CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

CELA Publication #537

March 16, 2006

Mr. David Morin
Section Head
Environment Canada
National Program Integration
and Coordination Section
351 St Joseph Boulevard
Gatineau, Quebec K1A 0H3

Ms. Mary Ellen Perkin
Head, Industrial Information
Environment Canada
Industrial Information Section
351 St Joseph Boulevard
Gatineau, Quebec K1A 0H3

Dear David and Mary Ellen:

On behalf of the Canadian Environmental Law Association (CELA), we are writing to you regarding your email dated March 6th, 2006 announcing the publication of a Canada Gazette Notice for March 4th, 2006 entitled *Notice with respect to Selected Substances identified as Priority for Action* in *Part I* of *Canada Gazette*. CELA is expressing its concern and surprise over the timing of the release of this notice. As you know from previous multi-stakeholder meetings on matters regarding the Domestic Substances List (DSL) categorization process, CELA has been keenly interested in the development of this and subsequent surveys in relation to the DSL categorization work. We expressed our eagerness to participate in meetings and teleconferences on this topic because the government viewed surveys as a means of gathering industry information for the purposes of prioritizing substances for assessments. The efforts initiated by your department to facilitate discussions with CELA and others on the development of surveys were welcomed.

At the last such teleconference on January 27, 2006, CELA and industry representatives were provided with a draft copy of the survey and asked to provide comments. We welcomed the invitation to participate in this important discussion, and we did so with the understanding that there would be additional opportunity to review (and comment on) the next draft of the survey before its final publication. Indeed, this understanding was confirmed by government representatives at the end of the call.

CELA recognizes that government is under a significant time pressure to publish and incorporate the results from the surveys. However, CELA is concerned that the publication of this survey in the absence of further discussion with stakeholders participating on the January 27th call demonstrates a departure from the consultation process which had been outlined. Such a development weakens the transparency of government's actions. Upon further reflection, it appears that the process to develop surveys, which already included ongoing dialogue with industry representatives, was in its late phases. Hence, CELA's participation in the later stages of this process did not provide the opportunity for real engagement and input into these matters.

Given these developments, CELA identifies below some examples of issues and concerns which have yet to be addressed by government in the course of survey development. At least one of these issues, the application of confidentiality requirements, has been raised repeatedly by us in previous DSL categorization discussions. Not only does the current notice in the Canada Gazette fail to reflect consideration of our recommendations on confidentiality requirements, CELA also has yet to receive any government response to, or acknowledgement of, the concerns we expressed during the meetings. It is noted that nearly all of the final changes made to the draft survey reflected industry concerns, and such changes were made without the opportunity for CELA and other public interest organizations to respond to these amendments.

Confidentiality

The text on confidentiality found in both the Gazette notice and the accompanying Guidance document is wholly inadequate. In the Gazette notice, notifiers are simply asked to indicate for which items they are claiming confidentiality, and to provide an open-ended written justification. The Guidance document provides a list of considerations which may provide the basis for their justification. The list includes such considerations as "the information is not available to the public." In the public interest, CELA would argue that such a circular justification (i.e., the public should not be allowed access to this information because the public does not have access to this information) is overly permissive. While recognizing that the text of the Gazette notice and Guidance document is a legal interpretation of section 313 of *the Canadian Environmental Protection Act* (CEPA), we contend that government's interpretation of this section has become increasingly vague and open-ended over time. Evidence of this is found in the Guidelines for the Notification and Testing of New Substances, in which the New Substances Program construes the same section in a more restrictive manner. Namely, in section 9.2.1 of that document the list of confidentiality "considerations" is portrayed as a list of criteria, each of which must be met in order to successfully claim confidentiality. Furthermore, the New Substances Notification Guidelines require notifiers to sign a specific Certification Statement pertaining to their confidentiality claim, in addition to signing-off on their notification package as a whole. While we would still argue that the criteria used are overly broad, the New Substances Program's approach at least attempts to provide concrete guidance and oversight for notifiers claiming confidentiality.

CELA is concerned that this recent development for claiming confidentiality by industry or other affected facilities may lead to further weakening provisions for public access to information and limiting transparency in process.

