REVIEWING CEPA:

An Overview of the Issues

Canada

Cat.no.: En 40-223\1994
ISBN: 0-662-61188-8

INTRODUCTION

The *Canadian Environmental Protection Act* (CEPA) was proclaimed in 1988 and is a cornerstone of federal environmental protection legislation. Its origins stem from the major environmental issues of the early 1980s — the control of toxic substances. At the time, it was becoming clear that the *Environmental Contaminants Act*, the federal government's primary piece of legislation to protect the environment and human health from contamination by chemicals, was inadequate to deal with the multiplicity of problems associated with toxic substances. CEPA was intended to fill in the many gaps that existed at that time in the management of toxic substances.

In addition to providing a life cycle approach to the management of toxic substances, CEPA was designed to consolidate, in a single comprehensive environmental protection statute, disparate elements and authorities that were contained in five acts administered by Environment Canada; to ensure greater consistency in enforcement; to increase previously low penalties for environmental offenses; to provide for intergovernmental agreements; to stipulate federal-provincial and public consultation on specific environmental matters; to allow citizens greater access to the law; to improve the federal government's own environmental performance and standards on federal lands, including Indian reserves; and to enable Canada to fulfil specific international environmental protection obligations. CEPA also requires the creation of environmental quality objectives, guidelines, codes of practice and regular reporting on the state of Canada's environment.

Section 139 of CEPA requires a review of its administration by a committee of Parliament within five years of its enactment and a report to Parliament of any suggested changes to the Act or its administration. The five-year anniversary was in June 1993. A motion referring the matter to the Standing Committee on the Environment was approved by the House on June 8, 1993. The work of the Parliamentary Committee did not begin until 1994 because of the summer recess and the election.

Environment Canada and Health Canada have prepared this issues overview paper to assist the Parliamentary Committee. Its purpose is to identify key issues important for an examination of the adequacy of existing provisions of CEPA and consideration of new areas needed to expand and strengthen the Act. This paper also identifies the factors, such as fiscal restraint and federal/provincial/territorial roles and responsibilities, that should be taken into account during the examination of the issues. It is also intended to stimulate dialogue on issues related to the Act and to facilitate the sharing of ideas among interested parties.

As part of its preparation, Environment Canada commissioned Resource Futures International to do an independent evaluation of the administration of CEPA against the objectives set out in the Act. As well, the Department examined the Act and its administration against a range of policy issues not included in the Act. These issues reflect the changing economic and social context with which the legislation will have to contend, as well as emerging opportunities for use of alternative approaches to environmental protection. Aside from seeking the advice of individuals on these topics, a workshop was held in late November to discuss issues related to the Act with ENGOs, groups representing labour, industry, and aboriginal peoples, as well as other government departments.

Some Successes To Date

Given the relatively short time during which the Act could be expected to produce measurable effects, it is still too early to draw definitive conclusions regarding the success of CEPA in meeting its objectives. Strategies for managing most CEPA-toxic substances are still in the development stage. Moreover, it is difficult to separate the effects of actions taken under CEPA from those created by other federal legislation, provincial initiatives, green consumerism, industrial changes brought about by the globalization of the economy, recession, free trade and technological innovation. Nevertheless, some preliminary impacts can be attributed to the Act.

Strengthening Health Protection and Disease Prevention

It is difficult to measure the extent to which CEPA has been effective at strengthening health protection and disease prevention by examining indicators of health alone. Many of the health effects associated with exposure to environmental contaminants are multifactorial and environmental exposures are normally lower than those at which health effects would be detectable in the general Canadian population. The actions taken to date under CEPA, however, are expected to contribute to health protection by reducing exposures to potentially harmful substances. For example:

- The *Gasoline Regulations (Amendment)*, which required the phase-out of leaded gasoline, is largely responsible for the reductions in blood-lead levels seen in Canada in recent years;
- Emissions of ozone-depleting substances have been significantly reduced through regulations to control production, consumption and import into Canada of those substances;
- The four PCB regulations have resulted in improved management practices for PCBs;
- Dioxin and furan regulations for pulp and paper mills have been developed;
- Notification regulations for new chemicals and polymers have been completed and will be implemented in 1994. These preventative regulations will ensure that new substances will be screened for health and environmental effects, and controlled where necessary, before entering Canadian commerce.

Improved Connections between Science and Decision Making

Decision making that makes use of scientific findings has improved under CEPA. The *Priority Substances List* (PSL) and the new substance provisions resulted in Environment Canada and Health Canada focusing their scientific efforts in a more systematic manner, improving coordination between their scientific and regulatory arms. Part II of the Act also increased the capacity of these departments to assess and manage toxic substances. A number of regulations ranging from controls on ozone-depleting substances, through pulp and paper effluents, PCB storage, improved application procedures for ocean dumping permits, to new substances notification regulations have been developed under CEPA.

Risk assessment methodologies have been developed. Assessment of 44 PSL substances has been completed, and development of control mechanisms, where controls are identified as the best option, is on-going. As well, the assessment program required by the Act has enabled Canada to participate in and benefit from the sharing of assessment information that

is occurring within the Organization for Economic Co-operation and Development (OECD) and other international forums. In addition, a knowledge base has been developed that will be useful no matter what form of pollution control strategy is adopted in the future. This is reinforced by regular reporting on the state of the environment.

Improved Dialogue with Public and Industry

CEPA contains a number of provisions designed both to enhance public awareness and knowledge about environmental issues and to authorize public participation in the regulatory development and enforcement process. The emphasis on toxic substances created by the Act has raised public and industry awareness of these issues, and the regulatory process has benefitted from their increased participation under CEPA.

The increased emphasis on early consultation and identification of control options has also improved industry's satisfaction with the overall priorities and direction of federal environmental control. In particular, as a consequence of CEPA and related legislation in the provinces, Europe and the U.S., industry now places more effort on attempts to anticipate and minimize future regulatory obligations by controlling the nature, processes and releases to the environment of new substances as they are developed, by developing new and cleaner production processes, and by developing better waste management techniques.

Improved Intergovernmental Coordination

Mechanisms established under CEPA to harmonize intergovernmental environmental protection responsibilities have resulted in more frequent and structured consultations between federal and provincial environmental departments. As well, several provinces have strengthened their own environmental laws since CEPA came into effect. Although CEPA cannot take sole credit for all these improvements, the publicity surrounding the introduction of CEPA may have induced a number of provinces to take this legislative action. It is notable that some of these laws have adopted elements of CEPA.

Improved Coordination of Environment Canada's Legislation

CEPA consolidated most of the environmental protection authorities vested in the Minister of the Environment at the time. This consolidation has helped foster a more uniform approach to environmental management.

