USING THE *CANADIAN ENVIRONMENTAL PROTECTION ACT* TO CONTROL AIR POLLUTION, PROTECT SIGNIFICANT AREAS AND REDUCE GREENHOUSE GAS EMISSIONS

SUBMISSIONS TO THE HOUSE OF COMMONS AND
THE GOVERNMENT OF CANADA
ON THE
LEGISLATIVE COMMITTEE AMENDMENTS TO
BILL C-30 (*Canada's Clean Air and Climate Change Act*)

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ABOUT THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION

The Canadian Environmental Law Association (CELA) was founded in 1970 for the purposes of using and improving laws to protect public health and the environment. Funded as a legal aid clinic specializing in environmental law, CELA represents individuals and citizens' groups in the courts and before tribunals on a wide variety of environmental matters. In addition, CELA staff members are involved in various initiatives related to law reform, public education, and community organization.

In particular, CELA has played a central role, by way of written submissions, testimony and consultations, in the ongoing development, review and implementation of both the 1988 and current (1999) versions of the *Canadian Environmental Protection Act* (CEPA). CELA has also been instrumental in the formation and operation of the Canadian Partnership for Children's Health and Environment (CPCHE), a ten-member partnership of health, environment and child-focused groups addressing the special vulnerability and health risks to children of toxic substances and environmental pollution and advancing a policy agenda to address these risks. Of particular concern to CPCHE partners is the urgent need to address the well-established scientific evidence of harm to children from air pollution. Given CELA's long-standing involvement in child health issues and CEPA, the submissions herein are focused on provisions in Bill C-30 touching on CEPA, and do not include comments on Bill C-30's proposed amendments to the *Energy Efficiency Act* and the *Motor Vehicle Fuel Consumption Standards Act*.

I. INTRODUCTION

On March 30, 2007, a Legislative Committee reported to the House of Commons on proposed amendments to Bill C-30, "An Act to amend the *Canadian Environmental Protection Act, 1999*, the *Energy Efficiency Act* and the *Motor Vehicle Fuel Consumption Standards Act* (Canada's Clean Air Act)." [1]

The purpose of these submissions is to draw to the attention of the Government of Canada and Members of the Parliament of Canada the views of the Canadian Environmental Law Association ("CELA") on selected amendments proposed for Bill C-30 respecting climate change, air pollution, toxic substances, and related matters.

In our view the First Reading version of Bill C-30 constituted a significant setback to the development of federal environmental law in Canada, and the version of Bill C-30 reported to the House of Commons by the Legislative Committee constitutes some improvement over the First Reading version of the Bill. While it still has significant shortcomings, it is our view that Bill C-30 contains kernels of potential that should be considered in future legislative proposals, either by continued debate on C-30 itself, or in further draft legislation.

[1] Among the Legislative Committee's proposals was to change the short title in clause 1 of the bill to *Canada's Clean Air and Climate Change Act*.

It should be noted that the Legislative Committee did its work while the House of Commons Standing Committee on Environment and Sustainable Development was in the final stages of writing its report on the legislative five-year review of the *Canadian Environmental Protection Act, 1999*, which it tabled shortly after Bill C-30 was reported back to the House of Commons. [2] In an ideal world, a single committee would have been able to undertake both studies simultaneously. The integrity of CEPA and other federal environmental legislation is most likely to be assured if the Parliament and Government of Canada can approach future federal environmental law reforms, including those pertaining to climate change, air pollution, toxic substances, and related matters, in the most integrated manner possible. The approach should also be premised on the principles of precaution and prevention that are contained in subsection 2 (1) ("Duties of the Government of Canada") of CEPA, 1999.

The submissions herein have been prepared with the above themes and principles in mind. CELA therefore strongly urges careful consideration of the recommendations in this submission.

II. DEFINITION OF AIR POLLUTANTS

An amended section 3(1) would introduce a definition for "air pollutant" that identifies eight specific substances (particulate matter less than 10 microns, ozone, sulphur dioxide, nitric oxide, nitrogen oxide, volatile organic compounds, gaseous ammonia, and mercury), and the authority to prescribe other substances.

Each of the identified air pollutants is already listed in Schedule 1 of the *Canadian Environmental Protection Act, 1999* ("*CEPA, 1999*") as a toxic substance. However, section 3(1) does not identify the eight air pollutants as toxic substances. As noted by CELA and other organizations previously, the Supreme Court of Canada in *R. v. Hydro Quebec* upheld the constitutionality of the provisions relating to control of toxic substances under the predecessor legislation to *CEPA, 1999*, in part because the statute did not purport to control the universe of environmental pollutants (and thereby potentially infringe on concurrent provincial environmental jurisdiction), but rather sought only to control a distinct subset of such pollutants, namely toxic substances as defined in the statute. Accordingly, the failure of Bill C-30 to identify the substances in section 3(1) as toxic substances creates uncertainty with respect to the purposes of the amendments in this regard and, therefore, risks jeopardizing the constitutional authority of the federal government to control these substances under *CEPA, 1999* should the amendments be challenged successfully in the courts.

Even if federal authority was eventually upheld, the amendments (1) invite re-litigation of matters that were settled by the Supreme Court in the *Hydro Quebec* decision, (2) re-introduce uncertainty as to the constitutional underpinnings of Part V ("Controlling Toxic Substances") of *CEPA, 1999*, and (3) have the potential to slow down the development by the Government of

[2] House of Commons, Standing Committee on Environment and Sustainable Development, *The Canadian Environmental Protection Act, 1999 – Five-Year Review: Closing the Gaps* (39th Parliament, 1st Session, April 2007).

