



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

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Grace Howland
Environment Canada
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Canada

Original transmitted by email

Dear Grace Howland:

RE: CELA comments on Global Mercury Treaty – INC 1

Canadian Environmental Law Association (CELA) appreciates the opportunity to provide the Canadian government with comments for consideration on the first meeting of the Intergovernmental Negotiating Committee towards a Global Mercury Treaty.

The Canadian Environmental Law Association (CELA) is a non-profit, public interest organization established in 1970 to use existing laws to protect the environment and to advocate environmental law reforms. CELA provides legal services to individuals and organizations that could not afford legal representations. In addition, CELA undertakes policy and law reform activities which are focused on five program areas: access to environmental justice, water sustainability, land use planning, green energy and pollution and health.

Under CELA's pollution and health program, CELA has a long history working on toxic management policy issues at the national, regional and international levels. This involvement includes advocating and promoting comprehensive policy and regulatory commitments by all levels of government to address persistent toxic chemicals and other toxic chemicals of concern through a preventative and precautionary approach. In the area of environmental concerns about reproductive and child health, we have prepared extensive educational materials and conducted numerous educational events with service providers and the public within which we make it a top priority to include information about mercury and fish advisories. This work has a particular focus on ensuring risk reduction among low income communities. Most notably, CELA's involvement in the toxics policy dialogue in the Great Lakes-St. Lawrence River basin since the 1970s and to the present time has had tremendous relevance to the evolution of toxics management policy discussions in Canada and at the international level. At the national level, the experience from the Great Lakes influenced the revision of the *Canadian Environmental Protection Act* in the 1990s. The experience gained in the Great Lakes was also instrumental in the significant contributions made to the negotiations of the Stockholm Convention on Persistent

Organic Pollutants (POPs). It is necessary that CELA make these linkages at this time as Canada prepares to participate in the international negotiations towards a global treaty on mercury.

In preparation for these negotiations, CELA is submitting for your further consideration two important reports released recently. The first report, *Partners in Pollution 2: An Update of the Continuing Canadian and United States Contributions to the Great Lakes –St. Lawrence River Ecosystem Pollution* (www.PollutionWatch.org), was released in April 22, 2010 by the Canadian Environmental Law Association and Environmental Defence under its PollutionWatch project. The second report, *IPEN Views on a Global Mercury Treaty* (see www.ipen.org), was released in 2010 by the International POPs Elimination Network in preparation for the international negotiations. These two reports urge the governments to seek strong commitments for the elimination of anthropogenic sources of mercury during the negotiations.

The former report, *Partners in Pollution 2*, includes a section highlighting releases and transfers of mercury in the Great Lakes-St. Lawrence River basin (see section 2.8.4 of the report). Using 2007 data from the National Pollutant Release Inventory in Canada and the Toxic Release Inventory in the US, the total release of and transfer of mercury from facilities in the Great Lakes basin was almost 33,000 kg. Canada contributed over 23,000 kg of this total including releases off-site (mainly for disposal) of mercury of over 12,000 kg. The US facilities' contribution to the overall totals for release and transfer were significantly less. Despite the progress made to reduce mercury in the Great Lakes, more needs to be done. With the emergence of concern with toxic chemicals in consumer products, the urgency to address mercury in a more comprehensive manner rises in importance. The Great Lakes basin ecosystem, containing 20% of the world's fresh water and the principle source of drinking water for over 40 million people, is an important region that affects both Canada and the United States. International efforts aimed at addressing chemical threats such as mercury should be given priority particularly as they relate to the Great Lakes region because their scope and objectives will be expected to have significant implications for the two nations.

The second report proposes a set of recommendations for countries to adopt during the negotiations, including a call for elimination of mercury, consideration of vulnerable populations, the application of the precautionary principle and safe substitution to promote elimination, the need for technical and financial assistance for developing countries and countries in economic transition and the need for substantial and effective engagement by civil society, to name a few.

