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Heenan Blaikie For action as required. PK

FACSIMILE TRANSMISSION SHEET

ECIPIENT(S)	Mr. Michael J. Horgan, Deputy Minister of the Environment F (819) 953.6897
ENDER	David Stratas T 416 643.6846 • F 416 360.8425
ATE	August 15, 2006
UR REFERENCE	045120-0001
UBJECT	DuPont

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Message:

Please see attached.

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Heenan Blaikie

August 15, 2006

Ms. Anne O'Toole
Director General,
Pollution Prevention,
Environmental Stewardship,
Department of the Environment
351 St. Joseph Boulevard
Gatineau, Quebec
K1A 0H3

BY FAX ((819) 953-8098)
and BY COURIER

Dear Director General:

Re: **Notice published on June 17, 2006 in the *Canada Gazette*, Part I, regarding a proposal to make an order adding toxic substances to Schedule 1 to the *Canadian Environmental Protection Act, 1999***

And Re: **Notice published on June 17, 2006 in the *Canada Gazette*, Part I, regarding a proposal to make regulations amending the *Prohibition of Certain Toxic Substances Regulations, 2005* (Four New Fluorotelomer-Based Substances)**

We act for E.I. du Pont Canada Company ("DuPont").

Please find enclosed DuPont's Notice of Objection, filed with you pursuant to s. 332(1) of the *Environmental Protection Act, 1999* (the "Act"). In this Notice of Objection, DuPont formally objects to the above-noted proposals and requests that you establish a Board of Review under s. 333 of the Act.

Yours very truly,

David Stratas

encl.

David Stratas

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cc. E.I. du Pont Canada Company

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NOTICE OF OBJECTION

AND

REQUEST FOR BOARD OF REVIEW

SUBMITTED BY E.I. DU PONT CANADA COMPANY

IN RESPECT OF A NOTICE PUBLISHED ON JUNE 17, 2006
IN THE CANADA GAZETTE, PART I,
REGARDING A PROPOSAL TO MAKE AN ORDER
ADDING TOXIC SUBSTANCES TO SCHEDULE 1
TO THE *CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999*

AND

IN RESPECT OF A NOTICE PUBLISHED ON JUNE 17, 2006
IN THE CANADA GAZETTE, PART I,
REGARDING A PROPOSAL TO MAKE
REGULATIONS AMENDING THE PROHIBITION OF
CERTAIN TOXIC SUBSTANCES REGULATIONS, 2005
(FOUR NEW FLUOROTELOMER-BASED SUBSTANCES)

PURSUANT TO

THE *CANADIAN ENVIRONMENTAL PROTECTION ACT, 1999,*
SECTIONS 332(1) and 333

Submitted: August 15, 2006

NOTICE OF OBJECTION

A. The Ministers' Proposals

1. The Minister of Environment (Canada) and the Minister of Health (Canada) propose to take two regulatory steps (the "Proposals") under the *Canadian Environmental Protection Act, 1999* (the "Act"). They propose:

- to have Regulations passed that will prohibit the manufacture, use, sale, offer for sale and importation of four new fluorotelomer-based substances in Canada, two of which (the "New Substances") E.I. du Pont Canada Company ("DuPont") would like to import into Canada; and
- to add the New Substances to the "List of Toxic Substances" in Schedule 1 to the Act.[1] (The references appear as endnotes to this document.)

B. DuPont objects

2. DuPont objects to the Proposals.[2] It does so pursuant to this notice of objection, submitted under ss. 332(1) of the Act. Section 333 of the Act empowers the Ministers to "establish a board of review to inquire into the nature and extent of the danger posed by the [New Substances] in respect of which the decision is made or the order, regulation or instrument is proposed." DuPont states that in these particular circumstances, the Ministers must establish a Board of Review.

C. *Summary comments*

3. DuPont states that there is no sound or rational scientific basis for believing that the New Substances are unsafe or harmful to the environment or health. In fact, many fluorotelomer-based substances, similar to the New Substances, are already used and applied to finished goods imported into Canada without any restriction and, in particular, without any restriction under the Act. They are commonly used, for example, as water and grease repellents for materials such as paper, fabric, leather and carpets. In the absence of evidence demonstrating that the New Substances pose a specific danger and a danger justifying prohibition, there is no rational basis for singling them out for complete prohibition.

4. Where there is no evidence of impairment of the environment or health, it is in the public interest that Canadians have the benefit of new products and technologies. The New Substances are new products that will benefit Canadians: they will have many practical applications that will enhance Canadians' well-being. The New Substances and the other new substances that are the subject of the Proposals can be applied to make stain and water repellents for materials such as paper, fabric, leather and carpets, as well as stone and tile. They can also be used in levelling agents (to provide an even surface) in coatings. It is also expected that their importation, manufacture and use will sustain and create employment for Canadian workers.

5. For the reasons developed in more detail below and in endnotes to this notice of objection, DuPont states that the Proposals are not scientifically rational: they are based on speculations that do not have a basis in science or sound evidence. These speculations have sprung from a process that has been fundamentally unfair and arbitrary, a process that has disregarded proper scientific inquiry and analysis. Given the significant interests at stake for Canadians and for DuPont, a very high level of procedural fairness is required – but it was not provided. Therefore, it is necessary for the Ministers to establish a Board of Review to inquire into the nature and extent of the danger, if any, posed by the New Substances.

D. The Ministers' position

6. The Ministers say that they are prompted to make the Proposals because of their concerns about the presence of perfluorocarboxylic acids ("PFCAs") in the environment. Trace amounts of PFCAs, for example, have been found in Arctic animals. The Ministers say that PFCAs are long-chained perfluorocarbon chemicals that are either found in trace amounts in the fluorotelomer-based substances, or arise as a result of degradation of fluorotelomer-based substances. The Ministers acknowledge that there are significant "uncertainties" in the analyses upon which the Proposals are based. Nevertheless, out of all of the fluorotelomer-based substances of similar chemical composition, they have singled out the New Substances for regulatory action. Further, they propose the most extreme of steps – prohibition – to address their concerns rather than other available regulatory mechanisms, such as the imposition of conditions and the use of the Significant New Activity provisions under the Act.

E. The requirements of the Act and the precautionary approach

7. Under the Act, the Ministers are entitled to rely upon a precautionary approach in protecting the environment and health. But a precautionary approach is not a licence to take extreme and unjustified measures such as prohibiting a substance on the basis of baseless theory or speculations unsupported by evidence or science. In fact, by requiring scientific assessments and by contemplating the use of a Board of Review to examine the scientific validity behind proposals, the Act demands that a scientific approach – an approach founded on sound evidence, objective assessment and fair procedures – must underpin all proposals made by the Ministers under the Act.

