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November 16, 2016

Cynara Corbin
Clerk of the Standing Committee on Environment
and Sustainable Development
House of Commons
131 Queen Street, 6th Floor
Ottawa, Ontario K1A 0A6

Dear Ms Corbin:

Re: 2016 CEPA Review – CELA Response to October 6, 2016 Testimony of Mr. John Moffet, Environment and Climate Change Canada Before Standing Committee

We are writing in response to testimony given before the Standing Committee on October 6, 2016, by Mr. John Moffet, Director General, Legislative and Regulatory Affairs Directorate, Environment and Climate Change Canada ("ECCC"). Mr. Moffet was responding to questions put to him by a Standing Committee member as follows:

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"Hon. Ed Fast: ….On the NPRI, we've had some witnesses, one in particular I recall, who raised the issue of toxic pollution in Ontario compared to some of the U.S. states, and that has been used as a pretext to support toughening up CEPA.

This is my question for you. Is it appropriate to compare the two? If not, why not? If so, why?

I have just one follow-up question to that, so you have them both. Does CEPA already contain the power to regulate air emissions? That's just so we have it on the record.

Mr. John Moffet: I'll try to address those issues. My colleague may want to supplement the answer.

I think inter-jurisdictional comparisons are always useful to determine how a jurisdiction is doing and whether or not there are lessons to be learned. Specifically your question is, can we compare performance as reflected under the NPRI with performance as reported under statutes administered by certain U.S. states? There I would suggest that what would be appropriate to do, as in any comparison, is to ensure that you're comparing apples to apples and oranges to oranges. The particular comparison that was provided to the committee—and we'd be happy to follow up with an objective assessment of the numbers—compared the full set of releases that are reported under the NPRI, which includes emissions to the atmosphere, direct emissions to water, and off-

site releases, which are basically taking something and putting it in a waste disposal facility, which counts as a release in the NPRI. That's different from a reported emission to the environment under, for example, the New Jersey toxics reduction initiative.

While I think the main point of comparison in the presentation was to New Jersey—indeed, we have long tried to benchmark ourselves against New Jersey, which has an extremely effective toxics initiative—I would suggest that the data that you were presented with didn't compare apples to apples and therefore provided a rather large number on the Canadian side compared to a lower number on the U.S. side.

Again, what we'd be happy to do is give the committee the data, and not in a kind of defensive manner or explanatory manner, but just breaking down the data so that you can see emissions to air and emissions to landfill sites compared to....

Hon. Ed Fast: That would be helpful.

Mr. John Moffet: And your last question was...?

Hon. Ed Fast: That was power to regulate air emissions.

Mr. John Moffet: We have a number of authorities to regulate air emissions. First of all, many air pollutants are on the list of toxic substances, so we have authority under part 5 of CEPA to use the full set of CEPA tools—regulations, P2 planning notices, guidelines, codes of practice, and tradeable instruments—to regulate or otherwise control emissions of air pollutants that are considered to be toxic substances. In addition, we have authority under part 7 to regulate emissions to the air from vehicles, engines, and fuels. We have exercised authorities under all of those parts.

Hon. Ed Fast: Thank you." [pages 7-8]

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The allegations taken from the above questions and answers may be summarized as follows:

1. CELA used comparisons between Ontario and several states as a "pretext" to support "toughening up CEPA";

2. The Ontario-New Jersey comparisons CELA provided were apples to oranges comparisons because they included emissions to air, discharges to water, and off-site releases to land disposal facilities in Ontario versus emissions to the environment from New Jersey;

3. These allegedly inappropriate comparisons resulted in a large emissions estimate on the Canadian side compared to a lower estimate on the United States side; and

4. CEPA has a number of authorities to regulate air emissions and Canada has exercised those authorities.

CELA provides responses to each of the allegations below:

1. The Alleged "Pretext"

The dictionary defines a "pretext" as "a reason that you give to hide your real reason for doing something". Accordingly, the member's use of the term in this context is baffling. It is also wrong. CELA used the comparisons between Ontario and state jurisdictions because they show that overall Ontario is not controlling air emissions of toxic substances, including toxic substances common to both countries, in comparison to most state jurisdictions. In fact, regardless of the jurisdiction you compare Ontario to over the 2006 to 2012 period you get the same answer; Ontario's on-site air emissions of toxic substances are regularly the highest of any province in Canada and well in excess of most state jurisdictions in the United States, including those that have a far greater population and a comparable industrial base (e.g. New York – see page 17, Table 10 of CELA's letter to the Standing Committee dated June 16, 2016). The numbers are not an endorsement for maintaining the status quo under *CEPA, 1999*; they are a clear sign that the Act is failing to protect Canadians from air emissions of these substances. The 2016 CEPA Review is the Standing Committee's opportunity to fix this problem and, to use the member's terminology, toughen up the Act.

2. The Alleged Apples to Oranges Comparison

For the record, in its June 29, 2016 letter CELA provided the Standing Committee with the following Tables comparing the releases to air of known or suspected carcinogens (hereinafter "carcinogens") in 2013 by Ontario, Michigan, New Jersey, and Louisiana. CELA chose these jurisdictions for comparison because the June 14th testimony from Dow Chemical before the Standing Committee, reproduced in our June 29th letter, had suggested that these were the appropriate jurisdictions to compare to Ontario because of a comparable economic, manufacturing and industrial base. Table 1 of our June 29th letter showed that in 2013 Ontario had **one and a half times** the level of releases to air of carcinogens that **Michigan** had and more than **15 times** the level of releases to air of carcinogens that **New Jersey** had. Table 1 also showed that Ontario released in 2013 about **two-thirds** the level of carcinogens to air that **Louisiana** did.

Table 1: 2013 On-site Releases to Air of Carcinogens by Ontario, Michigan, New Jersey, and Louisiana and Corresponding Populations

Province or State	Quantum of Release of Carcinogens to Air (kg)	Population (millions)
Louisiana	1,897,362.22	4.6
Ontario	**1,266,374.82**	**13.5**
Michigan	736,818.18	9.9
New Jersey	83,407.93	8.9

Sources: CEC, Taking Stock; Statistics Canada; United States Census Bureau

Table 2, below, provided 2013 data on these four jurisdictions focused on just on-site releases to air of known or suspected carcinogens that are common to Canada and the United States. Table 2 showed that in 2013 Ontario had **one and a half times** the level of releases to air of common

carcinogens that **Michigan** had and more than **18 times** the level of releases to air of common carcinogens that **New Jersey** had. Table 2 also showed that Ontario released in 2013 about **two-thirds** the level of common carcinogens to air that **Louisiana** did.

Table 2: 2013 On-site Releases to Air of Carcinogens Common to Canada and the United States focusing on Ontario, Michigan, New Jersey, and Louisiana and Corresponding Populations

Province or State	Quantum of Release of Carcinogens to Air (kg)	Population (millions)
Louisiana	1,318,240.17	4.6
Ontario	**957,060.67**	**13.5**
Michigan	572,822.36	9.9
New Jersey	51,395.25	8.9

Sources: CEC, Taking Stock; Statistics Canada; United States Census Bureau

Accordingly, when Mr. Moffet testifies that CELA compared air, water and land disposal releases for Ontario and New Jersey (the so-called apples to oranges comparison) it is clear from the above tables that he is wrong. The CELA comparison was an apples-to-apples comparison.

