HARMONIZING TO PROTECT THE ENVIRONMENT?

An Analysis of the CCME Environmental Harmonization Process

Prepared for the Harmonization Working Group
of the Canadian Environmental Network

by

Karen L. Clark, LL.B., M.A.
Research Associate

and

Mark Winfield, M.A., Ph.D.
Director of Research

Canadian Institute for Environmental Law and Policy
November 1996

PREFACE

The following report has been prepared by the Canadian Institute for Environmental Law and Policy (CIELAP) for the Harmonization Working Group of the Canadian Environmental Network (CEN).

The paper reflects the views of the members of the Working Group regarding the Canadian Council of Ministers of the Environment (CCME) harmonization initiative, particularly as conveyed at a workshop for members hosted by the Working Group in October 1996. At that workshop members of the Working Group choose to focus the contents of this paper on the cross-cutting issues underlying the harmonization initiative, rather than the development of specific comments on the contents of the proposed Accord and Sub-Agreements released by the CCME in August and September 1996.

The specific items on which analysis was requested by Environment Canada in its Terms of Reference to the CEN are addressed in Appendix A.

The paper was developed under severe time and resource constraints. Readers are referred to the earlier commentaries on the CCME initiative developed by CIELAP and the Canadian Environmental Law Association for more detailed analyses of the harmonization initiative.

The Canadian Environmental Network is a not-for-profit, non-advocacy organization that works to coordinate and facilitate the efforts of environmental organizations across Canada. The Harmonization Working Group was founded in late 1994. Its sole focus has been to review and comment on the CCME harmonization initiative.

Established in 1970, the Canadian Institute for Environmental Law and Policy is an independent, not-for-profit environmental law and policy research and education organization.

TABLE OF CONTENTS

EXECUTIVE SUMMARY

This report has been prepared to comment on and propose an alternative to the federal-provincial environmental harmonization project of the Canadian Council of Ministers of the Environment (CCME).

Dynamic Federalism Versus Harmonization -- The report reviews the record of environmental protection under the "dynamic federalism" that has always been an element of Canadian politics and law-making. The record shows that dynamic federalism helps to protect the environment by encouraging action by both levels of government. This two-tier system creates checks, balances and "back-stops." Two levels of environmental protection means there are fewer cracks for things to fall through and result in a more comprehensive and effective environmental protection regime. In the current climate of de-regulation and budget cutbacks, there is no question that environmental protection needs to be improved in Canada, but it is also clear that the benefits of dynamic federalism should be preserved.

Harmonization Past and Present -- The report provides a brief history of harmonization, from the re-vamping of the Canadian Council of Ministers of the Environment (CCME) in the early 1990's, to the direction given by the First Ministers in June 1996, that the Ministers of the Environment "make progress" on harmonization. Since the earliest stages of initiative, commentators have questioned the rationale for harmonization. Although "duplication and overlap" has been offered as justification, a study commissioned in 1995 by the CCME showed that duplication and overlap is not a serious problem in Canadian environmental protection measures.

Moreover, harmonization is now clearly being pursued as a political solution to a political problem: the unity crisis triggered by the October 1995 Quebec Referendum. As a political solution to an political problem, harmonization is unlikely to result in improved environmental protection. In fact, the current proposals are likely to result in diminished protection of Canada's environment.

As an alternative, the report proposes an approach which seeks to address the pressing problems in environmental protection in Canada today, particularly reduction in financial resources available to all governments.

Harmonize to Protect the Environment -- The report proposes that, rather than the federal government delegating its authority to the provinces, and transforming the CCME from a forum for informal discussion to a national decision-making body accountable to no one, the federal and provincial governments should work cooperatively to protect the Canadian environment. There are examples in place that show how governments can share responsibility, retain their capacity in their respective roles, and work together to efficiently and effectively protect the environment. This is the model the harmonization project should follow. The report makes recommendations that will support the implementation of an alternative approach.

In the event that the federal and provincial governments pursue the harmonization project as

presently conceived, the report also makes alternative recommendations that will serve to partially address the problems raised by the CCME acting as a decision-making body. The report emphasizes, however, that while these recommendations may partially mitigate these problems, they will not remove them. The proposed decision-making role of the CCME, for example, presents fundamental problems in terms of accountability that, short of constitutional change, cannot be solved.

I.Introduction: Dynamic Federalism Versus Harmonization

1.Dynamic Federalism Protects the Canadian Environment

> "Federal forms (of government) are to be preferred to unitary forms because the inherent competition implies the existence of alternatives. This [is called] duplication and overlap, but those who fault federalism for competitiveness and duplication, fault it for its main virtue."[i]

Canada is a federal state. For good reason, it was designed to have two levels of government. In terms of environmental protection, the main virtues of federalism are that it encourages government action, and it provides checks, balances and "backstops" so that one government can "step in" when the other level of government fails to act.

Dynamic federalism creates the potential for more all-inclusive environmental protection regimes. When both levels of government have the ability to enact laws in a particular area (such as the environment), they tend to both want to "occupy the field." In Canada. when the federal government has moved to put environmental laws into effect at the national level, provincial governments have often been prompted to take actions which they otherwise would not have taken.

In 1975, for example, the federal government enacted the *Environmental Contaminants Act* which, for the first time, permitted it to regulate the manufacturing, import and use of toxic substances. Alberta responded by passing the *Alberta Hazardous Chemicals Act*. Quebec amended its *Environmental Quality Act*. Ontario set up its Hazardous Contaminants Programme.[ii]

The possibility of unilateral federal action has also been an important motivator of provincial action to protect the environment. The threat of unilateral federal action was, for example, fundamental to the achievement of agreement between the federal government and the seven eastern provinces to take action to curb acid rain in 1984.[iii]

The result of dynamic federalism an environmental protection regime in which both levels of government play a significant role, providing a system of checks, balances and "backstops." The effect is better environmental protection. When both governments have laws in a particular area, both have the capacity to enforce those laws. If one government, for whatever reason, chooses not to enforce its laws, then the other level can still act to enforce its laws.

In addition, the involvement of both levels of government means fewer cracks for things to fall through. It also provides for more consistent coverage for environmental protection nation-wide. When the federal government signed the Montreal Protocol (the ozone-depleting substances treaty), for example, some provinces had regulations in place first. The national standard followed the lead of the provinces, but covered areas not included in the provincial laws. The provincial and federal governments' combined actions created a reasonably comprehensive regime.

2.Dynamic Federalism is Not the Problem

Harmonization proposes that Canada's federal structure has had a negative effect on environmental protection. The project proposes as a solution to "duplication and overlap" the surrender of the federal role in environmental protection. This solution is unlikely to deal with the problem of ensuring adequate protection of the environment and the health of Canadians. In fact, it is likely to result in diminished environmental protection for all Canadians.

3.Improving Environmental Protection Through Cooperative Government Action

The challenge now -- in times of budget cut-backs and de-regulation -- is how to improve environmental protection in Canada. Harmonization proposes that the solution is to put only one government in place where there used to be two. But most provinces, and even the federal government, no longer have the resources (if they ever had) to operate alone. As well, "backstops" and other benefits of dynamic federalism will be lost if only one government has the capacity and right to act.

There is no question that environmental protection in Canada needs to be improved. However, eliminating dynamic federalism will not result in the improvements we need. Effective harmonization of environmental protection in Canada can be best achieved by changing *how* governments act, and not by changing *which* government acts. The emphasis should be on cooperative government action, not the delegation of federal responsibilities to the provinces.

