Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

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May 1, 1995

Charles Caccia, M.P.
Chair,
Standing Committee on Environment
and Sustainable Development
House of Commons, Room 353 S
Parliament Hill
Ottawa, Ont. K1A 0A6

Dear Mr. Caccia,

Re: Additional Comments on the Definition of "Toxicity" further to the September 1994 Submission to the Committee by the Canadian Institute for Environmental Law and Policy and the Canadian Environmental Law Association

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In reviewing the minutes of the Standing Committee on Environment and Sustainable Development, it appears that the Committee continues to discuss the definition of "toxicity" under the Canadian Environmental Protection Act. In particular, reference can be made to the discussion as far back as in the minutes of the Committee on October 17, 1994, commencing on page 45:6 and the pages following.

In light of the continuing discussion within the Committee, it is appropriate that we further elaborate on our September, 1994, submissions to your Committee. If you recall, the Canadian Environmental Law Association forwarded the submission entitled: "Incorporating Pollution Prevention into Part II of CEPA: An Agenda for Reform." The Canadian Institute for Environmental Law and Policy's submission was entitled "Reforming the Canadian Environmental Protection Act. In that submission, a commitment was made to further develop a position on the definition of "toxicity." (See Recommendation 10, note 4, see also Appendix 3 "CEPA, Chemical New Substances and Biotechnology," pg. 5, note 38) In a brief manner, please accept this letter as fulfilment of that commitment.

We believe that substances with the potential to cause harm to the environment or human health should continue to be designated as "toxic" for the purposes of CEPA. This designation conveys a sense of the need for urgent action in relation to such substances. in addition it reinforces the constitutional basis of federal legislation in relation to such substances as it indicates a seriousness of nation concern which would warrant action through Parliament capacity to legislate in relation to criminal law with respect to the protection of public health and for the Peace Order and Good Government of Canada (See CIELAP, "Reforming the

Canadian Environmental Protection Act," Appendix 1, pp.5-7).

The Problem with the Current Definition

Essentially, the current definition of CEPA requires that a substance be emitted into the Canadian environment, that it causes certain effects and there is sufficient exposure in the environment to precipitate those effects. It is respectfully submitted that the current section 11 definition of CEPA is inappropriate and does fulfil the purposes of CEPA. There are three reasons to reform this definition:

(a) The Current Definition Fails to Recognize the Intrinsic Toxicity of Substances

Substances may have characteristics or traits that, intrinsically, give them the potential to cause harm to human health and the environment. For example, some substances are "persistent" or "bioaccumulative." The simple question is this: **Do Canadians want substances with these kinds of characteristics to be freely put in commerce or remain in commerce?**

The current section 11 definition, however, does not ask this question. Instead, the conditions precedent to having a substance declared toxic requires that it not only be intrinsically toxic, but to have sufficient exposure. Not only must the substance be bad, it must demonstrate it.

The need to establish exposure was a major factor in the finding of PSL substances known to have intrinsic "toxic" properties not to be "toxic" for the purposes of CEPA. Toulene is a good example of this situation where, although the substance has toxic properties, it was not found toxic according to the definition in CEPA. Toulene is listed in virtually every provincial hazardous waste and occupational health and safety regulation in the country.

(b) The Current Definition Promotes a Reactive Approach

Another problem with the existing approach is that, having exposure as a component of the definition of toxicity, invariably invokes a reactive approach. The present approach requires that there be sufficient exposure of a substance in the environment before regulatory action be taken, even if the substance is inherently toxic. Hence, it follows, therefore, it is necessary to wait for harm to occur before preventive measures can be established. By its very nature, therefore, the current definition is in contraposition to the precautionary principle, a principle we recommend that the whole CEPA should be premised upon as it is being revised.

(c) The Current Definition has Frustrated Part II of CEPA

In effect, the current definition has defeated the very purpose of Part II of CEPA. Of the 44 substances on the Priority Substances List, as many as 13 of them were not assessed because of insufficiency of data. Exposure data was one of the areas were more data was needed. Hence, the narrow definition of toxicity has left 13 substances in a state of legal uncertainty.

For five years of effort, the assessment process of Part II has yielded only modest results, mostly because of the incredibly onerous requirements of the toxicity definition.

