

**ENGOs= SUBMISSION FOR INC3 TOWARDS  
A GLOBAL TREATY ON PERSISTENT ORGANIC POLLUTANTS**

Submitted to  
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## **1.0 INTRODUCTION**

The members of the Canadian Environmental Network (CEN) Toxics Caucus have prepared position papers for the two previous Intergovernmental Negotiating Committee (INC) meetings. These two papers provided detailed discussion on issues of importance for Canadian delegation towards its negotiation of an effective global treaty on persistent organic pollutants (POPs). The CEN Toxics Caucus would like to emphasize that the issues outlined in previous position papers remain relevant to INC3.

In addition, Toxics Caucus members have prepared additional correspondence to outline issues specific to INC3. This paper aims to demonstrate that recent discussions on toxic substances may have relevance to the INC3 discussions and also elaborate on several of the issues identified in our letters dated May 17, 1999 and July 5, 1999 and provide comments on the issues raised in the multi-stakeholder INC3 discussion paper prepared for the August 9, 1999 meeting in Montreal, Quebec.

### **1.1 Summary of Issues from INC2**

As the Canadian delegation prepares for INC3 in Geneva, Switzerland, members of the Toxics Caucus would like to ensure that the issues identified from previous position papers are carefully considered. These points include:

- \* The need for the Canadian government to provide a transparent process for timely and effective input and feedback from various stakeholders to the Canadian delegation on issues relating to POPs;
- \* The need for the Canadian government to press for a global treaty requiring the elimination of the twelve targeted POPs;
- \* The development and implementation by the Canadian government of action plans to eliminate in Canada the twelve POPs and other POPs not on the initial United Nations Environment Programme (UNEP) list;
- \* The development of a solid science based set of criteria for proposed additions to the initial list of twelve POPs;
- \* The need to take a pollution prevention approach by addressing the use, release, generation and production of substances;
- \* The mandatory reporting of all listed POPs through improvement of pollution release and transfer registries, and in the Canadian context, improvements to the National Pollutants Release Inventory (NPRI) to make it POPs-relevant;
- \* The need for significant support from northern countries for non-POPs generating technology transfer; and
- \* The need for further alternatives research and implementation for key POPs of concern in southern countries (e.g., DDT).

At this point, the Toxics Caucus would like to emphasize the relevance of a global treaty on POPs which focus on a goal for the elimination of POPs, in particular the twelve POPs identified on the initial list for action. Over the past months, the efforts of the Canadian government to provide the Canadian environmental non-governmental

organizations (ENGOS) opportunities, through conference calls and scheduled meetings, to contribute their views towards the development of the Canadian negotiating position has been appreciated.

## **2.0 ISSUES FOR INTERGOVERNMENTAL NEGOTIATING COMMITTEE (INC) 3**

### **2.1 Domestic Activities on Toxic Substances**

As noted in our submission towards INC2, member organizations of the Toxics Caucus outlined its concern on the effectiveness of Canada's domestic programs to address persistent toxic substances. Specific concerns were raised regarding Bill C-32: the *Canadian Environmental Protection Act* (CEPA) and the Toxic Substances Management Policy (TSMP), both of which may have direct implications for Canadian delegates to negotiate for a strong global treaty during INC3 and Canada's overall ability to meet its international obligations on eliminating POPs.

In the letter dated May 17, 1999, member organizations of the Toxics Caucus noted that the federal government's authority to address persistent toxic substances under Bill C-32 is under considerable pressure. In the recent weeks, media coverage on Bill C-32 have highlighted the controversy surrounding Bill C-32, particularly in key areas such as virtual elimination of persistent toxic substances and precautionary principle, two concepts that are integral to the negotiations for a global treaty on POPs. Bill C-32, in its current form, cannot eliminate the most hazardous substances because of the definition of virtual elimination and its implementation provisions. Substances must be detected at measurable levels before any action can be initiated. Such a framework will impede implementation plans for action on some of the most hazardous substances. Moreover, all implementation measures are only directed to the interim targets; there is no regulating requirement to meet the ultimate goal of virtual elimination. The goal of virtual elimination was undermined by amendments to Bill C-32 at Report Stage that may make the goal impossible to achieve.<sup>1</sup> While it is recognized that the draft text to the global treaty has yet to provide definitions for these key concepts, it is critical that the definitions promoted by the Canadian delegation focus on the elimination of POPs.

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<sup>1</sup> Paul Muldoon (August 26, 1999). *Presentation to the Senate Standing Committee on Environment and Energy Regarding Bill C-32: The Canadian Environmental Protection Act*, for Canadian Environmental Law Association, CELA Brief No. 374.

