Submission to the House of Commons Standing Committee on Environment and Sustainable Development regarding *The Canadian Environmental Protection Act, 1999*

Mark S. Winfield, Ph.D.
Faculty of Environmental Studies
York University
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1. Introduction

My name is Mark Winfield, and I am a Professor of Environmental Studies at York University in Toronto. I am also Co-Chair of the University's Sustainable Energy Initiative (http://sei.info.yorku.ca/), and Coordinator of the Master of Environmental Studies/Juris Doctor (MES/JD) Program offered jointly by the Faculty of Environmental Studies and Osgoode Hall Law School at York University.

My comments draw on a number experiences and previous submissions regarding CEPA. I was involved extensively in the first, 1995-1999, CEPA review in my capacity as Director Research with the Canadian Institute for Environmental Law and Policy.[1] I co-authored submissions to the 2003/4 review[2] and regarding the proposed *Clean Air Act* (Bill C-30) amendments to CEPA in 2007 as Program Director with the Pembina Institute.[3] My comments on the current CEPA review highlight six areas where CEPA 1999 should be strengthened. These are: 1) Public Participation (Part 2); 2) Vulnerable Populations and Environmental Equity; 3) Toxic Substances Management (Part 5); 4) CEPA and Canada's international obligations (Administrative Duties; Part 7); 5) Interprovincial Air and Water Pollution (Part 7); and 6) Environmental Management within the Federal Government (Part 9).

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[1] Winfield, M., and Muldoon, P., *Submission to the House of Commons Standing Committee on Environment and Sustainable Development Regarding Bill C-32, the Canadian Environmental Protection Ac*t, Canadian Institute for Environmental Law and Policy, Canadian Environmental Law Association, October 1998; Winfield, M., (ed.) Clark, K., Fisher, K., Mausberg, B., and Rutherford, B., "Reforming the *Canadian Environmental Protection Act*," to the House of Commons Standing Committee on Environment and Sustainable Development, September 17, 1994 (CIELAP Brief 94/7).

[2] Winfield, M., and Bramley, M., *The Canadian Environmental Protection Act, "Toxicity" and Greenhouse Gases* Pembina Institute, 2006

[3] Benevides, H., Wilkins, H., and Winfield, M., Submission to the Legislative Committee on Bill C-30 Regarding Bill C-30 (*The Clean Air Act*) and the *Canadian Environmental Protection Act,* Canadian Environmental Law Association, Sierra Legal and the Pembina Institute, 2007.

The submission also highlights three areas of concern with respect to the government's May 2016 discussion paper on the CEPA review.[4] These areas of concern relate to: 1) the separation of virtual elimination substances from other substances on the toxic substances list; 2) the reliance on other departments, entities and statutes for CEPA risk management purposes; and 3) the proposed increased reliance on administrative and equivalency agreements under CEPA.

These comments are, at this stage in the review process, relatively preliminary and high level. Greater background and detail on these themes can be provided upon request.

2. Areas where CEPA 1999 should be Strengthened

2.1. Public Participation (Part 2)[5]

Several measures emerged during the previous federal government's tenure in office that placed significant constraints on opportunities for public participation in decision-making at the federal level. These measures included the Bill C-38 limitations on standing in *Canadian Environmental Assessment Act*, National Energy Board hearings and other federal processes. These limitations on participation should be addressed in a systemic way through CEPA.

Recommendation:

1. *A statutory right of general application of participation by members of the public in federal decision-making processes, particularly with respect to the environment, energy, and natural resources, should be incorporated into the preamble and administrative duties section (2) of CEPA, 1999.*

The Canadian Environmental Protection Act (CEPA), 1999, established a number of mechanisms for public participation in decision-making, including an environmental registry, mechanisms through which members of the public could request investigations of alleged offenses, and protection of whistleblowers. However, the scope of the CEPA registry is narrow, and the application of all of these provisions is limited to CEPA itself.

[4] Environment and Climate Change Canada, *Discussion Paper: The Canadian Environmental Protection Act, 1999 – Issues and Possible Approaches*, May 2016.

