ENVIRONMENTAL LAW CENTRE

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Dear Mr. Bissett

RE: Environment Canada's draft *Guidelines for the Implementation of Pollution Prevention Planning Under Part 4 of CEPA, 1999,* draft document *Towards the Implementation of Virtual Elimination Planning under CEPA, 1999* and draft *Guidelines for the Implementation of Environmental Emergency Planning under CEPA, 1999.*

On behalf of the Environmental Law Centre, I thank Environment Canada for giving us the opportunity to participate in the workshops and to provide written comments regarding the above documents. Throughout these comments, the above documents will be referenced as follows:

1. draft *Guidelines for the Implementation of Pollution Prevention Planning Under Part 4 of CEPA, 1999* (the "P2 Guidelines");
2. draft document *Towards the Implementation of Virtual Elimination Planning under CEPA, 1999* (the "VE Document"); and
3. draft *Guidelines for the Implementation of Environmental Emergency Planning under CEPA, 1999* (the "E2 Guidelines").

Certain recommendations made by the House of Commons Standing Committee on Environment and Sustainable Development (the "Standing Committee") are particularly relevant to the above documents. Recommendation 31 advocates that CEPA require producers and users of CEPA toxic substances, including substances subject to sunsetting, to produce pollution prevention plans.[1] Recommendation 36 advises that non-

[1] Canada, Standing Committee on Environment and Sustainable Development, *It's About our Health! Towards Pollution Prevention* (Ottawa: Public Works and Government Services Canada, 1995) at 287.

regulatory mechanisms are to be used as a supplement to, and not as a replacement for, regulations or economic instruments used in managing CEPA toxic substances. [2] Although these recommendations are not directly reflected in CEPA, 1999, we would like to see both these recommendations reflected and implemented in the guidelines and other statutory instruments issued pursuant to CEPA, 1999.

P2 Guidelines

Scope of Application

The P2 Guidelines limit application based on a distinction between substances included in CEPA, 1988 and substances included after the promulgation of CEPA, 1999.

It is our submission that this distinction does not carry out Recommendation 31 made by the Standing Committee. We recommend that ideally *all* CEPA toxic substances - whether listed by CEPA, 1988 or CEPA, 1999 – be subject to P2 plans. This would increase certainty and predictability since there would not be a set of exceptional cases to which P2 planning may or may not apply. Rather, P2 planning would be required for all substances that are CEPA toxic.

However, working within the guidelines presented, we would recommend some minimum changes. With respect to CEPA, 1988 substances, the Minister has the discretion to require P2 plans where there is no regulation or other control mechanism in place, where the existing mechanisms do not address all relevant risks, where the existing mechanisms have not achieved and are unlikely to achieve the desired environmental effect, or where new information demonstrates that existing mechanisms do not adequately address the risks. It is our recommendation that the Minister's discretion in this regard should be removed. That is, the Minister should be required to demand a P2 plan if any of the four listed situations exist. This recommendation increases certainty and predictability because once a listed situation exists a P2 plan will always be required. As well, removal of the Minister's discretion results in more effective implementation of Standing Committee's recommendation that all producers and users of CEPA toxic substances produce P2 plans.

With respect to CEPA, 1999 substances, the Minister will require P2 plans for all substances unless a new regulation or amendment to existing legislation is intended, a substance is subject to a Strategic Options Plan, or a substance is adequately controlled through existing non-regulatory mechanisms. It is our recommendation that *all* CEPA, 1999 substances be subject to P2 plans. Although it should be acknowledged that certain substances are managed through the Strategic Options Plan or other existing non-regulatory mechanisms, these substances should not be exempt from the requirement for P2 plans. If a non-regulatory mechanism for managing a substance exists, that mechanism should be allowed to satisfy the requirement for a P2 plan but the obligation to have a P2 plan remains. This ensures that all CEPA toxic substances are subject to P2 planning but allows the use of existing P2 plans to avoid duplication.

[2] *Ibid.* at 288.

To carry out Recommendation 36 of the Standing Committee, it should be clearly stated in the P2 Guidelines that non-regulatory mechanisms are not an alternative to regulation. Regulations should be used in conjunction with existing non-regulatory mechanisms to ensure continued participation and to establish minimum standards.

Accountability

We have some recommendations regarding the portion of the P2 Guidelines dealing with accountability. A section 58 declaration is required to indicate that a P2 plan has been prepared and a second declaration is required to indicate that a P2 plan has been implemented. The term "implementation" is not defined in CEPA and, as such, should be defined by the P2 Guidelines. It might be helpful to develop a set of criteria which can be used to determine whether a P2 plan has been implemented. These criteria might include completed assessment of existing process, development of new technology, employee training and so forth.

