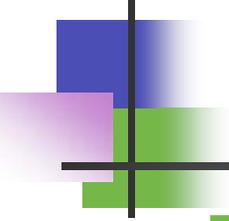


Making Your Voice Heard: Public Participation and Environmental Rights

February 1, 2010

Presented by: Renee Griffin, Counsel
Canadian Environmental Law Association



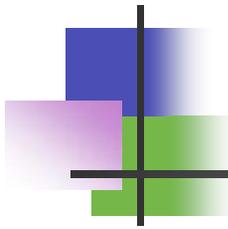


Introduction

- This presentation will discuss:
 - The importance of public participation in environmental decision making; environmental equity
 - Ontario's *Environmental Bill of Rights*
 - Proposed federal EBR
 - Toronto's 'Right to know by-law'
 - The threat of SLAPPs (Strategic Lawsuits Against Public Participation)



Why is Public Participation in Environmental Decision Making Important?

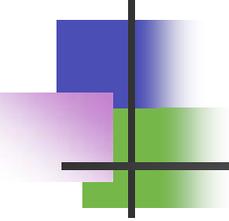


- Public participation is now widely regarded as essential for ensuring that a broad spectrum of societal views and concerns are reflected in environmental decisions.
- Public participation gives decisions a greater air of legitimacy and tends to promote the acceptance of those decisions.
 - This can lead to less litigation, fewer delays and generally better implementation of decisions.
- Public participation provides decision makers with information of which they otherwise would have been unaware
 - Ex. Knowledge of local conditions, past environmental violations by the proponent, etc.

Why is Public Participation in Environmental Decision Making Important?

- The importance of public participation in environmental decision making has been recognized in both international and domestic law:
 - International: Aarhus Convention, Agenda 21
 - Federal: *Canadian Environmental Assessment Act*, *Canadian Environmental Protection Act*, *Pest Control Products Act*
 - Provincial: *Environmental Assessment Act*, *Oak Ridges Moraine Conservation Act, 2001*, *Lake Simcoe Protection Act, 2008*, *Places to Grow, 2005*, *Planning Act*, *Ontario Planning and Development Act, 1994*, *Environmental Bill of Rights (EBR)*





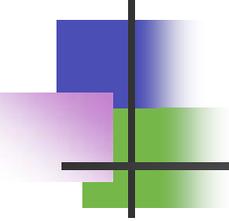
Environmental Equity & Environmental Justice

- What is 'environmental justice'?
 - Environmental justice links many social movements (anti-racism movements, Aboriginal rights and sovereignty movements, labour union movements, and environmental movement) and embodies a broad conception of the 'environment'
 - Hallmarks of environmental justice include access to information, early and meaningful public participation in environmental decision making, and access to courts and tribunals
 - It is a broader goal that incorporates the more narrowly defined problem of environmental racism

Environmental Inequities in Canada

- Environmental justice efforts in Canada have been somewhat piecemeal
- Canadian cities do not tend to have racial residential segregation in the same way as American cities
- Colonialism, urbanization and the expansion of the natural resource economy have contributed to the disadvantage of specific populations
- There are low-income areas in Canadian cities comprised of one or more racial groups.
- Low-income areas are vulnerable in contrast to more affluent areas where residents are able to participate in decision-making and mobilize to protect their own interests. Even when they participate, they are less likely to have their concerns heard.





Environmental Inequities in Canada

- As a result of resource development, small towns across Ontario are left with environmental health legacies
- Aboriginal communities were often pushed to “undesirable” land as a result of colonization. Now these communities are left with a myriad of toxic legacies.
- Urban planning has developed to benefit middle to upper classes, allowing some areas of cities to deteriorate. Often, these areas are home to low income and immigrant families.
- Lack of recognition of the special needs of biological vulnerable populations contributes to environmental injustice.

