

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

**REVIEW OF THE CANADIAN ENVIRONMENTAL PROTECTION ACT (1999)**

**(September 21st, 2006)**

**Mr. Hugh Benevides (Counsel, Canadian Environmental Law Association,  
PollutionWatch**

**Ms. Fe de Leon (Researcher, Canadian Environmental Law Association,  
PollutionWatch**

**Mr. Aaron Freeman (PollutionWatch)**

**Mr. Hugh Benevides (Counsel, Canadian Environmental Law Association,  
PollutionWatch):** Thank you, Mr. Chair, for having us.

Members know that PollutionWatch is a joint project of my organization, the Canadian Environmental Law Association and Environmental Defence and you have before you our various roles within those organizations. I will say only that as our individual organizations we've been heavily involved in the process of the categorization of the domestic substances list since 1999 when the process began and environmental groups were instrumental in achieving the degree of participation that did result in that process right from the beginning.

Needless to say, we think the results and what to do with them are extremely important and we will expand on that this morning, so we'll begin then. And I should say that there are a number of premises that Mr. Graham and Mr. Lloyd begin with that I would really like the chance to refute as strongly as possible, but I don't have the time to do that now, so I look forward to the chance to do that as you ask your questions and we have a chance to respond to them.

The rest of our presentation is Fe de Leon, who will discuss her experiences with the categorization exercise and Aaron Freeman will address the matter of the definition of toxic. I should say that I understand two representatives of the Pembina Institute for Appropriate Development, as well as Professor Linda Collins of the University of Ottawa faculty of law are coming to address the toxic issue next Tuesday as well. So I don't want to steal their fire.

So on the topic of the DSL, Fe de Leon, who is a researcher at CELA.

**Ms. Fe de Leon (Researcher, Canadian Environmental Law Association, PollutionWatch):**

Thank you.

Good morning, everyone. Thank you for allowing me to appear before the committee to share with you my experiences around the DSL categorization process.

As my colleague noted, the process for categorization began back in 1999. The principal objective of section 73 of CEPA was to assist the government in identifying substances that had been in use in Canada for several decades, and needing further attention.

The government recognized that in the last CEPA review process, the Canadian approach to assessment and management of substances was no longer efficient and required a lot of time to take action on hazardous substances.

There was very little toxicity information available on thousands of the chemicals and uses. Studies were beginning to show that some substances persisted in the environment for a period of time and/or bioaccumulate and build up in the environment.

There are also many chemicals that were linked to severe health effects, including cancer, reproductive, and developmental disorders, and respiratory problems that even disrupt normal hormonal functions. Biomonitoring data that we've seen in the last few months and years, reinforce the need to focus on these chemicals more stringently.

Children's health has become a focus in terms of exposure around toxic chemicals. We see chemicals being found in the Great Lakes and the Arctic, places where industrial activities would normally not be seen.

Taking actions on substances has been slow over the past two decades and the Canadian government has not been able to produce a report that shows how effective or how much progress has been made around strategies to deal with toxins or what has been achieved. Government efforts to assess chemicals have not been keeping pace with the urgency and need to take immediate action on the most troublesome chemicals.

The chemicals that decision-makers and stakeholders were most worried about are the 23,000 chemicals that are listed on the Canadian Domestic Substances List.

These chemicals have been in the market for decades but have been the ones reported between 1984 and 1986. They have a wide range of uses, including industrial applications, research and development, use as intermediates or catalysts for formation of other chemicals, and have been found in large numbers of everyday products and articles.

Under CEPA, substances on the DSL are assessed differently than those chemicals that entered the market after 1986.

The categorization process aimed to identify the chemicals on the DSL requiring further government attention. When listed on the DSL, very little information, as I noted, included toxicity data and health effects on most of these chemicals.

The categorization process sets out very specific sets of criteria. Chemicals that are persistent, bioaccumulative, and inherently toxic, or those chemicals that pose the greatest exposure to human health and to non-human organisms are the focus of categorization.

Based on these very narrow criteria during the seven-year process to review those chemicals, government did not focus on generating new toxicity data to make their decisions on categorization.

Despite some of these limitations, the categorization process has identified approximately 4,000 chemicals that require government attention. This is a critical first step. These numbers are very significant.

Because these substances are now known to have specific hazardous properties attached to them and they continue to be in use in Canadian commerce, the challenge for the Canadian government will be in the way it responds to the results of categorization.

The initial government plans on the 4,000 will have significant impact on how chemicals are assessed and managed in Canada for decades to come. We would almost say that the categorization process places Canada at a crossroads in this approach.

CEPA lays out some very specific steps to follow categorization. Screening assessments will be required for many of the substances, however, there are many questions related to how these assessments are undertaken and the timeframes in which they are required to be completed.

CEPA also has a number of regulatory tools necessary to effectively ensure that the environment and Canadians are protected, including the need to prohibit and eliminate some of these chemicals.

My colleague, Hugh Benevides, will spend a few minutes outlining our vision for the government on the categorization results.

**Mr. Hugh Benevides:** Thank you.

So, as Fe and the other witnesses have noted, the achievement of the categorization exercise is no insignificant accomplishment, and one that is unique to Canada. However, as Fe has intimated, it's really just the beginning of the really important steps that have to follow: the processes of further screening those substances, and then ultimately taking regulatory action on them.

