

# Priority Areas For Action For The Fraser Basin Management Board



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by

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*Submission*

## **I. Activities and Programs Currently Undertaken by West Coast Environmental Law Association (WCELA) that Contribute to the Goals of the Fraser Basin Management Program Agreement.**

Since 1974 the West Coast Environmental Law Association (WCELA) and since 1977 the West Coast Environmental Law Research Foundation (WCELRF) have provided legal services to promote protection of the environment and public participation in environmental decision-making in British Columbia. WCELA/RF started as a summer legal aid project. It is now a full service public interest law organization, doing legal aid, law reform, legal research, legal education and maintaining a reference library of environmental legal materials.

WCELA has three core staff lawyers and three core office staff members. There are usually one or two lawyers working on project contracts, one or two students, and five to ten volunteers working at WCELA. The membership of WCELA includes lawyers, environmentally concerned citizens, environmental professionals and others. A Board of Directors meets bimonthly to support WCELA's work.

WCELA and its sister organization the West Coast Environmental Law Research Foundation (WCELRF) have both legal and environmental strategic objectives.

The legal strategic objectives are to:

- broaden legal standing and legal rights to obtain remedies to protect the environment
- ensure timely and efficient access to environmental information

- improve the legal and administrative procedures for developing environmental standards, assessing environmental impact, and conducting land use planning
- foster the adoption of enforceable standards and other legal tools to protect the environment
- ensure compliance with environmental standards
- promote alternative methods of resolving environmental disputes
- strengthen mechanisms for implementing the polluter pays principle, for example, that the environmental costs of activities are borne by those who conduct such activities, and
- promote ways to facilitate environmentally responsible purchasing practices.

The organizations' environmental strategic objectives are to:

- protect the quality, quantity and timing of flow of water
- prevent damage to our air, atmosphere or climate
- prevent toxic contamination, and identify, contain and properly deal with existing toxic contamination
- promote environmentally sustainable activities that foster biological diversity and habitat, and safeguard wilderness and environmentally sensitive areas, and
- promote conservation of energy.

## **WCELA LAW REFORM ACTIVITIES AND FRASER BASIN GOALS**

WCELA works to achieve the legal and environmental objectives through five program areas: law reform, legal aid, legal research, public education on environmental law and policy, and maintaining a library of environmental and legal materials. Our law reform activities are particularly relevant to the Fraser Basin Management Board Program goals of restoring, enhancing and managing the natural resources and ecosystems of the Fraser Basin. Law reform is undertaken through WCELA and government initiatives, participation in law reform groups, and law reform publications. A brief description of each activity follows. [(1) -- 1. . Thanks to Ann Hillyer, Murraray Mollard and the authors of Preventing Toxic Pollution: Toward a B.C. Strategy: Bill Andrews, Calvin Sandborn and Brad Wylynko, for help with this submission.]

### **WCELA Initiatives**

Examples of WCELA law reform initiatives include advocacy of contaminated sites legislation as recommended in WCELR's series on *Toxic Real Estate in British Columbia*; collaboration with others preparing a proposed *Forest Practices Act* for B.C.; and co-initiating a special workshop on the policy implications of the latest scientific discoveries regarding the impact of effluent from pulp mills.

### **Government Initiatives**

West Coast also responds to legislative or policy initiatives by government. Recent examples of relevance to the Fraser Basin are participation in workshops about the proposed B.C. Environmental Protection Act; and workshops on the new waste discharge permit fee system. WCELA lawyers frequently present briefs and advocate improvements to proposed B.C. and federal legislation on issues such as contaminated

sites, endangered species, pollution prevention, water management, forest practices, environmental assessment, energy conservation, land use planning, climate change, conservation covenants, environmental enforcement, and pulp mill standards.

### Participation in Law Reform Groups

West Coast also pursues its law reform goals through participation in various organizations which are active in the environmental law reform area, such as:

- the Multi-Stakeholder Working Group on Pulp Mill Regulation in B.C., an *ad hoc* group promoting education and making recommendations on legislative, technical and scientific aspects of one of B.C.'s major pollution problems,
- the Regulatory Advisory Committee, which is developing regulations under the forthcoming *Canadian Environmental Assessment Act*, and
- the Canadian Council of Ministers of the Environment Core Group on Liability for Contaminated Sites, which is attempting to reach consensus on nationally accepted principles for statutory schemes to govern liability for contaminated sites.