F. The Official Policy

8. The Canadian Government has enacted an official policy for making decisions under the precautionary approach. This policy (the "Official Policy"),

entitled, "A Framework for the Application of Precaution in Science-based Decision Making About Risk" (2003), requires that:

- a "sound and credible case" must be provided to show that "a risk of serious or irreversible harm exists";
- reliance must be made on a "body of scientific information ... that can establish reasonable evidence of a theory's validity, including its uncertainties";
- "sound scientific evidence" be present and an emphasis be placed on "securing high quality scientific evidence" as such evidence is "a fundamental prerequisite to applying the precautionary approach";
- scientific data "be evaluated through a sound, credible, transparent and inclusive mechanism" leading to a conclusion that "expresses the possibility of occurrence of harm (including the extent of possible damage, persistency, reversibility and delayed effect)";
- scientific advice be "drawn from a variety of sources and experts and should reflect the full diversity of scientific interpretations consistent with the evidence available";
- scientific advisors "should give weight to peer-reviewed science and aim at sound and reasonable evidence on which to base their judgments";
- "peer review" be considered in order to "assess the soundness of the scientific evidence and its inherent credibility within the scientific community";
- proposals "be proportional to the potential severity of the risk being addressed and to society's chosen level of protection";

- proposals be "non-discriminatory and consistent with measures taken in similar circumstances", with "similar situations ... not be treated substantially differently"; and

- where there are different measures available, the "least trade-restrictive measure should be applied" – prohibition should be a last resort.

G. *The need for a Board of Review*

(1) *Failure to follow the approaches required by the Act and the Official Policy*

9. The Proposals and the process followed to date by the Ministers contravene the scientific approach required by the Act (see paragraph 7, above) and the Canadian Government's own Official Policy:

- the Proposals are not supported by a scientific approach based on a "sound and credible case" with "sound evidence", but rather have been prompted by a speculative, theoretical, largely circumstantial, unscientific approach;[3]

- there has been a grossly insufficient emphasis on "securing high quality scientific evidence";[4]

- "a variety of sources and experts" reflecting "the full diversity of scientific interpretations consistent with the evidence available" have not been drawn upon or properly considered; rather, one-sided approaches have been adopted, with hard data and analyses conflicting with the Ministers' hypotheses ignored;[5]

- there has been no resort to external, scientific "peer review" to "assess the soundness of the scientific evidence and its inherent credibility within the scientific community";[6]

- there has been no evaluation "through a sound, credible, transparent and inclusive mechanism";[7]

- the Proposals are discriminatory and, by prohibiting the New Substances outright, are inconsistent with the fact that identical substances on treated articles and similar existing substances are completely unrestricted;[8] and

- the Proposals are not proportional to the potential severity of the risk as disclosed by sound scientific evidence – the Ministers have defaulted to prohibition, rather than lesser forms of restriction, or, as in the case of similar substances, no restriction at all.[9]

(2) There has been procedural unfairness that has undermined the legitimacy and scientific validity of the Proposals

10. The Act requires that the Ministers follow a rigorous, impartial, open-minded and fair scientific process in order to assess whether regulatory action under the Act is required and, if so, what type of regulatory action should be taken. Instead, the Ministers have followed an unscientific, result-oriented, close-minded process, a process that has prevented all available scientific information from being considered. Particular deficiencies with the process include the following:

- the Ministers did not set deadlines and timetables, nor did they specify the relevant steps and methodologies in the process, nor did they disclose on a timely basis, if at all, the background documents and information that they were relying upon – with the effect that DuPont could not provide relevant information to assist in the scientific determinations;[10]

- the Ministers' staff repeatedly made it clear to DuPont that the Risk Assessment could only contain information used by the Ministers in reaching their decision to impose the interim prohibition on July 17, 2004; as a result, the Ministers disregarded all of the later studies, work, evidence and information supplied by DuPont and repeatedly made it clear that the Risk Assessment, which ultimately formed the basis for the Proposals, was unalterable even in the face of further studies that conflicted with it;[11]

- once the Ministers made their temporary order prohibiting the New Substances under ss. 84(1) of the Act, from that time forward the Ministers were focussed on assembling evidence to support that preliminary assessment, not to assess in a rigorous, impartial, open-minded and fair manner whether that preliminary assessment was correct and whether further proposals, if any, should be made;[12]

- the Ministers set up a public consultation process in early 2006; however, the rules for the consultation process were not determined or disclosed in advance but rather were made up as the process went along, with the result that DuPont could not put forward all available and relevant information and, as a result, the Ministers did not receive it;[13]

- the Ministers found it necessary to release an updated Risk Assessment in June, 2006 but did not consider the detailed comments of DuPont and others on the draft of it;[14]

- the Ministers promised to meet with DuPont to receive information from DuPont concerning the updated Risk Assessment before it was made available to the public; but, in an act demonstrating pre-judgment and close-mindedness and breaking the promise made, the Ministers posted the updated Risk Assessment on Environment Canada's website just days before the meeting;[15] further, the Ministers made the Proposals and

published them in the *Canada Gazette* before the meeting they promised took place; and

- the Ministers repeatedly rejected requests that there be an independent and impartial peer review of the science underlying the Risk Assessment and updated Risk Assessment, again demonstrating that the Ministers' approach, particularly in 2005-2006, was a result-oriented rush to judgment without regard to all of the evidence, rather than a rigorous, impartial, open-minded and fair scientific process.

(3) The Proposals are based on unproven assumptions, not a "sound and credible case"

11. The Proposals are based on unfounded assumptions, not a "sound and credible case", that the New Substances:

- are somehow different from existing, similar, unregulated substances – however, they are not;[16]
- contain trace amounts of PFCAs – however, DuPont has developed technologies to essentially eliminate PFCAs and direct precursors and has programs to reduce significantly unreacted starting materials or indirect precursors;[17]
- degrade into PFCAs – however, the Minister has not produced studies, grounded in science, that demonstrate such degradation;[18]
- will transport into the environment or PFCAs, produced as a result of degradation of the New Substances themselves, will transport into the Arctic environment – however, the Minister has not produced studies, consistent with the science, that demonstrate such transport;[19] and
- are harmful to the environment or health – however, the Minister has not produced studies, consistent with the science or consistent with the

approach taken by other regulators such as the U.S. Environmental Protection Agency, that demonstrate harm.[20]

The Ministers also have assumed that DuPont will do nothing to prevent the migration of the New Substances into the environment. DuPont is a responsible corporate citizen that constantly studies the products it manufactures and shares its findings with regulators, stakeholders and the scientific community.

