January 2004

RESPONSE TO THE PROPOSED WASTE DISCHARGE REGULATION

Andrew Gage, Staff Lawyer
West Coast Environmental Law

On October 21, 2003 the BC government passed its Bill 57, the *Environmental Management Act* (the "Act"). Bill 57 replaces BC's main pollution law, the *Waste Management Act*, with a new regime that is part of the BC government's deregulation initiative. It is expected that Bill 57 will eliminate about 80% or more of existing waste permits.

West Coast Environmental Law commented on the *Environmental Management Act* when it was first introduced into the Legislature in May 2003. Our concerns about the Act remain very much unchanged, and can be found at http://www.wcel.org/deregulation/bill57.pdf. A longer discussion of some of the changes proposed by government in relation to Waste Discharge (many of which were adopted in the final version of the Act and the current version of the Regulations) can be found at http://www.wcel.org/wcelpub/2002/13891.pdf.

However, the Ministry of Water, Land and Air Protection is currently requesting comments on the proposed *Waste Discharge Regulation* (the "Regulation") – a regulation which would be created under the new Act. This Regulation provides a higher level of detail about what can be expected in BC as a result of the new Act, and this backgrounder is intended both to inform the public on the implications of the Regulation, and to provide recommendations to Government on how the Regulation could be improved.

PRESCRIBED INDUSTRIES AND CODES OF CONDUCT

The main purpose of the Regulation is to set out what industries and practices are to be regulated under the Act, and to set out which requirements of the Act will apply to those industries. Basically, there are three types of waste discharges contemplated by the Act and created through the Regulation:

- Industries, trades, businesses, activities or operations appearing in Schedule 1 of the Regulation will require a government issued permit or other authorization under the Act before the operator can introduce any waste into the environment.

- Industries, trades, businesses, activities or operations appearing in Schedule 2 of the Regulation will be able to operate without any government approval, provided that the operator follows a "Code of Practice" which has been developed for that particular type of waste disposal. If no Code of Practice has been developed for one of the listed industries, the operator will need to obtain a government issued permit or authorization before any waste can be introduced into the environment.

- If an industry or operation does not appear in either Schedule 1 or 2 to the Regulation, then the waste discharge is subject only to the general requirement that a person must not introduce waste into the environment so as to cause pollution. The Act defines "pollution" as "substances or contaminants [in the environment] that substantially alter or impair the usefulness of the environment."

The result is that only about 20% of industries which discharge waste into the environment will require government approval to do so. This is a major reduction in the use of government approvals, raising serious concerns about enforceability, transparency and lack of accountability. We have previously raised these concerns in our earlier submissions on Waste Discharge issues and will not repeat them here. This paper will focus on the new information provided by the Regulation.

SCHEDULE 1 – INDUSTRIES FOR WHICH A PERMIT IS REQUIRED

Developing a list of industries that are sufficiently serious to warrant permitting by industry alone is an inherently difficult task. It is made more difficult by the fact that the Act gives no direction as to what factors are to be considered in including an industry in Schedule 1.

In terms of the specific industries listed in Schedule 1, we have previously recommended that "Government should establish a multi-stakeholder committee with independent expertise in environmental health and impacts to develop detailed operational criteria for assessing whether activities constitute "high", "medium" or "low" risk." It is difficult for non-scientists to intelligently comment on whether certain industries should be included in schedule 1 that have not been.

One specific activity which we have previously suggested should be regulated through permits is the mining of sand and gravel. There is a long history of damage to salmon streams arising from gravel and sand pit operations and these disruptive operations are often situated near residential areas making them particularly contentious. However, sand and gravel pits do not appear in either Schedule and will not be regulated (except to require that the 'usefulness' of the environment not be substantially impaired by their waste).

RECOMMENDATIONS:

- Government should establish a multi-stakeholder committee with independent expertise in environmental health and impacts to develop detailed operational criteria for assessing whether activities constitute "high", "medium" or "low" risk.

- Sand and Gravel Extraction should be included in Schedule 1 of the Regulation.

CODES OF PRACTICE

The Codes of Practice are not yet publicly available, and it is impossible to comment on whether they will adequately protect the environment, or even on whether the general approach taken by such Codes are adequate.

Previous communications have suggested that the Codes might be drafted as "permissive codes", which would set out preferred practices without enforceable requirements. As we have previously noted, this would be like traffic laws that allow motorists to speed and protect them from liability for accidents if they are not speeding. In many cases, regulations prescribing control equipment and/or emission levels are essential to avoid accidents and are essential if standards are to be enforced. Simply relying on prohibitions on emissions or prohibitions on causing pollution will often prove inadequate because they are difficult to enforce. For instance, it may be clear that a polluter is engaging in midnight dumping because they have no pollution control equipment, but it may be impossible to prove a specific incidence of midnight dumping.

We are glad to see that s. 5 of the Regulation, although oddly worded, appears to contemplate Codes of Practice that contain mandatory requirements and are not merely permissive Codes. However, depending upon the actual language in the Codes this section could effectively be rendered ineffective. We are not encouraged by the fact that

consultations around Codes of Practice seem to have been almost exclusively with the industry that the Codes are designed to regulate. While the impact of Codes on specific industries does need to be considered, transparency and protection of the public and the environment are crucial goals. We trust that the government will make certain that they are met.

