



CANADIAN ENVIRONMENTAL LAW ASSOCIATION
L'ASSOCIATION CANADIENNE DU DROIT DE L'ENVIRONNEMENT

VIA ELECTRONIC MAIL

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Standards Development Branch
Ministry of the Environment
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Dear Ms. Grant:

RE: SUBMISSIONS OF CELA AND ECOJUSTICE CANADA ON PROPOSED 2009 AMENDMENTS TO O. REG. 419/05 (EBR 010-6587) AS IT RELATES TO THE PROPOSED SECTOR-BASED APPROACH TO MANAGING AIR POLLUTION IN THE FOREST PRODUCTS SECTOR (EBR #010-6589) AND THE FOUNDRY SECTOR (EBR# 010-6588)

The Canadian Environmental Law Association (“CELA”) and Ecojustice Canada (“Ecojustice”) have prepared joint comments on the proposed changes to Ontario Regulation 419 /05.

CELA is a public interest law group founded in 1970 for the purpose of using and improving laws to protect public health and the environment. Funded as a legal aid clinic specializing in environmental law, CELA represents individuals and citizens’ groups in the courts and before tribunals on a wide variety of environmental matters, including cases involving air pollution. In addition, CELA staff members are involved in various initiatives related to law reform, public education, and community organization.

Ecojustice Canada (formerly Sierra Legal Defence Fund) is an independent, non-profit organization supported by 30,000 Canadians. We have a staff of lawyers and scientists who provide services to citizens and groups working to improve environmental laws.

Since forming in 1990, legal reforms and litigation around air emissions have formed a core of Ecojustice's work. Air toxics has been of great concern to many of Ecojustice's clients and Ecojustice is actively engaged in trying to improve and strengthen the laws with respect to air toxics to secure the health and environment of communities neighbouring facilities emitting toxic air pollutants.

General Comment

Ontario Regulation 419/05 ("O. Reg. 419/05") sets air toxic standards that apply at a facility's property line and is intended to protect the health and environment of neighbouring communities.

Both CELA and Ecojustice are concerned that the introduction of this proposal less than a year prior to the Schedule 3 O. Reg. 419/05 standard's finally coming into force is an easy way out for industrial sectors that have failed to take the necessary steps to ensure compliance.

Subject to our comments below regarding the adequacy of O. Reg. 419/05 itself, we recommend that the sector based technical standards be used as an additional compliance tool to assist facilities and sectors having compliance problems rather than as a replacement to the health and environmental based air toxic standards in O. Reg. 419/05 that are meant to protect local communities. This comment is particularly pertinent given that O. Reg. 419/05 already has a means of addressing non-compliant facilities through the site specific alteration of standards process (O. Reg. 419/05, section 32).

We have expressed concerns in the past regarding O. Reg. 419/05 (ex. Ecojustice's EBR Application for Review - Concerning the Need for Regulatory Amendments for Pollution Hot Spots) and the MOE has acknowledged these concerns and has committed to a review. However, this proposal has brought on a suite of new concerns that are detailed further below along with our outstanding concerns.

Please note that we did not conduct a review of the proposed technical standards for the sectors, nor do we have the expertise to do so, our comments are limited to non-technical concerns regarding this approach.

Does MOE Intend That the Proposed 2009 Amendments Will Address Background Concentrations, Cumulative, Synergistic, Persistent, or Bioaccumulative Effects of Contaminants?

The first problem with the proposal to adopt a sector-based approach for improving air quality (EBR # 010-6587) is that it still does not appear to address concerns identified by

the Environmental Commissioner of Ontario (“ECO”) in his 2005-2006 annual report (page 83) regarding deficiencies in O. Reg. 419/05. In his report the ECO noted in part that:

The continued reliance on a POI approach means that while the ministry has some control over short-term *concentrations* of contaminants (measured over minutes or hours), the ministry is not directly controlling annual *loadings* of contaminants. For some types of persistent contaminants that accumulate in the environment, such as lead or mercury or certain organic toxic substances, the annual load to the environment is a parameter with a great deal of significance. Nor does [O. Reg. 419/05] address the impacts that mixes of various contaminants may have on the environment or health. It also does not offer a strong remedy for local “hot spots”; industrial airsheds with significant background concentrations of pollutants from multiple facilities. MOE acknowledges that more work is required in these areas, stating: “The regulation does not explicitly deal with background concentrations, cumulative or synergistic effects, persistence and bioaccumulation of contaminants. However, a section has been added to the regulation that clarifies the existing director’s authority to require more stringent standards where warranted.”...With regard to controlling cumulative loadings of persistent toxic substances over time, a number of commentators, including Environment Canada, have noted that MOE will never be able to assess or control cumulative loadings effectively until the point of impingement approach is replaced [Emphasis in original].