II.The Harmonization Process -- Past and Present

Prior to 1992, the Canadian Council of Ministers of the Environment, and its predecessor, the Canadian Council of Resource and Environment Ministers (CCREM) were informal forums for off-the-record exchanges between provincial, territorial and federal ministers of the environment. Since the early 1990s, however, the CCME has played an increasingly important role. At the 1992 United Nations Conference on Environment and Development Prime Minister Mulroney identified it as one of four key organizations in Canada's sustainable development strategy.[iv] In all of the different versions of harmonization that which have been proposed to date, the Council would assume a central role in environmental policy-making in Canada.[v]

In November, 1993, the CCME announced that harmonization would be its top priority in the coming two years. The first important release was the "Purpose, Objectives and Principles" document that was approved by the Ministers of the Environment in June 1994.[vi] The first words in the document stated that: "The elimination of duplication and overlap in federal/provincial/territorial regulatory matters, the harmonization of policies and programmes, and the need to redefine working relationships between orders of government, the private sector and the public, have quickly become fundamental issues in the Canadian political context."

By late 1994, non-governmental organizations responding to the "Purpose" document

expressed doubt that "duplication and overlap" was as pressing a problem as it was being made out to be. A submission presented to the House of Commons Standing Committee on Environment and Sustainable Development in September 1994 asked, for example: "Given that there is very little federal law to enforce, and very few people to enforce it, the repeated claims of "duplication" are mysterious. What, exactly, is being duplicated? Where...is there overlap?"[vii]

In November 1994, the first formal non-governmental organization (NGO) commentary on harmonization -- endorsed by thirty different environmental groups -- was released.[viii] Among other observations, the commentary noted that harmonization seemed to propose to grant powers to governments that they did not lawfully have. It also seemed likely that harmonization would result in "lowest common denominator" national standards.

In December 1994, the CCME released the first draft "framework" document, and four "schedules," dealing with monitoring, compliance, environmental assessment and international agreements. The direction of the proposed agreements was clearly towards a significant devolution of federal authority over the environment to the provinces. A workshop concerning these drafts was hosted by the CCME in Toronto in February, 1995. During the workshop it became clear that governments had not thought through the full ramifications of the agreements. Government representatives could not, for example, answer fundamental questions regarding the legal status of the proposed agreement.

In January, 1995, the federal government proclaimed into force the *Canadian Environmental Assessment Act*. In response, Quebec suspended its participation in CCME processes.

Environmental non-governmental organizations continued to express concern over the direction of the harmonization initiative. In February 1995 the Prime Minister received an open letter, signed by almost eighty organizations from across Canada, expressing concern over the harmonization project and asking that the federal government withhold its ratification of any harmonization agreement until the completion of public hearings on the environmental responsibilities of the federal government by the House of Commons Standing Committee on Environment and Sustainable Development.

In March, 1995, the Canadian Institute for Environmental Law and Policy (CIELAP) and the Canadian Environmental Law Association (CELA) presented a detailed analysis of the draft harmonization agreement and schedules released in December 1994.[ix] In their commentary CIELAP and CELA concluded that: the agreement would constitute a *de facto* constitutional amendment; no analysis of the problems which the agreement was to solve have been developed; the agreement was a framework for federal abandonment of the environmental field; and that the agreement would lead to diminished environmental protection in Canada.

The conclusions of this commentary were subsequently endorsed by 65 environmental organizations from across Canada in an April 1995, statement entitled "Environmental Harmony or Environmental Discord?" The statement asked that the federal government not endorse the

proposed harmonization agreement at the May 1995 CCME meeting, and that it: initiate a meaningful study of the needs and gaps in Canada's environmental protection system; provide a clear statement of the federal government's vision of its environmental role; and refer any agreement if concluded, to the House of Commons Standing Committee on the Environment and Sustainable Development for public hearings prior to signature and ratification.

At the May 1995 CCME meeting then federal Minister of the Environment Sheila Copps objected to the proposed schedule of the agreement on environmental assessment. This objection stalled the harmonization project, and its direction appeared to be in serious question. In the meantime, responding to the doubts expressed about the amount and seriousness of duplication and overlap in environmental protection in Canada, the CCME asked a consultant to prepare a report on the topic. This report, delivered in August 1995, showed that there was very little actual duplication and overlap, and what there was had already been limited by agreements between governments.[x]

The issue of environmental harmonization was raised at the Premiers' meeting in September 1995. Following their meeting, the Premiers presented a letter to the Prime Minister requesting that the harmonization project -- stalled by Minister Copps' objections -- be revived.

Subsequently, at October 1995 meeting of the CCME, the Ministers agreed to release a draft *Environmental Management Framework Agreement* (EMFA) and eleven schedules, dealing with monitoring, enforcement, policy and legislation, standards and guidelines, international affairs, environmental education, research and development, emergency response, state of the environment reporting and pollution prevention. Minister Copps' continuing objections prevented the release of the environmental assessment schedule, and the issue of environmental assessment was stated to be "off the table" for the purposes of harmonization by the federal government.

On October 30, 1995, Quebec held a referendum on whether or not the province would stay within the Canadian federation. By a very narrow margin, the people of the province voted to stay. This narrow victory prompted the federal government to focus on a "unity agenda" more aggressively than it had before.

In particular, Prime Minister Chrétien appointed Stéphane Dion as Minister of Intergovernmental Affairs in January 1996. The new Minister arranged a number of meetings with the provinces in the following months. During these meetings, he was told that the provinces wanted, among other things, control over the environment, especially environmental assessment.

Meanwhile, in January 1996, the CCME held a multi-stakeholder workshop in Toronto on the draft agreements released in October 1995. At the workshop, it became clear that the Accord could not go forward. Non-governmental organizations identified seven cross-cutting issues that pointed to serious problems with the project, including the continuing issue of its justification, the proposed devolution of federal responsibilities, and the degree to which the agreement proposed that the CCME replace the federal government as Canada's national environmental policy-making body. Other stakeholders, including aboriginal and first nations organizations and some academic

and industry representatives also expressed serious concerns over the contents of the proposed agreement and schedules. A detailed critique of the agreement was presented by CIELAP in February 1996, describing it the proposals as a model for "dysfunctional federalism."[xi]

The future of the harmonization agreement again appeared uncertain, particularly as the CCME secretariat suffered fifty per cent cut to its budget early in 1996.[xii] February 1996 saw a new federal Minister of the Environment, Sergio Marchi, appointed to Cabinet. During the same month, the Speech from the Throne, reflecting the results of Mr. Dion's meetings with the provinces, spoke of "new partnerships" with the provinces, including partnerships on environmental management.

In April, in anticipation of the May 1995 CCME meeting environmental non-governmental organizations released a third statement, signed by more than seventy organizations, opposing the proposed CCME Environmental Harmonization Agreement and requesting that the Ministers not endorse, sign or ratify the proposed agreement, and that they initiate instead a comprehensive and independent review of current federal, provincial, territorial, First Nations and aboriginal environmental roles, responsibilities and capabilities, for the purposes of identifying essential needs and critical gaps in relation to the present and future state of Canada's environment.

Under intense pressure from the Prime Minister's Office,[xiii] Minister Marchi agreed at the May CCME meeting to pursue a new Framework Accord and three new sub-agreements dealing with environmental assessment, inspections and standard-setting. These were to seek to achieve the "highest" possible standard for environmental protection in Canada. It was seen by the federal government to be particularly important that the CCME reach agreement, as for the first time in almost two years, the Minister from Quebec was also at the table.

In late May, in anticipation of the June 1996 First Minister's Conference a Statement for Support For A Strong Federal Role in Environmental Protection was released. It was signed by more than 140 environmental and other organizations representing every province and territory.

