriate.

The revised CEPA could further provide for such warrants to be issued by a justice of the peace through means of telecommunication such as telephone, facsimile transmission, computer modem, etc.

Items that Inspectors May Seize and Detain

In addition to the existing authority which CEPA inspectors may currently exercise under the *Act* to seize evidence, a renewed CEPA would provide explicit authority for inspectors and CEPA officers to seize items such as vessels, vehicles or shipping containers that may contain substances that are being illegally exported from or imported into Canada, or substances that are being exported or imported in excess of allowed quantities.

Extension of Inspector's Direction Power and Reporting

The inspector's direction power described in the paragraph entitled "Inspectors' Direction" is currently limited to the current CEPA Part II (Toxic Substances) and Part IV (Federal Departments, Agencies, Crown Corporations, Works, Undertakings and Lands). In accordance with the Standing Committee's recommendation, the Government would extend this power to Part V (International Air Pollution), Part VI (Ocean Disposal) and all new Parts of the *Act*. The Standing Committee further recommended that individuals, companies and government facilities to whom an inspector has issued a direction report on what action they have taken to comply with the direction. Accordingly, the Government intends that a renewed CEPA contain an obligation to report on the steps taken. It would be reasonable to require that the report be submitted within 15 days of receiving the inspector's direction.

In addition, the current authority of inspectors to enter any place or property to deal with unauthorized releases and to grant permission for others to have the same access to deal with a potential or actual unlawful release is limited to Parts II and IV of CEPA. The Government would extend this power to Part V (International Air Pollution), Part VI (Ocean Disposal) and all new Parts of the *Act*.

CEPA Investigators

Some CEPA inspectors are investigation specialists who investigate suspected offences and have expertise in areas such as the gathering of evidence and court procedures. The Standing Committee determined that the powers available to these investigators were insufficient for the job. The Committee also noted that the creation of the designation of CEPA Officer under the *Act* would result in the distinction between compliance verification, carried out routinely by CEPA inspectors, and the investigation of offences, generally carried out by investigation specialists.

5.9 In accordance with the recommendation of the Standing Committee, we propose to create a new category of officer, called an investigator, whose primary function would be to investigate suspected offences. CEPA investigators would have all the powers conferred on CEPA inspectors. They would be designated by the Minister and carry official designation. In addition, investigators would have certain powers which are similar to those exercised by peace officers and which would be:

- authority to serve summonses (notices to appear in court for hearings or trials),
- authority to secure search warrants over the telephones or through other means of telecommunications, such as facsimile transmission, computer modem, shortwave radio, etc.,
- limited use of force, such as the authority to break locks on doors and filing cabinets during the execution of search warrants.

These powers would not confer the status of peace officer on CEPA investigators.

CEPA Analysts

Currently, CEPA allows the Minister of the Environment to designate as official analysts under the *Act* individuals that he or she deems qualified. That designation allows analysts to present the results of tests and laboratory analyses as evidence in court in the form of a certificate, rather than having to present the data in person. CEPA further states that, in the absence of evidence to the contrary, the analyst's certificate is proof of the statements contained therein. CEPA also provides that the defence may, however, require the attendance of the analysts for purposes of cross-examination.

At present, CEPA official analysts have no power to enter a premises, examine substances, open receptacles, take samples or conduct tests and measurements. Inspectors can often benefit from the assistance of analysts, particularly in the areas of sampling substances, effluents, and emissions, witnessing compliance tests to ensure that the tests are carried out in accordance with the test method, and ensuring that testing equipment is calibrated in accordance with the instructions of the equipment's manufacturer and with any specific directions in test methods. To compensate for the lack of these powers, Environment Canada has been training laboratory analysts as inspectors so that they can assist CEPA inspectors where necessary.

The Standing Committee believes that this is not cost-effective or efficient. In its Report, the Committee indicated that it would be beneficial to expand the limited authority of official analysts beyond the current ability to give their evidence in court in the form of a certificate. Further, inspectors should be able to take advantage of the specialized knowledge that CEPA analysts have.

5.10 Accordingly, the Government of Canada proposes to incorporate, into a revised CEPA, authority for CEPA analysts to accompany inspectors, and, when accompanying inspectors, to enter premises, to open and examine receptacles and packages, to take samples and measurements and to conduct tests.

Offences - The Need for Classification

Offences are violations of provisions of CEPA and/or its accompanying regulations. CEPA currently contains offences punishable by summary conviction and by indictment. The terms "summary conviction" and "indictment" refer to two different methods of prosecution and court process. Summary conviction offences are tried before a judge alone. Most indictable offences permit the accused to choose between a trial before a judge alone and a trial by judge and jury. The *Canadian Charter of Rights and Freedoms* requires that persons charged with an offence punishable by five years' imprisonment or a more severe punishment have a right to a jury trial.

A renewed CEPA would continue to contain summary conviction and indictable offences. In its Report, however, the Standing Committee recommended that a classification system for offences be added to the *Act*. Indeed, to implement efficiently and effectively the AMPs system described above, it would be a virtual necessity for the renewed CEPA to group offences into categories.

5.11 Accordingly, we propose that a renewed CEPA classify offences into categories. A classification scheme would serve two main purposes:

(1) it would provide the courts with guidance by indicating the seriousness of the offence, and
(2) it would be necessary for the use under CEPA of administrative monetary penalties (AMPs).

There are different ways to classify offences, such as:

- by the severity of the penalty that could be imposed; or
- by designating certain violations as offences for which penalties would be recoverable through the civil procedures, others as regulatory offences subject to an administrative monetary penalty (AMPs) system, and others as offences which would be punishable in the criminal courts and which would include violations often referred to as "true crimes", such as fraud and reckless conduct resulting in the loss of the use of the environment, injury to persons or death.

With the exception of those offences which could be dealt with under an administrative monetary penalty, the Government of Canada intends to preserve in CEPA imprisonment as a potential punishment for the most serious, indictable offences such as reckless and wanton disregard for the environment and the safety of persons where bodily injury or death could or does result.

Guidelines for Sentencing

The Standing Committee recommended that CEPA be amended to provide sentencing guidelines for the court's consideration. The Committee made this determination within the context of existing case law, the presence of guidelines for sentencing offenders in the *Canada Shipping Act*, and the Government's own Bill C-41, an Act to amend the Criminal Code.

5.12 Accordingly, we propose to incorporate sentencing criteria in a renewed CEPA. Those criteria could include:

- the harm or risk of harm caused by the offence;
- an estimate of the total costs of cleanup, of harm caused, and of best available measures to reduce or rectify the damage caused;
- corrective action already taken or proposed to be taken by the offender to reduce or rectify the harm;
- whether, if the offence involved unauthorized release to the environment of substances under CEPA, the incident was reported on a timely basis as required by CEPA or its accompanying regulations;
- whether the offence was deliberate or inadvertent;
- the incompetence, negligence or lack of concern of the offender;
- any precautions taken by the offender to avoid the offence;
- any economic benefits or profits earned by the offender that, but for the offence, the offender would not have received; and
- any evidence from which the court may reasonably conclude that the offender has a history of non-compliance with legislation designed to prevent or minimize harm to the environment.

Court Orders

Currently, under the present CEPA, the courts may impose on a convicted offender one or more of various orders provided for in the statute. For example, the court may impose an order to prohibit the offender from doing any activity that may result in continuation or repetition of the offence; direct the offender to correct resulting harm to the environment, or to take measures to avoid potential harm; direct the offender to compensate the Minister of Environment for the costs of any preventive or corrective measures, including cleanup, taken by the Minister as a result of the infraction; and direct the offender to pay an amount for the purposes of conducting research into the

ecological use and disposal of the substance in respect of which the violation was committed. The type of court order which the Minister has, in the past, wished to seek but has been unable to obtain is one which directs the offender to publish an apology for the violation.

5.13 Accordingly in a renewed CEPA, the Government of Canada proposes to retain the current provisions governing court orders and add orders that courts could impose, so that the offender would be obliged to publish an apology for the violation. The Government also proposes to include preparation and implementation of pollution prevention plans, as described in chapter 6, as the subject of orders that the courts could impose on convicted offenders.

As noted above, court orders may be used under the current *Act* to direct that funds from fines be applied to conducting research into the ecological use and disposal of the substance in respect of which the offence was committed. In its Report, the Standing Committee noted the current budgetary limitations that the Government of Canada is facing and examined the notion of how the Government could use innovative means to fund its environmental programs and activities. The Committee recommended the creation of an "environmental fund" that would be used for a variety of environment protection activities, including cleanup of environmental emergencies covered under CEPA, cleanup of contaminated sites on federal lands, and provision of financial assistance to groups and individuals so that they might take advantage of available rights and remedies, and participate in the making of decisions that affect their environmental and health. However, federal legislation and budgeting practices of government restrict how the Government of Canada can use funds derived from cost recovery mechanisms and awards such as fines, administrative monetary penalties and court orders.

5.14 Accordingly, the Government of Canada proposes that a renewed CEPA broaden the discretion of the courts to direct how awards imposed by the courts for CEPA violations would be spent in relation to that case (for example, site remediation, an allocation to environmental, health or other groups to assist in their research, other work in the community where the offence took place, or creation of an awareness program). The court would be given authority to designate a trustee to ensure that the expenditures and activities directed by the court are accomplished with the Minister of Environment being a possible designate for these purposes.

Chapter 6. Pollution Prevention

The Standing Committee recommended that Pollution Prevention be Canada's priority approach to environmental protection. This is emphasized in the title of the Committee's Report, *It's About Our Health! Towards Pollution Prevention; CEPA Revisited.* In addition, *Creating Opportunity: The Liberal Plan for Canada* committed to use the review of CEPA "to make pollution prevention a national goal." The recently released strategy document, *Pollution Prevention - A Federal Strategy for Action*, reaffirms the goal of incorporating pollution prevention in federal legislation, including CEPA. The definition of "pollution prevention" included in the Government of Canada's response to the Standing Committee is that which was approved by Cabinet as part of the Federal Strategy for Action.

The intent of the "Pollution Prevention" Part of a renewed CEPA would be to shift the focus of environmental protection activities towards avoiding or minimizing the creation of pollutants and wastes rather than trying to manage them or clean them up after they have been created. Its goal is to turn thinking away from pollution control and waste treatment as preferred mechanisms for protecting the environment. Canadians would be encouraged to adopt "preventive environmental care" which encourages environmental and economic efficiencies through waste reduction and measures to avoid the creation of pollutants as early in an activity as possible. This approach would guide changes to existing activities and influence decision-making right from the conception, design and planning stages of new activities.

Pollution Prevention Planning

Pollution prevention planning is the foundation of the pollution prevention approach. It is a systematic, comprehensive method of identifying options to minimize or avoid the creation of pollutants or waste associated with many types of public and private sector activities. Pollution prevention plans can be developed for industrial sectors such as manufacturing, transportation and forestry, or at a more localized level such as for an individual refinery, factory or farm. Pollution prevention plans can also be used for specific substances and for avoiding or minimizing the creation of pollutants and wastes associated with their use. For example, dispersive uses of substances can be identified and discouraged. Pollution prevention plans can also be produced for processes such as metal forming, machining, plating and painting which are common to many sectors.

Pollution Prevention Planning in CEPA

The Government of Canada agrees with the Standing Committee and believes that provisions for pollution prevention planning should be incorporated into a renewed CEPA and that "pollution prevention planning should become a self-sustaining business practice rather than a regulatory burden on industry or an enforcement burden on governments." In accordance with this, the Government proposes that CEPA enable pollution prevention plans to be required for certain toxic substances. The Minister would determine for which toxic substances plans are required, who is to prepare plans and the circumstances under which the plans are required. For the thousands of substances not subject to regulation, the Government would encourage voluntary pollution prevention planning and believes that this has potential for significant environmental and economic gain.

Pollution Prevention Plans for CEPA Toxic Substances

In the case of toxic substances, the Government of Canada believes that if these pollution prevention plans are properly designed and delivered, the benefits of the planning process would become self-evident. Having examined and evaluated the options from a prevention perspective, companies should be better able to identify ways to meet the requirements of the *Toxic Substances Management Policy* and optimize technical, environmental, and economic considerations. Additional benefits are anticipated through cost savings, product and process improvement, and improved worker and community safety. Successes from the first round of planning should encourage further examination of company practices to identify further opportunities for improvement.

6.1 Substances declared toxic (CEPA Schedule 1) pose significant risks to human health or the environment. Given these risks and the consensus amongst Canadian society that action must be taken to reduce the risk posed by toxic substances, the Government proposes to amend CEPA to enable the Minister to require the preparation and implementation of pollution prevention plans for toxic substances.

In its report, the Standing Committee acknowledged that the federal government would have to identify the parties to whom the requirement to produce a pollution prevention plans would apply. The example given by the Committee was that, while a manufacturer of a toxic substance may be required to produce a plan, the user of a product for household purposes would not.

Criteria would be developed to support the Minister's decision to require pollution prevention plans. It is proposed to identify the criteria through the consultation process. For example, the Minister's decision requiring a pollution prevention plan could be primarily based on the recommendation resulting from the assessment of CEPA-toxic or CEPA-toxic equivalent. Other factors could include cost/benefits, and usefulness and opportunities for industry to put in place innovative solutions to protect health of people and the environment. It could also include the extent to which industry has already engaged in this activity.

6.2 For a pollution prevention plan, the Minister would specify, through a notice in the *Canada Gazette,* criteria such as:

- who would be required to prepare and implement a plan, for example, which producers, importers, generators, users or exporters;
- the substance(s) for which a plan is required;
- the type and level of activities to be included a plan; and
- the time frame for preparation and implementation of a plan.

