

October 31, 2006

The Honourable Rona Ambrose
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Dear Madame Minister,

**RE: International greenhouse gas pollution: your duties to act under
Section 166 of the Canadian Environmental Protection Act 1999**

Friends of the Earth Canada and Friends of the Earth International, in collaboration with the Climate Justice Programme, with the support of the Canadian Climate Action Network representing fifty environmental groups, write to express our extreme disappointment at the failure of your government to act to reduce our country's emissions of greenhouse gases (GHGs). These emissions contribute to an environmental threat of significant, and potentially catastrophic proportions, both for Canadians and the wider world, as amply demonstrated in the Report of the Commissioner of the Environment and Sustainable Development published in September 2006 ("the Commissioner's Report"). As Canada's leading environmental organizations wrote in our letter to the Prime Minister on 4th October, we consider that the nature of this threat requires the bringing forward of measurable short-term and long-term targets for reductions in Canada's GHG emissions, which sets our economy clearly on a path towards 80% below 1990 levels by 2050. It is in fact possible to cut Canada's total GHG emissions in half by 2030 using existing technology, while maintaining our quality of life and economic growth at "business as usual" levels (Ralph Torrie, et al, Kyoto and Beyond, 2002, www.davidsuzuki.org/files/Kyoto_Beyond_LR.pdf).

Unfortunately, you have not acted to propose regulations to control such emissions under your current authority contained in the Canadian Environmental Protection Act, 1999 (CEPA). Indeed, based on the recent draft Clean Air Act (October 13, 2006 Notice of Intent and Bill C-30, sections 38-40), your specific proposal to remove GHGs from Schedule 1 of CEPA would have the effect of removing the requirement to make regulations to control these substances by 2008, as set out in section 92(1) of CEPA. Instead, your government does not even intend to establish absolute reduction targets until 2050, of between 45-65% from 2003 as the base year, contrary to the agreed Kyoto Protocol commitment to reduce overall GHG emissions by 6% from a baseline of 1990.

However, we do not consider that you are free to avoid taking action to reduce such emissions and consequently we wish to draw your attention to your current obligations to act under section 166 of CEPA in order to prevent, control or correct international air pollution caused by or contributed to by Canada's emissions of GHGs; and to request certain assurances. This is particularly relevant in view of the Commissioner's Report which found that "Canada is a major source of GHG emissions that contribute to climate change" (Vol. 1, p. 5). There is every reason to believe that Canada's GHG emissions are contributing to international air pollution.

As you may be aware, you are obliged to act under this section if you and the Minister of Foreign Affairs have reason to believe that a substance released from a source in Canada into the air creates, or may reasonably be anticipated to contribute to, air pollution in a country other than Canada (s. 166(1)(a)); or, to air pollution that violates, or is likely to violate, an international agreement binding on Canada in relation to the prevention, control or correction of pollution (s. 166(1)(b)).

As you may also be aware, you have two main obligations under this section, depending on whether the emissions in question originate from 'federal sources' or from 'non-federal sources'.

In respect of non-federal sources, you must consult with the relevant provincial government with a view to offering it an opportunity to act under its laws to prevent, control or correct such pollution (s. 166(2)).

In respect of federal sources, or if the relevant provincial government cannot prevent, control or correct the air pollution under its laws, or does not do so, you are required at least (on approval by the Governor in Council) to publish a notice under section 56(1) requiring pollution prevention plans, or to recommend regulations for the purpose of preventing, controlling or correcting such air pollution (s. 166(3)).

We outline the three elements that trigger your section 166 duties, namely:

1. Substances are released from sources in Canada into the air;
2. These substances create, or may reasonably be anticipated to contribute to, air pollution; and
3. Such pollution violates, or is likely to violate, an international agreement binding on Canada in relation to the prevention, control or correction of pollution.

We summarize below how each of these three elements are clearly met.

1. Substances are released from sources in Canada into the air

According to the Commissioner's Report, as of 2004 Canada's GHG emissions were almost 27% above 1990 levels and are rising (Vol.1, p. 8). Per capita, Canadians are among the highest emitters in the world and the production and consumption of fossil fuels account for 80% of these emissions (Vol. 1, p5).

