Recommendations For Improvements To Proposed

BRITISH COLUMBIA ENVIRONMENTAL PROTECTION ACT

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WEST COAST ENVIRONMENTAL LAW ASSOCIATION

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INTRODUCTION

Since 1974, West Coast Environmental Law Association (WCELA) has provided legal services to members of the public who are concerned about threats to the environment. WCELA and the West Coast Environmental Law Research Foundation provide legal representation, promote law reform, provide legal education, conduct legal research and maintain a library of environmental legal materials.

WCELA advocates pollution prevention as the preferred approach to dealing with environmental contamination. For many years we have supported the development of a long term pollution prevention strategy for British Columbia, combining strict law enforcement for environmental polluters with economic incentives to encourage polluters not to pollute in the first place. [(1) -- 1. For example, see *Preventing Toxic Pollution: Toward a British Columbia Strategy*, West Coast Environmental Law Research Foundation, 1991, which outlines a pollution prevention strategy for B.C.] We strongly support provincial legislation to provide the sound legal basis for a comprehensive pollution prevention strategy for British Columbia. Further, new environmental protection legislation has long been needed to replace the existing *Waste Management Act* and to provide an explicit change in focus from end-of-pipe waste management to pollution prevention.

We have participated extensively in the consultation processes for the development of the *British Columbia Environmental Protection Act* (the Act), including the advisory committee and a number of subcommittees dealing with specific topics. Our comments

below are in addition to those provided, both orally and in writing, during these consultation processes.

Our recommendations in this brief arise from our review of the draft Act dated June 30, 1994. We appreciate the opportunity to comment on the draft Act and look forward to reviewing the revised Act in the near future.

GENERAL COMMENTS

- We support a strong purpose statement in the Act to provide a vision for environmental protection in the province into the next century. We have a number of specific suggestions for strengthening the purpose statement in the current draft of the Act.

- We strongly support the inclusion of the environmental bill of rights provisions in Part 2, in particular the public trust doctrine and the civil cause of action. This will bring British Columbia's key legislation for setting environmental standards further into line with modern environmental legislation.

- We recommend moving the citizen initiated investigation provisions to the part of the Act dealing with enforcement, to clarify that this Act will meet the equivalency requirements in CEPA.

- The definition of pollution prevention is a major defect of the Act. We strongly recommend revising the definition of pollution prevention throughout the Act so that it is clear that it refers to activities that prevent pollution at the source. Pollution prevention should refer to environmental protection methods that are fundamentally different from approaches that focus on managing or controlling pollution after it has been created.

- The Act should be expanded to allow for the regulation of noise pollution.

- The Act should include enabling provisions for a legislated program for intervenor funding and participant assistance.

- The importance of public participation in environmental decision making is vital to both maintaining and enhancing the state of our environment. Despite wide acceptance of this principle, there is a growing threat that those individuals and organizations who advocate for greater environmental protection may be subject to private litigation designed to retaliate against them for past advocacy and participation. In the absence of other provincial legislation dealing with this issue, the Act should contain provisions to protect those individuals and organizations active in public interest environmental advocacy from lawsuits designed to deter their participation. These provisions are referred to as anti-SLAPP measures ("Strategic Lawsuits Against Public Participation"). These

provisions should define what constitutes a SLAPP and the parameters for protection and should consider remedies against a SLAPP such as

- a right to petition the court to determine whether a particular legal action is a SLAPP and, if so, a right to dismiss the action;
- in a dismissal petition, the plaintiff should bear the burden to show that the cause of action has a substantial basis in law or has a substantial probability of success;
- where an action is dismissed because it is determined to an unjustifiable SLAPP, an automatic court award of costs to the defendant as a penalty to SLAPP filers and as a strong disincentive to those who consider filing a SLAPP;
- special funding to provide financial assistance for SLAPP defendants.

- The Act should prevent the application of adverse cost awards for public interest participants.

- The Act should provide the basis for requiring the province to set ambient standards for air quality and water quality. Exceedances of these standards should trigger actions such as reviews of all authorizations in the affected areas and programs to deal with non-point sources of contaminants.

SPECIFIC COMMENTS

PART 1

INTERPRETATION, APPLICATION AND ADMINISTRATION

Division 1 -- Definitions, Interpretation and Application

Section 1 -- Definitions

"authorization" -- This definition should include a compliance agreement entered into under Part 11.

"board" -- Since the recently passed *Environmental Assessment Act* establishes an environmental assessment board, which will have the abbreviation "EAB", we recommend renaming this board to avoid the confusion arising from both boards sharing the same abbreviation.

"contingency plan" -- The best way to deal with an environmental emergency is to prevent it from occurring in the first place. Further, to reflect the overall purposes of the Act, it should provide that any contingency plan should be designed to prevent as well as manage environmental accidents.

Therefore, we have two suggestions for strengthening this definition. First, we recommend inserting the words "preventing and" between "procedures for" and

"managing environmental accidents". Second, we recommend adding a new subsection (a.1) as follows:

"(a.1) methods and procedures to prevent and environmental accident;"

"pollution prevention" -- We have serious concerns about this definition and outline our reasons in our comments regarding Part 3 of the Act. Therefore, we recommend the following amendments to the definition:

"pollution prevention means to avoid, eliminate or reduce from all sources the use, generation or release of polluting substances, including toxic substances, or the manufacture of products with polluting or toxic constituents, by means of activities including

- (a) avoidance and elimination of polluting substances,
- (b) substitution of polluting substances with less polluting substances;
- (c) reduction of the use of polluting substances;
- (d) elimination and reduction of the generation of polluting substances; and
- (e) in process recycling and reuse or onsite closed loop recycling."