The Need for Global Action on Mercury

It is our view that a global commitment to eliminate mercury from anthropogenic sources is necessary and long overdue. The upcoming negotiation process offers one opportunity available to Canada to further promote the elimination of mercury. The impacts to the environment and to human health, particularly to vulnerable populations such as children, from exposure to mercury are well documented. Mercury persists in the environment, bioaccumulates up the food chain, and has the potential to travel long distances from its point of origin depositing in remote regions. Mercury is a known neurotoxin that can affect the brain and kidney but also lead to irritation in the lungs, stomach and airways. Major industrial sectors such as electric generating

plants from coal-burning facilities, and base metal smelting operations contribute mercury releases. There are various consumer products including compact fluorescent lights and thermometers that also contain mercury.

Global Action on Mercury benefits Canada - Efforts to Address Mercury Emissions from Industrial and Consumer Products

In particular, Canada as a northern country is uniquely susceptible to the impacts of mercury. Monitoring and biomonitoring programs in Canada indicate that mercury is being detected in the Great Lakes ecosystem and arctic ecosystems. Most recently, aboriginal communities such as Grassy Narrows have documented the extent of mercury contamination in lakes affecting fish populations and the human health impacts.

Based on our experience working to eliminate persistent toxic chemicals such as mercury from the Great Lakes basin, we recognize that enhanced efforts are needed to address mercury levels in the Great Lakes. Some progress has been made to reduce the levels of emissions of mercury and other persistent toxic chemicals in the Great Lakes basin but much of that work has been focused on controlling the emissions levels rather than a focus on virtual elimination and prevention, which are key components entrenched in the Great Lakes Water Quality Agreement, a binational agreement between Canada and US governments to address pollution in the Great Lakes basin ecosystem. To achieve the objectives of the Great Lakes Water Quality Agreement on toxic chemicals, management efforts aimed at zero discharge and prevention should be emphasized rather than the usual control management approach generally applied to date. A further effort to apply pollution prevention using safer alternatives and “green chemistry” to promote elimination and phase out is urgently required to fully achieve the objectives of the GLWQA.

The 2009 Fall *Report of the Commissioner of the Environment and Sustainable Development* by the Office of the Auditor General reviewed the risk management efforts of seven toxic chemicals listed under Schedule 1 of the *Canadian Environmental Protection Act*. Mercury was one of the seven chemicals reviewed for its risk management strategies and progress for management. While the report noted progress to manage the risk associated with mercury and other chemicals has been undertaken, one significant conclusion made by the Office of the Auditor General is that the “[r]isk management strategies that provide a comprehensive picture of the federal government’s approach for managing lead and mercury are not in place.”¹ Risk management strategies are required for all toxic chemicals added to Schedule 1 of CEPA but no guidance on risk management strategies existed in CEPA when mercury was added to Schedule 1. These strategies are relevant for transparency and accountability in tracking government progress to achieving overall objectives on these toxic chemicals, the scope of risk management actions it expects to carry out, its performance expectations, and timelines for measuring progress.²

¹ Office of the Auditor General of Canada. 2009 November Report of the Commissioner of the Environment and Sustainable Development. Chapter 2.

² Ibid.

The Auditor General's report made three key observations that provides evidence that enhanced pollution prevention strategies to promote the elimination of mercury is needed for the protection of the environment and human health.

- 1) Canada has used regulatory and voluntary tools to manage mercury including the blood sampling of the Canadian populations. Results from these blood sampling efforts have shown that nearly all samples had drop in mercury levels below the Health Canada guidance. But the "federal government research indicates that mercury levels continue to be high in some Inuit and wildlife populations in Canada's North."
- 2) Federal government continues to manage mercury from industrial sources and consumer products. However, cross border sources of mercury are significant for Canada, particularly for Canada's North.
- 3) Understanding how the impact of climate change related to melting ice and permafrost may affect Canada's environment and human populations from toxic chemicals like mercury.

