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ENGO Response to Questionnaire on Scoping the Issues (CEPA)

Preparation for the Parliamentary Review of the *Canadian Environmental Protection Act*, 1999 (CEPA)

Strengthening Legislation for a Sustainable Environment, a Healthy Population and a Competitive Economy

Prepared for the Canadian Environmental Network Toxics Caucus
Submitted: February 11, 2005

Environmental groups from across Canada, working on a wide-range of issues, have cooperated through the Toxics Caucus of the Canadian Environmental Network to present the following answers to Environment Canada's and Health Canada's questionnaire on scoping the issues around the review of CEPA. Many environmental groups have also individually submitted comments directly to EC and HC at their workshops and/or by e-mail or regular mail.

Environmental groups, particularly those who are members of EC and HC's Advisory Committee for CEPA Review, are also submitting the document *ENGO Agenda for CEPA Review*, which goes through CEPA and raises issues specific to each part of the legislation.

Before proceeding through the questionnaire, we wish to comment on the subtitle of EC and HC's scoping document: "Strengthening Legislation for a Sustainable Environment, a Healthy Population and a Competitive Economy." We have a major concern with the use of the phrase "competitive economy" in the subtitle. We noticed at EC and HC's workshops across the country in January and February that many industry representatives used the "competitive economy" phrase as a rationale for not having stronger environmental protection measures in Canada than in other countries – especially in the U.S. It was basically a statement that we should be followers rather than leaders at protecting the environment and human health. We should not put at risk or degrade environmental and human health in order to give Canadian industry a supposed international competitive advantage. Instead, we must make decisions based on the recognition that the long-term well-being of the Canadian economy is dependent on the high status of environmental and human health.

FOREWORD

Do you agree with the issues identified by the departments?
Do you have additional issues?

How would you suggest CEPA 1999 and/or its implementation evolve to address these issues?

ENGOs have identified the following over-arching priority issues and concerns that should be addressed during the review process:

1) Implementation of the Act:
We believe that many of the problems with CEPA are a result of a failure to fully implement CEPA rather than problems with the actual words in the legislation. The federal government has not allocated sufficient human and fiscal resources to implement the Act. It has diverted much of its attention to harmonization agreements with the provinces and territories (devolution) and the promotion of voluntary, as opposed to regulatory, environmental protection measures.

Enforcement of the Act needs to be enhanced. We need consistent levels of enforcement regardless of sector, region, province or territory. There has not been rigorous enforcement and compliance with the legislation and associated regulations. The federal "safety net" has not been clearly defined and rigorously implemented to require the best available processes, practices and technologies for the protection of the environment and human health.

Also the provisions to provide for enforcement by citizens are not working properly and need to be reviewed.

We are pleased that EC and HC are having an independent evaluation of the implementation of CEPA conducted. We urge that the entire evaluation be made publicly available as soon as it is completed to help all of us in scoping the implementation issues for the CEPA review.

2) Public Participation:
There has been an enormous revolution in information access and management since the adoption of CEPA 1999. EC and HC are behind in the best practices. For example, the CEPA Registry has not yet fulfilled its potential as a tool for public access to information and public engagement in decision-making.

CEPA also provides measures for public engagement in implementation and enforcement of CEPA, including opportunities for reporting offences and utilizing judicial procedures. But the public rarely uses these tools.

The CEPA review should assess why the public has not been using these tools more frequently and why the tools have not been more effective when citizens have tried to use them.

3) Pollution Prevention:
Unfortunately, although pollution prevention is described in the preamble to CEPA as a "national goal and as the priority approach to environmental

protection," pollution prevention has not been a strong component in the implementation of CEPA.

Activities under CEPA have focused on pollution control rather than on true pollution prevention, which is material or feedstock substitution, and product redesign or reformulation.

Also tools such as pollution prevention planning have been severely underutilized. Only four pollution prevention plans are underway and none have been implemented.

The CEPA review should focus on assessing why pollution prevention has not been more effectively implemented and on developing mechanisms to overcome these shortcomings.

4) Controlling Toxic Substances:
The problem of toxic substances remains largely undealt with by CEPA five years after it was passed. The current CEPA substance-by-substance approach to controlling toxic substances is both time-consuming and costly.

The CEPA review process should study programmes in other countries for assessing and controlling toxic substances. One example of such a programme is the European Registration, Evaluation and Authorization of Chemicals (REACH) programme.

5) Implementing the Precautionary Principle:
CEPA requires the government to apply the precautionary principle such 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."

