Canadian Environmental Law Association
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VIA ELECTRONIC MAIL

Lorie Cummings
Manager
Mining and Processing Division
Industrial Sectors, Chemicals, and Waste Directorate
Environmental Protection Branch
Department of the Environment
351 Saint-Joseph Boulevard
Gatineau, Quebec
K1A 0H3
Email: mmp-tmm@ec.gc.ca

Maria Klimas
Acting Director
Regulatory Analysis and Valuation Division
Economic Analysis Directorate
Strategic Policy Branch
Department of the Environment
200 Sacré-Cœur Boulevard, 10th Floor
Gatineau, Quebec
K1A 0H3
Email: RAVD.DARV@ec.gc.ca

Dear Ms. Cummings and Klimas:

RE: Regulations Repealing the *Secondary Lead Smelter Release Regulations* – *Canada Gazette*, Part I, Volume, No. 44, November 4, 2023

Summary Recommendation

The Canadian Environmental Law Association submits that it is premature for the federal government to repeal the *Secondary Lead Smelter Release Regulations*, SOR/91-155 as is proposed in the above *Gazette* notice. The government should instead retain the existing regulations until new federal regulations can be promulgated under the *Canadian Environmental Protection Act, 1999* ("*CEPA,1999*") that update the regulation of secondary lead smelter emissions in Canada.

Basis for the Government Proposal

The *Gazette* notice indicates that in 2022 the Department completed a review of the regulations and concluded that they were no longer needed for the following reasons:

- There are enforcement issues with the regulations, including the absence of reporting requirements, outdated lab methods and uncertainty over who is covered under the definition of a secondary lead smelter;
- The regulations contain technical elements that are no longer applicable to the current lead smelting industry terminology and practices; and
- There is regulatory duplication, given that the outcomes of the regulations are "obtained" by provincial regulations and municipal by-laws.

The *Gazette* notice also indicates that originally the regulations helped reduce lead and particulate matter concentrations released into the ambient air from secondary lead smelters since there were no other federal or provincial regulations in place to control such emissions. The *Gazette* notice also indicates that the emission limit requirements in the regulations led to the installation of control equipment and to the achievement of lower lead and particulate matter concentrations.

The *Gazette* notice further indicates that the number of lead smelters in Canada has dropped from 51 in 1984 to 6 in 2020 and that these six lead facilities include five secondary lead smelters and one primary lead smelter that is also a secondary lead smelter. The six remaining smelters (located in British Columbia, Ontario, and Quebec) are now also subject to provincial regulations or municipal by-laws, which are as or more stringent than the federal regulations. The *Gazette* notice also indicates that it is expected that provinces and municipalities will continue to exercise existing levels of stringency when it comes to lead risk management. The notice further indicates that the federal regulations cover only particulate matter and lead contained in particulate matter, while provincial and municipal requirements where secondary lead smelters are operating also cover additional pollutants.

The *Gazette* notice goes on to say that since 2006, the department has developed instruments, including pollution prevention plans and environmental performance agreements to address emissions of lead from the base metals smelting sector, including the primary lead smelter.

Health and Environmental Effects from Lead Air Emissions

The potential health impacts of lead, as reported in a 2021 Health Canada study, are significant. Chronic low-level exposure to lead has been associated with nervous system effects, cardiovascular disease, decreased kidney function and reproductive problems. Lead exposure in infants and children is associated with lowered intelligence quotient (IQ) and a greater risk of attention-related behaviours. No safe level of exposure is known to exist for these neurodevelopmental outcomes.[1] The International Agency for Research on Cancer ("IARC") has classified inorganic lead compounds as probably carcinogenic to humans.

A 2019 department study reported that while between 1990 and 2017, emissions to air of lead decreased by 86 percent, since 2013, lead air emissions have been increasing, due to non-ferrous smelting and refining.[2]

A 2021 department report indicates that: (1) in 2021, 94.7 tonnes of lead were emitted in Canada; (2) the largest source of lead emissions has been the non-ferrous smelting and refining industry since 1990; and (3) this industry accounted for 65 percent (or 62.0 tonnes) of total emissions in 2021.[3] So while overall, lead emissions have been declining over the last 30 years, this industry continues to be a significant contributor to the remaining problem.