At the First Minister's Conference, the Prime Minister and the Premiers agreed to direct their environment ministers to "make progress" on harmonization by the November 1996 CCME meeting. By late June, the three new draft documents agreed to in May were circulating among governments. A draft national accord and draft agreements in the areas of standard setting and inspections were released to the public in August. A proposed "approach" to the issue of the harmonization of environmental assessment regimes has also been released.

III.The Current CCME Harmonization Proposals

The August and September draft Accord and Schedules include changes addressing some of the criticisms made about harmonization. The proposed National Accord states, for example, that "addressing gaps and weaknesses" (rather than duplication and overlap) will be one of the ways harmonization will achieve its objectives.[xiv] However, the chief problems remain: the transformation of the CCME into a decision-making body, and the devolution of federal authority

to enforce federal laws and set national environmental standards to the provinces.

There are other problems. The project appears, for example, to be intended to apply retroactively. That is, existing laws will be changed in order to conform to whatever objectives are identified under the harmonization process. This will create a high degree of uncertainty regarding environmental regulations and standards. It will also have the inequitable result of punishing industries that have re-tooled their plants in order to comply with "pre-harmonized" laws. Finally, the proposed harmonized system has never addressed the environmental law-making capacities of other ministries besides ministries of the environment (such as natural resources, municipalities, fisheries and oceans, and so on).

The legal and political context in Canada has changed dramatically since 1989. The end of the 1980s bore witness to government activity on the environment the likes of which this country may never see again. While hoping to gain politically by taking strong stances on environmental protection, governments were also concerned about the effect their tougher laws might have on economic activity in their provinces. It was around this time that some ministers started to talk about harmonization, understanding that if all jurisdictions had standards as high as theirs, they would not lose industries to other provinces.[xv]

More recently, however, many governments have drastically cut back on environmental regulation, and reduced funding their environmental agencies and curtailed their environmental law enforcement activities.[xvi] Environment Canada's budget, for example, has been cut by thirty per cent. The CCME commissioned study cited earlier found that there never really was a problem with duplication and overlap. It certainly is not a problem now.

This raises the question of what the federal and provincial governments are really "making progress" on through the harmonization project. Of the reasons first set out to justify harmonization, the only one left is provincial "irritation" with the authority the federal government has to regulate within their boundaries. In addition, in the context of the October 1995 Quebec referendum, there is a perceived need show that federalism "still works."

It seems then that the CCME harmonization process is less and less about protecting the environment. Rather, it has increasingly apparent that the project is being pursued as a political solution to a political problem.[xvii] As such, harmonization is unlikely to result in improved environmental protection. In fact, the current proposals are likely to result in diminished protection of Canada's environment by reducing the role of the federal government, and constraining its ability to take independent action to protect the environment in the future.

IV.Conclusions: Harmonize To Protect the Environment

The discussion that follows sets out an alternative design for harmonization. It assumes that the purpose of harmonization is to find ways, in a period of scarce government resources, to effectively protect the environment.

1.Environmental Protection must be the Primary Focus

Environmental protection must be the primary reason for harmonization. The other reasons given for harmonization either do not exist (duplication and overlap) or are about problems that have nothing to do with the environment (national unity).

2.Focus on Cooperative Government Action, Not the Delegation of Authority

The problem in environmental protection in Canada today is not "duplication and overlap." It is finding ways to use increasingly thin government resources to effectively protect the environment. The solution proposed by harmonization is to give twice the responsibility to only one government -- in most cases, a provincial government. The inspection sub-agreement states, for example, that a government that has delegated its inspection responsibilities will hold its authority "in abeyance." In other words, the federal government will completely withdraw from the field. This is the "one window" approach.

While, at first look, this may seem more efficient, as there is only one face at the window instead of two, closer examination shows it is not. The enforcement of some federal regulations requires specially trained technical staff, which the provinces currently do not have. In order for the provinces to be able to inspect, they will have to retrain their staff, or hire new staff. This means a financial burden will be transferred from the federal government to the provinces. Most provinces do not have the resources to manage this burden. Furthermore, there is another problem: conflict of interest where a province is sponsoring, funding or operating a project which it would inspect for the purposes of federal law enforcement.

A better way to harmonize environmental protection in Canada is for governments to work out how they can most effectively coordinate the resources they have. Transferring burdens is not the solution. Neither is delegating responsibility. Governments must remain responsible for their operations under their own legislation and retain the ability to enforce their own laws.

Both levels of government have the responsibility to protect the environment. In some areas, such as inland waters, these responsibilities are shared. Governments can no longer afford to "duplicate" resources in areas where they share responsibility. Nor, however, can they afford to "go it alone." Instead, they have to find a way coordinate their efforts to make the most of their resources and to achieve effective environmental protection.

More effective communication between governments will make it easier to find out how resources can be efficiently coordinated. A by-product of better communication will be a better, less contentious, more efficient system. There are examples of projects in Canada that have worked to open communication, and have improved the environment. An important element of these successful projects was that they included mid-level management people as well as the Ministers.

Better understanding of one anothers' concerns at the management level smooths out disagreement, and encourages action.

A very good example of cooperative government action is the *Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem* (COA). For more than twenty years, the two governments have been sharing the task of improving environmental quality in the Great Lakes basin. The 1994 COA is the fourth partnership agreement on the Great Lakes that the governments have entered.[xviii] The COA bears all the hallmarks of what is being recommended here: better environmental protection through cooperative government action involving mid-level management personnel; effective stakeholder participation through consultation and joint action; open communication of goals; regular progress reports.

Two points in particular need to be mentioned about the COA. The first is that it has worked reasonably well without the proposed harmonization agreement. The second is that the success of the COA has been limited recently by budget cut-backs and the restructuring of the Ontario Ministry of Environment and Energy. Even efficient, effective cooperative government action fails without adequate funding and coherent staffing policy.

3.The CCME Should be a Forum of Discussion, Not a Decision-Making Body

The role proposed for the CCME is one of the most serious problems associated with the harmonization initiative. Since the 1995 draft, it has been proposed that the CCME become the central decision-making body for environmental protection in Canada. Currently, individual Ministers of the Environment and cabinets of which they are members make decisions regarding environmental protection within their jurisdictions. Ministers and cabinets must to answer for the decisions they make to either Parliament, or their provincial legislature, and the people they represent.

The CCME, on the other hand, exists in "intergovernmental space," outside of Canada's current constitutional/legal structure. Consequently, no formal accountability mechanisms exist in relation to the CCME. It is answerable to no legislature or electorate for its collective decisions.

This is not a problem if the CCME is simply a forum for discussion. However, it is an enormous problem if the CCME acts as a decision-making body as is contemplated under the draft harmonization agreement. If the CCME becomes a decision and policy-making body, then a significant component of environmental policy-making would be moved out of the reach and oversight of the Legislatures, Parliament and the electorate.

Furthermore, the link between governments and the adequacy of the level of environmental quality which they provide within their jurisdictions would be significantly weakened. Environmental standards within each jurisdiction become a function of CCME decisions, and not the decisions of individual governments for which they can be held directly to account.

The only way to maintain these lines of accountability is for the role of the CCME to remain

essentially as it is now. The CCME could be the forum where Ministers and their officials meet to discuss their concerns. The Council could also be the office that administers consultation and working groups similar to those used in the COA, discussed above.