Canada of needed programs under *CEPA, 1999* while the constitutional issues work their way through the courts.

Accordingly, if an amended section 3(1) definition for "air pollutant" is to remain in Bill C-30, it should be further amended to make clear that each and every air pollutant identified in the subsection remains a toxic substance listed under Schedule 1 of *CEPA, 1999*. In the (preferred) alternative, the amended section 3(1) definition for "air pollutant" should be deleted from Bill C-30.

III. EQUIVALENCY PROVISIONS

Amended section 10(3) would introduce a further principle of equivalency to existing *CEPA, 1999* provisions on equivalency. The amendment would allow the federal cabinet to declare by order that a regulation under *CEPA, 1999* would not apply, for example, in a particular province if the federal Ministers of Environment and Health and the provincial government agree that the "effects" of the provincial law "will demonstrably provide an equivalent or superior level of protection of the environment and human health based on, *amongst other factors*, the *quantifiable effects* of the regulation on the environment and human health and the effective enforcement and compliance of the *federal regulation*." (Italics added). Section 10(3.1) would require any agreement between the federal ministers and the particular government to also include "a method of determining whether the terms and conditions of the agreement are being fully met."

CELA submits that section 10(3) is vague, confusing, and inferior to even the weak equivalency provisions that already exist in *CEPA, 1999*. The concept of equivalency in *CEPA, 1999* has always been controversial because of the extent to which it had the potential to remove the application of federal environmental law in a province and substitute inexact standards of equivalency and inadequate federal oversight of whether provincial laws were an appropriate substitute for the job intended with the enactment of *CEPA, 1999*.

Indeed, the history of equivalency provisions has not demonstrated that the country is well-served by the approach. In its 1999 Report to the House of Commons on federal- provincial environmental agreements, the office of the Commissioner of the Environment and Sustainable Development ("CESD") reviewed whether (1) equivalency agreements under the predecessor to *CEPA, 1999*, and (2) administrative agreements under *CEPA* and the *Fisheries Act*, were working.[3] In general, the CESD found several common implementation problems with respect to all of the federal-provincial environmental agreements it reviewed including:

(1) lack of ongoing analysis once agreements were in place;
(2) failure to analyze whether duplication in government administration was reduced even though this was a primary motivation for the agreements in the first place; and
(3) weak annual reporting of meaningful results under the agreements.[4]

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[3] Commissioner of the Environment and Sustainable Development, *Chapter 5 - Streamlining Environmental Protection Through Federal-Provincial Agreements: Are They Working?* (Ottawa: Minister of Public Works and Government Services Canada, 1999).
[4] *Ibid*. at 5-11 to 5-12.

With respect to the only equivalency agreement in place at the time (with Alberta), the CESD noted that while industry and the Alberta and federal governments were satisfied with how the agreement was working, the CESD found the following deficiencies with implementation of, and reporting with respect to, the agreement:

- The federal government did not have detailed provincial information, particularly information on provincial inspections and associated enforcement activities;

- The lack of complete information on provincial activity was a problem (given that the existing equivalency provisions provide that federal regulations are suspended in favour of supposedly equivalent provincial regulations);

- Without such information, Environment Canada was not in a position to ensure that the equivalent federal requirements are satisfactorily enforced and that its legislated responsibilities are being carried out; and

- Parliament had little information on how well the *CEPA* agreement was working because reporting to Parliament was incomplete and out-of-date.[5]

In the circumstances, the CESD recommended that: "In its reports to Parliament, Environment Canada should include more meaningful, complete, timely, reliable, understandable and results-based information on the *CEPA* equivalency [agreement]."[6]

Indeed, the CESD noted that the House of Commons Standing Committee on Environment and Sustainable Development recommended as long ago as 1995 that: "…at a minimum, the report [to Parliament] should contain information on provincial inspection, investigation, verification and enforcement activities, data on spills and releases, and information on disputes that have arisen under the agreements."[7]

In the intervening years since both the CESD and the Standing Committee have reported on these matters, it is not at all clear that the problems they identified have been resolved.

Furthermore, the proposed wording of section 10(3) is vague and confusing so as to have the potential to worsen the situation. For example, what is meant by a phrase such as "amongst other factors"? Section 10(3) does not set out or define what these "other factors" might be or establish a methodology for how they are to be determined. Nor is there any regulation-making authority established that would allow such factors to be standardized and made subject to prior public notice and opportunity for comment.

How are "quantifiable effects of the regulation on the environment and human health" to be determined? Indeed, what is a "quantifiable effect"?

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[5] *Ibid.* at 5-12, 5-13, and 5-20.
[6] *Ibid.* at 5-20.
[7] *Ibid.* (referring to 1995 report entitled "It's About Our Health! Towards Pollution Prevention").

All of these matters appear to be left to be fleshed out, if at all, through any future agreements that might be entered into between governments instead of being subject to a more transparent process, such as regulation-making, which would at least subject the process to public notice and opportunity for comment.

Finally, the last part of the amended section 10(3) respecting "the effective enforcement and compliance of [sic] the *federal regulation*" (emphasis added) makes no sense since, by definition, where an equivalency agreement is in place there is no federal regulation.

