

Recommendations For

The Proposed

BRITISH COLUMBIA ENVIRONMENTAL PROTECTION ACT

by

Ann Hillyer

Linda Nowlan

Christopher Rolfe

Murray Mollard

Barristers & Solicitors

WEST COAST ENVIRONMENTAL LAW ASSOCIATION

June 22, 1993

PART I. 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 has a long history of promoting pollution prevention as the preferred approach to dealing with environmental contamination. We support 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. . 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. Portions of this paper rely on sections of that earlier report.] Therefore, we support the development of legislation that will provide the legal basis for a comprehensive pollution prevention strategy for British Columbia. New environmental protection legislation is urgently needed to replace the existing *Waste Management Act* -- to



provide the change in focus from end of pipe waste management to preventing pollution.

PART II. GENERAL PRINCIPLES

1. Fundamental Guiding Principles in BCEPA

A number of fundamental principles should guide the development of the proposed Environmental Protection Act (the "BCEPA"). These principles should be set out in the legislation to ensure that it provides the legal basis for a comprehensive pollution prevention strategy for British Columbia. These principles include:

- the precautionary principle, that where there is a threat of serious or irreversible environmental harm, action should be taken to prevent contamination before there is conclusive proof of harm;
- the pollution prevention principle, that it is better to prevent the generation of pollutants than it is to control or clean up such pollutants after they have been created;
- the polluter pays principle, that those who pollute should pay for the resulting costs and damages, on a full cost accounting basis; and
- the zero pollution objective, that incorporates the goal of eliminating the formation, use and release of all persistent toxic contaminants.

a. Precautionary Principle

WCELA strongly supports incorporating the precautionary principle into the BCEPA. This principle has been advocated by many scientists and policy makers who have pointed out the dangers of waiting for proof of harm before taking action to cut pollution. To quote the Great Lakes Science Advisory Board:

The current requirement for "proof" of harm creates a situation that can resolve itself only through costly errors. One by one "proof" of harm can never keep pace with the rates of introduction of chemicals. [(2) -- 2. . Great Lakes Science Advisory Board, *Report of the Great Lakes Science Advisory Board to the International Joint Commission* (Windsor: International Joint Commission, 1989) at 67.]

Likewise, Gro Brundtland, Prime Minister of Norway and former chair of the U.N. Commission on Environment and Development states:

... I will add my strong support to those who say that we cannot delay action until all scientific facts are on the table. We already know enough to start to act -- and to act more forcefully. We know the time it takes from decision to implementation to practical effects. We know that it costs more to repair environmental damage than to prevent it. If we err in our decisions affecting the future of our children and our planet, let us err on the side of caution. [(3) -- 3. . Quoted in J. Cameron & J. Abouchar, "The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment: (1991) 14:1, *Boston College International and Comparative Law Review*.]

This 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.

The precautionary principle is essential as often studies which do not find that an environmental effect is occurring may actually have a very low chance of detecting such an effect if it did exist. [(4) -- 4. . Jaccard, Mark, *Abatement Costs and Energy Resource Planning: Revealing Social Preference*, presentation to the OECD, Paris, May 24, 1992.] The bias of environmental research towards underestimating environmental damage must be clearly recognized in legislation and policy. [(5) -- 5. . *Ibid.*]

Using the precautionary approach in developing policy, programs and regulations to deal with pollution makes sense if we are serious about achieving sustainability. Where there are threats of serious environmental damage, lack of scientific certainty should not be used as a rationale for postponing measures to prevent that damage.

b. Pollution prevention principle

The traditional emphasis on pollution control rather than pollution prevention has not been successful in preventing widespread contamination of the environment. There is an increasing recognition that reducing the generation at source has numerous advantages over trying to control discharge at the end of the waste discharge pipe.

Pollution prevention has the intrinsic benefit of being simple in concept and holistic and comprehensive in application...People can understand the pollution prevention imperative: eliminate or minimize *all* waste outputs and pollutants. Moreover, it is difficult to see how any other approach can successfully cope with the increasing global population. [(6) -- 6. . Hirschhorn, Joel & Oldenburg, Kirsten, *Prosperity without Pollution - The Prevention Strategy for Industry and Consumers*, Van Nostrand Reinhold, New York, 1991, p. 339.]

c. Polluter pays principle

The BCEPA should reflect the polluter pays principle, taking into account the full environmental and social costs of pollution and environmental degradation, not just the immediate clean-up costs.

d. Zero pollution objective

WCELA supports making zero pollution an explicit goal in the BCEPA. The zero pollution objective can be achieved by incorporating the following strategies in the BCEPA and the accompanying regulations:

- eliminating persistent toxic contaminants according to an urgent and realistic timetable;
- sunseting (banning) the worst contaminants;

- establishing a mechanism to identify and prioritize pollution problems;
- ensuring periodic updates of pollution standards;
- promoting pollution prevention in land use planning and environmental assessment processes; and

2. Purposes of BCEPA

The BCEPA should specifically state the purposes on which it is based, including the guiding principles outlined above, namely the precautionary principle, the preventative approach principle, the polluter pays principle and the zero pollution objective. The purposes section should also clearly state the right to a clean environment, and the recognition that the province is the trustee of British Columbia's resources. The purposes section of proposed Ontario legislation should be considered in the development of a purposes section for the BCEPA. It states:

2.(1) The purposes of this Act are:

(a) to protect, conserve, and where reasonable, restore the integrity of the environment as provided in this Act;

(b) to provide sustainability of the environment for the benefit of present and future generations as provided in this Act;

(c) to protect the right of present and future generations to a healthful environment as provided in this Act;

(2) The purposes set out in subsection (1) include the following:

- 1. The prevention, reduction, and elimination of the use, generation and release of pollutants that are an unreasonable threat to the integrity of the environment.
- 2. The protection and conservation of biological, ecological and genetic diversity.
- 3. The protection and conservation of natural resources, including plant life, animal life and ecological systems.
- 4. The encouragement of the wise management of our natural resources, including plant life, animal life, and ecological systems.
- 5. The identification, protection and conservation of ecologically sensitive areas or processes. [(7) -- 7. . *Report of the Task Force on Ontario Environmental Bill of Rights*, July 1992, Ontario Ministry of the Environment, pp. 150.

