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RESPONDING TO THE ROLLBACKS:

Comments on Responsive Environmental Protection

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INTRODUCTION

On July 31, 1996, the Ministry of Environment and Energy released a consultation paper entitled *Responsive Environmental Protection: Reforming Environment & Energy Regulation in Ontario* (REP). Two weeks later, the government released a technical annex which provides more details with respect to the nature of the regulatory changes which will be undertaken. However, many details of the nature of the changes still remain unknown.

The following submission is intended to provide a response to the REP document. The response to each regulatory reform summarizes the purpose of the regulation, the nature of the proposed reform, its environmental implication, and a specific recommendation from CELA.

The overall thrust of this submission is that the REP represents a profound disappointment. The disappointment lies in the fact that, while there is recognition that the regulatory framework of the province should be improved, the general direction of REP is not to make regulations more efficient, but to compromise environmental protection measures within the regulations. While there are certain proposals which will make regulations more efficient and provide more clarity, these positive changes are overshadowed by the obvious attempts to weaken current regulatory standards, thereby negatively impacting on the environment and human health.

Before the specific analysis is undertaken with respect to REP, two general comments are in order. The REP must be put in the context of the larger governmental agenda dealing with the environment and the inadequacy of the consultation process pertaining to the REP to date.

The REP in Context

It is difficult to appreciate many of the proposals in the REP without some understanding of the history of regulatory reform over the past year. Essentially, the regulatory reform package proposed in REP serves to further a much broader deregulatory agenda that is unprecedented in Ontario's history. The number of such initiatives are simply too numerous and lengthy to list and summarize. However, a number of the important legislative proposals that are furthered in REP include Bill 57, which proposes significant reform to the province's approvals regime and Bill 76, which substantially changes the *Environmental Assessment Act.* Such legislative changes must also be seen in light of the drastic reduction in the capacity of the Ministry of the Environment and Energy (MOEE) to fulfil its regulatory mandate. Earlier this year, the province started to implement its budget cuts by eliminating over 750 jobs in MOEE. The Ministry of Natural Resources lost some 2100 jobs.

The dismantling of environmental laws and policies in the province should be of grave concern to the people of Ontario. In fact, while the provincial government is moving towards deregulation of environmental laws, Canadian public opinion is strongly in favour of strengthening environmental protection. Four recent polls in Canada suggest that the trend toward deregulation, at least with respect to the environmental field, is in fact contrary to the expectations of the public. These polls indicate that the public wants stronger, not weaker, government action to protect the environment.

The Canadian Council of Ministers of Environment commissioned polls in order to determine the public attitudes to environmental law twice yearly since 1988. The latest results, released last September, demonstrate that the public attitudes have grown more supportive of strong environmental standards laws over the years.[1]

The majority believe Canada has gone only 30% of the way toward a safe environment. Seventy eight percent said environmental regulations should be strictly enforced even in times of recession. When asked the best way to reduce industrial pollution, 48% cited strict laws and heavy fines to punish companies; and 29% chose the use of public reporting of companies' pollution levels to embarrass them. Another 25% favoured tax breaks and financial incentives.

Seventy percent believe government should restrict use of chemicals when there is only a possibility of damage, or evidence of damage but no proof (the application of the precautionary principle.) Twenty-seven percent would wait for scientific proof (a decline of 9% between 1988 and 1994).

Similarly, in a late 1995 poll conducted by Metro Toronto, residents of the Greater Toronto Area (with a population of four million people) ranked environmental services as the most important of all the types of services provided by municipal government. Fifty nine percent supported increasing spending on these services.[2]

A January 1996 poll conducted for the World Wildlife Fund by Environics Research Group found that 81 percent of Ontarians (67 percent from Northern Ontario) favour government action to protect a system of parks and wilderness areas, even when reminded that this could result in reduced logging, mining and urban development. Seventy six percent believe that completion of a network of protected areas will make very little difference to the deficit.

Finally, polls of business attitudes confirm the importance of strong laws and regulations in achieving environmental protection. KPMG Management Consultants conducted a poll of over 300 businesses, school boards and municipalities in 1994 and 1996, questioning them about their environmental management programs.[3] Of those that had programs with the necessary elements, 95% said that their number one motivation for having the program was compliance with regulation. Over 60% cited potential directors' liability, a factor also related to environmental laws. The 1996 survey showed that only 25% were motivated by voluntary measures.

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[1]See: The Environmental Monitor, "Canadians and the Environment" Presentation to the Canadian Council of Ministers of the Environment, Whitehorse, Yukon Territories, October 23, 1995.

[2]The GTCC Quality of Life Steering Committee, Comparative Advantage: An Enviable Quality of Life (October 1995).

[3]KPMG, Canadian Environmental Management Survey, (1994); KPMG, Canadian Environmental Management Survey, (1996).

Finally, the most recent poll conducted last summer confirms the view that Canadians want more strict laws to protect the environment. According to that poll, eight of ten Canadians want environmental laws to be made more strict. The only major difference within this group is whether environmental laws should be made more strict quickly, or over a longer period of time. Thirteen percent states that current environmental laws should remain the same (without weakening them). Only three percent of the people polled supported a weakening of current environmental laws.[4]

The recent drop of the government's support in the polls indicate that the Ontario public may be questioning the legitimacy of the government priorities.[5] It can certainly be argued that environmental deregulation played a role in diminishing support in the polls for the government.

The trends in these polls show ever increasing public support for environmental laws rather than deregulation.

Adequacy of Consultation and Information for the Regulatory Review

The effect of the regulatory reform is to consolidate 80 of the environmental protection regulations in the province into 47 regulations. Some regulations will be left untouched, some revoked outright, others revised or consolidated. Overall, this initiative is the most ambitious and complex initiative in the history of environmental law in the province. Despite this fact, the Ontario public was given less then three months to comment on this initiative.

Moreover, according to the MOEE, REP "reflects nine months of discussion with industry, and other groups." The Canadian Law Association (CELA) is listed as one of the groups with whom the MOEE consulted. The consultation process consisted of two meetings during which MOEE officials indicated that the Ministry was in the process of reviewing its regulation and invited comments. In response, CELA sent a letter outlining serious concerns with the consultation process. Once the REP document was released, a meeting was scheduled again to review it. This meeting was cancelled by the Ministry and never rescheduled. The process employed in developing the regulatory reform package was woefully inadequate and blatantly ignored Ontario's long history of public consultation with such major government initiatives.

Further, the amount of information given to provide informed comment is clearly inadequate. In fact, public comment was significantly assisted by CELA's efforts to secure background documents prepared by the Ministry of the Environment and Energy.

In early 1996, CELA requested access to all information, documents and submissions pertaining to regulatory reform, including background studies that would form the technical basis and rationale for REP. CELA's request for information was rejected by MOEE. CELA then filed

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[4] "Government Environment Regulation" Environics, field dates, June 19 to July 8, 1996.

[5] See: "Tories Lose Support, Poll Shows" Toronto Star, October 8, 1996.

a request for the information under the *Freedom of Information and Protection of Privacy Act* (FOI document) which was denied. After an appeal to the Freedom to Information and Right to Privacy Commission, negotiations were undertaken with respect to the release of the background studies. As a result of that negotiation, the request resulted in the release of a six hundred page document which provides details about the evaluation done by MOEE staff on the need for regulatory reform. The evaluation process consisted of a standard set of questions with respect to each regulation which staff were required to answer. Some of the following questions included:

- How effective has the regulation been in fulfilling the Ministry's mandate?
- Are the benefits of the regulation commensurate with the costs imposed on the regulated community and the government?
- Are there specific aspects of the regulation which have been identified by shareholders or the Ministry as irritants or of questionable value?
- Is the regulation required to sustain environmental benefits?
- Can the objectives of the regulation be more effectively and /or efficiently met through non- regulatory means?

Unfortunately the Ministry denied CELA access to information about the options available for reform as well as the conclusions and recommendations. This information was exempted from the documents released by the FOI request on grounds that it constituted advice to government.

However, even without the inclusion of the options and recommendations, the FOI documents make it abundantly evident to MOEE staff consider the vast majority of regulations under review to be essential for protecting Ontario's environment. Moreover, MOEE staff frequently noted that the environmental benefits of specific regulations exceeded the costs to industry.

Yet, REP proposes numerous regulatory changes which are at odds with internal MOEE staff evaluation. A comparison of the FOI documents with REP suggests that industry comments were given paramount consideration even when these concerns conflicted with MOEE staff evaluation. The concerns raised by the general public, other government agencies and non-governmental organizations in conjunction with many of the MOEE's staff evaluations, hopefully will prompt the government to re-evaluate and revise many of the detrimental proposals contained within REP.

The Environmental Commissioner of Ontario has also criticized the government's failure to give Ontarians sufficient time, information and opportunity to comment on proposed changes to environmental laws, including initiatives such as REP. On October 10, 1996, the Commissioner issued a special report entitled "*Keep the Door to Environmental Protection Open.*"[6] In the report, she notes that "Ministries are also failing to provide timely information, by either not

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[6]A Special Report to the Legislative Assembly of Ontario, submitted by Eva Ligeti, Environmental Commissioner of Ontario, October 10, 1996.

releasing relevant information when the public comment starts, or not releasing it at all."[7] She also noted that the public is being given an inadequate opportunity to comment on proposals and that ministries are failing to assess and report on the environmental effects of proposed changes.

[7] *Ibid.*, p. 5.

AIR QUALITY

REGULATION 336/90

Air Contaminants from Ferrous Foundries

Regulation 336/90 provides a minimum control for particulate releases from ferrous foundries.The regulation was enacted in 1971 under the *Air Pollution Control Act* as *Regulation* 228/89. When the *Environmental Protection Act* was enacted in 1971, the *Air Pollution Control Act* was repealed and its regulation moved under the *Environmental Protection Act*. The regulation has not since been amended.

PURPOSE

The regulation sets the following requirements for ferrous foundries:

- a minimum of 97% particulate collection efficiency of the plus 25 micron fraction
- a maximum emission of particulate per hour for cupolas (two different emission rates based on capacity) and electric furnaces
- prohibits water fallout and impingement of the water plume beyond the property line

The regulation was promulgated to provide the best practicable control for particulate emissions recognizing that some small foundries would have more difficulty complying with the more stringent particulate emission rate established in Regulation 346.[1]

PROPOSED REFORM

The regulation will be revoked.

ENVIRONMENTAL IMPLICATIONS

There will be no negative environmental implications as a result of the revocation. The impacts may even be positive given that ferrous industries will now be required to comply with the more stringent requirements of Regulation 346. According to the MOEE most of the industry has moved to developing countries. The revocation of this regulation will ensure uniformity in the application of the particulate standards in Regulation 346.[2]

CELA Recommendation: The proposal to revoke Ontario Regulation 336/90 is supported.

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[1]Responsive Environmental Protection: Technical Annex, Ontario Ministry of Environment and Energy p.3.

[2]*Ibid.* pp.3-4.

REGULATION 338/90

Boilers

The boiler regulation was promulgated in January 16, 1986 and sets limits for the sulphur content of fuel in oil and coal fuels. The regulation contributes to Ontario's Countdown Acid Rain programme's objective of reducing annual SO_2 emissions from all from stationary sources in Ontario.[3]

PURPOSE

Regulation 338 applies to all new boilers and modified existing boilers and requires that the sulphur content of the liquid and/or solid fuels used in these boilers be limited to less than 1% (by weight).

If the sulphur content of the fuel exceeds the 1.0% limit the boiler operator must take all necessary action to treat boiler flue gas in such a manner that the SO_2 emissions discharged from the boiler stack gases are equivalent to using fuel with 1.0% sulphur.

All boilers affected by the regulation and using fuels with a sulphur content exceeding 1.0% will have to demonstrate by modelling their SO_2 emissions to verify compliance of wet sulphate deposition rate of less than 0.1 kilograms per hectares per annum.

No specific action is requested of the regulated industries other than to obtain a Certificate of Approval from the Ministry's Approvals Branch to operate the boiler after satisfying the conditions of this regulation.

No ongoing demonstration of compliance is required by the regulated party.

PROPOSED REFORM

The regulation will be revised and replaced with a standardized approval regulation. In addition, the current requirement in Regulation 338 will be amended as follows:

- (1) Section 2.1, sub-sections (b), (c) and (d) referring to existing boilers, would be revised to allow sulphur content in fuel to exceed 1% when upgrading boilers where such improvements do not increase SO_2 emissions.

- Section 2.1, sub-section (e) referring to the use of substitute or stand-by fuel for a gas-fired boiler with interruptible gas contracts would be revised. The revised section would address excess SO_2 emissions on the basis of a percentage of boiler operating hours using substitute

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[3] *Ibid.* p.5.

fuel, a limit of substitute fuel usage, or a fixed number of operation hours with substitute fuel in a year.

- Section 3.3 will be revoked. This section requires that operators of new boilers using fuels with less than 1% sulphur meet a wet sulphate depositing rate of less than 0.1 kilograms per hectare per year. This exemption is applicable to large SO_2 emitters, of which there are currently no new boilers using less than 1% sulphur content fuel.

ENVIRONMENTAL IMPLICATIONS

The boiler regulation is an essential component of Ontario's overall acid rain programme to reduce SO_2 emissions from stationary sources in Ontario.[4]

The MOEE's rationale for amending section 2.1(b), (c) and (d) of Regulation 338 is to allow operators of older boilers to upgrade their boiler and use higher sulphur content fuels, provided there is no corresponding increase in SO_2 emissions. These current regulatory requirements are regarded to be a disincentive to boiler upgrades which would benefit the environment through the reduction of particulate NOx and CO emissions and energy reduction.[5]

New upgrades of boilers which improve environmental and energy efficiency should be encouraged. However, the proposed amendments do not require operators to provide any verification through testing that the use of higher sulphur content fuel would not result in increasing SO_2 emissions. Furthermore, there is currently no monitoring of this regulation by the Ministry to ensure compliance. In view of the cutbacks to MOEE staff, it is highly unlikely the MOEE will be able to monitor any increase in SO_2 emissions arising from the use of higher sulphur content fuel.

The MOEE should, therefore, examine other alternative methods of regulating the use of high sulphur content fuels. One option would be for the MOEE to promulgate a regulation prohibiting the sale of fuel with sulphur content greater than 1.0% in Ontario. This would be a far more effective mechanism to prevent the use of greater than 1.0% sulphur content in fuel as opposed to regulating boiler operators.[6]

CELA Recommendation: The MOEE should pass a regulation prohibiting the sale of sulphur content fuel exceeding 1.0% in Ontario.

In the event the MOEE does not pass a regulation, it should require operators who use fuels with more than 1.0% sulphur to provide verification that there will not be an increase in

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[4]Review of MOEE Regulations, O. Reg 338 R.R.O 1990 "Boilers" A. Summary Information.

[5]Technical Annex p.6.

[6]MOEE Regulation Review, O. Reg. 338 1990 "Boilers" D. 3.

sulphur dioxide emissions.

REGULATION 349

Hot Mix Asphalt Facilities

Regulation 349 is intended to apply to all portable and permanent asphalt plants operating in Ontario to regulate the impact from dust, visible and other nuisance emissions from asphalt plants.

REQUIREMENTS OF REGULATION

Regulation 349 includes:

- an in-stack particulate limit;
- off-property visible emission limitations; and
- a requirement to submit a notice of re-location to the Regional Director for any re-location of a portable asphalt plant.

The in-stack particulate emission limit was amended in 1987 from a formula to 0.230 grams per cubic meter. These revised standards do not apply to facilities with valid Certificates of Approval dated earlier than December 31st, 1985. Facilities which were approved prior to December 31, 1985 are subject to the previous limit of 1.67 pounds per minute emission limit.

PROPOSED REFORM

Regulation 349 will be replaced with a Code of Practice which will be incorporated into a standardized approval regulation.

The Code of Practice was developed with the Ontario Hot Mix Producers Association (OHMPA) and the MOEE. It focuses on regulating the operating conditions at asphalt plants.[7] Major weaknesses in the Code include the failure to require emissions standards for contaminants; the failure to require continuous monitoring of wind direction and speed; the failure to require cessation of operations when wind speed and direction are likely to cause odours; and the failure to prevent siting of asphalt plants where they are likely to cause adverse effects on human health and the environment.

ENVIRONMENTAL IMPLICATIONS

The operation of asphalt plants in Ontario poses environmental risks because of the carcinogenic potential of asphalt fumes. The epidemiological data to date is insufficient to conclude with any

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[7]Review of MOEE Regulations, Regulation 349 - Hot Mix Asphalt Facilities C. Current Issues and Actions.

degree of scientific certainty whether asphalt presents a cancer risk to humans, however, there is a general agreement on the basis of animal studies that asphalt may pose a risk.[8] Accordingly, there is a need for an effective regulatory mechanism to control and limit emissions from asphalt plants. The use of a general Code of Practice to replace the current system of issuing Certificates of Approval raises numerous environmental concerns.

Currently, portable asphalt facilities are not required to obtain MOEE approval prior to relocating. The only regulatory requirement is to provide the MOEE with a notice of intended relocation. Ministry staff have identified the need for a siting approval or site criteria for portable asphalt plants to replace or supplement the notice of relocation in regulation 349.[9] Unfortunately, the proposed Code of Practice does not contain any provision to address the problems associated with the siting of asphalt plants near sensitive receptors such as hospitals, schools and residential neighbourhoods.

The main rationale for the proposed changes is that the current regulation does not address many of the primary impacts from asphalt plants such as odour, fugitive dust and particulate emissions. Regulation 349, however, could be amended to address these concerns, with the MOEE continuing to retain authority to address more site specific concerns via Certificates of Approval. The benefit of having a technical review is that it allows the MOEE to weed out clearly unacceptable facilities. Moreover, it also allows the MOEE to require up-front modifications in project design or construction to reduce and\or eliminate adverse effects. It would seem that this is the most practical way to address potential adverse effects caused by asphalt facilities, as opposed to ex post facto investigation and enforcement.