These upcoming international negotiations provide the opportunity for Canada to enhance efforts on mercury that will go beyond the reduction efforts achieved through binational efforts in the Great Lakes and the current federal focus on consumer products containing mercury. Since Canada is susceptible to mercury emissions because of the transboundary movement of atmospheric deposition of mercury and the major facilities in the Great Lakes basin continue to release and transfer significant levels of mercury in the Great Lakes basin, CELA seeks a higher level of commitment from the federal government to promote the elimination efforts on mercury as well as other persistent toxic chemicals.

Our comments in preparation for the first Intergovernmental Negotiation Committee (INC) will focus on the following general issues:

- 1) Consultation Approach
- 2) Expectations for the INCs
- 3) Objective and scope of treaty

Consultation Approach

Limited time for public response

While we urge the government to ensure effective civil society engagement throughout these negotiations, the notice and scope of engagement should be well articulated. This should begin with adequate notice and time for stakeholders to provide comments on key government documents which are intended for use for consideration in the development of Canada's negotiating position. The current release of the Canadian consultation document was released with a one week response time. This timeframe is not adequate and it may be perceived that the input of stakeholders is not fully valued because of the short timeframe to respond. This approach could be avoided if advance consultation seeking input and recommendations on a potential approach is requested in advance of the release of a consultation document.

Format of consultation document

Currently, the style and format of the consultation document is narrow and unacceptable for a comprehensive stakeholder engagement. This consultation document poses a series of important questions for response from stakeholders. However, the report fails to provide an outline of initial positions being considered by government on issues proposed. The absence of this information does not provide stakeholders with an understanding of what and how the government plans to proceed.

Lack of details on follow-up engagement with stakeholders

Currently, the consultation document does not communicate how comments received by stakeholders will be considered by government in their development of the government's positions during the negotiation process. The process appears one sided at the moment with government seeking public input but not showing how that input will be used. A process that outlines how government will review and incorporate comments received by stakeholders is essential to effective stakeholder engagement. This would include releasing for further comment the draft government position on specific issues to be discussed during the negotiations. The government should consider the stakeholder consultation process that was followed throughout the negotiations for a treaty on persistent organic pollutants between 1998-2001 and that resulted in the successful ratification of the Stockholm Convention on POPs as a model for organizing and communicating on government positions for a global treaty on mercury. This process included on-going discussions with stakeholders to prepare a consultation workshop and the development of a consultation document for each of the INCs. In this approach, the government would release draft positions on issues to be discussed during the negotiation and seek further comments from stakeholders on these issues.

Furthermore, it is essential for government to consider enhanced public engagement at these negotiations. The inclusion of non-governmental organization representation on the Canadian delegation to these INCs is an important element for effective public engagement. It is our view, that this arrangement has provided added value to members of the Canadian delegation as well as for the stakeholders. We have raised the issue of inclusion of NGOs to the Canadian delegation but have not received any further feedback on status of inclusion at this time. *The stakeholder process practiced by Canada during the negotiation for the POPs treaty provides a good model for public stakeholder engagement for the upcoming negotiations for a global mercury treaty. We strongly encourage the government to adopt a similar approach for these negotiations.*

NGO Expectations for INCs

In the previous section, we noted a need to maintain stakeholder representation to the Canadian delegations throughout these negotiations and to encourage enhanced civil society engagement throughout these negotiations. The initial workshop held in February 2010 to discuss potential Global Mercury Partnerships is one element towards public engagement. While details on potential partnerships will be utilized throughout the negotiation process are yet unclear, it is essential that all components of engaging the stakeholders be presented in a comprehensive manner by the government. In addition, the government should indicate how these partnerships impact the development of government positions at the negotiations.