This passage was quoted with approval by a panel of the Environmental Review Tribunal in *Dawber v. Ontario (Ministry of the Environment)* (2007) 28 C.E.L.R. (3d) 281, at para. 41.

MOE again confirmed these problems with O. Reg. 419/05 in 2007 when it approved amendments to certain standards under the regulation. In doing so, MOE admitted that it does not consider cumulative impacts in setting air quality standards and that consideration of cumulative impacts would require a major shift in MOE’s regulatory regime for air pollution control. MOE did acknowledge the importance of the issue and indicated that it was considering the implications of moving to a more integrated approach to addressing air quality (Ontario Ministry of the Environment, *Notice of Decision on April 7, 2007 Proposal to Amend Ontario Regulation 419/05: Air Pollution – Local Air Quality*, EBR Registry No. 010-0000 [August 31, 2007]).

In the view of CELA and Ecojustice, the proposal fails to state how MOE will address the concerns identified by the ECO and acknowledged by MOE itself. The current initiative does not appear to be the long-awaited MOE response to the structural failings of O. Reg. 419/05 regarding the failure of the regulation to address background concentrations, cumulative or synergistic effects, persistence and bioaccumulation of contaminants. Even if the proposed sector-specific technical standards are meant to replace, in whole or in part, the POI concentrations for air standards under O. Reg. 419/05 that still does not answer the question of whether and, if so, to what extent, if at all, the new standards would address background concentrations, cumulative or synergistic effects, persistence or bioaccumulation of contaminants. MOE should ensure that those issues are addressed front-and-center in amendments to O. Reg. 419/05. If the current initiative is not designed to do this then MOE should answer directly and forthwith when it does propose to address this problem.

Does MOE Intend That the Proposed 2009 Amendments Will Ensure That Individual or Sector-Based Waivers or Alterations From the O. Reg. 419/05 Standards are Subject to the EBR Leave to Appeal Provisions?

The second problem with the proposal to adopt a sector-based approach for improving air quality (EBR # 010-6587) is that it is not at all clear that either the existing (which is to be maintained) regime of allowing site-specific alterations to O. Reg. 419/05 standards pursuant to section 32 of the regulation, or the new proposal as applied to whole industrial sectors, will be subject to the leave to appeal provisions of the *EBR*.

It has been the experience of both CELA and Ecojustice that companies will use the section 32 altered standard (or waiver approach) as a means of circumventing the leave to appeal regime under the *EBR* for instruments. If a company can achieve the same business result without a potential hearing, which is what the altered standard or waiver approach offers in comparison to amending an instrument, then companies will increasingly opt for it.

MOE does ask in 010-6587 “Question 2.5.1-A: Should the MOE require an EBR posting of the request for registration under the sector-based technical standard or is it enough to publish a list of facilities that are currently registered on the MOE website? Under what circumstances should MOE not allow a facility to be registered?” (Page 11). CELA and Ecojustice submit that requests for registration should be subject to both (1) posting, and (2) leave to appeal under the *EBR*.

The *EBR* leave to appeal process is important to enhancing both public participation and government accountability in the environmental decision-making process. The altered standard procedure (site-specific or sector-based) should not be used, or be seen to be used, to undermine that process.

Both CELA and Ecojustice are strongly of the view that as drafted currently the proposal would be an abuse of the *EBR* process and needs to be corrected. Amendments to O. Reg. 419/05 should not be used as a vehicle to exacerbate the abuse.

How Does MOE Intend That These Amendments Will Bring O. Reg. 419/05 Into Full Compliance With the MOE Statement of Environmental Values?

For the reasons set out above, CELA and Ecojustice are concerned that these amendments will not bring O. Reg. 419/05 into full compliance with the MOE Statement of Environmental Values (“SEV”), particularly in light of the existing inadequacies in the regulation.

Does MOE Intend That the Proposed 2009 Amendments Will Ensure That the Local Community is Fully Informed Through a Community Meeting Hosted By the Facility Intending to Register Under the Technical Standards Program?

Both CELA and Ecojustice recommend that the sector based approach require a facility to hold a public meeting similar to the meeting required for a facility requesting a site specific alteration of a standard.