It would be expected that plans would focus on pollution prevention practices and techniques, and these would be complemented by reuse and recycling, control and treatment, and safe disposal, as appropriate. The initial results of pollution prevention planning could be of benefit for government and industry in developing proposals to control and prevent pollution by "CEPA-toxic substances" referred to in 9.14.

Pollution Prevention Plans for Infractions of CEPA

6.3 The Government further proposes to amend CEPA to enable the Minister to require preparation and implementation of pollution prevention plans where there is an infraction of a CEPA regulation or where there is a finding of liability under the administrative monetary penalty system, which is also proposed to be included in CEPA.

Model Pollution Prevention Plans

6.4 The "Pollution Prevention" part of a renewed CEPA proposes to provide authority for the Minister to formulate a model pollution prevention plan in the form of a guideline. The guideline could be expected to contain the following components:

- a senior-level statement of commitment to prepare and implement the pollution prevention plan;
- a clear statement of the objectives and environmental goals for the plan, and a schedule for meeting those goals;
- a comprehensive quantitative review of all activities including purchasing, processing, producing, generating, distributing, treating, disposing, or releasing of the substance(s) for which the plan is required;
- an identification, feasibility study, and ranking of opportunities to avoid or minimize the production, generation, or release of the substance(s) in all activities identified above;
- a selection of options to meet the environmental goals for the plan and preparation of a schedule for the implementation of the selected options;

- implementation of the selected options;
- measurement, tracking and evaluation of their success; and
- reporting on progress towards environmental goals.

Submission of Pollution Prevention Plans

6.5 Where a person is required to prepare a pollution prevention plan as outlined above, it is proposed that the person would be required to submit, within a specified time limit, a formal declaration to the Minister, indicating that a pollution prevention plan has been prepared in accordance with the guideline and the notice in the *Canada Gazette*. CEPA would also be revised such that failure to submit the declaration or submission of a false declaration, would be an offence.

6.6 The Minister could exercise the information gathering powers outlined in Chapters 4 and 9, and require that the pollution prevention plans or parts thereof, be submitted to assist the Minister in determining and assessing prevention and control options.

Tracking Progress on Pollution Prevention

The Standing Committee was of the view that the National Pollutant Release Inventory should provide the means for the federal government to monitor progress on pollution prevention. The Government of Canada agrees that progress on pollution prevention in Canada should be tracked. This information also would allow companies that are undertaking pollution prevention planning to demonstrate to the public they are committed to improving their environmental performance.

6.7 The Government of Canada proposes to revise the National Pollutant Release Inventory to provide a means for industry to report on pollution prevention activities.

Pollution Prevention Targets and Schedules

The term "eco-efficiency" is gaining currency. It is a new term that has recently emerged from the *Business Council for Sustainable Development*, a network of 120 CEOs of many of the world's leading companies including those operating in Canada. In many respects eco-efficiency can be equated to concepts like Responsible Care™, Total Quality Management and Pollution Prevention. In 1993, the *Business Council for Sustainable Development* reported that in the industrialised world, reductions of over 90 per cent in material throughput, energy use and environmental degradation will be required by 2040 to meet the needs of a growing world population fairly within the planet's ecological means. The key feature of the recent meetings of the *Business Council for Sustainable Development* was that given a 25 year time horizon all forward thinking companies should be able to meet reduction targets by a Factor of 10. In real terms this means an average 8-9% reduction in total pollutant releases and waste production per year.

6.8 Given the international context and the broad multi-national base for these targets the Government of Canada proposes to challenge Canadian companies to strive to achieve reduction targets such as those set out by the *Business Council for Sustainable Development.*

Technology Development and Transfer

The Standing Committee noted that the importance of technology development and transfer in the shift toward pollution prevention cannot be over-stressed. The federal objective of pollution prevention is to avoid or minimize the creation of pollutants and wastes in production processes and products by means of materials substitution, equipment modifications, innovative technologies, product reformulation, and efficient use and conservation of natural resources. Like the Committee, the Government of Canada believes that such a focus should also carry economic benefits. There is already abundant evidence that the information technologies, new materials technology

and biotechnology have important parts to play in a sustainable economy - through conserving natural resources, reducing waste and pollution, and achieving cleaner and more efficient alternatives to wasteful production processes.

Technology development and transfer programs facilitate greater awareness, innovation and adoption of advanced environmental technologies. Such programs also involve the diffusion of technical knowledge. We believe that technology development and transfer programs authorized by CEPA should increasingly emphasize promoting pollution prevention measures.

6.9 Recognizing the importance of technology development and transfer in pollution prevention, the Government proposes to accept the Standing Committee's recommendation to amend CEPA to authorize the Minister to collect environmental data and to conduct research and demonstration projects with a focus on promoting clean technologies, as well as pollution control and abatement technologies (see 4.2(j)).

Voluntary Pollution Prevention

Pollution prevention goals will be more likely achieved if organizations and small businesses have the learning resources and tools to develop pollution-prevention strategies of their own. In this regard, success stories and demonstration projects highlighting the benefits of pollution prevention are additional strategies for promoting and facilitating voluntary adoption of clean production processes and products.

6.10 We propose to amend CEPA to develop a national pollution-prevention information clearinghouse that would encourage and facilitate industrial adoption of clean technologies, production processes and products.

The clearinghouse could provide information such as demonstration projects, development and research focused on new prevention technologies and management initiatives, policies, legislation, regulations and programs; model pollution prevention planning; learning and training materials for those interested in more efficient environmental solutions; and information on programs highlighting success stories.

Recognition and Awards

Generally, the use of voluntary approaches by Environment Canada has been to better manage and control the emissions of substances that are not regulated. The Accelerated Reduction/Elimination of Toxics (ARET) program, for example, is showing significant voluntary results on more than one-hundred substances of which only thirteen are partially regulated.

The same is the case for other voluntary agreements in a range of industrial sectors: motor vehicle manufacturers, auto parts manufacturers, metal finishers, printing and graphics, dry cleaning, chemical producers and others still under development. The social and economic benefits of improved environmental performance and the anticipation of regulation are driving corporations to get ahead of legislation and to demonstrate to governments and to the public that self-regulation is a viable alternative.

All sectors of society will not respond positively to voluntary approaches. All substances of concern cannot be managed by voluntary action. Those initiatives currently in place will help government assess which sectors respond to this approach and which substances can be managed this way. It will also help to focus the federal government's regulatory regime.

To encourage voluntary initiatives that promote pollution prevention, as recommended by the Standing Committee, and to continue to realize the significant environmental gains that are achieved by voluntary approaches

6.11 It is proposed to amend CEPA to establish an awards program to recognize genuine achievements in improving environmental performance, that these awards be made by Ministers in a public forum, and that information on the achievements and their recognition be made available in the pollution prevention information clearinghouse.

Environmental Aspects of Emergencies

The Standing Committee referred to an "environmental emergency" as a crisis situation that results from a spill, explosion, leak or other like incident that inflicts or threatens to inflict damage on the environment. Generally, these "environmental emergencies" involve the uncontrolled release to the environment of hazardous substances and can occur at any point in the life cycle of a substance, including manufacture, storage, transport, use, and disposal.

As the Standing Committee pointed out, the responsibility for management of emergencies is shared by the federal, provincial, and municipal governments. In general, provinces are responsible for public safety. The first response is usually at the municipal or local level and may involve police, fire department and the managers of the site where the emergency occurred. But if the scale of the emergency requires it, provincial and federal governments may also become involved.

Prevention, Preparedness, Response and Recovery Framework (P2R2)

Spills, leaks or other such incidents involving hazardous substances often result in emergency situations that cause damage to the environment, are a risk to public health, and require rapid response and cleanup. The key to avoiding environmental damage from spills, leaks and other releases is

- to prevent their occurrence in the first place,
- to be fully prepared in terms of training and availability of equipment if there is an incident,
- to have in place response and cleanup procedures, and
- to restore the damaged environment and recover the costs of cleanup, restoration and perhaps seek compensation for that damage.

The framework for prevention, preparedness, response and recovery, or P2R2 for short, is entirely consistent with the Government's philosophy of pollution prevention described in the Federal Strategy for Pollution Prevention and in an earlier section of this Response. The importance of adopting this framework was highlighted in the recommendations of the August 1994 report entitled "Environmental Aspects of Emergencies and the *Canadian Environmental Protection Act* - An Analysis" prepared by the Major Industrial Accidents Council of Canada (MIACC) and submitted to the Standing Committee. MIACC is a multistakeholder group whose members are federal departments, provinces, industry associations, associations of fire chiefs and ambulance services, labour organizations and academia.

In considering the Standing Committee's recommendations, it is important to recognize that CEPA is well suited to deal with the environmental aspects of emergencies. Further, it can build on the specific actions taken to protect the environment contained in other federal *Acts* such as the *Canada Shipping Act* and the *Transportation of Dangerous Goods Act 1992*. Therefore, the proposed P2R2 approach in a revised CEPA would strengthen the legislative base that the Government already has for dealing with the broad range of emergencies.

6.12 The Government of Canada proposes to amend CEPA to include new provisions to enable the Minister to establish a legislative framework, including regulatory and non-regulatory approaches, for:

- dealing with the environmental aspects of emergencies, and
- addressing the elements of prevention, preparedness, response and recovery

Federal-Provincial-Territorial-Aboriginal Cooperation

The federal, provincial, territorial governments and self-government regimes of Aboriginal Peoples have legitimate roles to play in the management of emergencies, and these roles are recognized in this Response.

Standards, Guidelines and Codes of Practice

Since 1987, MIACC, the multi-stakeholder group referred to above, has developed standards, guidelines and codes of practice to deal with the environmental aspects of emergencies. In addition, recognized standard-setting bodies, such

as the International Standards Organization (ISO) and the Canadian Standards Association (CSA), as well as the International Labour Organization (ILO) also develop similar types of standards, guidelines and codes of practice based on the premise of P2R2.

The 1993 amendments to the *Canada Shipping Act* provide for the Minister of Transport to issue standards of various types, which are not, however, regulations with the force of law within the meaning of the federal *Statutory Instruments Act*. In addition, to give standards issued by the Minister and standards issued by other organizations such as ISO or CSA the force of law, the revised *Canada Shipping Act* allows regulations to incorporate by reference such standards, including any modifications that are made to them from time to time.

6.13 In recognition of the value of standard setting in developing procedures and conduct to be observed when dealing with environmental aspects of emergencies, we propose to ensure that a renewed CEPA includes the authority of the Minister to develop and/or adopt by reference appropriate standards, guidelines and codes of practice for the environmental aspects of emergencies.

6.14 We propose to continue to work with MIACC and other organizations in the development of standards, guidelines and codes of practice and to consult on incorporation of any such standards, guidelines and codes of practice into CEPA.

The "Federal House"

Federal facilities, including those of Crown Corporations and facilities on federal lands may use hazardous substances which could be released to the environment through spills, leaks and other such incidents. The Standing Committee recommended that federal facilities be subject to the same requirements for site registration and spill-reporting as well as for prevention, preparedness, response and recovery as would be required of comparable facilities regulated by provinces and territories.

6.15 Therefore, in conjunction with the actions more specifically outlined in the Chapter on Government Operations, Federal Lands and Aboriginal Lands, the Government of Canada proposes to take the necessary measures to ensure that federal facilities deal with the environmental aspects of emergencies. Under a renewed CEPA, it is proposed that the Minister would have the enabling authority to regulate these measures for the federal house.

Site Identification and Registration

In order to implement the P2R2 approach, organizations responsible for emergency planning and response need to know at what sites hazardous substances are imported, manufactured, processed, transported, used, stored, sold, or disposed of.

6.16 Accordingly, we propose to initiate discussions with provincial and territorial governments, which the Standing Committee recommended commence by December 31, 1996, to explore the development of a system for identification and registration of fixed sites within federal and provincial/territorial jurisdictions containing quantities of hazardous substances in excess of specified thresholds.

Reporting of Spills, Leaks and Other Such Incidents

The Standing Committee recognized the benefits of a Canada-wide network for the reporting of spills, leaks and other like incidents that is harmonized with and complementary to existing emergency alerting and reporting systems. In fact, through the Canadian Council of Ministers of the Environment, discussions have already begun with our provincial and territorial counterparts regarding such a network.

6.17 The Government proposes to continue discussions with provincial and territorial governments to explore the development of a national spill-reporting network.

Bilateral and Multilateral Agreements

The authority already exists in CEPA to conclude bilateral and multilateral agreements for the implementation of certain aspects of CEPA. This authority could be used with respect to the environmental aspects of emergencies, including the registration of sites and a national reporting network for spills, leaks, and other such incidents.

Recovery of Costs of Damages from Spills, Leaks and Other Such Incidents

The Government of Canada has endorsed the "polluter pays" principle since 1984. It further confirmed this principle in terms of its application to accidental pollution in an OECD Council Act of 1992. As noted by the Standing Committee, this principle was included in the 1993 amendments to the *Canada Shipping Act*, which provides for the recovery of costs for measures taken to "prevent, repair, rectify or minimize damage" to the environment following a spill or other like incident. CEPA already provides the legislative authority through a civil cause of action to recover such costs as those for cleanup, prevention, notification of affected members of the public and correction of environmental damage, in relation to

- unauthorized releases or potential releases of toxic substances regulated under the Act,
- materials released in contravention of regulations governing the federal departments, agencies, crown corporations, works, undertakings and lands; and
- damage arising from ocean disposal that violates the Act or its Ocean Dumping Regulations.