Environmental Equity: Why It Matters

- Socio-economic status influences the conditions of childhood, and the availability and quality of education, food, housing, employment, working conditions, and health and social services
- Poverty (esp. malnutrition) can contribute to greater susceptibility to harmful effects of exposures



The *Environmental Bill of Rights* (EBR)

- What is the EBR?
 - A provincial law that recognizes protection of the natural environment as one of its primary purposes. It also provides mechanisms for you to participate in environmental decision making in your community.
- What does the EBR apply to?
 - The EBR applies to environmentally significant decisions and proposals made by prescribed Ontario Ministries and under prescribed Acts.
- What does the EBR mean for Ontarians?
 - They can participate in government decisions about the environment and hold the government accountable for those decisions

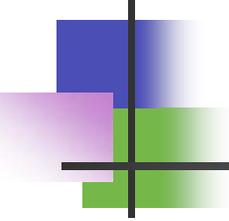


EBR: Public Participation Tools

- Environmental Registry
 - It can be accessed on line and is meant to provide notice to the public of environmentally significant decisions and to provide comment opportunities in relation to new statutes, regulations, policies and instruments. (www.ebr.gov.on.ca/)
 - Generally, the Minister must give 30 days notice before the proposal is implemented. During this time, the public can submit comments.



How the EBR Works: Instruments



- The EBR requires that government give notice to the public (via the EBR registry) of requests by industry for issuance of approvals, permits, or licenses.
 - The public has a right to comment on these proposals before they may be approved.
 - If approved, the public may apply for leave to appeal some of these decisions and if leave is granted a hearing is held.
- 



Your search resulted in 2 page(s), 18 notice(s), [you may refine your search.](#)

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Add	EBR Registry Number	Ministry Reference Number	Title or Proponent	Type	Published Date
<input type="checkbox"/>	011-1197	1043-88VK5C	BASF Canada Inc. (EPA s. 9) - Approval for discharge into the natural environment other than water (i.e. Air)	Instrument Proposal	September 17, 2010
<input type="checkbox"/>	011-0916	4677-882KYZ	AS Canada, ULC (EPA s. 9) - Approval for discharge into the natural environment other than water (i.e. Air)	Instrument Proposal	August 13, 2010
<input type="checkbox"/>	011-0865	8537-87ZJ55	Sensient Flavors Canada Inc. (EPA s. 9) - Approval for discharge into the natural environment other than water (i.e. Air)	Instrument Proposal	August 09, 2010
<input type="checkbox"/>	010-9114	1354-7Z2NKY	FCM Recycling Inc. (EPA s. 27) - Approval for a waste disposal site.	Instrument Decision	August 03, 2010
<input type="checkbox"/>	010-9268	2536-82QTJ5	Xactics (2001) International Inc. (EPA s. 9) - Approval for discharge into the natural environment other than water (i.e. Air)	Instrument Decision	July 08, 2010
<input type="checkbox"/>	011-0508	9270-86RNF9	Advantech Advanced Microwave Technologies Inc. (EPA s. 9) - Approval for discharge into the natural environment other than water (i.e. Air)	Instrument Proposal	July 05, 2010
<input type="checkbox"/>	011-0479	6924-85UPQR	Ray Bolger Steel Fabrication Limited (EPA s. 9) - Approval for discharge into the natural environment other than water (i.e. Air)	Instrument Proposal	July 02, 2010
<input type="checkbox"/>	011-0103	1350-84QSB2	Canlyte Inc. (EPA s. 9) - Approval for discharge into the natural environment other than water (i.e. Air)	Instrument Proposal	May 25, 2010
<input type="checkbox"/>	010-6999	7192-7T4NQ2	Brenntag Canada Inc. (EPA s. 9) - Approval for discharge into the natural environment other than water (i.e. Air)	Instrument Decision	May 18, 2010
<input type="checkbox"/>	010-7332	9436-7TZJFV	Matrix Coatings Inc. (EPA s. 9) - Approval for discharge into the natural environment other than water (i.e. Air)	Instrument Decision	April 28, 2010

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Instrument Proposal Notice:

Proponent: BASF Canada Inc.
501 Wallrich avenue
Cornwall Ontario
Canada K6J 2B5

Instrument Type: Approval for discharge into the natural environment other than water (i.e. Air) - EPA s. 9

EBR Registry Number: 011-1197

Ministry Reference Number:
1043-88VK5C

Ministry:
Ministry of the Environment

Date Proposal loaded to the Registry:
September 17, 2010

Keyword(s): Air

The comment period for this proposal is now over.

