

THE ENGO AGENDA FOR THE REVIEW OF THE CANADIAN ENVIRONMENTAL PROTECTION ACT (1999)

*Prepared for the
Canadian Environmental Network Toxics Caucus*

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SUMMARY

The ENGO delegation to the Advisory Committee for CEPA Review, working with other environmental groups throughout Canada, has completed a series of documents related to the CEPA review: the *ENGO Agenda for Improving CEPA – Overview*, the *ENGO Response to Questionnaire on: “Scoping the Issues.”*

This document, the *ENGO Agenda For The Review Of The Canadian Environmental Protection Act 1999*, details specific issues that should be addressed during the review, listing them according to the part of CEPA 1999 that they relate to.

Based on experience in all parts of Canada, ENGOs conclude that, despite government efforts to control pollution under CEPA, the volume of dangerous chemicals released into Canada’s environment continues to increase.¹ ENGOs believe that the CEPA review should be seen as an opportunity to create the legislative and administrative conditions that will result in healthier lives and a sustainable economy for all Canadians.

ENGOs believe that to achieve that goal the following over-arching priority issues need to be addressed. This brief then details what is wrong with the current operation of CEPA and the issues the review should focus on for each part of CEPA.

This assessment of CEPA is guided by the following overarching issues that ENGOs believe should guide the CEPA review:

- Implementation of the Act,
- Public participation,
- Pollution prevention,
- Controlling toxic substances, and
- Implementing the precautionary principle.

Preamble:

- What can be done to ensure that the guiding principles in the CEPA preamble are fully and properly used in decision-making?
- How can the Act effectively protect children’s health and other vulnerable communities?

Administration:

- What can be done to ensure strong federal leadership on national environmental standards?
- What can be done to ensure that the equivalency provisions of CEPA ensure adequate protection of the environment and human health in all parts of Canada?

Public Participation:

- How can the CEPA tools be changed to provide for more transparency, involvement and accountability in decision-making?

¹ See, for example, Environmental Defence and Canadian Environmental Law Association, *Shattering the Myth of Pollution Progress in Canada: A National Report*, December 2004.

- What are the factors preventing citizens from using their rights to act more frequently and effectively and how can these barriers be removed?

Information Gathering:

- What can be done to improve information sharing between the Health and Environment Ministers or between Environment Canada and Health Canada and other departments or agencies?
- What can be done to improve public access to the information gathered under CEPA?
- What can be done to better integrate information gathering and regulatory activities under CEPA?
- What can be done to reduce confidentiality provisions?
- What can be done to maximize the comprehensiveness and validity of the NPRI?
- What can be done to require polluters to gather and report information that they do not currently gather?

Pollution Prevention:

- What can be done to include a comprehensive mechanism that will promote the development of safe alternatives and techniques in a pollution prevention strategy?
- What can be done to improve the application of pollution prevention?
- How can pollution prevention planning be required for a wider range of users?
- What kinds of mandatory elements can be introduced into pollution prevention planning?
- What provisions can be added to make the plans be publicly available and allow for public input?

Controlling Toxic Substances:

- How can the categorization, assessment and management processes be accelerated? Is it possible to move from a substance-by-substance approach to one that addresses groups or families of substances of concern? Is it possible to quickly categorize substances that have been designated in other countries?
- How can the categorization process requirements be extended to consider substances based on their hazardous properties such as carcinogenicity, respiratory toxicity, endocrine toxicity, and neurological toxicity?
- How can burden of proof be switched from government to the users, producers and emitters of the substance?
- What precautionary methods can be used to ensure that pollution does not continue or increase while assessments are being conducted?
- How can the use of a virtual elimination strategy be improved?
- How can public access to information and peer review be incorporated into the assessment process for new substances?
- How can CEPA be used to more effectively ensure the domestic implementation of the international agreements that Canada signs?

Animate Products of Biotechnology:

- How could CEPA play a more effective role in the regulation of biotechnology products?

Controlling Pollution and Managing Wastes:

- What can be done to strengthen the CEPA role in ensuring effective nutrients management in all parts of Canada?
- What can be done to ensure that all types of nutrient sources are addressed?
- What can be done to introduce regulatory measures for protection of the marine environment from land-based pollution sources?
- Does CEPA need to be amended to address marine-based aquaculture operations?
- How can CEPA be changed to provide for public participation in ocean disposal permitting?
- How can the polluter pays principle be applied to ocean dumping permit fees?
- How can monitoring of ocean dumping be made more adequate?
- How could CEPA be applied to the fuel distribution system?
- How could timelines be improved for regulation of toxics in fuels?
- Are the exemptions for certain engine types valid?
- How could regulations and implementation requirements be improved?
- How can CEPA ensure that activities of other jurisdictions around international air pollution achieve CEPA goals and principles and fulfill Canada's international commitments?
- How can it be ensured that Canada lives up to its international obligations on international water pollution?
- How can the regulatory process for import and export of wastes be accelerated?
- How can public involvement opportunities in waste import and export decisions be improved?
- What can be changed in CEPA to ensure that the focus on waste import and export matters is on pollution prevention?

Environmental Matters Related to Emergencies:

- How can the provisions of CEPA be expanded to apply to a wider range of environmental emergencies?
- How can the provisions be changed to provide for better public access to information about emergency planning?

Government Operations and Federal and Aboriginal Land:

- How can CEPA be changed to ensure action on federal lands?
- How can aboriginal peoples be more fully included in decision-making to fulfill Canada's responsibilities under section 35 of the *Charter of Rights*?

