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December 2, 2022

Alexandre Longpré
Clerk of the committee
Standing Committee on Environment and Sustainable Development
Sixth Floor, 131 Queen Street
House of Commons
Ottawa ON K1A 0A6
Canada

Dear M. Longpré

**Re: Bill S-5, An Act to Amend the Canadian Environmental Protection Act, 1999, etc. –
Supplementary Submissions by the Canadian Environmental Law Association**

The following are CELA's supplementary submissions arising from our November 25th appearance before the Standing Committee on Bill S-5. These submissions address: (1) questions asked by members that we were not able to fully answer during the time allotted; and (2) evidence filed by other organizations with respect to which the Standing Committee may wish to hear our views.

We would ask that these supplementary submissions be posted on the Committee website in addition to being distributed to Committee members.

Should Committee members have any questions arising from the attached, please feel free to contact either myself or Ms. de Leon.

Yours truly,
CANADIAN ENVIRONMENTAL LAW ASSOCIATION



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Encl. CELA Supplementary Submissions on Bill S-5

SUPPLEMENTARY SUBMISSIONS OF THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION TO THE HOUSE OF COMMONS STANDING COMMITTEE ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT ON BILL S-5 AMENDMENTS TO THE CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999

Questions Asked by Members

Removal by Bill S-5 of the Schedule 1 title “List of Toxic Substances” and Bifurcation of the Schedule

Mr. McLean, during our appearance before the Standing Committee on November 25th, asked us to elaborate on the above issues, which we had addressed in our written [testimony](#) and background submissions to the Standing Committee.

CELA’s submission on this issue is very straight-forward. **The changes to Schedule 1 contained in Bill S-5 should be reversed by Parliament.** The changes unsettle what is otherwise settled law under CEPA and send mixed and confusing messages to the public and the courts by doing three things:

- Removing the title “List of Toxic Substances” from Schedule 1;
- Continuing, nonetheless, to refer in the text of the statute to “the list of toxic substances in Schedule 1” even though the Bill specifically removes that title from the Schedule; and
- Bifurcating Schedule 1 into two parts:
 - Part 1 where only 19 substances (13 percent of the total number of substances in the schedule) would be eligible for prohibition; and
 - Part 2 where 132 substances (87 percent of the total number of substances in the schedule) would:
 - not be subject to prohibition;
 - not be subject to safer alternatives analysis; and
 - largely be subject only to pollution abatement – not pollution prevention – if the government continues to administer Part 4 of the statute the way it has been administered for the last 20 years.

The 2007 House Standing Environment Committee was concerned that meddling with the identification of substances as toxic risked inviting litigation on whether the Act continued to be a valid exercise of the federal criminal law power under the *Constitution Act, 1867*. Witnesses appearing before the House Standing Environment Committee in 2016 recommended against bifurcating Schedule 1 into two parts because: (1) it might have the potential to affect the construction of the constitutional basis for federal regulatory authority on toxic substances established in *Hydro-Quebec*; and (2) creating a “two-tiered” system of toxic substance regulation might lead to non-precautionary and ineffective regulatory actions.

Furthermore, the government has provided no compelling reason for such changes to the Act but chemical industry representatives have applauded the proposed Bill S-5 changes to CEPA that removed what they called the “inappropriate toxic substances label”.

Indeed, as we noted in our testimony since the introduction in April 2021 of Bill C-28 (predecessor to Bill S-5) industry has been emboldened to challenge in two separate Federal Court cases the constitutional basis for the designation and regulation of certain substances in Schedule 1.

The changes the government proposes in Bill S-5 risk more litigation challenging Schedule 1 designations on constitutional grounds. But even if such challenges eventually fail, Bill S-5 will have sown the seeds of constitutional confusion, diverted government resources from regulation development to defending constitutional challenges in the courts, and have a chilling effect on future regulatory initiatives. In the view of CELA, that is too high a price to pay to make the chemical industry feel better about its products. **The changes to Schedule 1 contained in Bill S-5 should be reversed by Parliament.**

Pages 15-19 of our September 2022 submissions, which have been provided to members of the Standing Committee,¹ provide references for the above comments and Tab 6 of our September 2022 Proposed Amendments provide amending language to correct the problems posed by the Bill S-5 amendments (See: [Submissions to the House of Commons Standing Committee on Environment and Sustainable on Bill S-5, An Act to Amend the Canadian Environmental Protection Act, 1999](#) and [Proposed Amendments Submitted to the House of Commons Standing Committee on Environment and Sustainable Development on Bill S-5, An Act to Amend the Canadian Environmental Protection Act, 1999, etc.](#)

Evidence of Other Witnesses

Alleged Need for Precision in Schedule 1 Designation of Exposure Routes of Toxic Substances

Another problem with the Bill S-5 bifurcation of Schedule 1 is reflected in the evidence of the coalition of industry groups, several of whom also appeared before the Standing Committee on November 25th. Their written evidence argues that the Bill S-5 bifurcation of Schedule 1 makes it clear that the government recognizes that some substances are of greater risk than others and that Schedule 1 designations must become more precise with respect to, and should identify, exposure routes of such substances under Parts 1 and 2.²

CELA submits that such an approach is wholly unwarranted and that if adopted would make CEPA an even more risk-based regime than it already is when what is needed is a more hazard-based approach. CEPA needs to focus more on the hazard properties of chemicals, not try to guess the exposure route to regulate. Who would have predicted, for example, that PFAS chemicals could end up in drinking water?³ Trying to shoe-horn Schedule 1 designations in this way is a recipe for playing whack-a-mole with some of the most dangerous chemicals on the planet.