(4) The fundamental problem

12. The fundamental problem, as shown by the foregoing, is that the process to date and the evaluations made to date have not established the nature and extent of any danger posed by the New Substances to any level of scientific acceptability or legitimacy, with any acceptable level of transparency or fairness. In the various Risk Assessments, the Ministers ignore profound and acknowledged uncertainties in the hypotheses, data, analytical methods, alleged transport phenomena and supposed degradation associated with the New Substances, uncertainties that the Ministers themselves acknowledge. Yet the Ministers have defaulted to the most drastic measure possible – prohibition – while they have taken an entirely different risk management approach for other similar fluorotelomer-based products. As a result, the Proposals are currently unwarranted and unsustainable in policy or in law. A Board of Review is necessary.

H. The Board of Review must be established

13. In these circumstances, a Board of Review must be established. As set out in paragraph 7, above, the Act requires that a scientific approach, founded on sound evidence, objective assessment and fair procedures, be followed. The Official Policy gives DuPont and all Canadians an expectation that certain procedures and standards will be followed. As stated in paragraph 9 above and the endnotes hereto, the Proposals

and the process followed to date by the Ministers contravene the scientific approach required by the Act and the Canadian Government's own Official Policy.

14. Further, as is set out above, there is a fundamental disagreement concerning whether the New Substances pose a danger to such an extent that they must be prohibited or, in light of their similarity to substances that are demonstrably safe and that are commonly used and applied on other articles, whether they should even be regulated at all. As explained in paragraphs 9 and 11 above and the endnotes hereto, the scientific basis for the Proposals is inadequate to support the Proposals and the scientific procedures followed to date are contrary to what is required under the Official Policy. As explained in paragraphs 3 and 4 above, for Canadians the consequences associated with the Proposals and their implementation are significant. The Official Policy itself effectively calls for a Board of Review to be established in circumstances such as this: it requires that scientific data "be evaluated through a sound, credible, transparent and inclusive mechanism" and, for the reasons, set out above and in the endnotes, to date such a mechanism has not been present.

15. Any delay caused by the establishment of a Board of Review and its hearing will not result in any threat to health or the environment. The New Substances are currently prohibited as a result of an order under ss. 84(1) of the Act and the prohibition continues in force as a result of the publication of the Proposals and ss. 84(4) of the Act.

I. Relief Sought

16. Therefore, for the reasons set out in this notice, DuPont hereby files this notice of objection under ss. 332(1) of the Act to the Proposals and requests that the Ministers establish a Board of Review under s. 333 of the Act.

17. Given the importance of the Board of Review and given the need for fairness, transparency and accuracy in this matter that is important to all Canadians and to DuPont, DuPont requests that the Ministers:

- if they are not convinced that a Board of Review should be established, provide a response to this notice of objection so that DuPont may offer submissions in reply;
- if they determine (after full submissions from DuPont) that a Board of Review should not be established, provide full reasons, responsive to the issues raised in this notice of objection;
- if they decide to establish a Board of Review,
  - take extreme care to ensure that the members of the Board of Review are scientifically qualified in the relevant issues, and are completely independent and impartial with no ties whatsoever, past or present, with the Ministers and their Departments;
  - make full disclosure well in advance of the start of the Board of Review's proceedings of the studies, analyses, literature, data, assessments, observations and other relevant material (the "materials") relied upon by the Ministers; and
  - ensure that the hearings of the Board of Review take place when relevant witnesses and counsel are available and only after all parties have reviewed the materials and have had an opportunity to assemble, in response, any relevant materials, witnesses and submissions.

All of which is respectfully submitted, this 15th day of August, 2006

David Stratas

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ENDNOTES

Reference 1:

On June 17, 2006, the Ministers published two notices which appeared in the *Canada Gazette*, Part I, regarding a proposal to make an Order Adding Toxic Substances to Schedule 1 to the Act and to make *Regulations Amending the Prohibition of Certain Toxic Substances Regulations, 2005 (Four New Fluorotelomer-based Substances)*. The Regulations will prohibit the manufacture, use, sale, offer for sale and importation of the New Substances and the Order will add the New Substances to Schedule 1 of the Act, thereby designating them as "toxic" under the Act.

Reference 2:

DuPont is well known as a good environmental citizen. Among other things, DuPont has headed the global list of "Top Green Companies" based on total reduction of greenhouse gases.

Former Prime Minister Mulroney stated in his public speech on April 20, 2006 in which he accepted his award as the "greenest Prime Minister in history": "DuPont responded to the challenge" posed by ozone-depleting substances by "creating innovative technologies" that have made DuPont "a world leader in environmental responsibility".

In addition, DuPont has been at the forefront of many groundbreaking environmental initiatives. Good examples include its leading efforts to produce environmentally attractive alternative fuels and products using biology and its memorandum of understanding with the Canadian government in 2003 to reduce greenhouse gas emissions – the first for the chemical sector.

DuPont focuses on "sustainable growth" by reducing its environmental impact, stewarding its products throughout their life cycle and engaging its stakeholders through social responsibility, community outreach and corporate philanthropy.

Reference 3:

The original risk assessment document concerning the New Substances ("Risk Assessment") that was prepared by the Ministers presents as conclusions a number of hypotheses and speculations that are unsupported by evidence and science. There are many examples of this.

One example is that the Risk Assessment concludes that polymer backbone degradation occurs with the New Substances. There is no data to support this conclusion. That conclusion is then used as a foundation for the principal hypothesis or speculation that

degradation of fluorotelomer-based polymers is the source of PFCAs in the environment. That conclusion is completely contrary to recently conducted soil biodegradation studies on like fluorotelomer-based polymeric materials that show no indication of degradation of the polymer backbone after twelve months, which greatly exceeds the timeframe of one hundred twenty days required under Organization for Economic Co-Cooperation and Development (OECD) international standards for degradation tests of this nature.

Another example of hypotheses and speculations presented as conclusions that are unsupported by evidence and/or science is found in the Regulatory Impact Statement. The Regulatory Impact Statement is said to be the basis for the Proposals. The concerns identified in the Regulatory Impact Statement relate only to PFCAs and their precursors. There has been no scientific evidence confirming degradation of the fluorotelomer polymer backbone to PFCAs, or any adverse human health effects known to be attributed to fluorotelomer intermediates or any fluorotelomer-based polymers. Notwithstanding the lack of evidence regarding degradation of the New Substances to PFCAs, Health Canada presumes this to be the case and relies on it as the basis for its conclusions regarding the nature and extent of the danger posed by the New Substances.

A properly constituted Board of Review under the Act would examine the science and the evidence and would examine the matter free of hypotheses and speculations.

