

**The Environmental Management Framework
Agreement (EMFA)
Report on the Potential Effects of Harmonization on the
Environment in New Brunswick**

Prepared by Juli Abouchar
for the New Brunswick Environmental Network Harmonization Working Group
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Introduction

The Environmental Management Framework Agreement (EMFA) aims to harmonize environmental laws across Canada to make them consistent and to avoid duplication. The impetus for this initiative was government and industry concern over regulatory duplication, and inconsistent standards. While none of us want to see money being needlessly spent, environmentalists are concerned that good environmental protection may be sacrificed to keep Canadian industry competitive and reduce government spending. Furthermore, good evidence of existing duplication has not been provided to demonstrate the need of the Agreement, nor has an assessment been undertaken of the Agreement's potential effect on the environment.

The purpose of this report is to examine the EMFA and how it may affect the environment in New Brunswick. This report raises many concerns about how the Agreement will adversely affect the environment of New Brunswick. The concerns fall into three main categories: a) enforcement b) standard setting and c) accountability.

Concerns related to enforcement include the issues of capacity and the balance of power in a federal political system. The Agreement proposes to transfer the obligation to enforce federal environmental legislation to the provinces, without a corresponding transfer of funds to enable provinces to fulfill their new roles. Beyond the capacity concerns, federal enforcement contributes to the important "checks and balances" of power within the province, and the better protection of the environment. The underlying philosophy of the agreement is to download enforcement of environmental laws to provinces; many environmental groups in the province have fundamental disagreement with this philosophy.

Concerns related to regulatory standard setting are many. Under the proposed EMFA, the Federal government will be unable to act as a guarantor of a minimum standard of environmental protection for all Canadians, nor to prevent the emergence of "pollution havens" among the provinces. Several aspects of the agreement may make New Brunswick vulnerable to becoming a pollution haven. The EMFA proposes a new level of governmental decisionmaking based on consensus of the federal government and all provinces; the natural result will be a strong pull towards the lowest common denominator. The EMFA builds in an additional mechanism which permits a province to freely develop lower environmental standards but requires a province to justify and notify all other parties where it proposes stricter standards. Finally the EMFA does not resolve the real jurisdictional problems in environmental protection in Canada which result in areas that are unregulated "gaps".

The first and the second categories of concern are related in as far as weak enforcement will exacerbate environmental problems brought about by lower environmental standards.

The third concern, accountability, applies to both enforcement and regulatory issues. The EMFA lacks a mechanism to ensure accountability among the parties and to the public; there is nothing but peer pressure to prevent a province from systematically developing lower environmental standards, or weaker enforcement as a result of political pressure from industry. An overall concern is that the proposed process creates a new level of "national" decision making by government representatives that are not elected and are not accountable to Canadians.

I. Enforcement Issues

A major concern is that Agreement proposes to transfer the obligation to monitor and enforce federal environmental legislation to the provinces, without a corresponding transfer of funds to enable provinces to fulfill their new roles.

Specifically, Schedule I transfers to the provincial governments the responsibility to monitor air and water discharges, water quality and ambient air quality. Schedule III transfers to the provincial governments the responsibility to ensure compliance with federal, as well as provincial legislation related to industry.

Although the Agreement provides for the possibility of a transfer of funds to meet these additional obligations, it does not guarantee it. As the current federal fiscal situation is an impetus for the agreement, it is unlikely that the federal government will be able to make significant fiscal transfers to the provinces.

A particular concern is that New Brunswick may not have the technical and human resources to take on the federal government's functions in compliance and enforcement of the federal laws, such as the Fisheries Act (important sections prevent the pollution and of waters that are fish habitat), Fisheries Act regulations (prevent pollution from pulp and paper, mining and agriculture sectors), and the Canadian Environmental Protection Act (prevents release of toxic substances from industrial sectors).

The New Brunswick Department of Environment has 18 inspectors to enforce 19 provincial regulations and statutes. According to the New Brunswick Department of the Environment the provisions of the Fisheries Act and CEPA are already enforced by the province through incorporation into Certificates of Approval issued under the Clean Environment Act.

