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February 16, 2016

Sent via email

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Dear Ms. Grant and Ms. Hall,

RE: EBR Registry postings nos. 012-4164, 012-4167 and 012-4168

We write concerning the proposed changes to Ontario's *Procedure for Preparing and Emission Summary and Dispersion Modelling Report (Guideline A-10)* (EBR Registry number 012-4167), *Air Dispersion Modelling Guideline for Ontario (Guideline A-11)* (EBR Registry number 012-4164) and *Guideline for the Implementation of Air Standards in Ontario (Guideline A-12)* (EBR Registry number 012-4168). Our comments also address proposed changes to the *Guide to Applying for Registration to the Technical Standards Registry – Air Pollution (Technical Standards Guide)* and the *Guide to Requesting a Site-Specific Standard (SSS Guide)*.

As members of the External Working Group (**EWG**) under the Local Air Quality Regulation (**Regulation**), our organizations have worked extensively with the Regulation under the *Environmental Protection Act (EPA)* and the policy documents that guide the Regulation's implementation, including Guidelines A-10, A-11 and A-12. It is from this perspective that our

organizations have a number of concerns about the proposed amendments to Guidelines A-10, A-11 and A-12, including those discussed in these comments.

In these comments, we recommend the following changes to the proposed Guidelines:

- 1) **Remove proposed changes that suggest the purpose of the Regulation is to promote industry competitiveness and production.**
- 2) **Clarify that not all current air standards are based solely on science and act swiftly to update those that are not.**
- 3) **Clarify in Guideline A-10 that all contaminant sources excluded on the basis that they are subject to a technical standard must be identified in the executive summary of an ESDM report.**
- 4) **Remove language from Guideline A-10 suggesting that transitional operating conditions may be disregarded as a potential maximum POI operating scenario in some circumstances when conducting compliance modelling, contrary to the Regulation.**
- 5) **Amend proposed language in Guideline A-10 regarding the use of information on frequency and duration of maximum POI concentrations to clarify that all exceedances of Ministry standards are violations of the Regulation, regardless of the Ministry's assessment of significance.**
- 6) **Remove proposed language in Guideline A-12 and the SSS Guide that permits regular consideration of cost effectiveness during economic feasibility analyses.**
- 7) **Retain language in the SSS Guide that constrains the availability of 10 year SSS to "extenuating circumstances."**
- 8) **Clarify a misleading statement in Guideline A-12 that suggests that exceedances of a URT are not prohibited.**

We explain these recommendations in greater detail below.

In addition, we note that none of the draft Guidelines include the guideline number assigned to each document by the Ministry (e.g., Guideline A-10) on its website. For ease of reference, we suggest that these numbers be added to the title page of each Guideline.

- 1) **The proposed changes to language explaining the purpose of the Local Air Quality Regulation do not accurately reflect the purpose of the Regulation or the EPA**

We are very concerned by the alarming changes proposed for the introductory section of Guideline A-11. Specifically, the draft Guideline A-11 proposes removing the following language:

The regulation is intended to protect communities against adverse effects from local sources of air emissions. The Regulation places limits on the concentration of contaminants in the natural environment that are caused by emissions from a facility.

The draft Guideline A-11 proposes replacing that language with the following:

Ontario's Local Air Quality Regulation is the main tool used by the MOECC to regulate air contaminants released by industrial and commercial facilities to protect local communities. The regulation aims to limit or reduce substances released into air that can affect human health and the environment, while ensuring industry can remain competitive and productive.

[underline added]

Promoting the competitiveness and productivity of industry is not the purpose of either the Regulation or the *EPA*. The purpose of the *EPA* is to provide for the protection and conservation of Ontario's natural environment.¹ The Supreme Court of Canada has consistently confirmed this and has further explained that the purpose of the *EPA* also includes protecting human health, plant and animal life and property.²

Likewise, promoting the competitiveness and productivity of industry falls outside of MOECC's mandate under the *EPA* and the Regulation and, in many cases, such a role can be expected to conflict directly with MOECC's obligations as a regulator. MOECC's role is to protect the health of Ontarians and Ontario's natural environment from harmful air emissions, not to act as a cheerleader for the very industry it is supposed to be overseeing.

The language of Guideline A-11 should accurately reflect the purpose of the Regulation and MOECC's proper role in implementing it; accordingly, we recommend that the proposed new language be removed and the current language be retained.

The draft Guidelines A-10 and A-12 contain similar proposed amendments. The draft Guideline A-10 proposes removing the following language:

Ontario Regulation 419/05: Air Pollution – Local Air Quality (the Regulation) made under the Environmental Protection Act (EPA) is the regulation that is intended to protect communities against adverse effects from local sources of air emissions.

