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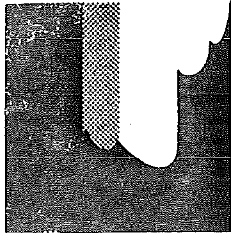

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THE REGULATORY EFFICIENCY ACT - Bill C-62

a) Treasury Board's Proposed Amendments

b) Summary of Treasury Board Amendments

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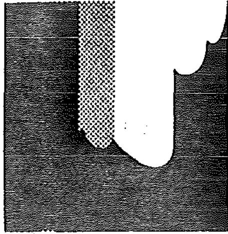

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16 May 1995

Re: TREASURY BOARD'S PROPOSED AMENDMENTS TO BILL C-62

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1. Section 3: Provides that compliance plans must be at least as effective as the designated regulations in attaining the safety, health, environmental or other objectives of designated regulations.

This should be read with the new requirement in Section 9 that the applicant demonstrate on the basis of factual information or other objective and convincing evidence, that its provisions will be at least as effective in attaining the regulatory goals as the regulation would have been and are consistent with the purpose of this Act.

Comments: First, as the authors of *Report on Bill C-62* demonstrated, the purpose of any particular regulation can be described in various ways, some of which connote higher levels of public protection than others. Hence, the public cannot be assured that the regulators will define the objectives of a regulation at a high enough level to ensure that a compliance plan actually provides the same protection as the regulation.

Second, it is unlikely that there will be "factual evidence" available in many instances, since what is being proposed is a new approach, previously untried. "Evidence" of equal effectiveness will be, by definition, non-existent. The evaluation of equal effectiveness will be largely speculative and open to abuse.

2. Section 4: The previous requirement to identify regulations for which compliance plans may be designated by regulation has been changed to allow this to be done by Order in Council alone (S.4(1)). The designation must be published in the Canada Gazette; no specific time limit is included for the notice. (S.4(3))

Comments: This change will speed up the approval process for business, and remove the scrutiny inherent in the regulatory process.

Permission for "persons" to approve a CP has been removed; only agencies created by Parliament may do so. (Sec.4(1c)). This is an improvement as it at least requires a public agency or body, as such, to accept responsibility for the CP.

3. Section 6: Before publishing procedures for submitting and evaluating compliance plans, the

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regulator must make reasonable efforts to consult the persons, governments and government agencies affected by the designated regulation.

Comments: This is a weak requirement, with no standards for what the consultation should comprise. Nor is the regulator required to consult broadly with those concerned with the public interest.

4. Section 7: The regulator must consult, before approving a plan, only regarding whether the plan will be as effective as the regulation "in attaining the regulatory goals" and whether it is consistent with the *Regulatory Efficiency Act*.

Comments: This limits the subject matter of consultation more than did the original Bill. It will not include other obvious subjects such as whether the Plan can be enforced as well as the regulation, will cost enforcers more or less, what its impacts will be on others besides the applicant, etc. Nor will its consistency with the purpose of other Acts be subject to discussion in the consultations.

5. Section 8: The regulator must publish a notice of the Plan or change 30 days (not 60 days as in the original Bill) before approving it.

Comments: This shortened notice period will make public comment during the plan approval process less likely.

6. Section 9: Re Section 9(1), see above, re Section 4. A change to Section 9(3)(b) deletes the obligation of the regulator to monitor compliance with the Plan, and provides only for monitoring implementation of it.

Comments: This represents a reduction in governmental overview, since the explicit obligation to ensure compliance is essential to any regulation, and should also be required for a substitute for regulation.

7. Section 10: The legal wording for this section is not provided. The government plans to refer compliance plans to the relevant standing committee of Parliament, which will have 15 sitting days in which to decide whether to review it **only** for the purpose of determining whether it will be as effective as regulation in reaching the regulatory goals, and whether it is consistent with the purpose of this Act. If the Committee does not do so, or does not complete a review within 20 days, it is deemed to have approved the Plan. If it recommends against approval, or prescribes conditions, its decision is binding.

Treasury Board states that given normal House sitting times, this will provide 45 sitting days to review. However, their math is wrong (20 plus 15 do not equal 45); they probably intend the 20 days to be 30 days.

Comments: This is an extremely limited scope of parliamentary review.

Only a **possibility** of review is granted, and given busy standing committees, we cannot know if it is even **likely** that committees will review the Plans; we certainly know that review is not guaranteed. Since committees are typically able to review only a limited number of legislative initiatives, it seems unlikely that they will be able to examine many compliance plans.

The jurisdiction for review is very limited; presumably, the committee cannot examine whether it is in the public interest to use such a plan, given enforcement, public access, cost and other issues. The amendments to the Bill will permit multiple companies to sign on to a plan, once it has been approved for one applicant (Section 15(1) of amendments), but preclude any review of that addition by the committee. However, there may be important differences between, for example, the suitability of a plan designed for a large company, and the degree to which a smaller business can comply with the same requirements.

