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SUBMISSIONS

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THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION

on

AN APPROACH TO ENVIRONMENTAL STANDARD-SETTING IN ONTARIO WITH SPECIFIC REFERENCE TO MOBILE PCB DESTRUCTION FACILITIES

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I INTRODUCTION

The Canadian Environmental Law Association (CELA) has been involved over the years in various federal and provincial regulatory initiatives involving the manufacture, use and destruction of polychlorinated biphenyls (PCBs).[1]

In March, 1983, we responded to the Ministry of the Environment's discussion paper entitled, "Guidelines for the Regulation and Siting of Mobile PCB Destruction Facilities". At that time it appeared that the Ministry intended to introduce a draft regulation which would then be the subject of a public hearing by the Environmental Assessment Board. Thereafter, proponents would not be subject to hearings to establish that their facilities would meet the regulation, but need only apply to the Ministry for approval.

However, during the past year, a number of new developments have taken place. The Ministry is now proposing that the standard-setting hearing take place under the Public Inquiries Act. Further, at least one proponent has made an application for a Certificate of Approval under Part V of the Environmental Protection Act.

CELA welcomes the Ministry's general initiative in proposing

standard-setting hearings for mobile PCB destruction units. However, it is our position that this cannot foreclose subsequent hearings for the establishment and siting of specific facilities. We would contend that to do otherwise would undermine both existing applicable legislation and citizen confidence in the decision-making process. CELA, however, does take the position that the standard-setting hearing should take place first before any individual proponent's application for a Part V Certificate be heard. To do otherwise would mean that, in effect, standard-setting would take place on an ad hoc basis in relation to only one proposal.

These submissions will focus on CELA's recommendations for a general standard-setting approach to be taken by the Ministry of the Environment, with specific reference to the proposed Public Inquiries Act hearing in regard to mobile PCB destruction facilities. Suggestions for reform to what amounts to de facto standard-setting in relation to company specific orders and approvals have been dealt with elsewhere[1a] and will therefore not be discussed here.

II A PROPOSAL FOR ENVIRONMENTAL STANDARD-SETTING

CELA, since its inception, has called for legislative reform to give citizens the right to participate in the setting of environmental standards.[2]

Generally, regulations establishing environmental quality standards can be said to be the "teeth" of government environmental protection efforts. Yet, currently under Ontario's

environmental legislation, the first time the public - the presumed beneficiary - usually hears about a new regulation is when it is published in the Ontario Gazette. Usually, no one but the affected industries will have been given an opportunity to comment on a regulation before it becomes law. No environmental legislation in place today gives the public any opportunity to propose standards where none exist, or to demand that existing standards be reviewed on the basis of subsequent scientific studies demonstrating the potential inadequacy of a standard.

The rationale for greater public input into regulation-making has been well documented elsewhere. Benefits of a more open process have been said to include:

(a) making more viewpoints and information available, thereby increasing the likelihood of determining what the public interest is;

(b) making plainer who pays and who benefits from both environmental improvement and continued degradation;

(c) fostering greater accountability in and support for decision-making institutions; and

(d) augmenting confidence in the regulations ultimately promulgated.[3]

It appears that generally governments are moving in a direction to provide more legislative opportunities for public input into regulation-making. At the federal level, the Clean Air Act and the Environmental Contaminants Act provide for notice and

comment periods and the opportunity under the latter legislation to trigger a hearing by a Board of Review. In Ontario, the Occupational Health and Safety Act provides an example of a legislative process involving public involvement in the setting of standards in relation to toxic substances in the workplace environment. It is submitted that with increased public concern about the impact of toxic substances (including PCB's), in the environment, amendments to Ontario's environmental statutes to establish a mechanism for meaningful public input into the environmental standard-setting process are long overdue.

It was therefore somewhat encouraging to read the Minister of Environment, Andrew Brandt's, October 11, 1983 statement to the Standing Committee on Resources Development concerning the Ministry's intent to set standards to control the presence of chemical contaminants and involve the public in the process through an Environmental Standards Advisory Committee.[4] We would hope that there would be public input into the establishment of such a committee and its terms of reference and that there would be public representation on such a committee. We would submit that this should be just one facet of opening up the process.