If the CCME is to become the place where national environmental standards are made, there will have to be firm rules put in place. Appendix B describes a possible model that could be followed. It works, as much as possible, to preserve Ministerial and government accountability. A point worth repeating, however, is that, even with these rules, the lines of accountability between governments, Parliament, the Legislatures and the electorate will be less clear. It will be harder, with harmonization, to make governments and ministers accountable for the decisions they make about environmental protection in Canada.

In the event that the CCME is to be made a new decision-maker for environmental protection in Canada, more than clear rules about decision-making will be needed. The process must be open and knowable. Debates and discussions at the CCME must be published and made available to the public. All of the priorities, deadlines, and actions agreed on, should be a matter of public record. The terms of every agreement made between governments about inspections or other functions should also be readily available.

4.Create a Public Advisory Committee to the CCME

As an intergovernmental forum for discussion, the CCME would benefit greatly from the creation of a Public Advisory Committee. Such a committee, composed of stakeholders from all sectors, could assist in the identification of priorities and other matters.

5.Governments Must Commit to Providing Adequate Funding to Protect the Environment

While it is recognized that government resources are limited, it must also be acknowledged that it is a false economy to cut back on environmental protection. Weakening environmental laws and institutions will impose enormous costs for clean-up, remediation and health care on future generations of Canadians. The greatest economy can be achieved by governments working together.

Unfortunately, the harmonization proposal simply proposes to shift responsibilities from one level of government which lacks the resources to carry them out, which also lacks the necessary resources. It does not provide a framework for the effective sharing of resources to ensure that essential functions are fulfilled.

6.The Power of the Public to Act: Environmental Bills of Rights

Harmonization should in no way restrict the few mechanisms presently available to the public to act to protect the environment. Recognizing that governments sometimes fail to perform

their responsibilities to protect the environment, the public should be empowered, through environmental bills of rights in each jurisdiction, to help to address these failings.

7.Effective Aboriginal Participation

Harmonization has always been understood as an agreement "between governments." However, the role of aboriginal communities and first nations governments in the process has never been clear. They should have full status as parties and participate in the process as do the provincial and federal governments.

8.The Next Steps

The future of the harmonization initiative will be determined at the November 1996 CCME meeting. It is recommended that, in light of the foregoing recommendations, approval of the proposed National Accord and, in particular, the proposed sub-agreements on standards and inspections, be deferred until such time as a full consultation process, supported by appropriate background research, has been established.

Full consultation would entail broad-based stakeholder participation in the development and drafting of harmonization proposals, with appropriate support for non-governmental participants. It should also include case studies of how the proposed harmonized system would work in specific cases.

V.Recommendations in the Alternative if the CCME Takes On The Role Presently Contemplated in the Draft Accord and Sub-Agreements

In the event that the federal and provincial governments agree to follow the provisions of the draft documents and the CCME becomes a new decision-making body regarding environmental protection measures in Canada, then the following recommendations apply. The preceding recommendations five, six and seven would apply as well. It should be noted, as already discussed, that this new role for the CCME creates serious accountability problems. These problems may be addressed somewhat by the recommendations below. However, they cannot be fully addressed without fundamental constitutional change.

1.CCME Decision-making Should Be Subject To Clear Rules

As described in Appendix B, strict rules must apply to the deliberations of the CCME. Governments, and particularly the federal government, must retain the capacity to accept or reject

CCME decisions on all aspects of environmental management. If a government rejects CCME decisions, then it must retain its powers, capacities and all its existing laws and policies. All governments have to retain the ability to set standards higher than those agreed to at the CCME. Most importantly, the federal government, if it believes the standard agreed to at the CCME is not high enough to adequately protect the environment, then it must retain the capacity to set a national standard that does.

2.All CCME Deliberations and Documents Should Be Matters of Public Record

As a new decision-making body whose deliberations will directly impact every Canadian, the CCME should be as "transparent" as the Legislatures and Parliament. There should be Hansard-like reports issued for all discussions and decisions made at the CCME. All priorities, time-lines, progress indicators, progress reports, audit reports (see below) and any other documentation should be readily available to the public.

3.Create A CCME Audit Committee

All actions undertaken under a "harmonized" environmental protection regime should be subject to review by a independent third-party audit committee. The committee should be responsible for the development of annual, public reports on activities under the harmonization agreement. The committee should be in a position to investigate complaints from parties to the agreement and members of the public regarding the failure of parties to adopt or implement national standards developed through the CCME process.

4.Undertake a Limited Test of Harmonization

Because the process is unprecedented, and proposes a radical change from normal procedures, harmonization should be tested on one area first. Reasonable time limits should be set. Benchmarks should be established to determine progress under the harmonized measure, and a full audit of the final results of the test should be made. Once the test has shown that harmonization actually works to protect the environment, then the full project could proceed.

APPENDIX A -- Legitimacy, Accountability and Governments "Best Situated"

Environment Canada has requested as part of this report analysis on three particular aspects of the harmonization process. These are: legitimacy, accountability and what makes a government "best situated" to put environmental protection measures into effect. The discussion in the main body of the report has dealt with "accountability" and "best situated." These points will be elaborated on here. This appendix also deals with the question of legitimacy.

1.Legitimacy

In the draft Accord, and the Inspections sub-agreement, governments are required, once they have delegated their authority, to hold their power "in abeyance." Only when the government that has been delegated the responsibility persists in not acting may the delegating government act. There are many serious problems with this part of the harmonization proposal.

One key problem is that authority "held in abeyance" is a contradiction in terms. Authority that is not used ceases to be authority at all. For example, the federal government technically has the power to "disallow" provincial laws, as provided by s. 90 of the Constitution Act, 1867. This power still sits "on the books", but has not been used since 1943.[xix] If the federal government were to try to act on this power, there would be considerable political costs to pay.

As expressed in the following excerpt from the CIELAP and CELA commentary of March 1995,[xx] authority -- particularly federal authority over the environment -- cannot be held in "abeyance" and still retain legitimacy:

> "... the devolution of federal responsibility for environmental protection through the EMFA raises a number of questions. In effect, the federal government is agreeing not to exercise its constitutional capacity to establish and implement national environmental standards through federal legislation. This *de facto* abandonment of legitimate legislative authority by federal government could make a re-assertion of this authority in the future extremely difficult.
>
> This would be partly a consequence of the federal government's loss of institutional capacity in the field due to the elimination of fiscal and human resources. In addition, once it is established by practice and convention that the federal government not exercise its legislative authority, and that the provinces fully occupy the field, an effort by the federal government to re-assert its legal authority would be likely to engender intense federal-provincial conflict.
>
> ...Administrative delegation may have the same *de facto* result as legislative delegation. Even if the courts continue to distinguish legislative delegation because Parliament has maintained the authority to withdraw that delegation, as time goes on, it is less and less likely to occur. This is partly a practical result, as the federal government loses its institutional capacity to fulfil that role due to reduced

resources. However, it also is a political consequence, as an effort by the federal government to re-assert its legal authority would be likely to prompt strong provincial resistance."

In other words, if a government does not use its authority, it will lose it. It follows, therefore, that in order to retain authority, and the perceived legitimacy of the use of that authority, governments have to retain an operative role in the field.

The alternative to holding powers in abeyance has been proposed in the main body of the report. Governments may rationalize their activities in the field in order to eliminate any real duplication of effort, but both should retain a presence. Both levels of government have the responsibility and power to protect the environment. It follows that in order to keep the exercise of their power legitimate, both levels of government must continue to actively exercise their authority.

