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SUBMISSION ON PROPOSED AMENDMENTS TO THE ENVIRONMENTAL CONTAMINANTS ACT

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Frank Giorno
Research Director
Canadian Environmental Law Association

Marcia Valiante
Research Director
Canadian Environmental Law Research Foundation

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I. INTRODUCTION

The Canadian Environmental Law Association (CELA), founded in 1970, is a public interest environmental law group. Since 1980 CELA has focused both its case work and law reform efforts in the area of toxic chemicals, hazardous wastes and pesticides. In 1982 CELA participated in the New Chemicals Workshop sponsored by Environment Canada and Health and Welfare Canada. In 1981, in co-operation with the Canadian Environmental Law Research Foundation (CELRF), CELA held a Roundtable Discussion on Toxic Chemicals Law and Policy in Canada. The focus of the discussion was the adequacy of the Environmental Contaminants Act (ECA). As part of the Roundtable discussion a paper written by CELA's then Research Director Joe Castrilli ("Toxic Chemicals in Canada: An Analysis of Law and Policy") critically examined the Environmental Contaminants Act.

The Canadian Environmental Law Research Foundation (CELRF) is an independent research organization which carries out studies in environmental law matters, in particular with respect to problems posed by toxic chemicals. CELRF is presently engaged in a study of toxic and oxidant air pollution. In 1983, CELRF held a conference on Hazardous Substances and the Right to Know. In 1984 CELRF presented a conference on the Regulation of Biotechnology in which a paper written by the Foundation staff

assessing the adequacy of existing legislation for the control of biotechnology was reviewed.

This joint submission of CELA and CELRF provides comments and proposes recommendations on the Environment Canada and Health and Welfare Canada proposals for amending the ECA. The brief consists of three sections. In the first section we comment on the proposals for amending the methods for assessing and controlling new chemicals. The second section deals with the proposals for upgrading several sections of the ECA. In the third section we examine the proposal for including a new section on export notification.

The Environmental Contaminants Act has great potential for preventing the introduction of hazardous new chemicals into Canada and for controlling existing chemicals which are found to be hazardous. The Act is important because it enables the government to prohibit or restrict the use of a hazardous chemical prior to its causing widespread damage to the environment and human health. However, as the material produced by the Interdepartmental Working Group indicates, flaws in the existing legislation have revealed serious inadequacies in the effectiveness of the legislation. We welcome the opportunity to provide comments on the proposed amendments.

II. COMMENTS ON PROPOSALS FOR NEW CHEMICAL AMENDMENTS TO THE ENVIRONMENTAL CONTAMINANTS ACT

The introduction of new chemicals in Canadian society often occurs without adequate knowledge about their health and environmental impacts. Many chemical products are beneficial to society, and others such as PCBs and chlorofluorocarbons may cause severe ecological damage and harm to human health.

The Environmental Contaminants Act (ECA), proclaimed in April 1976, was designed to provide the federal government with a framework to collect information about chemicals in use in our society and prohibit or restrict the use of some of these chemicals if they were found to be harmful. One of the weaknesses of the Act is that it does not adequately provide for the identification and assessment of new chemicals in Canada.

The original version of the Environmental Contaminants Act did not address the issue of reporting information on new chemicals. However, s. 4(6) was added to the ECA subsequently. Subsection 4(6) states:

> Where, during a calendar year a person manufactures or imports a chemical compound in excess of 500 kilograms and he manufactures that quantity for the first time, he shall, within 3 months of manufacturing or importing the said quantity notify the Minister of:
> a) the date of the manufacturing or importing;
> b) the name of the compound;
> c) the quantity manufactured or imported during that year; and

d) any information in his possession respecting danger to the environment posed by this compound.

A number of deficiencies have been found in s. 4(6). First, the subsection has been of little aid in determining which substances are new to Canada because no inventory of existing chemicals is required by the present Act. Second, s. 4(6) does not enable government to obtain the information it requires to determine whether the chemical is potentially harmful. Under the present Act, companies are required to submit any information in their possession respecting any danger to human health or the environment. Many new chemicals entering Canada are imported and the importing company does not have basic data on health and safety or chemical identity. Third, the present Act contains no provision for control of new chemicals until information has accumulated concerning their hazardousness. Under this approach there must be actual experience about the hazards of a new chemical before steps can be taken to control its use. The absence of research information about a new chemical is not a legal basis for concern about the hazardousness of a new chemical. Government cannot compel the owner to provide the information or to conduct testing. A chemical, even though it is known to be hazardous, may be on the market for years before action can be taken through the slow and lengthy process of scheduling and regulation-making. Fourth, there is no provision in the existing Act for either pre-manufacture or pre-market notification. Fifth, the existing Act uses the term "chemical compound" without properly defining it. Sixth, there is no provision for

permitting Canada to participate in international information sharing concerning new chemicals.

Upgrading the new chemicals reporting section is vital for preventing unsafe chemicals from being used in Canada. Therefore, we would submit the following comments on Environment Canada's proposals to amend the New Chemicals Reporting Section of the Environmental Contaminants Act.

