



August 26, 2016

Ms. Charlene Cressman
Senior Program Advisor
Ministry of Environment and Climate Change
Environmental Programs Division
Modernization of Approvals Branch
135 St. Clair Avenue West, 12th Floor
Toronto, Ontario
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Via Email

Dear Ms. Cressman:

**Re: Environmental Activity and Sector Registry Technical Discussion Paper
for Plant and Production Processes with Air and Noise Emissions
EBR Registry Number 012-7954**

BACKGROUND

The Canadian Environmental Law Association (CELA), Ecojustice Canada (Ecojustice) and Environment Hamilton (EH) are providing you joint comments on the Ministry of Environment and Climate Change's (MOECC) Technical Discussion Paper on Proposed Regulatory Changes and Environmental Activity and Sector Registry (EASR) Requirements: Plant and Production Processes with Air and Noise Emissions (Technical Discussion Paper).¹

CELA is a legal aid clinic with a mandate to use and improve laws to protect the environment and public health and safety. CELA has been extensively involved with MOECC's approvals process. CELA counsel is a member of Ministry's Modernization of Approvals Stakeholder Roundtable. CELA counsel have represented clients in numerous cases regarding the environmental compliance approvals. CELA has also individually, and jointly with Ecojustice, provided comments on a number of MOECC proposals regarding the Environmental Activity and Sector (EASR) regime.² Consequently, CELA has considerable experience with issues pertaining to environmental compliance approvals and EASR.

¹ Ontario Ministry of Environment and Climate Change, Technical Discussion on the Proposed Regulatory Changes and Environmental Activity and Sector Registry (EASR) Requirements" Plant and Production Processes with Air and Noise Emissions hereinafter referred to as Technical Discussion Paper on Air and Noise Emissions.

² See CELA, CIELAP and Ecojustice's Comments dated April 16, 2010 on Modernizing Environmental Approvals, EBR Registry No.010-9143; CELA, CIELAP and Ecojustice's comments dated March 4, 2011 regarding the Proposed Environmental Activity and Sector Registry Group 1 Activities and Sectors Technical report, EBR Registry No. 011-1959; CELA and Ecojustice's letter dated March 29, 2012 to the Honourable Jim Bradley regarding the Environmental Activity and Sector Registry - Group 2 Activities; CELA and Ecojustice's letter dated April 18, 2012 to the Honourable Jim Bradley regarding the exemption of the transportation of hazardous waste from licensing requirements; CELA 's comments on the Proposed Policy Framework for Modernizing Approvals for **Canadian Environmental Law Association**

Ecojustice is Canada's premier non-profit organization providing free legal and scientific services to protect and restore the environment and human health. From offices at four locations in Canada in three provinces, Ecojustice legal counsel and scientists work on leading environmental issues across the country at every level of court. In recent years, Ecojustice has worked on behalf of several communities confronted with pollution concerns from provincially regulated facilities, including members of the Aamjiwnaang First Nations near Sarnia. Through Ecojustice's work with communities like Aamjiwnaang, the organization has developed an in-depth understanding of the limitations and weaknesses of the approvals process. Ecojustice's senior scientist is also a member of the MOECC's Stakeholder Roundtable to modernize the approvals process.

EH is a non-profit organization which helps Hamiltonians develop the skills and knowledge to protect and enhance the environment. EH's director is the co-chair of the MOECC's Working Group on O.Reg 419/05- Local Air Quality, which facilitates discussion on a broad range of issues related to air regulation, including environmental compliance approvals. EH has been actively involved in addressing the problem of industrial air emissions in Hamilton, including the problem with fugitive emissions. EH has also been extensively involved in addressing the adverse effects caused to local citizens by facilities discharging noise and odours within the Hamilton area.

GENERAL COMMENTS

We have reviewed the Technical Discussion Paper and have a number of serious concerns. In particular, we are concerned with the MOECC's proposal to delegate to a Qualified Person (QP) the responsibility of making determinations of whether the discharge of contaminants has the potential to cause adverse effects. The MOECC is proposing to define a QP, for the purpose of the proposed EASR regulation, as a person with a license or a limited license under the *Professional Engineers Act*.³

We are also concerned that the proposed length of time for notification of complaints to the MOECC is at odds with the notification requirements generally established under provincial environmental legislation.

