Tracking Environmental Crime through CEPA: Canada's Environment Cops or Industry's Best Friend?[1]

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Abstract. This paper examines shifts in the regulation and governance of environmental crime over the twenty-year period since the passage of the Canadian Environmental Protection Act (CEPA) in 1988, tracing its history, policies, and enforcement record from 1989–2008. Documents assessed include Environment Canada's enforcement data, Annual Reports, reports on its Plans and Priorities, the Senate and House of Commons five-year reviews of CEPA 1988 and CEPA 1999 and the government's response to these reviews. The purpose of the paper is to document the process and compromises that have shaped federal environmental protection, and explore the policy paralysis this has produced.
Key Words: regulation; enforcement; environmental protection; policy; crime; federal responsibilities.

Résumé. Le présent document examine les changements dans la réglementation et le gouvernement de la criminalité pour l'environnement au cours de la période de 20 ans depuis le passage de la Loi canadienne sur la protection de l'environnement (LCPE) en 1988, traçant son histoire, ses politiques et son dossier d'application de 1989 à 2008. Les documents évalués comportent des données d'application d'Environnement Canada, ses rapports annuels, ses rapports sur les plans et priorités, les examens quinquennaux de LCPE 1988 et LCPE 1999 par le Sénat et par la Chambre des Communes et aussi les réponses de gouvernement à ces examens. Le but de l'article est de documenter le processus et les compromis qui ont formé la protection de l'environnement fédérale et explorer la paralysie de politique que ceci a produit.
Mots clés: règlement; application; protection de l'environnement; politique; crime; responsabilités fédérales.

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This century has brought an increasing awareness of global environmental destruction and its implications for the survival of all life on Earth. While nation-states in general have been slow at responding to these threats, most have now passed laws to protect universal goods such as air, water, and citizen health. Environmental concern in Canada, rooted in the cultural ferment of the 1960s, spurred the establishment of a new federal Department of the Environment (now Environment Canada) in 1972. Environmental activism in the 1980s produced the first *Canadian Environmental Protection Act* (CEPA), passed on June 30, 1988 and followed 11 years later by CEPA 1999. Today, the Canadian government is under national and international pressure from advocacy groups to take serious action on pollution; climate change; and the depletion of resources, species, and watercourses. Many of these environmental movements are decidedly global; the resources of the Internet give them ready access to the knowledge claims of the natural sciences to increase pressure on recalcitrant regimes, demanding new legislation and more effective enforcement of existing environmental laws. Resistance to environmentalism also has gone both global and digital: powerful interests and industries, national and increasingly transnational, use the languages of moderation and progress and the spectres of unemployment and depression to challenge those advocating nonnegotiable laws backed by meaningful criminal sanctions (Paehlke 2000; CBC News 2002).

In Canada, Environment Canada is the federal ministry with primary responsibility for the environmental portfolio. It professes total commitment to environmental sustainability, claiming its policies balance protection of the environment with business interests and the economy (touted as synonymous with "prosperity" by a succession of governments). However, even the kindest critics admit this "balance" has generally privileged the claims of business and development industries over the protection of Canada's air, water, and wildlife — the failure to honour the Kyoto Agreement is a case in point (Boyd 2003; Schrecker 2005). Another example is a five-year study reported by the Commission for the Environmental Co-operation of North America which found that the direct release of harmful pollutants into the environment increased in Canada by 5% between 1998 and 2002 (Sallot 2005). Even compared to the United States, another country with an egregious environmental record, Canada lags behind. During this same period, 1998 to 2002, the United States decreased its direct pollutant release by 14% (Sallot 2005; see also Van Nijnatten 1999; Boyd 2003). Further, in 2008 the Canadian government lobbied *against* American legislation banning the purchase of fuels "whose production releases more global warming pollution than conventional petroleum," a prohibition aimed at Alberta's oil sands and

their massive environmental impact (Mittelstaedt 2008). The Canadian federal government's latest "Green Plan," announced in the 2008 budget, contains no carbon taxes and abolishes rebates to encourage purchase of fuel-efficient cars (CBC News 2008). Prime Minister Stephen Harper portrays environmental protection as the enemy of economic development and prosperity, claiming a carbon tax would "wreak havoc on Canada's economy, destroy jobs, [and] weaken business" (Chase 2008:1). The global recession and credit crisis that have ravaged financial markets will only strengthen this short-sighted economic focus. While there have been victories for the environment over economic considerations in the past, including banning DDT (1985) and leaded gasoline (1990), new threats have appeared and previous problems (e.g., acid rain, plastic biodegradability, and species extinction) have reemerged.

This paper reviews Canada's environmental record over the last 20 years by examining the enforcement record of CEPA, originally passed in 1988. Using CEPA's annual enforcement records and related documents — including Environment Canada Reports on Plans and Priorities, Senate and House of Commons five-year reviews of CEPA 1988 and CEPA 1999 and Environment Canada's response to these reviews — the paper documents the shifts and changes in the regulatory enforcement of CEPA and argues that environmental laws must have much more than a symbolic status to effectively protect the environment. Canada's environmental record is then situated in the massive transformations that have occurred in the governance of the modern capitalist state, specifically the rise of neoliberalism and the allied "re-thinking" of crime and regulation. Section I outlines the history and legacy of (federal) environmental protection; Section II examines the data, the enforcement record itself. Section III shifts focus from "What happened" to "Why," probing the assumptions, assertions, and silences that have shaped CEPA and outlining the political economy of environmental regulation.