A. Definition of Chemical Compound

The existing Environmental Contaminants Act uses the term "chemical compound" but does not define it. The term is intended to apply to chemical compounds with unique chemical structures and to exclude those with poorly defined structures.

Environment Canada proposes to amend the ECA by including the U.S. Toxic Substances Control Act (TSCA) definition of chemical substance:

> A chemical is any organic or inorganic substance of particular molecular identity including, i) any combination occurring as a result of a chemical reaction or occurring in nature, and ii) any element or uncombined radical.

The TSCA definition applies to unique chemicals, reaction products, elements, and radicals. It excludes pesticides, tobacco products, nuclear material, food additives, drugs and cosmetics. Mixtures containing a new chemical are still

considered individual chemicals and are reportable. Mixtures and finished articles are not considered chemicals and will not be included within the scope of the scheme. Chemicals, such as pesticides, that are subject to other regulatory action, are excluded from the provisions.

We agree in principle that the TSCA definition is a good starting point. However, we recommend that the definition of chemical compound be comprehensive enough to include substances such as biotechnology within its scope. That is, the wording should be broad enough to include substances which are animate such as micro-organisms developed through the application of biotechnology.

B. Definition of New Chemicals and the Development of an Existing Chemical Inventory

Under the existing ECA there is no way of determining if a chemical is being manufactured or imported into Canada for the first time. This is partly because an inventory of existing chemicals in Canada is not required under the Act.

Environment Canada recommends the establishment of an inventory of existing chemicals unique to Canadian commerce so that a new chemical may be defined as one that is not on the list. The information collected for the inventory will include: the name of the chemical, molecular formula, structure synonyms, quantities, and uses. Nominations to the list will require

certification as proof that the chemical was actually imported or manufactured and could be subject to verification. New chemicals will be added to the inventory two years after first manufacture or importation. When a new chemical is added to the inventory, the name will not be confidential.

We agree in principle with the creation of an inventory of existing chemicals used in Canada. The inventory should consist of the name of the chemical; the name and location of the company manufacturing, importing and using the chemical; the health and environmental hazards caused by the chemical; test data and any other relevant information. The list should be updated and any changes to the composition of existing chemicals should be reported.

C. Pre-Manufacture Notification

The present system does not provide for either pre-manufacture or pre-market notification. Notifications are received after a chemical is introduced on the Canadian market. The chemical may already be in the marketplace when concern is raised about its safety.

In order to provide better protection of human health and the environment, Environment Canada proposes that pre-manufacture notification be adopted.

The recommendation calling for the adoption of pre-manufacture notification in the ECA is sound. To the extent that testing can be required at this earlier stage, sound decision-making is likely to result because large capital investments will not have been committed to developing the chemical. Therefore if a chemical is found to be hazardous at the pre-manufacturing stage it can be withdrawn without incurring additional expenses associated with marketing the chemical.

The onus should be on industry to show that any new substance to be introduced into the marketplace will be safe. If pre-manufacturing notification is not regarded as appropriate, we recommend the use of a registration system for such chemicals. A registration requirement would not appear onerous because few new chemicals are produced in Canada. If international testing guidelines are in place, most of the necessary data should already be available for new chemicals imported into Canada.

D. Timing of Notification

Environment Canada proposes that the Act be amended to ensure that a manufacturer or importer will be responsible for notifying officials at least 90 days prior to the intended date of manufacture or import. Both low volume chemicals and those in quantities greater than 1000 kg per year will be subject to notification of sufficient information to allow an initial assessment of the chemical's potential to pose a hazard. The concept of a minimum pre-manufacturing set of data would apply.

Information should include chemical identity and uses, physical-chemical properties, acute toxicity, ecotoxicity and environmental effects data. However, low volume new chemicals in the range of 100 kg to 1000 kg per year will be subject to reporting basic information such as identity, use, quantities and any available information on dangers to human health or the environment. Test data will be generated using OECD Testing Guidelines or equivalent test methods and the OECD Principles of Good Laboratory Practice.

The Act will have provisions to demand additional data and testing if, after assessing a chemical, the government suspects on reasonable grounds that a danger could exist. Therefore, in cases where chemicals are subject to full pre-manufacture notification, the Act will require information beyond the minimum pre-manufacturing set of data. For chemicals subject to limited reporting, the information required will be bumped up to include the minimum pre-manufacturing data.

The submission of pre-manufacturing or pre-import data is necessary to determine whether a new chemical is hazardous and should be controlled. Adopting this amendment will aid the process of evaluating new chemicals. Also the implementation of the OECD Testing Guidelines and Principles of Good Laboratory Practice will help standardize testing proposals and improve the overall reliability of the test results. We also support the

powers to request more information on suspect chemicals. Without this power no further action can be taken to control a suspect new chemical until there is actual experience with its impact on human health and the environment, after the chemical has been in use for a period of time.