The remaining elements of the current definition should be included in a definition for waste management or pollution control.

"pollution prevention plan" -- We recommend that the definition of a pollution prevention plan list the elements generally considered appropriate for a comprehensive facility pollution prevention plan, including

- a policy statement of management support for pollution prevention, the facility plan, and its implementation;
- a statement of reduction goals and a schedule for meeting those goals;
- a comprehensive review of all of the operation's processes that use, generate or release pollutants;
- the identification of pollution prevention opportunities in all such processes and schedules for implementing those opportunities;
- financial and technical analysis of identified options;
- criteria for choosing or discarding identified options;
- procedures for measuring and monitoring progress in achieving reductions;
- a description or employee involvement and training.

"substance" -- We note two problems with this definition. First, the definition should be expanded to include noise or vibration, so as to incorporate noise pollution in the definitions of "polluting substance" and "air contaminant", since both of these definitions refer to a "substance". Many other Canadian jurisdictions provide for the regulation of noise pollution in their environmental statutes, including Manitoba, New Brunswick, the Northwest Territories, Ontario, Prince Edward Island and the Yukon.

Second, since biotechnology substances include organisms, the definition of "substance" should be expanded to include organisms.

Therefore, we recommend this definition be amended as follows:

"'substance' means any product, by-product, residual or organism and includes the degree of acidity or alkalinity, heat, odour, noise and vibration;"

Section 2 -- Purpose

This is a very important section of the Act and should provide a sense of vision for environmental protection into the next century. We have a number of comments regarding the purpose section of the Act.

First, we strongly recommend strengthening the provision incorporating the precautionary principle by deleting the reference to cost-effective measures and not limiting the application of the precautionary principle to decisions made by the Lieutenant Governor in Council or the minister.

The precautionary approach contrasts with the traditional approach of delaying regulation of a pollutant until it is conclusively proven that it is harmful to humans or the environment. The traditional approach ignores how little is really known about the multitude of pollutants that are released into the environment and the overwhelmingly complex web of life that such pollutants affect. Using the precautionary approach is an essential component of effective environmental regulatory and policy development, since decisions frequently must be made to deal with threats of serious environmental damage in the face of scientific uncertainty.

Second, we support making the achievement of zero pollution an explicit goal in BCEPA and recommend strengthening subsection 2(1)(c) in that regard. The present language refers to minimizing pollution, but this is only part of the overall objective of achieving zero pollution. Stating the goal more clearly provides the basis for stronger action when it is needed, such as eliminating persistent toxic contaminants and sunsetting or banning the worst substances.

Third, subsection 2(1)(g) recognizes that our economic prosperity depends on sound environmental management. More fundamentally, our economic well-being depends on a healthy environment, which is the objective of sound environmental management, but requires other actions as well.

Fourth, since the Act in Part 2 recognizes the right of citizens to a healthy environment, we recommend adding this as one of the purposes of the Act.

Finally, we note that there may be a need to add provisions in the purpose section dealing with pest management and biotechnology when those parts of the Act are finalized.

Therefore, we recommend amending section 2 at this time as follows:

"2(1) The purpose of this act is to provide for the protection, conservation and sustainability of the environment by...

> (c) achieving the goal of zero pollution in British Columbia; (d) applying the precautionary principle so that if there are threats of serious or irreversible damage the lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation;... (e.2) protecting the right of present and future generations to a healthful environment;... (g) recognizing British Columbia's economic prosperity depends upon a healthy environment and sound environmental management;"

Division 2 -- Administration, Roles & Partnerships

Section 6 -- Functions and powers of the minister

Subsection 6(2) should state that the first responsibility of the minister is "to promote the protection of the environment and sustainability;".

Section 9 -- Advisory committees

In subsection 9(1), it should be clarified that an advisory committee may be established to advise on any portion of the Act, not just the Act as a whole. For example, an advisory committee could be established, for a fixed time period, to make recommendations about the appeal process. A committee could also be established on an ongoing basis to address a specific emerging issue, such as biotechnology.

Therefore, we recommend inserting the words "or any portion thereof" in subsection 9(1)(a) as follows:

"9(1)(a) the content and administration of this Act or any portion thereof, and"

A provision should be added providing that the establishment of an advisory committee and any reports, recommendations and reasons made by an advisory committee must be posted on the electronic registry.

Section 12 -- Delegation of power

This section provides that the minister may delegate any power or duty of the minister to a person representing other government bodies. This section should require the minister to ensure that any delegated power or duty is properly carried out within the purposes of the Act and require the minister to revoke any power or duty if the purposes of the Act are not being met.

Section 15 -- Laboratories and monitoring methods and procedures

It is very important that independent laboratories that are used to conduct testing required under the Act be subject to routine inspections and spot audits, to determine that their equipment and methodologies meet acceptable standards and to ensure reliable and accurate monitoring data and analysis.

We recommend that any person holding an authorization must obtain written consent, from any independent laboratory it wishes to employ, to routine inspections by the ministry and spot audits. This consent should be a condition of the authorization being granted.