The New Realities

The ultimate goal of the Act is the protection of the environment, which is essential to the well-being of Canada. Views about how best to achieve this have evolved since CEPA came into force. The following factors can be expected to influence environmental management in the near future:

- The development and first five years following the implementation of CEPA occurred during a period of dramatic evolution in opinions and strategies concerning environmental and human health protection, resource conservation, economic development, and social responsibility. The focus of this evolution has shifted from environmental protection to the broader concept of sustainable development;

- Increasingly, the management of environmental and health issues is becoming an internationally coordinated activity where standards, targets and schedules are agreed to by countries or blocks of countries and then implemented through domestic action. The scope and complexity of this international policy coordination is widening, and international regulatory harmonization is achieving significance, with increasing emphasis on voluntary standards and codes of practice in addition to controls and regulations;

- Concern over international competitiveness is fuelling greater scrutiny of the relationship between environmental and economic policies;

- International economic and environmental agendas more frequently drive domestic agendas, and, therefore, the international community is likely to scrutinize Canada's domestic policies more closely. The growing recognition of links between trade and environment has led to a number of environmental concerns being addressed in the negotiation of trade agreements. Green protectionism already exists in Europe through pressure to create trade barriers and to boycott products and processes deemed to be unsustainable;

- Today the worldwide market for environmental goods and services is valued at US $280 billion a year, and it is expected to reach US $580 billion a year by the end of the decade. The environmental technologies and services industries sector comprises almost 6,000 Canadian companies directly employing some 90,000 people, with annual domestic revenues of more than C $10 billion;

- As the limits to a purely regulatory approach become more evident, there has been a shift internationally to an increasing reliance on a mix of management solutions to environmental problems. These solutions include regulation, economic (market) instruments, voluntary action by industry, promoting the four Rs (reduction, reuse, recycling, recovery), activating social pressure, and setting strategic priorities;

- More burdensome fiscal pressures on Canadian jurisdictions in the 1990s continue to limit the resources available for environmental and health protection. Governments at all levels can be expected to attempt integrating their activities in order to capture the economic benefits from elimination of overlap and duplication.

The new realities do not call for reduced health and environmental protection. Rather, there is a recognized need to re-examine the means by which health and environmental protection should be delivered in this changing climate.

ISSUES FOR DISCUSSION

This part of the paper will identify some key issues for discussion and possible options for consideration. The issues are grouped under nine broad themes.

Sustainable Development

How can the Act contribute to the attainment of sustainable development? Should CEPA make specific reference to biodiversity, and if so, in what context? Does CEPA provide the necessary flexibility to adapt to the changing understanding of ecosystem management strategies over the past five years? How can CEPA contribute to coastal zone management?

Intergovernmental Harmonization and Coordination of Legislative and Regulatory Authorities

The first issue concerns the existing provisions in CEPA for facilitating federal-provincial/territorial cooperation. The second arises from the current climate that exists for greater federal-provincial/territorial harmonization of environmental protection within Canada.

Environmental Management within the Federal Government

The first issue concerns the interface between CEPA and relevant provisions of other federal environmental legislation. The second concerns the provisions for keeping the federal house in order. The third examines the option of amending the Act to explicitly address environmental protection on reserve lands.

Pollution Prevention

The issues raised primarily revolve around mechanisms and tools for promoting pollution prevention: mandatory pollution prevention planning; voluntary and negotiated approaches; technology assistance mechanisms; economic instruments; information mechanisms/community-right-to-know. In addition, the issue is raised of whether CEPA should be amended to incorporate provisions for addressing environmental emergencies, particularly in the areas of prevention and preparedness, as well as environmental damage.

Enforcement

Issues focus on the inclusion in the Act of additional enforcement tools and on the application of existing enforcement tools to parts of CEPA to which they cannot currently be applied.

Human Health and Environmental Protection

Issues include public input and participation in the risk assessment process; designation of "toxic;" coordination of risk assessment and risk management for existing substances; insufficient information; accountability in CEPA; significant new uses; adjustments to new substances provisions; scope of new substances provisions for biotechnology products; provisions for reporting adverse effects of existing substances; single substances versus complex mixtures; and strategic options.

International Dimension

How does the development of new international obligations impact on the present language and administration of CEPA, and on the mechanisms designed to promote federal-provincial/territorial cooperation in the field? What is the future role of CEPA in the treaty implementation process in Canada?

Administration of CEPA

The most important issue here is the manner in which priorities are set and results defined. Other issues revolve around implementation resources and organization.

Technical Amendments

The issue is whether there is any merit in fast-tracking certain technical amendments to CEPA while the examination of broader policy issues and questions continues.

Sustainable Development

Sustainable development — the integration of economic, environmental and societal decision making to maintain the welfare of people and the global ecosystem for present and future generations — is supported strongly by a majority of Canadians. CEPA makes little reference to the concept of sustainable development which was in its infancy during 1986-87 when the Act was being developed.

This review provides an opportunity to examine how the Act can contribute to the attainment of sustainable development.

In addressing this issue, several factors should be kept in mind. It is well recognized that sustainable development cannot be promoted entirely by one level of government, or through a single piece of legislation or other instrument. The concept of sustainable development is broad, encompassing international, social, economic, cultural, human health, and ecological issues. Although sustainable development often focuses on the environment and economy, the Brundtland Commission also recognized human health as a key component, while the World Health Organization has noted the reciprocal relationship of human health and sustainable development — one depends on the other.

Sustainable development is about behavioral change. It demands fundamental change in the decision-making processes of governments, industry and the general public. Its institutionalization will require the merging of public policies, in particular those in support of competitiveness, job creation and the environment. And, perhaps most importantly, sustainable development calls for the integrated participation of all levels of government, the private sector, a diverse array of institutions and interest groups, and the public at large.

The role of CEPA in contributing to sustainable development needs to be discussed in the context of current efforts to develop a national strategy that sets out principles and criteria for sustainable development. Canada committed itself to generating such a national strategy at the United Nations Conference on Environment and Development. Many provinces and municipalities as well as social and industrial sectors have developed or are developing their own sustainable development strategies.

Biodiversity

Biodiversity — the variability among living organisms and the ecological complexes of which they are part — is receiving considerable attention at present. Like sustainable development, it is a broad-based topic. As well, biodiversity and sustainable development are tightly linked. Biodiversity encompasses resources, such as wild flora and fauna, landscapes, fisheries, agriculture and forests, that are under the responsibility of different agencies within the federal government or under the constitutional purview of the provinces or of aboriginal peoples through land claims legislation. CEPA contains no reference to biodiversity, but the implementation of the Act in its existing form, or with changes, will have an impact on biodiversity. Should CEPA make specific reference to biodiversity, and if so, in what context?

Discussion of the role of CEPA vis-à-vis biodiversity has to take into account the Canadian Biodiversity Strategy that is currently being developed through stakeholder consultations. The strategy will address the issue of how Canada should or could best meet its obligations under the United Nations Convention on Biological Diversity. As part of the process, an inventory of federal policies, programs and legislation was prepared so that the government could identify necessary changes. A similar exercise was undertaken at the provincial/territorial level. In keeping with commitments made at the United Nations Conference on Environment and Development and in accordance with the Convention on Biological Diversity, the aboriginal peoples are key players in the preparation of Canada's national biodiversity strategy.