In addition, Bill C-32 outlines a definition for the precautionary principle that is based on cost-effectiveness. In our view, precautionary principle as defined in Bill C-32 implies that industries and other users of these hazardous substances do not have to act unless it can be demonstrated that the protection of human health is less expensive than continuing the activity. Precautionary principle ensures that lack of information or data should not impede action that protects the natural ecosystem or human health. Essentially, the definition in Bill C-32 is complex and burdens the process before action is taken on a substance. The Auditor General's report highlights that the cost of conducting studies on toxic substances is in the area of \$100 million.<sup>2</sup> The precautionary principle should be an integral component in the legally binding instrument for eliminating POPs. For example, the Criteria Experts Group (CEG) incorporates the precautionary principle in the process to screen potential substances to be added onto the list for action. In Annex II, paragraph 30, the term precautionary principle is used but the draft text for the global treaty has yet to proposed a definition for precautionary principle. The precautionary principle should be included in the Objective section as well as the Preamble section of a global treaty.

During a conference call between the Canadian delegates to the CEG and the Toxics Caucus, it was indicated that one definition under consideration for precautionary principle is the one provided in the Rio Declaration. The Canadian delegates should promote a definition for precautionary principle that does not include reference to cost-effectiveness.

## **2.2 Action with Respect to Designated Pollutants**

The *Environmental Harmonization Accord* (Accord) was signed in January 1998 despite the concerns expressed by the environmental and health communities across Canada regarding the Accord. The aim of the Accord was to devolve powers to protect the environment from the federal level to the provincial level of governments. The Canadian Environmental Law Association filed suit against the government to review the Accord. The decision was received in April 1999. A review will be undertaken of the implications of the court decision.

Under the Accord, a process to develop Canada-wide standards for specific substances (i.e., mercury, benzene, dioxins and furans) was developed. Members of the Toxics Caucus are active in the these consultations. It is unclear at this time, how these standards will impact on Canada's ability to meet its international obligations. However, the Canada-wide Standard Setting process on dioxins and furans includes a review of an inventory on dioxin sources that may be of interest to the broader POPs process.

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<sup>2</sup> Commissioner of the Environment and Sustainable Development (1999). *Managing Toxic Substances*, Chapter 3 *Understanding the Risks from Toxic Substances: Cracks in the Foundation of the Federal House*; Chapter 4 *Managing the Risks of Toxic Substances: Obstacles to Progress*.

### **2.3 The Need to Establish and Maintain an Inventory on Persistent Organic Pollutants**

As noted in the ENGOs- January 1999 submission for INC2, we highlighted the need to establish an inventory of POPs. The NPRI is one program that could accommodate such information. Currently, the threshold for reporting under the NPRI is so high that many substances such as POPs are not captured. Action should be taken to review the threshold for reporting under NPRI that would allow governments and communities to monitor progress on eliminating and reducing POPs and enhance information sharing capacity between countries. Inventories for substances is one source of information that can benefit other countries on the issue of POPs. The development of inventories has received support from other countries including Canada. Such information should be readily accessible to all Parties, in particular, to developing countries.

Furthermore, it is critical that information transfer occurs in a systematic manner. The Canadian position outlines a commitment to facilitate information transfer. There is general support for proposing that a report by the Secretariat be prepared to investigate options to facilitate information exchange.

### **2.4 Need to Incorporate Elimination as an Overriding Goal in the Treaty**

The preliminary draft text of AAn International Legally Binding Instrument for Implementing International Action on Certain POPS<sup>3</sup> does not currently include definitions for key concepts such as virtual elimination. The goal to eliminate the use and generation of the most hazardous substances that are toxic, persist and bioaccumulate in the environment is important because it ensures the protection of human and wildlife populations and their environment.

There has been considerable debate on the definition of Avirtual elimination.<sup>3</sup> The definition provided by the International Joint Commission (IJC) in its Sixth Biennial Report on Water Quality is an appropriate and acceptable definition, which should be considered by the INC. Further, the January 1999 ENGO report for INC2 outlines comprehensively the weaknesses of the Toxic Substances Management Policy (TSMP) and the definition provided for virtual elimination. In the review of the Bill C-32: the CEPA, ENGOs disagreed with the definitions proposed for elimination for a number of reasons which have been documented in the Canadian Environmental Law Association-s briefs to the House of Commons Standing Committee on Environment and Sustainable Development<sup>3</sup> and more recently to the Senate Committee on

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<sup>3</sup> Paul Muldoon and Mark Winfield (October 1998). *Submission on Bill C-32 the Canadian Environmental Protection Act*, CELA Brief No. 350, ISBN #1-894158-01-6, CIELAP Brief No. 98/4.

Environment and Energy.<sup>4</sup> A copy of the brief to the Senate Committee has been attached to this report as Appendix 1. The Toxics Caucus will review proposed definition for elimination in future INC documents, however, as previously noted, the definition should reflect a goal of elimination of POPs. It is important that societies worldwide send signals to industry that failing to eliminate POPs pose a threat to our health and ecosystem.

Elimination is achievable for intentionally produced substances such as pesticides and other industrial substances for which there are less toxic or benign alternatives. For by-products, changes to processes and products of industrial processes should be encouraged, if not mandated by a POPs global treaty. For example, dioxins and furans have proven to have serious health effects at very low levels of exposure.

