ENVIRONMENTAL LAW CENTRE

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Standing Committee on Environment and Sustainable Development
Sixth Floor, 180 Wellington Street
Wellington Building
House of Commons
Ottawa, ON, K1A 0A6
Canada

Via Clerk of the Committee: Eugene Morawski
VIA FACSIMILE: (613) 996-1626

To the Standing Committee on Environment and Sustainable Development:

RE: Statutory Review of the *Canadian Environmental Protection Act, 1999*.

The Environmental Law Centre (ELC) is a charitable organization incorporated in 1982 to provide an objective source of information on environmental law and policy in Alberta and Canada. The ELC's mission is to ensure that laws, policies and legal processes protect the environment. In pursuit of this mission the ELC seeks the enactment and effective enforcement of sound environmental laws and the effective and informed public participation in environmental regulatory, law-making and decision making processes.

The ELC is pleased to provide its submission to the House of Commons Standing Committee on Environment and Sustainable Development Review in relation to the statutory review of the *Canadian Environmental Protection Act, 1999*[1] (hereinafter *CEPA*).

***CEPA* goals and its effectiveness to date**
The goals of *CEPA,* as reflected in the preamble of the Act, are as salient today as they were during the inception of the legislation. The preamble notes: [2]

> Whereas the Government of Canada is committed to implementing pollution prevention as a national goal and as the priority approach to environmental protection;
>
> Whereas the Government of Canada acknowledges the need to virtually eliminate the most persistent and bioaccumulative toxic substances and the need to control and manage pollutants and wastes if their release into the environment cannot be prevented;

[1] S.C. 1999, c. 33, *as amended* (CEPA).
[2] *Ibid*. at Preamble.

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Further the Act indicates that the Government of Canada is to:[3]

> Exercise its powers in a manner that protects the environment and human health, applies the precautionary principle that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation, and promotes and reinforces enforceable pollution prevention approaches; [and] take preventive and remedial measures to protect, enhance and restore the environment;

Unfortunately it appears that the status quo and economic considerations continue to govern toxic substance management in Canada. Releases of toxic substances, particularly those that persist and bioaccumulate have yet to be managed in a way that is preventative. The virtual elimination framework of *CEPA* has been particularly ineffective.

For this reason the ELC recommends the following amendments be made to *CEPA* in an effort to pursue the reduction and elimination of toxic substances in Canada:

1. Make pollution prevention the paramount goal and administrative principle governing actions under *CEPA*;
2. Add oversight provisions relating to equivalency agreements;
3. Add additional substance monitoring requirements and expand the *CEPA* environmental registry to ensure that Canadians are adequately informed;
4. Remove existing barriers to environmental protection actions;
5. Allow for substance assessment and management to be guided by standards and strategies in other jurisdictions (with a focus on jurisdictions with standards that are most protective of human and environmental health);
6. Ensure that vulnerable populations and ecosystems are protected;
7. Amend the virtual elimination definition and process to facilitate timely listing and elimination of toxic substances that are persistent and bioaccumulate;
8. Broaden risk assessments to reflect precaution and pollution prevention; and
9. Place the burden of proof in assessments with the substance proponent.

1. Make pollution prevention the paramount goal and administrative principle governing actions under CEPA

Pollution prevention must be the paramount goal and the overriding administrative principle of *CEPA* to ensure that environmental and human health is protected from the impacts of toxic substances.

The current system appears more narrowly focused on pollution management and risk management with little or no focus on preventing the pollution in the first instance. A focus on pollution prevention would entail identification and use of less toxic alternatives and the phase out of processes that produce substances that threaten human and environmental health.

[3] *Ibid*. at sections 2 (1)(a) and (a.1).

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2. Add oversight provisions relating to equivalency agreements

To be effective, equivalency agreements must be subjected to period review or continued oversight. Only Alberta has pursued equivalency under *CEPA* and it does not appear that any assessment and review of the equivalency process has occurred since the signing of the equivalency agreement in June 1994.[4] Amendments should be made to *CEPA* for periodic review and assessment of the efficacy of equivalency agreements and whether the agreements are facilitating the pollution prevention goals of *CEPA.*

Currently, Alberta implements *CEPA* standards through individual facility approvals. To guarantee true equivalency and accountability, periodic review and analysis of *CEPA* equivalent provisions is required. This is particularly the case when amendments, such as current amendments to the *Pulp and Paper Mill Effluent Regulations,* are being contemplated.