Ecosystem Approach

One aspect of sustainable development is the increasing emphasis on moving from the narrow concept of "environmental quality" to the more encompassing and integrated view of "ecosystem health," which implies integrated management of ecosystem components (air, land, water, and biota, including humans), all of which function together to maintain the integrity of the whole. The ecosystem approach is not a new idea, but it is an evolving perspective. Does CEPA provide the necessary flexibility to support and adapt to the changing understanding of ecosystem management strategies that has taken place over the past five years? Such a question inevitably has to discuss the definitions of the terms "ecosystem approach" and "ecosystem health."

CEPA currently does not prohibit the adoption of an ecosystem approach, but neither does its wording promote or encourage it. It is likely that there would be widespread support for broadening the emphasis so as to encompass the principles of an ecosystem approach and ecosystem health goals. Extending that emphasis to address ecosystem variation or cumulative effects, whether it be through the use of regulation, economic instruments or voluntary action, would be somewhat more complex.

For one thing, there is insufficient scientific knowledge to guide informed decision making on ecosystem functioning. The knowledge base must be extended before it can be applied widely within the currently rigorous science/decision-making process within CEPA. Current scientific uncertainty with regard to the ecosystem approach raises the concept of the "precautionary approach," as described in Principle 15 of the Rio Declaration on Environment and Development: "When 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." Should CEPA be amended to embrace this principle?

As well, CEPA currently requires that regulations dealing with toxic substances be national in scope. Any change in that respect may modify the federal role in regulating toxic substances. Ecosystem components are commonly managed independent of one another under a variety of laws and institutional arrangements. The ecosystem approach is dependent on cooperation among all levels of government. It focuses on the development of ecosystem health objectives and the strengths of each jurisdiction, rather than on the division of powers.

Coastal Zone Management

Canada's near-shore and shoreline areas have suffered from environmental degradation, habitat loss and conflicts among resource users. These worsening conditions have increased the long-standing interest in developing and implementing a coastal zone management (CZM) framework for Canada. The situation is common to other coastal nations and has resulted in international agreements — to which Canada has responsibilities — that call for integrated management of coastal areas.

Agenda 21 of the United Nations Conference on Environment and Development recognized the special importance of the oceans and coastal zones in relation to sustainable development and calls for coastal states to commit themselves to integrated management of and sustainable development for coastal areas and the marine environment. Recommendations adopted in 1992 by the OECD oblige member countries to facilitate the long-term planning and management of their marine environments.

Due to the multi-faceted and multi-jurisdictional nature of CZM, it is recognized that no single initiative can address it in Canada in a holistic manner. A process involving a series of steps, some of which are already underway, and a combination of policy tools at the disposal of governments would allow a more integrated effort to manage the coastal zones and their ecosystems in Canada. CEPA is one of the federal instruments that the federal government could use to address its responsibilities for protecting and enhancing the coastal zones of Canada.

Although all of CEPA may have some application to marine or coastal activities, Parts I and VI have the most relevance to CZM. Part I as drafted has the potential to contribute towards such CZM goals as maintaining a high-quality coastal environment, raising public awareness and controlling pollution from land-based sources.

CEPA Part VI (Ocean Dumping) is limited to the disposal of wastes at sea, which accounts for only an estimated 10 per cent of the pollutants entering the marine environment; it therefore lacks the comprehensive scope required for CZM. Without major changes this part of the Act cannot have a significant role in CZM, but its restrictions on ocean disposal are complemented by the requirements and prohibitions of other federal legislation. At least 15 departments and agencies administer over 40 pieces of legislation relating to marine environment. While the existing legislative framework has allowed the federal government to protect and manage particular aspects of the marine environment, the legislation was not designed to protect and enhance coastal areas as ecosystems. As a result, not much attention has been paid to the land/sea interface.

Intergovernmental Harmonization and Coordination of Legislation and Regulatory Authorities

Under the Constitution, responsibility for the environment is shared by the federal and provincial governments. Not surprisingly, this has led to overlapping environmental responsibilities. Interjurisdictional coordination is essential, therefore, to achieve efficient and effective environmental protection and to progress towards sustainable development on a national basis.

Existing Cooperative Mechanisms

Several provisions in CEPA encourage federal and provincial regulators to cooperate on environmental matters of mutual interest in order to avoid overlap and duplication of effort. The three major mechanisms for cooperation involve the Federal-Provincial Advisory Committee (FPAC), equivalency agreements and administrative agreements.

Members of FPAC have expressed a general satisfaction with the operations of the Committee. Administrative and equivalency agreements have been under negotiation for several years, with the current priority being placed on negotiating administrative agreements. The emphasis in negotiations over the last year or so has been on the development of a one-window approach whereby industry would be provided with a single regulatory contact representing the interests of both levels of government. Although no administrative or equivalency agreements have been signed with the provinces, several are in advanced stages of the negotiations.

Recent negotiations have focused on requests by some provinces for funding of costs incurred under administrative agreements. As for equivalency agreements, the major stumbling block concerns section 34(6) of CEPA which requires, in part, that provincial legislation contain provisions that meet the criterion for equivalency defined in sections 108 to 110 of the Act. At present, only Saskatchewan and Alberta have such provisions. Most provinces are addressing this issue, however, and some are already preparing the legislation.

Harmonization of Environmental Protection Regimes in Canada

Proposed amendments to existing cooperative mechanisms must be examined in the wider context of what is happening in the area of federal-provincial/territorial harmonization of environmental protection objectives. The perception that environmental protection in Canada is expensive, duplicative, unpredictable and a hindrance to Canadian competitiveness is widespread. Business, industry and ENGOs, often from different perspectives, are lobbying governments at all levels to rationalize their environmental management regimes so as to make administrative provisions more efficient and effective.

Environment ministers in Canada, under the auspices of the Canadian Council of Ministers of the Environment (CCME), have been consistent over the years in calling for greater harmonization of environmental activities in Canada. Their success has been irregular owing to jurisdictional protectionism, differing priorities among governments, and failure to agree on fundamental divisions of responsibility and capacities to act on environmental issues.

The commitment now exists within the broader political context, with considerably greater hopes for success, to rationalize the environmental management framework. The current spirit of agreement among governments in Canada for harmonization of policies and programs and for elimination of regulatory duplication and overlap offers important opportunities for significant progress.

CCME has recently undertaken a major new initiative to harmonize environmental management in Canada while maintaining a consistent and high level of environmental protection. CCME ministers have agreed to proceed with an Environmental Management Framework that does not require constitutional change: harmonization is to be achieved within existing jurisdictional limits. The matching of roles and responsibilities to respective strengths and capacities within federal and provincial/territorial environmental departments is regarded by all jurisdictions as the key component of efforts to harmonize environmental management in Canada.

The manner in which Parliament conducts the CEPA review will be seen by the provinces/territories as a bellwether of the federal government's commitment to harmonization. The question of CEPA, its scope, orientation, content, as well as federal-provincial/territorial arrangements, all are viewed as matters which should be addressed only after the CCME Task Force on Harmonization has issued its initial report in May of this year on principles and objectives to guide the preparation of the Environmental Management Framework. Harmonization efforts, it is argued, will set the context and largely determine how things are going to be done in the future. An intergovernmental agreement on federal and provincial/territorial roles and responsibilities in the field of environmental protection could potentially be applied to CEPA and to the many other acts for which the federal government is responsible.