I. ORIGINS: CEPA DEVELOPMENT AND HISTORY

Canada's first environmental initiatives focused on protecting wilderness and the natural environment. Pushed by new organizations such as Pollution Probe (1969), the Canadian Environmental Law Association (1970), and Greenpeace (1971), the Liberal government established the Ministry of the Environment in 1972. The first priority of this Ministry was to control the manufacture and discharge of toxic chemicals. Thus, the *Environmental Contaminants Act* (ECA), passed in 1975 (Van Nijnatten 1999), was to regulate the "quantities, concentrations and condi-

tions under which the entry of toxic chemicals [into the environment] was acceptable" (Chanteloup 1992:54). While an important first step, the Act was reactive rather than proactive: it put limits on already known toxic chemicals such as dioxin, but did nothing to prevent harmful substances from entering the environment in the first place, since companies were required to report new chemical compounds only *after* they were in use. Furthermore, because the bulk of the responsibility for environmental protection was (and is still) a provincial responsibility (Chanteloup 1992; VanNijnatten 1999; Granzeier 2000), the ECA applied only where provincial regulations were absent or deemed insufficient.

This illustrates the eternal dilemma of environmental law in Canada: federal/provincial rivalries and turf wars have produced endless jurisdictional disputes. Provincial resistance to federal "interference," along with antiregulatory business lobbies, have effectively prevented federal authorities (the few times they had the political will) from introducing long-term, preventative strategies (Granzeier 2000; Boyd 2003). Provincial regulations, and the commitment to enforce them, vary widely across the country and across time. For example, Ontario's Ministry of the Environment was the strongest in Canada in 1992 and the weakest 6 years later. When the Conservative government under Premier Mike Harris launched its neoliberal "Common Sense Revolution" in 1995, 725 enforcement and investigation officials were let go. Charges for environmental violations dropped from 1,640 in 1994 to 724 in 1996; the average pollution fine dropped from $3.6 million in 1992 to $1.2 million in 1997; overall spending on the environment fell by almost two-thirds. By 2000 the Ministry was employing 41 percent fewer people than it did in 1994–95 (58 percent fewer if contract and temporary job assignments are included) (Krajnc 2000; see also Snider 2004).

Interprovincial rivalries and competing regulatory regimes have given polluting industries multiple places to hide, allowed them to play governments against each other, and, given the up-front costs of pollution control, made it difficult for even the best intentioned companies to act as responsible environmental citizens. In general, both federally and provincially, the chances of detecting ECA violations were miniscule and sanctions were tiny for the few cases that got to court. Those found in violation of the federal ECA could, in theory, be fined up to $100,000 or jailed for up to two years, but judicial reluctance to send "upstanding corporate citizens" to prison generally produced fines lower than the average licensing fee (Chanteloup 1992; Friedrichs 2007).

However, for a complex tangle of reasons, environmental crises and toxic disasters throughout the 1970s and 1980s became increasingly visible, forcing both governments and businesses to pay rhetorical

and sometimes substantive and statutory attention. The deformities and deaths produced by toxic wastes dumped into the Love Canal in Niagara Falls (1978), the moon-like environment produced by discharges from nickel mining around Sudbury (prior to 1987), and the toxic blob near Windsor (1985) increased public and media awareness of environmental threats and led to the creation of the Citizen Environmental Alliance and similar activist movements (Douglas and Hébert 1998). Activists criticized government inaction and pointed to the mishmash of vague, cumbersome, and competing legislation that constituted federal environmental protection. For example, the *Clean Air Act*, *Environmental Contaminants Act*, nutrient provisions of the *Canada Water Act* and the *Ocean Dumping Act* all claimed jurisdiction over different components of water pollution — and all of these laws were weak, outdated, and unresponsive to public input, especially in comparison with progressive measures enacted in countries such as Sweden and the Netherlands (Chanteloup 1992; Boyd 2003). The federal government's response was to establish a special Task Force in 1984, which recommended the passage of legislation governing the lifespan of chemicals "from cradle to grave" (Douglas and Hébert 1998; VanNijnatten 1999). After negotiations with all provinces and territories, industry spokespeople, environmental groups and "the general public," CEPA was passed on June 30, 1988. CEPA consolidated all federal Acts dealing with the environment and assumed primary responsibility for evaluating all toxic substances (new, in development, and existing), for monitoring and investigating violations, and for sanctioning violators (Chanteloup 1992; Douglas and Hébert 1998). In addition, it was empowered to negotiate intergovernmental environmental treaties and establish objectives and guidelines for all government departments and institutions (Douglas and Hébert 1998). Sanctions for noncompliance included fines up to a million dollars or life imprisonment (Chanteloup 1992).