Enforcement:

- How can enforcement of CEPA be improved?

Nanotechnology:

- How can nanotechnology be best introduced into CEPA?

CEPA Evaluation:

- How can CEPA best be evaluated on a regular basis?

INTRODUCTION

The *Canadian Environmental Protection Act* (CEPA 1999) is Canada's principal piece of federal environmental protection legislation. It is defined as "An Act respecting pollution prevention and the protection of the environment and human health in order to contribute to sustainable development." CEPA addresses issues that range from controlling toxic substances to public participation, biotechnology, nutrients, hazardous waste, vehicle emissions, international air and water pollution, disposal at sea, and other measures.

Section 343 of CEPA states that there must be a review of the Act and its administration by a parliamentary committee every five years after the Act comes into force. This means that CEPA must be referred to a parliamentary committee for review by March 31, 2005.

As part of the review process, Environment Canada and Health Canada set up an Advisory Committee for CEPA Review (ACCR) in April, 2004 to provide them with advice on the process for engaging Canadians to identify and provide feedback and advice on substantive issues and options related to CEPA. Six ENGO representatives are on the ACCR; the Canadian Environmental Network coordinates their participation and engages environmental groups from across Canada in providing input to the ENGO representatives.

The ENGO delegation to the ACCR, working with other environmental groups throughout Canada, has completed a series of documents related to the CEPA review: the *ENGO Agenda for Improving CEPA – Overview*, the *ENGO Response to Questionnaire on: "Scoping the Issues."*

This document, the *ENGO Agenda For The Review Of The Canadian Environmental Protection Act 1999*, details specific issues that should be addressed during the review, listing them according to the part of CEPA 1999 that they relate to.

Based on experience in all parts of Canada, ENGOs conclude that, despite government efforts to control pollution under CEPA, the volume of dangerous chemicals released into Canada's environment continues to increase.² ENGOs believe that the CEPA review should be seen as an opportunity to create the legislative and administrative conditions that will result in healthier lives and a sustainable economy for all Canadians.

ENGOs believe that to achieve that goal the following over-arching priority issues need to be addressed. This brief then details what is wrong with the current operation of CEPA and the issues the review should focus on for each part of CEPA.

² See, for example, Environmental Defence and Canadian Environmental Law Association, *Shattering the Myth of Pollution Progress in Canada: A National Report*, December 2004.

Implementation of the Act:

Many of the problems with CEPA are a result of a failure to fully implement CEPA rather than problems with the actual words in the legislation. The federal government has not allocated sufficient human and fiscal resources to implement the Act. It has diverted much of its attention to harmonization agreements with the provinces and territories (devolution) and the promotion of voluntary, as opposed to regulatory, environmental protection measures.

Enforcement of the Act needs to be enhanced. There should be consistent levels of enforcement regardless of sector, region, province or territory. There has not been rigorous enforcement and compliance with the legislation and associated regulations. The federal “safety net” has not been clearly defined and rigorously implemented to require the best available processes, practices and technologies for the protection of the environment and human health.

Environment Canada’s and Health Canada’s independent evaluation of the implementation of CEPA should be completed by the end of March 2005 and made publicly available in its entirety immediately after that. This evaluation should assist everyone in scoping the implementation issues for the CEPA review.

Public Participation:

There has been an enormous revolution in information access and management since the adoption of CEPA 1999. Despite this, the CEPA Registry has not fulfilled its potential as a tool for public access to information and public engagement in decision-making.

While CEPA provides measures for public engagement in implementation and enforcement of CEPA, including opportunities for reporting offences and utilizing judicial procedures, the public rarely uses these tools.

The CEPA review should assess why the public has not availed themselves of these tools more frequently and why the tools have not been more effective when citizens have attempted to use them.

Pollution Prevention:

Unfortunately, although pollution prevention is described in the preamble to CEPA as a “national goal and as the priority approach to environmental protection,” pollution prevention has not been a strong component in the implementation of CEPA.

Activities under CEPA have focused on pollution control rather than on true pollution prevention, which is material or feedstock substitution, product redesign or reformulation, and changes to manufacturing processes.

Tools such as pollution prevention planning have been severely underutilized. Only five pollution prevention plans are underway and none have been implemented. Furthermore, in cases where pollution prevention planning is being applied as the risk management

instrument, it has no regulatory strength, the only legal requirement being the declaration that a pollution prevention plan is being prepared and implemented.

The CEPA review should focus on assessing why pollution prevention has not been more effectively implemented and on developing mechanisms to overcome weaknesses in the current manner in which it is being applied.

Controlling Toxic Substances:

The problem of toxic substances remains largely undealt with by CEPA five years after it was passed. The current CEPA substance-by-substance approach to controlling toxic substances is both time-consuming and costly.

The CEPA review process should study programs in other countries for assessing and controlling toxic substances. One example of such a program is the European Registration, Evaluation and Authorization of Chemicals (REACH) program.³

Implementing the Precautionary Principle:

CEPA requires the government to apply the precautionary principle such that "... where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

The CEPA review should assess how Environment Canada and Health Canada have operationalized this principle and to what extent they have used it in making specific decisions.

³ For discussion of the applicability of REACH to Canada see Canadian Environmental Law Association, *Within REACH: An Agenda for Improving the Canadian Environmental Protection Act, 1999* (December 2004) and World Wildlife Fund, *The REACH Files: A policy guide* (December 2004).