At INC1, the Canadian government made a commitment to eliminate the twelve POPs. In the Canadian government's INC3 discussion document, Canada reiterates its commitment to the development of national implementation plans for addressing POPs. The Toxics Caucus supports the development of national implementation plans, however, the Canadian delegation should make it a priority to ensure that action plans for the twelve POPs are developed immediately to demonstrate its leadership in this area. In no way should action plans be considered to be the key mechanism to address individual substances. Each action plan should include a goal of elimination along with appropriate timelines.

Further, the INC3 discussion document outlines Canada's objective for global treaty is to reduce and/or eliminate foreign sources of POPs that are impacting the health and environment of Canadians, particularly in Canada's Arctic.<sup>6</sup> While Canada is a net-recipient of POPs, in our view, this objective is too narrow and should be revised. The overarching Canadian negotiating objective should include reference to all sources of POPs, both foreign and domestic, as Canadian industries continue to use, generation and release POPs in significant quantities.

## **2.5 Obligations on Substance Control**

Since the onset of the INC process, member organizations of the Toxics Caucus have been promoting the need for an elimination strategy for POPs. It is our view, that these POPs and others to be selected for action should be eliminated from generation, use, release, and disposal. Article D of the draft global treaty outlines a number of control regimes which do not entirely promote an elimination framework, this paper will restrict its comments to the proposal. Briefly, the control regimes under Article D should at a minimum be interim phases towards elimination of POPs. By promoting a regime that

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<sup>4</sup>Paul Muldoon (August 26, 1999). *Presentation to the Senate Standing Committee on Environment and Energy Regarding Bill C-32: The Canadian Environmental Protection Act*, CELA Brief No. 374.

focus on elimination, safe alternatives could be highlighted.

Under Article D, Canada should not promote the proposal to support an environmentally sound disposal<sup>6</sup> of POPs wastes as current documents do not provide a list of criteria to determine what is considered an environmentally sound disposal<sup>6</sup> method. It is clear that one option for addressing POPs wastes includes a complete destruction of POPs, however, the Article allows for consideration of other disposal technologies such as incineration, which can contribute to the production of additional POPs such as dioxins and furans, which may have adverse impact the environment and health of the local community.

### ***2.6 Developing Criteria for Addition of Substances to Persistent Organic Pollutants List***

Canada's action on persistent toxic substances at the domestic level has resulted in very little progress to eliminate these substances from use, production, release and disposal. ENGOs documented their concerns with regards to the TSMP's focus on reduction versus elimination of persistent toxic substances when the policy was released in June 1995. It is important that the Canadian delegation not be constrained by the criteria outlined by the TSMP. Emerging scientific evidence and proper operationalization of the precautionary principle should be critical factors in determining priority substances for addition to the list of twelve POPs targeted for initial action. Since the adoption of the TSMP by the federal government, evidence has mounted on the damage to ecosystem and human health from exposure to very low levels of a wide range of substances including endocrine disruptors.

It should be noted that a technical reports from the World Wildlife Fund (WWF) called "Persistent Organic Pollutants: Criteria and Procedures for Adding New Substances to the Global POPs Treaty" to the Criteria Expert Group on this issue provide comprehensive analysis of the issues under discussion by the CEG including a review of the proposed numerical values for each of the proposed scientific criteria: persistence, bioconcentration or bioaccumulation factors, evidence of long range transport and toxicity. In general, we support the recommendations put forth in this document, however we would like to emphasize several issues that were raised during a recent discussion with Canadian representatives to the CEG.

The main points of discussion brought forward by ENGO representatives include:  
\* the need to include alternative options rather than solely scientific criteria to determine how substances are added to the list of POPs. It is understood that the mandate of CEG is to develop a process for selection of substances that is based on scientific parameters. However, the discussions of the CEG includes consideration of non scientific parameters such as socioeconomic factors. It is unclear as to the role of socioeconomic factors when determining POPs substances. Further, we could not support a process for identifying POPs if consideration of socioeconomic factor is an

integral component for determination. As indicated in the WWF report, if socioeconomic factors must be included in the CEG discussion, socioeconomic factors as well as other moral and political factors must be reviewed prior to action on these POPs. We appreciate and support the Canadian position on this issue.

\* as noted earlier, there is a need to provide definitions for key concepts such as the precautionary principle. Precautionary principle should not include use of Acost effectiveness@ but should be operational within the text of the treaty. One way to operationalize the precautionary principle in determining the priority substances is through the use of the weight-of-evidence approach. The IJC has contributed relevant information to this issue. For example, IJC-s Sixth Biennial Report includes a section on the issue of weight-of-evidence.

\* the need to define Atoxicity,@ a focus of many debates. Until a definition for toxicity is developed and an approach for determining toxicity has to been proposed, the Toxics Caucus cannot not provide specific comments beyond those set above.

