

**Proceedings of the Workshop
on the
Government of Canada's Discussion Document on the Precautionary
Approach/Principle
and its Application to CEPA 1999**

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Health Canada.**

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1. BACKGROUND/CONTEXT TO THE WORKSHOP

Over the past 25 years the precautionary principle has emerged as an important element of international and domestic environmental law and policy. Internationally, it has been articulated in numerous multi-lateral treaties (conventions), declarations and resolutions on pollution control, toxics management and environmental policy. There is currently no single, universally accepted definition of the principle. The most widely agreed formulation of the principle is contained in Principle 15 of the Rio Declaration:

Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

This definition has been adopted in CEPA 1999. Under CEPA it is now the explicit duty of the Government of Canada to implement the precautionary principle. There are four direct references to the precautionary principle in CEPA: the Preamble; Section 2.1 detailing the administrative duties of the Government of Canada; Section 6.1 detailing the duties of the National Advisory Committee; and Section 76.1 relating to assessments or reviews of decisions from other jurisdictions related to toxic substances.

Since 1992, the increasing frequency of references to the precautionary principle, both in Canada and abroad, has generated significant debate and differences of opinion as to terminology (e.g., precautionary principle vs. approach), its definition/meaning and how it should be operationalized in domestic and international law and policy. At both the international and domestic levels, the debate is vigorous.

In February 2000, in response to increasing calls for clarification regarding the meaning of the precautionary principle, a process was launched by the Privy Council Office (PCO) to articulate a federal government position on the application of the precautionary principle/approach, focusing on its use by the science-based regulatory departments including Environment, Health, Canadian Food Inspection Agency and Fisheries and Oceans. The Government of Canada (GoC) released its Discussion Document (DISCUSSION DOCUMENT), entitled *A Canadian Perspective on the Precautionary Approach/Principle* on November 23, 2001. (The Discussion Document and other supporting documents are available through the Green Lane at: http://www.ec.gc.ca/econom/pp_e.htm). The document outlines proposed "guiding principles" to support overall consistency in how the precautionary approach is used in science-based risk decision-making in government. (More detailed background

information on the evolution and objectives of the GoC Discussion Document are included in Stephen McClellan's presentation, below.)

The PCO required relevant departments and agencies to undertake stakeholder consultations between the end of November 2001 and the end of April 2002 to provide input into the development in late 2002 of a final framework and a strategy for integrating it into the broader risk management approaches of the federal government.

On 20 March, 2002, Environment Canada and Health Canada hosted a Multistakeholder Consultation Workshop on the GoC Discussion Document and the application of the precautionary principle in CEPA.

2. OBJECTIVES AND STRUCTURE OF WORKSHOP

A Workshop Organising Team was formed in early January 2002 to provide oversight for the procedural and substantive content and structure of the Workshop, including: setting objectives, identifying issues and questions for discussion, and reviewing background papers, Members of the Workshop Organising Group (WOG) included:

- Cameron Siles - Environment Canada
- Michael Wilson, Environment Canada
- Nigel Skipper, Environment Canada
- Allan Godfrey, Health Canada
- Paul Muldoon, CELA
- Pascoal Gomes, CEN
- Bob Redhead, Friday Group
- Hajo Versteeg - Environmental Law & Policy Advisor (facilitator)

The Workshop had three main objectives:

- *To capture the views of participants on the Government of Canada Discussion Document on the Precautionary Approach/Principle*
- *To discuss the extent to which the Guiding Principles identified in the Discussion Document are reflected, and can be effectively operationalized in CEPA 1999*
- *To discuss other options for operationalizing the precautionary principle in CEPA 1999*

Over 60 people attended the Workshop. Participants included members of federal and provincial governments, industrial, manufacturing and business interests, environmental non-governmental organisations, public health associations, labour representatives, academia and consultants. The list of Workshop participants, with their affiliations and addresses, is attached as Appendix 1.

These Proceedings represent the output of the precautionary principle Workshop. The Agenda for the Workshop is detailed in Appendix 2. The Workshop was divided into 3 sessions plus a discussion on next steps:

- Session One provided an overview of the Government of Canada Discussion Document. It also included “introductory” perspectives on the Discussion Document provided by individuals from industry, environmental, labour and academic organisations.
- Session Two included a plenary discussion on the GoC Discussion Document.
- Session Three addressed four themes relevant to operationalizing the precautionary principle in CEPA 1999:
 - the use of the precautionary principle as a legitimate and distinctive decision-making tool;
 - circumstances where the precautionary principle can apply;
 - designing precautionary measures; and
 - public involvement and precautionary decision-making.

These Proceedings summarise all presentations and discussions relating to issues raised during the presentations. All of the overheads used by each of the presenters are duplicated in Appendix 3.

