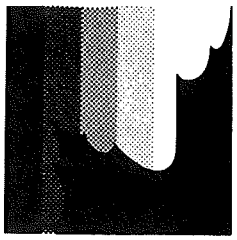

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SUBMISSION BY

THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION

ON THE

PROPOSED DESIGNATED SUBSTANCES REGULATIONS

UNDER

THE OCCUPATIONAL HEALTH AND SAFETY ACT, 1978

TO

DESIGNATED SUBSTANCES PROJECT

STANDARDS AND PROGRAMS

MINISTRY OF LABOUR

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SUBMISSION BY THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION ON THE PROPOSED DESIGNATED SUBSTANCES REGULATIONS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT, 1978

I. INTRODUCTION

The Canadian Environmental Law Association, founded in 1970, is a public interest environmental law group committed to the enforcement and improvement of environmental laws. We have previously made submissions to the Ministry of Labour in October 1978 on the then proposed Regulation respecting General Occupational Health Hazards and the proposed Regulations Respecting Lead, Asbestos and Silica.

CELA is pleased to be able to put its comments on the proposed Designated Substances Regulations (Gazette, August 16th, 1980) to the Minister of Labour through the Designated Substances Project. In doing so, we hope to bring to bear the expertise and viewpoints of those whose demonstrated concern is for the development of effective legal regimes to improve the environment, including the work environment.

II. MEDICAL MONITORING, EXPOSURE LEVELS AND REMOVAL FROM EMPLOYMENT

A. General

The Ministry did not formally publish a Statement of its own rationale or supporting data for the Designated Substances Regulations ("the Regulations"). In the absence of such a Statement, it would appear that the general thrust of the Regulations is as follows: to set exposure standards sufficiently low that excessive numbers of employees should not contract an industrial disease; to require a rigorous system of medical monitoring of employees to detect actual or potential industrial diseases even given the low exposure standards; and to remove employees from

exposure which is producing or has produced an industrial disease. The rigours of the proposed medical monitoring program express the inevitable fact that employees will continue to be at risk even when the arithmetically expressed criteria of the Regulations are met. The result is that employees will be subject to frequent periodic medical examinations, often including x-rays[1], that may themselves impair health. They will still be subject to contracting the particular industrial diseases associated with a given designated substance. And finally, they will be subject to removal from employment with all the attendant dislocation and disruption that that entails.

CELA queries whether the Regulations are, in fact, adopting exposure criteria which are sufficiently low. If the sophisticated and frequent examinations proposed are necessary, it is legitimate to question whether the criteria could not be set at a lower level.

Even if the exposure criteria proposed in the draft Regulations are finally adopted, it is still open to require an additional obligation: that no exposure be permitted beyond the lowest level that is then feasible. Feasibility might be defined in the same way the Regulations do in relation to criteria for the permitting of respiratory equipment, namely, that feasibility is a question of available existing technology.

By importing this additional obligation the Regulations would be adopting a limited self-correcting feature to take into account advances in technology. The self-correcting feature might well have the effect of decreasing exposure to workers who might otherwise be unnecessarily exposed while the regulatory process took its course. In terms of achieving certainty, there is no substitute for arithmetically expressed ceilings; but, in terms of achieving maximum prevention of industrial disease it would be well worth attempting to put in place a downward flexible ceiling.

Nothing would prevent the Ministry from promulgating new arithmetic ceilings in response to new technology, but while the process was underway employees could enjoy the benefits of that technology. It should also be clear in the regulations that collective bargaining agreements may require stricter standards than those established under these regulations.[2]

B. Removal From Exposure: Permissive vs. Mandatory Requirements

Two of the draft requirements are permissive with respect to the ability of an employer to remove an employee from exposure (asbestos and silica) and four are mandatory (lead, mercury, isocyanates and vinyl chloride). If removal requires job relocation, presumably the preventive rehabilitation policies of the Workmen's Compensation Board[3] will ease the economic burden.

We appreciate that the regulations apply to substances whose toxicity, latency period, and certainty of prognosis differ. But we do not see why protection by removal should be any less certain or speedy by virtue of any of these differences. Especially with regard to the proposed silica regulation, it is known statistically that most pre-silicotics will inevitably deteriorate to being silicotics and that further exposure can only exacerbate this process.[4] The deterioration of pre-asbestosis to asbestosis is less certain, but as noted above, it is reasonable to assume that continued exposure will be harmful.

We do not believe it should properly rest as an individual management decision to determine whether a person with mineral dust effects (MDE) should run the risk of fully contracting a fibrous lung disease. Nor, for that matter, should this be an individual employee decision. Our society has an important stake in protecting its members from preventable disabling or fatal diseases whenever it can, and we see no rationale for

distinguishing for this purpose between, for example, silicosis and lead poisoning.

C. Mineral Dust Effects

Regarding the proposed asbestos regulation, we observe that section 5 permits removal of an employee from further exposure to asbestos by the employer where a physician has stated that his health "has been impaired". We submit that the section should permit such removal when health "has been or may be impaired". We base our concern on the asbestos fibre dust effect (AFDE) which can signal further deterioration to confirmed asbestosis.