However, placing federal standards in the Certificates of Approval and enforcing these Certificates of Approval are two completely different issues. The Certificates of Approval contain numerous terms and conditions for operation derived from provincial and federal legislative requirements. Although violation of the Certificate constitutes a violation of the act which contains the legislative requirements, it is difficult to monitor all of the conditions, raising concerns of both enforcement and transparency. Lenience in the enforcement of Certificates of Approvals of major industrial interests in the province and a lack of transparency is seen in the treatment of the October 1994 high levels of emissions at the Irving Oil Refinery in Saint John.

Irving was asked simply to increase selfmonitoring, despite calls for public information announcements and prosecution for violation of the certificate by public citizens in Saint John whose health suffered as a result of the emissions.

The concern widely expressed by NBEN member groups and borne out by statistics supplied by the New Brunswick Department of Environment (DOE) is that the province is hard pressed to effectively enforce its own legislation let alone additional responsibilities of federal inspectors and investigators without an injection of capital.

Within New Brunswick, there are 2 federal Environment Canada inspectors, 2 Fisheries Act habitat field workers and 96 full time federal fisheries officers. These numbers indicate the important role that the federal fisheries officers play in the province. They act as a backup to provincial enforcement activity. Where the province fails to enforce its Certificates of Approval, the federal officers can enforce powerful federal provisions, under the Fisheries Act.

New Brunswick's environmental Investigations and Enforcement Branch has suffered in recent years as a result of difficult economic times. In any province, but especially one with an economy which is not highly diversified and resource based, hard times tend to favour development oriented policies over environment. The effects of the present economic priorities of the New Brunswick government on enforcement of environmental regulation in the province was highlighted in a report by the Director of the Investigations and Enforcement Branch, Bradford Marshall. Mr. Marshall reports that since 1994, a general "feeling" was communicated to the Departmental Staff that job protection and creation rather than environmental protection was the government's top priority. In addition, the Department of the Environment as a whole, and the Investigations and Enforcement Branch, in particular, have suffered from budget cuts. The department's global budget was decreased by 8.2% in 1994/95 and 3.2% in 1995/96. The investigations and enforcement branch suffered a budget reduction of 3.1% (\$46,600) from \$1,530,800 to \$1,484,200 in 1995/96. For the upcoming 1996/97 year, the DOE budget was cut by \$10 million, or 31%. However, the investigations and enforcement branch actually saw a budget increase of about \$48,000.

As a result, enforcement activity decreased markedly, and staff positions in the Investigations and Enforcement branch were eliminated. Two of three regional Branch Managers positions were eliminated between May 1994 and April 1995. Prosecutions of environmental offenses decreased by 53.4% (23 cases) from 43 in 1993/94 to 20 in 1994/95. Fines for environmental offenses decreased by 24.9% over the same period, from \$41,026 to \$30,828. Ministerial Orders, whereby the Minister can order a polluter to clean up or stop polluting, decreased a staggering 90.2% over two years, from 57 in 1992/93 to 5 in 1994/95.

These statistics, at the very least, show a trend away from legal enforcement activity. They may indicate a new emphasis on compliance, whereby ministry officials work with industry to encourage them to clean up their activities in the long term, rather than taking immediate enforcement action. However, a compliance policy should still result in a cleaner environment. Lacking annual state of the environment reporting in the province, we have no objective method of determining whether the recent policies of the DOE have resulted in a cleaner environment.

However, "occurrences", which are pollution incidents which require an inspector to be in the field for more than 1 hour can be a rough guide to the state of the environment, and are reported by the DOE. The number of occurrences decreased by a scant 6% from 4620 in 1993/94 to 4340 in 1994/95 when the number of prosecutions decreased by 53.4%. This indicates that while prosecutions decreased substantially, the state of the environment did not improve significantly.

New Brunswick's ability to enforce its environmental laws may be further weakened with the recent court challenge to the absolute liability provisions of the Clean Environment Act and the Clean Water Act. As it stands, defendants do not have the defence of due diligence when charged with an offense under these acts. However, should the court challenge be successful, defendants who could show that they took all reasonable care to avoid the offense, or that they were operating according to industrywide standards, would be found not guilty of the offense. The impact on the DOE will be an enforcement process that is considerably more costly and lengthy.