They are being distributed, subject to amendment, to all workshop participants, and will be communicated to all departments participating in the GoC Discussion Document consultation process, as coordinated by the Privy Council Office (PCO).

3. INTRODUCTORY REMARKS BY BARRY STEMSHORN, ASSISTANT DEPUTY MINISTER, ENVIRONMENTAL PROTECTION SERVICE, ENVIRONMENT CANADA

On behalf of Health Canada and Environment Canada, Dr. Stemshorn welcomed all participants. He stressed the importance of obtaining stakeholder feedback on the GoC Discussion Document. For Environment Canada, the precautionary principle is a challenging subject, and there is general agreement that the department needs to do more work internally and with its stakeholders in understanding and articulating the practical application of the principle under CEPA. Therefore, the key point of the workshop is to gauge participants’ reactions to the “guiding principles” proposed by the GoC Discussion Document , and their appropriateness with respect to CEPA.

Dr. Stemshorn underlined Environment Canada’s recognition of the need to develop a better understanding of the precautionary principle, in view of its mandate and responsibilities. While it has been applying the principle at a general level, he acknowledged the need to deepen its understanding of the precautionary principle and its implications. He indicated that he would welcome feedback on issues such as the appropriateness of the GoC Discussion Document principles in an environmental context and whether they provide enough information and guidance to all stakeholders.

Dr. Stemshorn emphasized that, although Environment Canada and Health Canada have been considering issues related to the precautionary principle in the lead-up to this workshop, they have not yet established firm positions on the subject. He stated that the Departments commissioned the workshop background paper from Stratos Inc., not to reflect the official views of Health Canada and Environment Canada, but to serve as a basis for discussions.

4. SESSION ONE: OVERVIEW OF AND REACTIONS TO THE GOVERNMENT OF CANADA DISCUSSION DOCUMENT

4.1 *Introduction to the GoC Discussion Document by Stephen McClellan, Director General, Economic and Regulatory Affairs Directorate, Environment Canada*

Mr. McClellan began his presentation by noting that the need for federal inter-departmental work on precaution is very timely. The current explosion of scientific innovation in Canada and globally adds greater complexity and challenges to traditional risk management and Canada needs a rigorous, credible and transparent process for decisions that are consistent and defensible. The GoC Discussion Document provides a “principles-based” approach with two main objectives:

- to develop a coherent and cohesive position for use in federal areas of responsibility and for integration into the broader processes of risk management; and,
- to assist departments in developing operational guidelines in their particular area of responsibility.

The document proposes “guiding principles” that are for case-by-case consideration, not prescriptive rules. These principles would constitute the key elements of a federal framework for the precautionary approach. Such a framework would have four purposes:

- to improve the predictability, credibility and consistency of Canadian federal precautionary approaches to ensure they are adequate, reasonable and cost-effective;
- to support sound federal government decision-making while minimising crises and unnecessary controversies, and capitalising on opportunities;
- to increase the confidence of public and private stakeholders, in Canada and abroad, that federal precautionary decision-making is rigorous, sound and credible;
- To increase Canada’s ability to positively influence international standards and applications of the precautionary approach.

In closing his presentation Mr. McClellan noted that PCO would coordinate and consolidate all feedback on the GoC Discussion Document, would gauge domestic and international perspectives and would then formulate the basis of a GoC application of the precautionary principle/precautionary approach.

In discussions following his presentation, Mr. McClellan stressed that the document is a work in progress, and has been since deputy ministers agreed two years ago that the GoC needed to obtain a better understanding of the precautionary principle and how it is conceived by departments and agencies. This agreement led to an extensive internal process among regulatory and economic departments led by PCO (underlying its importance). The completion of the GoC Discussion Document itself represents a major achievement, given the different perspectives among (and within) departments. Mr. McClellan noted that the public comment period on the GoC Discussion Document concludes at the end of April 2002. The final guiding principles for applying the precautionary principle will then likely be presented to Ministers in the fall 2002 as a final Canadian federal position.

In response to Mr. McClellan's presentation, Ken Ogilvie, the Executive Director of Pollution Probe recommended that the precautionary principle be placed on a two-track process. The first track would implement the precautionary principle within the confines of CEPA 1999 (which imposes some constraints on the broader definition and application of the principle that NGOs are looking for). The second track would be to initiate a more open-ended dialogue on elements of the precautionary principle that do not fit into the current text of CEPA 1999. The second track would allow for discussion of key elements of the precautionary principle that should be included in the next round of the CEPA review, commencing in 2005.

4.2 Presentation by Geoff Granville, Manager, Toxicology and Material Safety, Shell Canada

Dr. Granville prefaced his remarks by cautioning participants that "industry" is not a single, homogeneous entity, but comprises a broad spectrum of interests on the precautionary principle from an industry, business and manufacturing perspectives; therefore his comments are not intended to "represent" the views of all facets of the industry, manufacturing and business sectors.

