

Review of the Canadian Environmental Protection Act (CEPA 1999)

Perspectives of Non-Governmental Organizations (NGOs)

Submission to the House of Commons Standing Committee on Environment and Sustainable Development

December 2006

Submitted by the following Organizations

Allergy and Environmental Health Association of Quebec
Allergy and Environmental Illness Group
Ambioterra
Association for the Protection of the Bouctouche Watershed
Avon Peninsula Watershed Preservation Society
Bathurst Sustainable Development
Bedford Mining Alert
Beyond Factory Farming Coalition
Campaign for Pesticide Reduction - NB
Canadian Association of Physicians for the Environment (CAPE)
Canadian Coalition for Health and Environment
Canadian EarthCare Society
Canadian Environmental Law Association (CELA)
Canadian Institute for Environmental Law and Policy (CIELAP)
Canadian Institute for Environmental Research and Development
Canadian Society of Environmental Biologists – Saskatchewan Chapter
Centre for Long-term Environmental Action in Nfld.
Chemical Sensitivities Manitoba
Citizens Environment Alliance of Southwestern Ontario
Citizens For Renewable Energy
Citizens' Network on Waste Management
Clean Calgary
Clean Production Action
Comité pour un environnement sain à Dollard-des-Ormeaux/Roxboro
Community Environment Alliance
Conservation Council of New Brunswick
Conservator Society of Hamilton & District
Crooked Creek Conservancy Society of Athabasca
Crossroads Community Group
Earth Action (PEI)
Eastern Co-operative Health Organization (ECHO)

Ecology Action Centre
 Edmonton Friends of the North Environmental Society
 Environmental Health Association of Nova Scotia
 Environnement Contrôle & Protection Inc
 Environment North
 Environmental Education Ontario
 Environmental Defence
 Falls Brook Centre
 Friends of Crescent Beach
 Friends of the Earth Canada
 Friends of the Oldman River
 FORPA Forest Protection Allies
 Gander Region Environment Group
 Great Lakes United
 London and District Labour Council
 Manitoba Wildlands
 MiningWatch Canada
 National Farmers Union of Canada
 N.B. Common Front for Social Justice (CFSJ)
 Newfoundland and Labrador Sustainable Communities
 New Brunswick Partners in Agriculture
 Oak Ridges Friends of the Environment
 Oakvillegreen Conservation Association
 Partners FOR the Saskatchewan River Basin
 Pembina Institute
 Prevent Cancer Now
 Reach for Unbleached
 Residents for Accountability in Power Industry Development (RAPID)
 Resource Efficient Agricultural Production (R.E.A.P.)
 RiverSides Foundation
 Saint John Citizens Coalition For Clean Air
 Sarnia Environmental Activists SEA
 Saskatchewan Eco-Network
 Save the Oak Ridges Moraine (STORM) Coalition
 Sierra Club of Canada
 Sierra Club of Canada-Quebec Chapter
 Sierra Legal Defence Fund
 Sierra Youth Coalition
 Slovenian Sports Federation Environmental Group
 Soil & Water Conservation Society, BC Chapter
 SOS Eau Water Sankwan Inc.
 Stop the Hogs Coalition
 Symbiose
 Tantramar Environmental Alliance
 Treeline Ecological Research
 The Kawartha Outdoor Education Centre
 The Cowichan Valley Naturalists' Society.
 The Ecological Farmers Association of Ontario
 The Rescue Lake Simcoe Coalition
 The Safe Drinking Water Foundation
 Toxics Watch Society of Alberta
 Whole Village
 York Region Environmental Alliance (YREA)

December 15, 2006

Mr. Bob Mills, Chair
House of Commons Standing Committee on
Environment and Sustainable Development

Members of the Standing Committee on
Environment and Sustainable Development
House of Commons
Ottawa, Ontario K1A 0A6

Dear Chair and Members;

Re: The Review of the *Canadian Environmental Protection Act* (CEPA 1999)

The Parliamentary Committee has now completed six months of hearings on the Review of CEPA and will be preparing its Report on its findings and recommendations. We, as members of the Canadian Environmental Network (RCEN), appreciate the opportunity to submit this summary brief to the Committee and trust that the recommendations and comments will assist the Committee in its preparation of its Report on the CEPA Review.