[5] The recommendations regarding public participation flow from Winfield, M., *A New Era of Environmental Governance in Canada: Better Decisions Regarding Infrastructure and Resource Development Projects* (Toronto: George Cedric Metcalf Foundation, 2016)

Recommendations:

2. *The scope of the CEPA registry created under the Canadian Environmental Protection Act (CEPA)1999[6] should be expanded to provide notice and comment opportunities for all proposed regulations, policies, guidelines, approvals and permits under federal environmental legislation, including CEPA, CEAA, the Fisheries Act, the National Parks Act, the Species at Risk Act and the Navigation Protection Act or its successor. Specific permits under CEPA which should be subject to notice and comment requirements include:*

    a. *Ocean Dumping Permits (s.127)*
    b. *Permits to import, export on transit hazardous wastes, recyclable materials or prescribed non-hazardous wastes (s.185)*
    c. *Exports of substances on the Export Control List (s.101)*
    d. *When information is provided regarding substances or living organisms that are not on the Domestic Substances List (ss.81 and 106), or "significant new activities" regarding these organisms or substances (s.81 and 112)*
    e. *The granting of waivers regarding new substances notification information (s.81, s.106).*
    f. *The imposition of conditions or prohibitions on the manufacturing, import or use of new substances or living organisms.*
    g. *The issuance of waivers regarding fuels regulations (s.147), exemptions from vehicle or engine emission standards (s.156)*
    h. *Permits of equivalent safety under s.190*

3. *Application of the CEPA 1999 Request for Investigation mechanism[7] should be expanded to encompass all major federal environmental legislation (i.e. CEAA, the Fisheries Act, the National Parks Act, the Species at Risk Act and the Navigation Protection Act or its successor). The process should be administered by the Office of the Commissioner of the Environment and Sustainable Development, as per the existing petition process under the Auditor General Act.[8]*

4. *The application of the Whistleblower Protection provisions of CEPA 1999[9] should be expanded to include all federal environmental legislation.*

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[6] See CEPA Environmental Registry, http://www.ec.gc.ca/lcpe-cepa/default.asp?lang=En&n=D44ED61E-1
[7] CEPA 1999, S.C. 1999, c. 33, s.17.
[8] *Auditor General Act,* R.S.C., 1985, c. A-17, s.22.
[9] CEPA 1999, s.16.

2.2. Vulnerable Populations and Environmental Equity

The government proposes to add to the preamble of CEPA mention of the the importance of considering vulnerable populations in risk assessments.[10] While this would be a welcome development, it would be a wholly inadequate response to the issue. The Canadian Environmental Law Association has provided the committee with detailed recommendations for amendments to the following sections of CEPA in this regard: [11] section 2 (addressing the administrative duties of the Government of Canada), section 3 (definitions for “environmental justice”, “fair treatment”, “meaningful involvement”, and “vulnerable population”), section 46 (the authority for the NPRI program), section 56 (the pollution prevention authority), section 76.1 (authority for the weight of evidence approach), section 83 (information in connection with new substances), and section 93 (regulation-making authority). I support CELA’s recommendations in this regard.

2.3. Toxic Substances Management (Part 5)

The overall focus of the Act needs to place much greater emphasis on action, as opposed to study and consultation, particularly on toxic substances. The Act needs to create an atmosphere where there is an expectation of action once substances have been declared toxic, if not by industry itself then by EC and HC. The process of toxicity assessment needs to be accelerated. The process of assessment is not currently subject to specific timelines.

Addition of Substances to the TSL

The requirement for cabinet approval of the addition of substances to the TSL has provided opportunities for political interference in the process, and substances that should have been placed on the TSL based on Environment Canada and Health Canada’s assessments of their toxicity have not been listed as a result (e.g. road salt and waste crankcase oils).

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[10] Environment and Climate Change Canada, *Discussion Paper* s.2.1.

[11] Canadian Environmental Law Association, Re: 2016 CEPA Review – CELA Response to Questions Posed by Committee Members at the May 19, 2016 Hearing and Related Matters June 16, 2016. http://www.cela.ca/publications/2016-cepa-review-cela-response-questions-posed-committee-members-may-19-2016-hearing-related-matters.

Recommendation:

5. *Substances should be added to the TSL automatically upon finding of toxicity by the Ministers of Health and Environment, and timelines for the proposal and implementation of risk management measures triggered at that point.*

Cabinet approval would still be required for any regulatory action under CEPA, and this provides adequate opportunities for the consideration of technical and economic factors in decision-making.