]

3. Definition of Environment

The BCEPA should incorporate a broad definition of the environment, based on an ecosystem approach. The current definition of "environment" in the *Waste Management Act* is limited, and therefore should be expanded to emphasize the interconnected ecological relationships in the ecosystem.

The Yukon *Environment Act* uses the following broad definition:

"environment" means

- (a) air, land and water;
- (b) all organic and inorganic matter and living organisms, including biodiversity within and among species;
- (c) the ecosystem and the ecological relationships;
- (d) buildings, structures, roads, facilities, works, artifacts;
- (e) all social and economic conditions affecting community life; and
- (f) inter-relationships between or among any of the factors in paragraphs (a), (b), (c), (d), or (e). [(8) -- 8. . S.Y.T. 1991, c.5, s.2.]

RECOMMENDATIONS

The BCEPA should

1. expressly state that it is based on the precautionary principle, the pollution prevention principle, the polluter pays principle, and the zero pollution objective;
2. contain a purposes section that reflects these principles, clearly states the right to a clean environment, and recognizes that the province is the trustee of British Columbia's resources;
3. specify that a central purpose of the legislation is to eliminate the discharge of persistent toxic pollutants according to an urgent and realistic timetable; and
4. contain a broad definition of "environment", based on an ecosystem approach.

PART III. POLLUTION PREVENTION AND WASTE MINIMIZATION

1. Waste Hierarchy

The BCEPA should require provincial authorities to promote and adhere to a waste management hierarchy that places source reduction of waste as the preferred option at the top of the hierarchy.

The School of Forestry & Environmental Studies at Yale University recently published a working paper on solid waste policy entitled *Does the Solid Waste Management*

Hierarchy Make Sense? The author, John Schall, examines the justification for the widely accepted hierarchy that sets waste reduction at source as the first priority for waste management. Schall concludes that the hierarchy is technically feasible, cost-effective and environmentally desirable. He finds that source reduction produces very significant cost savings -- around \$100 U.S. per ton of waste avoided or 70% of the cost of managing a ton of waste generated. Further, he finds that the environmental impacts avoided by waste prevention are almost twice as large as the cost savings. [(9) -- 9. . *WARMER Bulletin*, No. 37, May 1993 (England, Tunbridge Wells: The Warmer Campaign).]

2. Pollution Prevention Orders

In keeping with the overall pollution prevention approach of the BCEPA, the Act should provide the authority for the Ministry of Environment, Lands and Parks to issue pollution prevention orders, without waiting for actual damage to the environment to occur. This will have the effect of preventing environmental degradation and saving the costs of clean-up.

3. Pollution Prevention Planning Legislation

British Columbia should follow the lead of many jurisdictions in the United States by adopting mandatory pollution prevention planning provisions in the BCEPA. The province should also provide the education and technology outreach programs that help industry prevent pollution by avoiding, reducing or eliminating the use of toxic substances and the creation of waste and toxic products. This includes changes in production processes, changes in the inputs into production, redesigning or reformulating products, and improved management of production. It does 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.

Despite the enormous benefits of pollution prevention many businesses instead focus on controlling waste after it is created. These firms are not moving towards pollution prevention because of information, attitudinal and corporate organization barriers. Moreover, while pollution prevention is usually the most cost effective way of reducing waste, there are times when industry may be reluctant to adopt pollution prevention because society is currently paying the bulk of the costs of dealing with waste.

As a result, many B.C firms have neglected to produce pollution prevention plans. A 1993 report to the B.C. Ministry of Environment, Lands and Parks indicates that less than 25% of hazardous waste generators have produced waste reduction plans and that producers of certain types of hazardous waste have not made any improvements to their processes to avoid waste generation for over eight years. [(10) -- 10. . *Characterization of Hazardous Wastes in British Columbia*, Project Report prepared for the Ministry of Environment, Lands and Parks, by Peat, Marwick, Stevenson & Kellogg, March 8, 1993.]

Due to these barriers to pollution prevention, over 30 U.S. states have adopted pollution prevention legislation. British Columbia should follow the lead of progressive U.S.

legislation and make pollution prevention planning mandatory for firms which generate or use significant quantities of toxic substances or which generate large amounts of non-toxic waste. Mandatory plans should include:

- a comprehensive review of all of a firm's industrial processes that use, generate or release hazardous materials or create large amounts of waste;
- the identification of pollution prevention opportunities in all such processes; and
- schedules for the implementation of these opportunities.

Plans should be subject to approval by the Ministry of Environment, Lands and Parks, updated regularly and available to the public. Public scrutiny of plans and implementation reports is especially important since government regulators have only limited money and personnel for review and enforcement of plans. Where a firm has failed to implement or amend a plan it should be subject to fines and regulators should have the authority to modify or revoke permits under provincial or regional environmental laws.

4. Pollution Prevention Centre

To support the pollution prevention approach in the BCEPA, the province should establish a pollution prevention centre. It could play a key role in disseminating needed information, breaking down existing barriers to pollution prevention initiatives, and encouraging pollution prevention programs within B.C. industry.

Specifically, it should perform the following functions:

- provide a central clearinghouse for dispensing the rapidly developing body of world-wide information on pollution prevention;
- provide pollution prevention educational materials, including training manuals, videos, and other multi-media materials;
- develop training programs for key personnel in industries that produce pollution, including technical seminars, workshops and conferences geared to specific industries;
- focus its resources on small businesses that might not otherwise have the resources to fully analyze pollution prevention opportunities;
- provide on-site assistance and consultations with industry;
- coordinate its efforts with industrial associations;
- coordinate its work with the B.C. Institute of Technology and B.C. universities, particularly with the engineering and environmental sciences faculties; and
- focus its resources on users whose processes' toxicity, widespread use, or potential for improvement merit priority.