In this regard, CELA's expectations for an effective Global Mercury Treaty are well articulated in the IPEN Views for a Global Mercury Treaty (attached). Selected recommendations from this report include:

- *Have, as its objective, to protect human health, wildlife and the environment from mercury by eliminating where feasible anthropogenic sources and releases of mercury;*
- *Recognize particularly vulnerable populations such as children, women of child bearing age, indigenous peoples, Arctic communities, island and coastal dwellers, fisherfolk, small-scale gold miners, the poor, workers, and others;*
- *Have a broad scope and address the entire mercury life-cycle;*
- *Establish an adequately funded and predictable financial mechanism with new and additional resources sufficient to enable developing countries and countries with economies in transition to fulfill their treaty obligations without compromising their poverty reduction goals;*
- *Use elimination-based control measures subject to possible limited, time-bound exemptions to phase-out all products and processes that contain or use mercury, and in the interim, establish standards and controls for those products and processes that remain;*
- *Establish effective controls on international trade in mercury and mercury-containing products;*
- *Establish Best Available Techniques (BAT) for coal-fired power plants, cement kilns, and other combustion processes that release mercury to the environment with an agreed schedule for its phased-in application; aim to phase-out any of these sources when good alternatives are feasible, available and affordable;*
- *Promote the use of renewable, alternative energy sources as a substitute for coal-fired power plants that release mercury to the environment;*
- *Prohibit new uses of mercury;*
- *Promote research and development on sustainable, non-toxic, alternatives to products and processes that contain or use mercury with special emphasis on addressing the needs of developing countries and countries with economies in transition; and*
- *Establish effective and enforceable treaty compliance provisions.*³

Similar to the process to address POPs, Canada's experience with reducing mercury in the Great Lakes ecosystem will be relevant to the negotiation process for a mercury treaty. CELA urges the government to build on the government's efforts, particularly in the Great Lakes basin, to seek a phase out and elimination of mercury from anthropogenic sources from industrial and consumer products. Developing countries and countries with economies in transition will benefit tremendously from a global commitment to reduce mercury levels overall, particularly with appropriate levels of financial and technical assistance provisions in place. For Canada this is an opportunity to re-establish its leadership role in these mercury negotiations as it did throughout the negotiations for a POPs treaty because it recognizes the severe implications for Canada's own environment. Canada should challenge the countries participating in the negotiations to seek an objective of elimination of all anthropogenic sources of mercury. It is simply inadequate

³ International POPs Elimination Network. *IPEN Views on a Global Mercury Treaty*. 2010.

to engage in these negotiations urging other countries to increase their commitment to address mercury. Canada should be willing to seek the highest level of protection from mercury and that can be achieved only by seeking a goal of elimination of anthropogenic sources of mercury.

Objectives

As noted several times in this submission, the overall objectives that Canada should seek for the mercury treaty is elimination. Based on the Governing Council Report, paragraph 27 of decision 25/5, the focus of the provisions mainly puts emphasis on the reduction of mercury. This is a great concern given the extent that mercury impacts the environment and health. We urge Canada to promote the elimination of mercury in full scope of the treaty, recognizing that issues such as recycling of products containing mercury, appropriate disposal methods and contaminated sediments and water ways will be issues that require special consideration in the context of a treaty. By establishing an objective of elimination for anthropogenic sources, there will be a sense of urgency to address the mercury issue and send signals that the current approaches now under consideration should shift away from simply controlling industrial releases of mercury to seeking the prevention for sources of mercury and applying strategies such as safe alternatives and technology, and green chemistry.

The INC document, UNEP(DTIE)/Hg/INC.1/5 outlines options for specifying objectives of the instrument. The four options presented in this document for specifying objectives cannot be fully supported. Instead elements of each option are relevant for developing the mercury treaty. The mercury treaty should include clear outcomes and specific actions to be taken to achieve the outcome. While this approach may be viewed as more prescriptive, it will emphasize accountability and transparency in how the outcome is to be achieved by the Parties. In addition, as stated in Option D, the specific objectives should also focus on some key overarching principles and concepts that will be applied throughout the treaty.

Concepts that are essential to be covered in the Treaty and specifically in this section/article should include the:

- precautionary principle as defined in Rio Declaration;
- goals of elimination;
- recognition of the impacts to human health and environment;
- recognition to address all phases of the life cycle of mercury sources including its use to disposal phase to recycling and reuse phase;
- recognition of the role and contributions made through the effective engagement of civil society in all aspects of the treaty, including workplan development and implementation;
- application of pollution prevention using safer alternative materials and processes such as green chemistry;
- need for effective accountability and transparency;
- recognition of impact to mercury to vulnerable populations particularly children, the unborn, people of low income or living in poverty, indigenous communities, arctic communities and other aboriginal communities, and workers; and
- others.