The Canadian Environmental Network (Réseau canadien de l'environnement, RCEN) is a non-profit non-partisan umbrella organization of approximately 800 environmental non-government organizations (ENGOS) across Canada. Through participation in numerous consultations and research efforts, many members of the RCEN caucuses have accrued a wide range of experience with different aspects of CEPA 1999 and have participated in the Review.

At the beginning of the Parliamentary Review, caucus members of the RCEN submitted the "ENGO Agenda for the Review of CEPA" to the Committee. This paper included a detailed set of comments and recommendations on each section of the Act along with key themes and principles as overarching priority issues to guide the review, namely¹:

- Implementation of the Act
- Pollution Prevention
- Public Participation
- Controlling Toxic Substances
- Implementing the Precautionary Principle
- Accountability and Enforcement
- International Agreements

Throughout the hearings, ENGOS have emphasized the need to implement CEPA according to these key themes and principles and have recommended improvements to the Act so that it does serve its role as Canada's principal piece of environmental legislation for the protection of human health and the environment.

¹ The RCEN link to the ENGO Agenda document is <http://www.cen-rce.org/eng/cepa/phase2/index.html#review>

This brief addresses topics that reinforce these key themes and principles and offers recommendations where the Act should be improved. It also highlights areas which have not been addressed adequately in the Review process and require further attention.

1. Implementing the Precautionary Principle

Specific measures are needed under CEPA in order to operationalize the Precautionary Principle throughout the decision-making process for the assessment and management of toxic substances. Existing language that limits actions only to those that are “cost-effective” should be removed from the definition of the precautionary principle. The “cost-effectiveness” of industrial activities must not be assured at the expense of human health and human lives.

2. Pollution Prevention

Although pollution prevention (P2) is described as Canada’s “priority approach to environmental protection” in the Act, it has not been forefront in the actual implementation of CEPA. The pollution prevention approach has not given priority to substitution with safer chemicals or processes. P2 activities so far have focused on the application of “pollution prevention plans” as the risk management instrument for a sector or substance.

A major weakness of the current P2 planning regime is that the Act empowers the Minister of the Environment to order the “preparation and implementation” of a pollution prevention plan and interim progress reports. While the person preparing and implementing the plan may be required to report that these tasks have been completed, there is no requirement that the plan be submitted or subject to public review. Furthermore, P2 plans incorporate “factors to consider” which have no regulatory strength. To date, only eight P2 plans have been developed but none are near the implementation stage.

Pollution prevention planning: A number of major adjustments need to be made to strengthen this instrument, such as, the inclusion of mandatory elements such as timelines and targets; a focus on substitution; shortened timeframes from development to implementation; confidentiality provisions and waiver requests need to be removed; and public access needs to be enshrined. CEPA needs to integrate a robust definition of the Substitution Principle with Pollution Prevention to ensure the progressive and innovative adoption of inherently safer products and green chemistry².

3. Enhancing Public Participation – Right-to-Know

i) Environmental Registry

The Environmental Registry was established by CEPA 1999 as the main instrument for public dissemination of information in support of the government’s commitment to “encourage the participation of the people of Canada in making decisions that effect the environment”. While the Registry has led to a significant improvement in information access, deficiencies have been noted. The access to information through the CEPA Registry has not always been adequate, public engagement in decision-making processes has not always happened at the appropriate time, and provisions for judicial action have rarely been utilized.

² Substitution is defined as the replacement or reduction of hazardous substances in products and processes by less hazardous or non hazardous substances or by achieving an equivalent functionality via technological or organizational measures.

Public transparency and participation need to be improved and strengthened. Suggestions for these improvements are found in the ENGO Agenda document and other submissions (refer to the submission by PollutionWatch, June 2006).

ii) National Pollutant Release Inventory (NPRI) –Right-to-Know

The NPRI is one of the most important public right-to-know provisions of CEPA 1999. While there have been improvements to the NPRI in the past years, more recently, a number of stumbling blocks in improving the inventory have brought into question the “will” of the government to implement necessary improvements. For example, issues related to data gaps and data quality present problems for both public users of the inventory and the federal government, as these could compromise the ability of Canada to demonstrate that it is meeting its national and international obligations.

However, under CEPA, government can only require that information be reported that “may be in the possession of that person or to which the person may reasonably be expected to have access” [sec. 46(1)]. CEPA must be changed so that facilities are required to gather and report information that they do not currently gather.

