CANADIAN ENVIRONMENTAL LAW ASSOCIATION

ENVIRONMENT HAMILTON

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Mr. Dale Henry
Director
Ministry of Environment
Environmental Sciences and Standards Division
Standards Development Branch
40 St. Clair Avenue West, Floor 7
Toronto, Ontario
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Via Fax (416) 327-2936

Dear Mr. Dale Henry:

Re: EBR Registry Number 011-3088, Amendments to the Altered Standards Process for Air Standards under O. Reg. 419/05

The Canadian Environmental Law Association (CELA), Ecojustice and Environment Hamilton have prepared a joint submission on the proposed changes to the altered standards process for air standards under O. Reg. 419/05 (hereinafter referred to as the site-specific standard).

I: BACKGROUND

Since 2005, the Ontario Ministry of Environment (MoE) has developed new or updated air quality standards which are significantly more stringent than the earlier standards. These new standards were based on the best available science to ensure that standards were at levels that the MoE considered to be necessary to protect human health and the environment, without considering whether a company could technically or economically meet them.

However under O. Reg. 419/05, the province also provided facilities with two compliance options to meet the standards set in O. Reg. 419/05. A facility could meet the prescribed air quality standard for each contaminant discharged by the facility by the required date and demonstrate its compliance through an Emission Summary and

Dispersion Modelling (ESDM) report. Alternatively, if it was not economically or technically feasible to meet the air quality standards by the applicable phase in-date, a facility could apply for a site-specific alteration of the standard under section 32 of O. Reg. 419/05.

II: THE PROPOSED AMENDMENTS

The Ministry of Environment (MoE) is proposing to make the following three amendments to Ontario Regulation 419/05 in relation to the site-specific standard process:

(i) Change the term "altered standard" to "site-specific standard";
(ii) Allow facilities a minimum of 5 years and a maximum of 10 years for approval of a site-specific standard and remove the reference to "extenuating circumstances"; and
(iii) Remove the requirement for a public meeting when facilities are requesting renewal of a site-specific standard if there are no significant changes to the information that supported their original request.

III: SPECIFIC COMMMENTS ON THE AMENDMENTS

(i) Proposal to Change the Term "Altered Standard" to Site-specific Standard

CELA, Ecojustice and Environment Hamilton do not object to MoE's proposal to change the term "altered standard" to "site-specific standard." However, MoE should add a definition to O. Reg. 419/05 defining the new term. That definition should include recognition or acknowledgement that a "site-specific standard" constitutes a variance, on an interim basis, to a less stringent standard from the provincial effects-based standard that would otherwise apply to a facility under O. Reg. 419/05.

Recommendation # 1: MoE should define the term "site-specific standard" as one constituting a variance, on an interim basis, to a less stringent standard from the effects-based standard that would otherwise apply to a facility under O. Reg. 419/05.

(ii) Revision to the Minimum Duration of a Site-Specific Standard and removal of the reference to "extenuating circumstances."

(a) Duration of site-specific standards approval period to be provided for a minimum of 5 years and up to ten years

We are concerned about the proposal to extend the time period approval of a site-specific standard to a minimum of five years and a maximum of ten years. We realize that for

industry, a longer time frame may be desirable as it allows for greater regulatory certainty while the facility makes significant adjustments and investments to reduce its air emissions. However, we are concerned that shifting to a five year minimum standard would result in the loss of some of the significant protection which is currently afforded under the Guideline for the Implementation of Air Standards in Ontario (GIASO).

Section 2.8.1 of the GIASO states:

> **Factors that may affect the Period of Approval for Altered Standards**
>
> The Director may approve an altered standard for up to 5 years (or up to 10 years in extenuating circumstances). The timing for these approvals may vary based on incremental risks to potentially affected receptors present in the area. For more information, see Chapters 3 and 4 of this Guideline. Including an analysis of economic feasibility under subsection 32(14) when seeking an altered standard may affect the approval period. Where economic hardship prevents the implementation of the option that best reduces the POI concentrations, it is likely that, if the altered standard is approved, it would be for a period that is less than 5 years.

We are concerned that shifting the duration of the approval to a five year minimum and up to a maximum of ten years will result in the loss of some of the important safeguards which currently exist in the GIASO. These include requirements to ensure that a facility responds to problems swiftly and to preclude a facility from arguing that economic hardship is a justification for not taking timely action to reduce POI levels.