In the circumstances,the proposed section 10(3) cannot be supported as it would open the door to greater use of equivalency agreements, rather than establishing the needed checks on their use. It does not appear prudent to expand the scope of equivalency provisions either in the manner proposed by the Government of Canada in the First Reading bill, or as amended by the Legislative Committee. The fact that the current equivalency provisions in *CEPA 1999* are very weak, as noted above, may provide justification for eliminating altogether the concept of equivalency from *CEPA, 1999*, and/or from its successor.

IV. SIGNIFICANT AREAS

Under a proposed new section 53.1(1), Bill C-30 would grant the Minister the authority to designate a region as a significant area if, in the opinion of the Minister:

- The region is particularly environmentally vulnerable to the effects of toxic substances; or

- A significant volume of toxic substances is released into the environment of the region.

The Legislative Committee also proposed a number of comparatively minor notice, information-gathering, research, and related amendments with respect to significant areas [section 53.1 (2)-(4)].

Several major problems with the proposed section 53.1(1) can be identified. First, the amendment is not that different from authority that already exists under section 330(3.1) of *CEPA, 1999* to promulgate regulations with respect to toxic substances that are applicable in only a part or parts of Canada in order to protect the environment, biological diversity, or human health.

Second, the proposed section 53.1(1) is discretionary, not mandatory. Accordingly, there is no guarantee that anything will happen as result of the amendment.

Third, controlling toxic substances in significant areas needs to be comprehensive in its approach. Therefore, if *CEPA, 1999* is to be the vehicle for such an approach, far more of the existing statute would have to be amended than what is proposed under section 53.1(1)-(4).

CELA has, therefore, drafted comprehensive amendments to *CEPA, 1999* respecting designation by the Minister of the Environment, and protection of "significant geographic areas" from toxic substances. These amendments are appended to these submissions (see Appendix A). These new provisions are intended to replace the new s. 53.1 proposed by the Legislative Committee.

V. GREEN INVESTMENT BANK

A proposed section 63.1 would authorize establishment of a Green Investment Bank of Canada (referred to as the "Bank") following negotiations among federal, provincial and territorial governments, aboriginal communities, the private sector, and non-governmental organizations. The Bank would be responsible for monitoring and regulating the greenhouse gas emissions of large industrial emitters (defined elsewhere in Bill C-30 and discussed below).

While the intention to control large industrial greenhouse gas emitters is laudable, section 63.1 creates confusion about the respective roles and responsibilities of government regulators and the Bank.

By contrast, the trend in countries that are moving to control greenhouse gas emissions is essentially to employ a two-step process: (1) impose a cap (often a sliding scale downward cap over time), and (2) authorize emissions trading as a method of achieving compliance with the cap.

Second, the regulatory authority proposed for the Bank in s. 63.1 ("the Green Investment Bank of Canada … is to be responsible for monitoring and regulating the greenhouse gas emissions of large industrial emitters") has the potential to come into conflict with the regulatory authority vested with the Minister elsewhere in Bill C-30 (such as the proposed subsection 103.05 (2) authority to set "sectoral carbon budgets").

Third, the authority granted the Bank is potentially capable of conflicting with the regulatory authority vested elsewhere in current *CEPA, 1999* with the federal cabinet (such as the existing authority in subsection 94.1 (1) to make regulations establishing a domestic greenhouse gas emissions trading and offset system).

Fourth, the proposed obligation for the government to enter first into unnecessarily long and protracted negotiations with the above-noted stakeholders includes no provision for their conclusion in the event of stalemate, meanwhile allowing emissions to continue to grow unchecked.

CELA therefore proposes that section 63.1 be deleted in favour of a regime that both meets Canada's international obligations and moves Canada toward a significantly less carbon-intensive economy. [8]

[8] See, for example, the proposals in Matthew Bramley, "Fair Share, Green Share: A proposal for regulating greenhouse gases from Canadian industry (Submission to the House of Commons Legislative Committee on Bill C-30)". Pembina Institute, February 20, 2007. http://climate.pembina.org/pub/1372 (accessed 5 July, 2007)

VI. ASSESSMENT AND ACTION PLAN

A proposed subsection 68.1(1) would oblige the Minister to require an assessment of certain substances of concern and an action plan for achieving their "substitution." The substances of concern are:

(1) known or suspected carcinogens identified by the International Agency for Research on Cancer ("IARC") that have not been identified for assessment under section 74 of *CEPA, 1999*; and
(2) other substances of concern identified by the Minister.

Under proposed subsection 68.1(2), a substance slated for "safe substitution" must be phased out for use within ten years of the coming into force of the section.

While these are laudable provisions, they require both clarification and expansion. First, neither "substitution" nor "safe substitution" is defined in Bill C-30. Reform of European chemicals law has included a requirement to encourage the substitution of dangerous by less dangerous substances or technologies where suitable alternatives are available. The purpose of such an approach is to ensure that the risks from substances of very high concern are properly controlled, or that these substances are replaced by suitable alternative substances or technologies.

Second, instead of "known or suspected carcinogens identified by [IARC]", it would be more accurate to identify the list of substances that are carcinogenic to humans (Group 1) and probably carcinogenic to humans (Group 2A) as identified by IARC. These two groups alone constitute 168 substances or classes of substances. A Group 2B – "possibly carcinogenic to humans" – consists of 246 additional substances or classes of substances. [9]

Moreover, the exclusive focus on carcinogens implied by these proposals is needlessly limiting given what is known about developmental toxicity of additional substances.