Dr. Granville stated that the major strengths of the GoC Discussion Document are:

- Its emphasis on a "principles-based" approach;
- Its premise that precautionary principle is an element within science-based risk management;
- Its emphasis on the importance of transparency in precautionary decision-making processes; and,
- Its assertion that it reflects current government practice.

He suggested that the main weakness of the Discussion Document is its inadequate treatment of the "burden of proof" issue. He noted that the concept of the "burden of proof" is not a principle, but a procedural or operational issue that should be evaluated on a case-by-case basis. In general, he argued, the burden to establish a "threat of serious or irreversible harm" should be on the party alleging the harm. Dr. Granville

also pointed out that the Discussion Document does not discuss the burden of proof concept consistently.

Dr. Granville cautioned that the final GoC position on the precautionary principle/approach must provide a consistent umbrella that forms the basis of departmental application/operationalization of the principle. While recognising that the current Discussion Document is a work in progress, he expressed concerns by industry members that departments including Environment Canada and Health Canada must apply the guiding principles. The application of precautionary principle within CEPA 1999 must comply with the GoC's Guiding Principles on precautionary principle. He noted for example that in the view of industry, the issue of whether the precautionary principle applies to risk assessment is "closed." Moreover a "suspicion" of serious or irreversible harm is not sufficient to trigger a precautionary measure. There must be a "real" scientifically-based "threat".

Dr. Granville asserted that the government should only apply the precautionary principle in the context of science-based decision-making. He recognised that governments have the right, and will on occasion make decisions based on a range of "societal values" that may not always emphasise science. He stressed that on these occasions governments should clearly state those "societal values" and should not use the precautionary principle as a rationalisation for the decision.

Dr. Granville indicated industry support for the definition of precautionary principle stated in CEPA 1999 and hoped that it would be uniformly adopted and applied across government laws, policies and practices. He concluded his introductory remarks by referring participants to the industry papers they received as background papers. These papers include numerous additional comments and recommendations on the GoC Discussion Document and the application of the precautionary principle by federal departments.

Lively discussions following this presentation focused primarily on the burden of proof issue. Dr. Granville pointed out the near impossibility of proving a negative (i.e. zero effect), and suggested that decision-makers must therefore be reasonable in assessing whether a credible threat exists. Such decisions can only be made on a case-by-case basis in determining the appropriate level of concern. He further argued that the impossibility of proving no harm also supports the position that the person alleging harm should have the obligation to demonstrate the alleged harm (as opposed to requiring the proponent of the activity to demonstrate "no harm").

4.3 Canadian Environmental Network presentation by Theresa McClenaghan, Counsel, Canadian Environmental Law Association

Ms. McClenaghan presented the CEN perspective that the precautionary principle is not a part of the current risk assessment-risk management paradigm, but rather a fundamental alternative approach to traditional decision-making. She stated strong

support for the Wingspread conceptualisation of the precautionary principle:

When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause-and-effect relationships are not fully established scientifically. In this context the proponent of an activity, rather than the public, should bear the burden of proof. The process of applying the precautionary principle must be open, informed and democratic and must include potentially affected parties. It must also involve an examination of the full range of alternatives, including no action.

Based on this conception, Ms. McClenaghan – and successive ENGO, public health and labour speakers throughout the day – rejected the characterisation of the precautionary principle in the GoC Discussion Document as an element of a risk assessment – risk management approach. She argued that traditional risk management-based approaches have proven to be inadequate (too time-consuming, too expensive, too reliant on industry data, and too restrictive in their approach...substance by substance), and that new, precaution- and prevention-based approaches are necessary, available and effective.

Ms. McClenaghan stated that public advocacy groups strongly believe that the precautionary principle requires that the burden of proof should be on proponents of an activity (e.g., owners of a product, applicants of a new substance); not on parties alleging a threat of harm. She argued that, without acceptance of this fundamental notion, the application of the principle will not result in significant change.

Ms. McClenaghan made various other comments about the GoC Discussion Document, including:

- ENGO agreement on its overall emphasis on transparency;
- Its failure to address how children or other vulnerable groups would be better protected by application of the precautionary principle;
- its discussion of cost-effectiveness assumes that all societal costs (including the costs of long term impacts) can be calculated when that calculation is not always possible;
- trade considerations (the 11th proposed guiding principle in the GoC Discussion Document) should not be given any special mention as they are no more or less important than other important values for national decisions;
- it does not adequately link the precautionary principle to other, related (and already established) governmental policies such as pollution prevention and virtual elimination.

4.4 Intervention by Dave Bennett, National Director, Health, Safety and Environment, Canadian Labour Congress

Dr. Bennett expressed his strong support for the comments made by Ms. McClenaghan.

