

December 4, 2019

Mr. Mirek Tybinkowski
Ministry of Environment, Conservation and Parks
Great Lakes and Inland Water Branch
40 St. Clair Avenue West, 10th floor
Toronto, Ontario
M4V 1M2

Via Email: mirek.tybinkowski@ontario.ca

Dear Mr. Tybinkowski

Re: ERO 019-0773

The Canadian Environmental Law Association is extremely concerned about the proposal referenced above, which was placed on the Environmental Registry of Ontario for a 45-day comment period (ERO proposal). If implemented, the proposal would revoke the Municipal Industrial Strategy for Abatement (MISA), a province-wide program that has regulated industrial effluent discharges from certain sectors for decades. Instead, the government would regulate all industrial effluent discharges on a site-by-site basis through Environmental Compliance Approvals (ECAs).

The ERO proposal claims that the change will not affect the current level of environmental oversight for regulated facilities. However, CELA believes that the proposal to revoke the MISA program would, in fact, make Ontario's water bodies extremely vulnerable to toxic pollution from industrial facilities. For the reasons outlined below, CELA recommends that the MISA regulations not be revoked. Instead, the MISA regulations must be retained and strengthened.

Repeal of Nine Regulations under the Municipal Industrial Strategy for Abatement (MISA) program

The MISA program was established in Ontario in June 1986 to control hazardous and conventional discharges from industrial and municipal sources.¹ It has been described by the Ontario Ministry of Environment, Conservation and Parks (MECP) as “a major and important component in the Ministry's strategy to abate pollution sources and improve the ecosystem.”²

¹ Mark S. Winfield, *Blue-Green Province: The Environment and Political Economy of Ontario*, (Vancouver, UBC Press, 2012) at p. 43. Although, MISA was intended to address both industrial and municipal discharges, no regulations regarding discharges from municipal sewage treatment plants were ever adopted. See accompanying text at 70.

² Ontario, Ministry of the Environment and Energy, *Water Management: Policies, Guidelines, Provincial Water Quality Objectives*, (Queen's Printer for Ontario, 1994) at 3.

MISA's "ultimate goal is the virtual elimination of persistent toxic contaminants" from Ontario's waterways.³ According to the Ministry, "[t]he fulfilment of this goal is necessary to reduce the risk of damage to the ecosystem and to protect public health by minimizing the presence of toxics in drinking water, fish and wildlife."⁴ The program establishes effluent standards for nine industrial sectors: electric power generation⁵, inorganic chemical⁶; industrial minerals⁷, iron and steel manufacturing⁸, metal casting⁹; metal mining¹⁰; organic chemical manufacturing¹¹; petroleum¹² and; pulp and paper.¹³ The effluent standards are based on best available technology economically available (BATEA) for each of these nine sectors and, as technology improved, the allowable effluent levels were to be decreased.¹⁴ The effluent limits include both allowable maximum concentration for the discharge of a contaminant as well as total contaminant loading limits.¹⁵ The regulations also specify sampling, monitoring and reporting requirements for the nine industrial sectors. The self-reporting requirements in the MISA regulations were backed up by Ministry inspections, so that appropriate abatement and/or enforcement action could be undertaken to address any violations.¹⁶

The MISA program has resulted in significant reductions in toxic discharges into receiving waters. Indeed, MISA's pulp and paper regulations, along with federal regulations under the *Fisheries Act* and the *Canadian Environmental Protection Act* are regarded as having contributed to "one of the great success stories in Canadian environmental policy, leading to major reductions in discharges of both conventional and toxic pollutants from the sector."¹⁷

Proposed Changes Announced by the Ministry of Economic Development, Job Creation and Trade

On December 6, 2018, the Minister of Economic Development, Job Creation and Trade announced a package of 30 actions to "reduce red tape and regulatory burden."¹⁸ The

³ Municipal-Industrial Strategy for Abatement (MISA): *A Policy and Program Statement of the Government of Ontario on Controlling Municipal and Industrial Discharges into Surface Water*, ISBN 0-7729-7200-1, (Toronto: Queen's Printer for Ontario at p. 7.