SPECIFIC COMMENTS

Improper Delegation of the Director's responsibility to a 'Qualified Person'

According to the Technical Discussion Paper, the MOECC is proposing to delegate responsibility for determining the extent of the adverse effects to a QP in the following circumstances:

Ontario Natural Resources dated November 13, 2012 and CELA comments dated December 21, 2015 regarding regulations prescribing certain short term water takings as EASR activities.

³ *Ibid.* at p. 24.

- where an Emission Summary and Dispersion Modelling (ESDM) report indicates that the concentrations of a contaminant will be above the level published by the Ministry in the “Jurisdictional Screening Level (JSL) List – A Screening Tool for Ontario Regulation 419: Air Pollution – Local Air Quality”;⁴
- where contaminants do not have a standard set out in Schedule 2 or 3 in O.Reg 419/05 or a guideline limit set out in the ministry document “Summary of Standards and Guidelines to support O.Reg 419/05 - Air Pollution- Local Air Quality as amended”⁵;
- where an ESDM report identifies fugitive and dust sources⁶;
- where noise levels exceed the setback requirements⁷; and
- where odour levels exceed setback requirements.⁸

The MOECC’s proposal to delegate responsibility for assessment of whether contaminants discharged from a facility will cause adverse effects to a QP is fundamentally at odds with the evaluative criteria which were established for assessing the eligibility of an activity for the EASR. When the Ministry introduced the EASR regime in Ontario it indicated that it would only apply to facilities and/or activities which posed minimal risk to the environment and which had predictable impacts that could be regulated by pre-set rules.

If the extent of the adverse effects caused by the discharge of a contaminant by a facility cannot be readily determined and subject to pre-set rules, it should not be subject to the EASR process. Instead the facility should be subject to an Environmental Compliance Approval (ECA). The MOECC instead is inappropriately proposing to transfer certain activities to the EASR regime by delegating the determination of the adverse effects to a QP. This approach clearly contravenes the evaluative criteria which were established for the EASR regime and broadens the scope of its application to activities and facilities which should clearly remain subject to an ECA.

The responsibility for assessing whether facilities discharging contaminants into the air will cause adverse effects is the responsibility of the Director of the MOECC under section 9 of the *Environmental Protection Act (EPA)*. We are very concerned about the MOECC’s proposal to delegate this core government responsibility under the *EPA* to a QP who will be hired by an EASR applicant to make the assessment. The proposal establishes a process whereby the extent of adverse impacts caused by discharge of contaminants from a facility and the appropriate mitigative measures will be entirely left to the discretion of a QP hired by that very same facility. Given that it is the facility that will hire and pay the QP for his or her assessment, the QP has an inherent conflict of interest. Thus, there is a very real concern that the assessment of potential adverse effects from these activities will not be made independently and impartially. We are very concerned about the disturbing trend of MOECC allowing facilities which are known to pose increased environmental risks to register under the EASR regime and to inappropriately delegate to a QP the responsibility for making the determination about whether the facility is causing

⁴ *Ibid.*, at p.7, O.R-1, iv.

⁵ *Ibid.* at p. 7, OR-1, v.

⁶ *Ibid.* at p.8, O.R-2.

⁷ *Ibid.* at p. 11, O.R-4, v.