The alteration of standard process under section 32 of O. Reg. 419/05 requires that a person making a request for an alteration of a standard first hold a public meeting (section 32(18)). Furthermore, the subsection details requirements regarding advertising and notifying neighbours of the meeting and the type of information that must be presented at the meeting. Under the sector based approach (waiver approach) there is no proposal for a public meeting, however as with the site specific standard approach, the facility may be exposing neighbouring communities to higher levels of air toxics, and thus greater risk, than represented by the O. Reg. 419/05 air standards. Given this additional risk, the community has a right to be informed and engaged in the process and not to be under the mistaken impression that O. Reg. 419/05 standards apply to them.

Does MOE Intend To Require That The Residual Risk Of Exposure To Air Toxics Be Assessed Once The Sector Based Approach Has Been Implemented?

Both CELA and Ecojustice recommend that, at a minimum, once a facility has implemented the sector based technical standards that it be required to assess the residual risk by both modelling and monitoring air toxic levels at the facility property line.

It is necessary to ensure that the technical standards are in fact functioning as expected; that toxic air pollutant concentrations are lowered to levels that do not present a risk to public health or the environment. The results of such an assessment should be open and available to the public. If the technical standards have not succeeded in lowering air toxics levels to O. Reg. 419/05 concentrations, then further steps need to be taken to reduce emissions and the technical standards would need to be revised. If further reductions cannot be made another option would be for the facility to return to the site specific standard process and apply for a site specific standard. As noted above, both Ecojustice and CELA recommend amendments to allow site specific standards to be subject to third party appeals under the *EBR*.

Does MOE Intend To Ensure That The Proposed Sector Based Approach Does Not Cause Further Delay In Implementing Actions To Reduce Air Toxic Levels Near Facilities That Don't Meet The Health And Environment Based Air Toxic Standards In O. Reg. 419/05?

It is our understanding that the proposal is to allow facilities in the sectors cited to take up to a year to decide if they wish to opt out of O. Reg. 419/05 and adopt the technical standards approach, and a further five years to implement the technical standards if they choose that approach.

Both Ecojustice and CELA find this proposal completely unacceptable because it builds in further delay. We recommend that the O. Reg. 419/05 Schedule 3 standards come into force February 1st, 2010 as was always intended for all the sectors in Schedule 4. It is our

understanding that the February 1st, 2010 enforcement date for Schedule 3 standards was already a compromise when the regulation was first brought into force in 2005 to allow industry additional time to plan for compliance.

In our opinion the targeted sectors have had more than enough time to assess their situation and plan for compliance with the new standards and, if necessary, start the process for applying for a site specific alteration of standard.

Could MOE achieve the same outcome as is expected from the technical standards by enforcing the certificates of approval of facilities?

Both Ecojustice and CELA question if the technical standards are an improvement upon the standards already in place in individual facility certificates of approval (Cs of A). We do not have the means to compare Cs of A to the technical standards, but both CELA and Ecojustice strongly recommend that the MOE ensure that the technical standards reach well beyond the existing Cs of A in reducing emission sources.

We make this point because at the public consultation session on August 18th, 2009 a representative of the Foundry sector clearly stated that the proposed technical standards for that sector are based on the contents of certificates of approval for facilities in that sector. This response begs the question: ‘Why doesn’t MOE simply enforce the certificates of approval and keep O. Reg. 419/05 in force?’

Thank you again for the opportunity to provide comments on the proposed revisions to O. Reg. 419/05 and the proposed sector based approach to managing air pollution. Please do not hesitate to contact the undersigned should you wish to discuss our comments. For ease of reference a summary of our recommendations follows:

Summary of Recommendations

1. Clarify whether the new standards would address background concentrations, cumulative or synergistic effects, persistence or bioaccumulation of contaminants.
2. Requests for registration should be subject to both (1) posting, and (2) leave to appeal under the *EBR*.
3. Clarify how MOE intends that these amendments will bring O. Reg. 419/05 into full compliance with the MOE Statement of Environmental Values.
4. The 2009 Amendments to O. reg. 419/05 should ensure that the local community is fully informed through a community meeting hosted by the facility intending to register under the technical standards program.
5. Ensure that the proposed sector based approach does not cause further delay in implementing actions to reduce air toxic levels near facilities that don’t meet the health and environment based air toxic standards in O. Reg. 419/05.

6. Evaluate whether MOE could achieve the same outcome as is expected from the technical standards by enforcing the certificates of approval of facilities.

Yours Truly,



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