

June 5, 2001

Hon. Charles L. Caccia, P.C., M.P.
Chair
Standing Committee on Environment
and Sustainable Development
House of Commons
180 Wellington Street
Ottawa ON K1A 0A6

Dear Mr. Caccia,

Re: Bill C-5, *Species at Risk Act*

On April 26, 2001, the National Environmental Law Section (NELS) of the Canadian Bar Association (CBA) appeared before the Committee, represented by Magdalena A. Muir and Tamra L. Thomson. At the hearing, the Committee requested that we provide supplementary comments on the scope and nature of public participation under Bill C-5. These comments draw on general principles from resolutions passed by the CBA and from recent written submissions of NELS on endangered species legislation and other federal environmental legislation.

The CBA has a long history of encouraging full public participation in federal environmental legislation. In 1991, CBA Council adopted a resolution entitled Federal Action for Environmental Protection and Sustainable Development, which delineated the scope of public participation. It called for:

- Full public participation in any environmental impact assessment process and intervenor funding and awards of costs in any public hearing under that legislation;
- Improved public access to environmental justice including:
- broadening the rules of standing in environmental matters, improving citizen suits and civil remedies for violation of environmental statutes and regulations,
- removing statutory limits for the quantum of civil liability for environmental damages, and
- legislating a rule-making for the development of environmental regulations to enhance opportunities for public input;
- Strengthening the enforcement of federal environmental legislation by formulating and submitting for public review and comment written enforcement and compliance policies and the details of any proposed or existing federal-provincial agreements for the administration and enforcement of federal environmental statutes (Resolution 91-05-m).

In resolution 95-03-A (Environmental Prosecution Information), the CBA urged federal, provincial and territorial governments to publicize information on environmental prosecutions by providing lists of those charged with environmental infractions and disposition sheets for unreported convictions. Governments now provide this information on a routine basis. Finally, Resolution 99-06-A (Notice of Proposed Legislation) called for adequate notice of all proposed legislation to facilitate public participation and consultation.

NELS supports public participation in all phases of drafting, enacting and implementing legislation. NELS also supports public participation and consultation in negotiating and implementing administrative, equivalency and delegation agreements under environmental legislation. It includes public participation in environmental impact assessments and environmental management arrangements. NELS' previous submissions (see Appendix) have emphasized public access to justice through broadening or maintaining the rules of standing in environmental matters and improving citizen suits and civil remedies for violation of environmental legislation.

Bill C-5 takes a narrow approach to public participation. The effectiveness of this type of legislation depends on public support which flows from public participation. NELS encourages a broader approach that incorporates the full range of public participation referred to in the above resolutions and discussed in NELS' recent submissions on proposed endangered species legislation and other federal environmental legislation. We support public participation being incorporated into legislation, with appropriate civil remedies being available before the courts.

Yours truly,

Dufferin Harper
Chair, National Environmental Law Section

APPENDIX

A. Excerpt from NELS submission concerning Bill C-65, *Canadian Endangered Species Protection Act* (December 1996):

As with other environmental legislation such as the *Canadian Environmental Protection Act*, the *Fisheries Act* and the *Canadian Environmental Assessment Act*, public access to information, participation and decision making, accountability mechanisms and public remedies are essential to effective legislation for the protection of endangered species and their habitat. This is all the more so in view of the public interest in the protection of endangered species as reflected in the preamble to Bill C-65.

The proposed legislation demonstrates a serious effort to ensure public access and remedies. However, the Bill employs narrow definitions to identify interested public parties, does not ensure easy and meaningful public involvement in decision-making, provides inadequate accountability, and places too many barriers in the way of remedies. Some examples serve to illustrate these points:

Territorial equivalency - s. 3: Equivalency agreements require prior consultation with land claims bodies. Similar provisions should be made for the participation of the Canadian public. Equivalency is not a merely technical matter, but relates to overall administrative and enforcement capacity, budget and political will. These are matters upon which Canadians are entitled to comment.

Delegation Agreements - ss. 7-8: Subsection 7(3) requires pre-publication of agreements made with any province. In our view, public participation and accountability must also require a right to public comment on draft agreements and a requirement of government response to those comments. The same should apply to the termination of such agreements under subsection 7(7). Publication and indexing of such agreements in *Canada Gazette* and provincial Gazettes should be required, in addition to the public registry established pursuant to s. 9. Comprehensive annual federal and provincial reporting on the administration and enforcement under the agreements and sunset clauses and periodic review of all agreements should also be included.

COSEWIC Designation - s. 21: Prior to any final decision, COSEWIC should be required to give notice of decisions in draft form and invite public comment.

COSEWIC Documents - s. 26: COSEWIC documentation should be published and indexed in the *Canada Gazette*, in addition to the public registry created pursuant to s. 9.

Emergency Action - s. 34: Emergency orders should be obligatory whenever emergency conditions arise, as timely reaction to threats may be required. Thus, s. 34 should be framed in obligatory language (“shall”), without Ministerial determinations. Emergency orders should be available at public request. A court has jurisdiction to make emergency protection orders under s. 60(3), but only within an endangered species protection action. As drafted, the Bill does not contemplate remedies in such actions being available on an emergency basis.

Recovery Plans - ss. 38, 39 and 41: Like the s. 3 equivalency agreements, the constituency to be consulted in the development of recovery plans is too narrow and is left to Ministerial discretion to determine who may be a “directly affected” or “interested” party.

Protection Actions - s. 60: The availability of this remedy depends on, among other things, unreasonable ministerial conduct or decisions. This is an unprecedented and unworkable prerequisite to public action.

Government Reports - ss. 101 and 103: These provisions should stipulate the content required in the reports.

B. Excerpt from NELS submission concerning the proposed Canadian Environmental Protection Act (CEPA) (September 1998):

NELS supports those provisions of the Bill which facilitate public participation. The Bill requires the federal government to facilitate the protection of the environment by Canadians, encourage public participation in making decisions affecting the environment and provide information to Canadians about the state of the environment. Many of the Bill’s provisions provide mechanisms to achieve these goals.

However, the Bill requires some changes to ensure effective public participation. For example, the right to notice and the opportunity to comment should be expanded. There should be public notice of all proposed CEPA regulations, documents and approvals, and a reasonable right to comment in each case. Exceptions to these rights, such as those found in equivalency agreements, should be removed.

Besides providing a public right to comment on equivalency and administrative agreements, the Bill should require that any provincial laws referred to in these agreements contain provisions equivalent to or offering greater environmental protection than those provisions found in CEPA. This is particularly important for provisions regarding whistle blower protection, citizen rights to sue, notice and comment. CEPA or Environment Canada should have a list as to the requirements for equivalency so there is no dispute about minimum requirements.

The Environmental Registry should contain as much information as possible, and be available in electronic form. However, until universal access is assured, Environment Canada should continue to provide paper copy access.

The Registry should be proactive, and make all applications under CEPA available to the public, except that information which is confidential. In particular, it should contain notice of applications for approvals, pending decisions and proposed development of, or changes to, policies or regulations.

The right of citizens to bring an action should not be severely restricted under CEPA. Requiring citizens to request an investigation and receive a response before they can sue may cause unnecessary delay. In some cases, such delays may inhibit action that is urgently required to prevent environmental harm. Furthermore, a right to bring an action should be available not only where an offence has been committed but also where an offence is imminent.