6.18 We propose therefore to amend CEPA to expand the cost recovery provisions through a civil cause of action to deal with the environmental aspects of emergencies, similar to those in the *Canada Shipping Act.*

Chapter 7. Biotechnology

The Standing Committee recognized that "the economic potential of biotechnology as a 'new' technology is considerable." Biotechnology is the term used to describe a collection of technologies that use living organisms to create improved products and processes. These technologies are being used to develop new medicines, to improve yields from fish stocks, forest growth and agricultural crops, to promote energy production from biological sources, to improve treatment of liquid effluents, and to assist in cleanup of wastes and the environment.

Products of biotechnology can be of two types: non-living or living. Non-living products of biotechnology are in reality specialty chemicals such as enzymes, biochemical products and biopolymers, and are used to make products such as beer, plastics and detergent additives. Live or animate products of biotechnology involve the use of micro-organisms, such as those designed to help clean up oil spills or as alternatives to traditional chemical pesticides, plants such as vegetables that retain their fresh quality longer, or animals such as fish that grow to maturity faster. We intend that biotechnology applications be prime components of pollution prevention programs and of environmental restoration and cleanup technologies where damage has occurred.

The Government of Canada wants to ensure that we have a regulatory regime in place which promotes innovation, encourages investment in biotechnology, supports technology transfer and places Canadians at a competitive advantage. However, the Government of Canada recognizes the concern of many that biotechnology applications could have the potential to cause adverse effects on the environment or human life or health, and that there is a need for a continued strong federal presence in ensuring the safe and effective use of biotechnology. The Government of Canada has had in place a "Framework" for dealing with the products of biotechnology since 1993. The use of CEPA in conjunction with other federal laws is reinforced in the proposed new Part of the *Act*, particularly with respect to the safety of live biotechnology products released to the environment.

As a principle, there would not be overlap and duplication in regulating products of biotechnology. It is intended that CEPA would serve as the "safety net" for those areas that are not covered by other federal *Acts*.

Definition of "Biotechnology"

The Committee noted that the Government of Canada definition of biotechnology included in CEPA is broad enough to ensure that the range of products or processes resulting from the application of the technology will be covered by the *Act*.

7.1 Therefore, the Government of Canada proposes to retain the current definition of biotechnology.

Control of Non-living Products of Biotechnology

Since these non-living products are, in fact, chemicals, they will continue to be dealt with under the provisions of a renewed CEPA dealing with Controlling Toxic Substances (Chapter 9). This means that, where non-living products of biotechnology are new to Canadian commerce, and where regulatory authority does not exist under other federal *Acts*, we would maintain the obligation under CEPA for their developers, manufacturers or importers to provide data on these products before they can enter the Canadian marketplace. New provisions of CEPA arising out of the recommendations of the Standing Committee for assessment of new substances could also apply to non-living products of biotechnology.

Separate Part for Live or Animate Products of Biotechnology

However, the Standing Committee and the Government of Canada both recognize the unique nature of live or animate products of biotechnology.

7.2 Consequently, in accordance with the recommendation of the Standing Committee, we propose to create a separate Part of CEPA to deal specifically with living products of biotechnology.

7.3 The new Part could mirror previous and new authorities in CEPA requiring notification of data on products of biotechnology that are new to the Canadian marketplace, allowing continuity with current regulatory developments under CEPA and the 1993 *Federal Framework for Regulating Biotechnology Products*. The section would establish criteria for biotechnology products based on the existing criteria for toxicity under s.11 of CEPA and Canada's international commitments under the United Nations Convention on Biological Diversity.

7.4 In keeping with the Government's objectives of avoiding duplication, it is not intended that this proposed Biotechnology Part apply to aspects of products of biotechnology that are or may be regulated under other *Acts* of Parliament. Therefore, the following principles apply:

(1) where legislation or regulations do not exist, CEPA will provide a general "safety net" to protect health and the environment, except in circumstances where regulations are not required. Further, CEPA regulations which establish notification and product assessment requirements will apply until such time as regulations may be promulgated under other relevant legislation;

(2) where legislation exists, and regulations respecting notification and product assessment requirements to protect health and the environment are approved by the Governer in Council on the recommendation of the responsible Minister, CEPA would have no regulatory role.

The views of the public and stakeholders on the application of the "safety net" will be sought during the consultation process.

For the purposes of the "safety net", a biotechnology product would be regulated under CEPA, for the purpose of notification prior to the manufacture, import or sale of the product, and for an assessment of whether it:

(1) may have an immediate or long-term harmful effect on the environment, including impacts on biodiversity;

(2) may constitute a danger to the environment on which human life depends;

(3) may constitute a danger in Canada to human life or health.

Consideration of Additional Amendments

In addition to responding to the recommendations of the Standing Committee, the Government of Canada is considering amendments to deal with the areas of cost recovery, international commitments and application of live products of biotechnology to pollution prevention.

The additional amendments address specific approaches to enhance pollution prevention, provide a basis for international leadership and allow for promotion of biotechnology as a green technology. Adopting the recommendations of the Standing Committee would be essentially resource neutral, but implementing the additional amendments would not be resource neutral and may require internal resource re-allocation.

Cost Recovery

CEPA does not at this time provide authority for issuing permits and for setting fees relative to the importation, manufacture or use of biotechnology products that are regulated under CEPA.

7.5 The new Biotechnology Part of CEPA, in accord with the government policy on recovery of costs for services provided to Canadians, could provide authority to enable the government to issue permits for biotechnology activities regulated under CEPA, and to recover the costs of:

- processing applications for permits;
- issuing permits; and
- monitoring of environmental effects of activities authorized under permits.

International Commitments

Several international conventions and protocols which Canada has signed and ratified address the issue of biotechnology. For example, a significant concern identified in both the 1992 *Convention on Biological Diversity* and *Agenda 21*, the non-binding declaration of the 1992 United Nations Conference on Environment and Development, is the control of transboundary movement of live products of biotechnology that could have an adverse effect on the conservation of biological diversity. Canada has also reflected this concern nationally in the 1993 *Federal Framework for Regulating Biotechnology Products*, in reference to movements across ecosystems. A further issue addressed in these international agreements is the application of the principle of Advanced Informed Agreement between exporting and importing countries with respect to live biotechnology products that could have an adverse effect on the conservation of biodiversity.

7.6 Accordingly, the Government of Canada could include, in the revised CEPA, authority to make regulations as necessary to complement existing federal authorities to implement binding agreements made under international conventions and protocols for products where regulations do not exist under other federal *Acts*.

Application to Pollution Prevention

Pollution prevention will be a cornerstone of the revised CEPA, and will be the preferred method of protecting the environment and human health. The application of biotechnology to the development of new processing techniques, in-pipe pollution prevention technologies and environmentally friendly substances that may replace older materials has been recognized internationally, for instance in the development of biodegradable plastics, and biological air and water filters.

7.7 In the renewed CEPA, we could provide authority to set criteria through regulation for effective and safe use of live products of biotechnology in pollution prevention where regulatory authority does not exist under other federal *Acts*.

Development of a Biotechnology Science Base

Biotechnology and its applications are a rapidly growing field. The numbers and types of applications of biotechnology are expanding into areas not usually associated with environmental safety.

7.8 To enable the Government of Canada to respond to innovative technology and to ensure a national science base in the area of biotechnology and its applications, we could include, in a renewed CEPA, authority for the Ministers of the Environment and Health to enter into bilateral, multilateral and international agreements to develop, gather and share data. Interested parties who might participate in such agreements are, in addition to the Government of Canada, provinces, territories, Canadian universities and research institutes, industry, labour, environmental or other special interest groups, foreign governments and foreign universities or other institutions that carry out scientific research.

Chapter 8. Controlling Pollution and Wastes

International Air Pollution

The Government of Canada is a party to international agreements that are designed to protect or repair the Earth's atmosphere. In the continuing struggle to protect the planet's resources, this country is likely to maintain its current international commitments and to become party to more international agreements to preserve or restore air quality or to control air pollution. CEPA is the federal legislation that Canada uses to implement international clean air agreements. The current Part II of CEPA, covering toxic substances, was used to implement the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, and the current Part V, entitled "International Air Pollution", led to the 1991 Canada-U.S. Air Quality Agreement.

In its Report, the Standing Committee recognized the federal role in dealing with regional transboundary air pollution such as acid rain, smog, and hazardous air contaminants as well as global issues such as protection of the stratospheric ozone layer and world climate. The Committee applauded the signing by Canada of several international clean air agreements since 1988 including the Canada-U.S. Air Quality Agreement, the United Nations Economic Commission for Europe Long Range Transboundary Air Pollution Convention, and the Framework Convention on Climate Change. It also noted co-operative federal-provincial action to reduce acid-rain causing emissions and federal-provincial agreement on the Comprehensive Air Quality Management Framework for Canada in 1993. The Committee was, "nevertheless, of the opinion that Part V should be utilized to play a more important role in the management of international air pollution." It pointed particularly to the example of Canada's 1992 commitment under the international Framework Convention on Climate Change to stabilize greenhouse gas emissions to 1990 levels by the year 2000.

The management approach of multiple air pollutants proposed below will fit well with the Comprehensive Air Quality Management Framework for Canada (CAQMF) signed in 1993 by federal, provincial and territorial Ministers of Environment and Energy, and would allow for the blending of expertise, particularly in meeting the greenhouse gas emission targets to which Canada is committed internationally. The CAQMF will continue to be used as the basis for integrated air pollution management in Canada in partnership with the provinces and other stakeholders. In making these proposals, the Government of Canada proposes to address more effectively matters in the arena of air pollution, so that this country remains able to fulfil its international clean air agreements.

Part V of CEPA currently contains general provisions to enable the implementation of Canada's international air pollution obligations. Prior to recommending a regulation to the Governor in Council, the Minister of the Environment must be satisfied that, for pollution sources other than federal works or undertakings, the province, provinces or territory where the pollution source is located are either not able or not willing to make the required regulations.

8.1 The Government of Canada proposes to put to better use the current provisions of Part V by including:

- the establishment of a framework, including timelines, for federal and provincial governments, and where appropriate Aboriginal Peoples that operate under self-government, comprehensive claim or specific claim agreements, to control domestic sources of international air pollution that are within their borders. It would be the Government's intention to consult with provinces, territories and Aboriginal Peoples on the framework and timelines. In addition, the Government would seek authority for the Minister of the Environment to take corrective action without undue delay where there is an emergency situation;
- the use of tools including economic instruments, in particular emission trading schemes for regional air shed management for SO_X and/or NO_X, regulations, pollution prevention planning and negotiated federal-provincial, federal-territorial agreements on emission targets, with provision for similar agreements with aboriginal governments;

- comprehensive management, jointly by federal, provincial and territorial governments with participation by Aboriginal Peoples as appropriate, of combinations of air pollutants such as sulphur dioxide, particulates, nitrous oxides, volatile organic compounds, other hazardous air pollutants and greenhouse gases including carbon dioxide, within regions of Canada, when those emissions are identified as significant contributors to transboundary or global air pollution.

Fuels

National Standards for Fuels

There has been discussion of the need to provide consistent fuels across Canada, in order to maintain air quality and protect the environment. The effective way to achieve this consistency would be to create a national standard or national "mark" for fuels which would be traded interprovincially or which would be imported into Canada. In fact, on October 23, 1995, the Canadian Council of Ministers of the Environment endorsed the concept of national standards for gasoline and diesel fuel.

Under a national standard or "mark" for fuels, inter-provincial trade and importation could not take place, unless the fuel bore the "mark" denoting that it met the national standard. This would meet the goal of national consistency, while permitting the petroleum industry to comply in a cost-effective manner.

8.2 The Government of Canada proposes, therefore, to incorporate into a renewed CEPA, authority to make regulations setting national standards for fuels, where the fuels would cross provincial borders or are imported into Canada. There is a similar scheme in place currently under the federal *Motor Vehicle Safety Act*, to set motor vehicle equipment standards. One avenue for creation of a national fuel standard could be to incorporate by reference, into a CEPA regulation, fuel specifications developed through the Canadian General Standards Board.

Within the context of national standards for fuels, the Government of Canada wants to ensure that Canadians have fuels that give better emission performance. This can require specifying minimum characteristics for fuels, while still leaving the ability for refiners to exceed or offset one characteristic against another.

Currently, the regulation-making authority to control fuels, their ingredients and physical properties require stipulation of concentrations or quantities which, "if exceeded", would result in a significant contribution to air pollution. The phrase "if exceeded" prevents the Government of Canada from stipulating fuel characteristics or quantities for additives that would lead to improved air quality and reduction of air pollution. Detergent-like additives are an example of ingredients where a specific quantity must be present for fuels to be used more efficiently and "cleanly".

8.3 The Government of Canada proposes to add wording to CEPA to allow regulations to specify a range of characteristics. This would allow refiners to focus on performance and would provide the freedom to adjust ingredients and characteristics of fuels in the most cost-effective manner. This approach would be similar to that currently in effect in the United States for gasoline and would be based on scientific and economic principles.

Impact of Fuels on Pollution Control Equipment

8.4 There must be compatibility between fuels and the equipment in the vehicles that would burn them, in order to prevent deterioration of the emission performance of the equipment. The amended wording of a renewed CEPA could also provide authority to deal with the negative impact that certain characteristics or constituents of fuels may have on pollution control equipment.

Current CEPA Wording "on the Combustion of the Fuel in Ordinary Circumstances"

In addition, the Standing Committee also recommended removal of the phrase "on the combustion of the fuel in ordinary circumstances." The Committee has drawn attention to the unnecessary restriction to the regulation of fuels under CEPA to the combustion stage of their use. Constitutional authority will allow regulation of other stages. For example, evaporative emissions that occur when fuels are being stored or transported or when vehicles and other equipment are being fuelled, stored or used can make a significant contribution to air pollution.

