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**COMMENTS ON THE REVISIONS TO
COMPLIANCE GUIDELINE F-2**

*Submitted to the
Ministry of Environment and Energy*

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I. INTRODUCTION

On April 4, 1995 the Ministry of Environment and Energy (MOEE) placed notice of the *Revisions to Compliance Guideline F-2 (Guideline)* on the Environmental Registry.

The main objective of the Guideline is to provide guidance to MOEE staff in achieving and maintaining province-wide compliance with respect to environmental legislation.

The purpose of this document is to identify those provisions of the Guideline which are of concern to the Canadian Environmental Law Association (CELA) and to provide specific comments and recommendations, with a view to assisting the MOEE in achieving the objectives of the Guideline.

II. COMMENTS AND RECOMMENDATIONS ON THE GUIDELINE

General - The Guideline should be upgraded to a Policy

The Guideline replaces Compliance Policy 05-02. This change of status from Compliance Policy to Compliance Guideline is a matter of serious concern to CELA. Guidelines are less formal and definite than policies, and are therefore, more difficult to enforce. Guidelines also provide for less accountability on the part of MOEE staff. Furthermore, guidelines permit a greater degree of discretion in the decision-making process.¹ If MOEE staff have more discretion in enforcing compliance, there is less likelihood that the Guideline will be applied in a uniform and consistent

¹MOEE Manual of Environmental Guidelines and Procedures, 1994.

manner in the province.

Recommendation No. 1 It is recommended that Compliance Guideline F-2 be upgraded from a guideline to a policy.

Section 4.4 - Non-Compliance Situations

Section 4.4 permits abatement staff to pursue voluntary abatement where mandatory criteria exist. However, the section fails to identify the factors which should be considered before voluntary abatement is deemed to be the appropriate course of action. Abatement staff have been delegated unfettered discretion in determining the circumstances in which they may deviate from mandatory abatement. The factors which warrant resort to voluntary abatement should be clearly stipulated in order to provide guidance to abatement staff, and to ensure consistent application of the Guideline.

Recommendation No. 2 It is recommended that the Guideline specify the criteria under which voluntary abatement may be pursued, even though mandatory abatement criteria exist.

Section 5 - Voluntary Abatement

Although the Guideline provides specific examples of mandatory abatement, it does not establish any criteria for determining voluntary abatement.

Recommendation No. 3 It is recommended that the Guideline specify situations in which voluntary abatement is appropriate.

Section 5.4 - Program Approval

The Guideline states that a program approval is a form of voluntary abatement and sets out specific conditions under which the Director may issue a program approval.

When the *Environmental Protection Act* was first introduced in 1971, it provided the Ministry with authority to issue program approvals. The original purpose for program approvals was to allow polluters a reasonable amount of time to bring their facilities into compliance, without incurring undue financial hardship.² The *Environmental Protection Act* has now been in effect for over two decades, and the original purpose for issuing program approvals is no longer relevant.

Moreover, there is no valid reason for the MOEE to continue to resort to program approvals since the MOEE can achieve the same voluntary abatement objectives through control orders, while retaining the option to resort to enforcement in the event of non-compliance.

Empirical data suggests that emphasising prosecution ensures environmental compliance. Corporations which have been prosecuted allocate more resources to environmental protection

²D. Estrin and J. Swaigen, *Environment on Trial - A Guide to Ontario Environmental Law and Policy* (Toronto, Montgomery Publications Limited, 1993) at p.444.

than those which have not been prosecuted.³

By revamping program approvals as a voluntary abatement tool, the MOEE runs the risk of undermining its enforcement policy in the province.

Under Compliance Policy 05-02, a programme approval was only permitted for situations where preventative measures were needed and not for abating pollution that was actually occurring. The rationale for this restriction was that program approvals were subject to abuse because a Director, under this regime, had the opportunity to approve unacceptable levels of pollution rather than enforce section 14 of the *Environmental Protection Act*.⁴ The failure to provide such a restriction in the Guideline is ill-advised, and poses a serious obstacle to the enforcement of environmental laws in a fair and even-handed manner.

The Guideline states that in event that a person does not comply with a program approval, the MOEE may prosecute for the original violation. This qualification only applies, however, if the MOEE lays charges within two years of the date of the offence. Since programme approvals can extend for a couple of years or more, there is no assurance that the MOEE will be able to prosecute polluters for the original violation.

³D. Saxe, *The Impact of Prosecutions of Corporations and their Officers and Directors upon Regulatory Compliance by Corporations*, 1 J.E.L.P. (Calgary, Carswell, 1990) at p.100.

⁴D. Estrin and John Swaigen, *Environment on Trial* (Toronto, Montgomery Publications Limited, 1993) at p.444.

Recommendation No. 4 It is recommended that Section 5.4 be deleted since there is no valid rationale to support program approvals as a voluntary abatement tool. It is further recommended that the MOEE should not issue program approvals in situations where pollution is occurring.

Section 6.2 - Compliance Schedule

Section 6.2 of the Guideline provides that where mandatory abatement is appropriate, the Ministry will issue one or more of the various control documents listed in Schedule 1.

The Guideline does not provide any guarantee that these authorizing documents will have expiry dates, or that the MOEE will conduct regular reviews to ensure that the conditions in the authorizing documents have been complied with. It is also necessary for the MOEE to periodically review the adequacy of the documents in light of technological developments or material changes in circumstances.

Recommendation No. 5 It is recommended that every authorizing document have an expiry date and be routinely subject to review in order to assess compliance and to determine whether there is a need to improve, upgrade or amend the authorizing document.