One of the staff counsel at WCELA, Ann Hillyer, is a member of the Waste Management Steering Committee for the Fraser Basin and will contribute expertise on how to manage waste within the Fraser Basin area.

### Law Reform Publications

Recent publications in the law reform area of interest to the Fraser Basin Program include the 1990 series on toxic real estate in British Columbia; *Preventing Toxic Pollution: Toward a British Columbia Strategy*, published in 1991; the 1992 report on *Using Conservation Covenants to Preserve Private Land in British Columbia*; and our upcoming publication (due June 1993) on methods of protecting private land in British Columbia.

We see the work of the Fraser Basin Management Board as an important step towards achieving sustainability in British Columbia.

## II. WCELA's Views on Priority Areas for Action for the Fraser Basin Management Program

WCELA's two main goals: to promote protection of the environment and to foster public participation in environmental decision making overlap with the Board's goal of achieving sustainability in the Fraser Basin. Since the areas of overlap are numerous, this submission will concentrate on three issues:

1. enforcement of existing environmental laws;
2. filling the gaps in the environmental regulatory structure; and

3. increasing public access to environmental law information.

## 1. Enforcement

Unless provincial and federal regulators have the political will to enforce the standards that are established by legislation and set out in the permits and licenses of regulated undertakings, even the most progressive of laws will be irrelevant. [(2) -- 2. . Rankin, Murray, "Economic Incentives for Environmental Protection: Some Canadian Approaches" (1991) 3:1 *Journal of Environmental Law and Practice*, at 242.]

Political will is the main ingredient required to enforce the existing environmental laws. All levels of government must recognize the importance of devoting adequate monetary and personnel resources to enforcement. The Fraser Basin Management Board should promote environmental law enforcement as a priority area for action for the governments involved in the region.

Environmental law in the province is in a state of flux. The current government has promised to overhaul the entire environmental regulatory structure [(3) -- 3. . B.C. Environment, *New Directions in Environmental Protection: Five Year Action Plan (1992-1997)* (Victoria: the Ministry, 1992).]. The *Waste Management Act*, the current major pollution control law which is based on an outdated "end of the pipe" regulatory approach, will be replaced by an *Environmental Protection Act*. The proposed new Act will be based on the 5 Rs hierarchy for reducing waste - reduce, reuse, recycle, recover, and residuals management and will emphasize the "polluter pay" principle, that whoever causes environmental degradation or resource depletion should bear the full cost. [(4) -- 4. . Ministry of Environment, Lands and Parks, *New Approaches to Environmental Protection, A Legislation Discussion Paper* (Victoria: the Ministry, 1992).] This new law will hopefully be introduced in 1993.

The other three major new laws will be *Environmental Assessment*; *Water Management*; and *Fish, Wildlife and Endangered Species*. All will be valuable tools for environmental protection. But since the new laws are not yet enacted, we submit that the Fraser Basin Management Board should focus on promoting strict enforcement of existing laws and disseminating more coordinated information to enable the public to play a bigger role in enforcement.

Four examples of enforcement problems follow: noncompliance with waste management permits; pulp pollution; environmental impacts of poor forestry practices; and uncoordinated enforcement of water quality programs in the Fraser Basin region.

### i) *Noncompliance with Waste Management Permits*

Many industries and other organizations have historically not complied with the *Waste Management Act*, and its predecessor, the *Pollution Control Act*. A study of the 1967 to 1981 period found that waste dischargers along the lower Fraser River exerted "considerable and perhaps excessive sway" over the regulators, frustrating enforcement

efforts. [(5) -- 5. . L. Kolankiewicz, "Compliance with Pollution Control Permits in the Lower Fraser Valley, 1967-1981" (Winter 1986-87) 72 B.C. Studies 28, at 47. ]

The situation is changing, but data gathered by the Ministry of Environment, Lands and Parks demonstrates that compliance remains a problem. The Ministry 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 by the provincial government.