8.5 The Government of Canada, therefore, proposes to amend CEPA to remove the phrase "on the combustion of the fuel in ordinary circumstances."

This could allow the development, if needed, of regulation of fuels and their ingredients both in the ordinary course of combustion and independently of the combustion phase of fuel use.

Authority to Prohibit Export of Environmentally Harmful Fuels and Fuel Ingredients

The Standing Committee criticized the absence of authority in the current CEPA to control exports of fuels. In keeping with the premise that we should "think globally and act locally", the Government should have authority to control the export from Canada of fuels with ingredients and characteristics that can have particularly harmful effects on the environment, human life or health, or all three.

8.6 The Government of Canada currently has the authority to regulate and prohibit if necessary, the export of most hydrocarbon fuels under the *National Energy Board Act*.

Where the regulation or prohibition of fuels and fuel ingredients with particularly environmentally deleterious characteristics is needed to protect the environment, human life or health, the Minister of the Environment as well as those other Ministers with legislative responsibilities can request the Minister responsible for the National Energy Board to take action. Minor amendments to the *National Energy Board Act* may be required to ensure that the above can be addressed.

This would be managed in accordance with Canada's obligations under international agreements to which it is a party.

Motor Vehicle Emissions

An environmental component of the federal *Motor Vehicle Safety Act*, administered by the Minister of Transport, is the authority under that *Act* to regulate emissions from new motor vehicles. It was the view of the Standing Committee that the legislative authority for motor vehicle emissions more properly belongs under a federal environmental law, rather than under a federal law that sets vehicle safety and emission standards. This same thought was expressed in the 1981 recommendations of the House of Commons Sub-Committee on Acid Rain.

8.7 Accordingly, we will examine the possibility of transferring legislative authority for emissions from new motor vehicles from the *Motor Vehicle Safety Act* to CEPA, thus consolidating most authority for fuels, fuel additives and vehicle emissions under a single federal *Act*.

8.8 We could also include authority to regulate emissions from

- new off-road vehicles such as farm and construction equipment, and pleasure crafts,
- utility engines for equipment such as generators and lawn and garden machines.

International Water Pollution

The Standing Committee noted that, while international air pollution merited a separate and distinct part within the Act, there were no provisions to address international water pollution. Pollution on waters that Canada shares with the United States, in particular, is an extremely important issue. The United States' federal *Clean Water Act* requires the Administrator of the U.S. Environmental Protection Agency to take action to identify and abate water pollution that is endangering the health or welfare of persons in a foreign country. This requirement for the U.S. Administrator to act only applies, however, to those countries that provide similar rights to the United States. The Standing Committee recommended that CEPA should be amended to provide a similar requirement for the Minister of Environment to act in such circumstances.

Reciprocal legislation, as recommended by the Committee in relation to international water pollution, is certainly not foreign to Canadian law. In fact, Part V (International Air Pollution) of the current CEPA exists in part, because the U.S. *Clean Air Act* has a similar provision regarding air pollution originating in the United States that endangers the health or welfare of persons in a foreign country. In order for the federal government of the United States to be required to act to counter air pollution in that country which endangers Canada and Canadians, the Government of Canada had to put into law provisions allowing the Minister of Environment to act when the emissions of air contaminants creates or is reasonably anticipated to create air pollution in another country.

Regrettably, in the area of international water pollution, CEPA does not provide the ability for the Minister to make regulations. While some of the required powers may be found in Canada's *International Boundary Waters Treaty Act*, which was adopted in 1911 to implement the 1909 Boundary Waters Treaty between Canada and the United States, that *Act* is not sufficiently detailed to clearly satisfy s.310 of the U.S. *Clean Water Act*. As the Standing Committee pointed out, the *International Boundary Waters Treaty Act* provides for the appointment of commissioners who sit on the Canadian component of the Canada-U.S. International Joint Commission (IJC). The IJC has authority to study only issues which are referred to it by one or both of the Canadian or U.S. Federal Governments, but it has no power to correct transboundary water pollution problems. Further, the IJC has no jurisdiction over environmental issues related to the Arctic Ocean.

It was the Standing Committee's belief that "Canada should have adequate authority to prevent and correct transboundary water pollution that could violate international treaty obligations with the United States [sic: other than those already included under the 1909 Boundary Waters Treaty] and any other foreign country. The powers should extend beyond the Ocean Dumping provisions contained in Part VI of CEPA, and should be modeled on the international air pollution provisions in Part V."

8.9 Accordingly, the Government of Canada proposes to include, in a renewed CEPA, provisions to prevent transboundary water pollution, to mirror and respect the reciprocity provisions of the U.S. *Clean Water Act*, and to enable Canada to continue to comply with international agreements, to which it is a party or may become a party, relating to transboundary water pollution.

The new provisions could be modeled on the international air pollution provisions in Part V of the current CEPA.

Nutrients

There are substances, called nutrients, which, when they enter lakes and waterways, in excess concentrations, can cause excessive growth of algae and aquatic weeds, leading to interference of the use of those waters by humans, animals, fish or other plants. Part III of the current CEPA allows the Government of Canada to regulate such nutrients.

Definition of "Nutrient"

The Standing Committee recommended changes to the definition of "nutrient" that appears in the current Part III of the *Act*.

8.10 Accordingly, we propose a new definition as follows:

"nutrient" means any substance or combination of substances that, if added to waters in excess concentrations, provides nourishment that promotes the growth of aquatic vegetation in those waters to such densities as to:

- interfere with the functioning of an ecosystem, namely the interaction of plant, animal, human and micro-organism communities and their non-living environment, or,
- degrade or alter or form part of a process of degradation or alteration of the quality of those waters that is detrimental to their use by human beings or by any animal, fish or plant.

Regulation of Nutrients

As stated above, Part III of CEPA currently has authority to regulate nutrients. But, at the present time, the only nutrient regulated under Part III is phosphates in laundry detergents. The Standing Committee recommended that the Government regulate the phosphate content of other cleaning products within one year of the tabling of the Standing Committee's CEPA Review Report. We cannot commit to further regulation of phosphates in cleaning products such as automatic dishwasher detergents, or to regulation of other nutrients in other products such as water softeners and fertilizers, until we have studied to what extent nutrients from sources other than laundry detergents are causing damage to the environment.

8.11 Consequently, the Government of Canada proposes to undertake, within the next 12 months, a comprehensive study of nutrients that enter the environment through human activities. Once we have results of that study, we will be able to determine whether or not nutrients in general are causing negative environmental effects, whether only certain nutrients, rather than nutrients as a class, are problematic, and whether those effects are limited to one component of the environment, such as water, or to entire ecosystems, including wildlife.

Reduction of Hazardous Wastes and Non-hazardous Wastes

The Government of Canada advocates minimizing the creation of wastes and maximizing reuse, recovery, and recycling of any wastes that are produced through human activity. Ideally, wastes that are produced through any manufacturing process or any other human activity would be recycled so that wastes would be fully reused. Also, as a signatory of *Agenda 21*, the declaration produced at the 1992 United Nations Conference on the Environment and Development, Canada should be working towards the commitment made in that document to promote the prevention and minimization of wastes. The use of economic instruments, subject to constitutional authority, and financial incentives in CEPA in addition to amendments to CEPA, as recommended by the Standing Committee, would ensure that we progress towards waste reduction and the effective management of wastes that can inevitably result from various processes.

Waste Definition

The Government of Canada is undertaking domestic and international consultations to develop an appropriate definition of waste in preparation for OECD and other discussions regarding this issue. A logical definition of waste, would include criteria to distinguish among wastes for final disposal, recyclable materials, and products. As stated in the Government's Mining Agenda this is in the best interests of waste reduction, the environment, and the competitiveness of industry.

8.12 The Government of Canada is embarking on a process to develop an appropriate definition of waste to be used in OECD discussions and for domestic purposes. When developing a renewed CEPA, the Government of Canada will consider the results of domestic and OECD deliberations when developing the regulations to control waste.

Responsibilities of Users and Producers

In the context of sustainable development, responsibility is shared by the users and producers of substances and products, when those substances and products or the processes used to extract or create them result in pollutants and wastes. The Government of Canada recognizes that the producers and users of products or toxic substances should be responsible for their wastes.

8.13 The Government of Canada proposes to incorporate the principle of such responsibility into CEPA and would apply this principle to substances as well as products. This concept is consistent with the approaches being implemented by other members of the Organization for Economic Co-operation and Development (OECD), such as the United States, Netherlands, Germany and Japan.

To determine the most "environmentally friendly" practices of dealing with wastes, we will also explore programs which develop "green" products, promote product stewardship, and promote technologies that release little or no waste to the environment.

Like other nations, Canada is involved in international commercial transactions involving wastes. We export and import non-hazardous and hazardous wastes for recycling or for final disposal. Our nation has commitments to meet under the following international agreements dealing with the movement of hazardous waste: the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (1989); OECD Council Decision concerning the Control of Transfrontier Movements of Wastes Destined for Recovery Operations (1992); and the Canada-U.S. Agreement concerning the Transboundary Movement of Hazardous Waste (1986). Both the Basel Convention and the Canada-U.S. Agreement also deal with transboundary movement of non-hazardous solid wastes. We intend that CEPA continue to be the statute which we use to implement our obligations under those conventions and agreements.

Hazardous Wastes

Hazardous Wastes - Maintaining Current Controls for Exports and Importts

8.14 We propose to maintain the current authority in CEPA

- to require that notice be given to Canadian authorities before hazardous wastes are exported from or imported to Canada, and
- to set conditions governing export and import of hazardous wastes for the purposes of disposal and recycling.

Conditions in the regulations that we propose be maintained include

(1) the requirement for the receiving jurisdictions (country or province) to declare that it consents to the import of the shipment of hazardous wastes,
(2) the requirement that a waste manifest describing the waste accompany the shipment at all times,
(3) the obligation to carry insurance to cover any damages to third parties for which the exporter or importer is responsible and to cover environmental damage due to spills, leaks or other like incidents during export and import, and
(4) the requirement for Canadian exporters to accept return of wastes which are refused by the importing country.

Hazardous Wastes - New Requirement - Reduce/Phase-out the Quantity of Hazardous Waste Being Exported for Disposal

8.15 It is proposed that CEPA be amended to require exporters to have plans for reducing/phasing out the quantity of hazardous waste that is being exported for the sole purpose of final disposal. This could include plans to reduce at source, recycle or recover material from this waste stream. In accordance with Canada's obligations under the Basel Convention, these reduction/phase-out plans would identify the

reason for export. Hazardous wastes being exported for the sole purpose of recycling would not be affected by this new provision.

Hazardous Wastes - New Authority to Ban Exports and Imports

8.16 In addition, the Government of Canada proposes to amend CEPA to clarify the authority to make regulations to ban exports and imports of hazardous waste to and from any country when required under international environmental agreements to which Canada is a party.

That would not mean that those exports and imports would be banned automatically. It means that the Government of Canada would seek regulatory authority under CEPA to ban such exports and imports in accordance with our international commitments.

Hazardous Wastes - New Authority to Control Exports and Imports

8.17 In addition, we propose to amend CEPA to give authority to Environment Canada to refuse the export or import of a hazardous waste if the waste in question is not to be managed in an environmentally sound manner according to international agreements to which Canada is a party.

Non-Hazardous Solid Wastes

Non-Hazardous Solid Wastes - New Controls for Exports and Imports

More than a million tonnes of non-hazardous solid wastes enter and leave Canada annually. In recognition of the large quantities of non-hazardous solid waste being imported and exported between Canada and the United States, the Canada-U.S. Agreement on the Transboundary Movement of Hazardous Waste was amended in 1992 to include municipal solid wastes. The Standing Committee recommended insertion within CEPA of authority to control the movement of non-hazardous solid waste between Canada and the United States. The Government of Canada would construct any amendment to CEPA in this regard to cover any exports and imports of non-hazardous solid wastes between Canada and any other country, not just the U.S.

8.18 Accordingly, in a renewed CEPA, we propose to add authority for the Government of Canada to control the export from and import into Canada of non-hazardous solid wastes for final disposal.

Controls could include:

(1) a requirement to notify the Government of Canada of proposed imports, exports of non-hazardous solid wastes into or out of Canada destined for disposal;
(2) the ability of the importing jurisdiction to refuse the shipment on environmental grounds; and
(3) a requirement to report on the quantities and types of such wastes exported from and imported into Canada.

Non-Hazardous Solid Wastes - New Authority to Ban Exports and Imports

8.19 Also, the Government of Canada proposes to add authority to CEPA to ban the export and import of non-hazardous solid wastes for final disposal as required under international agreements to which Canada is a party.

The new provisions would be similar to the current and proposed requirements governing the export and import of hazardous wastes which are discussed above.

Interprovincial/Territorial Movements of Hazardous Wastes

Currently, interprovincial/territorial shipments of hazardous wastes are tracked through a manifest system for waste dangerous goods under the *Transportation of Dangerous Goods Act, 1992* (TDGA) and its accompanying regulations. It is proposed that CEPA be amended to deal with the environmental aspects of these shipments.

8.20 Accordingly, the Government of Canada proposes to amend CEPA to include authority to control the interprovincial/territorial movement of hazardous recyclables destined for recovery operations and hazardous waste for final disposal, through a manifest system, to ensure that such movements are properly tracked and destined to environmentally sound facilities. Current authority under the *Transportation of Dangerous Goods Act*, 1992 (TDGA) to deal with the transportation safety aspects of such waste shipment would remain intact.