CHANGING THE CODES OF PRACTICE

We have previously noted that "regulations for medium risk emitters need to be designed on a case-by-case basis, weighing competing concerns regarding enforceability, effectiveness and flexibility for industry. A blanket commitment to Codes of Practice should be avoided." Section 6(1)(a) begins to provide some of this flexibility – allowing the Minister or a Director to increase requirements of the Act where necessary to protect the public or the environment.

We are concerned that the Minister or the Director may approve the substitution of requirements from a Code of Practice as long as the "intent of the code of practice is met." It is unclear what the legal meaning of "intent" is in this case, and how the Director (or the Minister) is to judge whether it is met. The language does not even appear to require that equivalent protection for the public or the environment be provided by the substituted requirement, or that any other public interest test be met. In the absence of a legal requirement that the substitution meet or exceed the environmental and human health protection provided by the Code, we feel that this approach can only reduce environmental protection.

Moreover, it is disturbing that there are no firm requirements that the public will be notified of proposed substitutions in a Code of Practice, but only a power for the Director to order a person to give such notice. Even then, such notice is limited to either personal service or posting copies of the application in post offices – there is no provision for the broader public notice so common in most environmental statutes in this day and age.

Moreover, the Regulation creates a formal process in which an industrial operator may apply for a substitution, but no process whereby a member of the public or a person affected by the industrial waste may apply for a substitution "to protect the public or the environment." While a member of the public could informally lobby the director or the Minister, the result is that the industrial operator not only gains a legitimacy under the Act, but also a right of appeal to the Environmental Appeal Board should the Director decline to approve the substitution. A member of the public who is aggrieved by the waste discharge should have rights to have his or her problems addressed by the government. These rights should be more protected than the right of an industrial operator to be relieved from the ordinary requirements of the law. This addition would also allow for greater tailoring of Codes of Practice to specific locations while protecting public rights.

In a recent paper, *Public Health Hazards and Section 7 of the Charter*, published in the Journal of Environmental Law and Practice, 13 J.E.L.P. 1, West Coast Environmental Law staff lawyer Andrew Gage suggested that section 7 of the Canadian Charter of Rights and Freedoms might require certain basic procedural protections in relation to legislation authorizing public health hazards. If this paper is correct, it may be that the failure of the

Regulations to provide any meaningful recourse to a member of the public whose health is affected by waste discharge may be unconstitutional.

RECOMMENDATIONS:

- The Regulation should provide greater guidance as to what the goals of a Code of Practice are. These goals should include a requirement that operations under the Code not cause a significant adverse impact on human health or the environment. Codes should be required to be enforceable and to be developed on the basis of the precautionary approach.

- The Regulation should require any substituted Code requirement under ss. 6 or 7 of the Act to provide equivalent or greater protection to human health and the environment.

- The Regulation should contain clear requirements for public notice including, where appropriate, notice published in public newspapers, signs posted at the industrial site, and other types of notice.

- The Regulation should provide a process for persons aggrieved by waste discharges to allow them to request that sections of a Code of Practice be substituted in order to protect the public or the environment, thereby giving them equivalent procedural rights to those of the industry discharging the waste.

ANNUAL FEES

The Regulation sets out the annual fees for industries discharging waste. The amounts provided for are the same as those currently set out in the Waste Management Permit Fees Regulation, and have been set at those rates since August 31, 1993.

Needless to say, these fees are totally inadequate. That it costs a mere $284.00 to discharge one tonne of arsenic into our province's river-ways is obscene. This cost neither compensates the people of British Columbia for the harm created by this waste nor provides a meaningful financial incentive to industry to improve its performance. As we have previously noted:

> [T]he current rate for NOx is approximately 1/1000 of the fee imposed on Swedish power generators! We recommend increases in fees charged per unit of emission. We recommend using increased fees to adequately staff administration and enforcement of permits and development of regulations.

RECOMMENDATIONS:

- Increase the annual permit fees to provide a more effective incentive to pollution reduction. Earmark revenue for administration and enforcement purposes.

PUBLIC NOTICE OF DISCHARGE

While there is a requirement that an industrial actor inform government before beginning the discharge of waste, there is no requirement that members of the public be so notified. The ability to know what substances one may come into contact with is a basic human right, and one which we are shocked is not provided for in the Act or the Regulation. While individual Codes of Practice may address this need, this is another matter which should be required in the Act itself.

RECOMMENDATIONS:

- Set out specific requirements for public notification of where and when a waste discharge will be occurring

CONCLUSION

We remain very concerned with the approach taken by this government to waste management. While the verdict is out on how effective the Codes of Practice will be until the public is finally given a chance to see them, the Regulation contains a number of gaps that suggest that environmental protection is worsening. We strongly encourage this government both the implement the recommendations made above, but also to revise the Environmental Management Act to address the concerns raised in our previous submissions.

\\fs\docs\Publicat\BRIEFS\2004\WMA_WDR.doc