In addition, facilities reporting to the NPRI are asked to provide information on pollution prevention measures. However, the lack of any substantive reporting in this field is detrimental to the core principle of CEPA, that is, pollution prevention. The provisions and resources for the NPRI program must be enhanced if it is to be an effective public database tool in reporting releases of pollutants to the environment and in monitoring progress in reducing and preventing pollution.

iii) Environmental Protection Action

CEPA created a new “**Environmental Protection Action**” (the “Action”), that in theory was intended to allow citizens to sue to remediate environmental damage. In the six years that the new right has been in existence, it has never been used. There are onerous limitations on the use of the Action. For example, it can only be initiated if the Minister has “failed to conduct an investigation and report within a reasonable time”, or if the Minister’s response to the investigation was “unreasonable.” The action can also only be employed where “significant harm to the environment” has already occurred, rather than in instances where potential or even likely harm may occur.

The onerous conditions on the use of the “Action” should be removed from the Act so that it is not conditional upon an investigation, and the claimant needn't show “significant harm”, as that is implicit in a breach of CEPA.

iv) Confidentiality

Provisions in CEPA concerning the confidentiality of business information and rules for submission of information are found in different regulations and guidance documents issued under the Act. These provisions are applied in such a manner that they are allowed to take precedence over policies favouring public disclosure. Information respecting individual facilities tends to be withheld when confidentiality is claimed. These provisions need to be evaluated in terms of the barriers they present to public information. The *Pest Control Products Act* provides an example of how confidential test data have been dealt with in a different context.

4. Assessing and Controlling Toxic Substances

First of all, we want to stress that it is essential that the word “toxic” remain in CEPA. There has been ample discussion on this topic (refer to submission by CELA and Environmental Defence, September 21, 2006.)

The achievement of the categorization exercise is a very significant accomplishment. It signals the beginning of the important steps that need to follow: the processes of further screening those substances, and ultimately, taking regulatory action on them. In light of the newly announced Chemicals Management Plan, it is important that the current Act is improved to deal effectively with the harmful substances in our environment. This entails the need for speedier action on assessments; regulatory action on those substances that are of the greatest concern, mandatory timelines for that action to be taken; and public accessibility to the content and the results of categorization.

i) Assessment

The assessment of chemicals has not kept pace with the urgency and need to take immediate action on chemicals of concern. While CEPA’s regulatory provisions provide the authority to regulate consumer products, the government has generally not used CEPA for this purpose (refer to “Scientists for a Healthy Environment”)³. It does not consider the synergistic effects of multiple exposures to chemicals. Moreover, CEPA does not require the use of safer alternatives or substitution despite the fact that safer substitutes exist on the market for all CEPA toxics.

Recommendations:

- Require and accelerate the timelines for each stage in the assessment process.
- Provide CEPA with the authority to regulate toxic substances in consumer products.
- Invoke the precautionary principle at specific stages in the assessment process.
- Require the assessment process to account for vulnerable populations. People suffering from Environmental Sensitivities are to be included under ‘Vulnerable Populations’.
- Require substitution planning for hazardous chemicals to be a core element for all CEPA toxic and categorized chemicals.
- Shift the burden of proof to industry to prove that a substance or product is safe. Industry should be required to submit data demonstrating the safety of substances at different points in the assessment process.
- Place priority on phasing out and banning the most persistent and bioaccumulative toxic substances.

5. Virtual Elimination

According to CEPA 1999, substances are put on the virtual elimination list if they are persistent, bioaccumulative and released as a result of human activity. The Act defines virtual elimination as the ultimate reduction in the release of the quantity or concentration of a specific substance to below the “level of quantification” (LOQ), that is, the lowest concentration that can be accurately measured using sensitive but routinely available technology. There is no specified time period for which virtual elimination is to be achieved.

³ <http://www.scientistsforahealthyenvironment.ca/signon.php>

To date, only one substance, Hexachlorobutadiene (HCBD), has been put on the virtual elimination list and this only happened on December 13, 2006. This substance was initially proposed to be on the list in 2003, so clearly the process has taken far too long. In any case, this substance has never been commercially produced in Canada and has not been imported or used in Canada for a number of years. It is also worth noting that dioxins and furans, which have been slated for virtual elimination for many years, are not on the virtual elimination list.