¹ Canadian Environmental Law Association, *Submissions to the House of Commons Standing Committee on Environment and Sustainable Development on Bill S-5, An Act to Amend the Canadian Environmental Protection Act, 1999, etc.* (September 2022).

² Brief Submitted by Eleven Industry Associations to the Standing Committee, dated November 17, 2022, at page 2.

³ Sarah Gibbens, "Toxic 'forever chemicals' more common in tap water than thought, report says" *National Geographic* (24 January 2020).

The industry evidence also underscores why the Chemicals Management Plan (“CMP”) has not well served Canadians and that bifurcation of Schedule 1 will exacerbate mistakes that have been made under the program. Whether some substances are of greater risk or not may be debated but it would be impossible to discern the rationale for why Bill S-5 only placed a few known or suspected carcinogens in Part 1 of Schedule 1,⁴ but relegated dozens of other known or suspected carcinogens to Part 2,⁵ where they will not be subject to prohibition, analysis of safer alternatives, and likely only subjected to pollution abatement measures while they otherwise remain in Canadian commerce and the environment. This is a decision with enormous implications for the health of Canadians, particularly vulnerable populations.

Furthermore, comparing the releases to air of 24 CEPA Schedule 1 toxic substances that are also carcinogens common to Ontario and New Jersey for the period 2006 to 2020,⁶ the same period as the CMP was operative in Canada, also illustrates problems with CEPA ignored by the industry submission and that Bill S-5 would make worse. CELA chose New Jersey for this comparison because chemical industry witnesses appearing before the House Standing Environment Committee in 2016 said that with respect to releases of toxic substances, New Jersey would be an appropriate jurisdiction to compare with Ontario because the two jurisdictions have a similar economic, manufacturing, and industrial base.⁷ CELA also chose New Jersey because Environment Canada officials, also appearing before the Standing Committee in 2016, testified that the department tries to benchmark its programs against New Jersey, which they said has “an extremely effective toxics program”.⁸ However, what the data in Table 1, below, show is that, adjusting for differences in the populations of the two jurisdictions, **Ontario’s air releases of the 24 carcinogens over this 15-year period were more than 22 times greater than New Jersey’s.**

Table 1: Total Air Releases of 24 CEPA Schedule 1 Toxic Substances That Also Are Carcinogens Common to Ontario and New Jersey – 2006 to 2020

Year	Ontario (Air Releases in Kilograms)	New Jersey (Air Releases in Kilograms)
2006	2,191,991.94	87,956.31
2020	1,112,434.57	24,917.02

Source: National Pollutant Release Inventory, Canada; Toxics Release Inventory, United States

⁴ Known or suspected carcinogens that would be placed in Part 1 of Schedule 1 under Bill S-5: Dioxins; Furans; Hexachlorobenzene.

⁵ Some of the known or suspected carcinogens that would be placed in Part 2 of Schedule 1 under Bill S-5: Arsenic; Naphthalene; Benzene; Dichloromethane; Ethylene oxide; Formaldehyde; Acetaldehyde; Trichloroethylene; Lead (and its compounds); Tetrachloroethylene; Nickel; 1,2 dichloroethane; Hexavalent chromium compounds; Bis(2-ethylhexyl)phthalate; Cadmium; Carbon tetrachloride; Vinyl chloride; Asbestos; 1,3-Butadiene; Mercury (and its compounds); and PAHs.

⁶ The 24 toxic substances are: 1,3-Butadiene; Acetaldehyde; Arsenic; Asbestos; Benzene; Benzyl chloride; Cadmium compounds; Carbon Tetrachloride; Di(2-ethylhexyl) phthalate; Dichloromethane; Epichlorohydrin; Ethylene oxide; Formaldehyde; Hexachlorobenzene; Lead compounds; Mercury compounds; Naphthalene; Nickel compounds; Tetrachloroethylene; Trichloroethylene; Vinyl chloride; 1,2 dichloroethane.

⁷ Canada, House of Commons Standing Committee on Environment and Sustainable Development, Testimony of Mr. Michael Burt, Corporate Director, Regulatory and Government Affairs, Dow Chemical Canada Inc., June 14, 2016.

⁸ Canada, House of Commons Standing Committee on Environment and Sustainable Development, Testimony of Mr. John Moffet, Director General, Legislative and Regulatory Affairs Directorate, Environment and Climate Change Canada, 6 October 2016.

Table 1 shows that Ontario's air releases of carcinogens common to Ontario and New Jersey that were also CEPA Schedule 1 toxic substances were over 44 times those of New Jersey's. Adjusting for population differences results in Ontario's releases being over 22 times greater for this 15-year period. **Under Bill S-5, most of these 24 carcinogens would be placed in Part 2 of Schedule 1 of CEPA.**

In the submission of CELA, what contributes to these vastly different results in the two jurisdictions is that New Jersey has both robust pollution prevention⁹ and environmental rights¹⁰ laws on the books and Ontario and Canada have neither and Bill S-5 will not change this picture. CELA's proposed amendments would.

⁹ *Pollution Prevention Act*, New Jersey Stat. Ann. § 13:1D-36.

¹⁰ *Environmental Rights Act*, New Jersey Stat. Ann. §§ 2A:35A-1 to 2A:35A-8 (West 2022).