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Raouf Morcos
Environment Canada
Place Vincent Massey
351 St. Joseph Blvd.
Hull, PQ
K1A 0H3

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Dear Mr. Morcos:

**Re: A Response to Toxic Substances Management Policy:
Environment Canada Implementation Strategy
for Existing Substances (Final Draft)**

Thank you for giving us this opportunity to comment on the following document: Toxic Substances Management Policy: Environment Canada Implementation Strategy for Existing Substances. Attached you will find our comments and recommendations with respect to this document.

While the comments attached provides details as to our positions on various issues, we would like to highlight the following. First, we have a very serious concern with respect to the timing of this policy initiative. Bill C-74, the proposed new Canadian Environmental Protection Act, has just recently been introduced into Parliament and expects to be a focus of discussion for many of the issues outlined in the Toxic Substances Management Policy (TSMP). The proposed implementation strategy for TSMP prematurely presumes that the debate on CEPA will have little or no effect on the TSMP.

Second, many of the weaknesses of the implementation strategy for the TSMP stem directly from the weaknesses of the TSMP itself. The clearest example of this problem are the inappropriate definitions given to key terms such as virtual elimination and reverse onus.

Third, the issues relating to the use of Limit of Quantification (LOQ) in the development of action plans for Track 1 substances has also been a source of concern. The steering committee members of the Toxics Caucus of the Canadian Environmental Network have recently been provided minutes to the July 1996

workshop on Dioxins and Furans. We have expressed concerns that we were not invited into that workshop and therefore have not had the opportunity to express our views with respect to that issue. In a letter dated January 31, 1997 to you, we requested an opportunity to identify concerns and an opportunity to discuss these concerns with Environment Canada. We are awaiting a response to that request.

Finally, the emphasis of non-regulatory strategies to address Track 1 and Track 2 substances is not supported by the environmental community. We have expressed our views on this issue with respect to the problems of voluntary approaches and the need to strengthen regulatory approaches to environmental protection.

We hope that Environment Canada will not implement the proposed strategy until some of these key issues are addressed in an effective and timely manner.

Please do not hesitate to contact us should you have any questions.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Paul Muldoon
Counsel

Chair, Toxics Caucus
Canadian Environmental Network

cc. Hon. Sergio Marchi, Minister of the Environment
Canadian Institute for Environmental Law and Policy
Canadian Labour Congress
Great Lakes United
Toronto Environmental Alliance
Tom Balint, Caucus Coordinator, Canadian Environmental Network

**The Toxic Substances Management Policy -
Environment Canada Implementation Strategy
for Existing Substances - Final Draft**

Comments submitted by:

Canadian Environmental Law Association

Canadian Institute for Environmental Law and Policy

Canadian Labour Congress

Great Lakes United

Toronto Environmental Alliance

January, 1997

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INTRODUCTION

The Toxic Caucus of the Canadian Environmental Network (CEN) is comprised of environmental, labour, community and other public interest groups from across Canada. The Caucus has been actively involved in discussions pertaining to the review of the Canadian Environmental Protection Act (CEPA), the development of the Toxic Substances Management Policy (TSMP) and the Pollution Prevention: A Federal Strategy for Action document. Further, member groups are active participants in the Strategic Options Process as well as other related consultations.

In light of the history of involvement of the members of the Toxics Caucus, the groups endorsing this submission welcome this opportunity to comment on the document, Environment Canada Implementation Strategy for Existing Substances - Final Draft. Our overall message, however, is that we are profoundly disappointed with the proposed implementation strategy. To a large part, the weaknesses of the implementation strategy are directly related to the weaknesses of the TSMP itself. Unless the TSMP itself is significantly reformed, any implementation strategy will be problematic.

PRELIMINARY COMMENTS

Timing of Implementation Strategy Development

It is critical to note that the member groups of the Toxic Caucus were extremely disappointed both in the *process in the development* of the TSMP and the

content of the TSMP. Foremost, member groups were surprised and disappointed when the Policy was released just days before the Standing Committee on Environment and Sustainable Development released its report on its review of the Canadian Environmental Protection Act, *It's About Our Health: Towards Pollution Prevention*. The Standing Committee report addressed issues directly relating to the TSMP and, in fact, made recommendations that contradicted some of the measures outlined in the TSMP.