The concern is widely expressed amongst New Brunswick environmental groups that the NB Department of Environment cannot be trusted to take on the responsibility to enforce federal environmental laws since it often fails to enforce its own environmental laws. Furthermore, gaps in enforcement, where neither level of government takes responsibility, are cited more often than duplication of enforcement activities. Enforcement related concerns are gravest in the areas of watercourse and fish habitat protection, pulp and paper mill effluent pollution, and coastal zone management.

water course and fish habitat protection

Water courses and fish habitat in the province are protected by the federal Fisheries Act and the Watercourse Alteration Regulation under the NB Clean Water Act. This overlap of jurisdictions, rather than being unnecessary serves the interests of the environment and the citizens of New Brunswick. It is often the case that neither level of government will enforce their provisions relating to watercourse and fish habitat protection. When such gaps in enforcement occur the federal authorities sometimes enforce more readily, and often their involvement prods the provincial government to action.

One NBEN member group cited an example of a neighbourhood brook that was about to be bulldozed without a watercourse alteration permit. Both the provincial Department of Environment and the federal Department of Fisheries and Oceans (DFO) were called. Initially there was no response from the province, however, DFO visited the brook and carried out tests. Eventually the province became involved and issued the required permit. Another person cited an example of clear cutting and quarrying activity by a private business which endangered a brook. The province was contacted, but failed to visit the site nor remedy the situation. It was not until DFO was called that the site was inspected and the company was ordered to reseed and plant vegetation on the banks of the brook.

A further example of the benefit to fish habitat of a federal enforcement presence is in relation to the transportation sector. The NB Department of Transportation (DOT), while overseeing sandblasting of a bridge over Mitchell Brook in the Hammond River area, permitted significant

damage to fish habitat. It was only as a result of DFO laying charges that the DOT agreed to place experts on the site to instruct the machine operators about the protection of habitat.

pulp and paper

The pulp and paper industry in New Brunswick plays a dominant role in the provinces economy. One in seven jobs is linked to the forest products industry. The NBEN member groups are concerned that environmental offenses of the forestry industry may be overlooked due to the recent governmental priority placed on job preservation and creation.

The political strength of the pulp and paper industry can be seen in the record of leniency shown to the industry by provincial enforcement officers. For example, for years Repap mills at Nelson Miramichi and Newcastle had been in chronic violation of Fisheries Act provision 36(3) that prohibits the deposit of substances deleterious to fish. The Nelson Miramichi plant was finally charged in 1988 by the federal government for the release of untreated effluent after years of tacit acceptance of the practice by the province. As a result of the federal charge Repap designed a system to control its effluent in an effort to comply with the Fisheries Act. This report is not intended to single out Repap from among the pulp and paper operations in NB. In fact, it is reputed to be one of the cleaner operations. Nonetheless, this example illustrates how the federal Fisheries Act provision prohibiting the release of deleterious substances into water frequented by fish can be used by the federal government where the province has failed to enforce the terms and conditions of Certificates of Approval. For this reason, it is important to maintain this provision and the powers of the federal government to enforce it.

The federal government powers are not seen as a panacea by any means. Often the federal government fails to enforce the Fisheries Act pollution prevention provisions. For example, in spite of well documented damage to the ecosystem from the Lake Utopia pulp and paper mill effluent, the federal government refused to act. Such gaps in enforcement, where neither level of government acts, are numerous and of serious concern to the Network member groups.

In spite of these lapses, the Fisheries Act provisions are a very powerful tool. When the federal government does act under them, the effect is to cause the province to enforce its own legislation. For example, the McCains plant was charged federally under the fisheries Act and fined a symbolic \$1 for each of 6 violations. This charge lead ultimately to a provincial compliance activity and abatement of the discharge from the plant.

coastal zone management: rockweed

The management of rockweed in New Brunswick is another area that illustrates the twin concerns of incapacity and gaps in enforcement, and regulation. Both provincial and federal levels of government have responsibilities with respect to rockweed harvesting. However, both have de facto abdicated their enforcement powers. Rockweed grows in the intertidal zone, a region under provincial jurisdiction. However, the federal government has jurisdiction over harvesting and catch quotas, as well as the responsibility to protect fish habitat under the Fisheries Act and the no net loss of fish habitat policy. Although Environment Canada has responsibilities for coastal zone management, the responsibility for developing a coastal zone

management plan to govern NB rests with New Brunswick's Ministry of Municipalities, Culture and Housing. To date there is no Coastal Zone Management Plan in New Brunswick.

