Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

VIA ELECTRONIC MAIL
< anna.trikoupis@ontario.ca >

May 30, 2014

Anna Trikoupis
Project Manager
Ontario Ministry of the Environment
Environmental Programs Division
Environmental Innovations Branch
40 St. Clair Avenue West – Floor 14
Toronto, Ontario M4V 1M2

Dear Ms Trikoupis:

RE: Reducing Coal Use in Energy-Intensive Industries – EBR Registry Number: 012-1559

These are the submissions of the Canadian Environmental Law Association ("CELA") respecting the above proposal of the Ontario Ministry of the Environment ("MOE") to eventually promulgate a regulation facilitating the burning of certain "alternative fuels" in substitution for coal in energy-intensive industries (e.g. cement, lime, iron and steel sectors) in Ontario.

About CELA and Its History of Involvement in Proposals Respecting the Burning of Alternative Fuels

Founded in 1970, CELA is an Ontario legal aid clinic that assists people with environmental problems and also advocates environmental law reforms, where appropriate. CELA has had long experience with proposals of the kind identified in the Registry notice, having represented clients in connection with the issuance by MOE of air and waste approvals in 2006 under the *Environmental Protection Act* ("*EPA*") allowing Lafarge Canada Inc. to burn tires and other materials as a partial replacement for coal in the production of cement at the company's Bath, Ontario facility. In 2007, CELA's clients along with local landowners and environmental groups were granted leave to appeal the MOE approvals by the Environmental Review Tribunal ("ERT").[1] The ERT decision granting CELA's clients, as well as the landowners, and the other groups leave to appeal was judicially reviewed by Lafarge but affirmed in 2008 by the Divisional Court of Ontario and the Ontario Court of Appeal.[2] An ERT hearing on the merits of the approvals granted was never held because Lafarge decided not to proceed further with the proposal and returned the approvals to MOE, which rescinded them.

[1] *Dawber v. Ontario (Ministry of the Environment)* (2007), 28 C.E.L.R. (3d) 281 (Ont. E.R.T.).
[2] *Lafarge Canada Inc. v. Ontario (Environmental Review Tribunal)* (2008), 36 C.E.L.R. (3d) 191 (Ont. Div. Ct.), leave to appeal to Ont. C.A. refused (unreported, November 26, 2008, Court File No. M36552).

The Proposal

The proposal contained in the Registry notice of April 17, 2014, would eventually allow the energy-intensive industries by regulation under the *EPA* to burn, in substitution for coal, certain alternative fuels (e.g. shingles, railroad ties, telephone poles, tire recycling fluff, animal meal, used carpet-material, etc.) at their facilities across the province. A purpose of this proposal would be to reduce the greenhouse gas emissions of these industries by reducing their burning of coal.

CELA Concerns

CELA has examined the material MOE has posted on the Registry and has procedural, process, and substantive concerns with the proposal. In light of these concerns, CELA reserves the right to file further submissions after June 1, 2014.

Procedural and Process Concerns

There are a number of procedural and process concerns with the MOE proposal.

First, the MOE notice and comment period of 45-days (notice posted on the Registry April 17; comment deadline June 1, 2014) is far too short for a proposal with the environmental health implications of this one. This is particularly the case for a proposal for which there was no prior warning and that literally came out of nowhere. We are not aware of any pressing urgency in proceeding with such an environmentally significant proposal that would warrant such undue haste. CELA has requested that the comment period be extended significantly but, to date, has not had a response from MOE.

Second, there appear to be significant gaps in the information MOE has provided with this proposal. For example, CELA understands that there have been a minimum of one and perhaps as many as three test burns in Ontario in respect of this proposal. However, no reports respecting the results from these test burns were released with the Registry notice for the proposal. Nor are we aware of any peer review reports produced in connection with those tests.

Third, the nature of the information that has been provided also is not satisfactory. For example, emissions information for certain parameters (e.g. lead, mercury, benzene, dioxins and furans, PAHs, arsenic, cadmium, particulate matter) has been reported in concentrations, or concentration ranges, but there is no information on the total annual loadings for these various parameters. This makes it very difficult for CELA and, we would imagine other groups, the scientific community, and members of the public, to evaluate the true environmental and health impacts of the proposal. In these circumstances, we would have thought it would also be very difficult for MOE to evaluate, let alone support, such a proposal.