RECOMMENDATIONS

The BCEPA should require provincial authorities to promote and adhere to a waste management hierarchy that places reduction of waste generated as the most preferred option.

The BCEPA should provide the authority for the Ministry of Environment, Lands and Parks to issue pollution prevention orders, in circumstances where there is a serious threat to the environment.

The BCEPA should adopt mandatory pollution prevention planning provisions for firms which generate or use significant quantities of toxic substances or which generate large amounts of non-toxic waste.

To support the pollution prevention planning approach in the BCEPA, the province should establish a pollution prevention centre.

PART IV. SETTING MINIMUM WASTE DISCHARGE STANDARDS

1. Setting Minimum Standards by Regulation

The BCEPA should require regulations be developed covering water, air and land, which set enforceable, minimum standards to be applied throughout the province.

The authority to set these regulations should make it clear that the regulations will set minimum standards and that a permit can -- and should where necessary -- set more stringent standards and set requirements not covered by the regulation. This should occur where the receiving environment is particularly sensitive or loaded with pollutants from other sources, or the existing standards are outdated in relation to current technologies or knowledge of environmental impacts.

The BCEPA should also require that pollution regulations, guidelines and permits set out explicit timetables for expected improvements, and that these be reviewed and revised on a periodic basis, such as every five years.

2. Best Available Control Technology (BACT)

The provincial policy regarding the use of BACT must be placed within an overall statement of principles for setting waste discharge standards and within a framework that adopts a different approach for pollutants associated with different levels of environmental concern. Waste discharge standards should not be set on BACT alone. Also, it is important to stress that BACT is not limited to end of pipe controls but also includes raw materials, inputs, and general production technology.

We recommend that the setting of waste discharge standards be based on the following principles:

- the primary means of achieving pollution control should involve reducing or limiting discharges at the source rather than allowing their dilution in the environment;
- the discharge of toxic pollutants should be eliminated from all sources in British Columbia; and

- the discharge of all pollutants should be controlled as a matter of responsible stewardship of the environment.

Pollutants should be divided into three levels of concern:

1. persistent toxics, for which waste discharge criteria would be zero;
2. other toxics, for which waste discharge criteria would be based on Lowest Achievable Discharge Rate (LADR); and
3. other pollutants, for which waste discharge criteria would be based on BACT.

As we stated above, waste discharge standards should not be set relying on BACT alone. However, those that appropriately are determined using BACT should be incorporated into enforceable, minimum standards (with provision for more stringent site specific standards in appropriate circumstances) for the province. These standards should be revised on a periodic basis.

3. Control of Nonpoint Sources

Currently permits are given for point but not nonpoint discharges. [(11) -- 11. . The section on reducing nonpoint sources is from *Preventing Toxic Pollution: Toward a British Columbia Strategy*, West Coast Environmental Law Research Foundation, 1991.] Nonpoint sources are pollution sources other than industrial or municipal waste pipes or chimneys. Key examples of nonpoint sources in B.C. include:

- vehicle emissions, which cause smog and disperse pollutants to the ground;
- urban stormwater runoff, which collects pollutants from vehicles and other sources and carries it to bodies of water;
- agricultural fertilizers and pesticides, which leach into groundwater and surface water;
- dredging, which can disturb previously buried contaminated sediments;
- woodstoves and fireplaces, which emit particulate, toxics and greenhouse gases;
- logging and roadbuilding, which can damage streams by siltation, temperature change (loss of shade) and altered timing of flow (faster melting of snow pack); and

Many of these nonpoint sources of pollution are not effectively regulated. Theoretically, the general anti-pollution provisions of the federal *Fisheries Act* and the B.C. *Waste Management Act* apply to many of these pollution sources. But these statutes are rarely effective, because nonpoint sources are usually too numerous and too small to warrant the devotion of scarce enforcement resources. Yet the cumulative impact of nonpoint sources can be quite significant.

Motor vehicle emissions are currently the most closely regulated of all the types of nonpoint sources of pollution, but they are still a major problem. While emission standards for new motor vehicles are set by the federal government, [(12) -- 12. . Motor Vehicle Safety Regulations, CRC 1978, c.1038, as amended by SOR 89-279, under the federal *Motor Vehicle Safety Act*, RSC 1985, c.M-10.] the province should press to have

these standards tightened. The federal government should follow the lead of California, which has auto emission standards requiring cars to be 50-85% less polluting than today's strictest requirements within twelve years, and will also require that 10% of new cars have zero emissions.

Emissions from in-use vehicles are regulated by the Province. [(13) -- 13. . Div. 29, Air Pollution Controls on Motor Vehicles, of Motor Vehicle Regulations, BC Reg 229/70, as amended by B.C. Reg. 343/77, under the *Motor Vehicle Act*, RSBC 1979, c.288.] The province should develop a comprehensive plan to reduce significantly the amount of vehicle use, including measures to:

- substantially improve public transit availability and ridership;
- encourage carpooling, walking and bicycling; and

Like vehicle emissions, dealing with pollution from pesticides should involve a broad range of techniques both to discourage inappropriate pesticide use and to encourage alternatives to chemical pesticides. The province should:

- expand research into alternative pest control methods;
- reorient agricultural and silvicultural support programs to promote alternatives to chemical pesticides;
- consider laws prohibiting the use of pesticides unless non-pesticide pest controls have been shown to be infeasible; and
- implement economic incentives and disincentives to the use of chemical pesticides. [(14) -- 14. . See M. Kansky, ``The Pesticide Regulatory Process'', in C. Sandborn, ed., *Law Reform for Sustainable Development in British Columbia* (Vancouver: Sustainable Development Committee, B.C. Branch, Canadian Bar Association, 1990).