PART-BY-PART ASSESSMENT OF CEPA

Preamble:

The CEPA preamble lays out pollution prevention, virtual elimination, ecosystem approach, national leadership, precautionary principle, and polluter pays as the guiding principles for CEPA. The CEPA review needs to focus on these guiding principles in making assessments about progress under CEPA.

The subtitle of Environment Canada's and Health Canada's scoping document is "Strengthening Legislation for a Sustainable Environment, a Healthy Population and a Competitive Economy." The use of the phrase "competitive economy" in the subtitle is inconsistent with the preamble to CEPA. The preamble "acknowledges the need to integrate environmental, economic and social factors in the making of all decisions by government and private entities." This is much broader in meaning and more acceptable to Canadians than the limited scope of a "competitive economy."

At Environment Canada's and Health Canada's public consultation meetings across the country early in 2005, industry representatives used the "competitive economy" phrase as a rationale for not having stronger environmental protection measures in Canada than in other countries – especially in the U.S. This sentiment was essentially a statement that Canada should be a follower rather than a leader at protecting the environment and human health.

Environmental and human health should not be put at risk or allowed to degrade in order to give Canadian industry a supposed international competitive advantage. Instead, consistent with the preamble to CEPA, decisions should be based on the recognition that the long-term well-being of the Canadian economy is dependent on a high status of environmental and human health.

Issues to Focus Review on:

- What can be done to ensure that the guiding principles in the CEPA preamble are fully and properly used in decision-making?
- How can the Act effectively protect children's health and other vulnerable communities?

Part 1: Administration

The underlying theme to this part is "cooperative action in matters affecting the environment and for the purpose of avoiding duplication in regulatory activity among governments." The primary concern of ENGOs with the implementation of this part is that it has meant that the federal government has not been a leader in setting environmental policies and acting to solve environmental crises. The Sydney Tar Ponds in Nova Scotia and the Taku River watershed in British Columbia are examples of delay and failure when problems of overlapping jurisdictions occur. In addition, the concept of the underlying federal safety net to ensure environmental and human health protection in

all parts of the country has been only weakly applied because the federal government is unwilling to intrude on or interfere with other jurisdictions.

What is wrong with CEPA?

- **CEPA's administration has been significantly affected by the implementation of the Canada-Wide Standards Sub-Agreement under the 1998 National Accord on Environmental Harmonization.** Federal-provincial processes have dominated decision-making and federal action around substances covered by the CWS initiative, particularly dioxins and furans, mercury, and ground-level ozone and particulate matter. Implementation of CWS is in the hands of the provinces. However, provincial performance is inconsistent, e.g., in Ontario, the CWS standards on dioxins and furans for waste incineration have been applied to some facilities but not others. Federal-provincial discussions have also dominated with respect to the revisions of the CEPA hazardous waste import/export regulations, and drinking water protection. It is misleading to refer to the CWS as "standards" because they are not enforceable at a national level.
- **There has been no rigorous and comprehensive review of the outcomes, effectiveness or efficiency of these federal-provincial processes.** The five-year review of the harmonization agreement prepared for the CCME in 2003 was not adequate. The evidence presented in it was primarily anecdotal in nature.

The available information suggests that in some cases, e.g., dioxins and furans, the CCME processes have resulted in actions that would not have otherwise been taken, e.g., the phase out of conical waste burners in Newfoundland and Labrador. But implementation in British Columbia of the CWS for pulp and paper boilers burning salt-laden wood has been repeatedly delayed. In other cases, the review showed the problems of outcomes based on the lowest common denominator and of deadlock flowing from the CCME's consensus-based decision-making processes, e.g., dioxin and furan emissions for electric arc furnaces, mercury emissions from electric coal-fired power plants.

A rigorous and independent review of the outcomes and effectiveness of the CWS process is needed before harmonized approaches to standard setting and implementation can be properly incorporated into CEPA.

- **The federal government has not conducted a comprehensive review of the results of the administrative and equivalency agreements they have entered into with respect to the CEPA and the Fisheries Act.** Reviews by the Commissioner of the Environment and Sustainable Development⁴ and Sierra

⁴ "Working Together," *Report of the Commissioner of the Environment and Sustainable Development*, 2000.

Legal Defense Fund⁵ have shown that there are serious problems with provincial performance under the agreements.

Issues to Focus Review on:

- What can be done to ensure strong federal leadership on national environmental standards?
- What can be done to ensure that the equivalency provisions of CEPA ensure adequate protection of the environment and human health in all parts of Canada?

Part 2: Public Participation

This part provides many measures for increased public access to information and engagement in CEPA activities. Unfortunately, the public has not used these tools to a substantial extent. This is because of a lack of public awareness of the tools' existence and also because the tools are too difficult to use.

What is wrong with CEPA?

- **Environment Canada's and Health Canada's public participation processes are not as comprehensive or inclusive as they should be.** While acknowledging that Environment Canada's practices with respect to public consultation have usually been better than in other federal agencies, including Health Canada, both departments need to improve their efforts at meaningful public consultation.
- **The CEPA registry has not fulfilled its potential as a tool for public engagement around decision-making.** In the first five years of its existence, the CEPA registry has been used to post documents for public review and comment, including risk assessment reports and management reports for substances on the Domestic Substances List. However, the CEPA registry does not post proposed permits and approvals for public comment, as is the case in Ontario under the *Environmental Bill of Rights*. Permits and approvals issued under CEPA include such important items as: ocean dumping permits; import and export permits for wastes; exports of substances; when information is provided regarding substances or living organisms that are not on the Domestic Substances List or significant new activities regarding these organisms or substances; waivers regarding new substances notification; conditions or prohibitions on the manufacturing, import or use of new substances or living organisms; waivers regarding fuels regulations; exemptions from vehicle or engine emissions standards; and permits regarding equivalent safety.