The PCB initiative should be seen as another potential model for involving the public in the standard-setting process. CELA's position is that Ontario's environmental legislation should be amended to provide for an environmental standard setting process and that ad hoc procedures should not be encouraged. However, in the absence today of any legislative mandate for public input

into regulation-making, CELA believes that the proposed use of the Public Inquiries Act to establish a hearing process in regard for setting standards for mobile PCB units is appropriate if certain minimum requirements for ensuring public input are provided. These will be discussed below. We hope that if this process is successful, it would be put in place in the form of amendments to environmental legislation.

CELA's position with regard to general standard-setting is that while a hearing may not be required in every instance, it should not be ruled out as an appropriate mechanism in certain circumstances.

CELA has briefly looked at the U.S. approach to rulemaking for features which might be applicable in the Canadian context. Generally, it can be said that perhaps the most advanced procedures for incorporating public participation in the development of environmental standards exist in the United States. The 1946 Administrative Procedure Act (APA) is the general authority establishing procedures for rule or regulation-making.[5] The APA provides two models of rulemaking: formal and informal.

Section 553 "informal rulemaking procedures" consist mainly of publishing a notice and description of the proposed rule in the Federal Register, a minimum 30-day comment period, and an opportunity for "submission of written data, views or arguments with or without opportunity for oral presentation". Subsequently, the

agency promulgating the rule must incorporate in the rule adopted a concise general statement of its basis and purpose. Agencies are also required to give interested persons the right to petition for the "issuance, amendment, or repeal of a rule".[6] However, no record is developed and no trial-type hearing is provided. Agency decisions need not be based either wholly or in part upon comments received; and the agency is free to consider any information it deems relevant. Judicial review is limited to situations where a rule is found to be arbitrary and capricious or an abuse of discretion.[7]

Formal rulemaking involves the same procedural requirements as adjudication, including: opportunity for oral presentation, cross examination and rebuttal. Ex parte communications are prohibited and agency rules "unsupported by substantial evidence present in the record" are reviewable by the courts.[8]

In practice, there have been very few formal rulemaking hearings in the United States, and those that have taken place took many years to complete and have been criticized as being too expensive and too time consuming by all sides.[9]

On the other hand, the informal rulemaking process was often found to be lacking in providing opportunity for public participation and agency accountability. Increasingly during the 1970's, the American judiciary created a middle ground known

as "hybrid rulemaking" which attempted to create procedures which offered fuller exploration of factual issues and a higher degree of agency accountability than the minimum requirements prescribed by the APA, without the cumbersome trappings of adjudicatory proceedings. Some of the court-imposed procedures included: a statement of grounds for action, a mandatory response by the agency to criticisms, cross-examination of experts and the compilation of a record consisting of all materials submitted in support of all positions.[10] With the Vermont Yankee case in 1978, the U.S. Supreme Court ended judicial attempts at creating hybrid procedural models.[11]

What did survive was the "paper hearing" practice: the requirement that a reviewing court have before it all relevant documents, including criticisms, intervenor evidence, and agency responses. The Supreme Court in Vermont Yankee upheld the need for a formal record in notice and comment proceedings. Since this court decision, various commentators have called for amendments to the APA to provide for a hybrid form of rulemaking.[12] At the same time the U.S. courts were attempting to fashion a hybrid rulemaking process, Congress, in the development of specific environmental legislation, provided for rulemaking requirements going far beyond the general APA provisions, to further encourage public involvement and scrutiny of agency rulemaking activity.

One example is the Clean Air Act of 1977. In that Act, notice of a

proposed rule must be accompanied by a statement of its basis and purpose. The statement must include a summary of the factual data support, methodology and major legal interpretations and policy of the rule. In addition, the Clean Air Act requires the Administrator to create a docket which is open to the public at reasonable hours. Placed in the docket as they become available are all Federal Register publications, (including notice), written comments, transcripts of hearings, all drafts of the proposed rule, and any new documents available after publication of the proposed rule. Finally, the rule may not be based upon items not found in the docket, and the docket forms the exclusive record for review.[13]

In another departure from the limited APA provisions, in certain circumstances, federal environmental agencies have also held several days of preliminary public hearings before rules are drafted. During these sessions, the overall strategies that should be adopted for implementation of a particular statute are discussed. There is opportunity for further feedback in the Federal Register.[14]

CELA would submit that some of the features being proposed by commentators for hybrid rulemaking in the U.S. as well as some of the unique rulemaking procedures found in the Clean Air Act and other U.S. environmental legislation are a good starting place for designing an environmental standard-

setting process for Ontario.