Reference 4:

The Risk Assessment fails to consider or disclose significant work and studies conducted and provided by DuPont and other published scientific studies. The Risk Assessment presents an inaccurate view of the existing state of the science on fluorotelomer-based products by failing to include certain data and information.

In the References below, a number of examples of this are provided.

One example concerns the soil biodegradation studies referred to in Reference 3. They were discussed in a public technical meeting of the Society of Environmental Toxicology and Chemistry in November, 2005 in Baltimore in the presence of many Canadian scientists including at least one from Environment Canada. This important information was never considered or incorporated into the various Risk Assessments.

The soil biodegradation studies were also presented, in updated form, to the Ministers' officials when they visited DuPont on June 6, 2006.

In fact, the Ministers' staff has made it quite clear to DuPont, without explanation, that the Risk Assessment contains only information used by the Ministers' staff and not all of the studies, work, evidence and information that DuPont supplied or that was otherwise available in the public domain.

In addition, the Ministers do not properly characterize scientific uncertainties and they do not support the conclusions they have reached with sound evidence. On the basis of the foregoing, the Risk Assessment has not accurately assessed or presented the nature and extent of the danger, if any, posed by the New Substances.

Unfortunately, however, the Risk Assessment is the very foundation of the Proposals.

The Act does not contemplate such a one-sided, result-oriented, unscientific basis for regulatory action.

A properly constituted Board of Review under the Act would examine all available work, studies and literature, thereby evaluating the nature and extent of the danger, if any, posed by the New Substances.

Reference 5:

The Risk Assessment dismisses and discounts certain data in peer-reviewed journals or data that was developed under accepted international protocols. It does so where the data is not supportive of the hypotheses and speculations in the Risk Assessment.

There are many examples of this. For example, the Ministers had access to a study concerning the levels of PFOA in human blood. They referred only to the early portions that supported the result they wanted to reach, but completely ignored, without explanation, later evidence in that same study that suggested that PFOA levels in human blood were actually remaining the same or decreasing. There are other examples of one-sided, result-oriented analysis, discussed below.

In order to be complete and in order to demonstrate that all data has been properly and thoroughly considered, the Risk Assessment should include all data, set out a scientifically-based position concerning it and explain the rationale for the position. The Risk Assessment does not do this. Instead, it is selective in its use of data in the journals and publications reviewed and the bases for the selections and rejections are not explained. This results in an inaccurate and inappropriate representation of the state of the science and creates a deficient and unreliable Risk Assessment. As a result, the Risk Assessment uses incomplete data and reaches an unfounded conclusion on the toxicity of PFOA. This is then used as the basis for determining the toxicity of higher-chained PFCAs. This is faulty scientific reasoning and also undermines the conclusions reached on both PFOA and PFCAs.

In the course of reaching its conclusions in the Risk Assessment, assumptions concerning the toxicity of PFOA were made. These assumptions were adopted by the New Substances Assessment & Control Bureau of Health Canada rather than the division of Health Canada that is responsible for and engaged in the health assessment

of PFOA, namely the Existing Substances Division of Health Canada. That division has been looking at this issue for some time and has not completed its assessment. Therefore, these assumptions adopted in the Risk Assessment about PFOA are premature.

A properly constituted Board of Review that conducts itself appropriately would be balanced and fair, with its findings made as a result of the discernment and impartial and independent application of scientific criteria with a view to determining the nature and extent of the danger, if any, posed by the New Substances.

Reference 6:

In light of the serious deficiencies in the scientific analysis, the unproven assumptions, hypotheses and the baseless speculations associated with the various Risk Assessments and other views adopted by the Ministers (discussed *infra*, throughout this document), DuPont repeatedly requested that a formal scientific peer review be conducted of the data, the risk assessments and the science. This request is consistent with the scientific approach required under the Act.

DuPont suggested that this peer review be organized and managed by a third party separate from the government officials that prepared the Risk Assessment, utilizing qualified independent experts with no conflict of interest who have ability in a number of standard disciplines, such as chemistry, eco-toxicology, human toxicology, exposure and environmental fate. DuPont proposed that it be a highly transparent, open and public in-depth assessment of the assumptions, calculations, methodology, alternate interpretations and conclusions of the assessment, in light of all the available data. Health Canada uses such a process: its Existing Substances Program uses a peer review process similar to the one suggested by DuPont, often involving Toxicology Excellence for Risk Assessment, an independent, non-profit organization interested in assuring quality risk assessments.

However, the Ministers have repeatedly rejected DuPont's requests for a peer review without explanation.

Given the consequences of prohibiting the New Substances, such a scientific peer review is required and if not conducted, full reasons and scientific explanations are owed.

The Ministers have verbally explained that a request by them for comments in November, 2005 from a broad group of interested parties, including non-scientists, was a "peer review". The Ministers regard this as a peer review regardless of whether or not such interested parties have the scientific qualifications to make meaningful comments.

The Ministers' approach on this does not follow the conventionally accepted definition of peer review employed as a matter of course in scientific work.

In January, 2006, DuPont provided scientific comments in response to the Risk Assessment and submitted those comments directly to the Ministers. The Ministers did not properly consider those comments, again selectively incorporating only the comments that supported the conclusions they wished to reach.

The Ministers set up a public consultation process to solicit comments in February, 2006. But the rules appeared to be made up as the Ministers went along. The intent of this process was to provide "window dressing" so that the Ministers could give the appearance of having conducted a consultation, when they had no intent of actually being swayed by any of the comments provided.

In the updated Risk Assessment, released by the Ministers in June, 2006, the Ministers selectively incorporated or ignored comments in order to support their pre-ordained conclusions.

All of the foregoing is consistent with the one-sided, result-oriented, unscientific approach described in Reference 5, an approach that is contrary to the rigorous and fair scientific approach contemplated by the Act.

Given the significant interests at stake for Canadians and for DuPont, a very high level of procedural fairness is required. The Act requires genuine scientific assessment, not supposition, circumstantial evidence, and unproven hypotheses. The various Risk Assessments are filled with supposition, circumstantial evidence, and unproven hypotheses, not genuine scientific assessment. The failure to submit them to scrutiny by peer review is a breach of procedural fairness and contrary to the Act's requirement of genuine scientific assessment.

A properly constituted Board of Review under the Act would examine all available work and data from scientific experts, including the peer review work and data assembled and submitted by DuPont, but ignored to date.

Reference 7:

Transparency is lacking. The procedural failures described in paragraph 10 of the Notice of Objection and the endnotes in that paragraph (References 10-15) have caused considerable lack of transparency in the process.

There are some other specific examples of lack of transparency.

