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Monday 16 May 2005

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Lundi 16 mai 2005

Standing committee on the Legislative Assembly

Environmental Enforcement Statute Law Amendment Act, 2005

Comité permanent de l'Assemblée législative

Loi de 2005 modifiant des lois sur l'environnement en ce qui concerne l'exécution

Chair: Bob Delaney
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ASSEMBLÉE LÉGISLATIVE DE L'ONTARIO

STANDING COMMITTEE ON THE LEGISLATIVE ASSEMBLY

COMITÉ PERMANENT DE L'ASSEMBLÉE LÉGISLATIVE

Monday 16 May 2005

Lundi 16 mai 2005

The committee met at 0904 in committee room 1.

ENVIRONMENTAL ENFORCEMENT STATUTE LAW AMENDMENT ACT, 2005

LOI DE 2005 MODIFIANT DES LOIS SUR L'ENVIRONNEMENT EN CE QUI CONCERNE L'EXÉCUTION

Consideration of Bill 133, An Act to amend the Environmental Protection Act and the Ontario Water Resources Act in respect of enforcement and other matters / Projet de loi 133, Loi modifiant la Loi sur la protection de l'environnement et la Loi sur les ressources en eau de l'Ontario en ce qui a trait à l'exécution et à d'autres questions.

CMD INSURANCE SERVICES INC

The Chair (Mr. Bob Delaney): Good morning, everyone. This is the standing committee on the Legislative Assembly. We are holding hearings on Bill 133, the Environmental Enforcement Statute Law Amendment Act, 2005.

Our first deputation this morning is CMD Insurance Services Inc.

Are you in the room? Please sit down. You have the luxury of the first word. Please begin by stating your name for the purposes of Hansard. You have 15 minutes for your deputation. If you choose not to use the entire time, it will be divided among the political parties for questions. The floor is yours; please begin.

Mr. Richard Dresher: Thank you. My name is Richard Dresher. I'd like to thank the committee for the opportunity to address issues surrounding Bill 133. I'm appearing here today representing my firm, CMD Insurance Services. I've been following the progress of the bill since its first reading in October. I've been involved in the ongoing consultations as a member of the board of directors of ONEIA, the Ontario Environment Industry Association, and have assisted them in developing that organization's position on this piece of legislation.

Speaking on behalf of ONEIA, I believe the organization agrees with the major thrusts of this bill, which include reduction in the number and severity of spills, swift consequences when spills occur, compensation for victims of spills and to level the playing field between the good and bad actors.

During the formulation of the ONEIA position, there were a number of concerns that members raised, either for themselves or on behalf of their clients, that our firm agrees with. These include:

—allowing environmental penalties to be laid by front-line environmental officers, rather than someone more senior. We believe the ministry has indicated that this concern is being addressed and EPs are to be laid by the director.

—expanding the definition of spills covered from "is likely to" to "may" cause an adverse effect. We believe that's going to greatly expand the number of issues for industry.

—a one-year time period for the laying of an EP does not, in our opinion, constitute swift consequences, so we'd like that period shortened, if possible.

—the reverse onus on all officers and directors of a corporation for any contravention of the act seems too onerous. You could have a director in charge of marketing charged for something as simple as a proper form being filled.

—the ability to lay an EP for any contravention of the act or conditions of a certificate of approval. It was our understanding that EPs were to be applied for spills alone. We believe wording the legislation to include all offences, even if curtailed in the regulations, produces an unnecessary level of anxiety in the business community.

Where our organization diverges from a number of other organizations, including the position of ONEIA, is with respect to the appropriateness of large civil penalties. The concerns I have heard during the consultations on the bill can be summarized as follows: absolute liability associated with EPs, with no due diligence defence; and the counter-effectiveness of the large quanta of the EPs, together with absolute liability.

Our firm does not share these concerns. However, there may be the perception that our rationale may be viewed as self-serving. For this reason, we feel it would be inappropriate to express those views in any way that may be construed as being those of ONEIA. As such, I would like to stress that, despite my prior activity in putting forth ONEIA's position, I am here today expressing the views of CMD Insurance alone.

The concerns expressed above have been put forth in two arguments that I've heard against large civil penal-

ties. These arguments are: true accidents happen, even to the best-managed companies; applying a penalty to those companies without allowing for a due diligence defence is unfair.

The second argument would be, since large penalties can be levied without regard to due diligence, companies will do less, not more, to prevent spills, taking the attitude, "If we're going to get hit with a penalty despite due diligence, why bother with due diligence at all?"

My experience over the past 27 years of helping companies deal with risk suggests that this will not be the industry response if EPs are introduced.

Basic risk management consists of four steps. First, you identify exposures your company has to economic loss or risk. Second, you formulate strategies to handle that risk. Then, you select the appropriate strategies and put them into a coherent plan. Finally, you monitor the plan over time to address new risks as conditions change. This is fundamental business strategy that is practised, to one degree or another, by every company, small or large.

Companies that deal with hazardous materials have already been exposed to the risk of some sort of spill and the economic consequences of dealing with that spill. The introduction of EPs simply increases the financial cost if a spill were to occur. By the number of responses you have received on this bill, I believe you have done a good job of identifying to industry the exposure to this new risk. If EPs are introduced, companies will move on to the next stage of risk management, which is developing strategies to deal with this new risk. Basic strategies might include: eliminating the risk altogether, mitigating the risk, retaining the risk or transferring it to a third party.

Where possible and economically achievable, it is always best to eliminate the exposure to a risk. The presence of EPs may encourage companies to change their processes, which could involve the use or production of more benign products. If this becomes the case, it will benefit us all. Where it is not possible to economically eliminate the risk, companies can choose to mitigate the risk, such as putting measures in place to minimize the probability or severity of a spill. They may do this by installing better monitoring equipment, leak retention systems etc. Every company will evaluate the cost of investing in reducing the chances of a spill versus the cost of a spill when measured in terms of cleanup response costs, damage to their reputation and now the amount of expected EPs they might face. Companies are making that decision now, substituting the cost of EPs with the cost of providing a due diligence defence.

Once a company has done its best guess at the appropriate expenditures to eliminate or mitigate its risk of a financial loss from a spill, it has two choices: retain the remaining risk, or transfer that risk to a third party.

0910

The largest firms with the greatest financial resources tend to retain a higher level of risk, and so may look at EPs as an additional cost they will be forced to bear. However, these are also the companies that have the financial resources to have the best systems in place to prevent spills in the first place. They also have the resources to respond to the spills quickly once one does occur and minimize their damage to the surrounding community. These are exactly the criteria that would allow them to eliminate or reduce the amount of any EP contemplated by the ministry through the agreements provision in clause 182.1(8)(c) of the bill.

Smaller companies may not have the risk tolerance or resources required to retain the same degree of risk as the largest firms. Thus, EPs may be viewed as more onerous on them. However, these firms have the opportunity to transfer this risk to a third party. Insurance is currently available that is specifically designed to pay for the cleanup and associated liabilities for a spill of a pollutant. Many small- and medium-sized firms already have this type of insurance in place. Insurance mitigates the effects of EPs for these firms in three ways: It provides a ready pool of cash to clean up a spill; insurers offering this type of policy provide access to 24/7 emergency spill response, as it is in their best interests to reduce the impact of any spill as much as possible; many policies also include coverage for fines, penalties and defence costs, where permitted by law, which would include these new EPs.

The quanta of the EP for companies with environmental insurance coverage in place should be minimized due to the rapid response to clean up a spill and being able to show that due diligence systems that were in place. Insurance companies will be checking for these systems when underwriting the policy originally. The EP will be just another cost in the insurance claim related to the spill. As the company who caused the spill would have a single deductible, or self-retained portion of the claim, the EP would have essentially no impact on that firm's overall costs related to the spill. The only cost that the firm may face is slightly higher insurance premiums once the additional cost of EPs filter through the system. However, I believe that any increase will be negligible, as simply having insurance available to pay for the immediate response to a claim will ensure that any EP levied will be small and, thus, only account for a small percentage of the overall costs of any claim.

Insurance can have a significant impact on achieving what we at CMD perceive as the goals of this legislation. It provides a pool of money to quickly respond to any spill and reduces the effect on the community. It provides funds to compensate the innocent victims who suffer a loss as a result of a spill. It levels the playing field between the good and the bad actors and provides third-party verification that companies have an effective environmental management system in place. Those companies with good systems will have a low risk of a spill, which includes many of the companies who have responded negatively to this legislation. This will translate into a lower cost of insurance. Those companies with poor systems and/or multiple spills will find insurance either expensive or unavailable. Those companies will be the ones that face the highest EPs, as they will not have

access to the pool of capital that insurance would provide to respond to spills. Their slower response and lack of effective spill management systems will negate their opportunity for negotiating lower EPs. If large EPs and other liabilities imposed by Bill 133 cause the bad actors to clean up their act or force them out of business altogether, the community will be better off, as will their competitors who are responsible corporate citizens.

Because of the protections afforded by insurance to smaller- and medium-sized companies with good environmental management systems, it's our company's position that there is no need to limit the application of EPs to just MISA companies. They can be an effective tool for ensuring that companies all of sizes have appropriate systems in place to prevent spills.

The Chair: Thank you very much. We have time for one question—two if they're very brief—from each party, beginning with Mr. Barrett.

Mr. Toby Barrett (Haldimand–Norfolk–Brant): Thank you for your presentation. Very briefly, with respect to absolute liability for environmental penalties—I missed the first part of your presentation. On the issue of due diligence, if you had one wish, is that the most important priority, to see a change in this legislation?

Mr. Dresher: Personally, no. The fact is that for a small or medium-sized company that has environmental insurance in place, those EPs—the environmental penalties—are part of the coverage. When they look at a risk to offer insurance, they want to make sure that the environmental management systems are in place. If a true accident happens, that's what insurance is for. The basic premise is, if you get hit by lightning or destroyed by a tornado, it's not your fault—that's why you have insurance—and it would be the same thing with this. It's just another cost to the claim.

Mr. Gilles Bisson (Timmins–James Bay): I've got a theoretical question. If this legislation, in its current form, were to pass, at the end of the day would that mean for insurance companies that they would be paying out fewer claims, because supposedly the polluters would be less likely to pollute because of the liability?

Mr. Dresher: It's possible.

Mr. Bisson: That's all I wanted to know.

Mr. John Wilkinson (Perth–Middlesex): Richard, thanks for coming out. Actually, my background is in insurance, so I enjoyed your presentation this morning, but I'm on the other side of the business. I'm a certified financial planner.

Just getting back to the question of risk management, one of the things that struck me about this bill—you were talking about the un-level playing field between those companies that are just wonderful environmental stewards and those that are not, and there's a difference. Obviously, the insurance industry knows that as well, and the EPs will bring this into focus. My question has to do with—we have kind of a patchwork. In the MISA sector, about half of the companies have spill contingency plans—in other words, if a spill happens, we know what to do and have a plan to react—but half don't. Very few companies have spill prevention plans which say, "What do we need to do to make sure we don't have a spill?" This bill proposes to mandate spill prevention.

In your professional opinion, if all of those companies had to have spill contingency and spill prevention, your contention would be that their insurance costs would go down, because they were mitigating their risk. Is that correct?

Mr. Dresher: Absolutely. Insurance companies look at the chance of a risk. People with a high risk of having a spill pay higher premiums. People with a low risk have lower premiums. A factory that has a sprinkler system in place pays less in insurance premiums than one that is made of wood and is—

Mr. Wilkinson: If it costs money to have the sprinkler system, they're just offsetting that with the fact that their costs for insurance would go down. In other words, the company, from a corporate level, has to look at that.

Mr. Dresher: Correct. The other thing is that studies for large claims in the insurance sector have suggested that probably only 50% of a large claim, the true economic cost to a company, is actually covered by insurance. So companies who have large claims, whether they be spills or whatnot, suffer other economic loss that you just can't have insurance for. One of them, in a spill situation, is loss of reputation; you can't buy insurance for that. In other insurance situations, if your factory is destroyed and you can't operate, you have lost opportunity costs, because you can't bid on a contract without a factory. You may have customers that go to seek alternate suppliers while you're down and find they like them better and never come back.

Studies—primarily in the United States, but they're just as valid here—suggest that if you have a large claim, only about 50% of that cost is going to be covered by insurance. So the fact is that putting in prevention systems isn't going to be completely offset by the insurance cost, but you're always better off not to have a claim than to have good insurance in place.

The Chair: Thank you very much for coming in this morning.

ENVIRONMENTAL DEFENCE CANADA

The Chair: Environmental Defence, Sarah Winterton.

Good morning. You have 15 minutes before the committee this morning. Please begin by stating your names for the purposes of Hansard. If you leave any time remaining in your deputation, the time will be divided among the parties for questions. The floor is yours. Please begin.

Ms. Sarah Winterton: Sarah Winterton, program director, Environmental Defence.

Mr. David Donnelly: David Donnelly, legal counsel to Environmental Defence. I'm with the firm of Gilbert's LLP.

Ms. Winterton: Good morning. Thank you very much for the opportunity to make this presentation on Bill 133.

First, I wanted to give you a little bit of background on Environmental Defence. We're a national charitable organization founded in 1984. We work for stronger legislation that will protect the environment and human health, to educate and engage people in solving environment problems, and with citizens' groups involved in legal action or tribunals.

0920

In considering the need for Bill 133, Environmental Defence strongly supports Bill 133 in principle, but with amendments to ensure that it will do the job of decreasing the amount of toxic contaminants released into our waterways, air and land effectively. Bill 133 is needed to address the crisis of increasing amounts of toxic contaminants entering the environment from industrial spills. MISA facilities accounted for 84% of reported liquid spills by volume in 2003 and 97.9% in 2004.

A few more details on that time period: From 2003 to 2004, reported spills by MISA facilities included an increase in frequency by almost 13%, an increase in average volume for liquid spills from approximately 15,000 to 55,000 litres, and an increase in average weight for solid spills from about 200 kilograms to over 1,000 kilograms. The spills ranged in volume from less than one litre to over 18 million litres, equivalent to 900 tanker trucks. That would have been a lot of beer spilled last week on the 401. The available Ministry of the Environment data indicates a six-fold increase in the number of water treatment plant intake closures across the province due to spills from MISA facilities during this time period.

The people of Ontario and their communities, as well as Ontario's fish and wildlife, which depend on natural habitat for survival, have needed a strong and effective enforcement bill for some time. While the focus has been on the dramatic increase in reported volume of spills over those two years, Environmental Defence submits that the reported spills by MISA facilities in 2003 were already indicative of the need for Bill 133.

The Ministry of the Environment's report, Industrial Spills in Ontario, May 2005, details some incidents in 2004 that are worthy of a closer look. On February 1, 2004, the Imperial Oil refinery in Sarnia spilled 157,000 litres of methyl ethyl ketone and methyl isobutyl ketone into the St. Clair River. You're all aware of this accident, which shut down water treatment plant intakes for Wallaceburg and Walpole Island First Nation for three and four days respectively. Extensive monitoring was required for one month, at which time the plume had dissipated. Methyl ethyl ketone and methyl isobutyl ketone are harmful to human health. Methyl isobutyl ketone is a suspected developmental toxicant, gastrointestinal or liver toxicant, kidney toxicant, neurotoxicant, respiratory toxicant and skin or sense organ toxicant. In addition to all of the above, methyl ethyl ketone is a suspected cardiovascular or blood toxicant.

In another case cited in the MOE's report, on October 24, 2004, Goldcorp Inc. spilled mine effluent containing arsenic directly into Red Lake. Consequently, 300 residents in the municipality of Red Lake were forced to use an alternative supply of water for two days. Arsenic is harmful to human health and the environment. It is a suspected carcinogen, cardiovascular or blood toxicant, developmental toxicant, gastrointestinal or liver toxicant and neurotoxicant. In fact, it is ranked as one of the most hazardous compounds—within the worst 10%—to ecosystems and human health.

The list of spilled contaminants as reported by ndustrial facilities to the MOE is extensive and includes acid solution, benzene, black liquor, chrome-plating solution, hydraulic oil, hydrocarbons, hydrochloric acid, ethylene glycol, oil, mill effluent with arsenic, process water—which contained styrene, ethylbenzene, benzene and toluene—pulp mill effluent, sulphuric acid, tar, transformer oil, vinyl chloride etc.

Just looking at one of these compounds, benzene is very harmful to human health and the environment. It is a known carcinogen and developmental and reproductive toxicant, a suspected cardiovascular or blood toxicant, an endocrine toxicant, gastrointestinal or liver toxicant, immunotoxicant, neurotoxicant, respiratory toxicant and skin or sense organ toxicant. Again, it is ranked as one of the most hazardous compounds—within the worst 10%—to ecosystems and human health.

In short, these spills mean contamination of the environment by harmful chemicals. Bill 133 must be effective to decrease the volume of these toxic substances entering our air, water and land.

Environmental Defence is not confident that this change will occur without strong legislation. In fact, our lack of confidence in industry to put the protection of the environment and human health as one of its first operating priorities is well founded. The recently released report by the MOE's SWAT team titled Environmental Compliance in the Petrochemical Industry in the Sarnia Area revealed that almost 100% of facilities inspected, 34 out of 35, were found to be in non-compliance with one or more legislative and regulatory requirements; 23% of the facilities inspected either had no spill prevention plan or spill contingency plan or just had one of the two; and more than 260 instances of non-compliance with environmental legislative and regulatory requirements were identified.

We see a number of benefits to environmental penalties, and Bill 133 begins to address some of the problems I've just outlined.

We strongly support the move to lower the threshold for prosecutions in the Environmental Protection Act so that it is sufficient that an action "may" cause harm instead of "is likely to" cause harm to either the environment or public health.

Bill 133 will provide a simpler approach to collect and recover money from environmental damages, encourage companies to develop new innovative approaches to protect our environment, help companies to protect the environment, and target companies that damage the environment.

The benefits of environmental penalties are numerous.

Cost savings: Compared to engaging the criminal prosecution process, levying EPs is inexpensive.

Time savings: Compared to engaging the criminal prosecution process, levying EPs is fast.

Deterrence: It ensures that minor breaches are not ignored, since there is no need to engage in an expensive and time-consuming criminal process. Proof is on a balance of probabilities, not the higher criminal standard of proof beyond a reasonable doubt. It eliminates any economic benefit that may be created by non-compliance.

Implementation: It's a simple process, with no court intervention necessary to levy penalty, and increases the likelihood that non-compliant persons will pay for their environmental damage, thereby lowering the chances that such persons will gain any economic benefit from non-compliance.

Lack of stigma: EPs are not designed to be penal, and thus avoid the expensive and time-consuming penal process. They supplement the criminal process. The same legislation can address both EPs and criminal prosecutions. Issuing an order requiring payment of an administrative penalty does not prevent the crown from prosecuting the same offence.

Finally, it's fair: Procedural fairness is protected; orders may be reviewed and/or appealed.

Bill 133 is not unique. Many jurisdictions use administrative penalties as a mechanism to deter non-compliance with environmental legislation. Administrative penalties have been used in Canada for quite some time and have been incorporated into environmental and non-environmental pieces of legislation. Administrative penalties are common in American environmental legislation as well. I've appended a short report for your consideration.

Our recommendations to strengthen Bill 133 include expanding section 18, which allows MOE officials to require facilities to develop and implement plans to prevent and reduce pollution; requiring the MOE to provide annual reports on the operation of Bill 133; making public all settlement agreements; and providing assurances that Bill 133 will be expanded to phase in other sectors, such as smaller facilities and the transportation sector, over time.

In conclusion, thank you once again for the opportunity to address the standing committee. We urge you to move quickly to pass the legislation and improve environmental protection in Ontario.

The Chair: Thank you very much. We should have time for a question from each caucus, beginning with Mr. Bisson.

Mr. Bisson: Thank you for your presentation. I appreciate the work that you do. We all understand the importance of having strong regulation and fines. In the event that a polluter pollutes the environment, we need some sort of mechanism to deal with the case after the fact.

But I'd be interested to hear what you have to say about what we can do to try to prevent spills in the first place, what kind of prevention initiatives or legislation you think we'll be able to put forward to try to deal with this issue before it ever becomes a spill. It seems to me it's always the penalty, the penalty, the penalty. We're not doing enough, in my view, to deal with what we need to do ahead of time.

Ms. Winterton: I agree with you. Pollution prevention is the primary step that companies need to take, so we are urging that pollution prevention plans be made mandatory for all companies. That's what they need to do.

Mr. Bisson: Should that be part of this bill?

Ms. Winterton: We believe so, yes.

The Chair: Mr. Wilkinson.

Mr. Wilkinson: I'm sure you'll be delighted to know that the minister was here on Friday and mentioned the fact that she's quite interested in making spill prevention plans mandatory for the MISA sector in this province. I'm sure you'd agree.

I just want to talk about your suggestion. You're the second group to come to us about making settlement agreements transparent in this province. Under the arrangement that we have with environmental penalties, companies are able to deal with the ministry on a proactive basis as they look to the things that they have been doing to try to mitigate the spill, rapid response and the type of behaviour that we need in the unfortunate event that a spill happens.

0930

One of the criticisms has been—you're the second people to mention this—that the settlement agreements that could be entered into between the company and the ministry are not transparent. There's a suggestion that we actually post these on the EBR, the Environmental Bill of Rights. Would you be in agreement that that would be the best and most transparent way to get these things out to the general public? If someone is in a community that's been affected, the ministry has come in and put in an environmental penalty and there has been this to and fro between the ministry and company—is that the best way to get this to be transparent?

Mr. Donnelly: We absolutely support as much transparency in the process as possible. The right to pollute is in fact a privilege. One of the mistakes we've made, I think, in Canada, is to assume that you can put anything you want into the environment and not be responsible for its release. In our communities now, when there are offenders who are dangerous to the community, we let the community know. We post notices; we let parents know that there's a risk to their children. I don't see why contamination of drinking water should be viewed any differently. We should take every step possible to make sure that people know what's going into the community.

I was in the room in Walkerton when Premier Harris apologized to the people of Walkerton. One of the promises he made to the citizens of Ontario was that we would stop polluting drinking water in Ontario for all

time, once and for all. This bill goes some way toward fulfilling that promise, but not the full way. One of the things we need to do, as your suggestion so rightly puts it, is to make people aware of the releases into the environment and how we can clean them up.

People should have a right to be at the table. It's all our drinking water. The right to pollute is a privilege. You don't give people the right to drive a car at 200 miles an hour; we shouldn't give people the right to pollute drinking water.

Mr. Norm Miller (Parry Sound-Muskoka): I missed Thursday's hearings because I was up in my riding attending the Federation of Northern Ontario Municipalities conference. One of the presentations there was pretty interesting. It was an hour-long presentation from a company that's in the environmental business of relining old sewer pipes in industry. They had a very impassioned presentation on protecting water. So I was saying, "I'm going to be at committee hearings on Monday. Can you give me some advice? Do penalties work? What's the best way to work toward achieving the goal of less pollution?"