We also recommend that written consent to inspections and spot audits be required from any laboratory certified under section 15.

Section 16 -- Powers of the Lieutenant Governor in Council

In subsection 2 the Lieutenant Governor in Council should be required to act in a manner that protects the environment as well as is in the public interest. Therefore, we recommend subsection 2 be amended as follows:

"16(2) In acting under this section, the Lieutenant Governor in Council shall act in a manner that ensures the protection of the environment and that he or she considers to be in the public interest and shall not be limited to the considerations that would be taken into account by a director, district director, officer or manager."

Section 20 -- Immunity

This section conflicts with the public trust provisions in section 30 of the Act and should be deleted or revised to take the public trust provisions into account.

Section 22 -- Municipal liquid waste management areas

This section provides that the Lieutenant Governor in Council may designate municipal liquid waste management areas. We have four comments regarding this section.

First, we recommend that decisions to do so, and any other decisions to delegate authority to local and regional governments and to designate areas within municipalities be entered on the environmental registry.

Second, we recommend that, when any delegation of rights and obligations under this Act occurs, all notice, public comment and appeal provisions that would otherwise exist under this Act be maintained or established by the delegated authority as a condition of the delegation.

Third, subsection 22(5) provides that "a person affected by an order...under this section" may appeal to the board. For the reasons noted in our comments on Part 10, Appeals, we recommend that this section be amended to provide that "any interested person" may appeal an order to the board.

Fourth, this section refers to the term "waste" which is now not defined in the Act and has been replaced generally by the term "residual".

Section 23-- Municipal liquid waste in municipalities

Subsection 23(2) provides for a maximum fine of $50,000 under this section. Since this section provides for bylaws respecting direct or indirect discharge of wastes into sewers, which may include substances which cause adverse effects, the size of the maximum fine should be increased to the maximum under the Act for the discharge of any substances that may cause an adverse effect to the environment.

Section 24 -- Control of air contaminants in Greater Vancouver

Subsection 24(2)(b) provides for a maximum fine of $200,000 for contravening a provision of a bylaw, other than a provision dealing with the quantity or quality of air contaminants discharged. However, subsection 26(2)(m) provides for a maximum fine of $300,000 in similar circumstances.

For consistency, we recommend that subsection 24(2)(b) be amended to reflect the higher fine provided for in subsection 26(2)(m).

Section 27 -- Municipal administration of storage tanks

This section permits a municipality to administer regulations respecting storage tanks by simply giving notice to a director. It also provides for immunity from liability in relation to the exercise of this authority for the municipality, a councillor, an officer or an employee.

It is not clear why the administration of these regulations should be dealt with differently than the provisions for transferring the administration of other provisions of this Act in section 13, which vests control with the Lieutenant Governor in Council, sets some criteria and allows the minister to revoke the transfer of administration.

We favour the approach taken in section 13 and recommend deleting section 27. In any event, the immunity provision must be subject to the public trust provisions in section 30.

Section 28 -- Conflicts with this act

This section provides generally that this Act applies if there is a conflict with another act. However, subsection 28(1) permits the Lieutenant Governor in Council to prescribe

exceptions to the general rule. Also, subsection 28(7) permits the Lieutenant Governor in Council to suspend the operation of a bylaw or land use contract to allow the exercise of an authorization under this Act.

We recommend that in both of these cases the ability of the Lieutenant Governor in Council to override the general rule should be guided by the criteria that the exception is to provide for better protection of the environment.

Therefore, we recommend this section be amended in subsections 28(1) and 28(7) as follows:

"28(1)(b) as may be prescribed by the Lieutenant Governor in Council <u>for the protection of the environment</u>;"

28(7)" ...the Lieutenant Governor in Council may, by order, suspend the operation of the bylaw or contract to the extent he or she considers necessary <u>for the protection of the environment</u> to enable the rights given by the permit, approval or order to be exercised."

PART 2

ENVIRONMENTAL BILL OF RIGHTS

Section 184 -- Public application for investigation

We recommend moving the sections of the Act allowing a person to apply for an investigation of a contravention of the Act to Part 11, Enforcement, for two reasons.

First, it is primary an enforcement mechanism, aimed at improving compliance with this and other environmental legislation and regulations.

Second, it would clarify that the enforcement mechanisms in BCEPA are equivalent to the enforcement mechanisms in the *Canadian Environmental Protection Act* (CEPA), facilitating the harmonization of federal and provincial environmental regulation. If the province wishes to sign equivalency agreements with the federal government declaring that specific CEPA regulations do not apply in British Columbia, it will need to show under section 34(6)(b) of CEPA that the enforcement provisions of BCEPA contain citizen initiated investigation provisions.

Our remaining comments respecting the provisions of Part 2, Environmental Bill of Rights, will be submitted directly to the subcommittee reviewing these provisions of the Act.

PART 3

POLLUTION PREVENTION

Division 1 -- Prohibitions and Authorizations

The definition of pollution prevention is a major defect of the Act. It does not follow the current trend in progressive North American environmental protection legislation which is to avoid the creation of pollution, not just control it. The definition is important, not simply as a matter of semantics. The concept of pollution prevention demands a conscious shift in thinking that prevents the creation of pollution in the first place. The current definition of pollution prevention in the Act is confusing since it includes some prevention, some pollution control and some pollution remediation.