\* the need to provide a role for ENGOs in the selection process. Currently, it is unclear whether nomination of substances to the list for action is restricted to Parties of the agreement. The knowledge of community organizations - environmental and health organizations, on local issues relating to POPs may be beneficial to the selection process. In Canada, ENGO involvement in nominating substances for consideration has provided constructive insight to the process. We urge the Canadian government to ensure ENGOs have a meaningful role in this process.

### ***2.7 Assessment of the Effectiveness of Measures Taken under the POPs Convention***

The Toxics Caucus supports the Canadian position outlined in the Canadian government-s INC3 discussion document to propose for the development of a review process that will measure the effectiveness of the actions undertaken through the global treaty. Such a review process is necessary to ensure accountability by Parties to the agreement. One of the major issues that will be a matter of interest is with respect to the enforcement mechanism of the treaty. This is an issue that ENGOs are now conducting further research. There are programs currently in place in a number of countries that will assist in the evaluation process. For example, inventories of substances, such as the NPRI in Canada, can be an critical tool in assessing the progress for reduction of POPs, if amendments are made to include POPs. The Toxics Caucus will review proposals for evaluating the effectiveness of the measures of the treaty.

### ***2.8 Trade Issues***

The Toxics Caucus, in previous ENGO position papers, have not outlined its concerns

regarding trade issues. The Toxics Caucus recognizes that it is imperative that a global treaty on POPs include a clause on dispute resolution. A dispute resolution should outline a process by which Parties to the treaty be able to submit complaints on components of the treaty.

There is concern that the current text for an internationally legally binding instrument for implementing international action on certain POPs, in particular, Article N bis which focuses on settlement disputes, may conflict with existing trade agreements. It is important to note that the initial list of POPs identified for action be accepted globally (for instance by the World Health Organization) as evidence of environmental harm. Member organizations of the Toxics Caucus will investigate the implication of this Article, with particular focus on its relationship with other agreements.

### **3.0 CONCLUSION**

The ENGO community has identified a number of significant issues that will be relevant to INC3 in Geneva, Switzerland, including the need to negotiate a global treaty that reflects a goal of elimination of POPs. As the negotiation process enters a critical stage where draft text for many sections of the treaty will be under negotiations, we urge the Canadian delegations to INC3 and INC4 to give careful consideration to the issues discussed in this report to ensure that the global treaty on POPs protects the health of Canadians, wildlife populations and their environment from exposure to POPs.

## APPENDIX 1

**Presentation to the Senate Standing Committee on Environment and Energy  
Regarding Bill C-32: The *Canadian Environmental Protection Act***

**Prepared by**

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Brief No. 374**

**August 26, 1999**

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## 1. Introduction

The Canadian Environmental Law Association (CELA) is a public interest group, founded in 1970, with the objective to use and improve laws to protect the environment and conserve natural resources. Funded as a community legal aid clinic specializing in environmental law, CELA represents individuals and citizens= groups before trial and appellate courts and administrative tribunals on a wide variety of environmental issues. In addition to environmental litigation, CELA undertakes public education, community organization and law reform activities.

CELA has been involved in the *Canadian Environmental Protection Act* (CEPA) review process since the first consultations hosted by Environment Canada in October of 1993. Throughout the review process, CELA has been the chair of the Toxics Caucus of the Canadian Environmental Network (CEN). The Caucus includes a few dozen public interest organizations from across Canada interested in CEPA and other initiatives that focus on toxic substances.

In preparation for the initial public hearings on the CEPA by the House of Commons= Standing Committee on Environment and Sustainable Development, the Caucus sponsored in-depth research papers on various aspects of CEPA.<sup>5</sup> In addition, the Caucus developed a summary submission entitled, *The Canadian Environmental Protection Act: An Agenda for Reform*. This submission was endorsed by over 50 organizations, representing a variety of sectors from across Canada.

Subsequent to these hearings, the Standing Committee released its report on CEPA in June of 1995, entitled, *It's About Our Health! Towards Pollution Prevention*. While many members of the Toxic Caucus applauded this report, the government response<sup>6</sup> to it was disappointing, although not surprising due to the intense lobbying by agriculture, industry and natural resource interests. The government response formed the basis for the drafting of Bill C-74, which was introduced for First Reading in December of 1996. This bill died on the order due to the 1997 federal election. The bill was then introduced in 1997 as Bill C-32. A number of important changes were made that made Bill C-32 in fact weaker than Bill C-74. Bill C-32 then proceeded to Second Reading and was reviewed by the House of Commons= Standing Committee.

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<sup>5</sup> These research papers are available to the Senate Committee upon request.

<sup>6</sup> Environment Canada, *Environmental Protection Legislation Designed for the Future - A Renewed CEPA - A Proposal* (1995).

CELA appeared before the House of Commons= Standing Committee on Environment and Sustainable Development with respect to CEPA and related matters. In October of 1998, it presented a 288-page submission on Bill C-32 to the Standing Committee.<sup>7</sup> This submission provided a detailed section-by-section analysis of Bill C-32 together with some 172 recommendations to amend Bill C-32.

