

## **Backgrounder to Canadian Environmental Protection Act s. 166 Action**

By Christine Elwell, B.A., LL.B., LL.M., October 31, 2006

**Why?** The purpose of the CEPA s. 166 action is to cause the Canadian government to aggressively and urgently regulate greenhouse gas (GHG) emissions by bringing pressure in Canada and internationally to act to prevent the current climate change crisis.

**Who?** 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 demand action under CEPA to prevent, control or correct (“control”) international air pollution contributed by Canada’s GHG emissions.

**What?** Under Part 7, s. 166 of CEPA on Controlling International Air Pollution, ( see <http://lois.justice.gc.ca/en/C-15.31/225933.html>) the Canada’s Minister of Environment is obliged to act if 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 (section 166(1)(a)); or, to air pollution that violates, or is likely to violate, an international agreement binding on Canada in relation to the control of pollution (section 166(1)(b)).

Respecting non-federal sources, the Minister of Environment must consult with the relevant provincial government with a view to offering it an opportunity to act under its laws to control such pollution (section 166(2)). In respect of federal sources, or if the relevant provincial government cannot control the air pollution under its laws, or does not do so, the Minister is 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 controlling such air pollution (section 166(3)).

**How?** The elements to invoke s. 166 have been met. The recent Environmental Auditor General’s Report provides every reason to believe that Canada’s GHG emissions are contributing to international air pollution (2006 Report, p. 5 “Canada is a major source of GHG emissions that contribute to climate change”, see [http://www.oag-bvg.gc.ca/domino/reports.nsf/html/c2006menu\\_e.html](http://www.oag-bvg.gc.ca/domino/reports.nsf/html/c2006menu_e.html)).

Further, “the production and consumption on 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).

This pollution violates or is likely to violate a binding international agreement in relation to the control of pollution. FOE have obtained a recognized international lawyer’s opinion that Canada is in violation of the UNFCCC (on reversing emission trends, on implementing national adaptation measures and on complying with reporting duties) and of the KP (on demonstrating progress in achieving its 6% reduction target by 2005) and likely in breach of the KP for failing to meet its 6% reduction target.

**When?** On Tuesday October 31, 2006 FOE filed a letter with the Minister of Environment demanding action under CEPA s.166 ([letter](#)), together with the legal opinion ([opinion](#)). This letter and opinion were also filed with the Kyoto Protocol Compliance Committee to add weight to the complaint already lodged by South Africa on behalf of the Group of 77 countries and China ([letter](#) / [backgrounder](#)). In May 2006 they asked the Committee to investigate the failure of 15 countries including Canada to report on their demonstrable progress to reduce GHG emissions. As of October 29<sup>th</sup>, 2006, 10 out of the 15 countries have since reported on their demonstrable progress. Canada remains out of compliance.

**So What?** Should non-compliance with the KP targets be found, the Compliance Committee will deduct 1.3 times the volume of emissions of the Party in non-compliance, which add up to:

- its excess emissions in the first commitment period;
- plus an extra 30% of those as "penalty"; and
- plus its negotiated target for the commitment period starting after 2012.

Such a Party would also no longer be allowed to participate in international emission trading by selling assigned amount units.

**Next Steps?** The Environment Minister was asked to carefully consider our letter and the legal opinion and to report back to us within 30 days on how the government will fulfill its duties to Canadians under CEPA and to the world under the KP. Stay tuned!