Given that the section 58 declarations are the documents by which the public can assess P2 plans, the quality and consistency of declaration content is very important. We would like to see comprehensive reporting requirements incorporated into the declarations. We recommend that the P2 Guidelines clearly outline the minimal acceptable information required for each portion of the declaration. Any deviation from this minimum standard should be explained and justified by the declarant. In addition, we recommend that there be clear guidelines regarding the process that Environment Canada will use to assess the acceptability of the declarations.

Given the nature of P2 plans, there is a potential for large time periods between filing of the initial declaration and filing of the final declaration. It is suggested that some form of "interim reporting" may be appropriate, especially if there are significant time lags between declarations. The interim reports would provide information on the progress toward implementation of the P2 plan. This measure would assist Environment Canada in ensuring P2 plans are being diligently implemented thereby increasing accountability.

VE Document

Scope of Application

The VE Document limits application based upon a distinction between substances included in CEPA, 1988 and substances included after the promulgation of CEPA, 1999. The VE Document provides that VE plans will not be required for substances included in CEPA, 1988. It is our recommendation that VE plans be required for *all* substances that have been slated for virtual elimination. That is, any CEPA toxic substance that is:

1. persistent and bioaccumulative;
2. present in the environment primarily as a result of human activity; and
3. not a naturally occurring radionuclide or a naturally occurring inorganic substance;

should be subject to VE plans regardless of whether it is a CEPA, 1988 or a CEPA, 1999 substance. The need to achieve virtual elimination of a substance remains regardless of whether it is a CEPA, 1988 substance or a CEPA, 1999 substance. The decision to require a VE plan should be based upon the properties of a substance, not upon the date it was added to the Toxic Substances List.

E2 Guidelines

Scope of Application

As with the P2 Guidelines and the VE Document, the E2 Guidelines limit application based upon a distinction between substances included in CEPA, 1988 and substances included after the promulgation of CEPA, 1999. We recommend that ideally *all* CEPA toxic substances - whether listed by CEPA, 1988 or CEPA, 1999 – be subject to E2 plans.

However, given the E2 Guidelines as presented, we recommend some minimum changes. If a substance is listed in CEPA, 1988, the Minister has the discretion to require an E2 plan for substances for which the existing risk management plan may not achieve or take into account the environmental goal of preventing, preparing for or responding to a sudden, unplanned release. It is our recommendation that the Minister's discretion be eliminated in this situation. That is, if the existing risk management plan may not achieve or take into account environmental emergencies arising from sudden, unplanned releases, the Minister should be required to demand an E2 plan. The need to prevent, prepare for and respond to sudden, unplanned releases of substances exist for *all* CEPA toxic substances. If a substance is toxic enough to be added to the Toxic Substances List, there should be definite, not discretionary, requirements for E2 planning.

The E2 Guidelines provide that, with respect to CEPA, 1999 substances, the Minister will not require an E2 plan when the substance is no longer used or manufactured in Canada. It is our recommendation that the Minister retain the discretion to demand an E2 plan for such substances. Despite being no longer used or manufactured in Canada, a substance may be present in quantities sufficient to cause an environmental emergency. Discretion is required to respond to the existence of containment sites, abandoned sites and other situations in which "stockpiles" of substances no longer used or manufactured may exist. If such situations do exist, the Minister should require E2 plans to be developed.

Accountability

Given that the section 58 declarations are the documents by which the public can assess E2 plans, the quality and consistency of their content is very important. We would like to see comprehensive reporting requirements incorporated into the declarations. We recommend that the E2 Guidelines clearly outline the minimal acceptable information required for each portion of the declaration. Any deviation from this minimum standard should be explained and justified by the declarant. In addition, we recommend that there be clear guidelines regarding the process that Environment Canada will use to assess the acceptability of the declarations.

It is also suggested that the E2 Guidelines require distribution of E2 plans to local authorities, including fire departments, police and hospitals. This requirement should encourage communication between the various parties required to respond to an environmental emergency and, as such, lead to more effective emergency planning and response.

General Comments

Section 73 of CEPA requires that, within seven years of Royal Assent, the Ministers categorize the substances that are on the Domestic Substances List. Given the large number of substances involved, it is recommended that a transparent, predictable process be created to categorize these substances. The public should be aware of which substances have been assessed, are being assessed and will be assessed This process should be designed to allow public comment on whether or not a particular substance should be classified as CEPA toxic. In addition, the process should be predictable to allow affected parties to prepare P2, VE and E2 plans in consideration of current and future requirements.

On behalf of the Environmental Law Centre, I again thank Environment Canada for giving us the opportunity to provide written comments on the P2 Guidelines, the VE Document and E2 Guidelines. If you have any questions regarding our comments, please do not hesitate to contact me at (780) 424-5099.

Sincerely,

Brenda Heelan Powell
Staff Counsel