The Workmen's Compensation Board has discussed the problem of AFDE in its Directive of May 11th, 1976. It notes that although identification of AFDE is much more problematic than silica dust effects (SDE), and although there is no certainty that removal from exposure will prevent deterioration, "it seems reasonable to assume that the earlier the removal, the less will be the chance of progression".[5] A federal government task force on pneumoconiosis reached much the same conclusion.[6]

With regard to the proposed silica regulation, the employer may remove the employee from exposure where a physician certifies that his health has been or "will be" impaired, thereby clearly recognizing the importance of SDE. Although there are more difficulties in identification and prognosis with AFDE than SDE, we strongly believe that these should not prevent an informed attempt to reduce the incidence of full progression to asbestosis of those workers who can be reasonably believed to be at risk.

III. THE ROLE OF THE INSPECTOR REGARDING RESPIRATORY EQUIPMENT

We support the initiative to require compliance with strict environmental standards without reliance on personal protective equipment. Even more, we commend the draft's criteria for determining

when it is "not feasible" to meet the standards and thereby permit the use of personal protective equipment. We note that the draft does not appear to take into account the cost of meeting the environmental standard, and we believe this to be significant progress.

On the other hand, we also observe that the employer must demonstrate the non-feasibility of compliance to "the satisfaction of an inspector". Without taking a position on the question, we query whether an issue of such importance and complexity can safely be left entirely to the interaction of the employer and the inspector.

Partly because cost is not a factor in determining feasibility, some employers may have a tremendous stake in trying to meet the terms of the non-feasibility criteria, and may put the inspector in an invidious position. The inspector would not by the terms of the section have the benefit of competing submissions or information from the employees or the confidence that his superiors would back up his decision on an appeal. We are not necessarily suggesting a procedure involving a hearing or an appeal, but we do put forward a concern that inspectors may be the subject of substantial persuasion in these situations.

We do suggest that such concern might be handled by requiring that the employer prove his case to the satisfaction of a Director upon notice to the employees. Alternatively, the inspector might have the option of referring decisions on the question to a Director, again on notice to the employees.

IV. THE REGULATION SETTING PROCESS

We are encouraged that the Ministry has taken a more serious approach to the public's participation in the regulation setting process. We note the substantial changes that have taken place

in the draft regulations from those of 1978 to those of 1980 including:

(a) the standards for asbestos and lead;
(b) the involvement of employees in control programs;
(c) the clear obligation not to rely on personal protective equipment;
(d) the availability of health records and monitoring results; and
(e) the refinement of the required health records.

It is evident that the Ministry has taken into account the views of the many observers, including ourselves, who have previously commented on the topics addressed.

We do, however, have one strong objection to the way in which the regulatory process is handled. Maximum benefit from public participation can only be expected to be achieved when all commentators have equal access to ministerial thinking. Lack of a Statement accompanying or preceding the draft Regulations setting out the Ministry's own thinking and supporting material only results in unnecessary speculation, second guessing and possibly misinformed comment.

Whatever one might think of the rationale used by the U.S. National Institute of Occupational Safety and Health (NIOSH) in recommending an asbestos exposure standard of .1 fibres/cc of air, at least the rationale was clear:[7]

(a) no level of asbestos was safe;
(b) no unsafe level should be permitted;
(c) only a detectable limit should be set;
(d) the lowest detectable limit was .1 fibres/cc;
(e) therefore the limit should be .1 fibres/cc.

By achieving this remarkable clarity NIOSH permitted the debate to be waged on the basis of definable issues and calculated positions on some very important non-scientific value judgments. In Ontario, we are not invited to participate in a debate of comparable sophistication and CELA believes we all suffer as a result. The omission to use a Statement is all the more serious since the provincially appointed Advisory Council on Occupational Health and Occupational Safety had already pointed the way towards use of the Statement in developing Regulations.[8]

V. SUMMARY

While welcoming many of the initiatives in the Regulations, particularly the prohibition of reliance on respiratory or other personal protective equipment, our Association does recommend that further attention be given to the following points:

(a) the exposure criteria does not appear to result in the prevention of all but numerically insignificant cases of industrial disease;
(b) the obligation to keep exposure to an arithmetically expressed ceiling could be supplemented by an additional obligation to keep exposure to the lowest level feasible, defining feasibility as a question of available technology;
(c) the obligation to remove employees from actual or potential danger to health as medically certified should not be limited to lead, mercury, isocyanates and vinyl chloride, but should be extended to asbestos and silica;
(d) removal from exposure to asbestos should be extended to cases of medically certified potential danger, as well as actual harm;
(e) the role of the inspector in deciding to permit the use of respiratory equipment needs re-examination;

(f) all regulations must be accompanied by a ministerial Statement as outlined by the Advisory Council on Occupational Health and Occupational Safety.

VI. NOTES

1. The Workmen's Compensation Board actively promotes controlling unnecessary exposure to x-rays in its own diagnostic services. See WCB, 1978 Annual Report, page 14.

2. Advisory Council on Occupational Health and Occupational Safety, First Annual Report, 1 April, 1978 to 31 March, 1979, pages 33-35.

3. WCB, Vocational Rehabilitation Division Manual, Doc. 44-21-01.

4. WCB, Board Policies and Administrative Directives,
   Directive #6, May 27, 1975, page 196
   Directive #2, May 11, 1976, page 197A.

5. Ibid.

6. Health and Welfare Canada, Task Force on Occupational Respiratory Disease (Pneumoconiosis), Ottawa, February, 1979, page 48.

7. U.S. Department of Health Education and Welfare (DHEW), "Remarks by NIOSH Director Anthony Robbins on the Need for a New Asbestos Standard," April 17, 1980 and U.S. DHEW, "Workplace Exposure to Asbestos: Review and Recommendations," April, 1980.

8. Supra, note 2.