The present submission does not propose to repeat all of the recommendations outlined in the Standing Committee submission, and in particular does not propose to repeat those recommendations that were not adopted by the Standing Committee. The Standing Committee's submission is available to this Committee, and for the most part, is still relevant. CELA stands behind those recommendations and urges this Committee to consider those recommendations in detail.

It should be made clear that CELA did not support the passage of Bill C-32 as it was before the Standing Committee. In order to gain CELA's support, significant changes were required in several key areas. CELA has been consistent in its message that the enactment of the bill without significant changes would be a backwards step in the protection of the health and environment of Canadians.

The Standing Committee on Environment and Sustainable Development considered hundreds of amendments. It is of interest to note that many of the controversial amendments were proposed by Liberal members of the Standing Committee. In fact, some of those amendments were accepted by Standing Committee while the government itself introduced a number of important changes.

At the end of the Committee's deliberations and amendments, Bill C-32 still represented a weak and problematic bill.<sup>8</sup> Nevertheless, CELA did consider the bill to be supportable, despite its very serious reservations. However, it was a surprise that the Standing Committee's version of the bill was not accepted at report stage in the House of Commons. At that time, then Minister Christine Stewart proposed a number of important changes to the bill that, in effect, reversed some of the amendments put forth by Liberal members and the government itself. Many of these changes (approximately 6 of 11) were precisely the changes lobbied for by industry. It is fair to state that the industry lobby that occurred between the end of the Standing Committee's deliberations and Report Stage was perhaps one of the most intense and concerted efforts seen in recent times.

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<sup>7</sup> Canadian Environmental Law Association and the Canadian Institute for Environmental Law and Policy, *Submission on Bill C-32 - the Canadian Environmental Protection Act* CELA Brief no. 350 and CIELAP Brief No. 98/4, October, 1998.

<sup>8</sup> House of Commons, Bill C-32, reprinted as amended by the Standing Committee on Environment and Sustainable Development as a Working Copy for the Use of the House Commons at Report Stage and as Reported to the House on April 15, 1999.

The changes to the bill at Report Stage were changes that had profound impact on the effectiveness of the bill. Not only was Bill C-32 an already weak bill, but the changes made a weak bill simply unacceptable. In its present form, CELA does not support the passage of Bill C-32.

As note above, it is not the intention of this submission to review every provision of the present bill. Instead, it proposes to review a number of the crucial provisions, most of which were provisions that were proposed or supported by the House of Common-s Standing Committee, but were changed by the Minister at Report Stage at the insistence of industry.

## **2. Concerns that Warrant Senate Amendments with Respect to Bill C-32**

### **2.1 Virtual Elimination**

#### **(a) Introduction**

One of the recurring themes in the CEPA review has been the goal of addressing the environmental and human health problems arising from the most dangerous substances, such as dioxins and furans. How to further this goal has been an issue in the CEPA review from its inception. Hence, in order to understand the significance of the provisions in the current version of Bill C-32, it is necessary to provide some background to the issue.

There are a number of substances that are persistent, bioaccumulative and toxic. A significant amount of scientific work has be undertaken with respect to the environmental effects of toxic substances, particularly in the Great Lakes region. Throughout the CEPA review, public interest groups and the Standing Committee on Environment and Sustainable Development agreed that there is no safe level for these types of substances. It is for this reason that one of most controversial issues in CEPA has been to determine what should be the ultimate goal with respect to these most dangerous substances.

Under the bill, there is, in effect, a special regime for the most dangerous substances. Simply stated, the proposed bill outlines the basic goal for these substances, as Avirtual elimination.<sup>@</sup> The bill then details the characteristics of those substances that should be on the Avirtual elimination<sup>@</sup> track and a process to have the Minister designate those substances that meet the criteria. Then there are provisions that provide guidance on how to implement or further the goal of virtual elimination.

#### **(b) Definition of Virtual Elimination**

Public interest groups have consistently taken the position that the only legitimate goal for the most dangerous substances is Aelimination.<sup>@</sup> In this context, CELA proposed a definition that sought to *eliminate the use, generation and release of substances* that meet certain criteria.

Until the Standing Committee's public hearings, Bill C-74 and then Bill C-32 included a definition of "virtual elimination" that was focussed on the control of pollutants, despite the fact that the term "virtual elimination" was used. As originally stated, the definition was simply unworkable, ineffective and inherently inconsistent. The basic problem was that rather than focusing on *eliminating the use and generation of substances*, the proposed definition focussed on how much of these substances industry could *release*. The definition prescribed that virtual elimination means that industry could release quantities prescribed by regulation (which is generally those quantities that are measurable) *and* that the amount released must have some adverse impact.

