Chemical Sensitivities Manitoba

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Re: Implementing Section 75 of CEPA - Draft for Public Comments

Chemical Sensitivities Manitoba and Prevent Cancer Now are submitting the following comments and recommendations in response to the government's consultation document, Implementing Section 75 of the *Canadian Environmental Protection Act* (CEPA 1999) (Draft for Public Comments), released on April 1, 2016.[1]

Section 75 of CEPA obliges the Minister of the Environment and Climate Change to cooperate and to develop procedures with non-federal governments in Canada and with the governments of member states of the Organisation for Economic Co-operation and Development (OECD) for the exchange of information on substances that are prohibited or substantially restricted for environmental or health reasons, in their respective jurisdictions. This also requires that when decisions are made by any of these jurisdictions to specifically prohibit or substantially restrict substances for environmental or health reasons, the substances are to be reviewed by the Minister of the Environment and Climate Change and the Minister of Health, to determine whether the substances are potentially harmful to Canadians and their environment.

Implementation procedures are outlined in the consultation document for the exchange of information with non-federal governments in Canada and with OECD jurisdictions, and ensuing actions. There is a concern that the proposed approach is not sufficiently aggressive to advance the key objectives of CEPA including pollution prevention, the transparent application of the precautionary

[1] Government of Canada. April 2016. Implementing Section 75 of CEPA - Draft for Public Comments. http://www.ec.gc.ca/ese-ees/F251F2AB-DDC7-4D48-A9B5-32EA40261E01/Section%2075%20OECD%20mechanism_EN.pdf

principle and moreover, the overall protection of the environment and human health in Canada.

We focus our comments on the following elements of the approach.

1) Definitions of "Specifically Prohibited" and "Substantially Restricted" Substances

Currently, CEPA 1999 does not include definitions for "specifically prohibited" and "substantially restricted". The definitions for these terms within the Rotterdam Convention are broad in scope and lack sufficient regulatory weight to require action, if they were to be adopted for CEPA, section 75.

The definition for "specifically prohibited" suggests that a voluntary withdrawal of a substance by industry would meet the requirements set out in CEPA section 75. With this assumption, the following issues arise:

a) The definition appears to violate the requirements set out in section 75(2), which states " The Minister shall, to the extent possible, cooperate and develop procedures with jurisdictions, other than the Government of Canada, to exchange information respecting substances that are specifically prohibited or substantially restricted by or under the legislation of those jurisdictions…"
b) Regulatory actions provide the key evidence for triggering the requirements of section 75.
c) As a result of the previous point, the Rotterdam Convention, and the use of the Prior Informed Consent (PIC) Circular to track regulatory decisions on substances may not be sufficient to track the inventory of substances that may have been withdrawn by industry from domestic markets.

Similarly, the definition for a "substantially restricted substance" is also restrictive with respect to the implementation of CEPA, section 75, as described below:

a) From the definition for "specifically prohibited", the phrase "or been withdrawn by industry either from domestic market…", also appears to be a voluntary action by industry to withdraw a substance from the domestic market. This type of decision would not meet the requirements set out in section 75(2).

Reference to the word "virtually" in the definition for "specifically prohibited" is vague. This is qualified with the phrase that "certain specific uses will remain allowed". However, it fails to include that these "specific uses" or conditions for the decision to continue permitting particular uses would be severely minimized. Voluntary withdrawal has the potential to stall provision of important information relevant to health and the environment. As well, the Minister should be informed

as to alternatives in place for the abandoned substance, to reduce the chances of a period of unfortunate substitution.

Recommendation: We do not support reliance upon the definitions for "specifically prohibited" and "substantially restricted" as outlined in the Rotterdam Convention.

Recommendation: The government should include definitions in CEPA for "specifically prohibited" and "substantially restricted" that reflect decisions that are based on regulatory decisions as required in section 75(2).

2) **Reliance on the Rotterdam PIC Circular to list "specifically prohibited" and "substantially restricted" substances is limiting**

The proposed approach outlines the "PIC Circular" as the key mechanism to exchange information regarding hazardous substances among OECD member states. There are several limitations to this proposal. The Circular is published twice annually and relies on Parties to submit information to the PIC Secretariat in a timely manner, so PIC Circular is not a prompt notification of newly recognized toxicants.

The Canadian government should be more proactive and not wait for the publication of the PIC Circular to confirm regulatory measures but in addition, commit government resources to conduct regular reviews of regulatory developments and actions on substances included in the CEPA implementation workplan.

Recommendation: The government should conduct frequent reviews of regulatory measures taken by OECD member states rather than relying solely on the PIC Circular.

3) **Adequacy of criteria outlined for review**

For criterion #1, the draft document indicates that a review under CEPA 1999, section 75(3) is required if a member state concludes that a substance is 'severely restricted' or 'specifically restricted.' Neither term is defined within the Canadian legislation, and the terms are being used interchangeably. Also, there is no explanation as to how these terms are different from 'substantially restricted.'