Randy Cooper from Evanco Environmental felt that being proactive and getting industry to have plans in advance of pollution is the best way. He hadn't seen this bill in detail, but I understand the main part of this bill is bringing in EPs, environmental penalties. Have they been found to work in other jurisdictions, and can you outline some of the other jurisdictions where they've been successful?

Mr. Donnelly: Administrative penalties are a common enforcement technique across North America. There's nothing unique or unusual about them. They are not the answer. They are not going to solve the problem of discharge into the environment. It makes it a little easier to enforce the existing laws that we have.

Take a place like Texas. If Erin Brockovich had been born in Ontario, she'd be Erin Who? I've read the submissions from industry, and they say that this bill violates the principles of natural justice. Well, why don't we have jury trials in Ontario when there's a release into the community, so that a jury of the peers of the corporation that has polluted the drinking water—it actually has to face the people whose lives they've affected and potentially harmed? If you want to talk about natural justice in the province of Ontario, why is it that under the Cemeteries Act, we still allow people to unearth aboriginal gravesites and ship them around the province? Natural justice? We've got a long way to go in this province before we address some of the fundamental fairness issues about how we treat the environment.

I'm sympathetic to industry; they want a level playing field, transparency and enforcement. If they wanted real enforcement, they would advocate and recommend, as we do, that we reform the tort process in this province so that people have access to real justice. Administrative penalties? You don't like this bill? You want to see natural justice in the province of Ontario? Great. Open up our courts so that we have real justice the way they have in places like Texas.

The Chair: Thank you for your deputation this morning. That concludes your time.

CANADIAN INSTITUTE FOR ENVIRONMENTAL LAW AND POLICY

The Chair: The Canadian Institute for Environmental Law and Policy.

Please be seated and make yourself comfortable. You have 15 minutes for your deputation this morning. Please begin by stating your name for Hansard, and then the floor is yours.

Ms. Anne Mitchell: Good morning, Mr. Chair, ladies and gentlemen. My name is Anne Mitchell. I am executive director of the Canadian Institute for Environmental Law and Policy, also known as CIELAP. CIELAP was founded in 1970, with the mission to provide leadership in the research and development of environmental law and policy that promotes the public interest and sustainability. Our vision is a world where the right to a safe and healthy environment is included as a basic human right.

Thank you for giving me the opportunity to speak with you this morning on Bill 133, the Environmental Enforcement Statute Law Amendment Act, otherwise known as the spills bill. We are impressed, and we applaud the inclusion of a polluter-pays-related provision, with a funding mechanism to clean up spills.

You will have received from the clerk a publication and some maps which I hope will assist you in considering this bill.

While we have not done a line-by-line analysis of Bill 133, we have monitored the bill's process closely. We have spoken positively about the intent of the bill. We have appeared in newspaper articles asking why it has not moved further faster and citing the abysmal record of some Sarnia-area companies, as revealed in the recent SWAT report, as evidence of the need for the bill. We have also reflected on the activities of Mr. Kinsella and the Coalition for a Sustainable Environment.

Our position on spills is one that I hope everyone in this room, and all the presenters, including those from industry, agrees with, and that is that spills are bad and should be avoided. While this statement may seem trite and perhaps simplistic, that is in fact why we are in this room today. While some may argue that the increased number of spills is a product of better record-keeping and more enforcement, the current trend line of increasing numbers of spills with larger volumes of pollutants released is not the one we want to follow.

You have heard it before: Spills by MISA facilities increased in frequency between 2003 and 2004 by over 12%, with the average volumes of liquid spills increasing nearly fourfold.

Obviously, we need to stop spills, be it into the air, land or water. Clearly, spills have the potential to harm human health and impact the environment. There is a

need to clean up previous spills, better understand the cumulative impacts of even small spills and reduce the number of spills.

Our goal should be that the Great Lakes and rivers in Ontario are swimmable, fishable and drinkable for our grandchildren.

So what is the appropriate response from the Ontario government, particularly the Ministry of the Environment? Ontarians expect their government to ensure that the air, land and water are safe. It is the government's responsibility to ensure that the air, land and water are safe. Therefore, the government has to act.

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The Ministry of the Environment is proposing to amend the Environmental Protection Act and the Ontario Water Resources Act to strengthen the administrative penalty provisions in these two acts. The specific proposal is a new environmental penalties framework.

I am appalled by how the industrial special interests in this province have lobbied against this bill. There is no doubt there were many chuckles in Bay Street law offices and boardrooms when Mr. Kinsella circulated the Coalition for a Sustainable Environment letterhead. While it is stereotypical to say that many in the environmental community have no sense of humour, I will admit to finding nothing humorous about the lobby against this bill. I find it disturbing and distressing. It is shocking that some Ontario industrial leaders have opened their chequebooks to lobby against this bill.

During the past few weeks, I've had conversations with three different industrial leaders. Each has claimed that he supports the intent of the bill. In one meeting, it was pointed out by several there that when industry is challenged, it resorts to its old tricks: Put up money to lobby against what industry does not like. A more courageous act of leadership would be to stand up and say, "OK, fellas"—because it is mostly fellas—"you and I know that for the sake of our grandchildren we need to stop spills and clean up our act. How can we work with others who are also concerned about the future of their grandchildren to get a bill that will work, that will result in reductions to the number of spills to our air, land and water?" This is not happening. Instead, industry lobbied, and is lobbying hard, to subvert this bill.

Obviously, environmental groups have to respond, and you're back to your classic "us" and "them," rather than people coming together to find a solution to an issue: how to stop spills. Have we not learned anything over the years? What happened to "Choose change"? We need to work together to clean up our environment. We need to establish better working relationships, regulatory agencies, industries being regulated, and communities. How can we make sure that the proposals are going to bring bad actors into compliance?

As well, environmental groups want the bill strengthened. Facilities should have pollution prevention plans and should report on how they are doing. And where is consideration of extending the coverage to non-MISA facilities?

The public has a right to know what is happening to the air they breathe, the water they drink and the land where they live, play and grow their food. But, above all, the Ministry of the Environment needs to have the financial resources so it can enforce its current legislation. We are pleased to see an increase for the Ministry of the Environment in the recent budget.

I think the main message I want to leave with you today is that the Ministry of the Environment has been starved of resources. Environmental legislation has not been enforced and spills have increased. The polluter must pay. The citizens of Ontario want the minister to take action to stop spills. Our health, the environment and our grandchildren's future depend on action by this government.

Mr. Chair, I wish you and your members every success in your deliberations. Thank you.

The Chair: Thank you. We should have time for one brief question from each caucus, beginning with Mr. Wilkinson.

Mr. Wilkinson: Good morning, Anne. Thank you so much for coming. You have a great deal of experience in regard to the process of legislation in this province over the last few decades, and we appreciate your coming here today and supporting the bill.

My question specifically has to do with a proposal we've heard about the need to make the environmental penalty process transparent for all people. Of course, we believe that if you spill, it shouldn't be the taxpayer picking up the tab; it should be the person who spills. We have a process that allows companies, particularly the ones that are great environmental stewards, to have a process where they deal with the ministry in regard to settlement, so that we're acknowledging good behaviour. That is something we're trying to do with this bill: encourage good behaviour. A lot of industry groups have come to me and said, "We've got great environmental track records." They want us to help level the playing field, because they're not so happy with their neighbours in the industry who have gone to the lowest standard. Are you in support of making sure that that process is transparent so that the public can see that?

Ms. Mitchell: I think any effort to make information available to the community and to make the process transparent is beneficial, is good. I would assume that the good actors want the communities to know their good actions and the bad actors don't want the community to know their bad actions. So I think it would help.

Mr. Barrett: Thank you to the Canadian Institute for Environmental Law and Policy for the presentation. You make two requests. One is that facilities should have pollution prevention plans. This bill, this legislation, does not mandate that. Have you lobbied as well? Have you put forward a suggested amendment?

Ms. Mitchell: No, not specifically to the Ontario government. Our work in that area has been directed more to the federal government. One of the documents I gave you is The Citizen's Guide to Pollution Prevention. In that, we talk about the need for pollution prevention

plans. We've suggested that the federal government make these mandatory, but it would be good if they would be considered as part of this bill as well.

Mr. Barrett: The second recommendation was consideration to extend coverage to non-MISA facilities. I understand this law already covers all industries. It would require an amendment to delete those smaller industries. Is that your understanding?

Ms. Mitchell: I don't expect it to happen in this round, but eventually you might want to use this bill to cover other facilities that are—

Mr. Barrett: I think it already does.

Ms. Mitchell: OK.

The Chair: Mr. Bisson.

Mr. Bisson: I appreciate your presentation. You would know that in the past, some budgets ago, the Ministry of the Environment lost about half of its budget.

Ms. Mitchell: Yes.

Mr. Bisson: You made a comment just now that you're glad and supportive of the increases that we got in this year's budget. I just ask you this question: The ministry is barely able to hang on and do what's got to be done now. I know, talking to the people in the water division, that when it comes to spills, they are not able to investigate even what's going on now. How is this bill going to work if we don't have the enforcement, considering there hasn't really been an increase in this budget? It's basically flatlined.

Ms. Mitchell: I think we tried to say that. I know that my organization, during the previous government, monitored on an annual basis the way the Ministry of the Environment was being gutted, of personnel and of budget. At one point when we released our annual report, the then Minister of the Environment told us that we were a bunch of poets and lawyers, telling half truths.

Of course the ministry needs to have the resources to enforce the legislation, and I think your comment is well taken. The resources have to be found for the ministry to enforce this bill.

The Chair: Thank you very much for coming in this morning.

ONTARIO MINING ASSOCIATION
PLACER DOME CANADA

The Chair: The Ontario Mining Association and Placer Dome Canada, please.

Mr. Bisson: Welcome back, Chris.

Mr. Chris Hodgson: Good morning. How are you doing, Chair?

The Chair: Very well. I'm sure you're familiar with the drill here, but, very briefly, you have 15 minutes before us this morning. Please begin by stating your name for the purposes of Hansard. The floor is yours; kindly continue.

Mr. Hodgson: Thank you very much, Chair and members of the committee. My name is Chris Hodgson and I'm the president of the OMA. With me today is Ross Gallinger, vice-president of sustainability with Placer Dome Canada.

Thank you for giving the Ontario Mining Association time on the agenda today. While many of the submissions to the EBR and the committee are from our industry, we wanted to take the opportunity to speak to you first-hand.

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Since 1920, the OMA has represented Ontario mining companies. Our more than 50 members are engaged in exploration, mining, smelting, refining and providing services to the industry. We have a long history of working in concert with government to ensure our province is the envy of the world. Our members believe in and indeed practise measures to protect the environment. Their families live in the very communities these mines operate in and, obviously, they place the highest concern on the safety of those communities.

We have some major concerns with Bill 133 and its consequences for mining operations in Ontario. I'd like to begin with a bit of an overview of the mining industry and some general concerns with the bill and then Ross will go into more detail, hopefully leaving us enough time for questions.

Mining today is a modern, safe, environmentally responsible high-tech industry. Mining takes place in all parts of the province and all of the province benefits from the social and economic contributions of the mining industry. The mineral industry cluster in Ontario is estimated to employ more than 197,000 people, with an annual payroll of $9.5 billion. The safety performance of the industry in Ontario is among the best in the world. Along with improvements to safety, our operations have a new environmental focus: We are voluntarily cleaning up decades-old abandoned mine sites. Our member companies have no legal liability for these messes created by other companies before closure plans were a requirement; however, it is the right thing to do and, therefore, we are doing it.

The two MISA sectors for mining—metal mining and industrial minerals—are over 99% in compliance with meeting the discharge limits set by the ministry. Even within that allowable discharge, our members, on average, run at only about a quarter of the limits.

Mining produces the raw materials that help society keep its standard of living, including those products that help protect the environment. The modern world could not exist without mining, and we certainly could not make Ontario businesses and homes environmentally friendly without the employment of the products of mining.

For example, without the palladium from northwest Ontario, we could not make catalytic converters for our cars—a major help to air quality. The calcite mined in southeastern Ontario, when used as a filler, reduces the quantity of petrochemical feed needed to make plastics and paints, and the number of trees needed to make paper. It also reduces the amount of energy needed to

make all of these products. Everything from solar cars to energy-efficient homes rely on minerals we produce.

Given that, we know that mining is only going to grow in the world. The question is whether this growth will occur in Ontario or not.

Toronto is the mine-financing capital of the world. But ore bodies don't come with guarantees, and keeping that money in our province depends on a number of factors. Investments are large and yet prices are globally set. Returns take time, if they come at all.

We are blessed with natural mineral deposits, but so are a lot of other places which have lower energy, transportation and labour costs. If Bill 133 is passed, it will have a direct impact on the ability of Ontario companies to compete, because it takes away the one advantage we have: clear laws with predictable costs. The Mining Act and closure plans are clear and consistently applied. Certificates of approval and MISA rules are clear, and we have practices to meet them.

Our concern with Bill 133 is that primarily it changes the certainty of operating compliance costs. This is not about the penalties or the principle of you spill, you pay. That is motherhood and apple pie—everyone agrees with that. It is the concern that you are going to pay whenever the government asks you to pay, regardless of the negative impact on the environment or the best practices we invest in.

This bill is characterized as a spills bill. It is, in effect, much broader than a spills bill and affects the everyday allowable discharges mining companies comply with.

We regret that this bill was introduced with no consultation and that it has become so divisive. We could have worked out common ground with environmental groups and others for a better bill for the environmental protection of Ontarians. However, we do thank the minister for listening to our concerns and we thank her for having first reading hearings.

We look forward to seeing the actual wording of the amendments the minister mentioned on Thursday. In general, we appreciate that some of the concerns are being addressed with the proposed amendments that (1) only a ministry director can impose an environmental penalty, not a provincial officer, (2) the environmental penalties shall only be imposed against the company, and therefore an individual employee is not disincented from reporting even the smallest spill, and (3) the environmental penalties are not an admission of guilt, and whether a company tried to prevent, minimize or clean up a spill will be taken into account, and a court shall consider the environmental penalties in determining the amount of the fine.

What are still outstanding are four general areas of concern. The first major concern, which causes uncertainty of the rules, is a change to the Environmental Protection Act, section 14(1). At the moment, the EPA has regulations, permits and approvals in place that allow for discharges of contaminants up to a prescribed limit as long as there is no adverse effect.

Under section 3 of Bill 133, uncertainty comes into the process by making every discharge of a contaminant a contravention. Specifically, this is done by striking out "that causes or may cause an adverse effect." Today's laws give an environmental protection guarantee against adverse effect beyond any regulation, permit or approval. Removing the adverse effect condition could make all regulated and permitted limits void.

Essentially zero discharge becomes the new limit for everything. This cannot be enforced as written. The result is that Ontarians will be left with uncertainty as to when they may be subject to enforcement action. This change to the EPA, we assume, will be in force for all Ontario citizens and businesses, not just MISA-reporting companies.

The second major concern is that the bill encompasses changes to the Ontario Water Resources Act. It should be noted that this too affects all Ontarians, not just MISA companies, which the government has stated is their target for reform.

Currently, our members cannot discharge material that may impair water quality. Section 28 of the OWRA states that even if water quality is not or may not become impaired otherwise, it is deemed to have been impaired if the material discharged may cause injury to any person, animal, bird or other living thing.

Under section 2 in Bill 133, the definition "deemed impaired" is much more stringent than the existing wording. The proposed definition will include the test for any organism, whether or not that organism lives in that habitat. In essence, it appears the government is trying to say that even the discharge of non-inherently toxic substances will be prohibited.

This is impractical, and I would argue that the general public would understand this is impossible and unnecessary to implement in the real world. This should be debated in a separate bill as it does not apply to the slogan, "You spill, you pay." It should be debated about the science and the practicality of this measure.

Is the law clear to golf course owners, small business people, ordinary residents of Ontario and MISA reporting companies? What are the practical, consistent enforcement standards for discharges that end up in our surface and groundwater? This applies to all Ontarians and leads to the basis of enforcement of the Ontario Water Resources Act, and therefore requires consultation with the public at large, we believe.

I'd like to now turn it over to Ross.

Mr. Ross Gallinger: Our third major concern is the proposed change of the wording "cause or are likely to cause an adverse effect," to "may cause an adverse effect." The wording affects the notification provisions, the spills notification, mitigation and compensation provisions, and the order-making provisions in the acts.

While it is reasonable to prohibit and require notification and remediation of discharges of contaminants that "cause or are likely to cause an adverse effect on the environment," it is not clear that discharges that "may

cause an adverse effect" should be regulated the same way.

Essentially, we're talking about uncertainty again, and this aspect moves "adverse effect" to a more qualitative aspect than a scientific-based quantitative effect.

Our fourth concern has to do with the new fine structure and penalty sections. The fine structure needs to be clarified that it does not go up on self-reported exceedances. Currently, under C of A's there is a requirement to self-report aspects in terms of non-compliances.

Bill 133 changes the existing three-tiered fine structure to a prescriptive two-tiered fine structure. The offence in the top tier includes "discharge of a contaminant" and "exceeding discharge limits set in regulations, certificates of approval, permits or orders" whether or not there was a risk of an adverse effect or it resulted in an adverse effect. For our operations, at times we're reporting non-compliance aspects that may be analytical errors, as an example, and whether these apply in terms of the fines.

The other aspect is the additive fine structure that's contained in these changes. The uncertainty of what the government may do around the fines, not just the penalties, creates uncertainty of costs for our mining operations. Do the present C of A's apply or not and will they apply in the future? These are concerns all around uncertainty in terms of where this legislation will apply to our operations in the future, and that's why we're talking about our concerns.

Mr. Hodgson: In regard to environmental penalties, which the minister has stated will only apply to MISA members, you have heard from coalition members and others about their concerns around due process and rights of appeal etc.

We have some additional questions. Companies right now are required to clean up spills and mitigate and pay for damages, and that'll be the same under the new bill. Is this penalty on top of those costs, and will the community fund being set up from these penalties be used only in the community of the spill? Who has access to these funds? Is there going to be a mechanism for paying grants to NGOs? What transparency of the books will be required from groups or individuals who receive monies from this fund?

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In summary, Mr. Chair and members of the committee, there are four areas we would like to see changed or clarified: the uncertainty around the EPA, to have consistent application of the law; removing section 28 of the OWRE, which should be a separate bill; the uncertainty created by changing "likely" to "may" throughout the bill; and the environmental fines and penalties and questions around the community fund.

Hopefully we can make this a better bill, more focused on preventing and cleaning up spills, with the polluter paying the costs. We'd like to again thank you for your time and hearing our concerns.

The Chair: Thank you. We should have time for one brief question, about a minute from each caucus.

Mr. Miller: Thank you for your presentation today. Mr. Gallinger, you were at the same conference I attended, FONOM, just a few days ago. At that same conference, as I was mentioning, my first opportunity to ask a question was to a presenter from an environmental company that's in the business of lining industrial sewer pipes. It's an Ontario-based company which has done most of its work down in the States. They've spent about 10 years down in Richmond, Virginia, working on lining sewers. Having sat through that presentation, I mentioned that I'd be here on Monday and I wanted that person's comment about this bill and whether penalties are the right way to go.

You're saying you're 99.6% in compliance, and that when you've not been in compliance in terms of spills, you've been self-reporting right now. I guess my question is, are environmental penalties going to help, or are they going to make industry not report exceedances because they know they're going to be paying a fine if this new law comes into effect?

The Chair: It was a long question, but it needs a brief answer.

Mr. Gallinger: OK. I can tell you from my perspective that we will continue to report non-compliances. There will be those issues, because there are things that are out of our control. There are also aspects in terms of what is non-compliance. Let me give you a typical example: If the speed limit is 90 kilometres, and you go 91 kilometres, we'd have to report that, if it were an environmental aspect. Whether that has a significant effect on safety, in terms of speeding etc., is questionable. We will continue to report those things from our company's perspective, but you have to question whether others may try to find some way of not reporting those incidents.

Mr. Bisson: Other than Mr. Peterson and myself, most people wouldn't understand the difficulty there is in trying to bring a mining project to actually becoming a mine. The reality is, how much money do you have to spend in exploration to ever get a project as a mine? I guess my question is that, in trying to raise the dollars necessary to do the type of exploration that's needed in order to possibly find a mine, how will this bill impact on the ability to raise dollars for explorations?

Mr. Gallinger: The issue will revolve around aspects of uncertainty in terms of the legislation and the ability to comply. When it becomes much more difficult to have certainty around what the rules are and how to conform to those rules, it will fall into a decision as to where you want to place your money and your investment going forward.

Mr. Wilkinson: I was just looking at a review: the concern about having an environmental penalty if you're actually within your certificate of approval. I can assure you that we've clarified that to make sure that there would never be an environmental penalty applied to a discharge that was within a company's certificate of

approval. You're right; that would be counterintuitive and counterproductive. We'll try to make sure we have whatever clarity we need for the industry.

Just taking a look at some information I have on metal mining, it seems that almost all of your industry in mining, voluntarily—not ordered by the minister but voluntarily—has both spill prevention and spill contingency. We want to congratulate the industry. I'm sure that when the minister said last week that we'd be mandating spill prevention, that would be something the vast majority of your companies are already doing. But I note that despite that, there are many instances in 2003-04 where spills in exceedance of the lawful certificate of approval have happened.

The Chair: I need you to come to a question.

Mr. Wilkinson: So I guess my question is, won't environmental penalties, in your opinion, help you within your own industry raise that standard? Because you have some companies that are doing it, and some that are not, and that's not fair. So your comment on that, Chris?

Mr. Hodgson: That's a good comment. A lot of our companies have implemented ISO 14001 standards and others, which cost a lot of money to bring in. We want to incent everyone to report even the most minor spills so that we can get a handle on it and correct the processes. Environmental penalties only apply, according to the minister's amendments, to MISA-reporting companies. Some of the examples at Ross's company, Placer Dome, wouldn't have been covered under that amendment. They're non-operating mines. The one spill that's mentioned in the ministry report, the one that you highlight from Red Lake, wouldn't be covered under this bill.

In terms of the environmental penalties, we don't have a problem with polluter-pay. You have to clean up the spill, you have to mitigate the damage and you have to do it quickly. That's motherhood; we're in favour of that.

The Chair: Thank you very much for having come in this morning.

FRIENDS OF THE EARTH CANADA

The Chair: Friends of the Earth Canada, please.

Good morning and welcome. You have 15 minutes to address the committee. If you leave any time remaining, it will be divided among the parties for questions. Please begin by identifying yourself for Hansard, and the floor is yours.

Ms. Beatrice Olivastri: My name is Beatrice Olivastri of Friends of the Earth. Thank you, Mr. Chair and committee, for this opportunity to address you on what might be the most important piece of legislation to appear before committee in a long time. It may not be as time-sensitive as a budget, it might not get the same headlines as a new deal for cities, but I'd like to argue that it is equally or even more important over the long run for citizens of Ontario.

