

**PRESENTATION TO THE HOUSE OF COMMONS STANDING
COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT**

REVIEW OF THE CANADIAN ENVIRONMENTAL PROTECTION ACT (1999)

(September 26th, 2006)

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Mr. Mark Winfield (Director, Environmental Governance, *Pembina Institute*):

Thank you, Mr. Chair. My name is Mark Winfield. I'm Director of the Environmental Governance Program with the Pembina Institute. With me today is Dr. Matthew Bramley who is Director of our Climate Change Program.

The definition of toxic substances under the Canadian Environmental Protection Act has been one of the most contentious issues in relation to the act. The assessment of substances against the definition of toxicity in CEPA is the centrepiece of the act's structure. Once substances are classified as toxic and added to the list of toxic substances, also known as schedule 1, the federal government is able to exercise a wide range of regulatory authority over their production, import, export, use and release into the environment.

In recent years, the classification of a number of substances that are produced and released into the environment in large quantities but which do not have high inherently toxic properties as toxic for the purposes of CEPA has been a source of major controversy. These substances included road salt, certain criteria air pollutants and greenhouse gases. These substances have been classified as toxic on the basis of the severe cumulative effects of their releases on their environment and human health.

It has been argued by some that due to their lower inherent toxic properties relative to other substances that have been added to the list of toxic substances, these substances should not be described as toxic. Arguments have followed from this contention that they should be removed from CEPA schedule 1 and dealt with under separate legislation or that the substances meeting the definition provided in section 64 of the act be re-labelled to some other term.

It is important in approaching this issue to understand the legislative history behind the definition of toxic substances in section 64 of CEPA. When CEPA was originally drafted, the legislation's authors were trying to balance a number of factors. These included the need flowing from the Supreme Court's 1988 Crown Zellerbach decision to ensure the

scope of federal regulatory activity under the act was of a nature that obtained a “singleness, distinctiveness and indivisibility that clearly distinguished it from matters of provincial concern and a scale of impact on provincial jurisdiction that was reconcilable with the fundamental distribution of legislative power in the constitution.”

This implied that regulatory activity under the act would need to be bounded in some way and could not simply cover all matters related to environmental protection.

The establishment of a limited list of substances, whose development was subject to a series of extremely rigorous tests in relation to which federal activity would occur, was seen as a way of addressing the need to bound the scope of federal regulatory activity with respect to the environment.

At the same time, the drafters of CEPA wished to establish a definition of toxicity that was broad enough to provide a basis for federal regulatory action in relation to global environmental threats or other serious threats to human health in the environment that did not fit the traditional model of exposure of individual organisms to substances with inherently toxic properties.

Rather they sought to provide a legislative basis for the federal government to address threats to the structure and function of the ecological and global systems on which life depends. Indeed, at the time CEPA was being drafted, its authors wanted to be certain that the act would provide a basis for federal action on a class of pollutants with low inherent toxicity which were having a severe adverse effect on the global atmosphere and were subject to a major international agreement, namely CFCs.

It is also important to understand how difficult it is for substances to meet the definition of toxicity laid out in section 64. Substances are required to be identified and assessed by Environment Canada and Health Canada, a process that itself usually takes several years. The departments' assessments are subject to extensive external review and may be challenged before boards of review. Decisions to add substances to schedule 1 of CEPA are ultimately made by cabinet and not by individual ministers.

It is also important to recall that the addition of substances to schedule 1 of CEPA does not mean that the federal government will actually regulate their use, production, release or disposal. Rather the addition of substances to schedule 1 merely provides the basis for federal action. It does not in and of itself mean the use, production and release of a substance has been restricted or controlled. This in fact has been identified as a major weakness in CEPA's structure.

My colleague, Dr. Bramley, is going to speak directly to the issue of the status of greenhouse gases as substances on schedule 1 of CEPA.

Mr. Matthew Bramley (Director, Climate Change, Pembina Institute):

Thank you.

I'd like to make clear, at the beginning, that there is very clear and abundant evidence, underpinned by a strong scientific consensus, that greenhouse gases meet all three criteria for toxic substances as defined by CEPA. The professional climate science community, and that is to say, the people that publish their findings in peer reviewed journals, is virtually unanimous that greenhouse gases, from human activities, are now a dominant cause of the very rapid, global warming observed in the past half century, and that these emissions will cause far greater warming over the course of this century unless dramatic reductions are achieved in emissions.

Since 1988, governments have mandated the intergovernmental panel on climate change--the IPCC--to review and assess the wealth of scientific research on the subject. The IPCC's conclusions have been endorsed by all the leading national science academies.

Paragraph 64(a) of CEPA establishes a criterion of immediate or long-term, harmful effect on the environment, or its biodiversity. Specifically on the point of biodiversity, it's widely understood that the climate change that is underway is so rapid that many species simply won't be able to adapt or move in time to survive. A paper was published in the journal *Nature*, in 2004, that projected between 15% and 37% of land-based species would be

committed to extinction by the year 2050 under mid-range warming scenarios.

Paragraph 64(b) of the Act establishes the criterion of danger to the environment on which life depends. On this point, it's projected that by the 2080's, with only two degrees Celsius of global warming above pre-industrial levels, tens of millions of additional people world-wide would be at risk from coastal flooding and from hunger; hundreds of millions of additional people would be at risk from malaria; and 3 billion additional people would be at risk from water shortage.

Paragraph 64(c) of the Act establishes the criterion of danger in Canada to human life or health. On this point, it's expected that rapid warming will harm life and health in Canada in a number of ways. I would mention heat stress affecting, particularly, the young, frail, and elderly, during heat waves--we saw an example of this in southern Europe a couple of years ago; warming induced increases in the frequency of smog events and the spread of vector-borne disease. In summary, it's very clear, from many years of accumulation of scientific study, that greenhouse gases do meet all three criteria for toxic substances as defined by CEPA.

Mr. Mark Winfield: To conclude, it's clear, in our view, that greenhouse gases meet the definition of toxic substances provided in Section 64 of CEPA 1999. Indeed, in our view, no serious challenge has been mounted to that basic conclusion. The presence of greenhouse gases, criteria air pollutants, and other priority substances on the list of toxic substances, lays the groundwork for action for the federal government under the existing provisions of the act.

In our view, opening the definition of toxic in Section 64 or relabeling substances that meet the definition of toxicity, runs the risk of undermining the constitutional basis of parts 5 and 6 of CEPA, as established through the Supreme Court of Canada's xxx and Hydro-Quebec decisions. Although some modifications to CEPA to strengthen the federal government's ability to act in international air pollutants would be useful, such modifications are not essential for early regulatory action on these substances.

Thank you.