He argued that the GoC Discussion Document imposes a “straight jacket” by describing the precautionary principle as an element of the risk management process. Decisions to take precautionary measures should be based on social preferences and moral considerations as well as on scientific calculations of risk and benefit. As such, the GoC Discussion Document is only of limited value. Dr. Bennett’s concerns were elaborated in the Canadian Labour Congress’s Position Paper distributed to participants as background material.

4.5 Intervention by Joel Tickner, Research Assistant Professor, Department of Work Environment, Center for Sustainable Production, University of Massachusetts at Lowell

Dr. Tickner complimented the Canadian government for leading the international discussion on the precautionary principle and, through these consultative mechanisms, for allowing Canadians to influence the government position. He observed that the GoC Discussion Document describes the precautionary principle as a principle only to be invoked at the risk management phase of decision-making. Instead, he argued that it would be much more effective to conceive of the precautionary principle as an overarching guide to improving decisions under uncertainty, so as to prevent risks more effectively.

Dr. Tickner argued that a central element of the precautionary principle – which is not reflected in the Discussion Document – is to shift the types of questions decision-makers ask about risks from “what risks/exposures are acceptable” to “what opportunities or alternatives exist to reduce or prevent risks while achieving some given service or goal”. This focuses decision-making on continuous improvement, solutions and innovation.

Dr. Tickner also argued that the framework we seek should be called a “science-informed” framework, not a “science-based” one. A broader approach to science is critical in environmental policy but ultimately decisions under uncertainty are policy decisions and must be informed by a wide range of stakeholders in society.

How much precaution is necessary and what is an unacceptable risk should be a function of various factors and determined on a case-by-case basis. Such a determination should include: the level of hazard/risk; magnitude of the risk; level of uncertainty and ignorance; and availability or development potential of safer, feasible alternatives. Alternatives should be considered early in the decision process; safer alternatives may obviate the need for a complicated, expensive, and time-consuming full risk assessment. A consideration of alternatives can avoid prolonged debates over causality and place a focus on solutions to risks. In addition to these factors, societal input is critical in decisions under uncertainty.

Dr. Tickner recommended that the Discussion Document outline a range of tools for the broad application of the precautionary principle. Precaution is not just about yes/no

decisions to activities but can result in a range of policies. Most important of these is pollution prevention/cleaner production. The underlying rationale of pollution prevention is not establishing acceptable risks, but undertaking processes/planning that prevent or minimise the creation of risks while providing a particular “service”.

Dr. Tickner also suggested that an environmental health research agenda that focuses on better understanding of complex, uncertain environmental risks, early warnings of potential risks, and development of alternative technologies is a critical precautionary practice.

With respect to cost considerations, Dr. Tickner argued that, in applying the precautionary principle, it is very important to consider the costs of regulation, but also important to remember that not taking precaution can have large costs – in terms of lost lives and economic productivity. It is important to note the large literature that shows that precautionary regulations can stimulate innovation and actually reduce costs in the long run – a long-term decision-horizon is often important to capture the benefits of precautionary action. Dr. Tickner cited the Environmental Issue Report No. 22, prepared by the European Environment Agency, entitled *Late Lessons From Early Warnings: The Precautionary Principle 1896-2000* as an excellent reference work on this topic. (The document is available at: http://www.edie.net/gf.cfm?L=left_frame.html&R=http://www.edie.net/news/Archive/5062.cfm.)

In concluding, Dr. Tickner emphasised the importance of balancing concerns about the inappropriate abuse of the precautionary principle with reliance on uncertainty to justify inaction. He suggested that the way to bridge these two concerns is to understand precaution as being about preventing risks, not impeding progress. Central to this goal is harnessing science, technology, and policy to address uncertainty, complexity, and innovation.

5. SESSION 2: PLENARY DISCUSSION ON THE GOVERNMENT OF CANADA DISCUSSION DOCUMENT

This session’s objective was to capture the views of participants on the Government of Canada Discussion Document on the Precautionary Approach/Principle (GoC Discussion Document). The main questions for consideration were:

- Do the principles in the Discussion Document enable you to understand clearly when the government will apply the precautionary principle and what will happen when it applies the precautionary principle? If not, how would you improve them?
- Do the guiding principles meet your expectations for the application of the precautionary principle? If not, how would you amend them?
- Will the guiding principles promote fair and consistent application of the precautionary principle (domestically and internationally)?
- Will the guiding principles increase your “comfort level” with respect to government decisions relating to health and environment?