The February 1993 report lists about 50 organizations in the Fraser Basin area that are significantly noncompliant with their waste management permits. Of these, the majority relate to air pollution. Water is the medium second most affected by noncompliance and land the third. Five regional district governments are included in this list, as well as two First Nations. Pulp and saw mill operations are highly represented in the list. Geographically, polluters are centered in three regions: the Lower Mainland; Prince George; and Williams Lake. Twelve of the organizations on the list were also on the noncompliance list released in October 1992.

The February 1993 list of convictions and charges under the *Waste Management Act*, *Fisheries Act*, *Pesticide Control Act* and *Water Act* includes about 80 (out of a total of 147 on the list) in the Fraser Basin region. More information could be usefully included in both lists. 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.

Publication of these lists is a step in the right direction. Companies that want to avoid the negative publicity associated with appearances on the lists will increase their environmental protection efforts. And charges under the *Waste Management Act* or other environmental laws can have an even more dramatic impact on the resources devoted to environmental control. Time is wasted preparing for and appearing in court; money is wasted on legal fees and fines or compensation; and again the negative publicity of regulatory charges can sour the public relations image a company has spent a long time developing.

**Recommendation 1.** The Fraser Basin Management Board should insist that member governments devote more resources to investigating compliance with waste management permits issued under the *Waste Management Act*. When violations are uncovered, charges should be laid. And repeat offenders must face ever increasing penalties. The existing list of convictions issued by the provincial government can include more specific information.

## *ii) Pulp Pollution*

Pollution from pulp and paper mills is a serious environmental problem in a number of locations in the Fraser Basin. Long overdue regulations to control some aspects of this form of pollution were introduced in 1992. These regulations must be strictly enforced. In addition, since other elements of pulp mill effluent are still pollution concerns, the regulatory gap must be filled to at first reduce and to eventually eliminate all forms of pulp and paper mill pollution.

Since 1988, lawyers at WCELA have acted on behalf of 54 individuals and organizations, comprising over 250,000 citizens, that are concerned about pollution from pulp and paper mills in British Columbia (the Pulp Pollution Campaign). WCELA lawyers pursue the Pulp Pollution Campaign's four campaign goals:

1. elimination of organochlorines from pulp and paper mills according to an urgent and realistic timetable;
2. compliance by B.C. mills with the existing federal and provincial pollution standards, with improvements where necessary;
3. promotion of wide availability of pulp and paper products free from contamination with organochlorines; and
4. quick and routine public access to information about the environmental impact and regulatory compliance record of the B.C. pulp and paper industry.

In 1992, the provincial government adopted a regulation that requires pulp and paper mills that use chlorine or chlorine compounds to eliminate organochlorines (AOX) produced in the bleaching process no later than December 31, 2002. The Pulp Pollution Campaign supports this regulatory direction.

However, organochlorines are not responsible for all environmental problems associated with pulp mill effluent. For example, research by scientists at Environment Canada suggests that pulp mill effluent causes sublethal effects on fish, even when the effluent is from a pulp mill that does not use chlorine compounds. Also, pulp mill air emissions and waste disposal to landfill are sources of concern. Therefore, we need to assess all sources and develop timetables to reduce or eliminate all forms of pulp mill pollution, in addition to eliminating the organochlorines from pulp mill effluent.

To do this it will be necessary to establish a process, with full public participation, to identify and assess all the impacts of pollution from pulp and paper mills in British Columbia. Issues that should be addressed in this process include

- the comparative impacts from various pulping processes,
- pollutants in effluent other than organochlorines,
- sludge disposal,
- air emissions, and

- energy requirements and the impact on climate change.

The purpose of this process would be to develop the means to eliminate pollution from pulp and paper mills in British Columbia. It would also encourage the development and implementation of clean technology for the pulp and paper industry.

**Recommendation 2.** A process, with full public participation, should be established to identify and assess all sources of pulp mill pollution and develop timetables to reduce or eliminate all forms of pulp mill pollution, in addition to eliminating the organochlorines from pulp mill effluent. Existing regulations must also be strictly enforced.