E. Exemption from Information Requirements

Exemptions should not be based exclusively on quantity. For example 100 kg of a substance may be more hazardous than 1000 kg of another substance. Therefore all new chemicals regardless of quantity should be required to provide information to allow the Federal government to monitor the use and impacts caused by these new chemicals.

We further oppose granting exemptions for reporting impurities, by-products and coincidentally produced chemicals. On the contrary, knowledge and information on impurities, by-products and coincidentally produced chemicals should be part of the reporting requirements for new chemicals. Often the by-products and impurities may be as harmful as the specific substance that is being manufactured or imported.

We do not believe research and development chemicals should be granted a total exemption from reporting requirements. They should be required to submit basic information consisting of name, chemical structure and quantity manufactured or imported, so that monitoring of their impacts may be assisted.

F. Notification Follow-Up

Environment Canada proposes that the original notifier be required to report again if there is a significant change in the use of a new chemical; a significant increase in quantity imported or manufactured; new knowledge about hazardous properties; or change in methods of manufacture.

The follow-up notification provision is a sound concept. All changes in quantities and use must be reported as these changes may have an effect on the possibility that the chemical may be released into the environment. A more thorough evaluation of a chemical may be desired in light of reported changes.

G. Control Action

The existing Environmental Contaminants Act has no authority to control new chemicals by prohibiting or restricting prior to import or manufacture those new chemicals found to be unsafe. To rectify this situation, Environment Canada proposes to amend the legislation to include the powers to: (a) issue general orders that will prohibit a new chemical from being imported or manufactured, or restrict uses of new chemicals in Canada; (b) issue specific orders addressing the packaging, disposal, record-keeping and provision of data sheets.

The effective control of hazardous new chemicals can only be accomplished by including the kind of amendments that have been

recommended. We assume that failure to adhere to orders will result in charges being laid against an offender.

H. Access to Information

The Federal government recognizes the need to keep the public informed of new chemicals in Canada. However, it also feels obliged to protect trade secrets and other confidential information. Environment Canada proposes to protect all sensitive data submitted by industry compatible with access to information legislation and the OECD principles for exchange of confidential business information.

Environment Canada also proposes that a company will be required to submit a non-confidential report available to the public. The report will contain non-confidential data and the best possible description of the chemical without the disclosure of confidential information.

We cannot support Environment Canada's proposal on access to information because it does not guarantee access to environmental and health information. The problem lies with Environment Canada's intention to provide for the protection of all sensitive data submitted by industry, compatible with access to information legislation. The federal Access to Information Act s. 20(1)(a) provides for protection of the trade secrets of a third party. All requests for information considered to be trade secrets will be rejected under s. 20(1)(a). However, the Access to

Information Act does not define what constitutes a trade secret. Canadian courts have tended to accept the American definition of trade secrets, which states that: "a trade secret may consist of any formula, pattern, device or compilation of information... which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers." (See "Restatement of Law of Torts", 1st ed. (St. Paul American Law Institute, Publishers, 1931) at art. 757, comment 6.)

Industry's historic position has been that trade secrets include health and environmental effects data. Therefore, to ensure that health and environmental data is available to the public, a clear amendment is needed to the Environmental Contaminants Act. Both TSCA and the Federal Insecticide, Fungicide and Rodenticide Act specifically provide for the release of health and environmental studies and provide useful models for consideration.

We recommend that the Environmental Contaminants Act be amended guaranteeing the right to all information relating to the chemical name, structure, uses, environmental and health effects, sources of emissions and discharges and any other information which is required to understand the impact or potential impact of the chemical on the environment and human health. The purpose of such an amendment is to make it clear that health and

environmental studies should no longer be considered trade secrets.

I. Summary

Environment Canada's proposed amendments to the new chemicals reporting section of the Environmental Contaminants Act are a significant improvement over the existing legislation. The principles enunciated by Environment Canada should be developed in detailed proposals for legislative amendments at which time we would like further opportunity to comment.

By way of additional comments, we suggest that the following recommendations be added as amendments to the New Chemical section of the Act:

- A Centre for Toxicology should be developed to assist smaller businesses to evaluate new chemical products.

- Consideration should be given to requiring manufacturers, processors and importers of chemicals to notify government immediately if one of their substances causes or contributes to human health or environmental danger.

- Consideration should be given to the establishment of a chemical victims compensation fund to be financed

from taxes or fees from industry based on risk level, quantities, and likelihood of exposure.

- Public input should be allowed in the regulation-making process. For example, the public should be able to initiate regulation-making or advisory committee activity. Funding should be provided to members of the public who wish to participate.

III. COMMENTS ON THE PROPOSED UPGRADING CHANGES TO THE ENVIRONMENTAL CONTAMINANTS ACT

A. Change in Definition of "Class of Substance" - Section 2(1)

The proposed change to include substances with similar physico-chemical or toxicological properties allows flexibility to deal with a single substance or groups of similar chemicals as necessary. However, it fails to address the suitability of the definition of "substance" which now applies only to inanimate matter and, if amended, could apply to the products of biotechnology.