Again, my name is Beatrice Olivastri and I serve as the Chief Executive Officer of Friends of the Earth Canada, sometimes called FOE. Friends of the Earth has grown from a small group of volunteers in 1978 to one of the country's most important voices speaking out on environmental issues. As the Canadian member of Friends of the Earth International—that's the world's largest grassroots environmental organization—we campaign in over 70 countries for a safe and healthy planet for people and other living beings.

We believe that a healthy environment is the basis for our economic and social well-being. Friends of the Earth endorses the precautionary principle and, significantly, in the context of our discussion today, the polluter-pays principle. As well, Friends of the Earth supports democratic processes and we are politically neutral.

Ladies and gentlemen, Bill 133 is crucial to the immediate and long-term health of virtually every citizen in Ontario. We have a spills problem in Ontario. Many of the industries appearing before you with the assistance of their slick, high-paid lobbyists will tell you that they have the problem under control. But the record in Ontario says otherwise. That's why we need Bill 133.

Bill 133's principle is straightforward and consistent with the principles we express at Friends of the Earth: you spill, you pay. While there are some aspects of the bill that we believe could be strengthened, and while we reserve judgment on the amendments proposed by Minister Dombrowsky until we have reviewed them, we support the principles of Bill 133 and urge that it be passed.

Let me outline briefly why it's clear that we have a spills problem in Ontario and why we think this bill will remedy it. First, it should be noted that spills are an increasingly common way for pollutants with unknown effects to make their way into the air we breathe and the water we drink. Many of these pollutants are linked with cancer and other serious diseases and ailments. Those of you who heard my colleague from Environmental Defence earlier this morning will have heard her comments on the cancer and disease aspects of these pollutants.

Bill 133 would cover only those industries governed by MISA as it stands now, 138 companies in nine industrial sectors. Ideally, legislation of this type would cover all industries in Ontario, but we recognize that a new way of addressing spills has to start somewhere, and the MISA industries are the logical place to start.

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In just one year—and you've heard this statistic already this morning—from 2003-04, spills by MISA facilities increased by nearly 13%. The number of closures of water intake plants across Ontario because of spills went up sixfold in that same year.

I take it that part of the argument of the slick lobbying campaign by industry is that Bill 133 is excessive. Perhaps, like me, you would think that number we heard earlier, 18 million litres, is an excessive number, and in that case it was exceeding what the company was permitted to pollute.

You know, in a way—and this might be the mind shift I would invite you to make this morning—we've already

institutionalized spills. We call them "emissions to air" and "discharges to water." The same protesting companies already have permission to expose Ontario citizens to huge amounts of pollution under federal and provincial laws. The same protesting companies and their associations already expose Ontario citizens to, for example, using 2002 numbers, 1.2 million tonnes of pollution through emissions to air, water, land and underground. This is using the data just for Ontario companies in the material that Anne Mitchell gave you earlier this morning. Again, it's federal data, but relevant only to Ontario operating companies that report under that. So bear in mind that that number—1.2 million tonnes—does not cover all pollution. Not all chemicals are reported under NPRI, and only pollution that's on a large enough scale to trigger reporting. In most cases, the company would have to be in possession of about 10 tonnes of a given pollutant before they'd be reporting. So we're still talking at a macro scale with 1.2 million tonnes of pollution. This is what I call "institutionalized spills"; quite legal. It's part of our agreement of what can be done.

What we at Friends of the Earth like about Bill 133 is that it fills an important gap in Ontario's suite of measures—I think there's been some comment earlier this morning—for dealing with polluters. Could I remind you that just last year, Ontario announced its environmental leaders program, an attempt to provide aspiring companies—in one case an association—with a number of incentives to improve efficiency, long-range planning and flexibility. Our organization was one of three that worked with the ministry on the terms of reference for the leaders program. These factors—efficiency, long-range planning and flexibility—are all high on industries' wish list. We heard a little bit about that just a moment ago. In that environmental leaders program, the Canadian Chemical Producers' became the first sector-level participant, in September 2003. So one might expect aspiring leaders to see the value in addressing laggards, typically expressed by industry as providing a level playing field.

Friends of the Earth maintains that Bill 133 is an important way to level the playing field in Ontario by instituting environmental penalties, a concept in place, as you know, across the US and other provinces, but until now, not here. Environmental penalties, in our view, enable Ontarians to be swift of foot in taking action when spills occur. Rather than wait for a spill situation to churn through the courts while pollution continues, environmental penalties provide the mechanism for a community cleanup fund and quick action. Environmental penalties can be issued when a spill occurs. We think this does two things: It expedites cleanup and encourages industries that now spill far too often—those laggards I mentioned earlier—to think harder about how to avoid spills; in effect, pollution prevention.

The letter-writing campaign you've seen from industry is obviously in high gear, with dire warnings about how the sky will fall in Ontario if this spills law is strengthened. We've heard this song before; in fact, when MISA itself was brought in. As you can imagine, our position is that Bill 133 is not tough enough. The existing situation is not tough enough, but the bill, as it stands, will go some way to correct that. I say "some way" because the bill could be even more comprehensive, in our view. We'd like to see provisions that make the system more accountable and transparent, and you have heard that several times this morning. For example, when an industry spills, pays the environmental penalty and reaches a settlement, we'd like it guaranteed that the communities downstream of the spill are involved in the negotiation of the settlement. We'd like to ensure that these details are reported to the public.

Also, we'd like to see the bill extended to include spills in other media, such as air. This should include a transparent and publicly accessible reporting system, one that would look at all the existing and new performance requirements, such as under certificates of approval.

We want to point out the extreme difficulty in obtaining information on the status of significant releases and spills in Ontario. This is, of course, a North American problem. In going forward and dealing with the reporting around this bill, we'd like each facility to be required to provide a global status report. In the interest of time, I'll just mention that I think there are some interesting federal-provincial co-operative things that can be done in this respect.

Mr. Chair, ladies and gentlemen, there are details that can improve Bill 133. We think the minister and the government have gone far in listening to all sides of the debate about this bill, even to the extent of holding these hearings prior to second reading, just so everyone can provide input. We appreciate the opportunity to be heard with respect to this bill and urge that Bill 133 become the law in Ontario.

Just to provide a bit of background to the mind shift I was asking you to make about institutional spills, we've provided two charts that show you, in the province of Ontario, using the Ministry of the Environment district offices, what kind of releases you're seeing as a matter of business. This would be in 2002. So the spills that would be addressed by this bill would be over and above the tonnes of pollutants that are shown in these charts.

Thank you very much for your attention.

The Chair: Thank you. If we can squeeze a question and an answer within about a minute, we should be able to do one in each caucus, beginning with Mr. Bisson.

Mr. Bisson: I come out of mining. Just so you know, I worked underground as an electrician and as a millwright's apprentice for a number of years. We were losing people both to injury and to death, by both disease and accidents, for many, many years in mining. We took the approach of fines. We said, "Let's have a coroner's inquest every time somebody dies, and if not, let's file a compensation claim in order to fine the company for the damage done either by way of accident or by way of death by disease."

We finally came to the conclusion, as Steelworkers, that that was ineffective, that in fact what we needed to

do was prevent the accident before it happened. So we lobbied at the time of the Conservative government and got the Occupational Health and Safety Act, which puts all of the emphasis, 99% of the act, on prevention.

You look at the stats today in mining, and it's one of the safest industries to work in for the type of heavy industrial work that we do. It's one of the safest places and certainly compares light years ahead of what it was even 20, 25 years ago.

So my question is, by putting more fines, at the end of the day, do we really get what we want, or should we be putting more of our emphasis on prevention?

Ms. Olivastri: Actually, we're in agreement. What I said and what I would suggest would be the case for a lot of people is that there is a focus on leadership, there is a focus on—and I didn't mention this—compliance and assurance, which is, in the ministry's office of transformation now, a renewal around certificates of approval, pollution prevention, this kind of thing.

The Chair: Mr. Wilkinson.

Mr. Wilkinson: Thank you for coming in, Beatrice. Two things. Just a point of clarification: You had a question about air emissions and this being restricted to spills, to water. Just so you and your members are clear, actually, air emissions in exceedance of a certificate of approval will be subject to this bill. So I'm sure you'll be happy to hear that.

Ms. Olivastri: I'll be very happy to hear that.

Mr. Wilkinson: The second thing: Just with your experience, if you could be brief, you were talking about the fact, when MISA came in, of a very strong lobby against the government: "Oh, no, we can't do this. Business will stop. Everyone will leave Ontario." You actually have, I believe, some experience in that battle at that time. I was wondering if you could just kind of share that with some of us who are new to this file.

Ms. Olivastri: I think we've got a couple of generations, actually, of experience that show that companies that do step up to be leaders begin to see this as a competitive factor in their favour.

Mr. Wilkinson: Great. Thank you.

The Chair: Mr. Barrett.

Mr. Barrett: Thank you, Ms. Olivastri. Dr. Heathcote produced the IPAT report at the request of this government. You made mention of the environmental leaders' program and moving toward incentives. One of the recommendations of the IPAT report was that there be a legislative framework that incorporates both sticks and carrots—i.e. incentives like grants, low-rate loans, accelerated depreciation programs—to try to improve plants and equipment in some of these either problem or non-problem companies. There's nothing in the bill about this. Do you know of anyone that's putting forward any amendments to—

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Ms. Olivastri: I understand—because I have met with an official in the ministry in an office, as I mentioned, called the office of transformation—that they are in fact working toward this kind of program under the compliance and assurance—

Mr. Barrett: That would have to be another piece of legislation, then?

Ms. Olivastri: I don't actually know if it'll take another piece of legislation or simply a retooling of existing work, but we're very much in support of this effort. As I say, I think that's part of the core business of dealing with certificates of approval as they now stand and perhaps being more effective in updating them, supporting them and then enforcing them.

Mr. Barrett: Just a head's up: No amendments have been mentioned to date.

The Chair: Thank you very much for coming in today and for delivering your deputation.

CHATHAM-KENT PUBLIC HEALTH UNIT

The Chair: The municipality of Chatham-Kent public health unit.

Just to give you a quick summary again of the ground rules, you have 15 minutes before us today. If you leave any time remaining, it'll be divided among the parties for questions. Please begin by stating your name for Hansard.

Dr. David Colby: Thank you, Mr. Chair and members of the committee. I'm Dr. David Colby. I'm the acting medical officer of health of the municipality of Chatham-Kent. I'm here representing the board of health, the health unit and actually the people of Chatham-Kent. I'm a fellow of the Royal College of Physicians and Surgeons of Canada, I'm a coroner appointed to the province of Ontario and I'm also a member of the OMA, which, until earlier this morning, I thought referred to the Ontario Medical Association, not the Ontario Mining Association. Nevertheless, as the medical officer of health, it's my personal responsibility to take action when spills occur in my jurisdiction. I'm on call 24 hours a day, seven days a week, including right at this moment.

I'm very appreciative to be able to speak to this bill. We believe that this legislation is essential to improving the health and safety of our communities by providing a disincentive to acts of pollution.

I'd like to tell you a little bit about my municipality. Chatham-Kent is an amalgamated municipality consisting of both rural and urban centres. We're located in southwestern Ontario, with Lake Erie directly to our south and the St. Clair River and Lake St. Clair directly to our west. The town of Wallaceburg is located in the northwest corner. Wallaceburg receives its municipal water supply directly from the St. Clair River. This community has been severely impacted on numerous occasions by spills from petrochemical companies located upstream to the north in Sarnia's chemical valley. I have provided in my deposition a map for the convenience of the committee members. The industry in Sarnia's chemical valley includes many of the largest petrochemical companies in Canada. Many of these companies use volumes of water from the St. Clair River in their pro-

duction and cooling processes and are situated directly adjacent to the river.

As long as current practices continue, there will be more spills. I've heard it asserted today that the process is working with regard to that. Well, I have no evidence of that, as the one who has to deal with it. I don't think this process is working at all. There have been literally hundreds, if not thousands, of chemical spills into the St. Clair River. Quite possibly, many of these spills were never reported in the early days of industrial development in what we now call the chemical valley, but residents of the area still have clear memories of the infamous chemical blob in the St. Clair River that resulted from the cumulative load of a great number of spills, some of which probably in themselves would have been judged as individually insignificant. I in fact treated some of the blob divers when I was an emergency physician in the mid-1980s.

I have provided a list of events we have on record since 1985, comprising 19 separate spills. Every one of these required decisions about closing and reopening water intakes. With prolonged closure, the committee members should realize that we are dealing with potential loss of fire protection to the community because of a drop in water levels in the reservoirs. Some of these spills required the provision of bottled water to our citizens, at tremendous expense.

If you look at some of the chemicals that have been spilled, they make the list of the most toxic chemicals known to humankind: dioxin, furan, benzene, vinyl chloride—all of which we've heard earlier this morning have well-established reputations as being cancer-causing toxins that have the ability to be absorbed into the human body.

The impact of spills in Chatham-Kent and the community of Wallaceburg is tremendous. When there is an industrial spills crisis, it affects thousands of citizens, but especially the communities of Wallaceburg and the Walpole Island First Nation.

Thousands of people receive their drinking water from a water source that has been contaminated on many occasions over the past few years, as I've outlined. Not only does the Wallaceburg water treatment plant obtain its water from the St. Clair River, but there are a number of private users—I mentioned the Walpole Island First Nation. We need to provide safe drinking water and protection of that water to ensure that human health and community well-being is protected. That's my job.

The Chatham-Kent public health unit is very happy that the Ontario government has stated its intention to introduce watershed-based drinking water source protection legislation in spring 2005. We believe that strong legislation, through Bill 133, will complement the government's efforts in protecting the drinking water in Ontario.

This is the time for consistency in the province's approach to the provision of safe drinking water. We all know the impact that the news about a little town called Walkerton had on all of us.

Nearly one year after the Royal Polymers vinyl chloride spill into the St. Clair River, the Ontario government assembled the Industrial Pollution Action Team, the IPAT team, to put together a comprehensive report on recommendations for spills prevention based on the findings in that spill, which generated an unprecedented amount of local anger.

Two months after filing the report, the Honourable Minister of the Environment introduced Bill 133, the Environmental Enforcement Statute Law Amendment Act, which, while very positive, does not incorporate many of the monitoring and prevention recommendations that are integral to the IPAT report. I've heard a lot of criticism this morning of this bill on that basis. That's not what it's designed to do. It shouldn't be considered inadequate because of that. It's designed to provide a disincentive to allowing spills and to make companies clean up and try to prevent the possibility of encouraging large fines. Virtually all of the laws we have, aside from standards legislation, as I understand it—I'm not a lawyer; I'm a doctor—in Ontario are based on penalizing people who break the law. This is nothing unusual, I don't think.

During the period since that infamous spill, we've had numerous spills in Chatham-Kent that have created a level of anxiety and mistrust that is really getting unmanageable, especially in the community of Wallaceburg.

The Imperial Oil spill of methyl ethyl ketone and methyl isobutyl ketone on February 1, 2004, had such a major impact in Chatham-Kent and southwestern Ontario that the water treatment facilities of Stag Island, Walpole Island, Wallaceburg, Tilbury, Stoney Point, Belle River, and Tecumseh and Windsor were all affected and all had to deal with this. Significant human and technical resources were dedicated to this event alone for over one month at the Chatham-Kent public health unit, in addition to the work done by the local public utilities commission, the community administrations, the Ministry of the Environment and many others. We've got other things we have to do too. We can't just devote all our energy to that.

1030

We feel there's no choice but to enhance and bring forward proactive legislation that puts more responsibility and more disincentive on polluters. This spills problem has persisted for years, and it's time to take decisive action. Bill 133, although it does have limitations, is a very positive step in this direction. We need to do this. In Chatham-Kent, and especially in Wallaceburg, the provincial government is in danger of losing credibility. As long as spills continue, it's perceived as inaction, to them, on the part of the government. We don't need more of that.

Grassroots community groups have sprung up. The Wallaceburg Advisory Team for a Cleaner Habitat, WATCH, has formed looking for answers. They're angry, they're resourceful, they're smart and they're motivated to make improvements. Who can blame them? It's their water that gets shut off all the time. We're told

that we can't use it for a while because it's unsafe. Doubt and concern are an international issue; they span both sides of the river. Both Michigan and Ontario communities have mobilized to seek solutions, such as a real-time monitoring station in the St. Clair River that would provide warning of unannounced spills.

This situation is not going to go away any time soon. The confidence of affected communities needs to be earned, and Bill 133 is only part of that solution. We need to recognize that active enforcement must be done, whether through the ministry's environmental SWAT team or through another mechanism. Self-regulation by petrochemical companies is clearly not an option here. Some companies are very good corporate citizens; it's not my intention to paint the petrochemical industry as villains in this regard. But if you look at it from their point of view, who wouldn't argue against heavier fines that have an economic impact on their company? They'd be crazy if they didn't argue against that. But we need those fines. It's not going to affect the majority of companies that are good corporate citizens. It's only going to affect the bad actors in this whole situation. I think we've heard the term "levelling the playing field" several times. I can only support that opinion.

Change cannot happen without a comprehensive framework for action that's progressive and based on sound prevention policies. This bill does not comprehensively affect those, but it does some good and it needs our support.

The government needs to heed its own advice. The Honourable Leona Dombrowsky, in her speech on October 27, 2004, said, among other things, "We are making excellent progress in developing safeguards to protect drinking water from source to tap.... We have introduced regulations to make Ontario's hazardous waste rules the toughest in North America. We have created the environmental leaders program to reward and recognize the top environmental performers among Ontario companies.

"We know that the vast majority of companies in this province are responsible corporate citizens. It is only fair to them that we target companies that fail to live up to their environmental responsibilities. In the past, some have turned a blind eye to pollution, calling it a part of the cost of doing business in Ontario." We've heard a little bit about that this morning, but that's unacceptable. "It is not fair to our responsible businesses and it is not fair to the people of Ontario."

She said, "This government will not tolerate companies and individuals who put our environment and the health of Ontarians at risk."

We can't turn a blind eye to what's been happening. Spills are continuing. They're not the cost of doing business. We can't tolerate anything less than zero spills into drinking water in Wallaceburg, Chatham-Kent or any place in Ontario.

As a medical officer of health, my mandate extends to the health of the community of Chatham-Kent first, foremost and primarily, but the first degree I received was in biology. The fresh waters of the Great Lakes—

The Chair: Just to remind you, you have about one minute.

Dr. Colby: I will finish on time, sir. The fresh waters of the Great Lakes are a valuable resource and a national treasure, but are also home to myriad wild creatures that share our own fragile planet. They are part of our own ecosystem and they are under our domain. Our rivers and lakes are not toxic waste dumps. There must be strong disincentives to pollution, and Bill 133 is part of that solution.

Thank you very much.

The Chair: Thank you very much for having come in this morning. That concludes the time that we have available to you.

CANADIAN MANUFACTURERS AND EXPORTERS

The Chair: I'd now like to ask the Canadian Manufacturers and Exporters to come up.

Thank you for having come in this morning. You have 15 minutes for your deputation. Please begin by stating your names clearly for the purposes of Hansard, and the floor is yours.

Mr. Ian Howcroft: Good morning. Thank you very much. We're very pleased to be here. My name is Ian Howcroft, and I'm vice-president of the Ontario division of Canadian Manufacturers and Exporters. With me are Nancy Coulas, CME's director of environmental policy, and Lisa Kozma, who is chair of our Bill 133 ad hoc committee, chair of our occupational health and safety committee and a member of the Ontario division board of directors.

Canadian Manufacturers and Exporters is Canada's largest trade and industry association. Its mandate is to promote the competitiveness of Canadian manufacturers and enable the success of Canadian goods and services exporters in markets around the world. We're currently involved in a major initiative, entitled Manufacturing 2020. It's what we have to do now to ensure that we in Ontario and Canada have a vibrant manufacturing sector in the year 2020.

CME's membership is drawn from all sectors of Canada's manufacturing and exporting community and from all provinces across the country. The association represents Canada's leading global enterprises, and more than 85% of CME's members are small and medium-sized enterprises. Together, CME's membership accounts for approximately 75% of the country's total manufacturing production and is responsible for approximately 90% of the country's exports. Ontario accounts for about 51% of the total manufacturing output in Canada.

CME members are responsible corporate citizens that contribute to the well-being of the communities in which they are located and in which they operate. CME is committed to the principle that if you pollute, you should pay the costs of response and restoration of the environ-

ment. CME members respect and comply with the laws of Ontario and of Canada, and as employers, workers and residents of the communities in which they are located, strongly support good environmental stewardship

Bill 133 was introduced with very little consultation and, perhaps in part as a result, raises a number of very serious concerns.

The legislation as drafted applies to everyone, with the environmental penalty provisions applying to persons engaged in business activities described in the regulations and persons holding an environmental approval and their directors, officers, employees and agents. It has been said that the intent is to apply to MISA-regulated companies. If this is the intent, it would be more appropriate to amend the regulations currently governing MISA-regulated companies. The legislation as drafted should be clearly consistent with the intended scope and intent.

The legislation as worded ignores long-established principles of good governance and denies citizens the type of fair treatment they have a right to expect in a democracy.

The bill as currently worded may have the inadvertent consequences of (1) encouraging companies to move jobs and investment from Ontario into other jurisdictions where there is greater certainty as to the legislative requirements, and (2) undermining the effective working relationship between regulators and industry and encouraging industry to focus more on protecting themselves from legal liability than on good environmental stewardship practices.

CME members will continue to be good corporate citizens. However, the current drafting of Bill 133 is so unclear in terms of the requirements that it will be extremely difficult for any company, even with the best of intentions, to be sure it is in compliance. Without major improvements, this law will therefore be a major barrier to attracting new investment for manufacturing in Ontario and will negatively impact fragile existing investment. For these reasons, the committee must support amendments to Bill 133 to promote certainty, fairness and robust compliance with Ontario's environmental laws that address the following concerns.

1040

Director and officer provisions: The potential scope of liability for directors and officers is greatly expanded under Bill 133. Activities such as burning logs in a fireplace or operating in accordance with the terms of an approval may be out of compliance and unfair in that quasi-criminal proceedings should not be taken against an organization or individuals where there "may" be an environmental impact. Quasi-criminal proceedings are very serious proceedings for both individuals and organizations, and should not be used unless there is at least the likelihood of an adverse environmental impact. Environmental legislation that abandons the use of science and measurement and instead proposes to substitute subjective judgments creates a regulatory regime with an unreasonable level of uncertainty and unpredictability as to what is and what is not an offence.

As applied to spill and emissions reporting, the reduced threshold will significantly increase the number of reportable incidents by including incidents that may or may not have an adverse environmental impact, an unnecessary burden on industry and the government. Both industry and government resources should be clearly focused on spills that have or are likely to have an adverse environmental impact. This issue cannot be fixed in regulations and therefore must be dealt with by this committee as an amendment to Bill 133.

I'd like to now turn to Nancy Coulas to continue with environmental penalties.