Consideration should be given to the concept of alternatives assessment for priority toxic substances, as proposed by the Canadian Environmental Law Association.[12]

Implementation of Risk Management Measures

There is a need to ensure that inventory and reporting requirements keep pace with the results of screening and toxicity assessments of DSL and PSL substances, and other substances of concern emerging through other CEPA processes and international agreements and initiatives. This is of particular concern regarding the emergency planning requirements under the s.200 regulations and the National Pollutant Release Inventory. In both cases, the reporting lists have failed to keep pace with the emergence of substances of concern through both CEPA and international processes.

Recommendations:

6. *All substances added to the TSL should be automatically added to the s.200 emergencies regulations, unless the substances in question are by-products that are not manufactured, used, or stored in Canada.*

7. *All CEPA TSL substances should be automatically added to the NPRI, at appropriate thresholds to capture 90% of releases and transfers from facilities to which NPRI reporting requirements apply.*

8. *The process for the consideration of PSL substances, and substances identified as meeting toxicity, bioaccumulation and persistence criteria through the DSL screening process, and substances of concern identified through intergovernmental and international agreements, for addition to the NPRI should be expedited.*

[12] Canadian Environmental Law Association, "CELA Supplementary Submissions to Standing Committee Arising from May 19, 2016 Appearance – Alternatives Assessment" July 7, 2016 http://www.cela.ca/sites/cela.ca/files/CELA-Supplementary-Submissions-to-HCEnvSD-July7.pdf.

Information Gathering

There is a need to ensure that opportunities to integrate information gathering and reporting requirements, and ensure that full use is made of opportunities where information gathering activities can be used for multiple purposes. The notices and manifests required under the CEPA Export and Import of Hazardous Waste and Hazardous Recyclable Materials Regulations, for example, do not require the provision of information on the presence of CEPA toxic substances in waste streams, or the quantities or concentrations in which such substances might be present, even though this information could be extremely useful from the perspective of toxic substances management or the fulfillment of international obligations. [13]

Recommendation:

9. *Notices and manifests required under the CEPA Export and Import of Hazardous Waste and Hazardous Recyclable Materials Regulations, should require the provision of information on the presence of TSL substances in waste streams, or the quantities or concentrations in which such substances might be present.*

2.4. CEPA and Canada's International Environmental Obligations (Section 2 and Part 7)

International Agreements

The existing preamble to CEPA includes a provision noting that "the Government of Canada must be able to fulfil its international obligations with respect to the environment." However, CEPA contains no provision requiring that the Government of Canada ensure that Canada fulfils its obligations under international environmental agreements, which are binding on Canada.

Recommendations:

10. *CEPA should be amended to add a clause adding a new section (s.2(1)(p)) to the administrative duties provisions of CEPA requiring that the Government of Canada ensure that Canada fulfils its international obligations with respect to the*

[13] M.Winfield and H.Benevides *Mechanisms for Tracking Canadian Mercury Imports and Exports for Use and Disposal,* (Drayton Valley: Pembina Institute for North American Commission for Environmental Cooperation, 2001).

environment, including international agreements binding on Canada in relation to the prevention, control or correction of pollution listed in Schedule 7 of the Act.

11. *CEPA should be amended to add a clause creating a new schedule (7) within CEPA, listing the International agreements binding on Canada in relation to the prevention, control or correction of pollution to which Canada is a party. The schedule should include (but not be limited to) the following agreements:*
    - *The United Nations Framework Convention on Climate Change and its subsidiary agreements*
    - *The Canada-US Air Quality Agreement and its subsidiary agreements*
    - *The Boundary Waters Treaty, Great Lakes Water Quality Agreement and its subsidiary agreements*
    - *The United Nations Economic Commission for Europe Air Quality Agreements and protocols*
    - *The Vienna Convention for the Protection of the Ozone Layer and its subsidiary agreements*
    - *The Stockholm Convention on Persistent Organic Pollutants*
    - *The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides*
    - *The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*
    - *The North American Agreement for Environmental Cooperation*
    - *The International Convention for the Prevention of Marine Pollution from Ships—MARPOL*

Specific proposals for statutory language on these matters can be provided upon request.

International Air Pollution and Water Pollution

CEPA includes provisions intended to permit the federal government to regulate emissions from air and water pollution sources in Canada that cause pollution in other countries or that violate international agreements on air and water pollution to which Canada is a party (CEPA Part 7, Divisions 6 and 7). The provisions also allow the federal government to require the development of pollution prevention plans by these sources under s.56 of CEPA.

