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

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Dear Mr. Leigh and Mr. Madé:

Re: Response to Canada Gazette, Part I, Vol. 145, No. 32 (August 6, 2011) for Export of Substances on the Export Control List Regulations

The Canadian Environmental Law Association (CELA) is providing the following response to the *Canada Gazette*, Vol. 145, No. 32 (August 6, 2011) *Export of Substances on the Export Control List Regulations* (the proposed Regulations).

The following comments and recommendations are intended to supplement the comments provided to the government on the proposal to Amend the Export Control List of Schedule 3 of the *Canadian Environmental Protection Act, 1999* (CEPA 1999).

CELA is pleased that the proposed regulations aim to reduce duplications that are currently present in the *Export Control List Notification Regulations* (ECLN Regulations) and the *Export of Substances Under the Rotterdam Convention Regulations* (ESURC Regulations) as well as address export activities as they relate to the obligations of the Stockholm Convention on Persistent Organic Pollutants (POPs).

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CELA supports the intent of the proposed Regulations as they will improve transparency on export activities on toxic substances undertaken in Canada and facilitates information exchange on substances with importing countries on these substances. The proposed Regulations also will support the domestic and international obligations to achieve the elimination of persistent, bioaccumulative toxic chemicals. While the proposed Regulations do not include commitments that require reductions in export activities on specific toxic substances, the obligations set out in the proposed Regulations creates an information sharing regime that will influence how importing countries or destination countries continue to use, handle and dispose of toxic substances. In order to establish a strong framework, we have identified a number of obligations in the proposed Regulations that should be strengthened to improve Canada's ability to track exports, share information by expanding the type of information submitted on toxic substances and promote transparency through increase public reporting requirements on export activities.

The following are a few areas of the proposed Regulations that require improvements.

Export requirements under the Stockholm Convention on POPs

Generally, CELA is please that the proposed Regulations address the matter of export of substances listed under Annex A or B of the Stockholm Convention. However, there are several elements of the proposed Regulations that CELA would like to highlight as being of concern

Listing on ECL for Part 2 and 3

Persistent organic pollutants (POPs) listed under Annex A or B of the Stockholm Convention are expected to be listed to Part 2 or 3 of the Export Control List (ECL) but not to Part 1 of the ECL. This would be in keeping with CEPA Section 100, which outlines how substances are added to ECL.[1] However, the rational for not listing selected POPs to Part 1 is unclear. Several POPs listed to Annex A of the Stockholm Convention are targeted for elimination in its use and production. The goal for these POPs should provide the rationale for appropriately listing such POPS to Part 1 of the ECL. Listing to Part 1 would mean that these POPs would be exported only for destruction. Currently, ECL does not include all POPs in Annex A and B of the Stockholm Convention.

For specific POPs, such as perfluorooctane Sulfonate (PFOS), its salts and its precursors (PFOS and its salts), domestic regulations are in place to prohibit its use, manufacture, import and offer for sale. However, these regulations also have important exemptions that may affect the listing to the ECL. In July 2011, the Minister proposed to add PFOS and its salts to Part 3 of Schedule 3.[2] This listing will not require a reduction of export activities on PFOS and its salts. Listing of PFOS and its salts to Part 3 of the ECL may be appropriate based on the scope of the regulations and specific exemptions in place. But strong consideration should be made to changed listing to Part 1 (purpose of destruction) once the expiration date for specific exemptions approaches in 2013. At that time, the remaining challenges related to management of PFOS and its salts should focus on PFOS waste and stockpiles rather than ongoing issues of PFOS use for specific applications. It is unclear whether, or how the government will dispose of remaining stockpiles

[1] Government of Canada. Canadian Environmental Protection Act, 1999 (CEPA 1999). Accessed at: http://www.ec.gc.ca/lcpe-cepa/default.asp?lang=En&n=26A03BFA-1.

[2] Government of Canada. Canada Gazette, Part I, Vol. 145, No. 31 — July 30, 2011 Order Amending Schedule 3 to the Canadian Environmental Protection Act, 1999. Accessed at: http://www.gazette.gc.ca/rp-pr/p1/2011/2011-07-30/html/reg1-eng.html.

of PFOS and its salts or PFOS waste. It would be appropriate in these instances that the only export that should be permitted in Canada would be for destruction of these POPs stockpiles in situations where no such facility or technology is available in Canada.