The time frame for review is short, and will likely preclude meaningful public participation; there is no provision for public notice of referral to committee, or participation at the committee stage in the Bill.

8. Section 12(2): With the notice of approval published in the Canada Gazette, the regulator must also give "information on how members of the public may obtain copies of the compliance plan..."

Comments: The original Bill did not provide for public access to the complete plans.

9. Section 12(3): An applicant with an approved plan must inform other persons subject to it of the plan or change (in a plan).

If a company obtains approval for a new approach to the transport of hazardous goods, or pollution discharge standards, with potential impact on the public at large, whom must it inform: only its employees? Municipal and provincial governments in towns and cities affected? Public health officials? Local residents?

Since Canadians rely on public safety regulations in all sectors, there are various levels of officials who rely on them and have a role in enforcing them. To that extent, these officials and local residents are "subject" to them and will be subject to compliance plans. Will companies even know what agencies and members of the community they must notify, and more important, will they do so?

This innocuous-sounding requirement actually underlines how drastic this Bill is; instead of having generally known and applicable law, which everyone is presumed to know and comply with, we will have a patchwork with uncertain notice even to public officials charged with enforcement and residents subject to effects.

10. Section 13: Regulators are required to monitor the implementation of compliance plans.

Comments: No standards for monitoring are provided, nor is **compliance monitoring** required.

11. Section 14: The regulator may be liable to pay compensation for suspending or terminating a plan, but not "to any person who commits an offence involving the plan or who breaches a term or condition" of the approval.

Comments: We do not now compensate persons or businesses when periodic changes in regulations affect them.

Aside from demonstrating the level of privilege being granted to business in this Bill, this provision will be a powerful deterrent to any regulator contemplating termination of plans. The plans will be more inflexible than our current legal system, since even in the event of need for change, given changes in technologies or scientific evidence of health or environmental problems, regulators will be loath to terminate a compliance plan if required to pay compensation.

12. Section 15(1) and (2): Additional businesses may apply to the regulator to become subject to a plan. The regulator will treat this as a change in a plan but requirements for consultation (S.7), proof of effectiveness (S. 9) and parliamentary committee review (S. 10) will not apply.

Comments: This is a major gain for business, and provides for the expansion of this deregulation scheme throughout the economy, quickly and cheaply (for business). Industry associations are already preparing to obtain the approvals for their members, and small businesses will now have easy access to the plans. This is the "streamlining" of the process business has been lobbying for during the amendments process.

As noted above, it will often, in fact, be inappropriate for small business to "sign on" to plans designed by larger businesses for themselves.

13. Section 16: Administrative Agreements. These agreements may only be made with governments in Canada (foreign governments are now excluded) but agreements may also still be made with "persons". The regulator must monitor implementation of the agreements; as above, there are no indications of the form, depth, or standards for the monitoring. It must also make a "reasonable effort" to inform those affected by the change. The Bill purports to exclude delegation of "any powers, functions or duties of a (regulator) under another Act."

Comments: The restriction to governments within Canada is positive, but the continuing power to delegate administration of whole Acts and regulations to individuals remains very dangerous, as argued by the authors of the **Report on Bill C-62.** Again, the consultation issue raises the question of whether the Regulators will inform the public at large of these changes; past practice

with federal-provincial agreements does not inspire confidence. Although the section purports to exclude illegal sub-delegation, it is difficult to see how that could be avoided, given the potential scale of these agreements.

14. Section 17: Compliance plans, changes, and conditions of approval must be available to the public. The trade secrets and financial loss exceptions have been deleted.

15. Previous Section 17: This provision, which made compliance plans valid, even if not approved in accordance with the procedures required in the Act, has been deleted.

16. Section 20: There will be a parliamentary review of the Act by a House or joint House/Senate Committee five years after implementation.

Comments: This is also clearly a provision to make the Bill more appealing to legislators. However, if the Bill is implemented, a lot of damage will be done in five years!

17. Section 21: Environmental Assessment. This section purports to preserve environmental assessments, where currently required by regulation passed pursuant to Section 59(f) or (g) of the *Canadian Environmental Assessment Act*, and to require that they be carried out before a compliance plan can be approved.

Comments: As Brian Pannell of Pollution Probe argues, although the section appears to require environmental assessments (EA) prior to approval of a compliance plan, it does not preserve them for projects that arise after the compliance plan has been approved. Projects that would require EA under the *Canadian Environmental Assessment Act* may arise at any time, but once a compliance plan has been approved, the regulator has no means (ie. non-approval or non-issuance of a licence under the EA Act) to compel completion of an assessment.

18. Section 22 (new) will treat as offences, for the purposes of this Act, administrative monetary penalties proposed in the current Bill C-61, which proposes administrative penalties for enforce a number of statutes governing agriculture.