It is not surprising, therefore, that the Standing Committee on Environment and Sustainable Development expressed similar disappointment to the release of the TSMP.¹ The release of the TSMP prior to the tabling of the Standing Committee's report, in effect, pre-empted debate on the scope, rationale and content of the TSMP.

Member groups were also disappointed in the TSMP development process as not one of the recommendations in the detailed submission forwarded by the member groups was adopted in the final version. For your reference, attached to this submission please find a copy of the submission by the member groups on the TSMP dated November 1994. Many of the concerns identified in that submission manifest themselves in the draft implementation strategy.

Further, the timing of the release of Environment Canada's TSMP implementation strategy for public comment raises some fundamental concerns. With

Bill C-74 having been introduced for first reading in the House of Commons on December 10, 1996, it is unclear to us why there is such an effort to finalize the implementation policy at this time. The debate of how, and to what extent, the TSMP will be incorporated into CEPA is just commencing in the context of the legislative discussion. How can the implementation strategy be finalized if the very core policy dimensions are still before Parliament?

For a policy proposal of this importance, serious concern must be expressed concerning the lack of direct consultation with the public and the inappropriately short timeframe for response. In the end, member groups are not convinced that Environment Canada has a sincere desire to address the concerns the public has in the context of this policy proposal.

Recommendation No. 1: Environment Canada Implementation Strategy for Existing Substances should not be finalized until Bill C-74 has been fully debated and enacted.

Scope of TSMP Implementation

The proposed implementation strategy states that "Environment Canada will identify Track 1 substances that may or do occur in the environment and that are subject to the department's legislative mandate."² Is it fair to assume that other departments will be issuing their own implementation policy? What happens if other

departments do not issue an implementation policies? What if there are inconsistencies between the implementation policies?

In our view, as the TSMP is a policy of the government of Canada, the implementation policy should be applicable to all departments. In this way, all substances will be dealt with in a similar manner, including those not under the mandate of Environment Canada.

Recommendation No. 2: An implementation policy for the TSMP should be applicable to all departments in order that all substances of concern are subject to the TSMP.

GUIDING PRINCIPLES AND DEFINITIONS

Another preliminary issue worthy to note also stems from the TSMP. It is appropriate once again to restate our fundamental disagreement with how some general principles are applied and the definitions used in some of the key components of the TSMP. Most important, the definitions pertaining to the term "virtual elimination," the precautionary principle and the term "environment."

Virtual Elimination

The definition of virtual elimination in the TSMP should be rejected. The term "virtual elimination" cannot be equated, as suggested in the TSMP, with the notion of

"no measurable release." Instead, it means the phase-out or sunset of the substance in the sense that the substance is no longer produced as a feedstock or substance, or used or generated within the process. It is our view that the definition used in the TSMP is not consistent with the definition in the Great Lakes Water Quality Agreement,³ the interpretations provided by the International Joint Commission (IJC) in their biennial reports on water quality,⁴ the Standing Committee on Environment and Sustainable Development report on CEPA,⁵ the federal government in Pollution Prevention: A Federal Strategy for Action, and in the Liberal Red Book.⁶ Our November, 1994 submission on the TSMP outlined the reasons for our position and can be summarized as follows:

(a) It Is Inconsistent with the Concept of Pollution Prevention

The present approach which defines the goal of Track 1 substances as "no measurable release" promotes a pollution control approach rather than a pollution prevention approach. Pollution prevention is defined as a measure that avoids or prevents the use and generation of toxic substances. Its strength is that it emphasizes changes in the industrial process through such techniques as raw product substitution, process reformulation, substitution, among other such techniques.