The next major legislative changes to CEPA were occasioned by its mandatory 5-year evaluation (section 139 of the Act) (Douglas and Hébert 1998). This evaluation, by the House of Commons' Standing Committee on Environment and Sustainable Development, produced a scathing report titled *It's About Our Health! Towards Pollution Prevention,* with 141 recommendations for changes to CEPA (1995). This all-party review committee (including members of the governing Liberal party) accused Environment Canada of ignoring its own directives requiring a "strict compliance" policy (Government of Canada 1995). The report called for a strengthened CEPA with sustainable development, biodiversity, pollution prevention, and the precautionary principle as major policy goals. Enforcement should focus on the responsibility of users

and producers; pollution prevention over pollution management (Douglas and Hébert 1998). After 90 days of public comment Bill C-74 was introduced, with a series of amendments heavily influenced by industry which ignored many of the Standing Committee's recommendations. It was followed by Bill C-32 in 1998 and another lengthy review process which produced 250 new recommendations, resulting in the final proclamation of CEPA 1999 into law on March 31, 2000.

CEPA 1999 emphasized voluntary measures to replace mandatory penalties and the much denigrated "command and control" legislation favoured in the past. Corporate compliance would henceforth be facilitated through self-regulation, public business-government-citizen engagement, standard-setting by nongovernmental bodies, and rewards for environmentally friendly behaviour. As Environment Canada (2005:1) put it: "compliance is easier when those being regulated understand the purpose of regulations and have input into their creation." Companies were required to develop pollution prevention plans that suited their business model, employees and citizens were protected through whistleblower laws, and citizens gained the right to sue if they felt CEPA was not being fully enforced (Brunnée 1998). While the maximum fine remained unchanged at $1 million, Environment Canada could now raise revenue by charging for permits, chemical assessments, and the transport of hazardous waste. New sentencing options allowed judges to order offenders to make reparations in a number of ways — by paying for chemical disposal research, funding scholarships for environmental studies, or adopting a corporate plan to meet environmental standards. This emphasis on voluntarism, privatization, and market-based remedies resonates closely with the neoliberal discourses dominating government and regulatory discussions at this time (see Section III) (Tombs 1996; Garland 2001; Snider 2004; Schrecker 2005).

Nothing about this process has been simple, easy, or quick. Resistance from business interests and provincial governments — sometimes allied, sometimes independent or opposed — has produced decades of lawsuits and constitutional challenges. The 1998 Canada Accord on Environmental Harmonization, allowing federal authority to be ceded to provincial authorities if provincial legislation is deemed equivalent, (Van Nijnatten 1999; Kukucha 2005) has given provincial governments legal grounds to challenge any provisions they dislike despite the fact that it was designed to resolve jurisdictional overlap once and for all (Douglas and Hébert 1998). While some provinces have excellent environmental legislation and well-equipped staff, others do not, and environmental policies can change with every election. These difficulties are perfectly illustrated by federal attempts to pass an endangered species Act (see

VanNijnatten 1999; Paehlke 2000). Introduced by a Liberal government in 1996, Bill C-65, the *Endangered Species Protection Act* went through three years of consultation with provincial governments, federal departments, resource industries, and environmental groups. The first set of recommendations weakened an already problematic Bill. Seven weeks later the House of Commons called a token debate on the Bill, only to have Parliament dissolved before it was completed. Consequently, although Canada passed the *Species at Risk Act* in 2003, the federal government has still not fully met its international commitments to protect species at risk (Boyd 2003; Nature Canada 2008).

Turf battles between federal and provincial jurisdictions have not been the only difficulty. Aboriginal groups and municipalities play increasingly important roles, sometimes supporting, sometimes resisting environmental provisions, sometimes challenging any government's right to pass laws over lands native peoples claim as their own (DeMarco and Campbell 2004). New interest groups, some sponsored by coalitions of pollution-heavy industries, have also entered the fray. From 2000–2008, as the oil crunch intensified and the price of natural commodities boomed, industries in the natural resources sector increased in size and clout. Thus, many precedent-setting Supreme Court decisions were not about federal-provincial jurisdiction but about the rights of business versus government.[2]

In sum, provincial and industry opposition to federal authority has stymied Environment Canada's efforts (such as they were) to pass meaningful legislation. However, new activist voices demanding stronger laws and stricter enforcement, nationally based and internationally linked, have arisen as counter-lobbies. This is the crucial second layer of pyramidal enforcement, the proregulatory citizen voices which allow government to act as an "honest broker" between citizens and industry (Braithwaite 1985; Ayres and Braithwaite 1992). However, since no one power block has secured a permanent advantage over all the others, environmental protection has degenerated into an apparently endless series of ideological and legal battles. This is reflected in Environment Canada's enforcement record, documented in the next section.

II. CEPA's Record of Enforcement

This investigation uses data from records produced by Environment Canada from 1988–2005, including information posted online by its

2. See *Regina v. Crown Zellerbach Canada Ltd* (1988), *Regina v. Hydro-Quebec* (1997) and *Imperial Oil Ltd v. Quebec (Minister of the Environment)* (2003), described in DeMarco and Campbell 2004; Kukucha 2005.

enforcement division, the Environmental Law Enforcement Program (www.ec.gc.ca/ele-ale/), and from CEPA Annual Reports from 1990–2005 (www.ec.gc.ca). Additional data were gathered through university library archives, and from contacts at Environment Canada. Although the Minister of the Environment is required to present "as soon as possible after the end of each fiscal year" an annual report on the administration and enforcement of CEPA during the year (Part 11, "Miscellaneous Matters," section 342(1) of the CEPA 1999 legislation), no annual reports were available after the fiscal year 2004–2005; reports for 2005–2006 and 2006–2007 were still "being written" in 2008 (personal contact, July 4, 2008). After dozens of calls, the Enforcement Directorate kindly gave us access to updated enforcement data, which we have incorporated into the Tables where appropriate. This information was finally made publicly available in November 2009, and can be found in Environment Canada's online archive of annual reports.