The result of this lacunae has potentially devastating effects on fish habitat and the Bay of Fundy ecosystem. Acadian Sea Plants Ltd., after exhausting the rockweed in Nova Scotia, is now looking to the New Brunswick coast for rockweed to harvest. Because the province lacks the resources to monitor the harvesting of rockweed, and a coastal zone management plan to preserve the resources in the Bay of Fundy, Acadian Sea Plants was granted exclusive jurisdiction to harvest, as well as to monitor and assess the effects of harvesting on the ecosystem. This arrangement raises concerns of conflicts of interest and public accountability. It is evidence that in the face of provincial incapacity to regulate and enforce all of its environmental protection measures, public accountability and arm's length protection of NB's natural resources are sacrificed.

II. Regulatory Standards

Under the Agreement, the federal government will be unable to act as a guarantor of a minimum standard of environmental protection for all Canadians, nor to prevent the emergence of "pollution havens" among the provinces. The processes established in Schedules V and VI of the Agreement delegate to the provinces the regulatory, or standard setting role, without establishing mechanisms to make the provinces accountable to either the public or a higher level of government.

According to the Schedule V of the agreement, "national" guidelines will be established by negotiation amongst the provinces and the federal government, with the federal government taking the lead. These guidelines will then be implemented by the provinces using the measures of their choice. Since the guidelines are not enforceable, they do not guarantee consistent environmental standards across the country.

The process of negotiating the guidelines itself may lead to a downward harmonization of environmental standards towards the lower end of the spectrum. In addition provisions allowing deviation from the national guidelines will encourage further downward adjustment of standards. Provinces will have the option of setting stricter environmental standards. However, they are discouraged from doing so through the requirements of justification and notification.

The process established in Schedule VI permits the parties to establish national policies which may recommend that certain regulations be passed. However, these are simply recommendations, also arrived at through consensus and are not binding on the provinces. The process may be subjected to downward harmonization, and the national policies will not provide a guaranteed minimum environmental standard. Areas which will be most adversely affected by the lack of federal minimum regulatory standards are the pulp and paper industry, coastal zone management, toxic substances, and the nuclear industry.

pulp and paper

In the pulp and paper sector, it has been stated that it is federal regulation that drives compliance in the province of New Brunswick. As has been mentioned, pulp and paper mill effluent is regulated federally by the Fisheries Act and CEPA.

Organochlorides, a class of substances that have been shown to be carcinogenic, are produced primarily by the pulp and paper industry. The public has been urging New Brunswick to take action to regulate organochlorides for years. Both Ontario and British Columbia, provinces with a significant pulp and paper industry, have introduced regulation of organochlorides. The New Brunswick government's course was to wait and see what action the federal government would take. The federal government, under pressure from industry dropped the organochlorides regulation, opting instead to regulate a subset of organochlorides, dioxins and furans under CEPA. As a result, New Brunswick mills are regulated by standards that are less strict than their counterparts in BC and Ontario.

Although organochlorides were not regulated as a class, New Brunswick has seen the results of having federal regulations on dioxins and furans. A hundred million dollars was spent in the last three years on a new treatment facility in Saint John. This is evidence for the assertion that it is federal regulation that drives compliance in New Brunswick

The pulp and paper sector is also regulated under the Fisheries Act through Pulp and Paper Effluent Regulations, and through the provisions that prohibit the deposit of substances deleterious to fish into watercourses. Up until recently the Pulp and Paper Effluent Regulations were guidelines only, and the province had a practice of applying the guidelines more strictly to the mills upriver than on the coast. However, since the regulations were promulgated, all of the mills are being brought into compliance. This experience illustrates the need for strong, enforceable regulations at the federal level rather than unenforceable guidelines to regulate resource industries in the province.