The draft A-10 propose replacing that language with the following:

Ontario's local air quality regulation (O. Reg 419/05: Air Pollution – Local Air Quality) works within the province's air management framework by regulating air contaminants released into communities by various sources, including local industrial and commercial facilities. The regulation aims to limit exposure to substances released into air that can affect human health and the environment, while allowing industry to operate responsibly under a set of rules that is publicly transparent.

The draft Guideline A-12 proposes removing the following language:

The Ontario Ministry of the Environment (MOE) sets contaminant-specific Point of Impingement (POI) standards to manage air pollution from non-mobile sources (e.g. industrial and commercial sources). Air standards are generally derived from Ambient

¹ *Environmental Protection Act*, RSO 1990, c E.19, s 3(1).

² See, e.g., *Castonguay Blasting Ltd v Ontario (Environment)*, 2013 SCC 52 at paras 9-11.

Air Quality Criteria (AAQC). Ontario’s air standards are based on the best scientific information available and are set at levels that safeguard the natural environment and protect sensitive populations such as children and the elderly. Ontario Regulation 419/05: Air Pollution – Local Air Quality (hereafter referred to as “the Regulation”) is the primary regulatory tool used for the assessment and implementation of air standards to protect local air quality in our communities. Other general provisions of the Environmental Protection Act (EPA) are also used, including the prevention of adverse effects.

The draft Guideline A-12 proposes replacing that language with the following:

Ontario’s local air quality regulation (O. Reg 419/05: Air Pollution – Local Air Quality (hereafter referred to as “the Regulation”) [sic] made under the Environmental Protection Act (EPA) works within the province’s air management framework by regulating air contaminants released into air by various sources, including local industrial and commercial facilities. The regulation aims to limit exposures in nearby communities to substances released into air that can affect human health and the environment, while allowing industry to operate responsibly under a set of rules that is publicly transparent.

Likewise, the draft Technical Standards Guide proposes removing the following language:

Ontario Regulation 419/05: Air Pollution – Local Air Quality (the Regulation) made under the Environmental Protection Act (EPA) is the regulation that is intended to protect communities against adverse effects from local sources of air emissions.

The draft Technical Standards Guide proposes replacing that language with the following:

Ontario Regulation 419/05: Air Pollution – Local Air Quality (the Regulation) made under the Environmental Protection Act (EPA) is the regulation that works within the province’s air management framework by regulating air contaminants released into communities by various sources, including local industrial and commercial facilities. The regulation aims to limit exposure to substances released into air that can affect human health and the environment, while allowing industry to operate responsibly under a set of rules that are publicly transparent.

Each of these proposed amendments requires clarification. It is self-evident that industry cannot be considered to be operating responsibly unless the actual objective of the Regulation (i.e., to protect communities and the environment against exposure to harmful air pollutants) has been achieved. However, the phrase “while allowing industry to operate responsibly” suggests that operating responsibly is a factor to be balanced against the actual purpose of the Regulation when the Ministry makes permitting, enforcement or other regulatory decisions. To clarify this statement of the Regulation’s objective, we recommend adopting the explanation currently provided in Guideline A-11: the regulation is intended to protect communities (and the environment) against adverse effects from local sources of air emissions. This change has the added benefit of ensuring consistency across the guidance documents.

Alternatively, the proposed language in draft Guidelines A-10 and A-12 could be modified as follows:

The regulation aims to limit exposures in nearby communities to substances released into air that can affect human health and the environment and requires industry to operate responsibly under a set of rules that is publicly transparent.

While we support the commitment to public transparency in the rules, we note that it is equally important that the rules be implemented and enforced in a publicly transparent manner and we recommend that this statement be amended accordingly.

2) Some current standards are not based solely on science

The draft Guideline A-10 proposes to add an explanation that Ontario's air standards are "set based solely on science without taking into account technological or economic factors into account [sic]." A similar claim appears in proposed Guideline A-12.³

