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May 12, 2016

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

Dear Ms Corbin:

Re: 2016 CEPA Review

Enclosed please find a summary we have prepared of the testimony heard by the Standing Committee on March 8 and 10, 2016 regarding the above matter.

As we may refer to this testimony during our appearance before the Standing Committee on May 19, 2016, we thought it would be of assistance to committee members to have the March 2016 testimony available in summary format.

Yours truly,
CANADIAN ENVIRONMENTAL LAW ASSOCIATION

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SUMMARY OF TESTIMONY BEFORE THE HOUSE OF COMMONS STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT HEARD MARCH 8 AND 10, 2016 REGARDING THE 2016 CEPA REVIEW

A. The 2016 Review

1. Background

On February 25, 2016, the House of Commons Standing Committee on Environment and Sustainable Development adopted the following motion: "…that the committee undertake a review of the *Canadian Environmental Protection Act, 1999*, in particular as regards chemicals management, air and water quality, pollution prevention planning, precautionary thresholds for persistence and bioaccumulation in toxicity assessments, risk management strategies and re-assessment of substances. This study may incorporate recommendations for reform in relation to other federal legislation and/or regulations pertaining to the protection of human health and the environment from toxic substances".

Following this motion, on March 22, 2016, the House of Commons designated the Standing Committee on Environment and Sustainable Development to undertake a comprehensive review of the provisions and operation of *CEPA, 1999*.

Hearings before the Standing Committee began in early March 2016 with appearances by officials from the federal government, industry, and environmental non-government organizations. The following summarizes the views of those appearing before the Standing Committee on various issues surrounding the provisions and operation of *CEPA, 1999*.

Any material appearing in brackets is not a summary of testimony but has been provided by CELA for clarification purposes.

B. Federal Government

Officials from Health Canada and Environment and Climate Change Canada were the first to give evidence before the Standing Committee. The testimony from Health Canada centred on an historical overview of the goals and achievements of the (1) Chemicals Management Plan ("CMP"), and (2) air quality management programs under the Act.

With respect to the CMP, Health Canada noted that it works closely with Environment and Climate Change Canada in implementing Parts 5 (Controlling Toxic Substances) and 6 (Animate Products of Biotechnology) of *CEPA, 1999*. This work has included the categorization of 23,000 substances that were in commerce in Canada in the period 1984-1986 (i.e. prior to the enactment of the former Act). These substances would not have been assessed for risk to human health or the environment. Under the categorization process, 4,300 of these existing substances were identified by the departments as requiring further attention.

A key goal of the CMP is to ensure that by 2020 all 4,300 substances will have been assessed for potential environmental and human health risks and subsequently managed as appropriate. Health Canada officials testified that between 2006 and 2016, the departments have assessed approximately 2,700 substances and implemented, or have proposed implementing, risk management measures for approximately 300 of them. The third phase of the CMP program ("CMP3") is now commencing, with an objective of assessing a further 1,550 of the 4,300 substances over the next five years. Health Canada acknowledged that even after the departments have assessed the 4,300 substances from the categorization process, they will still need to manage those determined to be harmful to human health or the environment and consider new science that could trigger a need to reassess existing substances.

The testimony of Health Canada officials also noted that the CMP program, which is about reviewing existing substances, has also allowed the federal government to better integrate departmental chemical programs, as well as assess and manage approximately 450 new substances (or new uses of existing substances) in Canada each year.

Health Canada acknowledged that implementing *CEPA, 1999* also involves bilateral and multilateral collaboration with other national governments. A bilateral example is the Canada-United States Regulatory Cooperation Council. Under this arrangement, both national governments are making efforts to develop common approaches to identifying priorities and emerging environmental or human health risks from chemicals shared by both countries, and align some risk assessment and management measures where appropriate.