⁴ *Ibid.*

⁵ Ontario Regulation 215/95 (Electric Power Generating Sector)

⁶ Ontario Regulation 64/95 (Inorganic Chemical Sector)

⁷ Ontario Regulation 561/94 (Industrial Minerals Sector)

⁸ Ontario Regulation 214/95 (Iron and Steel Manufacturing Sector)

⁹ Ontario Regulation 562/94 (Metal Casting Sector)

¹⁰ Ontario Regulation 560/94 (Metal Mining Sector)

¹¹ Ontario Regulation 63/95 (Organic Chemical Manufacturing Sector)

¹² Ontario Regulation 537/93 (Petroleum Sector)

¹³ Ontario Regulation 760/93 (Pulp and Paper Sector)

¹⁴ David Estrin & John Swaigen, *Environment on Trial: A Guide to Ontario Environmental Law and Policy* (Toronto: Emond Montgomery Publications Limited, 1993) at 546.

¹⁵ *Ibid.*

¹⁶ Ontario, Ministry of the Environment and Energy, *supra* note 4 at 18.

¹⁷ Winfield, *supra* note 3 at 87.

¹⁸ Ontario, Ministry of Economic Development, Job Creation and Trade, "Proposed Changes to Create Jobs and Reduce Regulatory Burden in Specific Sectors", Newsroom (Toronto: 6 December 2018). Online; <<https://news.ontario.ca/medg/en/2018/12/proposed-changes-to-create-jobs-and-reduce-regulatory-burden-in-specific-sectors.html>>.

government's press release states that these proposed changes, "along with regulatory changes, eliminate burdensome regulations so businesses can grow, create and protect good jobs."¹⁹ One of the proposed changes is to revoke the nine regulations related to MISA. The government's press release states:

In Ontario, 113 facilities are currently subject to nine sector-specific industrial wastewater regulations, as well as site-specific ECAs. To reduce regulatory burden for facilities while maintaining oversight over release of industrial wastewater, the government would transfer applicable requirements from the nine regulations into the ECAs for these facilities, and then revoke the nine regulations. These changes would allow businesses to have greater operational flexibility, such as the ability to implement changes to their production processes, so they could focus on being more innovative and competitive.²⁰

In a letter sent January 28, 2019, CELA provided comments on the government's proposal to revoke MISA. Our comments in relation to the ERO proposal remains the same and for reasons we indicated previously, we strongly recommend that the Ministry not proceed with this proposal.

Analysis

Repealing the MISA regulations and transferring the applicable requirements to individual environmental compliance approvals makes Ontario's water bodies extremely vulnerable to toxic pollution from industrial facilities. It also fundamentally undermines regulatory consistency and certainty of the effluent limits for major industrial facilities that discharge pollution into Ontario's waters.

The government's proposal to transfer the requirements of MISA to the ECA process fundamentally weakens the regulatory framework governing water pollution and creates the very problem that the MISA regulations were enacted to address. Prior to MISA the Ministry's approach to water protection was undertaken through the approvals process on a "case-by-case basis through negotiations between local ministry staff and the industry concerned."²¹ This resulted in highly variable limits in terms of both the concentration and types of chemicals that could be discharged by industrial facilities operating in Ontario.²² According to legal experts, the previous approach led to "[d]ischarge objectives for specific pollutants" not being included on a "consistent basis" in the approvals issued by the Ministry to industrial facilities.²³ The Ministry was also criticized for ignoring a "wide range" of toxic chemicals, and focusing only on "conventional pollutants, such as suspended solids, some heavy metals and a limited group of organic pollutants."²⁴ The MISA regulations were enacted precisely to avoid these flaws in the Ministry's approvals process, which had led to highly inconsistent and unpredictable standards

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ David Estrin and John Swaigen, *supra* note 16 at 546.