Notice of Export to the POPs Secretariat

The proposed Regulations outline the process by which Canada will inform the POPs Secretariat about exports of POPs from Canada. CELA would like to ensure that the proposed Regulations uphold export practices permitted under the Stockholm Convention outlined in Article 3 (Measures to reduce or eliminate releases from intentional production and use) as well as provide the destination countries to respond to notice of export [3] Therefore, in this regard it would be critical that Canadian exports of POPs to a State or regional economic integration organization that is not a party to the Stockholm Convention provide full transparency regarding toxicity information on POPs export. This would ensure the destination State or region possesses the information necessary to make decisions for the protection of its citizens health and environment. Information that should be provided to all importing countries (Party and non-party states) include:

- toxicity of the POPs substance and measures to be taken for safety handling, use and **disposal** of the POPs. This information should also include, if available, information on the safe alternatives available on the toxic substance.
- Information submitted in an official language of the importing state (Party or non-Party to the Stockholm Convention). The availability of providing information in the language of the destination country will enhance the understanding of the information provided and minimize the potential for misinterpreting toxicity information and information safety measures.
- Canada should require that the destination country provide written response to confirm consent of export of POPs. The written consent should indicate an understanding and acceptance of impacts of POPs and confirm the intentions of the importing country's intended use of the POPs.

The proposed Regulations should be amended to address these gaps.

Meeting the obligations in Article 6(1)(d) of the Stockholm Convention

Section 6(2)(c) of the proposed Regulations states that "POPs is exported for the purposes of environmentally sound disposal in accordance with paragraph 1(d) of Article 6 of the Stockholm Convention;"[4]. Under paragraph 1(d) of Article 6, it is important to emphasize that this paragraph states the following:

> *Take appropriate measures so that such wastes, including products and articles upon becoming wastes, are:*
> *(i) Handled, collected, transported and stored in an environmentally sound manner;*

[3] United Nations Environment Programme. Stockholm Convention on Persistent Organic Pollutants (POPs) as amended in 2009: Text and Annexes.
[4] Ibid.

> *(ii) Disposed of in such a way that the persistent organic pollutant content is destroyed or irreversibly transformed so that they do not exhibit the characteristics of persistent organic pollutants or otherwise disposed of in an environmentally sound manner when destruction or irreversible transformation does not represent the environmentally preferable option or the persistent organic pollutant content is low, taking into account international rules, standards, and guidelines, including those that may be developed pursuant to paragraph 2, and relevant global and regional regimes governing the management of hazardous wastes;*
> *(iii) Not permitted to be subjected to disposal operations that may lead to recovery, recycling, reclamation, direct reuse or alternative uses of persistent organic pollutants; and*
> *(iv) Not transported across international boundaries without taking into account relevant international rules, standards and guidelines*[5]

The proposed Regulations should aim to permit exports of POPs to achieve the obligations set out in the Stockholm Convention. Substances covered in Part 2 or 3 of Schedule 3 in CEPA should have explicit commentary or links that describe exports that are permitted.

Absence of definition

Section 6(2)(e) of the Proposed Regulations includes words such as "trace amounts" that are not defined. A definition should be provided to determine what levels of POPs would be considered "trace amounts" for the purposes of the proposed Regulations. In the Stockholm Convention, the use of the word "trace contaminants" are also used for POPs but are yet to be defined.[6]

Laboratory use of POPs

The export of POPs, even for laboratory analysis, should be limited. The quantity threshold in the proposed Regulations is set at 10 kg per calendar year. Due to persistence, bioaccumulative and toxicity characteristics of POPs, this quantity threshold should be reduced. The impacts of POPs to the environment and human health are significant. Effects of POPs are observed in the environment and health even at very low levels and because they can be transported long distances, POPs will impact ecosystems far from their original sources, with the arctic regions being very sensitive to such contamination. In some cases, the continued use of POPs, even in quantities as low as 10 kg/year, may have long term impacts to the ecosystem.