Table 1 presents data from 1990–91 to 2007–08 fiscal years, combining statistical information from cases falling under both CEPA 1988 and CEPA 1999 versions of the legislation. The purpose of combining this statistical data is to examine federal government environmental enforcement trends over time through CEPA.

It is important to distinguish between inspections and investigations, CEPA's two primary regulatory tools. *Inspections* are undertaken if enforcement officers have reasonable grounds to believe that "there are activities, materials, substances, records, books, electronic data or other documents that are subject to the Act or relevant to its administration" (Environment Canada 2001a:18). Under these conditions, officers are allowed to enter the premises of a business to obtain samples, conduct tests, and access records and data. The frequency of inspections is determined by protocols based on CEPA's assessment of risks to human or environmental health, the compliance history of the target, the age of the regulation (new ones get priority), the priorities outlined in CEPA 1999, and "particular environmental risks" which vary from year to year (Environment Canada 2007:58). All of these inspections are scheduled; unscheduled inspections only occur in response to "spills, complaints, intelligence, or other information" (Environment Canada 2007:58). Both types are included in Tables 1 and 2.

Investigations, the next step up the enforcement pyramid, may be initiated by CEPA officials or citizen petition. A warrantless search will be initiated if the officer believes there is immediate danger to the environment or human life. All other circumstances require a search warrant (Environment Canada 2001a:18–19). After the investigation the officer

Table 1: Enforcement Date, CEPA 1988 and CEPA 1999*

	1990–91	*1991–92*	*1992–93*	*1993–94*	*1994–95*	*1995–96*	*1996–97*	*1997–98*	*1998–99*	*1999–00*	*2000–01*	*2001–02*	*2002–03*	*2003–04*	*2004–05*	*2005–06*	*2006–07*	*2007–08*
Total Inspections	2794	1574	1233	1548	1362	963	701	1647	2613	3305	3247	4637	4804	4413	5274	5210	5132	5196
Investigations	61	120	93	55	64	94	53	60	78	65	20	57	36	32	43	35	64	43
(Investigations/Inspections)	2.18%	7.62%	7.54%	3.55%	4.70%	9.76%	7.56%	3.64%	2.99%	1.97%	0.62%	1.23%	0.75%	0.73%	0.82%	0.67%	1.25%	0.83%
Prosecutions**	8	16	22	3	8	15	5	7	2	26	11	27	4	8	13	11	6	5
Convictions	6	2	17	10	9	8	7	3	1	1	7	7	3	14	1	2	3	1
Directives	5	6	4	1	0	0	2	0	8	9	22	5	3	8	2	8	96	4
Warnings	78	82	105	120	127	87	28	208	421	473	450	517	347	672	1162	2215	1785	1560
(Warnings/Inspections)	2.79%	5.21%	8.52%	7.75%	9.32%	9%	12.63%	12.63%	16%	14.31%	13.86%	11.15%	7.22%	15.23%	22%	42.51%	34.78%	30.02%

* For the years 1990-91 to 1998-99, the data are from enforcement activities carried out under CEPA 1988 only; for the years 1999-00, 2000-01, and 2001-02, the data for enforcement under both CEPA 1988 and CEPA 1999, as enforcement activities continued to be carried out for the 1988 legislation during the transition to the 1999 legislation; for 2002-2003 onward, the statistics are for enforcement under CEPA 1999.

** For some years, the number of prosecutions is less than the number of convictions recorded for the same year: this is because, for any given year, the convictions obtained in that year may have been for prosecutions starting in a previous year.

NOTE: For the years 1988 (the start of CEPA) to the fiscal year ending March 1990, there is no detailed enforcement data available; we only know that 5821 investigations/inspections took place (non-delineated in the Annual Report) and that 339 unspecified "enforcement actions" were taken during this year and a half period.

may issue a directive, to educate the offender and prevent recurrence, or a warning.

As Table 1 indicates, the annual number of *inspections* by CEPA officers rose dramatically, from 1233 in 1992–3 to 5274 in 2004–05, a 335% increase. This number kept pace with increases in the number of enforcement officers, which tripled from 1999 to 2002 (Environment Canada 2001b:72). In 2008 there were 213 enforcement officers, with commitments in the 2008–09 fiscal budget to hire 100 more.[3] However, the number of *investigations* declined from a high of 94 cases (9.76% of inspections) in 1995–96 to 43 (0.83% of inspections) in 2007–08.[4] No violation was suspected or discovered in 99.27% of inspections.[5] Charges are rare, prosecutions and convictions rarer still. In 2000–01, 27 prosecutions were launched, 3 in 1993–94; convictions ranged from 17 in 1992–93 to one in 1998–99, 1999–00, 2004–05, and 2007–08.[6] Small fines, contributions to environmental funds, or token community service hours were the most common sanctions. The average monetary penalty from 1988–2005 was $14,258, total fines over the entire period were only $2,224,302, and $600,000 of this was assessed against one body, Hydro-Quebec.[7] This single case consumed 8 years of government staff time, from charge-laying for polychlorinated biphenyl (PCB) violations in 1990 to sentencing in November 1998.