Participants agreed to proceed directly to discussing the second question because all of the other questions were dependent on the answer to the second. In general, there was strong agreement among participants that some of the issues addressed in the GoC Discussion Document are clear (most obviously the transparency issue). Equally, there was strong agreement among participants that the second question cannot be answered in detail without further clarification of the meaning of terms such as risk management decision process, burden/onus of proof, defining “society’s chosen level of protection”, and threats of serious or irreversible harm. Those familiar with the formulation of the GoC Discussion Document noted that government officials involved in the development of the document decided not to develop a prescriptive approach to each of these issues, but preferred a principles-based approach that would allow for a pragmatic application of the precautionary principle.

Industry representatives supported the GoC Discussion Document, but argued that some points need clarification and that the onus issue in particular remains problematic. For some, the main issue is consistency of application, both domestically and internationally. Some also argued that the GoC Discussion Document should state categorically (“right up front”) that the government does not consider the precautionary principle to be an accepted element of customary international law. They pointed to the experience in recent trade disputes with the European Union where (mis)application of the precautionary principle resulted in Canadian exports being denied access to EU markets. Some industry members stressed that the Government should use the term “precautionary approach” (and not “precautionary principle”) to minimize any suggestion that it intends to endorse the “precautionary principle” as being a principle of customary international law. Moreover, any use of the term “precautionary approach” should be used in a manner consistent with the wording of the Rio definition. The Discussion Document should endorse a single definition of the precautionary approach and not allow for a proliferation of definitions having significantly different implications. The Discussion Document also needs to incorporate a single trigger for use of the precautionary approach namely a demonstration on the weight of the evidence that the risk is serious or irreversible.

Several other participants countered that the GoC Discussion Document needs to avoid propagating the view that respecting international trade obligations is a barrier to environmental protection - the two can and should go hand in hand, and Canada should be a leader in this regard. Various representatives disagreed that the precautionary approach/principle should only be triggered on the basis of scientific evidence of serious or irreversible harm and called for a broader recognition of ethical and social perspectives in implementing precaution.

Another focus of considerable debate was the relationship of the precautionary principle to risk management. As noted above, the ENGO, labour and public health organisation representatives argued that the GoC Discussion Document needs to broaden the application of the precautionary principle (and the guiding principles) beyond risk management approaches to include a broader recognition of ethical and social

perspectives in implementing precaution. Restricting the debate to how the precautionary principle applies to a risk management approach would only validate the status quo, which is not acceptable. A clear and forceful argument supported by several participants was that precaution must be applied throughout the decision process-i.e., that alternatives must be considered early in the process and action need not be taken only after a full quantitative risk assessment.

A number of participants suggested the need to include additional guiding principles in the Discussion Document, such as: (i) the precautionary approach/principle should foster greater consideration of alternatives in decision-making to promote the application of environmentally sensitive technologies and approaches; and (ii) the precautionary principle should be interpreted in light of other principles of sustainable development, such as pollution prevention, public participation, polluter pays and intergenerational equity as well as human rights norms, such as the right of children to a healthy environment. Without a fundamental discussion of risk management and how this process is understood in the context of the GoC Discussion Document, public advocacy groups and most academic representatives stated that they cannot agree that the GoC Discussion Document guiding principles meet their expectations.

John Shortreed, Director of the Network for Environmental Risk Assessment and Management, noted that "risk management" has evolved considerably in the last decade and now includes a comprehensive consideration by decision-makers of both the "scientific evidence" and "stakeholders' concerns" including cost and benefits of various risk controls. There is now a set of ISO risk terminology definitions that should remove some misunderstanding. The older model of risk management, usually described as the RA/RM administrative technical and scientific approach, is still useful in many situations, but the new, more comprehensive model is much richer and better able to deal with issues such as the desire to take precautions in some specific situations. Documents such as the US Presidential/Congressional report in 1997 have made milestone contributions to the development of the new risk management framework. The treatment of the precautionary principle within the framework of an improved and expanded risk management framework would not only improve the treatment of issues that involve precaution but would also improve the ongoing practice of risk management. This path would not change the direction of the recommendations that are coming forward from the European Union, the GoC, Pollution Probe and others, but would place them in a more comprehensive framework and would improve the debate and likelihood of an acceptable direction.

Industry representatives expressed concern that it is premature to substantively discuss the operationalization of precautionary principle in CEPA 1999 prior to the finalization of the GoC position on precautionary principle.

In concluding the session, Dr. Stemshorn thanked participants for their thoughtful comments. Dr. Stemshorn acknowledged the "angst" that exists regarding issues such as the role of risk management, the concerns about expanding perspectives to include social policy issues, and the need to clarify the meaning and role of terms such as

“burden of proof”, “weight of evidence” and “cost-effectiveness”. He also acknowledged the general agreement that a clear discussion of certain terms will be an important part of Environment Canada’s work to clarify its application of the precautionary principle under CEPA.