CELA, in its submission, vigorously opposed the definition of virtual elimination for the following reasons:<sup>9</sup>

- (1) **Fails to Respond to Ecological and Human Health Threat:** The proposed definition would not phase out the most dangerous substances known, but in fact, have the effect of allowing and legitimizing the use and generation of these dangerous substances.
- (2) **The Definition is Inconsistent with the Concept of Pollution Prevention:** When referring to "no measurable release," the focus is on "controlling" the amount of pollution rather than preventing or avoiding the use and generation of it in the first place. When using the "no measurable release" definition, the thrust of initiatives will then be to reduce emissions, not to move toward process change or other measures that avoid the use and generation of toxic substances. Hence, while a goal of CEPA is on pollution prevention,<sup>10</sup> the bill incorporates a pollution control approach to the most dangerous substances known. The approach is also inconsistent with federal policy that states the federal government's commitment to the pollution prevention approach.<sup>11</sup>
- (3) **The Definition is Inconsistent with the *Great Lakes Water Quality Agreement*:** The *Great Lakes Water Quality Agreement*, an agreement between U.S. and Canada, has the goal to "virtually eliminate" persistent toxic substances. It is clear that, as interpreted by the International Joint Commission, virtual elimination does not relate to "no detectable level." Instead, it means the complete elimination of these substances.

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<sup>9</sup> Supra, pp. 93-97.

<sup>10</sup> Pollution prevention is defined as a measure that avoids or prevents the use and generation of toxic substances. Its strength is that it emphasizes changes in the industrial process through such techniques as raw product substitution and process reformulation among other such techniques

<sup>11</sup> Government of Canada, *Pollution Prevention: A Federal Strategy for Action* (1995).

Despite the problems with the definition, both the government and industry refused to amend the definition stating that, in effect, the definition was a compromise deal.

In 1998, after two years of intense criticism by public interest groups, the government reviewed its position on the definition during the Standing Committee hearings and proposed a modified definition. This definition has many of the same problems noted above, however, it is much clearer as to intent of virtual elimination. The definition reads:

- s. 65(1) In this Part, virtual elimination means, in respect of a toxic substance released into the environment as a result of human activity, the ultimate reduction of the quantity or concentration of the substance in the release below the level of quantification specified by the Ministers in the List referred to in subsection (2).

As noted, this definition has the same problems as the previous definitions.

## RECOMMENDATION NO. 1

**CELA still recommends that a new definition be employed, namely:**

**s. 65(1) In this Part, virtual elimination means the cessation of the intentional production, use, release, export, distribution or import of a substance or classes of substances.**

**(2) Where a substance is produced as a by-product of the production or use of another substance, virtual elimination means changes to processes or practices or substitution of material or products to avoid the creation of substance in question.**

### (c) Implementing Virtual Elimination

The provisions to implement the goal of virtual elimination have become the most controversial aspect of Bill C-32. To understand the significance of the provisions, it is important to review how the provisions worked as envisioned by the Standing Committee on Environment and Sustainable Development.

#### *Bill C-32 Provisions as Recommended by Standing Committee*

While section 65(1) provides the ultimate goal for the most dangerous substances, a number of provisions in the Act provide the means to implement this goal. These can be briefly summarized as follows:

- ss. 77(2)(c)/  
ss. 77(4) *Identifying Substances for Virtual Elimination:* These sections provide that where the Ministers have conducted a screening assessment under section 20, a review of a decision of another jurisdiction to act with respect to a substance, or an assessment of substance on the Priority Substance List, the Ministers may, among other options, recommend that the substance be subject to the goal of virtual elimination (so long as they otherwise meet the criteria outlined in section 77(4)).
- s. 79(1)/  
s. 79(2)(a) *Required Plans for Virtual Elimination:* This section requires that where a substance has been designated for virtual elimination, the Minister is given the authority to require a plan to achieve the virtual elimination goal.
- s. 91(2) *Timeframes for Virtual Elimination:* This section requires the incorporation of timeframes when regulations or instruments are proposed for virtual elimination.
- s. 91(4) *Additional Measures:* This section requires an outline of any additional measures required to meet the virtual elimination goal.
- s. 92.1 *Regulations for Implementation Made by Ministers:* This section gives the Minister the authority to make regulations to implement virtual elimination.

All of these sections are geared to measures that seek to implement the virtual elimination goal. In order to facilitate the implementation of the goal, section 65(3) gives authority to the Minister to set interim goals pending the achievement of the ultimate goal of virtual elimination. The section, as drafted in the version emanating from the Standing Committee report reads:

- s. 65(3) When taking steps to achieve the virtual elimination of a substance, the Ministers shall prescribe the quantity or concentration of the substance that may be released into the environment either alone or in combination with any other substance from any source or type of source, and in doing so, shall take into account any factor or information

provided for in section 91, including, but not limited to, environmental or health risks and any other relevant social, economic or technical matters.

### *Bill C-32 Provisions at Report Stage*

As the Standing Committee approved the above provisions, industry provided one of the most intense lobbies to weaken the Bill C-32. The proposals put forth by industry become well known.