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[1] Health Canada, *Lead in Canadians* (Ottawa: Government of Canada, 2021).
[2] Environment and Climate Change Canada, *Emission of Harmful Substances to Air: Canadian Environmental Sustainability Indicators* (Ottawa: Government of Canada, 2019) at 11.
[3] Environment and Climate Change Canada, *Emissions of Harmful Substances to Air: Canadian Environmental Sustainability Indicators* (Ottawa: Government of Canada, 2021) at 12

Furthermore, vulnerable populations are particularly at risk from lead emissions. Members of Indigenous communities appearing before the House of Commons Standing Committee on Environment and Sustainable Development during its 2016 review of *CEPA, 1999* testified that monitoring data they were collecting indicated increasing levels of contaminants such as mercury, lead, cadmium, arsenic, chromium, and polycyclic aromatic hydrocarbons ("PAHs") [all listed in Schedule 1 list of toxic substances under *CEPA, 1999*] in their traditional foods (e.g. fish, moose).[4]

The Need to Continue Applying *CEPA, 1999* to Lead Air Emissions from the Smelting Industry

Lead was one of the first substances to be listed under the Schedule 1 list of toxic substances regulated under *CEPA, 1999*. Lead was specifically mentioned by the *Supreme Court of Canada* in its decision upholding the constitutionality of the Act as a valid exercise of the criminal law power in dealing with toxic substances.[5]

Reliance on *CEPA, 1999*'s pollution prevention plan ("PPP") regime as a substitute for on-going federal regulation of air emissions from the lead smelting industry seems misplaced as the PPP program has largely been implemented as a voluntary program by the federal government. The only PPP notice applicable to base metal smelters and refineries and zinc plants under the program in the last 20 years was in place from roughly 2006 to 2015. The companies subject to this plan achieved a 46 percent reduction in lead emissions. While this is laudable, the PPP did not establish emission reduction targets. Moreover, while the reductions achieved constitute improvement, this must be benchmarked against the fact that in 2021 the smelting industry was still generating two-thirds of the country's lead emissions and there has not been another PPP applicable to the industry for almost a decade. Intermittent application of the PPP program is not a substitute for a permanent regulation dedicated to reducing lead emissions from an industry that is still the leading source of such emissions in the country.

Reliance on the effectiveness of provincial regulation also seems misplaced. While the *Gazette* notice points to provincial regulations, such as Ontario's O. Reg. 419/05, as at least partial justification for repealing the federal lead smelting regulations, this seems premature as a regulatory policy decision. The provincial regulation also allows waivers from compliance with the standards set out under it (known as site specific standards), and in recent years industry in general has been taking advantage of this approach. The result has been a wave of industry applications to comply with less strict standards than those set out under the regulations for a wide variety of toxic substances including benzene, benzo(a)pyrene, cadmium, and vinyl chloride. Can lead be far behind? In the circumstances, it would be premature in our view, for the federal government to put all its eggs in the provincial basket.

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[4] Canada, Parliament, House of Commons Standing Committee on Environment and Sustainable Development, A Review of the Canadian Environmental Protection Act, 1999 – Evidence, No. 36, 1st Sess., 42nd Parl. (November 17, 2016) at 1-3 Melody Lepine, Director, Government and Industry Relations, and Phil Thomas, Scientist, Mikisew Cree First Nation).

[5] *R. v. Hydro-Quebec*, [1997] 3 SCR 213 at paras 141, 145.

Summary Recommendation

For the foregoing reasons, the Canadian Environmental Law Association submits that it is premature for the federal government to repeal the *Secondary Lead Smelter Release Regulations*, SOR/91-155 as is proposed in the above *Gazette* notice. The government should instead retain the existing regulations until new federal regulations can be promulgated under *CEPA,1999* that update the regulation of secondary lead smelter emissions in Canada.

Yours truly,
CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Joseph F. Castrilli
Counsel