We would contend that the main policy goals should be to ensure increased and informed public participation in the regulation-making process; to enable the Ministry of Environment to exercise some discretion and flexibility in designing the particular set of proceedings to be used for each regulation; and the production of a detailed record.

Key features would include:

- general notice of regulation-making proceedings to be placed in the Ontario Gazette. The initial notice should include not only the details of the upcoming regulation-making process but also the legal authority, bases and purpose, and the factual data, methodology and legal and policy considerations used in formulating the rule;

- a 'notification list' requirement which would ensure that notice is given to most interested and affected persons (without putting an undue burden on the Ministry). Seeking out interested members of the public and encouraging their participation will further the goal of gathering all points of view in regard to a specific regulation;

- a requirement to establish a "regulation-making" docket. The docket would include the initial notice, the proposed draft regulation, background documents used to develop the rule, written responses to the regulation, transcripts of any oral proceedings, any additional documents, and the final regulation;

- public accessibility of the docket;

- at least a 60 day period for public comment on the proposed regulation;

- during the period for public comment a number of additional procedures may be put in place. These would include:
  (a) cross-examination of Ministry technical staff
  (b) conferences
  (c) interrogatories
  (d) second-round written comments

(e) public hearings

The Ministry will be able to use its discretion in choosing the additional procedures. Further rules may be developed to avoid unnecessary costs or delay;

- provisions for judicial review of Ministry actions if they are "unsupported by substantial evidence" in the record.

In addition CELA sees benefit in developing mechanisms for public participation even earlier in the regulation-making process. This might include public input into general policy strategies, alternatives and priorities even before regulations are developed under a particular statute.[9]

CELA believes that the Environmental Protection Act and the Ontario Water Resources Act should be amended to provide for a standard-setting process such as outlined above.

One final element that must be considered in the development of a more open standard-setting process is the funding of interveners. It is trite to say that without funding, it is very difficult for public interest groups and others to make informed and well researched comments on proposed regulations.

Governmental advisory commissions and councils, among others, have recognized this fact and have recommended funding for intervenors in the regulation-making process. For example, the Economic Council of Canada has considered it a "fundamental principle that funding of public interest groups be considered as an essential component of regulatory reform." This assistance

was seen to include adequate provision:

- to finance representations at hearings on the development of policy directives;
- to undertake consultation with and representations to government concerning proposed new regulations; and
- to make representations in response to completed evaluations of regulatory programs.[15]

A mechanism could be developed to ensure the funds are accounted for, and to establish criteria for their receipt.

We will now turn to a discussion of the proposed Public Inquiries Act hearing for PCB mobile units.

III STANDARD-SETTING FOR PCB MOBILE UNITS

As stated earlier CELA sees the proposed standard setting hearing as a 'test case' and contends that it should be designed to engender as much public participation as possible. We believe that some of the procedures outlined above in CELA's general approach to standard-setting can be put in place here. Specifically we would recommend:

- full notification to all interested and affected persons including, in this case, public interest groups and all municipalities which currently store PCBs within their boundaries;
- public input into the composition of the commission, or alternatively the use of Environmental Assessment Board members (Ultimately it would be appropriate to ensure that Board members gained experience in standard-setting hearings as they would, as least in our submission, be the Board which would deal with any hearings required under our proposal for amending Ontario environmental legislation);

- publication of the draft terms of reference for such a commission, (i.e. the draft order in council) with opportunity for public input into the Order;
- establishment of a docket, which would include the items listed above on page 9, including background documents used to develop the standards for PCB mobile units and legal opinions and policy considerations used in formulating the regulation;
- funding for those wishing to participate in the public hearings;

In this case it should be clear that all performance and operation standards are open for discussion as are the existing ambient air guidelines for PCBs. To do otherwise would unduly limit the standard setting process and undermine the public confidence in the public inquiry.