3. This increase was heralded by Environment Minister John Baird as a sign of government commitment to "dealing aggressively" with violations, "Protecting our natural treasures means getting tough on those who poach, plunder or pollute" (Environment Canada 2008:1).
4. Interestingly, the language of Environment Canada's Annual Reports also demonstrates greater use of the word "inspection" compared to "investigation" from 1990–2005. This underlines the official preference for inspection over investigation in response to suspected violations.
5. Because investigations do not necessarily lead to prosecutions in the same fiscal year, and prosecutions are not necessarily resolved in time for inclusion in the statistics for that year, we cannot determine the proportion of prosecutions that result in convictions on a year-by-year basis, or slippage rates, or the stage at which an investigation is discontinued.
6. These numbers belie the fact that CEPA regulations require mandatory prosecution under any or all of the following conditions: if there is death of or bodily harm to a person; serious harm or risk to the environment, human life, or health; the alleged violator knowingly provided false or misleading information, obstructed the enforcement officer or CEPA analyst, interfered with a substance seized; concealed information or "did not take all reasonable measures to comply with orders or directives of enforcement officers or the Environment Minister" (Environment Canada 2001a:29–30).
7. Among the other companies fined were large corporations including the environmental waste-management company Safety Kleen Canada Inc. (fined a total of $100,000 in 1999), Hi-Line Manufacturing (fined a total of $100,000 in 1992), Canadian Tire Corporation Limited (fined a total of $80,000 over 2003–2004), Shell Canada Limited (fined a total of $50,000 in 2002), CCL Industries Inc. (fined $35,000 in 2002), and Elcan Optical Technologies (fined $25,000 in 2002).

Thus we have more officers and inspections, yet fewer investigations and prosecutions, and warnings are the most frequently used regulatory tool. Both the number and the percentage of warnings have risen, from 78 (2.8% of inspections) in 1991–92 to 1542 (29.68% of inspections) in 2007–08. In 2005–06, 42.5% (2215) of the year's 5210 inspections resulted in warnings, an all-time high.[8] Warnings are recorded and "taken into account" in future violations (Environment Canada 2001a:23), but they do not legally compel the offender to act. These patterns are highlighted in Table 2.

Table 2: Aggregate Enforcement Data

	1990–91 to 1994–95	*1995–96 to 1999–00*	*2000–01 to 2004–05*	*2005–06 to 2007–08*
Total Inspections	8511	9229	22,375	15,538
Investigations	393	350	188	142
(Investigations/Inspections)	4.62%	3.79%	0.84%	0.91%
Prosecutions	57	55	63	22
Convictions	44	20	32	6
Directives	16	19	40	108
Warnings	512	1217	3148	5560
(Warnings/Inspections)	6.02%	13.19%	14.07%	35.78%

The aggregate data presented here show a decline in both the number and percentage of investigations. Patterns for prosecutions and convictions are uneven but trending downward, particularly from 2005 on. Directives and warnings, on the other hand, have nearly doubled for each aggregate. Does Environment Canada assume that "bring[ing] the alleged violation to the attention of the alleged violator" will automatically force him/her/it to "return to compliance" (Environment Canada 2005:7)?

There are several possible explanations for this pattern. Directives and warnings are cheaper and faster than investigations and prosecutions. In addition, as Table 2 shows, Environment Canada has a sorry record in obtaining convictions — a total of 58 convictions from 140 prosecutions since 1995.[9] Explaining these patterns also requires examining Environment Canada budgets which have continuously declined since 1990–91. From 1994–5 to 1997–8 alone, the budget was cut from $737 million to $503 million. Subsequent House of Commons and Senate Review

8. Further, in Environment Canada's Annual Reports the use of the word "warnings" peaked in 2000–2001 and was consistently used thereafter.

9. Because Environment Canada does not present data by case, and cases may run over several years, it is hard to adequately trace cases from start to finish and impossible to present data on the type or size of "successful" versus "unsuccessful" prosecutions, or correlate sanctions to company characteristics — e.g. size, type of firm, etc.

Committees have admitted that these cuts weakened enforcement efforts; they may also have encouraged Environment Canada officials to choose cheaper, faster solutions (directives and warnings) over more expensive prosecutions and criminalization. Some claim the federal government explicitly directed the Ministry to target minor violations rather than undertaking large-scale resource-intensive investigations and prosecutions (such as the Hydro-Quebec case) (Fine 1997). The increased number of both inspections and inspection officers has not resulted in a similarly dramatic increase in investigations, prosecutions, or convictions. These patterns suggest a "negotiate-and-compromise-at-all-costs philosophy" adopted in the face of decreasing resources (Hessing and Howlett 1997:185). They must also be linked to the dominant cultural ethos of this entire period, particularly the deregulatory neoliberal philosophies dominating the regulatory literatures and permeating the federal civil service.

CEPA Today: Deja Vu!