2.Accountability

The chief accountability problem of the harmonization project is the proposed role of the CCME. As an intergovernmental body, there is no legislature or electorate which can hold the CCME to account for its collective decisions under the proposed harmonization agreement. It is also contemplated within the Standards sub-agreement (Section 6) that the CCME will be the body of final resort in the event that parties to the agreement are not meeting their obligations. This is problematic in that it makes Ministers accountable not to their own legislature or electorates, but to the CCME. It is also problematic in that it takes governments' responsibility to the public to protect the environment and makes it solely a matter for discipline at the CCME.

In the Inspections sub-agreement the chief accountability issue arises under the proposed delegation of inspection duties and the unspecified "due process" that evidently must be followed before a delegating government may act to conduct an inspection for the purpose of enforcing its own law. This will severly weaken, if not sever, the fundamental line of accountability between ministers and the legislatures which have charged them with the responsibility for the administration and enforcement of their laws. If the principle of ministerial responsibility is to upheld, then the judgement as to whether a delegated government is failing to conduct inspections in relation to the delegating government's laws, and decision for the delegating jurisidiction to therefore initiate its own inspection, must lie with the Minister of the delegating jurisdiction responsible to Parliament or a legislature for the administration of the law in question.

As noted in the main body of the report, the problems attached to the CCME as a decision-making body cannot, ultimately, be "fixed." The proposal set out in Appendix B can address the problem somewhat. All of the reporting and auditing functions set out in the recommendations may make CCME deliberations and decisions more knowable and transparent. But, as a decision-making body, the CCME presents insurmountable accountability problems.

As a facilitator of cooperative government action along the lines of the COA, the CCME may act as a forum for discussion and provide administrative assistance to governments. None of these functions are inherently problematic in the least. However, as soon as the CCME takes on a decision-making role, all of the problems described above arise.

3.Government "Best Situated"

The presumption evident in the draft documents is that the government "best situated" is the one territorially closest to the enterprise or undertaking subject to environmental protection measures. In other words, aside from borders and federal lands, the Accord and sub-agreements assume the provinces are "best situated." The agreements also assume that the "best situated" government will be delegated the authority to implement the other government's laws. However, as noted in the body of the report, government capacity is best determined by other criteria. Moreover, for reasons reviewed in the discussions above regarding legitimacy and accountability, cooperative government action is preferable to delegation of government authority.

Ideally, the "best situated" government is the one with constitutional authority, applicable legislation, trained staff and the resources to perform environmental protection functions. In the event that both governments meet all or most of these criteria, they can cooperatively determine where their resources can be most effectively directed. Effective cooperation requires that both governments retain a role and the capacity to perform that role. The chief purpose of cooperative action should be to reduce (and eliminate if possible) any duplication of effort, either on the part of government or regulated enterprises. Cooperative action may be formalized into bilateral agreements (such as the COA), and the agreements could be structured around legislation, sectors, sites or areas of concern. If both governments remain active in the field, the problem of conflict of interest will be lessened.

Rather than delegate their authority, governments should work together to determine how they can exercise their authority so as not to duplicate effort and to provide effective environmental protection. Retaining an active role will also serve to preserve the legitimacy of government action. It will also preserve Ministerial accountability for the implementation of environmental legislation.

APPENDIX B:The CCME as a Decision-Making Body in National Standard Setting: Key Problems

Note: The analysis that follows applies in particular to the standard-setting function of the CCME. Some of the comments may apply generally to any process by the CCME.

1.Accountability

The CCME exists in "intergovernmental space," outside of Canada's current constitutional/legal structure. Consequently, no formal accountability mechanisms exist in relation to the CCME. It is answerable to no legislature or electorate for its collective decisions.

This is not a problem if the CCME is simply a forum for discussion. However, it is an enormous problem if the CCME acts as a decision-making body as is contemplated under the draft harmonization agreement (particularly the standards schedule). If the CCME becomes a decision and policy-making body, then a significant component of environmental policy-making would be moved out of the reach and oversight of the legislatures, parliament and the electorate.

Furthermore, the link between governments and the adequacy of the level of environmental quality which they provide within their jurisdictions would be significantly weakened. Environmental standards within each jurisdiction become function of CCME decisions, and not the decisions of individual governments for which they can be held directly to account.

The lack of public records of discussions and decisions within the CCME is also seriously problematic. Without such records, there is no public record of the actual decisions taken by the Council. Ministers cannot be held to account for their decisions, when the public, the legislatures and parliament don't even know what those decisions are. The lack of any record of the positions taken by individual ministers in decisions, also means that there is no way in which they might be held to account in their home legislatures for their actions within the CCME.

The lack of formal processes for ratification, independent review, sunset, and renewal of agreements are also problematic.

Possible Solutions to The Accountability Problem

The only complete "potential solution" to the problem posed by the CCME as a decision-making body would be to amend the constitution, and make the CCME a new, elected, national body, or make it accountable to such a body. It is unlikely that this solution will ever occur. Failing constitutional amendment, all that remains are the imperfect solutions that follow.

One alternative is to give the federal government a veto over any CCME proposal or

decision which would limit its actions. In other words, the CCME can proceed on a priority, or set a new standard only if the federal government agrees. If the federal government does not agree, then all other jurisdictions, including the federal government, would exercise their authority as if there had been no CCME decision.

In effect, the federal Minister of the Environment would take responsibility for CCME decisions. The federal government would only surrender its authority to set national standards if it feels that the standard and implementation scheme proposed by the CCME are adequate to protect the health of Canadians and the environment. This model has the additional advantage of providing incentives to the provinces to agree to stronger standards as it preserves federal capacity to act unilaterally.

The primary flaw in this proposed solution is that, in practice, the line of accountability established through such a structure is still tenuous at best. In addition, the likelihood of actual exercise of federal power of veto is low. The proposal is also unlikely to be accepted by the provinces.

The problems associated with the CCME acting as a decision-making body can also be tempered somewhat by clauses in the accord and/or sub-agreements that make it very clear that any jurisdiction that wishes to enact standards higher than those agreed to at the CCME may do so. The presence of such a clause will ensure that individual ministers remain accountable to the needs of their own jurisdictions.

As noted in the main body of the report, if the CCME is going to be a decision-making body, then its deliberations and decisions have to be part of the public record.

Finally, the last imperfect accountability measure that can help to mitigate, but not entirely solve the problems presented by a decision-making CCME is that all of the harmonization agreements should have sunset, review, amendment, withdrawal and termination clauses.

2. The Decision-Making Process

Harmonization has always assumed that decisions will be made by the Council on a consensus basis. The most recent drafts still for the most part preserve this assumption. However, a repeated criticism has been that consensus decision-making results either in deadlock, or, most commonly, in lowest-common-denominator outcomes. If the rule is that everyone must agree, then the most-objecting jurisdiction has a veto.

Potential Decision-Making Models

Unanimous decision-making can have a role in the harmonization process. It is sensible to impose the rule that all jurisdictions agree to proceed with standard-setting in a given area. Unless all parties agree, there is no point in going forward. In the absence of consensus, then all jurisdictions may continue as before.

Once the parties have agreed to proceed with a standard-setting process, there must still be a reasonable time-limit, such as two years, set. If a decision is not reached within the time limit, then the process should end, and all parties continue as before. A time-limit will serve to ensure that issues assigned to the process are not lost in the "intergovernmental fogbank" forever.

As noted above, the unanimous consent model will not be suitable for determining standards as it tends to result in lowest common denominator outcomes. A possible model to follow as an alternative is based on the general constitutional amending formula: two thirds of the provinces and territories representing 50% of the population and the federal government. If there is no agreement, then all jurisdictions may continue as before. Again, jurisdictions must retain the right to raise standards above the agreed national standard. The advantage with this approach is that the most objecting governments no longer hold a veto over a proposed standard, and therefore, higher standards are likely to result.