Fourth, this proposal is described by MOE in the Registry notice as being of potential overall benefit to the province in terms of reduction of greenhouse gas emissions. However, the proposal has the potential, based on the limited information that has been made available, to increase local emissions of certain toxic substances (e.g. lead, cadmium, dioxins and furans, arsenic, PAHs) and particulate matter. Using the cement industry as an example, there will be six communities

in Ontario where these emissions will be concentrated, corresponding with the location of cement plants in the province (St. Mary's, Bowmanville, Bath, Picton, Mississauga, Woodbridge).[3] As a matter of procedural fairness, therefore, it should have been incumbent on the MOE and/or the cement industry to undertake detailed and extensive consultations with these communities prior to allowing the introduction of such a proposal. With the exception of an information notice approach to the issue,[4] we are not aware of MOE or the cement industry having undertaken such consultations, notwithstanding the Registry's suggestion that the MOE proposal would help achieve important objectives, including "ensuring the public, municipalities and other stakeholders continue to be consulted". In fact, just the opposite appears to be the case because the Registry notice indicates that going forward MOE proposes that demonstration projects would be allowed and "[t]he current practice of exempting [them] from public consultation requirements of the [*EBR*] and third-party appeal provisions would be maintained". The scope of the demonstration projects is discussed under CELA's substantive concerns (see point six below).

Fifth, the Registry notice does not include a draft of the regulation that will eventually be promulgated to allow this proposal to take effect as a matter of law. Often problems with a proposal only become apparent when the draft of the law is released. Moreover, there is no indication that MOE will post the draft regulation before going forward with the proposal. Frankly, it is counter-productive to introduce such a proposal divorced from the regulation that will eventually implement it. Again it smacks of undue haste for reasons that have not been articulated by MOE.

Substantive Concerns

There also are a number of substantive concerns with the MOE proposal.

First, the proposal would purport to remove the designation of this type of activity (burning ostensibly "alternative fuels" but actually waste materials) from the authority of the *Environmental Assessment Act* ("*EAA*"). If a proposed activity ever warranted the application of the *EAA* it is this one given the potential for increased atmospheric releases of certain toxic substances.

Second, the MOE is also proposing to remove the requirement that proponents responsible for these materials obtain a waste environmental compliance approval under the *EPA*, even though most of the materials that constitute alternative fuels are, in fact, wastes. The burning of various waste materials in decades-old kilns never designed to burn these types of materials, followed by the disposal of potentially still toxic post-combustion by-products, or residual materials in an on-site landfill, is definitely not state-of-the-art environmental management. Streamlining the regulatory path for a proposal that could increase the environmental release of numerous toxic

[3] See, e.g. O. Reg. 194/05, Table 4 listing locations for cement plants in Ontario. This table also lists plants and locations for the iron and steel sector in Ontario (Sault Ste. Marie and Hamilton).
[4] See e.g. Ontario Ministry of the Environment, *Update on Lafarge Canada Ltd.'s Submission of an Application for a Temporary Environmental Compliance Approval to Conduct an Alternative Fuels Research Project at its Bath Cement Plant*, EBR Registry Number 011-6414 (December 20, 2012).

substances contained in these waste materials seems like the wrong message for MOE to be sending the regulated community and the Ontario public.

Third, the proposal would appear to be reliant on using the province's air pollution regulation, O. Reg. 419/05, as the benchmark for acceptability of the increases in emissions of certain air pollutants expected under the proposal. However, O. Reg. 419/05, based as it is on point of impingement ("POI") concentrations, has long been criticized by the Environmental Commissioner of Ontario ("ECO") as inadequate to protect the province's air resources. As early as 2005-2006, the ECO noted that the regulation: (1) should be based on total annual loadings of contaminants, not short-term concentrations measured over minutes or hours; (2) does not, but should, direct itself to preventing "hot spots" of toxic substance release or contamination from developing due to the concentration of regulated activities that allow such emissions in local areas; and (3) should, but does not, address background concentrations, cumulative or synergistic effects, or persistence and bioaccumulation of concentrations of contaminants. The ERT endorsed this ECO concern in *Dawber*[5] and was not overturned by the courts on this and related points in *Lafarge*. Accordingly, bringing forward a regulatory proposal that is reliant on O. Reg. 419/05 appears counter-intuitive, if not counter-productive, given the unhappy history of similar proposals before administrative and judicial decision-makers in Ontario.