Canada's federal government, led since 2006 by a minority Conservative regime under Stephen Harper, has rejected the 1990 Kyoto agreement (signed but never implemented by the previous Liberal government), are now on their third Minister of the Environment, and launched their own "Green Plan" in 2008 ("Turning the Corner: Taking Action to Fight Climate Change"). This 26 page document outlines policies to fight rising greenhouse gas emissions. It promises to achieve 20% reductions in greenhouse gases from 2006 levels by 2020 and "a 60 to 70% reduction … by 2050" (Government of Canada 2008a:7). It also pledges to "put into place… one of the toughest regulatory regimes in the world" (Government of Canada 2008a:3), with short-term mandatory targets forcing "major industries" to annually reduce emissions, establish a carbon emissions trading market, a price for carbon, an end to coal-fired plants, mandatory renewable fuel and consumption standards for vehicles, and a ban on incandescent light bulbs (Government of Canada 2008a). The oil sands of Alberta, a major source of greenhouse gas emissions, will be "managed" and only those starting operations in 2012 will be forced to implement carbon capture and storage. Nothing in this self-described "aggressive" plan requires immediate action, no action is mandatory until 2010 when "old" facilities must start reducing emissions, and 2012 when targets for oil sands and power plants kick in and coal-fired plants can no longer be built (an obvious incentive to build them earlier). The baseline from which targets are set is not 1990 but 2006.[10]

10. Canada's embarrassing performance at Copenhagen in December 2009, and the black mark it has gained internationally, sent a message loud and clear that greenhouse gas emissions will not change anytime soon. In fact, documents revealed that the Conserv-

The latest evaluations from CEPA's mandatory 5-year review, issued by the House of Commons (Government of Canada 2007b) and the Senate (2008b) reinforce this *deja vu* reality. The House said that CEPA 1999 has not yet been fully implemented; the incomplete National Pollution Inventory remains useless for environmental assessment; funding has been "woefully inadequate"; and neither accountability nor transparency are guaranteed. In their words: "the government has virtually abandoned … monitoring and reporting, and communicating in a comprehensive way, information on pollution and environmental and human health" (Government of Canada 2007b:8). The House Report also points out that, contrary to CEPA provisions, explicitly shifting the onus of proof from government to show a substance is *un*safe, to industry to show it *is* safe, has not been done. Many of its 31 new recommendations reiterate those made in 1995 in regard to CEPA 1988.

The Senate report (Government of Canada 2008b:2) depicts CEPA 1999 as "a work in progress," pinpointing two major obstacles: a "lack of will" to enforce the Act, and a lack of resources. Ironically, this failure of will is epitomized in the report itself: despite pointing out that there are (still) "no consequences" for industries falling short of their own or of federal standards, remedial legislation was labelled "premature" because "stakeholders" had not been given enough time to work out the bugs in the provisions. Corrective action was only warranted, it said, if "provinces and territories fail to … show measurable progress towards achieving [these] objectives … within a specified timeframe" (Government of Canada 2008b:15). The timeframe and "measurable progress" were both left open to interpretation — and interpretation, in the past, has privileged the loudest voices, typically those of industry and provincial governments (Van Nijnatten 1999; Granzeier 2000; Paehlke 2000; Boyd 2003).

III. GOVERNANCE SHIFTS AND REGULATORY DEADLOCK

The uneven history of CEPA illustrates philosophical shifts that have transformed governance in virtually every Anglo-American state over the last 25 years. The neoliberal doctrines championed by an alliance of elite actors empowered by knowledge claims associated with Chicago-School economics (Friedman 1962), successfully argued that Keynesian welfare-state policies were inefficient and ultimately unsustainable. Unionized jobs, good wages, and government regulation would produce

ative government is considering setting new targets that would be even lower allowing "special treatment" for the oil sands in Alberta (CBC News 2009).

inflation, declining rates of surplus value for business, an erosion of corporate profitability and thus a crisis of capitalism (particularly for corporate elites). Eliminating public programs and cutting services, their recommended solutions, would "set citizens free" of the "nanny state." By "rethinking" welfare, (un)employment insurance, workers' compensation, and minimum wage laws, governments would end citizens' "unseemly" dependence and turn them into responsible, market-oriented consumers. To this end, tariffs, command-and-control regulation, and mandatory sanctions were softened or removed from government departments (Tombs 1996; Snider 2004; Braithwaite 2005). Deregulation, decriminalizing, and downsizing became the order of the day for corporate offenders, now described as "stakeholders."[11] Replacing costly safety and environmental regulations with self-regulation and voluntary measures would slash production costs and increase corporate profit levels. If regulation became necessary, it would be provided by globalized trade and competition — that is, by market forces, not government.

The US and the UK, under Reagan and Thatcher respectively, were the first major states[12] to implement these doctrines (Klein 2000; Monbiot 2000). In Canada at the federal level, the transformation was piecemeal, coming earlier in some institutional regimes (e.g., competition law and tariff reform) than in publicly contested arenas such as environmental protection. However by promoting neoliberal philosophies (figuratively) and the civil servants who espoused them (literally), Keynesian belief systems and policies promoting citizen protection and sanction-based deterrence slowly disappeared. Balanced budgets not citizen protection became the new, nonnegotiable goal. By the mid 1990s the conviction that "command and control" regulation was expensive, inefficient, and unnecessary was an article of faith in senior civil service ranks. The 1994 *Regulatory Efficiency Act* epitomized this paradigm shift: it was designed to abolish regulations deemed extraneous on either philosophical or practical grounds — for example, if budget cuts and downsizing made mandatory criminal sanctions unenforceable, such laws were impractical and should be eliminated. Although the Act itself (Bill C-62) was never officially passed, many of the cuts were quietly put in place. In the highly contested arena of environmental protection, a three-year struggle pitting environmental and labour groups against businesses keen on reducing their "regulatory burden" ensued.