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

for water protection in the province. A major achievement of the MISA program, therefore, was that it removed the establishment of *ad hoc* discharge limits for individual facilities by Ministry officials and instead ensured that effluent standards were set by regulations which applied province wide, ensuring consistency and predictability in the regulatory framework governing water protection in Ontario.²⁵ Under MISA the “bipartite bargaining model” that had been previously utilized to negotiate actual discharge levels was replaced by a multi-stakeholder advisory committee for each of the nine sectors composed of industrial representatives and members of the public.²⁶

CELA is very concerned that the proposal will weaken regulatory standards set under MISA to protect discharges into Ontario’s water. As the government notes in the ERO proposal, under the current regulatory framework the Ministry can only make an ECA amendment for a regulated facility which imposes requirements that are “in addition to or more stringent” than the MISA requirements. The owners of MISA-regulated facilities are currently not allowed to make any changes to production processes, production rates, the use of raw materials, or changes to wastewater treatment processes if the changes result in greater discharges than those allowed under MISA. By revoking the MISA regulations the Ministry will be able to allow discharges that are greater than those that are permitted by MISA. In fact, in the ERO proposal, the government admits that the underlying rationale for the proposed change is precisely to allow the Ministry to impose less stringent requirements than those established under MISA.

Although the MISA regulations decreased toxic pollution discharges into water, the program itself has been long overdue for improvement. In a recent report, the Environmental Commissioner of Ontario (ECO) stated:

Many of the toxic industrial chemicals persist for long periods in the environment. As noted above, when the MISA regulations were developed, the goal of the program was “the virtual elimination of persistent toxic substances.” This goal is as important today as it was then, but the MECP seems to have been content to make no progress towards it in 25 years.

In the last quarter century, we have become more aware of the harmful effects of chemicals, while the ability of water bodies to accept them has been eroded by population growth, loss of natural areas and climate change. Meanwhile, it is reasonable to expect that industry has better technology for detecting, managing and reducing toxic chemicals, just as today’s flat screens, LEDs and smart phones outperform 1993’s tube televisions, incandescent bulbs and landline phones. It is long past time for the MECP to update the legal limits for toxic industrial discharges into our water, especially persistent toxic substances.²⁷

Accordingly, the ECO recommended that the Ministry update the limits in the MISA regulations and environmental compliance approvals to require industries to use the best available technology to minimize toxic substance discharged into Ontario waters and to require industries

²⁵ *Ibid.*

²⁶ Winfield, *supra* note 3 at 44.

²⁷ Environmental Commissioner of Ontario, *Back to Basics Clean Water Vol 2* (Toronto: Environmental Commissioner of Ontario, 2018) at 85.

to virtually eliminate the discharge of persistent toxic substances.²⁸ While the ECO recommended that the MISA regulations be updated, the ECO cautioned against doing this through the approval process and stated:

The outdated MISA regulations might not matter if up-to-date pollution limits were set by the individual compliance approval issued to each facility under the Ontario Water Resources Act, but this has not happened either. Ontario industrial wastewater approvals are not regularly reviewed and rarely updated. Other jurisdictions, including the U.S Environmental Protection Agency, include expiry dates on approvals for industrial facilities. Ontario does not.²⁹

Given the ECO's findings, the proposal to transfer the requirements of MISA into the ECA process is wholly misguided and will seriously undermine environmental protection in Ontario. The government's proposal to repeal the MISA regulations will terminate a program that has played a vital role in protecting Ontario from toxic contamination caused by discharges from major industrial facilities. CELA strongly recommends that the existing regulatory framework under MISA program be retained. Furthermore, CELA recommends that the Ministry adopt and implement the ECO's recommendations regarding MISA. These include the need to update the discharge limits in the MISA regulations and environmental compliance approvals; require industries to use the best available technology to minimize toxic substances discharged into Ontario waters; and to virtually eliminate the discharge of persistent toxic substances.

Recommendations:

Recommendation No. 1: CELA strongly recommends that the MISA regulations governing the nine industrial sectors not be repealed.

Recommendation No. 2: CELA recommends the discharge limits in the MISA regulations and environmental compliance approvals be updated.

Recommendation No. 3: CELA recommends that industries be required to use the best available technology to minimize discharges of toxic substances and virtually eliminate discharges of persistent toxic substances.

Yours truly,

CANADIAN ENVIRONMENTAL LAW ASSOCIATION



Ramani Nadarajah
Counsel



Amanda Montgomery
Student-at-law

²⁸ *Ibid.*

²⁹ *Ibid* at 84-85.