When the goal of virtual elimination is defined as "no measurable release," legitimacy is given to continuing the use of pollution control techniques that attempt to reduce emissions at the end-of-the-pipe. When using the "no measurable release"

definition of virtual elimination, the thrust of the initiative will be to reduce emissions, not move toward process change or other measures that avoid the use or generation of toxic substances. As such, the proposed implementation strategy reinforces present practices. It will not encourage innovation. It will encourage industry to accept much more expensive, and ultimately less efficient, end-of-the-pipe measures.

(b) The Debate will Now Focus on What is "No Measurable Release"

Apart from the concern with the virtual elimination definition, there are also practical problems with the "no measurable release" definition. Most importantly, who will define what is the "not measurable" limit? How will that limit be set? What happens if detection technology improves? The reality is that the determination of what is the "no measurable release limit" will be just as difficult, controversial and complex, as existing limits.

(c) Consistency with IJC's Definition of Virtual Elimination

In its Seventh Biennial report, the IJC re-iterated its previous approach and views and states:

we...want to continue attempts to manage persistent toxic substances after they have been produced or used, or... eliminate and prevent their existence in the ecosystem in the first place, ... Since it seems impossible to eliminate discharges of these chemicals ..., a policy of banning or sunseting their manufacture, distribution, storage, use and disposal appears to be the only

alternative.⁷

More directly, in the IJC's Eighth Biennial report, it was noted that:

There are various interpretations of virtual elimination and zero discharge. Virtual elimination is not a technical measure but a broad policy goal. This goal will not be reached until all releases of persistent toxic chemicals due to human activity are stopped.

Zero discharge does not mean simply less than detectable. It does not mean the use of controls based on best available technology or best management practices that continue to allow some release of persistent toxic substances, even though these may be important steps in reaching the goal. Zero discharge means no discharge or nil input of persistent toxic substances resulting from human activity. It is a reasonable and achievable expectation for a virtual elimination strategy. The question is no longer whether there should virtual elimination and zero discharge, but when and how these goals can be achieved.⁸

The Commission has rejected the "no detectable level" as an appropriate prevention approach. The acceptance of this approach by the federal government is contrary, therefore, to the direction suggested by the IJC.

Recommendation No. 3: The definition of "virtual elimination" as stated in the TSMP and carried forward in the proposed implementation strategy should be rejected. Virtual elimination should be defined in a manner consistent with the definitions offered by the International Joint Commission and implemented through a national pollution prevention framework.

The Precautionary Principle - Reverse Onus

In the submission by the member groups in November 1994, concerns were outlined regarding misuse of the concept of reverse onus and the precautionary principle in the TSMP.⁹ In essence, the TSMP provides industry opportunities to continue to use substances which already have been deemed as Track 1 substances (and therefore should be subject to virtual elimination). Rather than furthering the precautionary principle and the goal of virtual elimination, the TSMP gives industry the opportunity to argue for the continued use and generation of these substances.

According to the TSMP's interpretation of the precautionary principle and user responsibility, "it place[s] the responsibility on those who generate or use Track 1 substances to demonstrate that these substances will not be released into the environment in measurable concentration at any point in their life cycles,..."¹⁰ It is submitted that the proposed "reverse onus" measure is not in keeping with true pollution prevention approach as being advocated in Pollution Prevention: A Federal Strategy for Action, which defines pollution prevention in the following manner.

The use of processes, practices, materials, products or energy that avoid or minimize the creation of pollutants and waste; without shifting or creating new risks to human health or the environment.¹¹

Recommendation 4: The precautionary principle and user responsibility concepts should be implemented at the onset of the screening process and not during each stage of the life cycle of a Track 1 substance since it is not in keeping with the pollution prevention approach as stated in the Federal Strategy document. If a substance is a Track 1 substance, the issue should be *when* that substance should be phased out, not *if* it should be phased out.

Environment - Worker Protection

The environmental community has made reference for the need to incorporate the workplace environment into the definition of the "environment" in the TSMP. The TSMP fails to address this concern and therefore is not reflected in the proposed implementation strategy. The importance of this issue is apparent: the present TSMP and its implementation strategy excludes consideration of worker safety since the goal of virtual elimination only applies to releases to the natural environment, irrespective of the concentrations within the plant gates. Moreover, it creates an artificial distinction between the environment within and outside of the facility.

