



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

June 19, 2012

Director General
Environment Canada
Chemicals Sector
200 Sacré Coeur Blvd
Gatineau, Quebec K1A 0H3
Canada

transmission: by email

Dear Margaret Kenny:

Re: CELA Response to Fourth Intergovernmental Negotiating Committee (INC4) Issues for a Global Legally Binding Instrument on Mercury

On behalf of the Canadian Environmental Law Association please find below brief comments in response to “Discussion Document March 2012: Fourth Intergovernmental Negotiating Committee (INC-4) to Prepare a Global Legally Binding Instrument on Mercury - Punte del Este, Uruguay, June 27-July 2, 2012” (Discussion Document).

PROCESS:

Environment Canada scheduled a teleconference call on May 16th, 2012 for approximately 1.5 hours to discuss Canada’s preparation for the fourth intergovernmental negotiating session for a legally binding instrument on mercury. CELA is taking this opportunity to express its growing concern regarding the current approach to public consultation related to mercury and the international negotiations process. Seeking public engagement and input into government proposals to undertake global measures to address mercury warrants a public consultation process that is much more extensive than allowed in a 1.5 hour dialogue. In the past, CELA has submitted similar recommendations, promoting greater transparency, accountability and public engagement on other international files, such as the Stockholm Convention on Persistent Organic Pollutants.

In the early phases of negotiations for a global legally binding instrument on mercury (such as leading up to INC3), the Government of Canada engaged stakeholders in a comprehensive manner, scheduling face to face meetings in addition to teleconferences, which allowed for interactive dialogue among the stakeholders and government officials on issues of importance. The Government also provided debriefing meetings to discuss negotiation outcome and follow-

up on specific issues. The current approach and level of commitment to public engagement is poor in comparison. The conference call of May 16th was of particular concern since the global negotiations are reaching a critical stage in the process. Throughout the call, substantial issues were identified but such issues could only be addressed in a very limited manner. The time constraints required discussions to be brief, making it extremely difficult to provide substantial comments on issues that will form the basis of government positions for the negotiating sessions. Furthermore, the current approach could not accommodate a thorough review of the proposed legal text, which makes it extremely challenging for all stakeholders to fully appreciate the overall impacts to achieving the intended objectives and goals of the legal instrument.

In the past, CELA and other non-governmental organizations have proposed the establishment of a multi-stakeholder advisory body that would be available to provide the government with a core group of people from which it could solicit initial feedback on specific issues relevant to international treaties such as the Stockholm Convention and now the mercury negotiations. The multi-stakeholder advisory body would be able to identify issues that require input from a broader group of stakeholders.

We welcome and strongly encourage the Canadian government to undertake substantial public engagement that extends beyond teleconference calls as the negotiation process enters a critical phase and governments will be faced with decisions that will affect the scope and level of obligations required to address mercury regulation at a global level.

SPECIFIC ISSUES RELATED TO DISCUSSION DOCUMENT

In preparation for INC3, CELA submitted substantial comments and proposed revisions to the legal text prepared for the negotiations for INC3. The link to the CELA submission for INC3 is <http://www.cela.ca/publications/engos-environmental-non-governmental-organizations-submission-intergovernmental-negotia>. We do not have the opportunity to provide in-depth commentary in response to all issues addressed in the Discussion Document for INC4. However, we believe the commentary provided in our submission for INC3 remain relevant for your consideration to INC4. Below, we provide you with brief commentary on the following issues addressed in Canada's Discussion Document for INC4:

- overall objectives;
- mercury releases to air, water, and land;
- waste;
- storage; and
- allowable use exemptions for products and processes.

1.0 Overarching Goal for Canada

Based on its Discussion Document, Canada stated its overarching goal in these negotiations is to protect the health of Canadians and their environment from the risks associated with mercury that arise from global anthropogenic (human) sources.

To achieve the overarching goal stated for Canada, the legal text currently proposed for the instrument needs to be strengthened with increased commitment towards mandatory requirements to achieve reductions or elimination of mercury. The draft text currently favors measures under consideration to focus on mercury releases to the atmosphere, while commitment to address releases of mercury to water and land remains vague. Releases to air are addressed in Article 10 while a separate article (currently in contained in square brackets as Article 11) addresses releases to water and land. This indicates that the countries have not yet agreed that mercury to water and land should be addressed in the final instrument. To successfully protect health and the environment from impacts of mercury, releases to all environmental media – water, land and air, merit the same level of attention. In the draft text, Option 2 (combine Articles 10 and 11 and Annexes F and G into a single Article 11.alt and a single Annex G.alt) proposes to address mercury releases to air, water and land in one article with specific targets to be set and prescribe how reductions will be achieved.. This approach is preferred rather than separate articles for atmospheric releases from releases to water and land. It will contribute to the overall goal to protect human health and the environment.

