Canadian Environmental Law Association
L'Association canadienne du droit de l'environnement

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Submissions of the

CANADIAN ENVIRONMENTAL LAW ASSOCIATION

to the

STANDING COMMITTEE ON RESOURCES DEVELOPMENT

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by

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Mr. Chairman and Members of the Committee:

The Minister of the Environment is to be commended on his statement to this Committee that the pulp and paper industry "must treat the environment so its operations no longer cause damage, nuisance, or loss of amenities to their neighbouring communities", and that these expectations are "reasonable and practical".

Dr. Parrott's recent statement is actually a statement of the law of this province. The Environmental Protection Act states clearly that no person shall deposit any contaminant into the natural environment that causes or is likely to cause impairment of the environment (s.14). The Ontario Water Resources Act states that any person that deposits any material in any place that may impair the quality of the water is guilty of an offence (s. 32).

How then is the pulp and paper industry continuing to pollute the air and water, and what can be done to stop this? What recourse does the public have if the Ministry does not follow the fine abatement policy announced by the Minister - a policy which appears to conflict with the stated policy of the Ministry never to prosecute as long as an operator shows improvement and cooperation?

The pulp and paper industry may continue to pollute and the Ministry may find ways to avoid implementing its abatement policy as long as regulation does not involve labour or the community,but only government and management. Proper implementation of this policy will require involvement in regulation.

Although it is an offence to pollute, the Ministry has an absolute discretion to issue a licence to an operator (certificate of approval, s. 8, EPA or approval, s. 42, OWRA) even though he is polluting. The public have no right to notice of this application for a licence, no right to see the information upon which the Ministry makes its decisions whether to issue a licence, and no right to make any submissions to the Ministry before the licence is issued. Nor has the public any right to make any submissions or have any hearing before a licence is amended or renewed.

The only right the public has under the EPA is the right to prosecute. But this is made difficult by the fact that the Ministry has no duty to make available its inspection reports. In fact, the policy of the Ministry is to conceal evidence of wrongdoing from the public. Under the OWRA, the public does not even have the right to prosecute if the source of the pollution can be characterized as a "sewage works" (almost any effluent pipe is a "sewage works"). (s. 32 (5) OWRA, see definitions, ss. 1(p), 1(q), OWRA).

The Ministry may issue a control order under the EPA (s.6) or order under the OWRA (s.33) requiring the operator to abate the pollution. However, the public has no right to notice of the Ministry's intent to issue such an order, no right to know what information the order is based on, no right to make submissions and no right to know the contents of the order until after it is in force.

Once the order under either statute is imposed, even though it allows continued pollution, the public lose all right to prosecute as long as the order is complied with. (s. 102 (2) EPA, s. 33 (5) OWRA). The Ministry has no legal duty to take any action, either, as long as the polluter complies with the order. If the Ministry refuses to issue a licence, or if the polluter does not want to comply with the terms of an order, he has the right to launch a series of appeals to the Environmental Appeal Board, the Minister and the Courts. (s.5s. 78 to 80, EPA, s. 79 OWRA).

In the case of orders, the order does not take effect until all appeals are exhausted, a matter of years rather than weeks or months. Thus the Ministry, knowing that it cannot enforce its orders or effectively refuse to issue a licence or impose stringent conditions on a licence, is under great pressure to accept whatever abatement measures the polluter offers to undertake.

Unlike the polluter, members of the public who oppose the issuance of a licence or would like more stringent conditions included in the licence or order have no right to appeal the decisions of the Ministry to the EAB.

Rather than have an order imposed on him, the polluter may voluntarily submit a program of pollution abatement measures to the Ministry for its approval. (s. 10, EPA). The same considerations apply to this method of enforcement of the Act. The public have no right to participate in the decision-making process, and the polluter has the right to delay indefinitely.

Once the Ministry accepts a program approval, the public loses its right to prosecute (s. 102 (2)).

If the Ministry does impose stringent conditions on a licence or order, industry can lobby to have the licence or order amended. The public has no right to know about the amendment until it is a fait accompli. As long as the polluter complies with the amended order, the public have no right to prosecute.

The result is a one-sided decision-making process, in which the government and the polluter appear to conspire to perpetuate pollution and to keep the victims of pollution in the dark. Whether this results in an amount of pollution that is necessary in the public interest, or more pollution than is necessary, is impossible to say, because only the government and industry know the facts. In many cases, only industry knows the facts, and the government relies on whatever information the industry chooses to give it. What is needed, clearly, is a method of administering the Act which includes:

1. Public access to government and industry information upon which licences, orders and approvals are based (with certain exceptions such as trade secrets).
2. The right of the public to notice of the government's intention to issue or amend licences, orders or approvals.
3. The right of the public to participate in a meaningful way in the decision to issue or amend licences, orders or approvals.
4. The public should have the same right to appeal Ministry decisions about licences and orders as the polluter has.
5. The public should have the same statutory right as the Ministry to apply to the courts for an injunction against polluting activities, whether a public nuisance or a private nuisance. (see s. 100, EPA, s. 74, OWRA).

