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March 21, 2017

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

Dear Mr. MacPherson:

Re: 2016 CEPA Review – CELA Response to Environment and Climate Change Canada CEPA Discussion Paper of May 2016

In May 2016, Environment and Climate Change Canada ("ECCC") provided the Standing Committee with a discussion paper on issues concerning *CEPA, 1999* and possible approaches to addressing them [Environment and Climate Change Canada, Discussion Paper: Canadian Environmental Protection Act, 1999 – Issues and Possible Approaches (Ottawa: ECCC, May 2016) (hereinafter "Discussion Paper")]. The Discussion Paper addresses most of the twelve parts of the Act. However, our comments will be restricted primarily to the Discussion Paper's consideration of Parts 2, 3, 4, and 5 of the Act regarding public participation, information gathering, pollution prevention, and control of toxic substances.

Summary of Selected Discussion Paper Proposals

With respect to some issues under Parts 2-5 of *CEPA, 1999*, the Discussion Paper suggests the following possible approaches:

- Amend the Act to mention in the preamble, the importance of considering vulnerable populations in risk assessments (section 2.1 of Discussion Paper);
- Amend the Act to add explicit authority to remove a substance from the Domestic Substances List when it is not in commerce, which would allow the substance to be treated as a new substance subject to the law's pre-market notification and assessment requirements if a person should wish to manufacture or import it to Canada following its deletion from the list (section 2.2);
- Amend the Act to allow an assessment period for a new substance to be paused if the Minister requests clarification related to submitted information (something not allowed now and which can result in the substance being allowed to enter Canada before the Minister receives the clarification required to make an informed decision) (section 2.4);

- Amend the Act to allow the controlled manufacture or import of a substance while also requesting the notifier provide additional information (section 2.6);
- Amend the Act to require notice for significant new activities respecting substances that are on the Domestic Substances List similar to that for substances not on the list (section 2.7);
- Amend the Act to authorize a different approach to virtual elimination of substances that are persistent, bioaccumulative, and toxic because the current approach restricts use of the authority to substances that can be measured while they are being released into the environment (e.g. point source releases), but prevents the federal government from seeking to virtually eliminate such substances that are released diffusely (section 2.8);
- Amend the Act to expressly recognize environmental performance agreements between the federal government and a member of the regulated community (something that has occurred outside the scope of the Act up to now and limits the use of certain preventive and enforcement measures under the law) (section 2.9);
- Amend the Act to allow the Minister of Health to be responsible for the ss. 91 and 92 obligations to develop a preventive or control instrument or regulation for a toxic substance: (1) when the management of risk will be led entirely by the Minister of Health using a *CEPA, 1999* instrument that the Minister has the authority to develop unilaterally (i.e. s. 55 guidelines or code of practice); or (2) when the development of a preventive or control instrument or regulation will be led entirely by the Minister of Health under a Health Canada law such as the *Canada Consumer Product Safety Act* or the *Food and Drugs Act* (section 2.10);
- Amend the Act to provide the Minister with express authority under s. 71 to request information on methodology, data, models used, toxicological or other tests performed, in furtherance of the purpose of assessing whether a substance is toxic or capable of becoming toxic (section 9.2);
- Amend the Act to lower the threshold for bringing an environmental protection action from an allegation that the violation caused "significant harm" to simply that it caused "harm" to the environment (section 12.1);
- Amend the Act to require the Minister to publish a notice indicating an intention to establish a board of review and thereby suspending the period under s. 92(1) during which the Minister must develop a regulation or instrument preventing or controlling a substance (section 12.2);
- Amend the Act to require a Parliamentary review every ten years rather than every five years as currently required by s. 343 (section 12.4). See generally, Environment and Climate Change Canada, Discussion Paper: Canadian Environmental Protection Act, 1999 – Issues and Possible Approaches (Ottawa: ECCC, May 2016).