3. Add additional substance monitoring requirements and expand the CEPA environmental registry to ensure that Canadians are adequately informed

Canada and the Provinces through various laws, regulations and soft law approaches govern toxic substances. Through the *CEPA* Environmental Registry and the National Pollution Release Inventory (NPRI) some information about toxic releases (limited to certain emitters) are made publicly available.

However, a central clearinghouse for toxic substances that captures the myriad of tools and jurisdictions governing these substances does not exist. There is the opportunity under *CEPA* to produce a central clearinghouse for information regarding the risks, management and regulation associated with toxic substances.

The existing *CEPA* Environmental Registry may become the platform for this clearinghouse. Its content should be expanded to provide additional information to the public and to other stakeholders, including:

- risk assessment information, including details regarding uncertainties that exist for assessed substances;
- information regarding provincial mechanisms and instruments in place to deal with toxic substance;
- increase transparency and access to information under *CEPA.* Transparency in risk assessments, pollution prevention plans (P2 plans) and virtual elimination plans are required to ensure the public is able to assess and participate in the pollution prevention processes. These plans and assessments should be publicly available; and
- NPRI being expanded to cover a broader range of substances and emitters of toxic substances. NPRI reporting requirements are hindered by the maintenance of arbitrary reporting triggers that may not catch emission activities of significance.

A more accessible system would provide a database that allows searching by substance with links to *CEPA* regulatory requirements and actions taken, provincial regulatory requirements and

[4] *An Agreement on the Equivalency of Federal and Alberta Regulations for the Control of Toxic Substances in Alberta*, signed June 1, 1994.

actions taken (if any), guidelines, policies, Canadian Wide Standards under the Canadian Council of Ministers of the Environment, and NPRI information. Harmonizing information in this manner is essential for effective public participation and increased transparency and accountability in managing toxic substances.

4. *Remove existing barriers to and facilitate environmental protection actions*

CEPA should facilitate public participation through amendments to the Act, including:

- Implementing intervener costs, general costs, and allowing for damages to be granted to the proponent of an Environmental Protection Actions under Part 2 of the Act; and
- Removing the preconditions to an environmental protection action, particularly section 22(1), as noted in the recommendations of the submissions of Pollution Watch.[5]

5. Allow for substance assessment and management to be guided by standards and strategies in other jurisdictions (with a focus on jurisdictions with standards that are most protective of human and environmental health)

Amendments to *CEPA* must include a stated preference for jurisdictions with standards and strategies for substances that are the most stringent or precautionary. Jurisdictional comparisons of toxic substance management are an important way to increase efficiency and use extra-jurisdictional expertise in relation to particular substances. However, in undertaking a jurisdictional comparison it is important to remain focused on preventative measures and science and not on the vagaries of political decisions being made in relation to management of toxic substances.

By way of an example, the United States administration attempted to give older, highly polluting coal fired electricity plants the flexibility to avoid the installation of pollution control equipment.[6] Such actions are an anathema to the pollution prevention and pollution reductions goals of *CEPA* and are based solely on conciliatory actions aimed at an industrial lobby.

6. Ensure that vulnerable populations and ecosystems are protected

To be preventative and precautionary, all assessments should work from the general presumption that exposure or substance releases will occur in a manner that exposes the most vulnerable populations and ecosystems. Classification of substances on this basis promotes a more precautionary approach to substance assessment and management. This approach is justified as science has yet to be able to determine acceptable levels of exposure for all individuals or all ecosystems.