We agree that Ontario's air standards should be based solely on current science without taking into account technological or economic factors. However, while newer standards may be based solely on science, many of the current standards in the Regulation were set before the Ministry adopted this policy. As a result, some standards, such as the Schedule 3 standard for sulphur dioxide, are not based solely on current science. While Schedule 3 of the Regulation currently imposes a 1-hour standard of 690 $\mu\text{g}/\text{m}^3$ for sulphur dioxide, the 1-hr US National Ambient Air Quality Standard (NAAQS) for sulphur dioxide is 196 $\mu\text{g}/\text{m}^3$, or about one third the Ontario standard, and current science recommends a human health reference concentration of 67 ppb (176 $\mu\text{g}/\text{m}^3$) for a 10 minute exposure.⁴ Using the conversion method provided for in s. 17 of the Regulation, this would be an equivalent 1-hr standard of 107 $\mu\text{g}/\text{m}^3$ or about 1/6 of the present standard, or an equivalent 24-hr standard of 44 $\mu\text{g}/\text{m}^3$ or 1/15 of the present 24-hr standard of 275 $\mu\text{g}/\text{m}^3$. Similarly, Schedule 3 of the Regulation imposes a 1-hr standard for Nitrogen Oxides as Nitrogen Dioxide of 400 $\mu\text{g}/\text{m}^3$ compared to a 1-hr US NAAQS of 188 $\mu\text{g}/\text{m}^3$. Accordingly, we recommend that the proposed language in Guidelines A-10 and A-12 be changed to reflect the fact that not all of the standards are currently based solely on science and that some standards have not been recently updated and were based on other considerations such as industrial interests. At the same time, we urge the Ministry to update outdated standards as soon as possible to ensure they are based solely upon current science and that they are protective of human health and the environment.

³ Section 1.4.

⁴ See, for instance, Health Canada's Health Risk Assessment for Sulphur Dioxide (Draft 2.0, dated February 28, 2014). The US NAAQS standard, which is health-based, was updated in 2010.

3) New guidance on technical standards ignores key considerations

The draft Guideline A-10 proposes to add new guidance about the use of technical standards. Among other changes, the draft Guideline A-10 explains that “[o]nce a facility registers under a technical standard, it is no longer required to model in an ESDM Report the registered contaminants addressed in the technical standard that are linked to the North American Industrial Classification System (NAICS).”⁵, as is provided for in section 42 of the Regulation. As ENGO members of the External Working Group under the Regulation we were opposed to these changes, particularly in light of the unresolved issue of assessing residual risk.

Excluding some contaminant sources from the Emission Summary and Dispersion Modelling (ESDM) reports required by the Regulation will create confusion and mislead local community members. Draft Guideline A-10 includes proposed language to clarify that an ESDM report must list all sources and contaminants at a facility, including those subject to a technical standard.⁶ However, the Regulation only requires that the executive summary of the ESDM report be provided to the public; our organizations have had considerable difficulties in obtaining complete versions of ESDM reports. This creates a risk that the public will not be able to determine whether sources have been excluded from the Emissions Summary Table required to be disclosed to the public. This is especially concerning given the excluded sources are also likely the sources emitting contaminants in excess of the Ministry’s air standards. This will undermine transparency and accountability and creates a real risk that the executive summaries of ESDM Reports will present a misleading view of a facility’s actual impacts. Given that MOECC has refused thus far to require the assessment of residual risk after implementation of the technical standards to assess the effectiveness of such standards, local communities will be put in a position of assessing the effectiveness based solely on the potentially misleading executive summaries of the ESDM Reports.

We recommend clarifying that all contaminant sources excluded on the basis that they are subject to a technical standard must be identified in the executive summary of an ESDM report.

4) Guidance on transitional operating conditions conflicts with regulatory requirements

We agree that it is important for the Ministry to clarify to the regulated community that transitional operating conditions (i.e., start-up, shutdown and malfunction conditions) may be the operating conditions that result in the highest point of impingement (POI) concentrations for the purposes of determining compliance with the Regulation’s air standards. However, the language in section 8.3 in draft Guideline A-10 confuses rather than clarifies that requirement under the Regulation. The following statement, which is currently housed under section 8.1 of Guideline A-10, is particularly problematic:

[F]ocusing the analysis on steady-state operating conditions may be reasonable if there are no acute effects associated with the contaminant during transitional operating

⁵ Draft Guideline A-10 at p 12.

⁶ See, e.g., Draft Guideline A-10 at pp 45, 109.

conditions and transitional operating conditions last only for a few hours a few times per year.

This language suggests that it may be acceptable under some circumstances to conduct compliance modelling based upon an assumed operating condition that does not result in the highest POI, contrary to what is required under subsection 10(1) of the Regulation. We recommend that this language in Guideline A-10 be removed.

5) Guidance on assessing concentrations and frequency of exceedances at specified POIs requires clarification

The proposed language of section 13.2 of draft Guideline A-10 includes the following:

If a facility is required to notify the ministry of an exceedance of an air standard (or ministry POI limit) under section 28 of the Regulation, then it may be useful for ESDM reports to include an assessment of emission rates and POI concentrations for different operating conditions (in addition to the assessment at operating conditions that result in the maximum POI concentration). It would also be useful to include a discussion of the frequency and duration of maximum POI concentration at the various operating conditions assessed. This additional information will be particularly useful in assessing the significance of any exceedances of a ministry POI Limit or Assessment Values (linked to annual standards).