Ms. Nancy Coulas: Environmental penalties give the Ministry of the Environment the authority to directly and quickly impose penalties on violators. While CME supports rapid and effective environmental enforcement, CME has several concerns with respect to the environmental penalties section of Bill 133 and believes that the committee should support amendments to the bill's environmental penalties provisions. CME's concerns include the following:

The intent with respect to the scope and implementation of environmental penalties is not clear from the legislation. CME believes that the government should use regulation only in instances that have been clearly envisaged by the Legislature and that these regulations should be drafted and seen by the public prior to the passage of Bill 133. To create certainty and facilitate robust compliance, the scope needs to be clarified to be specific to spills into water which "cause or are likely to cause" an adverse effect.

CME is adamantly opposed to the requirement that environmental penalties be absolute liability offences. The Supreme Court of Canada in Regina v. Sault Ste. Marie established "strict liability" offences on the basis that "If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of a breach?"

The defence of due diligence rewards and encourages companies to put in place responsible environmental practices. The proposal to eliminate due diligence as a defence is based on American law, which is far more prescriptive than Canadian law in its nature and ignores the Canadian legal heritage of cases such as the Sault Ste. Marie case. Due diligence as a defence is well established in case law in all Canadian jurisdictions, including Ontario. There would not appear to be any evidence that the American way is the more effective way.

As written in Bill 133, an MOE officer—i.e., field staff—has the power to issue an environmental penalty. To ensure that significant penalties such as penalties to corporations of $100,000 per day are imposed after appropriate review for consistency and to maintain effective working relationships with local abatement officers—I believe that in the minister's remarks on May 12 she indicated there might be an amendment to this. We would support that kind of amendment, where the penalty

would be issued by at least a director-level, or higher, MOE staff.

Environmental penalties should not be levied on employees, officers, contractors or agents of a company, but only on the company itself. Placing a penalty on an employee would be extremely punitive, as there are extremely limited appeal rights for such penalties to a court, potentially violating the fundamental rights of due process enjoyed by all Ontarians. These penalties may only be appealed to a court with respect to questions of law. Further, this would have a significant impact on the ability to hire engineers and environmental managers in Ontario. Environmental engineers will not wish to accept work under conditions where they risk having a fine imposed that could destroy their families' finances. CME would support making an amendment to the bill that would ensure that company officials or employees would not be subject to environmental penalties. Again, I believe the minister made some comments with respect to that issue as well. CME supports a cap on the maximum environmental penalties payable by companies, and there should not be environmental penalties for individuals.

Where the offence is more serious, prosecution is the appropriate enforcement tool, not an environmental penalty. In addition, there should be a one-year limitation period for the application of penalties.

CME supports sustainable, effective environmental laws and effective enforcement of those laws. CME supports the creation of a community clean-up fund, provided that the funds are used specifically to deal with community spill response and cleanup costs. The administrative costs for the fund need to be minimized, funds must be delivered in a timely fashion, and the scope of the fund—how it is spent—must be clearly outlined. With respect to cost recovery orders, more detail is required as to who would get compensation. We need to ensure that liability is not unlimited and that MOE cannot charge a company under both cost recovery orders and environmental penalties. CME recommends that the regulation that appears to be intended to govern what is compensable be released for public comment prior to the passage of Bill 133.

In the time available, we have only been able to touch upon a few key concerns with respect to the bill as it's currently worded. There are many other improvements that must also be made to this bill if it is to proceed, and we urge the committee to ensure that the bill is amended in ways that will make it both more effective and fair. We have heard remarks made by the Minister of the Environment on May 12 that she intends to table amendments to Bill 133 prior to second reading. We urge the government of Ontario to table these amendments immediately for public consideration prior to this committee completing its work on Bill 133.

All Ontarians, both as individuals and as members of organizations, have a responsibility to preserve and enhance Ontario's environment for future generations. Ontario's manufacturers pledge ourselves to working with all partners, including government, to encourage good stewardship of our air, lands and water. In turn, we ask this committee and the Legislature of Ontario to ensure that Bill 133 reflects the respect for basic rights and sound public policy that every Ontarian has a right to expect of our government.

We are pleased to have this opportunity to provide our input to the committee, and hope that our input will be reflected in timely amendments to the legislation.

The Chair: Thank you very much. We have about a minute for each caucus for a succinct question and answer, beginning with Mr. Wilkinson.

Mr. Wilkinson: Thanks for coming in today. We have been consulting broadly, as you know, for about the last eight months since the bill was introduced, and that's why we're in this process right now, before the bill goes back for second reading and approval in principle.

I just want to put on the record that you have brought up the Sault Ste. Marie case. We've done some review of course on the constitutionality of this. Remember that environmental penalties are civil administrative penalties; they're not criminal prosecutions. It's something that's applied in other jurisdictions, including in Canada, and I think the Supreme Court has been very clear, specifically in the Transport Robert case, about the fact that government and the Legislature have the power to impose fines, and when there's no threat of imprisonment, those fines are in the public interest. For example, in this province, if a wheel comes off of your truck, there is no defence of due diligence; the wheel came off your truck, and therefore there's a fine. Environmental penalties further that whole principle in law. So we have to make sure we're clear between the question of criminal prosecutions—which the ministry of course reserves; we have those powers—and ones of civil penalties.

Ms. Lisa Kozma: Yes, we're very aware of the Ontario Court of Appeal case that you discuss. What we're really talking about here is more a matter of principle. Yes, we understand that based on that case, government may have the authority to create absolute liability offences. The question is, however, more fundamental: It's whether the government should, and that's what was raised.

Mr. Barrett: I thank the Canadian Manufacturers and Exporters for coming forward, and I also wish to thank you for your brief. Each deputation has presented us with a brief; however, we did not receive a written brief, to my knowledge, when the minister came before this committee. So we are operating in a period of uncertainty right now. You've indicated a number of times that you believe the minister said this or said that; you use the word "might" introduce an amendment. Regrettably, we're operating in a vacuum here; I concur with you. Clause-by-clause will be this Thursday. We understand this bill is going to look different than originally planned, but we've been given no direction, and it has hampered this committee considerably. Do you have any comments on that?

1050

Mr. Howcroft: No, we just hoped that we would get some additional information. I think there's a lot of apprehension and need for clarification on that. I think that's why this committee's work is extremely important, to make sure that it reviews the information put forward through the deputations, and that it makes the recommendations necessary so that we get that information and we have good, sound environmental policy and regulations in place.

The Chair: Just as a point of clarification, the minister's opening statement was distributed today.

Mr. Barrett: The opening statement?

The Chair: Yes.

Mr. Barrett: Would that include the amendments? I haven't had a chance to read it.

Interjection.

Mr. Barrett: Her comments?

Mr. Wilkinson: A copy of what she said as well.

Mr. Barrett: Yes, we know it's in Hansard. Further to that—I guess I'll use my time as a point of order, Chair.

The Chair: You have about 30 seconds.

Mr. Barrett: Thirty seconds for a point of order? Again, it comes right from yet another well-written brief: "We urge the government of Ontario to table these amendments immediately." Yet they're not in Hansard. I heard the minister.

Interjection.

Mr. Barrett: I have 30 seconds; just a moment.

I'll make this as a motion, and I take it right from this brief: "We urge the government of Ontario to table these amendments immediately for public consideration prior this committee completing its work on Bill 133." We know clause-by-clause is this Thursday. We may get them Wednesday night. I don't feel that's fair to people who are making deliberations here. We've heard so much today on the importance of prevention. There's nothing in this legislation that addresses prevention. We just had a presentation from a medical officer of health. I have seen no amendments with respect to—

The Chair: Can you sum up?

Mr. Barrett: That flies in the face of the government's own IPAT committee, which focused on prevention and incentives to try to ameliorate some of these problems before they get worse. That's my motion, Chair. If there is any discussion—

Mr. Wilkinson: Mr. Chair, there is a difference between a point of order and a motion. But I find it odd that we were here on Thursday and I read into the record, with all-party support, the subcommittee report that all three parties agreed to. Perhaps my friend from Haldimand–Norfolk–Brant may want to check with Hansard about what happened just last week. Point number 11 clearly states "that proposed amendments to be moved during clause-by-clause consideration of the bill should be filed with the clerk of the committee by 5:00 p.m. on Tuesday, May 17, 2005."

We agreed to that process, so in the middle of this to say, "Well, now we should have a different process"—you would have raised that, then, before we all agreed to the deadline for submission of amendments.

Mr. Barrett: With this bill there have been, obviously, horses changing in mid-stream. What was presented to the Ontario Legislature last fall is probably going to be considerably different by Thursday. We've had so many delegations, companies that can't operate in a climate of uncertainly. This committee cannot operate in a climate of uncertainty.

The Chair: As you've proposed nothing that supersedes the sub-committee report, then I have to rule that out of order.

Mr. Barrett: My motion has been presented in writing to the clerk.

The Chair: Could you read your motion?

Mr. Barrett: Yes. I so move, "We urge the government of Ontario to table these amendments immediately for public consideration prior this committee completing its work on Bill 133."

The Chair: All those in favour? All those opposed? I declare the motion lost.

Thank you very much for your deputation this morning.

ROBERT GARTHSON

The Chair: Mr. Robert Garthson.

Mr. Garthson, you have 10 minutes to make your deputation before us this morning. If you leave any time remaining, it will be divided among the parties for questions. Please sit down, make yourself comfortable, state your name clearly for the purposes of Hansard and proceed.

Mr. Robert Garthson: My name is Robert Garthson. I did send a letter to this committee earlier. I don't know whether that letter has been copied and made available, in which case I won't repeat it.

I realize that I don't have a great amount of time and I certainly don't assume that I can educate members of this committee, who I'm sure have spent many times—as indicated in the letter, I strongly support the intention of the legislation. I believe all of us will benefit from having certainty on issues that affect our health and the quality of our life.

Many years ago in Sunday school, a man told me that average people should have the courage to act and speak on the things they believe in, and the determination and sense of responsibility to communicate those concerns. Many years later, when we shared a board of directors for St. Leonard's House, that same man said it was important to have compassion for those people who need our support and help. That man was former Premier Bill Davis, a long-time friend of the family and someone who certainly encouraged me to be involved in education and civic affairs.

I believe it is the government's primary responsibility to promote quality of life and to protect its citizens. There should be equity in terms of treatment and expectations of consequences. The old excuses that justified exploit-

ation and pollution without penalty have no place in our world.

Water is a very special resource. There has been no new water on the planet since the planet was created. We are all very much interrelated and interconnected and, as I indicated in my letter, I would hope that since this government has introduced many initiatives, they would look at those issues in total, whether it's biodiversity, environmental protection, water quality—whatever specific aspect—and take responsibility for those decisions. They should not privatize or download that responsibility on to levels of government that cannot afford it or do not have the expertise to handle it. In fact, in a Supreme Court decision involving BC Hydro, it was very clear that if someone had responsibility for an action that harmed the environment, that responsibility existed forever, not just at someone's convenience. I believe that is a very important consideration.

1100

As I indicated in my letter, I suffer from environmental illness. I have heavy metal mercury poisoning. It's had a major impact on my life. I'm not going to go into that story, but I've used that experience to learn from it. I'm an organic farmer. I practise permaculture, biodynamics and organics in everything I do in Shelter Valley, Northumberland. I moved to that location because of its clean air and water, and land that I could grow on that wasn't polluted by chemicals, only to find that we may be faced with an aggregate pit in the middle of our territory, in the middle of Shelter Valley, that has been classified previously by the Ministry of the Environment and others as a very toxic waste site, a dump site.

All of these things are connected. It will affect our water, our air and our quality of life. We hope the government will take responsibility for that and that everyone will support it.

In my master's work many years ago, I focused on our relationship with aboriginal peoples. There was an expression in the oral history of aboriginal peoples that said, "Before an action is taken that might cause harm to people or the environment, consideration should be given to the seven generations of children yet to be born." I think we could all learn from that. I hope we will do so.

I think the bill has come about partly because the concept of voluntary compliance was very popular at one time. I think the evidence is very clear that voluntary compliance in most cases means non-compliance. In fact, if we need to address the issue by having community education, if we need to look at budget priorities, if we need to reconsider things like tax cuts that may have jeopardized some of these issues, then those are the things that I would ask you to have the courage to do; that you would not simply follow what may be the easy course of taking advice or following direction from those who have something to gain from not putting this important legislation in place.

I have no profound statements to make, but I do believe you have a very important responsibility here, and my children, my children's children, all of our children and all life, both in Ontario and around us, will be impacted very much by the decisions you make. Despite popular myth, we know that in many cases pollution is increasing, both here and around the world, and we have to address that. I know the ministry has put out a number of directives on that. Ontario Nature has suggested that we need to extend the concept of the greenbelt—

The Chair: Just to advise you, you have about two minutes left.

Mr. Garthson: —to a greenway that would cover all of southern Ontario. I would invite you to come to Shelter Valley, to see what that might do for the quality of life of people in Ontario in our very small community.

With those comments, I thank you for being given the opportunity to speak today.

The Chair: We should have time for just one question, and that would be from Mr. Miller.

Mr. Miller: Thanks for your presentation today. The last group that presented said in part of their statement that one of the inadvertent consequences of Bill 133 is that it could actually undermine the relationship between business and the Ministry of the Environment in terms of trying to work toward spills prevention and programs to prevent pollution, because the focus would be more on preventing legal liability than on actual pollution prevention. In fact, the government's own Industrial Pollution Action Team report recommends that the ministry pursue the development of regulatory requirements for pollution prevention. Do you have any comments about that? This bill focuses on environmental penalties versus trying to develop programs to actually stop the pollution.

Mr. Garthson: Obviously, certain pieces of legislation may have a particular focus, and it's really up to the Legislature how broad they are. As I indicated earlier, I think the importance is that there needs to be an integrated approach that would include, if necessary, under separate legislation, clear guidelines for prevention. I think it is important to work together with all of the partners who could be involved in this process. But the reality is that we have a serious problem on our hands in Ontario and we have to address that problem.

I would hope that the Legislature would look at very comprehensive follow-up to this legislation that would cover whatever gaps, whatever issues arise. It's not something that's going to solve all the problems, but we know there are many stakeholders who are informally involved who don't have the opportunity to speak out and, as a former educator, I think there has to be much more public engagement in that. I did represent the Canadian educators on the world committee on technical education, and some of those questions were very obvious in that discussion as well.

The Chair: Mr. Garthson, thank you for coming in today.

BP CANADA ENERGY CO.

The Chair: BP Canada Energy Co.

Good morning to you. You have 15 minutes for your deputation before us today. Please begin by identifying yourself for the purposes of Hansard and continue.

Mr. Randy Jones: Good morning. My name is Randy Jones and I work for BP Canada Energy Co.

Mr. Chairman, members of the standing committee, first of all I'd like to thank you for allowing me this opportunity to come before you this morning and discuss what I consider to be a very important issue.

BP Canada Energy Co. is a wholly owned subsidiary of BP plc, the world's second-largest energy company. We've been active in Canada since 1948, and we currently employ about 1,500 Canadians, including about 200 people in the province of Ontario.

BP is Canada's leading natural gas value chain company. We explore for, develop, produce, process, market and trade natural gas and its derivatives. We are also leading oil and aviation product marketers, and are Canada's leading lubricants brand.

Here in Ontario, we have several operations, including a Castrol facility in Mississauga, Air BP Canada operations at Pearson International Airport and major natural gas liquids facilities in Sarnia and Windsor. I'm the area manager for BP for the natural gas liquids operations here in Ontario.

At BP, we are focused on meeting the world's needs for energy while preserving the environment and working for the communities that we call home. We are committed to the proactive and responsible treatment of the planet's natural resources and to the development of sources of lower carbon energy. Furthermore, we are proud of our record on the environment and we're committed to continuous improvement in the environment.

For example, in 1998, BP announced that we would reduce our greenhouse gas emissions to 10% below 1990 levels before 2010. We reached that target in 2002, eight years ahead of schedule. In addition, all of our major operations around the world, including Canada, are ISO 14001 certified. ISO 14001 is the international standard for environmental management plans. It is in this spirit that BP offers comments on Bill 133.

BP Canada has major concerns concerning the bill. I won't go into them in depth because I'm sure many have come before me mentioning some of the same things.

The bill makes no allowance for efforts by operators to exercise due diligence. The bill makes companies subject to penalties, even when companies are in compliance with existing permits. The bill makes companies subject to penalties even in cases where releases are not likely to have had an adverse impact. The fact is that environmental penalties raise an issue of double jeopardy, and then of course there's the reverse onus of proof.

We are encouraged that the Ministry of the Environment appears to be listening. While the amendments the minister has proposed do not address all of our concerns with Bill 133, we are pleased that the minister has indicated a willingness to work with industry to improve this bill. We are hopeful that these public hearings will lead to even more improvements and will result in a bill that industry can support wholeheartedly.

Rather than reiterating major concerns that are consistent with those of other stakeholders and that have been clearly stated to the ministry and this committee, we'd like to focus on how we can achieve the government of Ontario's goal of preventing all spills to the environment. I can tell you that BP's goal, as well as any other operator's, should be zero spills. I would also like to add that the province of Ontario has an opportunity with this bill to take a leadership position across Canada. A very important time in a very important decision-making process is underway.

Bill 133, with its emphasis on penalties, is reactive. Instead of focusing on preventing spills, it focuses on how to punish companies after a spill has occurred. While I, and BP, believe in the polluter-pay principle, we also believe that we should examine how best to prevent environmental harm from occurring, rather than remediating environmental harm that should have been prevented in the first place.

BP thus recommends that Bill 133 incorporate a comprehensive, risk-based approach for classifying, preventing and managing spills in Ontario, including unambiguous definitions of spills both to the air and to the water. This was a recommendation of Ontario's Industrial Pollution Action Team, or IPAT, which was reported on July 30, 2004. BP encourages the government of Ontario to make spill prevention plans mandatory for all operators.

Spill prevention plans, as mandated, for example, in the United States, require an assessment of the potential spill risk and the mitigation of such risks. Risk is assessed based on hazard, quantity and release potential of materials present on any given site. Preventive measures can then be implemented to address the specific risks and potential to all possible spill sources across the province, regardless of the industrial sector. A tiered approach to regulatory spill prevention can be valuable in focusing efforts and resources where the greatest spill risks exist. BP has extensive background in risk-based prevention programs and planning, as required under the US federal code. These resources are available if you wish to explore even further the knowledge base that we have.

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Some of the things that happen under US regulations: The potential to pollute is looked at across all industry segments. This leads to levels of preplanning very specific to the individual risk and includes potential impacts that are preplanned before any event occurs. It leads to inspections, depending upon risk. It also leads to realistic spill drill scenarios, because the best plan in the world isn't that good unless you practise what's in the plan. It also includes things like financial preparation to ensure that you can pay if you have a higher risk and also includes public disclosure.

A clear definition of what constitutes a spill would assist the government, industry and communities in prevention planning and communication. By determining spill reporting thresholds for compounds or groups of compounds, the responsibility of both the regulated community and the government becomes explicable and transparent. Furthermore, the public can better understand where risk does and does not exist. Again, this process must be reliant on comprehensive risk assessment as identified by IPAT and in much the same way the Ministry of the Environment sets air standards.

A good example in the US was when, once promulgated, ethylene glycol originally had a threshold reporting quantity of one pound. As additional scientific and health data became available, that threshold was raised to 10,000 pounds—again, based on the risk of that particular component.

Bill 133, as currently drafted, makes no distinction between companies that have good environmental performance and those that do not. BP believes that sound enforcement requires that there be a differentiation principle in effect. BP thus recommends that the government create a tiered enforcement program based on dischargers' spills and general compliance records. Again, this was a recommendation of IPAT.

It is our understanding from our discussions that Bill 133 would only apply to companies currently subject to the water-based municipal-industrial strategy for abatement, or MISA, regulations. BP believes it is unfair to impose environmental legislation on only a select group of companies by excluding those facilities that still have potential for harmful spills to air. This does not create a level playing field for all operators, nor does it further the overall goal of preventing harmful emissions from all industrial sources. BP thus recommends that an amended Bill 133 be applied to all industries in Ontario that have the potential to emit to either air or water or both.

Finally, I've mentioned the IPAT report several times in my remarks. While BP does not agree with all of the recommendations that IPAT made, we do see that the IPAT report recommendations are a good starting point for discussions on how to improve this bill. For example, IPAT recommends that the road to eliminating spills should include new incentives; improved communication; in-depth analysis of the technological, regulatory and behavioural factors that underlie spills; and a substantive public dialogue about the prevention and elimination of spill events in the St. Clair River and elsewhere in the province. Such an approach suggests that IPAT believes more in the carrot than in the stick.

BP is not asking for a licence to pollute, nor are we asking to shirk the responsibility that we would assume if a spill event occurs.

I would like to thank you this morning for the opportunity to share some insights from BP and myself on Bill 133. I hope I have provided you with some different insights than perhaps you have heard before and that I have conveyed to you that I, as well as BP, feel that all spills are preventable, all spills are reprehensible, and therefore prevention is the key to good performance.

Furthermore, and lastly, sound environmental legislation leads to sound environmental performance.

The Chair: We have about a minute each for the caucuses to ask questions, beginning with Mr. Marchese.

Mr. Rosario Marchese (Trinity–Spadina): Can I ask you, does spills prevention also include pollution prevention?

Mr. Jones: Oh, certainly.

Mr. Marchese: You must be familiar with the Massachusetts experience. In 1989, they passed some bill called the Toxics Use Reduction Act. It involves firms hiring toxic-use-reduction certified planners who will prepare plans for them to reduce their use of hazardous materials and production of by-products and emissions. You would be supportive of such a thing, is that correct?

Mr. Jones: That is correct. Again, by assessing the overall risk to pollution, to spills, then you can begin to put into place good, sound engineering controls to reduce the use of more toxics. It's an excellent way.

Mr. Marchese: I read that. Does the government agree with you about introducing such an assessment kind of procedure, or are they disagreeing with you? You must have proposed it while they were drafting it, right?

Mr. Jones: We have had talks with several MPPs during the course of this bill. I would hate to say what the government does or does not agree with.

Mr. Wilkinson: Thank you, Randy, for coming. On behalf of the ministry, BP Canada, as one of the MISA companies, has one of the most impeccable records in this province, and we appreciate that, and the citizens appreciate all the work that you've done. You've really been a leader in your own subsector of MISA. You have, voluntarily, a spills contingency and a spills prevention plan. Unlike some of the other people in your sector, my records here show that you haven't had any spills. So, obviously, the approach you've taken is working for the benefit of the environment, and we appreciate that. We want to get everybody else in your sector up to where you are.

Just to be clear, because you had raised some concerns, there would not be an environmental penalty on a company that was within their certificate of approval. I know that was something you raised. You'll be glad to know that we're going to make spills prevention plans mandatory, as the minister said last week, and this applies both to water and air, because of that suggestion. The fact that your company is ISO 14001—it would be a great day in Ontario if all of the companies in MISA were 14001 and had the same type of track record that you guys have.

Mr. Miller: Thank you very much for your presentation. It seems quite logical to me.