### *iii) Forestry Practices*

Logging activity has the potential to harm the productive capacity of the rivers, lakes and ocean. Among other valuable functions, these water sources support B.C.'s fisheries resource. The Ministry of Forests publishes the Coastal Fisheries and Forestry Guidelines which are intended to ensure that logging practices do not harm fish habitat. However, the Guidelines are not applicable in all circumstances and compliance is a problem. The Forest Resources Commission found that:

Unfortunately, secondary roads, spur roads and other temporary roads have sometimes been poorly constructed, poorly located, poorly drained with inadequate culverts, poorly maintained and poorly put to bed for the period of several decades between their use for silviculture or other management activities. [(6) -- 6. . Peel, A., *The Future of Our Forests* (Victoria: Forest Resources Commission, 1991) at 21.]

The Tripp Report, an independent 1992 audit conducted of enforcement of the Fisheries/Forestry Guidelines, found numerous violations on Vancouver Island. [(7) -- 7. . D. Tripp et al., *The Application and Effectiveness of the Coastal Fisheries Forestry Guidelines in Selected Cut Blocks on Vancouver Island*, Nanaimo, B.C. April 1992.] When followed, the Guidelines can reduce the number and severity of logging impacts on streams. However, the Tripp Report found that compliance with the Guidelines in the study area was generally poor, regardless of the location or the type of forest licence involved. Although the audit was performed on Vancouver Island, there is no reason to expect that the situation is much different in the Fraser Basin region. The Fisheries-Forestry Guidelines must receive better enforcement to prevent damage to fish habitat. When violations are uncovered, the appropriate regulatory action should be taken. The Department of Fisheries and Oceans' (DFO) failure to prosecute any of the violations uncovered in the Tripp audit is disheartening.

Citizens in the province are all too aware of violations of logging road permits and tree cutting permits. WCELA is frequently asked to help convince the Ministry of Forests to investigate violations and take appropriate regulatory action. WCELA recommends that audit programs, similar to that documented in the Tripp Report, should be carried out by each District Forest Office.



**Recommendation 3.** The Fisheries-Forestry Guidelines must receive better enforcement to prevent damage to fish habitat. When violations are uncovered, the appropriate regulatory action should be taken. Audit programs to investigate compliance should be carried out by each District Forest Office. Results of enforcement activities should be publicized.

#### *iv) Better Coordination of Water Quality Control*

All levels of government must make a concerted effort to use the existing environmental laws to move towards sustainability. Enforcement of the environmental laws guarding the water quality of the Fraser River and its tributaries is particularly vital to sustain human health, agriculture and fisheries.

The *Fisheries Act* is the major piece of federal environmental legislation applicable to the Fraser Basin. The prohibitions in this law against alteration of fish habitat and emitting deleterious substances into fish-bearing waters are particularly important for protection of water quality. Enforcement of this law is shared by the Department of Fisheries and Oceans and the federal Department of Environment. The Fraser River 1991-92 Action Plan reports that the two Departments are working together through a senior level DFO/DOE Fraser Basin Management Committee, and a number of other joint teams.

Improved cooperation between the two federal departments is commendable. However, there is still room for increased enforcement cooperation with the other levels of government involved in water quality control in the region.

For example, several regional districts in the Lower Mainland are considering the use of monochloramine to treat their water supply. The release of this disinfectant chemical through pipe breaks or other unplanned events into fish-bearing waters can be disastrous. Spills of monochloramine into a tributary of the Fraser River in 1989 and 1990 under a test program caused massive fish mortality. The Municipality of Surrey was convicted of offences under the *Fisheries Act* as a result of the 1990 spill. [(8) -- 8. . R. v. District of Surrey, unreported, Provincial Court of B.C., No. 52955, January 13, 1992.] The court found that Surrey's emergency response plan was inadequate to protect fisheries. Despite these well-publicized problems with monochloramine, the Dewdney-Alouette District (DARD) started a chloramination program on February 1, 1993. Although DARD provided information to the federal departments involved and the provincial Ministry of Environment, Lands and Parks, it decided not to consult with the Greater Vancouver Water District, which is currently studying the potential environmental impacts of implementing chloramination. Better coordination of water quality protection efforts could assist municipal governments in formulating better emergency response plans. Better coordination could help avoid prosecutions, and more importantly, help better protect the environment.