11. The opposite solutions — intensified criminalization, mandatory incarceration and zero tolerance — became the remedies of choice for nonbusiness offenders (Garland 2001)

12. New Zealand, under a Labour government, was the first country to officially embrace neoliberal doctrine. This happened in the 1970s when the United Kingdom dropped preferential tariffs favouring countries of the British Commonwealth.

Well-funded "stakeholders" from target sectors such as chemical, forestry, and pulp and paper mounted expensive lobbies to convince politicians that sanction-based laws were unnecessary because industry would *choose* environmentally responsible practices.[13] As a Ministry, Environment Canada was already power-sharing with the provinces and in some instances with First Nations as well. The fact that regulatory experts themselves were (and are) divided on the virtues of criminalization *versus* cooperation provided "scientific" legitimation for both government and industry should defence be required (Gunningham et al. 2003).

Required it was: resistance to neoliberal agendas in the environmental field has been vocal and fierce. Activists mobilized around the banner of environmental protection, invoking key Canadian values and the image Canadians cherish of their nation and themselves as "environmentally enlightened" (Paehlke 2000:160; Schrecker 2000). Through protest, lobbying, and judicious use of evidence from the natural sciences — whose number-based arguments are seen as "facts" not (mere) theories — several groups have achieved stakeholder status alongside business representatives. Environmental pressure groups have much more political, economic, and social capital than, say, activists fighting for welfare rights, and they also tend to be media-savvy, well educated, and comparatively well funded — though their material resources are tiny compared to their opponents. Activist resistance has variously publicized, blocked, delayed, or moderated some of the more extreme and damaging projects. Today, faced with the Conservative government's continued intransigence, environmentalists are increasingly using "right to sue" provisions provided in CEPA 1999 (Government of Canada 2008b).

Consider, for example, recent suits launched by Ecojustice, formerly the Sierra Legal Defence Fund, Canada's largest nonprofit environmental law organization. In May 2007 a global warming lawsuit (the first of its kind) accused the federal government of failing to comply with its commitments under the Kyoto Protocol and failure to meet its international environmental commitments (Ecojustice 2007a:2). In the summer of 2007 this lawsuit was stayed when the government introduced the *Kyoto Protocol Implementation Act*. A lawsuit was launched in September 2007 to force then Minister of the Environment, John Baird, to publish this plan within the stipulated 60 day window. Another lawsuit that autumn charged the Minister of the Environment with encouraging mining companies to conceal information about the industries' toxic waste disposal. Ecojustice argued that the mining industry was explicitly told it

13. The requirement that industries report any and all uses of toxic substances, however, was retained — yet another example of the constant regulatory struggle occurring in the environmental arena.

did not have to comply with CEPA requirements to file reports on toxic waste disposal (Ecojustice 2007b:2; De Souza 2007) — despite the fact that this same government passed an amendment in 2006 that *corrected* this long-standing exemption. This lawsuit finally reached a federal court hearing on January 19, 2009. A final example is a lawsuit launched by Ecojustice on behalf of Conservation Council of New Brunswick and Friends of the Earth Canada in 2008. It charged Minister of the Environment John Baird with failing to investigate the environmental impact of proposed industrial developments, in this case the proposed Irving oil refinery in St. John, New Brunswick. Alleging that this is merely "the latest in a growing list" of "weak environmental assessments of major industrial projects" (Ecojustice 2008:2), the lawsuit asks for a full environmental impact assessment examining the health and ecosystem impacts of the oil refinery instead of the more perfunctory, narrower assessment proposed by Environment Canada. As of this writing we have found no evidence that these cases have been resolved.

While legal battles rage, economic and political developments continue to make strict enforcement of CEPA simultaneously more difficult and more necessary than ever before. From 2000–2008 the primary and secondary industries that exact the heaviest environmental price — mining, forestry, chemical plants, oil recovery and refining — were booming, thanks to demand from rapidly developing nations such as India and China. This burgeoning demand generated jobs, capital, economic prosperity — and environmental destruction. "The economic development of natural resources generates $95 billion Canadian (14% of Canada's Gross Domestic Product) and constitutes 38% of Canadian exports annually" (Natural Resources Canada 1998, in Granzeier 2000:1). However, industry is responsible for 51% of greenhouse gas emissions (vs. 11% from commercial and residential heating combined) and 52% of air pollutants (vs. 1% commercial and residential heating combined) (Government of Canada 2007a). Governments and industry rationalize this by denying the existence of a problem or shifting both blame and remedial responsibility (Meadowcroft 2007). If the history of environmental enforcement is a valid predictor, today's global financial crisis will give new life to financial exigency rationales and further prolong the debate.