This amendment would not alter current requirements for shippers to complete manifests for interprovincial/territorial shipments of hazardous wastes. The requirement would, in the future, be included under a renewed CEPA instead of under TDGA. The opportunities for harmonization among provinces and territories would help eliminate internal barriers to trade within Canada. This internal harmonization received the support of the Canadian Council of Ministers of the Environment Working Group on Wastes on November 1 and 2, 1995.

Costs and Liability

Implementation of a Cost Recovery System

The Government of Canada has announced its intention to recover its costs where appropriate when providing services to Canadians. The Government must develop new methods to finance and deliver its environmental protection responsibilities.

8.21 The Government of Canada proposes to amend CEPA to provide authority to charge fees for and thereby recover government costs of processing applications, notices and other documents related to the export and import of hazardous wastes and to the movement of those wastes within Canada.

8.22 We propose to extend the authority for cost recovery to the processing of any applications, notices or other documents for the export and import of non-hazardous solid wastes.

International Commitments with Respect to Liability and Compensation

In addition, discussions among the parties to the Basel Convention on the *Control of the Transboundary Movement of Hazardous Wastes and Their Disposal* are currently focusing on a draft protocol on the matter of liability and compensation related to environmental damage arising out of the transboundary movement of hazardous wastes. Subjects under international debate include who would be liable for damage, what types of damages would be covered, and what level of compensation should be paid. Canada and the other parties to the Basel Convention are currently negotiating what contribution each party to the Convention will make to the fund, how and by whom the fund will be managed, and what damages the fund will cover and to what amount.

CEPA and Canada's Oceans

Environmental Responsibility for the World's Oceans

More than seven-tenths of the globe is covered by oceans and seas. The oceans rule climate and life on the planet. In the future, our food supply may depend on the oceans even more than it does today. It is no exaggeration to state that the safe-guarding of our common heritage - the oceans- may well determine the future of humankind. Canada

has the longest coastline in the world which provides an important habitat for wildlife and fish as well as providing tremendous economic benefits to humans. Eight provinces and two territories border oceans in Canada. Coastal areas are transition zones between land and sea. The Government of Canada recognizes that contamination of Canada's oceans and coastlines is principally the result of human activities, and that sources of that contamination include discharges of municipal wastewater, urban and agricultural runoff, industrial effluent, solid waste and litter, erosion, and disposal of wastes at sea.

Fifteen federal departments and agencies currently administer over 40 pieces of legislation relating to the marine environment. CEPA is only one of those. While provisions of CEPA relating to toxic substances and international air pollution deal with things, which if not controlled, may have a negative impact on our oceans, only Part VI of the current CEPA is specific to ocean matters. This Part controls the disposal of wastes at sea. We intend to improve CEPA's provisions, so that, in addition to the *Fisheries Act* and the new *Canada Oceans Act*, tabled in June 1995, for First Reading in the House of Commons, we can protect our oceans more effectively.

Environmental Objectives and Codes of Practice

8.23 Accordingly, the Government of Canada proposes to amend CEPA to authorize the creation of environmental objectives and codes of practice to preserve the quality of coastal areas and to guide reduction of contamination from land-based sources of pollution.

Management of Coastal Zones

Canada will continue to participate in international negotiations under the United Nations Law of the Sea Convention and to rely on other international treaties to help develop a global approach to coastal zone management, to protect the marine environment, and to safeguard legitimate uses of the world's oceans. In view of the new responsibilities that the Department of Fisheries and Oceans will assume under the *Canada Oceans Act* once it becomes law, Environment Canada will develop a policy to deal with land-based sources of marine pollution.

Ocean Disposal

Among our international legal obligations related to the world's seas are the London Convention, 1972, that sets out controls for the disposal of wastes at sea and the non-legally binding 1992 *Agenda 21*, chapter 17 which encourages governments to take appropriate action to put a stop to the dumping of hazardous waste at sea. At present, we meet our international obligations under the London Convention, 1972, through Part VI of the current CEPA. Part VI regulates ocean disposal by a system of permits and powers of inspection generally available under CEPA and special inspection powers that are particular to ocean dumping. We intend to maintain authorities currently in CEPA and make amendments along the lines discussed below.

Definition of Ocean Disposal

Ocean dumping is defined in the current CEPA as deliberate disposal at sea from ships, aircraft, platforms and other human-made structures and includes disposal by incineration or any other heat process.

8.24 In accordance with the Standing Committee's recommendation, we propose to amend the definition to include disposal from wharves and in intertidal zones. Drafting of these amendments would be considered in the context of the *Fisheries Act*.

Creation of a List of Wastes Authorized for Disposal in the Ocean

At present, a list attached to the current CEPA and having the force of law contains substances which are not allowed to be dumped at sea. In September 1994, the Government of Canada amended the list to take into account changes made to similar lists under the London Convention, 1972. These changes forbid the dumping of radioactive wastes or other radioactive material as well as industrial waste at sea. Wastes whose disposal at sea

would be permitted are dredged material, fish waste, scrap metal, ships, platforms and other manufactured structures at sea, uncontaminated inert geological material and uncontaminated organic material of natural origin.

In keeping with the precautionary principle and the need for clear policy direction we recognize that an exclusive list of authorized materials and wastes that may be disposed of in the ocean is preferable to a list which prohibits the dumping of certain substances and wastes. Anything not on the list could not be considered for disposal at sea.

8.25 Accordingly, we propose to add to a renewed CEPA a list of wastes that may be acceptable for disposal in the ocean, and thus prohibit the disposal at sea of any waste not on the list.

The list of authorized wastes would be limited to non-hazardous material and wastes that may be considered suitable for ocean disposal if it is the environmentally preferable option. The list would include dredged material; fish waste; scrap metal; ships, platforms and other manufactured structures at sea; inert inorganic geological material and organic material of natural origin.

Justifying the Need for Ocean Disposal

CEPA already stipulates that, before the Minister grants a permit for ocean disposal, he or she must consider the practical availability of alternative land-based methods of waste treatment and disposal and the availability of methods of treatment to render the substance less harmful for dumping at sea. The Standing Committee recommended strengthening this provision. The Committee recommended that permit applicants be required to prove that ocean dumping is the best option from an environmental perspective.

The Standing Committee also recommended incorporation of the Waste Assessment Framework (WAF) into CEPA. The WAF has been developed by signatories to the London Convention, 1972, including Canada. It has two main features. First, it places new emphasis on progressively reducing the need to use oceans for waste disposal. This is consistent with the principle of pollution prevention and the goal of waste reduction advanced by the Government of Canada and in Agenda 21 of the 1992 United Nations Conference on Environment and Development. Secondly, it provides a scheme to integrate into a single process many factors for determining whether or not ocean disposal is the environmentally preferable and practical method for waste disposal. Many of the items that form part of the WAF scheme already appear in provisions of the current CEPA and in the current Ocean Dumping Regulations. The WAF is still under discussion by parties to the London Convention, 1972 and, in 1996, may be incorporated into that Convention in its current form or in an amended form. Accordingly, the Government of Canada commits to examining the final version of the WAF to ensure that it is accurately reflected through CEPA provisions and, if not, will make what adjustments appear necessary.

Environmentally Preferable and Practical Method

8.26 Accordingly the Government of Canada could incorporate the Waste Assessment Framework which would require applicants to demonstrate their efforts to recycle, re-use or treat the waste. A permit would not be granted if opportunities exist to recycle, re-use or treat the waste without undue risks to human health or the environment or disproportionate costs.

8.27 The Waste Assessment Framework proposes to also require the applicant to provide a comparative assessment of each disposal option with respect to human health risks, environmental costs, hazards (including accidents) economics and exclusion of future uses. A permit would not be granted unless ocean disposal is shown to be an environmentally preferable and practical option.

The Arctic - A Special Case in Terms of Ocean Disposal of Wastes

The Arctic is a unique ecosystem. The extremely cold climate severely restricts the rate at which wastes can break down in the environment as well as the choice of waste disposal options. The Government of Canada

recognizes that, once an activity or development of a project has terminated, the removal of resulting wastes and excess materials from the Arctic should be preferred to other methods of disposal, and that ocean disposal of wastes in the North should be undertaken only where it is the environmentally preferable and practical option and only for non-hazardous wastes.

Disposal of Contaminated Sediments

Sediments dredged from Canada's harbours are the single largest source of waste disposed of at sea. In fact, over 90% of all material dumped at sea under permits issued in accordance with Part VI of the current CEPA is dredged sediments from harbours, estuaries, channels, or bays. Dredging may be carried out to maintain or improve existing ports and shipping channels, or to develop new harbours and channels. It is possible for sediments to be contaminated by harbour activities, past practices, erosion or pollution from run-off from agricultural lands and from municipal sewage or industrial effluents.

At present, Environment Canada refuses to grant ocean dumping permits for dredged sediments that contain contaminants above a specified concentration. The only exception is when the applicant for an ocean disposal permit can demonstrate that the contaminant or contaminants can be rapidly rendered harmless by physical, chemical or biological processes of the sea. The Government of Canada recognizes, however, that we must have a means of dealing with disposal of contaminated sediments.

8.28 Consequently, we propose to continue consultation with other interested parties such as the federal Departments of Transport, Government Services and Public Works, and Fisheries and Oceans, non-government groups such as the Canadian Environmental Network, Canadian Ports and Harbours Association, and regional environmental groups and regional ports authorities, on national guidelines for disposal of contaminated dredge sediments.

Towards Cost Recovery

In keeping with the "polluter pays" principle, the applicant seeking to dispose of wastes at sea and the eventual ocean disposal permit holder will pay fees to the Government of Canada, to cover the partial or full costs of processing the application, public consultation on that application or on the variance of conditions contained in an ocean disposal permit, pollution prevention, and the monitoring of the environmental effects of ocean disposal.

Applicant Fees

8.29 In a renewed CEPA, we propose to maintain the current authority to set fees for applications to secure ocean dumping permits. Whether the permit is eventually granted or not, there is government cost involved in evaluating the proposal for ocean disposal, and an application fee will allow this cost to be covered by the applicant rather than the Canadian taxpayer at large.

Ocean Disposal Fees

8.30 The structure for disposal fees would incorporate a sliding scale based on the nature and quantity of material dumped. That is, the fee imposed on the person who will be disposing of wastes at sea would vary in relation to the nature and volume of the wastes being dumped.

Public Access to Information Pertaining to Ocean Dumping Permits

One of the underlying goals of the Government of Canada is to make the federal decision-making process more transparent to the public. The establishment of an electronic registry would allow the general public to quickly and efficiently access information that was used, for example, to issue an ocean dumping permit.

8.31 We intend to develop a national ocean disposal database by 1997 which would be part of the public electronic registry, and which would include information provided in permit applications, the permits themselves, and location of load and dump sites.

Public Consultation

We recognize that the general public is an under-utilized resource. The Canadian Institute for Environmental Law and Policy stated before the Standing Committee "...that provisions under the Act for improved notice and comment would not only ensure that the public is made aware of and has an opportunity to participate in decisions regarding their environment, they might also improve the government's accountability in the administration of CEPA and enhance the quality of decision-making."

CEPA currently requires applicants to publish, in a newspaper of general circulation in the vicinity where the wastes would be loaded and dumped, their intent to apply for an ocean disposal permit. Anyone who wishes to comment or to seek additional information may contact the applicant or Environment Canada at the addresses and telephone numbers given in the notice. In addition, where Environment Canada determines that there is sufficient public concern surrounding a particular ocean dumping project, the department undertakes consultation with the concerned public that could include the local community, local industry, fishermen's associations or environmental groups.

Granting of Ocean Disposal Permits - Notification and 10-day Objection Period

The Government of Canada proposes to maintain in CEPA publication of the intended issuance of an ocean disposal permit in the Part I of the *Canada Gazette*.

8.32 In the renewed *Act*, however, the Government proposes that the publication be followed by a 10-day period during which members of the public may file a notice of objection.

In addition, under the current *Act*, an applicant who is dissatisfied with the terms or conditions imposed in the permit may file a notice of objection.

8.33 It is proposed that a renewed CEPA retain that right but set a period of 10 days during which the applicant must file any objections.

8.34 In both cases described above, if no notices of objection are filed, the permit would take effect at the end of the 10 days.

Refusal by the Minister to Issue an Ocean Dumping Permit and Decision by the Minister to Suspend or Revoke a Permit or Vary its Conditions

CEPA currently allows an applicant to file a notice of objection to the Minister's decision not to issue an ocean disposal permit. Similarly, when the Minister decides to suspend or cancel a permit, or change its terms or conditions, the applicant (in the situation of the Minister's refusal to issue a permit) and the permit holder (where it is a matter of cancellation, suspension or varying of conditions) may file a notice of objection.

Under the current CEPA, however, members of the public have limited rights of objection. They can, at present, only file a notice of objection when an ocean disposal permit is granted or its conditions are varied by the Minister; they cannot, however, file an objection when the Minister refuses to issue a permit, or suspends or revokes a permit.

8.35 Accordingly, the Government of Canada proposes that a renewed CEPA provide that members of the public as well as applicants and ocean disposal permit holders be able to file notices of objections when

- a permit is refused by the Minister;

- the Minister varies terms or conditions of a permit; or
- the Minister revokes or cancels a permit.

The period during which such notices could be filed would be 10 days from the date of notification of the Minister's decision. If no notices of objection are filed, the Minister's decision would stand.