The importance of the definition of pollution prevention is discussed in the *1994 Pollution Prevention Evaluation Report*, published by the Minnesota Office of Waste Management. It states at page 17:

Pollution prevention involves taking measures to address pollution at its source of generation, thereby eliminating toxic pollutants before they are created. Preventing pollution means a waste or emission is not generated in the first place.

The Toxic Pollution Prevention Act (Minn. Stat. §115D.03, subd. 8) defines pollution prevention as "eliminating or reducing at the source the use, generation, or release of toxic pollutants, hazardous substances, and hazardous wastes." The key phrase in this definition is "at the source."

Pollution prevention approaches can range from simple methods and techniques to advanced technologies. Simple preventive applications may include such activities as covering exposed containers of volatile chemicals or tightening loose and leaking pipe connections. Other low-technology options include personnel training, good housekeeping, improved business operations and inventory control practices. High-technology pollution prevention applications include redesigning manufacturing processes, substituting raw materials (e.g. switching hazardous solvents to water-based materials), increasing the efficiency of production, or redesigning and reformulating products.

Pollution prevention is an environmental protection method that is fundamentally different from approaches that focus on managing or controlling pollution after it has been generated. Pollution prevention occurs before the creation of a waste or a pollutant, and thus before the implementation of waste management alternatives such as pollution control, treatment, recycling or disposal.

We strongly support this approach to distinguishing between pollution prevention and waste management in the Act. A number of things flow from our recommended approach.

First, pollution prevention should be defined to include changes in production processes, changes in the inputs into production, redesigning or reformulating products, and improved management of production.

Second, pollution prevention should not include activities, such as out of process recycling or end of pipe pollution control, which are aimed at dealing with waste after it has been created. Out of process recycling in particular can create pollution or waste and the risk to workers, consumers, the community and the environment is increased due to the need for out of process handling, storage, transportation and reuse. Including out of process recycling in the definition of pollution prevention allows operators to consider "add ons" to existing ways of carrying on operations, such as recycling programs, rather than fundamentally rethinking the processes used and the design of the products.

Third, based on this distinction, the requirements in this division need to be reorganized to require pollution prevention planning from every operation that requires an authorization under the Act, without restricting the results of the plans to simple compliance. The minimum contents of the plan should be included in the definition of a pollution prevention plan.

Fourth, connected to the granting of an authorization, an applicant should be required to submit plans showing how compliance will be achieved on a comprehensive basis and should further be required to undertake pollution prevention planning as a separate exercise.

Finally, this distinction will allow pollution prevention activities to receive specific support in the Act, as well as in practice aimed at favouring source reduction over waste management. For example, certain economic incentives might apply only to pollution prevention activities. This approach will lead to more focussed efforts at eliminating at source substances that frequently cause adverse effects and will encourage and foster improved processes and practices.

Therefore, we strongly recommend that this division be amended to take into account this distinction.

Section 41 -- General prohibitions and pollution prevention targets

We have two comments regarding this section.

First, subsection 41(1) prohibits introducing into the environment any substance so as to "cause pollution." It is not clear why the prohibition is against causing pollution rather than causing an adverse effect.

We recommend the latter as the preferable approach.

Second, in subsection 41(2) we recommend adding "products" to the list of items that may be subject to pollution prevention targets set by the minister.

Section 42 -- Ministerial prohibitions and control areas

This is a very useful section of the Act and should permit appropriate action where activities or products pose serious threats to the environment, in a variety of circumstances.

We have three comments regarding this section.

First, the actions permitted by the minister in subsection 42(4) must be broad enough to authorize the elimination of the use or generation of substances, products or activities or a timetable for their eventual elimination. This should include bans of products themselves as well as product use.

Second, the power to issue the declaration in subsection 42(1), which permits the minister to declare that a works, product use or activity has or may cause an adverse effect, should be exercised by the minister alone. The latest amendment to this subsection requires the minister to consult with the Lieutenant Governor in Council prior to issuing this declaration. While the minister may choose to consult with the Lieutenant Governor in Council on many or most occasions, it should be the minister's decision alone to issue a declaration under this section. This approach confirms the authority of the minister in relation to environmental protection and allows for expeditious action if it is necessary to take immediate steps to protect the environment. Therefore, in subsection 42(1) we recommend deleting the phrase "in consultation with the Lieutenant Governor in Council".

Third, subsection 42(4) should permit the minister to make declarations that apply to the whole province or permit the minister to designate the entire province as an environmental control area.

To address these concerns we recommend subsection 42(1) and subsection 42(4) be amended as follows:

"42(1) The minister <<> may, in writing, declare pursuant to this section that an existing or proposed class of works, undertaking, substance, <u>product</u>, product use or type of activity has caused or potentially may cause an adverse effect;"

"42(4) If a declaration has been made under subsection (1), the minister may

- (a) designate <u>the whole province or</u> geographic areas of the province as environmental control areas;
- (b) establish criteria, objectives, standards, prohibitions, <u>bans</u> or regulations which shall apply to a class of works, undertaking, substance, <u>product</u>, product use or type of activity named in the declaration within any environmental control area designated under subsection (a);...

- eliminate, prohibit or manage the class of works, undertaking, substance, product, product use or type of activity named in the declaration for the purposes of this section."