⁸ *Ibid.* at p. 4, O.R 6.

adverse effects. Last year CELA raised similar concerns with respect to the MOECC's proposal to include certain short term water takings as EASR activities. In a letter to Mr. Ben Hatcher, Senior Program Advisor, MOECC, dated December 21, 2015, CELA raised concerns regarding a proposal to delegate to the QP the authority to determine whether a water-taking for construction dewatering could be safely discharged on land. CELA stated that "[i]n view of the potential adverse impacts that could be caused by the discharge of water on land, CELA is of the firm view that the decision should not be delegated to a third party hired by the proponent." A copy of our letter to Mr. Hatcher dated December 21, 2015 is attached. Ecojustice raised similar concerns two years ago regarding QPs in relation to the MOECC's policy review of contaminated soils.⁹

The proposal to delegate the assessment of adverse effects to a QP is also at odds with MOECC's position in the Technical Discussion Paper that activities which pose an increased risk should remain within the ECA process. The Technical Discussion Paper states that a facility that has requested or has been issued a site specific air standard, or a technical standard, will not be eligible for the proposed EASR regulation. According to the MOECC, "[f]acilities that are above these air standards pose an increased risk and therefore require technical review through the existing ECA process."¹⁰ The MOECC has failed to provide any rationale as to why these same considerations should not apply in relation to facilities which are discharging contaminants at levels above the JSL List, facilities which emit fugitive dust sources, and facilities which do not meet the noise or odour set back requirements.

The Ministry's Technical Discussion Paper minimizes the environmental and health risk posed by the discharge of contaminants from these facilities. The Technical Discussion Paper, for instance, states that fugitive dust, if not properly managed can result in the loss of the enjoyment and use of neighboring properties. The potential adverse impacts from fugitive dust are not limited simply to loss of enjoyment of property. Fugitive dust particles which are less than 10 microns or smaller (PM₁₀) can, when inhaled, cause respiratory illness, lung disease and even premature death in sensitive individuals. Similarly, exposure to noise pollution, depending on duration and intensity, can cause serious health impacts including hearing loss and impaired cognitive and psychological functions. Accordingly, it is important that the MOECC's section 9 Director undertake a review the QP's assessment of the extent of the adverse effects from these activities and the appropriateness of any recommended mitigative measures.

Notification Requirements

The Technical Discussion Paper is proposing that if a person engaging in the prescribed activities receives a complaint with respect to the facility, and the complaint relates the natural environment, the Local MOECC District Manager must be notified of the complaint no later than two (2) business days after the complaint is received.¹¹ We fail to understand why the MOECC is providing two days for notification when the environmental legislation generally requires

⁹ See Submission by Laura Bowman, Barrister and Solicitor, Ecojustice to Atif Durrani, Senior Policy Advisor, Land and Water Policy Branch, Ministry of the Environment and Climate Change, re; MOECC policy review of contaminated soils, December 17, 2014.

¹⁰ *Ibid.* at p.5.

¹¹ Technical Discussion on Air and Noise Emissions, p.17,O.R-9, Complaints Reporting Requirements.

notification forthwith in the event of adverse effects.¹² The provision of two days to report complaints is an unduly lengthy period and will delay the Local MOECC office's response to the complaint. Furthermore, inconsistent reporting requirements for adverse effects to the natural environment also create regulatory uncertainty and confusion. We recommend instead that the MOECC impose a requirement that notification of complaints to the Local MOECC District Manager be forthwith, as opposed to within two days.

Conclusion

In conclusion we recommend that:

1. (i) facilities which discharge contaminants which are at concentrations that cannot meet the JSL List;
- (ii) facilities where an ESDM report identifies fugitive dust sources;
- (iii) facilities which do not meet the set back requirements for noise; and
- (iv) facilities which do not meet the set back requirements for odour be required to apply for an ECA.

We further recommend in the event that the person engaging in the prescribed activities receives a complaint with respect to the facility, and the complaint relates to the natural environment, the Local MOECC District Manager should be notified of the complaint forthwith.

Yours truly,



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Counsel
CELA



Elaine MacDonald
Senior Scientist
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Lynda Lukasik
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- c. The Honourable Glen Murray, Minister of Environment and Climate Change
Lisa Thompson, PC Environment Critic
Peter Tabuns, NDP Environment Critic
Dianne Saxe, Environmental Commissioner of Ontario
Doris Dumais, Director, Modernization of Approvals Branch, MOECC

¹² *Environmental Protection Act*, R.S.O.1990, c. E.109 as amended, subsection 15(1); *Ontario Water Resources Act*, R.S.O.1990 as amended, subsection 30(2).