Date and Volume Restriction

The Gazette notice is restricted to persons manufacturing or importing more than 100 kilograms of a substance during the 2005 calendar year. Additionally, there is a Stakeholder Identification section in the Declaration of Non-Engagement which allows companies to indicate their interest in a substance even if they do not meet with notice requirements. Presumably, government has structured the survey in this manner so as to minimize the number of mandatory responses while still allowing others to participate on a voluntary basis. However, this approach introduces several legal complications which remain unresolved. It is our understanding that government may apply restrictive Significant New Activity (SNAc) notices to those substances which were not in use in 2005 in amounts over 100 kg. As a result, companies which used the substances in

2004 or previously, or plan to use the substances in 2006 or subsequently, or currently use the substances in amounts under 100 kg, will have to proceed through the New Substances Notification Regulations.

While this approach would seem justified for those substances which truly are not present in Canadian commerce, this survey does not appear to provide such information. CELA views the lack of additional and relevant information outlining conditions required to notify a SNAc as a significant gap in conducting these surveys. For example, industries may use different batches of substances over time as their product lines change and evolve, and companies which used high volumes of the substances in 2004 may not meet the survey requirements for 2005. Nonetheless, government is still obliged to assess the impacts of these substances on the environment and human health through screening assessments.

Similarly, unlike the *New Substances Notification Regulations* (NSNR), there are no volume triggers for the assessment of existing substances sections 73 and 74 of CEPA. If substances meeting the categorization criteria are currently used in amounts under 100 kg, they should still receive screening assessments (even if they are not assigned a high priority for this next step).

It is entirely possible that substances manufactured or imported in some year other than 2005, or in amounts smaller than 100 kilograms, nonetheless pose a hazard. The reasons for this could include their persistence in the environment, synergistic effects with other DSL substances, or potential for long range transport, to name a few. There is therefore a need and a legal obligation to assess their toxicity and determine appropriate risk management strategies. However, under the terms of this survey it will be impossible for government to identify which substances truly are not in Canadian commerce, and which simply were not in heavy use in 2005. The problem is exacerbated by the Guidance document, which fails to identify the anticipated next steps for these substances (i.e., possible SNAc notices). The document merely states that "confirmation of substances not currently in commerce in Canada will allow government to ensure that post-categorization efforts are focused on substances with potential for release into the Canadian environment." Since the serious implications of "non-responses" have not been communicated, companies may not be motivated to complete the voluntary Stakeholder Identification section of the notice.

Additional Issues

It is noted that the Gazette notice and Guidance document have been additionally weakened to reflect industry concerns. We highlight two such instances:

- the removal of volume information for substances hazardous to human health (see section 3 of schedule 1), and,
- the use of the phrase "may meet the categorization criteria" under the description of which substances have been included in survey.

Based on level of uncertainty implicit in Health Canada's estimations on exposure, we are disappointed that government has foregone this opportunity to gather information on the quantity range for manufacture or import in 2005. This information had been previously included in the draft survey, and was challenged by industry at the January 27 conference call.

With respect to the phrase “may meet categorization criteria”, we note that this is very misleading given the high level of concern associated with the categorization packages decisions for these substances. Based on available data and application of government approached for categorization process, the substances targeted under the notice do meet the criteria under Section 73 as of March 4th. Furthermore, as of September 14, 2006, it will become technically inaccurate to use the word "may"; once the categorization process is complete, these substances will have met the criteria, though they may or may not be declared as toxic in the final analysis. Thus, government should be cautious in using qualified language in an effort to lessen the stigma associated with these substances.

In conclusion, CELA would like to articulate that the application of surveys (section 71) is necessary and critical in the categorization process. It is expected that the information gathered through surveys provide extremely valuable information for setting priorities for the departments among other things. However, the surveys announced in the Canada Gazette notice of March 4th may prove to be nothing more than an exercise to further reduce the number of substances which meet the criteria outlined in section 73 of CEPA that should be identified for further screening level risk assessments by government. From this perspective, CELA is very concerned that the surveys are being applied in a very limited manner and scope which may result in underestimating the number of DSL substances that truly require further attention by Environment Canada and Health Canada to protect the Canadian environment and human health.

Thank you for your consideration of these matters. If you have any questions, feel free to contact us. We look forward to your response.

Yours truly,

Jessica Ginsburg
Special Projects Counsel

Fe de Leon
Researcher

c.c. John Arseneau, EC; Paul Glover, HC; Bette Meek, HC; Danie Dube, EC; Olivier Bertin-Mahieux, CEN