See examples throughout this document, *e.g.*, Reference 5.

The Risk Assessment uses PFOA as a surrogate for the higher chained PFCAs, with a determination on toxicity being stated on that basis. However, as mentioned above, the definitive Canadian health assessment on PFOA which is being conducted by the Existing Substances Division of Health Canada is not yet complete or even released in a draft form and there have been no transparent consultations. This is a significant shortcoming in the Risk Assessment which undermines its overall credibility and reliability.

Secondly, the Risk Assessment omits important technical references, without explanation or justification. This generates a lack of confidence in any conclusions reached and eliminates the ability to assess and confirm such references, thereby rendering the Risk Assessment deficient.

DuPont repeats its comments made above and throughout this document: because of the significant interests at stake for Canadians and for DuPont, a very high level of procedural fairness is required. The Act requires genuine scientific assessment, not supposition and unscrutinized hypotheses.

A properly constituted Board of Review under the Act would add needed transparency to the assessment, based on science and sound evidence, of the New Substances.

Reference 8:

See comments in paragraph 3 of the notice of objection. It is irrational, discriminatory and contrary to the Official Policy and the environmental policy expressed in the Act to single out the New Substances for prohibition when they are so similar to substances on finished articles and to existing substances, neither of which are restricted in any way. For example, if the Proposals become law, DuPont cannot import the slightest amount of the New Substances by themselves into Canada, but anyone can import treated articles, such as textiles, apparel and leather goods, that have the New Substances applied to them outside of the country. In one case, total prohibition; in another case, unrestricted liberty.

A Board of Review is necessary in order to ensure that there is fairness of treatment, scientific rationality and policy rationality concerning the New Substances.

Reference 9:

There are other more appropriate mechanisms for controlling the New Substances until additional studies are completed, a more comprehensive and inclusive assessment takes place and all similar chemical substances can be regulated in the same manner.

Specifically, in lieu of the Order and Regulations contemplated by the Proposals, Environment Canada could use ss. 84(3) of the Act to issue a condition on the importation, manufacture and use of the New Substances. For example, the condition could specify the content of residuals in fluorotelomer-based substances, require that notifying companies inform their North American customers of this requirement, and that notifying companies commit to a program of residuals reduction to commensurate levels in any other new or existing substances of the same or substantially similar fluorotelomer chemistry that they manufacture or import in Canada.

Alternatively, Environment Canada could use the provisions of the Act (ss. 85(1)) that relate to Significant New Activity ("SNAc") to control the New Substances. This would permit specifying the limited acceptable uses, as well as incorporating the New Substances into the proposed voluntary plan for residual reduction that has been proposed for existing substances.

Either of these options would actually be more effective than the prohibitions currently proposed.

If the Proposals are implemented, manufactured articles will be exempted from the amendments to the *Prohibition of Certain Toxic Substances Regulations*. As a result, any fluorotelomer-based substances that are not on the Domestic Substances List under the Act (*i.e.*, the New Substances or substances similar to them) will be encouraged to enter freely into Canada on finished goods such as clothing. The Proposals will not necessarily limit in Canada the amount of the New Substances or substances similar to them, but will prevent their entry from being known to the government.

On the other hand, the application of conditions or SNAc's would have the effect of lessening the incentive to import finished goods, imposing management provisions that are commensurate with the real environmental risk (if any), maintaining the visibility of the control program, keeping the government aware of new substances entering Canada, and providing a mechanism to leverage the reduction of residuals across the fluorotelomer industry while minimizing the disruption of Canadian industry.

The use of SNAc's to regulate this situation would also align with the treatment recently given by Environment Canada to a perfluoroalkyl polymer (SNAc Notice 14276, dated July 22, 2006).

Finally, the use of conditions or SNAc's to regulate this situation, if properly designed, could result in a common regulatory approach for both the New Substances and existing fluorotelomer-based substances.

A properly constituted Board of Review under the Act would identify the nature and the extent of the danger, if any, posed by the New Substances, based on science and sound evidence. Once that is done, measures that are necessary to deal with the nature and the extent of the danger, if any, posed by the New Substances, such as the imposition of

conditions, can be carefully designed so that they are proportionate and go no further than necessary.

Reference 10:

After the Minister filed the temporary prohibition of the New Substances, DuPont asked the Ministers to agree to a timetable of experimentation and decision-making so DuPont could assess what types of experiments to conduct in order to demonstrate to the Ministers that there was no regulatory concern. This demonstration may well have shown that regulation through imposition of conditions or through use of the SNAc provisions in the Act, not absolute prohibition, would be appropriate.

The Ministers refused to agree to any timetable or to give DuPont any guidance on experimentation. They refused this even when DuPont asked the Ministers directly for a timetable and guidance in order to develop and execute the best possible technical submission.

Reference 11:

See Reference 4.

Reference 12:

DuPont and the Ministers met in the 2002-2004 period to discuss the chemistry, the hypotheses and their merits, the options, the remedies, testing results, testing that was planned, societal benefits, sources of PFCAs in the environment and telomers' role – all of which fell on deaf ears and closed eyes, with no receptivity to any argument or logic.

In September, 2004, DuPont organized an international meeting, the "Workshop on the Environmental Fate of Fluorotelomer-Based Polymers", in Toronto. Global experts in the field, representatives of the U.S. Environmental Protection Agency and representatives of the Ministers attended, along with others representing all points of view. The meeting brought to light the overwhelming uncertainties in the Ministers' hypotheses, analytical methods and analytical data but the Ministers did not properly consider these.

DuPont first saw the Risk Assessment in draft form. DuPont objected to the conclusions in the Risk Assessment because of the presence of significant speculation, acknowledged uncertainties, and unproven hypotheses. The Ministers declined to make any changes to the conclusions, repeatedly making it clear to DuPont that the Risk Assessment could only contain information generated and used by the Ministers in reaching their decision to impose the interim prohibition on July 17, 2004.

DuPont offered and provided later studies, work, evidence, information, suggested rewrites and data to support changes to the Risk Assessment that it felt were critical and scientifically justified. The Ministers disregarded all of this and repeatedly made it clear that the Risk Assessment, which ultimately formed the basis for the Proposals, was unalterable even in the face of further studies that conflicted with it. In short, the Ministers' officials wanted to maintain the justification for the interim prohibition measure that the Ministers had already taken, rather than engage in the rigorous, impartial and fair assessment required by the Act.