For example, it is unknown if laboratory uses of POPs may result in creating POP stockpiles over several calendar years. The proposed Regulations do not require explicit reporting by laboratories of their use of POPs or disposal practices involving POPs. More stringent requirements should be outlined for laboratory analysis and research with respect to exports of POPs so as to promote better tracking of use and disposal of POPs.

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[5] United Nations Environment Programme. Stockholm Convention on Persistent Organic Pollutants (POPs) as amended in 2009 (Text and Annexes). Accessed at http://chm.pops.int/Convention/tabid/54/Default.aspx.
[6] United Nations Environment Programme. Stockholm Convention on Persistent Organic Pollutants (POPs) as amended in 2009: Text and Annexes.

Exempted Substances from proposed Regulations

Section 7 of the proposed Regulations lists substances that will not be captured by the obligations outlined in sections 8-22 (Prior Informed Consent Procedure) of the proposed Regulations. These include but are not limited to

> *2) Sections 8 to 22 do not apply to a substance that…*
> *(h) is exported by or to an individual for that individual's personal use, if the total quantity exported by the exporter does not exceed 10 kg per calendar year; or*
> *(i) is exported for use in a laboratory for analysis, in scientific research, or as a laboratory analytical standard, if the total quantity exported does not exceed 10 kg per exporter per calendar year.*[7]

The substances that fall in these categories warrant additional consideration with respect to issuance of permits and compliance with provisions outlined in sections 8-22. For example, CELA has provided comments related to the importance of substances, particularly POP substances that are used for laboratory purposes. While specific substances would be permitted for use for laboratory purposes or personal use, there continues to be a need for full disclosure on activities that involve the use of such substances to allow for better tracking of use of POPs.

Labelling requirements

The proposed Regulations outline requirements for labelling exports in section 21. The scope of information to be provided by exporters would include:

> *(1) An exporter must affix to any container in which a substance is exported a label that includes the following information in either or both official languages and, as far as practicable, at least one of the official languages of the country of destination:*
> *(a) the name of the substance as it appears on the Export Control List and the commodity code of the substance as it is identified in the Harmonized Commodity Description and Coding System;*
> *(b) a description of the hazards to the environment or human health that can arise from the nature of the substance or, if applicable, the product that contains it; and*
> *(c) the precautionary measures to be followed when handling, using or being exposed to the substance or, if applicable, the product that contains it, and the first aid measures to be administered in case of exposure.*[8]

The above information is essential. However, labelling information should also include the following:

- CAS RN for the substance;
- relevant Canadian regulations that aim to manage the substance:
- safety measures to be taken in **disposal** processes related to the substance.

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[7] Government of Canada. *Canada Gazette*, Part I, Vol. 145, No. 32 — August 6, 2011 Export of Substances on the Export Control List Regulations. Accessed at http://www.gazette.gc.ca/rp-pr/p1/2011/2011-08-06/html/reg2-eng.html.

[8] Government of Canada. *Canada Gazette*, Part I, Vol. 145, No. 32 — August 6, 2011 Export of Substances on the Export Control List Regulations. Accessed at http://www.gazette.gc.ca/rp-pr/p1/2011/2011-08-06/html/reg2-eng.html.

- Where available, provide information on safe alternative to the toxic substance, which provides options for importing country to assess value in continuing its use of toxic substance or consider replacement with substances which is considered less hazardous.

Section 21 of the proposed Regulations should be revised to include the above information.

The information contained on the labels should be accessible and understandable to the country of destination. This would reduce the potential for misunderstanding information related to the toxicity and safety measures required for the substances. Section 21 states that "…includes the following information in either or both official languages and, as far as practicable, at least one of the official languages of the country of destination."[9] The requirement to provide information on labels in the official language of the destination country should be strengthened by deleting the words "as far as practicable." Given the lack of consistency in regulatory approaches practiced by each country to manage toxic substances, the information contained on labels is essential to promoting safety in the destination country. The proposed legal text "as far as practicable" would provide exporters discretion to provide information in the official language of the destination country. By providing information in the language of the country of destination country regarding the hazard and handling information associated with a substance, they are able to inform their decisions about what is needed to protect their workers and communities. This requirement should not result in significant costs for businesses. However, costs related to translation should be covered by exporters.