Description of Instrument:

This proposal is for the renewal of Basic Comprehensive Certificate of Approval (Air) No.2592-6PXX62 which is a single Certificate of Approval that replaces the existing Certificate(s) of Approval (Air), and includes the addition of new or historically unapproved sources for all emissions from BASF Canada Inc. located in Cornwall, Ontario. This facility processes and blends various chemicals for industrial and commercial uses.

This application is for all sources of emissions from the facility which includes process emissions, laboratory fumehoods, storage tanks, sumps, lagoons, cyclones, truck loading, furnaces, cooling towers, emergency generator, and boilers.

Contaminant emissions to the atmosphere include volatile organic compounds such as 1-hexanol, 1-octanol, and methylene diphenylene diisocyanate, particulate matter, and products of combustion such as nitrogen oxides.

The Basic Comprehensive Certificate of Approval (Air) requires that the company demonstrate compliance on an ongoing basis with Ontario Regulation 419/05, applicable Ministry Guidelines for Air and Noise and other performance requirements as specified in their conditions. It permits modifications such as process changes, de-bottlenecking or addition of new equipment subject to limits on operational flexibility that include a production limit for the facility to be specified on the Basic Comprehensive Certificate of Approval (Air). The limited operational flexibility conditions have a five year expiry date. The company will be required to make application for amendment at that time to renew these conditions. Of specific public interest, one condition that will be included on the Basic Comprehensive Certificate of Approval (Air) will require

Contact:

Application Processor
Client Services Section
Ministry of the Environment
Operations Division
Environmental Assessment and Approvals Branch
2 St. Clair Avenue West
Floor 12A
Toronto Ontario
M4V 1L5
Phone: (416) 314-8001
Fax: (416) 314-8452

Location(s) Related to this Instrument:

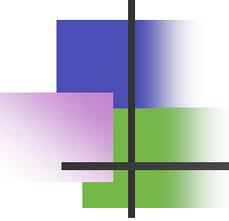
501 Wallrich Avenue

Cornwall, United Counties of Stormont, Dundas and Glengarry: K6J 2B5

How the EBR works (cont.)

- The EBR also recognizes the right of the public to request a **review** of an existing approval, permit, or license held by a company
- The EBR further recognizes a right in the public to ask government to **investigate** alleged violations of environmental laws by industry
- If not satisfied with the government response the public can **sue** a polluter for causing environmental harm to a public resource
- If the harm is caused by a public nuisance, you can sue for damages (monetary compensation) in certain circumstances





Some criticism of the EBR

- Problems with Environmental Registry
 - Minimum comment periods are too short or are absent
 - Lack of supporting documentation
 - Significant delays
- Leave test and funding for third party appeals
 - Short time (15 days) to serve and file leave to appeal application
 - Stringent leave test
 - Lack of available intervenor funding
- Ministries' refusal on applications for review and investigation

Proposed Federal Environmental Bill of Rights

- October 2009, Bill C-469 (establishing the *Canadian Environmental Bill of Rights* ("CEBR")) was given First Reading by the House of Commons
- June 2010, the CEBR was referred to the Standing Committee on Environment and Sustainable Development, and the Committee held public meetings on the CEBR in late 2010.
- In comparison to Ontario's EBR:
 - Ontario's legislation contains more prescriptive detail than the CEBR in relation to public participation in governmental decision-making (i.e. creation of EBR Registry; instrument classification system; specific notice/comment requirements; third-party appeal mechanism, etc.).
 - the CEBR creates substantive environmental rights, entrenches the public trust doctrine, and makes it easier for citizens to go to the courts for redress in environmental matters.
- It remains to be seen whether the CEBR will be enacted and proclaimed into force by the current Parliament.