B. Change in Definition of "Release" - Section 2(1)

The proposed change to add "leaking, seeping, discharging, exhausting and depositing" to the existing definition of "release" is important as a way of embracing all receiving media and deliberate and inadvertent releases. The change is also intended to deal with abandonment. In order to properly deal with abandonment, it should also be defined.

Because "release" has relevance only for the offence section (s. 8), where wilful release of a substance which has been put on a schedule is prohibited, and suggestions are made for changing the

offence section, comments will be given in association with those changes.

C. Expansion of Section 3(1) - Assessment of Chemicals

Changes to allow for information gathering on how suspected chemicals are put to productive use, and the generation of impurities such as dioxins are improvements to the section. However, the suggestions would limit information to be supplied which is either within the possession of the manufacturer or importer or to which they "may reasonably be expected to have access". The extent of "reasonably expected to have access" is not clear and should be given consideration, particularly as it relates to information in the possesssion of non-Canadian parent companies. One problem with limiting the supply of information to that already possessed is that if that information does not exist or is inadequate, there is no power to require testing or searching for information. This is in contrast to the new chemicals reporting amendments proposed by Environment Canada whereby testing can be required.

The proposal does not contemplate expanding the power of the Minister beyond that of publishing notice. In certain circumstances it may be appropriate for the Minister to contact specific manufacturers or users directly, where these are known.

We recommend that the Minister be given the power to require testing by a manufacturing or importing company if there is insufficient data on a chemical.

D. Expansion of Section 3(3) - Investigation When Danger Suspected

Section 3(3) is intended to allow the Ministers to collect data and conduct investigations when they suspect chemicals may pose a danger to health or the environment. The proposed change would give inspectors the power to enter premises, take samples or investigate records of companies manufacturing or using suspicious chemicals. Because a great deal of the information required would only be available in such a way, these powers would add greatly to the ability of the departments to collect data and conduct investigations and allow the Ministers to fulfill their obligations. The powers of inspectors generally and their relation to the Charter guarantees against unreasonable search and seizure are dealt with infra.

E. Changes to Section 4(1) - Disclosure of information when Ministers have reason to believe there is danger

Before the Ministers can require firms to notify them or to furnish them with information, they must have "reason to believe" a substance is entering the environment so as to constitute a significant danger. It is proposed to change the circumstances which trigger use of this section from the Ministers having "reason to believe" to "suspect on reasonable grounds". The

reason given for changing the disclosure trigger is to relax the standard necessary to allow information to be gathered. This is presumably to allow its gathering when there is less certainty about a substance. In principle this is an important and necessary change, but it is not clear that the proposed change accomplishes this. The requirement of reasonable grounds implies an opinion is justifiable according to a legal standard of reasonableness and may in fact be little different in meaning from "reason to believe". Consideration should be given to a more clearly distinct change in wording. While looking at the wording of this seciton, consideration should also be given to changing the wording from "a substance is entering or will enter the environment" to encompass a less certain situation, as in section 3(3) where the wording is "entering or is likely to enter". This would allow data to be required when the full risks are still uncertain and increase the ability of the Ministers to prevent environmental problems.

F. Expansion of Section 4(4) - Confidential Business Information (CBI)

Canada has given commitments through the OECD to exchange information with agencies of other nations and to protect CBI from disclosure. To do this, it has been suggested that provisions from the Access to Information Act be built into the ECA and that the exchange of CBI with other federal, provincial and foreign agencies be provided for while protecting confidentiality.

Information exchange among different agencies is important and necessary for comprehensive regulation to take place. However, it is our position that affected members of the public have the right to share in that information exchange. Because there is no provision for sharing of information with the public in the proposed amendments, consideration must be given to developing a mechanism for sharing information with members of the public or workers in appropriate circumstances while protecting the legitimate confidentiality requirements of industry. What is meant by building in Access to Information Act provisions should be clarified.

G. Deletion of time limit on offer to consult with Provinces Prior to Regulating a Substance - Section 5(1)

The difficulty identified with a time limit of "as soon as reasonably practicable, but no later than 15 days" after Ministers are satisfied of danger is that it is hard to pinpoint when the Ministers are "satisfied" and that 15 days is too short to process documents.

If the problem with this time limit stems in part from the difficulty of pinpointing when the Ministers become "satisfied", a mechanism to address this directly seems more appropriate than eliminating the entire time element. This is a major difficulty in that no criteria is specified and there is no guidance in the Act for what being "satisfied" entails.

Even if 15 days is too short a time for the bureaucracy to proceed, this is not a valid reason for excluding the words "as soon as reasonably practicable". Leaving these words in allows for flexibility but also conveys the importance of timely consultation when the Ministers are satisfied of danger to health. Timely consultation is especially important because consultation (or refusal) is a pre-requisite to regulating a dangerous substance and opportunities to delay should be minimized in order to minimize health implications.

