



Sent by E-mail and Mail

January 27, 2010

Mr. George Enei
Director General
Environment Canada
Science and Risk Assessment
200 Sacré Coeur Blvd
Gatineau, Quebec
K1A 0H3
Canada

Dear Mr. Enei,

Re: Notice of Intent to Amend the Domestic Substances List (DSL) to Apply the Significant New Activity (SNAc) Provisions of the Canadian Environmental Protection Act, 1999 (CEPA 1999) to three Batch 6 Substances

Ecojustice is Canada's premier non-profit providing free legal services to protect and restore the environment. From offices at four locations in Canada in three provinces, we are legal counsel on the leading environmental issues across the country, at every level of court. One component of our work focuses on healthy communities, a component of which seeks to address the proliferation of harmful substances that enter our communities.

Canadian Cancer Society is a national community-based organization of volunteers whose mission is the eradication of cancer and the enhancement of the quality of life of people living with cancer. The Society advocates for the implementation of public policies and government legislation that help protect Canadians from cancer-causing substances at home, at work, or in their environment.

The following are general comments and concerns from Ecojustice and the Canadian Cancer Society regarding the final assessment decisions regarding 14 of the 18 chemicals in Batch 6 of the challenge for chemical substances that are of high priority for action. These comments are not intended to be a detailed analysis of the assessment results or decisions on the 14 chemicals in Batch 6, but general comments regarding the application of *CEPA 1999* with respect to the final assessment decisions.

Application of the Precautionary Principle

One of the fundamental principles underlying *CEPA 1999* is the precautionary principle.

Section 2(1) of *CEPA 1999* states:

2. (1) In the administration of this Act, the Government of Canada shall, having regard to the Constitution and laws of Canada and subject to subsection (1.1),

(a) exercise its powers in a manner that protects the environment and human health, ***applies the precautionary principle 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***, and promotes and reinforces enforceable pollution prevention approaches; [emphasis added]

International acceptance of the precautionary principle is well developed. Since the Supreme Court of Canada decision on *Spraytech v. Hudson*¹ the precautionary principle has gained greater presence in Canadian federal law.²

The importance of applying the precautionary principle in decision making regarding chemicals management under *CEPA 1999* is heightened when the chemical is known to be harmful to the environment or biological diversity, or a danger to life or human health.

CEPA 1999 requires the Minister to apply the precautionary principle when conducting or interpreting the results of a substance screening assessment.

Section 76.1 of *CEPA 1999* states:

76.1 When the Ministers are conducting and interpreting the results of
(a) a screening assessment under section 74,
(b) a review of a decision of another jurisdiction under subsection 75(3) that, in their opinion, is based on scientific considerations and is relevant to Canada, or
(c) an assessment whether a substance specified on the Priority Substances List is toxic or capable of becoming toxic,

the Ministers shall apply a weight of evidence approach and the ***precautionary principle***. [emphasis added]

Ecojustice and the Canadian Cancer Society have reviewed the final screening assessment reports of Batch 6 substances. We are concerned that in some cases decisions

¹ 114957 Canada Ltée (Spraytech, Société d'Arrosage) v. Hudson (Town), [2001] 2 SCR 241

² See J.V. De Marco and M.L. Campbell, 'The Supreme Court of Canada's Progressive Use of International Environmental Law and Policy in Interpreting Domestic Legislation' 13:3 RECIEL (2004), 320, at 330.

regarding whether a substance meets the definition of toxic under s. 64 may have been made without adequate application of the precautionary principle as required by s. 76.1.

Section 64 of *CEPA 1999* states:

64. For the purposes of this Part and Part 6, except where the expression “inherently toxic” appears, a substance is toxic if it is entering or may enter the environment in a quantity or concentration or under conditions that

- (a) have or may have an immediate or long-term harmful effect on the environment or its biological diversity;
- (b) constitute or may constitute a danger to the environment on which life depends; or
- (c) constitute or may constitute a danger in Canada to human life or health.

The use of ‘may’ in subsections 64 (a), (b) and (c) indicates that the evidence of harm or danger posed by a substance need not be definitive for a substance to be found toxic. This is consistent with the precautionary principle which calls for preventive steps to be taken in the absence of full scientific certainty.

Substances Presence in Consumer Products

Some of the Batch 6 challenge substances present, or suspected of being present, in consumer products have been designated as carcinogenic, genotoxic, developmental or reproductive toxic by other jurisdictions and, in the case of carcinogenicity, a leading international health agency.³ Yet, based on minimal information in the screening assessments on actual exposures in Canada, the substances were found to not meet the s.64 thresholds for designation as toxic under *CEPA 1999*.

In addition, *CEPA 1999* s. 2 (shown above) stresses pollution prevention which would be better supported by designating a dangerous or harmful chemical as toxic. If a chemical is not designated as toxic under *CEPA 1999*, then regulations or other instruments under *CEPA 1999* cannot be proposed to prevent further release or exposure to that substance.