Another rationale given for the use of the Code of Practice is to reduce the workload of the MOEE's Approval Branch, in having to review Certificates of Approval. The MOEE's effort to make the Approvals Process more expeditious and efficient is a laudable goal. However, given that the MOEE's Approval branch issues approximately less than twenty asphalt plant certificates (for both new and modified plants per year) the Code of Practice will not lead to a significant reduction in the workload for the Branch.[10]

The MOEE currently imposes specific monitoring requirements in Certificates of Approval to asphalt operators to monitor wind speed and wind direction and to modify their operation accordingly, to avoid odour complaints.[11] The issuance of Certificates of Approval provides the MOEE with flexibility to address site specific factors, such as proximity of the operation to

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[8]British Journal of Industrial Medicine August 1991 volume 48, No. 8.

[9]MOEE Regulation Review, Regulation 349 - Hot Mix Asphalt Facilities, C. Essential Questions 1.

[10]MOEE Regulation Review, Regulation 349 - "Hot Mix Asphalt Facilities" B. Impacts and Effects of Current Regulation.

[11]See for example Certificate of Approval No. 8-1121-92-948 issued to Harold Sutherland Construction. Inc.

sensitive receptors, as well as meteorological conditions and topographical features which could exacerbate adverse effects. The proposed Code of Practice fails to provide for such variables thereby potentially hamstringing MOEE's flexibility to address unique site specific concerns.

CELA Recommendation: The replacement of Regulation 349 with a Code of Practice under a standardized approval regulation is not supported.

It is recommended the MOEE retain authority to issue Certificates of Approval to address the site specific concerns associated with asphalt plant operations. It is also recommended that the MOEE staff develop siting criteria for portable asphalt plants to replace or supplement the notice of intended relocation in Regulation 349.

REGULATION 350

Lambton Industry Meterological Alert

Regulation 350 is used to address frequent exceedences of the sulphur dioxide ambient air quality criteria in Sarnia.

PURPOSE

Regulation 350 requires monitoring of sulphur dioxide at four specific locations and curtailment of operations emitting sulphur dioxide during an alert. The MOEE Regional Director may declare an alert when the twenty four hour running average of SO_2 levels reaches 0.07 parts per million and the meterological forecasts indicate that weather conditions conducive to evaluate sulphur concentrations will continue for six hours. In the event of an alert, industrial facilities must reduce their sulphur emissions to the extent necessary to achieve a maximum ground level concentration of 415 micrograms per metre cubed by either limiting production or switching to alternative fuels.

PROPOSED REFORM

Regulation 350 will be replaced with a Memorandum of Understanding.

ENVIRONMENTAL IMPLICATIONS

Sulphur dioxide emissions into the atmosphere have the potential to harm both human health and vegetation. The adverse effects to human health include respiratory illness, breathing discomfort, and aggravation of existing respiratory and cardiovascular disease and are associated with increased deaths and hospital admissions. Sensitive plant species can suffer acute or chronic

injury form sulphur dioxide. Sulphur dioxide is also a primary precursor of acid rain.[12]

According to MOEE staff, Regulation 350 was promulgated to address the high SO_2 ambient levels without imposing undue cost to industry. If the MOEE had opted to regulate sources to meet the ambient air quality criteria at the property line, it would have put companies in the Lambton area out of business. MOEE staff have stated that Regulation 350 has been very effective in fulfilling the MOEE's mandate and objectives and the original policy objectives of the regulation continue to be valid.[13]

One environmental implication of the proposed reform is that the LIMA no longer has a regulatory force. This is of concern since the primary motivator for industry to have an environmental management system in place is to ensure compliance with the regulations. Voluntary initiatives have been ranked as the lowest motivator.[14] Furthermore, a regulation, unlike a memorandum of understanding (MOU), is enforceable in court, in the event of non-compliance.[15]

MOEE staff have indicated that there is no pressing need to make any changes to Regulation 350 since "Regulation 350 has been effective at low Ministry cost, in controlling periodically high SO_2 ambient air quality criteria in the Lambton airshed during periods of poor dispersion."[16] With respect to whether the objectives of the regulation can be more effectively met through non-regulatory mechanisms, MOEE staff state, "It is uncertain whether the objectives would be more effectively and/or efficiently met through non-regulatory mechanisms."[17]

Furthermore, MOEE staff note that Regulation 350 addresses the "occasionally high ambient levels in the airshed at a cost savings to industry and the ministry."[18] It is abundantly evident in view of MOEE's staff review that there is no valid rationale to justify revoking Regulation 350 and replacing it with a MOU.

CELA Recommendation: The replacement of Regulation 350 with a memorandum of

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[12]MOEE Regulation Review, Lambton Industry Meterological Alert, B., Impacts and Effects of Current Regulation.

[13]MOEE Regulation Review, Lambton Industry Meterological Alert, D. Rationale and Continuing Need for Ministry Regulation.

[14]1994 Canadian Environmental Management Survey.

[15]MOEE Regulation Review, Regulation 350, D. Essential Questions, 2.

[16]*Ibid.*, D. Summary Information.

[17]*Ibid.*, D. Essential Questions, 2.

[18]*Ibid.*, D. Essential Questions, 1.

understanding is not supported.

REGULATIONS 660/85, 661/85, 663/85 & 355

Acid Rain Regulations

Ontario's four separate acid rain regulations were promulgated under the Province's Countdown Acid Rain Program.

PURPOSE

Ontario Regulation 660/85 applies to the Inco Sudbury smelter complex and requires Inco to limit its annual SO_2 emissions to less than 265 kilo tonnes after 1993.

Ontario Regulation 661/85 applies to the Falconbridge smelter complex and requires Falconbridge to limit its annual SO_2 emissions to below 100 kilo tonnes after 1993.

Ontario Regulation 63/85 applies to the Algoma Steel Inc. plant in Wawa and requires it to limit its annual SO_2 emissions to less than 125 kilo tonnes after 1993.

Ontario Regulation 355/90 applies to the Ontario Hydro thermal electricity generating plants and requires Ontario Hydro to limit its annual combined SO_2 emission from its plants to less than 175 kilo tonnes and 215 kilo tonnes respectively.

PROPOSED CHANGES

All four regulations will be consolidated into one and the existing emissions limit will be retained. The new regulation will no longer require Inco, Falconbridge, Algoma Steel Inc. and Ontario Hydro to prepare and provide plans, performance reports, and studies on how to achieve emissions limits. The current requirements to provide quarterly reports will be reduced to annual reports.

ENVIRONMENTAL IMPLICATIONS

The regulations were promulgated to reduce SO_2 emissions in order to protect acid rain impacted areas in Ontario and reduce the impact from long range transport of SO_2 emissions and to meet the negotiated SO_2 emission cap of 885 kilo tonnes for Ontario under the Provincial/Federal Agreement of 1987. The objectives of the regulation are still valid and in effect until the year 2000 as part of the eastern Canadian agreement (1987) signed by seven provinces east of the Saskatchewan/Manitoba border to limit their combined SO_2 emissions to 2.3 million tonnes per year.

The regulation is regarded as necessary to sustain the environmental benefits achieved so far in

protecting Ontario's aquatic and terrestrial areas from the impacts of acid rain. According to MOEE staff the benefits of the regulation are commensurate with the costs imposed on the regulated community and the government.

The emission cap on SO_2 levels and the monitoring requirements are the key components of the acid rain regulations. The rationale for reducing the reporting requirements from quarterly to annual reports is because the SO_2 emission levels imposed in the regulation have been met. The Director's Order which was issued against each of the four companies requiring independent audits of annual emissions to ensure compliance with the regulatory limits continues to be applicable. As long as the requirements of the Director's order continue in effect and there is no weakening of the current emissions levels the changes proposed to the regulations are generally acceptable.

The MOEE is currently examining the need for further reductions to SO_2 levels, however the focus is on voluntary measures by industry as opposed to regulatory requirements.[19]

CELA Recommendation: Consolidation of the regulations is supported. However, further reductions in SO_2 levels should be implemented through regulations as opposed to voluntary measures.

REGULATIONS 189/94, 356, 413/94, 717/94 AND 718/94

Ozone Depleting Substances

PURPOSE

The purpose of Regulations 189/94, 356, 413/94, 717/94 and 718/94 is to reduce the release of ozone depleting substances (ODS).

REQUIREMENTS OF THE REGULATIONS

- **Refrigerants - Ontario Regulation 189/94**

1. prohibits the release of ozone-depleting fluorocarbons from refrigerators and air conditioning equipment;
2. restricts access to refrigerants to trained individuals;
3. ensures proper management of refrigerant containers; and
4. requires the removal of refrigerant from equipment prior to disposal.

Regulation 189/94 was developed to replace a previous voluntary system after concerns were

[19] Refer to pp.XX The Regulatory Process: Comments on the Proposed Regulatory Code of Practice.

raised that the voluntary system created an uneven playing field with unconscientious competitors.

- **Ozone Depleting Substances - Ontario Regulation 356**

  1. prohibits containers holding less than 10 kilograms of CFCs;
  2. prohibits the use of CFCs in the manufacturing and importing of flexible and rigid insulation foams; and
  3. requires the makers of these foam products to phase out the use of CFCs beginning in 1990 and ending by the end of 1993 (appliance makers had until the end of 1995).

- **Halons - Ontario Regulation 413/94**

  1. prohibits the release of Halons except when used to put out fires;
  2. requires that only certified companies inspect, service, recover or recondition halon fire fighting equipment and that they recycle halons; and
  3. prohibits existing halon equipment from being replaced with equipment containing certain types of other ODSs.

- **Sterilant - Ontario Regulation 718/94**

  1. bans the production, use and releases of sterilant containing Class 1 ODSs after January 1, 1996, and Class 2 ODSs after January 1, 2000; and
  2. bans the storage of sterilant containing Class 1 ODSs after January 1, 1998 and Class 2 ODSs after January 1, 2002.

- **Solvents - Ontario Regulations 717/94**

  1. bans the production of solvents containing Class 1 ODSs after January 1, 1996 and Class 2 ODSs after January 1, 2000;
  2. bans the discharge, use and transfer of solvents containing Class 1 ODSs after July 1, 1996 and Class 2 ODSs after January 1, 2000;
  3. bans the storage of solvents containing Class 1 ODSs after July 1, 1998 and Class 2 ODSs after January 1, 2002.[20]

PROPOSED REFORM

The MOEE is proposing to consolidate all five ODS regulations into one new regulation. The training and certification components of the regulations will be removed and incorporated into a new Training, Certification, Licensing and Accreditation regulation. The rationale for this change is to simplify and consolidate all pertinent training and accreditation requirements into one regulation making it easier for the industry to understand and comply.

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[20]Responsive Environmental Protection, Technical Annex, Requirements of the Regulations pp.16-17.

ENVIRONMENTAL IMPLICATIONS

The environmental implications of the amendments to the ODS regulations cannot be fully assessed given that it is not clear which provisions will be revoked by consolidation. The training and certification requirements should, however, remain in the ODS regulations. These requirements will be more accessible to the regulated community if they are incorporated in the specific regulation which governs the industry as opposed to a general Training, Certification Licensing and Accreditation Regulation. Different regulations require different types of training and certification, thereby rendering it highly unlikely that a single regulation could be promulgated to capture the various regulatory requirements. Moreover, the removal of training requirements from such regulations may cause them to be overlooked.

CELA Recommendation: It is not possible to provide any specific comments on the consolidation since the details of which provision will be amended or deleted is, as yet, unknown. The training and certification requirements should remain in the ODS regulations.

REGULATION 271/91, 353 AND 455/94

Gasoline Volatility, Motor Vehicles & Recovery of Gasoline Vapour in Bulk Transfers

PURPOSE

The Gasoline Volatility Regulation (271/91) was introduced to reduce emissions of smog-forming hydrocarbons. The Motor Vehicles Regulation (Reg 353) was developed to minimize emissions from on-road vehicles. The Recovery of Gasoline Vapour in Bulk Transfers Regulation (Reg 455/94) was implemented to reduce emissions of volatile organic compounds (VOCs) through vapour recovery during gasoline distribution.

REQUIREMENTS OF THE REGULATIONS

- **Gasoline Volatility - Ontario Regulation 271/91**

  1. The regulation places a 72 kiloPascal volatility limit on summer gas in southern Ontario (from May 15 - September 14) and northern Ontario (from June 1 - August 31)

  2. Refiners/importers are required to test and report monthly each batch of gasoline over 25,000 litres, to ensure compliance with the volatility limit. Volatility tests must be conducted by accredited laboratories.

- **Motor Vehicles - Ontario Regulation 353**

  1. The regulation sets limits for maximum emissions (hydrocarbons, carbon monoxide and

visible emissions) for light duty vehicles, prohibits tampering and/or removing emission control equipment for all motor vehicles, restricts the use of leaded fuel and establishes a mechanism for provincial officers to require emission inspections.

- **Recovery of Gasoline Vapour in Bulk Transfers - Ontario Regulation 455/94**

1. Gasoline facility operators are required to install, maintain and operate gasoline vapour recovery systems at gasoline distribution facilities, bulk plants, service stations and cargo trucks. These systems are required by the end of 1996 for the Golden Horseshoe Area and the end of 1997 for the Southern Ontario Corridor. In addition to the operating procedures, there are requirements for record keeping, testing procedures and training equipment.[21]

PROPOSED REFORM

The three regulations will be consolidated into one regulation for vehicles and fuels. In addition, the following changes will be made to regulations:

271/91 - the gasoline vapour pressure will be lowered to 62 kiloPascals in southern Ontario and/or all of Ontario from 72 kiloPascals. This reform implements the recommendations of the Canadian Council of Ministers initiative.

The MOEE will also be examining options to streamline activities and responsibilities with the Ministry of Consumer and Commercial Relations and with the Federal Government.

Regulation 353 - programme options to update test/procedure/technology and emission standards for light duty vehicles and heavy duty vehicle (trucks & buses) are under review.

ENVIRONMENTAL IMPLICATIONS

The proposal to lower the summer gasoline volatility limits from 62 kiloPascals, compared to the current 72 kiloPascals will improve environmental protection.

The Canadian Petroleum Products Institute (CCPI) has indicated to the MOEE that it would prefer to see a simpler testing and reporting procedure. Accordingly, the MOEE's Program Development Branch will be examining various options to ensure volatility limits are met.[22] It is unclear what options the MOEE is considering in lieu of the current testing requirements.

The test results were critical to show that all gasoline sold in Ontario during the summer months

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[21] *Ibid.*, p.19.

[22] MOEE Regulation Review, Regulation 271, Gasoline Volatility, C. Current Issues and Action, Summary Information.

complied with the relevant volatility limits. This in turn, ensured the MOEE was able to fulfil its regulatory mandate to reduce human exposure to hydrocarbon emissions from gasoline use. Unless the MOEE replaces the current testing scheme with an equally rigorous method for ascertaining gasoline volatility during the summer months, there will be no method of controlling the negative environmental effects from the harmful pollutants in gasoline.

Other than a desire to comply with the request by CCPI, it is not evident why the MOEE considers it necessary to eliminate the testing requirements given that it costs the MOEE only six person days per year to review the results, tabulate results and issue four monthly reports. According to the MOEE staff "the costs to the oil industry and MOEE are small, whereas the benefits derived from this regulation, in term of reduced pollution, are considerable."[23]

The MOEE efforts to allocate functions with respect to vehicles and fuels regulations in the most effective and efficient manner and coordination of these functions with other government agencies is desirable to reduce duplication of adminstration and provide for clearer delineation of responsibilities. The REP document does not provide any details on how this will be achieved. A reallocation of services with other government agencies, however, should not be utilized in times of budgetary constraint as a means to decrease environmental protection.

Harmonization of the regulations with MCCR and the federal government is also being considered. However, the consultation paper lacks any specificity of what provisions would be harmonized. Again, although harmonization of standards is desirable to prevent any unnecessary overlap or duplication, the pursuit of harmonization may constrain the ability of Ontario to set higher standards because any attempt for any upward movement of environmental standards may be limited by the need to achieve consensus.

Regulation 353 will not be revised. However, program options to update test procedure/ technology and emission standards for light duty vehicles are under review. This update will also include requirements for heavy duty vehicles such as trucks and buses which are currently not subject to the requirements of Regulation 353.

An update of Regulation 353, although helpful, will not in itself ensure reduction in pollution from vehicles. During the late seventies and mid eighties, random spot checks of motor vehicles were done to ensure compliance with Regulation 353, resulting in a reduction of emissions and removal of some polluting vehicles. However, there has been a gradual decrease in the effectiveness of Regulation 353 due to a lack of resources and minimal enforcement.[24] According to the MOEE staff, the objectives of the regulation are still valid to prevent VOCs, carbon monoxide and smoke from motor vehicles. Smog continues to be a serious environmental problem and the total emissions from both light and heavy duty vehicles is increasing as the

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[23] *Ibid.*, B. Essential Question 4.

[24] MOEE Regulation Review, Regulation 353 Motor Vehicles, B. Impacts and Effects of Current Regulation, Summary Information.

vehicle population increases and the kilometres travelled increases.[25]

The MOEE staff recommended implementing a model similar to British Columbia, which has an annual mandatory emission Inspection and Maintenance Program. The programme should require testing of all vehicles and could be self funded by imposing a fee on motor vehicle owners for testing.[26]

CELA Recommendations:

1. **The imposition of more stringent gasoline volatility limits in Regulation 271/91 is supported.**

2. **The reallocation of responsibilities for vehicles and fuels regulation is supported to the extent that it does not decrease environmental protection.**

3. **Harmonization of vehicles and fuels regulation with other jurisdictions is supported provided it does not lead to a decrease in environmental standards.**

4. **Regulation 353 should be updated to provide the use of the latest technology considered most effective to reduce smog. The regulation should be supported by an Inspection and Maintenance Program to provide regular testing for all vehicles.**

5. **The MOEE should consider implementing a model similar to British Columbia's which has an annual mandatory emission Inspection and Maintenance Program. The program should require testing of all vehicles and could be self funded by imposing a fee on motor vehicle owners for testing.**

REGULATION 361

Sulphur Content of Fuels

PURPOSE

The purpose of regulation 361 is to control sulphur dioxide emissions in Metropolitan Toronto by controlling the sulphur content of fuel used in small heating units and boilers.