There are both federal and non-federal sources of these substances. The Commissioner summarized that the federal government's general mandate with respect to energy includes: interprovincial and international aspects of energy resource management, trade and commerce, transboundary environmental protection, as well as policies of national interest (Vol. 3, p. 3). The Supreme Court of Canada specifically upheld federal jurisdiction to regulate toxics under Schedule 1 of CEPA in the 1997 Hydro Quebec case as a matter of public interest. Clearly, you have authority to act now.

Federal sources of air pollution are defined in CEPA (s.3) and include government departments, agencies, crown corporations and federal works and undertakings. An example of a federal agency responsible for regulating federal sources of GHG emissions is the National Energy Board respecting energy development, pipelines and trade see http://www.neb.gc.ca/index_e.htm.

The Commissioner was concerned about the lack of a strategy for reducing emissions from transport, responsible for about 25% of GHG emissions in Canada and given the regulatory framework available to the federal government in this sector (Vol. 2, p. 16).

The Commissioner's Report also identified a number of non-federal sources of GHG emissions: "The provinces and territories have jurisdiction over natural resources within their boundaries, including energy resources such as oil, natural gas and coal. They control power generation, provincial building codes and provincial transportation. Finally, they have jurisdiction over municipal governments, which also have an influence on GHG emissions..." (Vol. 1, p.38). An example of a provincial agency responsible for regulating provincial sources of GHG emissions is the Alberta Energy and Utility Board, see <http://www.eub.gov.ab.ca/portal/server.pt>.

It is therefore obvious that substances are released from sources in Canada into the air, in the form of GHG emissions, from both federal and non-federal sources.

2. Substances create, or may reasonably be anticipated to contribute to, air pollution

According to the Commissioner's Report: "The production and consumption of non-renewable energy releases pollutants into the air. Among those pollutants are GHGs which governments of many countries, including Canada, have formally linked to climate change" (2006 Report, Chapter 3, p. 2).

Under section 3 of CEPA, “air pollution” (« *pollution atmosphérique* ») is defined as a condition of the air, arising wholly or partly from the presence in the air of any substance, that directly or indirectly (a) endangers the health, safety or welfare of humans; (b) interferes with the normal enjoyment of life or property; (c) endangers the health of animal life; (d) causes damage to plant life or to property; or (e) degrades or alters, or forms part of a process of degradation or alteration of, an ecosystem to an extent that is detrimental to its use by humans, animals or plants.

There is more than ample evidence that GHGs released from sources in Canada create, or may reasonably be anticipated to contribute to, a condition of the air that directly or indirectly affects human health, safety, welfare, life and property, animal and plant health, and ecosystems, in the manner defined. For the definition to take effect, it is only necessary for one of the five categories to be so affected, and not necessary for any of them to be faced or experienced in Canada. For the purposes of s. 166(1)(b) duties, the substance in question does not even need to be identified as a toxic.

To cite just one source, the 2001 Intergovernmental Panel on Climate Change (IPCC)’s found in its Third Assessment Report (TAR) that: the global average surface temperature had increased over the 20th century by about 0.6°C, and global average sea level rose between 10 and 20 cms; and that most of the observed warming over the last 50 years was due to the increase in greenhouse gas concentrations. For the future, the TAR said the global average surface temperature is projected to increase by 1.4 to 5.8°C from 1990 – 2100, which is much larger than the observed changes during the 20th century and is without precedent during the last 10,000 years; and that global mean sea level is projected to rise by 9-88 cms. Since 2001, the evidence of human influence on temperature, and of the impacts, has become clearer and stronger.

According to the World Resources Institute, Canada’s emissions of CO₂ from fossil fuel use and cement manufacture from 1850-2002 have amounted to a 2.15% contribution to current global concentrations, and to a 2.16% contribution to global temperature increase (<http://cait.wri.org>). At approximately 22 tonnes per capita, Canada’s GHGs are amongst the highest in the world.

There can be no doubt that Canada’s emissions of GHGs create, or may reasonably be anticipated to contribute to, air pollution.