My background, prior to being a politician, was running a small resort, and my experience with the Ministry of the Environment is doing things like small septic systems.

The approach seems to have changed over the last 30 years. I remember 20 years ago, when going to do a little septic system, the MOE would work with the resort and would actually assist in terms of planning out the small septic system etc. The approach seems to be switching to the government being more of a police force of the environment. I think what you're saying is that industry wants to work with government, and that approach, as supported by this IPAT report, would work better.

Mr. Jones: Absolutely. I want to be on the same page as the government that's regulating me. We need to have the same list of concerns, the same list of things that are important, and we need to come to some agreement on being proactive in what's at risk and being able to put in place the right level of mitigations before anything ever occurs. That becomes very co-operative, and it is possible.

I worked very closely with both state and federal regulators in the US on just these sorts of issues, actually inviting them to drills that would occur at my facility, working with them in the planning process, identifying sensitive areas that could be reached in the event something goes terribly wrong.

Mr. Miller: And a good start would be to use the IPAT report that was just done and build off that.

Mr. Jones: Yes, sir.

The Chair: Thank you very much for having come in this morning and for your thoughtful deputation.

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ONTARIO WASTE MANAGEMENT ASSOCIATION

The Chair: Ontario Waste Management Association.

Good morning. Please be seated and make yourselves comfortable. You have 15 minutes to make your deputation before us. If you have any time remaining, it will be divided among the caucuses for questions. Please state your names clearly for the purposes of Hansard and begin.

Mr. Rob Cook: My name is Rob Cook and I'm the executive director of the Ontario Waste Management Association. With me today is Adam Chamberlain, a partner with Aird and Berlis LLP, who also serves as a volunteer legal advisor to the OWMA board of directors.

I'd like to thank the committee for providing us with this opportunity to appear before you today and talk about the important principles contained in Bill 133. We are also supportive of Minister Dombrowsky's intent to bring forward amendments to the bill.

Unfortunately, like the committee itself, we are somewhat handicapped in being able to provide informed and useful commentary on the important principles in this bill because we know that amendments are forthcoming but we don't know the form and breadth of those amendments and are unable to assess whether they truly address the fundamental flaws contained in the bill.

We would urge the government and this committee to find a way to introduce the proposed amendments during the committee process prior to clause-by-clause discussion, to allow stakeholders the opportunity to provide that meaningful input. The comments I am providing today relate to Bill 133 as currently drafted.

The Ontario Waste Management Association represents the private sector waste management industry in Ontario that invests in and manages the province's waste management system—a system that all of us in this room have come to rely on as an essential service. Our members directly manage over 90% of the waste and recyclables that are generated by Ontario's industrial/commercial and institutional sectors, and we manage over 80% of the residential waste and recyclables annually generated by Ontario municipalities and residents. Our management of residential waste takes place under contract with municipalities—an important issue that I will refer to later in my presentation.

OWMA and its member companies support the principle of "polluter pay." We are also committed to ensuring that Ontario has the highest standards of environmental care and protection and believe that those who cause environmental damage should bear the costs of response, abatement and remediation and should be held accountable by prosecution under our regulatory and legal system.

The Ontario Waste Management Association is a member of the Coalition for a Sustainable Environment. However, we are not a MISA-regulated industry. Some might question why we are members of the coalition and some might question why we are concerned about Bill 133 if we are not regulated under MISA. The answer is simple: Bill 133, as it currently exists, is flawed legislation that can and will likely be applicable to multiple-industry sectors in the future.

The bill erodes or eliminates natural justice principles that are fundamental to our system of regulatory fairness and upon which individuals and companies rely. In our view, any industry and any individual in this province should be concerned with legislation that deviates from these natural justice principles.

The government and this committee have focused on the applicability of Bill 133 to MISA-regulated industries. The implications of Bill 133 and its provisions have been measured and assessed against the types of industries and large companies in the MISA sector that the minister has indicated will be identified by regulation. But as I sit before you today, Bill 133 does not reference MISA facilities. The much-talked-about regulation to accomplish that goal is not before us.

Comments from the ministry and the design of this legislation contemplate the expansion of environmental penalties to other industry sectors in the future. It is therefore important to understand how environmental penalties and other provisions of Bill 133 will impact on other non-MISA industries—industries like waste management that are comprised primarily of small businesses that would face severe economic hardship if faced with an environmental penalty and no recourse to the judicial system. Over 60% of the members of OWMA are small

businesses, family businesses and many of the "ma and pa" type enterprises that commonly service much of rural and northern Ontario.

The waste management industry is also unique in that, unlike other industry sectors, virtually all aspects of both the public and private waste management systems operate under EPA approval instruments—certificates of approval—and the provisions and regulations of the EPA.

EPA approvals are required to simply be in business. A certificate of approval is required to operate a waste collection vehicle, to operate a recycling facility, to compost organic waste or to operate a landfill. Unlike other industry sectors, these approvals are not limited to environmental emissions or impacts. Waste industry approvals are very prescriptive in how a business operates and contain requirements for administrative and operational issues that have minimal or no environmental risk or consequence.

When the application of Bill 133 is extrapolated to the waste management industry, section 182.1 of the bill specifically identifies any certificate of approval contravention as being subject to environmental penalties, not just spills. Much has been said about Bill 133 in terms of it's applicability to spills but, as currently drafted, Bill 133 is broad in its application.

We support, by amendment to the bill, a narrowing of the scope of environmental penalties to spills to reflect the government's intent and the incorporation into the bill of a clear, concise, scientific definition of "spill." We also support amendments to specify in the legislation which industries and/or facilities are subject to environmental penalties and not leave the broadening of environmental penalty application to regulations.

We believe it is a privilege, not a right, to do business in Ontario, but the government must ensure that legislation like Bill 133 distinguishes between those companies and individuals who are diligent and respect that privilege and those that don't. The fundamental changes in Bill 133, particularly surrounding due diligence and reverse onus, potentially remove that distinction.

We support amendments that recognize due diligence as the foundation upon which environmental risk management has been integrated into business and operating practices over the past 25 years and amendments to restore due diligence.

Bill 133 also creates a new compliance threshold definition for any activity regulated under the EPA and associated approval instruments by replacing "likely to cause an adverse effect" with "may cause an adverse effect." This radically changes the role and value of risk assessment and mitigation as they pertain to any activity regulated under the EPA and, more importantly, to the standard by which compliance or enforcement action will be determined. The proposed change in Bill 133 to "may cause an adverse effect" could negate the validity of conditions and limits contained in approval instruments already issued by the MOE.

A new compliance threshold will also make it very difficult to attract new or expanded private sector investment in the waste management system in Ontario. The Ontario government is currently seeking private sector investment in waste recycling infrastructure to facilitate the achievement of the government's 60% waste diversion goal. The change in the compliance threshold will make it difficult or impossible for Ontario waste companies to quantify and warrant environmental risk for financial institutions and investors when seeking investment capital. Investment will flow to other industry sectors and/or other jurisdictions, to the detriment of government policy initiatives related to waste diversion. We view this potential change as one of the most significant contemplated in Bill 133, and we strongly recommend that the committee amend the bill to retain the current threshold definition of an environmental consequence—"likely to"—as currently contained in the EPA.

I mentioned earlier in my remarks the fact that waste industry companies operate under contract to provide services to municipalities for managing waste and recyclable materials. The waste management system in Ontario comprises both public—municipal—and private entities that function as partners, customers, competitors or sub-contractors, depending on the business situation. In order to maintain a level playing field, it is imperative that private sector and municipal entities be treated equally under Bill 133.

In a speech by the Honourable Leona Dombrowsky in Toronto on December 8, 2004, she stated, "There is no intention to apply environmental penalties to municipalities, agricultural operations or the retail industry."

There must be equitable treatment of both the public and private sector waste management entities under the bill. It's applicability must be for either none or all of the waste management system in the province. Municipal taxpayers will bear the cost of environmental penalties, whether environmental penalties are applied directly to municipalities or indirectly through service providers who pass that cost on to the municipality. Likewise, an unbalanced application of environmental penalties to private sector entities only could force municipalities to reduce their exposure to environmental penalties through their private sector contractors by assuming direct waste service provision at a substantially increased cost to municipal budgets and municipal taxpayers.

Rather than leave the significant issue of applicability to regulations, we recommend that the principle of fair application relative to the private and public sectors be contained in an amended bill, irrespective of which industry sector is ultimately identified in the legislation or the regulation.

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As members of the Coalition for a Sustainable Environment, we support the coalition's messages and positions delivered to the committee last Thursday by the Honourable Perrin Beatty:

We support amendments to the bill that narrow the scope of environmental penalties to spills and clearly define a spill.

We believe that the possibility of serving directors, employees and contractors with EPs should be removed by amendment.

We support amendments that confirm EPs will only be issued by an MOE director or more senior MOE representative.

We support amendments to specify in the legislation what industries and/or facilities are subject to EPs and not leave the broadening of EP application to regulations.

We believe that amendments are required to eliminate the potential for double jeopardy—the independent applications of environmental penalties and prosecutions.

We support the amendments that remove the reverse onus provisions and recognize and restore due diligence.

Finally, we support amendments that retain the existing EPA compliance threshold of "likely" and remove reference to "may."

In closing, I would like to thank you for the opportunity to appear before you. As drafted, Bill 133 contains serious flaws that will hopefully be remedied by amendments proposed by the Minister of the Environment or by members of this committee. We urge the committee to provide all stakeholders with the ability to focus efforts in making Bill 133 better public policy by providing the opportunity to comment on the proposed amendments within the bounds of the committee deliberations and prior to the final committee report. Thank you.

The Chair: Thank you very much. We should have time for just one question, and that would be from Mr. Wilkinson.

Mr. Wilkinson: Thank you, Rob. It's good seeing you again, and we're glad that we're in this process. We were discussing just a few months ago that this would be the process our government is taking and the fact that we're looking for consultation.

I think you're probably the first group to come to us speaking on the industrial side of it that's not a MISA-regulated company, although I think some of the companies within you, in their other operations, are. I'd be interested if you'd just elaborate more about the necessity of having a level playing field in the waste management industry between the municipal and the private. It's the first time I've seen that comment. Could you just elaborate on that for us so we understand there should be balance, if it's—

Mr. Cook: Certainly. As I mentioned earlier, Ontario has a kind of—well, it's not a unique system, but it has a dual waste management system in that historically the private sector and private sector companies have managed waste from businesses, industries and commercial enterprises, exclusive of a municipal role. So it's a direct fee-for-service kind of provision. Municipalities, on the other hand, generally have managed residential waste. Within those two systems, there is some overlap and there's some competition. Municipalities own landfills, private sector companies own landfills—the same with recycling facilities, the same with collection vehicles.

Clearly, one of the concerns is that an uneven application of Bill 133 would disadvantage one side of that equation, likely the private sector side, making it difficult to provide service, to compete and, certainly from the point of view of our being subcontractors, municipalities might be concerned about the liability their subcontractors would have for environmental penalties.

The Chair: Thank you for coming in this morning. That concludes the time available to you.

ONTARIO BAR ASSOCIATION, ENVIRONMENTAL LAW SECTION

The Chair: Ontario Bar Association, environmental law section, please.

Thank you for joining us this morning. You'll have 15 minutes to make your deputation to the committee. If there's time remaining, we'll divide it among the parties for questions. Please begin by stating your names for the purposes of Hansard, and proceed.

Ms. Sarah Powell: My name is Sarah Powell and I'm chair of the environmental law section of the Ontario Bar Association. I'm here today with Janet Bobechko, who is also a member of the section. We're both certified specialists in environmental law by the Law Society of Upper Canada, and we're here on behalf of our environmental law section.

Just to provide a little bit of background, our section is comprised of 500 members, lawyers who practise in the area of environmental law. It represents a broad sector of lawyers, those in private practice as well as in government and non-government organizations and in-house counsel. Our section is a group of volunteers, and when we comment on legislation, what we try to do is to park our client hats at the door and look at it in as open a perspective as possible.

We did provide detailed comments to the ministry on January 7. Those comments were provided to the clerk on Friday, I believe, but if you need copies, I have additional copies here. Those comments that were provided on January 7 were detailed and covered several issues. Today, Janet and I would just like to address two specific issues. I'm going to address the first, which is the absolute liability issue, and Janet is going to address the threshold to establish contraventions under Bill 133.

I wanted by way of background to advise that in 2002, the Ontario Bar Association did support the concept of administrative monetary penalties, or, as they're now called, environmental penalties. Our section felt they were an important additional tool for the Ministry of the Environment in their enforcement package. At that time, though, our support was based on environmental penalties being for more minor offences or contraventions, as opposed to significant, $100,000-per-day ones. We're not going to address that today; it is addressed in our written submission. We're just going to focus, as I said, on two issues: absolute liability with respect to environmental penalties, and the proposed threshold to establish contraventions.

I have to back up a little bit, because what I'm going to focus on is absolute liability with respect to environ-

mental penalties. I'm not going to talk about absolute liability in the context of part X of the Environmental Protection Act. That deals with compensation and the right to compensation. I think our section supports the idea that absolute liability is appropriate when it comes to spills—if you spill, you pay—and that concept is already in part X of the Environmental Protection Act. That is absolute liability for that part of the right to compensation. That right to compensation is proposed to be broadened, again based on absolute liability. We're not going to comment on that concept of absolute liability today. I'm just focusing on absolute liability with respect to environmental penalties.

That issue of absolute liability for environmental penalties is our most significant concern with respect to Bill 133 from the perspective of the legal community. It's our strong view that there should be a defence of due diligence available for environmental penalties, and I'm going to walk very briefly through why we think that's the case.

We believe that some minimum requirement of fault when it comes to environmental penalties strikes a better balance between fairness and the compelling need to protect the environment. We're not aware of any evidence that suggests that absolute liability leads to better compliance or better protection, and indeed the Supreme Court of Canada, back in 1978, concluded otherwise. I'm going to focus on the Supreme Court of Canada's decision back in 1978, because I think it's key to understanding why absolute liability, in our view, does not make sense in this context.

The Supreme Court of Canada considered the concept of liability in relation to public welfare offences back in 1978 in a key decision called Regina v. Sault Ste. Marie. In that case, the Supreme Court carefully considered the basic principles of liability and balanced them against the public goals sought to be achieved through regulatory measures. A unanimous Supreme Court held that strict liability, which means the ability to have a due-diligence defence, represented an appropriate compromise between the competing interests involved. It's argued that the Supreme Court's conclusions in Sault Ste. Marie are no less valid today. I'm going to walk through those reasons very quickly.

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I'm going to start by focusing on the principal arguments for absolute liability that were put before the Supreme Court.

First, it was argued that the protection of social interests requires a higher standard of care on the part of those who follow certain pursuits, and such persons are more likely to be stimulated to maintain those standards if they know that ignorance or mistake will not excuse them.

The second principal argument put before the Supreme Court was one of administrative efficiency. In short, it was argued that absolutely liability was the most efficient and effective way of ensuring compliance and the social ends to be achieved were of such importance that it was prudent to override the unfortunate by-product of punishing those who may be free of moral turpitude.

Those were the two arguments for absolute liability that were put before the Supreme Court. In the end, the Supreme Court—again, in a unanimous decision—held that the arguments of greater force were argued against absolutely liability. I'm going to just give you a quick quote from the Supreme Court decision. It read:

"The most telling is that it violates fundamental principles of penal liability. It also rests upon assumptions which have not been, and cannot be, empirically established. There is no evidence that a higher standard of care results from absolute liability. If a person is already taking every reasonable precautionary measure, is he likely to take additional measures, knowing that however much care he takes, it will not serve as a defence in the event of breach? If he has exercised care and skill, will conviction have a deterrent effect upon him or others? Will the injustice of conviction lead to cynicism and disrespect for the law, on his part and on the part of others? These are among the questions asked. The argument that no stigma attaches does not withstand analysis, for the accused will have suffered loss of time, legal costs, exposure to the processes of the criminal law at trial and, however one may downplay it.…" I'm just going to skip through for time. "In sentencing, evidence of due diligence is admissible and therefore the evidence might just as well be heard when considering guilt...."

I think at the end of the day, the Supreme Court also endorsed the recommendations made by the Law Reform Commission of Canada. The commission recommended that every offence outside the Criminal Code be recognized as admitting of a defence of due diligence. The commission stated, "Let us recognize the regulatory offence for what it is—an offence of negligence—and frame the law to ensure that guilt depends upon lack of reasonable care."

This case, Sault Ste. Marie, therefore recognized that strict liability was an appropriate middle ground between full mens rea, which is the intent to commit an offence, and absolute liability, which is absence of fault. This new category of strict liability that was created by the Supreme Court represented a reasonable compromise that acknowledged the importance and essential objectives of regulatory offences but at the same time sought to mitigate the harshness of absolute liability. Further, Sault Ste. Marie concluded that public welfare offences are prima facie classified as imposing strict liability. In other words, negligence was clearly to be the usual yardstick for public welfare offences. Almost 30 years ago the Supreme Court decision in Sault Ste. Marie embraced the merits of strict liability, and we believe that these reasons are no less valid today.

I think it's interesting that a more recent report, the 1990 Report on the Basis of Liability for Provincial Offences of the Ontario Law Reform Commission, also embraced the wisdom of strict liability and stated that no person should be held liable in the absence of fault. This rejection of absolute liability offences is reflected in the

central recommendation of the commission's report, namely that absolute liability should be abolished for provincial offences and that liability for all such offences should be based on some minimum requirement of fault. The commission concluded that this proposal would strike the proper balance between fairness and the essential law enforcement requirements of the larger community.

I'm just going to touch quickly on one more decision. The ministry's background documents relied to a large extent on the American approach and American experience. When we talked to the ministry during a stakeholder consultation, much emphasis was put on the fact that the American courts and the American system do not acknowledge a due-diligence defence. They do have absolute liability in many contexts—it's a different context—whereas we have always had across Canada the concept of a strict liability or due-diligence defence.

I just wanted to touch on the Supreme Court's decision in Wholesale Travel Group, because I think it's instructive. In that decision, the court said, "It must always be remembered that there are important differences between our charter and the Constitution of the United States. There are also important historical and other differences between Canadian and American society. Decisions of the highest American court should not be and must not be slavishly followed.... Indeed it is telling that several American commentators who have decided the imposition of absolute liability have argued in favour of a middle-ground position very similar to strict liability as that term is defined in Sault Ste. Marie."

For this reason, it's our view that there is a sound basis for strict liability and that it has proven to be a workable concept in Canadian law for almost 30 years. While the proposed EP, or environmental penalty, regime may ultimately facilitate imposition of significant penalties by removing the accused's ability to disprove negligence, for the reasons noted above we believe that the proposed environmental penalty regime will not likely result in a higher standard of care and therefore will not result in better protection of the environment. More care in the conduct of affairs cannot be expected by simply penalizing blameless conduct. It is our view, therefore, that the liability for an environmental penalty should be based on some minimum requirement of fault. This approach is more consistent with the Canadian approach and strikes a better balance between fairness and the compelling need to protect the environment.

I'm now going to hand over to Janet, who's going to touch briefly on the threshold to establish a contravention.

The Chair: Just to let you know, you have about three minutes left.

Ms Janet Bobechko: It won't take that long.

For the Ontario Bar Association, the proposal under Bill 133 to reduce the threshold to establish a contravention is very important. We don't want it to get lost in all of the other submissions that are being made.

We think it's an extremely significant proposal and, in general, that the threshold currently for prohibiting discharges is reasonable and clear. Changing the threshold to "may" will likely introduce significant uncertainty in the application of the law. We'd appreciate if the MOE would clarify its reasons for the proposed change. In our view, the current pollution prohibitions are sufficiently broad and general to ensure Ontario's environmental protection legislation is reasonably capable of responding to a wide variety of scenarios. That said, the pollution prohibitions should not be so broad and general that they ultimately violate the constitutional requirements of fair notice to citizens. It is our view, therefore, that the proposed threshold is potentially unfair and/or unconstitutional, in that it is vague and overbroad, and that it should be tied to some scientific standard.

We'd like to thank the committee for the opportunity to address you today and to make the concerns of the legal profession from the Ontario Bar Association known. We look forward to seeing a redrafted Bill 133 that takes into consideration submissions made through the EBR process and through this process.

The Chair: Thank you. We should have time for one question, and that would be from Mr. Barrett.

Mr. Barrett: I'd like to thank the Ontario Bar Association for your brief on liability and the threshold.

One reason this committee is sitting here is because of spills in the St. Clair River, but much of our discussion has been not so much on spills but more on penalties.

We don't have the amendments from the government. There was a presentation by the minister. She states, "More emphasis on spill prevention is required." On page 4 she states, "Environmental penalties will encourage companies to take action to prevent spills and to clean up a spill right away."

Really, there is no environmental legislation that focuses on prevention, as I understand it, in the province of Ontario. Do you feel environmental penalties are the route to take to prevent spills in the first place?

Ms. Powell: No. I think what is quite clear from the Supreme Court's decision is that there's no empirical evidence to show that absolute liability, which the EPs are based on, or I think penalties themselves, will lead to better compliance. What we did think was that for minor offences, the ministry needs better tools. A prosecution, we agree, is a very cumbersome tool, and the EP, the environmental penalty, is helpful for the ministry because they have another tool in their basket. Will it ultimately lead to better pollution prevention? I think it's doubtful.

The Chair: Thank you very much for coming in to make your deputation today. Just for members to note, the submission from the Ontario Bar Association was distributed earlier today in the packages that you received when you came in.

I would respectfully request members to be back in this room in time to start the deputations precisely at 4 o'clock. These hearings stand in recess until 4 o'clock.

The committee recessed from 1150 to 1602.

SARNIA-LAMBTON ENVIRONMENTAL ASSOCIATION

The Chair: Good afternoon, everyone. Welcome or welcome back, as the case may be. This is the standing committee on the Legislative Assembly. We're here to consider Bill 133, the Environmental Enforcement Statute Law Amendment Act, 2004.

Our first deputant for this afternoon is the Sarnia-Lambton Environmental Association.

Welcome to you. Glad to see that you're seated. Please begin by stating your names for the purposes of Hansard. You'll have 15 minutes for your deputation. If you leave any part of it, I'll divide it among the parties to ask you questions. The floor is yours; please proceed.

Mr. Scott Munro: Thank you very much, Mr. Chairman. My name is Scott Munro. I'm the general manager of the Sarnia-Lambton Environmental Association, and with me today is Mr. Ronald Huizingh, who is the president of the organization. We're honoured to have the opportunity to appear before you today on behalf of the Sarnia-Lambton Environmental Association.

The association is an industrial environmental co-operative of 20 petroleum-refining, petrochemical and associated facilities operating in Lambton county. It has a long history of environmental achievement, tracing its origins back to 1952. In fact, its efforts to foster environmental stewardship precede the formation of the Ontario Ministry of the Environment and Environment Canada. We are particularly proud that the association has been used as a model for similar environmentally focused, science-based organizations formed in other areas of Canada and the world.