CELA is of the view that the current approach proposed in the draft instrument weakens the overall goal stated by Canada and may pose long term challenges for the health of Canadians. While the atmospheric deposition of mercury may pose the most significant challenge for Canada, particularly from transboundary sources, by emphasizing the need to address mercury emissions to water and land in the same manner as air emissions will ensure that mercury releases are tracked and addressed comprehensively. It would also promote the development or innovation for technology that seeks to reduce mercury releases to all environmental media. The strength of a global instrument on mercury should be measures by the level of commitment to reduce overall mercury reductions to all environmental media because of the ubiquitous nature of mercury.

Canada's objective to protect the health of Canadians can be achieved if the instrument provides for mandatory obligations to reduce mercury levels for all sources - industrial and non industrial sources. The current legal text currently contains many sections that indicate extensive discussion are required to determine if the scope of work will be mandatory or voluntary in nature. We urge Canada to take a strong position to seek mandatory mercury reduction provisions that include specific targets and timelines to achieve reduction of mercury. Failure to include targets and timelines will severely weaken the scope of the final legal instrument on mercury.

2.0 Mercury releases to air, water and land

A focus on atmospheric emissions of mercury is very appropriate given that Canada, particularly the arctic regions, is a major recipient for mercury deposition through transboundary deposition. As noted in the previous section, CELA is of the view that releases to water and land warrant significant attention under the instrument.

Based on Canada's National Pollutant Release Inventory, an important source of pollution data for mercury releases in Canada, data suggests that releases to air have decreased over the period

of 2008 and 2010, but releases to water and land remain relatively unchanged. (See Table 1) Below we have summarized mercury releases to land, water, land and disposal of mercury for the years 2008, 2009, 2010 using data from the NPRI.

Table 1: NPRI data for Mercury releases (on-and off site) and disposal for 2008, 2009 and 2010 (kg)^{1, 2, 3}

Year	Air Releases (kg)	Water Releases (kg)	Land Releases (kg)	Total On-site releases (air, water, land) (kg)	Disposal (on- and off-site) (kg)
2010	3,429	269	111	3,809	208,082
2009	3,690	345	24	4,059	72,216
2008	4,465	212	0.005	4,678	51,694

This data would suggest that attention on mercury releases to water and land is warranted. Furthermore, the NPRI data also shows that disposal levels for mercury have increased, particularly for 2010. The dramatic spike in disposal of mercury is evidence that more attention by Canada should be given to management of mercury in the disposal stream. The issue of mercury waste will be addressed in a later section of this submission.

CELA is concerned that the current focus for Canada is only on atmospheric emissions. Based on available NPRI data, Canada will create a situation where mercury releases to water, land and to disposal streams will not be addressed adequately under the legal instrument. Lack of attention to these media may lead to Canada's on-going contribution to the global loading of mercury despite seeking reductions in atmospheric releases of mercury. To ensure that measures seeking the reduction in overall releases of mercury are achieved effectively, we urge Canada to support

¹ Government of Canada. National Pollutant Release Inventory. Search for mercury releases for 2010. See results at:
http://www.ec.gc.ca/pdb/websol/querysite/results_e.cfm?opt_report_year=2010&opt_facility=ALL&opt_facility_name=&opt_npri_id=&opt_chemical_type=CHEM_NAME&opt_cas_name=NA+-+10&opt_cas_num=&opt_location_type=ALL&opt_province=&opt_postal_code=&opt_urban_center=&community1=&opt_industry=ALL&opt_naics6=&opt_naics3=&opt_naics4=&opt_nai6code=&opt_csic=&opt_media=all

² Government of Canada. National Pollutant Release Inventory. Search for mercury releases for 2009. See results at:
http://www.ec.gc.ca/pdb/websol/querysite/results_e.cfm?opt_report_year=2009&opt_facility=ALL&opt_facility_name=&opt_npri_id=&opt_chemical_type=CHEM_NAME&opt_cas_name=NA+-+10&opt_cas_num=&opt_location_type=ALL&opt_province=&opt_postal_code=&opt_urban_center=&community1=&opt_industry=ALL&opt_naics6=&opt_naics3=&opt_naics4=&opt_nai6code=&opt_csic=&opt_media=all

³ Government of Canada. National Pollutant Release Inventory. Search for mercury releases for 2008. See results at:
http://www.ec.gc.ca/pdb/websol/querysite/results_e.cfm?opt_report_year=2008&opt_facility=ALL&opt_facility_name=&opt_npri_id=&opt_chemical_type=CHEM_NAME&opt_cas_name=NA+-+10&opt_cas_num=&opt_location_type=ALL&opt_province=&opt_postal_code=&opt_urban_center=&community1=&opt_industry=ALL&opt_naics6=&opt_naics3=&opt_naics4=&opt_nai6code=&opt_csic=

measures under the instrument that requires mandatory reductions in mercury releases to water and land as well as atmospheric releases..