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[25] *Ibid.*, A. Essential Questions, 1 and 1.

[26] *Ibid.*, B. Essential Question, 5.

REQUIREMENTS OF THE REGULATION

Regulation 361 requires that heating fuels used in boilers in Metropolitan Toronto should contain not more than 0.5% weight sulphur, for grade 1 and 2 fuels and not more than 1.5% weight sulphur for grade 4, 5, 6B and 6C fuels and bituminous coal, except for equipment for which a Certificate of Approval has been obtained.

PROPOSED REFORM

The regulation will be revoked.

ENVIRONMENTAL IMPLICATIONS

Regulation 361 was enacted in 1970 to control the sulphur dioxide emissions from the thousands of heating units in Metropolitan Toronto, by controlling the sulphur content of the fuel, rather than having to test and control thousands of small sources.

The rationale given for the revocation is that Regulation 338, which sets province wide standards for the sulphur content of fuels for boilers, supersedes Regulation 361. However, regulation 338 came into effect in 1986 and would not apply to heating units operating prior to 1986. Moreover, regulation 361 sets a more stringent limit of 0.5% for sulphur content in fuels, in comparison to Regulation 338, which establishes a 1.0% limit.

The revocation of regulation 361 will mean heating units in operation in Toronto prior to 1986 will be permitted to use heavy heating oil with a high sulphur content. In addition, the permissable level of sulphur content in fuels will increase from 0.5% in Regulation 361 to 1.0% allowed in Regulation 338.

According to MOEE staff the objectives of Regulation 361 are still necessary to provide air quality protection in Ontario. Moreover, MOEE staff noted that the costs of the regulation are negligible but the benefits, in terms of improved air quality, are significant.[27] The MOEE staff evaluation confirms the need to retain Regulation 361.

CELA recommendation: The revocation of Regulation 361 is not supported.

REGULATIONS 337 AND 346

Ambient Air Quality & General - Air Pollution Regulations

Regulation 337 is intended to provide ambient air quality targets/goals and points of reference

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[27]MOEE Regulation Review, Regulation 361, B. Essential Question 5.

for evaluating air quality data. Regulation 346 gives the MOEE authority to regulate all aspects of air pollution with respect to stationary sources of air pollution.

PURPOSE

Regulation 337 sets the acceptable ambient air quality by establishing a list of desirable concentrations for twenty three contaminants. Regulation 346 establishes concentration limits for stationary sources discharging contaminants. These sources must meet point of impingement standards using dispersion methodologies and opacity limits specified by regulations.

PROPOSED REFORM

Regulation 337 will be revoked and incorporated into Regulation 364. In addition, under certain conditions, particularly where air pollution conditions are caused by emissions from numerous different sources, the MOEE is proposing new approaches, including the use of Local Airshed Management Units (LAMUs). LAMUs would be comprised of representatives from the community, local industry and government. LAMUs would have a wide range of tools available to them including, local airshed management contracts, economic instruments (e.g. emissions reduction trading) pollution prevention activities and community outreach programmes.

LAMU contracts are designed to set environmental performance goals for air quality that are precise, quantifiable and achievable within the time period of the contract. The contract would require parties within the LAMU to commit to a plan of action to improve environmental performance - beyond existing regulatory requirements. Environmental indicators would be identified, with regular evaluation of progress and reporting of results to the community.

ENVIRONMENTAL IMPLICATIONS

The use of LAMUs is a recognition by the MOEE that the current regulatory scheme is inadequate to address air pollution caused by many diverse sources, transboundary movements of air pollutants and unique topographical or meterological conditions. The move to address the cumulative effects of air pollution is desirable. However, the use of LAMU contracts to address this problem is vague and unlikely to be effective. Some question raised by LAMUs include:

1. Between whom will the contract exist? Who will be a party to the contract?
2. Will the general public as a whole be a party to the contract or just representatives of the public?
3. Who will choose these public representatives and the other parties to the contract?
4. Will the public as a whole have the opportunity to participate in the development of the terms of the contract?
5. Will the contract be transparent to the public? Will they be able to see its terms and conditions?
6. Will the contract supersede regulations?
7. What if the contract is breached - is the contract enforceable? Who can bring an action -

only parties to the contract or the general public too?

8. What remedies are available if the contract is breached - just regular contractual remedies?
9. Will the parties to the contract have to make performance achievements available to the public at large or just to the other parties to the contract?
10. Will there be an independent audit of compliance with the terms of the contract or will the parties to the contract assess compliance themselves? Will this assessment be left to the sole discretion of industry alone?
11. Will there be independent reporting of compliance or will the parties to the contract decide if/what to report? Will this be left up to the sole discretion of industry alone, ie. self auditing?
12. Who will be in charge of administering the LAMU contract program?
13. Who will oversee the process of determining which areas to address in the contract - parties to the contract, the MOEE or industry?
14. Who will initiate the contracts - industry or the MOEE?
15. Will the terms of LAMU contracts have to be approved by the MOEE or will they be strictly private initiatives?
16. If they will be approved, who will do the approving?
17. How much will the contracts cost?
18. Who will pay for the cost of implementing and monitoring compliance with the contracts - parties to the contract or the MOEE?
19. What is the incentive for industry to enter into a LAMU contract if the regulations still apply? (just reduced monitoring requirements?)

The regulatory deficiencies LAMUs seek to overcome are not new. The MOEE has for some time been cognizant of the weaknesses in the air regulations.[28] In particular, the air regulations have been criticized for:

- lacking specific requirements for treating emissions prior to their discharge through stacks;
- using air quality models that are no longer current and which are being applied beyond their original limits;
- not having specific rules for use in multiple source situations and addressing cumulative and/or synergistic impacts;
- not addressing fugitive sources very satisfactorily because of confusion over which models to use.

In response to these concerns the MOEE, in the late eighties, considered a fundamental reform of Ontario's air pollution laws by proposing the Clean Air Program (CAP). The proposed CAP regulation would have reduced emissions in the atmosphere from stationary sources. It was designed to protect the environment from air emissions by:

- requiring that all significant stationary sources of emissions to the atmosphere be controlled

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[28]Stopping Air Pollution at its Source, CAP Clean Air programme, 1987 MOEE.

to minimize releases to the environment;

- requiring controls commensurate with the known or suspected hazard of the contaminant being emitted, with the strictest controls on the emitters of substances known to have serious health and environmental effects (toxic), especially those which persist, accumulate in living things and have the ability to cause cancer or mutate genes;

- requiring that all significant (new and existing) sources of emissions obtain a Certificate of Approval, renewable on a ten year basis to operate; and

- ensuring that community air standards are met throughout the province.[29]

CAP contaminants were to be ranked according to the toxicity, persistence, bioaccumulative and transport characteristics. The ranking would have used a scoring system in which chemicals would be evaluated in a number of categories, including hazard to health or property. The magnitude of the score would reflect the level of concern. Substances with high toxicity would be subject to the highest level of control. The CAP approach mirrored the Municipal Industrial Strategy for Abatement (MISA) in seeking to control pollution at its source and to phase out the most hazardous contaminants.

Unfortunately, LAMUs will not remedy the deficiencies in the existing regulatory approach nor ensure systematic air pollution reduction for the following reasons.

1. LAMUs, unlike CAP, are a voluntary, not mandatory regulatory scheme. Under CAP emissions limits would have been set in Certificates of Approval and subject to renewal. A Certificate of Approval is enforceable in a court of law and carries regulatory weight. In contrast, LAMUs envisage the use of a wide range of actions including non-enforceable tools, such as pollution prevention activities and community outreach programmes.

2. Unlike CAP, LAMUs do not focus on controlling air emissions at source, i.e., before they escape into the atmosphere. Instead, the problems with long range transportation of air pollution and the ability of some of these chemicals to persist in the environment will be addressed through various plans of action including studies, research, emissions trading, and demonstration projects.

3. More importantly, LAMUs do not intend to phase out the use of hazardous chemicals. As long as MOEE fails to incorporate zero discharge of contaminants as the primary mechanism to prevent air pollution, the efficacy of any reforms to air pollution regulations remains suspect.

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[29]Environment Ontario, Clean Air Program, Summer 1990.

CELA Recommendations:

1. **The consolidation of regulation 337 and 346 is supported.**

2. **Instead of pursuing the LAMU approach the MOEE should implement the CAP model, which focuses on reducing atmospheric contamination by imposing direct emission limits for contaminant sources.**

ENVIRONMENTAL ASSESSMENT

BILL 76

General

The claims made in the REP document about the Government's proposed changes to the *Environmental Assessment Act* (EA Act) are strongly disputed in CELA's detailed submissions on Bill 76 presented to the Standing Committee on Social Development.[30]

Contrary to statements in the Responsive Environmental Protection (REP) document, early public access was *not* guaranteed in Bill 76. Fortunately, recent amendments to the Bill during clause-by-clause review partially address this concern. Up front public participation will now be required during the development of "terms of reference" (TOR). However, there is no provision for participant funding during these negotiations. Moreover, the ability to negotiate "binding" terms of reference remains a serious concern. The TOR can be used to scope the environmental assessment (EA) planning process to be followed by the proponent such that full EA of large, contentious proposals may be avoided. Nor does Bill 76 define "consultation" or describe who is an "interested person" for the purposes of consultation. With no obligation on proponents to pay "participant funding" or "intervenor funding" to eligible parties, public participation will suffer. Nor will the "mediation process (sic) provide a guarantee that issues are identified and resolved early on".[31] While the introduction of mediation as an *option* is worthwhile, it is only an option and one that may be inappropriate depending on specific circumstances.

The statement that more certainty will result from early and clear direction for stakeholders on the content of EA documents[32] is a vague reference to the amendments which will allow for the negotiation of terms of reference to scope the contents of EA documents. Without participant funding, these negotiations may very well provide for a David and Goliath situation devoid of meaningful public involvement. The outcome of these negotiations can be binding TOR that remove the requirements for full environmental assessment of proposals subject to the Act.

For example, in the landfill context, EA requirements that could conceivably be negotiated off the table could include requirements to examine 3Rs or other "alternatives to", requirements to examine alternative sites that may be hydrogeologically superior to the preferred site, requirements to examine alternative landfill liners or leachate collection systems, and requirements to examine social, economic, or cultural impacts caused directly or indirectly by the landfill.

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[30]Submissions of the Canadian Environmental Law Association to the Standing Committee on Social Development Regarding Bill 76 - Environmental Assessment and Consultation Improvement Act, 1996, Richard D. Lindgren, July, 1996.

[31]Responsive Environmental Protection: Ontario Ministry of Environment and Energy, p.31.

[32]*Ibid.*, p.31.

Despite the addition of public consultation requirements during negotiation of the TOR, Bill 76 removes the guarantee, made numerous times by Premier Harris, while in Government and in opposition, that full environmental assessments will be required for large and contentious undertakings such as landfills. The Bill gives the Minister of Environment and Energy a new power to approve EA documents that do not include or address the essential EA requirements that are mandatory in the existing EA Act.

The proposals in Bill 76 to harmonize the provincial and federal EA processes are similarly retrograde. While making a "harmonization order" under Bill 76, the Minister is empowered to vary or dispense with any requirement under the EA Act. This power is in addition to the Minister's power under Bill 76 to grant wholesale exemptions from the EA Act for any undertaking or proponent.

The so-called "housekeeping" amendments to "enshrine in legislation the highly efficient class environmental assessment process"[33] are highly problematic. The Bill appears to place Class EAs on a firmer legislative basis but the amendments do *not* implement several important, and widely supported, recommendations made by the Environmental Assessment Advisory Committee regarding Class EAs. For example, the amendments do not impose time limits on the approval period for Class EAs. More important, the amendments do not limit Class EAs to minor projects that are similar in nature and that have predictable and mitigable effects. This omission is one of the most objectionable aspects of the Bill since it leaves the Minister free to approve Class EAs for groups of highly significant undertakings (e.g. all landfills or incinerators in Ontario? all nuclear generating stations?) in order to avoid full individual EAs for such undertakings. Among other things, this omission will likely lead to renewed interest in developing highly inappropriate Class EAs, such as the Timber Management undertaking.

The failure to limit the scope of Class EA undertakings is compounded by the failure to guarantee full consideration of essential EA requirements. In many respects, the Bill 76 regime for Class EAs suffers from the same problems that plague the individual EA process under Bill 76 (i.e.: no participant funding requirements at the terms of reference stage; the ability for the Minister to approve a Class EA terms of reference that do *not* meet full EA requirements that are mandatory in the existing EA Act; and no reference to the clear need for systematic monitoring and reporting of cumulative effects at both the individual project level and overall class level).

Finally, the overall statement in the REP document that Bill 76 will make the EA process "less costly, more timely and more effective"[34] is highly debatable. Bill 76 will likely *increase* uncertainty and unpredictability (and therefore time and costs) by over-politicizing the EA process through excessive Ministerial and bureaucratic discretion. Bill 76 gives the Minister and the Director of the EA Branch over 30 different discretionary powers, which are frequently unaccompanied by detailed criteria (or public notice requirements) to help structure the exercise

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[33] *Ibid.*, p.31.

[34] *Ibid*, p.31.

of such discretion. Bill 76 also gives the Minister broad powers to delegate his/her powers to various persons (including non-Ministry personnel), and to refer EA matters to any "entity" for a decision.

Another serious flaw with Bill 76 is the set of amendments affecting public hearings before the EA Board. These amendments will significantly affect the availability, scope, and independence of the EA hearing process. The Minister enjoys broad discretion *not* to refer EA applications to the Board, even when members of the public have filed hearing requests respecting particularly controversial or significant undertakings, such as landfills. Second, Bill 76 gives the Minister authority to dictate the length of the hearing and to constrain the scope of the hearing by issuing binding directions to the EA Board when matters are partially referred to the Board for consideration. Finally, as noted above, Bill 76 does not require proponents to pay upfront "intervenor funding" to eligible parties in order to facilitate public participation in EA hearings.

The foregoing discussion calls into serious question the claims made in REP about the Government's attempts to "modernize and strengthen"[35] the Environmental Assessment Act through Bill 76.

REGULATION 334

Environmental Assessment

Regulation 334 has been in effect since 1976 and was last amended in 1993. This regulation defines the application of the EA Act, i.e., it defines which projects are subject to Environmental Assessment.

PURPOSE

This regulation establishes which public sector undertakings are subject to the EA Act. It specifies reporting requirements for EA documentation in addition to the requirements of Section 5(3) of the Act. It spells out which bodies are defined as "public bodies" (e.g., Algonquin Forestry Authority, Ontario Realty Corporation, etc.) and provides extensive details regarding where and how the Act applies and the interpretation of exemptions of projects not subject to the Act. It has been criticized as being confusing and also unfair and inequitable by some stakeholders (in terms of requiring application of the EA Act unevenly across the public sector). The REP document states that "it can be difficult to determine if a project is subject to the EA Act".[36]

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[35] *Ibid.*, p.31.

[36] *Ibid.*, p.33.

PROPOSED REFORM

The REP document states that this regulation "is currently being revised to simplify language and structure" and will be posted to the EBR Registry this fall. Described as "housekeeping oversights [that] are confusing and wasteful of participants' time and money", the revised regulation will assist proponents in determining if a project is subject to environmental assessment.

ENVIRONMENTAL IMPLICATIONS

The FOI report states that stakeholders and the Ministry have raised the issue of "equity" in the past, in terms of what ministries/agencies are exempt from the EAA and the different triggers (especially monetary triggers) that exempt certain projects from the EAA.[37]

CELA Recommendation: It is not possible to provide comments until the revised regulation is available.

REGULATION 345

Private Sector Developers

Regulation 345 has been in effect since 1993.

PURPOSE

Regulation 345 designates "private sector developers" (as defined in this regulation) subject to the requirements of Section 5(1) of the EA Act under several specific circumstances. The regulation renders private sector developers proposing certain road, water or wastewater projects to service residential development subject to relevant Class EA requirements.

PROPOSED REFORM

No changes are proposed.

EXEMPTION REGULATIONS

There are 545 regulations exempting projects from the EA Act.

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[37]MOEE Regulation Review, Regulation 334 - Environmental Assessment, B. Impacts and Effects of Current Regulations. Essential Questions - 3.

PROPOSED REFORMS

Of the 545 existing exemption regulations, the REP document states that 315 are obsolete and will be revoked.[38] According to the FOI report, "irritants identified by stakeholders and the Ministry" about these regulations include ineffective terms and conditions and lack of monitoring of the regulations. The Ministry's response to these "irritants" is apparently to continue to clarify the regulations' terms and conditions to improve their effectiveness in monitoring proponent's compliance with exemption regulation terms and conditions.[39] No details are provided as to how these improvements will be accomplished.

The Ministry is preparing an "omnibus revocation regulation" to remove all obsolete government exemption regulations under the EA Act.

ENVIRONMENTAL IMPLICATIONS

It is impossible to determine the environmental implications of these changes without seeing the regulations in question and the text of the so-called "omnibus revocation" regulation. It is unclear whether the regulations scheduled to be revoked have existing terms and conditions (including monitoring requirements) that will no longer be mandatory once these regulations are revoked. Presumably this will be the case. The statement that existing terms and conditions and monitoring requirements are "irritants" that will be addressed through clarification of terms and conditions is unclear. Will these clarified terms and conditions apply to projects where these regulations are to be revoked, i.e., in the "omnibus revocation regulation"? Perhaps this statement refers only to the drafting of such regulations in future.