These provisions could provide the basis for decisive federal action in relation to conventional and hazardous air and water pollutants, including substances on Schedule

1 of CEPA, such as greenhouse gases and smog precursors, and other international air and water pollutants.

However, the existing provisions of CEPA remain virtually unused. The provisions are subject to extensive consultation with the affected provinces, without clear timeframes or criteria for when the federal government may undertake regulatory action of its own.

Recommendation:

12. *CEPA should be amended to strengthen and clarify its existing provisions regarding international air and water pollution. In particular, the requirements for consultation with provinces prior to the federal government taking action should be streamlined, and the thresholds for federal action clarified and accelerated.*

Specific proposals for statutory amendments regarding these matters can be provided upon request.

2.5. Inter-Provincial Air and Water Pollution (Part 7)

CEPA contains no provisions regarding sources of air pollution within one province or territory of Canada that may affect other provinces or territories, or that violate intergovernmental agreements regarding the prevention or control of such pollution. The scope of current the sections 166 and 176 are limited to international air and water pollution respectively. The federal government has clear jurisdiction to take action on pollution crossing provincial, territorial boundaries as well as “international” air pollution having a Canadian source.

Recommendation:

13. *CEPA should be amended to add provisions parallel to the current Part 7, Divisions 6 and 7 (International Air Pollution and Water Pollution) of CEPA enabling the federal government to address sources of inter-provincial air and water pollution.*

Specific proposals for statutory amendments regarding these matters can be provided upon request.

2.6. Environmental Management within the Federal Government (Part 9)

CEPA was intended to provide a framework for environmental protection in the operation of federal agencies and activities on federal lands.

The Act has been almost a total failure in this regard. The Act establishes no general standard of protection or offense provision, as is the norm with provincial environmental protection legislation.[14] The only way in which standards are established is through the making of regulations. Only three such regulations have been adopted since the enactment of CEPA in 1988, of which two have been subsequently repealed:

- Federal PCB treatment and destruction (Subsequently repealed)
- Federal halocarbons
- Petroleum and allied product storage tanks on federal lands (and guidelines) (Subsequently repealed).

The situation essentially leaves federal agencies operating in a regulatory vacuum, as federal legislation of general application (e.g. the *Fisheries Act)* is limited to certain types of activities and circumstances.

There are two potential options to address this situation:

- In the absence of specific federal regulations, CEPA should require federal agencies to comply with the relevant provincial/ territorial environmental statutes and regulations affecting their operations; and/or

- Establish a general offense provision in Part 9 of CEPA, requiring that federal agencies carry out their activities on federal lands in a manner that does not result in the release of contaminants to the environment, and establishing a permitting/approval regime for activities that may have such effects.

Either option would essentially require that federal agencies exercise the same standard of care and behaviour as private sector entities.

3. Areas of Concern in the Government Discussion Paper

3.1. The TSL and Virtual Elimination Substances (Part 5)

The government proposes to subdivide the TSL between virtual elimination substances and other toxic substances.[15] The proposal raises risks of weakening the significance of non-VE substances on the TSL, and thereby undermining the constitutional basis for

[14] See, for example*, The Ontario Environmental Protection Act*, ss.9 and 15.

[15] Environment and Climate Change Canada, *Discussion Paper: The Canadian Environmental Protection Act, 1999 – Issues and Possible Approaches*, May 2016, s.2.8.

federal regulatory authority regarding such substances established through the Supreme Court of Canada's 1997 *R. v.Hydro Quebec* decision.[16]

Recommendation:

14. The government's proposal to split the TSL into VE and non-VE substances should not be adopted.

3.2. Intergovernmental Coordination (Part 1)

Equivalency Agreements

The government proposes to remove the precondition of a written agreement between the federal government and the other jurisdiction, before the Governor in Council can stand down the federal regulation under the equivalency provisions of CEPA.[17]

The record of provincial performance and federal monitoring of provincial performance under equivalency agreement is extremely weak.[18] Indeed the agreements have been regarded as a kind of "get out of jail free" card for provinces, and the previous federal government virtually promoted them as such.[19]

Recommendations:

15. The requirement for a written equivalency agreement between the federal government and a province before CEPA regulations are "stood down" should be retained.

16. The provisions of CEPA regarding the criteria required to establish equivalency agreements should be strengthened, as should the requirement for monitoring and reporting of performance under the agreement by the affected province and by Environment Canada.

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[16] R v Hydro-Québec, [1997] 3 S.C.R. 213.