CELA recommends that these provisions be further expanded to include, at a minimum, the list prepared by law under the State of California *Safe Drinking Water and Toxic Enforcement Act of 1986* (also known as Proposition 65). The Proposition 65 list includes chemicals known to cause cancer or reproductive toxicity. It provides a minimum level of protection as it addresses known health risks in these two areas. A much large number of chemicals are suspected of these and other serious health impacts, particularly in the fetus and developing child.

Finally, the timeline for phase-out should be (after the coming into force of the relevant provision) no more than four and one half years from the date a substance is slated for assessment. This recommendation is consistent with timelines proposed by CELA for the assessment and risk management process.

[9] All figures cited here are accurate to January 24, 2007.

VII. REGULATIONS

The proposed subsection 94.1(1) identifies a category of regulation-making authority that is mandatory on the federal cabinet. The proposed subsection 94.1(2) identifies a category of regulation-making authority that is discretionary with the federal cabinet.

The inclusion of mandatory regulation-making authority is laudable. However, if the purpose of Bill C-30 is to ensure that Canada meets its obligations under the Kyoto Protocol then more items that appear in the discretionary regulation-making category should instead be placed in the mandatory category (e.g. regulations linking domestic greenhouse gas emission trading system with international trading systems that also establish verifiable greenhouse gas emission reductions so as to comply with the requirements of the Kyoto Protocol). In addition, timelines for developing and implementing regulations should be outlined in subsection 94.1 (1).

VIII. CLIMATE CHANGE ACTION

A proposed new Part 5.1 for CEPA, 1999 would establish a regime for action on climate change. The following is a brief evaluation of the adequacy of the various components of that regime.

A. Purpose

A new section 103.01 sets out the purpose of Part 5.1 as reducing "Canada's greenhouse gas emissions to below *current and historical levels* in order to protect the environment…" (emphasis added).

It is not at all clear from Bill C-30 what is meant by "current and historical levels" of greenhouse gas emissions in Canada. Both "current" and "historical" levels should be defined in Bill C-30.

B. Carbon Budget

A new paragraph 103.02(1)(b) would establish a national carbon budget for Canada. Projecting into the future, the section would require that Canada's domestic greenhouse gas emissions for 2020 be at least 20% lower than 1990 levels and for 2050, 60% to 80% lower than 1990 levels.

In general, the approach taken in section 103.02 is appropriate. However, there is consensus in the domestic and international scientific community that the long-term targets for Canada's domestic greenhouse gas emissions for 2020 should be at least 25% lower than 1990 levels and for 2050 should be 80% lower than 1990 levels. Section 103.02(1)(b) should be amended accordingly.

A new section 103.02(2) states that the sectoral carbon budgets established by Bill C-30 are portions of the national carbon budget determined by the Minister to be appropriate for each

group of persons that the Minister considers is responsible for "a large portion of Canada's greenhouse gas emissions."

Bill C-30 should define what is meant by "a large portion."

Finally, section 103.02(6) would authorize the Minister to issue a carbon permit to any person emitting greenhouse gases who is required by regulation to possess such a permit.

Establishment of a carbon permit system is an important component of a regime designed to control greenhouse gas emissions. However, the permit regime should be designed on the basis of a permit per tonne of greenhouse gases released, not on the basis of a single permit per person. Alternatively, the permit system should be designed to grant carbon allowances on an annual basis with each tonne of greenhouse gas emitted being the equivalent of one allowance.

C. Climate Change Plan

A proposed section 103.03 would require the Minister to establish an annual Climate Change Plan that includes certain characteristics set out in the section.

However, while a Ministerial failure to prepare such an annual plan could attract legal consequences, Bill C-30 contains no consequences for failing to implement the contents of the plan itself. Section 103.03 should be amended accordingly.

In particular, consequences could be attached to proposed section 103.03(1)(f) (respecting plan implementation) in the form of depriving large industrial emitters of greenhouse gases (to be identified pursuant to section 103.05) who are not meeting their obligations under section 103.05 of subsidies, tax breaks, or both.

D. Large Industrial Emitters

A proposed section 103.05 would authorize the Minister, in consultation with the federal cabinet, to designate as "large industrial emitters" persons in the electricity generation, oil and gas, and energy-intensive industrial sectors that the Minister considers are particularly responsible for a large portion of Canada's greenhouse gas emissions.

Bill C-30 should authorize establishment of a schedule or schedules to the Act designating such persons. Such persons would then be subject to the consequences outlined in Section C above.

E. Greenhouse Gases – Territorial Approach

A proposed section 103.051 would allow the federal cabinet to exempt a province from the requirements of Bill C-30, or a regulation promulgated thereunder, where the Ministers recommend, and the Green Investment Bank determines by notice in writing, that the provincial

government has greenhouse gas emission reduction requirements in force that are equivalent to those under Bill C-30.

Section 103.051, like amended subsection 10 (3) discussed in Part III above, deals with equivalency. For the reasons set out in Part III, CELA recommends that federal responsibility for emission reductions should not be ceded to other governments by means of either equivalency agreements or executive order without strong measures in place for ensuring environmental protection and accountability.

IX. AMBIENT AIR QUALITY STANDARDS AND AIR EMISSION STANDARDS

A proposed section 103.07 would authorize the Minister among other things to (1) issue ambient air quality standards in respect of each "air pollutant" (identified under amended section 3(1) discussed above), (2) divide Canada into zones for the purpose of setting air emission standards applicable in each zone, and (3) impose the air emission standards on each industrial facility in a zone where there is not compliance over a six month period, with an ambient air quality standard for a particular air pollutant in that zone.