Under the current CEPA, the Minister is compelled to hold a Board of Review for any notice of objection filed by an applicant or permit holder if the applicant is dissatisfied with the permit conditions, the Minister refuses a permit, or he or she suspends or revokes a permit or varies its conditions. But when the Minister grants a permit or varies its conditions and when members of the public file notices of objection in either case, the Minister is not compelled to hold a Board of Review; the convening of the board is at the Minister's discretion.

8.36 The Government of Canada proposes that a revised CEPA contain the requirement for the Minister to convene a Board of Review in all of these cases, unless the Minister determines that the objection or objections are frivolous or vexatious.

8.37 We further propose that, where the Minister receives notice of objection and whether or not the Minister decides to convene a Board of Review, the renewed CEPA require that the Minister consider all notices of objection and report on how the Minister took the objections into account in making his or her decision.

Chapter 9. Controlling Toxic Substances

Introduction

In response to the Report of the Standing Committee, the Government of Canada shares many of the views expressed about strengthening the effectiveness of Part II of CEPA. The Government of Canada recognizes that substances causing or capable of causing adverse effects in the environment or to human health remain a significant concern for Canadians, and that there should continue to be a strong federal role in environmental and human health protection in this area. CEPA has been and will continue to be the principal legislative tool for the federal government to deal with dangerous substances that can find their way into the environment. A strengthened CEPA, coupled with other relevant federal acts and regulations, as well as national commitments to international protocols and conventions, provide the Government of Canada with the legislative tools needed to protect the Canadian environment and the health of Canadians. The federal *Toxic Substances Management Policy*, released in June 1995, sets the direction for all federal government departments when taking decisions about toxic substances and managing them. The key management objectives of this policy are: virtual elimination from the environment of toxic substances that result predominantly from human activity and that are persistent and bioaccumulative; and management of other toxic substances throughout their entire life cycles, to prevent or minimize their release to the environment.

The Government of Canada takes the view that renewal of Part II of CEPA should be responsive to the intent of the Standing Committee recommendations communicated in its Report and which provides direction to Government for change. We believe that any changes to Part II should enhance our ability to make decisions to protect the environment and health and, should also reflect defensible science and economics if Canada is to meet its national sustainable development goals. Furthermore, in making changes, the Government of Canada must remain cognizant of the international context within which Canada functions.

The assessment and management of substances, particularly existing substances, was the central issue in Chapter 5 of the Standing Committee's Report. The Committee indicated that for the effectiveness of Part II to improve, there should be increased accountability for decisions and a larger number of substances should be assessed in less time leading to a larger number of substances found to be "toxic." As well, less time should be taken to regulate "toxic" substances.

To further these ends, the Standing Committee recommended a number of "new tracks" that, coupled with the concept of "inherent toxicity", would assist in the timely identification and regulation of toxic substances. These different tracks would expedite the assessment process by identifying standards of assessment and then identifying which substances meet those criteria. In total, the Standing Committee made over 30 recommendations with respect to toxic substances to which the Government of Canada is responding in this Chapter.

As outlined below, the Government of Canada agrees with the intent of the Standing Committee's recommendations, and proposes to achieve these ends in part, through the application of key principles, a reformed existing substances program, including the Priority Substances List, a revised assessment process and the incorporation of the key elements of the recently announced *Toxic Substances Management Policy* into CEPA.

Overriding Principles

Throughout the Standing Committee's Report, a number of principles were intended to pervade the reform of CEPA. In particular to provisions pertaining to the management of toxic substances, the Standing Committee specifically recommended the adoption of the precautionary principle, increased producer/importer responsibility, and the ecosystem approach.

Precautionary Principle

The Standing Committee recommended shifting the orientation towards making decisions to control existing substances on the basis of less information. The Government views this approach to be a practical application of the precautionary principle as stated at the 1992 United Nations Conference on the Environment and Development in Rio

de Janeiro. For new substances, the Government of Canada would continue to control the entry of any new dangerous substances into Canadian commerce by requiring users and producers to submit notifications on new substances in advance of any manufacturing or importation. As is currently the practice, this information would be assessed by the Government of Canada prior to commercial activity and, in a precautionary way, control measures on the basis of a suspicion that danger could occur. Proposals will be made to manage some existing substances based on faster track assessments than those conducted currently under CEPA for priority substances, by applying predetermined criteria that appear in regulations, using expert scientific judgement, and by making use of the risk assessment efforts of other jurisdictions.

Producer/Importer Responsibility

The Government of Canada accepts the view of the Standing Committee that it must engage producers and importers of substances and the public to a greater extent in decision-making if it is to benefit from greater application of the precautionary principle, and if it is to ensure that final decisions are best for Canada. At present, the onus is exclusively on the Government, not only to gather and interpret the evidence available on existing substances, but also to make the case that some are dangerous and warrant regulatory control. The onus also rests with the Government of Canada to assess notifications submitted by industry for new substances without any interpretation offered by the notifiers as to the safety of its products. We believe this onus should be shifted and propose to do so in a number of ways.

Ecosystem Approach

The Government of Canada agrees with the Standing Committee's view that it is imperative to use an integrated approach to environmental protection, an approach that recognizes that the individual components of ecosystems are interconnected. The Government of Canada proposes to amend the definition of "environment" to include explicit reference to ecosystems. The intent is to enable the assessment of substances under the *Act* in a manner that promotes the structural and functional integrity of ecosystems.

Reforming the Existing Substances Program, including Priority Substances

To meet the intent of the Standing Committee's Report, the Government of Canada believes it is necessary to reform the Existing Substances program, including the Priority Substances List (PSL). The thrust of the reform is to identify, screen, assess and control larger numbers of substances, including those that are persistent and bioaccumulative, in an effective and efficient manner. The reform is subject to determining the impact of these proposals on government resources and the economy.

Prioritizing Substances for Action

The Government of Canada proposes the following systematic approach involving the categorization and screening of existing substances to identify priorities for assessment or for preventative or control action.

(A) Substances meeting persistence or bioaccumulation or other criteria

For some time now, those substances that persist in the environment, and accumulate in fish, wildlife and humans and produce toxic effects have been a focus for the Government of Canada and were the major factor behind the TSMP. The Standing Committee's recommendations intended to make these substances priorities for action in a reformed CEPA. The properties of persistence and bioaccumulation can serve as surrogates of potential long-term exposure for environmental organisms. Other surrogates in addition to persistence and bioaccumulation are pertinent indicators of potential human exposure.

9.1 Accordingly, the Government of Canada proposes to introduce the following measures:

(i) substances currently on the Domestic Substances List, estimated at 23,000 substances, would be categorized with respect to persistence or bioaccumulation and inherent toxicity to environmental organisms. The criteria for persistence and bioaccumulation are those referred to in 9.6. Where valid actual or predicted data do not exist to complete this categorization, we would draw on the work of OECD member states and other international bodies, in an effort to share responsibility for generating needed data where appropriate. Canada will benefit from international discussions on the persistence and bioaccumulative properties of inorganic compounds and sparingly soluble compounds.

(ii) substances on the Domestic Substances List with the greatest potential for exposure of Canadians would be categorized.

(iii) substances categorized as indicated above would be candidates for screening level risk assessments based on science, which could result in no further action, addition to the PSL, or proposals for preventative or control action consistent with the TSMP.

(B) Substances that have been banned, sunsetted or severely restricted in an OECD country or Canadian province

The Standing Committee made a series of recommendations that would require the Government of Canada to automatically adopt decisions or actions on toxic substances taken by provinces in Canada or by member countries of the Organization for Economic Co-operation and Development. In this way, decisions would be made faster in Canada on more existing and new substances. The decisions or actions of other jurisdictions, which cover thousands of substances, can range from product labelling and reporting requirements to complete bans on commercial activity. Severe actions by other jurisdictions signal significant concern on their part about substances; Canada can profit the most from those severe actions taken on the basis of human or environmental health reasons.

The Government of Canada is a leader in various international fora at promoting harmonization of assessment methodologies and mutual acceptance of evaluations. It will continue to do so since, in the case of existing substances, no one country has the resources to make decisions about all those that may be in national commerce or present in its environment. The longer term result of this effort will be shared data, shared assessments, saved resources and decisions on many more substances. The Government of Canada recognizes that decisions of other jurisdictions to act on existing and new substances may be based at present on scientific, socioeconomic and other considerations that may not be appropriate for decisions in Canada.

9.2 The Government of Canada proposes to screen all substances that have been banned, sunsetted or severely restricted, by regulation, in other OECD countries or Canadian provinces for environmental or health reasons that are based on science and are relevant to Canada. Substances identified in this way that are currently on the Domestic Substances List would be candidates for addition to the PSL, or for preventative or control action consistent with the TSMP. Under this proposal, a provision would be added to CEPA identifying the process for periodically reviewing the actions of OECD countries and Canadian provinces.

(C) Substances that have otherwise been placed on the PSL through the Nomination Process provided through the Current CEPA

9.3 A third mechanism for adding substances to the PSL is, in effect, the process that the Government of Canada now proceeds through by way of public nomination and the use of Advisory Panels of Experts. This process provides the opportunity to include mixtures and classes, apart from individual substances as well as by-products of industrial processes and takes into account potential for exposure of Canadians. This process would be retained.

In addition,

9.4 The Government of Canada proposes to add provisions to CEPA to specify the conditions under which the Minister can delete substances from the PSL. The condition for deletion would be that a determination has been made whether the substance was found to be toxic or non-toxic. Where there is insufficient information to make such a determination, a "stop the clock" provision, discussed below, would be made available.

Deciding Which Substances Are Toxic Under CEPA

A key issue for the Standing Committee was the "standard" in Part II of CEPA for deciding whether substances are "toxic". The Committee considered this standard to be very rigorous and to have a detrimental influence on the number of substances assessed, the number found to be "toxic" and the time taken to make decisions. The Committee was particularly concerned that conclusions were not reached regarding the toxicity of 13 of 44 substances on the original PSL.

It is Section 11 of CEPA that defines the conditions for determining whether a substance is "CEPA-toxic". Under this definition, the Government of Canada is required to consider the manner in which substances are or may be entering the environment, the degree of exposure that results or may result and the levels of exposure that can cause adverse effects to occur. The Government of Canada agrees with the Standing Committee that this should be interpreted to mean that the Government must consider the risk posed by substances before rendering a conclusion. Understanding the nature (including sources) and extent of the risk enables the Government to prioritize dangers to human health and the environment and to focus controls where they will have the greatest benefit.

The Standing Committee acknowledged that in-depth assessment against a risk-based standard was appropriate for most substances. However, the Committee also indicated that decisions should be taken in some cases on the basis of laboratory or other studies relating to inherent toxicity for certain types of substances of concern, particularly those which are persistent and bioaccumulative, and therefore potentially pose serious environmental threats. In its view, the door could be opened to decision-making on this basis by removing reference in Section 11 to conditions associated with entry and exposure. The Committee also recommended that the "standards of assessment" including criteria relating to inherent toxicity, persistence and bioaccumulation be prescribed in regulations based on new authority for doing so within Section 11.

The Government of Canada considers inherent toxicity to be the intrinsic ability of a substance to cause harm. It is most often determined from the results of laboratory studies and accordingly, a substance can be considered inherently toxic regardless of whether there is any actual exposure. Inherent toxicity plays a very significant role in establishing the levels of exposure at which adverse effects occur and, when coupled with exposure information, forms the basis for assessing risk.

The Government of Canada is committed to a risk-based approach to decision-making. The Government of Canada has recently acknowledged in its *Toxic Substances Management Policy* that given the uncertainty associated with predicting the environmental effects resulting from long-term exposure of biota to persistent and bioaccumulative substances, these characteristics should be considered as qualitative surrogates for long-term exposure. This reduces the need for the often difficult task of quantitatively estimating exposure of biota to these substances. For a relatively small number of predominantly anthropogenic substances, decisions can be made about environmental risks based on the use of laboratory studies, when taken in combination with evidence of persistence and bioaccumulation and using expert scientific judgement.

9.5 The Government of Canada believes that the existing structure of Section 11 of CEPA supports risk-based decisions including those, for a relatively small number of substances, as per TSMP Track 1, based on persistence and bioaccumulation and laboratory studies (i.e. inherent toxicity) and using expert scientific judgement. If, following consultation with the Canadian public, there is a need to strengthen the legal basis for proposing decisions in this way, the Government of Canada will consider amendments to s.11.

The federal *Toxic Substances Management Policy* sets the direction for all federal government departments when taking decisions about toxic substances and managing them. Substances that are primarily the result of human activity and which meet criteria for toxic, persistence and bioaccumulation are proposed for virtual elimination (Track 1). Other substances of concern that do not meet all of these criteria are managed throughout their entire life cycles.

9.6 The Government of Canada proposes to legislate in CEPA, the virtual elimination of Track 1 substances. As set out in the *Toxic Substances Management Policy* and as recommended by the Standing Committee, the criteria for persistence and bioaccumulation for Track 1 substances would be prescribed in regulations.

9.7 To ensure that the intent and interpretation of "virtual elimination" is understood, it is proposed to provide a definition for this term in CEPA that is consistent with the TSMP.

9.8 Consistent with the theme of profiting from the efforts of other OECD jurisdictions and Canadian provinces, the Government of Canada proposes to deem toxic those substances identified in 9.2 for preventative or control action.

The Government of Canada proposes to also undertake a number of additional measures to improve the assessment of existing substances under the *Act*.

9.9 The Government of Canada proposes to strengthen the information gathering provisions of CEPA requiring users, producers and importers to supply available data needed to assess existing substances, and to carry out additional testing where necessary to conduct PSL assessments.

The Government also proposes to establish authority to require testing by others for a relatively small number of substances when available scientific information suggests a need to conduct fast track assessments.