⁵ *Pulping the Law: How Pulp Mills are Ruining Canadian Waters with Impunity*, November 2000.

- **The tools for citizen reporting and enforcement are rarely used.** CEPA contains important tools for the public such as whistle-blowing, applications for investigation of possible offences, and the right to bring an action if the Minister fails to act, but the public has rarely used these tools.

Issues to Focus Review on:

- How can the CEPA tools be changed to provide for more transparency, involvement and accountability in decision-making?
- What are the factors preventing citizens from using their rights to act more frequently and effectively and how can these barriers be removed?

Part 3: Information Requirements

This part includes information-gathering requirements and powers, objectives, guidelines and codes of practice. These have brought substantial improvements to the fulfillment of this critical public right, but the progress has not gone far enough.

What is wrong with CEPA?

- **Public access to information is still very limited.** With the exception of the NPRI, information gathered is usually not made publicly available, and even when it is, the data is usually not in accessible or useable formats. For example, under the ocean dumping requirements, what is permitted for dumping is reported but not what is actually dumped. Likewise the contents of waste manifests are not made publicly available. Also facilities can request that specific information be considered confidential. In a number of cases, such information is needed to develop an appropriate risk management strategy for a toxic substance.
- **Inventory and reporting requirements do not 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.**
 - CEPA-toxic substances are not automatically added to the s. 200 emergencies regulations. A number of CEPA toxic substances that are known to be used and released in significant quantities from industrial facilities in urban areas are not currently on the s. 200 regulation list. Dichloromethane is a prominent example of such a substance.
 - CEPA Toxic Substances List substances are not automatically added to the NPRI at appropriate thresholds to capture at least 90% of releases and transfers from facilities to which NPRI reporting requirements apply. The NPRI has fallen significantly behind in this regard over the past few years.
 - The process is inadequate for adding those substances to the NPRI that have been identified as meeting toxicity, bioaccumulation and persistence criteria through the DSL screening process, and substances of

concern identified through intergovernmental and international agreements.

- **There is inadequate integration of information gathering and reporting requirements, or ensurance that full use is made of opportunities where information-gathering activities can be used for multiple purposes.** For example, the notices and manifests required under the CEPA Export and Import of Hazardous Waste and Hazardous Recyclable Materials Regulations 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.
- **Lack of government commitment and resources to information gathering.** For example, two overarching problems have created obstacles for improving and expanding the NPRI program:
 - lack of staffing and financial resources to support the program, and
 - lack of commitment by the government to improve the program.
- **Environment Canada's efforts to expand the NPRI have stalled since 2002.** Since the 2002-reporting year, Environment Canada has stalled its own and others' efforts to make further improvements to the NPRI. This has meant that PCBs, metals such as thallium, beryllium and barium, and radionuclides have still not been added to the NPRI even though these substance have been repeatedly proposed for addition. In other cases, e.g., nickel, the thresholds for reporting have not been lowered, even though such changes were suggested by Environment Canada. Another example is the failure of Environment Canada to revise the current reporting exemption for mining activities other than the processing of mined materials. The failure to add greenhouse gases to NPRI is an example of a missed opportunity to have NPRI be a comprehensive, one-stop-shopping location for the public to access data.
- **There is inadequate validation of NPRI data.** Rarely does Environment Canada carry out an actual audit of a polluter's report. This is a major problem as it reduces the ability of the public to have confidence in the data contained in the NPRI.
- **Under CEPA, government can only require that information be reported that "may be in the possession of that person or to which the person may reasonably be expected to have access" [sec. 46(1)].** This means, for example, that some substances that should be added to NPRI are sometimes left off because polluters don't usually gather and gather the particular information needed.

Issues to Focus Review on:

- What can be done to improve information sharing between the Health and Environment Ministers or between Environment Canada and Health Canada and other departments or agencies?
- What can be done to improve public access to the information gathered under CEPA?
- What can be done to better integrate information gathering and regulatory activities under CEPA?
- What can be done to reduce confidentiality provisions?
- What can be done to maximize the comprehensiveness and validity of the NPRI?
- What can be done to require polluters to gather and report information that they do not currently gather?

Part 4: Pollution Prevention

Under CEPA, the Government of Canada is “committed to implementing pollution prevention as a national goal and as the priority approach to environmental protection,” but pollution prevention provisions have only been minimally used and even in those cases where they were used, they have been inadequate at driving true pollution prevention.

What is wrong with CEPA?

- **The pollution prevention approach under CEPA does not focus on substitution with safer chemicals or processes.** Actions under CEPA usually focus on the adoption of pollution control measures rather than prevention at the source. For example, tetrachloroethylene used in the dry cleaning sector has been listed as a CEPA toxic but the actions developed around this substance have focused on end-of-pipe controls. The Canadian Labour Congress’ *Pollution Prevention Strategy* (November 2004), World Wildlife Fund Canada’s *Advancing Pollution Prevention in Canada* (February 2005), and Environmental Defence and the Canadian Environmental Law Association’s *Shattering the Myth of Pollution Progress in Canada* (December 2004) detail this deficiency.
- **The pollution prevention approach is rarely used and even in those cases it is taking too long.** Thus far only five pollution prevention plans are underway and none have been implemented.
- **The model plan is too generic, and only provides basic guidance to these plans.** Pollution prevention planning is being used as a facility-based exercise with little being prescribed except for items such as release limits, targets and timelines, which in themselves are only “factors to consider” and not regulatory in nature. As a result, both the interpretation of pollution prevention and the components of a pollution prevention plan can vary considerably within a

single sector and facilities involved. This creates business uncertainty and limits investment toward effective pollution prevention planning.