Recommendation No. 5: The implementation strategy should define

environment without excluding directly or indirectly the indoor environment or making a distinction between the environment within or outside of the plant gates.

TRACK 1 SUBSTANCES

The proposed implementation strategy also suffers from the problem that there is no express recognition or commitment to phase-out or sunset Track 1 substances. Track 1 substances represent the most problematic, and all inherently toxic, substances and, consequently, should be subject to a phase-out regime. At present, both the TSMP and the proposed implementation policy fails to incorporate a sunset or phase-out regime.

Further, the criteria for identifying Track 1 substances (i.e., bioaccumulation factor, persistent, CEPA toxic and from predominantly human-made sources), are generally so high that only a few substances will fall under the scheme.

Apart from the high thresholds in the criteria, there also should be provision to put on Track 1 substances that are toxic, even though they may not be persistent or bioaccumulative. Some toxic substances may be so problematic that they warrant a Track 1 status. For example, the meeting of the four criteria as outlined in the TSMP may make it difficult for potentially hazardous substances such as some endocrine disruptors to be dealt with as a Track 1 substances. Many endocrine disruptors

which have not yet been identified may fall under this category. Endocrine disruptors require special attention because they have been known to have a wide range of effects on wildlife species and humans.¹² It is possible for substances to be endocrine disruptors, yet not meet the persistent and bioaccumulative thresholds in the criteria under the TSMP.

Recommendation No. 6: (a) The TSMP implementation strategy should ensure that all inherently toxic substances are Track 1 substances. In particular, Track 1 substances should be broadly defined to include, where appropriate, endocrine disruptors.

(b) Consistent with Recommendation No. 3, Track 1 substances should be targeted for phase-out or sunset in the sense that such substances are no longer produced, used or generated.

Limits of Quantification

There are concerns regarding the use Limit of Quantification (LOQ) when determining action for Track 1 substances. Most important, there has been limited public consultations with respect to this issue. There does not seem to be any background papers providing the rationale and technical basis with respect to the many of the issues concerning LOQ.

A workshop was held by the Task Force on Dioxins and Furans in July of 1996 which included participants from government departments and scientists, but

excluded any participation by non-government environmental groups. It is the only forum we are aware of where the policies and procedures concerning the use of LOQ were discussed. The Canadian Environmental Law Association wrote letters on January 22, 1997 and January 31, 1997 outlining its concern about the lack of public interest involvement in the membership of that task force and in the July, 1996 workshop.

At this point in time, we are reserving our right to further comment on the issue of LOQ. Our absence from the July, 1996 workshop, and the fact that the minutes from that workshop were only forwarded to us in late January of 1997 make it impossible for use to provide useful comment on the issue at this time. We are hoping that we will be given an opportunity to provide comment, and that those issues that are raised will be subject to detailed discussion. At this point in time, it is our position that it is unfair and inappropriate that environmental groups must "accept" the conclusions and determinations arrived at by government and industry, to the exclusion of environmental groups.

A few examples of our concerns about the use of LOQ can be given and can be found on page 4 of the proposed implementation strategy. The implementation strategy states that: "Once an LOQ is established for a sector/source it will not be lowered just because the measurement methods have improved. A new LOQ will only be required when environmental monitoring indicates the need to do so."¹³

Why should LOQ be frozen in time despite the advances of technology and what is the policy basis for that decision? What kind of environmental monitoring is necessary to trigger a change in LOQ? What is meant by the statement "the objective of virtually eliminating a substance from the environment does not mean chasing the substance down to its last molecule."¹⁴ How does LOQ relate to the concept of pollution prevention in that should not the goal be to *avoid* the *use* and generation of toxic substances rather deciding what are the acceptable emissions levels?