]

RECOMMENDATIONS

The BCEPA should

1. require that enforceable, minimum standards be set by regulation and specify that a pollution permit for a particular discharger should, in specified situations, set more stringent standards and other requirements not covered by the regulation;
2. require that pollution regulations, guidelines and permits set out explicit timetables for expected improvements, and that these be reviewed and revised on a periodic basis; and
3. provide the authority to prevent and control, by regulation, nonpoint sources of pollution.

PART V. ENFORCEMENT

1. Enforcement Policy

Achieving compliance with environmental standards must be a high priority goal. In the past few years, B.C. has started to prosecute offenders more vigorously, but non-compliance is still a major problem.

In August 1991, the B.C. government released an enforcement and compliance policy which reaffirms a commitment to "an aggressive prosecution policy, especially with respect to pollution offences." [(15) -- 15. . Enforcement Branch, B.C. Environment, *Ensuring Effective Enforcement, British Columbia's Environment, Planning for the Future* (Victoria: the Ministry, 1991) at 4.] The government also proposed changes in seven key areas.

Some of these proposed changes may be being considered for the BCEPA. A discussion paper on "an enhanced administrative and enforcement framework, enhanced mechanisms for public involvement, and state of the environment reporting requirement" for the proposed BCEPA has been promised, but not yet released. [(16) -- 16. . B.C. Ministry of Environment, *New Approaches to Environmental Protection*, (Victoria, B.C.: the Ministry, 1991) at 2.] We will therefore address some of the key proposals made in 1991 that should be included in the BCEPA.

First, B.C. Environment should be authorized to impose administrative penalties against violators of certain environmental offences. [(17) -- 17. . *Ensuring Effective Enforcement*, at 16. Utilizing **both** the administrative penalty approach and criminal sanctions is recommended in R. Brown & M. Rankin, "Persuasion, Penalties and Prosecution: Administrative v. Criminal Sanctions" in M. Friedland, ed., *Securing Compliance: Seven Case Studies* (Toronto: University of Toronto Press, 1990) pp. 325-353. and M. Rankin, "Economic Incentives for Environmental Protection: Some Canadian Approaches" (1991) 1:3 *Journal of Environmental Law and Practice*, at 241.] Compared to using the criminal courts, the administrative penalties approach is said to be simpler, cheaper, faster, more likely to be utilized, more likely to be based on risk than on harm, and more likely to produce consistent results. But there is empirical evidence that corporations which have been prosecuted allocate significantly more of their resources to environmental protection than do corporations which have not been prosecuted. [(18) -- 18. . D. Saxe, "The Impact of Prosecution," 20 *Hazardous Materials Management*, at 34.] Administrative penalties may be a good adjunct to prosecutions, and the BCEPA should give authority to the Ministry to use these penalties. However, the power of prosecutions should not be forgotten.

Second, liability of directors and officers for the actions of their corporations should be expanded, incorporating a statutory duty obliging directors and officers to avoid environmental offences by their firms. This approach is adopted in Ontario legislation. [(19) -- 19. . *Ontario Water Resources Act*, R.S.O. 1980, c.361, s.75(1); *Environmental Protection Act*, R.S.O. 1980, c.141, s.147.(1).] We support this approach, which is consistent with the polluter pays principle. The value of the proposal is supported by a recent empirical study of over 100 Canadian business executives that concluded that enhancing the possibility that corporate executives would face personal prosecution

would cause greater corporate efforts to avoid pollution. [(20) -- 20. . *Op. cit.*, Saxe, fn. 18.]

Third, sentencing options available to a court in relation to an environmental offender should be widened. We support wider sentencing options, including powers to order the offender to refrain from continuing or repeating the offence, to restore the environment, to avoid potential harm, to notify those adversely affected by the offence, to publish the facts of the offence, to perform community service, to compensate the government for preventive or corrective measures (including clean-up) necessitated by the violation, and to contribute to the cost of research regarding the subject matter of the violation.

Two other sentencing options also should be added to the provincial legislation: the power to order the offender to pay compensation to persons who suffer damage as a result of the offence and the authority to sue civilly for damages caused by conduct contrary to the Act, whether or not there has been a conviction.

2. Public Participation

Currently, many members of the public are vitally interested in strict enforcement of environmental laws. Many citizens report suspected violations of fisheries laws, waste storage and disposal laws, and logging road construction laws. Frequently, they have no way of knowing whether their complaints are acted on. The Task Force on the Ontario Bill of Rights states:

Every minor suspicion should not be reported, nor should it be investigated. But when reasonable people have reasonable grounds to believe an environmental offence or contravention has occurred they should be able to rely on a government response that acknowledges their allegation and advises them of the outcome. [(21) -- 21. . *Report of the Task Force on Ontario Environmental Bill of Rights*, July 1992, Ontario Ministry of the Environment, p. 71 (the "Ontario Report").] Statutory right to request investigation

The BCEPA should include provisions similar to those in the federal *Canadian Environmental Protection Act* (CEPA) permitting concerned citizens to participate in enforcement, both in the administrative process and in the courts. Under CEPA, "any person" can apply to establish a board of review for investigation into certain activities, and any two Canadian residents of majority age can require an investigation if they have reason to believe that an offence has been committed under the Act. The proposed Ontario Environmental Bill of Rights also will permit any two residents of the province who are 18 years of age or older and who believe that a contravention of one of the prescribed acts has occurred to apply to the Environmental Commissioner for an investigation by the appropriate Minister. The Minister would be required to investigate unless the application is frivolous or vexatious, the alleged contravention is not serious enough to warrant an investigation, or the alleged offence is not likely to cause harm to the environment. Otherwise, the investigation must proceed and both the people who laid the complaint and the Environmental Commissioner must be notified of the result within a specified period of time.