Environmental Management within the Federal Government

With the introduction of CEPA, the federal government committed itself to demonstrating moral leadership and responsibility in the field of environmental protection in Canada.

Interface between CEPA and the Relevant Provisions of Other Federal Legislation

One of the objectives of CEPA when it was proclaimed in 1988 was to consolidate some of the environmental protection authorities vested in the Minister of the Environment at the time. The consolidation of these provisions within CEPA has helped foster a more uniform approach to environmental management than was the case under the formerly distinct statutes. CEPA represents a much more powerful and inclusive legislation than any previous federal environmental legislation. By no means, however, does it constitute a comprehensive environmental protection act.

There are some 50 statutes in a number of other federal ministries that have environmental protection provisions. Moreover, the landscape of federal environmental protection legislation has changed significantly. The passage of statutes, including the *Canadian Environmental Assessment Act*, the *Yukon Waters Act* and the *Northwest Territories Waters Act*, and the amendment of several other pieces of legislation, such as the *Fisheries Act*, the *Canada Shipping Act* and the *Motor Vehicle Safety Act*, have taken place since CEPA was proclaimed.

One issue for discussion concerns the interface between CEPA and the relevant provisions of other federal legislation. CEPA is often criticized as existing within a patchwork of regulations and policies. Are federal responsibilities being met in the most effective and efficient manner? It is abundantly clear from the preceding section that this issue must be considered within the wider context of what is going on today in the area of federal-provincial/territorial harmonization of environmental management in Canada.

Keeping the Federal House in Order

As Canada's largest enterprise and as the Crown responsible for the Yukon and Northwest Territories, the federal government potentially has a huge impact on the environment. Within the context of CEPA and federal environmental stewardship, the federal government has the opportunity to demonstrate leadership and commitment. All parts of CEPA are binding on the Crown. The key provisions to accomplish the "cleaning of its own house" are found in CEPA Part IV - Federal Departments, Agencies, Crown Corporations, Works, Undertakings and Lands. To date, very little has been accomplished in implementing Part IV of CEPA.

There has been some criticism based on the perception that a double standard exists between the federal government and the private sector when it comes to regulating operational requirements and enforcing toxics regulations. Part IV of CEPA authorizes the Minister to regulate specific activities of federal agencies otherwise controlled under provincial jurisdiction; these include waste handling, disposal practices, and the release of emissions and effluents. The legislation provides a mechanism to develop guidelines and regulations that apply to federal lands, works and undertakings. In some cases, the impact of

federal activities has caused strained relations between provincial and federal agencies. Absence of use of the provisions of CEPA Part IV has been pointed to as evidence of the lack of federal commitment to environmental stewardship. As a result, industry questions the government's moral authority to exert environmental quality controls on the private sector.

The issues highlighted above must be considered within the context of federal initiatives taken outside of CEPA to put the government house in order — CEPA provides only one tool to accomplish this task.

Through the Green Plan, the federal government made a commitment to operate its facilities in an exemplary manner. The primary mechanisms mentioned were the Code of Environmental Stewardship, environmental audits and the establishment of an Office of Environmental Stewardship, as well as legislative tools. In addition, Treasury Board amended the Real Property Management Manual so as to require departments to include environmental considerations in the acquisition, management and disposal of real property. Departments were also required to prepare environmental action plans and regular progress reports that are available to the public. Federal departments, in cooperation with their internal-audit units, have started to implement policies and procedures for environmental auditing. As indicated in the Stewardship annual report, departments are making progress in responsible environmental stewardship, although it may not be as fast or as comprehensive as might be wished.

It should be noted also that many departments already follow provincial and local environmental requirements. This is being done on policy grounds and not because federal departments are legally bound by provincial or local requirements. Owing to variations in provincial environmental requirements, some federal departments choose, for operational efficiency, to adopt the highest provincial standard which they can use uniformly across the country. There may be incremental costs to departments in formally meeting provincial requirements.

As well, current discussions about the possible roles and functions of an environmental auditor general include addressing the negative perception of federal agencies' environmental efforts.

Reserve Lands

When Part IV of the Act was incorporated into CEPA, specific reference was made to Indian reserves at the request of the provinces to reduce the possibility of such lands being used to avoid provincial anti-pollution laws. To date, Part IV has not been used to develop regulations for Indian lands. At issue is whether the Act should be amended to explicitly address environmental protection issues on reserve lands.

First Nations, and federal and provincial/territorial governments have raised concerns about environmental problems on reserve lands, such as landfill/solid-waste sites, fuel storage tanks, contaminated water and soil (hydrocarbons), and sewage treatment plants. Many of the environmental problems on reserves are not being dealt with because of a regulatory gap.

Only some provincial environmental protection legislation and regulations apply to reserves. Since the *Constitution Act* (1867) assigns jurisdiction of lands reserved for Indians to the federal government, provincial environmental laws relating to land usage likely do not apply to reserve lands. Because of this provincial legislative and regulatory gap, First Nations are not afforded the same level of protection as is provided to other Canadians.

The *Indian Act* allows the Minister of Indian Affairs and Northern Development to pass regulations and band councils to pass by-laws, but because the *Indian Act* is silent in the area of environment, First Nations and the Minister are prohibited from making by-laws or regulations in environmental protection unless they relate to the protection and preservation of fur-bearing animals, prevention and spread of diseases, provision of sanitary conditions, prevention of nuisances, and zoning. The Act is weak and ineffective in terms of environmental protection. The maximum penalty for a regulation under the Act is $100 and $1,000 for a by-law. The Act has no provisions for environmental inspection or investigation, and does not provide for effective enforcement powers, such as search and seizure.

As the cornerstone of federal environmental protection legislation, CEPA is a possible vehicle for addressing environmental protection issues on reserve lands.

In the development of a solution to the legislative and regulatory gap on reserve lands, a number of issues must be addressed. These include the need for equivalent standards and levels of protection on and off reserves, appropriate and effective enforcement mechanisms, flexible and culturally appropriate penalties, First Nations law-making power, the need for consistency with the future direction towards devolution and self-government, and harmonization of federal, provincial and First Nations environmental management regimes. Some of these will require legislative change. First Nations must also have a voice in Canada's Environmental Management Framework.

Discussion of the issues highlighted above must take place with the active involvement of First Nations. The federal government is committed to working in partnership with the aboriginal peoples in finding solutions to critical problems. During the CEPA review, aboriginal peoples must be provided opportunities to participate in decisions affecting the future environmental protection framework in their communities.

Pollution Prevention

A growing body of evidence indicates that employing pollution prevention techniques will not only produce real and significant environmental benefits but also result in optimizing economic benefits, and reducing economic and legal liabilities. Consensus is emerging among ENGOs, labour, industry and governments that pollution prevention offers an efficient and effective approach to environmental protection.

There are several different expectations for and approaches to designing and implementing pollution prevention principles and practices. In some areas there is agreement; in others, disagreement. Some argue for a national, legislated pollution

prevention strategy developed under the auspices of CCME, with a strong federal leadership role. Others argue for a national pollution prevention strategy, but not one that must be legislated. Many agree, though for different reasons, that in the short term the most realistic approach for shaping the federal role within a national legislative framework for pollution prevention should begin with an examination of CEPA.