Fourth, the proposal seems to implicitly favour the use of alternative fuels because of purported reductions of greenhouse gas emissions notwithstanding apparent increases of emissions of certain toxic substances. Some of the increases in release of toxics are with respect to substances with particularly nasty side effects. For example, the potential for endocrine disruption from increased releases of dioxins and furans is well known.[6] Particulate matter, especially PM10 and fine PM (e.g. PM2.5), are considered toxic under the *Canadian Environmental Protection Act, 1999*[7] and are associated with various respiratory problems. Furthermore, PM2.5 travels deep into the lungs, potentially decreasing lung function and causing chronic respiratory disease.[8] The MOE rush to judgment in favour of the burning of "alternative fuels" seems especially problematic in the circumstances without the benefit of the scrutiny that the environmental assessment process could bring to the issue, as noted above.

Fifth, just as the burning of tires in cement kilns would have discouraged the development of what is now a relatively robust program of tire recycling efforts in the province, the Registry notice proposal has the potential to undermine 3Rs initiatives in Ontario with respect to the feedstocks that would be designated as "alternative fuels" for burning at cement plants. On that ground alone the proposal lacks merit, contrary to the Registry notice's suggestion that the MOE proposal would help achieve the important objective of "reducing the flow of residual waste to landfills while confirming the province's commitment to the 3Rs (reduce, reuse, recycle)".

---

[5] *Dawber*, *supra* note 1 at para 41.

[6] See e.g. Chen, S. et al, "Endocrine disruptor, dioxin (TCDD)-induced mitochondrial dysfunction and apoptosis in human trophoblast-like JAR cells" (2010) Journal of Molecular Human Reproduction 361-372; doi: 10.1093/moleehr/gaq004.

[7] *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, Schedule 1, List of Toxic Substances, item 51.

[8] Environment Canada and Health Canada, *Priority Substances List Assessment Report for Respirable Particulate Matter* (Ottawa: DOE, 2000).

Sixth, it should be recalled that at the time of the 2006 *EPA* approvals issued to Lafarge, MOE also proposed a 2-3 year province-wide ban on the incineration of tires while acknowledging that it had no experience monitoring the environmental performance of facilities that incinerate tires. The ERT, relying on MOE's own media release on the ban, called the Lafarge approvals a "pilot project" that, in the circumstances, was not consistent with the precautionary approach because they "were approved in the face of uncertainty about environmental risk, and possibly for the purpose of investigating whether the risk would come to pass."[9] So what has changed in 2014? Has MOE suddenly acquired enough experience to now determine that tire recycling fluff, or other "alternative fuels", can be safely burned and monitored? If so, it does not appear to be reflected in the material released with the Registry notice. In fact, the Registry notice makes it clear that there will be more "demonstration projects" that could operate at a site: (1) for 30 consecutive days; (2) for up to 90 days per year; and (3) over a three-year period. In short, in a three-year period there could be as many as 270 days of test burns per site.

Seventh, the MOE proposal also lacks consideration of the full life cycle of alternative fuels examining, for example, how fly ash will be collected, treated, and disposed of where the burning of such fuels is allowed.

Eighth, the proposal acknowledges that energy-intensive industries proposing to burn alternative fuels would still require air environmental compliance approvals under the *EPA* and, therefore, such instruments would still be subject to notice and comment as well as third-party leave to appeal opportunities under the *Environmental Bill of Rights* ("*EBR*"). However, it is CELA's experience that it is no easy task to obtain leave to appeal under the *EBR*. Roughly only 1 in 10 such leave applications are granted by the ERT in whole or in part. However, given the gravity of the increased toxic emissions that could be released by energy-intensive industries burning such fuels, there is no reason why third party leave applicants should not instead be granted an automatic right of appeal in relation to MOE approvals of such instruments. A precedent for this approach is the amendment to the *EPA* adopted in 2009 respecting automatic rights of appeal of renewable energy approvals ("REAs") based on certain limited grounds.