H. Reform of the Board of Review Mechanism - Section 6

A number of changes to the Board of Review mechanism are proposed. The changes are not drafted in specific terms, but would be intended to: allow the Ministers to set procedures; provide for funding apart from the departments for a number of (ECA and non-ECA) public hearing procedures; allow "any person" to file an appeal to a regulatory action but provide a mechanism to weed out frivolous ones; and, allow for consultation even when no objection has been raised. It is not clear whether all appeals would be dealt with by a Board of Review and whether activity would be allowed to continue during the appeal period.

These are positive changes in terms of their intent. The details of the funding mechanism will, of course, be important but it is critical for effective public participation that funding be accepted in principle, as recommended by the PCB Board of Review.

Expanding the appeal provision to "any person" from "any person with an interest" is a positive move, but the grounds for determining the relevancy and validity of an appeal should be watched carefully when set out in detail so that those raising important issues are not excluded. The major drawback of the appeal mechanism continues to be that it only applies to "regulatory action", not to cases of failure to act.

I. Expansion of powers of Governor in Council - Sections 7(1) and 18

Because the wording of these sections implies no power in Cabinet to delete substances from the schedule or to make regulations which amend existing regulations, it is proposed to make these powers explicit and make them subject to the appeal mechanism.

The appeal mechanism (publication of recommendations by Ministers objection, Board of Review, receipt of Board's report) should apply to changes to the schedule as well as additions to it. There is no indication in the material about criteria for deletion of a substance from the schedule. The criterion for adding to the schedule is the two Ministers being satisifed that significant danger exists and presumably a parallel criterion should apply when deleting from the schedule.

J. Changes to the Offence Section - Section 8

1. Environment Canada proposes to amend s. 8(1) to include inadvertent releases, as well as deliberate release, and to allow only summary conviction for inadvertent releases. The nature of the offence contemplated for inadvertent or deliberate releases should be clarified. Would this be an offence of absolute liability (as is implied) or strict liability, which allows for a defence of due diligence? In any event, expansion of the offence beyond deliberate release is a necessary step in providing for environmental protection.

2. Under s. 8(2) it is an offence to use a substance on the schedule. The proposed amendment allows the Governor-in-Council to differentiate between uses and allow the use of specific concentrations in some cases. In principle, this change seems a practical adjustment. However, the determination of a concentration which does not contribute to "significant danger" must recognize the problems associated with persistent toxic chemicals (accumulation and bio-magnification). Thus, the establishment of "safe" concentrations for this purpose must be subject to the appeal mechanism.

3. The proposed change to s. 8(4) is designed to exempt the manufacture, sale or import of a scheduled substance as an offence where the purpose is the destruction of the substance and also to exempt small quantities for research. We submit that the

import and sale for purpose of destruction must provide for appropriate safeguards, including requiring complete destruction in specified facilities (licensed, monitored, appropriate technology), and allowing for return (export) if the substance is not accepted by the facility.

It is suggested that the research exemption specify the kinds or scope of studies allowed and that the exemption be subject to the Ministers' discretion as well. These are important safeguards which should be fleshed out further.

4. The proposed change to s. 8(6) extends the limitation period for summary offences from one to two years. This change is beneficial as it brings the Act into line with the limitation period for summary offences under the Criminal Code, which is more appropriate for toxic chemicals offences.

5. To make the new provision on abandonment in s.8 workable a good definition of abandonment is necessary. This issue involves more than assigning responsibility for abandoned materials (though that is an important issue). It opens up the question of proper disposal of toxic substances and the extent of federal authority in what is generally regarded as a (until now) provincial area of control. While the disposal of wastes has been treated as a provincial concern or an area of cooperation between the two levels of government, a strong argument can be made that the federal government has authority to deal with toxic

chemicals from cradle to grave at least to the extent of setting national regulations for disposal which are implemented by the provinces. The need for such a comprehensive approach was emphasized by the Board of Review dealing with PCBs. They suggested the requirement of a payment to the Department by users of scheduled substances, to be refunded if proof of proper disposal could be provided. We support such an approach.

Abandonment also raises the issue of compensation for persons harmed when responsibility cannot be assigned. Provisions to provide for such compensation should be considered.

6. The new provision on emergencies in s.8 gives Ministers authority to issue orders in cases of imminent threat in order to temporarily prevent particular uses, to prevent importation and to dictate clean-up measures. If enacted, decisions made by the Ministers can only be blocked by industry through application to courts for injunctions. Under the new provision, the Ministers do not require Cabinet approval before action can be taken, but there is an existing provision (s.7(3)) which gives Cabinet the power to prevent the use of substances (by adding them to the schedule) in emergency situations. The relationship between these two provisions should be explored further. What is needed in the Act is authority to deal quickly and comprehensively with imminent threats in order to prevent and mitigate harm. This includes the authority to order clean-up and authority to recover costs of clean-up if the person so ordered fails to do so.