CELA Recommendation: It is not possible to provide comments until the regulation is available. However, if projects that have been exempted are ongoing and terms and conditions were attached to the exemption regulation, those terms and conditions should be reinstated in the omnibus revocation regulation.

DESIGNATION REGULATIONS

There are 20 regulations designating private sector undertakings as subject to the EA Act. These regulations include the following:[40]

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[38]Responsive Environmental Protection, *op. cit.*, p.32.

[39]MOEE Regulation Review, Exemption Regulations under Section 29 of the Environmental Assessment Act, C. Current Issues and Actions.

[40]The list of designated projects is summarized from a table produced by the Environmental Assessment Branch of the MOEE, dated July 17, 1996. The comments in parentheses are taken from a column entitled "Designation, Date/Status". However, the information about when projects were designated and/or their current status is not complete in the table. For example, the status of the designation on the Trintek Systems EFW Plant

- Great Lakes Paper Forest Resources Corporation (designated October, 1976, dormant)
- International Nickel Company of Canada - Spanish River Hydro-Electric Proposal (designated June, 1977, withdrawn)
- Onakawana Limited - Lignite Development Proposal (designated March, 1978, withdrawn)
- BASF - Fighting Island Sludge Management Proposal (designated 1981, dormant)
- Regional Municipality of Hamilton-Wentworth, Redhill Creek Expressway (designated June, 1980, EA approved)
- Victoria Hospital Corporation - Energy from Waste Plant (EA approved November, 1983)
- Petrosun/SNC - Energy From Waste Plant (designated April, 1987, EA approved May, 1988)
- Trintek Systems Inc. - Energy From Waste Plant (designated December, 1987)
- KAM 1 Hydroelectric Project (designated May, 1988)
- RSI Reclamation Systems Inc. - Acton Quarry Landfill (designated January, 1989, hearing)
- Unitec Landfill Project (designated November, 1989, EA approved December, 1993)
- Steetley Landfill (designated May, 1989, EA approval denied by EA Board, March, 1995)
- BFI - Biomedical Waste Incinerator (designated October, 1989, withdrawing EA)
- Consolidated Professor Mines - Shoal Lake (designated August, 1989)
- Laidlaw/Tricil - Storrington Township Landfill (designated October, 1989, EA approved by Board, March, 1993)
- LASCO Landfill (designated January, 1991, EA approved May, 1994)
- Laidlaw-Warwick Landfill (designated October, 1991, dormant)
- St. Lawrence Cement Refuse Derived Fuel (designated July, 1990, EA returned - non-compliance with legislation)
- Laidlaw Rotary Kiln (EA withdrawn)
- Taro Aggregates Ltd. East Quarry Landfill (designated September, 1995, EA under review - post script: EA was approved without a hearing shortly after this list was prepared by EA Branch)

PROPOSED REFORMS

The REP document is unclear about the proposed changes. It states that there are 20 exemption regulations, they are obsolete and will be removed but this intention is not restated in the summary of reforms on the same page[41] nor are the specific regulations listed in the annotated list of regulations in Appendix B of REP. The list above was obtained by contacting the EA Branch and staff there said that these regulations will not be revoked (and only the designation regulations will be revoked).[42] As well, the FOI report makes no mention of revoking these

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is not indicated, only the date of designation.

[41]Responsive Environmental Protection, *op. cit.*, p.32.

[42]Environmental Assessment Branch Projects Designated Under the Environmental Assessment Act, July 17, 1996 (table) and fax cover sheet note from Dave Griffin, EA Branch, MOEE to K. Cooper, Canadian Environmental Law Association, September 9, 1996.

regulations and also state that designation regulations are still necessary.[43]

ENVIRONMENTAL IMPLICATIONS

The proposed changes in the REP document are inconsistent with the assurances provided by MOEE EA Branch staff that the regulations will not be revoked. If these regulations are to be revoked, it is possible that significant private sector undertakings will be able to go forward without being subject to the EA Act. This proposal to revoke existing designation regulations (if it is accurate) could also signal an intention to discontinue designation of private sector projects.

CELA Recommendation: For private sector projects that have been designated under the EA Act, the designation regulation should not be revoked if a decision on the project has not yet been rendered.

REGULATION 335

Rules of Practice for the EA Board

PURPOSE

Promulgated in 1988, this regulation establishes the procedures to be followed by the EA Board during hearings.

PROPOSED REFORM

According to the REP document, the EA Board is drafting a new "Rules of Practice" under the Statutory Powers and Procedures Act. REP states that the new regulation will be posted on the EBR Registry this fall and once in place, the existing regulation will be revoked.[44] REP states that hearing participants have raised concerns about timeliness of decisions, cost of hearings and scoping of issues. These changes are also described as "housekeeping" oversights that are "confusing and wasteful of participants' time and money".[45]

ENVIRONMENTAL IMPLICATIONS

It is not possible to determine the environmental implications without seeing the revised regulation. The FOI report makes no mention of the preparation of a new regulation or revoking

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[43]MOEE Regulation Review, Designation Regulations under Section 39 of the Environmental Assessment Act, Sections A, B and C.

[44]Responsive Environmental Protection, *op. cit.*, p. 32.

[45]*Ibid.*, p. 31-32.

of the existing regulation. Rather, the background materials raise additional issues such as where stakeholders have expressed concerns about *how* the Board interprets the regulation. These background materials explicitly state that the Board is addressing concerns that have been expressed *without amending this regulation* and that the Ministry is working with the Board to address issues and being proactive in suggesting appropriate actions during hearings.[46] Moreover, the EA Board completed an exercise in July of 1996 that spent over a year reviewing the Board's Rules of Practice with the assistance of a multi-stakeholder advisory committee. Since that exercise was finalized before the REP was released, the statements made in the REP are utterly confusing.

This situation is another example where the REP document is inconsistent with the materials prepared by MOEE staff as input to the Regulation Review. It is peculiar that the REP is so definitive in stating that the regulation is being revised and due for posting to the EBR Registry this fall while the staff report completely contradicts this statement. The situation is further compounded by the fact that a prior (and completed) exercise appears to have been completely overlooked in the preparation of the REP proposals.

CELA Recommendation: It is not possible to provide comments until a revised regulation (if it is indeed being prepared) is available.

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[46]MOEE Regulation Review, Regulation 335 - Rules of Practice - Environmental Assessment Board, B. Impacts and Effects of Current Regulation: Essential Questions 2, 4 and 5. C. Current Issues and Actions.

ENVIRONMENTAL BILL OF RIGHTS

REGULATION 73/94

Environmental Bill of Rights, "General - Application of Act"

PURPOSE

This regulation outlines which ministries and which statutes are subject to the various parts of the Environmental Bill of Rights (EBR). The EBR is not exhaustive in its application. It applies only to prescribed ministries and prescribed statutes. Even for prescribed ministries and statutes, there is a phase-in period for the act so that some ministries will not be subject to the statute until 1998.

PROPOSED REFORM

Under the proposed reforms, the regulation will be changed to reflect renaming of three ministries (Ministry of Economic, Development, Trade & Tourism; Ministry of Citizenship, Culture & Recreation; and Ministry of Municipal Affairs & Housing). Also one statute will be replaced with another, namely the *Crown Forest Sustainability Act* will replace the *Crown Timber Act.*

ENVIRONMENTAL IMPLICATIONS

There are no anticipated environmental implications since these are administrative changes.

CELA Recommendation: CELA supports the proposed changes to this regulation.

REGULATION 681/94

Environmental Bill of Rights, "Classification of Proposals for Instruments"

The Environmental Bill of Rights (EBR) was passed in 1993. The EBR vests in the Ontario public a set of environmental tools to protect the environment. Part II of the Act establishes a notice and comment regime where the public is given notice of proposals for new instruments, regulations, policies and statutes. At a minimum, these proposals are put on a public electronic registry which outlines how to participate in the comment process with respect to that proposal.

The EBR has been very useful in ensuring that Ontario citizens have the opportunity to be informed of proposed approvals in their area and have some say whether, and how, that approval should proceed. Indeed, while many proposals do not receive public comment, many other

proposals do receive significant public comment and have led to more informed decisions and as a result, better environmental protection.

However, not all proposals are subject to the notice and comment rights. The right must be prescribed pursuant to a statute. In 1994, the Ministry of the Environment and Energy issued a regulation classifying what instruments would be subject to Part II of the EBR.

PURPOSE

The purpose of Regulation 681/94 is to identify what proposals are subject to the notice and comments rights under Part II of the EBR. The regulation specifically outlines which approvals are subject to the EBR.

PROPOSED REFORM

The purpose of the reform is to revise the regulation to remove EBR notification requirements for certain instruments. These reforms are to be undertaken in two phases. The first phase will remove named instruments deemed to have "little or no public interest." The second phase will include instruments that are affected by the standardized approval approach and reforms (Bill 57).

The phase 1 proposals for change include:

(a) *Environmental Protection Act,* s.9 - Approvals for air emission

1. Ventilation equipment used to discharge any of the following:
   - heat, steam and /or moist air from building or piece of process equipment;
   - air from offices, shopping malls and other public places including washrooms, lunchrooms and designated smoking rooms;
   - air from drainage systems as defined in the Plumbing Code;
   - vehicle emissions during vehicle repairs.
2. Hospital sterilizers;
3. Equipment used during fire fighting exercises and training;
4. Prescribed burns for forestry control;
5. Composting operations;
6. Spray irrigation, snow-making and skywriting;
7. Exhaust systems for battery charging operations;
8. Pressure relief valves and emergency rupture disks;
9. Laboratory exhausts;
10. Pilot tests and demonstration projects.

(b) *Environmental Protection Act* s. 27 - Approval for Waste Disposal Sites

- For operation of household hazardous waste collection activities not exceeding 12 days per site per year. This clarifies an exception that previously existed in the regulation.

(c) *Pesticides Act* - Regulation 914 - Pesticide classification

- For pesticides containing new active ingredients - since the federal government is implementing equivalent public consultation at a national level.

There are no detailed proposals with respect to what instruments would be removed from the classification regulation from Phase II of this proposed regulatory reform, except that they emanate from the proposed reforms of the approvals process.

ENVIRONMENTAL IMPLICATIONS

As a general principle, these proposals are not supported by CELA for two reasons. First, the EBR requirements should apply to all environmentally significant instruments. Some of those proposed to be exempted from the public rights in the EBR are in fact environmentally significant proposals and thus, should remain subject to Part II of the EBR. Second, the effect of this regulatory reform is to take away public rights to participate in environmental decision-making. Such rights should not be taken away without clear and unequivocal evidence that the proposals are in fact environmentally insignificant. To the contrary, there is virtually no evidence presented by the Ministry of the Environment and Energy as to the environmental consequences of these proposals, the number of instruments it applies to annually, the background as to use of these approvals and the kind of environmental problems that can arise should something go wrong.

Phase I - Declassification

(a) E*nvironmental Protection Act,* s. 9 - Approvals for air emission

At this point in time, it is not possible to evaluate whether most of the proposals for declassification are in fact "insignificant." In particular, serious concern is expressed over the following proposals for declassification:

- Ventilation equipment;
- Hospital sterilizers;
- Prescribed burns for forestry control;
- Composting operations;
- Spray irrigation, snow-making and skywriting;
- Exhaust system for battery charging operations;
- Laboratory exhausts;
- Pilot tests and demonstration projects.

Many of these approvals have, and will continue to have, the potential for serious environmental harm. Ventilation equipment, at first glance, does seem to be benign to the environment. However, the size, kind, location and other site specific factors may make an enormous difference with respect to the environmental and human implications of such activities. Ventilation from one building near another building housing elderly people may have real consequence for those

residents.

There are various examples in the province where composting operations have caused environmental harm. The degree of concern again relates to many site specific conditions as well as the size of the composting operation. It would be negligent not to assume that some of these facilities may pose a risk to the environment or health.

Some prescribed burns have led to large forest fires with significant social and environmental impacts.

Similarly, it is totally inappropriate to exempt such activities as spray irrigation and demonstration projects. What kind of spray irrigation is contemplated? What kind and what size of demonstration projects? Are there local conditions that should be recognized? There are dozens of other questions should could and should be dealt with a more specific and comprehensive analysis of the environmental risks from these operations.

There are many demonstration projects which do carry with them a very considerable degree of risk. Would it include new mobile hazardous waste incinerators? The very fact that they are new, unproven technologies suggests that there is an even stronger reason to have the public, especially the directly affected public, made aware of the project and comment on the proposal.

(b) *Pesticides Act* - Regulation 914 - Pesticide classification

Pesticides pose a risk to the Ontario public. Those new pesticides with active ingredients certainly fall within the category of potentially being a problem. Hence, it is imperative that the public understand what pesticides are being registered and for what reasons.

Phase II - Declassification Emanating from Bill 57

Various instruments are proposed to be declassified from the EBR regulation when standardized approvals are institutionalized by way of Bill 57. CELA continues to raise concerns about Bill 57 and, in particular, the standardized approvals proposals. These concerns are outlined in detailed in CELA's submission on Bill 57 which is appended to this submission as Appendix A.

CELA Recommendation: While CELA does agree that some insignificant instruments should be declassified, and thus removed from the public and notice requirements, CELA does not support the proposal in the REP document for the following reasons:

1. **the proposals to declassify these approvals do not provide sufficient evidence to conclude that they are environmentally "insignificant;" in fact, there is no rationale, explanation or any other documentation that would serve to justify why public rights should be removed with respect to these instruments;**

2. **in fact, some of these proposals are environmentally significant, suggesting that the**

public should not be denied the right to comment on such purposes, and in particular, those mentioned above; and

3. **the identification of environmentally insignificant instruments should be developed in consultation with whose rights are most directly affected and those whose rights are being taken away, namely, the Ontario public, through a more concerted consultation.**

NIAGARA ESCARPMENT

REGULATIONS 826, 827, 828

Niagara Escarpment Program

Promulgated under the *Niagara Escarpment Planning and Development Act,* these regulations do three things: (1) designate the area of development control; (2) designate the Niagara Escarpment Planning Area; and (3) define certain types of "development" that are exempt from development permit requirements.

PURPOSE

The purpose of these Regulations is to implement the protective policies and provisions of the *Niagara Escarpment Planning and Development Act.* The purpose of this Act is to "provide for the maintenance of the Niagara Escarpment and land in its vicinity substantially as a continuous natural environment, and to ensure only such development occurs as is compatible with that natural environment". In 1990, the international significance of the Escarpment environment was recognized by the United Nations Educational, Scientific and Cultural Organization (UNESCO) when it designated the Niagara Escarpment as a World Biosphere Reserve.

PROPOSED REFORM

In the REP, the MOEE indicates that while Regulations 826, 827 and 828 have been reviewed, no specific reforms or amendments to these Regulations are being proposed. The MOEE further indicates that it is committed to ensuring the "efficient administration" of the Niagara Escarpment Plan (p.39). Significantly, the MOEE's professed commitment to "efficiency" was preceded by substantial funding cuts to the Niagara Escarpment Commission (NEC), which oversees and administers the Niagara Escarpment Plan. Given that these funding cuts resulted in the loss of approximately half of the NEC's staff, it remains unclear how the NEC will be able to effectively carry out its statutory mandate to protect the Niagara Escarpment.

It is noteworthy that the FOI materials obtained by CELA indicate that there will be a "separate and distinct review and decision" regarding the Niagara Escarpment program, and that the Regulations may be revised in the context of the "review". Given that the first Five Year Review of the Niagara Escarpment Plan was completed in June 1994 (when the Plan was revised and improved), CELA questions the need to embark on another comprehensive review at this time. Nevertheless, if such a review is undertaken, CELA requests that the review be conducted in an open and consultative manner with all interested or affected persons.

Subsequent to the release of the REP, the MOEE quietly posted a notice on the EBR Registry to announce its intention to amend Regulation 828 in order to exempt aggregate operations from

development control requirements. CELA is fundamentally opposed to this proposed regulatory change, and CELA submitted its written objections on this proposal to the MOEE under separate cover in accordance with the EBR Registry notice.

It is CELA's understanding that there has been renewed interest by the MOEE in delegating the NEC's development control powers to municipalities within the Plan Area. This proposal was firmly rejected by the previous Ontario government, and CELA submits that the current government should similarly reject or disavow this ill-conceived proposal, as described below.

ENVIRONMENTAL IMPLICATIONS

The Niagara Escarpment Plan Area covers approximately 184,000 hectares along a 725 kilometre strip of land that stretches from the Niagara River to Tobermory. This area of land contains unique and diverse ecosystems, and it provides habitat for numerous rare, threatened and endangered species of flora and fauna. Numerous watercourses, coldwater streams, wetlands and headwater areas are located within the Plan Area. Geological and life science ANSI's (Areas of Natural or Scientific Interest) are found throughout the Plan Area. In short, the Niagara Escarpment is a special area requiring special protection. Regulations 826, 827, and 828 are integral components of Ontario's Niagara Escarpment program, and CELA submits that these Regulations must be retained in their present form in order to protect and conserve the Niagara Escarpment environment. In CELA's view, there is no viable alternative to regulatory controls in the Niagara Escarpment context.