The discussion on Article 10 and Annex F are expected to be substantial and contentious with respect to the scope of the obligation. It is important that the Article on atmospheric emissions contains flexibility sufficient to capture potential emerging sources of mercury that may not be currently identified in Annex F. Currently, Annex F reflects the industrial and non-industrial sectors that should be subject to measures. The effectiveness of reducing atmospheric emissions could be undermined if thresholds are established to only capture the biggest emitters of mercury. Furthermore, CELA is very concerned that there are polarizing views with respect to who should be subjected to applying Best Available Technology (BAT) and Best Environmental Practices (BEP). CELA does not support a definition for significant emitters that establishes a threshold for annual releases of mercury as proposed by the EU. The EU proposal to establish a threshold of 10 tonnes annually would mean that Canada may not be required to meet the obligations stated in Article 10 based on its NPRI data. Therefore, Canadian facilities responsible for contributing to the global mercury levels will not be obliged to make changes to their operations. Canada should support measures that will require Canadian facilities to review their technology and practices where improvements on environmental performance can be achieved.

The issue regarding BAT technologies should consider the following:

- We urge Canada to require BAT technology for all existing and new facilities that may be sources of mercury.
- BAT should be required for all existing and new facilities within a specified timeframe to ensure accountability and progress towards achieving the goals of the instrument.
- The definition of BAT should include preference for technologies that seek to promote prevention or the elimination of release of mercury or even promote the use of alternative non-chemical technologies that do not produce mercury. Currently, the draft text's definition does not include preference prevention technologies.
- Finally, applying BAT should achieve the reduction of mercury emissions to air, water and land.

3.0 Waste (Article 13)

Canada has explicitly relied on the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* to govern the transboundary movement and environmentally sound management of mercury wastes. CELA has expressed its concern and its apprehension in regards to this reliance because the Basel Convention does not include specific goals for protecting human health and the environment. These concerns should form the foundation of a legally binding instrument on mercury.

We offer the following comments regarding waste and the use of the Basel Convention to address waste issues under this instrument. CELA is of the view that the mercury instrument should include specific mandatory provisions to address mercury wastes rather than shift this responsibility under the scope of the Basel Convention. IPEN also holds similar views (see:

<http://ipen.org/hgfree/wp-content/uploads/2011/07/IPEN-Thoughts-about-Preparing-for-INC4-new-final.pdf>).

In the background section of the Discussion Document, it was noted that :

One key outstanding issue for INC-4 is whether the mercury treaty would defer to guidance adopted under the Basel Convention on environmentally sound management of mercury wastes, which includes guidance on appropriate final disposal and recycling options for mercury wastes, or whether the mercury treaty would also develop guidance on mercury wastes. The Government of Canada is of the view that the guidance for environmentally sound management developed under Basel is sufficient both now and in the future, and there is no need to develop further guidance under the mercury treaty, something that could in fact be confusing from an implementation perspective.⁴

CELA does not support the Canada's proposed approach. It is our view that guidance on mercury waste should be included in the mercury instrument rather than be left to the Basel Convention and its working group to negotiate the criteria to be implemented to identify and address mercury waste. The mercury negotiation process is better positioned to identify and address issues that relate specifically to mercury wastes and creates the necessary framework to develop guidance on waste. The current draft text suggests revising the Basel Technical Guidelines rather than establishing new guidelines under the mercury instrument to address mercury waste. We urge the government to reconsider its approach. We are providing the following comments pertaining to the Basel Convention and our expectation regarding mercury wastes.