- **While the declaration to have a pollution prevention plan put in place is publicly available, the contents of the plan are not publicly available.**
- **The scope of substances required in pollution prevention plans is too limited.** While “release limits” may be specified for the specific CEPA-toxic substance or substances in the pollution prevention plans, other toxic substances are not monitored and pollution prevention plans do not incorporate methods to prevent their formation or release. A whole-workplace approach is not taken.
- **Pollution prevention plans are non-regulatory tools.** Pollution prevention plans are not regulations, although they may contain elements that are covered under regulation (e.g., jurisdictional permits, etc.). While their intent is to meet risk management objectives, the achievement of these objectives is not mandatory. How will government assess the quality of a pollution prevention plan? How will government monitor the implementation of the plans? What actions will be taken if pollution prevention plans are not implemented? No answer is given to any of these critical questions.
- **Non-regulatory pollution prevention plans are used as substitutes for regulatory measures.** For example, base metal smelter emissions are now being considered for a voluntary pollution prevention approach rather than using a regulatory tool. According to NPRI data, base metal smelters were responsible for 26% of the releases to air of CEPA toxics in Canada in 2002.

Issues to Focus Review on:

- What can be done to include a comprehensive mechanism that will promote the development of safe alternatives and techniques in a pollution prevention strategy?
- What can be done to improve the application of pollution prevention?
- How can pollution prevention planning be required for a wider range of users?
- What kinds of mandatory elements can be introduced into pollution prevention planning?
- What provisions can be added to make the plans be publicly available and allow for public input?

Part 5: Controlling Toxic Substances

The current CEPA approach to categorizing, screening and controlling toxic substances is taking too long and, as a result, leaves the environment and human health under threat for excessively long periods.

What is wrong with CEPA?

- **Under CEPA, the requirements for screening level risk assessments are not explicit. CEPA does not outline a timeframe required for completion of the assessment nor does it outline what is considered acceptable and adequate data to make a determination of toxicity.** Such a gap in the regulatory requirements leaves much interpretation to Environment Canada and Health Canada. To date, efforts to develop the screening level risk assessment have not effectively demonstrated what criteria will be applied to make the determination of toxicity. It is unclear how the details of the assessment reports will affect the type of management tools that are to be developed for those substances that are found to be toxic under CEPA. Currently, only two groups of substances, seven poly-brominated dimethyl ethers (PBDEs), which are used as flame retardants, and perfluorooctane sulfonates (PFOS), which are used as stain repellants, have been put through the screening level risk assessment. The screening level risk assessment is also being applied to 123 substances under a Pilot Project. No plan of action has been developed by Environment Canada and Health Canada for screening level risk assessments on substances found to meet the criteria for categorization.
- **The requirement for cabinet approval of the addition of substances to the Toxic Substances List (TSL) has resulted in political interference in the listing process.** Substances that should have been placed on the TSL on the basis of Environment Canada's and Health Canada's scientific assessments of their toxicity have been substantially delayed or not added at all, e.g., road salt, and waste crankcase oils.
- **Full risk assessments are too resource intensive and time consuming.** Currently it takes up to 5 years to complete an assessment. In the case of some substances on the Priority Substances List where a determination of toxicity was not concluded by 1994, the timeframe for making a determination is now over ten years.
- **Timelines for development of management strategies are too long to support a precautionary and preventive approach to management.** Once a substance has been declared "toxic", it usually takes another 3 years to have a risk management strategy and instrument in place. On top of this, waivers and time extensions may be granted. Given the already drawn out timeframe, such extensions weaken the intent of CEPA.
- **The burden of proof is on government to prove there is a problem rather than on industry to demonstrate that substances are safe. Section 71 is not mandatory for collection of data for making a determination of toxicity.** The use of section 71, requiring data from industries, has not been fully

utilized to assist the government's efforts in making a determination of toxicity. Even in the categorization process, the government has generally been requesting data from industry through a voluntary approach. Also, industries may and have requested confidentiality when they submit this information; this happened with hexachlorobutadiene (HCBD).

- **Through the New Substances Notification Regulations, only limited information on toxicity of substances considered "new" in Canada is submitted for consideration prior to adding the substance to the Domestic Substances List (DSL).** Approximately 850 notification applications for new substances are submitted each year with an estimate of 300 substances added onto the DSL each year. The toxicity information that notifiers are required to submit varies according to the type of substance and quantity of use. There are insufficient testing requirements for substances that are low-volume, export only substances and listed on the non-domestic substances list (NDSL), or those polymers for which all monomers are listed on the DSL or NDSL. Additionally, data on specific hazardous endpoints such as chronic toxicity, endocrine disruption and developmental neurotoxicity is not mandatory in the notification package for any type of substance prior to its addition to the DSL.
- **There is an absence of transparency in the process to review applications and of the data submitted.** There is a lack of transparency regarding whether those new substances entering the Canadian market pose harm to the environment or human health, and children's health in particular. There is no public access or peer review of the information on which decisions are based. In fact, there are no mechanisms to even inform the public that new substances are being reviewed by Environment Canada and Health Canada.
- **The assessment process does not take a precautionary approach if there is not enough data available on the substance.** There are significant data gaps with regards to a majority of the substances found in the Canadian market, especially on those substances listed under the DSL. This lack of data on toxicity makes it difficult to make a determination of toxicity under CEPA. This results in continued threats to human health and the environment because action to reduce or eliminate some of the most hazardous substances is delayed or never taken.
- **The timeframe for finalizing assessments results in some substances remaining in limbo.** An example is radionuclides. To date, CEPA has not addressed radionuclides or nuclear waste in any significant manner. The one action on this topic is that releases of radionuclides from nuclear facilities were placed on the priority list of substances and underwent an assessment to determine their toxicity. In 2000, the draft assessment proposed that releases of radionuclides from uranium mines and mills and waste management areas be considered "toxic." Further, it was recommended that options to reduce such

releases be considered “a high priority.” The final assessment still has not been released and management plans have not been developed.