In general, the approach contemplated by section 103.07 is laudable. However, the approach appears to be predicated on that found in the United States *Clean Air Act Amendments of 1990* ("*CAAA*"), a much more sophisticated and complex regulatory regime than that contemplated by section 103.07. First, the *CAAA* applies to both stationary and mobile sources of air pollution, whereas section 103.07 would only impose obligations on stationary sources. Second, the *CAAA* imposes compliance obligations on states in order to ensure that the ambient air quality standards in each zone in the state are met through a broad array of regulatory, fiscal, planning, and technical measures. The states, in turn, impose these measures locally.

By contrast, section 103.07 would appear to impose only regulatory obligations directly on polluters without regard to other fiscal, planning, and technical measures that might also be necessary to achieve compliance. In the circumstances, and having regard to the constitutional considerations applicable in Canada, section 103.07 should be re-considered with a view to applying to both stationary and mobile sources.

Finally, for the reasons set out in Part II above, the de-coupling of air pollutants from the List of Toxic Substances under Schedule 1 of *CEPA, 1999* raises concerns about the constitutionality of section 103.07. Accordingly, we repeat our recommendation made above.

X. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

As noted in the introduction to these submissions, it is important for both the Government of Canada and the Parliament of Canada to make future federal environmental law reforms in an

integrated, consistent and comprehensive manner, including those pertaining to climate change, air pollution, toxic substances, and related matters. In light of this, CELA urges both the Parliament of Canada and the Government of Canada to consider the present submissions together with our earlier submissions on both *CEPA, 1999* and Bill C-30. We would be pleased to provide any further information or clarifications.

B. Recommendations

In light of the foregoing, CELA makes the following recommendations:

1. If an amended subsection 3(1) definition for "air pollutant" is to remain in Bill C-30, it should be further amended to make clear that each and every air pollutant identified in the subsection is already, and shall remain, listed as a toxic substance in Schedule 1 of *CEPA, 1999*. In the alternative, the amended subsection 3(1) definition of "air pollutant" should be deleted from Bill C-30.

2. Delete the amendments made to subsection 10(3).

3. Delete subsections 53.1(1)-(4) and substitute protection of significant geographic areas from toxic substances in the manner set out in Appendix A herein.

4. Section 63.1 should be deleted in favour of a regime that both meets Canada's international obligations and moves Canada toward a significantly less carbon-intensive economy..

5. Define "substitution" as proposed in the attached s. 3 definition, and enact the new obligation on the Minister of the Environment to investigate safer substitutes for toxic substances proposed in s. 68.1, also attached.

6. Instead of using the phrase "known or suspected carcinogens identified by [IARC]" in section 68.1, it would be more accurate to identify by listing in a schedule to *CEPA, 1999* the substances that are carcinogenic to humans (Group 1) and probably carcinogenic to humans (Group 2A) as identified by IARC. In addition, this schedule should include the State of California *Safe Drinking Water and Toxic Enforcement Act of 1986* (Proposition 65) list of chemicals known to cause cancer or reproductive toxicity.

7. If a purpose of Bill C-30 is to ensure that Canada meets its obligations under the Kyoto Protocol, then more items that appear in the discretionary regulation-making category under section 94.1 should instead be placed in the mandatory category (e.g. regulations linking a domestic greenhouse gas emission trading system with international trading systems that also establish verifiable greenhouse gas emission reductions so as to comply with the requirements of the Kyoto Protocol).

8. Both "current" and "historical" levels of greenhouse gas emissions in Canada should be defined in connection with section 103.01 of Bill C-30.

9. Paragraph 103.02(1)(b) should be amended to read that the targets for Canada's domestic greenhouse gas emissions for 2020 should be at least 25% lower than 1990 levels and for 2050, should be 80% lower than 1990 levels.

10. Subsection 103.02(2) should be amended to define what is meant by "a large portion of Canada's greenhouse gas emissions."

11. Subsection 103.02(6) should be amended to authorize the establishment of a permit regime designed on the basis of a permit per tonne of greenhouse gases released, not on the basis of a single permit per person. Alternatively, the permit system should be designed to grant carbon allowances to greenhouse gas emitters on an annual basis, with each tonne of greenhouse gas emitted being the equivalent of one allowance.

12. Section 103.03 should be amended to require the Minister to implement the contents of the annual Climate Change Plan required to be prepared under this section.

13. Consequences should be attached to proposed paragraph 103.03(1)(f) (respecting plan implementation) in the form of denying subsidies, tax breaks, or both from large industrial emitters of greenhouse gases where they are not meeting their obligations under section 103.05.

14. Pursuant to proposed section 103.05, Bill C-30 should authorize establishment of a schedule or schedules to the Act designating persons in the electricity generation, oil and gas, and energy-intensive industrial sectors, as "large industrial emitters."

15. Federal responsibility for emission reductions should not be ceded to other governments by means of either equivalency agreements or executive order without strong measures in place for ensuring environmental protection and accountability.

16. Having regard to the constitutional considerations applicable in Canada, section 103.07 should be re-considered with a view to applying to both stationary and mobile sources.

17. With respect to section 103.07, see Recommendation 1, above.

Please also see the proposed amendments in Appendix A.