This language is partially new; the sentence regarding frequency and duration of maximum POI concentration has been moved from current section 8.1 (Operating Conditions). As drafted, it is unclear whether the Ministry's intent here is to rely on the frequency and duration information when, for instance, it determines what steps it will take to address the exceedance under the Ministry's Compliance Policy.⁷ We recommend adding language to clarify the Ministry's intended uses for such information. In particular, we note that the term "POI Limit" may be used to refer to any numerical concentration limit set by the ministry, including air standards in the Regulation's schedules.⁸ We also recommend adding language to clarify that any modelled exceedance of an air standard is a violation of both the Regulation and the *Environmental Protection Act* itself, regardless of the Ministry's assessment of the exceedance's significance.⁹

6) Cost effectiveness should not be considered in economic feasibility analyses

Section 2.5 of draft Guideline A-12 contains proposed new language that would permit a consideration of "cost effectiveness" to the economic feasibility analysis of the technology benchmarking reports as part of the site-specific standard (SSS) application process. A similar

⁷ Ontario Ministry of the Environment, *Compliance Policy: Applying Abatement and Enforcement Tools* (May 2007), <https://dr6j45jk9xcmk.cloudfront.net/documents/1098/60-applying-abatement-and-enforcement-tools-en.pdf>.

⁸ See footnote 3 of Draft Guideline A-10 (p 10).

⁹ Regulation, s 20(2); EPA, s 6.

addition is proposed for the SSS Guide in section 3.6.1. Facilities have in the past been permitted to raise financial hardship issues as part of the economic feasibility analysis of the technology report prepared according to section 27.1 of the Regulation. However, the addition of cost effectiveness considerations to the economic feasibility analysis will lead to requests for even higher SSS than would otherwise be available if only financial hardship issues could be raised. Cost effectiveness analysis will allow a facility exceeding the Schedule 3 standards to eliminate pollution control options based on costs, in essence putting a price on protecting the health of local communities and the local environment from toxic pollution.

We are particularly surprised to see this proposed addition to Guideline A-12 and the SSS Guide as, to our knowledge, there has been no prior discussion of this addition at the EWG. Although the proposed additions refer to a user guide titled “Application of Cost Effectiveness Methodology and Indicators for Use in Section 32 Requests under Ontario Regulation 419: Air Pollution – Local Air Quality, USER GUIDE, Total Resource Effectiveness (TRE) Methodology and Calculations”, dated June 2009, we cannot recall consultations on this user guide or discussion at the EWG. We note that there is no record of any consultation on this document posted on the EBR Registry. The addition of cost effectiveness considerations to the technology benchmarking reports weakens the Regulation even further and provides the regulated community with further means to avoid adopting measures to reduce emissions. We are vehemently opposed to this addition to Guideline A-12 and the SSS Guide.

7) Site-specific standards as minimum of 5 years to 10 years

As the ENGO members of the EWG, we have previously indicated our opposition to the amendments to the regulation that allowed SSS to be extended to 10 years. Proposed section 2.4 of draft guideline A-12 would delete language indicating that an SSS is to be issued for 10 years only “in extenuating circumstances.” Furthermore, language indicating that economic considerations will generally not be considered extenuating circumstances warranting an approval period greater than 5 years has been deleted.

This proposed deletion has the effect of incenting industry to seek SSS for the longer period of 10 years rather than the shorter period of 5 years. We are opposed to these amendments. Given that SSS allow facilities to emit toxic air pollutants that result in concentrations that exceed Schedule 3 standards and thus pose a higher risk to local communities, the Ministry should use all available tools to encourage facilities to achieve compliance with the Schedule 3 standards as soon as possible. Accordingly, we recommend that the language constraining the availability of 10 year SSS be retained.

8) Upper Risk Threshold (URT) exceedances are prohibited in some cases

Draft Guideline A-12 includes, at page 89, the proposed addition of the statement that “...there is no prohibition for an exceedance of the URT.” That statement is misleading. We recognize that the Regulation does not explicitly prohibit the exceedance of a URT. However, as the URTs are

set at far higher (i.e., less stringent) levels than the Schedule 3 standards, an exceedance of a URT for a contaminant that also has a Schedule 3 standard is, by default, an exceedance of the Schedule 3 standard. Exceedances of Schedule 3 standards are violations of both the Regulation and the *EPA*. We recommend that this proposed addition be removed or, if retained, be clarified in accordance with our comments.

Yours truly,



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