- **The focus on toxic substance use, manufacture and release means that toxic substances contained in products are ignored.** CEPA hasn’t been used to address toxic substances that may be released during use or disposal at the product stage, e.g., mercury in light switches.
- **The virtual elimination sections of CEPA have only been used once.** In the CEPA preamble, the government “acknowledges the need to virtually eliminate the most persistent and bioaccumulative toxic substances.” But this approach has only been used for hexachlorobutadiene – a substance that is no longer manufactured or used in Canada. The requirement for a limit of quantification (LOQ) number is a barrier towards virtual elimination designation.
- **The application of section 75 on substances severely restricted or prohibited by other jurisdictions is unclear.** Timing and requirements for triggering these obligations are unclear, which is resulting in this section not being properly used.
- **CEPA does not outline how Canada will meet its international obligations on toxic substances.** For example, Canada has ratified many key international agreements and protocols aimed at toxic substances. These include agreements such as the Stockholm Convention on POPs, the Basel Convention on Hazardous Wastes, and the Rotterdam Convention on Prior Informed Consent. It is unclear how Canada will meet its targets and timelines under such international agreements.

Issues to Focus Review on:

- How can the categorization, assessment and management processes be accelerated? Is it possible to move from a substance-by-substance approach to one that addresses groups or families of substances of concern? Is it possible to quickly categorize substances that have been designated in other countries?
- How can the categorization process requirements be extended to consider substances based on their hazardous properties such as carcinogenicity, respiratory toxicity, endocrine toxicity, and neurological toxicity?
- How can burden of proof be switched from government to the users, producers and emitters of the substance?
- What precautionary methods can be used to ensure that pollution does not continue or increase while assessments are being conducted?
- How can the use of a virtual elimination strategy be improved?
- How can public access to information and peer review be incorporated into the assessment process for new substances?

- How can CEPA be used to more effectively ensure the domestic implementation of the international agreements that Canada signs?

Part 6: Animate Products of Biotechnology

This part of CEPA has been seriously underused.

What is wrong with CEPA?

- **Environment Canada has failed to seriously use its powers under CEPA concerning biotechnology.** Environment Canada has not been using its powers under CEPA to issue notices for information or take control actions on biotechnologies. Environment Canada explains this by saying that most biotechnologies are being adequately controlled under other legislation, often by other departments. But CEPA needs to play a leadership role because it is the only federal legislation that provides clear authority for regulation of biotechnologies. It should set baseline standards for assessment of new products and ensure coverage for products not controlled under other acts. CEPA is failing on each of these fronts.
- **The Canadian regulatory framework does not adequately address biotechnology products for the following reasons:**
 - No liability for environmental escape and damage of genetically modified organisms (GMOs);
 - No systematic requirements for assessment of potential long-term impacts of products prior to authorization;
 - No political willingness to implement the precautionary principle to deny and/or suspend authorization of the environmental release of GMOs, even in the absence of conclusive scientific reports proving no harm.⁶
 - Post assessment and approval monitoring of biotechnology products has been extremely weak;
 - The assessment process makes no provision for external review and assessment of the information on which decisions are made.⁷
- **The “Living Modified Organisms Regulations” designed to enable Canada to ratify the Cartagena Protocol on Biosafety still have not been passed.** As a result of the failure to pass these regulations, Canada has not been able to ratify the Cartagena Protocol, which it signed in 2001.

⁶ See, for example, The Royal Society of Canada, *Elements of Precaution: Recommendations for the Regulation of Food Biotechnology in Canada*, 2001.

⁷ *Ibid.*

Issues to Focus Review on:

- How could CEPA play a more effective role in the regulation of biotechnology products?

Part 7: Controlling Pollution and Managing Wastes

Division 1: Nutrients

This division addresses substances that promote the growth of aquatic vegetation. The release of nutrients to the aquatic environment continues to be a serious problem. A study by the Conservation Council of New Brunswick in 2002 found that seven of ten estuaries in eastern and northern New Brunswick exhibited moderate to severe eutrophication symptoms. Similar problems are occurring through Canada.

What is wrong with CEPA?

- **These substances are often regulated under other Acts of Parliament, which leads to confusion, omissions and sometimes to weaker approaches.** An example of this is the *Fertilizers Act*.
- **The persistent or synergistic qualities of some nutrients are not specifically defined in relation to aquatic ecosystems, or how they may interact with other substances.**
- **Some sources are omitted, e.g., wastes from factory farms.** Lake Winnipeg's water quality is deteriorating, with nutrient loadings from agricultural sources being a primary concern. Similar problems as a result of agricultural sources have been identified in British Columbia, Saskatchewan and Ontario.

Issues to Focus Review on:

- What can be done to strengthen the CEPA role in ensuring effective nutrients management in all parts of Canada?
- What can be done to ensure that all types of nutrient sources are addressed?