Section 41A -- Authorization

It should be mandatory, rather than discretionary, for a manager to require any person who has or needs an authorization to prepare a pollution prevention plan. It should be discretionary for other activities that do not require an authorization, if it is necessary for the protection of the environment.

Section 43 -- Application of environment criteria, objectives and standards

We have two comments regarding this section.

First, in issuing an authorization, the overriding criteria should include ensuring that the environment is protected and to prevent any adverse effect from occurring. Therefore, we recommend that subsection 43(1) be amended by adding a new provision as follows:

"43(1)(a.1) ensure the authorization contains requirements for the protection of the environment and prevention of any adverse effect;"

Second, we favour the approach of setting timetables for the future reduction or elimination of substances, allowing for the development of new pollution prevention technology or processes, the installation of equipment and, in appropriate circumstances, spreading out capital expenditures. However, the overriding consideration in setting timetables must be the protection of the environment, which should not be sacrificed for economic or other reasons if irreparable damage to the environment could occur by scheduling environmental improvements over time.

Therefore, subsection 43(4) should require that environmental factors must take precedence over economic, social and cultural values in setting timetables. Also, the scheduling of the time limits should be subject to public notice, comment and the right of appeal.

Section 57 -- Pollution prevention plan public involvement process

We support requiring comprehensive public involvement regarding the development and content of pollution prevention plans. To be effective, the process for public involvement must be clearly set out, the requirements easily accessible to the public, and the requirements consistently applied to the greatest extent possible. To that end, minimum standards for satisfying the test of "comprehensive public involvement" should be prescribed by regulation and should be consistent with or better than the

standards for public notice, comment and appeal which apply generally in relation to authorizations under this Act.

Public availability of plans is particularly important since government regulators have only limited resources for review and implementation of plans. Public availability of plans also is important both for the purposes of a community's right to know what toxic substances and wastes are being generated in its backyard and to measure the success of pollution prevention efforts.

Section 56 -- Pollution prevention plans

As discussed above, we recommend that pollution prevention planning be mandatory and should contain, at minimum, the items listed in our proposed definition of pollution prevention plans.

Section 51 -- Approvals

Granting of approvals should be subject to criteria about when an approval is used rather than some other form of authorization. Approvals should be subject to public notice and comment provisions, should be entered on the environmental registry, and should be subject to the appeal provisions.

Division 2 -- Clean Air Provisions

We recommend adding a provision to the section requiring the minister to prescribe ambient air quality standards for polluting substances which may apply to the whole province or any area of the province.

Division 3 -- Clean Water Provisions

Section 55G -- Water quality standards

We recommend that it be mandatory that the minister set ambient water quality standards for polluting substances. A violation or exceedance of ambient standards should trigger a review of all authorizations in the affected area and actions to deal with any non-point sources of pollution.

Section 55K -- Product disclosures

This should be a very useful section and we support its inclusion. However, we recommend that it be expanded to include information about substances and products that may enter any water body, the air or land, rather than being limited to surface or ground water.

Division 4 -- Packaging and Reduction of Residuals

Section 64 -- Packaging, product containers and disposable products

In subsection 64(2) we strongly support allowing the minister to make regulations to facilitate the reduction of packaging and other products.

Division 5 -- Special Waste

Section 44 -- Special waste - confinement

In subsection 44(3) if a special waste is released it is deemed to cause pollution. It is not clear why this term is used rather than "adverse effect". We favour the latter.

Division 6 -- Miscellaneous

Section 46A -- Polluting substance - confinement, storage and transportation

This section requires polluting substances to be confined in accordance with an authorization. It should also require keeping records of those substances that are available for review by the public.

PART 4

ECONOMIC INSTRUMENTS

Section 65 -- Charges, fees and costs to be paid to the Crown

Subsection 65(2) lists a number of factors on which fees and charges must be established. This is a useful list which should be considered in setting a fee schedule, but will not all be relevant in each specific situation.

Therefore, we recommend providing that all of these factors must be considered in setting overall or general schedules for discharge fees and charges. However, in setting the actual fees payable in a specific situation, the fees and charges should be based on any or all of the listed factors and should vary on the basis of those factors. This will prevent an actual fee being declared *ultra vires* because one of the factors is not relevant in a particular case.

Section 69 -- Fees levied by local authorities

This section provides the basis for local authorities to set and collect fees. However, the criteria for a local authority doing so in section 69 differ from the criteria for the province in section 65. Therefore, we have two suggestions for harmonizing the approach taken to setting fees and charges.

First, since the GVRD is a local authority, we recommend dealing with all local authorities uniformly and setting up one list of criteria for local authorities including the GVRD.

Second, we recommend expanding the factors listed in section 69 to include all of the factors referred to in subsection 65(2) and providing in section 69 that a local authority shall establish fees and charges based on any or all of those factors.

Section 70 -- Marketable discharge units

We have five comments regarding this section.

First, we recommend expanding subsection 70(1) to allow the Lieutenant Governor in Council to market rights to produce, import or sell products which lead to pollution, such as solvents, or fuels or vehicles with different emission characteristics. This would be in addition to marketing units of discharge.

Second, since units may at times be allocated rather than marketed, we recommend providing in subsection 70(1)(a) that the Lieutenant Governor in Council may "market or allocate units...".

Third, section 70 should include a provision making it an offence to exceed the discharge level authorized by the market unit.