CELA would reiterate that this standard-setting exercise must not foreclose the application of existing environmental laws in regard to the siting to specific PCB mobile units. These units must be scrutinized in a public forum with any test results, design, and the specific sites subject to the normal hearing procedures for waste disposal sites under the EPA. However, it would seem that with increased public participation in an open standard-setting hearing, subsequent EPA hearings may not be inordinately time-consuming, if proponents have done their technical homework. The alternative of exempting proponents from existing legislation will not engender public support and will be seen as yet another example of government and industry ignoring existing laws, and acting behind the scenes to impose untested disposal facilities on communities.

IV CONCLUSIONS

CELA believes that the time has come for impelmenting important law reforms designed to increase meaningful public participation in the environmental standard-setting process in Ontario. We have expanded on our earlier research on the area and believe the proposals we have outlined provide for flexible approach to ensure that decisions are taken after a full review of all viewpoints on any proposed regulation. We believe that hearings can be just one of a number of options available beyond an expanded notice and comment period and the development of a public docket. CELA believes the proposed hearing to set standards for mobile PCB destruction facilities is an important initiative to test new procedures for public input.

We believe that there ultimately must be a legislative framework put in place to guarantee public participation in standard-setting and have therefore addressed the PCB standard in this broader context.

v NOTES

1. See, for example, CELA/Pollution Probe, Minority Opinion submitted to the Technical Task Force Report on the use of Cement Kilns for the Destruction of Liquid PCBs, (Toronto, October 3, 1979); Robert Timberg, CELA, correspondence to Environment Canada regarding "Guidelines for the Management of PCB Wastes", (Toronto, February 9, 1983). See also Re. Canadian Environmental Law Association et al and Pitura (1980), 9 C.E.L.R. 41 (Ont. D.C.); aff'd on other grounds (1981), 10 C.E.L.R. 80 (Ont. C.A.).

1a. Robert Gibson, Control Orders and Industrial Pollution Abatement in Ontario (CELRF: Toronto, 1983).

2. See Estrin and Swaigen: Environment on Trial, Carswell and Swaigen, eds. (Revised ed. Toronto: CELRF, 1978) at 470-472. For a general discussion regarding environmental regulation-making and proposals for reform, see J.F. Castrilli and C. Clifford Lax, "Environmental Regulation-making in Canada: Towards a more Open Process", in Swaigen, Environmental Rights in Canada (Toronto: Butterworths, 1981) at 334.

3. Id. at 338.

4. The Honourable Andrew S. Brandt, Minister of the Environment, Statement to the Standing Committee on Resources Development, Ministry Estimates 1983/84 (Toronto, October 11, 1983) at 12-13. The Ministry has also recently been reorganized and a new Hazardous Contaminants Branch formed.

5. U.S.C. s.s. 551-706 (1976 & Supp. III 1979).

6. See section 553(b)(c) and (d). "Rule" includes what in Canadian law would be described as a "regulation".

7. 5 U.S.C. s.706 (2)(a)(1976).

8. 5 U.S.C. s.556-557. (1976 & Supp. II 1978). In formal rulemaking the record "constitutes the exclusive record for decision..." 5 U.S.C. s.556 (e)(1976).

9. See Robin Alta Charo, "A Specific Proposal for Hybrid Rulemaking", (1980) The Columbia Journal of Environmental Law 69. This article provides an excellent discussion of U.S. developments and has been used extensively by the author in developing an approach to regulation making in Ontario.

10. Id. at 70-79.

11. See Vermont Yankee Nuclear Power Corp. v. Natural Resouces Defense Council, Inc., 435 U.S. 519 (1978).

12. Supra note 9 and references contained therein.

13. See 42 U.S.C. ss. 7401-7642 (Supp. 1 1977 & Supp 11 1978) as amended. See also the 1974 Safe Drinking Water Act 42 U.S.C. ss. 300P-300j-10 which also provides for public participation procedures beyond those provided under the APA.

14. See U.S. Environmental Protection Agency, Regulatory Reform Initiatives Quarterly Progress Report, (Washington, D.C.: U.S. EPA, December 1978).

15. Economic Council of Canada, Responsible Regulation, An Interim Report, (Ottawa, November 1979) at 81-84.