The CEPA review should assess how EC and HC have operationalized this principle and how they have used it in making specific decisions.

SECTION 1: INTRODUCTION

No questions.

SECTION 2: CONTEXT FOR THE REVIEW

No questions.

SECTION 3: EFFECTIVE DECISION-MAKING

Q 3.1. What are your views on this issue [implementing pollution prevention]?
As we stated in response to the questions in the *Foreward*, EC and HC have failed to adequately implement pollution prevention. The definition does not have the proper focus and the tools have not been used frequently enough.

Q 3.2. Should CEPA 1999 provide support for the objective of keeping-clean-areas-clean? If so, how?
Yes. The "no degradation" principle should be applied throughout Canada. We have concerns with the use of the word "clean", however, since it implies that there currently are truly clean areas. Some certainly are cleaner than others, but toxics have become so widespread throughout the country that no area is now clean.

Also, for those areas that are not now considered clean, it should not be good enough to just achieve the standards set by government. These standards should be seen as interim targets only with an objective of getting ever cleaner.

Q 3.3. Does work under CEPA 1999 adequately consider the precautionary principle and the most vulnerable populations?
No. As we pointed out in response to the questions in the *Foreward*, the precautionary principle has not been adequately implemented.

Q 3.4. Does CEPA 1999 adequately enable effective transparency, access to information and opportunities for public participation?
The tools in CEPA for citizen access, reporting and enforcement are not frequently used because they are not easily usable and effective. The review must focus on improving citizen involvement in CEPA activities.

Q 3.5. Are there improvements needed to the CEPA Environmental Registry to facilitate better access to information and informed participation in decisions related to CEPA 1999?
Yes. The CEPA Registry has not fulfilled its potential as a tool for public engagement around decision-making. In addition, most people don't even know of the existence of the Registry.

Q 3.6. Should the Parliamentary review of the Act be increased from every five years to every seven years?
Yes. This would allow more time for implementation between reviews, which could give us a better basis for making an assessment of effectiveness. In addition, it is important that the resources be put into implementation of the Act instead of being diverted to too frequent reviews. To make the review every seven years more effective, EC and HC should have a reporting mechanism in place that includes quantitative data to help in the review. This data should be available before the review scoping process begins.

Q 3.7. If Ministers choose the route of no further action under CEPA 1999 (i.e. a non-CEPA measure is pursued), should conditions be put in place to ensure effective accountability for protection of the environment and human health?
Yes. Conditions should be set to ensure that the same principles as those in CEPA are used in the alternative mechanism, e.g., precautionary principle, pollution prevention and full public involvement. They should be required to report regularly to the public on how well these benchmarks have been met.

Q 3.8. If a non-CEPA 1999 measure is pursued, should CEPA 1999 play a backstop role? If so, how can this be done efficiently?
Yes. There should be a back-drop regulation.

Environment Canada and Health Canada regard administrative and equivalency Agreements as important mechanisms for enhancing the efficiency of the overall Canadian environmental management regime. As such, the subject matter, scope and timeframe of these agreements can vary markedly.
Q 3.9. Should CEPA 1999 provide the flexibility to tailor administrative and equivalency agreements to appropriate circumstances?
Any such flexibility should be backed up by a strong federal role in monitoring the programme to ensure that all Canadians have a consistent level of protection. Any flexibility that is provided should require that the environmental and human health protections are at least as strong as those required by CEPA and are consistent with all of CEPA's principles.

Q 3.10. What are your views on this issue [CEPA NAC as tool for engaging aboriginal interests]?
The aboriginal groups should determine which tools they want to have for engagement in CEPA activities.

Q 3.11. What are your views on this issue [managing toxics associated with products]?
CEPA definitely should address toxics at all the stages in their life cycle, including toxics in products. As suggested in the EC and HC scoping document, CEPA should address toxic substances in products at the point of manufacture. For those products manufactured outside of Canada, the requirements should be applied to the importer.

Q 3.12. How should CEPA 1999 interface with other federal authorities for the management of products?
CEPA should take priority to ensure that consistency, effectiveness and the objectives of CEPA are met.

The management of biotechnology is an important and complex issue that has many dimensions - such as horizontal governance - outside of the scope of CEPA 1999

Q 3.13. In the context of a federal strategy to build on existing legislation, is the residual role that CEPA 1999 serves adequate for assessing and managing products of biotechnology which are not covered under other federal legislation?
No. Other federal departments are focused on serving market interests and, therefore, cannot be expected to place primacy on environmental protection and human health.

