



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

VIA FAX (416) 327-2936 and Electronic Mail

September 29, 2009

Minnie deJong, Manager
Human Toxicology and Air Standards Section
Ministry of the Environment
Environmental Sciences and Standards Division
Standards Development Branch
40 St. Clair Avenue West, Floor 7
Toronto, Ontario
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Dear Ms. deJong:

Re: Submissions of CELA and Ecojustice Canada on Proposed 2009 Amendments to O. Reg. 419/05: Air Pollution – Local Air Quality (EBR 010-7190) as it relates to introducing new or updated standards for nine (9) contaminants.

Background:

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

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.

Please note that we did not conduct a review of the science behind these proposed standards, rather, our comments are limited to non scientific aspects of the proposal.

Comments

Ontario Regulation 419/05 (“O. Reg. 419/05”) sets out air toxic standards and is intended to protect local air quality. It sets out standards that apply at a facility’s property line to protect the health and environment of neighbouring communities.

Ecojustice and CELA would like to commend the Ministry of the Environment (“MOE”) for their policy of setting effects based air standards that safeguard human health and the natural environment. We encourage the MOE to continue to set health based air standard protective of the most sensitive receptors.

Implementation

We are concerned about the five-year delay in implementing eight of the proposed standards. The MOE states that it generally proposes a five year phase-in period for new standards, or standards that will be more stringent than the current standard. The fact that Ontario currently does not have health-based standards or guidelines or the fact that the updated standards are more stringent than the ones currently in existence, should not be the reason to delay implementation. Many of these standards have been under development for many years while local communities remain vulnerable to the effects of exposure to these contaminants. Further delay will only lead to further health effects.

We recommend that the MOE apply a precautionary approach to implementing the eight standards and that they come into force on February 1, 2010 (when the Schedule 3 standards come into force for many sectors) and not delay for the next five years.

Cumulative and Other Effects

Although we support the introduction of new or updated standards for the nine contaminants, we are disappointed that the cumulative effects and background levels of various pollutants from multiple sources in a given areas continues to receive very little, if any, consideration under *Regulation 419/05*. This is the result of continuous reliance on the Point of Impingement approach to regulating air quality. The Point of Impingement system may work effectively in situations where facilities are spaced, however, it does not work for areas with multi-pollutant and multi-facility areas. The Point of Impingement could work in multi-pollutant and multi-facility areas if *Regulation 419/05* required polluters to account for multiple sources and multiple pollutants in the area when they assess air quality.

Sarnia, an area impacted by multiple toxic air pollutants from multiple industrial sources, is a germane illustration of a failure to consider cumulative impacts. Similar pollutants, and sometimes with similar health impacts, are being emitted from large, closely-spaced facilities. Even though new and updated standards for the nine contaminants have been introduced, the present legal framework and standard setting process does not account for exposure to more than one pollutant simultaneously that may have the same effect and thus act in a cumulative manner or the same pollutant from more than one source which may increase exposures above safe levels.

Similar concerns were 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 proposal for nine new air standards under O. Reg. 419/05 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 and 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, including the proposed new air standards, will address background concentrations, cumulative, synergistic, persistent, and bioaccumulative effects of contaminants?

Director's Notice Issue

MOE is proposing a notice provision allowing, through a written notice, the Director to waive the application of some of the standards for size fraction based standards where there are multiple standards for one contaminant (i.e. PM2.5, PM10, or the TSP).

Ecojustice and CELA are concerned about this proposed amendment as it may weaken protection and would like clarification on the implications of this proposed provision.

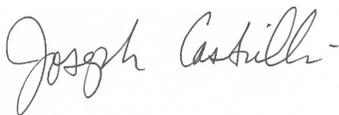
Please clarify the implications of the proposed Director's notice provision to waive size fraction based standards?

Thank you again for the opportunity to provide comments on the proposed amendments to O. Reg. 419/05 to introduce new or updated standards for nine contaminants. 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. Continue practice of setting health and environmental effects based standards.
2. Faster timelines for implementation.
3. Add a cumulative and other effects approach.
4. Clarify implication of proposed Director's notice.

Yours Truly,



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