- Statutory right to request repeal of environmentally harmful law, or addition of new law needed for environmental protection

The Ontario Report [(22) -- 22. . *Ibid.*] also has proposed extending citizen rights so that any two residents of Ontario who are 18 years or older can apply to the Environmental Commissioner for a review of a policy, act, regulation or instrument (such as a waste discharge permit) that they believe should be revoked, amended, replaced, or repealed because it is harmful to the environment. Another innovation would allow two residents to apply to the Environmental Commissioner to examine whether there is a need for a new policy, act, regulation or instrument to protect the environment. Again, the Commissioner will refer the request to the appropriate Minister who must respond within a certain time. These could be valuable tools for British Columbians. Concerned citizens could ask for a new *Water Management Act*, for example, to deal with groundwater contamination problems. They could also ask for a revocation of the current timber and mineral tenure system.

- Reform of public nuisance law

Increasing public participation in enforcement through these statutory mechanisms is not enough. The public also needs increased access to the courts to ensure that the environment, a public resource, can be protected. If the government does not respond to requests to investigate alleged infractions of environmental laws, the public should have the power to ask the courts to intervene.

Reform of certain legal doctrines is required to increase access to the courts. There is a right of action for "public nuisance", which would be an ideal vehicle for obtaining a court remedy for environmental damage, since it is designed to protect the public from inconveniences or interferences caused to the public generally. Unfortunately, there are some limitations to this doctrine. The Attorney General must bring the action on behalf of the public. If the Attorney General does not consent, an individual could bring an action only if she or he could demonstrate that she or he had suffered a harm different from and greater than the general public. Courts have interpreted this so that even if a large number of people suffer from a noxious emission, for example, since they are all suffering to the same degree, no remedy is available.

Reform of the deficiencies in the public nuisance laws would increase court access for individuals wanting to enforce environmental laws.

- Statutory remedy for protection of public resources

The BCEPA should contain provisions like those in the proposed Ontario Environmental Bill Of Rights creating a new

statutory cause of action allowing individuals to obtain court remedies to protect public resources. Residents using this remedy could seek two orders from the courts: an injunction to stop the harm to the extent that it is unlawful; and an order that the parties negotiate a plan to restore the public resource and return to the court for approval of the plan within a fixed period of time.

- Private Prosecutions

When the responsible agency declines to prosecute an environmental offence, in B.C. a citizen has the option of proceeding with a private prosecution. Private prosecutions have been a powerful tool in citizens' efforts to protect the environment. The BCEPA should encourage private prosecutions by awarding citizens who initiate an action one half of any fine that is recovered.

3. Regular Reporting

The new provincial State of the Environment Report, released in May 1993 and published jointly by the federal and provincial environment ministries, is an important innovation. The BCEPA should require annual reports of this kind.

The *Environmental Protection Act* should also mandate the release of compliance and enforcement information. The Ministry of the Environment, Lands and Parks now voluntarily releases data on enforcement in three parts: the noncompliance list, the pollution concern list including contaminated sites, and the list of charges and convictions under select environmental laws. These lists have been released to the public approximately twice a year since 1990. The BCEPA should require publication of these lists at specified times.

More information usefully could be included in both lists of convictions and charges under the *Waste Management Act*, *Fisheries Act*, *Pesticide Control Act* and *Water Act*. The list of convictions reports the name of the party convicted and the amount of the fine, but neither the Act or section of the Act under which the conviction was made, nor the geographic location of the conviction. The list of charges does report the offence location, the charge date, and a description of the offence, but again omits the name and section number of the relevant Act. These would be easy omissions to correct for more precise information. Similar enforcement information should be issued from other responsible levels of government: federal, municipal and First Nations.

The Enforcement and Compliance Policy for the pollution control and habitat protection provisions of the *Fisheries Act* has long been promised, and should be released. WCELA lawyers have been asking for release of this policy for years. [(23) -- 23. . For example, see Hillyer, A. and Andrews, W., "Recommendations for Improvements to Bill C-74, An Act to Amend the *Fisheries Act* and to Amend the Criminal Code in Consequence Thereof," WCELR, Nov. 19, 1990.] The province should press the federal government to release this policy.

RECOMMENDATIONS

The province should pursue vigorous enforcement to achieve compliance with environmental standards and should increase the present enforcement mechanisms by including provisions in BCEPA that will:

1. expand the liability of directors and officers of corporations;
2. introduce innovative sentencing options;
3. permit statutory "civil suit" provisions, to impose absolute liability for damages caused by illegal pollution; and
4. provide clear authority for private prosecutions for environmental offences.

PART VI. ECONOMIC INCENTIVES

The BCEPA should provide the legislative authority for the Ministry of Environment, Lands and Parks to implement a number of economic incentives to enhance environmental protection and to complement strong regulations setting minimum standards. Some of these incentives are discussed below.

1. Waste Discharge Fees

Waste discharge fees are not a means of buying the right to pollute, but instead a means of encouraging dischargers of waste to reduce their discharges below levels allowed by regulation and permit. The British Columbia government's adoption of a new Waste Permit Fee Regulation was a welcome innovation in that it introduced charges per unit of pollutants released into the environment with the charges for different substances varying according to the contaminant's risk to the environment. However, the British Columbia system is deficient in several ways:

1. The system does not fully incorporate the polluter pay principle. Fees are set at a level which is aimed at recovering the costs of administering the permit system but do not recover the costs to society and the environment of polluting. The BCEPA should clearly mandate emission fees to capture back these costs to society caused by polluters.
2. The fees charged should be an effective incentive to pollution reduction. A recent OECD report found that emission charges are generally too low to be an effective incentive and are "far below the desired level from an economic efficiency point of view."

3. Current fees are charged on the permitted amount of discharges as opposed to the actual discharges. At least a portion of the fees should be charged on actual discharges in order to provide a continuous daily incentive for pollution reduction.

4. The system only applies to a small percentage of polluters. For instance, only 9% of volatile organic emissions and 15% of nitrous oxide emissions in Greater Vancouver come from permitted sources, the remainder coming from vehicles and small sources. Where it is not feasible to accurately monitor certain emissions the province should establish charges for different classes of polluters, and provide an economic incentive by providing a rebate of the pollution charges if an individual polluter can establish that it meets certain performance standards or has installed state of the art pollution reduction technology that assures high performance. The BCEPA should clearly allow for these sorts of charges and performance rebates.