The association's mission is to promote a healthy and sustainable environment by ensuring that members are well-informed on environmental management and regulatory issues, by operating an extensive monitoring network of air and water quality monitors providing high-quality data in real time and by sharing information with regulatory agencies and the community.

Although primarily designed to track trends in environmental quality over time, the monitoring network also provides invaluable data to assist in managing accidental releases. The association's St. Clair River water quality monitor, for example, is now in its 20th year of continuous operation, providing hourly analysis of 20 contaminants potentially associated with petrochemical operations. The instrument records approximately 172,000 analyses per year, more than 98% of which are less than detection limits—less than one tenth of one part per billion. The system also takes automatic grab samples for subsequent analysis in a laboratory in the event there is a need to identify contaminants not included in the routine analyses. The instrument's on-line record is extraordinary. It has delivered quality data in real time close to 99% of the time throughout its life, most lost data being due to calibration procedures.

The association also tracks emissions, discharges and spills, aggregated for all of our members. Whether the data relates to emissions, discharges, spills or levels of contaminants measured in the ambient environment, the long-term trends are consistent: All identify a trend to lower and lower emissions and improving air and water quality. Spills to the St. Clair River from our member facilities have declined from more than 100 per year in the 1980s to 10 or fewer over the past several years. Our goal is zero spills, and we recognize that reaching that goal is a challenge that must be met.

Over the past year and a half, the association and its member sites have provided their full co-operation and assistance to two initiatives by the Ministry of the Environment to address concerns about spills. When the minister deployed the SWAT team to conduct an inspection sweep in our area, we welcomed the scrutiny. All sites cooperated fully with the SWAT inspectors. We assisted the work of the Industrial Pollution Action Team, including providing tours of member facilities. In addition, we met with the International Joint Commission's Canadian chair, the Honourable Herb Gray and his US counterpart, Dennis Schornack, at their request, to discuss spills and the unique operation of our river water monitoring equipment.

It was within this spirit, and the long-established record of open co-operation with the Ministry of the Environment, that the association was surprised and disappointed that Bill 133 was introduced in the Legislature without prior consultation with stakeholders. Our association did provide comments during the brief comment period following the posting of the bill to the Environmental Bill of Rights Web site. Those comments form the basis of our submission today, and are included in our presentation package.

The Sarnia-Lambton Environmental Association fully supports the philosophy that industrial operations must be responsible for protecting the environment in which they operate and for restoring it when they cause an identifiable impact: the polluter-pays principle. However, in our view, Bill 133, as introduced in the Legislature, is fundamentally and fatally flawed. It is the antithesis of the philosophy of working together to prevent spills expressed in the Industrial Pollution Action Team report. Only through significant amendment can Bill 133 provide the kind of efficient, effective, equitable and progressive environmental protection Ontarians expect, and to which they are entitled.

As currently drafted, Bill 133's amendments to the Environmental Protection Act and the Ontario Water Resources Act place the owners and employees of operating facilities in Ontario in an untenable position created by the uncertainty of what is expected of them while denying them the due process guaranteed to every other citizen by Canadian law. A more practical and effective approach would be to focus on putting in place regulatory mechanisms to facilitate installation of spill-prevention programs and facilities. The unstable environment anticipated from Bill 133 as proposed is due to the convergence of four fundamental changes introduced by the legislation:

First, "contaminant" is defined in terms of "causes or may cause" an adverse effect. As all scientists know, there is no scientific means to disprove "may"; that is, you cannot prove the absence of all possible effects, no matter how unlikely they may be.

Secondly, in practical terms, the proposed revision to section 14.1 of the Environmental Protection Act is a requirement for zero discharge. The clause, which overrides any other provision of the act or its regulations, is a general prohibition on the discharge of contaminants into the natural environment, which, according to the definition of "contaminant" described earlier, means anything that "may" cause an adverse effect. By removing the phrase "that causes or is likely to cause an adverse effect," which appears in the existing wording of the Environmental Protection Act, any opportunity to create regulations to define acceptable limits on discharges or to define what is meant by the phrase "may cause" is lost. Wording designed to interpret the word "may" found in other sections throughout the Environmental Protection Act and the Ontario Water Resources Act, such as the Environmental Protection Act section 15.1's phrase "out of the normal course of events," loses its effect, given the proposed amendment to remove the phrase "that causes or is likely to cause" from section 14.1.

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Some people have referred to this proposed change as a change in the definition of the threshold beyond which an offence is said to occur. Unfortunately, it is that and more, effectively creating uncertainty in what the threshold is and preventing the regulatory agency from setting realistic, achievable limits that would provide clarity to the threshold while continuing to be protective of human health and the environment.

(3) Bill 133 attempts to establish a requirement for reverse onus of proof, requiring the defendant to prove that the discharge did not occur or that it could not have caused even a remotely possible adverse effect—taken with the definition of "contaminant," an impossibility.

(4) Bill 133 also attempts to create offences of absolute liability, depriving individuals and corporations of their right to reasonable defences established in common law and guaranteed in the Canadian Charter of Rights and Freedoms. The section also deprives defendants of reliance on proof of due diligence as a defence and as a consideration in mitigating penalties.

In our view, the convergence of these fundamental elements is unique to Ontario, creating an untenable situation for corporations and for the many individuals dedicated to operating their facilities in an environmentally friendly and sustainable way. Discharges of contaminants are prohibited; the accuser need not prove the offence; proof of absence of the offence is scientifically impossible, absence of a measurable environmental effect being insufficient; and defences well established in common law are excluded.

The association has also identified additional concerns with the proposed legislation and with the information released by the minister's office in support of the bill. The bill introduces environmental penalties—monetary penalties imposed arbitrarily by any environmental officer for any discharge—without requiring that the accuser establish the likelihood of an offence, denying the accused access to due process and removing the right of appeal to the court system.

The Chair: Just to let you know, you've got about three minutes.

Mr. Munro: Thank you. Apparently, the rationale for environmental penalties is that the legal system works too slowly, and there is a need to quickly compensate municipalities impacted by a spill.

There is an evident dichotomy here. Most discharges—"discharges" is the word used in Bill 133 to which environmental penalties are attached—are not spills, and do not cause and are unlikely to cause an identifiable or measurable impact; hence, no compensation is required. For spills causing an impact and a need for compensation, the existing spills section of the Environmental Protection Act provides all the tools, such as director's orders, necessary to direct swift compensation to affected parties. Beyond the legal requirement, it is the established practice of our members to supply alternative sources of drinking water, in bulk or bottled, during those infrequent spills for which closure of community water intakes has been advised by health authorities.

The minister has stated publicly that Bill 133 will apply only to certain already closely regulated facilities, those to whom the MISA, or Ontario clean water regulations, apply. This intent, not identified in the bill currently before this committee, is fundamentally inequitable. Such a restriction would impose environmental penalties on only 140 of the thousands of facilities operating in Ontario. A brief review of the ministry's Web site, which features press releases of recent convictions under environmental legislation, demonstrates that the vast majority of offences, including spills, are not from MISA sites but rather from those that will be excluded from the legislation.

There is a preferable, viable alternative to the reactive, punitive approach to spills. That alternative is working together—industry, the regulatory agency and the potentially affected communities—to complete design and implementation of spill prevention measures. The Industrial Pollution Action Team report makes in excess of 30 recommendations designed to facilitate implementation of effective spill prevention programs. The report espouses a philosophy of decisions based on risk assessment and of creating multiple barriers between potential contaminants and their point of release. It also calls for vigilance through effective monitoring by the operators within facilities and in the ambient environment by the Ministry of the Environment. The report further identifies the need to reorganize the Ministry of the Environment such that it can work co-operatively with industry to speed the implementation of spill prevention measures.

The Chair: Thank you. That concludes the time we have available. Unfortunately, there won't be any time for questions. Thank you for coming today and for providing your deputation.

CANADIAN CHEMICAL PRODUCERS' ASSOCIATION

The Chair: The Canadian Chemical Producers' Association, please.

Good afternoon to you. Welcome. You have 15 minutes to present to us. You can use all or a portion of that time. If you leave any time remaining, I'll divide it among the parties for questions. Please begin by identifying yourself for the purposes of Hansard, and proceed.

Mr. Roger Hayward: My name is Roger Hayward. I am chair of the Ontario regional committee of the Canadian Chemical Producers' Association and president of Rohm and Haas Canada. My associate is Norm Huebel, who is the regional director of our association.

We represent more than 65 companies nationwide. Our member companies manufacture greater than 90% of all the industrial chemicals in Canada. We represent about half of the total chemical sector in Ontario, which includes downstream customers as well as upstream manufacturers such as ourselves. The chemical sector is the third-largest sector in the province in terms of sales. We have extensive manufacturing facilities in the Sarnia area.

We have practised environmental stewardship for decades through our Responsible Care initiative. Developed in Canada, the Responsible Care initiative has now been exported to more than 50 countries around the world. As a condition of membership, all of our CEOs must sign a commitment to continuous improvement to the six codes of Responsible Care, with its 151 management elements.

This initiative includes a commitment to the prevention of spills and releases and extends to the setting of environmental performance objectives that go beyond the baseline set by regulations. Compliance to this initiative is verified every three years by an independent team, which includes members of the public. It is because of this Responsible Care commitment that we find Bill 133 so disturbing.

I understand that the Minister of the Environment on Thursday, May 12, indicated that she would be moving amendments to the bill. Since I have not seen legal drafts of the bill, I am unable to comment on their adequacy in responding to our concerns. Therefore, I will comment on the bill, as it is currently drafted.

This bill, as currently written, treats everyone the same. Companies that have put environmental management systems and equipment in place to prevent occurrences are treated the same as those who have done nothing. The bill does not recognize safeguards or other efforts made by organizations to go beyond compliance. This treatment will discourage participation in programs such as the Ontario environmental leaders program or independent voluntary environmental performance improvement. Leaders and laggards should be treated differently.

Another major concern that we have about the bill is its broad scope and applicability. We feel that it is appropriate that this bill has been referred to this committee prior to second reading so that we can explore the underlying principles of the bill. If this bill is targeted at spills, it would have been more appropriate to amend or develop a new spills bill rather than bring forward a bill that covers an infraction of the Environmental Protection Act or the Ontario Water Resources Act. In addition, if it is truly about spills, there should be no exemptions.

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A spill from any source can have an environmental impact. Since there is no correlation between the size of a spill or the environmental impact from a spill and the size the company, it is inappropriate and clearly discriminatory to target a select group of companies, MISA companies, for applicability of the bill. It should apply to all. Although the bill does not limit the applicability to MISA companies, news releases and statements by the ministry have indicated that, through regulation, it will only apply to MISA companies. An effective bill would apply to all. We recommend that the scope of the bill be narrowed to only cover spills to the environment, and not to other contraventions of the EPA or the OWRA.

In addition, applicability should not be limited on a discriminatory basis. Flawed legislation is not fixed by regulation. While we do not have an issue with the requirement to compensate for costs and damages associated with a spill, we do take issue with the environmental penalties as they are currently structured, as they look like fines without due process.

When we examine the bill in detail, we have the same concerns that you will hear from many others, from the Coalition for a Sustainable Environment. These include: absolute liability with removal of the due diligence defence; reverse onus—guilty until proven innocent; double jeopardy; unattainable or unclear thresholds; individual liabilities for EPs—that's employees, officers and directors; and the community fund. I would like to focus on a few of these.

Due diligence: If a company has voluntarily done everything that it can to prevent an occurrence, assessing an environmental penalty will not change behaviour, because the company has already done everything that it reasonably can. The environmental penalty thus becomes nothing more than a fine or a tax. We recommend that due diligence be introduced as a mitigating factor or consideration when assessing environmental penalties.

Unattainable threshold: By lowering the threshold from "likely" to "may," it becomes almost impossible for companies to operate, even under their current certificates of approval. It is virtually impossible to prove that something may not have an adverse effect on the environment. Because of this legal uncertainty, a company no longer knows what standards have to be met to be in compliance. We recommend that the current

wording in the Environmental Protection Act and the Ontario Water Resources Act be retained.

Reverse onus/individual liability: There is no practical means by which a director or officer of a corporation can micromanage all systems that are in place to prevent all contraventions. Consequently, the reverse onus provision, combined with the personal liability provision, places undue burden on individuals and will force them to focus their managerial efforts in areas that have little environmental benefit. Attraction of strong corporate directors will be made more difficult. With respect to employees, they cannot predict and prevent catastrophic equipment failures, even if sound preventive maintenance systems are in place. I could liken this to the person who has just had a medical examination by his or her doctor and been pronounced physically fit and then dies of a heart attack when leaving the doctor's office. We therefore recommend that the EPs only apply to corporate entities and not its directors, officers or employees.

Community fund: Although we have no problem with compensating communities quickly for immediate expenses associated with a spill, we do have concerns about the creation of a special fund to do so. Questions of purpose, access, administration and accountability are only a few that arise with respect to this fund.

It is important to point out that the Environmental Protection Act already provides municipalities with a right of compensation from the owner or person in control of a pollutant, and in some circumstances municipalities may be able to recover costs from the Environmental Compensation Corp. or from the Ministry of the Environment. Therefore, we recommend that this fund be dropped and other mechanisms for providing funds on a more timely basis be explored.

In conclusion, we believe in sound legislation that is appropriately focused on the policy objective and that differentiates between responsible and irresponsible behaviour. We believe that the party that spills should pay the costs for responsible cleanup and remediation. We believe in strong enforcement. We believe that people in vulnerable communities should be protected from spills. We believe in upfront consultation. Hindsight is always 20/20. The problems with this bill could have been avoided if the government had consulted with all the stakeholders, including industry, prior to the first reading of the bill.

We hope that our input will be helpful to the committee in its deliberations on this legislation and trust that it will result in a revised and more focused bill that will meet the needs of all Ontarians with respect to spills.

If there is one message we would want to leave with you, it is: This bill is not about spills, although that may have been the original political motivator. It will not accomplish the objective of reducing spills. That is why there has been such pushback from so many stakeholders. In fact, in the EBR posting after first reading of the 164 submissions, 157 were critical of the bill, and many environmental groups did not even respond to the posting. I believe they did not respond because they did not want to appear to be critical of the bill, but were not supportive.

We thank you for your time, and we will be pleased to answer any questions you may have.

The Chair: We would have time for just one question. It is the turn of Mr. Marchese. If you can encapsulate the question and response in about a minute, that would be great.

Mr. Marchese: I had three questions, so I'll limit myself to the only one that is in my hand. Paul Muldoon said that MISA facilities accounted for 84% and 97.9% of reported liquid spills, by volume, in 2003 and 2004, respectively. What do you say to that statement of fact, it appears?

Mr. Norm Huebel: When you talk about statement of fact, I think—

Mr. Marchese: Or statement.

Mr. Huebel: One year or two years do not make a trend. I think you have to examine the spill pattern over the last 20 years and not just over basically a one- or two-year period. You have to look at trends. It's like anything else. You can get blips—

Mr. Marchese: So that's a blip, perhaps?

Mr. Huebel: It perhaps is a blip. The other thing you have to look at when you talk about spills is the environmental impact from a spill. As we said earlier, no one should be exempt from spills. To bring it back to something very simple: Which is more critical, if somebody spills a cup of arsenic or somebody spills 10,000 gallons of ethanol into the water? There's been no differentiation between the spill and the type of spill.

The Chair: Thank you for having come in today.

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CONSERVATION COUNCIL OF ONTARIO

The Chair: Conservation Council of Ontario, please.

Welcome. Please be seated. You'll have 15 minutes to present to the committee this afternoon. If you leave any time, it will be divided among the parties for questions. Please begin by identifying yourself for the purposes of Hansard and then proceed.

Mr. Chris Winter: My name is Chris Winter, and I'm the executive director for the Conservation Council of Ontario. I thank you for the opportunity to present today.

I wish to make three points with respect to Bill 133. First, this bill is needed and long overdue. Second, Bill 133 needs to be set within the context of clear goals and targets for a pollution prevention strategy for Ontario. Third, companies should pay the full clean-up costs for spills out of their own operating costs. Environmental penalties should be that: They should be a penalty, not just a means for recouping cleanup costs.

Bill 133 is needed because the voluntary approach to pollution prevention is stalling. It is needed because we still have spills: 3,700 incidents in 2003 and 3,900 incidents in 2004. It is needed because the number of spills is increasing and because there is no discernable commitment to pollution prevention within the MISA industries.

Seventeen years ago, the Conservation Council of Ontario gave the Lambton Industrial Society, now called the Sarnia-Lambton Environmental Association, an award for environmental leadership.

Twelve years ago, we gave the Canadian Chemical Producers' Association the same award for environmental leadership in establishing the Responsible Care initiative. The award was the Lieutenant Governor's conservation award, and it was the most prestigious environmental award in Ontario at the time. Other winners of the award have included Adele Hurley and Michael Perley for their work on the Canadian Coalition on Acid Rain, Charles Sauriol, Monte Hummel, the Coalition on the Niagara Escarpment, and Energy Probe. The award was managed by the Conservation Council of Ontario and presented by the Lieutenant Governor.

Twelve years ago, corporate stewardship was an innovative approach to pollution. It offered the promise of quick gains in reducing accidental spills. Responsible Care was one of the best, and it deserved to win an award. Chemical companies are better at handling chemicals now than they were 20 years ago, and Responsible Care is one of the reasons why.

But that was 12 years ago. Leadership means that you continue to press ahead. It means continuous improvement. What was at the cutting edge 12 years ago should be the industry norm now, and indeed corporate environmental management systems are much more of an industry norm, a fundamental part of the process for certification as an ISO 14000 company.

However, recent spills data show there has been little overall progress in reducing environmental accidents. Voluntary measures are failing to make headway towards the elimination of pollution and they are failing to accept responsibility for accidental spills. We need a stronger legislative approach that picks up where the voluntary approach fails us.

I consider environmental restoration to be a fundamental plank in any environmental management system. Therefore, I find it strange that Responsible Care does not include a commitment to environmental restoration in the event of a spill. There is a missing principle in Responsible Care—mea chemical, mea culpa—or to paraphrase Saint-Exupery, "I am responsible for my chemical."

Thirty-nine hundred spills a year are not accidents; they are failures in a voluntary management system.

The second point I wish to raise is the need for a clear pollution prevention plan for Ontario, including goals and measurable targets. Bill 133 should be part of a broader pollution prevention strategy set by the province.

Pollution prevention refers to the preferred option of not producing or using hazardous substances in the first place. The Ontario Ministry of the Environment was at the forefront of this movement in the early 1990s through the pollution prevention office, and the federal government was instrumental in establishing the Canadian Centre for Pollution Prevention in Sarnia. This was in the early 1990s.

We need now to re-establish the Ministry of the Environment's leadership role in laying out the timetable and goals for pollution prevention, including achieving zero discharge of priority contaminants, the virtual elimination of all major environmental contaminants and the promotion of alternatives to hazardous chemicals and products. We need to set a target of less than 100 spills by 2008 and for Ontario to be at the bottom of the pack for North America in overall pollutant releases, not at the top.

The third point I wish to raise is with respect to the application of the fines for a community cleanup fund. I know there are many good precedents for applying environmental fines to habitat restoration, and some of them include Kentucky, Wisconsin, Oregon. There are some very good programs in place there where they take the fines and apply them to rehabilitation, not necessarily just recouping the costs but applying them to good environmental projects. I feel that using the environmental penalties to contribute to the cleanup costs of the company that they should already be paying for doesn't make a lot of sense.

What I would recommend is that companies be required to pay the full cost of environmental cleanup and community costs as standard procedure or through an industry-financed liability fund where that money is there up front, and that the environmental penalties be used for a provincial conservation fund, which would promote, among other things, pollution prevention. Fines are nothing to a company. They're a minor dent in profits. For them, the real damage, the real problem is one of image, and image is everything.

As part of a provincial pollution prevention strategy, and as part of Ontario's commitment to a culture of conservation, we need to establish a multimillion-dollar Ontario conservation fund that would be financed through a combination of donations, marketing agreements for conservation products, taxes on over-consumption and environmental fines. Now, if the chemical industry saw their fines being used to finance social marketing programs on the alternatives to hazardous products, then I believe you'd see some real action to prevent spills in Ontario, and we'd all be winners. I thank you for your time.

The Chair: Thank you. We will have time for a round of questions, beginning with Mr. Wilkinson. You've got about two minutes for each party to ask questions.

Mr. Wilkinson: Thank you for coming in, Chris. We appreciate it. I just want to talk about a couple of things. Prior to your submission, we just heard from the Canadian Chemical Association. They're very proud of the program that they're using, Responsible Care. But you were saying that it doesn't include responsibility for remediation. Is that correct?

Mr. Winter: If you look at the principles of Responsible Care—and I'm sure there are some applications where they will say, "Yes, we do commit to the rehabilitation"—the principles of it are community awareness and emergency response, which means they will

contribute to emergency response. It falls short of saying, "If it was our chemical, we are totally responsible."

Mr. Wilkinson: If the company was ISO 14001 certified though, that would then be part of that system. Is that correct?

Mr. Winter: Exactly. That's what I would consider a flaw in the ISO 14000 process, that it deals with environmental management systems. It doesn't deal with accepting responsibility.

Mr. Wilkinson: I believe there's an equivalent in the chemical industry, I think RC 14000. There's an equivalent for that industry.

The other question I had is, there's been a suggestion from others that in an environmental penalty regime there can be some negotiation between the MOE and a company. There have been suggestions made to us that those settlement agreements would be made public, that they would be posted on the Environmental Bill of Rights. Could you comment on whether or not you think that is a wise idea?

Mr. Winter: It's the first I've heard of it, but offhand I would say very much in favour. I think everything should be open and above-board. The more we bring this out into the open, the better. The more the public is aware of the hazards of chemical use and the costs of chemical use, both environmental costs and community costs, health costs, the better off we will be.

Mr. Barrett: Thank you, Mr. Winter, for your presentation from the Conservation Council of Ontario. You state in your brief that Bill 133 should be part of a broader provincial pollution prevention strategy. Is it possible for this bill itself to be amended to have a framework that would actually consist of pollution prevention or spill prevention?

I know in the IPAT report there are 30 recommendations, and much of it does relate to prevention. They indicate that at present in Ontario there is no regulatory requirement for pollution prevention or spill prevention under Ontario environmental legislation. Do you feel in the next couple of days it's possible for us to completely rewrite this legislation to fulfill that need?

Mr. Winter: I think it is entirely possible for you to rewrite this legislation in any way or shape that this committee agrees is desirable. With respect to establishing—

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Mr. Barrett: Do we have enough time, though? I'm concerned.

Mr. Winter: It depends. What I would suggest with respect to Bill 133 is that you proceed with it and build and craft a pollution prevention strategy around Bill 133, where it is just one piece of the program. The environmental leadership program is one piece of it as well. If you're looking at a truly effective provincial strategy for pollution prevention, it has to start with a goal, it has to have measurable targets and it has to have a range of instruments, which include voluntary measures and commitment; the regulatory base, the setting of baseline performance and environmental standards; the enforcement of those; the economic instruments, which includes both the penalties and incentives to encourage companies to be leaders; and public education and public involvement.