At the multi-stakeholder meeting held on May 3, 2011, to discuss the proposed changes, the MoE did not provide any explanation as to whether or not the current safeguards in the GIASO would apply to the proposed changes. Consequently, we are unable to support the proposed changes regarding the duration of the approval for a site-specific standard.

(b) Removal of reference to "extenuating circumstances"

We are also concerned about the removal of the reference to "extenuating circumstances." The extension of the time period to allow the company to operate under the site-specific standards is intended to only occur if there were "extenuating circumstances." While this term is undefined in the regulation, the term has been defined legally. Black's Law Dictionary for example, defines "extenuating circumstances" as circumstances that "render a delict or crime less aggravated, heinous or reprehensible than it would otherwise be, or tend to palliate or lessen its guilt." In other words, currently under O. Reg. 419/05 the MoE Director, would need to consider whether there were any mitigating factors in a facility's favour in determining whether an extension of the site-specific standard should be extended beyond five years. In our view this requirement is consistent with the underlying purpose of the site-specific standard process, namely that it was to establish an interim standard with the goal of continuous improvement toward achieving the provincial effects-based standards over time. The

site-specific standard was intended to serve as the exception and to apply only in those special circumstances where, due to technical or economic considerations, a facility could not meet the air quality effects-based standards.

The use of the term "extenuating circumstances" is consistent with this approach as it means that the MoE Director should not routinely grant an extension of an approval based on site-specific standards. To do so would remove the incentive for a facility to work towards continuous improvement and make the necessary investment to reduce and eliminate the adverse impacts caused by air pollution. Accordingly, we do not support MoE's proposal to extend a site-specific standard to a maximum of ten years without consideration of "extenuating circumstances."

Recommendation # 2: CELA, Ecojustice and Environment Hamilton do not support the MoE's proposal to extend the time period of an approval for a site-specific standard for minimum of five years and a maximum of ten years and the deletion of the term "extenuating circumstances."

(iii) Public Meeting

The MoE is also proposing to remove the requirement for a public meeting when facilities are requesting a renewal of a site-specific standard if there are no significant changes to the information that supported the original request.

The EBR registry notice does not provide any compelling rationale to justify this removal. We are very concerned about the MoE's proposal to remove the requirement for a public meeting upon the renewal of a site-specific standard as this proposal reflects a general trend by the Ministry to roll back important public consultation rights in relation to environmental approvals.[1]

CELA and Ecojustice noted in an earlier submission under the site-specific standard approach the facility may be exposing neighbouring communities to higher levels of air toxics and thus greater risk, than represented by O. Reg. 419/05 standards. It has been our position that given this additional risk, the public has a right to be informed and engaged in the renewal of the site-specific standard process.

We regard public transparency as a vital component of the site-specific standard process. Indeed, ENGO support for the site-specific standard approach was largely based on the inclusion of the public consultation requirements. One of the features of the public consultation process is that the facility must hold a meeting with the public before the request for approval of an altered standard process is submitted. The public consultation requirement to have a public meeting is an opportunity for community members to provide direct input to a facility before the request for approval or renewal of the approval is submitted to the MoE and serves to ensure that the facility directly engages

[1] See R. Nadarajah, E. MacDonald & M. Carter-Whitney, "Modernizing Environmental Approvals: EBR Registry No. 010-9143," April 16, 2010, pp. 10-12.

with the local residents. In contrast, the public notification process under the EBR does not require a facility to directly engage with the local community. Rather, notification of the renewal is provided through an electronic registry and comments are submitted to the Director of the MoE as opposed to the company. Community members thus will not have an opportunity to understand why the renewal of the site-specific standard is required and the barriers for the facility with complying with O. Reg. 419/05. The removal of the requirement to hold public meeting for renewal of a site specific standard would, thus, reduce public transparency in the site-specific standard process. Consequently, we do not support this proposed amendment.

CELA and Ecojustice expressed concerns earlier that companies may use the site-specific standard approach as a means of circumventing the appeal regime under the *Environmental Bill of Rights* (*EBR*) for instruments.[2] We indicated that if a company can achieve the same business result without the prospect of a hearing, which is what the site-specific standard approach offers, in comparison with complying with O. Reg. 419/05, then companies will increasingly opt for it. We are very concerned that if the MoE makes the site-specific process more attractive for companies they will opt for this process as opposed to investing in new technology to ensure compliance with the effects-based standards established in O. Reg. 419/05. This would be counter to the objectives of the site-specific standard approach which was intended to serve only as an interim measure with the goal of having a facility achieve the effects-based standard in O. Reg 419/05 over time.