To assess substances based on the "average" ecosystem or population may relegate those that are particularly vulnerable to a category of "acceptable harms" or "acceptable loss". Canadian courts of law recognize the rights of the "thin skulled plaintiff"[7] and this is a reflection of the full

[5] See Pollution Watch, *Reforming the Canadian Environmental Protection Act, Submission to the Parliamentary Review of CEPA, 1999*, June 2006, at page 8, available online: <http://www.cela.ca/publications/cardfile.shtml?x=2648>

[6] This move provoked a lawsuit against the U.S. federal government that was joined by the government of Ontario and was ultimately successful. See <http://www.ene.gov.on.ca/envision/news/2006/051001.htm>

[7] The "thin skulled plaintiff" principle indicates that you must take a person as you find them, even if they are particularly susceptible to a particular harm.

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recognition that every individual Canadian has a right to be free of harm. The management and assessment of substances should approach every potential receptor of the substance as vulnerable.

7. Amend the virtual elimination definition and process to facilitate timely listing and elimination of toxic substances that are persistent and bioaccumulate

Pollution prevention must be seen as more than legislative and government rhetoric. It appears that there exists institutional and administrative hesitance to proactively pursue a *CEPA* pollution prevention mandate.

The current definition of virtual elimination and administrative framework around virtual elimination has proven to be ineffective. Despite significant knowledge about persistent, bioaccumulating, and inherently toxic substances these substances have yet to be put on the virtual elimination track. To better facilitate pollution prevention, the virtual elimination definition and administration of substance needs to be revised.

Once a substance is classified as being persistent, bioaccumulating and inherently toxic there should be a timely phase out of activities or processes that cause the production, by-production or release of the substance. This will require innovation of industry processes and foster further research and development in Canada.

Furthermore, government policy and technical barriers appear to be hindering the virtual elimination process. Altering the definition of virtual elimination is required to remove these barriers. The new definition should be accompanied by regulatory requirements for timely reduction and eventual elimination of use, production or release of these substances.

8. Broaden risk assessments to reflect precaution and pollution prevention

Implementing the precautionary and pollution prevention principles requires that legal or policy amendments take place to broaden substance assessments under *CEPA*.

The current risk assessment and risk management scheme of assessing the Detailed Substances List and proposed new substances adheres to traditional assessments based on assessing the hazard associated with a substance and, to varying degree, the likelihood of exposure to that substance. This hazard risk assessment, particularly when framed within a socio-economic context, tends to ignore fundamental questions of whether the substance is necessary or whether potential alternatives to that substance exist. Principles of pollution prevention and precaution require that such a "needs and alternatives assessment" be mandated in substance assessments.

The lack of a "needs and alternatives assessment" in the substance assessment phase of the process results in a system that is reactive, wherein we seek to manage and control substances. The assessment fails to consider possibilities of avoiding the risk altogether. The current assessment and management process is inherently flawed in this manner from a "prevention" perspective.

Policy and legislative amendments are required to ensure a proactive approach to substance assessment and management. This entails a mandatory needs and alternatives assessment as part of the risk assessment process. The assessment would then be utilized through legislation (or

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regulation) that would mandate the use of less harmful alternatives or prohibit substances from entering the market where they are deemed unnecessary.[8] The responsibility for carrying out such assessments can be placed on the proponents of the use, manufacture or release of the substances.

9. Place the burden of proof in assessments with the substance proponent

CEPA should be amended to clearly outline that the burden of proof regarding the effects of substances on the environment and human health lies with the proponent of the use, manufacture, or release of the substance. Where risks of harm are uncertain it is important to require that the proponent provide additional data about impacts of the substance on human and environmental health. If the substance is already in use there should be ongoing monitoring and assessment requirements placed on the proponent. All assessment information must be made available for independent verification.

Conclusion

Pollution prevention entails minimization and elimination of use, manufacture and release of toxic substances, particularly when those substances are persistent or bioaccumulate in the environment. Reform of *CEPA* is required if we hope to minimize and, ideally, prevent continued harm to the environment and to human health. The ELC is pleased to have the opportunity to provide the foregoing submission and should you have any questions please contact us at 1-800-661-4238 or (780) 424-5099.

Yours truly,

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[8] Some comparison of substances occurs through the Toxic Substances Management Policy, however, a legislative or regulatory mechanism to ensure such assessments are consistently and proactively made is required.

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