Finally, there must be formal processes introduced in order to ensure that it is clear what is being agreed to. Public records of all decisions must be kept.

3.Implementing Standards

Without any constitutional or legal status, the CCME has no lawful authority to compel its member jurisdictions to adopt agreed upon standards. This means that, while "national" standards may be agreed to at the CCME, there are no legal mechanisms in place to ensure that every jurisdiction actually implements the standard. The result could be a nation with "national" standards in some jurisdictions but not others. Jurisdictions could fail to enact agreed upon standards for a number of reasons. One reason could be that the cabinet or legislature rejects the proposed CCME standard. Another could be that an objecting jurisdiction simply does not implement the standard. Aside from exerting political pressure on the Ministers of non-complying jurisdictions, there is nothing the CCME can do to compel implementation.

Possible Solutions To Implementation Issues

The problems around implementing agreed-upon standards highlights the main weakness of the "decision-rule" approach described above. The approach is beneficial in that it permits parties to set standards higher than those proposed by the most objecting jurisdictions. However, dissenting jurisdictions (the ones outside the two-thirds/fifty percent majority) may "opt out" and fail to implement the standard.

There are a number of mechanisms that can improve how standards are implemented under the CCME process, and mechanisms that can put some pressure on jurisdictions to perform. For example, parties should agree to implement standards within a set time, and back their performance up with reports to the legislatures, Parliament and the public. The means by which the standard is implemented should also be precisely delineated, with meaningful sanctions if the standards are not met by enterprises in each jurisdiction. "Voluntary programmes," for example, would not be an acceptable means in implementing "Canada-wide" standards.

Another mechanism to ensure compliance with the standard would be to establish a process where another jurisdiction, or a member of the public, can make a complaint against a non-complying jurisdiction. The complaint could trigger a third-party report on whether or not the party in question has implemented or maintained the standard as required. The report should be prepared by an independent third party and made available to all governments and the public. Such a report, however, would bring only political pressure to bear on the offending jurisdiction.

The only constitutional and legal mechanism available to implement national standards that really would apply nationally is for the federal government to implement the agreed standard. In practice, the federal government would have to implement the agreed standard using its authority and then possibly enter into equivalency agreements in provinces where the standard is met or exceeded. However, equivalency should only be permitted where an independent third party confirms that the agreed to standard has been met or exceeded. Otherwise the federal standard would remain in place.

Provisions should also be made for the withdrawal of equivalency agreements where equivalency with the federal standard is no longer met either as a result of the lowering of the standard or a failure to implement and enforce the standard by a province or territory. This requires a compliant procedure (from another party or public) and a third party body to determine if equivalency is still met. Continued monitoring of compliance by an independent third party would also be required. In all cases, the decision to grant equivalency and to withdraw it must rest with the federal Minister of the Environment.

APPENDIX C:CIELAP COMMENTS ON THE AUGUST 23, 1996 DRAFT NATIONAL ACCORD ON ENVIRONMENTAL HARMONIZATION

Canadian Institute for Environmental Law and Policy
September 1996

1.GENERAL COMMENTS

-Draft Agreement contains some cosmetic improvement over previous proposals

-the fundamental problems which the NGO and academic communities have identified with this initiative have not been addressed in the draft Accord.

-question of what problem does this Accord seeks to solve has yet to be answered.
-if a "problem" can be identified, is this multilateral approach the most appropriate response?
-How can the tendency towards deadlock and lowest common denominator outcomes inherent in the CCME's consensus-based approach be avoided?
-How will giving governments like Ontario's and Alberta's a larger voice in national environmental policy-making improve environmental protection in Canada?
-What of the implications for the accountability of governments to Parliament, the Legislatures and the public of the creation of this intergovernmental space called "national" (or "Canada-wide")?

-Answers are needed to these questions before this initiative proceeds.

2.VISION

-more than a little strange to be talking about governments working in partnership to achieve the highest level of environmental quality for all Canadians when several of the would-be parties are working vigorously to weaken their own environmental standards (e.g. Ontario, Alberta, Quebec, and Newfoundland) and actively engaged in downwards harmonization (e.g. Ontario on Environmental Assessment (Bill 76), definition of "subject (hazardous) waste" and PCB waste).

3.PURPOSE

-fails to answer why this accord is needed.

4.OBJECTIVES

5)what is a "nationally consistent environmental measure." Is national consistency desirable if it is a

barrier to policy innovation and strengthening standards within individual jurisdictions?

5.PRINCIPLES

4)what is a "performance-based, results oriented and science-based" environmental measure?
-note that performance based standards are not appropriate in all circumstances. In some cases the use of specific technologies or procedures may be required to ensure protection of the environment, and human health and safety.

7)what constitutes a "national" approach to environmental issues?
-should be a recognitation of federal leadership and coordination role in dealing with "national" issues, as suggested by CCPA.

8)consensus-based decisions
-consensus based decision-making will lead to deadlock or lowest common denominator outcomes, as each party holds a veto. (See The Environmental Management Framework Agreement: A Model for Dysfunctional Federalism? (CIELAP, March 1996), pg.17 for detailed arguement on this point)
-what is the actual decision-making process?
-what constitutes consensus?

9)Non-derogation clause:

-needs to recognize Parliament and Legislatures as source of governmental authority, and preserve the authority of governments to make decisions and take enforcement actions through authority granted them by Parliament and Legislatures.
-ultimate lines of responsibility and accountability to Parliament and Legislatures for administration and enforcement of legislation must be maintained
-should be no excuses for failures of administration or enforcement
-governments must retain right to act when necessary to do so.

-N.B. strong non-derogation clauses would be consistent with government response on CEPA review regarding administrative agreements and "General Agreements on Environmental Management" (Environmental Protection Legislation Designed for the Future pp. 18-19, paras 2.9 and 2.12)

Suggested Wording:

"*Nothing in this accord alters the legislative or other authorities of Parliament and the Legislatures under the Constitution of Canada. In addition, nothing in this agreement alters the authority of federal and provincial governments to make regulations, policies and decisions under legislation made by Parliament and the Legislatures respectively, and to enforce that legislation.*"

10)words "located within" appear to limit right to implement more stringent measures to places physically located within the jurisdiction in question. This would appear to limit the right of the federal government, in particular, to raise standards affecting matters beyond federal lands. (see The Environmental Management Framework Agreement: A Model for Dysfunctional Federalism? (CIELAP, March 1996), p.32 for detailed arguement on this point).

Suggested Changes:

-delete word "located"

-also need to consider problem of were action needs to be taken by jurisdiction to protect environment features or values in another jurisdiction
-e.g. acid rain emission controls in Ontario to prevent acid rain damage in Quebec
-also problem for federal government as under customary and treaty international law it is obligated to address sources of environmental problems within Canada which have negative impacts on other countries.

6.SUB-AGREEMENTS

Para 1

-requires that all issues be addressed through multi-lateral agreements regardless of whether such agreements are an appropriate instrument or not.
-an inspection sub-agreement, for example, will have to be implemented through bilateral agreements, as it will have to be tailored to the particular legal requirements of each province and territory.

Suggested Re-wording:

"*Governments may enter into multi-lateral, regional or bilateral sub-agreements to implement the commitments set out in this accord. These sub-agreements will be related to specific components of environmental management or environmental issues.*"

Para 2

1)roles and responsiblities to be undertaken by one level of government only
2)one-window delivery of services

5)bar on action by other level of government once responsibility assigned.

