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COMMENTS ON THE MINISTRY OF ENVIRONMENT AND ENERGY'S DRAFT POLICY ON ACCESS TO ENVIRONMENTAL EVALUATIONS

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1. INTRODUCTION

On February 17, 1995 the Ministry of Environment and Energy (MOEE) placed the *Draft Policy on Access to Environmental Evaluations* ("Draft") on the Environmental Registry. The purported aim of the Draft is to "encourage environmentally responsible companies and individuals to develop and use environmental evaluations." The policy provides assurance to business in Ontario that the MOEE will not as a matter of course demand access to environmental evaluations and limits their use in prosecution. This need for confidentiality is premised on the notion that business avoids self-audits because of a fear of self-incrimination.

2. A NEED FOR THE POLICY HAS NOT BEEN DEMONSTRATED

The Canadian Environmental Law Association (CELA) supports initiative on the use of environmental evaluations by corporations conducting business in the Province. There is, however, no empirical data to suggest that the policy is necessary. A key element of due diligence is the prompt reaction to a problem.[1] Environmental evaluations assist corporations in responding to environmental problems and are a prerequisite to a successful due diligence defence.[2] Business, thus, has every incentive to conduct these evaluations regardless of MOEE policy.

The need for a policy limiting access to environmental evaluations has been questioned in other

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[1]D.Saxe, *Environmental Offenses* (Aurora, Canada Law Book Inc.) 1990 at p.160.

[2]See "Rights to Environmental Audits and other Data", Gordon Crann January 30, 1993. *Canadian Bar Association of Ontario Institute.*

jurisdictions. David Ronald, Assistant Attorney General and Chief of the Environmental Crimes Unit for the Arizona Attorney General's office has stated that "the need for privilege should be *unquestionably* demonstrated before the rather dramatic step of creating a new privilege is taken." According to Mr. Ronald the record and experience of American enforcement shows:

> ...that industries that use environmental audits in good faith have little to fear if their only concern is civil penalty actions or criminal prosecutions by government. However, if industries fear they will have to pay to remediate a site or reach compliance and wish not to be held accountable there can be reason to hide information from the regulatory agency from the outset. Responsible firms know the value of environmental audits; less responsible companies don't conduct them.[3]

The record in Ontario indicates that audits have been helpful to industry in prosecution. In 1992, the Investigations and Enforcement Branch (I.E.B.) of the MOEE obtained seven audits, of which five were turned over voluntarily. In at least four of the seven cases, the audits were advantageous to those providing them.[4]

Recommendation #1

We recommend that this policy not be implemented since the need for such a policy has not been demonstrated.

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[3]"The Case Against Environmental Privilege", David Ronald, September 1994, National Environmental Enforcement Journal, Vol 9, No.8.

[4]Report to the Assistant Deputy Minister Policy Division (MOEE) by the Advisory Committee on Use of Environmental Information, p.16.

3. THE POLICY IS POORLY DRAFTED

One of the weaknesses with the Draft is that there does not appear to be any ascertainable limit as to what falls within the term "environmental evaluation". Companies may, therefore, hide behind an environmental evaluation as a justification for not providing otherwise relevant information to the MOEE. For example, a company suspects that its effluent is impairing water quality. The company therefore decides to undertake a special study, which goes beyond routine monitoring and performance testing, to determine the contaminant levels in its effluent. The study reveals that the company's discharge is at levels that may impair water quality. Under the *Ontario Water Resources Act* the discharge would have to be reported to the MOEE.

The company, however, decides not to report the discharge on the basis that the monitoring was conducted as part of the environmental evaluation and is therefore privileged. Since the evaluation is privileged, the monitoring data that was obtained is also arguably privileged. The Company now has a ready-made defence for its failure to report to the MOEE. The MOEE would be denied access to information upon which it could take prompt action to protect downstream users.

David Ronald raised similar concerns when he stated that:

> It is unclear why anyone should believe that polluters are likely to develop environmental consciences if legislation is passed allowing them to shield potentially damaging evidence contained in environmental audits. How is the public protected if a firm starts a cleanup when people living downstream or downwind of a serious problem are denied access to the data in the company's environmental audit? If a problem is found, it is preferable, both from an environmental and business standpoint, to inform the appropriate state or federal

> agency and cooperatively implement a clean-up plan. Once the problem is uncovered, stonewalling on pollution leads to greater costs. Businesses that pollute the soil, the water and the air should be held accountable and such accountability is fostered, not by secrecy but by openness.[5]

The adminstration of justice in the province is not advanced by a policy which hinders investigators from gaining access to evidence which may demonstrate illegal conduct and which restricts the Crown from introducing that evidence against alleged environmental offenders. If the MOEE is intent on establishing a policy, regardless of need, the MOEE should ensure that corporations that commit environmental offences do not benefit from protection granted by the policy. The policy is poorly drafted and needs to undergo revision.