It is the position of Ecojustice and Canadian Cancer Society that if a substance is a danger or is harmful to human health or the environment, the absence of information on its presence and quantities in the environment, or exposures in Canada, cannot be used as a reason to find the substances does not meet any of the s. 64 definitions of ‘toxic’.

In such situations, where the toxic effects of a substance are well documented, only iron clad evidence showing the substance is not present in Canada or found in products in Canada, and thus demonstrating the substance is of a negligible risk to the environment

³ Two of the jurisdictions mentioned are the United States and the European Union and the agency is the International Agency for Research on Cancer (IARC).

and the health of Canadians, would justify the substance not receiving a designation of 'toxic' under *CEPA 1999*.

Non- Threshold Health Effects

Health Canada established a policy for new substances for the determination of 'toxic' to human health under *CEPA 1999*. While no similar policy with respect to existing substances could be found, it would be inconsistent to apply a less stringent assessment of 'toxic' for existing substances than new substances given s.64 applies in both situations.

The Health Canada policy sets out the rule for 'toxic' designation for new substances causing a non-threshold effect such as cancer. In the case of a carcinogen, if it is classified as human carcinogen (Group I) or probable human carcinogen (Group II), it is considered toxic under *CEPA 1999* if the risk associated with it is not negligible.

The policy states:

A new substance that can be classified as "Carcinogenic to Humans" (Group I) or "Probably Carcinogenic to Humans" (Group II) will be considered to be toxic under CEPA if the risk associated with it is not negligible.⁴

Some of the Batch 6 challenge substances, such as Direct Black 38 and 3-Chloropropene, which are carcinogenic have not been found to be toxic under s. 64 but may be considered toxic based on the new substance policy.

Health Canada also has a policy for mutagenic substances which is another non-threshold health effect. Several of the substances in Batch 6 are reported to be genotoxic but the final screening assessments do not include information on human germ cell mutagenicity, as required to assess toxicity for new substances.

In this regard, the Health Canada policy states:

Similarly, a new substance classified as a "Human Germ Cell Mutagen" (Group I) or a "Probable Human Germ Cell Mutagen" (Group II) will be considered to be toxic if its estimated risk is not negligible.⁵

Ecojustice and Canadian Cancer Society recommend that the assessment of human health toxicity for all existing substances, including those in Batch 6 of the challenge, be reviewed in light of the Health Canada policy on new substances to ensure that decisions regarding existing substances are at least as protective to human health as the Health Canada policy on determination of 'toxic' under *CEPA 1999* for new substances.

⁴ Available at <<http://www.hc-sc.gc.ca/ewh-semt/pubs/contaminants/toxic-toxique/hazard-danger-eng.php>>

⁵ Ibid

The Failure to Address ‘May Enter’

Section 64 of *CEPA 1999* clearly states that a substance can be deemed toxic if it “*is entering or **may enter** the environment in a quantity or concentration or under conditions that...*” [emphasis added]

With the exception of benzyl chloride which was found to meet one or more of the criteria under s. 64 of *CEPA 1999*, the final assessments of the Batch 6 chemicals that were found not to meet the definition of toxic, do not address the issue of ‘may enter’ in the conclusions.

Section 64 of *CEPA 1999* is not intended to only assess whether a substance is entering the environment but if it ‘may enter’ the environment in a quantity or concentrations or under conditions such that it may be toxic as described in subsections 64 (a), (b) and (c).

A brief examination of the Batch 6 screening assessments shows that in some cases substances were dismissed as not a threat to human health simply because there was little evidence of import or use in manufacturing even though the substance is used in consumer products and thus may be entering at concentration or in quantities or under conditions that pose a danger to human health. This is a clear violation of the precautionary principle.

Ecojustice and the Canadian Cancer Society request that the Batch 6 assessments be revisited to ensure that the assessments and resulting decisions are based not just on information on the substances ‘entering’ the environment, but information on whether the substances ‘may enter’ the environment, as required under s.64. In applying a ‘may enter’ analysis, the assessment must take a precautionary approach.

New Information Must Trigger a Reassessment

Some of the screening assessments note that the information is lacking on certain aspects of the health threat posed by the chemicals and thus follow-up activity is proposed.⁶ In each of these screening assessments, a decision to not designate the chemical as toxic according to s.64 was made anyway.

It is the position of Ecojustice and the Canadian Cancer Society that the screening assessments must be updated once this important follow up activity is completed. Furthermore, as part of the follow up activity, we request a commitment to revisiting the decisions to not designate these substances as toxic under s.64, with public consultation.

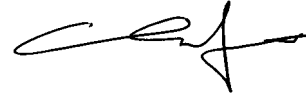
⁶ See Monoazo Dyes, Direct Black 38 and Disazo Dyes

Thank you for the opportunity to provide our comments and concerns regarding the final screening assessments and proposed decisions on Batch 6 of the challenge for substances that are of high priority for action. If you have any questions regarding our comments or concerns please do not hesitate to contact the undersigned.

Yours Truly,



Dr. Elaine MacDonald
Senior Scientist
Ecojustice



Aaron Levo
Director, Public Issues
Canadian Cancer Society

cc Ms. Karen Lloyd
Director General
Health Canada