Division 2: Protection of the Marine Environment from Land-based Sources of Pollution

What is Wrong with CEPA?

- **There are no regulatory provisions in this division of CEPA.** There are no requirements or obligations for the Minister to ensure that Canada is meeting its international obligations, or to ensure that coastal communities and other legitimate users of the sea are adequately protected.

- **Pollution from marine-based aquaculture operations may not be covered by CEPA because they may not be defined as land-based.**

Issues to Focus Review on:

- What can be done to introduce regulatory measures for protection of the marine environment from land-based pollution sources?
- Does CEPA need to be amended to address marine-based aquaculture operations?

Division 3: Disposal at Sea

What is Wrong with CEPA?

- **There is only limited public participation.** CEPA requires that notice of an application for a disposal permit be published in newspapers in the vicinity of the ocean disposal site. Once a permit is granted, however, the Act only requires notice of the granting of the permit to be published in the Canada Gazette. As a result, citizens in communities in the vicinity of ocean disposal activity may be unaware of permits granted and may not be able to take advantage of the 30-day objection period following the granting of the permit. This diminishes the ability of the public to participate in ocean disposal permitting.
- **It does not follow the polluter pays principle.** CEPA provides for a flat rate fee of \$2500 per permit for ocean dumping. It does not take into account differences in costs to the environment associated with higher volumes and toxicity levels of wastes dumped. The fee does not reflect the cost to society of environmental damage caused by dumping, as well as economic costs associated with processing the application, technical analysis, public consultation, monitoring the site, and enforcing the Act.
- **There are only limited monitoring requirements.** Monitoring of ocean disposal sites occurs according to *National Guidelines for Monitoring Dredged and Excavated Material at Ocean Disposal Sites*. CEPA only provides that the minister shall monitor selected sites. No provisions in the Act or accompanying regulations specify the type, extent, scope or frequency of monitoring required. Presently, heavily used dumping sites are generally monitored only once every five years. The number of sites monitored and the extent of physical, chemical or biological monitoring activity is dependent on resources received through the collection of monitoring fees from permittees. As such, there are no guarantees of minimum monitoring activity.
- **There is no requirement to publicly report how much and what is actually dumped into the ocean.** The public can know what the permit says may

be dumped but this does not usually correspond with how much or what was actually dumped.

Issues to Focus Review on:

- How can CEPA be changed to provide for public participation in ocean disposal permitting?
- How can the polluter pays principle be applied to ocean dumping permit fees?
- How can monitoring of ocean dumping be made more adequate?

Division 4: Fuels

What is wrong with CEPA?

- **There are no specific authorities to address fuels throughout the distribution system (from refinery to gas tank).** This is a problem because additives may be added downstream of the refineries, after the point at which the CEPA provisions apply.
- **Trade agreements often delay or inhibit a Minister's ability to protect human health as was evident in the case of MMT (methylcyclopentadienyl manganese tricarbonyl).** MMT is used as an octane enhancer. Manganese is a known potent neurotoxin when inhaled.
- **There are no specific requirements or timelines to require regulations for substances determined toxic that may be found in or are a component of fuels.**

Issues to Focus Review on:

- How could CEPA be applied to the fuel distribution system?
- How could timelines be improved for regulation of toxics in fuels?

Division 5: Vehicle, Engine and Equipment Emissions

What is wrong with CEPA?

- **This Division provides an exemption for an engine designed to propel an aircraft, rolling stock, a steamer, steamship or tug all of which are significant contributors to air pollution and greenhouse gases.**
- **There are no provisions for regulations that would require manufacturers to provide warranties on emission control components.**

- **There are no fast track provisions or requirements to implement emissions or equipment standards that would reduce air pollution and improve human and environmental health.** Such provisions are used in other OECD countries, including the United States.

What issues need to be addressed?

- Are the exemptions for certain engine types valid?
- How could regulations and implementation requirements be improved?

Division 6: International Air Pollution

What is wrong with CEPA?

- **This division's powers are available only if the other jurisdiction is unwilling or unable to act, yet there are no timeline requirements, other than "as soon as possible", for another jurisdiction to prevent, control or correct the air pollution source(s).**
- **This division does not have a definition of air pollution in contrast with the International Water Pollution Division of CEPA, which does have a definition of water pollution.**
- **This division does not specify requirements or opportunities for the Minister to act to implement international air agreements such as the Kyoto Protocol and UNECE's Convention on Long-range Transboundary Air Pollution.**

Issues to Focus Review on:

- How can CEPA ensure that activities of other jurisdictions around international air pollution achieve CEPA goals and principles and fulfill Canada's international commitments?

Division 7: International Water Pollution

What is wrong with CEPA?

- **This division's powers are available only if the other jurisdiction is unwilling or unable to act, yet there are no timeline requirements, other than "as soon as possible", for another jurisdiction to prevent, control or correct the water pollution source(s).**
- **The Minister has failed to act, even when international jurisdictions and/or authorities have asked the Minister to act, when a Canadian jurisdiction has refused to do so.** The decade of acutely toxic-to-fish pollution leaching from the Tulsequah Chief Mine on the international transboundary Taku River in British

Columbia is one example of the government's failure to act in an effective manner. The recent approval of Coal Bed Methane operations along the international transboundary Flathead River in British Columbia is another example. In both examples, repeated requests by United States' elected representatives or authorities were ignored.

- **The Minister may only act when it is anticipated that it will “create” water pollution – not “contribute” to it.** This is inconsistent with Canada's responsibilities to the international community through treaties such as the Boundary Waters Treaty and the Pacific Salmon Treaty.