Multilateral examples mentioned by Health Canada include work with the Organization for Cooperation and Development and the United Nations Environment Programme on efforts to share knowledge, expertise, and information in order to identify and manage chemical risks, as well as efforts under international conventions, such as the Stockholm Convention on Persistent Organic Pollutants, and the Minamata Convention on Mercury where international obligations made by Canada must be reflected in, or implemented by, domestic national law, such as *CEPA, 1999*.

With respect to air quality, Health Canada noted in evidence before the Standing Committee that the federal government recently has developed [under the authority of ss. 54-55 of *CEPA, 1999*] new, more stringent air quality standards (called Canadian Ambient Air Quality Standards) that are based on protecting health and the environment. Health Canada also noted that the federal government, along with provincial, territorial, and Aboriginal governments, industry, and health and environmental non-governmental organizations, has been developing a national approach to air quality management known as the air quality management system ("AQMS"), under the auspices of the Canadian Council of Ministers of the Environment. The purpose of the AQMS is to replace the current patchwork of approaches to the management of air quality across the country with air zones to help with monitoring and managing local and regional air quality. Health Canada also noted in evidence before the Standing Committee that Canada continues to work with the United States to address transboundary air pollution under the Canada-United States Air Quality Agreement and has supported global action on improving air quality through the World Health Organization ("WHO"), including supporting a resolution in 2015 that calls for WHO to develop a path forward for enhanced global response to the adverse health effects of air

pollution. This followed a 2013 WHO report that found that there are approximately 9,000 premature deaths in Canada per year (4,000,000 world-wide reported by WHO in 2012) as a result of exposure to fine particulate matter. See generally, Canada, Hansard, Parliament of Canada, No. 6, 1st Sess., 42nd Parl. (March 8, 2016) (John Cooper, Acting Director General, Safe Environments Directorate, Health Canada).

Testimony from Environment and Climate Change Canada centred on providing a further historical overview of the provisions and operation of *CEPA, 1999*. This evidence noted that since its enactment in 1999, and coming into force in 2000, *CEPA, 1999* has undergone a handful of minor modifications, a review by a House of Commons committee, and a parallel review by a Senate committee in 2006 and 2007. However, no subsequent Parliamentary reviews have occurred and no comprehensive reforms have been made to the Act since 1999. Approximately one-third of the recommendations made by the committees were for law reform but none have been incorporated into the Act.

The Act is designed to work in a residual manner in that if another law provides for equivalent environmental and health protection, *CEPA, 1999* does not need to be invoked. Given the extensive and complex nature of the Act, the evidence from Environment and Climate Change Canada focused on three ways of understanding the statute: (1) by its structure; (2) by the broad sets of authorities it contains; and (3) by the subject matter it addresses.

Broadly speaking, *CEPA, 1999* is structured to facilitate public participation and transparency in government decision-making, gather information, and develop measures based on information gathered to guide the conduct of the regulated community, including objectives, guidelines, and codes of practice with respect to issues of concern under the Act.

The CMP program, the legal framework for which is found in Parts 4, 5, and 6 of the Act, is premised on whether a substance is toxic; defined broadly to mean harm to health, the environment, or to the environment on which human life depends. The authority to regulate a substance under *CEPA, 1999* is founded on whether this test is met. The process of review under the Act is quite different for new substances versus existing substances. New substances cannot be used until information is provided to the federal government that allows them to make a determination on the safety of the substance. For existing substances, under the CMP, the federal government established a regime that, with respect to certain substances, almost adopted a presumption of risk until shown otherwise. In response to questions from Standing Committee members, Environment and Climate Change Canada officials stressed, however, that the approach used under *CEPA, 1999* is quite different from that used in Europe under REACH, which they described as an extremely time-consuming process that requires extensive work on the part of users and producers and that has achieved fewer decisions than Canada has achieved under the CMP.

Another authority mentioned by Environment and Climate Change Canada officials before the Standing Committee is with respect to the setting of emission and design standards for air emissions from vehicles and engines, and regulating fuel composition. These authorities are viewed as important because the combustion of fuels can lead to air pollution and the release of greenhouse gases.