Several meetings, both public and private, were held in 2005 to provide science updates. The Ministers, whose staffs were present at these meetings, refused to truly listen or budge from their well-entrenched position. At these meetings several matters were discussed including consumer article safety, worker health, blood levels and trends, sources, fate, and transport ("SFT") of PFCAs, pharmacokinetic studies, degradation results and programs. Among other things, there were two significant public scientific meetings where many of these topics were discussed: Fluoros in Toronto (August, 2005) and a conference organized by the Society for Environmental Toxicology and Chemistry in Baltimore (November, 2005), both well before the Proposals were made. Many of the studies presented at these meetings have now appeared in peer reviewed journals. Much of the information presented at these meetings contradicted the conclusions in the Risk Assessment. Yet the Ministers did not properly consider this information and science: they ignored it unless it fit their pre-conceived and speculative conclusions.

In August 2005, DuPont provided further updates on various matters including the SFT of PFCAs, degradation of fluorotelomer-based polymers, models for understanding the impacts of biodegradation of DuPont's fluorotelomer-based products in North America, the effects of exposure to PFOA from paper articles treated with DuPont's fluorotelomer-based products, and the pharmacokinetics of DuPont's primary raw material for making fluorotelomer-based products.

DuPont also presented to the Ministers its comprehensive telomers strategy along with the results from DuPont's pilot plant, confirming the effectiveness of DuPont's new telomer impurity reduction technology. Again, the Ministers did not consider this information, as they were interested only in the regulatory result, scientifically-unsound and speculative as it was, that they wished to reach.

By the time the Risk Assessment finally was published in November, 2005, a considerable amount of new information had been received by the Ministers that refuted many of the findings set out in the Risk Assessment. This prompted the Ministers to insert a "context discussion" into the Risk Assessment, acknowledging uncertainties, thereby challenging many of the conclusions made elsewhere in the Risk Assessment. But the conclusions in the Risk Assessment, speculative, theoretical, unscientific, result-

oriented and self-justifying as they were, remained and formed the basis for the Proposals.

Curiously, when the updated Risk Assessment was published in June, 2006, the "context discussion" was dropped, eliminating any discussion of "uncertainty", and rendering it thoroughly speculative, theoretical, unscientific, result-oriented and self-justifying. The Ministers maintained the same flaws and baseless assumptions that they adopted earlier and added some new mistakes and misrepresentations of data.

See also Reference 6, concerning the Ministers' failure to expose the various Risk Assessments and their hypotheses, speculations, analyses and theories to peer review.

Reference 13:

One example of this is that the updated list of relevant scientific references and the comments from reviewers of the Risk Assessment were supposed to be available before the consultation meeting but were not made available until well after. As one of the Minister's senior officers put it, this was necessary in order to "ensure the consultations are informed by a current view of the science". The failure to do this seriously reduced the usefulness and validity of the consultation meeting.

Reference 14:

The updated Risk Assessment selected only the portions of new information provided to the Ministers that supported their pre-ordained conclusions. (See Reference 5, above.) Simply put, important scientific information contrary to the conclusions reached was ignored.

In addition, the Ministers had promised to circulate the reviewers' comments on the Risk Assessment and the Ministers' response to the comments. This was not done until days before the Proposals were published.

Reference 15:

This is completely different from what the Ministers did in the case of the Risk Assessment. That Risk Assessment was issued a year after the Ministers had imposed a temporary prohibition. In this case, the Ministers could not wait for a few days to keep their promise and meet with DuPont before releasing the updated Risk Assessment.

Reference 16:

There are numerous other existing fluorotelomer-based products that are substantially the same as the New Substances, both from a chemical perspective and from an environmental and health standpoint. It is inconsistent for Environment Canada to prohibit the New Substances and list them as "toxic", while taking an entirely different risk management and regulatory approach for other similar fluorotelomer-based products. This inconsistent approach calls into question the concerns expressed by Environment Canada about the New Substances. The Proposals, which prescribe prohibition, are measures far in excess of environmental or health needs, if there are any.

Reference 17:

DuPont plans to implement its improved technology in 2006.

DuPont shared openly with the Ministers the information it had concerning its improved technology. It did this in August 2005 after it had fully completed its seven month pilot plant operation to confirm the effectiveness of the new technology.

However, the Ministers have not considered whether this technology would reduce any supposed risks and whether, as a result of this technology, prohibition of the New Substances would be unnecessary. See Reference 5, concerning the one-sided, resulted-oriented, unscientific approach taken generally and specifically in the various Risk Assessments. Those Risk Assessments and, in fact, all analyses, do not include or take into account information supplied by DuPont suggesting that the environmental impacts, if any, can be reduced and managed effectively.

A properly constituted Board of Review under the Act could examine the nature and the extent of the danger, if any, posed by the New Substances, based on science and sound evidence, and in light of other technologies that may exist in order to reduce dangers, if any.

Reference 18:

In the Regulatory Impact Statement offered in support of the Proposals, the Ministers simply assert that PFCAs "are the ultimate degradation products from the four new fluorotelomer-based substances". There is no evidence that the polymeric backbone in the New Substances do degrade into PFCAs.

One example of the unscientific approach taken on this issue is the existence of PFCAs detected in Norwegian landfill sites. Meetings between DuPont and Environment Canada reveal this to be a prime reason for assuming that the New Substances degrade

into PFCAs. However, there is no evidence that the New Substances or, in fact, any substance similar to the New Substances are deposited at this specific landfill. The assumption of the Ministers seems to be that if PFCAs (source unknown) are discovered to be present in a landfill somewhere in the world, there is "sound evidence" that the New Substances degrade into PFCAs.

A properly constituted Board of Review under the Act would examine all science and sound evidence and would evaluate the nature and extent of the danger, if any, posed by the New Substances.

Reference 19:

In the Regulatory Impact Statement, the Ministers state that "certain PFCA precursors are volatile and subject to long-range transport via the atmosphere. PFCAs themselves may be subject to long-range transport via oceanic currents."

Certain telomer precursors can be volatile under certain environmental conditions to partly transform into PFCAs. For this reason, DuPont embarked on a substantial technical program in early 2003 to substantially reduce all precursors that might form PFCAs in the DuPont fluorotelomer-based products. The details of this program have been shared with the Ministers on more than one occasion. Once again, the Ministers have ignored this information and have defaulted, on the basis of speculation, baseless theory and hypotheses to the most drastic measure possible, prohibition.

The Ministers note the presence of the widespread presence of low levels of PFCAs in wildlife, and archived tissue samples show increasing concentrations in certain species over time. But the Ministers have no evidence as to the source of this and no evidence whatsoever as to whether the New Substances will contribute to this. Reliance on the long-range atmospheric transport of fluorotelomer alcohols ("FTOH") as the explanation for the presence of low levels of PFCAs in wildlife is not warranted: to date no FTOH measurement in the Arctic has been reported.