6. SESSION 3: OPERATIONALISING THE PRECAUTIONARY PRINCIPLE IN CEPA 1999

Following the morning consideration of the GoC Discussion Document , the afternoon focused on the application of the precautionary principle under CEPA 1999, using the GoC Discussion Document ’s 11 proposed guiding principles as a starting point. Environment Canada commissioned a background paper, prepared by Stratos Inc., to identify how these principles could inform possible applications of the precautionary principle along the array of environmental protection measures under CEPA 1999. The afternoon’s discussion was broken into four parts, with each discussion preceded by a brief summary by Michael Wilson, Acting Director, Strategic Issues Branch, Environmental Protection Service of the findings of the background paper.

6.1 Theme 1: Use of the precautionary principle as a legitimate and distinctive decision-making tool

Mr. Wilson observed that the application of the precautionary principle is the first of 17 administrative duties enumerated in s. 2 of CEPA 1999. He then presented the following issues for discussion:

- *When implementing CEPA 1999, should Environment Canada and Health Canada apply the precautionary principle throughout CEPA decision-making processes?*
- *Is the precautionary principle a “legitimate and distinctive” decision-making tool?*

There was general consensus that the precautionary principle is legitimate. However, there was no consensus on where in the Act the precautionary principle applies. Industry representatives argued that the precautionary principle only has specific operational application under Part V of CEPA 1999. They noted that although the precautionary principle appears as the first of the “Duties” provisions of the Act, it appears alongside 16 other duties and it should not trump the other 16 duties on the basis of the order in which it appears under section 2. One industry member stated that there is no statutory rule of construction that supports such a view. She referred to the “Legal Considerations” portion of the Government of Canada Discussion Document, which states at p. 10 that “[if] the precautionary approach is to override all other considerations [in a statute], this will need to be made explicit in the statutory language”. This was not done in CEPA 1999. Industry members also argued that if the precautionary principle applies in an operational way throughout the Act, Parliament would not have needed to have specifically included the precautionary principle again

under section 76.1.

Public advocacy representatives and some academic representatives insisted that the nature of the principle itself and the explicit wording in Section 2 require its application across the various decision making responsibilities throughout CEPA 1999. The clearly articulated precautionary measures detailed in the ocean dumping provisions in Part VII of CEPA 1999 were cited as illustrative.

In addition to the disagreement about whether the government should take a narrow or a broad perspective of the application of precautionary principle in CEPA, there was extensive and clear disagreement about whether the “trigger point” for its application is limited to the decision to take measures to prevent or control a risk (risk management) or is applicable across all aspects of the risk assessment/risk management continuum. In particular, industry representatives argued vigorously that precautionary principle only arises in the decision-option phase of risk management once an objective risk assessment has established the threat to be serious or irreversible on the weight of the scientific evidence.

Public advocacy representatives argued that the application of the precautionary principle solely within risk management is an incorrect interpretation of CEPA 1999 and the GoC Discussion Document. They argued that the process of making decisions on hazards to human health and environment involves both a risk assessment (which evolves through initial hazard assessment, into dose-response assessment, exposure assessment, and risk characterization); and risk management – which involves decisions around what measures are going to be taken to reduce or remove the risk. The GoC Discussion Document should therefore clarify what is meant by “risk management” and should state that the precautionary principle should be applicable at any stage of the risk assessment/risk management continuum, including the hazard identification and risk assessment stages.

6.2 Theme 2: Circumstances where the precautionary principle can apply

Mr. Wilson presented the following issue for discussion:

- *On what basis should Environment Canada and Health Canada decide that there is sufficient threat of serious or irreversible damage, notwithstanding lack of full scientific certainty, for the precautionary principle to apply?*

Many workshop participants stated that they would have difficulty addressing all of the issues relevant to this question in detail until some key terms are clarified. A core debate emerged on the question of whether the “weight of evidence” or “society’s chosen level of protection” should be the main determinant of a precautionary decision. Industry representatives emphasized the importance of ensuring that decisions are science-based. Adopting weight of evidence as the procedural basis for determining the applicability of the precautionary principle ensures that scientifically defensible

information and data will be fully evaluated before invoking the principle. ENGOs argued that risk assessment and management decisions inevitably reflect judgements and social values, and should therefore be more explicitly values-based. In many instances a weight of the evidence approach may mean that precautionary decisions are delayed, which is contrary to the intent of the principle.

Related to the issue of “society’s chosen level of protection”, some ENGOs suggested that the application of the precautionary principle requires meaningful citizen engagement throughout decision making processes, including in decision-making processes about the nature of risks, and about whether and how to manage risks. Others, including some representatives of health organisations, argued that weight of evidence and science more generally need to remain as the driving force in deciding whether to manage risks.