3. The Alleged Inappropriateness of the Numbers Produced

In our June 29th letter to the Standing Committee, CELA compared 2013 on-site air emissions from Ontario and New Jersey using data from the agency created under the North American Free Trade Agreement, the Commission for Environmental Cooperation ("CEC"). CEC is charged by the three national governments of Canada, the United States, and Mexico with monitoring the performance of each country's environmental laws (though our comparisons presented to the Standing Committee were limited to Canada and the United States). The CEC numbers are taken directly from the National Pollutant Release Inventory ("NPRI") (Canada) and the Toxics Release Inventory ("TRI") (United States) databases, authorized under the federal laws of both countries. CEC annually makes these on-site air emission comparisons and has been doing so for years. Such emission comparisons constitute comparing apples to apples because they are on-site emissions to the air environment in both Ontario and New Jersey. There is nothing inappropriate in making the comparison. What would be inappropriate would be to ignore this data and what it says about the ineffectiveness of *CEPA, 1999* in controlling air emissions of toxic substances. Indeed, in the tables below we have compared on-site air emissions data from Ontario and New Jersey for the eight-year period 2006 to 2013. In each year of the comparison, Ontario emissions dwarf those of New Jersey, the jurisdiction Mr. Moffet testifies that Canada has "long tried to benchmark" itself against.

Table A: On-site Releases to Air of Carcinogens by Ontario and New Jersey – 2006 to 2013

Year	Ontario (kg)	New Jersey (kg)
2006	3,226,671.50	257,173.25
2007	2,382,143.83	219,027.86
2008	1,996,298.56	198,879.50
2009	1,430,500.83	125,199.13
2010	1,296.701.64	130,308.56
2011	1,570,553.19	94,220.77
2012	1,372,860.96	88,069.80
2013	1,266,374.82	83,407.93

Source: CEC, Taking Stock, 2016

Table A shows that in 2013 Ontario's on-site releases to air of carcinogens (not necessarily common to both countries) were more than **15 times** greater than those of New Jersey. Even in 2013, Ontario's lowest recorded on-site releases to air since record keeping began were still more than **five times** greater than what New Jersey released eight years ago in 2006.

Table B: On-site Releases to Air of Carcinogens Common to Canada and the United States Released in Ontario and New Jersey – 2006 to 2013

Year	Ontario (kg)	New Jersey (kg)
2006	3,210,680.75	247,952.19
2007	2,367,380.34	214,354.51
2008	1,977,394.36	191,809.58
2009	1,412,312.72	106,449.05
2010	1,277,268.39	126,392.99
2011	1,567,761.35	90,273.81
2012	1,370,944.23	85,561.39
2013	1,264,967.73	71,956.33

Source: CEC, Taking Stock, 2016

Table B shows that in 2013 Ontario's on-site releases to air of carcinogens common to both countries were more than **17 times** greater than those of New Jersey. Even in 2013, Ontario's lowest recorded on-site releases to air since record keeping began were still more than **five times** greater than what New Jersey released eight years ago in 2006.

Table C: On-site Releases to Air of CEPA-toxic Carcinogens Common to Canada and the United States Released in Ontario and New Jersey – 2006 to 2013

Year	Ontario (kg)	New Jersey (kg)
2006	2,282,321.75	102,083.60
2007	1,540,346.34	93,413.88
2008	1,307,980.36	87,423.24
2009	965,473.76	64,799.97
2010	825,597.61	72,008.38
2011	899,441.00	45,667.43
2012	879,340.40	42,769.06
2013	899,526.87	42,627.96

Source: CEC, Taking Stock, 2016

Table C shows that in 2013 Ontario's on-site releases to air of "CEPA-toxic"[1] carcinogens common to both countries were more than **21 times** greater than those of New Jersey. Even in 2013, Ontario's on-site releases to air of "CEPA-toxic" carcinogens common to both countries were still more than **eight times** greater than what New Jersey released eight years ago in 2006.

If, as Mr. Moffet states in his testimony, New Jersey "has an extremely effective toxics initiative" what does it in fact say about the effectiveness of Canada's initiative under *CEPA, 1999* when we see:

- 15 times more on-site air releases of carcinogens in Ontario compared to New Jersey (Table A);
- 17 times more on-site air releases in Ontario compared to New Jersey of carcinogens common to both countries (Table B); and
- 21 times more on-site air releases in Ontario compared to New Jersey of CEPA-toxic carcinogens common to both countries (Table C)?

