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May 16, 1985

MEMORANDUM

TO: CELA and CELRF

FROM: Marcia Valiante

RE: Amendments to the Environmental Contaminants Act

Attached are summaries of changes to the ECA respecting upgrading of the Act and export notification with my preliminary comments. Frank has already sent around his comments on the new chemicals amendments (these are the three groups of changes).

For us to work up a submission on these proposed amendments, we need everyone's comments on these provisions. Because I am late in getting this out, the sooner comments can be given the better.

Note that there are a number of issues which have not been addressed in the proposals which we could make submissions on. Some of these are the following:

- failure to address the premise of the Act to allow manufacture, use, etc. until significant danger can be proved. Suggestions have been made in the past about moving to a registration-type system, similar to that used for pesticides.

- failure to address the standard of proof required before a substance can be controlled (that the Ministers be "satisfied" that significant danger exists. Because "significant danger" is not clear, there is little room to regulate suspicious chemicals so as to <u>prevent</u> a major environmental problem.

- retention of the onus on the government to discover suspicious chemicals; there is no obligation on manufacturers or users who discover potential harmful effects to notify the government. One suggestion proposed at the time the Act first passed was to require companies to so notify the government and refrain from distributing that chemical until approval had been granted by the government.

- the whole question of public access to information under the Act needs to be dealt with in a comprehensive way. We should develop a set of principles to be included.

Summary of Proposed Upgrading Changes to the Environmental Contaminants Act with Comments

1) Change in definition of "class of substance". (2(1)).
Problems: Existing definition relies solely on chemical structure.
Proposed Change: Change to include substances with similar physico-chemical or toxicological properties.

Comment: This change 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 if amended, could apply to biotechnology.

2) Change in definition of "release" (2(1)).
Problems: Doesn't clearly cover all receiving media; does not deal with abandonment.
Proposed Change: To add "leaking, seeping, discharging, exhausting and depositing" to the existing definition of release.

Comment: Release only has relevance for the offence section, where wilful release of a substance which has been put on a schedule is prohibited. Suggestions are also made for changing the offence section, so comments will be given in association with those changes.

3) Expansion of section 3(1) - assessment of chemicals.
Problems: Does not allow gathering of information on how much of suspected chemicals go to what uses and into what products, on known impurities (eg, dioxins in chlorophenols), and on other than commercial activities.
Proposed Change: Expand to allow this information.

Comment: The suggestions would limit information to be supplied to that either within the possession of the manufacturer or importer or to which they "may reasonably be expected to have access". Thus, 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 sections respecting new chemicals (this section applying to chemicals already manufactured or imported) where testing can be required.

4) Expansion of section 3(3) - investigation when danger suspected.
Problems: Inspectors lack power to enter premises, take samples or investigate records.
Proposed Change: Provide for these powers.

Comment: These powers would add greatly to the ability of the departments to collect data and conduct investigations, however, Charter guarantees against unreasonable search and seizure must be kept in mind in the drafting of this section.

5) Changes to section 4(1), disclosure of information when Ministers have reason to believe there is danger.
Proposed Change: (a) Change trigger from "reason to believe" to "suspect on reasonable grounds". (b) Allow the Ministers to require information on the life cycle of substance and on quality controls used.

Comment: The reason 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 less certain information is available. It is not clear that the proposed change accomplishes this. The requirement of reasonable grounds implies justifiable according to a legal standard of reasonableness and may in fact be little different from "reasons to believe".

6) Expansion of section 4(4) re confidential business information (CBI).
Proposed Changes: Build in provisions from the Access to Information Act and provide for the exchange of CBI with other federal, provincial and foreign agencies, while protecting confidentiality - in accordance with OECD commitments.

Comment: Information Exchange among different agencies is important and necessary, however, there is no provision for sharing of information with the public. Consideration should be given to a mechanism for sharing information with members of the public or workers in appropriate circumstances.

7) Deletion of time limit on offer to consult with provinces prior to regulating a substance (5.5(1)).

Problem: With a time limit of "as soon as reasonably practicable, but no later than 15 days" after Ministers are satisfied of danger, hard to pinpoint when Ministers are satisfied and 15 days is too short to process documents.
Proposed Change: Eliminate all of above time limit.

Comment: If the problem stems in part from difficulty of pinpointing when Ministers are "satisfied", a mechanism to address this directly seems more appropriate. This seems to be a major difficulty - no criteria are specified, no guidance 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 once the Ministers are satisfied of danger to health. This is especially important because consultation (or refusal) is a prerequisite to regulating a dangerous substance and opportunities to delay should be minimized.

8) Reform of the Board of review mechanism (5.6)
Proposed Changes: 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.

Comment: These are positive changes in terms of their intent. The details of the funding mechanism will, of course, be more important - perhaps we should suggest those details?

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 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.

9) Expansion of powers of Governor in Council (S.7(1), S.18)
Problem: Wording of sections implies no power in Cabinet to delete substances from the sxhedule or to make regulations which amend existing regulations.
Proposed Change: Make these powers explicit and make them subject to the appeal mechanism.

Comment: 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 satisfied that significant danger exists and presumably a parallel criterion should apply when deleting from the schedule.

10) Changes to the offence section (S.8):

(a) S.8(1) - Expand to include inadvertent release (as well as deliberate release) and allow only summary conviction for inadvertent release.

Comment: The nature of the offence contemplated should be clarified, i.e., whether this would 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.

(b) S.8(2) - Offence to use a substance on the schedule to be changed to allow Governor in Council to differentiate between uses and allow use of specific concentrations for different uses.

Comment: 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 biomagnification). Thus, the establishment of "safe" concentrations for this purpose must be subject to the appeal mechanism.