[17] Environment and Climate Change Canada, *Discussion Paper*, s.11.1.

[18] Commissioner for the Environment and Sustainable Development, *Report – 2000*. Chapter 7 - Co-operation Between Federal, Provincial and Territorial Governments. E. Christie and J. McEachern, *Pulping the Law: How Pulp Mills are Ruining the Water with Impunity* (Vancouver: *Sierra Legal Defence Fund*, 2001). There appear to be no more recent assessments.

[19] Government of Canada, *Turning the Corner: Taking Action to Fight Climate Change*, 2008. See also D.Macdonald, "Climate Change Policy" in D.VanNijnatten ed., Canadian Environmental Policy and Politics, 4th Edition (Toronto: Oxford 2015) Pp.220-234.

Administrative Agreements

The government proposes[20] that CEPA be amended to expand the list of parties with whom the Minister may formally enter into administrative agreements under section 9. Parties added to the list could include bodies or entities responsible for the administration of another Act of Parliament or an Act of the Legislature of a province.

The intent of these proposals is ambiguous, but could have the affect of permitting the federal government to enter into administrative agreements with non-governmental entities. Serious concerns have been raised about accountability and reporting structures under existing equivalency agreements.[21] Permitting agreements with non-governmental entities, who are not subject to access to information legislation, oversight by federal or provincial auditor-generals or environmental commissioners or direct oversight by Parliament or a provincial legislature would reinforce these problems significantly.

Recommendations:

17. *CEPA s.9 should not be amended to permit the ministers to enter into administrative agreements with non-governmental entities.*

18. *Administration of regulations under CEPA should not provide for the delegation of the administration and enforcement of CEPA regulations to other government departments, except in specified circumstances established with CEPA.*

19. *The criteria for the establishment of administrative agreements under s.9 of CEPA should be strengthened, and monitoring and reporting on the performance of entities with which the department enters into such agreements enhanced.*

3.3. Reliance on Other Departments, Entities and Statutes to Carry out CEPA functions

The government proposes[22] increased reliance on other government departments (s.2.8), other levels of government (via expanded use of equivalency agreements (Chapter 11), and third parties (via Administrative agreements (chapter 11) and Environmental Performance Agreements (2.9) for the implementation of risk

[20] Environment and Climate Change Canada, *Discussion Paper*, s.11.2.
[21] CESD, *Report – 2000*. Chapter 7 - Co-operation Between Federal, Provincial and Territorial Governments; Christie and McEachern, *Pulping the Law*.
[22] Environment and Climate Change Canada, *Discussion Paper*.

management measures under CEPA. The record of performance with such approaches is poor,[23] is likely to result in additional delays in the identification and implementation of risk management measures, and could lead to confusion on the part of the public regarding who is accountable for action on regulated substances and activities. The government's proposals for the increased reliance on other government departments, levels of government and third parties for the implementation of risk management measures should be approached with great caution as a result.

Products of Biotechnology (Part 6)

CEPA can stand-down in favour of other Acts that contain an equivalent assessment regime with respect to products of biotechnology, if they are listed on Schedule 4 of CEPA. However, in certain cases, the departments with the relevant expertise do not have statutes with equivalent pre-market notification regimes.

The government proposes[24] that CEPA could be amended to formally allow the Governor in Council to designate another Minister–whose department or agency has the appropriate mandate, expertise and stakeholder relationships for a given living organism–as responsible for, and having the authority under CEPA to assess and manage, specific products of biotechnology.

Given CEPA's status as providing the baseline assessment framework for products of biotechnology, any delegation of responsibility for assessment and management should be subject to specific criteria establishing the necessary capacity and expertise to carry out these roles.

Further Information:

Mark S. Winfield, Ph.D.
Professor
Co-Chair, Sustainable Energy Initiative
Coordinator MES/JD Program
Faculty of Environmental Studies
York University 4700 Keele St.
Toronto, Ontario M3J 1P3
Tel: 416-736-2100 ext. 21078
Fax: 416-736-5679

[23] Commissioner for the Environment and Sustainable Development, *Report – 2000*. Chapter 7 - Co-operation Between Federal, Provincial and Territorial Governments. E. Christie and J. McEachern, *Pulping the Law*: How *Pulp* Mills are Ruining the Water with. Impunity (Vancouver: *Sierra Legal Defence Fund*, 2001).
[24] Environment and Climate Change Canada, *Discussion Paper*, s.2.13.