-together these clauses elminate possibility of backstopping by other level of government
-appears to involve surrender of right to intervene to enforce or exercise decision-making authority
-problem of capacity of single level to implement services, particularly in light of budgetary reductions in some provinces
-problem of conflict of interest where one-window order of government is proponent or sponsor of undertaking (e.g Oldman River Dam).
-problem of elimination of possibility of sharing of inspection responsibilities
-some federal regulations (e.g. CEPA New Substances Notification Regulations) are highly specialized, may make sense to continue federal inspections rather than try to train already overburdened provincial inspectors.

3)what does "government best situated to discharge" mean?

4)what is an "objective performance based obligation" for discharge of assigned role?

Suggested Change:

Delete paragraph beyond words "each subagreement will delineate roles and responsibilities for each jurisdiction."

Para 3

-Parties or ministers cannot guarantee amendment of their jurisdictions legislation, policies or regulations
-changes to legislation requires the consent of Parliament and the Legislatures
-changes to policies and regulations may require consent of cabinets.

Suggested Re-Wording:

"*Ministers may <u>seek</u>, as necessary, the review and amendment of legislation, regulations, policies and existing agreements to provide for the implementation of the Accord.*"

General

-why handcuff drafting of sub-agreements with such tightly wound requirements?
-also need a supremacy clause establishing that provisions of General Accord take precidence over provisions of sub-agreements.

7.ADMINISTRATION

2)CCME Annual Reports - CCME reports on its own activities are likely to be of limited usefulness
-does not address wider accountability issues which have been identified with respect to CCME acting as a "national" decision-making body.

4)Unanimous consent requirement for amendment
-will make amendment of accord and sub-agreements virtually impossible (A Model for Dysfunctional Federalism?, pp.33-34 for detailed arguement on this point).

6)5 Year review:
-inconsistent with proposals in Government Response to CEPA Review for five year sunset clauses in CEPA Equivalency and Administrative Agreements and "General Agreements for Environmental Management" (Environmental Protection Legislation Designed for the Future pp. 18-19, paras 2.9 and 2.12)
-sunset would provide opportunity for thorough review of an as yet untried approach - otherwise agreement continues until the end of time (particularly problematic given requirement for unanimous consent to amend agreement);
-sunset would permit governments to reconsider participation in process, requires explicit decision to continue with approach
-particularly important given none of the participating governments have mandate to negotiate an agreement of this nature
-also need to provide mechanism for independent review

Recommended Changes:

-Agreement should provide for the sunset of the agreement 5 years from the date of it coming into force, with option of renewal by mutual consent of the parties

-agreement also lacks provisions for termination or withdrawal by a Party.

8.ANNEX

-November 1996 completion of inspections and standards agreements does not provide for meaningful consultation, adequate indentification of problems to be addressed, and indentification and assessment of potential solutions

-Similar considerations apply re: environmental assessment, particularly given complexity of issues and role of CEAA.

-reference to other sub-agreements should be deleted until there is agreement to proceed in these areas.

9.PROCEDURAL CONSIDERATIONS

-the government proposed pre-publication and public comment periods on proposed intergovernmental agreements in Environmental Protection Legislation Designed for the Future (para 2.8). These commitments should be upheld with respect to the proposed "National Accord."

APPENDIX D:CIELAP COMMENTS ON THE AUGUST 29, 1996 DRAFT SUB-AGREEMENT ON INSPECTIONS

Canadian Institute for Environmental Law and Policy
September 23, 1996

1.General

-inspection is closely linked to enforcement
-without right and capacity to conduct inspections, enforcement is virtually impossible
-likely result is *de facto* devolution of responsibility for domestic environmental enforcement by federal government.

2.Inspections as Subject Matter for Multilateral Agreements

-not really an appropriate subject for multilateral agreement
-differences in legislative/regulatory structures and requirements among provinces mean that actual arrangements have to be worked out on a province by province, law/regulation/approval by law/regulation/approval and site by site basis.
-differences in capacity among provinces mean federal government will have to play different roles in different provinces
-one size does not fit all.

3.One-Window Approach

-agreement seems obsessed with one-windowism
-problems:
-capacity of jurisdictions to deliver all inspection services single-handed, particularly in light of budgetary and personnel reductions
-in most jurisdictions there are serious doubts about capacity to maintain current inspection and enforcement activities with respect to existing requirements
-Ontario explicitly presents this as a rationale for some of its de-regulation initiatives (i.e. Aggregates).
-implies little or no capacity to take on inspection responsibilities in relation to other jurisdictions' (i.e. federal) laws and regulations.
-conflict of interest where delegated jurisdiction is proponent, operator or sponsor of the undertaking to be inspected.
-specialized nature of some federal regulations require specialized training and inspection procedures (e.g. CEPA Chemical New Substances and Biotechnology Notification Regulations).
-failure to provide adequate inspection services in one province will undermine goals of national scheme established by these regulations.

-eliminates possibility of backstopping and oversight by delegating jurisdiction.

4.Accountability

-proposals raise major accountability issues
-inspection is closely linked to enforcement
-without capacity and right to conduct inspections, enforcement by delegating jurisdiction will be virtually impossible.

-requirement to follow "due process" for delegating jurisdiction to reassert right to conduct inspections has potential to sever fundamental line of accountability and responsibility between minister and Parliament/Legislature for administration and enforcement of Parliament's/ a Legislature's law
-if ultimate decision to reassert right to conduct inspections lies with decision-making body within "due process" and not the delegating minister then line of authority and accountability to parliament and public is cut.
-due process also raises issues of imminent potential for harm to health or environment, and emergencies
-does delegating jurisdiction have to wait for the completion of "due process" in event of imminent potential for harm to human health or the environment, or emergencies?

5.Additional Problems

i)Risk-Based Approach to Enforcement

-we prosecute murders, but let bank robberies go?
-what about cumulative effects of "minor" violations

ii)Harmonization of Compliance Policies

-not good idea given non-compliance policies of most jurisdictions
-appears designed to prevent jurisdictions from taking more aggressive approach

iii)Delivery of service by independent public or <u>private sector</u> inspection service

-proposes privatization of inspection services (i.e. law enforcement)
-note that even the strongest proponents of privatization express concerns over the privatization of services and activities related to law enforcement (William Standbury's 1986 <u>Canadian Public Administration</u> paper on the results of the privatization of environmental laboratory services in B.C. is a classic on this)

iv)Jurisdiction Best Suited to Deliver Services
-how will this be worked out?

v)Unaddressed Issue:Implications for CEPA Requests for Investigation.

-what are implications for CEPA sections 108-110 requests for investigation?
-how will federal government respond to requests for investigation if can't do inspection without "due process" and potentially without capacity?
-N.B. section 109 establishes statutory requirement to "investigate all matters that the Minister considers necessary for a determination of the facts"

6.Recommended Approach to Sub-Agreement

-short agreement to negotiate bilateral agreements in this area.

-agreement should make clear right of delegating jurisdiction to conduct inspections where it believes that the delegated jurisdiction is failing to fulfil its obligations under any agreement.
-if "due process" established (N.B. we do not support this), final decision must rest with delegating minister
-delegating minister also must have right to act immediately in cases of imminent potential for harm to human health or the environment or emergencies.

-Agreement should make clear that in all cases federal government retains responsibility (and capacity) for inspections in relation to treaty and customary international obligations, as under international law federal government is responsible for Canadian fulfillment of such obligations.