3. Such pollution violates, or is likely to violate, an international agreement binding on Canada in relation to the prevention, control or correction of pollution

Canada has entered into, in particular, two international agreements relating to the prevention, control or correction of pollution from GHGs, namely the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol (KP).

The Commissioner recognized that Canada has a number of current obligations under the UNFCCC as an Annex I and Annex II Party to the Convention, and under the KP (see Vol. 1, p. 34-37).

Please find enclosed an opinion by international climate change lawyer Dr. Roda Verheyen of the law firm Gunther, Heidel, Wollenteit and Hack of Hamburg, Germany and also co-Director of the Climate Justice Programme dated October 30, 2006 who identifies a number of violations and/or likely violations of these agreements, namely:

(1) Canada is violating the UNFCCC in 3 respects, by not having:

- (a) established measures that would lead to a reversal of the long-term trend of increasing GHG emissions in order to stabilize atmospheric GHG concentrations, contrary to Article 4.2(a) and (b), with Article 2;
- (b) adopted and implemented measures to adapt to the impacts of climate change, contrary to Article 4.1(b); and
- (c) submitted its 4th National Communication, contrary to Articles 12 and 4, and Decision 4/CP.8;

(2) Canada is violating the Kyoto Protocol in 2 respects, by not having:

- (a) made demonstrable progress by 2005 in achieving its 6% reduction target for 2008-2012, as required by Article 3.2; and
- (b) submitted its report on demonstrable progress, contrary to Art. 7.2 and 7.3, with Art 3.2 and Decision 22/CP.7; and

(3) Canada is likely to violate Article 3.1 of the Kyoto Protocol by not achieving its 6% reduction target during the 2008-2012 period.

Dr. Verheyen's findings indicate that the third element needed for the exercise of your duty to control international air pollution under section 166 of CEPA is triggered. In view of the three elements of section 166(1) (b) CEPA being met, we remind you that obligations arise under section 166(2) and (3).

Kyoto Protocol Compliance Committee

In view of Canada's significant departure from domestic and international expectations, a copy of this letter and the legal opinion are being sent to the Kyoto Protocol's Compliance Committee to provide additional information to the Committee's facilitative branch in respect of the submission already made to the Committee in May 2006 by South Africa, on behalf of the G77 countries and China.

This submission, by developing countries to hold developed countries to account on Kyoto, is the first compliance action under the Protocol's compliance mechanism. It requests the Committee to investigate the failure (as at 25th May 2006) of 15 Parties, including Canada, to have provided their required reports demonstrating the progress they have made in achieving their Kyoto targets. The submission also states that "[t]he facilitative branch should also ascertain whether continued non-compliance with the requirement to provide timely information constitutes early warning of potential

non-compliance by these Parties with" their Kyoto targets.

As at 30th October, according to the UNFCCC Secretariat website, Canada, Italy, Luxembourg, Poland, Russia and Ukraine had still not submitted their reports on demonstrable progress.

Conclusion

Given the current climate change crisis, we urge that you act quickly to ensure Canada's meaningful contribution to address this global problem. In June 2005, the national scientific academies of the G8 countries, plus those of Brazil, China and India stated: "The scientific understanding of climate change is now sufficiently clear to justify nations taking prompt action. It is vital that all nations identify cost-effective steps that they can take now, to contribute to substantial and long-term reduction in net global greenhouse gas emissions.

In the light of the world's best scientific evidence, and of the legal implications that arise under CEPA and the international agreements designed to address GHGs, we respectfully ask you to consider carefully the contents of this letter.

We would appreciate your assurance that you will act in accordance with your clear duties under section 166 of CEPA, and we look forward to receiving your response within 30 days, giving you time to consult with your international colleagues at the upcoming UNFCCC Conference of the Parties at Nairobi on how to best fulfill Canada's domestic and international obligations. If your office has any questions or comments with respect to any of the above, please feel free to contact Christine Elwell, B.A., LL. B., LL.M., and Senior Campaigner, Friends of the Earth Canada at 001- 416-604-7333 or by email at celwell@foecanada.org.

Yours sincerely,



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