The Need for a New Definition

It is submitted that a new, broader definition of CEPA is both warranted and required. It is therefore recommended that:

> The definition of toxicity in CEPA should be based on a hazard assessment. A hazard assessment would identify substances based on their inherent or intrinsic toxic properties. **By focusing on the inherent characteristics of substances, a true precautionary approach would be taken.** One way to further this approach is to remove the exposure component in the section 11 toxicity definition. In other words, CEPA would deem toxic substances that have inherent toxic properties without having to wait for complex data for exposure. A redrafting of the CEPA definition of "toxic" to achieve this result was proposed in note 38 of Appendix 3 of CIELAP's brief. A copy of this text is attached.

The effect of this reform is simply that there would be many more substances found to be toxic; however, there is still government discretion as to what to do with toxic chemicals. In the past, the Canadian Institute for Environmental Law and Policy and the Canadian Environmental Law Association has made specific recommendations on the range of actions that should flow from a designation of CEPA toxic. See: CIELAP, Reforming the Canadian Environmental Protection Act September, 1994, recommendations 12 and 13.

In addition to amending the definition, it is recommended that the Committee go one step further to respond to the public call for action on toxic substances. It is recommended that:

> The Committee incorporate of a list of substances deemed toxic into CEPA and for which regulatory action is mandated. In other words, there would be two tracks - those found to be toxic and those deemed toxic under legislation.

This is the approach under the Clean Air Act in the U.S. where some 189 substances were deemed to be toxic and require regulatory action by the Environmental Protection Agency. A list for priority substances for CEPA could be developed by including PSL CEPA toxic substances (and those substances on the PSL that were not assessed), the Ontario Candidate Substances List and the lists compiled by the International Joint Commission.

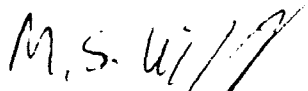
One of the direct advantages of undertaking the approach suggested herein is that, by undertaking hazard assessments, clear direction is also given with respect to new substances. If you recall, the Canadian Institute for Environmental Law and Policy recommended a "sunrise protocol" requiring that, persistent, bioaccumulative, toxic new substances not be authorized for use in Canada except in exceptional circumstances. This position has been updated through the brief on the proposed Toxic Substances Management Policy, which we

have attached for your convenience.

We hope these comments are of an assistance. At this time, we would very much welcome the opportunity to further explain our views to you or your Committee. Otherwise, we would be pleased to provide any information to you that may be of assistance or to respond to any questions in this regard.

Yours very truly,

Paul Muldoon
Counsel
Canadian Environmental Law
Association
and
Chair, Toxics Caucus
Canadian Environment Network



Mark Winfield, PH.D.
Director of Research
Canadian Institute of Environmental Law and Policy

cc. Karen Kraft-Sloan, MP
Clifford Lincoln, MP
Norman Radford, Clerk, Standing Committee on Environment and Sustainable Development

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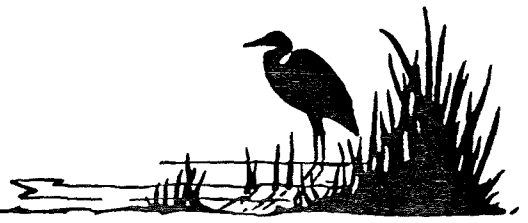
Reforming the Canadian Environmental Protection Act



A Submission to the Standing Committee on Environment and Sustainable Development

CANADIAN INSTITUTE FOR ENVIRONMENTAL LAW & POLICY

REFORMING THE CANADIAN ENVIRONMENTAL PROTECTION ACT

A SUBMISSION TO THE STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

CIELAP Brief 94/7

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APPENDIX 3

CEPA, CHEMICAL NEW SUBSTANCES, AND BIOTECHNOLOGY

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September 1994

of the Act. Their significance is due to two principal features. First, the pre-commercial evaluation of new substances is the ultimate preventative activity. Rather than waiting for substances to cause damage to the environment or human health, new substances can be assessed and, if necessary, their use controlled, to prevent such outcomes. Secondly, the CEPA new substances provisions are not limited to the assessment of new chemicals. Other new "substances," such as biotechnology products, can also be assessed through the Act. In fact, CEPA was the first environmental statute in Canada to specifically recognize biotechnology products as a distinct category of substances.