-agreement should provide for detailed reporting on inspection activities by delegated jurisdiction to delegating jurisdiction in relation to the delegating jurisdiction's legislation, and by the delegating jurisdiction to public and parliament or legislature.
-this should include resources (human and financial) available, number, type, location, date of inspections and outcomes (compliance status of inspected facility/undertaking, enforcement actions taken (warnings, investigations, injunctions, prosecutions)).

-agreement should provide for a public request for inspection/investigation mechanism.
-responsibility for responses to public requests for inspections/investigations should lie with the Minister of the jurisdiction under whose legislation the investigation has been requested (i.e. if investigation requested under CEPA then responsibility for response lies with federal Minster).
-requires right of jurisdictions to conduct inspection in relation to their legislation in response to

public requests.

-any multilateral agreement must include, amendment, sunset and review clauses.
-any bilateral agreements should include 5-year sunset clause, with option for renewal by both parties.
-any bilateral agreements should provide for independent review prior to renewal.

APPENDIX E:PARTICIPANTS IN THE DEVELOPMENT OF THIS PAPER

William AndrewsExecutive Director, West Coast Environmental Law Association

Marc BeaucheminPresident, Quebec Environmental Law Centre.

Craig BoljokovacResearcher, Inuit Tapirisat of Canada.

Shelly BryantExecutive Director, Action: Environment (NF).

Glen KorolukManitoba Eco-Network.

Martha KostuchVice-President, Friends of the Oldman River Society.

Paul MuldoonCounsel, Canadian Environmental Law Association.

Marilyn PowellWashademoak Environmentalists (NB).

Howard SamoilStaff Counsel, Environmental Law Centre (Alberta).

Carol Lyn WallaceActing Executive Director, Canadian Environmental Defense Fund.

Karen ClarkResearch Associate, Canadian Institute for Environmental Law and Policy.

Mark WinfieldDirector of Research, Canadian Institute for Environmental Law and Policy.

Anne MitchellExecutive Director, Canadian Institute for Environmental Law and Policy.

Tom BalintCaucus and Consultation Coordinator, Canadian Environmental Network.

ENDNOTES

1.Peter N. Nemetz, "The Fisheries Act and Federal-Provincial Environmental Regulation: Duplication or Complementarity?" in (1986) 29 CANADIAN PUBLIC ADMINISTRATION 401 at 415-416..

2. Mark Winfield, "The Ultimate Horizontal Issue: The Environmental Policy Experiences of Alberta and Ontario, 1971-1993" , in (March, 1994) 27 CANADIAN JOURNAL OF POLITICAL SCIENCE 129.

3. Doug MacDonald. The Politics of Pollution (Toronto: MacLellan and Stewart, 1991) at pp. 250-252.

4.The other three institutions were the International Development Research Centre, The International Institute for Sustainable Development, and the National Round Table on Environment and Economy.

v.5. The reason for the increasing importance of the CCME is described by Kathryn Harrison. In a time of conflict and disagreement because the federal government had taken a stronger role in environmental management in Canada, the CCME emerged as a forum that moderated federal power:

> "Within the CCME the provinces...are in a relatively strong position to resist federal proposals. The Council's long-established norm of consensual decision-making also strengthens the provinces' ability to constrain federal involvement, particularly in joint initiatives. These features can help explain why revitalization of the Council was consciously pursued by some provinces as a means to establish a credible alternative to federal policy-making.

Kathryn Harrison, "Prospects for Intergovernmental Harmonization in Environmental Policy," in Brown and Hiebert (eds.) Canada: The State of the Federation 1994 (Kingston: Queens University, Institute of Intergovernmental Relations, 1994) at 192.

6. Canadian Council of Ministers of the Environment, "Rationalizing the Management Regime for the Environment: Purpose, Objectives and Principles," undated.

7. K. Clark and B. Rutherford, "The Constitution, Federal-Provincial Relations, Harmonization and CEPA" in M. Winfield (eds) Reforming the Canadian Environmental Protection Act: Submission to the House of Commons Standing Committee on Environment and Sustainable Development (Toronto: Canadian

Institute for Environmental Law and Policy, 1994) at 19.

8.S. Ochman, ed., An Environmentalists' Perspective on Harmonization: A Preliminary Analysis (Ottawa: Harmonization Working Group, November, 1994).

9. S.Kaufman, P.Muldoon and M.Winfield. The Environmental Management Framework Agreement: An Analysis and Commentary (Toronto: The Canadian Institute of Environmental Law and Policy and the Canadian Environmental Law Association, 1995).

10.See KPMG Management Consulting Resource Impacts Assessment Study: Environmental Management Framework Agreement Study Report, (Ottawa/Winnipeg: Canadian Council of Ministers of the Environment/KPMG August 1995; and see G.R. Brown, "Canadian Federal-Provincial Overlap and Presumed Government Inefficiency," Pubilus, 24, (1994),: 21-37.

11. M. Winfield and K. Clark, The Environmental Management Framework Agreement - A Model for Dysfunctional Federalism? An Analysis and Commentary (Toronto: The Canadian Institute of Environmental Law and Policy, 1996).

12.R.Matas, "Cash low to cut red tape," The Globe and Mail, January 24, 1996.

13.R.Spiers, "Environmental safety sacrificed for 'harmony'" The Toronto Star, July 2, 1996.

13.However, the drafts also indicate that harmonization will proceed on identified "priorities" -- a process that by definition will leave gaps in the harmonized regime. Unless "addressing gaps and weaknesses" is identified as a priority, then it would appear that harmonization will create more gaps in environmental management in Canada.

15. See Harrison, op cit, for a full discussion of the provincial and federal response to the "my standard is better than yours" dynamic in Canada in the late 1980s.

16.See, for example, on the case of Ontario, M.Winfield and G.Jenish, The Common Sense Revolution and Ontario's Environment (Toronto: Canadian Institute for Environmental Law and Policy, June 1996).

17. Rosemary Speirs, "Environmental Safety Sacrificed for 'Harmony'", *Toronto Star*, 2 July, 1996; and "Harmonized Environmental Rules A Recipe For Disaster, *Toronto Star*, 26 September, 1996. See also "Victory in the Referendum in Quebec Led to a New Showdown," Maclean's Magazine, October 21, 1996 at 27:

"Even before the referendum campaign began, the Liberals had been planning a post-referendum charm offensive. They wanted to appear more cooperative in areas where the federal government and the provinces shared control, such as health care and the environment. On September 27, Chretien wrote a note to Sheila Copps, in her role as environment minister, pointedly suggesting that she end jurisdictional disputes she was entangled in with several provinces. "Dear Colleague," the letter began, "I am writing to seek your assistance in the management of several potentially difficult issues during the period of national reconciliation which will follow the referendum." Proposed actions would be studied on several fronts, the letter continued, including "...environment in order to demonstrate both federal commitment and leadership in forging a stronger federation."

Excerpted from Edward Greenspon and Anthony Wilson Smith, Double Vision: The Inside Story of the Liberals in Power (Toronto: Doubleday, 1996)

18. *The Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem, 1994*. Under "Principles" the agreement states:

Canada and Ontario recognize their shared responsibility for managing the Great Lakes and that neither government can succeed alone. Programs and activities resulting from this Canada-Ontario Agreement will be shared in such a way as to reflect the unique roles and responsibilities of each government, to minimize cost and to avoid duplication and overlap.

See also: *First Progress Report Under the 1994 Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem*; and *The Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem, 1994 Stream 2 Progress Report (July 1994-July 1995), August 16, 1995.*

19. Peter Hogg. Constitutional Law of Canada. 2nd Ed. (Toronto: Carswell, 1985) at 90.

20.Kaufman, Muldoon and Winfield, The Environmental Management Framework Agreement: An Analysis and Commentary.