"Community Right to Know By-Law"

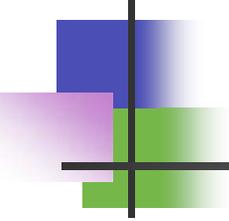


- On Dec 1, 2008 Toronto City Council adopted an Environmental Reporting, Disclosure and Innovation program which includes a bylaw (the 'right to know bylaw') requiring businesses to publicly report their use and release of 25 hazardous chemicals.
- The bylaw came into effect on January 1, 2010 and reporting will be phased in over four years.
- Right to know laws have been effective in reducing pollution
 - When companies are required to track and report toxics use, they often find ways to reduce chemical use.

“Community Right to Know Bylaw” (cont.)

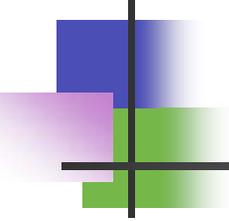


- The public will be able to access data collected. A searchable website will be available to the public by January 2012, and will allow the public to search by facility, chemical, area etc.
- With this information, the public will be able to:
 - Participate more fully in environmental decisions in their community
 - Support facilities and companies that are making good environmental decisions.



Strategic Lawsuits Against Public Participation (SLAPPs)

- SLAPPs are lawsuits with little merit that are brought by private interests against citizens who have participated in government decisions
 - They are often brought in relation to environmental decisions
- In most cases, SLAPPs are not successful at trial. However, since the threat of a lawsuit (and the legal fees and costs associated with it) will often dissuade citizens from participating in public processes, SLAPPs achieve their purposes of silencing the public without having to succeed in courts.
- CELA has argued that Ontario needs anti-SLAPP legislation to protect Ontarians from this threat.



Ontario's Anti-SLAPP Advisory Panel

- On October 28, 2010, the Anti-SLAPP Advisory Panel submitted a report to the AG Ontario
- Highlights of the report's recommendations:
 - Ontario should adopt "anti-SLAPP" legislation
 - The language of the legislation should emphasize the importance of (a) protecting expression on matters of public interest from undue interference, and (b) promoting the freedom of the public to participate in matters of public interest through expression.
 - New legislation should broadly define a sphere of activity to be protected by a special procedure. The protected activity should include all communications on matters of public interest, and not be limited to communications directed to a public body.

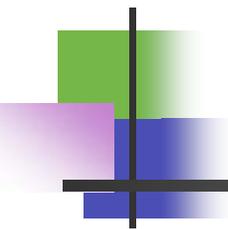
Ontario's Anti-SLAPP Advisory Panel

- The test to determine if SLAPP:
 - a. Defendant has to show that the case involves the protected activity of public participation.
 - b. Burden then shifts to plaintiff to show that:
 - i. The case has substantial merit
 - ii. There are substantial grounds to believe that no valid defence exists, and
 - iii. The harm it has suffered outweighs the harm done to the public interest (especially in freedom of expression) by allowing the action to continue.
- Procedures should be in place to ensure that appeal is dealt with speedily
- If the case is dismissed, full indemnity costs should be awarded to the defendant. [44]
- If the court finds bad faith or improper motive on the part of the plaintiff, the court should award damages to the defendant in such amount as is just.
- While the motion is pending, related proceedings before public bodies involving the plaintiff should be suspended (subject to discretion of court)

Conclusions

- Public participation in government decision making is an important right that should be protected.
- There are many laws which provide the public with tools to become involved, including the EBR and the Right to Know By-law
- Public participation in government decision making can result in greater legitimacy and more effective and efficient environmental laws and policies.





Thank you.

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