5. Under the *Municipal Act* and *Waste Management Act* regional districts do not have the authority to charge emissions fees for emissions into their sewer system. Municipalities and regional districts operating sewage systems should have all the powers of the province to charge variable effluent fees and charge certain classes of users standard fees with provision for rebates if performance standards are met as well as powers to mandate pollution prevention strategies.

2. Deposit Refund Systems and Green Levies

Whether or not a deposit refund system or green levy is the best tool will depend on the nature of the product. For products which can be recycled (such as tires, batteries, solvents and oils) deposit refunds are appropriate. For products which cannot be returned for recycling or disposal (such as pesticides) green levies are the best option to fund mitigation or research into alternatives. For many products the answer may be a combination of levy and deposit/refund. For instance, for solvent a deposit could be charged at the time of purchase. Where some of the oil purchased is released into the environment (through leakage or burning) or incorporated into a new product there would be no refund available on that portion of the product lost, but there would be a refund available for the amount returned for recycling.

The *Waste Management Act* has recently been amended to allow the government to set up deposit refund systems on any product and the *Social Service Tax Act* has been amended to allow setting of green levies for hazardous products. Recent regulations require retailers and wholesalers of oil to either take back used oil or provide a facility for taking back the oil. While these are steps in the right direction a system of deposit refund regulations and green levies should be used to provide an economic incentive to ensure that consumers return dangerous waste such as batteries (both car and household), car tires, waste oil, paint and

solvents for recycling or proper disposal and to fund research into alternatives to dangerous products.

3. Tradable Emission Permits

Tradable emission permits are a means by which the total emissions from permitted sources could be reduced over time. The idea of the system is that government would define a limited number of pollution units for different contaminants which could be released into a given air or water shed. Permits allowing this total release would either be bought by polluters in auctions or allocated according to polluters in some other way. The number of permits available or the amount of release allowed by each permit could be reduced over time so that the total emissions in any watershed or airshed would be reduced. However, polluters would be able to trade permits so that those which could reduce emissions cheaply would do so and sell their permits while those that cannot easily reduce their emissions would buy permits from others. Manitoba and Alberta legislation allow governments to establish emission trading systems. The approach of these provinces could be considered in British Columbia. However, if British Columbia wishes to implement such legislation, it would need to be more detailed in order to avoid certain pitfalls related to tradable permits:

- the legislation should provide that tradable emission permits could be used in combination with emission charges. Polluters (especially those that have lagged in adopting clean technology) will receive a valuable commodity if allocated permits on the basis of past emissions. Emission charges will make the system more fair in that they compensate for the benefits provided to large polluters and can help pay for monitoring;
- the legislation should regulate permit trades in order to ensure emissions are not overly concentrated in one area or at one time;
- the legislation should require continuous emission monitoring or its equivalent wherever it is practicable in order to ensure polluters do not exceed their permitted emissions;
- permit exceedances should be subject to substantial and automatic penalties as well as criminal penalties;
- safeguards should be in place to ensure that any permits traded represent actual reductions in emissions;
- the legislation should prohibit the sale of permits by firms which have lowered their emissions by ceasing or reducing operations; and
- the legislation should require any tradable emissions permit system to be based on a schedule set out in regulations where the total cap on emissions is reduced according to a predetermined timetable. The legislation should also clearly allow the cancellation or accelerated reduction of permitted emissions without any compensation to the permit holders.

WCELA is currently researching what provisions would be necessary to effectively and safely implement an environmentally sound tradable emissions permit system. It will provide its report to the provincial government as soon as it is available.

4. Tradable Recycling Credits.

Recent amendments to the *Waste Management Act* allow the government to set quotas for recycled content in products. To aid in the creation of markets for recycled content the BCEPA should not only allow the setting of recycled content quotas but should also allow government to set up a system of tradable recycling credits. For instance, a regulation could require that a certain percentage of oil sold by refiners be recycled. Individual refiners could meet this quota either by recycling the required amount of oil or by purchasing recycling credits from other refiners who have exceeded their quota.

5. Green Taxes

Differential taxation can create a price advantage for environmentally preferable products in the marketplace. To take advantage of this, the province should expand the system of product taxes on environmentally harmful products.

RECOMMENDATIONS

The BCEPA should provide the legislative authority for the Ministry of Environment, Lands and Parks to implement a number of economic incentives to enhance environmental protection and to complement strong regulations setting minimum standards. In particular, BCEPA should:

1. clearly mandate emission fees aimed at recovering both the administration cost of regulating discharges and estimated environmental and social cost of pollution;
2. allow charges to be levied against certain classes of polluters with partial or full rebates if an individual polluter can establish that it meets certain performance standards or has installed state of the art pollution reduction technology;
3. incorporate *Waste Management Act* and *Social Services Tax Act* provisions for refund deposit systems and grant levies, allowing for partial refunds and making it an offence to dilute waste products;
4. give the government the power to require vendors to collect deposits on behalf of the government; and
5. allow the establishment of a tradeable emissions permit and tradeable recycling credit system with adequate safeguards to ensure such systems reduce overall emissions or increase recycling levels.

VII. PROCEDURAL REFORMS

1. Environmental Bill of Rights

The BCEPA should include the provisions of an environmental bill of rights. The right to a clean environment is found in a number of jurisdictions; in Canada, the Yukon and Northwest Territories currently enjoys this right, and Ontario is seriously considering introducing it. Likewise, several American states have enacted environmental rights legislation.

Environmental rights are not useful in the abstract, or as a preamble to a law. Rights guaranteed by statute must be enforceable, accompanied by a statutory cause of action for citizens such as that created by Section 3 (7) of the Yukon *Environment Act*.