6.3 Theme 3: Designing precautionary measures

Mr. Wilson presented the following issues for discussion:

- *Does the appropriate precautionary measure depend on the issue being addressed and the stage of decision-making?*
- *When applying the precautionary principle, to what extent should Environment Canada and Health Canada apply cost effectiveness considerations when deciding whether to act? When deciding how to act?*
- *Should the degree of efforts to ensure that a measure is “subject to reconsideration” reflect the level of scientific uncertainty, among other factors?*

There was no opposition to the general proposition in the first question that the appropriateness of a precautionary measure is dependent on the issue in question and the stage of decision-making. Participants disagreed, however, as to whether a decision to do further studies can be an appropriate response on its own. Some believed so, emphasising that the precautionary principle enables action, but does not require it. Others argued that the precautionary principle should create a positive obligation to take preventive measures.

One participant suggested that the ocean dumping provisions in CEPA 1999 (Part VII and Schedule 6) are based on the London Convention, which was designed to reflect the precautionary principle. These provisions in CEPA 1999 contain perhaps the clearest expression of the precautionary principle through their reverse listing scheme. This scheme restricts ocean dumping through a permitting process that is only applicable to a very limited list of non-hazardous substances. No substance can be dumped unless it is listed (unlike other schemes where an activity can occur unless it is on a prohibition list). All permit applications are individually assessed and require extensive information to help assess, prior to the dumping, possible risks.

The discussion of cost-effectiveness was highly contentious. Most participants agreed

that cost-effectiveness is an appropriate consideration regarding how to act, but opinion was sharply divided as to its role in deciding about whether to act to address a precautionary issue (that is, assess the cost effectiveness of precautionary measures to help determine whether or not to take those measures, as opposed to deciding to take precautionary measures and assessing which of the identified measures are most cost effective). Some warned that a strong requirement for cost-benefit analysis in deciding whether or not to act might preclude effective early action because of the analytical burden it imposes. Various industry representatives argued that some form of cost-benefit analysis is essential to inform decisions about whether to act, as well as about how to act. By contrast, many public advocacy representatives argued that, in the context of the precautionary principle, cost-effectiveness considerations should relate only to decisions about how to act.

Public advocacy representatives also stressed that “cost-effectiveness” considerations must be addressed in the broader context of “full cost accounting” which takes into consideration the social as well as the economic dimensions of proposed activities. In their view, industries required to examine full cost accounting principles will better appreciate the social (including environmental and human health) impacts of their products. Public advocacy participants also criticised the GoC Discussion Document for ignoring the importance of accounting for the distribution of costs.

Opinion was also divided as to whether the government should apply more effort to reconsidering precautionary decisions than other decisions. Some argued that all decisions should be subject to reconsideration based on new information. Others argued that identifiable “triggers” (such as certain kinds of new information) should bring about a reconsideration of decision about whether and how to manage a risk. Some industry officials further argued that, where an interim decision is based on the precautionary principle, the government must determine the information requirements for a firmer decision so as to avoid a potential challenge under a free trade agreement (WTO-GATT or NAFTA) based on the assertion that the decision in question is not clearly science-based.

6.4 Theme 4: Public involvement and precautionary decision-making

Mr. Wilson presented the following issues for discussion:

- *When Environment Canada and Health Canada are addressing threats of serious or irreversible damage and less than full scientific certainty, should they apply a “greater degree of transparency and public involvement”?*
- *Should the Departments describe their intended application of the precautionary principle under CEPA 1999, and should they document and communicate their application of the precautionary principle to specific decisions made under CEPA?*

Following detailed discussion, participants all agreed that transparency and public involvement are essential components of the precautionary principle, and must be

clearly and consistently incorporated into the precautionary principle process. There was also general agreement that Environment Canada/Health Canada should document and communicate their application of precautionary principle in specific decisions under CEPA 1999. While the need for transparency was agreed, the question of the need for “greater” transparency when dealing with the precautionary principle was also discussed. No clear views were expressed concerning the relative degree of transparency appropriate for precautionary decisions. Most agreed that all decision-making should be easily accessible to the public (i.e. not just precautionary decisions).

ENGO representatives observed that governments have tended to rely on the ENGO community for consultations, but these organisations are “over-subscribed” with consultations; the government should help enhance their capacity to participate effectively and should ensure that consultations broadly capture all stakeholder perspectives.

7. NEXT STEPS

Dr. Stemshorn committed to feeding the views expressed regarding the GoC Discussion Document into the interdepartmental process. He thanked participants for the quality of their input, and acknowledged that Environment Canada still has much to consider in operationalizing the precautionary principle under CEPA. Dr. Stemshorn particularly stressed the need for further thinking on various definitions such as “weight of evidence” and “burden of proof”. He assured stakeholders that they would remain full partners in this evolving process.