Recommendation #2

If the MOEE is intent on establishing a policy, regardless of need, we recommend that the Draft be referred back to the Advisory Committee on the Use of Environmental Information for revision.

4. THE POLICY CIRCUMSCRIBES PROVINCIAL OFFICERS' POWERS

Section 156 of the *Environmental Protection Act* provides broad powers to an inspector, including the authority to record or copy any document, require the production of any document and authority to remove any document for the purpose of making copies.[6] Section 158 of the

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[5]"The Case Against Environmental Audit Privilege," David Ronald, pp.7-8.

[6]Sections 156(q), 156(r) and 156(s) *Environmental Protection Act* (EPA) R.S.O. 1990 Chap.E.19, as amended.

Environmental Protection Act sets out the circumstances under which an inspector may obtain an order from the court to carry out his or her duties.

When an investigator needs to collect evidence to support a prosecution, the investigator must obtain a search warrant, unless there are exigent circumstances that make it impractical to do so.[7] The authority to obtain a search warrant is provided by section 158 of the *Provincial Offences Act.*

Section 4 of the Draft entitled "Circumstances when Involuntary Disclosure May be required" places limitations on the powers reserved for provincial officers. Under Section 4, an inspector is required to only obtain relevant portions of the evaluation when the inspector believes that:

(i) the evaluation's findings will be relevant in addressing the environmental problem; and

(ii) the information being sought through the evaluation cannot reasonably be obtained from other sources through the exercise of inspector's abatement powers; and

(iii) the information is necessary for administering the Act.

Under Section 4 of the Draft an investigator can only obtain relevant portions of the environmental evaluation when that investigator is satisfied on reasonable and probable grounds that:

(i) an offence has been committed;

(ii) the evaluation's findings are relevant to the particular violation and necessary to its investigation; and

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[7]Subsection 161(2) of the EPA.

(iii) the information being sought through the evaluation cannot reasonably be obtained from other sources through the exercise of investigators powers.

Section 4(c) of the Draft states that the only exception to the use of a search warrant or a judicial order is when the delay necessary to obtain the search warrant or judicial order would likely result in:

(i) an immediate danger to health or safety;

(ii) serious risk to the quality of the environment; or

(iii) the loss or destruction of evidence.

It is a matter of significant concern to CELA that Section 4 of the Draft circumscribes the powers provided to provincial officers to obtain relevant information for the purpose of administering environmental laws. Section 4 seeks to override the authority provided to provincial officers under the *Environmental Protection Act* as well as the complementary provisions found in the *Ontario Water Resources Act*[8] and the *Pesticides Act.*[9]

The normal procedure for amending the powers of a provincial officer would be through statutory amendments passed by the Legislature of Ontario. It is repugnant to the public interest to have the powers afforded to a provincial officer curtailed by a body other than the Legislature.

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[8]Sections 15(1) and 15(8) of the *Ontario Water Resources Act*, R.S.O. 1990, Chap. O.40, as amended.

[9]Subsection 19(6) of the *Pesticides Act*, R.S.O. 1990, Chap. P.11 as amended.

Recommendation #3

We recommend that the MOEE not circumscribe the powers reserved to a provincial officer to obtain relevant information for the purpose of administering environmental laws. Any change to the powers of a provincial officer must be done by statutory amendments passed by the Legislature of Ontario.

5. UNNECESSARY PROTECTION FROM USE IN PROSECUTION

On page 5 of the Draft, under Section 5, entitled "Protection from Use in Prosecution," the MOEE sets out additional protection for evaluations obtained either through a judicial inspection order or a search warrant. The Draft states that evaluations obtained by the MOEE:

> under this policy will not be used against business.... provided the business..... can demonstrate to the MOEE good faith in taking environmentally responsible action.

The Draft defines a demonstration of "good faith" by a business as when:

i) it has undertaken an environmental evaluation;

ii) it has initiated timely action to correct or to prevent any environmental deficiencies; and

iii) it has co-operated fully and promptly with authorities in addressing issues of non compliance identified in the voluntary evaluation.

There is no valid policy rationale for the MOEE to restrict the use of environmental evaluations in prosecutions if the environmental evaluation was obtained through a judicial inspection order or a search warrant.