Many of the suggestions made in the sections on enforcement of environmental law are tied in to a bill of rights. Citizens should have the right to request official investigations into suspected environmental damage, and the right to have a response to their complaint. They should have the right to ask the government to get rid of environmentally harmful policies and laws, and the right to ask for consideration of new policies and laws that would increase the level of environmental protection. And they should have the right to go to court to protect public resources.

The BCEPA should contain environmental bill of rights provisions to increase public participation in protection of our common heritage.

2. Public Trust Doctrine

The BCEPA should include statutory recognition of the "public trust" doctrine, which has been a valuable tool for protection of the environment in the United States. This doctrine requires the Province, as trustee, to manage public resources in a way that maintains their value for future generations. Public resources must not be used in a way which will decrease their value to the general public. It is in the public interest to provide every person with a remedy to protect the environment and the public trust. This doctrine is the reason for giving individuals the power to use the courts to call the government to account, if it violated the trust. [(24) -- 24. . *Report of the Task Force on Ontario Environmental Bill of Rights*, July 1992, Ontario Ministry of the Environment, p. 85.]

3. Public Participation in Setting Regulations

There are many reasons why the public should participate in setting regulations. [(25) -- 25. . This section is adapted from "Public Access to Environmental Justice," Franklin Gerter, Paul Muldoon and Marsha Valiante, in *Sustainable Development in Canada: Options for Law Reform* The Canadian Bar Association Committee Report, September 1990, (Ottawa: Canadian Bar Association, 1990)

pp.94-95.] Regulations developed with public input will lead to decisions that are more informed and accepted. Interested groups and individuals can challenge the data upon which the proposed regulations are based, test the regulatory assumptions employed, and provide a new or different perspective. Public participation ensures a fairer process, since those who must bear the risk of the decisions should have input into the process. The public is essential in helping define the public interest through direct representations to regulators. Also, increasing public participation may well increase the public acceptance of decision.

Current consultations on regulations lack uniformity. Further, the government has no requirement to take the comments received into account or to respond in any way. Also, many groups do not have the resources to seek out the background information, or undertake independent studies to test and challenge assumptions being put forth by the proponent or otherwise participate in the process on a long term sustained basis.

The Canadian Bar Association Sustainable Development Committee recommended in its 1990 report on options for law reform for sustainable development in Canada that:

The federal government should initiate a formalized rule-making process for the development of environmental regulations or a formalized permit-issuing or environmental approval process. These processes should include the following elements:

- a. public notice that the regulations or permits are being developed or considered;
- b. release of sufficient background information and technical documentation;
- c. public comment, with the length to be specified in regulations;
- d. a written response by the government to the public comments;
- e. within the public comment, the opportunity to request a public hearing;
- f. criteria for refusing a hearing should be established and, where the request for a hearing is denied, written reasons for the denial should be issued; and
- g. funding for public interest intervenors or participants.

The province of B.C. should apply these provisions to the BCEPA.

4. Notice and Comment Periods

A BCEPA should increase public participation in providing notice and allowing citizens to comment on proposed regulations. To allow meaningful comment, any proposed regulation should also explain the underlying reasons for its adoption. Section 13(1) of CEPA requires ministers to issue a public report explaining their decision whether or not to regulate potentially toxic substances.

Citizens should have adequate time to comment on the proposed regulation and should also have the right to request a hearing, similar to the power found in several provisions of CEPA allowing citizens to request a public review board. When a regulation is finally issued, the publication notice should respond to all issues raised in the comments and explain the reasons behind the action taken.

5. Appeal Reforms

The right of appealing a decision made under the authority of the *Environmental Protection Act* should be open to any person affected by a decision, not just the permit holder.

The Ontario Report [(26) -- 26. . *Supra*, fn. 21, pp.55.] recommends extending the right of appeal of instruments, defined as including any licence, permit, approval, certificate of approval, control order, or other legal authorization that controls contamination or degradation and is made under a prescribed Act. The Ontario Report recommends extending the right of appeal to a member of the public on the grounds that she or he participated in the consultative process and the instrument as issued is unreasonable having regard to the Act, the regulations, if any, and policies which govern the issuance of the particular instrument. [(27) -- 27.]

6. Alternative Dispute Resolution Procedures

Alternative dispute resolution procedures should be included in the new Act to encourage people to resolve their disputes informally if possible. One specific area in which alternative dispute resolution procedures could be used is as a preliminary attempt to resolve an appeal (but not substitute for an appeal). The BCEPA should authorize alternative dispute resolution processes in appropriate sections.

7. Access to Information

All information in the Ministry's possession in relation to the BCEPA should be available to the public. Compliance and monitoring information is particularly important.

A key component of the BCEPA should be an environmental registry. Such a registry is proposed in the Ontario Bill of Rights.

The Ontario Task Force on the Environmental Bill of Rights has classified environmental decisions by government into three categories: policy decisions, regulations and instruments. At present, public participation in these decision-making processes varies. There is no uniform method to ensure that the public can know what decision is being made, let alone be assured of influencing that decision through informed comment. An environmental registry could help solve this problem.

The Ontario Task Force suggested an electronic registry could serve as a databank and bulletin board for all proposed significant environmental decisions being considered by the province. Whenever the government planned to make a decision, it would provide notification by posting a notice on the electronic registry including a brief description of the decision to be made. The electronic registry would help notify citizens of pending environmental decisions, but would not be a substitute for other notice requirements. [(28) -- 28. . *Report of the Task Force on Ontario Environmental Bill of Rights*, July 1992, Ontario Ministry of the Environment, pp. 28-38.]

8. Intervenor Funding

The BCEPA should provide the basis for a legislated intervenor funding program to allow individuals to meaningfully participate in environmental decision-making.