Overall Impressions of Discussion Paper Proposals

On the whole, a number of the Discussion Paper suggestions would improve the overall effectiveness of *CEPA, 1999*. However, some of the suggestions may be characterized as only a limited improvement that does not go far enough in the circumstances (e.g. adding mention of vulnerable populations in the preamble, but not elsewhere in the Act), while other government suggestions could be viewed as a step in the wrong direction altogether (e.g. authorizing that the

review period occur every ten years instead of the currently required five years; or allowing the controlled manufacture or import of a substance while also requesting that the notifier provide additional information, an approach reminiscent of the problematic conditional registration regime under federal pesticides law recently criticized by the federal environment commissioner for allowing some conditionally registered pesticides to remain on the market for lengthy periods of time, measured in some cases by more than the five-year period normally allowed, while environmental health and safety studies remained outstanding – see Commissioner of the Environment and Sustainable Development, *Pesticide Safety*, (Ottawa: CESD, Fall 2015) < www.oag-bvg.gc.ca >). More detailed comments on several of the Discussion Paper proposals are set out below.

Specific Comments on Selected Discussion Paper Proposals

Mentioning Vulnerable Populations in Preamble

Section 2.1 of the Discussion Paper states: "CEPA does not formally recognize the importance of considering the vulnerabilities of certain populations as an important matter of principle when determining whether a substance is toxic or capable of becoming toxic". ECCC proposes as a possible approach to address the issue that: "CEPA could be amended to mention in the preamble, the importance of considering vulnerable populations in risk assessments" (Discussion Paper, page 11).

While it is encouraging that ECCC recognizes the importance of considering vulnerable populations in risk assessments, it is not clear how the ECCC views amending just the preamble to reflect this concern does more than what ECCC says it already does under *CEPA, 1999*. The Discussion Paper states: "Assessments of risks to human health, conducted under CEPA, consider the specific vulnerabilities of these groups, including appropriate safety factors, according to available hazard, use and exposure data" (Discussion Paper, page 11).

If consideration of vulnerable populations already takes place under the Act, there can be no harm in making this clear, not only in the preamble but, in the purpose and substantive provisions of the Act as well. We have previously stated this, provided a rationale for why it is necessary to go beyond simply amending the preamble, drafted such amendments, and provided them to the Standing Committee in the overall context of establishing environmental justice principles in *CEPA, 1999*.[1] Moreover, if Parliament could include consideration of vulnerable populations in 2002 amendments to the substantive provisions of the *Pest Control Products Act*,

[1] CELA testimony before the Standing Committee on Environment and Sustainable Development, May 19, 2016, at page 9; CELA Letter to Cynara Corbin, Clerk of the Standing Committee on Environment and Sustainable Development, June 16, 2016 (Response to Questions Posed by Standing Committee Members at May 19, 2016 Hearing) at pages 2-5; see also CELA Letter to Cynara Corbin, Clerk of the Standing Committee on Environment and Sustainable Development, August 24, 2016 (Comment on Letter by Dr. Dayna Scott, Associate Professor, Osgoode Hall Law School, York University to Standing Committee on August 3, 2016) at pages 2-3 (*The Preamble Issue*).

regarding agricultural chemicals, it can go at least that far - and CELA has urged it to go much further - in 2016-2017 amendments to *CEPA, 1999*, regarding industrial chemicals.[2]

Removing Substances not in Commerce from Domestic Substances List

Section 2.2 of the Discussion Paper states: "CEPA could be amended to add an explicit authority to remove a substance from the Domestic Substances List when it is not in commerce. This would result in the substance becoming subject to the new substance pre-market notification and assessment requirements, should someone wish to manufacture or import it into Canada following deletion from the List" (Discussion Paper, page 12).

On its face, this proposal does not appear objectionable. However, upon closer scrutiny it poses problems. First, s. 81(2) of the Act allows the manufacture or import of a non-DSL substance for up to 180 days for which prescribed information is outstanding, if the substance had been manufactured or imported between January 1, 1987 and June 30, 1994. This is an exception to s. 81(1), which requires that a non-DSL substance cannot be manufactured or imported unless the prescribed information has been made available to the Minister at the time of application and the period for assessing the information under s. 83 has expired. In our submission, there is no justification for granting a 180 day grace period for a reintroduced substance that was voluntarily removed from commerce. The prescribed information for substances removed from the DSL that seek re-introduction should be provided to the Minister at the time of application.