Where I'm critical of the lack of a strong provincial strategy is in that we haven't really wrapped it all together and marketed a pollution prevention strategy. We're dealing with some of the pieces of it without understanding why we're doing this. We're doing this because we want to eliminate pollution.

Mr. Marchese: Mr. Winter, a couple of questions. Many jurisdictions elsewhere in the world, including the European Union, have adopted prioritized lists of pollutants and have used those lists as a basis for developing differential pollution prevention, spills prevention, spills contingency, mitigation and notification requirements. I'm assuming you agree with this.

Mr. Winter: Yes.

Mr. Marchese: When you say, "We need to reestablish the Ministry of the Environment's leadership role in laying out the timetable and goals for pollution prevention, including achieving zero discharge of priority contaminants and the virtual elimination of all major environmental contaminants," what does the chemical industry say to you about that?

Mr. Winter: About setting out timetables?

Mr. Marchese: About your suggestion that we do that.

Mr. Winter: The chemical industry doesn't say much to me these days.

Mr. Marchese: They don't talk to you these days?

Mr. Winter: No. No one's really talked to us since about 1995.

Mr. Marchese: That doesn't sound civil to me.

Mrs. Donna H. Cansfield (Etobicoke Centre): We talk to you.

Mr. Winter: Now you do. Now people talk to us again.

Mr. Marchese: Isn't that nice.

"I would recommend that companies be required to pay the full cost of environmental cleanup and community costs as a standard procedure, or through an industry-financed liability fund." What do they tell you about that?

Mr. Winter: An industry liability fund exists in other sectors. I think it's a new idea for this sector. It's just something I put in today.

Mr. Marchese: I see. I thought this was—

Mr. Winter: I haven't broached this with the industry. In fact, it's an idea that I've just developed in response to this notion of a community cleanup fund.

Mr. Marchese: So this is a new idea of yours?

Mr. Winter: But it is based on established precedents in other sectors. If you look at the nuclear industry, there's a $6-billion fund for the cleanup and decontamination of sites and disposal of used nuclear fuel. In the aggregates sector, there's the abandoned pits and quarries fund. There are precedents within other industry sectors,

where money is put up front to deal with environmental problems.

The idea of setting something up for the chemical industry or for the MISA-regulated industries, where they put the money up front that just kicks right into play as soon as there is a spill to deal with the cleanup and the community costs, has plenty of precedent.

Mr. Marchese: Maybe you'll get a call.

Mr. Winter: Maybe.

The Chair: Thank you for having come in today, and for delivering your deputation.

WALLACEBURG ADVISORY TEAM FOR A CLEANER HABITAT

The Chair: Wallaceburg Advisory Team for a Cleaner Habitat, please.

Welcome this afternoon. You'll have 15 minutes to make your deputation to the committee. If you leave any time remaining, we'll divide it among the parties for questions. Please begin by stating your name for Hansard, and then proceed.

Mr. Jim Hasson: My name is Jim Hasson, and I'm the director of research and development for the Wallaceburg Advisory Team for a Cleaner Habitat. I'm honoured by this opportunity to address this legislative committee on behalf of the Wallaceburg Advisory Team for a Cleaner Habitat, or WATCH. WATCH supports the Environmental Enforcement Statute Law Amendment Act as it is currently written.

WATCH is an incorporated not-for-profit environmental advocacy group representing Wallaceburg and surrounding areas concerning environmental protection issues in dealing with government, business, industry and other organizations. Our team was formed in the wake of yet another industrial spill into our source of drinking water, when hundreds of kilograms of a class A carcinogen were released into the St. Clair River in August 2003. Most infuriating to our community was that this spill was not reported for five days. The result was a water ban being issued by the medical officer of health.

Our membership has volunteered its time and expertise for decades to represent community interests on committees such as Great Lakes United, Friends of the St. Clair River, the Binational Public Advisory Council, the St. Clair River Remedial Action Plan, the Industrial Pollution Action Team and a host of other environmental protection committees.

This afternoon, I would like to focus on the recommendations of the Industrial Pollution Action Team report and environmental penalties. On April 19, 2004, Minister of the Environment Leona Dombrowsky announced the formation of an eight-member Industrial Pollution Action Team, or IPAT. The mandate of IPAT was to examine the causes of industrial spills and dangerous air emissions and recommend to the government prevention measures for industry and others. On August 9, 2004, the IPAT report was released to the public and was unanimously endorsed by the WATCH organization.

To quote from the first point of the first chapter of the IPAT report, titled "Concerns Expressed by the Communities":

"In establishing IPAT, Minister Dombrowsky placed particular emphasis on the need for a community-based process and community perspectives on the problem of spills to the St. Clair River. Throughout our work, we have been moved by the profound impact that repeated spills to the river have had and continue to have on local residents. The communities are deeply concerned about the short- and long-term impacts on human health of repeated, serious spills to air and water in the St. Clair River area, and the implications those spills may have for aquatic and terrestrial habitats. Community representatives repeatedly reminded us that this is a long-standing problem, with many spills over many years. They are of the view that offenders have not received sufficient (or in some cases any) penalties for spill events, and may be considering spill-related fines as simply the 'cost of doing business.'"

The IPAT report includes 15 findings. To quote from "Finding 2, Current approaches to managing spills are not sufficiently risk-based":

"[W]e believe there may be potential for a formalized system of tiered penalties, along the lines of 'misdemeanor' and 'felony' offences, with ticket penalties for minor offences and in-depth investigation and enforcement for major offences. (Such an approach must however be carefully evaluated; we are concerned that a 'ticket' system used inappropriately could in fact trivialize serious offences.) Major offences could force a recall of the certificate of approval and an immediate order to correct the problem."

The IPAT report included 35 recommendations. To quote IPAT recommendation 7, "We recommend that the ministry investigate the potential of a comprehensive risk-based approach to spills response, including a tiered enforcement strategy employing tickets for minor offences, and more in-depth investigation and enforcement action for major offences."

Other IPAT findings detail how downstream communities are not recouping the full costs of spills and recommends that the ministry seek ways to institutionalize the delivery of a portion of the fees and fines associated with spills management to the parties that bear the costs of spills. That IPAT recommendation is another component of Bill 133.

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WATCH supports the Environmental Enforcement Statute Law Amendment Act as it is currently written. If our organization were to be so bold as to recommend one enhancement to Bill 133, it would be to request that the environment ministry publish an annual report for the public that includes the number of spills reported, the number of investigations conducted, the number of penalties awarded and the number of penalties collected.

Bill 133 is all about protecting communities. WATCH asks this legislative committee to support the recommendations of the IPAT report, many of which are

admirably addressed by the Environmental Enforcement Statute Law Amendment Act. Thank you very much for your time.

The Chair: Thank you. We'll have some time for questions, beginning with Mr. Miller. You'll have just a touch over two minutes for your questions.

Mr. Miller: Thank you for your presentation today. There have been some earlier presenters who mentioned the IPAT report. The acting medical officer of health attached that to his submission, and BP Canada Energy also mentioned the IPAT report and talked about pollution prevention and many of the recommendations made in the IPAT report, which don't seem to have been picked up in Bill 133. I was surprised to learn from one of the presenters that companies aren't required to have spill prevention plans. I would have thought that would make sense in this bill. Do you have any comments about that?

Mr. Hasson: Sure. I don't think the intention of Bill 133 was to address all 35 recommendations of the IPAT report. The IPAT report covers off some of those recommendations very well. Some of the additional IPAT recommendations were to develop detailed spill contingency plans and to bring up to date the MISA regulatory requirements, which have not been updated since 1990. There are 35 recommendations in the IPAT report, and certainly Bill 133 does not address them all. However, it is a very good start.

Mr. Miller: The first one is that Ontario's environmental management framework is largely reactive, not preventive. I get the impression from many of the industry people who have been here that they would like to work with the government and the Ministry of the Environment to try to prevent spills, but a few aspects of this bill—there have been about four key ones that have been highlighted, but they feel especially the EPs, environmental penalties, may actually hurt the end goal, which is prevention of spills into the environment. Any comments?

Mr. Hasson: I don't see environmental penalties as hurting prevention of spills at all. Industry wants to work with the ministry and with the communities. As our good neighbours such as the Sarnia-Lambton Environmental Association have stated, there's a lot of good work that's happened over the last 20 years. However, our community continues to have to close their fresh water intake. Spills may have been reduced by 90% from 1985 until 2005; just imagine how our community felt in 1985.

Mr. Marchese: The previous speaker, Mr. Winter, made a suggestion and recommended that companies "be required to pay the full cost of environmental cleanup and community costs as a standard procedure, or through an industry-financed liability fund." Did you have a comment on that? Do you find them useful suggestions?

Mr. Hasson: I do find them useful suggestions. There are more costs involved than most people may realize. It's not just a matter of shutting off your fresh water intake, bringing in bottled water and cleaning up the impairment of the river or environment. During the water ban of 2003, there were dentists' offices that had to close their business for the day; there were grocery stores that had to throw out produce. It turned our small community upside down. There's a whole lot more involved to compensation in the community than what most people might realize.

Mr. Marchese: Sure. We had the minister come here last week, and she stated that she was going to bring forth some amendments. A whole lot of people are concerned about not having seen them and would like to debate them. We have to introduce amendments by tomorrow, and then we are into clause-by-clause on Thursday, which means that most of you won't see them. You will, but they will be debated for clause-by-clause and during that time there isn't much room for changes, as you probably know. Usually, the government moves its amendments and usually has the numbers to win its amendments.

Does it concern you in terms of what amendments she might bring forth that you haven't seen, that it bypasses the usual process, second reading? We haven't had—

The Chair: I need you to be very brief on the response, please.

Mr. Marchese: I'll stop there.

Mr. Hasson: I'm not overly concerned with whatever recommendations might be brought by Environment Minister Leona Dombrowsky on this bill. I think the environment ministry has certainly shown that its heart is in the right place and that it is interested in protecting communities.

Mr. Wilkinson: Thank you, Jim, for coming. You really provide for us the voice of people who are downstream and are having to deal with this reality on a day-to-day basis. Just to give you some assurance, when the minister was here on Thursday—and following up on a point repeatedly made by the opposition, of which I must repeatedly remind them. The minister plans to introduce an amendment that would make spills prevention contingency plans mandatory.

It's interesting; as we do some of the analysis, we have a lot of companies that voluntarily have spills contingency and/or spills prevention. In some industries there are very few spills, and then in other industries, even where they have that voluntary regime, there are still a vast number of spills. Obviously, some work has to be done there.

From a personal basis, I had some brief experience in my hometown of Stratford where there was a water advisory and then a boil-water advisory. In your communities, did you have a time when that water intake was shut for about three or four days where there would be a question of risk about the fire department having enough water pressure? Is that correct?

Mr. Hasson: Absolutely. We were very fortunate, during a spill in February 2004 of 150,000 litres of an industrial solvent, that we did not have a major fire while our water intakes were closed down. Also, we were only technically capable of shutting our water intake down for approximately two days without risking further impairment. But keep in mind, even after two days, when our

medical officer of health, Dr. David Colby, who actually addressed this committee earlier, had recommended opening the freshwater intake, there were still trace amounts of MEK in the water, which residents of course would prefer not to have drunk. However, when you're in a situation where your industry is going to have to shut down—our automotive parts industry that does just-in-time delivery of parts—there are a whole lot of issues involved.

The Chair: Thank you for having come in today.

1700

CANADIAN VEHICLE MANUFACTURERS' ASSOCIATION

The Chair: The Canadian Vehicle Manufacturers' Association, please.

Good afternoon. Please be seated. Welcome to you. You have 15 minutes to present to us. In the event you leave any time, we'll divide it among the parties for questions. Please identify each speaker for the purposes of Hansard, and then proceed.

Mr. Mark Nantais: Thank you very much, Mr. Chairman, and good afternoon, members of the committee. My name is Mark Nantais. I am the president of the Canadian Vehicle Manufacturers' Association. I brought with me today some experts from our member companies. From Ford Motor Co., I have Lisa Kozma; from Daimler-Chrysler Canada, Paul Hansen; and from General Motors, Bryan Swift.

Let me begin by simply saying that our industry has quite a substantiated track record in terms of environmental performance and voluntary actions. We were probably one of the first ones in Canada to put in place the ISO 14001 environmental management systems, and clearly, that system's continuous improvement is one of the principles that is a cornerstone of all their activities.

Secondly, we were probably the most successful sector to put in place a voluntary initiative on pollution prevention itself, called the Canadian Automotive Manufacturing Pollution Prevention Project. That's a project which has delivered a 404,000-tonne reduction or elimination of toxic substances or other environmental contaminants of concern.

Thirdly, we've looked beyond pollution prevention and even into how we use the energy in our plants, and have made continuous improvement in the energy efficiencies of all our plant operations in Canada.

As it relates to Bill 133 specifically, we do remain quite concerned that Bill 133, as it is currently written, is unclear in its scope and intent, proposes overarching changes to the long-standing legislative environmental framework in Ontario and, as a result, will not achieve the objective of reducing spills to Ontario's waters.

In our view, Bill 133 creates uncertainty in the following ways: It is unclear as to what constitutes permissible discharges in Ontario. It discourages, quite frankly, effective environmental management. It discourages the best-qualified people from accepting roles as officers, directors or environmental representatives of organizations. On the other hand, it encourages an adversarial relationship between the Ministry of the Environment and the regulated community, and may well have a negative effect on Ontario investment and innovation. Further, it may well erode principles of risk management and risk assessment.

With respect to specific concerns, we essentially are going to outline three for you today, with roughly three priority recommendations. The first is the significant lowering of the emission and reporting thresholds. Many of the current provisions of the Environmental Protection Act regulate discharges that "cause" or are "likely to cause" an adverse effect. The bill proposes amendments to provisions of the EPA to regulate discharges that "may cause" an adverse effect. This would be a fundamental change to the balance in the current environmental regime in Ontario and would create great uncertainty as to permissible discharges.

The proposed amendment to the definition of "deemed impairment" in the Ontario Water Resources Act, which extends potential liability to discharges that may enter the water, would have a similar effect. Uncertainty in the permitted threshold for emissions and reporting will make it extremely difficult for organizations to have certainty that their operations are in compliance with all applicable legal requirements. For example, section 14 would actually prohibit the discharger or causing or permitting the discharge of any contaminant that causes or "may" cause an adverse effect. The proposed expansion of the prohibition to discharges that "may" cause an adverse effect would create an extremely broad prohibition and raises the concern that many industrial discharges, including those permitted by the Ministry of the Environment or those within MOE standards, could actually be in contravention of the act, as they "may" have the possibility of causing an adverse effect.

As previously stated, the use of the word "may" would cause great uncertainty as to what environmental discharges are actually permissible in Ontario and, when combined with the proposed environmental penalty provisions, may discourage some companies from self-reporting. For a business, having certainty is an operational imperative, and anything that contributes to a lack of certainty may impede current investment or act as a deterrent to attracting new investment in Ontario. Furthermore, this change in threshold will jeopardize the current systems that businesses have put in place for the last 30-plus years to meet their environmental regulatory obligations in this province.

Additionally, the proposed fines and penalties under the EPA and OWRA have been increased significantly. While CVMA acknowledges the polluter-pay principle, the imposition of quasi-criminal fines and jail terms for individuals for discharges which "may" cause an adverse impact on the environment is inappropriate.

The proposed powers of Ministry of the Environment directors and officers to issue orders, notwithstanding that discharges are permitted under certificates of

approval, where discharges "may" cause an adverse effect, gives the ministry far too much discretion. This type of discretion could be subject to abuse and may result in inconsistent enforcement across the province.

We would therefore recommend as follows:

The proposed amendments to change the current threshold from "likely to cause" an adverse effect to "may" in the EPA, and from "may impair water quality" to "may enter the water" in the OWRA, should be removed from this bill. If the government desires consistency between the EPA and OWRA, then the EPA threshold of "likely to cause" should be the one used. Secondly, strict boundaries need to be placed on the powers given to directors and provincial officers to ensure fair and consistent application across the province.

The second item I'd like to address is director and officer liability. The bill proposes a significant expansion to the existing liabilities for directors and officers of companies and organizations. Currently, directors and officers of corporations have a duty to take all reasonable care to prevent the corporation from causing or permitting an unlawful discharge. The bill proposes that every director or officer has a duty to take all reasonable care to prevent the corporation from committing any contravention of either the EPA or OWRA, however minor it may be. Directors and officers would be guilty of a quasi-criminal offence, with the potential for fines of up to $4 million per day and jail terms of up to five years until they proved themselves innocent. This proposed broadening of director and officer liability would likely impact the ability of organizations to obtain the most qualified directors and officers, particularly if there is no clarity as to what the directors and officers are actually expected to do.

The proposed amendments raise fairness issues. They will unfortunately have implications far beyond environmental matters, and it is not clear that they will result in any improvement to the environment. CVMA members do not support the changes proposed regarding director and officer liability in the bill. Those obligations are already laid out in the case law decision as it relates to R. v. Bata Industries Ltd. If the direction is to enshrine the Bata decision in legislation, the specific obligations for directors and officers need to be clearly defined.

We would therefore recommend that the current and existing obligations for directors and officers of companies should be maintained, as the Bata case already exists in case law. Therefore, the changes proposed in the bill, in our view, are unnecessary. Alternatively, if there is a need to further enshrine director and officer responsibility, then we would recommend that the provision require directors and officers to ensure that the organization establishes an environmental policy and program and, where applicable, a spill prevention plan.

The third area is the area of environmental penalties. The Ontario government can meet its environmental objectives by enforcing existing legal requirements using existing tools and, in our opinion, does not require environmental penalties. The environmental penalty provisions in the proposed amendments to both the EPA and the OWRA raise real fairness issues, and may raise constitutional issues under the charter. The full impact of environmental penalties cannot be determined without a review of the regulations, as environmental penalties would be issued by the director for certain contraventions subject to the regulations. There appears to be a reversal of the burden of proof as to the elements of the offence at the tribunal for certain orders relating to discharges, and only limited appeal to the courts on questions of law.

The environmental penalty provisions specifically provide that the penalties are absolute liability offences, applying even where a person has taken all reasonable steps to prevent the contravention and would therefore be innocent in the event of a prosecution. The concept of due diligence was initially introduced by the judiciary to provide fairness in the area of regulatory offences. Due diligence provides an incentive to implement effective environmental management systems to ensure compliance with environmental laws.

There does not appear to be any basis to conclude that an absolute liability regime would improve environmental performance. Such a regime would be extremely unfair, penalizing companies as well as individuals, even though they have done everything reasonable in the circumstances. This is particularly the case, as the potential fines for individuals, including directors, officers, and employees of an organization, are up to $20,000 per day. These monetary penalties, which are uncapped in the proposed legislation and which appear to apply to all contraventions of the EPA, OWRA, associated regulations, orders and approvals, may also be sufficient to create the stigma for an innocent individual, which would attract the protection of section 7 of the charter, security of the person. As a result, environmental penalties should not be applied against individuals.

In order to ensure that significant environmental penalties are only imposed after proper review to ensure appropriateness and consistency across Ontario, environmental penalties should only be issued by a director of the MOE. This will also ensure that the relationships between organizations and the MOE field officers are not impaired. Finally, both environmental penalties and a prosecution may occur for the same offence, thus raising the potential for double jeopardy.

1710

As it relates to environmental penalties, we recommend, if new provisions for environmental penalties are to be created, that the following conditions should apply: The penalties should be limited to a defined scope—that is, spills to water—and not apply to all contraventions under the EPA or the OWRA; they should only be issued by the director; penalties should only apply using the existing threshold of "likely" to cause an adverse effect; they should not apply to individuals; due diligence should be available as a complete defence to encourage environmental improvement; there should be a cap on environmental penalties and there should be a six-month time limit for issuing an environmental penalty; and

environmental penalties paid should be a factor in setting fines in the event of a prosecution.

In conclusion, Bill 133, as currently drafted, would impose an unnecessary burden on environmentally responsible companies with no associated environmental improvement. While the government has indicated that Bill 133 was intended to encourage compliance, level the playing field and improve accountability, we do not see this bill meeting those objectives. If amending Ontario's regulatory environment is the chosen path to achieve these objectives, the government must ensure that it develops effective legislation. Let's remember, pollution prevention is a mindset; it's a behaviour which needs to be encouraged. But regulating behaviour is a very difficult task. We believe the provisions must be realistic, justified and focused on meeting clearly defined objectives. The approach must deal with the current realities of our industry and other Ontario businesses. Maintaining and attracting new investment is critical to our province's ability to address its environmental obligations and ensure that the economy and the environment both benefit.

The Chair: Thank you. We will have time for perhaps one focused, succinct, less-than-one-minute question and response from each party, beginning with Mr. Marchese.

Mr. Marchese: Can you ask questions like that?

One quick question, Mr. Nantais: Do you get the impression the minister is of late listening to the concerns that you're raising?

Mr. Nantais: I think the minister has had the opportunity to receive a great deal of input. I think the minister, from my point of view, seems to be receptive to what she's hearing. Of course, from our industry's perspective, we hope that she will respond in a very constructive and favourable way.

The Chair: Thank you. Mr. Wilkinson?

Mr. Marchese: Was that a minute?

The Chair: That's about it.

Mr. Marchese: It seemed like 30 seconds to me.

Mr. Wilkinson: Thanks so much for coming in. I know that your association has been one of the groups that has been quite active on this file for the last six months. I think this whole process of having something that's transparent, allowing this bill to get in here before first reading—I know the minister made a number of suggestions on Thursday, amendments she'll be introducing that address some of the practical concerns, though they would not change the intent of the bill, as far as I'm concerned.

Just to be clear, in your association, my understanding is that it's just the one Ford casting plant in Windsor that's actually MISA-regulated at the moment. Is that correct?

Mr. Nantais: I'll of course let the Ford representative respond to that.

Ms. Lisa Kozma: Yes, that's correct.

Mr. Wilkinson: Your companies overall are almost all ISO 14001?

Mr. Nantais: All the CVMA member companies are, and the final one is underway.

Mr. Wilkinson: That's great, thanks.

Mr. John O'Toole (Durham): Thank you very much. I do want to respect the importance of your industry while asking a question. I agree; the certainty of investors as well as the industry for a long-term commitment to the environment would certainly require clarification on the "may" clause as well as "likely." Are you satisfied that the current negotiations with staff are advising the minister to make appropriate amendments to clarify, with some certainty, this ambiguousness on the legal language of "may"? It just leaves it wide open to the discretion of some enforcement officer who has a problem. Are you satisfied? Or is this something very subtle but very important?

Mr. Nantais: I'm not going to say that we're not satisfied, but you hit on the very issue which is of paramount importance, not just to our industry but—

Mr. O'Toole: It's a case of law, and there will be challenges to that.

Mr. Nantais: Exactly. It removes the due diligence defence. It essentially makes it wide open, as you suggest, with a great deal of potential for inconsistency.