CELA remains gravely concerned about the recent budget cuts and staffing reductions suffered by the NEC. Although the NEC has maintained that it can continue to carry out its mandate by "restructuring" its operations, it is far from clear that this can be realistically achieved within the current economic constraints imposed by the Ontario government. CELA therefore recommends that the NEC's funding be restored to a level that will permit the NEC to properly discharge its duties and responsibilities under the *Niagara Escarpment Planning and Development Act.*

CELA further recommends that the Ontario government reject any proposal to terminate the NEC or to delegate its development control powers to the numerous municipalities within the Plan Area. The rationale for this recommendation was succinctly expressed by a former Minister of Environment and Energy in 1993:

> The Niagara Escarpment Plan (NEP) represents a Provincial commitment to the protection of the Escarpment for the people of Ontario. The NEP seeks to protect the Escarpment, internationally recognized as a UNESCO World Biosphere Reserve, for the enjoyment of future generations. To achieve such protection, the policies of the NEP must be interpreted and implemented consistently across the length of the Escarpment, particularly for the protection of the natural features associated with the Escarpment which in many cases cross jurisdictional boundaries. This is why I believe that a single body or agency such as the NEC should be responsible for the administration and implementation of the key features of the Plan.

> Based on the above, I am not prepared to support delegation in the Escarpment Natural, Protection, Rural or Mineral Extraction Area designations. The areas covered by these designations require a consistent program of protection which, in my opinion, can best be provided by the NEC.[47]

CELA agrees with these comments and recommends that the present government should reject any proposal to delegate the NEC's development control powers to municipal authorities.

CELA Recommendation: Regulations 826, 827, and 828 should be retained in their present form. The MOEE must ensure the continuation of the NEC's mandate and budget, and must not delegate the NEC's development control powers to municipalities. The MOEE must withdraw and abandon its recent proposal to amend Regulation 828 in order to exempt aggregate operations from development control requirements.

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[47]Letter dated June 29, 1993 from the Hon. Bud Wildman to Ms. J. Eaglesham (Halton Regional Clerk).

PESTICIDES

REGULATION 914

Pesticides - General

PURPOSE

Regulation 914 is a general regulation covering the post-registration sale, use, storage, transportation and disposal of pesticides. The purpose of the regulation is to protect health and the environment and to minimize any adverse effects of pesticides.

PROPOSED REFORM

The MOEE is proposing the following changes.

1. Simplify the pesticide licensing system and upgrade training requirements for pesticide exterminators by reducing the licensing requirements from 53 to 15. In addition there will be improved training material, and recertification every five years for licensed exterminators.

2. Remove requirements under the *Environmental Bill of Rights* (EBR) Registry for the classification of pesticides with new active ingredients.

3. Eliminate the burying of empty commercial and agricultural pesticide containers and require recycling.

4. Eliminate sections of Regulation 914 dealing with the use of older pesticides that are no longer available.

5. Consolidate and clarify sections of Regulation 914 controlling the use of fumigants.

6. Simplify insurance requirements for operator licences.

7. Simplify the insurance requirements for operators and require a minimum of $1 million in comprehensive third party liability for all pest control businesses.

8. Harmonize pesticide classification systems with federal requirements.

9. Simplify public notification requirements to encourage integrated pest management programs and reduce pesticide use.

9. Remove permit requirements for pesticide applications that pose little environmental risk.

ENVIRONMENTAL IMPLICATIONS

Notification under the EBR

The REP document is proposing to eliminate the requirement for listing pesticides with new active ingredients on the EBR registry to accelerate access to "newer and safer pesticide." This proposed change is of concern because, according to MOEE staff, problems have arisen from the approved uses of pesticides that have subsequently been determined to cause adverse effects on human health and the environment. MOEE staff have also noted that "despite present regulatory controls, there have been infractions related to the misuse of pesticides, as well as the illegal use of pesticides not registered in Canada".[48] Public concern about the use of pesticides continues to remain high.[49] In light of these concerns, speeding up access to new pesticides is not a prudent course of action.

The EBR Registry provides the public with information and participation in decision-making about the introduction of new pesticides into the market. Limiting the public's ability to know about and respond to the introduction of new pesticides via the EBR registry restricts public knowledge and access to important information. The introduction of new pesticides is an environmentally significant event under the EBR and should be placed on the registry. Moreover, the EBR restrictions are not justified in view of the fact that the administrative burden on the MOEE is so slight. For instance, only 15 pesticides were listed on the Registry in 1995.[50]

Harmonization

Another rationale, provided in the REP document for eliminating the EBR requirements for pesticides with a new active ingredient is that the federal government has initiated an equivalent national process of public consultation of pesticide registration decisions. Replacing the provincial system with a national system may be desirable to prevent overlap and duplication. However, the national system is only at a proposal stage and not all provinces have agreed to the system. Therefore, the harmonization of the provincial pesticide classification system with a new national pesticide classification system is unjustified at this time.[51] Further comments on harmonization are not possible given that the REP document does not provide any details on the national system.

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[48]MOEE Regulation Review, Regulation 914, B. Impacts and Effects on current Regulation.

[49]*Ibid.*, Summary Information.

[50]Responsive Environmental Protection: A Consultation Paper, p.37.

[51]MOEE Regulation Review, Regulation 914, C. Current Issues and Actions, b.

Notification of spraying

The conclusion of MOEE staff is that a pesticide regulation is necessary to protect human health and the environment as pesticides are toxic and in wide use.[52] Scientific data and information on the adverse impacts of pesticides is continually emerging, indicating that regulating the use of pesticides is essential to protect human health and the environment. The notification requirements play a fundamental role in notifying the public about pesticide use so that adequate precautions may be taken. Without adequate notification, residents will not be able to take measures to protect themselves, their children and their pets against the hazards of pesticide exposure.

The REP document is proposing to simplify the notification requirement. Any changes to public notification should address the current deficiencies in the *Pesticides Act* on this issue. The REP document does not provide any specifics on how the notification requirements will be simplified. The notification requirement is currently the only mechanism for warning the public about pesticide application. The notice requirements should therefore only be exempted where no pesticide is used.

As part of its effort to amend the notice requirements the MOEE should consider addressing deficiencies in the current notification requirement in the *Pesticides Act.* In particular, the notification requirement should also include the telephone number of the poison control centre or hospital emergency department in the vicinity of the spraying. These changes will allow exercise of greater caution and ensure speedy access to medical attention in the event of adverse effects.

Recycling

The REP document is proposing to allow the recycling of empty commercial and agricultural pesticide containers. However, there could be health and environmental impacts from recycling pesticide containers. Before the MOEE implements any recycling changes to empty commercial and agricultural pesticide containers it should ensure that recycling methods and use of recycled products do not present a risk to human health or the environment.

Use of Integrated Pest Management

The FOI documents also states that the objectives of the *Pesticide Act* (to protect human health and the environment) have not been fully met due to the limited resources available to carry out compliance and enforcement activities and to conduct monitoring of pesticides use to determine the environmental levels of pesticide residues and to examine the potential adverse impacts associated with the use of pesticides on the environment. There is also limited compliance monitoring and enforcement by the federal government.

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[52] *Ibid.,* D. Rationale and Continuing Need for Ministry Regulation.

The encouragement of use of Integrated Pest Management to reduce the use of pesticides is therefore, desirable, in view of the government's limited capacity to reduce adverse effects from pesticide use. However, IPM approaches will be more successful if imposed through legislative requirements as opposed to merely a voluntary initiative on the part of licensed exterminators.

In addition to the substantive changes there are also policy implications in the REP document which deserve scrutiny. The Technical Annex states that the MOEE must consider the protection of human health, the environment and the economic benefits of pesticides. How does the MOEE propose to weigh these two competing interests? Before the MOEE considers implementing these policy statements with legislative requirements, the public should be provided more ample opportunity to debate and consider these fundamental changes to the MOEE regulatory mandate, namely the protection and conservation of the natural environment.

Removal of Permit Requirements

The removal of permit requirements for certain pesticides that pose "little" environmental risk cannot be justified from a public health standpoint. All pesticide application, by definition involves potential risk to human health and the environment and should be regulated.

CELA Recommendations:

1. **Continue to require sprayers to notify the public when they spray pesticides, and provide information on what type of pesticide has been applied. The notice requirements should stipulate the nearest poison control centre or hospital so that public will be able to seek and obtain speedy assistance in the event of exposure to a pesticide.**

2. **Continue to require notification on the EBR Registry with respect to newly approved pesticides.**

3. **Continue to require permit applications for all pesticide applications, even those considered to have little environmental risk.**

4. **The provincial classification system should be maintained since no federal pesticide classification system has been implemented. Before the MOEE considers making any changes to the current pesticide classification system, the MOEE should wait until the national pesticide classification system is in place.**

5. **Although recycling of empty commercial and agricultural pesticide containers should be encouraged where feasible, the MOEE should also ensure that the type of recycling activity does not pose a risk to human health or the environment.**

SPILLS

REGULATION 360

Spills

Regulation 360 was promulgated November 29, 1985 to clarify the duties, obligation and rights contained in Part X of the *Environmental Protection Act.*

PURPOSE

The objectives of the Regulation are to:

- Define and exempt certain spills from the requirements of Part X to avoid conflict between Part X of the *Environmental Protection Act,* and other provisions of the *Environmental Protection Act,* the *Pesticides Act* and the *Ontario Water Resources Act;*
- Define and minimize certain classes of spills from the reporting requirements thereby minimizing the administrative burden for spills with negligible environmental impact;
- Ensure that the broadly-worded duties and rights provided in the statute were imposed or exercised consistently with Part X;
- Specify, in detail, the conditions which must be met in order to obtain compensation from the Crown;
- Cap the liability of farmers who spill pollutants at $500,00 thereby ensuring that they be able to obtain insurance; and
- Outline the conditions which must be met by insurers to exercise their rights of subrogation.[53]

PROPOSED REFORM

1. To better organize and simply the language in the regulation.

2. Broaden the spill reporting exemption to ensure that fewer insignificant spills are reported. For example, reporting exemptions could be introduced under specific conditions for minor spills involving Hydro-related non-PCB mineral oil and minor fuel or oil spills at fuel outlets.

ENVIRONMENTAL IMPLICATIONS

MOEE efforts to clarify the reporting requirements in the spill legislation are generally desirable to ensure that the regulated community knows when a spill must be reported. However, in

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[53]Responsive Environmental Protection, Technical Annex: Purpose of the Regulation p.65.

addition to clarification the MOEE will be broadening the exemptions for reporting which could potentially have negative environmental implications.

The FOI documents indicate that the Spills Regulation has been "reasonably successful in fulfilling the Ministry's mandate and objectives. However, the lack of clarity in the wording of the regulation has diminished its effectiveness." According to MOEE staff "while reform and clarification in some areas would be generally desirable there has been no pressing need for its reform."[54] The pressure for reform therefore seems to arise from requests by industry, in particular, Ontario Hydro and Shell Canada Petroleum Ltd. which have both indicated a desire to have regulated minimum reportable quantities or more small quantity exemptions.[55]

The REP document states that Spills Regulation (360) should be better organised to eliminate "trivial and frivolous reports and ensure that only environmentally significant spills are reported." The MOEE is seeking to achieve this objective by encouraging industry to base their estimates of reportable spill quantities in contingency plans on an assessment of the likelihood of adverse effect. This proposal fails to recognize that the potential for adverse effect is determined not just by quantity but also by the circumstances of the spill and the nature of the spill contaminant. For instance, a small amount of spilled radioactive material has the potential to cause great environmental harm. Moreover, the circumstances of the spill are just as determinative of the potential for serious adverse effect. Gasoline entering a manhole could result in explosions and fires and should be reported regardless of quantity.[56] By restricting the reporting requirements to quantity, many environmentally significant spills could go unreported. Consequently, the MOEE, will be unable to take timely action to prevent or ameliorate the potential adverse effects caused by spills.

CELA Recommendations:

1. **The revision of Regulation 360 to better organize and simplify language is supported in principle, provided there is no substantive change.**

2. **The requirement for industry to base their estimates of reportable spills in continency plans solely on quantity is of concern because adverse effects are caused not only by the quantity of the contaminant, but also by the nature of the contaminant and the circumstances of the spill.**

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[54]MOEE Regulation Review, Regulation 360 Spills, B. Impacts and Effects of Current Regulation, Essential Questions 1.

[55] *Ibid.,* C. Current Issues and Actions.

[56]See for example *R v. Imperial Oil* 5 C.E.L.R (N.S) 81. A gasoline spill flowed into the sewer system causing an explosion and fires to six residences and resulting in the evacuation of 5000 people in the Timmins, Ontario.

WASTE MANAGEMENT

REGULATIONS 340, 341, 344, 345, 347, 348, 357, 362, 101/94, 102/94, 103/94, 104/94

Waste Management Regulations

Collectively, these regulations establish waste management requirements for a wide variety of sectors and undertakings, including: municipal waste; industrial waste; hazardous waste; PCBs; refillable containers; milk containers; and the 3Rs (reduce, reuse, and recycle).

PURPOSE

According to the MOEE, the purpose of Ontario's comprehensive waste management regime is twofold:

- to promote effective and efficient 3Rs programs in municipalities and industrial, commercial and institutional enterprises; and
- to ensure that wastes, once disposed, do not pose a danger to the ecosystem or human health.

The MOEE's general waste management regulation (Regulation 347) and other more specific regulations have been developed, amended and refined over the past three decades in order to achieve this stated purpose.

PROPOSED REFORM

A number of sweeping changes have been proposed to the general waste management regulation (Regulation 347), including:

- consolidating all waste regulations;
- separating hazardous and non-hazardous waste requirements;
- revising definitions for asbestos waste, inert fill, recyclable material, biomedical waste, agricultural waste, and organic materials;
- classifying types of waste facility approvals, and establishing "standardized approvals" for certain waste systems and sites;
- revising the definition of waste-derived fuel, possibly including non-hazardous solid waste;

- "simplifying the rules" for certain waste depots, including stewardship provisions;
- replacing the hazardous waste manifest system with a "roster system" for tracking small quantities of hazardous waste;
- amending the waste site definition for generator registration and tracking; and
- harmonizing the current hazardous waste definition with the federal definition.

In addition, the MOEE has proposed to repeal, amend or otherwise replace a number of the specific waste regulations, including:

- amending current Blue Box requirements under Regulation 101/94;
- possibly revoking current requirements for waste audits and waste reduction workplans under Regulation 102/94;
- possibly revoking current requirements regarding packaging audits and packaging reduction workplans under Regulation 104/94;
- possibly revoking current requirements regarding the recycling of non-refillable soft drink containers under Regulation 340;
- revoking the milk container requirements under Regulations 344 and 345;
- revoking the "obsolete" requirements for hauled liquid industrial waste disposal sites under Regulation 348; and
- possibly revoking current requirements regarding refillable soft drink containers under Regulation 357.

ENVIRONMENTAL IMPLICATIONS

Given the paucity of detail associated with many of the MOEE's waste management proposals, it is impossible to identify or evaluate the overall environmental implications of the proposed reform package. However, since several key regulatory requirements are to be dismantled and/or replaced by voluntary codes of practice or other unenforceable initiatives, the MOEE's ability to achieve its waste management objectives (i.e. promoting the 3Rs and ensuring sound waste disposal) will be substantially impaired, if not undermined entirely, by the proposed reform package. Moreover, it appears that the reform package will result in a significant weakening of existing regulatory safeguards respecting waste management activities in Ontario.

It should be noted at the outset that CELA has no objection to the proposal to consolidate most or all waste management requirements into a single general regulation. As described below,

however, CELA remains gravely concerned about the numerous proposals that unjustifiably repeal, dilute, or narrow current regulatory requirements which, in CELA's view, are integral to ensuring environmental protection and resource conservation in the waste management context.

CELA has organized its comments, concerns and recommendations regarding the MOEE's waste management proposals into four general categories: approvals; standards; waste diversion; and hazardous and liquid industrial waste. CELA has reviewed the submission on prepared by the Canadian Institute for Environmental Law and Policy (CIELAP),[57] and CELA hereby adopts and supports the numerous detailed recommendations made by CIELAP in relation to the MOEE's waste management proposals. It is our understanding that the CIELAP submission has been forwarded to the MOEE under separate cover. The following section of this brief identifies and analyzes what CELA considers to be the most significant and/or objectionable waste management proposals being put forward by the MOEE.

(a) Approvals

The MOEE has proposed four new categories of waste approvals (i.e. Class I, II, III, IV) that will establish requirements which are tailored to the level of potential environmental risk of activities caught within each category.

Class I facilities and systems would remain subject to Part V of the *Environmental Protection Act* (EPA) and, "where required", to the *Environmental Assessment Act* (EAA). CELA remains concerned that given the excessive Ministerial discretion under the Bill 76 amendments to the EAA, a full EA may not necessarily be "required" by the MOEE for municipal waste disposal sites, including landfills and incinerators. There is also the question of what the MOEE's intentions are with respect to private waste disposal sites under the EAA. Non-application (or selective application) of the EAA to such undertakings may leave the public with the mandatory (but considerably narrower) public hearings under the EPA for large landfills, incinerators, or hazardous waste facilities. This is a significant legal and policy rollback that cannot be supported by CELA, particularly in light of the biophysical, social and economic impacts associated with such undertakings. CELA also notes that in the recent Guelph and Sudbury decisions, the Ontario Divisional Court has ruled that Part V of the EPA cannot be used to address socio-economic impacts or other matters normally falling under the scope of the EAA. In CELA's view, these decisions underscore the importance of ensuring that full EA requirements continue to apply to such undertakings.

Class II facilities and systems would still require MOEE approval under Part V of the EPA, but the Director will have discretion as to whether there will be a public hearing. It is unclear whether this discretion will be as open-ended as the discretion currently conferred in section 32 of the EPA. In any event, this proposal, too, must be regarded as a significant legal and policy rollback since the proposed list of Class II activities includes solid waste and hazardous waste

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[57]M. Winfield, CIELAP's Comments Regarding Responsive Environmental Protection: A Consultation Paper (October 1996).

projects that currently trigger a mandatory, not discretionary, hearing under the EPA. CELA particularly objects to the proposed exemption of activities related to the disposal, incineration, burning as fuel, destruction or processing of hazardous or liquid industrial wastes from current EPA hearing requirements. These activities are inherently risky and environmentally significant, and they require careful and rigorous scrutiny in an open and public forum prior to approval.