Companion authority for establishing trading systems (ss. 322-326 of the Act) has been used in relation to development of regulations in respect of air, renewable fuels, sulphur, and gasoline, though officials noted that there is no authority to auction permits under *CEPA, 1999*, a feature of effective trading systems in other jurisdictions. Auctioning of permits allows the market to demonstrate the value of the permit, with the person who needs it the most paying the most. A further feature of effective trading systems in other jurisdictions but lacking under *CEPA, 1999*, is the authority to impose automatic administrative penalties. This gap is viewed by Environment and Climate Change Canada officials as a function of the criminal law power constitutional underpinning of the Act.

Other authorities mentioned and referred to in the testimony of federal officials included permit systems for ocean dumping, transboundary movement of hazardous waste, and export of substances that are on the export control list.

Pollution prevention plans are another authority of a different type allowed under *CEPA, 1999* (s. 56) whereby the federal government may require a member of the regulated community to develop a plan for managing a substance (see Part 4 of the Act). However, once the plan has been prepared that constitutes compliance under the Act. There is no further legal obligation under *CEPA, 1999* to actually implement the plan, which federal officials did not necessarily view as a gap under the law since in their experience companies usually did what was needed to address the environmental issue. Such plans are not used in all cases, only where companies have expressed receptivity to such an approach.

Authority to regulate under *CEPA, 1999* may be national in scope, or may be focused on a particular geographic region of the country where environmental or health concerns warrant such an approach. However, with respect to toxic substances in products, the testimony of Environment and Climate Change Canada officials was that where there are toxic substances that are best regulated by looking at the way in which a product is designed rather than the way it is used, *CEPA, 1999* does not currently grant that authority.

With respect to issues mentioned by Environment and Climate Change Canada officials, they noted that in *CEPA, 1999* Parliament wanted to distinguish among substances that are persistent, bio-accumulative, and inherently toxic because scientists, as well as the International Joint Commission, were concerned that such substances needed particular attention, and should be virtually eliminated from the environment. As a result, the Act establishes some obligations for virtual elimination. However, the officials noted that they have not been able to implement all of those obligations for all substances meeting those criteria. They also suggested that the obligations are redundant in that when a substance meets those criteria it is typically placed in a regulation prohibiting its use. Therefore, according to federal officials there is not much point in requiring development of a virtual elimination plan, based on reducing the quantity or concentration of a substance that may be released to the environment, and also having the minister develop a regulation prohibiting its use (see s. 65 of the Act and the *Prohibition of Certain Toxic Substances Regulations, 2012*, SOR/2012-285).

Other issues mentioned by federal officials in their testimony before the Standing Committee related to international law developments in conventions to which Canada is a signatory, such as ocean dumping (London Protocol), and transboundary movement of hazardous wastes and hazardous recyclable material (Basel Convention). Officials noted that since the Act was last amended in a comprehensive manner, there have been two amendments to the London protocol in 2006 and 2009 that Canada has not incorporated into *CEPA, 1999*. See generally, Canada, Hansard, Parliament of Canada, No. 6, 1st Sess., 42nd Parl. (March 8, 2016) (John Moffet, Director General, Legislative and Regulatory Affairs, Environment and Climate Change Canada).

C. Stakeholders

1. Industry

Representatives of the chemical industry also testified before the Standing Committee in its initial round of hearings. In general, the evidence of chemical industry representatives was that the CMP program is a success that is achieving its objectives. In this regard, they identified three factors that have contributed to this success: (1) appropriate resources have been allocated to the program; (2) it has been a model in its use of public and private resources to create effective public policy; and (3) it fully integrates multi-stakeholder, multi-jurisdictional, and multi-departmental actions in the management of toxic substances in Canada. Categorization allowed the government to go from a universe of 23,000 substances down to 4,300 priority substances of which less than 2 per cent have been shown under the CMP program to merit further risk management actions. Furthermore, the program is within sight of being completed by its original deadline of 2020, an overall achievement characterized by the industry representatives testifying before the Standing Committee as a "singularly impressive example of effective public policy".