9.10 Where testing is required for existing substances appearing on the Priority Substances List, the Government of Canada would introduce a "stop-the-clock" provision as recommended by the Standing Committee that would temporarily suspend the obligation of Government to complete its assessment within 5 years. Once the data are submitted within a predetermined time frame, the clock would start again. If two years after the clock has restarted, there is still insufficient information, there would have to be a decision made based on the best information available at the time as to the toxicity or non-toxicity of the substances. This provision is consistent with the precautionary principle and the user/producer responsibility.

New Substances

The Government of Canada proposes to also take a number of additional measures to improve the assessment of new substances under the *Act* and shift more of the financial burden for the assessment of these substances onto notifiers, for example by implementing cost recovery.

9.11 In agreement with the Standing Committee, the Government of Canada proposes to amend CEPA to enable the Ministers to require the mandatory reporting of significant new uses as a means to ensure the continuing safety of a substance in light of a change in use pattern.

The Standing Committee called for greater public accountability in the form of opportunities for filing notices of objection. With respect to Part II of CEPA, the Government of Canada agrees with the continuing need for accountability provisions for new substances. It also endorses the right of the public to comment on regulatory decisions taken in regard to new substances; however, it believes the approaches proposed by the Committee are not

supportive of the over-riding need for rapid decision making and effective pollution prevention. To achieve this, daily operational decisions must be made by the Government in several areas concerning new substances including the addition of substances to the DSL and requests for waivers of information requirements.

9.12 A more practical means to accomplish the Standing Committee's intent would be the process to which the Government of Canada is already committed, that is, for a multi-stakeholder review of its New Substances Notification Regulations (the first to take place in 1997). This review will provide an opportunity for the public to determine whether Canadians are being afforded an appropriate level of safety proposed by the Standing Committee in the management of new substances. Regulatory amendments will be implemented to address any short-comings. Furthermore, the policy of the Government of Canada is that an in-depth, public review of the CEPA new substances program will be undertaken periodically.

Though considered inappropriate for routine program decisions such as occur with new substances, provisions will continue to be made for filing of notices of objection on matters relating to Part II of CEPA, particularly regulatory decisions.

By-Products, Contaminants and Impurities

The Standing Committee recommended that s.26 of CEPA be amended to require the assessment of such impurities, contaminants and by products which appear during storage or after release into the environment.

9.13 The Government of Canada agrees that the consideration of impurities, contaminants and by-products are integral to the assessment of the toxicity of new substances. However we do not intend to subject them to individual notification. CEPA currently requires proponents to provide information on impurities and contaminants associated with the use, manufacturing, storage or release into the environment of each new substance so that the impacts resulting from these materials can be considered and explored in- depth when there is potential to cause harm to the environment or human heath. The Government of Canada proposes to review the need for further information on by-products.

Managing Risks Posed by Toxic Substances

The Standing Committee made a number of recommendations to improve the management of risks under CEPA. The Committee seeks to shorten the time to regulation but also to increase the control options available to the Government.

The Government of Canada agrees that it is important to implement controls quickly after the Ministers are satisfied that action should be taken. Part II of CEPA currently requires the Ministers to make a statement at the time assessment findings are made public about their intent to control "toxic" existing substances under CEPA. There are no further legal requirements on the Ministers to take action. The Standing Committee has recommended that the Government of Canada be obliged to promulgate control measures within 2 years of designation of an existing substance as "toxic".

The degree to which the Government can control timelines during the regulations development process and thus be held accountable is considered a deterrent to fully implementing the Standing Committee's recommendation. At present, the Government of Canada has a degree of control over the time it takes to make proposals on the regulatory and non-regulatory means to manage toxic substances. Once the proposals are published in Part I of the Canada Gazette, there are opportunities for the public to file Notices of Objection and to call for Boards of Review. Predicting public response and the timing of activities such as these cannot be controlled by Government.

The Government of Canada has recently taken a number of measures to clarify what will follow the finding that a substance is "CEPA-toxic." The most important of these is the release of a *Toxic Substances Management Policy* in June 1995. The policy commits the government to the achievement of the virtual elimination from the environment of predominantly anthropogenic substances which meet specified criteria for bioaccumulation

and persistence (Track 1) and to provide for the life-cycle management of other substances of concern including those that are "CEPA-toxic" (Track 2).

9.14 The Government of Canada proposes to incorporate into CEPA key elements of the TSMP, with the addition of timeframes as noted in 9.15 and 9.18. In particular, the Government of Canada proposes to amend CEPA to require that proposals for prevention and control be published in the *Canada Gazette* Part I within two years of the decision that a substance is toxic. In developing proposals, government and industry could benefit from the initial results of pollution prevention planning referred to in Section 6.1. For substances determined to be Track 1 under the criteria of the policy, industry proposals would be required within a set time frame concerning the means by which they will achieve virtual elimination of the substances in question and the schedule for doing so.

9.15 It is proposed that CEPA be amended to require that if, for any of the reasons authorized by CEPA, a Board of Review has been requested and granted by the Minister, the two year timeline for the proposal of controls is "stopped clock" on the day the Minister agrees to a Board, and does not restart until the completion of the Board of Review process.

9.16 It is proposed that substances that are assessed as CEPA toxic equivalent and designated for management as a Track 1 substance (TSMP) as per 9.5, would be proposed in *Canada Gazette I* for virtual elimination.

Industry and other stakeholders would have options to:

(1) provide undisclosed contrary or supporting evidence to Track 1 criteria of persistence or bioaccumulation or toxic or primarily anthropogenic, which may lead to either Track 2 management with either toxic designation and life cycle management or substance of concern designation and life cycle management or may continue along Track 1 to virtual elimination.

(2) However should the evidence not support toxic substances management to Track 2, industry would be obliged to provide their plans for virtual elimination.

This information would be taken into consideration in developing the conclusion and actions to be taken relative to the substance.

Time limitations would be set for options, at which time decisions would be taken. It is proposed that these decisions would be subsequently announced in *Canada Gazette II.*

The wording of CEPA currently leaves in doubt whether or not the Minister of the Environment has authority to require submission of information on substances once they are declared toxic and are added to the Toxic Substances List under the *Act.*

9.17 Accordingly, the Government of Canada proposes, for greater clarity, that the Ministers have explicit authority to required submission of data on substances that have been declared "toxic" and are already on the Toxic Substances List under CEPA, in order to determine, for example, whether

- the controls in place under CEPA are adequate, or in need of revision;
- additional aspects of the life cycle should be subject to control; or
- whether additional monitoring is required.

9.18 It is proposed that CEPA be amended to require that controls be in place for toxic substances within a timeline not exceeding 18 months of the publication of control proposals in the *Canada Gazette* Part I. Where there is a Board of Review requested regarding a control proposal, the 18 month timeline is "stopped clock" from the date that a Board is granted to the date of the completion of the review.

In addition to these steps, the Government of Canada would explore practical ways to deal with the larger number of toxic substances that are anticipated as a result of the improvements to the assessment process, and still meet the two year time frame, for control proposals. These may include: developing standard regulations (*cf* the proposed Banned Substances Regulations) which will only require addition of the toxic substance to a schedule in the regulation; and dealing with classes of substances, rather than individual substances by regulation.

Chapter 10. Government Operations, Federal Lands and Aboriginal Lands

CEPA's Application to the "Federal House", Federal Lands, Federal Works and Undertakings

Legislation of General Application

All Parts of the current CEPA that apply to all Canadians also apply to the federal government and federal lands, including national parks and Indian reserves and other lands set aside for the benefit of Aboriginal Peoples and subject to the *Indian Act*. This means that Part I (Environmental Quality Objectives and Guidelines), Part II (Toxic Substances), Part III (Nutrients), Part V (International Air Pollution), Part VI (Ocean Dumping), and Part VII (containing general provisions and enforcement powers) currently apply to all of Canada, including the federal government and its lands. These Parts are termed "legislation of general application."

Provisions that Apply Solely to the "Federal House"

One section of the current CEPA, namely Part IV, applies not to all Canadians but only to the "federal house". That Part is subtitled "Federal Departments, Agencies, Crown Corporations, Works, Undertakings and Lands", and also applies to federal commissions and boards. All of these entities are often referred to as the "federal house."

The reason that Part IV was created is that federal departments, agencies, boards and commissions and federal Crown corporations cannot normally be regulated under provincial law. This means that provincial regulations covering emissions, effluents, waste handling and disposal, environmental emergencies such as spills and explosions and other environmental matters do not apply to the "federal house" and to federal lands, including Indian reserves. This situation has created a circumstance frequently referred to as a "regulatory gap."

Regulation of the activities of the "federal house" and the management of federal lands fall under federal jurisdiction, and it is federal law that applies. For this reason, Parliament made Part IV of CEPA, to allow emissions, effluents and other environmental problems whose source is members of the "federal house" to be regulated. The idea was a blanket of environmental protection standards across Canada for federal entities, so that federal facilities would not be exempt from the type of regulations that similar facilities regulated by provinces would have to meet. It was also intended that Part IV be used to ensure that Canadians living on reserves would benefit from the same level of environmental protection as Canadians living elsewhere.

Federal Works and Undertakings

There is also the matter of "federal works and undertakings", as defined in Section 52 of CEPA. These are works under the legislative authority of Parliament and generally benefit one or more provinces or Canada as a whole. They include:

- airports, aircraft and commercial air services;
- banks;
- radio and television systems and networks that do broadcasting;
- railways, canals, and telegraph;
- ferries and ships between provinces or between Canada and a foreign country;
- works involving shipping and navigation whether inland or on Canada's coasts;
- works that Parliament declares to be for the general advantage of all Canadians or for the advantage of two or more provinces.

As a general rule, these works and undertakings are subject to provincial laws of general application, that is provincial laws that apply to all inhabitants of a province. But there is a condition that determines whether or not provincial laws apply to the federal works and undertakings listed above — that the provincial law in question does

not attempt to control the heart of the undertaking. For example, a railway would not be subject to a provincial law that attempted to regulate rail traffic.

Performance Under Part IV

According to the Standing Committee and its review of CEPA, the Government has not effectively used Part IV of CEPA. Reasons mentioned by the Standing Committee include:

- there was difficulty in interpreting wording of the regulation-making sections of Part IV;
- the process to make regulations for the "federal house" is complicated by the current requirement that the federal Minister responsible for the government department or other part of the federal family that would be targeted by the regulation must agree with the proposed regulations;
- regulation-making authority under Part IV only allows the setting of limits for emissions and effluents and the stipulation of waste handling and disposal practices, but do not provide authority to require the "federal house" to monitor its emissions and effluents or the environmental effects of same, to report unauthorized releases, to self-inspect and to correct deficiencies revealed by that self-inspection, or to keep written or electronic records, as regulations made by many provinces and territories under their environmental protection statutes do;
- people within the "federal house" were slow to become conscious of the need to protect the environment and prevent pollution;
- people within the "federal house" were also slow to allocate adequate funds to environmental management;
- there has been reluctance on the part of governments to address outstanding environmental issues involving aboriginal lands; and
- the Government of Canada had been waiting for the final report of the Royal Commission on Aboriginal Peoples.

Current and Future Greening of the "Federal House"

In the 1992 federal Code of Environmental Stewardship, the Government of Canada made the commitment to meet or exceed the letter and spirit of federal environmental laws in respect of federal facilities and federal lands. Also, we could not expect the private sector to meet environmental norms which the federal government itself would not meet or exceed.

Over the past year, the Government of Canada has taken steps to ensure that environment and sustainable development considerations are built into the workings of the members of the "federal house". These steps confirm the commitments outlined in the 1992 Code and are consistent with a number of recommendations of the House of Commons Standing Committee on Environment and Sustainable Development.

Following the May 1994 report of the Standing Committee that recommended creation of a Commissioner of Environment and Sustainable Development, the Government is proposing amendments to the *Auditor General Act* to create the position of Commissioner who would report to the Auditor General and monitor the environmental performance of the "federal house." To help achieve this monitoring, the tabling by departments of sustainable development strategies would be required within two years of the amendments to the *Auditor General Act* to this effect. These strategies would have to be updated every three years. In addition, the Government has directed departments to report annually on progress towards sustainable development when they table their budget estimates every fiscal year.

The translation of a sustainable development strategy into concrete action can be achieved in part through an Environmental Management System (EMS). The April 1995 federal policy *A Guide to Green Government* states that Ministers will direct their departments to develop and implement environmental management systems which provide a structure for federal entities to integrate environmental considerations into everything that they do. The EMS are to be based upon recognized standards, such as those developed by the International Organization for Standardization or the Canadian Standards Association. The policy also directs all departments to emulate the best environmental practices from the public and private sectors.

One of the first steps in developing an EMS is to obtain clear commitment from senior management to improve the organization's environmental management. Another key element of an EMS is the assignment of responsibility for the overall effectiveness of the organization's environmental management system to a senior official. Departments are therefore obligated to take these important steps. Under the *Guide to Green Government* policy, these requirements can also be extended to other members of the "federal house" at the discretion of the responsible Minister.

New Title for Part IV

The Standing Committee has recommended revamped provisions dealing with the "federal house." The Committee's recommendations recognized the inadequacies of the current Part IV and gave rise to the need to recognize the evolving relationship between the Government of Canada and Canada's Aboriginal Peoples who will increasingly assume control of their own affairs - in some cases to the extent of becoming self-governing and in other cases to the extent of taking on management of their lands and affairs.