Annual Reporting

The Risk Impact Analysis Statement noted that "the proposed Regulations would remove the obligation to provide an annual summary report of all exports reported in the preceding calendar year. This information is available to Environment Canada through the prior notice of export." [10]

CELA opposes the elimination of this obligation. While the rationale was to provide greater efficiencies for reporting by exporters and avoid duplication, the absence of this requirement will impact the quality of information on export activities and reduce the level of accountability by industry. The availability of the summary allows the relevant government department to validate the export permits issued to exporters as well as have a good source of information to determine the number of export transactions that each exporter has undertaken. The proposed regulations will place the onus on the government to conduct its own review of the export permits issued throughout the year. There is no basis to compare this number to the number of export permits that should have been issued.

Furthermore, an obligation for annual reporting would be relevant for reporting under the CEPA Annual Report on activities addressed through the proposed Regulations.

Under the Export Control List Notification Regulations, annual reporting was outlined in section 3 of these regulations. It stated:

[9] Ibid.
[10] Government of Canada. Export of Substances on the Export Control List Regulations. Accessed at http://www.gazette.gc.ca/rp-pr/p1/2011/2011-08-06/html/reg2-eng.html.

> *3. (1) Every person who exports a substance specified in the Export Control List in a particular year shall provide the Minister, on or before January 31 of the following year, with a report that contains for each export*
> *(a) the name of the substance as it appears in the Export Control List, the common name and trade name, if known, the CAS registry number of the substance if the number is specified in the Export Control List, the commodity code from the Harmonized Commodity Description and Coding System, and the name of the preparation, if known;*
> *(b) the date of export and the actual quantity of the substance exported;*
> *(c) the country of destination; and*
> *(d) the name and address of the importer.*
> *(2) The exporter shall keep, at the exporter's principal place of business in Canada, a copy of the report and copies of all shipping documents relating to the exports mentioned in it for a period of five years.*[11]

This requirement contains critical information that may be lost as a result of eliminating this provision in the proposed Regulations; for example, the requirement for "date of export and actual quantity of the substance exported" (section 3(1) (b)) and "…copies of all shipping documents …"[12] Information required under Schedule 1 of the proposed Regulations is inadequate to replace the information collected currently in section 3. The proposed regulations would require "estimated data" rather than "actual quantity of the substance." The data relating to exports and quantity of exports of particular substances would be estimated. There is no public reporting of final destination for each export and the quantity of exports for each location.

The proposed Regulation outlined that some information will be retained by the exporters in his address of business. This would include shipping documents related to the export, which are to be retained for a period of five years. The information from these shipping documents are not publicly released but there is added value for the public to know exact destinatation of exports and the frequency of exports of specific substances. This information should be released in reporting on exports activities in the CEPA Annual Report. Accurate data for exports of toxic chemicals is indeed necessary in order to keep track of these toxic substances and their potential impact to the importing country.

CELA recommends that the annual reporting obligations be reinstated and expanded.

Export Control List

Process for adding substances

The process for adding toxic substances to the Export Control List (ECL) is subject CEPA 1999 section 100 and is outlined in the RIAS of the proposed Regulations. The ECL consists of three parts:

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[11] Export Control List Notification Regulations. SOR/2000-108. under the Canadian Environmental Protection Act, 1999. Accessed at http://laws-lois.justice.gc.ca/eng/regulations/SOR-2000-108/page-1.html.
[12] Ibid.

•Part 1 includes substances whose use is prohibited in Canada. These substances may only be exported under very limited circumstances (such as for destruction).
• Part 2 includes substances for which notification or consent of the country of destination is required before the substance is exported from Canada, pursuant to an international agreement (e.g. the Rotterdam Convention). Examples of these substances include DDT and lindane.
•Part 3 includes substances whose use is restricted in Canada. Examples of these substances include ozone-depleting substances[13]

Under CEPA 1999, the discretion to add substances to the ECL lies with the Minister. The proposed Regulations do not outline a process by which other substances can be considered for addition to the ECL (Schedule 3) in CEPA 1999. Such a requirement should be considered as the ECL does not include a number of toxic chemicals currently listed on Schedule 1 (Toxic Substances List) under CEPA 1999 and are managed through regulations. The regulatory scope of many if not all these toxic chemicals do not include measures that restrict exports of these toxic substances. Nevertheless, consideration should be given to placing conditions on exports involving these toxic substances.