Class III facilities and sites will be subject to the much-hyped "standardized approval" (or permit-by-rule) regime being touted by the MOEE. In prior submissions to the MOEE, CELA has identified a number of legal, policy, and practical problems with previous versions of "standardized approvals" proposed by the MOEE within recent years.[58] In summary, these problems include: (1) the actual performance standards for the candidate exempted activities have not been promulgated to date; (2) the effect of MOEE budget cuts and staffing reductions on the ability to adequately monitor compliance with the standards; (3) the lack of site-specific review of individual applications; (4) the inability to craft or impose site-specific terms and conditions to meet individual circumstances; (5) the loss of public notice, comment, and third-party appeal rights under the EBR; (6) the unclear legal effect of "deeming" approvals into existence; (7) the lack of a requirement for proponents to notify the MOEE of their intended reliance upon a "standardized approval"; and (8) the inability of the MOEE to maintain a comprehensive inventory of waste facilities or sites if individual approvals or applications are no longer required.

In addition, CELA notes that many of the MOEE's proposed candidates for "standardized approvals" (i.e. engineered fill sites; soil conditioning sites; waste recycling sites; scrap yards; used tire sites; on-site hazardous waste storage sites (including PCB's); burning of hazardous or liquid industrial wastes generated on-site as fuels; and hazardous waste transfer stations) are, in fact, undertakings that can (and often do) result in significant environmental problems. Accordingly, CELA recommends that the proposed "standardized approvals" regime should not proceed at this time until the above-noted concerns can be adequately addressed. In the alternative, if "standardized approvals" proceeds, it should be restricted to small, municipally operated solid waste recycling sites and depots that receive source-separated recyclable materials. Under no circumstances should "standardized approvals" be implemented for hazardous waste or liquid industrial waste.

For Class IV activities, the MOEE proposes a complete exemption from Part V of the EPA. Proposed Class IV candidates include: sites receiving recyclable materials; sites or haulers within "manufacturer controlled networks" (including hazardous waste); certain on-site or mobile waste processing (including hazardous waste); and certain types of "inert" fill sites. CELA's principal concern here is that, given the proposed revisions to the definitions of "recyclable materials", "inert fill", and "agricultural waste", the MOEE will, in effect, be exempting a wide range of otherwise significant activities from the requirements of Part V of the EPA. Accordingly, CELA recommends that such exemptions should be restricted to small, municipally operated sites receiving source separated recyclable materials. Under no circumstances should activities

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[58]See, for example, R. Lindgren, Submissions by CELA to the MOEE Regarding Proposed "Exempting Regulations" (April 1993); and R. Lindgren, Submissions by CELA to the MOEE Regarding Bill 57 (July 1996).

involving hazardous or liquid industrial waste be exempted from Part V of the EPA.

(b) Standards

CELA has no objection to the promulgation of clear, comprehensive, and specific standards for sites and systems caught by Part V of the EPA. CELA does, however, object to the MOEE's description of the proposed landfill standards as "among the most environmentally protective in the world".[59] In a previous submission to the MOEE on the proposed landfill standards, CELA identified a number of problems and deficiencies in these standards.[60] Among other things, CELA concluded that the proposed standards do little more than consolidate approval requirements that already exist in law, regulation, MOEE policy and guidelines, and Environmental Assessment Board jurisprudence. However, many of the "standards" are far less prescriptive than they purport to be (i.e. the locational restrictions are subject to exemptions and lack minimum separation distances to nearby residences, waterwells, and roadways). In addition, the proposed standards reflect an unjustified departure from long-standing landfill siting principles that focus on hydrogeological suitability rather than rely upon engineered facilities to protect the environment. CELA recommends that these and other problems must be properly addressed by the MOEE before the landfill standards are finalized.

The MOEE also makes reference to its new guideline respecting air emissions from incinerators. In a previous submission to the MOEE, CELA identified numerous problems with the MOEE's repeal of the incineration ban and the MOEE's proposals respecting air emission requirements.[61] It appears that a number of these problems have not been adequately addressed by the MOEE to date. CELA understands that the new guideline will be implemented through air certificates of approval; however, CELA submits that for the purposes of greater certainty and enforceability, the guideline's requirements should be incorporated into a regulation under the EPA.

The MOEE is also proposing to consolidate and "simplify" standards for selected waste depots, and to create a "standardized approval" for small composting sites. CELA's concerns about "standardized approvals" have been outlined above. CELA does not support any weakening or elimination of current regulatory requirements for selected waste depots that handle wastes from industrial generators (i.e. pesticides, paints, batteries, and other "small quantity" wastes).

(c) Waste Diversion

The MOEE is proposing to expand the definition of "recyclable materials" to include certain types

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[59]MOEE, Technical Annex, p.74.

[60]R. Lindgren, Submissions by CELA to the MOEE Regarding Regulatory Standards for New Landfilling Sites Accepting Non-Hazardous Waste (July 1996).

[61]P. Muldoon and M. Wilson, CELA's Response to the Proposed Amendment to Regulation 347: The Case Against Incineration (September 1995).

of municipal wastes and hazardous materials. Such materials would then be exempted from existing requirements regarding transportation, handling and approvals. CELA submits that there are a number of serious interpretive problems in the MOEE's proposed list of items that would be caught by the revised definition of "recyclable material". Does, for example, the municipal waste material have to be source separated to qualify for this exemption? In CELA's submission, the definition must be expressly limited to source separated materials, particularly since the receipt of mixed or commingled materials does not necessarily facilitate reuse or recycling.

While CELA supports the 3Rs (especially reduction at source) in the hazardous waste context, CELA cannot endorse the MOEE's proposal to include hazardous waste in the definition of "recyclable materials". Given the significant risks that these wastes pose to the environment and public health and safety, recycling of hazardous waste should remain subject to all existing EPA requirements. This is also true of the MOEE's proposal to exempt all recycling of waste batteries or "precious metal-bearing waste" (which is undefined). In light of the widespread lead contamination associated with the now defunct Toronto Refiners & Smelters Ltd. (a secondary lead smelter that specialized in recycling car batteries), CELA submits that such operations must remain subject to all existing requirements under the EPA.

The Ministry also proposes to amend its "inert fill" definition by prescribing five different types of fill materials. To implement this proposal, the Ministry proposes to rely upon numerical quality criteria in the recently released Guideline for Use at Contaminated Sites. There are a number of unanswered questions arising from this proposal, including: what is the acceptable level of contamination for each fill type? What land use restrictions, if any, would be associated with each fill type? Until these and other related issues are addressed, CELA submits that the MOEE's new "fill" approach should not be implemented at this time.

The MOEE also proposes to significantly expand the definition of "agricultural waste" to include certain wastes from off-site sources. If applied to agricultural lands, these wastes (which, according to the MOEE, could include manure and dead fish, plants, or animals) clearly have the potential for off-site nuisance impacts and groundwater and surface water contamination. Given this fact, and the apparent lack of any comprehensive studies on the environmental or health impacts of applying such wastes to agricultural lands, CELA does not support the proposed revision of the "agricultural waste" definition.

The MOEE is proposing to establish a "standardized approval" for sites using biosolids (i.e. sewage and pulp and paper sludge) as a "soil conditioner". CELA's concerns about "standardized approvals" are outlined above.

With respect the current 3Rs Regulations, the MOEE has proposed a number of changes. For example, the MOEE is proposing an amendment to the municipal source separation regulation (Regulation 101/94) to provide more "flexibility". First, CELA questions the need to amend this regulation, particularly since it is of very recent origin and was the product of extensive public consultation. Second, CELA cannot support the MOEE proposal to merge the existing mandatory and supplementary Blue Box lists into a single list under the guise of "flexibility". Inevitably,

such a merger will result in the disposal of recyclables that should otherwise be diverted from the waste stream. Similarly, CELA cannot support the MOEE proposal to removal the existing 50 metre buffer requirement for municipal waste recycling sites, particularly in the absence of evidence indicating that such a buffer has been a significant obstacle in the establishment of these sites.

The MOEE is also seeking input on the option of revoking the existing waste and packaging audit and workplans regulations (Regulation 102/94 and 104/94). Again, CELA questions the rationale for revoking these important regulatory requirements, particularly since the MOEE itself concedes that "waste and packaging reduction has consistently saved institutional, commercial and industrial (ICI) generators money and increased operational efficiencies."[62] Accordingly, CELA does not advocate or support the revocation of these regulations.

CELA has no objection to the MOEE's proposal to consolidate existing requirements under the ICI source separation regulation (Regulation 103/94) into the new waste management regulation.

With respect to containers, the MOEE has invited public comment on the possibility of revoking existing requirements regarding recyclable and refillable soft drink containers. Despite the MOEE's regrettable failure to enforce the refillables regulation, CELA regards the regulation as an essential mechanism for preventing litter, conserving energy and resources, and making the soft drink industry internalize the cost of post-consumer management of their containers. Indeed, MOEE staff have recognized that a regulation is still needed to need to require the use of refillable or recyclable containers, and to maintain the current ban on detachable opening devices.[63] CELA shares this view and therefore recommends that the soft drink container regulations be retained and enforced by the MOEE. The MOEE should not be deterred by the fact that this regulation has been identified as an "irritant" to the industry, or by the fact that the industry has managed to make refillable containers an endangered species in this province, ostensibly because of "consumer demand".

The MOEE is proposing to expand the definition of "waste derived fuel" to permit the burning of non-hazardous solid waste. CELA does not support this proposal as it is inconsistent with provincial 3Rs objectives (especially recycling high-energy materials such as paper and plastic), and could result in the emission of air contaminants, depending on the feedstock used by proponents and other factors.

(d) Hazardous Waste and Liquid Industrial Waste

The MOEE is proposing a number of significant changes with respect to the definition of, and manifest system for, hazardous waste. For example, under the guise of "harmonizing" Ontario's definition of "hazardous waste" with the federal definition, the MOEE has proposed several

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[62]MOEE, Technical Annex, p.80.

[63]MOEE, FOI Materials: MOEE Regulation Review - Regulations 340 and 357 (Essential Question #1).

changes, including:

- adding corrosive solid waste into the Ontario definition;
- exempting liquid industrial waste from generator registration and manifest requirements; and
- removing generator registration requirements for registerable solid waste.

CELA supports the proposed inclusion of corrosive waste in the Ontario definition. However, CELA does not support the unjustified proposal to exempt liquid industrial waste from generator and manifest requirements. Similarly, CELA does not support the proposed removal of generator registration requirements for registerable solid waste, particularly since such wastes can produce potentially harmful leachate and thus may require special handling and disposal in a secure landfill.

The MOEE is proposing to reduce the reporting requirements under the existing hazardous waste manifest system. In particular, the MOEE proposes to introduce a "roster system" to simplify the tracking of small volume hazardous waste shipments (i.e. 100 to 500 kg). CELA does not support this proposal for the simple reason that volume per se is not necessarily the best indicator of potential environmental or health risk. Small quantities of highly toxic waste can pose a greater threat than larger shipments of less hazardous materials. In addition, reducing the frequency of reporting requirements, as proposed by the MOEE, may mean that significant problems or discrepancies may go undetected for lengthy periods of time.

The MOEE has proposed to amend the definition of "site" under Regulation 347 so as to include all facilities/complexes operated by a company within a specific municipality. The apparent rationale for this proposal is to avoid the registration and tracking of hazardous waste that is shipped on public roads from one complex to another complex owned by the same company. CELA does not support this amendment since it could result in "sleight-of-hand" shipping of hazardous waste back and forth between commonly owned complexes (thereby avoiding proper storage or disposal), or could be used to mask illegal off-site disposal.

The MOEE has proposed to exempt waste generated and collected under "field operations" from hazardous waste requirements, provided that the waste is transported directly to a local waste transfer facility. While CELA agrees that such operations should not be overburdened with excessive reporting requirements, CELA cannot support the MOEE proposal since it lacks a precise definition of "field operations", and since such wastes may still be highly hazardous if not collected and transported properly.

The MOEE is proposing a number of changes to existing PCB waste requirements. For example, it has been proposed that non-incineration mobile PCB destruction systems and sites would be categorized as a Class II approval (i.e. discretionary public hearing). Given, for example, that the Eco-Logic proposal is still pending and unapproved, it is CELA's position that it is premature to potentially eliminate public hearings for such undertakings at this time. CELA therefore submits that such undertakings should be characterized as a Class I approval (mandatory EPA

hearing and possible EAA application) until greater experience is gained with this new technology. Similarly, CELA does not support the MOEE proposal to develop a "standardized approval" for consolidation and transfer sites. In light of the hazardous nature of PCB's, CELA submits that such sites should remain subject to individual approval requirements under the EPA. CELA further submits that the Ontario definition should continue to include mono and dichlorinated species of PCB's, and should include collection of lighting ballasts.

CELA Recommendations:

(a) Approvals

The MOEE should commit to the continued application of full EA requirements for all Class I facilities and sites. There must be mandatory EPA hearings for all Class II facilities and sites involving landfilling, incineration or other disposal activities. Discretionary EPA hearings should be considered only for demonstration projects involving the 3Rs and source separated non-hazardous materials. The MOEE should not proceed with the proposed "standardized approvals" regime for Class III facilities or sites (especially involving hazardous or liquid industrial waste). Alternatively, the MOEE should restrict "standardized approvals" to certain municipal recycling sites and depots. A similar restriction should be imposed with respect to proposed Class IV activities, and activities involving hazardous or liquid industrial waste should not be exempted from Part V of the EPA.

(b) Standards

Prior to finalizing the proposed landfill standards, the MOEE must address a number of outstanding issues arising from the loopholes, exemptions, and other omissions within the "standards". The requirements of the new incineration guideline should be incorporated into a regulation under the EPA. The MOEE should not weaken current regulatory requirements for selected waste depots that handle wastes from industrial generators.

(c) Waste Diversion

The definition of "recyclable material" should be restricted to source separated materials. Hazardous waste should not be included in the definition of "recyclable material". The MOEE should not exempt all recycling of waste batteries or precious metal-bearing waste from existing EPA requirements. The MOEE should not proceed with its revised definitions of "fill" at this time, and should not expand the definition of "agricultural waste" as proposed. The proposed amendment to the municipal source separation regulation (Regulation 101/94) should not proceed. The MOEE should not revoke the existing waste and packaging audits and workplans regulations (Regulation 102/94 and Regulation 104/94). The existing soft drink container regulations should be retained <u>and enforced</u> by the MOEE. The definition of "waste derived fuel" should not be expanded to include non-hazardous solid waste.

(d) Hazardous Waste and Liquid Industrial Waste

The MOEE should include corrosive waste in the definition of "hazardous waste". The MOEE should not exclude liquid industrial waste or registerable solid waste from the definition of "hazardous waste". The MOEE should not implement the proposed "roster system" to track small volume hazardous waste shipments. The existing definition of "site" under Regulation 347 should not be amended to include all facilities or complexes owned by the same company within the same municipality. The proposed exemption for hazardous waste generated or collected through "field operations" should not be implemented. Non-incineration mobile PCB waste destruction systems and sites should be categorized as a Class I approval at the present time. The MOEE should not develop a "standardized approval" for consolidation and transfer sites respecting PCB's. The Ontario definition of "PCB waste" should include lighting ballasts and mono and dichlorinated species of PCB's.

WATER QUALITY

The Ministry of Environment and Energy is proposing the following changes to Ontario water regulations:

REGULATION 351

Regulation 351, originally passed in 1970, seeks to protect water quality in Ontario's waterways by requiring marina facilities to have pump-out and disposal of sewage facilities. This regulation is coupled with Regulation 343 which prohibits the discharge of black water from pleasure boats.

PURPOSE

The effect of these regulations is to ensure that sewage sludge is not discharged in Ontario's waterways, but instead disposed of in approved disposal facilities. The prevention of sewage discharge protects water quality by:

- preventing bacterial contamination of water; and
- preventing nutrient overloading which contributes to unacceptable levels of algae growth.

Ontario was a leader in enacting in such a regulation with other provinces and U.S. states following the example.

PROPOSED REFORM

The proposed reform is to revoke Regulation 351 upon the implementation of a voluntary code of environmental practice by Clean Marine Partnership, an organization representing various stakeholders such as the Ontario Marina Operators Association and the Ontario Sailing Association.

ENVIRONMENTAL IMPLICATIONS

The repeal of Regulation 351 may lead to a degradation of Ontario's waterways. Some existing marinas will not be required to install pump-out facilities while others may feel less compelled to maintain existing services.

The FOI document indicates that MOEE staff called for the retention of the regulation on the following basis:

> On the whole, Regulation 351 and 343 have been highly effective in preventing pollution of Ontario's lakes, rivers and canals from rapidly growing recreational boating activity. Regulatory efforts, however, need to be supplemented with boater education programs, voluntary Code of Environmental Practice for marinas and yacht club and promotion of

green marine products for boat maintenance and cleaning.[64]

Hence, it can be argued that a voluntary code of practice is simply insufficient. The more general critique of the voluntary approach is outlined in the section entitled Comments on Going Beyond Regulation. Moreover, the staff review identified that the success of the regulation was premised on a marina modernization assistance program sponsored by former Ministry of Tourism and Recreation. Certain parts of the province, and in particular, the North Channel in Georgian Bay, has a shortage of adequate marine facilities.[65] Hence, while the regulation may not be a total answer to having marinas build new facilities, it will encourage marinas to offer existing facilities.

One of the reasons for revoking the regulation pertains to reducing regulatory and cost burden on the regulated community.[66] However, in the FOI document the MOEE staff noted that the regulatory burden is insignificant since marinas are able to recoup investment through pump-out fees and "the benefits of the regulation far exceed the costs for all stakeholders.

There is no detail in the proposal as to the contents of the proposed Code of Environmental Practice, the process for negotiating it or its essential components that must be incorporated in the proposed Code.

CELA Recommendation: Regulation 351 should be maintained in its present state.