DuPont submitted a peer reviewed paper prepared jointly by DuPont scientists and those from the University of Stockholm, published in the Environmental Science & Technology journal, which refutes many of the assumptions upon which the Ministers drew their conclusion on contributions of fluorotelomer-based products to PFCAs in the environment. But the Ministers ignored this evidence. Instead, the Ministers leapt to assumptions, hypotheses and speculations about the degradation and transportation of the New Substances and whether they would actually contribute to global levels of PFCAs, assumptions, hypotheses and speculations that they have never adopted in the case of other, unrestricted and unregulated fluorotelomer-based products.

A properly constituted Board of Review under the Act would examine all science and sound evidence and would evaluate the nature and extent of the danger, if any, posed by the New Substances.

Reference 20:

The Regulatory Impact Statement offered in support of the Proposals shows that the available data used by Environment Canada "primarily" involved perfluorooctanoic acid ("PFOA") which, unlike the New Substances, is an eight carbon PFCA.

Environment Canada states in its Regulatory Impact Statement that it has "assumed" (*i.e.*, guessed) that despite "the absence of robust toxicity datasets for longer chain PFCAs", PFCAs are considered to be of greater concern due to their slower clearance rates and higher potential to bioaccumulate.

In adopting this assumption, the Ministers have not considered that the precursors may now be removed due to new DuPont technologies. Also there was no evidence before the Ministers that long-term repeated exposure to the New Substances would occur or that any adverse effects on health or the environment would result.

A properly constituted Board of Review under the Act would examine all of these issues and others in light of the science and sound evidence and would evaluate the nature and extent of the danger, if any, posed by the New Substances.

Heenan Blaikie

WITHOUT PREJUDICE

August 15, 2006

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BY FAX ((613) 952-1154) and BY COURIER

Dear Ministers:

Re: Notice published on June 17, 2006 in the *Canada Gazette*, Part I, regarding a proposal to make an order adding toxic substances to Schedule 1 to the *Canadian Environmental Protection Act, 1999*

And Re: Notice published on June 17, 2006 in the *Canada Gazette*, Part I, regarding a proposal to make regulations amending the *Prohibition of Certain Toxic Substances Regulations, 2005* (Four New Fluorotelomer-Based Substances)

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We act for E.I. du Pont Canada Company ("DuPont").

Enclosed with this letter is DuPont's Notice of Objection, filed today pursuant to s. 332(1) of the *Canadian Environmental Protection Act, 1999* (the "Act").

Confidentiality

This letter is a "without prejudice" communication concerning the enforcement, interpretation and application of the Act that is not to be disclosed by either DuPont or you without the consent of the other. It is covered by settlement privilege: as you will see, it contains an offer made in an attempt to settle outstanding differences concerning

the above-noted proposals (the "Proposals") and in the hope that future litigation may be avoided.

Notice of Objection

Today, DuPont has filed a Notice of Objection regarding the Proposals. DuPont has found it necessary to file a Notice of Objection, as it is the only official regulatory mechanism available for DuPont to ensure that its concerns are properly considered.

The Notice of Objection raises issues that are most serious. To summarize:

- There is no sound or rational scientific basis for believing that the new substances that are the subject of the Proposals are unsafe or harmful to the environment or health (see paragraph 11 of the Notice of Objection);
- The process followed to date has been fundamentally unfair – among other things, it has been a result-oriented, close-minded approach, rather than an impartial scientific approach (see paragraph 10 of the Notice of Objection);
- The Proposals are inconsistent with and fail to adhere to official government policy, namely the policy entitled, "A Framework for the Application of Precaution in Science-based Decision Making About Risk" (2003) (see paragraphs 8 and 9 of the Notice of Objection);
- The Proposals, themselves, are flawed by inadequate science, absence of evidence, speculation, idle theory and baseless hypotheses (see paragraph 11 of the Notice of Objection); and
- By following an unscientific approach, you have failed to follow the approach mandated by the Act (see paragraph 7 of the Notice of Objection).

The current legal situation

The current legal situation has several components:

- *The prohibition order.* The substances today remain covered by the interim prohibition order you have made under s. 84(1) of the Act. As a result, even if the substances actually posed any harm or threat of harm, there is no immediate environmental or health threat because the substances are prohibited at this time. If you determine, after further

review, that regulation through the imposition of conditions is more appropriate than a prohibitory approach, you can revoke the prohibition order under s. 84(3) of the Act.

- *Legal obligations triggered by the filing of the Notice of Objection.* As you are aware, under s. 333 of the Act, the filing of a Notice of Objection requires you to consider whether in these circumstances you should establish a Board of Review to inquire into the nature and extent of the danger posed by the substances that are the subject of the Proposals.

- *Your ongoing legal authority.* Although the Proposals have been published in the *Canada Gazette*, you have the legal authority to revoke or modify those Proposals at any time and, if modified, to republish them in the *Canada Gazette* or to make new, modifying proposals: see, for example, ss. 10, 12 and 31 of the *Interpretation Act*, R.S.C. 1985, c. I-21. In addition, after reviewing the grounds in the Notice of Objection, you can decide not to recommend to the Governor in Council under ss. 90(1) and 93(1) of the Act that the orders and regulations as described in the Proposals be made. Instead, you may make new proposals, publish those proposals and recommend them to the Governor in Council for implementation. Under all these scenarios, the interim prohibition order concerning the substances would remain in effect.

- *Timing for your decisions.* You have time to consider the Notice of Objection or to exercise your ongoing authority under the Act. There are no set deadlines under the Act for these matters. As a result, you have the time to consider carefully the offers contained in this letter and to engage in constructive discussions with DuPont.

- *The legality of the current Proposals.* Based on the grounds set out in the Notice of Objection, the entire process and the Proposals that emanated from them are fundamentally flawed. Therefore, the Proposals cannot be implemented into law.

- *Judicial review.* If you implement the current Proposals into law, your decisions will be the subject of a judicial review application supported by affidavits, with numerous exhibits offered in support evidencing your officials' discussions and conduct and establishing these grounds.

- *Damages claim.* The Notice of Objection places you on clear notice of the fact that you have failed to follow the approach mandated by the Act. Further, given the grounds set out in the Notice of Objection, any implementation of the Proposals into law would be a reckless exceedance

of your legal authority. As you are aware, in such circumstances, you may be liable for significant damages.

If your legal advisors disagree with the legal propositions we have set out above, we encourage them to contact us for open, "without prejudice" discussion.

Because of the existence of your ongoing authority to modify existing proposals, to revoke existing proposals, not to recommend existing proposals for implementation or to make new proposals and because of the fact that your interim prohibition order remains in place, there is an opportunity for discussions between DuPont and the Ministers to resolve the disagreement concerning the existing Proposals and to prevent any legal proceedings from being taken.

