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West Coast Environmental Law
DEREGULATION BACKGROUNDER

WASTE MANAGEMENT ACT REVIEW – STAGE 1

On September 21, 2002, the BC government announced a sweeping review of the *Waste Management Act*, the law that regulates polluters in BC.

Changes discussed in the first of three discussion papers could mean that:

- Government regulation of small and medium sized polluters is less effective at preventing regulation.
- Enforcement of environmental standards will become more difficult or practically impossible for small and medium sized polluters.
- Government will have less ability to deal with local concerns such as pollution near residential areas or into sensitive environments.
- Citizens concerned about local air and water impacts may not be able to appeal pollution authorizations given to polluters that are deemed to be low or medium risk.
- Local residents and citizens may no longer receive notice when industry applies for a pollution permit.
- Openness and public accountability could be bypassed through use of private contracts between government and industry that exempt industry from regulation.
- Legally binding standards could be waived through backroom deals with industry.

What is the Review Process?

Government has stated that their objectives for the review are: (a) to reduce costs to polluters and government, and (b) to ensure effective pollution prevention. While both of these objectives may be achievable, the extent of cost-saving government is looking for and the government's aversion to regulation, will likely mean a reduction in effective pollution prevention.

Notably, government's objectives do not include ensuring accountability for environmental protection or ensuring transparency or effective public involvement in decisions that affect them. As a result, government will likely not discuss many of the hallmarks of modern environmental legislation -- for instance, legally binding environmental quality targets, citizen-triggered audits of environmental protection, or public involvement requirements that lay down minimum standards for consultation.

Review of the Waste Management Act will extend through to 2004, with possible amendments occurring as early as Spring 2003.

What is being discussed so far?

The first of three discussion papers was released on September 21. It deals with authorizations – how government goes about the business of regulating polluters. The discussion paper proposes a number of possible changes to the *Waste Management Act*.

Tiered approach to big, medium and small polluters.

Currently, it is generally illegal for a person to emit waste into the BC environment unless they are authorized by a permit or regulation. The authorizations contained in permits or regulations normally set limits on how much a business can pollute and what pollution prevention equipment is needed. Many businesses are authorized by regulation, and approximately three thousand businesses are authorized by permit. A number of small businesses – e.g. kennels, drycleaners -- do not have permits but are technically supposed to have permits.

The discussion paper proposes a tiered approach to environmental protection in which polluters that are deemed to be high, medium and low risk are treated differently. Government proposes only using permits for "high risk" polluters. For polluters deemed to be "medium risk" government is proposing "Codes of Practice." Low risk polluters would simply be required to register with government, and subject to a prohibition against causing substantial impairment to the environment. The government has not proposed any criteria for what types of facilities constitute high, medium or low risks.

What's a Code of Practice?

Currently in BC, the only official Code of Practice is the *Code of Agricultural Practice for Waste Management*. The Code does not require farmers to do anything. It simply says that they can emit waste into the environment if they follow the Code. This contrasts with other regulations and permits which require polluters to take certain actions to avoid pollution. For instance, regulations require sawmills to have containment systems that avoid toxic antisapstain chemicals from entering waterways and killing fish. The following examples show how a Code of Practice is different from other regulations:

Example A: Sawmill regulated by Regulation. Joe's Sawmill is treating timber with antisapstain chemicals but has not installed a curb around work area to contain spills. Government enforcement staff visit Joe, and warn that he is legally required to have a containment system. Joe ignores them. After repeated warnings inspectors take photographs evidencing the lack of a containment system and charges are laid. Joe is convicted, fined and ordered to install a containment system. He does this. Two weeks later a storage tank springs a leak, but the toxic chemicals are contained and do not enter the environment. **End Result: successful prosecution; environment protected.**

Example B: Sawmill regulated by Code of Practice. Joe's Sawmill is treating timber with antisapstain chemicals but has not installed a curb around work area to contain spills. Government enforcement staff visit Joe, and tell him that he should install a curb. They warn him that if there is a spill he could be fined if he doesn't install a curb. Joe ignores them. Officials repeat their warnings, but Joe continues to ignore them. Eventually a storage tank springs a leak, and toxic chemicals enter the Fraser River causing a major fish kill. Enforcement staff visit, but Joe has fixed the leak and hosed down the dip tank area so there is no hard evidence that the spill occurred at Joe's sawmill. Charges are laid but the judge finds that there is not proof beyond a reasonable doubt that Joe was responsible. **End Result: unsuccessful prosecution; environment suffers.**

The proposed changes in policy raise major concerns:

1. **Codes of Practice do not prevent pollution.** Codes of Practice are voluntary standards that protect polluters from liability so long as they follow the Code. (See Box Above) An analogy would be traffic laws that only penalize speeding if it causes an accident, and protect drivers from liability if

they are following the speed limit. Polluters are not required to follow practices or install technology that prevents pollution.