Second, s. 81(8)(c) allows the Minister to waive requirements to provide information if, in the opinion of the Minister, it is not practicable or feasible to obtain the test data necessary to generate the information. A substance that had been on the DSL should already have ample scientific data available to demonstrate its safety to the environment and human health particularly with the completion of the categorization process that was undertaken between 2000 and 2006. The inability of a manufacturer or importer to provide data supporting the environmental health and safety of a substance that might have been on the DSL for decades before its removal should preclude re-introduction of the substance into Canadian commerce.

In our view the same arguments should apply to animate products of biotechnology [Part 6 of the Act] that are removed from the DSL and for which re-introduction into Canadian commerce is sought (see ss. 106(2) and 106(8)(c)).

Allowing Manufacture or Import of Substance While Data Outstanding

Section 2.6 of the Discussion Paper states: "CEPA could be amended to formally allow additional information to be requested using paragraph 84(1)(c) at the same time as allowing controlled manufacture/import under paragraph 84(1)(a) (i.e., allow an exception to the prohibition in section 84(2) if the manufacture or import is permitted under paragraph 84(1)(a))".

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[2] CELA Letter to Cynara Corbin, Clerk of the Standing Committee on Environment and Sustainable Development, August 24, 2016 (Comment on Letter by Dr. Dayna Scott, Associate Professor, Osgoode Hall Law School, York University to Standing Committee on August 3, 2016) at page 3 (*The PCPA Issue*).

As noted above this is not an environmentally sound suggestion and is contrary to the precautionary principle, which binds the federal government pursuant to s. 2(1)(a) of the Act. Allowing the controlled manufacture or import of a substance while also requesting that the notifier provide additional information, is an approach reminiscent of the problematic conditional registration regime under federal pesticides law that was criticized by the federal environment commissioner in 2015. In the commissioner's report it was noted that this allowed some conditionally registered pesticides to remain on the market for lengthy periods of time, while environmental health and safety studies remained outstanding. The commissioner found that users may become dependent on a product that is ultimately shown to be unsafe. Market dependence and the lack of alternatives could make it more difficult for the government to cancel authority for the use of products later determined to pose unacceptable risks.[3] The Standing Committee should not adopt this ECCC proposal.

Taking a Bifurcated Approach on Virtual Elimination

Section 2.8 of the Discussion paper states: "CEPA could be amended to create a more functional virtual elimination regime for managing persistent, bioaccumulative and toxic substances" by dividing Schedule 1 of the Act into two parts consisting of a virtual elimination list, and a list of other toxic substances. Substances could be added to one but not both lists. Risks from substances added to the virtual elimination list would be managed: (1) by a regulation under *CEPA, 1999* or another federal law; or (2) by being added to a new Toxic Substances and Restricted Activities List and specifying the activities associated with the substance that are prohibited. The reasons given by the ECCC for the proposal are: (1) the virtual elimination list and the procedures for dealing with substances on it essentially duplicate the risk management measures that are available by virtue of a substance being on Schedule 1; and (2) the virtual elimination regime is not designed to address fugitive, as opposed to point source, emissions of a substance.

In the submission of CELA, the Standing Committee should not adopt this ECCC proposal for the following reasons. First, virtual elimination was intended by Parliament [s. 77(2)(c), and (4) of the Act] to address toxic substances that are also: (1) persistent and bioaccumulative; (2) arise primarily from human activity; and (3) are not naturally occurring inorganic substances. These concerns have a long history at the federal level having been part of the federal Toxic Substances Management Policy ("TSMP") since at least the 1990s.[4] Toxic substances that are also identified as persistent, bioaccumulative, and result primarily from human activity are intended for virtual elimination (known as Track 1 under the TSMP). The ECCC proposal could result in some of those substances remaining in commerce by being placed in the proposed Toxic Substances and Restricted Activities List. The TSMP does have a Track 2, which allows toxic substances to remain in commerce. However, it is for toxic substances not meeting the criteria for virtual elimination. The ECCC proposal could have the effect of leaving persistent and bioaccumulative substances on the market, particularly if the federal government does not amend the outdated *Persistence and Bioaccumulation Regulations*, which are not as stringent as their equivalents in other countries. Second, the only proposal that makes sense is for the federal government to ban