Fourth, it should be clarified that, in some cases, holding marketable discharge units may be established as a requirement for any discharge at all.

Fifth, section 70 should include a provision specifying that the requirement for marketable units may be in addition to any limits established by other instruments.

Section 72 -- Environmentally responsible product use and purchasing

We support measures that promote product use and procurement policies aimed at enhancing environmental protection. Since the province is a significant consumer of goods and services, it has great potential to promote the availability of environmentally preferable products, goods and services.

We have two recommendations for improving this section.

First, the minister should be permitted, in subsection 72(1), to promote product use policies and purchasing policies which favour environmentally responsible products, goods and services both in partnership with other agencies or alone if a partner is unavailable. While it may be preferable to do so in partnership with others, the minister should be able to create programs or pilot projects independently in appropriate

situations. Therefore, we recommend subsection 72(1) be amended to allow the minister to establish programs either alone or with others.

Second, the ability to establish purchasing policies in subsection 72(3) should be expanded to include other environmental properties of products, goods and services in addition to recycled content. For example, goods containing alternatives to ozone-depleting substances could be favoured over those containing ozone-depleting substances.

Therefore, we recommend subsection 72(1) be amended as follows:

"72(1) The minister may establish programs for the purpose of promoting product use policies and purchasing policies which favour environmentally responsible products, goods and services, either alone or in partnership with the federal government, other ministries and agencies of the crown, local authorities or any other person."

We further recommend that subsection 72(3) be amended by adding a new paragraph (d) as follows:

"72(3)(d) with specified properties which reduce the burden on the environment."

PART 5

CONTAMINATED SITE REMEDATION

Since we understand that the provisions dealing with contaminated site remediation are not scheduled to be amended in connection with the introduction of BCEPA, we have not included comments on Part 5 at this time.

PART 6

PEST MANAGEMENT

Since we are participating in the committee that is reviewing the pest management provisions of the Act, we will submit our comments on pest management through that committee.

PART 7

ENVIRONMENTAL ACCIDENTS AND EMERGENCIES

Section 116 -- Planning

A contingency plan should be required for any person who produces, stores, uses or transports a polluting substance or engages in activities that may cause an adverse effect. The requirement to have a plan that meets prescribed standards should be mandatory, not discretionary.

Therefore, we recommend that section 116 be amended to require that such persons submit a contingency plan to the manager for his or her approval. This will allow those persons with satisfactory existing plans to merely document and submit those plans for approval and will require any persons without plans to prepare and submit newly developed plans.

Section 117 -- Spill reporting

Subsection 117(4) provides that nothing in this section is intended to derogate from reporting provisions in other enactments. We recommend that this provision be expanded to include regulations as well.

PART 8

BIOTECHNOLOGY SUBSTANCES

Since we are participating in the committee that is reviewing the provisions of the Act dealing with biotechnology substances, we will submit our comments on biotechnology substances through that committee.

PART 9

INFORMATION, EDUCATION AND PUBLIC INVOLVEMENT

Section 131A -- Environmental Registry

We strongly support the development of an environmental registry. This will facilitate more efficient dissemination of environmental information to citizens and organizations concerned about environmental protection and significantly enhance effective public participation in environmental decision-making. It should also streamline the process of providing information from the ministry to the public and to all persons regulated under this Act. This should reduce the amount of staff time and other resources needed to do so.

We recommend that the environmental registry for this Act be set up so that it is compatible with the registry which will be established under the new *Environmental*

Assessment Act, since much of the information may be relevant under both Acts and many of the same parties will require access to both registries. The reference to an electronic format for the registry is very innovative and should facilitate ease of access between different systems.

Given the importance of the environmental registry to the concerned public, we recommend the Act provide that the province must establish an environmental registry on a mandatory basis. This will ensure adequate resources are dedicated on a continued basis to establish and maintain the registry.

We further recommend requiring that key information, such as notice and public comment periods, authorizations granted, compliance information and enforcement actions, must be recorded on the registry. Other less time sensitive information, such as information about new programs, could be entered on a discretionary basis as resources permit.

We suggest this section be reworded as follows:

"131A. (1) The minister shall establish a registry of information to provide a means of giving information to the public about

(a) the environment, and

(b) administrative functions of the ministry related to the protection of the environment.

(2) The information held in the registry may be in an electronic format.

(3) For the purposes of subsection (1), the information about the environment shall include, but not be limited to

(a) authorizations, appeals, decisions and hearings;

(b) any notification required under this Act;

(c) any written reasons for decisions;

(d) notice of any agreements entered into under this Act;

(e) notice of any powers delegated under this Act;

(f) notice of any guides or codes of practice implemented or proposed under this Act;

(g) compliance data;

(h) charges, convictions, penalties, including administrative penalties, and other enforcement action brought under this Act;

(i) the establishment of any advisory committee under this Act and any recommendations from those committees;

(j) any other prescribed information;

and may include

(k) policies, criteria, objectives and standards;

(l) proposals and events that could affect the environment;

(m) results of monitoring carried out to assess the quality of the province's environment; and

(n) anything done under this Act.

Section 132 -- Notice and comment on regulatory and policy initiatives

We suggest three changes to this section.