What Should Be Done With Respect to This Proposal

In light of the above procedural, process, and substantive concerns with the proposal to allow the burning of alternative fuels by energy-intensive industries, CELA recommends that MOE do the following:

1. Not proceed further but re-post the proposal for a further 45-day period only after (a) the results of the test burns already conducted have been released and peer-reviewed, (b) O. Reg. 419/05 has been revised in accordance with the 2005-2006 recommendations of the ECO, (c) the *EPA* is amended to authorize automatic rights of appeal with respect to air and waste environmental compliance approvals for the burning of alternative fuels by energy-intensive industries, (d) full and detailed public consultation takes place with the communities surrounding, or in the vicinity of, such industries (e.g. cement plants at St. Mary's, Bowmanville,

[9] *Dawber*, *supra* note 1 at paras 48-58.

Bath, Picton, Mississauga, and Woodbridge; and iron and steel plants at Sault Ste. Marie and Hamilton), (e) a full life cycle analysis of the burning and management of alternative fuels is prepared and made public including with respect to the environmental fate of the critical contaminants discharged to air, land, and water, and (f) a draft of the proposed regulation is included with the re-posting;

2. Re-examine whether proposals such as the burning of "alternative fuels" at cement plants (or other facilities) should be allowed in Ontario if there is the potential to undermine future 3Rs initiatives; and

3. Re-examine whether such proposals should be subject to individual environmental assessments under the *EAA*.

We would be pleased to discuss the contents of these submissions with MOE representatives at your convenience.

Yours truly,
CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Joseph F. Castrilli
Counsel

cc. Gord Miller, Environmental Commissioner of Ontario

Canadian Environmental Law Association
EQUITY. JUSTICE. HEALTH.

VIA ELECTRONIC MAIL
< **anna.trikoupis@ontario.ca** >

May 30, 2014

Anna Trikoupis
Project Manager
Ontario Ministry of the Environment
Environmental Programs Division
Environmental Innovations Branch
40 St. Clair Avenue West – Floor 14
Toronto, Ontario M4V 1M2

Dear Ms Trikoupis:

RE: List of Organizations Supporting CELA Submissions Respecting the Proposal Identified as "Reducing Coal Use in Energy-Intensive Industries" – EBR Registry Number: 012-1559

The following organizations support the CELA submissions dated May 30, 2014 with respect to the proposal identified as "Reducing Coal Use in Energy-Intensive Industries" - EBR Registry Number 012-1559:

1. Canadian Association of Physicians for the Environment
   Contact: Gideon Forman, Executive Director (email: < Gideon@cape.ca >)

2. Citizens Environment Alliance of southwestern Ontario
   Contact: Derek Coronado, Coordinator (email: < dcoronado@cogeco.net >)

3. Citizens' Network on Waste Management
   Contact: John Jackson (email: < jjackson@web.ca >)

4. Environment Hamilton
   Contact: Lynda Lukasik, Executive Director (email: < lynda.lukasik@cogeco.ca >)

5. Greenpeace
   Contact: Joanna Kerr, Executive Director (email: < joanna.kerr@greenpeace.org >)

6. KANCED NGO
   Contact: Olga Speranskaya, Chair (email: < info@kanced.org >)

7. Lake Ontario Waterkeeper
   Contact: Mark Mattson, President & Waterkeeper (email: < Mark@waterkeeper.ca >)

8. Toronto Environmental Alliance
Contact: Emily Alfred, Waste Campaigner (email: < emily@torontoenvironment.org >)

9. Women's Healthy Environments Network
Contact: Taskin Shirazi, Chair (email: < taskin.shirazi@gmail.com >)

Yours truly,
CANADIAN ENVIRONMENTAL LAW ASSOCIATION

Joseph F. Castrilli
Counsel

cc. Gord Miller, Environmental Commissioner of Ontario