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XI. APPENDIX A – SIGNIFICANT GEOGRAPHIC AREAS

PROPOSED AMENDMENTS TO THE CANADIAN ENVIRONMENTAL PROTECTION ACT RESPECTING PROTECTION OF SIGNIFICANT GEOGRAPHIC AREAS (INCLUDING THE GREAT LAKES) FROM TOXIC SUBSTANCES

CEPA section #	Proposed Amendment	Rationale
Preamble (between current 9th & 10th recitals)	Whereas the Government of Canada recognizes that protection of significant geographic areas, such as the Great Lakes Basin, from toxic substances is integral to the environment and human health of the people of Canada living in these areas; Whereas the Government of Canada recognizes that the Great Lakes alone contain approximately 20 percent of the Earth's fresh surface water, and constitute a treasure of global significance; Whereas the Government of Canada recognizes that the Great Lakes Basin alone provides drinking water for 30 percent of the population of Canada, and represents 25 percent of the Gross National Product of Canada; Whereas the Government of Canada recognizes that the Great Lakes Basin contains over 50 percent of the industrial facilities reporting releases of toxic substances in Canada; Whereas the Government of Canada recognizes that the Great Lakes Basin contains nearly 50 percent of all toxic air pollution released in Canada, as well as a disproportionately high percentage of releases of toxic substances to water and land;	Certain significant geographic areas of Canada are particularly threatened by the use, generation, and release of toxic substances. One of these areas is the Great Lakes Basin. The information supporting the statements proposed as amendments to the Preamble to *CEPA* are contained in a variety of government and non-government documents. See, for example, 2007 Draft Report by the Agreement Review Committee to the Great Lakes Binational Executive Committee Respecting Review of the Canada-U.S. Great Lakes Water Quality Agreement (Vol. I-II). See also Canada-Ontario 2007 Agreement Respecting the Great Lakes Basin Ecosystem, including the Annexes (draft). See further PollutionWatch, *Partners in Pollution: An Assessment of Continuing Canadian and United States Contributions to Great Lakes Pollution*, February 2006; and PollutionWatch, *Reforming the Canadian Environmental Protection Act*, Submission to the Parliamentary Review of *CEPA, 1999*, June 2006..

ADMINISTRATIVE DUTIES

CEPA section #	Proposed Amendment	Rationale
Section 2 - (add new subsection 2(1)(k.1) - Duties of the Government of Canada	protect the environment, including its biological diversity, and human health, from the risk of any adverse effects of the use, generation, release, manufacture, import, export, sale or disposal of toxic substances in significant geographic areas;	Adds as a further duty of the Government of Canada the obligation to take additional or complementary measures in those areas within Canada that are, or could be, particularly threatened by activities associated with toxic substances.
Section 2 - (add new subsection 2(1)(k.2) - Duties of the Government of Canada	achieve the goals contained in the Canada - United States Great Lakes Water Quality Agreement, improve governance and accountability for implementation of the agreement, and ensure such goals are met through the cooperation of provincial, municipal, and aboriginal governments in the Great Lakes Basin Significant Geographic Area;	The GLWQA has been the key source of legislative and policy direction for protection of the Great Lakes from toxic substances at the international and intergovernmental level for the past three decades. Continued progress under this regime is integral to the success of *CEPA* in achieving protection of the Great Lakes Basin Significant Geographic Area and will act as a template for such success in other significant geographic areas eventually covered by the Act, and in the rest of Canada.

INTERPRETATION

CEPA section #	Proposed Amendment	Rationale
Section 3 - Definitions	"action plans" means plans authorized by section 103.1 of this Act;	See rationale under section 103.1.
Section 3 - Definitions	"Canada-United States Great Lakes Water Quality Agreement" means the revised Canada-United States Great Lakes Water Quality Agreement of 1978 as amended by Protocol in 1987, and any future amendments thereto;	Necessary to identify the scope of certain duties, obligations, and powers of the Government of Canada as reflected in these proposed amendments.
Section 3 - Definitions	"Great Lakes" means Lake Erie, Lake Huron (including Lake St. Clair), Lake Michigan, Lake Ontario, Lake Superior, and the connecting channels of those Lakes, including the St. Marys River, St. Clair River, the Detroit River, the Niagara River, and the St. Lawrence River to the border of the United States;	Necessary as part of defining the geographic extent of the Great Lakes Basin Significant Geographic Area.
Section 3 - Definitions	"Great Lakes Basin" means all the streams, rivers, lakes, and other bodies of water in the drainage basin of the Great Lakes;	Same.
Section 3 - Definitions	"significant geographic area" means an area so designated by the Minister when the area is, or could be, particularly threatened by the use, generation, release, manufacture, import, export, sale or disposal of toxic substances, and such designation shall include the addition of the name of the area to Schedule 7 by means of a ministerial order under subsection 103.1 (1);	Necessary as part of defining the trigger for designating an area as a significant geographic area.
Section 3 - Definitions	“substitution” means the development and use of a non-hazardous or less hazardous substance, or a non-hazardous or less hazardous technological process, as an alternative to an existing toxic substance or technological process;	Necessary to ensure development and use of safer alternatives to toxic substances and technological processes.

PART 1

ADMINISTRATION

Advisory Committees

CEPA section #	Proposed Amendment	Rationale
Section 7.1(1) (new) - Significant Geographic Areas Expert Advisory Committees	For the purpose of carrying out their duties under this Act, the Ministers or either Minister shall (a) establish a significant geographic area expert advisory committee for each such area listed in Schedule 7; (b) direct the committee established pursuant to subsection (a) to evaluate and report each year to the Parliament of Canada on the adequacy of, and recommendations regarding, monitoring activities pertaining to toxic substances required to be performed under this Act for an area so listed; and (c) specify by ministerial order such other functions that each committee is to perform and the manner in which those functions are to be performed.	Oversight measure to ensure that monitoring efforts on toxic substances for all areas designated as significant geographic areas are robust enough to achieve objectives of Act.
Section 7.1(2) (new) - Publication of report	The report of a committee established under subsection (1), including its recommendations and reasons, shall be made public.	Similar authority contained in existing section 7(2) of the Act.