Understanding this deadlock requires examining the political economy of enforcement, the balances of power that propel and impede regulation. Governments are simultaneously constituted, enabled, and constrained by dominant ideologies shaped by powerful economic actors (Carson 1970, 1980; Doern and Conway 1994; Tombs 1996; Calavita et al. 1997; Nikiforuk 1997; Pearce and Tombs 1998; Glasbeek 2002; Rosoff et al. 2007). In developed capitalist democracies where business

is the major (or only) economic actor, corporations have great political, economic, cultural, and ideological capital. This gives key business actors privileged access to regulatory policymakers and the crucial ability to influence the form, shape, and meaning of regulatory law. The industries most affected by environmental policy — the primary offenders in traditional police discourse — have been legitimized as inside players, "stakeholders" with the cultural authority to participate in committees shaping environmental statutes and their interpretation. Through the consultation process, dominant economic actors from major extraction industries help negotiate the meaning of "reasonable" targets, "excessive" punishment, and "responsible" corporate behaviour. Government dependence on the corporate sector to produce the prosperity voters demand makes it extremely difficult for political authorities, whether left, right, or centre, to pass or enforce laws limiting corporate profit-maximization (Tombs and Whyte 2003; Snider 2009). Corporate power is privileged at every level, from agenda setting and insider access (the really important relations of power) to public advertising and lobbying (the least effective tactic).

However, business, particularly in the environmental arena, has no monopoly on power — it faces daily resistance from environmental groups, Aboriginal communities, competitors, and regulators. Government regulatory officials in contested arenas face particular challenges. To reconcile competing interests and constellations of power, we argue, regulatory agencies and actors accommodate the economic and social capital of the powerful players they regulate (Snider 2009). They incorporate (internalize) the structurally generated, taken-for-granted realities of business/government interaction, turning this into regulatory "common sense," the everyday mentalities and sensibilities, habits and routines that guide agency and individual behaviour. This individual and cultural recognition of the realities of power makes it only "sensible" to recognize and adjust to the fact that criminalizing dominant economic players is not realistic. Because of their economic, political, and cultural power, government attempts to punish these elites through criminalization will be expensive, protracted, and probably unsuccessful. Within this frame it is far more "realistic" to consult, persuade, and educate. Activist groups are disadvantaged because they appear both unrealistic and impractical, they do not seem to recognize such "obvious" facts. Viewing environmental protection through this lens entirely obscures the *cause* of this reality, the unequal balance of power and the overwhelming structurally based capital of capital.

This does not mean regulators' perspectives are static: all parties simultaneously and constantly adjust their perspectives and change their

tactics to accommodate the myriad global, national, and regional events which are part and parcel of today's global communication systems. Environmental disasters, changes of government, new techniques and technologies all potentially affect the regulatory equation; these and much other input must be filtered and assessed (Gunningham et al. 2003). While the overall shape of the regulatory field, the general balance of power, is relatively constant, each specific case is unique, a particular response to local, regional, and organizational forces and personalities.

This regulatory struggle has shaped the patterns revealed in Tables 1 and 2. Environmental groups have used their economic, cultural, and political power to spur enforcement and block what they see as damaging industrial projects. Environment Canada has attempted to play the honest broker role, but outside environmental disasters[14] (or similar high-profile events), business-backed antiregulatory voices have consistently been stronger.[15] This deadlock between the contesting parties has produced a frustrating policy paralysis marked by delay and lawsuits. In the ongoing battle of the experts (Harrison and Antweiler 2002; Wood 2006), despite numerous studies showing that significant environmental protection has always required "actual regulation" backed by "explicit sanctions" (Wood 2006:270), and that codes giving polluters "a central role in environment target-setting" have historically produced lower environmental standards and more modest cleanup targets, "voluntary compliance" remains the order of the day (Wood 2006:255; see also Van Nijnatten 1999; Granzeier 2000; Paehlke 2000; Boyd 2003). Issuing warnings and directives to offenders remains Environment Canada's favourite policy tool; criminalization, mandatory penalties and strict enforcement are strategies of last resort.[16]

Conclusion

This article has provided an assessment of the enforcement record of CEPA. It has demonstrated the massive complexities of something as

14. The ongoing oil leak in the Gulf of Mexico is the latest example of the "permission to regulate" regulators receive after every major disaster.

15. We do not mean to suggest that businesses and those who run them are malicious offenders. There is considerable evidence that many would like to operate sustainably (Braithwaite 2005; Gunningham et al. 2003). However the structurally generated necessity to show profits every quarter, the competition with market rivals, and the perceived high cost of many environmentally friendly solutions can make these choices undesirable or impossible.

16. As recently as 2007, the government's ecoACTION Report asked companies to choose for themselves "the most cost effective way" to meet their reduction targets (Government of Canada 2007a).

apparently straightforward as passing laws to protect the environment. Canada's environmental governance is based on a classic Canadian compromise: an economy of "markets and private ownership, together with a state-centred international system" (Meadowcroft 2007:13). A cacophony of dominant voices and interests have portrayed environmental corporate crime as the unfortunate but inevitable "price of prosperity" in a globalized world. This has generated ongoing resistance, numerous environmental pressure groups, and a complex, multilayered regulatory bureaucracy with considerable statutory authority but little actual power to protect the environment. As the latest House of Commons and Senate Reports admit, Environment Canada has been unable to use the regulatory powers and tools the Canadian public has given it. Pushback and resistance from competing economic and political actors, in a wide array of institutional, political, and social arenas, has generally been too strong to permit meaningful long-term policy changes. Those who would protect the Canadian environment through federal law clearly need to develop a new set of tools and strategies. Challenging the roots of Canada's policy paralysis is a good place to start.

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