coastal zone management: rockweed

The management of rockweed in New Brunswick also demonstrates the vulnerability of the provincial government to pressure from industry, and a need for federal leadership in environmental protection regulation. Acadian Sea Plants Ltd. receives financial support from an Atlantic Canada Opportunities Agency grant. The company has applied for a further grant to build a rockweed processing plant in New Brunswick. The benefit to the New Brunswick economy through job creation (100 new jobs) might weigh in their favour. However, the company's claims of job creation could be overestimated. Nine people harvested 900 tonnes in 1995. At this rate, the company may not be able to meet the required processing volume of about 11,000 tonnes through manual workers, and may have to use mechanical equipment that is extremely destructive on the inter tidal ecosystem, and will employ fewer workers.

Because of the lack of a coastal zone management plan for the province, the effect of its operations on the ecosystem will not be assessed against any regulatory standards, and as indicated earlier, the operations will be self monitored. Such gaps in regulation often arise from questions of provincial/federal jurisdiction caused by the distribution of powers in the Canadian

Constitution. This is a problem that the EMFA will not address as it is not a constitutional document.

aquaculture

Another area of environmental protection where there is seen to be a gap and a need for a stronger federal role is in the area of aquaculture. Despite the possibility of serious health effects resulting from the accumulation of fertilizers in the environment, the federal government has not attempted to regulate aquaculture. The province has developed a policy, rather than regulations, which does not adequately consider the cumulative effects of the aquaculture industry.

The following example illustrates the problem when conflicts of interests and political pressure occur in a new industry that has not been regulated for adequate environmental protection. In New Brunswick salmon smelts are required to be vaccinated for furunculosis before release into cages. In the 1980's, only one vaccine source, a company on PEI with political affiliations was producing the vaccine and that company used a west coast instead of an east coast strain of the disease in their vaccine. In the late 1980s a vaccine that was accidentally "live" was distributed to customers, and introduced into the ecosystem. As a result thousands of caged fish died in the Bay of Fundy with a west coast strain of the disease.

toxic substances

The control of toxic substances is an area that the province has not specifically addressed in regulation other than for pesticides. Under the Pesticides Control Act the province can set more stringent standards than the federal government. However, the province typically waits for federal regulation before deciding to control substances. Fenitrothion and 2,4D illustrate the point.

In 1989, despite of the evidence of the biological harm caused by fenitrothion, the existence of a benign biological alternative (Bt), and the fact that all other jurisdictions in North America had stopped use of the chemical to sweep broad areas of forestland, the province refused to take action until the federal government regulated the substance under the Pest Control Products Act. At present, the New Brunswick Department of the Environment has not regulated the chemical but is hoping that there will be no applications for spray permits from the forestry industry this spring.

The case of the herbicides 2,4D and 2,4,5T, both of which contain toxic contaminants, is further illustrative of why a strong federal regulatory presence in the area of toxins is required. In 1981, after 2,4,5T had been banned in Ontario, a concern was expressed by a Liberal politician that the chemicals used by the NB forest companies might be the material banned in Ontario. However, upon the companies' assurances that they would buy new chemicals, they were granted permits to spray. Whether or not the companies purchased the chemical from Ontario, is not publicly known. However, it underlines the real concerns of environmentalists that as a result of less strict regulation on chemicals, New Brunswick risks becoming a pollution haven.

Herbicide 2,4D is a chemical used in agriculture and by householders for weed control. In September 1986, the province was convinced by the public to a temporary ban on 2,4D because of its widespread use on lawns. The ban was to last for 6 months pending review of the herbicide by the federal government. The federal report stated that the federal government would not phase out the herbicide because of economic concerns of prairie farmers. However, the report also stated that other jurisdictions could phase out 2,4D in spite of the federal position. Following the federal report, in April 1987, New Brunswick lifted the ban and approved the use of 2,4D even though it could have controlled it through provincial pesticides regulation with the go ahead of the federal government. This example indicates, again, the need for the federal government to lead in the establishment of enforceable regulatory standards in the area of toxic chemicals.

nuclear energy

Concerns were expressed by a New Brunswick environmental group that the Agreement might affect the regulation of the nuclear industry. The group strongly favours arm's length federal regulatory and enforcement activities with respect to NB Power's operation at LePreau. While it is unclear whether the EMFA will effect regulation of the nuclear field, the National Guidelines Implementation Strategy is required to involve other departments such as health, energy and environment when developing guidelines. This suggests that under the EMFA, nonbinding national nuclear guidelines may be established through this process and implemented through provincial regulation. New Brunswick's environmental groups are concerned that national guidelines will replace federal regulation of the nuclear field.