Q 3.14. Is the Act adequate for assessing and managing emerging developments of biotechnology?
No. Need to make CEPA become the central federal legislation on biotechnology in Canada. GMO products need to be required to go through assessment processes similar to toxic substances.

Q 3.15. Should CEPA 1999 authorize remedial measures with respect to animate products of biotechnology?
Yes. CEPA needs to include liability for escape of products of biotechnology. It also should include the power to require remedial actions, including a requirement that such measures be detailed prior to an approval for use is given.

The regulatory gaps with respect to federal activities and lands and with respect to Aboriginal lands presents ongoing challenges whose resolution requires considering a wide range of factors, some of which are well outside of the scope of CEPA 1999.
Q 3.16. What are your views on this issue?
Constitutional and fiduciary responsibilities should be respected and retained. Federal activities and lands should meet or exceed the best practice or technology found in Canada or elsewhere in the world.

SECTION 4: TIMELY ACCESS TO INFORMATION

CEPA 1999 is an important tool for the Minister of Health to use for protecting human health.
Q 4.1. Should CEPA 1999 be clarified to require the Minister of Health to conduct monitoring studies?
Yes.

Q 4.2. Is there a need to improve the reliability of information reported under NPRI and the administrative efficiency of the program? If so, what type of changes to CEPA 1999 would you recommend?
Yes, there is a need to improve the reliability of the information. More resources should be allocated to the programme for the government to audit the reports submitted to NPRI. We support reduced administrative complexity for reporters only if this does not result in reduced detail in the information available to the public.

Q 4.3. Should the Act extend the information gathering powers in s. 71 to the Minister of Health?
Yes.

Another problem in CEPA around information gathering powers is the provision that the only data that must be submitted is "any information that may be in the possession of that person or to which the person may reasonably be expected to have access" [sec 46(1)]. Reporters to NPRI use this provision as an argument for not adding certain substances to the NPRI list or not lowering thresholds, i.e., that they don't currently have this data. This provision must be changed to allow the government to require the collection of new data.

The information gathering powers have also proven to be a problem in the categorization process. Information on data that companies have about substances is not made available to the government until late in the process.

SECTION 5: SOUND SCIENCE AND RESEARCH

Q 5.1. How may current resources and capacity be used to further develop and coordinate scientific and research partnerships and activities, in order to advance scientific objectives which support decision-making under CEPA 1999?
Current government budgets to conduct the range of environmental and health studies required to advance decision-making under CEPA are inadequate. Because it is vital for governments to have the capacity to conduct independent studies in these fields, resources to do this work must be enhanced. It is also important to include scientists and researchers from a broad range of disciplines. Coordination and/or partnerships with other research facilities are useful and necessary, but should not come at the expense of less government funding for research.

Q 5.2. How can Environment Canada and Health Canada most effectively include traditional aboriginal knowledge in their decision-making processes?
Traditional aboriginal knowledge must be valued and integrated into the decision-making process. Respectful gathering of information pertaining to this knowledge includes permission to use it and proprietary considerations.

Given the challenges listed above, Environment Canada and Health Canada plan to continue to:

- *use the tools provided by CEPA 1999 in the most efficient manner possible;*
- *identify opportunities and methodologies for grouping substances together by class or sector for risk assessment; and*
- *seek collaborative opportunities to improve databases and reduce resource requirements and timelines for assessments of existing substances.*

Q 5.3. What are your views on this issue?

We strongly support the EC and HC's stated intention to focus more on classes of substances instead of proceeding on a substance-by-substance approach, which greatly increases the time and resources need to do the work.

On improving databases, government needs to place the responsibility of proving whether a substance and its current or proposed uses are acceptable on those who manufacture and use the substances, i.e., industry.

Q 5.4. Does the Act provide adequate authority to support inter-jurisdictional cooperation in the implementation of the New Substances Program?
Yes.

Q 5.5. Should CEPA 1999:

- *provide the authority to remove any of the originating substances from the DSL if information determines that the is no longer used in Canada; and*
- *clarify the authority for the submission of information regarding current use patterns and quantities in use of substances on the DSL?*

Yes to both questions. It is essential that, if a substance is removed from the DSL, it be treated as a new substance and be required to go through a full assessment process before deciding whether it can be reintroduced.