Mr. O'Toole: Do you have a clear recommendation here? I see it on the paper, where the minister has to change the definition from "may" to "likely" to cause. That's your recommendation here, as I understand it.

Mr. Paul Hansen: No, we have none at this time.

The Chair: Thank you for having come in today and for your deputation before us.

ONTARIO FOREST INDUSTRIES ASSOCIATION

The Chair: Ontario Forest Industries Association, please.

Good afternoon and welcome. You have 15 minutes to present before us this afternoon. If you leave any time, we'll divide it among the parties for questions. Please begin by stating your name for Hansard and then proceed.

Mr. Craig Gammie: Thank you, Mr. Chairman and members of the standing committee on the Legislative Assembly. My name is Craig Gammie, manager of environment and energy, Ontario Forest Industries Association.

The sector I represent is a significant contributor to the Ontario economy and has an excellent environmental improvement record. There's a separate package that logs the data on that environmental improvement record in your green package. I'm not going to go through it. I'm going to ask you to skip down five paragraphs, so I'll allow more time for questions.

We completely agree that there's a spills issue, a spills problem in Ontario, we completely agree that the status quo is not acceptable, and we completely agree that improvement is absolutely necessary.

We applaud the enthusiasm and dedication that the Minister of the Environment has brought to bear to minimize or eliminate spills and to get compensation quickly

to municipalities. The identification of the problems, the setting of improvement objectives, the IPAT process, the SWAT team working hard in southern Ontario—all commendable. But Bill 133 is not commendable. Bill 133 is so wrong, so far off course, that it needs to be scrapped so that we can make a fresh start and get the job done right. Bill 133 is in fact holding us back.

One of the shortcomings of the bill is that it will fall far short of what is potentially achievable in terms of spills reduction. In terms of environmental policy, Bill 133 is an environmental underachiever. The second shortcoming is that the bill is so draconian, it will discourage people from working in Ontario facilities, will discourage people from managing facilities in Ontario and will discourage people from investing in Ontario.

With a bill that is both an environmental underachiever and an economic threat, we thought it only reasonable to ask if there might be a better way to address the spills issue, the compensation issue and the retribution issue. The answer is a clear yes, and I will suggest some alternatives very shortly.

First, I would like to elaborate briefly on some of our concerns about the bill. A more detailed commentary is in our formal submission.

First is the new "may cause" standard. The "causes or is likely to cause" words in the current legislation are, in a sense, a definition of what is a violation. Lawyers tell me that it's also a bar or a hurdle that the prosecutors must get over in order to get a conviction. It's also a bar under which those with normal, acceptable, routine emissions pass without being charged or hit with an environmental penalty. There may be some grounds for clarifying that bar. There may be even grounds for lowering it. But Bill 133 lowers the prosecutors' bar right to the ground. This is simply not defensible.

Some of my colleagues have defined that as introducing uncertainty. I wouldn't call it uncertain at all. It's on the ground. It's very certain. It's absolutely right on the ground. Putting the bar on the ground is great for prosecutors. There's no doubt their conviction rate will increase.

But think about the bar from the perspective of an employee who is dedicated, conscientious and careful and is proud of what she and her colleagues have accomplished environmentally and has reported for years that discharges in her area have been well within regulated limits, have been well within certificate of approval limits and have been and are considered in the community as acceptable and permitted and for years have been easily and properly under that bar, off the radar.

With Bill 133, the bar is now on the ground and that same ongoing, routine discharge is now an offence. Bill 133 unreasonably changes the standard of what is a violation so that just about any discharge will be characterized as prohibited and subject to fines and penalties.

Lowering the bar with the "may" clause makes it easier to convict the clear offences, but it also makes it a cakewalk to get a conviction for what is not properly a violation.

It's worse for environmental penalties, because it's the same bar on the ground without even any controls to ensure that the accuser steps over it properly.

The very same argument can be made for the deemed impairment provision for the Ontario Water Resources Act. It's just another bar moved right down to the ground so that every emission is a violation.

We can talk about lowering bars. But if we're going to lower the bars, let's look not only at the benefit for the prosecutors in the community but also the consequences for those who are already doing a commendable job.

1720

Putting the bar on the ground is shameful and unacceptable. But the new fine structure is a concern mostly because of the connection to the new standard. With Bill 133, it would be a cakewalk for a prosecutor to carry a trivial or even innocuous discharge over the bar and into much higher fines and even some new minimum fines. All sense of balance is gone.

The minister indicated last Thursday that many other jurisdictions are using environmental penalties and it's time for Ontario to catch up. I took that to mean Bill 133 is that catch-up. But the issue is that Bill 133 is nothing like a lot of these regimes in other provinces. In fact, in BC, an environmental penalties regime has been introduced after it was introduced in Ontario in 2001 by the previous government, and it resembles exactly what is in the current Environmental Protection Act related to environmental penalties. It doesn't look anything like Bill 133.

Bill 133 doesn't just catch up. By setting the violation bar on the ground and squelching all legal rights, Bill 133 goes far beyond catch-up into territory where no other regulator in any democratic, free society would dare to even suggest going.

Legal rights, in the context of environmental penalties: the legal right of employees, directors and companies to impartial hearings is suppressed; the right of presumption of innocence is suppressed; the right not to be charged twice for the same offence is suppressed; even the right to present a full defence is suppressed—but it's not suppressed in the BC AMP legislation.

Any one of these in isolation is absolutely unacceptable, but when you start putting two or three of them together, you get a piece of draconian legislation. There is no need for any of it, because the problems at hand can be addressed without having to settle for environmental underachievement and without the negative prosperity consequences.

How would we address the problems? We spent a lot of time identifying the problems that Bill 133 was intended to resolve. We found fair consensus among all involved that there are three main issues and three corresponding objectives. These are the three in the first table of my remarks document.

The three problems are: too many spills; it takes too long to get compensation to municipalities; and it takes too long to get retribution for carelessness.

The objectives are just the opposite: eliminate spills; instant source of funds for municipalities; and punishment within months—although some people wanted it within days. Some people want punishment for the careless within the hour.

We have also shared with MOE officials and others two alternative packages to address these issues. They're in the second, larger table in my comments. Both alternatives have three components to address the three problems identified. Spills prevention and control regulations are common to both alternatives, and they're the flagship of the alternative packages.

There are examples of spills prevention regulations in other jurisdictions. Two examples currently in place have been attached behind our formal submission. The first is an emergency response plan requirement in section 11 of the pulp and paper effluent regulations made under Canada's Fisheries Act. We're already regulated. The second is part 8 of the Canadian Environmental Protection Act. It's also included in your package. There are lots of other examples around the continent and around the world.

To address the problem of delayed compensation to municipalities, we suggest either a government fund, replenished by court-assigned costs plus interest and a small surcharge to build up the fund, or administratively assigned cost recovery payments. In the table, I call this AMP but it's not really AMP that I'm talking about. I want to get rid of the word "penalties." I will take it out of a subsequent presentation.

To address the concern that retribution for carelessness takes too long, we submit that pushing justice aside just to get speedy "justice" is nothing less than lynch-mob vigilantism and we should have none of it. We can address the spills frequency and address the compensation to municipalities, but when it comes to retribution for carelessness, we're going to have to learn just to be a little more patient. Justice takes time, period.

We submit that either of the alternative packages in the table will achieve more than Bill 133, and at far lower cost, but to get there means withdrawal of the bill and starting fresh.

On Thursday, I think, Mr. Marchese called it odd that we were making deputations on a November 2004 version of the bill while the minister's draft 2, with many amendments, is sitting in her office. We've heard about them but we haven't seen them. I'd describe it as bizarre. What it means is that in the clause-by-clause analysis, you might spend two or three hours looking at a particular clause on Thursday that doesn't even appear in the draft on the minister's desk. This, to me, is a waste of legislators' time and it's a waste of our time—time we should all be spending on solving the problem, time we should all be spending on spills prevention regulations.

I hope you have the courage to recognize what a huge mistake Bill 133 is, and has been, and what a huge mistake it would be to throw good resources after bad. I hope you will drop Bill 133 completely so we can get on with the spills prevention regulations and then address instant municipal compensation. We're ready to help. Thank you.

The Chair: We have about one minute per party for questions, including the question and the answer.

Mr. Wilkinson: Thanks for coming in, Craig. It's good to see you again. I would assume that the concept the minister mentioned last Thursday about mandating spills prevention, about raising the bar for all, which I believe all of your members have, would be a good idea.

Mr. Gammie: Absolutely. We support that, but not as Bill 133.

Mr. Wilkinson: I guess my concern is, as I look at the stuff from the ministry here, of the MISA members that are affected in your industry, we had spills at Abitibi in Fort Frances, Iroquois Falls, Thunder Bay, Kenora and Thorold; Bullwater in Thunder Bay; Cascade in Thunder Bay; Domtar in Espanola and Cornwall; Georgia-Pacific in Thorold; Interlake Acquisition in St. Catharines; Kimberly-Clark Canada in Terrace Bay; Marathon Pulp in Marathon; Norampac in my hometown of Trenton; Strathcona in Napanee; Tembec in Smooth Rock Falls, and Weyerhauser in Dryden. Sir, you have spills prevention and spill contingency, and in the last two years, all of those companies spilled.

Mr. Gammie: You've done your homework. What's your question?

Mr. Wilkinson: My question is, surely there is a need for Bill 133?

Mr. Gammie: Absolutely. I did not suggest that—

Mr. Wilkinson: You said we should withdraw it.

Mr. Gammie: I did not suggest that anybody in my sector should be exempt from spills prevention regulations. We need to get on with it.

Mr. Miller: You're here representing the second-largest industry in the province. The automobile industry was just before you, and they commented that they don't think this bill will actually achieve the goal of preventing spills. I gather you agree with that. What sort of approach do you think government should use in working with industry to try to reduce spills? I'm sure industry wants to reduce spills as well; at least, I'm guessing it.

Mr. Gammie: I agree. I think the bill is likely to have an effect. I believe any draconian legislation will have an effect on compliance. What I'm saying is that there is a better way, and that better way is spills prevention regulations plus a compensation fund.

Mr. Marchese: Mr. Gammie, the Industrial Pollution Action Team makes this recommendation on page 20: "We recommend that the ministry consider adopting a comprehensive risk-based approach for classifying, preventing and managing spills in Ontario, including creation of unambiguous definitions of spills to air and water." Any comment on that?

Mr. Gammie: I think it's excellent. There's a lot we can learn from the IPAT report that we can use in developing spills prevention regulations, including those comments and the concept of prevention, control, mitigation and compensation. Yes, I think IPAT is right on, but Bill 133 does not follow the IPAT report.

The Chair: Thank you very much for having come in today. That concludes your deputation.

Mrs. Cansfield: Mr. Chairman, could I ask the gentleman for a clarification?

The Chair: Go ahead.

Mrs. Cansfield: You made a comment about IPAT, but if I go into your Ontario Forest Industries Association submission, it actually says:

"When the whole IPAT report is read carefully, complete with caveats and nuances as above, the report, in our view, says....

"While the IPAT report is full of interesting insights and ideas, we think that there is in the IPAT report no foundation...."

The Chair: That would be a question and not a clarification of what was said.

Mrs. Cansfield: I'm just asking, because he said one thing, coming from the industry, but it says another in the brief.

1730

The Chair: You're welcome to continue that round of questioning outside the proceedings.

Mr. Barrett: On a point of order, Chair: This follows from the presentation by the Ontario Forest Industries Association. I wish to put forward a motion to withdraw and replace Bill 133, and I have this in writing for the clerk.

The Chair: This motion has already been made and voted on, Mr. Barrett.

Mr. Barrett: This motion is a call to replace Bill 133 as well. It's different from the previous motion.

The Chair: Please read it.

Mr. Barrett: Does the clerk need to see it first?

The Chair: No, go ahead and read it.

Mr. Barrett: Thank you. A motion to withdraw and replace Bill 133:

Given that to get Bill 133—

Mr. Mario Sergio (York West): Mr. Chair, with all due respect, the motion is out of order.

The Chair: The Chair will rule on the motion after having heard it.

Mr. Barrett: Given that to get Bill 133 to an effective yet fair and balanced state would require almost total amendment.

Given that an amended version of the bill already exists but we are all using up valuable time working on an obsolete draft.

Given that it would be an unfortunate waste of good resources to find ourselves working on clauses of the bill that have already been removed by the minister's office.

Recommend that we finish the hearing, then drop the bill completely and instruct the ministry to immediately begin working on spills prevention regulations, using the sound work of IPAT as a foundation, and that the ministry begin very soon working on a fair, sensible measure to get compensation quickly to municipalities.

The Chair: Those in favour?

Mr. Barrett: I'd ask for a recorded vote.

The Chair: Recorded vote.

Those in favour? Those opposed? I declare the motion lost.

SIERRA LEGAL DEFENCE FUND

The Chair: Sierra Legal Defence Fund, please.

Good afternoon and welcome. You have 15 minutes to address us this afternoon. If there is any time remaining, we'll divide it among the parties for questions. Please begin by identifying yourself for the purposes of Hansard, and proceed.

Mr. Robert Wright: My name is Robert Wright. I'm a managing lawyer with the Sierra Legal Defence Fund here in Toronto. We've already handed out our summary of submissions, and prior to that we made a more detailed response to the EBR registry notice.

I'm going to focus on the need for environmental penalties, then I'm going to look at the Environmental Protection Act and the change from "likely to occur" to "may occur," and, finally, deal with the OWRA "deemed impairment" clause.

We are particularly supportive of those provisions, as we are supportive of the act. We are recommending that it be passed unamended, unless the amendment is to tinker with improvements which have been suggested in our paper.

Our experience with these issues comes from numerous private prosecutions, and also participating in prosecutions brought by the ministry. In particular, we've had one recently with the city of Kingston, and our experience there is that in some cases it takes up to five years for prosecutions to wend their way through the court, with uncertain result.

Regarding need, we think it's pretty clear from the lack of successful prosecutions that these environmental penalties are going to fill a real void in the enforcement process. They are civil penalties short of prosecutions, and there is a huge gap now, we feel, in enforcing the legislation, in particular the Environmental Protection Act and the Ontario Water Resources Act.

I've already mentioned our experience with prosecutions that we have participated in with the ministry, and those are only the most egregious ones. So if those take five years to wend their way through the court with the best evidence possible, you can imagine the roadblock in getting them going in the first place.

I'd like to point out to you in your deliberations section 14 of the Environmental Protection Act, which reads as follows: "Despite any other provision of this act or the regulations, no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect." That's the clause that we feel is key to be amended to the word "may," as proposed in the act.

The other key clause that you should be mindful of when you're dealing with the clause-by-clause review is section 30 of the Ontario Water Resources Act. That says, "Every person that discharges or causes or permits

the discharge of any material of any kind into or in any waters or on any shore or bank thereof or into or in any place that may impair the quality of the water of any waters is guilty of an offence." That is the preferred wording.

The act will make the wording of the Environmental Protection Act consistent with the OWRA. The reason this is important is that the OWRA deals only with water. Under the Environmental Protection Act, you're also dealing with land and air emissions. The problem with the standard of "likely to occur" is that it is very difficult to institute any proceedings regarding air emissions.

Contrary to what the previous two speakers said, in our view, changing the wording to make it consistent with the OWRA is the appropriate response, and that is the level we should be aiming for, not the lower threshold. We put it as the lower threshold—lower in the sense of being less effective—of the Environmental Protection Act.

The previous gentleman indicated that, in his view, the wording change left wide open the circumstances in which a corporation would be prosecuted. In our view, not changing it would leave wide open the arguments of defence counsel, who consistently and successfully argue against convictions based on the existing wording.

I refer you as well to what we use as the bible. It's the Prosecution and Defence of Environmental Offences written by Berger. There he refers to a case, R. v. Dow Chemical, and says, "An Ontario court judge has ruled that a charge of pollution may be made out under the EPA only when, in addition to a discharge into the environment and an adverse effect, there is evidence that the adverse effect was not a direct result of the discharge but a consequence of a polluted natural environment." Even the courts are confused about the existing wording. That phrase, "the consequence of a polluted natural environment," was rejected by the Court of Appeal, but it's evident that the courts are having trouble with the wording as it exists in the EPA.

Berger concludes, "Undoubtedly, to address the types of cases like Dow Chemical, where courts struggled with the threshold of environmental risk required to sustain a pollution charge, Bill 133, the Environmental Enforcement Statute Law Amendment Act, proposes to lower the threshold for pollution offences to mere potential harm. Cases which would have been passed over in the past will now be pursued with renewed optimism." They're talking about prosecutions there, but in fact I think you will find that most cases fall under the environmental penalties regime and are dealt with there. I think it unlikely that matters will proceed also by way of prosecution unless they are really serious offences.

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I'd like to turn now to the "deemed impairment" provision under the Ontario Water Resources Act. We look at it often from the aspect of the Fisheries Act, which is the federal legislation dealing with water. What we have at the moment is better protection of fish and fish habitat under the Fisheries Act than we have under the OWRA. The "deemed impairment" amendment will make that provision equivalent to, and as effective as, the Fisheries Act. Surely the people of Ontario are deserving of at least equal protection under our Ontario Water Resources Act as the fish are under the Fisheries Act. The essence of that provision is that you look at not only the effect on the receiving waters, which is something we argued recently in the Kingston case and is also an issue in another case before the courts now involving Inco, you look at the substance going into the water. That is the effect of that provision. That is what the Fisheries Act does. There is no reason why we shouldn't have the equivalent under the Ontario Water Resources Act.

The previous speakers also indicated they felt there was a risk that existing permitted emissions will become violations or subject to environmental penalties. You must remember that there is already essentially a licence to pollute up to a certain level under our legislation. We are not starting from ground zero. The bar is not on the ground; the bar is already significantly above the ground. So there is no fear here of lowering the bar to the ground, as was suggested.

In summary, we strongly support the bill in its present form. We ask that it not be watered down. There are very good reasons why those specific changes are necessary for enforcement of the environmental laws in Ontario. We urge you, if nothing else, do not water down those provisions. Let's leave a legacy for our children, for future generations. We want a legacy that has teeth and that we can be proud of. In our view, this bill will absolutely reduce spills, in answer to a question asked previously. Thank you.

The Chair: Thank you. We'll have about two minutes for each party to ask questions, beginning with Mr. Barrett.

Mr. Barrett: Thank you, Mr. Wright and the Sierra Legal Defence Fund. We have a direction from the minister as far as amendments. Some would weaken the bill, in your view, I imagine. Some would strengthen it. The minister has indicated that more emphasis on spill prevention is required. She does indicate in her presentation that environmental penalties will encourage companies to take action to prevent spills. Looking at the IPAT report, Dr. Heathcote, in finding number 1, makes reference to prevention. "It appeared to us that there was no regulatory requirement for pollution prevention or spill prevention under Ontario environmental legislation. Generally speaking, we found no preventive regulatory framework at all."

I know your presentation doesn't really touch on prevention, but do you feel it is possible to make amendments to this kind of bill to incorporate a preventive approach, a more proactive approach? As you've indicated, it does focus on penalties. I just wondered, is there any structure here to include prevention?

Mr. Wright: With respect, in our view, the bill is in fact preventive because it's aimed at having strong economic disincentives to carry on business as usual. I think you will find that the gentlemen at the table from the auto

industry and from the other industries will very quickly be able to adapt to the changes. By making it an economic imperative, if the penalties are in fact kept at a level that reflects the gravity of the spill—

Mr. Barrett: We know that Dr. Heathcote in the IPAT report seemed to reject the economic disincentives and did make, I felt, a fairly good argument for economic incentives, to reject the kind of command-and-control stick approach and to look at the carrot approach.

The Chair: A brief response, please.

Mr. Wright: I'm all for both approaches, the carrot and the stick. Without this bill, there is no stick.

The Chair: Thank you. Mr. Marchese.

Mr. Marchese: I guess you are probably not surprised at all to hear various stakeholders disagree with you, and they all seem to disagree.

Mr. Hayward, from the Canadian Chemical Producers' Association, says, "By lowering the threshold from 'likely' to 'may,' it becomes almost impossible for companies to operate, even under their current certificates of approval. It is virtually impossible to prove that something may not have an adverse effect on the environment. Because of this legal uncertainty, a company no longer knows what standards have to be met to be in compliance." They recommend "that the current wording in the Environmental Protection Act and the Ontario Water Resources Act be retained."

Mr. Nantais said, "[T]he use of the word 'may' would cause great uncertainty as to what environmental discharges are permissible ... and, when combined with the proposed environmental penalty provisions, may discourage some companies from self-reporting" even. He says, "For a business, having certainty is an operational imperative, and anything that contributes to a lack of certainty may impede current investment or act as a deterrent to attracting new investment in Ontario."

What do you think?

Mr. Wright: First of all, on the last comment, the failure to report or suggesting they may not report, I think that is unfortunate and not in the spirit of the bill, and I hate to hear that from an industry leader.

I think that the key here—and perhaps as you went on with your question, I focused on the last. I'd appreciate just very briefly you focusing on the original question.

Mr. Marchese: Obviously, they're against the change of language from "likely" to "may." They're all afraid that the industry is just going to go to hell in a handbasket.

The Chair: A brief reaction, please.

Mr. Wright: Yes. The myth that industry has been putting out is that somehow this leaves them in a quandary as to how to regulate their affairs. The fact is, penalties will not apply until a spill has occurred. So first you need a spill. A spill will have occurred—

The Chair: Thank you. Mr. Wilkinson.

Mr. Marchese: Let him finish for a second.

Mr. Wright: The spill will have occurred, and industry is trying to paint this as a "may" situation that occurs before the spills occur. The penalties do not come into force until a spill has occurred. Given the history with the Fisheries Act and the Ontario Water Resources Act, both of which deal with the same issue, this change in the standards, they are more than able to look at those past histories and gauge their affairs accordingly.

Mr. Wilkinson: Thank you for coming by today, Robert. So we're clear on this—because there seems to be some concern that this is draconian. I'm not a lawyer and you are. It's correct to say that if a company is doing something which is lawful, in other words, they are well within their certificate of approval, it would be bizarre to think that a company would somehow suffer a penalty for doing something that they're already allowed by the Ministry of the Environment to do. It has been thrown up that this is going to happen all over the place; we're going to issue certificates of approval on one hand and then turn around and charge people.

Just help me on the law, because I've been briefed on this. Obviously, the Ministry of the Environment would not have a penalty on something that we already approved a company to be able to do. Am I correct on that?

Mr. Wright: My answer can be very short: I agree. I'm puzzled by their comments as well.

The Chair: Thank you for your deputation today.

The proposed amendments to be moved during clause-by-clause consideration of the bill should be filed with the clerk of the committee by 5 p.m. on Tuesday, May 17, 2005. That's tomorrow. Clause-by-clause consideration of Bill 133 is scheduled for Toronto, in this room, on Thursday, May 19, 2005, at 3:30 p.m.

These hearings stand adjourned.

The committee adjourned at 1750.

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