First, we support the opportunity for public involvement in the development of regulations and policy initiatives. However, for this to be effective, standard notice and comment provisions should be set out in regulation, so that the public has a clear sense of when and how it can provide input. Therefore, we recommend adding "in accordance with any regulations" at the end of subsection 132(1).

Second, to strengthen the requirement for effective procedures in subsection 132(3), we recommend deleting the words "endeavour to" in the first line.

Third, as noted above, setting out in regulations the length of time for public input would provide certainty to the public. Therefore, we recommend adding "in accordance with any regulations" at the end of paragraph 132(3)(b).

Section 39 -- Reasons for decisions

We recommend that written reasons for making a decision to grant or not grant a stay under section 150 be made available to any person who makes the request. Therefore, we recommend amending this section to clarify that a person may also request written reasons from the board if it grants or refuses to grant a stay when an appeal is initiated. We suggest the following wording:

"39. When the board, a panel, a director or a manager makes a decision respecting an authorization or an order respecting a stay under this Act, ..."

Section 129 -- Confidentiality

Since the Act provides establishes a right of civil action in section 31, the exception in section 129 in regard to giving testimony should apply to civil suits as well as to proceedings under this Act or the regulations. Therefore, we recommend amending subsection 129(1) as follows:

"129(1) Except in a civil suit or a proceeding under this Act or the regulations, ..."

Section 133 -- Monitoring information

We have two concerns about this section.

First, this section should allow the minister to require that monitoring information submitted under subsection 133(3) as a requirement of an authorization be submitted in an electronic format, similar to provisions in regulations under the federal *Fisheries Act*. Therefore, we recommend inserting a new subsection as follows:

"133(3.1) The minister may require persons submitting monitoring information pursuant to subsection (1) as a requirement of an authorization to submit the monitoring information in an electronic format, in accordance with regulations."

Second, while we wholeheartedly support legislating the requirement that the minister release a non-compliance report regularly, this section should not authorize a reduction in the frequency of releasing that report. At present, the report is released semi-annually. Therefore, we recommend amending subsection 133(6) to require that this report be released at least twice per year.

Section 137 -- Codes of practice

The development of guides and codes of practice should be subject to notice to the public and should allow the opportunity for the public to provide input on the content. This could be done through the environmental registry.

Also, if a guide or code of practice is implemented, either a notice to that effect or the full document should be entered on the environmental registry.

Section 138 -- Research

This section should enable the minister to undertake a variety of types of research, not only scientific research. For instance, it might be useful for the minister to support

research evaluating the effectiveness of measures taken under this Act in connection with activities such as enforcement or economic instruments. Therefore, we recommend deleting the word "scientific" from this section so as to not limit the research that may appropriately be undertaken to achieve the objectives of this Act.

PART 10

APPEALS

Section 141 -- Environmental appeal board continued

We recommend removing the right of the Lieutenant Governor in Council to vary or rescind a decision of the board. Therefore, we recommend deleting subsection 141(7).

As noted above, since the recently passed *Environmental Assessment Act* establishes an environmental assessment board, which also will have the abbreviation "EAB", we recommend renaming this board to avoid the confusion arising from both boards sharing the same abbreviation.

Section 139 -- Standing

This section gives the right to appeal and standing before the board to "a person aggrieved" under this Act, acts listed in Schedule A or the regulations. We suggest this wording be amended to reflect the broad public interest in environmental protection. Although the draft Act reproduces the language currently in the *Waste Management Act*, we are concerned that the current wording could be used to give a restrictive interpretation to who will be given standing to appeal.

Therefore, we recommend amending this section as follows:

"139(1) Subject to this Part, any interested person may appeal to the board a decision made under this Act, an act listed in Schedule A or the regulations and shall have standing in any proceedings under this Part."

Section 146 -- Commencing an appeal

We have three concerns regarding this section.

First, for the reasons noted above, we recommend deleting in subsection 146(1) "a person aggrieved" and replacing it with "any interested person".

Second, since the Act now provides for an appeal directly to the board, it will be less confusing to the public to submit the request to appeal directly to the board rather than to the regional director. The board could be required to notify the regional director immediately, thereby triggering the opportunity to mediate a dispute under section 140.

It will be easier for the board to administer this process than to expect the public to remember that an appeal to the board does not get filed with the board.

Third, it should be possible for either the regional director or the board to extend the time for submitting a request to appeal under subsection 146(2) or to submit arguments supporting the appeal under subsection 146(4).

We recommend this section be amended as follows:

> **"146 (1) Any interested person may commence an appeal of a decision by submitting a written request to appeal to the board and, if so prescribed, in a form and manner prescribed by the minister.**
>
> (2) A request to appeal under subsection (1) shall be submitted to the board within 30 days after the decision or notice of the decision appealed from is given, whichever is later.
>
> (3) Immediately after receiving a request to appeal under subsection (1), the board shall notify the regional director.
>
> (4) A person commencing an appeal shall submit arguments supporting the appeal to the board
>
> > (a) with the request to appeal, or (b) within 15 days of submitting the request to appeal.
>
> (5) The board or a regional director may extend the time
>
> > (a) for submitting a request to appeal under subsection (1), either before or after the time period in subsection (2) has elapsed, and (b) for submitting arguments supporting the appeal, either before or after the time period in subsection (4) has elapsed.