It is possible, that the Schedule III on compliance may apply to enforcement of regulation in the nuclear field. Appendix B to the Schedule lists the Atomic Energy Control Act as being "under consideration for future inclusion" in the Schedule. Assuming the Agreement will apply to enforcement of nuclear regulation in the future, it is unclear whose role it is to enforce such regulation. The province would be responsible for enforcing legislation of service industries, of which the nuclear industry is one. However the federal government would retain responsibility to enforce federal regulation not specifically assigned to a province by way of bilateral agreement and identified in Appendix C. It is not certain whether the Federal/Provincial Agreement for Environmental Cooperation in Atlantic Canada will be included in Appendix C as a recognized implementation measure for Schedule III.

The question of the inclusion of nuclear regulation under the Agreement is illustrative of another weakness of the EMFA. How will the agreement apply to environmental regulation of federal departments other than Environment Canada? Departments such as the Department of Fisheries and Oceans, Department of Transportation, the Atomic Energy Control Board, Agriculture Canada, and Energy, Mines and Resources regulate in the environmental field. These departments were not at the table during the EMFA negotiations. It seems pointless to create an environmental management framework that does not account for the activities of these departments.

III. Accountability

Accountability concerns were widely expressed amongst New Brunswick environmental groups. The Agreement does not make the provincial governments accountable to each other or to the federal government for implementing its provisions, nor does the Agreement ensure public accountability.

Accountability can be encouraged by the nature of an agreement as binding upon the parties. However, the EMFA is likely to be nonbinding. Typically agreements signed under the auspices of the CCME are nonbinding "gentlemen's" agreements. They are not legally persuasive legislative documents. They carry only the weight of peer pressure.

Even if a document is nonbinding, it can create accountability by the inclusion of an effective dispute settlement mechanism, rules of decision making, transparent structures, and reporting requirements by the parties to each other. The EMFA provides little in the way of accountability:

Schedule V (Guidelines, Objectives and Standards) contains a Guidelines Implementation Strategy which is supposed to set out the accountability of the Parties in implementing national guidelines including evaluation and auditing procedures. However, at present, no accountability structure is established.

Schedule III (Compliance) requires a new "National Compliance Forum" to produce an annual "national compliance report" which will be a snapshot of "national compliance activities." As with other bodies proposed by the EMFA, no decision making rule nor structure of the Forum is indicated. In addition, this report is a report on "national compliance" rather than explicitly a vehicle for the parties to report to each other and the public whether they have implemented the national guidelines.

Concerns surrounding public accountability are twofold. First, the Agreement does not guarantee public participation in the development of national guidelines and policies. although it does make consultation possible. Second, in delegating to the provinces enforcement of federal environmental law, the citizens in provinces where environmental rights have not been codified in provincial legislation may lose the benefit of existing environmental rights of enforcement in federal legislation.

For example, there is no equivalent of CEPA s. 108 formal request for an investigation of a suspected environmental offense in the New Brunswick Clean Environment Act. Although citizens are able to take private prosecutions of environmental offenses under the Criminal code provisions of s. 504 this right is hampered by the Attorney General's power to stay the proceeding. The CEPA Standing Committee has recommended that the constraints on private prosecutions be loosened. While rights of citizens to take action to protect the environment are being developed federally and in other provinces, New Brunswick lags behind.