In order to obtain an environmental evaluation through a search warrant, the investigator must be satisfied on reasonable and probable grounds that an offence has been committed and that the evaluation will afford evidence as to the commission of an offence.[10] Once these grounds have been satisfied, any further prohibition on the use of environmental evaluations merely complicates the introduction of evidence at trial. It seems curious that the MOEE would want to provide a corporation facing prosecution with additional protection from the introduction of relevant evidence in court.

Another serious flaw in the Draft is the failure to identify exactly which official within the MOEE will determine the existence of good faith. For instance, if an inspector thought a corporation had exercised good faith but her opinion was disputed by both the investigator and Crown Counsel, could the environmental evaluation be tendered as evidence in court? Furthermore, it is not clear what type of evidence will be necessary under the Draft to establish good faith. Will unsupported assertions by a corporation about its exercise of due diligence suffice? The veracity and accuracy of such statements will frequently be subject to question. The type of considerations that involve a determination of good faith can only be dealt with effectively in a judicial forum.

In order for business to demonstrate good faith under items (ii) and (iii), it must establish evidence of due diligence and mitigation. Under item (ii), evidence that the company took timely action to prevent environmental deficiencies is the same type of evidence that it would lead at

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[10] Section 158 of the Provincial Offences Act, R.S.O.1990 Chap.P.33,as amended

trial to establish a due diligence defence. Item (iii) involves evidence of mitigation and is a relevant factor in sentencing. These are traditionally matters which are adjudicated by a court of law in determining the culpability of the defendant and the appropriate penalty upon conviction.

Evidence of due diligence would normally be within the peculiar knowledge of the company and not always known to the prosecutor. Therefore, a determination of the company's exercise of due diligence cannot always be readily made prior to trial.

In the usual trial process, the corporation would lead evidence of its efforts to prevent the offence, by calling witnesses, including experts to testify. This evidence can be challenged and tested by the Crown in cross examination. The trier of fact is in a unique position to assess the credibility of the defence evidence and determine whether the corporation has exercised due diligence. In the event of a conviction, the corporation can lead evidence of mitigation by demonstrating it took all reasonable steps to correct the situation after the offence[11] and that it co-operated fully and promptly with authorities. Evidence with respect to mitigation may also be challenged by the Crown.

MOEE officials do not have any of the benefits that a court would have in determining good faith. The MOEE official might therefore, make such determinations too hastily and erroneously, thereby foreclosing the Crown's right to lead important relevant evidence at trial. If the MOEE

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[11] *R. v. Canadian Forest Products Ltd.* (1978), 7 C.E.L.R. 113 (B.C. Prov. Ct.).

gives unfavourable decisions about good faith, prosecutions could become mired in pretrial motions as corporations seek to quash the use of the environmental evaluations and suppress evidence prior to trial.

The additional protection for environmental evaluations from use in prosecution creates numerous problems for the MOEE and the courts, both in terms of time and money and does not provide any assured environmental benefit.

Recommendation #4

We recommend that Section 5, which provides protection for environmental evaluations obtained through a judicial inspection order or a search warrant, from use in prosecutions, be deleted from the Draft.

6. ACCESS TO ENVIRONMENTAL EVALUATIONS BY THIRD PARTIES

Although the Draft does not purport to apply to private prosecutions, it could arguably be relied upon by a defendant to suppress the introduction of an environmental evaluation in a private prosecution. The Draft fails to deal with whether third parties who obtain access to an environmental evaluation can utilize it for litigation purposes or provide the evaluation to the I.E.B. for use in prosecution.

One of the enforcement tools used by CELA to protect the environment is the commencement

of private prosecution. The failure to address the use of environmental evaluations obtained by third parties is, therefore, a matter of concern.

(a) Private Prosecution

The right of citizens to launch private prosecutions is a historically entrenched right in the Canadian criminal system. The citizen's right to launch a private prosecution for environmental offences is provided by section 23 of the *Provincial Offences Act.*[12]

The role of private prosecutions in the environmental context has been recognized as an important alternative to government initiated action.[13] In times of government budget cutbacks and dwindling public resources, the role of private prosecutions becomes increasingly important to fill the gap left by government inaction.

In 1974, the Sudbury Environmental Law Association launched the first private environmental prosecution in Ontario against International Nickel Mines Company of Canada for an air pollution offence. The private prosecution was specifically launched on the ground that the Ministry of Environment and Energy "was failing to take proper legal action against industries in the Sudbury area."[14]

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[12]Section 23, *Provincial Offences Act*, R.S.O. 1990, Chap. P.33 as amended.

[13]Webb Kernaghan, *Taking Matters into their Own Hands; The Role of Citizens in Canadian Pollution Control Enforcement.* McGill Law Journal 1991.