PART 2

PUBLIC PARTICIPATION

Environmental Registry

CEPA section #	Proposed Amendment	Rationale
Section 13 (add new subsection (b.1) - Contents of Environmental Registry	copies of all investigations, prosecutions, convictions, appeals and the results thereof, under this Act and the *Fisheries Act*, R.S.C. 1985, c. F-14, pertaining to toxic substances within a significant geographic area; and	Improves the information base on the status of compliance and enforcement measures pertaining to controlling toxic substances in significant geographic areas.

PART 3

INFORMATION GATHERING, OBJECTIVES, GUIDELINES AND CODES OF PRACTICE

Environmental Data and Research

CEPA section #	Proposed Amendment	Rationale
Section 44 (add new paragraph (g) – Monitoring, research and publication	maintain and update on an annual basis an inventory of all data, monitoring, and biomonitoring activities of the Government of Canada pertaining to substances in significant geographic areas.	Improves the information base on the status of government measures pertaining to monitoring of substances in significant geographic areas.

PART 3, continued

Environmental Data and Research

CEPA section #	Proposed Amendment	Rationale
Section 44.1 (1) (new) – Significant Geographic Area Research Consortium established	Where a significant geographic area has been designated by the Minister of the Environment and listed in Schedule 7, the Minister shall establish a significant geographic area research consortium including representatives of the Government of Canada, interested provinces, and Canadian post-secondary universities.	Improves coordination of research efforts with respect to understanding and developing solutions for environmental threats to significant geographic areas.
Section 44.1 (2)(a)-(d) - Objects	The objects of a significant geographic area research consortium established under subsection (1) are to, (a) develop five- and ten-year research agendas that build upon and integrate current research initiatives focusing on identification of threats and stresses to the biological, physical, and chemical integrity of the area; (b) establish with federal funding a research and restoration fund for the area; and (c) develop technological innovations for implementing pollution prevention, elimination and reduction in the use of toxic substances, and development of safer product substitution measures.	Same. The federal government should establish by amendment to *CEPA*, if necessary, a fund for each significant geographic area that would include funding for both the administration of the research consortium and the necessary research activities. The amendments drafted here would not establish the fund itself.

PART 3, continued

Information Gathering

CEPA section #	Proposed Amendment	Rationale
Section 46 (1.1) (new) – Mandatory reporting on pollution prevention in significant geographic areas	Notwithstanding subsection (1)(l), the Minister shall require, by notice, that persons importing, selling, manufacturing, transporting, processing, or distributing a substance for commercial purposes, or using a substance in a commercial manufacturing or processing activity where (a) the substance is specified on the List of Toxic Substances in Schedule 1, or (b) the substance meets the criteria in section 73(1)(a) or (b), report to the Minister annually on pollution prevention measures undertaken in significant geographic areas.	Improves the information base on the level of pollution prevention efforts being undertaken in significant geographic areas.
Section 46 (1.2) (new) - Publication of report	The report referred to in subsection (1.1) shall be made public.	Similar authority contained in other existing sections of Act.
Section 46.1 (new) – Reporting on information gathered for significant geographic areas	The Minister shall on an annual basis publish information on releases and transfers of substances from all facilities in significant geographic areas reporting under sections 46 (1) and 46 (1.1).	Improves the information base on the status of releases and transfers of substances in significant geographic areas.

PART 4

POLLUTION PREVENTION

Pollution Prevention Plans

CEPA section #	Proposed Amendment	Rationale
Section 56.1(1) (new) – Pollution prevention targets, goals, and measures for significant geographic areas	Notwithstanding section 56, the Minister shall publish in the *Canada Gazette*, not later than one year after a significant geographic area has been designated by the Minister, a notice identifying proposed (a) pollution prevention targets for the significant geographic area; (b) elimination goals for all substances identified in the significant geographic area that are (i) substances appearing on the List of Toxic Substances in Schedule 1 of this Act; (ii) substances meeting the criteria in section 73(1) (a) or (b); (iii) substances contained in Annex 10 of the Canada-United States Great Lakes Water Quality Agreement; or (iv) substances listed as known to cause cancer or reproductive toxicity under the California Safe Drinking Water and Toxic Enforcement Act of 1986; (c) reduction goals for particulates and other smog-producing substances identified in the significant geographic area; and (d) measures to be implemented over a five and ten year period following the publication of the final targets and goals identified pursuant to subsection (4) for the significant geographic area.	Improves pollution prevention planning and implementation initiatives in significant geographic areas. Note: CELA has also prepared complementary provisions titled “Pollution prevention targets, goals and measures for consumer products.” The consumer products provisions should be enacted as a new s. 56.2, following the significant areas provisions proposed here.