- it does not include specific objectives for the protection of human health and the environment.
- The provisions do not effectively address issues related to the domestic handling, collection, disposal, or transport of mercury wastes. In Canada, the management and movement of waste is under the authority of the federal and provincial governments. It is vague how well the provincial mandate related to waste management and disposal fully achieves the obligations required under the Basel Convention. The federal government must establish requirements that should be met by all provinces in relation to waste management and its transboundary movement. Furthermore, the provinces should make explicit how their waste management and disposal regimes achieve the obligations of the Basel Convention.
- It is our view, that specific criteria and guidance for the management and disposal of mercury waste should be included in the mercury instrument to effectively address the hazards associated with mercury and mercury waste. As it pertains to waste, the mercury instrument should include:

⁴ Government of Canada. *Discussion Document March 2012: Fourth Intergovernmental Negotiating Committee (INC-4) to Prepare a Global Legally Binding Instrument on Mercury - Punta del Este, Uruguay, June 27-July 2, 2012.*

- the application of the polluter pays principle with respect to mercury waste in recognition that the private sector should have a significant role in effective delivery of the instrument.
- Provisions that seek to prevent or minimize the generation of mercury wastes rather than simply addressing waste management and its disposal.
- Requirements that are mandatory rather than voluntary to ensure progress is being made to meet the objectives of the mercury instrument.
- A listing of appropriate techniques and practices for effective treatment of mercury-containing wastes.
- A definition of performance levels for these techniques for purposes of creating the BAT/BEP guidelines for mercury waste.
- Criteria and definition of limit values that are health-protective limits and would effectively define what constitute waste as hazardous.
- Obligations that seek to minimize and prevent the generation of mercury-containing wastes;
- An outline of liability and compensation measures;
- Requirement for a national action plan that outlines the BAT/BEP criteria for mercury waste to be incorporated in the country National Implementation Plan;
- Provisions to prohibit movement of waste containing mercury from developed to developing countries which may not have adequate safety regimes for managing the waste in an environmentally sound manner placing the community and the workers at risk. For movements of waste between other countries, provisions should only occur with the consent of the importing country to ensure sufficient capacity exists to handle the wastes and to prevent waste dumping and subsequent harm to human health and the environment

4.0 Storage (Article 12, Annex H)

The issue of storage of mercury continues to generate controversy. It is critical that the mercury instrument includes provisions that support prevention and reduction of mercury. Like that of mercury wastes, interim storage of mercury should consider the criteria required to fully ensure that the community in which storage facilities are located are fully protected from potential hazards associated with mercury. It would be inappropriate to use the Basel Convention to outline the requirements for storage of mercury as the Basel Convention focuses on the environmental sound disposal of hazardous waste. It does not address interim storage of hazardous waste.

Similar to comments made by NGOs regarding mercury waste provisions, it is essential that specific criteria are in place to protect the environment and human health, including;

- ensuring storage facilities are subjected to stringent assessment.
- tracking and monitoring mechanisms should be required to follow mercury movement for the purposes of recycling or sale for allowable uses.

- Notifications, labelling requirements and other surveillance tools are necessary to ensure that mercury is not used in cosmetic products. Such requirements are needed to prevent the unwanted or illegal use of mercury in wider range of products.⁵
- Provisions to prevent impacts of mercury contamination by preventing the transboundary movement of mercury between developed to developing countries and requiring prior consent for movement of mercury between countries.
- Requirements for a national action plan that would include a process by which potential storage facilities are assessed and monitored. Consideration should be given to:
 - assess the adequacy of mercury storage facilities,
 - establish maximum levels of mercury permitted for specific storage facilities,
 - require annual inventory of storage locations and the level of mercury stored at each location, and
 - outline criteria to be considered as best practices for environmentally sound storage for mercury.

5.0 Mercury in Products and Processes: Allowable Use Exemptions; ASGM (Article 6, Article 7, Article 8 and Article 9)

The mercury instrument should include legal text that prohibits the use of mercury in products within specific target dates. Currently, the draft text proposed four options by which to identify allowable use exemptions. One option includes the use of a negative list which aims “to ban **all** processes and products except those with an allowable-use exemption (negative list).” This option is preferred as it would clearly list those products and processes which are permitted for use of mercury. Such a list should include specified timeframes for use, providing adequate time and appropriate triggers to identify and adopt safer alternatives. In this approach, however, we would be opposed to exempting specific products such as fish which may contain mercury because of unintentional environmental contamination. CELA finds this type of exemption puts many communities and vulnerable populations at undue risk from mercury exposure through diet. It would be a failure of the mercury instrument to allow such products to be exempted considering that the instrument is aiming to protect human health and the environment from impacts of mercury. It is widely known that mercury can build up in fish. Current use of fish advisories are relevant tools to communicate concerns related to presence of mercury in fish species but does not provide the necessary protection for consumers of fish products. We urge countries to ensure that obligations in the mercury instrument ultimately lead to the reduction of mercury levels so that mercury levels in fish and humans are reduced. Until that time, the burden to determine safety level should not be left to consumers, which would ultimately happen if products such as fish are exempted due to environmental contamination.