Further discussions on the appropriate definitions or interpretations of these elements/concepts should be undertaken with effective participation by stakeholders in Canada.

It should be further emphasized that during efforts to develop the specific objectives of the treaty, Canada should seek the goal of elimination rather than the minimization or reduction of mercury. The use of the words “minimize” and/or “reduce” will not prevent mercury releases in the future that would continue to add burden to the global ecosystem. The emphasis should be on elimination as it is appropriately supported through the objectives of the Great Lakes Water Quality Agreement and is also supported through the *Canadian Environmental Protection Act, 1999*, which seeks the virtual elimination of persistent toxic chemicals. Although Canada’s efforts have not fully achieved these objectives on mercury to date, these international negotiations could lend added support for Canada to continue to work to these goals. Goals of minimization and reduction are weak and insufficient as they will not necessarily lead to a focus on preventing mercury at the source. Rather the focus will continue to be simply controlling releases. This approach is simply no longer adequate if the goal is to protect human health and the environment from exposure to mercury. The on-going presence of mercury will always pose a growing risk to the environment and human health.

The questions outlined in the consultation document are all important and the provisions listed should be addressed in the mercury treaty in some manner. However, the issues related to these provisions will rely heavily on the ultimate objectives of the treaty. For example, the goal of elimination will be very different from a goal of minimization. The mechanisms and actions required to reach these objectives differ in approach and scope. If a goal of elimination is desired the provisions to support this goal would include a strong commitment towards applying prevention strategies that aim to implement safe alternatives and processes to replace the use of mercury in a more substantial manner than a call for minimization, which may consider control technologies to achieve reductions. The focus of efforts would not be on replacing mercury *per se* but to determine how releases can be controlled rather than prevented. Similarly, the focus is at the end of the pipe rather than a focus at the source of the process. This is a significant issue to consider because the potential for exposure to mercury to human is expected to be different if the focus of the actions is towards minimization than elimination. If the aim is to phase out mercury at the source in use in consumer products, for example, by applying the use of safer alternatives this would also lead to the protection of workers because the source of mercury would no longer exist at the production level.

Specifically, issues such as recycling, stockpiles and export, national action plans, inventories, information sharing, and public education are all critical components for the treaty. Our organization has a vast understanding of the implications that may ensue related to each of these provisions through our experience in Great Lakes issues, in implementing the *Canadian Environmental Protection Act*, and in the Stockholm Convention on POPs. It is our view, that the provisions be reviewed and discussed within the context of the specific objectives of the treaty. Furthermore, it is also necessary to consider the potential impacts of these provisions to the objectives set out in other international agreements focused on managing toxic chemicals such as the Stockholm Convention. For example, the management of stockpiles and the disposal of consumer products containing mercury will be expected to comply with the objectives set out in the Stockholm Convention on POPs if dioxins and furans are produced as a result of the

disposal methods selected. In this situation, Parties are expected to ensure that stockpiles of consumer products containing mercury and industrial emissions of mercury do not add further burden to the environment and health by using disposal methods that may result in the production of POPs such as dioxins and furans or other toxic chemicals. The potential for mercury waste and its proper management and storage to be handled safely will be a significant focus of discussion. To date, Canada has relied on the provisions of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal to address issues related to toxic chemicals such as POPs. It is our view, that a comprehensive investigation and analysis of the effectiveness of the Basel Convention provisions to fully address potential mercury waste and stockpile should be undertaken at this time.

On the matter of recycling, it is one issue that should elicit significant discussion by the participating countries. It is an issue that should not be neglected as an afterthought in these negotiations. Consideration of recycling and its impact to the environment and human health are critical and it is an integral part of the discussion when considering a full life cycle approach.