6. The public should have the right to notice of any regulations to be made under the EPA or OWRA exempting sources of pollution from the provisions of the Acts or setting standards of air or water quality, and the right to make submissions before the regulations are finalized.
7. The Acts provide the Ministry with broad powers and discretion, but impose no duty to act at any time. The Ministry should have a statutory duty to investigate and to take appropriate action to abate pollution when it is brought to the Ministry's attention.

Specific Recommendations

1. Section 102 (2) of the EPA and s. 32 (5) of the OWRA are pernicious and should be repealed. There may have been some justification for such a provision as a transitional measure when these statutes were first passed, but they have now been in effect for many years. It is difficult to think of any other law applying to the general public, involving public health and safety, in which the individual may put himself above the law by agreeing to be less unlawful than usual.
2. Section 6 of the EPA should be amended to provide that the Director shall publish a notice of his intent to issue a control order and the contents of the intended control order in the Ontario Gazette and give the public 60 days in which to make submissions before issuing the control order to the person responsible for contaminating the environment. The section should also provide that the public will have the right to view the report of the provincial officer on which the control order is based and any other information on which the company or the Ministry rely (other than specified exceptions such as trade secrets) at the regional or district office of the Ministry during office hours. A similar amendment to the OWRA is needed.
3. Section 8 of the EPA should also be amended to require the Minister or the applicant to publish a notice in the Ontario Gazette of the application for a certificate

of approval and to allow the public 60 days in which to make submissions before deciding whether to issue the certificate of approval. The OWRA should be similarly amended. Section 8 (2) of the EPA should be amended to provide that the public shall have the right to view any information provided for in this section (subject, again, to certain exceptions) and any other information on which the Ministry of the applicant rely. The OWRA should be similarly amended.

4. Section 10 of the EPA should be amended to provide for notice to the public in the Ontario Gazette before the Ministry approves any pollution abatement program, 60 days in which to make submissions, and the right to view the contents of the program and any other information on which the Ministry or the polluter rely. A similar amendment should be made to the OWRA.

5. Section 72 of the EPA and section 33 (1) of the OWRA should be amended to provide that the Director may amend, vary or revoke a control order only after publishing a notice in the Ontario Gazette, giving the public 60 days in which to make submissions, and providing public access to all documentation of the rationale for amending, varying or revoking the order relied on by the Ministry or the person subject to the order (again, subject to certain exceptions).

6. Section 76 of the EPA and section 3 B (1) of the OWRA should be amended to provide that the Director may not revoke a stop order until after giving notice to the public, allowing an opportunity for submissions and making available all documentation relied on (except trade secrets, etc).

7. Part X of the EPA dealing with the appeal procedure should be amended to give the victims of pollution the same powers of appeal as the polluters. Either the polluter's right of appeal to the Environmental Appeal Board under section 78 and 79 and to the Minister under section 80 should be repealed, or the victims of pollution should be given the same right of appeal from a decision to issue a certificate, the failure to impose a control order or stop order when so requested by a person affected by the operator's pollution, or the failure to impose sufficiently stringent conditions on a licence or order to bring the operation within section 14 of the EPA or section 32 (1) of the OWRA.

Delayed automatic penalties and effluent fees may be suggested to the committee as a replacement for or supplement to orders, control orders and program approvals. The delayed penalty concept involves an operator automatically paying a penalty if he defaults on his obligations under an order or approval. The advantage is that the penalty is set in advance, the polluter knows the consequences of his actions, and the public avoids the cost, delay and uncertainty of using the courts. Effluent fees or pollution charges may be defined as a payment to the appropriate authority for each unit of pollutant above a certain level (which may be zero) discharged into the environment or on each unit of disamenity imposed on the community. The advantages are said to be that the charges give polluters an incentive to abate pollution and the funds collected may be redistributed for pollution control purposes. The effectiveness of delayed penalties or effluent fees, however, is dependent, just like the present orders and approvals, on implementation. If the delayed penalties or effluent fees are set too low, they become a licence to pollute and neither serve as an incentive to abate pollution or a redistributive mechanism.

Thus, any decision to use these tools should include a mechanism to ensure that they serve their function and that the public has recourse to enforce them. In the case of effluent fees, for example, the term should be defined in the EPA and OWRA as a charge which is high enough to make it less costly to the operator over a specified period of time to abate than to pollute, or public hearings should be held by an independent tribunal such as the Environmental Assessment Board to set the amount of the fee. Periodic public review may be necessary as well.