(c) S.8(4) - Change offence of import, manufacture or sale of a substance on the schedule to exempt import and sale where purpose is destruction of the substance and to exempt small quantities for research.

Comment: 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 before further comment can be made.

(d) S.8(6) - Extend limitation period for summary offences from one to two years.

Comment: This change brings the Act into line with limitation period under the Criminal Code.

(e) New provisions to deal with abandonment (in S.8). Proposed Change: Add powers to permit control of abandonment, eg, PCB's left in electrical equipment.

Comment: 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 this (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. The need for such a comprehensive approach was emphasized by the Board of Review dealing with PCB's.

How do we stand on this issue?

Abandonment also raises the issue of compensation for persons harmed when responsibility cannot be assigned.

(f) New provision to deal with emergencies (in S.8).
Proposed Changes: Give Ministers authority to issue orders in cases of imminent threat to prevent particular uses temporarily, to prevent importation and to dictate clean-up measures; no appeal mechanism other than application to courts for injunctions; application to substances on the schedule and those not listed.

Comment: This provision does not require Cabinet approval before action can be taken, but there is an existing provision (5.7(3)) which gives Cabinet 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 is authority to deal quickly and comprehensively with imminent threats in order to prevent and mitigate harm. 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). Whatsoever the threshold, there should be grounds on which the Ministers can act spelled out in the section. This prevents the situation seen in the <u>Canada Metal</u> case where a stop order under the <u>Environmental Protection Act</u> was struck down where the grounds for the Minister's "opinion" of imminent harm were insufficient.

(g) New provision to allow regulation sector-by-sector or industry-by-industry, if appropriate (in S.8).

Comment: This apparently envisages the ability to allow use of a scheduled substance by some industries but not by others. The basis for making such a judgment should be clearly spelled out and related <u>only</u> to the purpose of the Act - the provision of health and the environment - not to inappropriate grounds such as importance of an industry to the economy of a region.

11) Changes to powers of inspectors (S.10).
Proposed Changes: Remove burden on inspectors to prove they reasonably believed Act had been contravened; give

inspectors broad powers to enter any place at any reasonable time and to examine any substance or document.

Comment: The broad nature of these proposed changes opens the way for better enforcement of the Act but has the potential to run afoul of the Charter guarantee against unreasonable searches, as judicially interpreted. 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.

12) Expansion of S.17 - the "other" offence section.
Proposed Changes: To provide for continuing offences by making each day the offence continues a separate offence and to add a limitation period of two years.

Comment: While section 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. The two changes make this section compatible with section 8.

13) Adding power to make regulations to require record keeping (S.18).
Proposed Changes: Add authority in Governor in Council to make regulations requiring books and records be kept and made available for inspection and requiring records be kept for non-scheduled substances.

Comment: It is not clear the extent of activities for which records would have to be kept - simply manufacture records or records addressing how and where substances are used or disposed of. The inclusion of substances other than those on the schedule is important because some on the priority list may work their way up to the schedule. The relationship between this provision and the information gathering provisions should be clarified.

14) Expand coverage of Act to adventitious production (ss 3,4,8,18).
Proposed Changes: To add "process" or "processing activity" to lists of activities covered by the Act.

Comment: 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. 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.

15) Expand coverage of Act to non-commercial activities (throughout Act).
Proposed Changes: To change "commercial, manufacturing or processing activity" to "any commercial or institutional, including governmental, activity".

Comment: 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.

SUMMARY OF AMENDMENTS RE EXPORT NOTIFICATION

In order to implement an OECD Council recommendation re information exchange related to the export of banned or severely restricted chemicals, amendments to the Environmental Contaminants Act are proposed.

A number of guiding principles have been adopted by the members of the OECD:

> Where exporter has taken control action on health or environmental grounds, the exporting country should make relevant information available to importing countries.
>
> "Alert" information should be provided prior to export if possible but there should not be delay because of such procedures.
>
> Minimum information which needs to be provided:
>
> fact of export
> chemical identification/specification
> summary of control action
> fact that additional information available from specified source in exporting country.
>
> Provision of information is on a one-time basis, when first export following control action (or adoption of OECD principles) occurs, but should recur if significant development occurs.
>
> Exporter should take steps to provide additional information to importer upon request.
>
> Provision of information must take account of protection of confidential information.

Elements of procedures for exporters:

- provision for determining when a control action has been taken and for informing exporters;
- provision for assuring that information exchange is initiated at time of first export;
- provision for sending information.

Elements of procedures for importers:

- designation of a person to receive alert information;
- procedures for reviewing alert information to determine need for additional information;
- internal procedures for receiving and acting on additional information;
- procedures for determining whether additional information is available elsewhere;
- procedures to maintain confidentiality.

PROPOSED AMENDMENTS TO ENVIRONMENTAL CONTAMINANTS ACT

It is proposed to use the ECA as the main vehicle for implementing the foregoing OECD principles. 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:

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".

Comment: 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 authorisation for a proposed first time use . . ."

It 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.

Comment: 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 be more flexible, but there may be some problem with ensuring that the requirements are complied with, both with 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).

4. Provide for prescription of responsibilities of exporters (countries) 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.

Comment: Because these matters are dealt with in the OECD recommendations, guidance could be provided for setting the regulations by reference to the recommendations in the Act.

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

Comment: Consideration should be given to how this "public review" would/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.

Comment: 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 section 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. Re 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.

Comment: It is not clear that sections 3 and 4 are adequate for this purpose as they stand. These sections are dealing with collecting 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.

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

Comment: As noted, this is part of the larger issue of protecting CBI under the Act generally and 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 inform ation until a chemical is controlled.