Supporters of CEPA introduced the Act in 1988 as a pollution prevention statute. As currently written, CEPA has a great deal of potential for implementing pollution prevention strategies. Indeed, a number of such strategies have already been implemented and several others are planned for the near future. But, it can be argued that the concepts and strategies of pollution prevention have evolved so rapidly in the past five years, that even if CEPA was seen as a pollution prevention law in 1988, it must be re-examined in light of the current understanding of pollution prevention.

Discussion of the legislative potential for pollution prevention principles and strategies in the Act must be fully appreciative of the limits of federal and provincial authority in this area. The vision of pollution prevention embraces every sector of Canadian society and includes local, regional, national and international dimensions.

Definition of Pollution Prevention

One primary issue to consider in amending the Act to accommodate pollution prevention is the lack of agreement on a common definition of pollution prevention. Since it first came to prominence in the early 1980s, the definition of pollution prevention has actually shifted from a broad, inclusive meaning to a collection of disparate, fragmented and, at times, mutually exclusive definitions. Any legislative efforts to incorporate a definition of pollution prevention inevitably is faced with clarifying where pollution prevention ends and where pollution control begins. Should the definition of pollution prevention focus on the creation and use of potentially harmful substances or on the release of potentially harmful substances? Or should it focus on all three: the creation, use and release of potentially harmful substances?

Mandatory Pollution Prevention Planning

Another major issue for debate concerns amending the Act to incorporate mandatory pollution prevention plans. Environmental and labour groups have argued for mandatory pollution prevention planning legislation similar to that adopted in many states in the U.S. Industry, on the other hand, has argued that pollution prevention is being adopted widely, that forcing all firms to produce plans is unlikely to yield meaningful results and that legislation should be restricted to cases where there is a clearly demonstrated need.

Any discussion of amending the Act to accommodate pollution prevention plans should consider the extent to which current provincial laws require pollution prevention planning, with a view to harmonizing the content and format of such plans for federal and provincial regulators and the private sector.

Voluntary and Negotiated Approaches

Many argue that voluntary and negotiated approaches are particularly well-suited to the development of pollution prevention strategies. The main argument in their favour is that such approaches provide one of the most cost-effective ways of moving towards pollution prevention and a sustainable economy. At issue is whether CEPA should be amended to embrace voluntary action as a key means of developing pollution prevention planning.

The non-regulatory nature of the instruments outlined in section 8 of the Act and the wide scope given to the Minister in formulating these instruments ensure that this provision is well-suited to the development of voluntary pollution prevention strategies. To the extent that industry cannot meet the targets agreed upon in voluntary programs, some would argue that a legislative backdrop may be necessary in order to meet environmental objectives.

Technology Assistance Mechanisms

The importance of technological development and transfer in the shift towards pollution prevention cannot be stressed enough. Abundant evidence exists that clearly identifies many of the new and emerging technologies as important building blocks of a sustainable economy. Production processes and operations that avoid, eliminate or greatly reduce the generation of pollutants often also increase the competitiveness and profitability of industries. The pollution prevention opportunities provided by mechanisms that can be used for technological assistance, such as tax write-offs and government loans and grants, are considerable. At issue is whether the Act should be amended to enable financial incentives directed at pollution prevention initiatives.

The use of the federal spending power along with the statutory mandate provided by section 7 of the Act provide the Minister with the necessary authority to implement technology assistance initiatives. Many argue, however, that consideration should be given to amending the section to include a specific reference to technological assistance mechanisms directed at pollution prevention initiatives. Any discussion of this issue must recognize that statutory authority enabling such incentives can reside in legislation other than the CEPA.

Economic Instruments

Any discussion on pollution prevention and its role in CEPA has to consider the role of economic instruments, such as emissions trading programs, taxes and charges. In 1988, the federal government favoured a strong regulatory approach to pollution control, as did many other jurisdictions both in Canada and abroad. Five years later, the emphasis is broadening as the costs of, and limits to, a solely regulatory approach are becoming increasingly evident. The issue at hand is whether the current command-and-control tools alone can do the job or whether economic instruments are also needed.

Many in Canada recognize the continued importance of command-and-control tools within the Act, particularly when action is needed to protect from immediate serious threats to human health and the environment. But there are other instances when the available tools within the Act provide limited flexibility in securing compliance with the law in an efficient and effective way. Some regulations, particularly those designed to specify product characteristics or to limit the discharge of substances, provide little incentive to more rapid technological innovation and progress on both environmental and economic fronts. The main argument in favour of economic instruments is that they provide industry with both the incentive and flexibility to minimize the aggregate costs of pollution abatement and to develop cleaner methods of production and more effective technologies.

An important consideration is the issue of effective compliance verification mechanisms and enforcement standards. Economic instruments sometimes cannot "stand alone" but must be supported by a command-and-control device setting a limit or ceiling (e.g., a regulation)

that would be used in the event of non-compliance. The potential importance of command-and-control tools in supporting economic instruments in certain situations must be explored.

Information Mechanisms/Community-Right-to-Know

Clarification of the legislative authority for collecting and compiling national inventories, and public reporting of information lie at the heart of any discussions on information mechanisms within CEPA. The need for clarification results from increased interest in applying the concept of community-right-to-know, which could include public access to information on all aspects of the life cycle of a substance manufactured, processed, imported, produced as a by-product, released to the environment, stored, used in a product, transferred to another place or transferred to a recovery or waste-disposal facility. This concept has been favoured by environmental, labour and other voluntary sector organizations in Canada for purposes such as emergency planning, monitoring progress in pollution prevention and tracking either voluntary or mandatory reduction requirements. Industry has expressed concerns about the safeguarding of confidential business information that relates to the use, storage and processing of substances.

Section 16 is particularly relevant to the generation of information for pollution prevention purposes. Currently, legislative authority for the *National Pollutant Release Inventory* (NPRI), a comprehensive inventory of specified substances released into the Canadian environment, lies in section 16.

The question to be explored involves whether to expand the Act to allow the collecting and reporting of information contained in inventories, such as the NPRI. The original concept for the NPRI was derived from a similar inventory in the United States (the *Toxics Release Inventory*) established in 1986 under the U.S. Emergency Planning and Community-Right-to-Know legislation. This inventory allowed the U.S. government to collect information on transfers and on-site use and storage of toxics and other hazardous substances, as well as release information.

At the time of its development, the NPRI was intended to collect substance-release information on an annual basis and make it available to the public. A 1993 CEPA section 16 notice requires individuals meeting the NPRI reporting criteria to submit information on releases and transfers of NPRI listed substances to the Minister by June 1, 1994. The need for legislative review arises because section 16 was not designed specifically to gather annual information or to make inventory information publicly accessible. In addition, as CEPA stands, individuals who do not want reported information made public could challenge the basis on which information was acquired and made public, or simply make a claim for confidentiality.