[14]*R. ex. rel. Mackinnon v. International Nickel Mines Company of Canada Ltd.* (1974), 3 Canadian Environmental News 75.

One Canadian commentator contends:

> ... Private prosecutions straddle an extremely important cleft which exists in our society. It is the cleft between promise and performance. The promises exist on a number of levels, embodied in expectations that elected officials represent the views of and are accountable to the public, that citizens can meaningfully participate in decisions which affect them, and that what is said in legislation will actually occur. To initiate a private prosecution is to put these promises to the test, and to demand that they are kept or that satisfactory explanations are provided for why they are not. The strong emotions expressed when citizens launch prosecutions of pollution offenses are indications of the gap between promise and performance.[15]

The Law Reform Commission of Canada recognized that environmental offences are more likely than other types of offences to inspire citizens to launch a private prosecution. According to the Commission, "large groups of people are committed to the enforcement of the values contained in environmental legislation."[16]

(b) The Citizen's Right to Use an Environmental Evaluation

It is CELA's position that third parties who obtain access to environmental evaluations should be entitled to use the evaluation either to conduct a private prosecution or forward it to the I.E.B. for use in prosecution. There is no valid policy reason why third parties should be prohibited from utilizing environmental evaluations to further a prosecution since the information would already be in the public domain.[17]

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[15]Webb, *Taking Matters Into their Own Hands; The Role of Citizens in Canadian Pollution Control Enforcement* at p.775.

[16]*Private Prosecutions*, Law Reform Commission of Canada, 1986, p.3.

[17]Report to the Assistant Deputy Minister Policy Division (MOEE) by the Advisory Committee on the Use of Environmental Information, p.39.

Private citizens do not have the resources and the powers of the state to obtain information about the commission of an offence from alternate sources. The Draft fails to recognize the disadvantages that citizens have in securing evidence to initiate a prosecution. In particular, citizens have difficulty obtaining information about:

1. collection of raw data upon which the charge can be based;
2. evidence analysis -- laboratory confirmation that a substance is harmful or exceeds standards; and
3. lack of due diligence, including weaknesses in management systems of the corporation.[18]

Environmental evaluations may, in some instances, be the most persuasive piece of evidence citizens have about the commission of the offence and the lack of due diligence.

Any prohibition against the use of environmental evaluations obtained by third parties would also be inconsistent with the provisions of section 174 of the *Environmental Protection Act*, which provides that:

> No employer shall:
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> (a) dismiss an employee;
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> (b) discipline an employee;
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> (c) penalize an employee; or
>
> (d) coerce or intimidate, or attempt to coerce or intimidate an employee,

[18]Webb, *Taking Matters Into Their Own Hands*, p.825.

> ..... because the employee ...has given or may give information to the Ministry or a provincial officer.

The *Environmental Bill of Rights,* 1993 also has a similarly worded provision. Subsection 105(3)5 states:

> For the purposes of this Part, an employer has taken reprisals on a prohibited ground if the employer has taken reprisals because the employee in good faith did or may do any of the following:
>
> > Give information to an appropriate authority for the purpose of an investigation, review or hearing related to a prescribed policy, Act, regulation or instrument.

One of the policy rationales underlying these two sections is the encouragement and promotion of the free flow of information between third parties and the authorities regarding environmental offences. The prohibition on the use of environmental evaluations obtained by third parties would place a heavy burden on a private prosecutor and reduce citizen activity in environmental enforcement.

Recommendation #5

We recommend the draft explicitly guarantee the use of environmental evaluations obtained by third parties for prosecution purposes.

7. CONCLUSION

The need for a policy limiting access to environmental evaluations and providing protection from their use in prosecutions has not been demonstrated. Consequently, there is no valid policy rationale to support the implementation of the Draft.

The policy is not only ill-conceived but is also poorly drafted. If the MOEE is nonetheless intent, on establishing a policy, the Draft must be referred back to the Advisory Committee on the Use of Environmental Information for revision.

The Draft circumscribes the powers reserved for provincial officers under the *Environmental Protection Act,* the *Ontario Water Resources Act,* the *Pesticides Act* and the *Provincial Offences Act.* Any limitations on the powers of a provincial officer must be made by the Legislature of Ontario through statutory amendments.

Section 5 which limits the use of environmental evaluations obtained through a judicial inspection order or a search warrant will result in protracted litigation with no assured environmental benefit and should be deleted.

The Draft should include a provision which ensures that third parties who obtain environmental evaluations may use them in a private prosecution or forward them to the appropriate government authority with no prohibition against use in prosecution.