SUMMARY

Treasury Board has removed or amended some of the sections most easily criticized by us and others, namely:

- the secrecy provisions
- the **total** lack of parliamentary scrutiny
- the availability of administrative agreements to foreign governments.

- compensation to those not complying with the plans, if the plan was therefore terminated; however, compensation for termination due to other causes remains.

However, it has made some elements worse:

- a shortened notice period;
- appealing but ineffective words about judging the effectiveness of compliance plans to meet the objectives of regulations;
- a possibility (and only a possibility) of a parliamentary committee review with very limited jurisdiction;
- a move from compliance monitoring to implementation monitoring; or
- the ability of multiple businesses to sign on to one plan.

CONCLUSION

As the Treasury Board states, "The heart of the bill remains the same." So does CELA's opposition to it.

Michelle Swenarchuk

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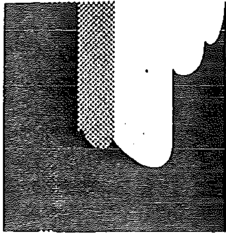

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SUMMARY OF TREASURY BOARD AMENDMENTS TO BILL C-62, THE REGULATORY EFFICIENCY ACT

In December, Treasury Board President Art Eggleton introduced the Regulatory Efficiency Act for First Reading. The Act would permit any regulatory authority to exempt any business from any federal regulation if the business signs a special agreement with the government "to meet the regulatory objectives" by other means. Recently, Treasury Board has circulated amendments, to be introduced if the Bill goes to Committee hearings.

Although some of the amendments are improvements to Bill C-62, some make it worse, and its most serious problems are unchanged.

The improvements include:

- removing the secrecy provisions (Sec.12(2));
- making administrative agreements unavailable to foreign governments (but whole Acts can still be administered by "persons", ie. individuals or companies) (Sec.16);
- removing payment of compensation for those not complying with the Compliance Plans (but compensation to businesses on termination of plans for other purposes still exists) (Sec.14);
- changing the total lack of parliamentary scrutiny (Sec.10);
- an attempt to preserve environmental assessments, where currently required by regulation, which will probably not be effective once a compliance plan has been approved (Sec. 21);
- removing the previous S.17, which allowed approval of plans developed without compliance with the Bill's procedures.

Some elements of the Bill have been made worse:

- public notice of an impending plan has been shortened from 60 days to 30 days (Sec.8);
- compliance monitoring of companies operating under compliance plans has been eliminated (Sec.13);
- multiple businesses will now be able to sign on to one plan without public notice or parliamentary committee scrutiny (Sec.15);
- regulations designated suitable for compliance plan will be approved by Order-in-Council, not by regulation, removing scrutiny (Sec.4);

The amendments also suggest (no legal wording is provided) that proposed compliance plans be examined by the relevant standing Parliamentary Committee, **but only for the purpose of deciding whether they are as effective as the regulations they will replace.** The Committees would not have jurisdiction to look into any other issues, such as:

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- whether the Plan can be enforced;
- whether the governments' costs of enforcement would be higher than for the present regulation;
- whether it is appropriate for small companies (with fewer resources) to be added to Plans written for larger ones;
- compensation payable to the business if the plan is terminated;
- whether the Plan is in the public interest.

These restrictions, plus filled-up parliamentary committee schedules, lack of technical experts, and reduced committee budgets amount to an **illusion** of parliamentary review. Asking Parliamentary Committees to grant or deny plan approvals introduces Congressional-style powers into the Parliamentary system.

Another illusory change is the new requirement that applicants for new plans demonstrate with "evidence" that the plan will be as effective as the designated regulations in meeting objectives (Sec.3 & 9). However, objectives can be defined in various ways, to connote higher and lower levels of protection. There won't be evidence available in most cases since the plans represent a new approach.

It is important to remember that the Bill applies to **all** federal statutes. All federal public safety regulations will be candidates for this circumvention of the law: ie. those governing drug and food standards, children's toys, rail and air safety, medical therapeutic equipment, consumer protection, etc. Treasury Board has stated that the two departments most interested in using the Bill are **Health** and **Agriculture**.

Since multiple parties may sign on to a Plan, (with even less scrutiny) industry associations will be able to negotiate them for their members, and the replacement of regulation by private agreements will proceed quickly. The regulations will become even more out of date, as the impetus to change them decreases.

We will therefore develop a **two-tier legal system**, regulations that apply to most Canadians, and a layer of compliance plans to apply to particular businesses.

In February 1995, lawyers of the Standing Joint Committee for the Scrutiny of Regulations criticized the Bill in Report on Bill C-62. They found it incompatible with constitutional law and values, in that it revives the illegal "Power of Dispensation", and conflicts with fundamental values such as the Rule of Law, equality and fairness, and principles of governmental accountability.

As the Treasury Board states about the amendments, "The heart of the bill remains the same." Its incompatibility with democratic and constitutional values also remains. The Bill should be withdrawn.

Michelle Swenarchuk
May 31, 1995