One model to study when considering the design of the intervenor funding program is the *Ontario Intervenor Funding Project Act* (IFPA), which has been quite successful. The most recent evaluation of the Act prepared for the Ontario Ministries of the Attorney General, Energy and Environment reviewed all funding applications under IFPA, conducted a literature search of funding models in other jurisdictions, conducted interviews, and received over 90 submissions from interested parties. The primary conclusion of the evaluation was that IFPA had been effective in meeting its objectives of increasing access and improving the quality of participation and resulting decisions. [(29) -- 29. . Bogart, W.A. and Valiante, M. *Access and Impact: An Evaluation of the Intervenor Funding Project Act, 1988*, Windsor, Ont., Feb. 1992.]

9. Whistleblower Protection

The BCEPA should include whistle blower protection. The rationale is clear. Under present employment law, an employer has extensive rights to terminate employment or otherwise discipline an employee. Thus, the employee who seeks to protect the environment from an employer's actions is susceptible to termination or other forms of discipline. A lack of job security provides a strong disincentive for employees to take action on environmentally harmful employer conduct.

Whistle blower protection will provide an important deterrent to employers that might otherwise discriminate against employees who wish to protect the environment. There is a growing body of legislation in other jurisdictions that extends this type of protection to employees.

We suggest that the following principles be considered in the development of whistle blower provisions in the BCEPA:

- employees who comply with or seek enforcement of the law, provide information or complain to responsible authorities and testify in proceedings related to enforcement of the law should be protected;
- all statutes (including subsidiary regulations, orders and licenses) that play an important role in protection of the environment should be included in the scope of protection;
- an employee's reasonably held belief that an employer was contravening the law or that the employee was complying with the law should act as the standard for protection;
- a wide variety of employer conduct should be prohibited based on the general principle that any discrimination against an employee that is in relation to protected action is prohibited; and
- the system for ensuring compliance and enforcement of the legislation should be equitable and efficient and include the possibility for mediation and the responsible agency should have broad powers to investigate and enforce the legislation.

10. Anti-SLAPP Measures

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 groups who advocate for greater environmental protection may be subject to private litigation designed to retaliate against them for past advocacy and participation.

"Strategic Lawsuits Against Public Participation" (SLAPP) are lawsuits by private interests against individuals or non-government organizations. A SLAPP alleges injury usually based on some form of tort (e.g. interference with economic relations) due to the individual's or organization's efforts to influence public decision-making on an issue of public concern. A SLAPP's underlying objective is to intimidate. It seeks to create a specific and general deterrent to participation by raising the risk of litigation for exercising fundamental democratic rights. The resources and costs required to defend against a SLAPP can produce an effective chill on the activities of individuals and organizations involved in public interest advocacy.

The province should consider anti-SLAPP legislation, in the BCEPA or elsewhere, to protect those groups and individuals active in public interest advocacy from lawsuits designed to deter their participation. Several states in the United States,

including New York and California, have recently passed such legislation. The legislation should:

- define what constitutes a SLAPP and the parameters for protection; [(30) -- 30. . The state of New York defines an "Action Involving Public Petition and Participation" to be "an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission."
]
- consider remedies against SLAPPs such as:
 - a right to petition the court to determine whether a particular legal action is a SLAPP and if so, a right to petition 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 be 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.

RECOMMENDATIONS

The BCEPA should include the following procedural reforms:

1. Provisions of an environmental bill of rights to give citizens additional rights in relation to environmental protection, including the right to go to court to protect public resources.
2. Statutory recognition of the "public trust" doctrine.
3. Provisions for public participation in setting regulations, including release of sufficient background information; opportunity for public comment; a written response by the government to the public comments; and the opportunity to request a public hearing.
4. A standardized procedure for public notice and comment on proposed environmental regulations, policies, Acts, and instruments.
5. Extension of the right of appeal of certain environmental legal decisions to anyone affected by or having a legitimate interest in the decision.
6. Alternative dispute resolution procedures.

7. Increased access to information about environmental compliance and enforcement information through an environmental registry.
8. A legislated intervenor funding program.
9. Protection for employees who report their employers' violations of environmental statutes ("whistleblower protection").
10. Anti-SLAPP measures to discourage intimidation of public advocacy groups.

Part VIII. OTHER LEVELS OF GOVERNMENT

Delegation to Local Governments

The proposed new Act has great implications for local governments. The Union of B.C. Municipalities has said it will call for a "dramatic revision of roles, authorities and responsibility in the areas of pollution prevention and waste management." [(31) -- 31. . The Union of British Columbia Municipalities Delegation of Environmental Responsibility, September 1992, p. 3.] The province has proposed in its legislative discussion paper to provide statutory authority for the minister to assign certain powers to local governments, as well as other ministries and federal authorities. The province envisions that local government will have authority to prepare a variety of plans to address issues such as municipal solid waste, liquid waste, air quality management, biomedical waste and environmental emergencies. Local governments will also be required to do pollution prevention planning in general and specifically in relation to transportation and energy planning. The province also recognizes that local government with its existing powers can contribute to development of environmental policy in critical areas such as protection of habitat and growth management.

Any delegation of authority must be subject to strong minimum environmental standards to ensure consistent environmental protection throughout the province.

Whatever level of government is responsible or shares responsibility for environmental protection, it is clear that government must be accountable to the public. Clear lines of authority must be set out through the BCEPA and the regulations. Citizens have a right to know who is making decisions about their environment, and who to turn to for help with environmental problems.

2. Coordination/Duplication and Federal-Provincial Agreements

Jurisdiction over the environment is shared by the provincial and federal governments. Every effort should be made to coordinate the enforcement of these laws.

There are a number of areas where federal/provincial agreements may be used to protect the environment. For example, agreements made pursuant to the National Contaminated Sites Remediation Program involved cost sharing for clean-up of contaminated sites between the federal and provincial governments. A separate agreement has been negotiated with each province. One of the elements of the agreement is that each province must implement "polluter pays" legislation for contaminated sites clean-up in order to be eligible for its share of federal clean-up funds.

RECOMMENDATION

The BCEPA should require that any delegation of authority to other levels of government is subject to strong minimum environmental standards to ensure consistent environmental protection throughout the province.

End of Recommendations For The Proposed BCEPA