The NPRI represents a first step towards implementing community-right-to-know in Canada, but the inventory itself and the commitment to make reported and other information public has no basis in law. The issue of collection and public release of information that was unresolved during the development of the NPRI needs to be explored.

Environmental Emergencies

In 1988, when CEPA became law, it was considered premature to include environmental emergency provisions. The international regulatory regime had not evolved sufficiently to provide appropriate models. Secondly, as an initial strategy, the federal government had chosen to support voluntary approaches in cooperation with or supporting industry. The five-year review explicitly included in CEPA allowed sufficient time to evaluate the degree to which these approaches might meet the federal government's environmental emergency goals.

Many favour confirming in law a shift in environmental emergency focus, from responding to incidents to preventing them, in a paradigm similar to shifting from pollution control to pollution prevention. Although it is recognized that being prepared for and responding to emergencies will always remain a high priority, and that adequate laws must exist to require efficient and expedient responses, more emphasis is needed on prevention. The current combination of federal statutes and regulations that deal with environmental emergencies leaves significant gaps, particularly in the areas of prevention and preparedness. Some see weaknesses in the Act's present event- (i.e., response) driven mandate at a time when public bodies are increasingly focussed on risk reduction and prevention.

A primary consideration in amending the Act to promote an enhanced prevention focus is the lack of agreement on the appropriate balance between legislated requirements and self-regulation by industry. Some see the CEPA review as an opportunity to rationalize an environmental emergency framework by creating complementary and consistent standards for all facilities and operators handling oil and hazardous materials. The degree to which environmental emergency provisions in an amended CEPA could be harmonized with existing provisions of other federal legislation, with those of the provinces/territories and with those of parties to the North American Free Trade Agreement (NAFTA) and the North American Agreement on Environmental Cooperation (NAAEC) would have to be examined. Such a national framework would enable Canada also to meet its international obligations for emergency prevention and preparedness.

Another consideration is whether or not the parties causing emergencies should be liable for providing full compensation for any environmental damage. Claims could include compensation for both direct and indirect economic losses arising from damages to the natural environment.

Enforcement

With the introduction of the *Canadian Environmental Protection Act*, a new direction was announced for federal environmental enforcement, a direction which promised rigorous enforcement using a range of tools from warnings through inspector's directions to ticketing, prosecution and civil suits. Despite the new emphasis on enforcement as a primary tool for achieving compliance with the Act, that enforcement has not been as successful as had been hoped.

A primary consideration in discussions on enforcement under CEPA concerns the practice of using the courts to address violation of regulations through the trial-and-punishment process of the justice system. A corollary to this issue is the proposal, raised

in the Government's *Creating Opportunity* document, "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." The courts are only beginning to drop their reluctance to view environmental offenses in the same category as traditional criminal offenses, and recognition by the courts of the seriousness of environmental offenses is coming steadily but slowly.

A principle that underlies any effective enforcement and compliance program is that violations must be handled without undue delay. The process of a criminal prosecution can take anywhere from 18 months to four years — a considerable period. For this reason, there is greater interest in using administratively imposed penalties in addition to resorting to the criminal court system. It is argued that this combination would put less pressure on Canada's criminal court system, as only the most serious cases would justify formal court action: damage or risk of damage to the environment, poor compliance history of an alleged violator and unwillingness of an alleged violator to correct the violation and/or prevent recurrence.

Any discussion of amendments to the Act to incorporate new enforcement methods must take into account current initiatives for federal-provincial/territorial harmonization of environmental management. Enforcement tools under CEPA would form part of that dialogue.

Administrative Penalties

If administrative penalties were available under CEPA, sanctions could be imposed without the need of prosecution in order to obtain a conviction in court. If the Act is amended, however, to allow for the establishment and use of administrative tribunals and penalties, it must be recognized that there may be considerable costs associated with the creation of an administrative penalties scheme.

Negotiated Settlements/Compliance Guarantees

CEPA does not authorize the development of negotiated settlements or compliance guarantees. These instruments are sometimes viewed as being "back room deals" or softening or delaying tactics. When used properly, however, they can result in creative solutions which protect, enhance or restore the environment more swiftly than through a criminal trial process and without the legal costs that such trials impose. If CEPA is amended to provide the authority for negotiated settlements and compliance guarantees, then the question of penalties to ensure compliance with those settlements and guarantees has to be addressed.

Administrative Orders

There are few provisions in CEPA authorizing the use of administrative directives. Such powers are useful in situations where swift action is necessary. They are found in provincial statutes, and are being added to new federal legislation such as the revised *Pest Control Products Act*. Should CEPA be provided with similar powers, and the circumstances and conditions surrounding their use?

Inspector's Powers

Another issue for discussion concerns provisions for inspector's powers. One problem with the existing powers is that they do not adequately address the situation where the occupant does not consent to the inspection of the premises. Should the Act be amended to provide warrants for inspectors to inspect business premises where an owner or operator refuses consent? Another problem arises from the fact that inspectors lack authority to secure compliance when directing that non-compliant activity be stopped or that preventive or corrective action be taken, except in instances where there is an unauthorized release of a regulated substance or the likelihood of such a release. Moreover, the existing authority for inspectors to issue directions when there is an actual unauthorized release or the likelihood of such a release is not consistent throughout the Act: it is not available under Part VI in relation to ocean dumping. An additional question to explore arises from the request of inspectors for powers to serve subpoenas and summons in accordance with sections 509(2) and 701(1) of the *Criminal Code*.

Human Health and Environmental Protection

Human health is inextricably linked to the environment through the air we breathe, the water we drink and the food we eat. Environmental quality is often perceived by the public as a health issue: half of the respondents in public opinion surveys (1989-92) felt that their health had been affected by pollution. CEPA is an important instrument for assessing and managing the health and environmental risks related to toxic substances. It is one of several acts dealing with the management of toxic substances for which Health Canada and/or Environment Canada have responsibilities (either on their own or shared with other departments), including the *Food and Drugs Act*, the *Hazardous Products Act* and the *Pest Control Products Act*.

Public Input and Participation in the Risk Assessment Process

While the transparency of the assessment process under CEPA has been increased by such documents as "Determination of 'Toxic' Under Paragraph 11(c) of the *Canadian Environmental Protection Act*," certain industry groups have requested greater input into the assessment process. Important issues to be considered include the role of stakeholders in the priority substances process, the need to protect the scientific integrity of risk assessment, the role of societal values in risk management, and the potential increase in time and resources necessary to complete stakeholder assessments.

Designation of "Toxic"

Both the word "toxic" and its definition in CEPA have been subject to criticism. The definition of "toxic" in CEPA contains the notion of risk (encompassing both toxic properties and exposure) and is consistent with current principles of risk assessment. This definition, however, is not consistent with the scientific definition or the public's understanding of the word. Consequently, there are misunderstandings about the meaning of concluding that a substance is or is not "toxic under CEPA." It is important to consider how the results of risk assessment under CEPA can be communicated more clearly than through the word "toxic."