Section 6.3 - Change in Status

Section 6.3 provides that all authorizing documents shall include a requirement that any change in status should be reported to the Director.

This provision should also include a clause stating that where there is any change in the operation, emission, discharge, ownership, tenancy, or other legal status of the facility or operation, the Director shall determine if the authorizing document should continue to be binding, or whether it would be more appropriate to amend the document or require an application for a new authorizing document. This would ensure that the MOEE is proactive in ensuring that polluters do not automatically acquire statutory authority to continue operating the facility/site.

Recommendation No. 6 It is recommended that Section 6.3 include a provision which requires the Director to review and consider whether to approve any change in the operation, emission, discharge, ownership, tenancy or other legal status of the facility or operation to which the authorizing document applies.

Section 7 - Public Notification and Consultation

Section 7 provides that the public shall be notified during the development of authorizing documents by means of the Registry unless notice of the proposed instrument is not required. Section 7 should clearly stipulate that notice on the Environmental Registry is a minimum form of notice.

There are other situations which warrant notice beyond that provided by posting on the Environmental Registry. In *759833 Ontario Inc v. The A.G of Ontario et al*, a case which involved the issuance of a Certificate of Approval, the court held that where the decision of the Director may have an adverse impact on a party, the party is entitled to notice.⁵ Consequently, parties who may be impacted by the Director's decision should be entitled to notice which goes beyond the minimum notice provided for on the Environmental Registry.

Recommendation No. 7 It is recommended that section 7 clearly stipulate that notice provided on the Environmental Registry is a minimum form of notice. It is further recommended that where the Director's decision may adversely impact a person's interests, the Director shall provide actual notice to that person.

Section 7.3 - Determination of Extent

In light of the comments with respect to Section 7, the MOEE is required by law to provide notice not only if the property rights of neighbouring and abutting lands are affected but also if other interests are affected.

Recommendation No. 8 It is recommended that the term "property rights" be deleted in Section 7.3(f) and replaced with the term "interests".

⁵(Unreported, December 4th, 1990, Ont. Ct. Gen. Div.) at p.23.

Section 7.6 - Amendments

Section 7.6(g) sets out the criteria for determining whether proposed amendments are environmentally significant. The section states that "any increase in the emission or a discharge of pollutants from the facility/operation" will be considered to be an environmentally significant amendment. The wording of this section does not address situations where the concentration levels of a contaminant may increase, but the total emission rate remains constant. If the proposed amendment results in any change to the concentration levels of the emissions, this should be considered to be an environmentally significant amendment which warrants being placed on the Environmental Registry.

Recommendation No. 9 It is recommended that the word "any increase" be deleted from Section 7.6(g) and replaced with the word "any changes".

Section 9 - Enforcement

Section 9 sets out the factors in which enforcement action is deemed appropriate. In addition to enforcement, the MOEE may also seek civil remedies, such as injunctive relief, to address pollution problems.

Recommendation No. 10 It is recommended that the Guideline specify the factors which will be used by the MOEE in considering when civil remedies will be used as an option for protecting and preserving the natural environment.

Section 9.3 - Prosecution Brief

Section 9 provides that when an IEB officer recommends the initiation of a prosecution, he or she will prepare and submit a written brief to the IEB supervisor.

Section 3.2.3 of Compliance Policy 05-02 had provided that "Where the Ministry has decided not to prosecute a polluter, the Ministry will make information regarding the pollution available to other parties upon request, subject to constraints imposed by legislation." This provision was of benefit to other government agencies and members of the public who sought access to this information. In particular, this provision was of benefit to persons who decided to pursue a private prosecution after the MOEE's decision not to prosecute.

Recommendation No. 11 It is recommended that the Guideline include a provision stating that if a written brief is prepared by the investigator and the Ministry decides not to prosecute, the Ministry will make the written brief available to other parties upon request, subject to constraints imposed by legislation.

Section 11.2 - Penalty

Section 11.2 sets out factors which the Crown should consider on sentencing. The section also states that where appropriate, the Crown may request "restoration orders or other available relief." However, the appropriate circumstances for requesting restoration orders are not specified. Furthermore, the types of available relief and the appropriate circumstances for their use has not been specified.

Recommendation No. 12 It is recommended that with respect to Section 11.2, the Guideline should clearly express the circumstances under which the Crown will consider the imposition of restoration orders. In addition, the section should specify the types of available relief which may be imposed by the courts, and the circumstances in which they would be appropriate.

III. CONCLUSION

The stated objective of the Guideline is to provide guidance to MOEE staff in achieving and maintaining province-wide compliance with environmental legislation. However, there are a number of deficiencies with the Guideline which will impede the MOEE from reaching its objective. The two major deficiencies result from the downgrading of the Compliance Policy to a Guideline, and the reliance on program approvals as a voluntary abatement tool.

The change from Compliance Policy to Compliance Guideline has provided far greater discretion to MOEE staff, making it less likely that the MOEE will be able to ensure uniform application of the Guideline, and secure province-wide compliance with environmental laws. Furthermore, there are a number of provisions in the Guideline which provide broad discretion to MOEE staff while failing to provide any criteria to the decision-making process.

The inclusion of program approvals in the Guideline, as a form of voluntary abatement is a regressive approach to environmental protection and should be abandoned. Program approvals

are unnecessary since MOEE can achieve the same abatement objectives via control orders while retaining the option of prosecuting for non-compliance. The Guideline's failure to prohibit the issuance of program approvals in situations of actual pollution has the potential to severely undermine the MOEE's enforcement policy.

These comments are intended to constructively assist the MOEE in improving the Guideline in order that MOEE staff are able to effectively ensure regulatory compliance within the province.