2. **Codes of practice may make enforcement difficult or practically impossible.** Polluters that are subject to Codes of Practice may still be liable if pollution occurs and they have not followed the Code of Practice, but this is often impossible to prove beyond a reasonable doubt. For instance, with prescriptive regulations it may be easy to verify that a business has equipment that avoids spills and treats waste. However, with a Code of Practice, it may be necessary to catch someone in the act of spilling or illegally dumping waste – a task which can be virtually impossible.
3. **Blanket Authorizations may make enforcement difficult or practically impossible**. The Discussion Paper proposes that "Low risk" polluters be authorized to pollute so long as they register with government, and will only be in breach of the law if they cause a "substantial impairment or alteration to the usefulness of the environment." This is likely to prove unenforceable in many cases – especially where pollution is caused by the cumulative effect of many polluters. In other cases, lawyers will quibble about whether the impairment to the environment is "substantial".
4. **Reduced use of permits means less attention to local concerns.** While regulations ensure a minimum standard for an industry, permits ensure that polluters are aware of the law and that local concerns such as a sensitive receiving environment, cumulative impacts or local residences are taken into consideration. For significant polluters the ideal strategy is to use regulation to ensure a baseline of protection and permits to ensure local concerns are considered. Reductions in use of permits will likely mean less attention to local concerns.
5. **Reduced use of permits means less opportunities for public engagement.** Under the current legislation**,** those affected by pollution – e.g. people suffering from asthma affected by air pollution or residents concerned about drinking water quality – have an opportunity to challenge pollution permits or insist on special conditions. Also, before permits are issued, local residents have an opportunity to raise concerns with government officials, and after permits are issued they can be appealed to the Environmental Appeal Board. These provisions for checks and balances will likely be extinguished if the permit system is abandoned for "medium and low risk" polluters.

New Directions or Going to Far with Old Directions?

To some extent, the proposal to reduce use of permits represents a continuation of the past government's policy of shifting from permits to regulation in order to reduce administrative burden. The proposal to exempt low risk polluters is similar to the government's long-standing de-facto policy of turning a blind eye to small-scale polluters (e.g. kennels and drycleaners).

However, the current government appears intent on accelerating de-permitting much further. After cutting environmental protection budgets by 44%, the government is arguing there is a need for triage in what polluters receive attention. Because BC was working to reduce the number of permits for most of the last decade, there is a risk that only a handful of big polluters will be subject to the permitting regime. Slightly smaller polluters could be subject only to unenforceable Codes of Practice, and many facilities that are currently permitted could be virtually unregulated.

Similarly, Codes of Practice have been used in the past and may be a reasonable approach to regulation if they do not create risks of environmental harm or enforcement difficulties. However, the discussion paper proposes their use for all medium risk industries.

Reduced Notice Requirements

The de-permitting process will likely mean that local residents will lose the right to be notified before a "low or medium risk" polluter locates next door. The discussion paper goes further in suggesting that notice requirements for permit applications could be reduced. It suggests possibly eliminating the requirement to publish applications in local newspapers – usually the most effective way in which local citizens find out about permit applications. (Minor permit amendments are already exempted from notice requirements). It does not suggest any of the low cost improvements to notification that exist in other jurisdictions, such as the use of web-based environmental registries, or letters to neighbours and local groups.

New enabling powers

The discussion paper also raises the possibility of amending the Act to allow several new strategies. These strategies could result in positive or negative impacts to the environment depending on how they are used:

Local Area Plans. A weakness of the present system is that it ignores the cumulative impacts to the environment of numerous permits. Local area plans to deal with cumulative impacts of polluters or protection of sensitive areas could be a positive tool if: they are used; they are legally binding on government; and both existing and new polluters have to take action to implement the plan.

Economic Instruments. Economic instruments such as deposit refund systems, emission fees and emissions trading can be effective tools for environmental enforcement if designed well. However, they can also weaken environmental standards. For instance, the Ontario emissions trading system for power generators has been widely criticized as leading to increase pollution levels.

Covenants. The paper also proposes the possibility of covenants between government and industry whereby industry agrees to certain practices or performance targets in exchange for government promises (e.g. promises to speed up approvals or consolidate permits etc.). Although the discussion paper raises issues related to transparency, consistency, openness and enforceability, the covenants approach raises the possibility that environmental standards could be weakened in backroom deals with industry. It could also take away citizen enforcement options by reducing environmental protection to a private contract between the government and a company.

West Coast Environmental Law will be publishing a full response to the Authorizations Discussion Paper on its web site.