One of the key issues targeted by industry was to weaken the virtual elimination provisions. Essentially, the same proposals on virtual elimination put forth by industry were accepted by the government and incorporated into the bill at Report Stage.

The general thrust of industry's proposals, subsequently adopted by the government, was fairly simple. Although the goal of virtual elimination would remain (in section 65(1)), *all of the implementing provisions would not longer be oriented to achieving the ultimate goal of virtual elimination; instead, all of the implementing mechanisms would be oriented to the **interim** goals.*

To accomplish these changes, sections 65, 77(2)(c), 77(4)(c), 79(1), 79(2)(a), 92(2), 92(4), and other sections were amended to ensure that measures oriented to reach the ultimate goal of virtual elimination in section 65(1) would only be geared to meeting interim targets in section 65(3).

### *Implications of Changes to Virtual Elimination Provisions at Report Stage*

The implications of the changes made at Report Stage are profound. For even the most dangerous substances known, the ultimate goal is no longer virtual elimination. Instead, the ultimate goal are those interim targets. As such, section 65(1) which defines virtual elimination is effectively and essentially an irrelevant section since all actions are directed to section 65(3)(interim targets) and not section 65(1) (virtual elimination).

Moreover, the proposed changes send the wrong message to industry. The intent of the virtual elimination concept is to identify and address these most dangerous substances. The design of these provisions is to give an unequivocal signal to industry that these substances are targeted for elimination in the long term, although social, economic and technological constraints may require interim release limits. Under the present wording, industry will invest in technologies to meet the interim limits rather than the long term goal of virtual elimination suggesting that:

- (i) industry will be spending its capital investment on interim goals rather than long-term goals;
- (ii) because industry spends its capital on interim goals, it will be difficult to convince it

to invest additional capital to make the interim goals more strict - the interim release limits quickly become the permanent limits;

(iii) industry will be spending more to get less result, but it will not encourage innovation. Rather than finding innovative techniques to make products with less or no toxic material, emphasis is placed on end-of-the-pipe thinking.

In the end, the special regime for the most dangerous substances known to humans has been reduced to reduction targets based on a variety of factors. It is submitted that the existing CEPA has far more power and authority to deal with these substances than the proposed new CEPA.

## RECOMMENDATION NO. 2

**Bill C-32 should be amended to reverse the changes put forth by the government with respect to virtual elimination. More specifically, Bill C-32 should be amended to replace the words "implementation of subsection 65(3)" in sections 77(2)(c), 77(4)(c), 79(1), 79(2)(a), 91(2), and 91(4) with the term "virtual elimination."**

(d) Amending the Preamble - Clarifying Legislative Intent

As noted above, the term "virtual elimination" has the long term objective of eliminating the worst pollutants. Often the legislative intent of bills are reflected in the Preamble. In Bill C-32, the Preamble initially noted that one of the objectives of the bill was to "phase-out" persistent, bioaccumulative and toxic substances. Before Report Stage, one clause in the Preamble stated:

Whereas the Government of Canada acknowledges the need to phase out the generation and use of the most persistent and bioaccumulative toxic substances and the need to control and manage pollutants and wastes if their release into the environment cannot be prevented.

However, at Report Stage, the wording in the Preamble was changed to remove the phrase: "phase out the generation and use of."

### *Implications*

It is unfortunate that the term "phase out" was removed. First, the term reflects the long term vision for the most dangerous substances. Second, the term is found only in the Preamble which only helps to interpret legislation - it is not a binding part of the law. Third, its removal signals a retreat by the government from the principle of "elimination" of these substances. The Minister of Environment has in the past committed to the elimination principle.

## RECOMMENDATION NO. 3

**The Preamble of Bill C-32 should be amended to reflect the legislative intent with respect to virtual elimination, that is, the Preamble should state that goal of the law is to phase-out the use and generation of the most dangerous substances.**

## **2.2 Inherent Toxicity**

### (a) Introduction

Apart from the goal of virtual elimination, another innovation of the Bill C-32 was the incorporation of the concept of inherent toxicity.<sup>12</sup> CEPA essentially incorporates a risk assessment approach to the review of substances in Canada. According to the definition of toxicity<sup>12</sup> in CEPA, a substance would be deemed to be toxic if the substance:

- (1) was emitted in the environment;
- (2) has effects on human health or the environment; and
- (3) is emitted in such amounts as to cause the noted effects.

This third requirement requires not only that the substance be toxic, but that there is sufficient *exposure* to cause the effects. Under the present CEPA, a substance has to proceed through this lengthy risk assessment process and only if found toxic (that is, meeting these three requirements) is the substance a candidate to be regulated or otherwise acted upon by the government.

Another approach that was debated at length in the development of Bill C-32 was the concept of inherent toxicity.<sup>12</sup> Inherent toxicity means that a substance could be found to be toxic because of the very nature of the make-up or molecular structure of the substance (such as being persistent and bioaccumulative).