[3] Commissioner of the Environment and Sustainable Development, *Pesticide Safety* (Ottawa: CESD, Fall 2015) at 1.10 to 1.11.
[4] < www.ec.gc.ca >

substances slated for virtual elimination. In that case, the level of quantification under s. 65.1 measurable for both point and non-point sources would be zero. Accordingly, the better approach is to not try to establish a level of quantification for a substance that should be virtually eliminated. The regulatory focus for such substances should be on eliminating them from the environment altogether. CELA's proposed approach is consistent with that of the 2012 Great Lake Water Quality Agreement wherein the focus is on the need to achieve virtual elimination and zero discharge of chemicals of mutual concern that could otherwise find their way into the air, water, land, sediment, and biota.[5] Third, adopting CELA's proposed approach would be more consistent with pollution prevention and Part 4 of *CEPA, 1999* by focusing on the need to get away from the management and abatement of such substances and instead focusing on alternatives to them. Fourth, there is one aspect of the ECCC proposal that is worth considering and that is removal of the definition of "virtual elimination" in s. 65(1) of the Act.[6] CELA would recommend as a substitute definition the following: "virtual elimination" means (a) the cessation of the intentional production, use, release, export, distribution, or import of a substance or classes of substances"; and (b) 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 creation of substances in question.

Expanding the Risk Management "Toolbox"

Section 2.9 of the Discussion Paper states: "CEPA could be amended to formally expand the toolbox" of regulatory compliance and enforcement measures available. While there are some good suggestions under this heading (e.g. ensuring products that release a substance can be regulated) there also are some concerns with the approach. Principal among the concerns is the ECCC proposal to allow the Ministers to enter into performance agreements with the regulated community as a means of fulfilling the risk management obligation. The problem with such an approach is that it potentially locks out members of the public from enforcing such agreements because they will not be parties to them. As a result, there could be a decrease, not an increase, in enforcement under the Act to the extent the approach becomes a preferred option for the Ministers. The ECCC proposal also has the potential to decrease the use of environmental protection actions, which the ECCC says it wants to increase (see below).

Streamlining Roles for Managing Toxics

Section 2.10 of the Discussion Paper states: "CEPA could be amended to formally allow the Minister of Health to be responsible for the sections 91 and 92 obligations to develop a preventive or control instrument or regulation for a toxic substance": (1) when the management of risk will be led entirely by the Minister of Health using a *CEPA, 1999* instrument that the Minister has the authority to develop unilaterally (i.e. s. 55 guidelines or code of practice); or (2) when the development of a preventive or control instrument or regulation will be led entirely by

[5] Canada – United States Great Water Quality Agreement 2012 (art. 4(0) – virtual elimination for releases of chemicals of mutual concern); art. 4(p) – zero discharge for control of releases of chemicals of mutual concern; Annex 3 – need to manage chemicals of mutual concern by implementing measures to achieve virtual elimination and zero discharge).

[6] Discussion Paper, page 16.

the Minister of Health under a Health Canada law such as the *Canada Consumer Product Safety Act* or the *Food and Drugs Act*.

CELA does not support the ECCC proposal for the following reasons: (1) chemicals found to be toxic to the environment are also found in products that under the ECCC proposal might only be addressed by federal consumer product legislation; (2) as reported during testimony by several witnesses before the Standing Committee, there have been too many instances where chemicals found to be "CEPA-toxic" have not been properly or fully regulated in consumer products after lengthy periods of time (e.g. PBDEs, BPA).[7] Accordingly, CELA submits that ECCC should retain statutory authority to act in these instances even where Health Canada has acted, or proposes to act.

