MEMORANDUM

TO: PAUL MULDOON
FR: RICK LINDGREN
RE: DRAFT PULP AND PAPER REGULATION
DATE: MARCH 22, 1993

The following comments are my preliminary thoughts on the draft pulp and paper regulation. These comments are based on a very quick review of the regulation, and are not intended to be an in-depth legal analysis.

GENERAL

1. What is the legal authority for this regulation; is this regulation being issued under the EPA or OWRA? This may make a difference in terms of investigation and enforcement options. It appears as if this is an EPA regulation (i.e. see definition of "Director").

2. We must push to ensure that the AOX plans are deemed to "instruments" for the purposes of the EBR. Similarly, the EBR request for investigation and new cause of action should be applicable to breaches of the regulation or the plans.

DEFINITIONS

3. Are the technical definitions adequate? Are there similar definitions in state/federal regulations in the U.S. that we can use for comparative purposes? We should also look at the effluent regulations under CEPA and the Fisheries Act.

4. Should "direct discharger" definition be amended to include present and past owners or controllers of plants?

5. Should the "surface water" definition be expanded to be more inclusive (i.e. creek, wetland, etc.)?

SECTION 2

6. Are all plants caught by the Schedule 1 list? Are there any idle plants not on the list that may be re-opened?

7. How will new plants be dealt with under the regulation? Will an amendment to Schedule 1 be necessary every time? Perhaps s.2 should be amended to state that it applies to the existing plants listed in Schedule and to any new plants constructed and operated after the regulation comes into effect?

PARAMETER LIMITS

8. I have no idea whether the prescribed limits in schedule 2 are sufficiently rigorous, but Gord should have a good idea.

LETHALITY LIMITS

9. The s.4 prohibition seems fine to me, but perhaps we should push to ensure that the sampling/monitoring/reporting documentation is available to the public. This is a general comment which applies to several sections.

SAMPLING/ANALYTICAL PROCEDURES

10. Is the MOE's October 1991 Protocol adequate (I've never read it)?

11. Section 6 seems to be technically sufficient.

12. Should "laboratory" in s.7 be defined (i.e. testing facilities (with competent/qualified personnel) operated or retained by the direct discharger)? Is s.7(2) an example of "less-than-zero" sleight-of-hand?

13. As a general comment, there appear to be several vague time references (i.e. "as soon as possible", "as soon as reasonably possible", etc.) throughout the regulations. Do the different phrases connote different standards? I think we should press for two reforms: consistent language and actual measurable deadlines (i.e. "within X days" or "no later than X days"...).

14. No comments on ss.7a, 7b, 8 or 9; however, this information should be available to the public.

MONITORING

15. Should the phrase "composite sample" be defined (or is the reference to the MOE Protocol sufficient)? Section 10(3) seems to invite monitoring hanky-panky through selective designations by the direct dischargers. Section 10(7) seems to legislate due diligence (which may be redundant), but it may be worthwhile to leave it in the regulation.

16. I'm having some difficulty understanding the rationale for s.11(2); why should law enforcement activity suspend the direct discharger's obligation to undertake daily monitoring? For how long does the monitoring obligation get suspended? For all parameters or only those of interest to the provincial officer? This provision seems to open up a slippery slope, but perhaps I'm having difficulty envisioning the factual circumstances giving rise to the concerns behind this subsection.

17. No real comments on ss.12-14. The notice referred to in

s.14(5) should be a matter of public record.

18. Again, should "quality control sample" in s.15 be defined within the regulation itself? I'm wondering what the courts will do with protocol recommendations which do not exist in legislative or regulatory form.

19. No real comments on s.16.

20. Again, will the references to federal protocols in ss.17-19 hold up in court? Are the federal protocols themselves sufficient? The discretion in s.17(5) is open to abuse (i.e. ensure 12 "clean" samples, then monitor less frequently and send out lethal effluent in "peaks" or "spikes" on non-monitoring days). Or I am just getting paranoid? What are the consequences of admitting to lethality under s.17(8), and will lawyers actually advise their clients to admit to lethality?

21. No comments on ss.21-23, except to question the margins of error (15 to 20%). Section 22(9) should delete the "reasonable efforts" language; the flow measurement system must be "inspectable" and understandable to provincial officers. The phrase "good operating practices" may be too vague in s.22(8) and probably could be deleted.

22. Again, is the provincial protocol in s.24 sufficient and/or legally enforceable? Surely the direct discharger's notice under s.24(2) should include reasons and/or supporting documentation so the Director can assess the reasonableness of the exemption request. The two year timeframe for the stormwater study in s.24(3) seems quite generous; why not one year? More importantly, where is the obligation in s.24 to: 1) actually send the study to the Director for review and approval; and 2) actually implement the recommendations of the study following approval by the Director. Without these two key provisions, the stormwater study is just a paper exercise.

<u>**RECORD KEEPING**</u>

23. As noted above, there must be public access to this information, at least where it is submitted to the MOE (or inspected by the MOE and copies/notes are made). Paul, you mentioned some U.S. precedents that could be used to counter the FOI/trade secrets arguments which will be raised to block or limit access to this critically important information. The summaries contemplated by s.26(4) are okay, but public access should not be "filtered" by the direct discharger's interpretations of the data. The analytical results and other raw data/reports should also be available. In addition, the public summary in s.26(4) should state which actions, if any, were taken in relation to instances of non-compliance. It may also be helpful to require an assessment of the significance of the instances of non-compliance, but I am sure that the direct dischargers would characterize them all as minor, trivial, non-

serious, etc.

24. Respecting the s.26 reporting obligation, the phrase "during normal business hours and as soon as the results are available" should be deleted. This language is a recipe for inaction; moreover, an exceedence of the prescribed parameters is an important matter and should be reported <u>immediately</u> or <u>forthwith</u> to the Director. This regulation should not set out a reporting requirement that is less rigorous than s.15 of the EPA or s.92 of the Spills Bill (Part X), both of which require immediate notification.

25. Again, the information in s.26(12) to (19) should be available to the public.

26. Respecting s.26(20), by-passes should be reported immediately, and the reports should also include: estimated volumes; known or likely environmental effects; actions, if any, taken by the direct discharger to prevent recurrences and/or to remediate environmental effects.

27. Respecting the AEP in s.26(22) to (25), the words "may" should be replaced by "shall" in subsections (22) and (23). The word "all" should be inserted ahead of the phrase "AOX generated by..." in subsections (22) to (24). More importantly, the AEP's should be subject to public notice and comment (i.e. by being considered as EBR instruments). The Director should be expressly authorized to review and approve the AEP's, and should be empowered to impose further terms and conditions to the Plans (i.e. where such conditions are, in the opinion of the Director, necessary to prevent, decrease or eliminate injury or damage to land, water, property, animal life, plant life and human health and safety.). In addition, it must be mandatory for the companies to implement the AEP's once approved (or alternatively, it should be an offence not to comply with a plan or a term or condition thereof). For greater certainty and enforcement purposes, I think these AEP's should have the same legal status as a Director's order, Control order, or C of A's.

28. Do we need a paramountcy provision to ensure that this regulation and/or the AEP's prevail in the event of conflict with other statutory instruments (i.e. provisions in a C of A regarding the amount/concentration of effluent that can be discharged)? Or will the AEP's require amendments to site-specific instruments now in existence for each of the plants?

29. No comments on the timeframes proposed in s.27.

Hope these comments are helpful. Please call me if you have any questions.