The Standing Committee on Environment and Sustainable Development, during its initial review of CEPA in 1995 and also outlined in its 1995, explained the concept of inherent toxicity<sup>12</sup> in the following manner:

Nonetheless, the Committee considers that an inherent toxicity<sup>12</sup> approach has merit and could help to identify quickly the most harmful substances. We are concerned that some potentially dangerous substances are not being adequately addressed by the current risk assessment-based [Priority Substances List] PSL system. Particularly, the current definition of toxic has contributed to two important problems, both of which could be addressed by moving in the direction of a hazard assessment. First, extensive amounts of data are required to conduct a full risk assessment. For some substances, these extensive data requirements may

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<sup>12</sup> See section 11 of CEPA or section 64 of Bill C-32.

be extremely difficult to satisfy with the result that the PSL process may be fatally compromised. For 13 substances on the first PSL, the assessment process, unfortunately, could not be completed for this reason. Second, the Committee believes that, in some cases, such exhaustive information is not required in order to justify their regulation.

Nonetheless, the Committee considers that an inherently toxicity approach has merit and could help to identify quickly the most harmful substances. We are concerned that some potentially dangerous substances are not being adequately addressed by the current assessment-based PSL system.<sup>13</sup>

(b) Bill C-32 Debate

Bill C-32 attempted to incorporate the concept of inherent toxicity by establishing a regime to expedite the treatment of the most dangerous substances. Section 77(3) of Bill C-32, as proposed by the Standing Committee, proposed that if the Ministers of Environment and Health were concerned that a substance was inherently toxic (as outlined in the provision), the Ministers may put the substance on the List of Toxic Substances and the virtual elimination track.

Section 77(3) stated:

- s. 77(3)       Where, based on a screening assessment conducted under section 74, the Ministers are satisfied that:
- (a) a substance may have a long-term effect on the environment because it is
    - (i) persistent and bioaccumulative in accordance with the regulations;
    - (ii) inherently toxic to human beings or non-human organisms, as determined by laboratory or studies;
  - and
  - (b) the presence of the substance in the environment results primarily from human activity, the Ministers shall propose to take measures referred to in paragraph (2)(c).

The effect of this section is that an inherently toxic substance would not have to proceed through the laborious PSL process. Instead, the focus is on whether such substances could harm health or the environment based on its very characteristics, (such as persistence and bioaccumulation), rather than exposure.

Despite the progressive nature this version, this section was amended by the Environment

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<sup>13</sup> Standing Committee on Environment and Sustainable Development, *It's About our Health! Towards Pollution Prevention CEPA Revisited* (June 1995), p. 67.

Minister at Report Stage. Section 77(3) now reads:

- s. 77(3)       Where, based on a screening assessment conducted under section 74, *the substance is determined to be toxic or capable of becoming toxic* and the Ministers are satisfied that:
- (a) a substance may have a long-term effect on the environment because it is:
    - (i) persistent and bioaccumulative in accordance with the regulations;
    - (ii) inherently toxic to human beings or non-human organisms, as determined by laboratory or studies;
  - and
  - (b) the presence of the substance in the environment results primarily from human activity, the Ministers shall propose to take measures referred to in paragraph (2)(c).*[Emphasis Added]*

The effect of this amendment is to nullify the concept of inherent toxicity. Since the amendment requires that a substance must meet the toxicity requirements of the bill, whether the substance is inherently toxic or otherwise toxic is of little relevance.

#### **RECOMMENDATION NO. 4**

**Section 77(3) of Bill C-32 should be amended to reflect the wording prior to Report Stage, that is, the wording from the draft bill emanating from the Standing Committee on Environment and Sustainable Development.**

#### **2.3 Powers of the Minister**

At Report Stage, a number of important amendments were made with respect the powers of the Environment Minister. The common threat in this series of amendments is that decisions that were assigned to the Minister to make are now to be made by Cabinet. The implications of these amendments, by having the matter decided by Cabinet, is to ensure that decisions take longer and to ensure that other strong economic interests can exercise their influence.

Examples where the Minister's decision making authorities were transferred to the Cabinet include:

- s. 166 - International Air Pollution [where Cabinet was given an enhanced role over international air pollution];
- s. 176 - International Water Pollution [where Cabinet was given an enhance role over international water pollution];

s. 92.1 - Release of Pollutants [under Bill C-32, prior to Report Stage, the Minister had greater powers to develop regulations governing release of toxics into the environment]

## **RECOMMENDATION NO. 5**

**Bill C-32 should be amended to reverse those changes made at Report Stage that removed powers of the Minister in favour of the Cabinet.**

### **3. Summary and Conclusions**

There are many other issues that this submission could have addressed. For example, there are issues relating to biotechnology and the precautionary principle, among others. At this point, CELA understands that other public interest groups will be addressing these issues (we understand that the World Wildlife Fund will be addressing the precautionary principle).

CELA is urging this Committee to review the recent changes made to Bill C-32 and make proposals that will serve to protect the health of Canadians and their environment.