We recommend that in the event the MoE decides to remove the requirement for a facility to hold a public meeting when renewing a site-specific standard, it should provide an alternative means for public engagement in the site-specific standard process. One option would be for the MoE to assume the responsibility to hold a public meeting and explain its decision to renew the site-specific standard. In the alternative, if the MoE is not willing to assume this responsibility, the MoE should provide the public with the right to seek leave to appeal an approval for a site-specific standard under the *EBR* for both the initial approval as well as any subsequent renewal or provide an automatic right of appeal as currently provided for approvals under the *Green Energy Act*.

Recommendation # 3: CELA, Ecojustice and Environment Hamilton do not support the MoE proposal to remove the requirement for a public meeting when facilities are requesting renewal of a site-specific standard even if there are no significant changes to the information supported in the original request.

[2] See Letter from Joesph F. Castrilli and Elaine MacDonald to Cathy Grant dated September 8, 2009 Re: Submissions of CELA and Ecojustice on proposed amendments to O. Reg. 419/05 (EBR 010-6587) as it relates to the proposed sector base approach to managing air pollution in the forest products sector (EBR #010-6589) and the Foundry Sector (EBR# 010-6588).

Recommendation # 4: In the event the MoE decides to remove the requirement for a facility to hold a public meeting for renewal of a site-specific standard, CELA, Ecojustice and Environment Hamilton recommend that the MoE assume responsibility for holding a public meeting to explain its decision to renew the site-specific standard.

Recommendation # 5: In the alternative, CELA, Ecojustice and Environment Hamilton recommend the MoE provide the public with the right to seek leave to appeal an approval or a renewal of a site-specific standard under the *EBR* or provide an automatic right of appeal for approval of a site-specific standard.

IV: CONCLUSION

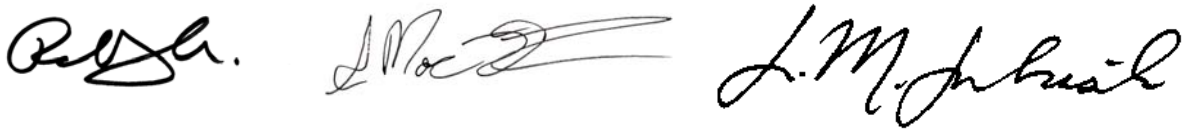
CELA, Ecojustice and Environment Hamilton are not opposed to changing the term "altered standards" to a "site-specific standard." However, we submit that MoE should acknowledge in O. Reg. 419/05 that a "site-specific standard" constitutes a variance, on an interim basis, to a less stringent standard from the provincial effects-based standard that would otherwise apply to a facility under O. Reg. 419/05.

We do not support the MoE's decision to allow the MoE Director to approve an altered standard for a minimum period of five years and up to maximum of ten years and the removal of the reference to "extenuating circumstances." We are concerned that shifting the duration of an approval of a site-specific standard to a five year minimum and up to ten years maximum will result in the loss of some of the important safeguards in the GIASO which were designed to ensure that facilities responded to problems swiftly and to preclude a facility from arguing economic hardship as a justification for not taking timely action to reduce POI levels. Moreover, we are of the view that if the facility wants to operate for more than five years under a site-specific standard, then it should only be allowed to do so where it can demonstrate to the Director that there are extenuating circumstances. We, therefore, recommend that the MoE not delete the reference in O. Reg. 419/05 to "extenuating circumstances."

We are very concerned about MoE's proposal to remove the requirement for a public meeting when facilities are requesting renewal of a site-specific standard even if there are no significant changes to the information supported in the original request. The removal of the requirement to hold a public meeting would reduce public transparency in the site-specific standard process. Consequently, we do not support this proposed amendment.

One option to address this problem would be for the MoE to assume the responsibility to host a public meeting and explain its decision to renew the site-specific standard. In the alternative, if the MoE is not willing to assume this responsibility, the MoE should provide the public with the right to seek leave to appeal an approval for a site-specific standard under the *Environmental Bill of Rights*, (*EBR*) for both the initial approval as

well as any subsequent renewal or provide an automatic right of appeal as currently provided for approvals under the *Green Energy Act*.



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CELA Publication # 786