Expanding Information Gathering Authorities

Section 9.2 of the Discussion Paper states: "CEPA could be amended to: 'Provide the Minister with the express authority to request the following information under section 71 for the purpose of assessing whether a substance is toxic or capable of becoming toxic [e.g. methodology, data, models used, samples of toxicological tests]'". The problem with this ECCC proposal is that it fails to deal with the obstacles posed by s. 72 of the Act; in particular that the Minister may not exercise the powers under s. 71(1)(c) [i.e. require persons to conduct toxicological or other testing] unless the Ministers have reason to suspect that the substance is toxic or capable of becoming toxic. As CELA indicated in our June 16, 2016 submission to the Standing Committee:

> "The primary problem with certain key sections of *CEPA, 1999* relating to existing substances is that they place the burden of proof on the Minister not industry for anything that is already on the market. Thus, the issue is not what should trigger an assessment of a substance so much as who has the burden of demonstrating safety. For example, the Minister of Environment does not have the authority to request that industry conduct toxicological and other tests under section 71(1)(c) if, under section 72, the Ministers of Health and Environment do not have reason to suspect that the substance is toxic or capable of becoming toxic. This is a distinct contrast to the situation under REACH in Europe where the onus with respect to the generation of data is squarely on industry for anything that is on the market".[8]

In the absence of repeal of s. 72 the proposed ECCC reform may not be effective in achieving the goal of greater information acquisition.

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[7] House of Commons, Standing Committee on Environment and Sustainable Development, *A Review of the Canadian Environmental Protection Act, 1999*, Evidence, No. 22, 1st Sess., 42 Parl. (9 June 2016) (Dr. Dayna Scott, Associate Professor, Osgoode Hall Law School and the Faculty of Environmental Studies, York University) at 3-4; and House of Commons, Standing Committee on Environment and Sustainable Development, *A Review of the Canadian Environmental Protection Act, 1999*, Evidence, No. 24, 1st Sess., 42 Parl. (16 June 2016) (Professor Miriam Diamond, Department of Earth Sciences, University of Toronto) at 2, 9.

[8] CELA Letter to Cynara Corbin, Clerk of the Standing Committee on Environment and Sustainable Development, June 16, 2016 (Response to Questions Posed by Standing Committee Members at May 19, 2016 Hearing) at pages 5-6.

Lowering Threshold for Bringing an Environmental Protection Action

Section 12.1 of the Discussion Paper states: "CEPA could be amended to lower the threshold for bringing an environmental protection action from an allegation that the offence caused 'significant harm' to simply that it caused 'harm' to the environment". In discussing this provision, the ECCC Discussion Paper noted that the Senate Committee recommended such a change during the last CEPA Review.[9] In testimony before the Standing Committee in October 2016, ECCC officials confirmed that: (1) this citizen suit provision has not been used since its passage; (2) the existing provision constitutes a high threshold for individuals seeking to bring such an action; and (3) the Environment Minister wanted this brought to the Standing Committee's attention for consideration.[10] However, there is more than just one aspect to s. 22 that is problematic. As we noted in our testimony before the Standing Committee in May 2016:

> "Currently, under section 22, an action cannot be commenced by an individual unless:
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> (1) the individual has first applied to the Minister for an investigation of an alleged offence committed under the Act (section 17);
>
> (2) the Minister failed to conduct an investigation and report within a reasonable time (section 22(1)(a));
>
> (3) the Minister's response to the investigation was unreasonable (section 22)(1)(b));
>
> (4) the alleged offence "caused significant harm to the environment" (section 22(2)(b)).
>
> Furthermore, under section 24(a) of the Act, an environmental protection action may not be brought if the alleged conduct was taken "to correct or mitigate harm or the risk of harm to the environment or to human, animal or plant life or health".
>
> The cumulative impact of these various barriers is that there are no reported cases of an environmental protection action having been invoked by a member of the public since *CEPA, 1999* came into force in 2000. In its March 2008 report on *CEPA, 1999*, the Senate Standing Committee on Energy, Environment and Natural Resources recommended removing the need for citizens to show that an action caused significant environmental harm before being able to proceed with an environmental protection action.
>
> CELA submits that all of the above barriers to the bringing of a section 22 environmental protection action be examined by the Standing Committee with a view to their removal".[11]

CELA continues to be of the view that all of the above provisions of the Act need to be reconsidered if s. 22 is to become an effective enforcement tool. At a minimum, it should not be necessary to demonstrate both a violation of the Act and significant harm in order to succeed. It also should not be necessary in emergency situations to first request that the Minister conduct and report upon the results of an investigation and then determine if the Minister's response was

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[9] Discussion Paper, page 37.