Pollution Prevention Plans, continued

CEPA section #	Proposed Amendment	Rationale
Section 56.1(2) (new) – Comments or objections	Within 90 days after the publication of the notice referred to in subsection (1), any person may file with the Minister comments or a notice of objection.	Similar authority contained in other existing sections of Act.
Section 56.1(3) (new) – Publication by Minister of results	After the end of the period of 90 days referred to in subsection (2), the Minister shall publish in the *Canada Gazette* and in any other manner that the Minister considers appropriate a report or notice of the availability of a report that summarizes how any comments or notices of objection were dealt with.	Same.
Section 56.1(4) (new) – Publication of final targets, goals, and measures for significant geographic areas	The Minister shall publish in the *Canada Gazette*, not later than two years after a significant geographic area has been designated, a notice identifying the final targets, goals and measures for the significant geographic area.	Same.
Section 56.1(5) (new) – Mandatory pollution prevention action by persons	The Minister shall require all persons described in the notice referred to in section 46(1.1) to undertake planning and implementation measures in order to meet the targets and goals established for a significant geographic area.	Improves likelihood that pollution prevention targets and goals established by the Minister for a significant geographic area will be achieved.
Section 56.1(6) (new) – Report to Parliament	The Minister shall include in the annual report required by section 342 a report on the administration and enforcement of this section.	Similar authority contained in other existing sections of Act.
Sections 57 - 60	Add section 56.1 wherever reference to section 56 appears.	Consequential amendments arising from addition of section 56.1.

PART 5
CONTROLLING TOXIC SUBSTANCES

General

CEPA section #	Proposed Amendment	Rationale
Section 68.1 (new) – Data collection and investigation of development and use of alternatives	Notwithstanding paragraph 68 (a) (xii), the Minister shall collect data and conduct investigations respecting the development and use of non-hazardous or less hazardous substances, and non-hazardous or less hazardous technological processes, as substitution for toxic substances.	As discretionary authority, paragraph 68 (a)(xii) has failed as a measure for ensuring that alternatives are developed and used where warranted.
Section 68.2 (new) – Report to Parliament on research, investigation and evaluation	The Minister shall include in the annual report required by section 342 a report on the administration of sections 68 and 68.1.	Similar authority contained in other existing sections of the Act.

Regulation of Toxic Substances

CEPA section #	Proposed Amendment	Rationale
Section 93(1) – Regulations (new language underlined)	Subject to subsections (3) and (4), the Governor in Council may, on the recommendation of <u>either Minister</u>,	Simplifies the regulation-making process by allowing either Minister to make recommendations to the federal cabinet on regulating a substance on the List of Toxic Substances in Schedule 1, rather than requiring both Ministers to make recommendations before the federal cabinet can act.

PART 5

CONTROLLING TOXIC SUBSTANCES

Protection of Significant Geographic Areas (new)

CEPA section #	Proposed Amendment	Rationale
Section 103.1(1) (new) – Authority to designate significant geographic area	The Minister may designate an area as a significant geographic area by listing it in Schedule 7 by means of a ministerial order, and such area shall be known thereafter as a significant geographic area for the purposes of the administration and enforcement of this Act.	Establishes authority of federal cabinet to designate and list significant geographic areas.
Section 103.1(2) (new) – Significant geographic area coordination office	Where a significant geographic area has been designated pursuant to subsection (1), the Minister shall, within one year of such designation, establish a coordination office that shall be the primary implementing agency for federal programs and the primary coordinating body for inter-jurisdictional programs in respect of the significant geographic area. The head of each coordination office so established shall report directly to the deputy minister of the Department of the Environment.	Establishes office responsible for implementation and coordination in significant geographic areas.

Protection of Significant Geographic Areas (new), continued

CEPA section #	Proposed Amendment	Rationale
Section 103.1(3) (new) – Report on significant geographic area	Where a significant geographic area has been designated pursuant to subsection (1), the Minister shall, within two years of such designation, issue a report describing findings concerning (a) the identification of persistent and/or bioaccumulative, and inherently toxic substances that are used, generated, manufactured, imported, released, or disposed of within the significant geographic area, including but not limited to substances that may pose the greatest potential for exposure to individuals in the significant geographic area; (b) the identification of carcinogenic substances that are used, generated, manufactured, imported, released or disposed of within the significant geographic area; (c) the identification of substances having endocrine-disrupting characteristics that are used, generated, manufactured, imported, released or disposed of within the significant geographic area; and (d) the identification of substances having properties that pose particular threats to children and other vulnerable populations and that are used, generated, manufactured, imported, released or disposed of within the significant geographic area.	Improves the information base on pollution threats in significant geographic areas.
Section 103.1(4) (new) – Action plan in significant geographic area	The Minister shall, within two years of the issuance of the report prepared pursuant to subsection (3), establish and implement an action plan for those substances identified in the report meeting the criteria set out in paragraphs (3)(a)-(d).	Improves compliance and enforcement measures for substances posing threats in significant geographic areas.
Section 103.1(5) (new) – Report to Parliament	The Minister shall include in the annual report required by section 342 a report on the administration and enforcement of this section.	Similar authority contained in other existing sections of Act.

Protection of Significant Geographic Areas (new), continued

CEPA section #	Proposed Amendment	Rationale
Section 103.1(6) (new) - Regulations	The Governor in Council may, on the recommendation of the Ministers, make regulations governing any matter relating to controlling toxic substances in significant geographic areas.	Similar authority contained in other existing sections of Act.

SCHEDULE 7

(Section 103.1)

LIST OF SIGNIFICANT GEOGRAPHIC AREAS (new)

1. Great Lakes Basin (new)

SCHEDULE 8

(Section ____)

LIST OF CARCINOGENS AND REPRODUCTIVE AND OTHER TOXINS