The development of national action plans/implementation plans and establishment of pollution inventories are essential in efforts to outline the scope of activities that is necessary to undertake to achieve the objectives of the treaty. Inventories play a relevant role in implementation efforts. They can be useful tools for policy makers and the public to scope out a potential pollution problem and make estimations on the extent of that problem. This tool also has the potential to provide some insight into progress made towards achieving the objectives of a treaty. The design and scope of these inventories will determine its usefulness. Canada's National Pollutant Release Inventory (NPRI) reports on the release and transfer of over 300 chemicals, including mercury and its compounds. However, the NPRI does not provide information on the quantity of use of chemicals nor does it require mandatory reporting on pollution prevention activities. Stakeholders have proposed the need for improvements to the NPRI. The inclusions of these two components, in addition to lowering the threshold for reporting under NPRI, would strengthen the value of NPRI for monitoring pollution in Canada. In 2000, the government made some changes such as lowering the threshold for reporting on mercury and other persistent toxic chemicals. This was seen as a valuable improvement to the NPRI. Continued improvement to Canada's NPRI program to address mercury may need to be considered as these negotiations progress.

CELA expects the government to support strong provisions for the financial and technical assistance for developing countries and countries in economic transition. In our experience on other international agreements, the lack of adequate support for technical and financial assistance for these nations to engage and implement treaties will be seen as a significant gap and severely weaken process and outcome of the negotiations. Canada's commitment in the POPs negotiation to establish a \$20 million Canada's POPs Fund was a key element that promoted the success of the negotiations. It demonstrated Canada's leadership and commitment in addressing the concerns on POPs. We urge the government to consider this type of support again for the mercury treaty.

In addition, provisions for compliance, enforcement and effectiveness evaluation are also critical components for an effective treaty. The development of an effective compliance mechanism

continues to be a challenge for existing international agreements including the Stockholm Convention. Without a compliance mechanism, the level of effectiveness of the Convention may be difficult to assess. It is essential that discussion on this issue be pursued at the onset. Much of the issues are related to other provisions in the treaty such as financial and technical assistance and effectiveness evaluation. Canada has been active in all international discussions that promote the need for compliance and development of an effectiveness evaluation mechanism as it relates to the Stockholm Convention on POPs. We expect this level of commitment to continue in these mercury negotiations.

However, we urge the government to expand its scope and reach when it relates to effectiveness evaluation. More resources and expanded programs are needed to truly assess the effectiveness of actions undertaken. There are a number of programs in Canada including Great Lakes monitoring programs that require new injection of funds and commitment by the government. In the past, these programs were instrumental in demonstrating the extent of contamination of persistent toxic chemicals in the ecosystem. In turn, these results contributed greatly to the development of a policy response needed to address the threats from pollution at the regional, national and in the international arena. Similarly, other monitoring programs may also need further funding to support effectiveness evaluation mechanisms for a mercury treaty. Finally, effectiveness evaluation will also be greatly enhanced by recognizing the information gathered from existing biomonitoring programs as well as the use of a pollutant release and transfer registry. We seek to ensure that the effectiveness evaluation mechanism utilize the full range of information sources available to Parties as well as make commitment for the establishment of new monitoring programs around the globe that will assist in the efforts to assess the progress made to achieve the objectives of the treaty.

We are unable to provide substantial comments on the remaining issues proposed in the consultation document at this time. We have substantial comments in the development of these components and seek future opportunities to discuss these issues with government.

We hope our comments are useful to the development of Canada's position. Please do not hesitate to contact Fe de Leon at 416-960-2284 ext 223.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

A handwritten signature in black ink, appearing to read 'Fe de Leon', with a long horizontal stroke extending to the right.

Fe de Leon
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c.c. Vincenza Galatone, Environment Canada; IPEN

encl.

Attachment 1 : *Partners in Pollution 2 : An Update on the Continuing Canadian and United States Contributions to Great Lakes-St. Lawrence River Ecosystem Pollution*

Attachment 2: IPEN Views on Global Mercury Treaty