- Those substances that require virtual elimination should be rapidly identified and placed on the virtual elimination list.
- The definition of virtual elimination using the LOQ criterion should be replaced by a criterion requiring zero discharge, that is, elimination of the use and release of the substance to the environment (as in the Great Lakes Water Quality Agreement, for example).

[Note: Further elaboration on Virtual Elimination will be submitted in January 2007.]

6. Accountability and Enforcement

Enforcement and accountability as well as implementation of the polluter-pay principle are essential for CEPA's regulatory tools to be effective. These powers in CEPA have rarely been used. Both the will and the resources to enforce it properly seem to be lacking. Enforcement activities are entirely discretionary, and Environment Canada has seemed reluctant to use them.

First, measurement and reporting systems should be developed and implemented in order to ascertain the effectiveness of the various enforcement mechanisms. Second, citizen participation in enforcement should be encouraged, and should include the creation of a fine splitting provision as already exists under the *Fisheries Act*. Human health should have protection equal to protection of our fisheries. There is no possibility of a "floodgates" argument as the Attorney General has prosecutorial discretion as to when prosecutions initiated by citizens may proceed.

7. Vulnerable Ecosystems

Vulnerable populations and vulnerable ecosystems are intrinsically linked. But while CEPA explicitly recognizes the importance of an ecosystem approach, it does not include provisions to address vulnerable ecosystems, such as the Great Lakes and the Arctic. The Minister under CEPA should have the power to designate vulnerable ecosystems as "significant areas".

8. Other Issues

A number of critical issues and chapters in CEPA have not been sufficiently covered or addressed in the review process. Some of these issues include harmonization, international agreements, biotechnology, water pollution, waste, and disposal at sea. Reference is made to three of these issues in this submission.

i) Harmonization –Federal/ Provincial processes - Canada-Wide Standards (CWS)

Under the Canadian Council of Ministers of Environment Harmonization Accord, Canada-Wide Standards (CWS) on air emissions from selected sectors were developed for 6 substances of concern. Québec is not a signatory to the Accord. However, the CWS exercise has resulted in unenforceable "standards" that are not necessarily health-based, and are neither adopted nor monitored consistently in

all jurisdictions. For example, the CWS for mercury from coal-fired electric power plants has taken several years to develop and leaves much to be desired in terms of effectiveness and accountability of industry. A CEPA regulation with the overall goal of preventing mercury emissions from these industrial facilities should have been enacted in the first place and is long overdue.

The Committee should address whether federal-provincial processes of harmonization, in particular CWS, adhere to the principles of CEPA 1999, and protect the environment and human health equally in all parts of Canada, rather than reducing the level of protection to the “lowest common denominator”. This could also be a serious problem if federal powers are devolved to the provinces.

ii) International Agreements

Canada has signed and ratified many key international agreements and protocols on toxic substances, waste, air and water pollution. However, there is no mechanism in CEPA to gather enough sufficiently accurate data to ensure that these commitments are being met, to make the Government of Canada properly accountable for implementing its commitments under these agreements. Further consideration should be given to establishing such mechanisms within CEPA.

iii) Animate Products of Biotechnology

Environment Canada has not utilized its existing powers under CEPA (Part 6) to issue notices for information or take control actions on biotechnologies. CEPA is the only federal legislation that provides clear authority for regulation of biotechnologies and needs to play a leadership role on this matter. The Act should set baseline standards for assessment of new products and ensure coverage for products that are not controlled under other acts. CEPA should also be used to regulate the development and use of nanotechnology.

The document, “*The ENGO Agenda for the Review of the Canadian Environmental Protection Act (1999)*” August 2006, is attached to provide the Committee with further detailed reference on ENGO recommendations on all parts of the Act.

Conclusion

The Act itself requires changes or adjustments in a number of areas to address its weaknesses, but overall, its fundamental principles are sound. But in addition, the Committee should place its efforts on ensuring that CEPA is implemented and enforced fully to establish real accountability, so that the Act fulfils its key function of protecting human health and the environment for Canadians.

The recently announced funding for the Chemicals Management Plan is encouraging in that it provides an opportunity for the Government to allocate human and fiscal resources required to make the recommended improvements to the Act and ensure its implementation and enforcement.

We appreciate the opportunity to present this submission to the Committee and look forward to the Committee’s Report on the CEPA review.