According to the chemical industry representatives, the CMP program is so successful that they have recommended it as a model that other countries should emulate. They note further that the prioritization approach enshrined in the CMP is the cornerstone of bills that are before committees in the Congress of the United States as they proceed to amend that country's *Toxic Substances Control Act* ("*TOSCA*"). In the view of chemical industry representatives appearing before the Standing Committee, because of the CMP process and its incorporation of the views of all stakeholders, Canada has not seen a checkerboard of competing rules and regulations across the country, unlike the situation in the United States where multiple actions by a multitude of individual state governments provides the potential to "confuse consumers and disrupt normal patterns of commerce".

Because the chemical industry views the CMP program as such a success, its testimony in response to questions from members of the Standing Committee did not support amending *CEPA, 1999* to incorporate (1) "environmental justice" considerations (though not defined during the hearings the concept is generally consistent with notions of greater focus on protection of populations disproportionately vulnerable to exposure to toxic substances due to race, colour, national origin, income, geographic location, age, sex, including pregnant women, infants, children, women, and seniors, etc.), because such considerations were said to already be built into the Act, (2) elements of the REACH program, because industry views it as a much less

effective use of public resources, (3) requirements for consideration of less toxic alternative substances, because industry argued that it happens already in the decision-making process, or (4) a hazard assessment as opposed to the current risk assessment process enshrined in the Act. See generally, Canada, Hansard, Parliament of Canada, No. 7, 1st Sess., 42nd Parl. (March 10, 2016) (Bob Masterson, President and Chief Executive Officer, Chemistry Industry Association of Canada).

2. Environmental Non-Government Organizations

Testimony before the Standing Committee from representatives of environmental non-government organizations centred on the need for a range of significant amendments to *CEPA, 1999*. Recommendations for amendments to the Act included:

- Incorporating environmental justice principles into the Act because vulnerable populations, such as low income communities, First Nations, pregnant women, infants, children, women, and seniors often suffer a disproportionate environmental burden in Canada, with a partial precedent for incorporating such principles being s. 19(2) of the *Pest Control Products Act*;

- Mandating under the Act the establishment of binding national air quality and drinking water standards because objectives authorized under s. 54 of the Act are not enforceable in and of themselves;

- Adopting mandatory requirements to consider safer alternatives to the use of toxic substances and organisms as part of the risk assessment process under the Act with a precedent for this approach under Canadian law, though discretionary, being s. 7(9) of the *Pest Control Products Act*;

- Clarifying the Act with respect to what triggers the need for an assessment of a substance (other than the categorization process) because existing provisions of the Act including ss. 70, 71, and 75(3) are not adequate for this purpose;

- Improving the statutory authority for public consultation and transparency regarding new substances;

- Strengthening the NPRI process by setting out in the Act clear, comprehensive reporting and publishing requirements, using lower thresholds, including mechanisms for allowing the public to request changes to the NPRI because the Act lacks prescriptive declarations of what should be included in the NPRI, the existing process under the program developed by the federal government includes many exemptions, such as releases from oil and gas exploration, and sets very high thresholds for reporting releases where they do apply such that it does not provide a complete picture of the actual levels of pollutant discharges in communities;

- Improving authority under the Act to address environmental and human health impacts from consumer products;

- Modifying the definition of “toxic” under the Act to take into account the impact of endocrine-disrupting chemicals;

- Shifting the emphasis under the Act from a risk-based approach to a hazard-based approach.

See generally, Canada, Hansard, Parliament of Canada, No. 7, 1st Sess., 42nd Parl. (March 10, 2016) (Elaine MacDonald, Senior Scientist, Ecojustice Canada and Maggie MacDonald, Toxic Program Manager, Environmental Defence Canada).