Issues to Focus Review on:

- How can it be ensured that Canada lives up to its international obligations on international water pollution?

Division 8: Control of Movement of Hazardous Waste and Hazardous Recyclable Material and of Prescribed Non-Hazardous Waste for Final Disposal.

What is wrong with CEPA?

- **Since the proclamation of CEPA, the government has not passed regulations to implement the hazardous and non-hazardous waste import-export provisions of CEPA.** This has resulted in:
 - Failure to establish meaningful requirements regarding the environmentally sound management of hazardous wastes;
 - Failure to integrate permitting and manifest system with information needs in other parts of CEPA;
 - Failure to provide public notice of permit applications before permits are granted;
 - Failure to provide useful public access to the information contained in notices, permits, authorizations, and manifests;
 - Failure to implement the CEPA provisions that allows Environment Canada to require export reduction plans for hazardous waste exporters.
 - Failure of federal government to get involved in non-hazardous waste issues. Since there are currently no federal regulations on the import or export of non-hazardous wastes, it has resulted in a lack of data on the extent to which non-hazardous wastes are exported and imported. This reduces the government's ability to make policies or programs to address this issue. It also means that there still is no activity by the federal government to ensure the appropriateness of the import and export of non-hazardous wastes. While the federal government has kept out of the picture, the issue of the cross-border movement of non-hazardous wastes has escalated. The most politically fiery of these is the shipment of municipal garbage from Toronto to be landfilled in Michigan.

- **The CEPA provisions for non-hazardous waste include only wastes destined for disposal, and do not allow for export reduction plans.** These important provisions are in the hazardous wastes section.
- **The proposed regulations for hazardous and for non-hazardous wastes do not include provisions for notifying communities that may be receiving the wastes and giving them an opportunity to comment.**
- **The waste reduction planning provisions apply to exporters rather than the generator of the wastes.** The exporter and the generator frequently are not the same person. Waste generators frequently send their wastes to a transportation company or to a transfer station and the actual exporter is the operator of that transfer station or of the trucking company.
- **The focus in the CEPA provisions is on recycling rather than waste elimination and pollution prevention.**

Issues to Focus Review on:

- How can the regulatory process for import and export of wastes be accelerated?
- How can public involvement opportunities in waste import and export decisions be improved?
- What can be changed in CEPA to ensure that the focus on waste import and export matters is on pollution prevention?

Part 8: Environmental Matters Related to Emergencies

This is a very important part because Environment Canada estimates that there are approximately 20,000 environmental emergencies annually in Canada, and approximately 1,000 of these require some form of involvement or action by Environment Canada.

What is wrong with CEPA?

- **The use of this section is basically limited to a substance or group of substances declared as toxic, or recommended for inclusion on the List of Toxic Substances.** This is too narrow to effectively protect the environment and human health.
- **Not all substances on the List of Toxic Substances are included under this division.**
- **This division does not have adequate provisions for public access to information about emergency plans.**

Issues to Focus Review on:

- How can the provisions of CEPA be expanded to apply to a wider range of environmental emergencies?
- How can the provisions be changed to provide for better public access to information about emergency planning?

Part 9: Government Operations and Federal and Aboriginal Land

What is wrong with CEPA?

- **CEPA has been almost a total failure at providing a framework for environmental protection in the operation of federal agencies and activities on federal lands.** The Act establishes no general standard of protection or offense provision, as is the norm with provincial environmental protection legislation, e.g., Ontario Environmental Protection Act, ss.9 and 15. 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: federal PCB treatment and destruction, federal halocarbons, and petroleum and allied product storage tanks on federal lands.
- **CEPA has not adequately included aboriginal peoples in decision-making that affects their lands.**

Issues to Focus Review on:

- How can CEPA be changed to ensure action on federal lands?
- How can aboriginal peoples be more fully included in decision-making to fulfill Canada's responsibilities under section 35 of the *Charter of Rights*?

Part 10: Enforcement

CEPA contains extensive enforcement mechanisms, but they have been used only infrequently. Sierra Legal Defence Fund has compiled the following table showing the extent to which the main enforcement tools have been used.

	1998-99	1999-00	2000-01	2001-02	2002-03
<i>inspections</i>	2613	3301	605	4637	4804
<i>investigations</i>	78	64	6	57	36
<i>prosecutions</i>	2	26	8	27	4
<i>charges</i>	n/a	n/a	n/a	n/a	9
<i>convictions</i>	1	1	6	7	3

What is wrong with CEPA?

- Enforcement activities are entirely discretionary and Environment Canada has seemed reluctant to use them. Environment Canada focuses on playing an advisory and promotional role rather than using prosecutions to ensure regulatory compliance with CEPA.

Issues to Focus Review on:

- How can enforcement of CEPA be improved?

Additional Issues

Nanotechnology:

The development of nanotechnologies is growing rapidly. Environmental and human health risks have been associated with the use of nanotechnology.

What is wrong with CEPA?

- **Nanotechnology is not included in CEPA.**

Issues to Focus Review on:

- How can nanotechnology be best introduced into CEPA?

Evaluation of CEPA:

CEPA requires that an annual report be published each year “on the administration and enforcement of this Act for that year.” This does not, however, provide for an evaluation of progress under the Act.

What is wrong with CEPA?

- **No regularized process for preparation and publication of an evaluation of the implementation of CEPA is in place.**

Issues to Focus Review on:

- How can CEPA best be evaluated on a regular basis?