The environmental situation under the Proposals

The Act, if applied in the manner in which you propose, and the Proposals, if implemented, create the worst of all worlds – detrimental effects on business and employment with no environmental or health benefits:

- *Business and employment detriments.* Canadians and Canadian businesses will be denied the ability to use or manufacture the new substances or apply them to articles in Canada in any way, in any manner. The addition of the substances onto Schedule 1 of the Act will create significant uncertainty about similar existing substances already in commerce.

- *No environmental or health benefits.* There will be no environmental or health benefits for two main reasons. First, the substances pose no danger or threat of danger to the environment or to health. Second, the Proposals do not prevent manufactured articles that have the substances applied to them from entering Canada. All that the Proposals do is to prevent a certain manner of entry of four of a class of substances into Canada.

Regulatory implications

To DuPont's knowledge, this is the first time that a formal Notice of Objection has been filed concerning a proposal to prohibit a new substance or to enact a regulation. There would be severe implications for the reputation of environmental and health regulation in Canada if the Proposals are not supported by a Board of Review or if they are enacted into law and judicial review ensues and is successful. Given the grounds in the Notice of Objection and the evidence that DuPont has to establish them, its legal challenge would almost certainly be successful.

Other implications

A groundless, unfair prohibition on the importation of substances into Canada, in the circumstances described in the Notice of Objection, with no resulting environmental or health benefit, may have serious bilateral trade ramifications. For example, the Proposals, by being unfair, inequitable, arbitrary and capricious, violate the international law standard of treatment and therefore, violate NAFTA's Minimum Standard of Treatment provision (Art. 1105).

Settlement wish

I have been instructed to extend to you DuPont's sincere wish that settlement and resolution of all differences be achieved. It is DuPont's belief, borne out by the science and the evidence, that a alternate approach, outlined below, is consistent with the highest standards of environmental and health protection.

An alternate approach

Review of original and updated risk assessments

Before considering whether to establish a Board of Review or whether to recommend to the Governor in Council that an order and/or regulation be enacted, you have time in which you can evaluate whether the evidence scientifically supports your Proposals.

DuPont believes that the Proposals are flawed by inadequate science, absence of evidence, speculation, idle theory and baseless hypotheses and were constructed using a result-oriented, close-minded approach, rather than an impartial scientific approach.

DuPont proposes that some external, mutually acceptable internationally-recognized experts be brought in to review the Proposals under a rigorous process. DuPont believes that such a process will show that the Proposals were not based on sound science and will not result in environmental protection and that an approach based on regulation through conditions (see discussion under the heading "Regulation Through Conditions", below) is superior. As a result of this process, you may conclude that the imposition of conditions is a better way to protect the environment than the current Proposals, which use prohibition.

An alternative proposal is that you subject the risk assessments to a fair scientific peer review. If that peer review results in DuPont's view of the Proposals being accepted, then you will know that the Proposals cannot be implemented into law. If that peer review supports the Proposals, including the extreme measure of prohibition contained in

the Proposals, DuPont offers to consider its position and to advise whether it will withdraw its Notice of Objection.

If you are interested in this offer, DuPont would be pleased to discuss the foregoing with you further.

Regulation through Significant New Activity provisions

DuPont urges you to consider a regulatory approach short of absolute prohibition.

Environment Canada could use the provisions of the Act that relate to Significant New Activity (known under the Act as "SNAc") to control the New Substances. This would permit specifying the limited acceptable uses, as well as incorporating the New Substances into the proposed voluntary plan for residual reduction that has been proposed for existing substances.

Under this approach, there would be no ability for substances to be introduced in Canada without being subject to the SNAc. This would also align with the treatment recently given by Environment Canada to a perfluoroalkyl polymer (SNAc Notice 14276, dated July 22, 2006).

Regulation through conditions

DuPont also offers to you, in the alternative, its support for a regulatory approach using conditions. DuPont offers to engage in a full and frank discussion and negotiation concerning conditions short of prohibition that fully achieve environmental and health objectives, rather than resorting to the judicial review described earlier in this letter.

Under this regulatory scenario, the existing s. 84(1) prohibition on the substances would be revoked and replaced by conditions under s. 84(3) of the Act.

A central aspect under this approach would be the development and implementation of an Environmental Performance Agreement (the "Agreement") to address the government's concerns (ill-founded in our view) that these substances are a potential source of PFCAs. The Agreement could also address alleged concerns with existing substances as well by spelling out clear performance metrics and, by calling for definitive scientific answers to key questions, before taking actions that could disrupt the marketplace without environmental benefits. The Agreement could also include a time limit if Environment Canada – after developing a thorough scientific analysis of risks, benefits and alternative actions – wants to signal to industry a need to transform these products. Alternatively,

limits on impurities or on uses of these substances could be imposed, pending the development of an Agreement.

Possible conditions that, when properly designed, DuPont is prepared to support (and avoid judicial review) include the following:

- Limiting residual PFCAs in new products, consistent with the interim program proposed for existing substances;
- Requiring persons to inform customers of the conditions and obtain concurrence as a prerequisite to any sale; and
- Requiring persons attempting to import new fluorotelomer substances to enter into a program to address their related existing substances in order to mitigate their potential to release PFCAs to the environment.

Conclusion on regulatory measures

The alternative approaches discussed above (regulation through the significant new activity provisions and regulation through conditions), rather than the prohibitory approach, would avoid the "worst of all worlds" scenario, described above and could be designed to achieve several other advantages:

- achievement of residual reductions;
- control of releases from dispersions;
- transition to shorter chain fluorotelomers;
- creation of a consistent, common approach for managing both new and existing materials;
- avoidance of potential marketplace disruption;
- harmonization with the US EPA program;
- achievement of Environment Canada's objectives of controlling the amount of PFCAs and their precursors in the environment; and
- engagement of the entire fluorotelomer industry (much of which is not actually affected by the current Proposals) in participating in the management process through the Agreement.

There has never been meaningful consideration by your officials of an approach based on conditions or the Significant New Activity provisions of the Act. There have been meetings between your officials and DuPont officials but, consistent with the result-oriented and closed-minded approach followed consistently throughout, your officials do not appear to have given serious consideration to these possibilities.

We invite you to share this settlement letter with officials in your department and to have them engage in discussions to settle all differences and avoid judicial review. We would be prepared to meet at any time, with or without legal counsel present, to try to achieve that end.

Yours very truly,

David Stratas

David Stratas

encl.

cc. E.I. du Pont Canada Company

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