APPENDIX: WORKSHOP AGENDA

WORKSHOP ON THE GOVERNMENT OF CANADA'S DISCUSSION DOCUMENT ON THE PRECAUTIONARY APPROACH/PRINCIPLE AND ITS APPLICATION TO CEPA 1999

*March 20, 2002
Westin Hotel
Provinces Ballroom
Ottawa*

AGENDA

OBJECTIVES:

- *To capture the views of participants on the Government of Canada (GoC) Discussion Document on the Precautionary Approach/Principle*
- *To discuss the extent to which the Guiding Principles identified in the Discussion Document are reflected, and can be effectively operationalized in CEPA 1999*
- *To discuss other options for operationalizing the precautionary principle in CEPA 1999*

OUTPUTS:

- *A Workshop Report detailing the comments from participants on the GoC Discussion Document*
- *Recommendations to Environment Canada and Health Canada on next steps for operationalizing the precautionary principle in CEPA 1999*

Workshop Agenda

- 8:15** **Registration: (coffee, juice, muffins)**
9:00 **Introductions and welcoming remarks**
Barry Stemshorn, Assistant Deputy Minister, Environmental Protection Service,
Environment Canada
- 9:15** **Purpose and approach of workshop/Rules of procedure**
Hajo Versteeg, Facilitator
- SESSION 1: Overview of the GoC Discussion Document**
- 9:20** Introduction to the GoC Discussion Document
Stephen McClellan, Director General, Economic and Regulatory Affairs
Directorate, EC
(+/- 10 minutes for presentation plus 5 minutes Q/A session)
- 9:35** Presentation of preliminary thinking on the GoC Discussion Document by an
industry representative:
Geoff Granville, Manager, Toxicology and Material Safety, Shell Canada
(+/- 10 minutes for presentation plus 5 minutes Q/A session)
- 9:50** Presentation of preliminary thinking on GoC Discussion Document by CEN
representative
(+/- 10 minutes for presentation plus 5 minutes Q/A session)
- 10:05** Other "Introductory" Comments
10:20 **BREAK**
- 10:40** **SESSION 2: Plenary discussion on the GoC Discussion Document**
Purpose: To capture the views of participants on the Government of Canada
(GoC) Discussion Document on the Precautionary Approach/Principle (please
read carefully the GoC Discussion Document prior to the Workshop)
- Questions for Consideration:
- Do the principles in the Discussion Document enable you to understand clearly when the government will apply the precautionary principle and what will happen when it applies the precautionary principle? If not, how would you improve them?
 - Do the guiding principles meet your expectations for the application of the precautionary principle? If not, how would you amend them?
 - Will the guiding principles promote fair and consistent application of the precautionary principle (domestically and internationally?)
 - Will the guiding principles increase your "comfort level" with respect to government decisions relating to health and environment?
- 12:15** **LUNCH**
Lunch will be provided

SESSION 3: Operationalizing the precautionary principle in CEPA 1999

- 1:00 Preliminary perspectives on operationalizing the precautionary principle in CEPA 1999**
Michael Wilson (Acting Director, Strategic Issues Branch, Environment Canada) to introduce this Session, plus each of the listed Themes
- 1: 15 Use of the precautionary principle as a legitimate and distinctive decision-making tool**
Introduction: Michael Wilson
Questions for consideration:
- When implementing CEPA 1999, should Environment Canada and Health Canada apply the precautionary principle throughout CEPA 1999 decision-making processes?
 - Is the precautionary principle a “legitimate and distinctive” decision-making tool?
- 2:00 Circumstances where the precautionary principle can apply**
Introduction: Michael Wilson
Questions for Consideration:
- On what basis should Environment Canada and Health Canada decide that there is sufficient threat of serious or irreversible damage, notwithstanding lack of full scientific certainty, for the precautionary principle to apply?
- 2:45 Designing precautionary measures**
Introduction: Michael Wilson
Questions for Consideration:
- Does the appropriate precautionary measure depend on the issue being addressed and the stage of decision-making?
 - When applying the precautionary principle, to what extent should Environment Canada and Health Canada apply cost effectiveness considerations when deciding whether to act? When deciding how to act?
 - Should the degree of efforts to ensure that a measure is “subject to reconsideration” reflect the level of scientific uncertainty, among other factors?
- 3:30 BREAK**
- 3:45 Public involvement and precautionary decision-making**
Introduction: Michael Wilson
Questions for Consideration:
- When Environment Canada and Health Canada are addressing threats of serious or irreversible damage and less than full scientific certainty, should they apply a “greater degree of transparency and public involvement”?
 - Should the Departments describe their intended application of the precautionary principle under CEPA 1999, and should they document and communicate their application of the precautionary principle to specific decisions made under CEPA 1999?
- 4:40 Next Steps**
- 5:00 Close of Session**