If a substance is removed from the DSL, the information that existed at that time on the use, nature and hazards associated with the substance should be retained in perpetuity in a readily available location both for the public and for government. This is necessary because in the process Canada now uses to approve new substances, if the U.S. EPA has approved a substance, Canada usually approves it without getting access to all the information that EPA used in making its decision. Therefore, if a substance is deleted from the DSL, Canada may have lost access to critical information on the substance.

SECTION 6: PERFORMANCE PROMOTION

CEPA 1999 provides broad authorities to enforce the Act and its regulations.
Q 6.1. What are your views on this issue?
The enforcement of the Act is completely inadequate. For example, in 2002-2003, only 36 investigations were carried out and only 4 prosecutions were conducted. Enforcement activities are entirely discretionary. Given the lax enforcement by the government, it is even more essential to strengthen the provisions for private prosecution.

Q 6.2. Should the Act provide an alternative approach to the designation of substances?
Yes. There should be more use of designations by classes of substances rather than individual substances to speed up the process. Some additional probable improvements to the process can be found in the European REACH programme.

Q 6.3. Should the Act provide an alternative approach to the listing of substances that have been determined to be toxic?
Yes. If the government review concludes that a substance or group of substances is “toxic”, it should automatically be designated as toxic without going to the Governor-in-Council for a decision.

Q 6.4. Should the Act include additional authority regarding economic instruments?
Yes. Economic instruments can be a supplement to encouraging compliance and performance, but they should not be seen as removing the need for regulatory actions. The current CEPA provision around “fees” should be expanded so that it does not restrict government to charge only for cost-recovery for services provided. Fees should have a much broader scope as to their basis.

Q 6.5. Should CEPA 1999 require an LoQ for every substance being added to the Virtual Elimination List?
No. The LoQ (Level of Quantification) is a contrived measure that sets values that are unnecessarily high and difficult to support as it does not reflect the need to “eliminate” substances.

Q 6.6. Should the Act enable export/import permits to adapt to changing circumstances?
Yes. The Minister should have the power to change permits that have already been issued and to put time limits on how long a permit is valid. Indeed, the Minister should be required to reopen and change the permit if the situation has changed.

Q 6.7. Are the export reduction planning provisions effective, or should they be clarified or removed from the Act?
The current provisions are not effective but they should not be removed from CEPA. The CEPA review should assess how to make changes to CEPA to make the reduction-planning concept effective. In addition, it should look at ways to require reduction plans from those who import hazardous waste into Canada. These provisions should also be extended to the import and export of non-hazardous wastes.

Q 6.8. Should CEPA 1999 enable further alignment with emission control standards of other countries, including the U.S.?
Yes, provided this does not result in a weakening of Canadian standards.

Q 6.9. Should CEPA 1999 include authorities to address fuels as they move throughout the entire distribution system (from the refinery to the service station)?
Yes.

Q 6.10. Should CEPA 1999 be clarified to ensure that the Minister can prohibit the sale or use of a new substance that has been manufactured in or imported into Canada prior to completion of its assessment?
Yes.

Q 6.11. Are there benefits to the CEPA 1999 requirement that disposal at sea permits be published in the Canada Gazette for a 30 day period?
Yes. There should be that further 30-day opportunity for the public to comment. Concern is expressed in the EC-HC scoping document that they haven't received public comments as a result of this posting. Most people do not go to the Gazette to see what is published there. EC and HC should develop mechanisms to inform the possibly affected and concerned public when something that may be of interest to them has been posted on the Gazette.

Q 6.12. Should more flexibility be accorded for a permit's term?
No. The permit should expire and as a result require a reassessment each year.

Q 6.13. What are your views on this issue [Fisheries Act issues]?
Both CEPA and the Fisheries Act should apply.

Q 6.14. Should CEPA 1999 authorize the designation of qualified persons as environmental emergencies officers?
Yes.

SECTION 7: EDUCATION - PROMOTING UNDERSTANDING

7.3 Should CEPA 1999 be implemented differently? Should the Act be changed?
Q 7.1. What are your views on this issue?
Indicators and Environmental and Health Prediction
Q 7.2. What are your views on this issue?
Risk communication
Q 7.3. What are your views on this issue?

Q 7.1-7.3: EC and HC should put much more effort into getting information out to the public. One useful item would be the preparation of regular state of the environment reports.

SECTION 8: CONCLUSIONS AND NEXT STEPS

No Questions.

EC and HC provided no questions under this section. We do, however, have a recommendation for the next steps.

Because of the importance of CEPA, we think that it is essential that the review be conducted by *elected* politicians through a House of Commons

committee such as the Committee on Environment and Sustainable Development.

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