[10] House of Commons, Standing Committee on Environment and Sustainable Development, *A Review of the Canadian Environmental Protection Act, 1999*, Evidence, No. 28, 1st Sess., 42nd Parl. (6 October 2016) (John Moffet, Director General, Legislative and Regulatory Affairs Directorate, ECCC) at 2, 6-7.

[11] CELA Letter to Cynara Corbin, Clerk of the Standing Committee on Environment and Sustainable Development, June 16, 2016 (Response to Questions Posed by Standing Committee Members at May 19, 2016 Hearing) at page 18.

unreasonable. The merits of an environmental protection action should stand or fall on their own weight.

Improving Board of Review Provisions

Section 12.2 of the Discussion Paper states: "CEPA could be amended to ensure the Board of Review provisions function efficiently and result in the best possible risk management decisions" with amendments: (1) requiring the Minister(s) to publish a notice indicating an intention to establish a board of review; and (2) allowing the notice to suspend the 18-month period in s. 92(1), rather than establishing the Board. In CELA's submission, there are far more concerning issues with the Board of Review process than those addressed by the Discussion Paper. In particular, the Board of Review process has been used almost as infrequently (once)[12] as the environmental protection action provision (never), in the 16 plus years *CEPA, 1999* has been in force. The Discussion Paper proposals, noted above, do nothing to address that issue. On more than one occasion, requests by environmental groups for the Minister to establish a Board of Review have gone unheeded. Indeed, even industry has had difficulty in getting a Board of Review established when seeking redress before the courts.[13] It would not be far off the mark to suggest that the notice of objection provisions of the Act do little to advance: (1) the overall objectives of the law; (2) the duties of the federal government to encourage public participation in environmental decision-making; or (3) the facilitation of protection of the environment by the Canadian public[14]. They should be modified so that they do contribute to achieving the goals of *CEPA, 1999*, including providing funding to interveners who cannot otherwise afford to participate in the Board of Review process.

Conducting CEPA Review Once Every Ten Years Instead of Once Every Five Years

Section 12.4 of the Discussion Paper states: "CEPA could be amended to require a Parliamentary review every 10 years, rather than every 5 years". The Discussion Paper rationale for this statement is that the Parliamentary review process and the development and finalization of legislation takes a long time and five years is not long enough to allow amendments based on a prior review to be enacted and assessed.[15] CELA submits that delaying by an extra five years the opportunity for Parliament to examine how the Act is working is a recipe for allowing the statute to become seriously out-of-date and out-of-touch with environmental threats posed by toxic substances. Development of new, and re-examination of existing, chemical substances is a particularly dynamic area of science that requires an equally dynamic law to oversee it. A law

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[12] A Board of Review was established in 2010 to examine the substance Siloxane D5.

[13] See *Syncrude Canada Ltd. v. Canada (Attorney General)*, 2014 FC 776, affd 2016 FCA (Minister does not owe applicant company a duty of fairness with respect to whether to convene a board of review because there is a general rule that typical procedural duties and protections do not apply in the legislative context and filing of notice of objection did not initiate an administrative decision-making process into the rights, interests, or privileges of applicant company). See also *Goodyear Canada Inc. v. Canada (Minister of the Environment)*, 2016 FC 466 (judicial review application dismissed on grounds that role of court is not to resolve disputes among scientists, and neither Minister's decision not to establish board of review, nor mandate of board itself, relates to applicant company's rights, privileges, or interests).

[14] *CEPA, 1999*, s. 2(1)(e) and (f).

[15] Discussion Paper, page 38.

that Parliament only reviews once every 10 years would lead to law reform that would take even longer than 10 years to enact and implement.