In addition to improved coordination, more information about compliance with and enforcement of the *Fisheries Act* would be helpful. No figures on enforcement activities under the *Fisheries Act* were available from the Department of Fisheries and Oceans.



*Fisheries Act* charges and convictions are included in the provincial list, but there are problems with both sections of that list as discussed in the above section on waste management permits.

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. [(9) -- 9. . 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.] Another useful source of information would be an Annual Report on administration of the habitat protection and pollution provisions of the *Fisheries Act*.

**Recommendation 4.** All levels of government: First Nations, federal, municipal and provincial must coordinate enforcement activities in relation to environmental laws, particularly for better protection of the water quality of the Fraser and its tributaries.

**Recommendation 5.** More data on enforcement of the *Fisheries Act* should be publicly available, including the Enforcement and Compliance Policy for the pollution control and habitat protection provisions of the *Fisheries Act*.

### Improving Enforcement of Environmental Law

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." [(10) -- 10. . 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. The current government may choose to adopt some of these changes in the proposed *Environmental Protection Act*. 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 *Act* has been promised, but not yet released. [(11) -- 11. . New Approaches to Environmental Protection, op. cit., at 2.] We will therefore discuss the 1991 proposals.

The proposals are: [(12) -- 12. . This section is a summary of a portion of Preventing Toxic Pollution, West Coast Environmental Law Research Foundation, Vancouver, Canada, 1991 at 52-58. ]

First, the policy proposes authorizing B.C. Environment to impose administrative penalties against violators of certain environmental offences. [(13) -- 13. . 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. [(14) -- 14. . Ibid, R. Brown & M Rankin, at 241, and M. Rankin, at 348.] 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. [(15) -- 15. . D. Saxe, "The Impact of Prosecution," 20 Hazardous Materials Management, at 34. The author concludes that, "This survey provides empirical evidence to support the decision of environmental regulators to give greater emphasis to prosecution, both of corporations and of their officers and directors." ]

Second, the government proposes expanding the liability of directors and officers for the actions of their corporations. This approach 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. [(16) -- 16. . D. Saxe, "The Impact of Prosecution," *ibid.* ]

Third, the government proposes widening the sentencing options available to a court in relation to an environmental offender. [(17) -- 17. . The proposals include 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. [p. 17] Ensuring Effective Enforcement.] The options proposed exist already in section 130 of the *Canadian Environmental Protection Act*, and were recommended for inclusion in B.C. legislation by the Sustainable Development Committee of the Canadian Bar Association. [(18) -- 18. . W. Andrews, "Waste Management Act: Recommendations to Improve Enforcement," in C. Sandborn, ed., *Law Reform for Sustainable Development in British Columbia* (Vancouver: Sustainable Development Committee, B.C. Branch, Canadian Bar Association, 1990) at 218.] One key sentencing option (included in section 131 of CEPA) 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. A related CEPA provision (s. 136) that should be added to B.C. legislation allows a person to sue civilly for damages caused by conduct contrary to the Act, whether or not there has been a conviction. There is a similar provision in s.42(4) of the federal *Fisheries Act* [(19) -- 19. . Fisheries Act, RSC 1985, c.F-14, s.42(3).] that allows a commercial fisher to recover damages due to the closure of fishing grounds because of pollution. The section imposes absolute liability. Lack of negligence is not a defence.

The Ministry's fourth proposal is to encourage more public participation in discovering and investigating environmental incidents that may be violations. This will be welcomed by concerned citizens frustrated with what they see as illegal pollution going unchecked. But citizens should also be involved in seeking remedies -- criminal and civil -- in cases of non-compliance. Regarding criminal remedies, private prosecutions have been a

powerful tool in citizens' efforts to protect the environment. For example, the Union of B.C. Indian Chiefs successfully conducted a private prosecution against the Greater Vancouver Regional District for illegal discharges from the Iona Island sewage treatment plant. This led to a cleanup of that plant. [(20) -- 20. . R. v. Greater Vancouver Regional District and Greater Vancouver Sewerage and Drainage District, (1981) 3 Fisheries Prosecutions Reports 134 (Prov. Ct.).] Another cleanup resulted when two private citizens successfully prosecuted the Municipality of North Vancouver for improperly operating its landfill. [(21) -- 21. . R. v. Corporation of the District of North Vancouver, Harry McBride and John Bremner, (1982) unreported (Prov. Ct.).]