Coordination of Risk Assessment and Risk Management for Existing Substances

Various stakeholders have expressed concern about the risk assessment process to date under CEPA, focusing on priority substances. The risk assessment phase, which is now complete for the first *Priority Substances List*, is a scientific exercise that helps determine whether a substance is "toxic" as defined in CEPA. Societal judgements concerning acceptability of health or environmental risk are not considered part of risk assessment, but part of the subsequent stages of risk management.

Current practice under CEPA results in three options following risk assessment (i.e., "toxic," not considered to be "toxic" or "insufficient data for assessment"). Consideration may be given to other options, such as risk assessment resulting in a ranking of priorities for further action. Another important issue is whether closer coordination is needed between risk assessment and risk management in CEPA.

Insufficient Information

Some priority substances could not be assessed for health or environmental effects because of insufficient scientific information. An issue to consider is whether the acquisition of additional data for completing assessments should be formally incorporated into the priority substances process, and how to integrate that step into the time limits for completing assessments.

Accountability in CEPA

One strength of CEPA lies in imposing mechanisms of accountability on various programs, including time limits, publication of assessments and opportunity for public input. The need for accountability mechanisms for risk management, and the nature of these mechanisms should be considered. It will be important to consider the impact of existing time limits (new substances, priority substances), and any new time limits, on resources, potential loss of ability to control substances, and quality of assessment and management options.

Significant New Uses

Part II of CEPA provides for the assessment of new and existing substances. New uses of a substance previously assessed as not being "toxic," however, may increase its exposure and therefore the risk, and the substance could then be considered "toxic," as defined in CEPA. An important issue for discussion will be the need for a process of reassessment of substances if they are used in a new or different way.

Adjustments to New Substances Provisions

Minor technical revision of a number of legal and technical items would improve the implementation of the new substances provisions of CEPA Part II for both government and industry.

Under the present structure of CEPA, importation or manufacture of a notified substance cannot commence until the regulatory prescribed period of assessment has expired. To avoid unnecessary complications for government and the regulated parties, the issue of providing government with the statutory authority to permit import and manufacture after the assessment has been completed, if the substance has been found to be non-toxic, should be considered ("greenlighting").

There is a need to modify the Domestic and Non-Domestic Substances Lists for administrative purposes. For example, a more appropriate name for a chemical may be developed, more current information regarding the identity of a substance may become available, administrative errors may occur, and there is a commitment to begin updating the Non-Domestic List in 1995. Although substances may be added to or deleted from the Domestic and Non-Domestic Lists in accordance with the specific procedures noted in the statute, consideration should be given to the addition of a general provision in CEPA to permit the Minister to amend the lists from time to time in order to correct errors and facilitate application of the regulations.

Scope of New Substances Provisions for Biotechnology Products

The federal framework for regulating the rapidly emerging products of biotechnology calls for the use of existing legislation. Therefore, many acts and departments will be involved. The new substances provisions of CEPA set out criteria for determining whether substances subject to other acts can be reported under CEPA. It may be necessary to reaffirm whether these provisions provide the best mechanism for ensuring health and environment protection and efficient regulation of biotechnology products.

Provisions for Reporting Adverse Effects of Existing Substances

Section 17 of CEPA requires reporting of adverse effects of existing substances but does not specify what actions should be taken after the information is assessed. The connection between this reported information and mechanisms for further action, particularly for substances regulated under other federal acts, needs to be examined.

Single Substances Versus Complex Mixtures

The CEPA definition of a "substance" is broad enough that almost anything could be defined as a substance for the purpose of the Act. In fact, the first *Priority Substances List* contained substances that were effluents, mixtures, and classes of chemicals. There have been calls, however, from some quarters for greater focus on complex mixtures such as emissions, effluents and wastes. An examination of the benefits and limitations of assessing single chemicals and complex mixtures should consider the availability of methodologies for each approach, and the appropriateness of resulting control strategies for environmental and human health risks.

Strategic Options

Once a substance has been assessed under the PSL process and declared CEPA-toxic, an assessment of management options is undertaken. There are three main types of tools for addressing environmental problems: command and control, economic instruments, and voluntary actions. Each may be regarded as a strategic option, having very different impacts upon innovation, industrial competitiveness and the economy. One issue for consideration is how CEPA can do a better job of assessing — at the earliest possible stage — the various strategic options for limiting the environmental and health effects and the economic impacts that are associated with the release of toxic substances to the environment. In the past, there has been a tendency to select command-and-control without due consideration of the economic impacts of this option compared to the other two. The economic costs must be compared to the environmental and economic benefits of controlling use/release of the substance. This early analysis should drive the selection of strategic options.

International Dimension

The preamble to CEPA notes that "Canada must be able to fulfil its international obligations in respect of the environment." This section looks at the role of CEPA in achieving this objective in a period of rapid expansion and change in the scope and nature of these international obligations. CEPA is one of the statutes in the environmental area which serves this purpose. Other statutes, such as the *Fisheries Act*, the *Migratory Birds Convention Act*, the *International Boundary Waters Treaty Act*, the *International River Improvements Act*, and the *Arctic Waters Pollution Prevention Act*, also serve as vehicles for implementation of Canada's international environmental obligations.

CEPA as a Tool for Implementing International Obligations

CEPA provides legislative authority for the implementation of three areas of international agreements. Part VI implements parts of the 1972 London Dumping Convention. Part II includes specific provisions which enabled the enactment of the *Export and Import of Hazardous Wastes Regulations* in November 1992, to implement the Basel Convention and other international agreements on the transboundary movement of hazardous wastes. Part V provides general enabling provisions for the implementation of international air pollution obligations.

CEPA also provides through its enabling provisions on toxic substances the ability to implement the provisions of those international agreements which regulate matters fitting the CEPA definition of toxic substances. To date, they have been used to implement the prohibitions and limitations of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, and its 1990 London amendments.

Beyond these provisions, CEPA also provides general enabling provisions that can contribute to fulfilling some of the procedural requirements at the international level. These include reporting on Canada's implementation of international environmental obligations, establishing air quality and emission inventories, state of the environment reporting through international bodies, and other such requirements. One issue that could be examined is whether the confidentiality provisions of CEPA constrain the provision of information under international agreements.

Another issue that could be examined concerns Part V, which incorporates provisions of the now repealed *Clean Air Act*. Part V was established as a residual authority which the federal government could use to address international air pollution. Prior to making a recommendation to the Governor-in-Council on a regulation for this purpose, the Minister of Environment must be satisfied that the province or provinces in which the regulated entities are located are not either able or willing to make the required regulations. Part V of CEPA has not been used since the Act was created. The 1992-93 CEPA Annual Report concluded that Part V has not been utilized because the provinces have responded effectively. Nevertheless, the conditions which must be met before it could be utilized are considered by some to be a barrier to its implementation in the future. This raises the question of whether Part V should be amended.

The Future Role of CEPA in Implementing International Obligations

Consideration of the future role of CEPA as a tool for the implementation of Canada's international environmental obligations should take into account the rapid changes that are occurring in the area. Since 1988, there has been a vast increase in the number of international environmental agreements and negotiations. This increase has been fuelled in large measure by the growing acknowledgement of the risks facing the earth's environment, including the atmosphere, and the need to address these risks in a global fashion. As well, the growing recognition of links between trade and environment has led to a number of environmental concerns being addressed in the negotiation of trade agreements.

