NOTICE OF OBJECTION

UNDER THE CANADIAN ENVIRONMENTAL PROTECTION ACT

A Notice of Objection is being filed by the World Wildlife Fund (WWF) and the Canadian Environmental Law Association (CELA) pursuant to sections 332(2) and 333 of the *Canadian Environmental Protection Act* to the Minister of the Environment, the Hon. D. Anderson, with respect to the proposed Order amending Schedule 2 to the *Canadian Environmental Protection Act*, 1999, No. 1 by adding the *Pest Control Products Act* and the Pest Control Products Regulations to Schedule 2 of CEPA. The proposed Order was published in the Canada Gazette, Part I, on February 10, 2001.

The reasons for this Objection are as follows:

1. The *Canadian Environmental Protection Act* (CEPA) was enacted in 1999 and proclaimed in 2000. The 1999 CEPA includes a number of significant revisions and enhancements to an earlier version enacted in 1988.

2. As in the 1988 Act, the 1999 CEPA includes provisions where the Governor in Council can make certain declarations that certain obligations and duties under CEPA are being carried out under other legislative or regulatory provisions of Canada. These so-called "equivalency" provisions are intended to avoid duplication of effort while at the same time ensuring that the same standards imposed under CEPA are met.

3. Section 81(7) of the 1999 CEPA states as follows:

> For the purposes of the administration of this section, the Governor in Council has the exclusive responsibility for determining whether or not the requirements referred to in paragraph (6)(a) are met by or under an Act of Parliament referred to in that paragraph, or regulations, made under that Act, and
>
> (a) if the Governor in Council determines that the requirements referred to in paragraph (6)(a) are met by or under an Act of Parliament referred to in that paragraph, or regulations made under that Act, the Governor in Council may by order add to Schedule 2 that name of that act or those regulations, as the case may be, and the fact that an Act or regulations are listed in Schedule 2 is conclusive proof that the requirements referred to in paragraph (6)(a) are met; …

The Proposed Order – PCPA and its Regulations as "equivalent" to CEPA

4. Section 81(6) of CEPA, as mentioned in section 81(7), refers to the notification and assessment of new substances provisions of the 1999 CEPA. The proposed Order in question is proposing that the *Pest Products Control Act* and its regulations be deemed to be

equivalent with respect to the notification and assessment of new substances provisions of the 1999 version of CEPA.

5. A careful review of section 81(7) provisions provides two criteria for equivalency. First, equivalency of provisions is a precondition to the authority of the Governor in Council to place an act or regulation on Schedule 2 of CEPA. Second, "equivalency" refers to the legislative provisions in each of the two statutes or the provisions contained in regulations promulgated under each statute. The term is one of legal equivalency; there is no mention of whether there are policy or practical measures in place to strive for equivalency (see: *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992) 7 C.E.L.R. (N.S.) (S.C.C.) 1).

6. It is respectfully submitted that when comparing the notification and assessment provisions under CEPA and the PCPA, and the regulations made under those statutes, the PCPA provisions and its regulations, are *not* equivalent to the CEPA and its regulations.

Differences in the Legislative Provisions

7. As mentioned, the new 1999 CEPA provides a number of important, new legislative innovations that are not part of the PCPA in any way.

8. Section 2 of CEPA imposes certain administrative duties with respect to the "administration of this Act," which are not imposed under PCPA. Without being exhaustive, these include:

    (a) Section 2(1)(a) of CEPA imposes an administrative duty to exercise powers "in a manner that protects the environment and human health, [and] applies the precautionary principle…" The PCPA does not impose the duty to apply the precautionary principle. It is submitted that the absence of this duty in the PCPA is a major legislative difference between CEPA and PCPA.
    (b) Section 2(1)(a.1) of CEPA imposes an administrative duty to "take preventive and remedial measures to protect, enhance and restore the environment," a provision that is not imposed in PCPA.
    (c) Section 2(1)(c) of CEPA imposes an administrative duty to "implement an ecosystem approach that considers the unique and fundamental characteristics of ecosystems," another provision not found in PCPA; and
    (d) Section 2(1)(e) of CEPA imposes an administrative duty to "encourage the participation of the people of Canada in the making of decision that affect the environment," another provision not found in PCPA.