While no threshold test for knowing what is an imminent threat and what is not is specified, the need for quick action implies a lower threshold than is true for regulating a substance under normal circumstances (though in s.7(3) the threshold is that the Governor-in-Council be "satisfied" of significant danger). Whatever the threshold is, there should be grounds on which the Ministers can act spelled out in the section. This prevents the situation seen in the Canada Metal case where a stop order under the Environmental Protection Act was struck down where the grounds for the Minister's "opinion" of imminent harm were insufficient.

7. This proposed amendment adds a new provision to allow sector-by-sector or industry-by-industry regulation if appropriate in s.8: This proposal apparently envisages the ability to allow use of a scheduled substance by some industries but not by others. It is our submission that the basis for making such a judgment should be clearly spelled out and related only to the purpose of the Act - the protection of health and the environment - not to inappropriate grounds such as importance of an industry to the economy of a region.

K. Changes to Powers of Inspectors - Section 10

The broad nature of the proposed changes opens the way for more effective enforcement of the Act but has the potential to run afoul of the Charter guarantee against unreasonable searches, as judicially interpreted. While the grounds for allowing inspection will be changed, the grounds for allowing seizure of material in connection with an investigation are not being changed and thus remain related to reasonable belief as to contravention of the Act. Consideration should be given to making this change.

L. Expansion of Section 17 - the "Other" Offence Section

While s.8 . 8 deals with offences against using substances on the schedule, this section is a catchall for contravention of other provisions. This would appear to include failure to comply with disclosure requirements. Two changes would make this section compatible with s. 8 (by providing for continuing offences and extending the limitation period). However, the important issue of the appropriateness of penalties has not been, but should be, addressed. In particular, a minimum fine and a higher maximum than that under the Criminal Code for summary offences may be appropriate for an Act of this nature which relies on the integrity of those required to report.

M. Adding Power to Make Regulations to Require Record-Keeping - Section 18

It is not clear the extent of activities for which records would have to be kept under this proposal - simply manufacture records or records addressing how and where substances are used or disposed of. The broader the range of activities, the more comprehensive will be the knowledge of the Ministers and the greater their ability to protect health and the environment. The inclusion of substances other than those on the schedule is important because some on the priority list eventually work their way up to the schedule. The relationship between this provision and the information gathering provisions should be clarified.

N. Expand coverage of Act to Adventitious Production - Sections 3, 4, 8, 18

It is important that the Act cover substances which are not deliberately manufactured but are by-products of manufacturing or trace contaminants of products if it is to be more comprehensive and protect against significant threats. This change would make it an offence to produce a scheduled contaminant inadvertently through processing but would not address formation of the contaminant through disposal of other products.

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O. Expand coverage of Act to Non-commercial Activities

On its face, this change is substantial because it changes from an emphasis on creation of a contaminant to an emphasis on release; that is, the Act becomes concerned with substances entering the environment from any of the named activities, which would include use of a substance. This would allow for more comprehensive data gathering.

IV. COMMENTS ON AMENDMENTS FOR EXPORT NOTIFICATION

It is proposed to use the ECA as the main vehicle for implementing the OECD principles on information exchange related to the export of "banned or severely restricted" chemicals. A number of alternative approaches were considered, but the recommended approach is to maintain the residual nature of the Act and allow the two Ministers to do the notifying when it has not been done under other legislative schemes (in particular, the Pest Control Products Act and Food and Drugs Act).

The recommended changes are summarized as follows and comments given:

1. Give the two Ministers authority to decide which substances require export notification, within broad scope of being "banned or severely restricted in order to protect human health or the environment".

It appears from the commentary that the substances for which notification could be required go beyond those controlled under the ECA itself and encompass those controlled under all federal legislation. This should be made explicit and provision be made for collecting and maintaining that kind of information. There does not appear to be provision for

addressing provincial controls on substances, which is a serious omission. It relates in part to the definition of the terms "ban or severely restrict".

The definition of "ban or severely restrict" is unclear and will be subject to interpretation. In the OECD Guidelines, a banned or severely restricted chemical is one subject to a control action,

> "(i) to ban or severely restrict the use or handling of the chemical in order to protect human health or environment domestically; or,
>
> (ii) to refuse a required authorization for a proposed first time use ...".

This definition could be interpreted as including provincial restrictions under either occupational health or environmental legislation, in which case a mechanism for gathering ban information and supporting documentation from all provinces would have to be considered. Under the proposed amendments to the ECA, this interpretation is to be done by the two Ministers at their discretion without further guidance.

2. Require consultation with other federal departments to determine the adequacy of their export notification procedures.

Again, the relevance of provincial controls should be addressed. Presumably, the federal statutes under which these departments operate will have to be reviewed to see if they allow for the powers contemplated under these amendments.

The decision to conduct notification on a residual basis may have the value of more flexibility, but with no consolidated notification there may be some problem in ensuring that the requirements are complied with, both sending the notification and keeping information on exports.

3. Develop a method for specifying the substances for which notification would be required. The recommended method is to place them on a schedule to the Act or regulations (much as controlled substances are listed), which seems appropriate.