Conclusions and Recommendations

Arising from the foregoing, CELA restates its conclusions and recommendations in respect of the ECCC Discussion Paper as follows:

1. If consideration of vulnerable populations already takes place under the Act, there can be no harm in making this clear, not only in the preamble but, in the purpose and substantive provisions of the Act as well (regarding section 2.1 of ECCC Discussion Paper);

2. There is no justification for granting a 180 day grace period for a reintroduced substance that was voluntarily removed from commerce. The prescribed information for substances removed from the DSL that seek re-introduction should be provided to the Minister at the time of application. The inability of a manufacturer or importer to provide data supporting the environmental health and safety of a substance that might have been on the DSL for decades before its removal should preclude re-introduction of the substance into Canadian commerce. The same arguments should apply to animate products of biotechnology [Part 6 of the Act] that are removed from the DSL and for which re-introduction into Canadian commerce is sought (regarding section 2.2 of ECCC Discussion Paper);

3. Allowing the controlled manufacture or import of a substance while also requesting that the notifier provide additional information, is an approach reminiscent of the problematic conditional registration regime under federal pesticides law that was criticized by the federal environment commissioner in 2015 and which the Standing Committee should not adopt for *CEPA, 1999* (regarding section 2.6 of ECCC Discussion Paper);

4. The ECCC proposal to take a bifurcated approach on virtual elimination could have the effect of leaving persistent and bioaccumulative substances on the market, particularly if the federal government does not amend the outdated *Persistence and Bioaccumulation Regulations*, which are not as stringent as their equivalents in other countries. The only proposal that makes sense is for the federal government to ban substances slated for virtual elimination. In that case, the level of quantification under s. 65.1 measurable for both point and non-point sources would be zero. However, the better approach is to not try to establish a level of quantification for a substance that should be virtually eliminated. The regulatory focus for such substances should be on eliminating them from the environment altogether (regarding section 2.8 of ECCC Discussion Paper);

5. The problem with the ECCC proposal to allow the Ministers to enter into performance agreements with the regulated community is that it potentially locks out members of the public from enforcing such agreements because they will not be parties to them. As a result, there could be a decrease, not an increase, in enforcement under the Act to the extent the approach becomes a preferred option for the Ministers. The ECCC proposal also has the potential to decrease the use of environmental protection actions, which the ECCC says it wants to increase (regarding section 2.9 of ECCC Discussion Paper);

6. In the absence of repeal of s. 72 the proposed ECCC reform to expand the gathering of information under s. 71(1)(c) may not be effective in achieving the goal of greater information acquisition (regarding section 9.2 of ECCC Discussion Paper);

7. Sections 17, 22(1)(a), 22(1)(b), 22(2)(b), and 24(a) of *CEPA, 1999* need to be reconsidered if s. 22 is to become an effective enforcement tool. At a minimum, it should not be necessary to demonstrate both a violation of the Act and significant harm in order to succeed. It also should not be necessary in emergency situations to first request that the Minister conduct and report upon the results of an investigation and then determine if the Minister's response was unreasonable. The merits of an environmental protection action should stand or fall on their own weight (regarding section 12.1 of ECCC Discussion Paper);

8. The notice of objection provisions of the Act do little to advance: (1) the overall objectives of the law; (2) the duties of the federal government to encourage public participation in environmental decision-making; or (3) the facilitation of protection of the environment by the Canadian public. They should be modified so that they do contribute to achieving the goals of *CEPA, 1999*, including providing funding to interveners who cannot otherwise afford to participate in the Board of Review process (regarding section 12.2 of ECCC Discussion Paper);

9. Delaying by an extra five years the opportunity for Parliament to examine how the Act is working is a recipe for allowing the statute to become seriously out-of-date and out-of-touch with environmental threats posed by toxic substances. Development of new, and re-examination of existing, chemical substances is a particularly dynamic area of science that requires an equally dynamic law to oversee it. A law that Parliament only reviews once every 10 years would lead to law reform that would take even longer than 10 years to enact and implement (regarding section 12.4 of ECCC Discussion Paper).

We would ask that in addition to the attached being distributed to the Committee members that it also is posted 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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Researcher