In addition, on-going dialogue should be undertaken to assess the exemption of other products, such as dental amalgam. At the domestic level, Canada is expecting to pass regulations that will exempt the use of dental amalgam. Caution should be given in this regard. Additional resources

⁵ Health Canada. Cosmetic Ingredient Hotlist. See at - <http://www.hc-sc.gc.ca/cps-spc/cosmet-person/indust/hotlist-critique/hotlist-liste-eng.php#M>

should be directed to identify safe alternatives as well as to identify barriers that exist for promoting the phase out of dental amalgam. The process to review products and processes for exemption should be a mandatory requirement every two years to identify advancements made in safer alternatives. In this regard, it is imperative that such exemptions are listed on a time limited basis. The absence of time limits will result in no restriction on use.

We are also supportive of an approach that requires Parties requiring a specific allowable use exemption to do so by registering for and later withdrawing from, exemptions. This requirement is currently practiced under the Stockholm Convention under Article 8. As noted in the Discussion Document, “Such a system could be useful in reducing over time the number of exemptions claimed/registered for due to provisions which make it easy for a Party to give up an exemption through a simple notification, rather than a treaty amendment being required.”⁶ Furthermore, the Stockholm Convention also requires that “when there are no longer any Parties registered for an allowable-use exemption, no new registrations/claims can be made for that exemption.” CELA supports this aspect of the Stockholm Convention. It provides the appropriate triggers needed to identify and implement safer alternatives and ultimately reduces the number of Parties that rely on mercury in specific products. We urge the Canadian Government to ensure this requirement is included in the mercury instrument.

For mercury used in processes, the Discussion Document notes the following:

The text for addressing manufacturing processes in which mercury is used is very similar to the proposal for mercury-added products. A mercury use in a manufacturing process would be restricted when listed in an annex (Annex D) or all manufacturing processes using mercury would be banned, and allowable-use exemptions would be available in Annex D to Parties to help them make the transition away from the use in question. One option is for Parties with facilities that use listed manufacturing processes to be asked to prepare national action plans for drawing up inventories of the facilities using such processes and for developing and implementing strategies for phasing out the mercury use.

CELA supports this approach. It is similar to the approach under consideration for mercury in products. In this proposal, we urge the government to seek specific reduction targets for processes releasing mercury as well as timeframe in which the reductions should be achieved. In addition, the mercury instrument should outline a specific date at which time no new manufacturing processes involving mercury should be permitted. We do not think this date should be the date at which the treaty enters into force as it opens the opportunity for expanding the number of facilities that have no reduction limits. Therefore, it is also essential to outline stringent criteria for appropriate technologies that must be met by existing and new facilities in order to promote prevention or restrictions of mercury releases to the environment. The date that should be considered is the date on which the final mercury instrument is signed.

Finally, on the matter of gold mining, Canada should continue to monitor its own gold mining practices for the purposes of mercury releases to the environment. Currently, there has been little discussion regarding large scale gold mining as a source of mercury. The instrument should

⁶ Discussion Document.

require a substantial inventory for mercury releases, manufacture, uses and disposal from all suspected sources including gold mining.

Although the issue of ASGM practices is not prevalent in Canada, Canada may be the ultimate recipient for products that result from such activities. Canada should support mandatory obligations regarding ASGM for the purposes of protecting vulnerable populations, particularly workers and indigenous communities, and the environment. Such provisions should include:

- the need to list ASGM as a mercury source in annexes F and G,
- development of national action plans to outline prevention strategies for exposure to vulnerable population,
- establishing specified timeframes for the phase out of such activities; and
- the requirements for remediation of the environment contaminated by mercury.

Closing comments

CELA considers the mercury negotiations of critical importance as domestic data shows that there are still significant sources of mercury in Canada. In the Great Lakes region where substantive government efforts have been undertaken in the past three decades to reduce the mercury levels, there hasn't been substantial reductions in levels of mercury in recent years. In other regions of Canada, we are beginning to see data that suggests mercury discharges are higher than previously expected. Together with the knowledge that Canada continues to be the recipient of mercury deposition through transboundary movement of mercury, it is essential that Canada seek the highest degree of mercury reductions through the mercury instrument. As such CELA urges the government to seek overall mandatory reductions of mercury releases from domestic and non domestic sources.

CELA welcomes the opportunity to participate in consultations to discuss the mercury negotiation process, particularly as the negotiations enter a important phase in the decision making process.

Please do not hesitate to contact CELA regarding its submission. Thank you for your consideration.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Fe de Leon
Researcher