10.1 Consequently, the Government of Canada proposes the title "Government Operations, Federal Lands and Aboriginal Lands" to replace the current Part IV title in a renewed CEPA. The new title would more accurately signal authority for the "federal house" and provide a mechanism for self-governing Aboriginal Peoples to regulate to protect their environment.

Amendments

Definition of "Federal Lands"

The current definition of "federal lands" contained in CEPA will need to be altered to allow a definition of both lands under the jurisdiction of the Government of Canada and lands that may be under the management of Aboriginal Peoples. The Government of Canada intends that a renewed CEPA maintain the definition of federal lands except for the paragraph that includes "reserves, surrendered lands and any other lands that are set apart for the use and benefit of a band and are subject to the *Indian Act*, and all waters on and airspace above those reserves or lands." The latter paragraph would be subtracted from the current definition of "federal lands" and added to a new definition for "aboriginal lands." The new definition of "aboriginal lands" will be discussed later in this section.

10.2 In a renewed CEPA, the definition of "federal lands" could include the following:

- lands that belong to the federal Crown or that the federal Crown has the right to dispose of, and all waters on and airspace above those lands,
- specified internal waters and the territorial sea of Canada,
- fishing zones and exclusive economic zones created by Canada,
- the continental shelf to the outer edge of the continental margin or to a distance of 200 nautical miles, whichever is the greater or as defined by an *Act* of Parliament.

Regulation-Making Authority

10.3 The regulatory authority of a renewed CEPA would clearly encompass all federal entities, lands and operations as well as tenants occupying federal lands. This could be achieved, in part, through a separate section dealing with regulatory authority related to all Crown Corporations.

10.4 It is proposed that a revised CEPA include authority to make environmental regulations to protect and preserve the environment with respect to the conduct of federal activities, regardless of the type or aspect. Examples of what could be included in those regulations are emissions and effluent limits, requirements for regulates to self-inspect and to correct deficiencies discovered during self-inspection, testing of emissions and effluents for compliance with regulated limits, gathering of data, or the development of environmental

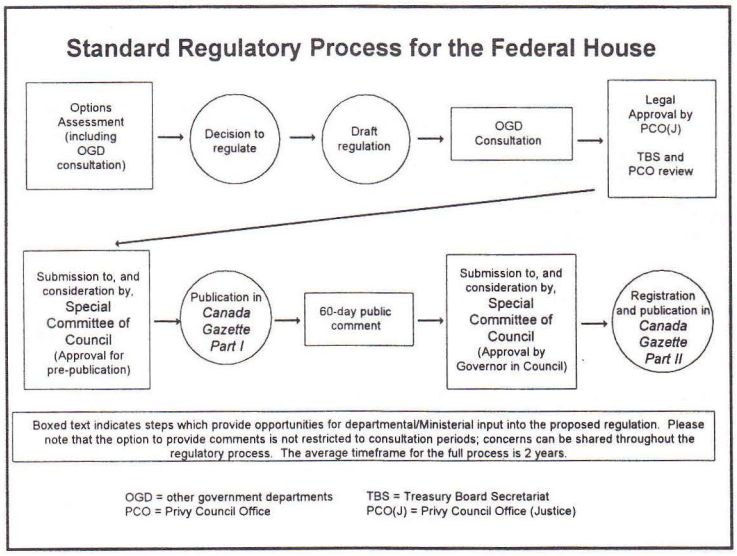
management systems. The regulation-making authority would also be broad enough to cover regulation of such matters as the reporting of spills and the requirement to put in place emergency prevention, preparedness and response measures.

Regulatory Development Process

The standard, federal regulatory development process used for all federal statutes requiring the approval of regulations by Governor in Council applies to all Parts of CEPA. However, the making of certain regulations under the current Part IV of CEPA differs from the standard, federal regulatory development process in that, in the case of environmental protection regulations for federal lands, works and undertakings, the agreement of the Minister with specific authority for the affected land, work or undertaking, is required before the regulations can be approved by Governor in Council.

10.5 The Government of Canada, in developing and approving regulations for the "federal house" proposes that affected Ministers, who have specific authority for lands, works or undertakings, be fully consulted before the regulations are proposed to the Governor in Council for approval. This would enable the regulatory development process to become consistent for all federal statutes. The standard, federal regulatory process will provide for numerous checks and balances at various stages, thereby providing ample opportunities for affected Ministers to give input into the proposed regulation.

Timely consultation and opportunities for input by members of the federal house will be ensured through continued adherence to the federal process for regulation development, as indicated below.



Other Tools

As in other Parts of the current and renewed CEPA, there could be provision for a range of tools that could apply to federal entities and federal lands.

10.6 The Government of Canada proposes to incorporate into the Act authorization to develop codes of practice and environmental quality objectives as well as guidelines for operations of the "federal house" and in relation to activities on federal lands. These tools would be formulated where non-regulatory measures could help achieve the Government's goals of protecting the environment and preventing pollution.

Priorities for Closing the "Regulatory Gap"

The Government of Canada intends that members of the "federal house" be held to the same environmental protection and pollution prevention standards as the communities in which they operate. Therefore, Environment Canada is committed to working cooperatively with other federal entities to quickly and effectively close priority gaps in environmental protection for the federal house. Environment Canada intends to use the most appropriate of the range of tools available under the Government Operations, Federal Lands and Aboriginal Lands part of a renewed CEPA to ensure protection of the environment on federal lands. In doing so, the Government of Canada will also ensure that Crown Corporations are subject to an appropriate regulatory framework. Further, federal entities would be bound, along with other Canadians, by requirements introduced under other sections of CEPA.

10.7 The Government's first priority would be to regulate federal activities which could result in emissions or other releases that threaten the surrounding community. Environment Canada would work with other federal entities to determine the activities within this range that would be most appropriate to address first.

10.8 When any regulations for federal entities or federal lands are developed under this Part of a renewed CEPA, the Government of Canada proposes to respect the intent of comparable provincial and territorial environmental protection requirements, which could include incorporation by reference of standards outlined in provincial or territorial regulations. Cost and jurisdictional implications would also be reviewed.

Aboriginal Peoples and the Future CEPA

Environmental Protection and Aboriginal Lands

In its CEPA Review Report, the Standing Committee indicated that "there is no regulatory framework to provide most Aboriginal Peoples with the basic levels of environmental protection that other Canadians enjoy and take for granted." In order to address this deficiency, the Government of Canada proposes that the new "Government Operations, Federal Lands and Aboriginal Lands" Part of a renewed CEPA continue to apply to reserve lands and any other aboriginal lands where title rests with the federal government, until such time that Aboriginal Peoples assume control over environmental matters under self-government or other agreements incorporating self-government provisions. In this way, Aboriginal Peoples can benefit from the same level of environmental protection as is enjoyed by other Canadians. This is one reason for the proposed new title of "Government Operations, Federal Lands and Aboriginal Lands" for the current Part IV and for other amendments which the Government of Canada will outline below. The Government of Canada recognizes that some Aboriginal leaders have raised concerns relating to the applicability of CEPA to Aboriginal lands and the possible effect on existing Aboriginal or treaty rights. In order to address these concerns, the Government of Canada will review the appropriateness of including a "non-derogation" clause in an amended CEPA.

Definition of "Aboriginal Lands" in a Revised CEPA

The Standing Committee recommended that aboriginal lands and reserves be specifically excluded from the definition of "federal lands" in CEPA. As explained under "Definition of Federal Lands", in a renewed CEPA, the Government of Canada proposes to exclude reserves and lands set aside for Indian bands from the current definition of federal lands, and would instead propose a definition of "aboriginal lands."

10.9 The term "aboriginal lands" could include

- reserves, surrendered lands where legal title is vested in Her Majesty, and any other lands that are set apart for the use and benefit of a band and are subject to the *Indian Act*, and all waters on and airspace above those reserves or lands;

- lands subject to a comprehensive or specific claim agreement signed between the Government of Canada and Aboriginal Peoples, where title or ownership of the land remains with the federal government; and
- lands subject to a self-government agreement between the Government of Canada and an Aboriginal People, where title or ownership of the land remains with the federal government.

Aboriginal Self-Government

The Government of Canada recognizes the inherent right of Aboriginal Peoples to self-government and is prepared to negotiate agreements with Aboriginal Peoples to implement that right. In August 1995, the Government of Canada published a guide to self-government negotiations, entitled "Aboriginal Self-Government - The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government." Among the items that are listed in the guide as subject to negotiation is authority for Aboriginal Peoples to manage environmental matters on their lands.

In its CEPA Review Report, the House of Commons Standing Committee on Environment and Sustainable Development recommended that self-government agreements or other agreements with self-government provisions that the Government of Canada signs with an Aboriginal People contain authority for the Aboriginal People in question to put in place environmental protection regimes. As outlined in the August 1995 aboriginal self-government guide, where Aboriginal Peoples wish to include authority for environmental management in self-government and other types of agreements, the Government is prepared to negotiate that item. We equally agree that those agreements should have provision for enforcement regimes, including inspector's powers, penalties, administrative procedures, etc., so that Aboriginal Peoples can enforce the environmental laws that they make.

The treaty, memorandum of understanding or contract that the Government of Canada and an Aboriginal People may sign or the Act of Parliament that implements these self-government and other agreements with First Nations and other Aboriginal Peoples will confirm the environmental management and enforcement authorities that the Government and Aboriginal Peoples have negotiated. The next step for those Aboriginal Peoples would be the creation and enforcement of their own environmental laws, by-laws or other type of enforceable instrument. Where Aboriginal Peoples have self-government and other agreements and where they have enacted environmental protection laws under those agreements, they will quite likely seek relief from the application of equivalent regulations made under the "Government Operations, Federal Lands, and Aboriginal Lands" Part of a revised CEPA.

Different Situations Involving Aboriginal Peoples and Self-Government Regimes

There will be some Aboriginal Peoples in Canada who will operate under self-government regimes that include environmental laws and the power to enforce them. Some will have self-government regimes and choose to exercise limited authority in the area of environmental protection and pollution prevention. Some will be self-governing but choose not to exercise any authority in the environmental sphere. Lastly, some may not want self-government at all and will wish to remain under the authority of the Government of Canada.

In the case of Aboriginal Peoples who are currently negotiating or will in the future negotiate self-government or other types of agreements with the Government of Canada, the matter of whether or not those Aboriginal Peoples wish to enact their own environmental protection regimes with enforcement powers will be determined between the Government of Canada and the Aboriginal People at the negotiating table. While the negotiations are in progress, any regulations made under the "Government Operations, Federal Lands and Aboriginal Lands" Part of a renewed CEPA would apply to those Aboriginal Peoples and their aboriginal lands.

Circumstances Leading to Non-application of the "Government Operations, Federal Lands and Aboriginal Lands" Part

10.10 A renewed CEPA could be drafted in such a manner that Aboriginal Peoples who

- have self-government regimes relating to aboriginal lands,
- have authority to enact and enforce their own environmental laws and

- have enacted such laws may apply their environmental laws instead of equivalent regulations under the "Government Operations, Federal Lands and Aboriginal Lands" Part of the *Act*.

10.11 Those Aboriginal Peoples who have chosen to implement only certain environmental protection measures could likewise apply their environmental measures instead of the equivalent regulations made under the CEPA "Government Operations, Federal Lands and Aboriginal Lands" Part.

Consultation

To achieve fully effective environmental protection on and for aboriginal lands, the Government of Canada will consult with Aboriginal Peoples, whether self-governing or not, on other amendments to CEPA that would contribute to this objective.

Training for Aboriginal Peoples in the Area of Environmental Protection

In several cases, Aboriginal Peoples wish to have training in environmental matters, in order to design, implement and enforce environmental management regimes on aboriginal lands, or in order to enforce CEPA provisions and regulations on their lands on behalf of the Minister of Environment. The Minister of Environment will consult on training with interested Aboriginal Peoples.

10.12 The Departments of Environment, Indian Affairs and Northern Development, Health, and Human Resources Development will co-ordinate the training that they currently offer or intend to offer on environmental protection and pollution prevention to Aboriginal Peoples.

Provisions Elsewhere in CEPA for the Participation of Aboriginal Peoples

In outlining the new relationship with Aboriginal Peoples which could be implemented for environmental protection under the "Government Operations, Federal Lands and Aboriginal Lands" Part of a renewed CEPA, it is useful to repeat areas where we would seek increased participation by Aboriginal Peoples and that are discussed earlier in this document.

CEPA National Advisory Committee

As indicated in the "Administration" chapter of this document, the Government is committed to the participation of First Nations and other Aboriginal Peoples in its review of CEPA-related issues and proposes to include them as members of the CEPA National Advisory Committee which would replace the current Federal-Provincial Advisory Committee and would consist of federal, provincial, territorial and aboriginal members.

Participation of Aboriginal Peoples in the Development of Objectives, Guidelines and Codes of Practice, the Priority Substances List and Regulations

We agree that Aboriginal Peoples be consulted with respect to the formulation of guidelines, objectives and codes of practice under the "Ecosystem Science and National Norms" Part of a renewed CEPA and the establishment of the Priority Substances List. In addition, with respect to the making of regulations under any and all of the various Parts of a renewed CEPA, the federal regulatory development process which has been in effect since 1986 provides for consultation and comment at various phases, including evaluation of initial options, consultation of affected parties during the actual drafting of the proposed regulatory text and comment on proposed regulations after publication in Part I of the *Canada Gazette*.

Administrative Agreements with Aboriginal Peoples Under a Renewed CEPA

We propose to amend CEPA to provide authority for the Minister of Environment to enter into administrative agreements with Aboriginal Peoples to administer regulations, such as those dealing with pollution prevention, pollution control, control of fuel emissions, etc. made under a renewed CEPA.