9. It is submitted that these and other like provisions in CEPA impose positive administrative duties that may directly affect the administration and implementation of the notification and assessment provisions of CEPA. Because these provisions are not found in PCPA or its regulations, there can be no determination of "equivalency."

10. Apart from section 2, the 1999 CEPA is focussed on the assessment of substances to determine whether or not they are "toxic." Toxic substances in this sense have a specific

legislative definition as outlined in section 64 of CEPA, which provides that a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions that

(a) have or may have an immediate or long-term harmful effect on the environment or its biological diversity;
(b) constitute or may constitute a danger to the environment on which life depends; or
(c) constitute or may constitute a danger in Canada to human life or health.

11. There is no similar *legislative* definition of toxic substances under PCPA and hence no roadmap to guide the assessment process. The *Pest Control Products Act* and its prescribed regulations also lack the requirement of section 81(6) (a) of the *Canadian Environmental Protection Act*, namely that the other Act provide for "an assessment of whether it is toxic or capable of becoming toxic".

12. In addition, one of the key thrusts of the 1999 CEPA is to develop a regime to "virtually eliminate" persistent, bioaccumulative and toxic substances. The definition of virtual elimination is outlined in section 65. To implement this provision, there are positive obligations to screen existing substances and, it is assumed, obligations to ensure that new bioaccumulative, persistent and toxic substances do not enter into Canadian commerce. Regulations under CEPA define the "bioaccumulation", "persistence" and "toxic" terms. The PCPA does not have analogous legislative or regulatory provisions.

13. Another difference between the two statutes concerns requirements for public notice. Section 81(4) of CEPA requires that adding new substances to the Domestic Substances List must involve publishing a notice in the *Canada Gazette* and allowing for public comment. No such provision exists in the PCPA. Indeed, the lack of transparency within the pesticide approval regime administered by the Pest Management Regulatory Agency has been the subject of considerable criticism in recent years including by the Commissioner for the Environment and Sustainable Development, in the report of the Standing Committee on Environment and Sustainable Development in its review of pesticide regulation and by numerous submissions made to the Standing Committee. This lack of transparency was also documented in the *Environmental Standard Setting and Children's Health* report published by CELA and the Ontario College of Family Physicians Environmental Health Committee in May of last year.

Differences in Regulatory Provisions

14. Further, the *Pest Control Products Act* does not provide for "notice" to be given as required by the CEPA, section 81(3) and (4) and its prescribed regulations, the New Substances Notification Regulations, SOR/94-260, as amended SOR/94-774; SOR/2000-101 such as for Part I, New Substances other than Polymers or Organisms, the information specified in Schedule II. That is:

(a) Schedule II, section 2, subsection (2) – data from the most appropriate type of acute mammalian toxicity test...selected on the basis of the most significant route of

potential human exposure to the substance. No such requirement is contained in the Pest Control Products Regulations, C.R.C., c. 1253, section 9 (2).

(b) Schedule II, section 2, subsection (3) – for tests referred to in subsection (2), the age, sex, number, species, strain and source of the animals tested; the route by which the substance is administered and the conditions under which the test is conducted, as well as the dose of the substance, the vehicle by means of which the substance is administered and the concentration of the substance in the vehicle. No such requirement is contained in the Pest Control Products Regulations, C.R.C., c. 1253, section 9 (2).

(c) Schedule II, section 2, subsection (4) – mutagenicity data obtained from one in vitro test of the substance...for chromosomal aberrations or gene mutations or another indicator of mutagenicity... No such requirement is contained in the Pest Control Products Regulations, C.R.C., c. 1253, section 9 (2).

(d) Schedule II, section 2, subsection (6) – a description or specification of the test procedures followed... No such requirement is contained in the Pest Control Products Regulations, C.R.C., c. 1253, section 9 (2).

(e) Schedule II, section 3, subsection (1) -- ... estimate of the quantity of the substance to be manufactured and imported annually ... No such requirement is contained in the Pest Control Products Regulations, C.R.C., c. 1253, section 9 (2).