One example is asbestos, which is managed through the Asbestos Mines and Mills Release Regulations under CEPA and restricted to limits on releases of asbestos from mining processes. This risk management strategy does not include measures that reduce the use or sale of asbestos. Asbestos is not listed to the ECL. All forms of asbestos are considered human carcinogens. Exports of asbestos are permitted in Canada despite growing evidence of its harmful effects to human health. The World Health Organization estimated that 125 million people in the world are exposed to asbestos at the workplace and that "more than 107,000 people die each year from asbestos-related lung cancer, mesothelioma and asbestosis resulting from occupational exposure." WHO is working with other international organizations and civil society to eliminate asbestos related diseases which can be achieved by "stop[ping] the use of all types of asbestos." Canada has not proposed any new measures to address the impacts to human health from asbestos. But on-going process by the governments of Canada, Quebec and investors interested in mining asbestos in Canada has generated concern about the safety of human health from exposure this substances. This concern was for workers and community people in Canada or in developing countries, where regulatory safeguards do not exist for safe use, handling and disposal of asbestos to protect workers, their families and community from impacts of asbestos. Over the past several years, there is growing political and public outcry within and outside of Canada to promote the exchange of information between exporting and importing countries through the Prior Informed Consent process prescribed in the Rotterdam Convention.

Currently, asbestos is not listed in Annex III of the Rotterdam Convention. At the fifth meeting of the Conference of the Parties to the Rotterdam Convention in June 2011, the

[13] Government of Canada. Canadian Environmental Protection Act, 1999 (CEPA 1999). Accessed at: http://www.ec.gc.ca/lcpe-cepa/default.asp?lang=En&n=26A03BFA-1.
Government of Canada. Export of Substances on the Export Control List Regulations. Accessed at http://www.gazette.gc.ca/rp-pr/p1/2011/2011-08-06/html/reg2-eng.html.

Parties had an opportunity to add chrysotile asbestos to Annex III. Canada exercised its objection to the addition of chrysotile asbestos to the Annex III despite the growing support of Parties and scientific evidence that demonstrate the significant impacts to human health. The listing to Annex III would trigger listing to Part 2 in Schedule 3 of CEPA 1999. While many Canadian organizations urged the government to support listing chrysotile asbestos to Annex III of the Rotterdam Convention, the missed opportunity to list this toxic substance for Prior Informed Consent procedures does not necessarily mean Canada cannot take steps through CEPA to develop additional management measures on asbestos that would include information sharing on toxicity, handling and disposal of asbestos. This should include export activities involving asbestos.

Similarly, a number of polybrominated diphenyl ethers (PBDEs) have been assessed and found to meet the criteria for toxicity under section 64 of CEPA 1999. The Polybrominated Diphenyl Ethers Regulations (PBDE Regulations) (SOR/SOR/2008-218) was passed in 2008. The PBDE Regulations aim to prohibit the manufacture, use, offer for sale and import of a number of polybrominated diphenyl ethers (PBDEs).[14] The PBDEs found in the Penta-BDE and Octa-PBDe mixtures were added to Annex A of the Stockholm Convention on POPs. The manufacture of all PBDEs (tetra- to deca BDEs) would be prohibited in Canada while many PBDEs (tetraBDE, pentaBDE and hexaBDE congeners) would be targeted for virtual elimination under the CEPA regulations. Based on a Revised Risk Management Strategy on Polybrominated Diphenyl Ethers released in August 2011, additional management measures are expected on PBDEs.[15] However, PBDEs have yet to be proposed or listed to ECL. In the last update to amend the ECL posted in the *Canada Gazette*, Part I, Vol. 145, No. 31 — July 30, 2011 Order Amending Schedule 3 to the *Canadian Environmental Protection Act*, 1999 , PBDEs were not among the substances listed for addition.[16] The timing for adding PBDEs to ECL is unknown at this time.