The "rather large" numbers in Ontario versus the "lower" numbers in New Jersey are not an invention of CELA. Just looking at the Table C numbers for the 8-year 2006-2013 period for Ontario, there were over 9.6 million kilograms (kg) of on-site releases to air of substances that were both CEPA-toxic and carcinogenic; an average of over 1 million kg released to air per year of such substances. These are rather large numbers irrespective of any comparison with New Jersey.

Furthermore, there is one additional issue for the Standing Committee to consider when looking at the CEC data. Tables A, B, and C show a decline in the on-site releases to air of carcinogens in Ontario and New Jersey for the period 2006-2013. One might, therefore, argue that: (1) Ontario is reducing its on-site air releases of carcinogens (even if not as swiftly as New Jersey);

[1] "CEPA-toxic" refers to a substance that meets one or more of the requirements of section 64 of *CEPA, 1999* and, as a result, has been listed under the Act's Schedule 1 List of Toxic Substances.

and (2) *CEPA, 1999* should take the credit for that, at least in part. However, CELA suggests that that conclusion would be the wrong one to draw due to what Table D, below, shows.

Table D: On-site Disposal or Land Release of CEPA-toxic Carcinogens Common to Canada and the United States Released in Ontario and New Jersey – 2006 to 2013

Year	Ontario (kg)	New Jersey (kg)
2006	51,980,046.24	61,501.80
2007	51,151,640.07	45,653.16
2008	52,386,402.44	53,244.63
2009	39,760,376.11	43,573.68
2010	43,905,012.97	49,258.00
2011	53,989,054.63	39,702.85
2012	50,639,781.58	29,729.87
2013	59,980,975.72	36,923.80

Source: CEC, Taking Stock, 2016

Table D shows a significant **increase** in Ontario (+15.39%) of on-site disposal or land release of the same CEPA-toxic carcinogens as in Table C, while New Jersey experienced a significant **decrease** (-39.96%) in the release of these same carcinogens over the same period. What Table D also shows is that Ontario may have been merely shifting the release of these carcinogens from one medium (air) to another (land) over this eight-year period. Moving cancer-causing substances from one exposure pathway to another does not represent progress in protecting human health and the environment. It merely represents putting a different part of the environment and a different group of people at risk.

In the respectful submission of CELA, these numbers are the result of either an ineffective regulatory regime under *CEPA, 1999*, an ineffective regulatory regime under Ontario law, or both. However, because the Table C and D analyses are for CEPA-toxic substances, we submit that the federal government cannot avoid the bulk of the responsibility for emissions of substances it has itself designated as problems under federal law. Nonetheless, the 2016 CEPA Review is the opportunity for the federal government to investigate and report to the Standing Committee on the extent to which the problem lies with *CEPA, 1999* and what are the solutions.

4. Authority to Regulate Air Emissions is not a Substitute for Regulating them Effectively

Finally, on this last point Mr. Moffet testified that *CEPA, 1999* mentions many types of authorities under which the federal government may act and he noted that these authorities have been exercised. The issue, however, is whether both the authorities and how they have been exercised are effective. The above data suggest they have not been effective.

These data also underscore why CELA has previously urged the Standing Committee to recommend to Parliament amendments to *CEPA, 1999* that: (1) are more preventive in nature; (2) provide better protection for vulnerable populations; (3) address the issue of alternatives in a comprehensive way because if the federal government cannot control the release of toxic substances then it needs explicit legislative authority to substitute safer alternatives for at least

the worst of them in Canadian industry and commerce; (4) strengthen the NPRI program; and (5) enhance the role of the public in the process.

We would ask that in addition to the attached being distributed to the Committee members that it also is posted as a brief on the Committee website.

Should Committee members have any questions arising from the attached, or wish us to re-appear before the Committee to discuss this material, please feel free to contact either myself or Ms. de Leon.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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