



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

Virtual Elimination - Addendum to *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)

“Virtual elimination” (VE) is intimately linked to the achievement of pollution prevention. Key provisions of CEPA 1999 reflect the importance of pollution prevention, and its link to VE:

- The formal title of CEPA begins “An Act respecting pollution prevention and the protection of the environment and human health ...”.
- The second recital of the Act’s preamble reads: “ **... the Government of Canada is committed to implementing pollution prevention as a national goal and as the priority approach to environmental protection.**”
- According to the third recital, “the Government of Canada acknowledges the need to virtually eliminate the most persistent and bioaccumulative toxic substances ...”
- The Administrative Duties of the Government of Canada in section 2 of the Act include the following:

“In the administration of this Act, the Government of Canada shall ...:

- “exercise its powers in a manner that protects the environment and human health, ... and promotes and reinforces enforceable pollution prevention approaches;” (paragraph 2 (1) (a))
- “take preventive and remedial measures to protect, enhance and restore the environment;” (paragraph 2 (1) (a.1))
- “protect the environment, including its biological diversity, and human health, from the risk of any adverse effects of the use and release of toxic substances, pollutants and wastes;” (paragraph 2 (1) (j)).

“Virtual elimination” has its origins and foundation in the philosophy of “pollution prevention,” an approach that is intended as a counter-point to pollution control, and the attendant need to “react to and cure” pollution after it happens.

However, when “virtual elimination” was finally articulated in CEPA 1999, it was buried deep in the Act (s. 65), and divorced from its proper pollution prevention context.

VE as articulated in CEPA 1999 focuses on releases rather than pollution prevention. Substances can only be added as a political decision by the CEPA ministers, not automatically on the basis of scientific evidence of harm. Section 65 expressly waters down the goal of VE by allowing the consideration of “relevant social, economic or technical matters” to affect the releases that are allowed. While s. 65 refers to VE as “the ultimate reduction” of a substance in a release to below

a “level of quantification”, there is nothing in CEPA compelling allowable concentrations to reach that “ultimate” level.

While the federal government finally moved in December 2006 to create the “Virtual Elimination List” enabled by CEPA 1999, and to add the first substance, Hexachlorobutadiene (HCBd) (p.2), two points of context need to be kept in mind. First, HCBd (p.2) was first proposed for VE in 2003, following a lengthy assessment process (and no other substances have been named to the VE List before or since). Second, the government has shown it can make use of the most effective pollution prevention measure – namely, prohibition – more quickly and more easily by means of the *Prohibition of Certain Toxic Substances Regulations*, which the Government has used regularly in recent years.

Recommendations:

1. If the term “virtual elimination” is to be used meaningfully in the Act, the following legislative changes are required:

Include explicit direction that “virtual elimination” is the centrepiece of pollution prevention. The focus of VE should be on the policy goal of preventing pollution by the worst substances. Such a policy goal would require replacing all of s. 65 with the following definition of VE:

“VE means the mandatory cessation of the intentional production, use, release, export, distribution or import of a substance or class of substances. Where a substance is produced as a by-product of the production or use of another substance, virtual elimination means changes to processes, practices, substitution of materials or products to avoid the creation of the substance.”

2. Known carcinogens, known reproductive toxins and known neuro-developmental toxins, as well as persistent and bioaccumulative substances, should be included among those substances targeted for VE.
3. The *Prohibition ... Regulation* – in particular, the addition of potentially harmful substances to Schedule 1 of the Regulation (“Prohibited Toxic Substances”) – should be identified as a core instrument of pollution prevention – and VE – in CEPA. Its use should be mandatory for the substances identified in Recommendation 2 above. A materials use policy emphasizing mandatory substitution should be incorporated into CEPA as the other core instrument for achieving VE and pollution prevention.¹
4. Virtual elimination, meanwhile, as articulated in the Act, has become a distraction and a technical substitute for real action. Therefore:

Delete references to “virtual elimination” in section 65 and related provisions (paras. 77 (2) (c) and (4); s. 79 and s. 91), replacing them with language that better describes the action taken pursuant to those provisions as they are currently drafted.

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¹ Two recent reports – “Safer Chemicals Within Reach” by Greenpeace International, and “Five Chemicals Alternatives Assessment Study” by the Toxics Use Reduction Institute, Massachusetts – show how substitution can work, and in fact has been implemented in other jurisdictions.