REGULATION 903

The Wells Regulation

The wells regulation sets forth the requirements for the installation of water wells, including requirements pertaining to construction requirements, pump installation, chlorination, well abandonment procedures and contamination control requirements.

PURPOSE

The purpose of Regulation 903 is to protect groundwater and consumers of groundwater by ensuring proper well installation, maintenance and abandonment. It also serves to collect hydrogeological data to be used in the management of groundwater. It includes various water wells including domestic, municipal, farm, water bottling, among others.

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[64]MOEE Regulation Review, O.Reg. 351, R.R.O. 1990, "Marinas" "A. Summary of Regulation.

[65]*Ibid.*

[66]Technical Annex, p.92.

The regulation sets out various requirements pertaining to the construction, installation and abandonment of wells. In addition, it provides for examination and licensing requirements of both well contractors and technicians, the insurance requirements for well contractors and the reporting of hydrogeological data to the MOEE during the construction of water wells.

PROPOSED REFORM

It is proposed that Regulation 903 increase the licensing fees, decrease the frequency of license renewal and require that water well records be improved in terms of water quality data and well location data and that it be submitted in electronic format.

ENVIRONMENTAL IMPLICATIONS

There are some 750,000 wells in use in Ontario with 10,000 to 20,000 new ones filed for each year. Increased water quality data and well location data will improve understanding of the conditions of well water and make the information more accessible.

The increased fees will assist to offset the administrative costs of administrating the regime. The electronic reporting should make the information reporting and storing more efficient. It is unclear at this point how often there will be need for licence renewal.

CELA Recommendation: The reforms to Regulation 903 are supported. However, well licence renewal requirements should be reviewed periodically.

If anything, this regulation should be strengthened (see background document where Ontario Groundwater Association argues it should be enhanced).

REGULATION 524/95 (Petroleum Refining Sector (Sept./93), in effect Jan./96); REGULATION 521/95 (Pulp and Paper Section (Nov./93), in effect Jan./96); REGULATION 560/94 (Metal Mining Sector (Aug./93), in effect Aug./97); REGULATION 561/94 (Industrial Mineral Sector (Aug./94), in effect Aug./97); REGULATION 526/95 (Metal Casting Sector (Aug./94), in effect Aug./97); REGULATION 63/95 (Organic Chemical Sector (Feb./95), in effect Feb./98); REGULATION 64/95 (Inorganic Chemical Sector (Feb./95), in effect Feb./98); REGULATION 214/95 (Iron and Steel Manufact. Sector (Apr./95) in effect Apr./98; REGULATION 525/95 (Electric Power Generation Sector (Apr./95) in effect Apr./98

Municipal- Industrial Strategy for Abatement (MISA)

The Municipal-Industrial Strategy for Abatement (MISA) commenced in 1986 and was designed

to improve the province's water quality by imposing technology-based effluent limits on direct dischargers.

PURPOSE

The goal of the MISA program is to virtually eliminate the discharge of persistent toxic substances from Ontario's waterways.[67]

The effluent limits regulations were promulgated between the years of 1994 and 1995 after a long regulation-making process involving all stakeholders.

In summary fashion, the regulations require:

- meeting discharge limits as defined in the regulations;
- meeting requirements that process and cooling water effluent discharges to be non-acutely lethal to rainbow trout and Daphnia;
- process effluent discharges be within a defined pH range;
- weekly assessment monitoring of cooling water discharges;
- semi-annual assessment monitoring for chronic toxicity;
- submission of various reports pertaining to exceedences, monitoring results, chronic toxicity testing results and updating of significant process changes; and
- the development of a storm water control study.

PROPOSED REFORM

The proposed reforms are as follows:

- to revoke sections 37 and 38 of the pulp and paper regulation which require the preparation of AOX elimination reports and Ministry review of the reports against the goal of zero AOX by December 31, 2002;
- reduction in the frequency of assessment monitoring for chronic toxicity when the Ministry has collected sufficient data for analysis of the relationship between industrial discharges and

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[67]See: Ministry of the Environment, Municipal-Industrial Strategy for Abatement (MISA) A Policy and Program Statement of the Government of Ontario on Controlling Municipal and Industrial Discharges into Surface Waters (June, 1986). For a review and background, see: Burkhard Mausberg, Still Going to B.A.T. For the Environment? Pollution Probe and the Canadian Institute for Environmental Law and Policy, 1990.

sublethal effects;

- allow regulated facilities to store monitoring data using software for their choice;
- regulatory concessions upon the fulfilment of certain conditions, such as:

    1. the elimination of monitoring requirements for a parameter if it is not used in the process; and

    2. reduction of monitoring frequency for a parameter if the discharger successfully achieves significant reductions in loading of that parameter beyond what is required in the regulation.

1. Revoking Requirement to Prepare and Submit AOX Elimination Plan in Regulation 760/93

ENVIRONMENTAL IMPLICATIONS

The preparation and submission of an AOX Elimination Plan was one of the most important innovations of the entire MISA process. The most obvious reason for opposing the revocation of the AOX Elimination Plan requirement is that the potential to eliminate the discharge of AOX effluent from pulp and paper mills is reduced. AOX, as a measure of organochlorines, represents a well-known threat to the Great Lakes and indeed, human health. By the end of the 1980s, it is reported that cumulative discharges to Canadian waters by bleaching pulp mills is estimated to be 1,000,000 tons. Although persistent toxic substances represent only a small portion of this number, the quantity is nevertheless significant.[68] The importance of the regulation cannot be over-estimated. It is estimated that there will be loading reductions of 74% for AOX (from 5,500 to 1,500 tonnes per year).[69]

However, there are four other reasons why it should be maintained.

(a) It Furthers the Recommendations of the International Joint Commission

The Great Lakes Water Quality Agreement, signed by the United States and Canada, states in Article II that the overall goal of the agreement is that the "discharge of persistent toxic substances be virtually eliminated." Annex 12 more specifically outlines the obligations in this regard and states that, when designing regulatory strategies, such strategies should be undertaken

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[68]For a review, see: *T. Muir, et al.* "Case Study: Application of a Virtual Elimination Strategy to an Industrial Feedstock Chemical -- Chlorine" in Vol. II, Report by the Virtual Elimination Task Force to the International Joint Commission, A Strategy for Virtual Elimination of Persistent Toxic Substances, pp.61-63.

[69]Review of MOEE Regulations, O.Reg. 760/93, Effluent Monitoring and Effluent Limits - Pulp and Paper and Sector, "B".

in the "philosophy of zero discharge."

The requirement for the AOX Elimination Plan seeks to implement this requirement. The International Joint Commission (IJC) has noted numerous times the importance of translating the general objectives of the Agreement explicitly into the domestic laws and regulations of both nations.[70] Moreover, the Commission itself has noted the potential for the MISA program to implement the goal of virtual elimination.[71]

In the past three biennial reports, the IJC has outlined a series of recommendations directed to implementing the virtual elimination goal. First, it has satisfied itself that the only long term strategy to deal with persistent toxic substances is:

> in consultation with industry and other affected interests, develop timetables to sunset the use of chlorine and chlorine-containing compounds as industrial feedstocks and that the means of reducing or eliminating other uses be examined.[72]

It has reiterated this recommendation in subsequent biennial reports.[73] The AOX Elimination Plan is a direct way to implement the IJC's recommendation.

Second, the Commission adopted a virtual elimination strategy that was formulated by a multi-stakeholder committee, including the industry, the environmental community, and state, provincial and federal agency representatives.[74] That strategy specifically discussed the need for the development of a pollution prevention planning and reporting regime.[75]

Third, the IJC has developed and evolved principles to further the policy context for this goal, such as the precautionary principle and the weight-of-evidence approach which can guide decision-makers in the face of uncertain science. It has also promoted the reverse approach onus to ensure those creating the risk have the onus to establish that the activities they are undertaking are safe.

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[70]See: International Joint Commission, Fifth Biennial Report on Great Lakes Water Quality, Part II, (Ottawa - Washington, 1990), p.1990.

[71]See: International Joint Commission, Sixth Biennial Report on Great Lakes Water Quality, (Ottawa - Washington: 1992), p.9.

[72]Sixth Biennial Report, Recommendation No. 7, p.30.

[73]For example, see: Seventh Biennial Report, p.9.

[74]See: Report of the Virtual Elimination Task Force to the International Joint Commission, A Strategy for Virtual Elimination of Persistent Toxic Substances Vol. 1, August, 1993.

[75]*Ibid.*, p.46.

The revocation of the AOX planning requirement constitutes a repudiation of the past commitment to the goals of the Agreement.

(b) The Elimination Plan Requirement Furthers Technological Innovation and Competitiveness

One of the clear advantages of these types of requirements, and in particular, the AOX Elimination Plan, is that it provides an opportunity to spark innovation in industry. The requirement does not prescribe how to achieve it, in fact, it is meant to be a technology-forcing mechanism to encourage new technologies that may make Canadian industries that much more competitive.

Moreover, the move to chlorine-free paper making also has the advantage of placing Ontario in a particularly attractive position in terms of fulfilling a specific market niche. It is interesting to note that several industries already planned for and made substantial investments to prepare for the regulation (for example, E.D. Eddy in Espanola and Domtar in Cornwall). Industries have already begun to plan and submit reports to reduce AOX to zero.

(c) The Negotiation Process for this MISA Regulation

Another reason not to amend the regulation relates to how the regulation was negotiated. It should be noted that most of the MISA regulations, including the pulp and paper regulation, were negotiated with the regulated industries. In particular, the Joint Technical Committees, comprised of industry and government officials, spent considerable time negotiating every aspect of the regulation. As with every negotiation, compromises were made to ensure concerns from both sides were met. The negotiation process has been fundamentally undermined by amending the regulation before there has been significant experience with the workings of the regulation.

CELA Recommendation: This regulatory requirement requiring the submission of AOX elimination plans should be maintained.

2. Reducing Assessment Monitoring for Chronic Toxicity

ENVIRONMENTAL IMPLICATIONS

This proposal is to reduce frequency of assessment monitoring for chronic toxicity when the Ministry has collected sufficient data for analysis of the relationship between industrial discharges and sublethal effects.

Chronic toxicity testing is seen as one of the key innovations of the MISA regulations. The basis for the testing regime is to determine whether the effluent in question, although not acutely toxic, remains at a level that still may cause harm over a longer period of time.

The proposal for changing this requirement is opposed for the following reasons:

First, there is a lack of detail for the rationale for changing this requirement. The toxicity testing requirement was imposed on all direct dischargers under MISA for essentially the same reason, that chronic toxicity testing is essential to understand the sublethal effects of the effluent. While it is proposed to reduce the frequency of assessment monitoring when sufficient data for analysis between industrial discharges and sublethal effects, there is no explanation regarding the information threshold needed, whether that applies to all sectors and what the nature of the reduction for assessment monitoring is for each sector.

Second, chronic toxicity testing is not a radical requirement. It is our understanding that such testing is required in many U.S. states with respect to the state implementation of the federal *Clean Water Act.* It is fair to say that chronic toxicity testing is a basic requirement for water quality regulations in other jurisdictions.

Third, the advantages of the chronic toxicity testing far outweigh any hardship on the regulated community. It should be recalled that this monitoring requirement was negotiated in a multi-stakeholder forum, the Joint Technical Committees. Hence, there was agreement in many sectors for this requirement, in part it can be anticipated, because other concessions were made. It would be inappropriate and unfair at this stage to revoke this requirement without an understanding of the trade-offs that were made in the negotiations.

CELA Recommendation: This regulatory requirement concerning chronic toxicity testing should be maintained.

3. Proposal to Allow Facilities to Store Monitoring Data Using Software of Their Choice

This proposal concerns provision to allow dischargers to use software of their choice. The adequacy of this proposal depends on the capacity of the MOEE to receive data on different software. If this challenge can be dealt with, then this proposal is not objectionable.

CELA Recommendation: This recommendation is supported in principle.

4. Proposal for Regulatory Concessions upon the Fulfilment of Certain Conditions

ENVIRONMENTAL IMPLICATIONS

Under this proposal, there would be regulatory concessions upon the fulfilment of certain conditions, such as the elimination of monitoring requirements for a parameter if it is not used in the process; and the reduction of monitoring frequency for a parameter if the discharger successfully achieves significant reductions in loading of that parameter beyond what is required in the regulation.

This proposal is premised upon the assumption that the regulatory incentives "will encourage

industry to implement pollution prevention measures."[76] There is no evidence or reason to assume that this is the case. Reduction in monitoring frequency should be coupled with the condition that more frequent monitoring will be re-instated where the "good" performance is brought into question.

CELA Recommendation: The proposal to reduce monitoring frequency in certain conditions is reasonable in principle, however, further details and exact proposals are needed.

REGULATION 77/92

"Exemption for Ground Source Heat Pumps"

The regulation exempts closed-loop ground source heat pump systems from section 9 approvals under the *Environmental Protection Act.* The only exemption in the regulation where an approval is needed is where the system uses methanol as the heat transfer fluid.

PURPOSE

The purpose of the regulation is to exempt closed-loop ground source heat pump systems, except where the system uses methanol. The need for the exemption results from a court decision placing approval responsibility and authority with the MOEE over certain ground source heat pumps as well as the requirement by various incentive programs promoting the systems to have a certificate of approval for the system.

Further, the MOEE developed a position that the use of methanol in the systems did pose an environmental risk for water wells and groundwater in the event of spill or system failure. As such, while other ground source heat pump systems were exempt, a certificate of approval for systems using methanol were not exempted from the requirement to obtain a certificate of approval.

PROPOSED REFORM

It is proposed that the regulation be revised so as to prohibit the use of methanol as a heat transfer fluid in ground source heat pumps.

ENVIRONMENTAL IMPLICATIONS

By prohibiting methanol in these systems, the environment and in particular, ground water resources in the province, will be better protected from the risk of system failure and the regulation will lead to more certainty as to the appropriate type of heat pumps to use.

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[76]Technical Annex, p.95.

Alternatives exist and the costs of using alternative technologies would be passed on to the consumer.[77]

CELA Recommendation: This proposal is supported and should proceed.

REGULATION 358 AND 359

Sewage System Regulations

Under Part VIII of the EPA, any person who wants to install a sewage system, that is a septic system, must obtain an approval. Regulation 358 has construction standards for all classified sewage systems. Further, the regulation regulates installers of septic systems and septate haulers. Regulation 359 exempts certain sewage works from Part VIII of the EPA.

PURPOSE

The purpose of this regulation is to protect the province's waterways from improperly installed sewage systems and to ensure that hauling of the septate is undertaken in an environmentally appropriate manner. The regulation outlines the requirements for the licensing of the installers of the systems and the haulers of the septate.

PROPOSED REFORM

Changes are being considered under Approvals Reform so as to revise the regulation and move this regulated area under a standardized approval system.

ENVIRONMENTAL IMPLICATIONS

Septic systems represent one of the greatest sources of contamination for both groundwater and surface water. Some 1 billion litres of septate is generated annually through some 1 million septic systems in Ontario, with 23,000 systems being installed annually.

Ill conceived or malfunctioning sewage systems "can, and indeed have, resulted in large scale and costly servicing projects in many municipalities throughout Ontario."[78] In fact, the US EPA has raised the alarm of the problem of malfunctioning septic systems warning of the risk of disease outbreak and the potential for significant contamination of ground and surface water. The Commission on Planning and Development Reform (Sewell Commission) has also highlighted this problem.

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[77]Technical Annex, p.102.

[78]Review of MOEE Regulations, O.Reg 358, Sewage Systems Regulation, "B".

One of the problems identified with this regulation is not that the regulation is too stringent, but that there may be need for increased training for those involved in fulfilling the objectives of the regulation, including design consultants, local inspectors, design reviewers, MOEE personnel.[79] The Sewell Commission also called for more comprehensive regulation in this area that, in effect, would have considerably strengthened Regulation 358. Under their proposals, the MOEE would continue to be responsible for the inspections and issuance of permits for private and communal systems, for setting standards for installation and operation, and for licensing septic installers and septate haulers. The MOEE, under the Commission's proposals, would institute training programs for installers, septate haulers and inspectors.[80]

Moreover, a considerable amount of septate is disposed of through land disposal which is largely unregulated in that there are few inspections. The Sewell Commission has made a number of significant recommendations in this regard to address these problems.

CELA Recommendation: The current regulation should be maintained and strengthened taking into mind the recommendations of the Sewell Commission.

REGULATION 435/93

Water Works and Sewage Works Regulation

Regulation 435/93 establishes a mandatory licensing system for operators of drinking water and domestic sewage treatment facilities in Ontario. This regulation was long in the making and replaced a voluntary certification program.

PURPOSE

The purpose of this regulation is to provide for certification of operators of drinking water and domestic sewage treatment facilities. Certification establishes recognized professional standards for operators to ensure that the operators have the knowledge and skills. Mandatory certification contributes greater assurance of safe drinking water and efficient and safe use of operating environment.

PROPOSED REFORM

The MOEE is proposing to develop policy to guide all training, certification, licensing and accreditation activities. This policy will be supported in regulation by introducing new measures

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[79] *Ibid.*

[80] Sewell Commission Newsletter - Septic Issue, "A sleeping Giant' Widespread Use Raises Contamination Concerns" in New Planning News, Commission on Planning and Development Reform in Ontario, Volume 1, No.3, Dec. 1991, p.1.

to accredit, certify and license third parties.

ENVIRONMENTAL IMPLICATIONS

The licensing of operators of drinking water and domestic sewage treatment facilities in Ontario should be seen as a major step forward for the protection of the environment, the economic efficiency of a properly operating plant and the proper maintenance of the facilities.

The REP document does not articulate the implications of developing a generic Training, Certification, Licensing and Accreditation Regulation. In other words, it is not possible to determine whether the standards and degree of proficiency presently required will be reduced; whether there will be the same degree of training and oversight; and whether the reform will have an overall long-run positive or negative impact with respect to the present system.