(f) Schedule II, section 3, subsection (3) – the anticipated nature and extent of the substance's release into the environment. No such requirement is contained in the Pest Control Products Regulations, C.R.C., c. 1253, section 9 (2).

(g) Schedule II, section 3, subsection (4) – the estimated number of persons who may become exposed to the substance. No such requirement is contained in the Pest Control Products Regulations, C.R.C., c. 1253, section 9 (2).

15. Further, similar arguments exist for the following regulatory requirements:

(a) Schedule III, Information required in respect of substances other than product development substances, site-limited intermediate substances and substances manufactured for export only, i.e., Schedule III, section 2, subsections (2), (3), (4), (4.1), (5), (6), (7), (8). In all of these cases the specified requirements are not contained in the Pest Control Products Regulations, C.R.C., c. 1253, section 9 (2).

(b) Schedule IV, Information required in respect of product development substances, i.e., Schedule IV, sections 2, 3, 4 and 5. In all of these cases the specified requirements are not contained in the Pest Control Products Regulations, C.R.C., c. 1253, section 9 (2).

(c) Schedule VII, section 2, subsections (2), (3), (4), (5), (6), (7), (8), (9), and section 3, subsections (3) and (4). In all of these cases the specified requirements are not contained in the Pest Control Products Regulations, C.R.C., c. 1253, section 9 (2).

(d) Schedule VIII, section 2, subsections (2), (3), (4), (5), (6), (7), (8), (8.1), (9), (10), (12) and (13), as well as section 3, subsections (1), (3) and (4). In all of these cases the specified requirements are not contained in the Pest Control Products Regulations, C.R.C., c. 1253, section 9 (2).

(e) Schedule XII, section 3, subsections (2), and (3), as well as section 4, subsections (e) and (f). In all of these cases the specified requirements are not contained in the Pest Control Products Regulations, C.R.C., c. 1253, section 9 (2).

(f) Schedule XV, section 1, subsections (f), (i) and (j), as well as section 2, subsections (k) and (l), and section 3, subsections (c), (d), (e) and (f), section 4, subsections (b), (c) and (d), section 5, subsections (a), (b) and (c), section 6, subsections (a), (b), (c), (d) and (e). In all of these cases the specified requirements are not contained in the Pest Control Products Regulations, C.R.C., c. 1253, section 9 (2).

(g) Schedule XVI, section 1, subsections (f), and section 2, subsection (d). In all of these cases the specified requirements are not contained in the Pest Control Products Regulations, C.R.C., c. 1253, section 9 (2).

(h) Schedule XVII, section 1 (d), (f), (i), and (j), as well as section 2, subsection (g), section 3, subsections (c), (d), (e), (f), (g) and (h), section 5, (a), (b), and (c). In all of these cases the specified requirements are not contained in the Pest Control Products Regulations, C.R.C., c. 1253, section 9 (2).

(i) Schedule XVIII, section 1, subsections (b) and (c), section 2 (c), section 3, section 5 (b), and section 8. In all of these cases the specified requirements are not contained in the Pest Control Products Regulations, C.R.C., c. 1253, section 9 (2).

(j) Schedule XIX, section 1, subsection (e), section 2, subsections (e), section 4, (a), (b) and (c), section 5 (a), (b) and (c), and section 6. In all of these cases the specified requirements are not contained in the Pest Control Products Regulations, C.R.C., c. 1253, section 9 (2).

16. Additionally, the Pest Control Pest Control Product Regulations, C.R.C., c. 1253, section 9 (1) requires that a determination be made as to the safety, merit and value of a pest control product. There is no corresponding requirement in CEPA or its regulations and such a determination could serve to undermine or interfere with a determination of toxicity.

17. These examples are not intended to provide the exclusive cases in which the PCPA and its prescribed regulations lack the assessment or notice requirements of the *Canadian Environmental Protection Act*.

Remedy

18. The remedy we recommend to resolve this situation is the establishment of a Board of Review pursuant to Section 333 of CEPA.