Fifth, the government proposes decentralizing to regional officials the powers to issue environmental protection, cleanup and emergency orders that are now exclusively the prerogative of the Minister of Environment or, in some cases, senior officials. It should also include the power to suspend or cancel a permit or approval for failure to carry out obligations.

Sixth, the government proposes authorizing officials to enter into agreements with alleged offenders as an alternative to going to court. The agreements would stipulate remedial actions, preventative measures and financial compensation payments. New legislation would provide that it is an offence to violate the agreement.

The seventh proposal is to enact legislation to require companies to conduct environmental audits and report them to the government.

All these proposals merit more study and discussion. Improving enforcement capabilities will help us move towards sustainability in the Fraser Basin and the province.

**Recommendation 6.** The Board should study and recommend ways for member governments to improve environmental law enforcement such as: using administrative penalties; expanding the liability of directors and officers; widening the sentencing options available to a court in relation to an environmental offender; encouraging more public participation in discovering and investigating environmental incidents that may be violations; decentralizing to regional officials the powers to issue environmental protection, cleanup and emergency orders; authorizing officials to enter into agreements with alleged offenders as an alternative to going to court; and requiring companies to conduct and report on environmental audits.

## **2. Filling Gaps in the Existing Regulatory Structure**

Another priority area of activity for the Fraser Basin Management Program should be to identify and, where appropriate, recommend to the appropriate level of government to fill the gaps in environmental protection laws. We will provide two examples of gaps in the law, and also recommend principles to form the basis for new environmental laws.

## ***i) Biodiversity***

Biodiversity is an example of a crucial area of legislation where enforcement of existing laws may be inadequate to sufficiently protect the environment. The province recently issued Biodiversity Guidelines to address this major environmental challenge. Because the Guidelines are so new, details of how they will be enforced are still unclear.

Enforcement of the Guidelines as well as other environmental laws will help conserve biodiversity. The Global Biodiversity Strategy prepared by the U.N. Environment Programme, the World Resources Institute and the International Union for the Conservation of Nature lists six threats to biodiversity: habitat loss and fragmentation; introduced species; overexploitation of plant and animal species; pollution of soil, water and atmosphere; global climate change and industrial, agriculture and forestry practices. All six threats exist in the Fraser Basin. Strong enforcement measures are required to combat these threats and conserve biodiversity.

The FREMP Habitat Activity Workgroup criticized existing environmental legislation as disjointed and fragmented, providing protection and conservation for fish, yet often missing wildlife. The Group described the existing laws as reactive in nature and said that the rights of private ownership were a major obstacle for the development of wildlife habitat and ecosystem-oriented legislation. The group recommended legislation which would recognize the interdependency of all living resources to protect the entire ecosystem. They also commented that all levels of government should improve the joint coordination and enforcement of existing regulations concerning habitat management. [(22) -- 22. . Fraser River Estuary Management Program, Report of the Habitat Activity Workgroup, October 1991, at 31. ]

The provincial government has promised a new *Fish, Wildlife and Endangered Species Act* but the timetable for introducing this Act has been postponed. The legislative gap in relation to biodiversity protection is a large one. The area in the Fraser River Estuary and the Strait of Georgia is of particular concern because of its significance as the largest single wetland habitat complex on the Pacific coast of North America. To protect this area: "Limits to certain types of industrial and urban growth must be defined and adhered to." [(23) -- 23. . Department of Fisheries and Oceans (Pacific Region), *The Fraser: A River of Opportunity* (Canada: December 1989, revised October 1990) at 5. ]