The establishment of LOQ provides a signal to industry to invest large amount of resources in control technology to reach established limits rather than focusing on pollution prevention. The resources spent on control technologies can be better invested in clean technology. Further, the process for setting LOQs does not provide for any public accountability and participation.

Recommendation 7: (a) We reserve our right to comment further on LOQ in light of the exclusion of environmental organizations from the July 1996 workshop on the topic and the fact that the minutes from that meeting only became available to us toward the end of January of 1997.

(b) Any future Task Force established to discuss the Dioxins and Furans or other CEPA toxic substances should include participation from the public interest community. The guiding principles by which the task force of this

nature operates should be formalized to provide accountability.

(c) As a general principle, the goal of virtual elimination, as defined as the phase out or sunset of substances, should be the overriding goal for the TSMP. Focus, therefore, should be on the prevention and avoidance on the use and generation of substances rather than on control measures as promoted in the proposed implementation strategy.

Application of Pollution Prevention Approach

On page 5 of the proposed implementation strategy, it is proposed that for Track 1 substances:

- * commercial chemicals are to be phased-out;
- * by-products, contaminants and wastes are to have reduced emissions through national standards of performance; and
- * contaminated sites (which are to have implementation plans based on an analysis of risks, costs and benefits).

We agree with the approach that commercial substances on Track 1 should be phased out. However, Track 1 substances which are by-products, contaminants and wastes should not only be subject to national standards of performance as interim steps, but should also be phased out. Any other interpretation renders the designation of a substance in the Track 1 category as meaningless. When applying the pollution prevention principle, process change, product reformulation and other pollution prevention techniques should be able to avoid the use and generation of

Track 1 substances. As a first step requirement, all Track 1 substances should have pollution prevention planning requirements. In terms of contaminated sites, the prime factor in determining clean-up should be the available technology.

Recommendation No. 8: As a general principle, all Track 1 substances should be slated for virtual elimination. Track 1 substances should be subject to a pollution prevention planning requirement.

TRACK 2 SUBSTANCES

The proposed implementation strategy for Track 2 substances is completely unsatisfactory. The primary tool for Track 2 substances are proposed "national standards of performance" which are based on both prevention and control strategies. There is no definition outlined for the term "national standards of performance." It is not clear whether these are regulatory in nature or only general guidelines. Further, it is very disappointing that these "national standards" include control strategies, especially in light of the commitments in the document, Pollution Prevention: A Federal Strategy for Action.

All Track 2 substances should be subject to rigorous requirements since they have been found to be CEPA toxic. At a minimum, all Track 2 substances should be subject to a clearly defined and comprehensive pollution prevention plans. The plans should require industry to study all sources of the substance, how to change

operations or processes to avoid the use or generation of that substance, and a mechanism to ensure that the plans are reviewed by agency staff in a timely manner.

Recommendation No. 9: Track 2 substances should be subject to a set of rigorous requirements with the aim of preventing their use or generation in Canada. At a minimum, all Track 2 substances should be subject to a requirement for pollution prevention plans.

NON-REGULATORY MANAGEMENT STRATEGIES

The Toxic Caucus has expressed concern over the use of non-regulatory management strategies as opposed to the use of regulations to address persistent toxic substances. Although there may be a role for using non-regulatory methods for addressing hazardous substances, a strong regulatory framework is necessary to ensure that action is taken to protect public health and the environment in a timely manner.

Many of the initiatives currently underway (i.e. Canada-Ontario Agreement, the NOx/VOC Management Plan) include voluntary components. Our concerns about the voluntary approach are well known and well documented.¹⁵ In brief, these initiatives do not provide for sufficient accountability by industry sectors participating in these initiatives. Moreover, it must be stated again that the substances under consideration are those which have already been assessed as "CEPA toxic" and are known to be

causing harm to health or the environment.

Recommendation No. 10: The implementation of TSMP should rely foremost on regulatory initiatives.