Section 140 -- Mediation of a dispute

We support the option of using mediation to attempt to solve environmental disputes where all parties agree to the process. However, we have a number of concerns regarding some of the specific provisions in this section. We also suggest that greater flexibility be provided for in the mediation provisions to encourage the use of mediation for resolving disputes in circumstances where all the parties agree mediation is appropriate.

First, we object to limiting the mediation of a dispute to situations where the regional director undertakes the mediation. There may be cases where it is appropriate for the regional director to mediate the dispute, but in other cases it may be appropriate for the board to appoint a mediator.

Second, in all cases the choice of using mediator should be with the agreement of all the parties. If there are parties that have been involved in commenting under section 131, they should be notified of the mediation process. They must not be bound by the results of the mediation if they did not participate.

Third, in all cases the parties must agree to the choice of the mediator.

Section 151 -- Costs

We recommend that this section provide that there will be no adverse public interest cost awards, to prevent the chilling effect of an adverse cost award on public participation in environmental decision making.

Section 150 -- Appeal does not operate as a stay

Given the importance of granting, or not granting, a stay in connection with an appeal of a permit or other decision made under the Act, we recommend that the board be required to provide written reasons for its decision about whether or not to grant a stay. The board should also be required to file its written reasons, or a notice that written reasons are available, on the environmental registry.

PART 11

ENFORCEMENT

Section 155 -- Right of entry and inspection

We recommend that inspectors be given the authority to take some additional specific actions during an inspection under this section.

First, we recommend that inspectors be allowed to verify emissions or discharges based on materials accounting.

Second, they should be given the authority to verify or have verified the working order of monitoring equipment, to ensure that monitoring data is accurate.

Third, inspectors should have the ability to conduct routine searches and inspections of laboratories relied on to analyze discharge and emission samples or other materials. In this regard, it may be necessary to require persons holding authorizations under this Act and other scheduled acts or regulations to provide, as a condition of the authorization, consents to spot audits and inspections from any independent laboratories used to conduct testing required under the authorization.

Section 169 -- Disposition of things seized

The reference to the minister in subsection 169(1)(c) should refer to the minister as "him or her".

Section 190 -- Environmental protection orders

Subsection 190(7) provides that the powers of a manager under subsection 190(5) are not exercisable in relation to an activity or operation that is in compliance with an authorization. We are concerned that it may be necessary to make orders in circumstances where an adverse effect is being caused or may be caused.

We recommend that, where an adverse effect has been or may be caused by an activity or operation, in spite of compliance with an authorization, a temporary order may be made followed by a mandatory review and possible amendment to the authorization. This will ensure that appropriate amendments are made to authorizations where activities or operations result or may result in an adverse effect, even when the authorization has been complied with by the holder.

Section 196 -- Compliance agreements

We have six comments with respect to this section.

First, time schedules should be a mandatory component of all compliance agreements, including a fixed expiry date to ensure they are not used to deal with compliance issues on an indefinite basis.

Second, any compliance agreement should be subject to the provisions in the Act requiring a public notice and comment period, filing on the registry, reasons for decision and a right of appeal that apply to other authorizations under the Act or regulations. The easiest way to accomplish this may be to include a compliance agreement in the definition of an "authorization".

Third, compliance agreements should not be used to permit a relaxation of regulatory or permit standards. If a relaxation of standards is to occur, such as in cases where a permit holder has agreed to meet more stringent standards at a date in the future in exchange for a temporary reduction in standards to allow time for equipment to be installed, a permit amendment or regulation should be used to document this arrangement, rather than a contractual mechanism.

Fourth, since a compliance agreement in respect of a contravention prevents the violator being changed with an offence in connection with that contravention, it should be mandatory that all compliance agreements contain provisions that yield some environmental benefit. There should be some demonstrable environmental benefit in exchange for agreeing not to charge the violator.

Fifth, to strengthen this tool, we recommend requiring that all compliance agreements must include bonding provisions. The bond would be forfeited in the event of a breach

of the compliance agreement, in addition to any charge for a violation of the Act under subsection 196(2).

Sixth, subsection 196(3) provides that a person who complies with a compliance agreement in respect of a contravention will not be charged with an offence in connection with that specific contravention. It should be clarified that this refers to a contravention that occurred prior to entering into the compliance agreement.

Section 198 -- Administrative penalties

We strongly recommend that administrative penalties not act as a bar to prosecution. Administrative penalties can provide regulators with an enforcement option which may in some cases be more practical than criminal prosecution, but this enabling provision should provide enough flexibility to allow administrative penalties to be used in addition to any criminal sentences.

Regardless of whether they are used in combination with or as a substitute for prosecution, there should be public access to information on the use of administrative penalties in the same way as there is public access to court records. Therefore, administrative penalty orders should be required to be filed on the environmental registry.

For additional comments and recommendations in connection with the use of administrative penalties, see *Economic Instruments and the Environment: Selected Legal Issues*. [(2) -- 2. C. Rolfe and L. Nowlan (A. Hillyer, ed.), West Coast Environmental Law Research Foundation, Vancouver, B.C., 1993.]

PART 12

GENERAL

Section 202 -- Regulations

We support the approach taken in the *Forest Practices Code of British Columbia Act* which includes a general regulation making power, omitting the need to list each specific regulation making power. However, it may be advisable to provide specifically for regulation making powers in relation to fees, security and bonding, and recovery of money.

End of Recommendations For Improvements To Proposed BCEPA