The federal government also has a role to play in biodiversity protection. Canada was the first signatory to the 1992 Biodiversity Convention. The federal government has said that no new federal laws are required to implement this treaty, a position which has been disputed by legal experts. Article 8 of the Convention requires nations to take legislative steps to protect biodiversity outside protected areas. One expert told the House of Commons Standing Committee on the Environment that the Convention required a federal law with national enforceable standards for protecting endangered species. [(24) -- 24. . Elgie, S., *Minutes of Proceedings and Evidence of the Standing Committee on Environment, House of Commons, Issue No. 47, Monday, November 23, 1992 at 47:33.*]

## **ii) Groundwater Regulation**

Another legislative gap exists in relation to groundwater. A new *Water Management Act*, promised by the government is urgently needed. There is currently no legislated protection of groundwater. Contamination of groundwater is a major environmental problem in the Fraser Basin region. The government needs legal authority to regulate groundwater.

**Recommendation 7.** The Board should recommend to the appropriate level of government to fill the gaps in environmental protection laws. Two examples of gaps are biodiversity protection and groundwater regulation.

### Principles for New Environmental Laws

Gaps in existing environmental law should be filled by laws which are based on principles of pollution prevention, especially the precautionary principle.

**Pollution prevention** principles include:

- eliminating persistent toxic contaminants according to an urgent and realistic timetable;
- *sunsetting* (banning) the worst contaminants;
- establishing a mechanism to identify and prioritize pollution problems;
- using regulations to set minimum standards;
- ensuring periodic updates of pollution standards;
- promoting pollution prevention in land use planning and environmental assessment processes; and
- enforcing legal standards.

In April 1992, the B.C. Ministry of Environment released *New Approaches to Environmental Protection in B.C. - A Legislation Discussion Paper*, which stated that the new Act should make "zero pollution" a specific goal of the Ministry.

The **precautionary principle** is also accepted by the Ministry of the Environment. The Discussion Paper states:

The BCEPA should provide a strong basis to not allow or control a discharge if damage or harmful effects are likely to be caused, even when there is inconclusive scientific evidence to prove a conclusive link between emissions and effects.

The 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. [(25) -- 25. . 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. [(26) -- 26. . 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 allowing the release of pollutants until it is conclusively proven that a particular pollutant is harmful to humans or the environment. Then governments respond by regulating the substance that has been proven harmful. The traditional approach ignores how little is really known about the multitude of pollutants that are released into the environment and the overwhelmingly complex web of life that such pollutants affect.

Using the precautionary approach 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.

**Recommendation 8.** Gaps in environmental law should be filled by laws which are based on principles of pollution prevention, especially the precautionary principle.

### **3. Fostering Public Participation in Environmental Decision Making**

The Fraser Basin Management Board should consider how to increase public access to data about enforcement of environmental law. Many suggestions have been made in this submission to increase the available sources of information. The provincial enforcement lists could be improved; more federal enforcement data for the *Fisheries Act* could be released; and forestry practices audit data should be publicly available.

The Multi-Stakeholder Working Group (MSWG) on Pulp Mill Regulation in B.C. has made a recommendation about public access to pulp mill pollution information which is applicable generally to collection and dissemination of environmental information:

The MSWG recommends that the provincial government and the federal government, either separately or together, for the purpose of facilitating the efficient and timely collection and dissemination of environmental information and achieving better understanding of such information, undertake pilot projects to develop systems for making available the following:

- (a) legal standards and compliance data for all B.C. pulp mills;

(b) data and reports arising from ongoing environmental effects monitoring programs; or

(c) some or all of the ongoing environmental research and results.

The B.C. provincial non-compliance list, list of pollution areas of concern, and list of charges and convictions under environmental statutes is a success story. This list should be expanded to include enforcement data from all other levels of government: municipal, federal and First Nations. Placing all data about environmental law enforcement in one easily-accessible place, either in a periodic press release report or an on-line data base, or both, helps citizens to monitor industry and government's progress towards moving towards elimination of toxic substances, and ecological protection.