I have a very short list on your outline of what we would like to see done with those. I won't go into great detail on them, because they are outlined in a number of places. One,

in a submission of Pollution Watch to your committee that we submitted last June, and also in two letters, actually three: one in June to the two CEPA ministers and to the deputy ministers, and another letter to the same two ministers that we sent on Friday, and that I sent to this committee earlier this week. I'm not sure whether it has been translated and so I'm not sure whether you have it before you today. But the gist of that, apart from the substance, of precisely what action we would like to see taken on the various substances, is that it's essential that the content of the lists and the results of categorization be given to the public.

We would urge, therefore, that the committee write to the ministers and ask when that will happen, and/or ask for the ministers to appear before you to answer that question. As Fe said, this list is 20 years old. There is not a lot of new data on those substances, and it's time for action to be taken on them.

There are other more specific recommendations which you'll see in that letter when you receive it, if you haven't already, and in our submission as well.

**Mr. Hugh Benevides:**

Those points are consistent with our submission, but in particular speedier action, regulatory action on those substances that are the most serious, those that have the most serious criteria, and mandatory time lines for that action to be taken. That's really to us the only way that we can continue the momentum that was created by the achievement of this exercise.

So, in view of the time, I'll turn over the conclusion of our presentation to Aaron Freeman.

**Mr. Aaron Freeman (PollutionWatch):**

Thank you very much.

I'd like to briefly address the issue of the term "toxic" and some of the concerns that have been raised by some of the other witnesses through the CEPA hearings. I think it's important to first understand the meaning of the word "toxic", both in terms of CEPA and in other contexts. The term is not, as some have suggested, limited to being acutely poisonous to humans. This limited definition is inconsistent with both the scientific and the publicly understood definitions of the term. The industry's concern would appear to assume that toxic relates only to acute instances of human health. Whereas, as substance can also be toxic to the environment, as the case with some of the examples that, in fact, industry has raised. It may also relate to human health via the environment, as would be the case, say, for a substance that is persistent and biocumulative, for example.

The industry's position seems to overlook that toxicity relates to dose. The term "toxic" in CEPA refers to a range of substances that, even under the industry's definition of harmful or poisonous, are indeed, toxic in particular contexts. For these reasons, the term

and the application of the term “toxic” is quite appropriate for the regulatory approach of CEPA.

Secondly, there are sound regulatory policy reasons for maintaining the toxic designation. There are substances currently managed by CEPA that have been regulated for more than three decades, for example, PCB's. These substances, as well as more recently regulated chemicals--PERC, TCE, vinyl chloride, and many others--are included in the list of toxic substances as well as being bound up in the Government of Canada Toxic Substances Management Policy, which remains the core policy for regulating dangerous substances.

Internationally, “toxic” is the term used to describe substances regulated by agreements that Canada is a party to, including the Stockholm Convention on Persistent Organic Pollutants, the Rotterdam Convention on Hazardous Chemicals and Pesticides, as well as Agenda 21, agreed to at the Earth Summit in 1992. Calling toxic substances something else would lead to a discrepancy between CEPA and the surrounding administrative and regulatory regimes for managing these substances, both in Canada and internationally.

Finally, from the public's perspective, there's a shared understanding, even if subconscious, that a toxic substance is among the worst. There's a shared expectation that government will deal appropriately with these substances and removing or weakening the term may thereby reduce the impetus for proper regulation of harmful substances.

The other aspect that I wanted to explore a little bit with you is whether watering down the term “toxic” would endanger the constitutionality of CEPA. It's our position that it's well established law that CEPA has the necessary constitutional authority to regulate environmentally harmful substances. However, given the history of this, and other environmental law of statutes, it's virtually beyond doubt that if any legal opening is provided, constitutional litigation will ensue. I believe that such a challenge would fail, but it could easily entangle the federal government, and other parties, in long and expensive legal battles, syphoning off badly needed resources that could better be used to administer the act.

If the term “toxic” is watered down, I believe the risk of such litigation is significant. In this regard, I would encourage the committee to consider the Hydro Quebec case, which is the Supreme Court's most significant ruling in this area of law. This case determined that CEPA's regulatory provisions lie properly within the federal jurisdiction. Had the split court gone the other way, as lower courts had held, the regulatory provisions that form the basis of CEPA's effectiveness would likely have been struck down. My written submission goes into greater detail about this case, but it is absolutely clear that “toxic” was a feature of the reasons why the federal government was deemed to be justified in using the criminal law power to regulate under CEPA. The judge draws on domestic and international precedent concerning substances and management regimes for toxic substances and it's clear that the judgment places great weight on the fact that the law deals with substances that are deemed toxic. In common parlance, it was held that

because this law deals with things that are toxic--not just any old substance, but toxic substances--the law is legally sound, constitutionally.

The dissent in the judgment also focused on the term "toxic". Put simply, had the word toxic not been present CEPA to provide specificity this may have increased the ambit of the legislation, perhaps strengthening the minority's view that the law was unconstitutional.

Returning to another point that was made earlier, about the term toxic containing both a human health and an environmental component. Justice La Forest in Hydro Quebec notes the importance of reducing pollution, not only for the purposes of human health but also for environmental protection.

The ruling also addresses the dose issue; noting that the quantity, concentration or condition can render a substance toxic.

Hydro Quebec settled the issue of the constitutionality of this section CEPA. It's worth asking whether we should be providing an opening for another challenge that could easily bog down implementation of the legislation for years to come.

For all of these reasons I would submit to the committee that it is both unnecessary and dangerous to remove or weaken the term toxic in CEPA. Industry concerns should best be met by communicating effectively with the public, the nature and usage of the substances placed on the market and through the fair and efficient administration of CEPA.

Thank you very much.