For criterion #3, a substance must have non-pesticidal uses in Canada; however, subsection 17(2) of the Pest Control Products Act (PCPA) requires that when a member country of the OECD prohibits all uses of an active ingredient for health and environmental reasons, the PCPA will initiate a special review related to

registered pest control products containing the active ingredient. A gap exists because this PCPA subsection would not trigger a review for “specifically restricted” active ingredients.

Recommendation: ‘Severely restricted’ and ‘specifically restricted’ cannot be used interchangeably. They should be removed and replaced with ‘substantially restricted,’ as defined by the OECD.

Recommendation: There should be a mechanism to trigger a review under the PCPA for substances that are “specifically restricted” (i.e. not 100% restricted) and have pesticidal uses in Canada.

4) **Public transparency and engagement**

The government’s proposed approach to review substances under the criteria as listed in subsection 75(3) lacks in transparency and public engagement as there appears to be very little or no opportunity for the public to monitor or respond to the government’s review of these substances regulated by other jurisdictions**.** This is a critical gap in the proposal as these substances require more immediate action, particularly if they are used or manufactured in Canada.

There is the possibility that this approach may result in situations where Canada lags behind regulatory efforts on hazardous substances made by other jurisdictions.

Recommendation: Effective public engagement and transparency must be incorporated through all facets of the implementation of CEPA 1999 section 75 to enable individuals across all sectors to act accordingly, rapidly and efficiently. It is disappointing to see the limited role of the public in the proposed approach.

5) **Timeframes for consideration of regulatory measures for Canada on substances that are ‘specifically prohibited’ or ‘substantially restricted’ elsewhere.**

For substances that are “specifically prohibited” or “substantially restricted” by an OECD member state, timeframes related to the monitoring of decisions by the government and the rationale for subsequent action, are absent from the implementation proposal for section 75. It must be emphasized that clear timelines to review and consider regulatory actions should be included.

The lack of public engagement throughout this approach and the absence of clear timelines to conduct assessments, demonstrate that the provisions outlined in section 75(3) of CEPA may not take precedence as the government’s position

to conduct a review would be “undertaken relative to other priorities that have been identified for action under CEPA”.[2]

Recommendation: Any regulatory measures by an OECD member country to specifically prohibit or severely restrict substances should be reviewed and a summary published of the basis of restriction elsewhere and proposed Government of Canada response (e.g., plans for hazard review, risk assessment and/or risk management proposal; with or without an immediate moratorium) released publicly within a 60 day period, followed by a public comment period.

6) Opportunities to advance pollution prevention and informed substitution in Canada

It remains unclear how many substances to date have been specifically prohibited or severely restricted using the approach as outlined in the draft implementation document. This section of the Act should be implemented with the intent to advance key goals underpinning CEPA such as the virtual elimination of persistent, bioaccumulative and toxic substances, pollution prevention, and a more comprehensive application of the precautionary principle. As currently proposed, serious considerations to advance these elements are greatly hindered by the lack of timelines and a mere vague commitment relative to other priorities identified under CEPA.

There are other tools under CEPA that could be considered for early regulatory action. For example, the Minister may consider applying section 94 (interim orders) for substances regulated by another jurisdiction, due to their toxicity to human health or the environment. Upon initial review and consideration of the 5 criteria outlined by the government, there may be chemicals that warrant consideration of an interim order to protect Canadians and their environment. These may include persistent, bioaccumulative substances not yet under consideration by the global community, including the Stockholm Convention on Persistent Organic Pollutants.

There are other triggers that warrant regulatory measures in the absence of risk assessment, including:

- There may be occasions when Canada previously reviewed a substance that has since been declared “specifically prohibited” or “severely restricted” by OECD member states, but Canada’s review had a different outcome. The proposed approach under Section 75 does not provide any

[2] Government of Canada. April 2016. Implementing Section 75 of CEPA - Draft for Public Comments. http://www.ec.gc.ca/ese-ees/F251F2AB-DDC7-4D48-A9B5-32EA40261E01/Section%2075%20OECD%20mechanism_EN.pdf

details as to how such situations would be addressed. This should be an opportunity for Canada to review its previous findings and to upgrade its risk management measures on the substance. Indeed, the recent court finding that pesticide reviews are required when the chemical is banned in another jurisdiction, indicates the importance of heeding others' findings.

- There is an unfortunate history of substitution of a recognized toxicant with a similar chemical about which there is little information, and the substitute turns out to be at least as toxic and harmful. For substances that are "specifically prohibited" or "substantially restricted" by OECD member states and fall into the category of "substituted substances," i.e. substances that were used to replace toxic substances, there should be a mandatory review by Canada.
- The current initiative is an opportunity to introduce modern concepts (post-1999) such as endocrine disruption as a criterion for more urgent action.

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