CELA Recommendation: It is not possible to make a recommendation with respect to this proposal owing to the lack of details as to the content and impact of the proposed Training, Certification, Licencing and Accreditation Regulation.

COMMENTS ON GOING BEYOND REGULATION

The Regulatory Process: Comments on the Proposed Regulatory Code of Practice

PROPOSED REFORM

The REP document, poses a "Regulatory Code of Practice" for the development of new regulations. The proposed Code is to guide the development and review of new regulations and includes the following elements:

- Identification and assessment of alternatives to regulation;
- Consultation on choice of policy instrument;
- Design and impact assessment (economic analysis);
- Clarity of langauge and regulatory requirements;
- Access to regulatory information;
- Periodic and sunset reviews.

The proposed Code raises a number of fundamental concerns. The overall thrust of the proposal for a Code is to establish formidable barriers to the development of new, needed environmental regulations.

In the REP document, although the proposed Code is outlined, there are not sufficient details to provide exhaustive comment. In effect, the proposed Code will require new initiatives to pass a twofold test before a new regulation can be enacted.

The first component of the test is that all non-regulatory alternatives must be examined before a regulation can be issued. The legitimatization of the non-regulatory or "voluntary" approach presents profound concerns. These are briefly outlined below.

The second component of the test is that it must pass an economic analysis, a yet undefined one. There is a stark absence of detail on the nature, scope and content of this economic analysis requirement. Hence, it is not worthwhile to provide detailed comment on this component of the proposed Code at this time.

ENVIRONMENTAL IMPLICATIONS

One of the key constants that must be retained in the move to update the regulatory framework is respect for the rule of law. The rule of law recognizes the rights and duties of government and citizens and that the interpretation of those rights and duties is the responsibility of the judiciary, carried out with due process of law. The fundamental importance of the rule of law is that it invokes a number of key principles. Without any attempt to be exhaustive, the key principles identified for the purposes of this paper include: fair and consistent decision-making; public accountability; and due process.

The concerns with de-regulation and self-regulation vary depending on the type of initiative proposed. However, the following concerns are common.[81]

(i) Lack of Equal and Consistent Decision-Making

One of the key attributes of the rule of law is that the law is meant to apply to all the regulated community. However, many self-regulation initiatives run contrary to this principle.

Some non-regulatory initiatives instill an inherent unfairness to the system - those with the resources, expertise and access have an advantage in negotiating self-regulation programmes. Most self-regulation initiatives tend to result in different rules applicable for the same targeted constituency. Within the environmental field, this problem may be quite serious. For instance, the negotiation of voluntary agreements may or may not include all companies within an industrial sector. If some of those companies are not part of the agreement, they gain an advantage over those who are. In addition, environmental benefit may be at best modest if the non-included companies are causing a disproportionate bigger part of the problem (such as high levels of toxic emissions). Moreover, local communities do not get any environmental benefit from non-included companies.

Governments may be hesitant to regulate in order to include companies not part of the program since regulating for a few may be as difficult as regulating for the whole sector.

Finally, the administrative burden placed on the government with respect to negotiating and implementing these non-regulatory measures with individual companies may exceed the costs of promulgating and enforcing a single regulation.

(ii) Loss of Accountability of the Regulated Community

One of the basic concerns of self-regulation is that there is simply less accountability from both the regulated community and the government. This loss of accountability manifests itself in a number of ways, such as enforcement and disclosure.

Regulation of economic or personal behaviour normally includes a legal standard of acceptable behaviour and the possibility of enforcement action if the standard is breached. The use of law to change, affect, or control corporate activity has been fundamental to the strategies of public interest groups over the past 25 years.

The very fact that many self-regulation initiatives are "voluntary" suggests that enforcement measures of the commitments in these initiatives are not available. It is often argued that enforcement of these initiatives would not be through traditional enforcement mechanisms, but through the "court of public opinion." The failure to abide by commitments is supposed to create

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[81]De-regulation and Self-regulation in Administrative Law: A Public Interest Perspective. M. Swenarchuk, P. Muldoon, CELA March 1996.

an embarrassment factor that would compel industry to comply with their promises.

However, enforcement through the "court of public opinion" carries with it many assumptions, including that public interest groups and government personnel have the resources, interest and information sufficient to determine when the commitments are not being met; an interested media that is willing to publicize the problem; an interested public that will be able to take action when companies do not meet voluntary commitments; and corporate decision-makers that regard it a high priority to live-up to such initiatives even during times of recession.

Frequently, regulation will impose reporting requirements on the regulated interest, which may contribute to enforcement actions, or serve other public interest functions. Self-regulation not only removes the standard governing behaviour, but also may remove the public reporting requirements. Indeed, in some instances, the regulated community opposes the reporting requirements as strongly as the standards, a testimony to their potency as a means of imposing accountability on a sector.

Certainly this is one of the key concerns with the ISO 14000 process. One analysis posed the question of how governments, workers and the public get access to all the environmental information prepared by an ISO 14000 certified company.

At this time, it appears, such information will not be available for public scrutiny. ISO 14000 requires that environmental records simply need to be stored, not communicated, and the auditing and certification may be done by consultants who already advise the company. Independent auditing is not required. As Benchmark Consulting noted, "Without external audit and public disclosure, self regulation is an oxymoron."[82]

(iii) Loss of Due Process for the Public

It is a hallmark of public interest reform groups in Canada that citizens want more involvement in decisions with significant social, consumer, and environmental impacts.[83] Therefore, many of the legal reforms instituted over the past twenty-five years both established a framework of legal regulation, and incorporated mechanisms for increased public participation as an element of reform.

Examples from the environmental field in Ontario include:

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[82]Benchmark Consulting, *Supra,* p.16.

[83]There is considerable literature on this issue. For an earlier perspective, and then a more recent one, see: P.S. Elder, (ed.) Environmental Management and Public Participation (Toronto: Canadian Environmental Law Research Foundation, 1976) and Marcia Valiante and Paul Muldoon, "A Foot in the Door: A Survey of Recent Trends in Access to Environmental Justice" in Steven A. Kennett (ed.), Law and Process in Environmental Management (Calgary: Canadian Institute of Resources Law, 1993), pp.142-169.

- the establishment of boards and tribunals for the issues of important environmental and natural resource approvals, such as the Environmental Assessment Board, the Environmental Appeal Boards and the Ontario Energy Board;

- the availability of intervenor funding to provide financial means for public interest intervenors to participate in environmental hearings; and

- the notice and comment provisions of the Environmental Bill of Rights[84] where the rights of public notice and comment are guarantees for designated approvals, and for governmental policies and regulations that are environmentally significant.

In addition to these provisions, common law has also broadened access to the courts through liberalized standing and intervention rules.[85] Similarly, most governmental agencies have developed policies recognizing the value and need for public participation in decisions affecting the environment and natural resources.

The adoption of the voluntary approach removes not only the framework of standards, but also these opportunities for public involvement in devising standards, in monitoring effects, and requiring enforcement when appropriate.

The legal process of regulation-making, in itself, has provided a basic level of public notice and information, with opportunities for public involvement and accountability through reporting. Non-regulation initiatives remove these hard-won current rights of public involvement in legal processes, which are fundamental to our democratic system.

For example, the vast majority of voluntary pollution prevention agreements concluded to date have been negotiated behind closed doors. In fact, most voluntary agreements were devoid of any consultation with the public, environmental groups, unions or health and safety organizations.

Apart from the lack of public input into the negotiation of the self-regulation initiatives, self-regulation also deprives citizens of legitimate public policy debates. As a general rule, voluntary agreements expressly recognize the ability of government to regulate irrespective of the agreement.[86] However, in practice, a presumption by the regulated industries is that there is a tacit understanding that government would be hesitant, if not pre-empted, to regulate industries on matters that are covered under a voluntary agreement. Industry is willing to risk a short term detriment (as defined under a voluntary agreement) to "cover the field" in order to anticipate and prevent regulatory action by government.

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[84]See: Environmental Bill of Rights, 1993, S.O. 1993, c. 28, Part II.

[85]See: Valiante and Muldoon, *Supra.*

[86]For example, see: CCPA Voluntary Pollution Prevention Partnership MOU, at 2.

The notion of regulatory pre-emption has two consequences. First, with the proliferation of voluntary agreements coupled with government downsizing, the capacity of government to regulate is at risk. Second, it should be recognized that most of the voluntary agreements are in areas of very significant, and frequently controversial, areas of public policy.

One clear example of this consequence pertains to the goals and scope of the voluntary agreements. In effect, the inclusion of more modest goals and scope have pre-empted the broader public policy debate on the topic. A classic example with respect to pollution-related issues is whether pollution prevention initiatives are limited to "emissions" of toxic substances or can also focus on the "use" of substances in the first place. Industry has argued strongly that the focus of the regulatory programs must be limited to emissions. The key voluntary programs relate to reduction of emissions rather than focusing on use.[87]

One of the key questions that should be asked in that analysis is simply this: should effort be expended on attempting to devise a different system to guide behaviour or should more effort be put in improving and bettering the existing regulatory framework?

Proponents of self-regulation often suggest that the present regulatory system is not working. However, there is little analysis as to the nature of the problem. A report prepared for the federal Standing Joint Committee for the Scrutiny of Regulations put the issue this way:

> Those critical of the use of regulations as a policy instrument typically characterize regulations as inflexible, difficult to amend, and therefore as being inefficient. Although it seems trite, it must be pointed out in response to such criticisms that none of these attributes are capable of being possessed by regulations themselves. In fact, such criticisms relate not to regulations per se, but rather to the process by which regulations are made and amended. There is no inherent reason why the regulatory process cannot be more responsive to changing circumstances. In the end any process, including the regulation-making process, can only be as effective as those in charge of it.[88]

Making the regulatory system work better, in the end, serves the broader public interest better than devising an alternative system with potentially equal or more pitfalls than the current

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[87]For example, the purpose of the MOU between CCPA and the MOEE is to "reduce emissions." [p.1] Most of the programs are emissions based. However, 23 U.S. states now have toxic use reduction laws that do focus on chemical use. Similarly, the International Joint Commission which monitors regulatory programs of both U.S. and Canada have recommended the examination of feedstocks and chemical use as a means of furthering pollution prevention. See: International Joint Commission, Seventh Biennial Report to the Governments of Canada and the United States (1994).

[88]Report on Bill C-62, Prepared for the Standing Joint Committee for the Scrutiny of Regulations, February 16, 1995, at 15-16.

approach.[89]

The benefits of a strong regulatory system cannot be overstated. One of the most succinct articulations of these benefits was recently given by two professors. Michael Porter and Claas van der Linde, in a recent Harvard Business Review, outlined six reasons for the promotion of regulations. The commentators list a number of reasons for regulations:

- to create pressure that motivates industry to innovate...
- to improve environmental quality in cases in which innovation and the resulting improvements in resource productivity do not completely offset the cost of compliance;
- to alert and educate companies about likely resource inefficiencies and potential areas for technological improvement...;
- to raise the likelihood that product innovations and process innovations in general will be environmentally friendly;
- to create demand for environmental improvement until companies and customers are able to perceive and measure the resource inefficiencies of pollution better;" and
- to level the playing field during the transition period to innovation-based environmental solutions, ensuring that one company cannot gain position by avoiding environmental investments.[90]

The attributes identified in this list could be generalized to most, if not all, regulated fields. The question should not be whether there should be a regulatory structure, but how to improve it to fulfil the public policy functions they are designed to do in the first place. Better designed regulations, that encourage innovation and are cost efficient are certainly common principles. The development of regulations that are timely, fair and result in results that are measurable, and thus, accountable, are additional principles.

CELA Recommendation: The Regulatory Code of Practice should not be pursued.

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[89]See: Rules and regulations are a fact of life for businesses throughout all countries of the world, including Canada. Whether they relate to health, trade, environmental or competition standards, they exist not only to ensure a level playing field for business, but to protect Canadians and enhance their future. The job of government is not simply to set these regulations, but to ensure they are set fairly. ... As stated in the Government's recent Building A More Innovative Economy "regulations play an important role in society, helping to assure that our markets are competitive, our products are safe, and our environment clean. Canada, CEPA Review: The Government Response - Environmental Protection Legislation Designed for the Future - A Renewed CEPA - A Proposal, December, 1995, pp.4-5.

[90]Michael E.Porter and Claas van der Linde, "Green and Competitive: Ending the Stalemate" Harvard Business Review, September-October, 1995, p.128.

CONCLUSION

REP proposes numerous fundamental changes to environmental regulations which govern air, environmental assessment, Environmental Bill of Rights, Niagara Escarpment, pesticides, spills, waste, and water. It also proposes a fundamental transformation of the current regulatory process. Although certain proposals in REP may lead to more efficient and clearer regulations, the majority of proposals will weaken environmental standards in Ontario. The following highlights some of the more detrimental changes:

Air - The MOEE is proposing a revocation of two regulations which have curtailed the levels of sulphur dioxide emissions discharged into the natural environment. These changes will fundamentally undermine the MOEE's acid rain program to reduce sulphur dioxide emissions in Ontario and prevent the adverse effects caused by acid rain.

Asphalt facilities will no longer have to obtain Certificates of Approval. Instead asphalt facilities will be regulated through a code of practice which will be codified into a standardized regulation. Asphalt fumes contain carcinogenic substances and have the potential to negatively impact on human health. The proposed changes will prevent the MOEE from weeding out clearly unacceptable facilities and requiring up-front modifications in project design or construction to prevent adverse effects.

Environmental Assessment - The *Environmental Assessment Act* has been seriously compromised through Bill 76 such that full environmental assessment of controversial projects such as landfills is no longer guaranteed. Amendments that affect joint federal-provincial EA approvals, Class EAs, and hearings before the Environmental Assessment Board, are similarly retrograde. Most of the regulatory changes proposed in REP with respect to the EA Act are not accompanied by any details as to what changes are contemplated. Consequently, it is not possible to comment on most of the proposals until the details of the regulatory changes are made available. For the two areas where some detail is available, significant discrepancies exist between what is proposed in REP and what was advised by MOEE staff (both in the materials obtained through a Freedom of Information request and correspondence with the Ministry).

Environmental Bill of Rights - If the proposals are accepted, the scope and the application of the Environmental Bill of Rights (EBR) will be seriously reduced. At present, the EBR gives the public certain rights to comment on proposed decisions. The REP document proposes to remove some of these public rights. Although some the proposals to remove these rights are for decisions that may be environmentally insignificant, there is a lack of information for others. Some are environmentally significant proposals, such as for composting facilities.

Niagara Escarpment - Along with the drastic budget cuts to the Niagara Escarpment Commission, the Niagara Escarpment Commission's development control powers will be delegated to Municipalities. In addition, aggregate operations will be exempted from development control requirements.

Pesticides - New ingredients in pesticides will no longer have to be posted on the Environmental Bill of Rights registry for comments. Consequently, the public will no longer receive notice about the introduction of new pesticides into the market and nor will they have any rights to provide their comments about these pesticides.

The notice requirements for pesticide application will be reduced for companies that use integrated pest management. The current notification requirements are the only means of warning the public about the pesticide spraying and therefore are necessary to prevent the public from being involuntarily exposed to pesticides.

Spills - The MOEE is considering removing the reporting requirements for certain types of spills based solely on the criterion of quantity. This change fails to acknowledge that the potential of a spill to result in adverse effects is not only determined by quantity but also by the nature of the pollutant and the circumstances of the spill.

Waste - Full environmental assessments may not be required for municipal waste disposal sites and incinerators as a result of the excessive Ministerial discretion proposed under the Bill 76 amendments. Hazardous waste which is recyclable will be exempt from regulatory controls required in environmental legislation. This amendment ignores the fact that hazardous waste whether or not it is recyclable poses significant risks to the environment and human health. Furthermore, undertakings which pose significant environmental risks (e.g on-site hazardous waste storage sites including PCBs hazardous waste transfer stations and burning of hazardous or liquid industrial waste generated on-site as fuels) will be subject to a standardized approvals and thereby exempt from an up front review by MOEE Approvals Branch.

Water - Under the REP document, water resources in the province will be at further risk. The regulatory cornerstone of the water quality program is MISA, the Municipal-Industrial Strategy for Abatement. The REP proposes important changes to the MISA program. Requirements to plan for the elimination of AOX (organochlorines) discharges from pulp and paper and the reporting of chronic toxicity of effluent are the most notable. These changes will discourage industry from developing new and innovative technologies. Some of the regulations that serve to protect the province's water will be turned into voluntary measures, such as a regulation that requires marinas to have pump-out stations for boaters. The removal of approvals for the installation and haulage of waste from septic systems is also of concern.

The Regulatory Process

The proposed "Regulatory Code" in the REP would establish major barriers to the development of new environmental regulations. First, new regulations would have to pass an undefined "economic" test or some version of a cost-benefit analysis. The nature, scope and content of this analysis has yet to be defined. There is significant potential, however, that new measures to protect the environment will not meet the economic test since the analysis may not include all the economic benefits of good regulation or the avoided costs of promoting environmental and human health. The non-economic values of a healthy environment are often excluded in most

of these kind of economic tests.

Apart from the economic analysis, the Regulatory Code also calls for the use of non-regulatory measures as a priority over regulatory measures. This requirement may be the most troublesome since it is an affront to the rule of law. There is little hard evidence available demonstrating the long-term effectiveness of non-regulatory measures. Further, such measures often serve to cutoff debate on important public policy issues since the usual public notice and comment regimes for regulatory measures are not applicable to voluntary initiatives. There are many questions with non-regulatory measures, especially when not all players within an industrial sector want to play by the same non-enforceable rules. Non-regulatory measures do not reap the same economic benefits as regulatory measures. In the end, the public will have little confidence in these measures despite the fact that the government is planning to emphasize these measures over regulatory measures.