The complexity of the international environmental agreements has also grown significantly. The 1992 Framework Convention on Climate Change is a clear example of this. Even a cursory reading of its provisions reveals the extent to which almost every aspect of day-to-day life has been reflected, from the use of carbon dioxide (CO_2) emitting fuels in the north for energy, heating or transportation, to the cutting of trees for cooking fuel or shelter in the south, to international financing, technology development and assistance, and capacity building in developing countries. The Convention on Biological Diversity similarly contains a number of paragraphs dealing with intellectual property rights and biotechnology among its other diverse aspects. In addition, the development of broad ecosystem approaches to environmental protection and conservation work to expand the scope of the negotiations.

The above changes have generated an increased diversity in the form of international obligations related to environmental protection. Traditional agreements were limited generally to the setting of an international law standard which states were free to implement in the manner they chose. Now at least five types of commitments can be identified. These include framework agreements which set out common understandings on which to pursue further negotiations; international standard setting of the traditional type; mandating the harmonization of domestic standards; procedural commitments at the international level such as reporting or dispute resolution processes and at the domestic level for such things as procedural due process and public rights of participation in environmental decision making; and the enforcement of one's domestic environmental law.

The sheer number of international environmental negotiations ongoing and planned raises the question of appropriate legislation for implementing the obligations. It should be noted that not all international obligations must be implemented through legal means.

The possible articulation within CEPA of a broader authority for the implementation of Canada's international environmental obligations requires an evaluation of the best means for Canada to respond to these developments, bearing in mind past trends and performance in this field. Other existing federal legislation to implement international obligations in the environmental field, as well as provincial jurisdictions should also be considered. In this regard, both government officials and a number of environmental groups have been concerned about the lack of at least a residual authority for implementing international environmental obligations in CEPA, beyond its existing authority.

CEPA as the Object of International Obligations

Another critical aspect of the international dimension is the notion of the content and enforcement of CEPA itself as the object of the obligations, a notion particularly relevant in the context of the North American Free Trade Agreement (NAFTA) and the North American Agreement on Environmental Cooperation (NAAEC). These agreements impose commitments with the United States and Mexico in many areas, including the environmental area. For example, the NAAEC imposes an obligation to "effectively enforce" environmental law in the three countries, and provides mechanisms including international panels, to address complaints of non-enforcement. There is also an obligation to report annually on enforcement practices through the newly created Commission for Environmental Cooperation. These provisions will impose additional challenges on the administration of CEPA, as well as on other federal and provincial environmental laws.

Administration of CEPA

CEPA is complex legislation to administer because of its multi-faceted nature. The federal government has established new management and coordination structures to implement the Act, recruited staff, released assessments of 44 substances on the PSL, refined the assessment process; developed 12 new regulations, improved its compliance and enforcement capacity, liaised extensively with the provinces, launched the Environmental Choice Program, and made important changes in the application of the ocean dumping provisions.

Although an extended learning process has occurred and many actions have been taken to resolve difficulties, some administrative problems persist.

Priority Setting

CEPA sets out a large range of statutory obligations. No clear expression has ever been made of the criteria to be applied in implementing the CEPA array of mechanisms and instruments. The setting of priorities has been determined largely by the operational requisites of CEPA delivery, among which PSL assessments were given the greatest weight. The lack of criteria for determining priorities is widely criticized and believed to hamper administration of the Act. The challenge now is to set out the objectives and desired results that should guide priority setting.

Results Definition

As noted above, a number of positive achievements resulted from the first five years of CEPA adminstration. Since it is premature to expect substantial measurable effects at the time of this review, measuring CEPA performance has had to relate more to the completion of activities, such as the number of PSL assessments completed. The challenge now is to define specific environmental and human health results to be accomplished through CEPA. The issue of results-driven performance measurement also needs to be explored. Results definition, in turn, will likely guide priority setting and define the necessary administrative and institutional arrangements.

Resource Allocation

The total five-year cost for administration of CEPA has been approximately $250 million. CEPA resources are a combination of those A-Base resources dedicated to existing environmental protection measures subsumed by CEPA when it was promulgated, new resources allocated for administration of the Act by the Treasury Board, and Green Plan funding. Green Plan funds, which are scheduled to end in 1996-97, currently account for approximately half of CEPA-related expenses. Modifications to CEPA, either in its administration or powers, will of necessity have implications for CEPA's resource requirements.

Administration of CEPA currently costs Environment Canada and Health Canada about $72 million annually, having risen from approximately $21 million in the first fiscal year of CEPA's operations. This increase in funding has resulted from the implementation of such key areas as monitoring, enforcement and state-of-the-environment reporting. As well, funding has been targeted for the Priority Substances List Assessments, strategic options reports for substances deemed toxic under the Act, and regulatory impact analysis statements for proposed regulations.

Organization

Environment Canada and Health Canada share responsibility for CEPA. Since the introduction of the Act, a good working partnership has been forged between the two departments. Although both departments take part in the assessment, regulatory and guideline development processes, the Environmental Protection Service within Environment Canada is responsible for coordination of CEPA. Within the Department, responsibility for CEPA is shared among several branches. Because of the complexity of CEPA administration, policy elaboration, regulatory development and enforcement activities have been assigned to different managers. The challenge is to ensure that CEPA-related activities are coordinated from an administrative point of view and integrated from a policy perspective.

Technical Amendments

Amendments to a statute can be classified into two broad categories: substantive or policy amendments and technical amendments. Although there is no universal definition for either category, there is general agreement that technical amendments involve non-controversial changes aimed at clarifying specific sections in an act. Unlike policy-oriented amendments that shift the direction or emphasis of a statute, technical amendments are aimed at minor improvements, often of a housekeeping nature.

Is there any merit in fast-tracking certain technical amendments of CEPA to improve its operational efficiency in the short term while the examination of broader policy issues and questions continues?

Opportunities for Fast-Tracking Technical Amendments to CEPA

During its five years of operation, CEPA has generated several hundred comments from various stakeholders concerning suggested amendments. A comprehensive analysis of these comments revealed the following:

- The vast majority of the comments recommended substantive or policy amendments, such as changes in the way CEPA regulates toxic substances;
- Approximately 40 comments dealt with technical amendments. Of these, most had clear policy implications (approximately 30). For example, several comments recommended seemingly minor housekeeping changes to improve information access and disclosure rules. This subject matter, however, is by definition controversial and complex, and implicates other federal laws (the *Access to Information Act*). Therefore, while the changes may seem minor, they have significant policy implications that cannot be easily separated;
- Only a handful of comments involved technical amendments with little or no policy implications. Examples include the need to clarify the definition of "place" in s. 100(1) to include "a means of transport," or to ensure that the English and French versions of s.71(4) both refer to Schedule III.

Given the difficulty and the questionable benefit of separating and fast-tracking technical amendments having policy implications, and the concern that any fast-tracked amendments to CEPA would have to be re-examined when the review of the substantive issues is complete, it may be more efficient to analyze all recommended technical changes at the same time as the substantive issues are analyzed and resolved.