The screening of new substances prior to commercialization is an ideal opportunity to apply the principles of pollution prevention and a precautionary approach to the management of potentially harmful substances. These provisions of the Act should be used to provide clear signals to industry regarding the types of new substances which are likely to be approved for use in Canada, and the characteristics of substances which will result in prohibitions or severe restrictions on use. This would provide direction to firms in terms of their investment and research and development decisions.

However, the CEPA new substances provisions, as presently drafted, suffer from a number of significant substantive and procedural weaknesses which make the achievement of this goal difficult. In particular, the relationship between the new substances provisions of CEPA and similar provisions contained in other statutes must be clarified, and the status of the CEPA provisions as providing a minimum assessment standard for all new substances affirmed. In addition, opportunities for public participation in the new substances assessment and approval process must be strengthened, as well as public access to information regarding new substances. The Act must also be amended to widen the scope of the assessment of the potential environmental and health effects of new chemical substances, strengthen the ability of the federal government to deal with substances "suspected of toxicity" or for which inadequate information to assess exists, provide clear provisions regarding the authorization and regulation of field tests of new substances, provide for more realistic assessment time frames, and to ensure the full assessment of substances intended for export from Canada.

In this context, we make the following recommendations:

The Definition of "Toxicity"

10) *The definition of "toxic" for the purposes of CEPA should be refined to stress the intrinsic characteristics of a substance in terms of its potential to cause harm to the environment or human health, rather evidence of its presence in the*

environment in sufficient quantity or concentration to cause "toxic" effects.[4]

11) *CEPA should be amended to require that new substances found to be "toxic" for the purposes of CEPA be placed on the Toxic Substances List.*

A "Sunrise" Protocol

12) *CEPA should be amended to require that new substances which are persistent, bioaccumulative and "toxic" not be allowed to be manufactured, imported or used in Canada (a "sunrise" clause). Thresholds for persistence and bioaccumulation should be established through regulation. Exemptions to the "sunrise" clause should only be allowed in exceptional circumstances.*

13) *Pollution prevention plans, acceptable to the Minister of the Environment, should be required to be developed by notifying parties for "toxic" substances whose use or manufacture are not prohibited through the "sunrise" protocol, prior to their use or manufacturing being permitted within Canada.*

The Relationship Between CEPA New Substances Provisions and Other Statutes

14) *Explicit criteria for establishing the equivalency of other statutes for new substances notification and assessment purposes should be included in the CEPA new substances provisions. These criteria should include:*

- *requirements that notice be given prior to the import, manufacture or sale of a substance and for an assessment of whether it would be considered "toxic" for the purposes of CEPA;*
- *provisions for public participation in the notification and assessment process equivalent to those contained in CEPA; and*
- *the availability of federal control options for substances found to be "toxic" or suspected of being "toxic" equivalent in scope to those available under CEPA.*

15) *CEPA should be amended to require the Governor in Council to publish a list of statutes considered equivalent to CEPA for the purposes of new substances assessments.*

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[4] A supplemental submission on the issue of the definition of "toxicity" will be provided by the Standing Committee by the CEN Toxics Caucus.

23.Ibid., s.30.

24.Ibid., s.33(1)

25.Ibid., s.33(3).

26.Ibid., s.34.

27.Ibid., s.34(2).

28.Ibid., s.48.

29.Ibid., s.89(1).

30.Ibid., s.91.

31.Ibid., s.94.

32.Ibid., s.20(1).

33.Ibid., s.20(4).

34.Ibid., 20(2)(f).

35.Ibid., s.20(2).

36.Ibid., s.31.

37.See, for example, Canadian Environmental Protection Act Priority Substances List Assessment Report No.4: Toluene (Ottawa: Environment Canada, Health and Welfare Canada, 1992).

38.A possible amendment of CEPA s.11 might be to require that a substances be considered "toxic" for the purposes of CEPA if it has any one, or combination of, the following characteristics:

- has or may have an immediate or long-term harmful effect on the environment;
- constitutes or may constitute a danger to the environment on which human life depends; or
- constitutes or may constitute a danger to human life or health.

A supplemental submission to the Standing Committee on Environment and Sustainable Development will be developed by the Canadian Environment Network Toxics Caucus to address this issue in detail.