STRATEGIC OPTIONS PROCESS

The Toxic Caucus has been monitoring the progress of the Strategic Options Process (SOP) since it commenced in early 1994. Great Lakes United prepared a brief discussion paper outlining the guiding principles and parameters for participation by the Toxic Caucus.¹⁶ With its multi-stakeholder nature, the SOP has proven to be a very complex process raising questions with respect to its effectiveness and the guiding principles under which particular issue tables operate. To date only 7 of 11 issue tables have been completed. In the case of many issue tables, the SOP has been used as another forum for industry and some government departments to attack the assessment decision of some toxic substances. Rarely does the discussion focus on pollution prevention and the phase-out of these substances.

In our view, the SOP requires a full evaluation to ensure that it is an effective forum to address CEPA toxic substances. In light of the CEPA review, the evaluation of the SOP process should be conducted immediately with effective input from public interest groups.

Recommendation No. 11: A comprehensive evaluation of the SOP is required to assess the effectiveness of this process in developing action plans for CEPA toxic substances. This evaluation should be undertaken to ensure that future consultations progress in an efficient and timely manner.

SUMMARY AND CONCLUSIONS

In conclusion, the implementation strategy of TSMP contains some major weaknesses. These weaknesses stem from the flaws of the TSMP and the lack of clarity in many of the concepts employed in the strategy.

It is not clearly indicated in the consultation document the timeframe by which the implementation strategy will be finalized. We strongly recommend that the implementation strategy be delayed until Bill C-74 is passed.

ENDNOTES

1. See Standing Committee on Environment and Sustainable Development, (Ottawa: June 1995), It's About Our Health: Towards Pollution Prevention.
2. Environment Canada, (December 1996), Toxic Substances Management Policy: Environment Canada Implementation Strategy for Existing Substances- Final Draft, p. 3.
3. Great Lakes Water Quality Agreement Between Canada and United States, (1978), Article II and Annex 12.
4. See International Joint Commission, (Ottawa-Washington, 1992), Sixth Biennial Report on Water Quality.
International Joint Commission, (Ottawa-Washington, 1993), Seventh Biennial Report on Water Quality.
5. Standing Committee on Environment and Sustainable Development, (June 1995), It's About Our Health: Towards Pollution Prevention, pp. 72-74.
6. Creating Opportunity, The Liberal Plan for Canada, (June, 1993), p. 66.
7. International Joint Commission, (Ottawa-Washington, 1994), Seventh Biennial Report to the Governments of Canada and the United States, p. 26.
8. International Joint Commission, (Ottawa-Washington, 1996), Eighth Biennial Report on Great Lakes Water Quality, pp. 8-10.
9. See Mausberg, Burkhard, Paul Muldoon and Mark Winfield, (November 1994), "A Response to the Proposed Toxic Substances Management Policy for Canada," recommendation 2, p. 5.
10. Environment Canada, (December 1996), Toxic Substances Management Policy: Environment Canada Implementation Strategy for Existing Substances - Final Draft.
11. Government of Canada, (1995), Pollution Prevention: A Federal Strategy for Action.
12. For example, see: Theo Colborn et al., (1995), Our Stolen Future.
13. Environment Canada, (December 1996), Environment Canada: Implementation Strategy for Existing Substances, Appendix 4, p. 18.
14. Environment Canada, (December, 1996), Toxic Substances Management Policy: Environment Canada Implementation Strategy for Existing Substances, p. 4.

15. See for a review: Terry Burrell, "Law in the Public Interest - Shrinking Government and the Protection of Ontario's Environment" A paper at CELA's conference entitled: "Law and the Public Interest," November 30, 1996.

Also see: Karen Clark, "The Use of Voluntary Pollution Prevention Agreements in Canada: An Analysis and Commentary" (Canadian Institute for Environmental Law and Policy, April, 1995); and Michelle Swenarchuk and Paul Muldoon, "De-regulation and Self-Regulation - A Public Interest Perspective" A paper prepared for the workshop on "De-regulation, Self Regulation and Compliance in Administrative Law" (March, 1996).

16. See Great Lakes United Letter to Minister Sheila Copps on Strategic Options Process, December 1995.