IV Miscellaneous Concerns Expressed by the NBEN Member Groups Interviewed

Environmental Impact Assessment

It was noted that the environmental impact assessment process in the province does not allow for the extent of public input that the federal process permits. Specifically, under the Environmental Impact Assessment Regulations under the NB Clean Environment Act, the Minister has the opportunity to screen out projects without any public input. The result of this Ministerial discretion is that the environmental effects of many projects are never assessed due to political pressure from industry. For example, the Irving pulp and paper lagoon on the east side of Saint John was not required to undergo a full EIA. The foam and odour from the lagoon has since destroyed a residential community.

Another undertaking that was screened out of the provincial process was the medium term disposal of high level radioactive waste from the LePreau reactor. Until a permanent solution is approved, the waste is being stored in a field of cement canisters since room has run out in the underwater storage areas at the plant. While the permanent storage solution is undergoing federal environmental impact assessment, the medium term storage of high level nuclear waste in the New Brunswick proceeded without either provincial or federal environmental impact assessment.

research and development

It was noted that the federal government has a strong role to play in research and development. The role of CANMET in research and scientific support to resolve the acid mine drainage problem was applauded.

The assessment of health and environmental risks of substances new to Canada under CEPA was identified as another important research role for the federal government.

emergencies

The future of the federal government oil spills initiative in the Bay of Fundy was also an issue of concern. The tripartite agreement among the federal government, industry and the community sets out responsibilities in the event of an oil spill. Although a Department of Transportation initiative, it is an environmental measure and the effect of the EMFA on this sort of program remains unclear.

CONCLUSIONS

The NBEN member groups are concerned that the harmonization initiative as drafted in the EMFA will have negative impacts to the environment in the province. Their concerns fall into three main categories.

Enforcement

1. The NBEN member groups are concerned that the province does not have the capacity or political will to effectively enforce its own environmental legislation, let alone additional federal legislation. This is borne out by the DOE emphasis on development over environment since 1994, and the downward trends in enforcement of environmental laws.

2. The NBEN member groups are concerned that without the federal government's presence in enforcing federal provisions, particularly the Fisheries Act, the province loses an important backup to the provincial enforcement activity. Duplication in this respect is seen as providing the citizens of the province with an important assurance to counter balance provincial politics. Examples such as the Fisheries Act charges of Repap and McCains, and DFO charging the NB DOT show how checks and balances work to favour the environment.

Regulatory Standards

3. The NBEN member groups are concerned that the consensus based decision making of the EMFA will encourage a downward harmonization of environmental standards. The member groups are of the opinion that a strong federal regulatory presence in environmental protection is necessary, particularly with respect to the forestry industry, and the nuclear industry. The member groups cite as evidence the eagerness of the provincial government to let the federal government act first, rather than being seen to be "proactive" with respect to the dioxin and furan regulations under CEPA, the pulp and paper mill effluent regulations under the Fisheries Act, and the control of toxic pesticides and insecticides.

4. When asked to identify examples of duplication and overlap in the regulatory field, member groups cited gaps where neither level takes responsibility rather than duplication. Examples include coastal zone management and aquaculture. The EMFA does not resolve the major jurisdictional problems in environmental law the gaps which are caused by the division of powers in the Canadian Constitution.

5. The NBEN member groups are concerned about other mechanisms in the EMFA which will encourage downward harmonization, or at least discourage upward harmonization. The EMFA requires provinces to notify the parties and justify when they want to impose stricter, but not less strict, standards than the national guidelines.

Accountability

6. The NBEN member groups are concerned that the EMFA lacks accountability mechanisms among the parties. The question was frequently asked who will ensure that the provinces do what they agree to do? In addition, the EMFA text seems vague and duplicative itself which will give rise to a variety of interpretations, and inconsistent implementation.

7. The NBEN member groups are concerned that the EMFA lacks a mechanism to make the parties accountable to the public. The process of drafting the EMFA lacked transparency. The EMFA contains no requirements that the public be consulted when determining, for example, issues of national priority and national guidelines.

8. The NBEN member groups are concerned that the result of the EMFA will be that they lose the few environmental rights that they have by virtue of federal provisions in CEPA. They note that the provincial legislation gives them no rights to request investigations, let alone privately prosecute without the interference of the Attorney General.

9. The NBEN member groups are concerned that the EMFA proposes to create a new "national" level of decision making immune from accountability and scrutiny that attaches itself to the office of elected public officials.

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