4. Provide for prescription of responsibilities of exporters as to what information must be provided, procedural requirements for notification and details respecting routing of information. It is proposed to prescribe these responsibilities in the regulations.

Because these matters are dealt with in the OECD recommendations, guidance should be provided by reference to the OECD recommendations. These recommendations should be referred to in the Act itself.

It is not clear from the wording of this provision whether "exporters" refers to companies which export or to countries. This should be clarified.

5. Provision for public review of additions and deletions from the schedule and of regulations.

Consideration should be given to how this "public review" would or should fit in with the existing review and appeal processes under the ECA - the Boards of Review and the advisory committees.

6. Require exporters to provide notification of exports of specified substances; provide for dealing with non-compliance.

The question of compliance is important, especially because responsibility for notification will be split among a number of departments. Requiring information about exports when there is no mechanism for maintaining records of existing chemical use or import raises a question of consistency within the Act.

Coordination appears to be a key problem. It may be possible to amend s. 8 (the offence section) of the ECA and thereby make the offence of exporting without sending notification applicable to all the federal acts involved. If this is possible, inspection powers should be assessed to allow for proper enforcement of these provisions for agencies operating under different statutes.

7. Canada as an importer of chemicals: It is felt that no changes are required to the Act to fulfill Canada's obligations under the OECD Guidelines respecting imports of banned substances.

It is not clear that sections 3 and 4 are adequate for this purpose as they stand. These sections deal with the collection of information and evaluation of that information is provided for through the use of the advisory committees. Because this would be an ongoing function, it may be preferable to have a standing advisory committee to assess this information rather than leave it as discretionary whether one is established.

8. Protection of confidential business information must be provided for.

As noted, this is part of the larger issue of protecting CBI under the Act generally, an issue which should be addressed in a comprehensive way. Protecting such information must be balanced against the public's right to have access to such information and that is no less true in this circumstance.

9. Miscellaneous. What these amendments do not address are questions about notification of toxic effects even though a substance has not been banned. There is no obligation to pass along any information until a chemical is controlled.

V. CONCLUSIONS AND RECOMMENDATIONS

In general the recommended changes to the Environmental Contaminants Act appear to be an overall improvement to the present Act. We would like to emphasize that our comments pertain only to the principles presented by discussion papers of the Interdepartmental Working Group. More detailed proposals by Environment Canada and Health and Welfare Canada are required before CELA and CELRF can adequately respond. We hope that we will be given that opportunity when draft legislation is developed to amend the Act.

Despite our approval of the general intent of the amendment we do have specific concerns about some of the proposals.

A. Under the New Chemical Section amendment:

1. We agree that the TSCA definition of chemical compound is a good starting point. However, it may not be broad enough to include animate substances such as products of biotechnology that may become contaminants when released into the environment.

2. We agree in principle with the creation of an inventory of existing chemicals used in Canada so long as the data collected is available to the public.

3. Pre-manufacture and pre-import notification should be adopted. Notification by a manufacturer should be made at least 90 days prior to the date of importation or manufacture. Along with notification importers and manufacturers should submit a minimum pre-manufacturing or pre-import set of data.

However, exemptions to the notification and information requirement should not be based exclusively on quantity. No exemptions should be given to reporting on impurities, by-products and coincidentally produced chemicals. Small quanitites of chemicals for research should be required to be reported.

The provision that gives the Act power to demand additional data and testing if the government suspects a danger could exist is beneficial as it puts the onus on the producer and importer to prove that the chemical is safe.

4. The ECA must have the power to control harmful new chemicals before they are widespread in the environment.

5. While we recognize the need to keep some trade secrets confidential, a higher priority should be given to making public information on any health and environmental duty on new and existing chemicals on the inventory list.

B. Under the proposed upgrading changes to the Environmental Contaminants Act we have the following concerns:

1. The proposed change in the definition of class of substances (s. 2(1)) fails to address the suitability of the definition of substances which applies only to inanimate matter. It should be amended to apply to products of biotechnology.

2. The proposed change in the definition of release (s. 2(1)) is important because it embraces all receiving media and deliberate and inadvertent release; and also abandonment.

3. The proposal for expanding the information gathering provisions in s. 3(1) are an improvement. However, the recommendations are limited to information in the possession of the manufacturer or importer or information to which he may reasonably have access. There is no provision for additional testing. This contrasts with the new chemical reporting amendments where testing can be required.

4. The expansion of s. 3(3) allows the Ministers to collect data and conduct investigations when they suspect chemicals may pose a danger. These powers will allow the Ministers to fulfill their obligations. The powers of inspectors and their relation to the Charter guarantees against unreasonable search and seizure should be dealt with in the amendments.

5. Changes to s. 4(1) are intended to alter the circumstances which trigger use of this section from Ministers having "reason to believe" to "suspect on reasonable grounds". It is not clear that the proposed change accomplishes its stated purpose of relaxing the standard allowing information to be gathered. There may be little difference in meaning between the two phrases. Consideration should be given to a more distinct change in wording.