Currently there are a number of environmental information data bases in development. The information is fragmented and not well publicized. A WCELRf project now underway hopes to partially remedy this situation. Bill Andrews of WCELRf is working on a project which will collect data about environmental on-line information systems, and recommend ways to improve coordination of these information systems. The Fraser Basin Management Board may wish to coordinate with this work in their Information Systems Committee. As well, the Board may want to consider the formation of an additional committee in the area of environmental law enforcement to coordinate efforts between the different levels of government. This committee would be a useful adjunct to the six committees already established.

**Recommendation 9.** Compiling all data about environmental law enforcement in one easily-accessible place, either in a periodic press release report or an on-line data base, or both, would help citizens to monitor environmental law enforcement.

**Recommendation 10.** The Board should consider the formation of an additional committee in the area of environmental law enforcement to coordinate efforts between the different levels of government.

### **III. WCELA's Expectations for Fraser Basin Activities for 1993-94 and the Next Five Years**

Until we have seen the Board's draft strategic plan for the years 1993-98, it is difficult to comment on our expectations for the Board's work. We expect that the reports produced by the six working groups on water resources management, waste management, fish stocks and fish habitat management, information systems, community economic development and communications will contribute to an understanding of how to move toward sustainability in the Fraser River Basin. We hope that governments will make the changes that are bound to be recommended in these reports. We hope to review the criteria, indicators and processes for the annual audit and reporting on the state of the basin's environmental systems, as well as the state of the Basin's institutions and the performance of the Fraser Basin Management Program and Board.



## IV. WCELA's Expectations for Involvement in the Ongoing Implementation of the Program

WCELA expects to contribute to the Board's ongoing implementation by providing continuing advice on what laws and policies are needed for environmental protection, restoration and enhancement; and by ongoing participation in ensuring compliance with existing laws and policies designed to achieve the goal of sustainability.

### Summary of Recommendations

**Recommendation 1.** The Fraser Basin Management Board should insist that member governments devote more resources to investigating compliance with waste management permits issued under the *Waste Management Act*. When violations are uncovered, charges should be laid. And repeat offenders must face ever increasing penalties. The existing list of convictions issued by the provincial government can include more specific information.

**Recommendation 2.** A process, with full public participation, should be established to identify and assess all sources of pulp mill pollution and develop timetables to reduce or eliminate all forms of pulp mill pollution, in addition to eliminating the organochlorines from pulp mill effluent. Existing regulations must also be strictly enforced.

**Recommendation 3.** The Fisheries-Forestry Guidelines must receive better enforcement to prevent damage to fish habitat. When violations are uncovered, the appropriate regulatory action should be taken. Audit programs to investigate compliance should be carried out by each District Forest Office. Results of enforcement activities should be publicized.

**Recommendation 4.** All levels of government: First Nations, federal, municipal and provincial must coordinate enforcement activities in relation to environmental laws, particularly for better protection of the water quality of the Fraser and its tributaries.

**Recommendation 5.** More data on enforcement of the *Fisheries Act* should be publicly available, including the Enforcement and Compliance Policy for the habitat protection and pollution control provisions of the *Fisheries Act*.

**Recommendation 6.** The Board should study and recommend ways for member governments to improve environmental law enforcement such as: using administrative penalties; expanding the liability of directors and officers; widening the sentencing options available to a court in relation to an environmental offender; encouraging more public participation in discovering and investigating environmental incidents that may be violations; decentralizing to regional officials the powers to issue environmental protection, cleanup and emergency orders; authorizing officials to enter into agreements with alleged offenders as an alternative to going to court; and requiring companies to conduct and report on environmental audits.

**Recommendation 7.** The Board should recommend to the appropriate level of government to fill the gaps in environmental protection laws. Two examples of gaps are biodiversity protection and groundwater regulation.

**Recommendation 8.** Gaps in environmental laws should be filled by laws which are based on principles of pollution prevention, especially the precautionary principle.

**Recommendation 9.** Compiling all data about environmental law enforcement in one easily-accessible place, either in a periodic press release report or an on-line data base, or both, would help citizens to monitor environmental law enforcement.

**Recommendation 10.** The Board should consider the formation of an additional committee in the area of environmental law enforcement to coordinate efforts between the different levels of government.

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End of Priority Areas For Action For The Fraser Basin Management Board