These two substances are considered appropriate for listing to ECL. However, CEPA 1999 section 100 does not provide options by which additional substances are considered for addition to the ECL. The proposed Regulations do not outline a process that will consider new toxic substances for addition to the ECL beyond those the Minister has proposed. Some consideration should be made to amend the proposed Regulations to include a process by which the public can nominate substances to be added to the ECL.

In this regard, CELA strongly urges the federal government to consider the addition of chrysotile asbestos to Part 2 of Schedule 3, at a minimum, to require the exchange of information to importing countries. Similarly, PBDEs should also be listed in ECL and subject to the obligations of the proposed Regulations.

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[14] Polybrominated Diphenyl Ethers Regulations (SOR/SOR/2008-218). http://www.ec.gc.ca/lcpe-cepa/eng/regulations/detailReg.cfm?intReg=108.

[15] Environment Canada. August 2010. Risk Management Strategy for Polybrominated Diphenyl Ethers (PBDEs). Accessed at http://www.ec.gc.ca/toxiques-toxics/Default.asp?lang=En&n=98E80CC6-1&xml=5046470B-2D3C-48B4-9E46-735B7820A444.

[16] Canada Gazette, Part I, Vol. 145, No. 31 — July 30, 2011 Order Amending Schedule 3 to the *Canadian Environmental Protection Act, 1999. http://www.gazette.gc.ca/rp-pr/p1/2011/2011-07-30/html/reg1-eng.html.*

Expand information for listing substances to the Schedule 3

The information presented for substances listed to Part 1, 2 or 3 of Schedule 3 should be expanded to include additional information about the conditions related to the export of each substance. This should include the scope and purpose of listing for export to the specific parts of Schedule 3. Some of the relevant information may already be available in different datasets or permit forms. However, if the public was interested in determining the rationale for listing a substance to a particular part of Schedule 3 of CEPA, one would be required to identify relevant CEPA regulations or Ministerial orders to prohibit or restrict substances or identify the relevant international conventions. This task is onerous and complicated for the general public. The level of transparency and accountability to the public would substantially improve if listing of substances to ECL (Schedule 3) would list substances and its CAS RNs, references for relevant regulations for restriction or prohibition, and conditions, if any, placed on its export by the Minister. For example, for substances listed to Part 1 of Schedule 3, the purpose of export, such as the destruction in an environmentally sound manner, should be noted. Since export permits are issued for the calendar year, modifications to the list may be necessary.

For substances listed in Part 1, the public should know what type of export is permitted for these substances. The Minister can exercise its discretion on what exports would be permitted but generally substances in Part 1 would be exported for purposes of destruction. These decisions are not released to the public but are required as the export permit is issued. The criteria applied by the Minister in its decision making process is unclear in this regard.

Additional comments on the proposed Regulations

The proposed Regulations outline conditions by which export permits are issued, cancelled, amended or suspended in sections 12-18. We have several comments that focus on validation processes and timeframes related to cancellation, amendments or suspensions. They include:

- For Part I substances in Schedule 3, in cases where exports are permitted for destruction of the substance in an environmentally sound manner, the proposed Regulations do not include requirements by exporters or by the country of destination to confirm or validate that destruction of the substance has been achieved.

- In situations where permits have been cancelled, amended or suspended (section 17) the proposed Regulation is not explicit as to the status of export activities allowed for the substance. For example, section 17(2) states:

  > *If a designated national authority advises the Minister that it revokes its written consent to the import of a substance for which an export permit has been issued, the*

> *Minister must cancel the permit and the cancellation takes effect on the day that is 30 days after the day on which the Minister is advised of the revocation.* [17]

In situations where this may apply, it is assumed that export transactions completed up to and including the 29th day after the Minister has been advised are permitted without penalty. How will the enforcement activities confirm that cancellations, amendments and suspension of permits are followed?

Should you have questions, please do not hesitate to contact us. Thank you for your consideration.

Yours truly,

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[17] Government of Canada. Canada Gazette, Part I, Vol. 145, No. 32 — August 6, 2011 Export of Substances on the Export Control List Regulations. Accessed at: http://www.gazette.gc.ca/rp-pr/p1/2011/2011-08-06/html/reg2-eng.html.