6. Access to confidential business information: It is our position that members of the public have the right to information. CELA does not accept the proposition that health and environmental safety studies, data, etc. should be protected as trade secrets. An amendment is required that would make environmental and health information available to the public.

7. The time limit on the offer to consult with the provinces prior to regulating a substance (s.5(1)) should not be deleted in its entirety.

8. The reforms proposed to the Board of Review mechanism are positive changes in terms of their intent. More details are required on recommendations such as funding for public participation; who has standing before the Board; the status of the chemical under appeal.

9. It is proposed that the expansion of powers of Governor in Council (s.7(1) and s. 18) make explicit cabinets power to delete substances from a schedule or to make regulations amending existing regulations. We are concerned that there is no indication in the material about what criteria apply for deleting a substance from the schedule.

10. Our comments to charges to the offences section -- s. 8 -- are as follows:

a) The expansion of s. 8(1) to include inadvertent releases as well as deliberate releases is a necessary step in providing environmental protection. However, it should be clarified whether the offence will be one of absolute liability or strict liability.

b) The change to s. 8(2) seems a practical adjustment. However, the determination of a concentration which does not contribute to "significant danger" must recognize the problems associated with persistent toxic chemicals (accumulation and bio-magnification). Also, the establishment of "safe" concentrations for this purpose must be subject to the appeal mechanism.

c) Changes to s. 8(4) which is designed to permit the import and sale of scheduled substances and exempted small quantities for the purpose of destruction and research purposes must provide for appropriate safeguards.

d) Extending the limitation period under proposed changes to s. 8(6) is beneficial as it brings the Act into line with the limitation period for the summary offences under the Criminal Code.

e) To make the new provision on abandonment in s. 8 workable a good definition of abandonment is necessary. Also the scope of federal authority in waste disposal matters must be clarified. There is room for a greater federal role which will more truly provide "cradle to grave" control.

Further, consideration should be given to the creation of a mechanism for compensating victims harmed by the improper disposal of scheduled substances.

f) What is needed in the Act is authority to deal quickly with imminent threats in order to prevent and mitigate harm. This includes the authority to order clean-up and authority to recover costs of clean-up if the person so ordered fails to do so.

g) A new proposal which would allow the use of a scheduled substance by some industry but not others should be clearly spelled out and related only to the purpose of the Act and not to economic considerations.

11. The changes proposed to the powers of inspectors (s. 10) opens the way for more effective enforcement of the Act.

12. While the proposed expansion of s. 17, the "other" offence section, make this section compatible with s. 8, it fails to address the appropriateness of penalties. In particular, a minimum fine and a higher maximum than that under the Criminal Code for summary offences may be appropriate.

13. The change recommended for s. 18 does not adequately clarify the extent of activities for which records would have to be kept. The relationship between this provision and the information gathering provisions should be clarified.

14. Amendments to ss. 3, 4, 8, 18 which expand coverage of the Act to include adventitious products are important because they would bring under the scope of the Act products which are not deliberately manufactured but are by-products of manufacturing.

15. Expanding the coverage of the Act to cover non-commercial activities is a substantial change because it alters the emphasis of the Act from creation of a contaminant to release of a contaminant into the environment.

C. Under the Export Notification Amendments it is proposed to use the ECA as the main vehicle for implementing OECD principles on information exchange related to the export of banned or severely restricted chemicals. We support the principle of adopting the OECD position on information exchange.

However, we have the following concerns:

1. It should be made explicit that the notification could go beyond those controlled under the ECA and provisions made for collecting and maintaining that kind of information. The definition of "ban or severely restrict" is unclear and should be clarified. Inclusion of provincial controls on substances should be clarified.

2. The proposal should require consultation with other federal departments to determine the adequacy of their notification procedures. Provincial control should be addressed.

3. The recommended method for specifying substances which would require notification seems appropriate.

4. Since the responsibilities of exporters pertaining to what information must be provided are taken from the OECD recommendations, these recommendations should be referred to in the Act itself. The responsibilities of exporting companies must be clarified.

5. Consideration should be given to how the provision for public review of additions and deletions from schedules and regulations should fit in with the existing review and appeal process.

6. There must be co-ordination within the Act between the requirement for export notification for specified substances; sanction against non-compliance and powers of inspectors to obtain information about non-compliance. Sections 3 and 4 are not adequate for this purpose as they stand.

7. Concerning confidential business information: the ECA should enshrine the public's right to have access to information pertaining to environmental and health impacts. Such information should not be confidential.

8. These amendments do not address the need for notification of toxic effects of substances which have not been banned.

D. In addition to the proposals for amendments made by Environment Canada we suggest that the following amendments be included:

1. A Centre for Toxicology should be developed to assist smaller buisnesses to evaluate new chemical products.

2. Manufacturers, processors, and importers of chemicals should notify government immediately if one of their substances causes or contributes to human health or environmental danger.

3. A victim compensation fund should be established.

4. Public input should be allowed in the regulation-making process.